**COURT OF APPEALS
DECISION
DATED AND FILED**

November 24, 2009

**David R. Schanker
Clerk of Court of Appeals**

NOTICE

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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.

Appeal No. 2008AP2307-CR

Cir. Ct. No. 2004CF2380

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE C. PAINE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER and JEFFREY A. WAGNER, Judges. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Lawrence C. Paine appeals from a corrected judgment of conviction for two counts of first-degree intentional homicide, and from an order denying his postconviction motion following a ***Machner*** hearing.[1] The issue is whether trial counsel's subjective reasons for failing to call two particular witnesses in Paine's defense constituted ineffective assistance. We conclude that trial counsel's performance in failing to call these two witnesses at trial was not deficient; therefore, Paine did not receive ineffective assistance of counsel. Consequently, we affirm.

¶2 Paine was originally charged with two counts of first-degree reckless homicide for the shooting deaths of Janari Saddler and Aaron Harrington. We set forth the facts from our previous decision on direct appeal:

> [T]wo men died as a result of being shot multiple times in the upstairs flat of a Milwaukee duplex. According to a witness who said he was present in the flat at the time of the shootings, one of the victims, Janari Saddler, got into a discussion about a parked car with a person the witness knew as "Chan." Apparently "Chan" had parked a car, which Saddler thought was stolen, in front of the duplex which was also where Saddler lived. Ultimately "Chan" became upset with Saddler for continuing to talk about the car, pointed a gun at Saddler, followed a retreating Saddler into the bedroom and, thereafter, the witness heard multiple gunshots. The witness then heard the other victim, Aaron Harrington, yell "Don't kill me!" followed by more gunshots. The witness then ran out of the building. Upon his return to the flat shortly thereafter, the witness saw the two bodies, one in the bedroom and one in the bathroom, and he left the flat again, this time calling 9-1-1 from

[1] The Honorable David A. Hansher presided over the jury trial, imposed sentence and entered the judgment and corrected judgment of conviction. The Honorable Jeffrey A. Wagner presided over the ***Machner*** hearing and entered the postconviction order. A ***Machner*** hearing is an evidentiary hearing to determine trial counsel's effectiveness. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

> another house. The witness subsequently identified a photograph of Paine as the person who he knew as "Chan." Another witness, who also said he was present in the flat at the time of the shootings, likewise identified Paine from a photograph as someone he knew as "Chan." Paine's middle name is Chan. The second witness described the events preceding the shootings in a substantially similar manner, although his account was not identical to the account given by the first witness. There was no physical evidence tying Paine to the murders.
>
> Paine's theory of defense, as described specifically in the postconviction motion, was that he was not at the duplex that evening, but rather was first at a strip club with another friend he knew as "Skin," and that after he dropped Skin off for the night, Paine then left for Minneapolis to visit his young son who lived there with his son's mother. To support his statements to police, Paine provided police with Skin's cell phone number.

State v. Paine, No. 2006AP2634-CR, unpublished slip op. ¶¶2-3 (WI App Nov. 6, 2007).

¶3 The first trial resulted in a hung jury. The State re-tried Paine and the jury found him guilty of two counts of first-degree intentional homicide. The trial court imposed two sentences of life imprisonment and declared Paine ineligible for extended supervision. In a postconviction motion, Paine alleged that his trial counsel was ineffective for failing to call two witnesses in Paine's defense, Anthony Mendez Blackman (also known and hereinafter referred to as "Skin") and Zenobia Davis. The trial court summarily denied the motion, and we remanded the matter for a ***Machner*** hearing on trial counsel's "failure to investigate and to call Davis and Skin as witnesses at trial." ***Id.***, ¶23.

¶4 On remand, the trial court conducted a ***Machner*** hearing at which the following people testified: Skin's mother Ella Blackman and the private

investigator retained by the defense prior to trial, William Garrott.[2] Skin did not testify, as he had died prior to the ***Machner*** hearing. Davis did not testify because she could not be located. Paine elected not to testify at the ***Machner*** hearing. The trial court denied the motion, finding that "it is undisputed that trial counsel made numerous efforts to locate Anthony Blackman with the limited information offered by the defendant." Trial counsel testified that Davis told him she did not want to testify so he decided not to call her as a witness because he also "did not believe that her testimony would be helpful." The trial court determined that trial counsel's decision not to call Davis was strategic, and therefore outside the purview of ineffective assistance, and concluded that trial counsel's performance was not deficient, nor prejudicial. Paine appeals.

¶5 To prevail on an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Prejudice must be "'*affirmatively* prove[n].'" ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (citation omitted; emphasis in ***Wirts***). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is

[2] Ella Blackman testified briefly to establish that her son and Paine were friends, and that her son was now dead, presumably to establish his unavailability.

insufficient proof of the other. *See* ***State v. Moats***, 156 Wis. 2d 74, 100-01, 457 N.W.2d 299 (1990). Matters of reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable," and do not constitute ineffective assistance. ***Strickland***, 466 U.S. at 690-91.

