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**DISTRICT III**

August 20, 2019

To:

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Circuit Court Judge  
Trempealeau County Courthouse  
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Whitehall, WI 54773

Hon. Rian Radtke  
Circuit Court Judge  
Trempealeau County Courthouse  
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You are hereby notified that the Court has entered the following opinion and order:

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2018AP815-CR

State of Wisconsin v. Jose Antonio Santiago (L. C. No. 2015CF2)

Before Stark, P.J., Hruz and Seidl, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Jose Santiago appeals a judgment, entered upon a jury's verdict, convicting him of aggravated battery, causing great bodily harm while intending to cause bodily harm, contrary to

WIS. STAT. § 940.19(4) (2017-18).<sup>1</sup> Santiago also appeals the order denying his motion for postconviction relief. Santiago argues he is entitled to a new trial because he received ineffective assistance from his trial counsel. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Santiago's arguments and summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21.

The charge in this case arose from allegations that Santiago assaulted David<sup>2</sup> outside a bar in the Village of Eleva. David suffered a traumatic brain injury and facial fractures. At trial, Dylan Kruger testified that he arrived at the bar around 1:00 a.m. on October 31, 2014, spoke to David outside the bar, and went inside to buy him a drink. When Kruger returned outside approximately two minutes later, he found David lying unresponsive on the sidewalk with Santiago standing by David's head. Santiago told Kruger that David was having a seizure, and Santiago ultimately "took off" when he learned the police had been called.

Lawrence Leonard, the bar owner, testified that Santiago first told him David "fell over and hit his head and had a seizure," and subsequently told him two bikers pulled up to the bar and the bikers, along with David and Santiago, had been snorting cocaine. Santiago told Leonard not to call the police because of the cocaine. When Leonard stated that the police had already been contacted, Santiago said the bikers had beaten David before fleeing on their motorcycles. Leonard added that he did not hear any motorcycles pull up to the bar that night. Leonard further testified that although Santiago used a cane in the past because he "usually has a

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

<sup>2</sup> Pursuant to WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

little problem walking,” Leonard did not see Santiago with a cane that night. Leonard also recalled seeing Santiago play pool in the bar earlier that evening. Santiago was arrested that night at the home of his long-time girlfriend, Christine Jenkins.

According to law enforcement, Jenkins reported that when Santiago arrived at her apartment, he told Jenkins that he “just beat the fuck out of [David], the cops will be coming soon.” During her trial testimony, however, Jenkins stated she could not recall making that statement to police. Rather, she testified that Santiago told her he found David “laying outside bloody with blood coming out of [his] nose, mouth and ears.”

Trempealeau County sheriff’s deputy Ross Huson testified that when he questioned Santiago at Jenkins’ apartment, Santiago told him he was outside the bar urinating when he heard a loud smack. Santiago told Huson that when he turned, he saw two bikers beating David before riding off. On cross-examination, Huson admitted he took no photographs and collected no evidence at the crime scene. He also admitted that when he went to Jenkins’ apartment, no other officers remained at the scene. Another sheriff’s deputy, Andre Bilski, testified that he accompanied Huson to Jenkins’ apartment where they interviewed both Jenkins and Santiago. Bilski further testified that after returning to the bar from Jenkins’ apartment, he found a large puddle of blood, blood spots and a blood smear, but he did not take any photographs of this possible evidence. Bilski also conceded that the scene was unattended “for quite some time.”

Sheriff’s detective Ronie Molitor testified on cross-examination that he did not attempt to collect DNA from David’s fingernails to perform DNA testing, nor did he test any of David’s bloody clothing, explaining that the clothes had been left unsecured at the hospital and he could

not confirm the clothes belonged to the then-unconscious David. Although David testified at trial, he could not remember what happened that night.

During her closing argument, Santiago's trial counsel emphasized that law enforcement left the crime scene unsecured for an unknown period of time, underscoring the possible effect that might have had on the security of the evidence found there. Defense counsel also noted that David had severe bruising on his hand, suggesting the possibility that he may have injured his assailant before that assailant ran from the scene. Counsel therefore argued that the only way to eliminate the possibility that another person assaulted David was to collect and test the blood evidence to confirm what happened, adding "that's what is required of the State and law enforcement." Defense counsel also emphasized that despite the amount of blood at the scene, Santiago's "hands were clean."

The jury ultimately convicted Santiago of the crime charged, and the circuit court sentenced him to two years' initial confinement followed by three years' extended supervision. Santiago filed a postconviction motion for a new trial, claiming he was denied the effective assistance of trial counsel. Santiago's postconviction motion was denied after a *Machner*<sup>3</sup> hearing, and this appeal follows.

