COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2021

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2019AP1047-CR **Cir. Ct. No. 2011CF1544**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON T. STEPHENS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: MICHAEL J. PIONTEK, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Davis, J.

¶1 PER CURIAM. Aaron T. Stephens appeals from a judgment convicting him of first-degree intentional homicide by use of a dangerous weapon and possession of a firearm as an adjudicated felon. He also appeals from an order denying his postconviction motion which was litigated after this court rejected prior appellate counsel's no-merit report. Stephens argues that he is entitled to a new trial because the circuit court erroneously permitted the State's ballistics expert to testify, and because trial counsel provided ineffective assistance in three ways. Specifically, Stephens contends that trial counsel should have objected to an officer's testimony that two witnesses lied in their initial statements to police; objected to the prosecutor's closing argument that a witness lied at trial; and obtained a defense ballistics expert. For the reasons that follow, we reject Stephens' arguments and affirm.

¶2 This case involves the fatal shooting of Adrian Jackson outside a Racine bar. Nena, Trevor, and Christina, Adrian's friends, drove to the bar to pick him up.[1] A black SUV pulled up and Stephens, who was in the front passenger seat, yelled out a comment directed at Nena and Christina. Adrian took offense and responded to Stephens' comment. Stephens exited the SUV, and Nena got in between him and Adrian to break up the argument. Stephens pulled out a gun and shot Adrian. Stephens tried to fire again but his gun jammed. He fled on foot and the SUV sped away. Adrian died as a result of the gunshot.

¶3 Police recovered a 9mm shell casing from the scene. Stephens was later arrested in Milwaukee, and police recovered a Ruger P-95 9mm semi-

[1] Like the State, we refer to the deceased victim and his friends by first name and to the defendant and his associates by last name.

automatic handgun from the closet of the residence. A ballistics report from the state crime lab matched the handgun to the shell casing. Following a ***Daubert***[2] hearing, the circuit court ruled that the State's ballistics expert, Mark Simonson, could testify as an expert and opine that the shell casing from the murder scene was fired from the recovered handgun.

¶4 At trial, Nena testified that she was standing right next to Adrian when she saw Stephens pull out a gun and shoot Adrian. She gave a description of Stephens to police that included his distinctive gold tooth. Nena identified Stephens at trial, stating he "killed my friend" and "I'll never forget the face."

¶5 Trevor testified that he saw Adrian get shot. He gave a description of Stephens to the police, noting he had braids in his hair. He identified Stephens as the shooter from a photo lineup, writing, "Think this guy See him in person." However, at trial, he stated he was not sure that Stephens was the shooter.

¶6 Keenan Gardner was a backseat passenger in the black SUV. He testified that Stephens was riding in the front passenger seat immediately before the shooting, and that Stephens exited the SUV and began arguing with the victim. Gardner testified that he did not observe the shooting but heard a "loud boom" from the area where Stephens was standing. Gardner stated that they sped off, met up with Stephens around the corner, and went back to Stephens' sister's house. While there, Gardner heard Stephens tell his sister that he just shot someone.

¶7 Gardner testified that he initially lied to police and denied any knowledge of the shooting, but that he later identified Stephens from a photo

[2] ***Daubert v. Merrell Dow Pharmaceuticals Inc.***, 509 U.S. 579 (1993).

lineup as "the person who killed [Adrian]." On cross-examination, Gardner further admitted that he made multiple untrue statements to police about where he was the night of the shooting and who he was with before finally admitting his involvement. He stated that he initially lied because he feared being tied to the murder and did not want to get Stephens in trouble.

¶8 Teran Griffin was the driver of the black SUV. He testified that immediately before the shooting, Stephens exited the SUV and exchanged words with the victim. Griffin then heard a gunshot and drove away. He picked up Stephens around the block and they eventually drove to a female's house, where Griffin exited the car. Stephens drove the SUV away. Griffin testified that he found a book bag containing the handgun on the female's porch. He testified that Stephens must have left it there, and that the next day, Stephens called him and retrieved the gun. Griffin testified that earlier in the evening of the shooting, there was another incident where Stephens pulled out a gun and threatened to shoot someone else. Griffin said he did not know "that Aaron Stephens was going to shoot a gun that night."

¶9 Like Gardner, Griffin testified that he initially lied to the police and told them he was not present at the shooting because he did not want to get in trouble. During cross-examination, Griffin was asked about each lie he told police in his initial statement.

