COURT OF APPEALS
DECISION
DATED AND RELEASED

September 12, 1996

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

NOTICE

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Nos. 94-3260-CR
94-3261-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRON NAPPER,

Defendant-Appellant,

WILLIAM NAPPER,

Defendant.

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM NAPPER,

Defendant-Appellant.

APPEAL from judgments and orders of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Affirmed*.

Before Fine and Schudson, JJ., and Michael T. Sullivan, Reserve Judge.

SULLIVAN, J. William Napper and his cousin, Terron Napper, appeal from their judgments of convictions, after a jury trial, for first-degree intentional homicide while armed, attempted first-degree intentional homicide while armed, and armed burglary—all as a party to a crime. In their appeals, which this court consolidated, the Nappers raise several issues involving alleged trial court error in: (1) admitting evidence of the Nappers' prior drug dealing and of a burglary in their home on the day of the offenses and providing an allegedly erroneous jury instruction on the use the drug dealing evidence to show motive or intent; (2) denying their motion for a new trial based on their claims of ineffective assistance of trial counsel; (3) failing to order a new trial when it was discovered post-verdict that a juror recognized a defense character witness; and (4) failing to order an *in camera* review of the post-trial psychiatric records of a victim and the State's only eyewitness.[1] This author rejects the Nappers' arguments and would affirm the judgments and orders. The joint concurring opinion in this case also affirms the judgments of convictions and orders denying postconviction relief. *See* concurrence, slip op. at 1.[2]

I. BACKGROUND.

[1] On February 14, 1995, this court granted the Nappers' motion to consolidate their appeals "for all purposes." On March 29, 1995, this court granted their motion to file separate appellate briefs, but to consider the arguments made in each brief in conjunction with each other. Although some of the arguments made in one brief may appear inconsistent with those raised in the other brief, pursuant to our earlier order, we consider these issues in tandem.

[2] To avoid any confusion on the part of the parties, the analyses invoked by the concurring opinion should be considered the majority when they conflict with that of the lead author.

The Nappers were convicted of crimes related to the shootings of Kenneth Dunlap and Hattie Smith in the pre-dawn hours of September 5, 1992. Dunlap and Smith were sleeping in their bedroom when two gunmen entered their apartment and shot them both at close range. Dunlap died, but Smith survived, suffering severe gunshot wounds to her face, arm, and hand. Smith pretended to be dead until her assailants left, and then walked downstairs to her neighbor's apartment, who in turn called 911. A firefighter arrived, began treating her, and asked Smith who shot her. Unable to speak because she was shot through her mouth, Smith responded by spelling out "Mack" on the floor. She later testified that "Mack" was the nickname of William Napper, who, along with his cousin Terron, had periodically sold drugs to Dunlap. The police arrested the Nappers and the State charged them with the shootings. They were tried together.

At trial, Smith's eyewitness testimony was central to the prosecution's case. She testified that the sound of gunshots woke her and that she saw her assailants. She testified that she recognized them as William and Terron Napper. Further, she stated that at the time of the shootings, she had known the Nappers for about nine months. In addition, evidence was introduced that Smith identified the Nappers as the assailants in a photo lineup the day after the shooting. She then identified the Nappers at trial. She also claimed to have recognized their voices and to have heard one refer to the other as "Six," Terron's nickname. Finally, although hospital records indicated that Smith had suffered some hearing loss, neither of the Nappers' trial counsel called into question her testimony about what she heard.

The trial court also allowed the prosecution to present evidence of a burglary at the Nappers' apartment several hours before the shooting, ruling that it was relevant to show motive and intent. The trial court also admitted evidence of William's drug dealing—both to show a basis for the Nappers' relationship with the victims and to show motive and intent. A jury found the Nappers guilty on all counts.

