**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

March 29, 2001

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**No. 00-2632**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**IN THE INTEREST OF EVANS A.W., A PERSON UNDER THE AGE OF 17:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**EVANS A. W.,**

**RESPONDENT-APPELLANT.**

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APPEAL from orders of the circuit court for Rock County: JOHN H. LUSSOW, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Evans A. W. appeals an order which adjudicated him delinquent, and an order denying his motion for a new fact-finding hearing based on ineffective assistance of counsel or newly discovered evidence. We affirm.

## BACKGROUND

¶2 The State alleged that Evans shot at a house in Beloit with a 9 mm. pistol while four people were on the front porch. The trial court, after a fact-finding hearing, found that he committed four criminal offenses stemming from the incident.

¶3 A resident of the street where the incident occurred testified at the hearing that he was standing across the street, twenty to twenty-five yards away, with an unobstructed view of the events. He stated that he saw two young men ride bicycles onto the street. He then saw one of them get off the bicycle, reach into the waistband of his pants, pull out a gun, and shoot the gun four times at the house. The shooter then jumped back on his bicycle and rode away. He identified the shooter as a black male wearing baggie bell-bottom blue jeans and a "purplish-blue" nylon windbreaker, "with elastic wrist and waistband, with … blue-white-blue-white." According to this witness, the other young male was also black and was dressed in dark clothes.

¶4 One of the persons standing on the porch when the shots were fired testified that he saw two acquaintances, Evans and Elijah R., approach the house

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). All references to the Wisconsin Statutes will be to the 1999-2000 version unless otherwise noted.

riding bicycles. He said that he saw both Evans and Elijah make movements toward their waistbands. He did not see a gun or who fired the shots because he went into the house. According to this witness, Evans was wearing a purple nylon coat, blue jeans and black shoes, and Elijah was wearing "all black"—a black coat, black pants and black shoes. He further testified that there was some sort of dispute between Evans and one of the other people on the porch, Omene K., at the time of the shooting.

¶5 A City of Beloit police detective testified that Evans initially told him that he was not involved in the incident. About an hour later, however, Evans told the detective that he did shoot the gun. He also directed the detective to the exact location of the gun in his mother's garage. In addition, the detective interviewed Elijah, who also told him that Evans shot the gun.

¶6 At the fact-finding hearing, Evans testified that he did not shoot the gun, but that Elijah did and that Elijah hid the gun in his mother's garage. He claimed that he was neither with Elijah nor riding a bike before the shooting, but came across him while en route on foot to the house in question. He said he took off on Elijah's bike when Elijah started shooting, and that Elijah "ended up right behind me" at the residence of mutual acquaintances soon thereafter. He stated that he confessed to the crime because he knew that the police had let Elijah go without charging him, he thought Elijah might have said that Evans did it, and he had heard via his girlfriend that Elijah had threatened him. Evans said he was wearing a "blue Yankees coat, like navy blue, with navy blue pants and tan shirt" at the time of the incident, and that Elijah was wearing "a whole outfit" that was "real dark."

¶7 Evans's girlfriend testified that Elijah told her that "Evans got arrested for everything I [Elijah] did," and that "if Evans snitched on him, he [Elijah] was going to beat his ass." According to her testimony, however, this conversation took place in the evening after Evans was already in police custody. Evans's mother testified that her son told her at the police station that he did not "do any shooting." There was also testimony from a neighbor of Evans's that some teenage boys had, at some earlier point, broken into the garage where the gun was found.

¶8 After hearing the testimony, the court found that Evans was the shooter and adjudged him delinquent. Evans filed a motion alleging his trial counsel had been ineffective for failing to call Omene K. as a witness, and, alternatively, that Omene's testimony would constitute newly discovered evidence. The trial court held an evidentiary hearing on the motion. *See* ***State v. Machner***, 92 Wis. 2d 797, 801, 285 N.W.2d 905 (Ct. App. 1979). Omene K. testified at the ***Machner*** hearing that Elijah, not Evans, was the shooter. Omene acknowledged that he had previously told police that he did not know which one did the shooting, Evans or Elijah. Evans's postconviction counsel then asked Omene, "why do you know that now and you didn't know that then?" He replied, "Because when I—they had me in the courtroom, the attorney was talking to me and stuff, and he showed me a sheet that Elijah—it was Elijah." Omene also said that he had talked to Evans's counsel about the case and had told him that Elijah had fired the shots.

¶9 The attorney who first represented Evans in this matter testified that he interviewed Omene for potential exculpatory evidence, and that Omene gave him the same information to which he testified at the hearing. This attorney subsequently withdrew from representing Evans in the case, and a second attorney

was appointed to represent Evans at the fact-finding hearing. Evans's first counsel testified that he was positive that he informed Evans's trial counsel in a telephone conversation of Omene's potential testimony. The first attorney indicated, however, that he did not take a written statement from Omene because he had been "undecided as to whether or not in fact [Omene] was going to be a witness, if I were to go to trial." The attorney's reservations about calling Omene were "[b]ecause of certain problems … related to him as a witness," including his possible lack of credibility as a witness.