¶10 Kenyon Canady was called by the State. In contrast to his statements to police, he denied that Stephens had pulled a gun on him on the same day that Adrian was shot and killed.

¶11 The State then called Investigator Donald Nuttall to the stand. Nuttall was asked to confirm that Gardner initially provided a false statement to

police. Trial counsel objected that the questions were improper under ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). The circuit court overruled the objection, explaining that Nuttall was asked about statements made during the investigation and was not asked to opine on the truthfulness of Gardner's trial testimony. The court also said that Stephens' counsel had opened the door to this line of questioning. Nuttall testified that Gardner changed his story after he was advised that police knew he was lying. Nuttall stated that Stephens' physical description matched the description received from witnesses, namely, longer hair with small braids and gold teeth.

¶12 Investigator Theodore Schlitz testified about his involvement in the investigation. He testified that he had taken statements from Gardner and Griffin, that neither was initially forthright, and that both changed their stories. As to their initial statements, Schlitz testified, "it appeared they both were lying … I knew they were there, so I believed they were lying to me, and I wanted them to be forthcoming with what happened." Schlitz recounted that he recovered the handgun when Stephens was arrested and noticed that the bullets in the magazine were made by the same manufacturer as the shell casing found at the scene of the crime.

¶13 Schlitz also testified that as part of the investigation, he interviewed Canady, who told him that earlier in the evening, before the shooting occurred, Stephens confronted him, pulled a gun, and threatened to shoot Canady and everyone around them. The video of Canady's interview was introduced as an exhibit and played to the jury after Canady denied making any of these statements to police. Schlitz also testified that during the investigation, he interviewed Trevor, who picked out Stephens from a lineup as the shooter, but "needed to see him in person to be sure."

¶14 Finally, the State called Simonson, a ballistics expert with the state crime lab. Consistent with his testimony at the ***Daubert*** hearing, he testified that he examined the firearm recovered when Stephens was arrested, the shell casing at the scene, test fired the weapon, and compared the markings on the two spent cartridges. He stated that he "was able to determine that the fired cartridge case [he] was asked to examine was fired in the semi-automatic pistol" recovered from Stephens. Simonson testified to a reasonable degree of scientific certainty that the cartridge recovered from the scene of the crime was fired from Stephens' handgun.

¶15 During closing arguments, the State summarized the testimony of all its witnesses. Regarding Canady, the prosecutor noted that he "changed his testimony" about his encounter with Stephens before the shooting and that Canady "just out and out lied to you."

¶16 During the defense closing, Stephens' counsel developed the theme that Griffin and Gardner, had lied in their testimony, calling them "known liars," and stating: "You know they lied on the stand. You know they did. We all know they did." He asked the jury why they should believe their court testimony any more than the lies they told police. This theme was accompanied by the suggestion that Griffin and Gardner, not Stephens, were responsible for shooting Adrian and the subsequent escape.

¶17 The jury convicted Stephens of both charges, and he was sentenced to life imprisonment without extended supervision.

¶18 Stephens moved for postconviction relief, asserting that his trial counsel was ineffective for failing to: (1) object to Schlitz's testimony concerning the truthfulness of Gardner's and Griffin's initial statements to the police,

(2) object to the portion of the State's closing argument in which the prosecutor called Canady a liar, and (3) secure testimony from a defense ballistics expert. He further asserted that the circuit court "erred in allowing the State's expert witness to testify as to the conclusion that the bullet recovered from the crime scene definitely came from the firearm recovered in Stephens' proximity."

¶19 The circuit court held an evidentiary ***Machner***[3] hearing. Trial counsel testified that he did not object to Schlitz's testimony regarding the truthfulness of Gardner's and Griffin's initial statements "because I was making the same argument, that they were liars .... So frankly, the officer's testimony, in my view at the time, was advantageous to us." He explained that his strategy was to convince the jury that the State's witnesses were not credible. Regarding the prosecutor's statement at closing argument about Canady, trial counsel remembered that Canady changed his testimony and that he did not object to the statement because "I'm sure that in my closing I said the exact same thing." Trial counsel also testified that he could not locate a ballistics expert to provide a favorable opinion and that the only qualified individual he had ever found "was horrible, and I never used him again."

¶20 Stephens also called Charles Stephenson, a retired police officer, to "show why a ballistics expert would have been beneficial in this particular case" as it related to the ineffective assistance of counsel claim. Stephenson testified that he agreed with "the ability to identify markers on either cartridges or bullets and determine the firearm that those are fired from" and that this was "good

[3] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (where a defendant claims he or she received the ineffective assistance of trial counsel, a postconviction hearing "is a prerequisite … on appeal to preserve the testimony of trial counsel").

science." His ultimate opinion was that he could not determine whether Simonson's conclusion was correct.

