

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 31, 2003

Cornelia G. Clark
Clerk of Court of Appeals

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.

**Appeal Nos. 01-1779-CR
01-2601-CR**

Cir. Ct. No. 97CF970383

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FREDDIE L. CARTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Deininger, JJ.

¶1 PER CURIAM. Freddie L. Carter appeals from a judgment convicting him of first-degree reckless injury, and orders denying him postconviction relief. The issues are whether trial counsel provided effective

assistance, whether newly discovered evidence requires a new trial, and whether this court should grant Carter a new trial in the interest of justice. We affirm.

¶2 The State charged Carter as a party to shooting Jimmie Smith. Smith had or formerly had a relationship with Carter's mother, Evonne Carter. On the day of the shooting they and several other people were at the apartment of Smith's sister, Debbie Carter. Smith and Evonne became involved in an altercation. Evonne's daughter called Carter and another son, Gene Thomas, for help. Both arrived at the apartment, as did four other men. Prosecution witnesses testified that all six men forcibly entered the apartment as a group. Carter testified that he arrived later and did not participate in the forced entry. In either case, after the group entered, Smith retreated to a bedroom. The men, either with or without Carter, congregated in the hallway outside. Debbie testified that she tried to block their entrance to the bedroom, but Carter pushed her aside. One man entered the bedroom and struck Smith, and another shot him from the doorway. All of the men, including Carter, then fled.

¶3 Carter's role in the shooting was disputed. Debbie Carter and her son testified that Carter arrived with the other men, and was at the forefront of the action. Debbie testified that Carter was standing immediately to her left in the bedroom doorway when the shot was fired. She could not say whether he was the shooter. Her son testified to seeing Carter shoot Smith with a gun held in his right hand. Smith testified that Carter was the shooter.

¶4 In defense, Carter and his brother Thomas testified that Carter arrived separately and after the five other men, and was standing behind them when the shooting occurred. Thomas testified that the shooter was actually Otha "Pokey" Donelson. Carter said that he did not see the shooter.

¶5 After Carter's conviction he sought postconviction relief, alleging ineffective assistance from counsel. At the hearing on his motion, Carter interrogated counsel concerning his trial preparation and investigation. Counsel testified that he interviewed Carter, Evonne Carter, Thomas, and Carter's girlfriend, Cherissa Davis. When Thomas told counsel that Donelson did the shooting, counsel did not investigate that allegation. He testified that he was not particularly concerned with that piece of information because the State charged Carter as a party to the shooting, and counsel saw no defense to that charge. Additionally, he did not believe Donelson was a real person, although a police report on the shooting gave Donelson's name, physical description, address and phone number. Counsel also did not follow up on a police report that Willie Smith, the victim's brother, attributed the shooting to an unidentified person rather than Carter. He further testified that he made no attempt to interview any of the other potential witnesses present at the shooting scene.

¶6 Carter also asked counsel why he questioned the jury panel only briefly during *voir dire*, did not object at closing when the prosecutor called Carter's witnesses liars, and did not make an adequate record of the reasons Carter wanted to replace him on the first day of trial.

¶7 After counsel testified, Carter presented testimony from four purported eyewitnesses to the shooting, all of whom testified that they saw Donelson shoot Smith, without Carter's involvement. However, none were called as defense witnesses during the trial. At the time of their postconviction testimony Donelson was reportedly no longer alive.

¶8 The trial court denied the postconviction motion, holding that counsel provided adequate, if not zealous representation, and that Carter was not prejudiced by the representation provided.

¶9 Carter subsequently brought a motion for a new trial based on newly discovered evidence. At the hearing on that motion Smith testified, with immunity from perjury charges, that he had lied at the trial. He stated that he actually did not see who shot him. He testified that he identified Carter as the shooter because he was convinced that Carter instigated the shooting. He added that he remained convinced of this.

¶10 Smith explained that he changed his testimony when Carter “bugged” him daily after both ended up at the same prison. “Because of the bugging. That’s the only reason,” he said. He denied that Carter offered him anything to change his testimony, but admitted Carter gave him cigarettes after he agreed to do it. Based on all of the circumstances, the trial court concluded that Smith’s new version of events was not sufficiently trustworthy to entitle Carter to a new trial.

¶11 To prove ineffective assistance of counsel, the defendant must show that counsel’s performance was deficient and that counsel’s errors or omissions prejudiced the defense. *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Deficient performance falls outside the range of professionally competent representation and this court measures it by the objective standard of what a reasonably prudent attorney would do in similar circumstances. *Id.* at 636-37. Prejudice results when there is a reasonable probability that but for counsel’s errors the result of the proceeding would have differed. *Id.* at 642. We strongly presume that counsel rendered adequate assistance and made all significant

decisions in the exercise of reasonable professional judgment. *Id.* at 637. Whether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law. *Id.* at 634.

