COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1132 **Cir. Ct. No. 1999CF2788**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES EDWARD HENNINGS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge.[1] *Affirmed*.

[1] The Honorable John J. DiMotto presided over the trials and entered the judgment of conviction. The Honorable John A. Franke issued the order denying Charles Edward Hennings's WIS. STAT. § 974.06 motion. This appeal concerns Hennings's appeal from the order entered by Judge Franke.

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 FINE, J. Charles Edward Hennings appeals, *pro se*, from an order denying his WIS. STAT. § 974.06 motion for postconviction relief. Hennings claims that he was denied the effective assistance of postconviction counsel. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996) (allegation of ineffective assistance of postconviction counsel sufficient reason to permit additional issues to be raised in § 974.06 motion). We affirm.

I.

¶2 Hennings was charged with first-degree intentional homicide and armed robbery, with the threat of force, for shooting and killing Patrick Nash. *See* WIS. STAT. §§ 940.01(1)(a), 943.32(2) (1999–2000). Hennings was tried by a jury in November of 1999. The jury was unable to reach a verdict and the trial court declared a mistrial.

¶3 Hennings was given a new trial lawyer. He was tried again in February of 2000. At the second trial, the main eyewitness to the shooting, Douglas Boyd, testified that around 2:15 p.m. on May 11, 1999, he and Nash drove to West Hadley Street to sell marijuana. When they arrived, Nash pulled over, Hennings got into the front passenger seat, and Boyd got into the back passenger seat. Boyd testified that he saw Nash take marijuana out of his jacket and give it to Hennings. According to Boyd, Hennings then pulled out a handgun, told Nash that he was taking the marijuana, and reached over and also took some money from Nash. There was a struggle between Hennings and Nash and the gun went off. Nash was shot twice in the chest and once in the neck.

¶4 The jury found Hennings guilty of felony murder. *See* WIS. STAT. § 940.03 (1999–2000). At sentencing, Hennings asked for an adjournment to investigate whether the jury was prejudiced by what he claimed was extraneous information. As an offer of proof, Hennings's lawyer told the trial court that an alternate juror, Thomas Buchanan, had a conversation in the hallway of the courthouse with Hennings's mother after he had been dismissed as an alternate juror. Buchanan allegedly told Hennings's mother that he learned that there had been a mistrial, and that some witnesses who had testified at the first trial did not testify at the second trial. Hennings's lawyer claimed that this information somehow got to the jury before Buchanan was dismissed, and asked for an adjournment to investigate. The trial court denied Hennings's request, determining that Hennings had not presented evidence that supported his claim.

¶5 Hennings then filed a WIS. STAT. § 809.30 motion for postconviction relief, re-alleging that the jury had been prejudiced by extraneous information. To support his claim, Hennings attached to the motion an unsworn report from a private investigator he had hired, Jim Dunn. Dunn's report indicated that he had interviewed Buchanan on November 13, 2000. During the interview, Buchanan told Dunn that, after the first day of the trial, a man who worked at the courthouse told Buchanan that the first trial had ended in a mistrial:

> I was an alternate juror on the jury for the 2nd trial of Charles Hennings, but I heard about the first trial. The night of the first day of the trial, when the attorney's [*sic*] gave the opening statements, I went to my friend Shirley's house and we went over to her friend Mona's house. This guy that was there, I think his name was Ronnie, or something like that. He said he saw me down in court on jury duty and he said you're on that Hennings case, aren't you. He said, you know they already had one trial on that and I said no, I didn't know that. He said he (Ronnie) was just telling him little thing's [*sic*] about the first trial like they were trying to hang him (Hennings). He said he

> (Ronnie) said it was a mistrial, or something like that. He went on to say that Ronnie works down in the courthouse and he's a para-legal or something.

Buchanan also told Dunn that, during the second day of the trial, he told "this black girl [and] some white girls" on the jury that Hennings already had a trial, and that someone had told him a lot of details about it.

¶6 The trial court denied Hennings's motion, determining that there was no evidence that the extraneous information was: (1) brought to the jury's attention, or (2) potentially prejudicial. *See* ***State v. Broomfield***, 223 Wis. 2d 465, 477, 589 N.W.2d 225, 230 (1999) (a party seeking to impeach a verdict based on extraneous information before the jury must show that the information was extraneous, that it was improperly before the jury, and that it was potentially prejudicial).

¶7 On his direct appeal, Hennings again argued, among other things, that the jury was tainted by extraneous prejudicial information. We affirmed, agreeing with the trial court that Hennings did not establish that the extraneous information was: (1) brought to the jury's attention, or (2) potentially prejudicial. *See* ***State v. Hennings***, No. 2000AP3432-CR, unpublished slip op. (WI App Nov. 13, 2001). We opined:

> [Dunn's] report fails to establish that the extraneous information was improperly brought to the jury's attention. There was no female juror by the name of Jackie or Jacqueline. When Buchanan was later asked by the investigator if there was a juror by the name of Sabrina, Buchanan "said he thinks that she is the one whose name he thought was Jackie or Jacqueline." These vague statements from Buchanan regarding what he thinks he might have told "some white girls" and "this black girl," whose names he cannot remember, do not constitute convincing evidence that extraneous information reached the jury.

Id., No. 2000AP3432-CR, unpublished slip op., ¶14. The Wisconsin Supreme Court denied Hennings's petition for review on January 29, 2002.

