

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 5, 2002

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 No. 02-0008-CR

Cir. Ct. No. 00-CF-35

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JACK R. HAYES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J. and Peterson, J.

¶1 PER CURIAM. Jack Hayes appeals a judgment convicting him of aggravated battery by use of a dangerous weapon, contrary to WIS. STAT. § 939.63(1)¹ and an order denying postconviction relief. In Hayes's words, "the

¹ All statutory references are to the 1999-2000 version unless otherwise noted.

sole issue before this Court is whether the alleged errors of Hayes's counsel in failing to call favorable witnesses prejudiced his defense." We are satisfied that the testimony in question would not have created a reasonable probability of a different result at retrial. We therefore affirm the judgment and order.

BACKGROUND

¶2 This appeal arises out of a shooting incident. Hayes was charged with aggravated battery after he fired a gun at Michael Zieve, who was unarmed and seated in Hayes's living room having a beer. The shot struck Zieve in his knee causing serious injury. Hayes immediately called 911 to get help for Zieve.

¶3 Hayes testified that he pointed the gun at Zieve in self-defense and it discharged accidentally.² Hayes believed he needed to use a gun to defend himself against Zieve because numerous injuries Hayes suffered over the years made him vulnerable and prevented him from adequately defending himself. In 1975, Hayes's former wife shot him in the face, causing major injuries requiring extensive reconstructive surgery. He required bone grafts and his head still contains pieces of metal and plastic. In 1978, Hayes severely injured his back and abdomen in a work-related crane accident, affecting his mobility. Also, in 1979 or 1980, he was hit in the head with a heavy beer mug. It cut an artery to his brain requiring eight wire stitches. He continues to suffer persistent headaches. Physicians had advised Hayes that he needed to be careful because a solid blow to the head would probably kill him.

² In order to put Hayes's ineffective assistance of counsel claim in context, we recount the facts from Hayes's testimony. Zieve denied that he had threatened or assaulted Hayes.

¶4 Zieve and Hayes had been friends for many years. Hayes testified that on the day of the shooting, Zieve telephoned Hayes around 8 a.m. and they met at a restaurant for breakfast. Their plan for the day was to “[g]et drunk.” Hayes drove and they went from bar to bar and to Hayes’s house, having beer and drinks.

¶5 At approximately 7 p.m., Hayes attempted to intervene in an altercation Zieve started with another patron at a bar. Zieve responded by punching Hayes in the temple with his fist. Hayes testified that Zieve “cracked my skull” and that he literally “shit my pants.” Hayes said that he felt his skull and “you could feel like sand going click, click, click.” He could “wiggle it.” Hayes testified that he became frightened and begged Zieve to stop, and Zieve hit him three or four more times in rapid succession. When a female bar patron interrupted them, Zieve stopped and began talking to her.

¶6 The bar owner asked Zieve to leave and he did, heading across the street. Hayes “sat there and drank that drink, and I waited about ten minutes, and ... I didn’t see him by my car or anything.” Hayes then “snuck next door” to another bar, and went in and ordered a drink. At that point, Zieve walked in.

¶7 Hayes testified that when Zieve asked Hayes for a ride home, he objected. Zieve insisted and Hayes, still scared, agreed. Enroute, Zieve apologized and asked Hayes to stop at another bar. Hayes did, but the two were asked to leave that bar. While driving away, Zieve “backhanded me [f]ull forearm right across ... the whole side of my face.” Hayes testified that he felt trapped and scared. Although he wanted Zieve to go home, Zieve demanded Hayes take him to another bar. Hayes testified that he feared Zieve due to his size and strength,

and agreed to stop at the bar. While at the bar, Hayes told the bartender that he was afraid Zieve would kill him. After drinking more, they left the bar together.

¶8 Zieve demanded to go to yet another bar. When Hayes objected, “he popped me again,” hitting him on the side of his face. Hayes did not believe he could overpower Zieve, who weighed 350 pounds and formerly worked as a bouncer, so he drove to the next bar. Hayes feared Zieve would kill him, and recalled saying something to this effect at the bar. After having some drinks, Zieve “just kind of gave me an elbow on the side and said, ‘Come on, let’s go.’”

¶9 When they were in Hayes’s car, Zieve demanded to be taken to Hayes’s house. When Hayes replied he just wanted to take Zieve home, “he backhanded me again [o]nce, twice.” It “felt like a baseball bat. It would daze you and stuff.” Hayes began to drive and on the way up his driveway Zieve hit him two more times. Hayes felt scared and was afraid that he would wind up crippled or dead.

¶10 Hayes testified that when he got out of his car, he did not attempt to run away due to his back and leg injuries. He felt that Zieve would catch up to him and beat him. Hayes unlocked his door and Zieve “comes by and he bumps me real hard with his belly. And I just kind of flew against the door.”

