

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 11, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2008AP1853-CR

Cir. Ct. No. 2006CF4990

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MATTHEW RICHARD,

DEFENDANT-APPELLANT.

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

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

¶1 CURLEY, P.J. Matthew Richard appeals from the judgment, entered following a jury verdict, convicting him of (1) first-degree intentional homicide while armed, (2) attempted first-degree intentional homicide while armed, and (3) possession of a firearm by a felon, contrary to WIS. STAT.

§§ 940.01(1)(a), 939.63, 939.32, and 941.29(2)(a) (2005-06).¹ He also appeals from the order denying his postconviction motion seeking, among other things, a *Machner* hearing.² Richard argues that his trial counsel was ineffective for failing to investigate and present exculpatory evidence, which would impeach the credibility of the State's witnesses.³ Specifically, he points to what he describes as counsel's failure to interview Johanna Velazquez, James Howard, and Jimmy Cruz before the trial, failure to enter phone records into evidence at trial, failure to thoroughly investigate the actions of a police officer, failure to impeach Howard's testimony or cross-examine Howard on his motives to lie at trial, and failure to object to Detective Chavez's testimony. Because Richard's trial counsel was not ineffective, we affirm.

I. BACKGROUND.

¶2 The underlying facts are that around 10:00 p.m. on September 13, 2006, Velazquez's boyfriend, Gualberto Gonzalez, returned a call to Richard. After Gonzalez called Richard, Richard and two other men arrived at the residence where Velazquez and Gonzalez were staying to purchase Gonzalez's vehicle. According to Velazquez, Richard wanted Gonzalez to follow him so that Richard could get money and drugs to be used as payment for the vehicle. Gonzalez asked Velazquez to accompany him as he followed Richard in a separate vehicle, and

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

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

³ The record reveals that Richard was represented by two attorneys during trial; however, we refer to them collectively as "trial counsel" in the singular form for continuity and ease of reference.

she agreed. They eventually ended up in an alleyway where Richard got out of his vehicle and came to the driver's side of the vehicle Gonzalez and Velazquez were driving. After a conversation, Velazquez noticed Richard lean down slightly and stand up with a gun in his hand. Richard fired four shots. One shattered the window next to Velazquez, one hit her arm, one hit her head, and one hit Gonzalez.

¶3 Velazquez waited to hear Richard leave before she drove to the hospital. As she was driving toward the hospital, she noticed a police van with its lights off and stopped to ask for help. According to Velazquez, the officer in the police van refused to help and told her to continue to the hospital. As relayed by the State, the officer was later identified and dismissed by the police department.

¶4 Before she knew Gonzalez was dead, Velazquez told the police that the initial purpose of the meeting with Richard was to sell a car stereo, but later admitted that it was both for the sale of a vehicle and for a drug purchase. She testified that she did not mention the drugs at first because she did not want to get Gonzalez in trouble.

¶5 James Howard, an acquaintance of Richard, was a new witness for the State in the second trial.⁴ At the time he testified, Howard was being held in custody on three felony charges. He testified that Richard called him looking for a handgun before meeting with Gonzalez. Howard said Richard told him he wanted a gun "to take out someone who he believed was setting him up with the police." Howard also suggested Richard may have received his handgun from Jimmy Cruz.

⁴ Richard's first trial resulted in a mistrial.

Cruz exercised his Fifth Amendment right not to incriminate himself and did not testify during Richard's trial. Two of the charges against Howard were ultimately disposed of without prosecution.

¶6 Detective Chavez, the lead detective in this case, interviewed Velazquez and Howard before the trial. Velazquez gave Chavez two possible locations for where the vehicle that Gonzalez intended to sell to Richard might be located. Chavez testified to finding the vehicle in one of the specified locations. Chavez also testified that he told Howard he would seek some form of consideration for the charges pending against Howard in exchange for Howard's cooperation with the State's case against Richard.

¶7 The jury found Richard guilty of intentional and attempted first-degree homicide while armed, and possession of a firearm by a felon. Afterward, Richard brought a postconviction motion seeking a *Machner* hearing based on ineffective assistance of trial counsel. The trial court denied Richard's petition for a *Machner* hearing.

II. ANALYSIS.

¶8 In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the United States Supreme Court set forth a two-part test for determining whether counsel's actions constitute ineffective assistance. First, the defendant must demonstrate that counsel's performance was deficient. *Id.*; *State v. McDowell*, 2004 WI 70, ¶49, 272 Wis. 2d 488, 681 N.W.2d 500. Second, the defendant must demonstrate that counsel's deficient performance was prejudicial to his or her defense. *Strickland*, 466 U.S. at 687; *McDowell*, 272 Wis. 2d 488, ¶49. This requires a showing that counsel's errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. We need not

address both of these factors if Richard insufficiently demonstrates one. *See id.* at 697.