During the postconviction proceedings, one of the jurors testified that she had not been familiar with defense witness Cottrell Allen's name during the voir dire but had vaguely recognized him when he testified. The trial court rejected the Nappers' claim that they were entitled to a new trial

based on juror misconduct. The trial court also rejected the Nappers motion for an *in camera* review of Smith's post-trial psychiatric records from treatment she received "a couple months" after the trial. The Nappers alleged that Smith had been having flashbacks of the shooting incident for which she was receiving psychiatric treatment. Accordingly, they sought review of any of her post-trial records dealing with these flashbacks of the shootings. Finally, they argued they were entitled to a new trial based on their trial counsels' alleged ineffective assistance of counsel in failing to raise the issue of Smith's hearing loss. The trial court concluded that their respective counsels were not deficient, nor were the Nappers prejudiced. Both Nappers appeal from both the judgments and the orders denying their motions for postconviction relief.

II. ANALYSIS.

A. Evidentiary rulings and instruction.

The Nappers argue that the trial court improperly admitted evidence that the residence he and William shared may have been burglarized several hours prior to the shooting of Dunlap and Smith. Terron claims that the evidence was irrelevant and inadmissible because whether a burglary occurred was not proven and a connection between the alleged burglary and the shootings was "pure speculation" resulting in unfair prejudice.

RULE 904.01, STATS., defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* ***State v. Migliorino,*** 170 Wis.2d 576, 593, 489 N.W.2d 678, 685 (Ct. App. 1992). All relevant evidence is generally admissible. RULE 904.02, STATS. "A trial court possesses great discretion in determining whether to admit or exclude evidence. We will reverse such a determination only if the trial court erroneously exercises its discretion." ***State v. Morgan,*** 195 Wis.2d 388, 416, 536 N.W.2d 425, 435 (Ct. App. 1995) (citation omitted). Thus, if the trial court applies the relevant law to the applicable facts and reaches a reasoned conclusion, the trial court has properly exercised its discretion. ***Id***.

The trial court admitted the burglary evidence as relevant to motive and possibly intent. It also determined that the evidence was relevant for describing the attitude and mood of the defendants. Indeed, the trial court concluded that this evidence supported the prosecution's general theory that the Nappers shot Dunlap and Smith thinking they had committed the burglary. Since it is clear that the trial court articulated its reasons for admitting the evidence, the question then before us is whether there was a reasonable basis for this decision. It is not a question of "whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Wollman,*** 86 Wis.2d 459, 464, 273 N.W.2d 225, 228 (1979).

The State summarized the evidence to support its retaliation theory as follows:

> The record shows that the burglary took place about 1:00 a.m. on the morning that Dunlap and Smith were shot and that the downstairs neighbor, Sandra Scott, told William and Terron about the burglary when they returned home about 2:00 a.m. Scott testified that they were very upset. Scott further testified that she heard them go down into the basement and they talked down there after she went back to bed about 2:30 or 2:45 a.m. Officer Charles Grimm testified that he and his partner responded to a call from Scott about a possible burglary that evening and inspected the residence of William and Terron and determined it had been ransacked, but that many valuable items had not been taken. Hattie Smith testified that she and Kenneth Dunlap knew William and Terron and that Kenneth would purchase cocaine from them. She further testified that William and Terron shot Dunlap and her about daybreak on that same morning.

Indeed, the record shows that the evidence of the burglary was intended primarily to show motive. Given the circumstances and timing of the burglary and the relationship of the parties, the trial court could properly conclude that evidence of the burglary was relevant to show that the shootings were in retaliation for the burglary. Although motive is not an element of any crime, it is an evidentiary circumstance entitled to as much weight as the fact finder deems appropriate. ***State v. Berby,*** 81 Wis.2d 677, 686, 260 N.W.2d 798, 803 (1978). Thus, the burglary evidence was relevant because it has a tendency to make the existence of a fact that is of consequence, namely motive, more probable than it would be without the evidence. *See* ***Migliorino***, 170 Wis.2d at 593, 489 N.W.2d at 685. The trial court properly exercised its discretion in admitting evidence of the burglary.

The Nappers also argue that the trial court should not have admitted evidence of their drug dealing. Both argue that even if it was proper to admit the evidence as relevant to the relationship between the parties, the trial court erred in instructing the jury that they could consider the evidence as relevant to motive and intent.