¶21 The circuit court denied the postconviction motion in full. Stephens appeals.

DISCUSSION

¶22 As he argued postconviction, Stephens maintains that trial counsel provided ineffective assistance by failing to object to Schlitz's testimony and to the prosecutor's closing argument, and by not obtaining a ballistics expert for the defense. The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To satisfy the prejudice prong, the defendant must demonstrate that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶23 Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Id.*** at 698. The circuit court's findings of fact will not be reversed unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination, which this court decides de novo. ***Id.*** We need not address both prongs of the test if the

defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶24 Stephens asserts that trial counsel was ineffective for failing to object to Schlitz's testimony that, as to the initial statements provided by Gardner and Griffin, "it appeared they both were lying … I knew they were there, so I believed they were lying to me, and I wanted them to be forthcoming with what happened." Stephens argues that Schlitz's testimony runs afoul of the ***Haseltine*** rule, which prohibits one witness from testifying that another witness is telling the truth. ***Haseltine***, 120 Wis. 2d at 96 (improper for expert to opine that there was "no doubt whatsoever" that the complainant was an incest victim; such opinion usurps the fact-finding role of the jury). *See also* ***State v. Romero***, 147 Wis. 2d 264, 432 N.W.2d 899 (1988) (error to allow a police offer to testify that the alleged victim's accusations against the defendant were "totally truthful").

¶25 We conclude that Stephens has not met his burden to prove deficient performance. First, we agree with the State that Schlitz's statement does not violate ***Haseltine*** or ***Romero***, and is proper under ***State v. Smith***, 170 Wis. 2d 701, 490 N.W.2d 40 (Ct. App. 1992). In ***Smith***, a detective testified at trial about statements made by a State's witness during the underlying investigation and explained that the witness initially did not tell the truth, but then provided additional truthful information when told that another witness was cooperating in the investigation. ***Id.*** at 705. The detective explained "it was at that point that he began to change his story to why [sic] I felt was the truth." ***Id.*** at 706. He testified that he "continued the interrogation until he got what he believed to be the truth." ***Id.*** at 718. The ***Smith*** court held that the ***Haseltine*** rule was not violated because "neither the purpose nor the effect of the testimony was to attest to [the witness's] truthfulness," as the detective made these statements in the context of explaining

the circumstances of the witness's interrogation. ***Id.*** *See also* ***State v. Snider***, 2003 WI App 172, ¶27, 266 Wis. 2d 830, 668 N.W.2d 784 (no ***Haseltine*** violation where a detective "testified to what he believed at the time he was conducting the investigation, not whether Snider or the victim was telling the truth at trial."). Like in ***Smith***, the detective simply "recounted how he conducted the interrogation and his thought process at the time." ***Snider***, 266 Wis. 2d 830, ¶27.

¶26 Schlitz's testimony falls squarely within the holdings in ***Smith*** and ***Snider***. Schlitz was asked what efforts he made to get Gardner to cooperate in the investigation. Schlitz explained that he told Gardner he did not believe Gardner's initial statement was truthful and that Gardner had to make "a decision whether he wanted to be a witness or a party to a crime." He explained he used a similar tactic with Griffin. Schlitz then explained that both witnesses changed their stories and provided new statements that were "factually more sound with what [Schlitz] knew about the case." Schlitz's statement about the changing nature of unsworn statements made by witnesses during a police interrogation does not violate ***Haseltine***.

¶27 Second, as trial counsel explained at the ***Machner*** hearing, he did not object to Schlitz's testimony because it supported the defense's strategy to paint Griffin and Gardner as serial liars who could not be trusted. There is a "strong presumption of reasonableness" attached to defense counsel's chosen trial strategy. ***State v. Breitzman***, 2017 WI 100, ¶65, 378 Wis. 2d 431, 904 N.W.2d 93. Indeed, the circuit court found that counsel's trial strategy was "a reasonable approach to take in a case like this where you have people with assorted criminal records and at least relationships with people that have criminal records." *See* ***id.***, (where the circuit court determines that trial counsel had a reasonable strategy,

that strategy "is virtually unassailable in an ineffective assistance of counsel analysis.") (citation omitted).