¶9 “The issue of whether a person has been deprived of the constitutional right to the effective assistance of counsel presents a mixed question of law and fact.” *State v. Trawitzki*, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801. The trial court’s findings of fact, “that is, the underlying findings of what happened,” will be upheld unless they are clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel’s performance was deficient and prejudicial to his or her client’s defense is a question of law that we review *de novo*. *Trawitzki*, 244 Wis. 2d 523, ¶19.

¶10 “Review of counsel’s performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight.” *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). “[T]he case is reviewed from counsel’s perspective at the time of trial, and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms.” *Id.* Counsel’s performance is deficient only if it was “outside the wide range of professionally competent assistance,” and “the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689-90 (internal quotation marks and citation omitted).

¶11 Richard argues that his trial counsel fell below the standard for reasonably competent counsel because: (1) counsel failed to properly interview

Velazquez, Howard, and Cruz before the trial;⁵ (2) counsel failed to introduce phone records that could have impeached Velazquez's testimony; (3) counsel failed to properly investigate the police officer who, according to Velazquez, failed to assist her after the shooting; (4) counsel failed to impeach Howard regarding the consideration of reduced charges he would receive in exchange for his testimony and the phone calls he claimed were made to him by Richard or cross-examine Howard on his motives to lie at trial; and (5) counsel failed to object when Detective Chavez indirectly vouched for the truth of Velazquez's testimony. We disagree.

¶12 According to Richard, trial counsel's failure to interview Velazquez, Howard, and Cruz before trial "demonstrates an overall attitude of ineffective performance." He claims in-depth interviews could have easily revealed additional inconsistencies that could have been combined and exploited by defense counsel upon cross-examination.

¶13 According to the State, there could have been several reasons why trial counsel did not thoroughly interview Velazquez before the trial. For instance, counsel had access to all of the reports relating to Velazquez's observations and could have relied on those reports during cross-examination. In addition, counsel may have limited his pretrial contact with Velazquez so as not to alert her to questions he intended to ask during cross-examination. Counsel was also aware of most of Velazquez's testimony having heard her testify during the first trial.

⁵ Richard contends that "Cruz was only questioned minutes before trial in the lobby in front of the courtroom."

¶14 Moreover, trial counsel's decision to forgo an interview with Velazquez does not mean that counsel was ineffective. Counsel's cross-examination of Velazquez takes up fourteen pages of the transcript and addresses discrepancies in her previous statements. During the cross-examination, Velazquez admitted that she lied about Gonzalez's drug dealing, acknowledged that she initially failed to mention to the police the fact that Richard was on crutches at the time of the incident, and claimed that she never told Detective Chavez that the vehicle for sale was parked somewhere other than her residence. Richard acknowledges the effectiveness of trial counsel in this regard, stating, "[t]o be sure trial counsel did impeach Ms. Vela[z]quez's testimony by bringing up the inconsistencies in her statements to the police," but Richard nevertheless contends that "numerous areas of cross[-]examination which would have severely damaged the credibility of her testimony were ignored by trial defense counsel."

¶15 In particular, Richard faults his trial counsel for failing to introduce into evidence certain phone records that he claims would have impeached Velazquez's testimony. He asserts that the phone records concerning his calls to Gonzalez would have conflicted with Velazquez's account of the events leading to the incident.

¶16 Even if counsel's failure to admit relevant phone records amounts to deficient performance, Richard has not shown that counsel's performance prejudiced his defense. Velazquez testified that Gonzalez and Richard made calls to each other before the shooting, but never specified when or for how long. Trial counsel was aware of the lack of specificity in the testimony and pointed out that the State did not present evidence confirming the time of the phone calls in his closing arguments. Any contention regarding the impact that the exact timing of the calls would have made at trial is conclusory and trial counsel's failure to

introduce the records was not “outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690.

¶17 Next, Richard claims trial counsel improperly investigated the police officer who allegedly failed to assist Velazquez and contends that instead, counsel simply accepted Velazquez’s testimony as truthful. To support his argument, Richard relies on a self-serving letter written five months after the trial by the police officer to the chief of police denying his involvement in the incident. Richard claims that if an independent investigation proved the officer was not negligent, it would constitute newly discovered evidence that would create a reasonable probability that a different trial result would be reached.

¶18 Richard has not demonstrated that trial counsel’s decision not to further investigate the police officer who refused to render assistance to Velazquez prejudiced his defense. According to the State, the officer was fired after a full internal investigation because he failed to assist Velazquez. Trial counsel’s decision to rely on the police investigation did not prejudice Richard’s defense by failing to impeach Velazquez because the dismissal of the officer from the police force verified Velazquez’s account of the incident. The predicted benefits from the alternative outcome of a separate investigation are not based on any facts and are completely conclusory.