Evidence of other acts such as the drug dealing in this case is not admissible to prove character flaws in the defendant but can be used for other purposes such as proving motive, intent, or identity. *See* RULE 904.04(2), STATS. In determining whether to admit evidence of other acts, the trial court must not only find the evidence relevant but must also examine whether it should be excluded because the danger of unfair prejudice substantially outweighs its probative value. ***State v. Clark,*** 179 Wis.2d 484, 491, 507 N.W.2d 172, 174 (Ct. App. 1993). As discussed above, the prosecution's theory was that the shootings were in retaliation for a drug-related burglary. We have already ruled that from the evidence, a jury could reasonably make such an inference. The evidence of drug dealing was relevant and indeed central to this theory.

The question then before us is whether the evidence was so prejudicial that it should not have been admitted. When dealing with evidence of other acts, "prejudice refers to the potential harm in a jury concluding that, because an actor committed one bad act, he necessarily committed the crime charged." ***State v. Roberson,*** 157 Wis.2d 447, 456, 459 N.W.2d 611, 614 (Ct.

App. 1990). We conclude that any prejudicial effects that could exist were adequately addressed by the trial court's limiting instructions:

> Evidence has been received regarding other conduct of the defendants for which the defendants are not on trial. ... You may not consider this evidence to conclude tha [sic] the defendant [sic] have a certain character or a certain character trait and that the defendants acted in conformity with this trait or character. ... You may consider this evidence only for the purposes I have described, giving it the weight you determine it deserves. It is not to be used to conclude that a defendant is a bad person or for that reason is guilty of the offense charged.

Thus, we conclude that the admission of the evidence of drug dealing was well within the bounds of the court's discretion, and further, that the charge reasonably and adequately explained the law to the jury. *See* ***State v. Amos,*** 153 Wis.2d 257, 278, 450 N.W.2d 503, 511 (Ct. App. 1989) (trial court's presentation of jury instruction will not be reversed absent an erroneous exercise of discretion such as inadequately stating the applicable law).

Terron makes a separate argument that the trial court erroneously exercised its discretion by failing to give a limiting instruction cautioning the jury not to use the evidence of William's drug dealing against Terron. Terron, however, failed to request the instruction and did not object that the proposed instructions were incomplete. He has thus waived any claim of error on appeal. *See* § 805.13(3), STATS.; ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988).

B. Juror misconduct.

The Nappers next argue that a juror committed misconduct by failing to inform the parties during voir dire that she knew a witness. The trial court found that the juror did not recognize the name of the witness during voir

dire, and that there was no proof that she failed to disclose her knowledge of a witness. The trial court also found that the juror was not biased against the Nappers and that her knowledge of the witness was "extremely slight, played no role in her decision as a juror ... and would not affect or change the outcome ... in any way whatsoever." We agree.

We utilize a two-part test when analyzing questions of alleged juror misconduct. The movant must show:

> "(1) that the juror incorrectly or incompletely responded to a material question on voir dire; and if so, (2) that it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party."

State v. Messelt, 185 Wis.2d 254, 268, 518 N.W.2d 232, 238 (1994) (citation omitted).

The trial court's finding that the juror was not biased against the Nappers was not clearly erroneous. She testified that she did not recognize the witness's name during voir dire. She testified that her knowledge of the witness was slight, that she did not know him personally, and that she had no opinion of him. The witness testified on the Nappers' behalf, and the trial court concluded that his testimony was insignificant. Given these findings, we cannot conclude that the trial court erred by denying the Nappers' motion for a new trial based on alleged juror misconduct.

C. Ineffective assistance of counsel.

The Nappers next argue that they received ineffective assistance of trial counsel when their attorneys failed to raise the issue of Smith's hearing loss to impeach her testimony about what she heard after the shooting. The trial court rejected this argument, as do we.