¶12 Trial counsel's performance raised a number of questions. He did not recall interviewing several potential witnesses. He did not call as witnesses several people potentially able to offer exculpatory testimony, including Smith's brother. He did not believe Donelson was a real person although police identified him as such in an available police report. He did not believe he had a maintainable defense to the charged crime, although Carter's alternative version of events made one arguably available. He also did not vigorously cross-examine Smith on a prior police report stating that he blamed the shooting on Evonne Carter, and, when Smith denied it, did not try to impeach Smith with the officer who took the statement.

¶13 However, Carter failed to demonstrate that any of the omissions mattered. He contends that the additional witnesses he identifies would have supported his credibility and impeached that of the prosecution witnesses. But the witnesses who testified at the postconviction hearing offered vague and contradictory accounts of the shooting. One essentially confirmed Debbie Carter's description of her struggle with Carter, which contradicted Carter's own version of that encounter. Another witness admitted that he told his story to no one involved in the case for years. While all attributed the shooting to Donelson, who was by then reportedly dead, that attribution alone would not necessarily have helped Carter because the State could have requested a party to the crime instruction to counter that testimony.

¶14 Carter failed to produce Smith’s brother at the postconviction hearing, and it remains speculative whether he would have corroborated his original statement. That statement also failed to exonerate Carter under a party to the crime theory, because Smith’s brother stated, according to the report, that Carter was not the shooter. The same failure of proof pertains to two other missing witnesses Carter now identifies as significant. Again, it remains pure speculation whether they would have helped Carter had counsel called them.

¶15 Trial counsel reasonably chose not to closely cross-examine nor attempt to impeach Smith about his statement to police blaming Evonne Carter for the shooting. Smith explained that he was heavily medicated at the time he gave the statement. By pursuing the issue counsel would have risked underscoring the fact that just after the shooting, and before receiving medication, Smith identified Carter as the shooter.

¶16 Counsel did not perform ineffectively when he failed to object during the prosecutor’s closing arguments. On several occasions, the prosecutor referred to Carter and his brother as “liars.” Where, as here, the prosecutor describes a witness as a “liar” in the context of analyzing the evidence, such references are permitted. *State v. Johnson*, 153 Wis. 2d 121, 132, 449 N.W.2d 845 (1990). This case turned entirely on credibility, and both sides argued that the other side’s witnesses were untruthful. Under those circumstances, counsel had no reasonable expectation that the trial court would have sustained an objection to the prosecutor’s statements.

¶17 Carter identifies three other instances of counsel’s alleged ineffectiveness—his inadequate *voir dire*, his failure to have a theory of defense, and his failure to make an adequate record of Carter’s request for replacement

counsel. The first claim fails because Carter did not show that counsel's efforts, or lack thereof, resulted in a biased jury. See *State v. Lindell*, 2001 WI 108, ¶¶81, 245 Wis. 2d 689, 629 N.W.2d 223. The second fails because regardless of counsel's belief concerning Carter's lack of defense, a viable defense was presented at trial: that Carter neither shot Smith nor participated in or provoked the group assault on him. The third fails because Carter made no showing that the court would have granted his last minute request to cancel his trial and replace counsel even if counsel had more fully explained it on the record.

¶18 The trial court reasonably denied relief on Smith's recantation. To obtain a new trial on recanted testimony, the defendant must show a feasible motive for the perjured trial testimony, and circumstantial guarantees of the trustworthiness of the recantation. *State v. McCallum*, 208 Wis. 2d 463, 477-78, 561 N.W.2d 707 (1997). Without these showings the trial court may deem the recantation insufficiently corroborated to justify a new trial. *Id.* This determination is discretionary. *State v. Terrance J.W.*, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). We affirm the trial court's exercise of discretion if it has a reasonable basis and the court applied the correct legal standards to the facts of record. *Id.*

¶19 Here, Smith explained that he lied at trial because he was angry and upset with Carter after he was shot. The court determined, however, that this was not a feasible explanation for the false testimony because "listening to him today and judging his testimony I just don't find that to be the case." A determination by the trial court that a recantation is not credible is sufficient in and of itself to deny a new trial. See *Terrance*, 202 Wis. 2d at 501. Additionally, the court determined that the recantation did not carry with it the required guarantees of trustworthiness because it admittedly came after Carter's incessant pressure, or

“bugging,” directed at Smith. That, too, was a reasonable conclusion from the testimony.

¶20 We deny Carter’s request to grant him a new trial in the interest of justice, under the discretionary authority provided this court by WIS. STAT. § 752.35 (2001-02).¹ He contends that the missing witnesses and Smith’s recantation caused a situation where the real controversy (Carter’s role in the shooting) was not fully tried. As noted, Carter has not shown that the additional witnesses would have influenced the outcome of the trial with their belated, inconsistent and ultimately cumulative testimony. Nor has he shown that the recantation justifies a new trial under § 752.35, in view of the trial court’s findings regarding that recantation.

By the Court.—Judgment and orders affirmed.

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

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