¶11 Zieve walked in and Hayes decided “at this point I am going to call the cops.” Hayes testified that Zieve was between him and the phone, and “he sticks his belly out again and, you know, he knew what I was going to do.” Zieve demanded a beer, but Hayes told him to get his own and went into a bedroom where the gun was kept. Hayes grabbed two shells, loaded the gun and stepped out of the bedroom. The gun was a pump shotgun, and to put a round in the chamber, Hayes had pumped the gun while still in his bedroom.

¶12 Hayes testified that as he exited the bedroom:

I didn't know where he was. I didn't know if he was coming behind me or what he was doing. I was scared to death. And I seen him [sic]. I aimed at him. And I thought, no. And I went to lower it and it went off.

....

I don't know, I was just going to threaten him. ... I didn't have a chance to finish thinking. It went off.

¶13 Hayes stated that when he pointed the gun at Zieve, Zieve had gotten a beer and was seating himself in the living room. "He wasn't completely sat down when I aimed the gun at his head" but in the process of sitting down. Zieve was unarmed at the time of the shooting, and other than to knock Hayes with his belly, there was no physical altercation inside Hayes's house. Once he was armed, Hayes gave Zieve no directive to leave his house. The record indicates that Zieve was seated twenty feet away from Hayes when he was shot.

¶14 On cross-examination, Hayes testified that the day of the shooting was the first time he ever had "[l]ife-threatening concerns" for his safety due to Zieve's behavior. The last time Zieve had struck him was two years before, but not in the head. Hayes also conceded that there was another telephone in his roommate's bedroom that he could have used to call the police but had not thought of it. He agreed that while at the various bars where Zieve beat him he never called the police or asked anyone to call the police. He agreed that in hindsight he could have stayed at a bar instead of leaving with Zieve each time.

¶15 Two witnesses corroborated Hayes's trial testimony. One bartender testified that Hayes told her that night that he feared Zieve was going to kill him, but she did not take him seriously because he was intoxicated. An owner of another bar testified that he saw Zieve slap Hayes in the head two to four times at

which point the bar owner asked Zieve to leave. The bar owner described the blows as “roundhouse fashion.” He testified that after Zieve left, Hayes told him he was afraid due to his head injuries.

¶16 Although Hayes testified that the shooting was accidental, the trial court granted Hayes’s request to instruct the jury on self-defense.³ The jury returned a verdict of guilty of aggravated battery while using a dangerous weapon.

¶17 Hayes brought a motion for postconviction relief based upon ineffective assistance of counsel. He argued defense counsel neglected to call

³ The court accepted Hayes’s apparent theory that he picked up and aimed the shotgun as a lawful act of self-defense and the shooting was an accidental outgrowth of that lawful act. The court instructed as follows:

Self-defense is an issue in this case. The law of self-defense allows a person to threaten or intentionally use force against another under certain circumstances. The state must prove that evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully in self-defense. The law allows a defendant to act in self-defense only if the defendant believed there was an actual or imminent unlawful interference with the defendant’s person, and believed that the amount of force he used or threatened to use was necessary to prevent or terminate the interference.

The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if he believes such force was necessary to prevent imminent death or great bodily harm to himself.

In addition, the defendant’s beliefs must have been reasonable. A belief may be reasonable even though mistaken. In determining whether the defendant’s beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant’s position under the circumstances that existed at the time of the alleged offense. The reasonableness or the defendant’s beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

three critical witnesses and inadequately investigated and prepared a defense. Hayes submitted three affidavits to support his claim. The first was Dr. Paul Marshall's affidavit. Marshall, a board certified clinical neuropsychologist, concluded that Hayes had "a legitimate reason to fear both a substantial head injury and brain injury when being struck on the right side of his head by Mr. Zieve as he alleged," that Hayes's head was "significantly more vulnerable to injury due to the 1985 skull fracture" and that his skull was in a "permanently weakened state compared to a normal skull."

¶18 Dr. Jay Greenberg, a chiropractor who treated Hayes for low back and leg pain on forty-four occasions between July 1999 and March 2000, submitted an affidavit that Hayes's back and leg pain resulted from a crane accident in 1978. Greenberg would have testified that Hayes sometimes had difficulty walking normally and his range of motion was restricted. Greenberg stated that Hayes's ability to run was hindered and "such action would have subjected him to a significant risk of immediate injury and pain and almost certainly would have aggravated his injury, causing a flare-up of his leg and back problems." The third affidavit was Rhonda Sanford's, the bar patron who witnessed Zieve's first punches to Hayes.

¶19 Accepting the affidavits' factual allegations as true, the trial court determined that no evidentiary hearing under *Machner* was necessary. *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). The court concluded Hayes failed to show that but for counsel's unprofessional errors, the result of the trial would have been different. The court ruled that Hayes was not entitled to relief because the evidence failed to undermine the court's confidence in the outcome, thereby demonstrating no prejudice.