A defendant's right to counsel includes the right to effective assistance of counsel. *See generally* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). There are two necessary elements for an ineffective assistance of counsel claim, "deficient performance by counsel and prejudice to the defendant." ***State v. Hubert***, 181 Wis.2d 333, 339, 510 N.W.2d 799, 801 (Ct. App. 1993). The burden of establishing these two elements is on the defendant. ***State v. Sanchez***, 201 Wis.2d 219, 232, 548 N.W.2d 69, 74 (1996). When reviewing an ineffective assistance of counsel claim, this court pays deference to the trial court's findings of fact. ***State v. Schambow***, 176 Wis.2d 286, 301, 500 N.W.2d 362, 368 (Ct. App. 1993). With respect to the performance elements, we operate with a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." ***Strickland***, 466 U.S. at 689. The final determination of whether counsel's perform-ance was deficient and whether there was prejudice are questions of law that we will review independently. ***Schambow***, 176 Wis.2d at 301, 500 N.W.2d at 368. If we conclude that the defendant was not prejudiced, we need not address whether the performance of trial counsel was deficient. ***State v. Kuhn***, 178 Wis.2d 428, 438, 504 N.W.2d 405, 410 (Ct. App. 1993).

Terron's counsel testified at the postconviction hearing that she reviewed all 117 pages of Smith's medical records, but did not notice the check mark on "hearing loss." Further, she stated that if she had seen the mark, she would have attempted to attack Smith's credibility using this information. She did testify, however, that she had not noticed Smith's hearing problem during her testimony at the preliminary hearing, the hearings on the motions *in limine*, or at trial.

William's counsel testified at the postconviction hearing that he did see the reference to Smith's hearing loss before trial, but that he did not believe Smith had a hearing problem. He testified that the evidence at trial showed that she could hear at the time of the shooting. Further, her testimony at trial revealed no otic problems; thus, counsel testified that he thought it would be foolish to contend Smith could not hear.

The trial court concluded that neither counsel was deficient in failing to raise the issue of Smith's hearing loss because it was a good strategic decision not to raise this issue given Smith's performance at trial. This author

agrees that neither counsel was deficient. The evidence at trial, including a treating firefighter's testimony that Smith was responsive to his questions when he found her after the shooting and Smith's performance at trial that showed no otic problems, support the trial court's conclusion that neither counsel was deficient. For the same reasons, we conclude that the failure to bring this information to the jury's attention did not render the verdict unreliable. Thus, this author concludes that neither of the Nappers has shown the necessary deficient performance or prejudice; hence, their ineffective assistance of counsel claims fail.

D. In Camera *review of psychiatric records.*

Finally, the Nappers argue that they are constitutionally entitled to have the trial court review Smith's post-trial psychiatric records otherwise privileged under RULE 905.04(2), STATS.[3] Although Smith's treatment took place months after the trial,[4] they claim that the records may contain material evidence that will require a new trial. Thus, this issue implicates concerns over

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[3] RULE 905.04(2), STATS., provides:

> **(2)** GENERAL RULE OF PRIVILEGE. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

[4] There is no evidence that Smith received any mental health treatment relating to the incident either before or during the trial. According to Smith's testimony at the postconviction hearing, she began treatment "a couple months" after the trial.

the Nappers' access to privileged information as well as concerns over whether the records are newly discovered evidence which may warrant a new trial. *See* ***State v. Behnke,*** No. 95-1970, slip op. at 9 (Wis. Ct. App. June 12, 1996) (ordered published July 29, 1996).

When dealing with privileged information such as a victim's mental health records at the pre-trial and trial stages, a trial court may conduct an *in camera* review of the records and release to the defense any exculpatory information. *See* ***Pennsylvania v. Ritchie,*** 480 U.S. 39, 58 (1987); ***State v. Shiffra,*** 175 Wis.2d 600, 605, 499 N.W.2d 719, 721 (Ct. App. 1993). This approach strikes a balance between the defendant's right to present a complete defense and the state's interest in protecting the confidentiality rights of its citizens. ***Shiffra,*** 175 Wis.2d at 605, 499 N.W.2d at 721. "To be entitled to an *in camera* inspection, the defendant must make a preliminary showing that the sought-after evidence is material to his or her defense." ***Id***. Whether a defendant has made the requisite preliminary showing for an *in camera* review is a question of law that we review *de novo*. ***State v. Munoz,*** 200 Wis.2d 391, 395, 546 N.W.2d 570, 572 (Ct. App. 1996).