¶6 The trial court found, based on trial counsel's testimony at the ***Machner*** hearing, that trial counsel hired "an experienced and aggressive investigator in attempts to find 'Skin.'" The investigator's efforts included: going to the neighborhood where Paine told trial counsel that Skin lived, knocking on doors and inquiring about Skin to people in that neighborhood, going to the Paradise Strip Club where Paine claimed he was on the night of the shootings to talk with potential witnesses and determine whether the club had videotapes or photographs, and viewing the club's videotapes. The investigator also went to the gasoline station where Paine claimed to have stopped that night or early the next morning. The investigator also reviewed the information developed by law enforcement about Skin.

¶7 The trial court's factual findings on trial counsel's efforts to locate Skin were not clearly erroneous. We affirm the trial court's factual findings that trial counsel's efforts, albeit unsuccessful, to locate Skin did not constitute deficient performance. Paine's inability to demonstrate that the trial court's factual findings were clearly erroneous renders an assessment of prejudice unnecessary. *See* ***Moats***, 156 Wis. 2d at 100-01.

¶8 The other witness Paine contends should have been called to testify was Davis. Paine contends that Davis's testimony was important for two reasons: (1) to corroborate Skin's existence; and (2) to bolster Paine's credibility.

¶9 Davis was interviewed by police and said that she met Skin "a long time ago." Both Davis and Paine described Skin, albeit their physical descriptions of Skin differed. *See* ***Paine***, No. 2006AP2634-CR, unpublished slip op. ¶15. Davis provided police with Skin's cell phone number, although "Davis also explained to police that Skin had told her he was not answering the police calls and had changed his cell phone number because he had outstanding warrants and was afraid of going to jail." ***Id.***, ¶6. According to what Davis told police, Skin telephoned Paine on the same day he discovered that police claimed Paine was involved in the two shootings because Skin saw Paine's picture on television as being wanted by police. Davis told police that although she only heard Paine's side of the telephone conversation with Skin, she heard Paine tell Skin, "Dog, I was at a club on the south side, Dog, wasn't I with you? Yeah, yeah, okay." Davis also told police that Skin telephoned her directly, to console her about Paine, telling her not to worry because Paine "would probably be out in a couple days." Davis attended Paine's trial, although she did not testify.

¶10 At the ***Machner*** hearing, trial counsel admitted that had Davis testified in Paine's defense, she would have corroborated Skin's existence (as opposed to Paine having made Skin up to provide himself with an alibi), and corroborated Skin's fear in talking with police. Although Davis attended Paine's trial, trial counsel testified that he did not compel Davis's testimony because: (1) she did not want to testify; (2) he did not believe that Davis's testimony would be helpful to the defense; (3) he did not believe that Davis would be "very effective on the witness stand"; and (4) he did not know "what she had to offer [or] how [he] was going to exactly get that in."

¶11 We review the trial court's findings on trial counsel's performance in failing to call Davis as a defense witness at trial. The trial court found that trial

counsel's performance with respect to not compelling Davis to testify was not deficient because: (1) she told him that she did not want to testify; and (2) it was a strategic decision not to compel her testimony at the re-trial after he interviewed her during the first trial. These factual findings are not clearly erroneous.

¶12 We review trial counsel's reasoning to determine whether it was objectively reasonable. *See* ***McMahon***, 186 Wis. 2d at 80. We also review trial counsel's strategy to assess that it was objectively reasonable. Paine's alibi was Skin. He could not produce Skin at trial as an alibi witness; consequently, Paine had to tell the jury about Skin. By its guilty verdicts, the jury did not believe Paine. Davis's proposed value as a defense witness was to confirm Skin's existence (as opposed to a fabrication), and to bolster Paine's credibility. Without presenting Skin as a witness, Davis's corroborative testimony as to Skin's existence may have been of little value. First, Davis was Paine's friend, and it was not unreasonable for trial counsel to believe that she may have been perceived by the jury as wanting to help Paine. Second, Davis only heard Paine's side of his conversation with Skin, which could have been interpreted as Paine confirming his whereabouts and purported alibi with Skin, or as Paine reciting what he wanted Skin to confirm as his alibi. The latter interpretation would not benefit Paine, and would most likely compromise his defense. Third, both Davis and Paine described Skin's physical characteristics differently. *See* ***Paine***, No. 2006AP2634-CR, unpublished slip op. ¶15. Although those descriptive differences may have been minimized through competent lawyering, those differences would not have bolstered the credibility of Davis or Paine. We affirm the trial court's finding that trial counsel's decision not to compel Davis to testify as a defense witness was strategic, thereby removing it from the realm of ineffective assistance of trial counsel. *See* ***Strickland***, 466 U.S. at 690-91. Trial counsel's performance was

objectively reasonable. *See* ***McMahon***, 186 Wis. 2d at 80. We therefore affirm the postconviction order and the underlying corrected judgment.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).