This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The circuit court's findings of fact will not be disturbed unless they are clearly erroneous. *Id.* However, the

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<sup>3</sup> See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

ultimate determination of whether the attorney's performance falls below the constitutional minimum is a question of law this court reviews independently. *Id.*

To succeed on an ineffective assistance of counsel claim, Santiago must show both: (1) that his counsel's representation was deficient; and (2) that this deficiency prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight ... and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. *Strickland*, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential ... the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689. A defendant proves prejudice by demonstrating there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. We may address the tests in the order we choose. If Santiago fails to establish one prong of the *Strickland* test, we need not address the other. *See State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

Santiago argues his trial counsel was ineffective by failing to introduce evidence of Santiago's physical limitations and by not doing more to challenge law enforcement's failures either to secure the crime scene or to test blood and other evidence found there. At the *Machner* hearing, Santiago testified that his trial counsel knew he had two hip surgeries and was seeing a chiropractor. Santiago claimed the surgeries would have impacted his ability to fight, he used a cane the night of the incident, and he started collecting Social Security Disability Insurance two weeks before the incident. Santiago conceded, however, that he had ridden his bicycle to the court proceedings and that he did not always need a cane to walk. With respect to law enforcement's investigation, Santiago testified that he and his counsel discussed the strategy of attacking the forensic investigation, and he complained about law enforcement's failure to test the evidence, particularly the clothes, which he hoped would contain a third person's DNA.

We conclude counsel's representation was not deficient with respect to either claim. First, nothing in the record establishes that counsel had any reason to believe that Santiago had health problems that would have prevented him from assaulting David. At the *Machner* hearing, trial counsel testified that Santiago himself never raised his medical problems with her. Although counsel noted that she was otherwise aware Santiago had some medical issues, she did not believe those issues rendered him physically incapable, as Santiago had ridden his bicycle to court during her representation of him. Ultimately, counsel cannot be deficient for failing to discover information that Santiago failed to share with her. See *State v. Nielsen*, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 634 N.W.2d 325.

Counsel further testified that she knew Santiago had been a fighter,<sup>4</sup> and she did not want evidence of his medical history and problems to open the door to his fighting history for fear it would make him look worse under the circumstances. In denying Santiago's postconviction motion, the circuit court determined that counsel's decision not to present Santiago's medical records and medical history was a reasonable trial strategy, and we agree with that conclusion. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Additionally, as the court recognized, evidence that Santiago could ride a bicycle and walk without a cane could have rebutted any argument that he was physically incapable of assaulting David. Although counsel did not cite this counter-evidence as part of her rationale for not presenting medical evidence, this court can consider justifications for a trial strategy that counsel did not articulate. See *State v. Williams*, 2006 WI App 212, ¶18, 296 Wis. 2d 834, 723 N.W.2d 719. Moreover, the fact that a strategy fails does not make the attorney's representation deficient. See *State v. Koller*, 87 Wis. 2d 253, 264, 274 N.W.2d 651 (1979).

With respect to the forensic investigation, Santiago's trial counsel testified that the fact "the crime scene had been left open for several hours" was the biggest issue. She explained that it was an issue "we hit hard on at trial," emphasizing the scene's potential contamination and that none of the physical evidence found there connected Santiago to the crime. Counsel also noted that she discussed law enforcement's failure to collect or test blood samples, opining that "the jury more than got the picture that there were flaws in the investigation." In rejecting Santiago's

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<sup>4</sup> At the *Machner* hearing, fifty-four-year-old Santiago testified that he had been a fighter twenty years earlier. When asked to clarify his history as a fighter, Santiago described himself as a boxer and explained that he did not "compete" but, rather, engaged in "street fighting type stuff."

argument, the circuit court noted that the inadequacy of the forensic investigation was the brunt of Santiago's defense, and trial counsel argued that inadequacy to the jury.

Santiago nevertheless asserts that his trial counsel failed to adequately explain to the jury why it was important that the scene was left unsecured and the evidence not tested. Specifically, Santiago asserts counsel should have argued the blood at the scene could have been tampered with, and it could have come from a third party, thus exculpating him. As noted above, however, counsel did argue that without proper testing, the State could not rule out the possibility that David was assaulted by a third party. Trial counsel cannot be deficient for failing to make an argument that she actually made. Because Santiago cannot meet his burden of showing that counsel was deficient in the manners alleged, the circuit court properly denied his postconviction motion for a new trial.

Upon the foregoing,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*