¶28 Stephens next asserts that trial counsel should have objected on ***Haseltine*** grounds to the following statement by the prosecutor, made in closing argument: "Mr. Kenyon Canady came into the court and just out and out lied to you.... He changed his testimony." Here again, we conclude that Stephens has not established that counsel's performance was objectively unreasonable.

¶29 First, if the record demonstrates that a witness provided inconsistent statements, a prosecutor may permissibly argue in closing that the witness lied. *See* ***State v. Miller***, 2012 WI App 68, ¶21, 341 Wis. 2d 737, 816 N.W.2d 331. In ***Miller***, the prosecutor referred to a police interrogation video and said: "And after watching that tape, you know—and looking at the actions which speak louder than words—that Andre is a liar. He's not credible." ***Id.*** This court concluded that the prosecutor's comment was not objectionable because it was "properly tied to the evidence." ***Id.***, ¶22. *See also* ***State v. Jackson***, 2011 WI App 63, ¶26, 333 Wis. 2d 665, 799 N.W.2d 461.

¶30 Here, the prosecutor summarized the statement that Canady gave to police and contrasted it with Canady's in-court testimony, noting that one of the values of recording interrogations is that "if someone gets into court and they change their testimony, we can prove they are lying." This was an accurate summation of the evidence because Canady's trial testimony was entirely inconsistent with the statement he initially provided to police, as demonstrated by Schlitz's testimony and the video recording of Canady's police interview. "Accusing a witness of lying, based on the evidence, is not even close to being beyond the pale." ***Jackson***, 333 Wis. 2d 665, ¶29.

¶31 Second, counsel's failure to object was not deficient because it supported the defense's theory that Gardner, Griffin, and Canady were all liars whose testimony could not be trusted. Trial counsel argued in closing: "You know they lied on the stand. You know they did. We all know they did. They didn't just lie on the stand, they lied before the confrontation with the investigators, and they lied after ...."[4] Because the prosecutor's comment furthered the defense's theory, trial counsel was not deficient for failing to object. ***Breitzman***, 378 Wis. 2d 431, ¶56.

¶32 Stephens' third ineffectiveness claim faults trial counsel for not hiring a ballistics expert to counter the State's ballistics expert.[5] We reject this claim for two main reasons. First, trial counsel testified that he did not locate a useful expert and the defense strategy was to suggest that either Griffin or Gardner shot Adrian, thus rendering the ballistics evidence irrelevant. The postconviction court found that trial counsel adopted a reasonable strategy that did not require expert testimony: "Why take on the person who's the firearms expert when you've got a real shot at some characters who have given different stories about

[4] To be clear, the defense strategy of portraying these witnesses as liars was primarily directed at Griffin and Gardner, since Canady's testimony at trial, in which he backed off his previous statement implicating Stephens as the shooter, was actually helpful to Stephens. This led to the situation where the prosecutor was put in the position of labeling Canady's testimony as false.

[5] We acknowledge that the central reason we rejected prior appellate counsel's no-merit report was because the transcripts showed that: trial counsel obtained adjournments in order to seek out a defense ballistics expert; no such expert was called at trial; Stephens raised this issue in his response to the no-merit report; and the record was silent as to why no defense expert was called. It is with the benefit of the ***Machner*** hearing testimony and the postconviction court's ruling that we now decide on the merits that trial counsel's failure to call a defense expert did not constitute ineffective assistance.

what happened …?"[6] Trial counsel's decision not to hire a defense expert was objectively reasonable under the facts of this case. *See* ***State v. Wood***, 2010 WI 17, ¶¶71-74, 323 Wis. 2d 321, 780 N.W.2d 63 (whether to consult an expert and whether or not to call an expert witness are discretionary decisions made by trial counsel).

¶33 Second, Stephens did not present evidence of any expert who would have concluded that the casing was not fired by the handgun in question. Rather, Stephenson, the expert he called in support of his postconviction claim, testified only that he could not tell if the opinion of the State's ballistics expert was correct. Indeed, Stephenson was not even qualified to render such an opinion. Stephenson did not undertake an apprenticeship in firearm tool mark examination and had never been a member of the Association of Firearm and Tool Mark Examiners. He did not prepare a forensic report for the case. The only documents he reviewed were photographs of the crime scene, Simonson's report, and Simonson's testimony. Stephenson was not able to examine the marks on the shell casing found at the crime scene because he viewed only a photograph of the casing. Stephenson admitted that in order to properly examine the shell casing, he would have needed to view it under a microscope. However, he did not do so. Because Stephens failed to establish that any expert would have concluded that the