DISCUSSION

¶20 Hayes assembles a vigorous argument. He contends that the question for the jury was whether Hayes's extreme fear of Zieve at the time of the shooting was reasonable in light of Zieve's conduct that day and Hayes's medical condition, despite the twenty feet between them. He claims that the jury was deprived of evidence essential to evaluate Zieve's conduct and Hayes's medical condition on which its determination of self-defense ultimately depended. To make matters worse, Hayes argues, the prosecutor slighted Hayes's injuries and argued they were exaggerated and would not have prevented his retreat. As a consequence, Hayes maintains that the trial court erroneously determined that Hayes failed to show prejudice. We conclude that the trial court properly rejected Hayes's ineffective assistance of counsel claim.

¶21 To prevail on an ineffective assistance of counsel claim, a defendant must establish that his trial counsel's performance was deficient and that this performance prejudiced his or her defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The court need not address both the deficient performance and prejudice components if the defendant cannot make a sufficient showing on one of them. *Id.* at 697. Whether trial counsel's performance prejudiced the defense is a question of law we review de novo. *Id.* Because the trial court did not rule on the deficiency component, our review is limited to whether the court erroneously decided that Hayes was unable to demonstrate prejudice as a result of defense counsel's failing to call the three witnesses to corroborate Hayes's defense.

¶22 To prove prejudice, the defendant 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. "A reasonable probability

is a probability sufficient to undermine confidence in the outcome.” *State v. Harvey*, 139 Wis. 2d 353, 375, 407 N.W.2d 235 (1987) (citation omitted). “[N]ot every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.” *Strickland*, 466 U.S. at 693. “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* Nonetheless, a defendant is not required to show that “counsel’s deficient conduct more likely than not altered the outcome in the case.” *Id.*

¶23 The focus is on the reliability of the proceedings. *State v. Moffett*, 147 Wis. 2d 343, 354, 433 N.W.2d 572 (1989). “The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Strickland*, 466 U.S. at 694. Accordingly, the test is whether defense counsel’s errors undermine confidence in the reliability of the results. *Moffett*, 147 Wis. 2d at 354. “The question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel’s errors would have had a reasonable doubt respecting guilt.” *Id.* at 357.

¶24 Reviewing the totality of the evidence in this case, we cannot conclude, as Hayes contends, that there is a reasonable probability that but for counsel’s alleged unprofessional errors, the result of the proceeding would have been different. The omitted evidence is not the kind of evidence that, viewed in the totality of evidence, undermines confidence in the result. The evidence went to the issue of the reasonableness of Hayes’s beliefs as to the actual unlawful threat to his life and safety, to bolster his claim that he actually believed Zieve’s conduct was life threatening. The evidence fails to address, however, the imminence of the alleged unlawful interference.

¶25 The court instructed the jury that a defendant “may intentionally use force which is intended or likely to cause death or great bodily harm only if he believes such force was necessary to prevent *imminent* death or great bodily harm to himself.” Note 3, *supra* (emphasis added).

¶26 While the evidence spoke to Hayes’s fear, it failed to address the imminence of Zieve’s threat. “Imminent” means “near at hand,” “ready to take place” or “impending.” See WEBSTER’S THIRD NEW INT’L DICTIONARY, 1130 (unabr. 1998). Accepting Hayes’s version of the events in question, he was in imminent danger at various times during the evening due to Zieve’s blows, but decided against seeking help and continued to accompany him on drinking rounds.

¶27 When they entered Hayes’s home, however, there is no evidence of imminent threat. According to Hayes’s own testimony, Zieve had gotten a beer and was seating himself in the living room when Hayes chose to point the shotgun at Zieve. Zieve was unarmed at the time of the shooting, and other than to knock Hayes with his belly, there was no evidence of threats or physical altercation inside Hayes’s house. Once he armed himself, however, Hayes gave Zieve no directive to leave the house. The record indicates that Zieve was seated twenty feet away from Hayes when he was shot.

¶28 Under these facts, the imminence of Zieve’s threat had passed before Hayes grabbed his gun and leveled it in Zieve’s direction. If the jury had been given the omitted evidence, there is no reasonable likelihood that the jury would have had a reasonable doubt about Hayes’s responsibility for the shooting. Hayes has not made “a showing that the conviction was rendered unreliable by a breakdown in the adversary process caused by the deficiencies in defense counsel’s assistance.” *Moffett*, 147 Wis. 2d at 357-58. Because defense counsel’s

alleged errors do not undermine our confidence in the reliability of the results, Hayes's ineffective assistance of counsel claim fails.

By the Court.—Judgment and order affirmed.

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