¶10 Evans's trial counsel testified that he was aware from police reports that Omene was a potential witness to the shooting incident. He did not recall, however, receiving information from his predecessor regarding Omene's statement, but he did not dispute that it was possible that had occurred. Because Evans's defense at trial was that Elijah, not Evans, was the shooter, trial counsel opined that Omene's testimony "[w]ould have aided in the defense," and that if he had been aware of Omene's testimony and failed to put it on, that would have been deficient performance on his part.

¶11 The court denied Evans's motion for a new fact-finding hearing. Evans appeals the order which adjudicated him delinquent and the order denying his post-adjudication motion.

## ANALYSIS

¶12 Evans makes two arguments. The first is that his trial counsel provided ineffective assistance by failing to present, or even to pursue and evaluate, Omene's potentially exculpatory testimony. Alternatively, if his trial counsel is deemed not to have been ineffective, Evans asserts that the testimony in question constitutes newly discovered evidence meriting a new fact-finding

hearing. We conclude that the record supports neither contention. We address the latter first.

¶13 In order to establish that evidence is "newly discovered" a defendant must show by clear and convincing evidence that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial or new trial. ***State v. McCallum***, 208 Wis. 2d 463, 473 ¶16, 561 N.W.2d 707 (1997).

¶14 The record indicates that the testimony Omene gave at the ***Machner*** hearing runs afoul of the first two criteria for newly discovered evidence. The fact that Omene was a witness to the events at issue was well documented in the police reports, which were available to both of Evans's attorneys. Evans's first attorney even spoke with Omene regarding the incident and elicited the very evidence Evans now claims is "newly discovered." That attorney testified that he relayed Omene's statement naming Elijah as the shooter to his successor, who did not deny that it was possible he had received the information. Omene's testimony was thus known or knowable prior to the fact-finding hearing, and the failure to call Omene as a witness may represent deficient performance on the part of trial counsel, but the testimony itself cannot be said to constitute "newly discovered evidence."

¶15 Accordingly, we conclude that the proper inquiry on these facts is whether trial counsel provided ineffective assistance by not calling Omene as a witness at trial, or by failing to at least interview Omene and evaluate his value to

the defense. To prevail on a claim of ineffective assistance of counsel, a defendant must establish that his trial counsel's performance was deficient and that this performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether trial counsel's actions constitute ineffective assistance presents a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not reverse a trial court's factual findings regarding counsel's actions at trial unless those findings are clearly erroneous. ***Id.*** at 634. Whether trial counsel's performance was deficient and whether that behavior prejudiced the defense, however, are questions of law which we review de novo. ***Id.***

¶16 In analyzing an ineffective assistance claim, this court may choose to address the "deficient performance" component or the "prejudice" component first. ***Strickland***, 466 U.S. at 697. If we determine that a defendant has made an inadequate showing on either component, we need not address the other. ***Id.*** We turn first to the issue of prejudice. To prove prejudice, Evans must show that trial counsel's errors had an actual, adverse effect on the defense. ***Id.*** at 693. He must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. Specifically, Evans must convince us that the failure to investigate Omene's testimony and call him as a witness deprived him of a "fair trial, a trial whose result is reliable." ***Id.*** at 687.

¶17 Evans claims that the absence of Omene's testimony prejudiced his defense to "a probability sufficient to undermine confidence in the outcome." *See* ***State v. Delgado***, 194 Wis. 2d 737, 755, 535 N.W.2d 450 (Ct. App. 1995). We disagree. The trial court said the following in its bench decision at the conclusion of the fact-finding hearing:

> I think that the testimony of [the neighbor and the person on the porch] does corroborate each other. And I can find beyond a reasonable doubt that Evans W[] was the shooter. And that is further corroborated by his confession to Detective Johnson.
>
> And I frankly feel there are a lot of inconsistencies in the testimony of the defense witnesses, and I question the credibility of these people.
>
> But [the person on the porch] certainly had no vested interest in this situation. Nor did [the neighbor].
>
> And so I'm satisfied that the state has met its burden … beyond a reasonable doubt on all four counts.