¶19 Richard also claims his trial counsel failed to effectively impeach Howard on the consideration he received in exchange for his testimony. Richard asserts that the fact that two felony charges were dropped against Howard after he testified was not brought to the jury’s attention. In addition, Richard believes his trial counsel was ineffective for failing to illuminate Howard’s motivation to testify, which, according to Richard, was compelled by his anger at Richard for

Richard's refusal to previously help him pay rent. Furthermore, Richard argues that his trial counsel was ineffective for failing to impeach Howard on matters relating to the timing and duration of the phone calls Howard claimed he received from Richard.

¶20 First, after Howard acknowledged during direct examination that he was testifying in the hopes that he would receive consideration from the State on the charges that were pending against him, trial counsel thoroughly cross-examined Howard on this point. The following exchange took place:

[Richard's trial counsel:] You say you don't want to be here?

[Howard:] No, I do not.

[Richard's trial counsel:] Well, you sure do because you're trying to buy your way out of 14 years of prison, right?

[Howard:] No, I'm not.

[Richard's trial counsel:] You're not?

[Howard:] I don't really know what my charge even carries.

[Richard's trial counsel:] Well, you had a first appearance in court, right?

[Howard:] Yes.

[Richard's trial counsel:] And they told you you were charged with delivery of [a] controlled substance, cocaine, one gram or less, second or subsequent offense, right?

[Howard:] Yes.

[Richard's trial counsel:] And that you're facing 14 years in prison or [a] \$25,000 fine or both, right?

[Howard:] I don't remember that.

[Richard's trial counsel:] Oh, you don't recall that. And the bail is 7,500 cash, right?

[Howard:] Yes, it is.

....

[Richard's trial counsel:] [Detective Chavez] said there would be consideration if you cooperated in trying to convict Matthew Richard, right?

[Howard:] Yes.

¶21 Detective Chavez was also questioned about the consideration Howard might receive in exchange for his testimony against Richard. Richard criticizes his trial counsel for not bringing to light the fact that it appears two charges against Howard were dismissed. However, given trial counsel's aggressive examination in all other regards, his conduct cannot be said to have caused prejudice such "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." See *Strickland*, 466 U.S. at 694. Furthermore, regarding counsel's failure to inquire whether Howard was motivated to testify because Richard would not help him with his rent, Richard does not indicate how the omission of this testimony prejudiced his defense.

¶22 Similarly, we are not convinced that trial counsel was ineffective for failing to impeach Howard related to the timing and duration of the telephone calls he claimed to have received from Richard. Richard's phone records reveal that three calls were made to Howard, one of which lasted eighty-one seconds. Even if Howard's testimony describing the timing of when the calls occurred was slightly off, the duration of the eighty-one-second call supported his testimony that Richard called and asked him for a gun. Finally, Richard's claim that trial counsel was ineffective for failing to interview Howard is conclusory and undeveloped. It

is unclear from his brief what Richard thinks an interview with Howard would have revealed.

¶23 Richard further contends that his trial counsel was ineffective for failing to interview Cruz. Cruz never testified at trial because he exercised his Fifth Amendment right not to incriminate himself. Richard has not provided any information as to what his counsel could have discovered by interviewing Cruz. Consequently, we fail to see how trial counsel's failure to interview Cruz before trial constitutes ineffective assistance given that counsel would not have been able to impeach Cruz on the stand.

¶24 Lastly, Richard claims trial counsel erred in not objecting to what he describes as Detective Chavez's indirectly vouching for the truth of Velazquez's testimony. *See State v. Romero*, 147 Wis. 2d 264, 277-278, 432 N.W.2d 899 (1988) (A witness, expert or otherwise, is prohibited from giving an opinion that another competent witness is telling the truth.). Velazquez gave Chavez two different addresses where the vehicle that was for sale might be located. The prosecutor asked Chavez whether he thought Velazquez was lying when she provided the addresses. Chavez stated that when he did not find the car in one location he proceeded to the next address and found the car. Failure to object to this exchange does not constitute deficient performance and certainly is not prejudicial. Chavez did not state whether Velazquez was lying or telling the truth, only that he found the car at one of the specified locations.

¶25 In a related claim, Richard contends that the trial court erred when it denied his postconviction motion without a *Machner* hearing. In light of our ruling that there is no merit to Richard's ineffective-assistance claims, the trial court properly exercised its discretion when it denied his motion without a

hearing. See *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (“[I]f the motion does not raise facts sufficient to entitle the movant to relief, ... the [trial] court has the discretion to grant or deny a hearing.”).

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