[6] The postconviction court's determination is amply supported by the record, including: counsel's opening statement that there was no reliable evidence as to who shot Adrian and no forensic evidence as to who handled the gun; counsel getting Nuttall to admit that there was no physical evidence indicating who fired the gun; counsel's closing argument that "Griffin is the one that had the gun at the end of the shooting, didn't he?"; counsel's closing argument pointing the finger at Griffin and Gardner based on the trial testimony; and counsel's closing argument, based on evidence elicited during cross-examination, that Stephens could not have been the shooter based on his height and the bullet's trajectory.

recovered handgun was not used in the shooting, he has not shown either deficient performance or prejudice.

¶34 Stephens' final argument is that the circuit court erred in admitting the expert testimony of Simonson, who determined that the shell casing left at the scene of the crime was fired from the weapon recovered when Stephens was arrested. Stephens asserts that the State did not provide sufficient foundation for Simonson's opinion to establish its reliability. We are not persuaded.

¶35 The current version of WIS. STAT. § 907.02(1) codifies the reliability standard for expert testimony first set forth in ***Daubert***. ***Seifert v. Balink***, 2017 WI 2, ¶51, 372 Wis. 2d 525, 888 N.W.2d 816. Under the statute, a court must perform a gatekeeping function and determine if proposed expert testimony is reliable by considering four factors:

> (1) whether the methodology can and has been tested; (2) whether the technique has been subjected to peer review and publication; (3) the known or potential rate of error of the methodology; and (4) whether the technique has been generally accepted in the scientific community.

Seifert, 372 Wis. 2d 525, ¶62 (citation omitted).

¶36 Application of the four ***Daubert*** factors is a "flexible inquiry." ***Seifert***, 372 Wis. 2d 525, ¶64. A circuit court has "wide latitude" in conducting the reliability analysis. ***Id.*** Our review on appeal is limited to determining "whether the circuit court erroneously exercised its discretion." ***Id.***, ¶96.

¶37 We conclude that the circuit court properly exercised its discretion in admitting Simonson's expert testimony. Simonson testified that he was employed at the state crime lab for over thirteen years, received practical training on weapons identification, was a member of the Association of Firearm and Tool

Mark examiners, was proficiency tested every year by an outside agency, and had testified as an expert witness in over 100 cases. Simonson explained the methodology he used to match the bullet casing to the firearm and described the equipment he used. He testified that his methodology was used by other experts in the field, was discussed in scientific journals, had been used for over 100 years, and had widespread acceptance. He explained that the matching process had been objectively tested and studies confirmed that small imperfections in the tooling process of firearm manufacturing results in each weapon leaving unique markings on a fired casing. He further explained that in this case he made a positive identification using three unique types of markings on the casing from the weapon's breach face, firing pin, and firing pin aperture.

¶38 Simonson testified that there was no standardized rate of error for this method, but "there has been some research throughout that suggests it's 1% or less." He explained that he has never personally issued a report containing a misidentification. He also stated that his reports are peer reviewed and his conclusion in each case is reviewed by an independent examiner to verify its accuracy.

¶39 The circuit court found that Simonson was qualified to testify as an expert as to his firearm testing analysis after specifically discussing each of the ***Daubert*** reliability factors in light of Simonson's testimony. The court's thorough decision at the ***Daubert*** hearing constitutes a proper exercise of discretion.

¶40 Stephens argues that: Simonson should have examined numerous shell casings fired from the recovered firearm in a process akin to a photo "line-up"; Simonson's opinion was not trustworthy because there is no national database relating to markings left by "the type of gun"; Simonson's analysis was not

"certified by any neutral body"; and it is improper for a ballistics expert to "match" a casing to a firearm.

¶41 We reject his arguments. First, the bulk of these criticisms were not raised at the ***Daubert*** hearing or during trial and are forfeited. ***Frankovis v. State***, 94 Wis. 2d 141, 152, 287 N.W.2d 791 (1980). Second, these criticisms are relevant to the weight of Simonson's testimony, not its admissibility. Where an expert's methodology otherwise satisfies the ***Daubert*** factors, "specific concerns" about his ultimate opinion and process "are more appropriately directed to the testimony's weight, rather than admissibility." ***Bayer ex rel. Petrucelli v. Dobbins***, 2016 WI App 65, ¶30, 371 Wis. 2d 428, 885 N.W.2d 173. In short, none of Stephens' concerns establish that the circuit court erroneously exercised its discretion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.