¶18 The court offered additional insights on its original findings in its decision following the ***Machner*** hearing:

> [A]t the time of trial the court, of course, listened to all the evidence from all of the witnesses. I did make some findings with respect to the credibility of those witnesses. And I made a finding that Evans W[] was delinquent beyond a reasonable doubt. In particular, I commented on the credibility of witnesses, and I think that's an issue once again today with the testimony of Omene K[].
>
> I think you correctly point out, this court has dealt with every one of these people over the last few years. I'm familiar with them. And I don't know what's going on out there on the street. But I can expect just about anything could happen. And so it's difficult to know whether Omene K[] is being truthful here today or not.
>
> But I guess my honest assessment is that—that if I look at this in terms of, is it reasonably probable that his testimony would have changed the result, I would say no. Because there was consistent testimony from the other witnesses. And there was, in fact, a statement given to police, which this court put a lot of weight on.

> ….
>
> And I think, also, that [trial counsel] may—yes, if he'd have known this or that, he might have put this witness on the stand. But I guess what I'm saying is I don't think it would have made any difference….
>
> And then is there prejudice here? I don't think that the—that Evans W[] was prejudiced by failure to—to call this witness. Because, as I say, I would have had a lot of trouble with his credibility as well.

¶19 Notwithstanding the trial court's comments, we must consider de novo whether the omission of Omene's testimony is sufficient to undermine confidence in the outcome of the fact-finding hearing. In doing so, however, we are mindful that, unlike in the case of a jury's one-word verdict, we have the benefit of the fact finder's express conclusions regarding the relative weight of the evidence presented at trial, and of its impression of the credibility of Omene's proffered testimony. We thus review the record with those conclusions and impressions in mind. Our review persuades us that, even had Omene testified at the fact-finding hearing as he did at the ***Machner*** hearing, there is no reasonable probability that the result would have been different. *See* ***Strickland***, 466 U.S. at 694.

¶20 First and foremost, the State presented testimony from a police detective that Evans admitted that he had fired the gun at the house. He also knew exactly where the gun was located in his mother's garage. Although he recanted his confession at trial, Evans admitted to the crimes when it was decidedly against his interests to do so. Moreover, his recantation testimony was of questionable credibility and conflicted with that of other witnesses. For one thing, he claimed to have been previously informed by his girlfriend that Elijah had threatened him

with bodily harm if he told the police that Elijah was the shooter, but the girlfriend said that Elijah's purported threat was communicated to her after Evans had been taken into custody. Evans claims to have arrived at the scene on foot, while three other witnesses (two at trial and Omene at the ***Machner*** hearing) testified that both Elijah and Evans arrived on bicycles. These inconsistencies, together with the inherent improbabilities of Evans and Elijah coincidentally arriving at a common location following the shooting, and Elijah's just happening to choose Evans's mother's garage to hide the gun, make it highly unlikely that a fact finder would accept Evans's trial testimony in lieu of his prior confession.

¶21 The State also presented two seemingly objective witnesses to the incident, whose collective testimony identified Evans as the shooter. The neighbor testified that he saw a young black male wearing baggie bell-bottom blue jeans, and a purple-blue nylon windbreaker with "blue-white-blue-white" cuffs and waistband, shoot a gun at the house four times. According to this witness, the other young male was dressed in dark clothes. The witness from the porch of the house, who knew both young men, testified that Evans was wearing a purple nylon coat and blue jeans, while Elijah was wearing a black coat and black pants. Evans himself testified that he was wearing a "blue Yankees coat" and navy blue pants at the time of the incident, and that Elijah was dressed in an "outfit" that was "real dark." As a whole, this testimony positively identifies Evans as the shooter. We thus do not accept one of Evans's proffered "bottom line facts" that "not a single eye-witness identif[ied] [him] as the shooter."

¶22 At the ***Machner*** hearing, Omene K. testified that he saw Elijah, not Evans, shoot the gun. There is no question that this testimony, if credible, supports Evans's defense at trial. The trial court, however, questioned Omene's credibility as a witness, and with good reason. Omene acknowledged that he was

a former gang member, and had been adjudged delinquent for theft and for battery. At the time he testified, he was incarcerated at a juvenile correctional institution. Like Evans, he had told the police something different than what he testified to, and he gave a less than convincing explanation of why his story had changed. Finally, we find it significant that Evans's first counsel, who was well aware of Omene's potentially exculpatory testimony, was "undecided" about calling him to testify due to "certain problems that [counsel] saw related to him as a witness."

¶23 In short, we conclude that it is highly unlikely that Omene's testimony would have overcome the substantial evidence at the fact-finding hearing pointing to Evans as the shooter. The absence of Omene's testimony does not therefore undermine our confidence in the outcome the delinquency proceedings. Evans has not established that the alleged shortcomings of his trial counsel had an actual, adverse effect on his defense, and hence, his claim of ineffective assistance of counsel fails. *See* ***Strickland***, 466 U.S. at 693.

## CONCLUSION

¶24 For the reasons discussed above, we affirm the appealed orders.

*By the Court.*—Orders affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)(4).