The issue in this case, however, involves the right of a defendant to an *in camera* review of records created months after the trial. A different panel of this court recently stated that to trigger an *in camera* review in such a case:

> The requirements are that the evidence must have come to the moving party's knowledge after trial, the party must not have been negligent in seeking to discover it, the evidence must be material, it must not be cumulative and it must be reasonably probable that a different result would be reached on a new trial.

Behnke, No. 95-1970, slip op. at 9. Further, the defendant must still meet "the threshold ***Shiffra*** test that the sought-after evidence is relevant and may be necessary to a fair determination of guilt or innocence." ***Id***.

This author concludes that the Nappers fail to meet even the threshold ***Shiffra*** test, much less whether this information would lead to a different result at trial. The Nappers allege that Smith's records may impinge on Smith's credibility, but they do not articulate exactly how. The mere fact that her treatment related to the shooting, about which she testified and for which the defendants were convicted, does not in itself entitle the defendants to an *in camera* review of her post-trial mental health records.

Quoting ***Shiffra***, the defendants claim Smith's trauma "might affect both her ability to accurately perceive events and her ability to relate the truth," thus entitling them to an *in camera* review. *See* ***Shiffra,*** 175 Wis.2d at 612, 499 N.W.2d at 724. The Nappers, however, fail to sufficiently articulate how the records will call her identification testimony into question. There is no indication that Smith developed mental health problems that affected her ability to relate the truth about who shot her. From the day of the shooting, Smith identified William and Terron Napper as her assailants. She testified the same at trial. Her flashbacks began after the trial was over. That something in the records of her treatment for those flashbacks could possibly make her testimony less credible is speculating on "mere possibilities" and does not satisfy the ***Shiffra*** test. *See* ***Munoz***, 200 Wis.2d at 397, 546 N.W.2d at 573. The trial court correctly denied the request for an *in camera* review of Smith's post-trial psychiatric records. ***Behnke,*** No. 95-1970, slip op. at 9-10.

III. SUMMARY.

In short, we reject all of the Nappers' arguments. The judgments of convictions and the orders denying their motions for postconviction relief are affirmed.

By the Court.—Judgments and orders affirmed.

Not recommended for publication in the official reports.

Nos. 94-3260-CR (C)
94-3261-CR (C)

SCHUDSON, J. (*concurring*). Although I agree with the lead opinion's conclusions, I write separately to note some of my differences with the lead opinion's analysis.

I conclude that counsels' failure to introduce evidence of Smith's hearing loss was deficient performance. I also conclude, however, that in light of the substantial evidence of Smith's ability to hear and in light of Smith's testimony specifying the voices and words she heard, counsels' deficient performance was not prejudicial; that is, it did not render "the result of the trial unreliable or the proceeding fundamentally unfair." ***Lockhart v. Fretwell***, 506 U.S. 364, 372 (1993).

I also offer a somewhat different analysis regarding Smith's treatment records. The Nappers argue that "[g]iven the evidence of [Smith's] hallucinations about this incident soon after the trial," an *in camera* inspection was required to determine whether the records "contain relevant, exculpatory information." If, in fact, the Nappers had offered the trial court any evidence that Smith suffered "hallucinations about this incident soon after the trial," I would agree that an *in camera* inspection would be required. That Smith's symptoms and treatment came after the trial, factors of apparent importance to the lead opinion, would be far less significant than the possibility that Smith testified inaccurately as a result of hallucinations she may have been suffering at the time she testified. The record, however, belies the Nappers' claim.

The evidence at the hearing on the Nappers' postconviction motion provides no support for the Nappers' assertion that Smith "was suffering from what were in effect hallucinations about this incident." Smith testified that she sought treatment because she "started having flashbacks about what happened, looking in the mirror, seeing my face like this, thinking about looking over, seeing Dunlap like he was." She also testified that she received post-trial treatment not for hallucination, but rather, for "[h]aving flashbacks from what happened to me, what they did to me, what I went through." Nothing in Smith's testimony or other evidence in the hearing even hints of any inaccuracy in Smith's memory or testimony. Therefore, I agree that the trial court did not err in denying an *in camera* inspection of Smith's treatment records.

I am authorized to state that Judge Ralph Adam Fine joins in this concurring opinion.