¶8 Hennings's *pro se* WIS. STAT. § 974.06 motion, the denial of which Hennings appeals, alleged that his postconviction counsel was ineffective because the lawyer: (1) did not "adequately litigate" the extraneous-prejudicial-information claim, and (2) failed to raise various claims of ineffective assistance of trial counsel. The trial court held a hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), and denied Hennings's motion.

II.

¶9 On appeal, Hennings renews his claims that his postconviction counsel was ineffective because the lawyer: (1) did not "adequately litigate" the extraneous-prejudicial-information claim, and (2) failed to raise various claims of ineffective assistance of trial counsel. We address each claim in turn.

A. *Extraneous Information.*

¶10 Hennings contends that his postconviction lawyer was ineffective "in failing to adequately litigate the claim of extraneous prejudicial information being introduced to the jury by juror Thomas J. Buchanan." Specifically, Hennings argues that his postconviction lawyer was ineffective when he submitted the investigative report instead of an affidavit from Buchanan because the report was hearsay, did not contain any extraneous prejudicial information, and was not "witnessed to and signed under the penalty of perjury." To support this claim, Hennings points to an affidavit from Buchanan, that Hennings attached to his WIS. STAT. § 974.06 motion, in which Buchanan averred, as material, "he informed some members of the jury" that: (1) Hennings had a prior trial; (2) the prior trial

had ended with the jury unable to reach a verdict; and (3) during the first trial Hennings had presented an alibi defense.

¶11 In a written decision and order, the postconviction court denied Hennings's claim because:

> [h]is affidavit from Thomas Buchanan does not alter . . . the appellate court's prior decision[]. [The] court[] determined that the defendant's claim with respect to juror misconduct was not viable even if Hennings had provided the affidavit of Thomas Buchanan himself which would have set forth all of the things he had told Investigator Dunn. Thomas Buchanan's current affidavit does not change the outcome of the prior decisions on this issue. Therefore, the law of the case applies, and Hennings' motion for a new trial is denied on the basis of juror misconduct.

(Underlining in original.) We agree.

¶12 "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991). On direct appeal, we concluded that "if Hennings's request for an adjournment or his postconviction motion were supported by an affidavit from Buchanan verifying the allegations in the investigator's report, Hennings fails to establish . . . that the extraneous information was potentially prejudicial":

> Here, the extraneous information that juror Buchanan heard was not potentially prejudicial to Hennings. If anything, this evidence was potentially prejudicial to the State. The information consisted of three facts: (1) Hennings had a previous trial; (2) the trial resulted in a mistrial because of a hung jury; and (3) two witnesses . . . who testified in the first trial, could not testify in the second trial. These facts would likely sway an average juror, questioning Hennings's guilt, toward a finding of reasonable doubt and acquittal, rather than a conviction; this information would have suggested to any

> jurors "on the fence" that other jurors in the previous trial were also not convinced of Hennings's guilt.
>
> Additionally, Hennings fails to put forth any arguments regarding the prejudicial nature of this extraneous information. He simply concludes that the "extraneous prejudicial information . . . prejudiced the rights of Hennings and of the State to an impartial jury." In his reply brief, Hennings asserts that "evidence pertaining to a prior trial, which resulted in a hung jury, would have or could have a prejudicial effect upon a new jury," but fails to delineate the prejudicial effect. These conclusory statements are inadequate and fail to establish that the extraneous information is potentially prejudicial.

Hennings, No. 2000AP3432-CR, unpublished slip op., ¶¶12, 16–17. Hennings's affidavit from Buchanan does not alter this analysis. Thus, Hennings has not shown one of the two predicates for an ineffective-assistance-of-counsel claim: prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (defendant alleging ineffective assistance must show deficient performance and prejudice). Thus, his claim under ***Rothering*** fails.

B. *Ineffective Assistance of Trial Counsel.*

¶13 Hennings also claims that his postconviction counsel was ineffective for failing to argue that his lawyer from the second trial was ineffective. As noted, to prove ineffective assistance of counsel, a defendant must show: (1) deficient performance, and (2) prejudice. ***Strickland***, 466 U.S. at 687. To prove deficient performance, a defendant must point to specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990).

¶14 To satisfy the prejudice aspect, a defendant must demonstrate that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687. In order to succeed, "[t]he defendant must show 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." ***Id.***, 466 U.S. at 694.

¶15 Our standard for reviewing an ineffective-assistance-of-counsel claim involves mixed questions of law and fact. ***Johnson***, 153 Wis. 2d at 127, 449 N.W.2d at 848. Findings of fact will not be disturbed unless clearly erroneous. ***Ibid.*** Conclusions, however, as to whether the lawyer's performance was deficient and prejudicial, present questions of law. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. Finally, we need not address both ***Strickland*** aspects if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶16 Hennings alleges that his second trial lawyer was ineffective because the lawyer did not call an alibi witness who testified at the first trial. At the first trial, Bruce Powell testified that he worked for a community-service program, where he helped people vacate suspensions of their driver's licenses and remediate fines, all by doing community service. Powell claimed that he had scheduled several appointments with Hennings, but that Hennings had failed to show up. Powell testified that Hennings did, however, keep his appointment on May 11, 1999, arriving at Powell's office around 11:00 a.m. Powell claimed that he was irritated with Hennings for missing his appointments, so, to get back at him, he made Hennings wait at his office until approximately 3:45 to 4:00 p.m.

¶17 Powell further testified at the first trial that he first learned that Hennings was accused of a crime when he received a letter from Hennings's lawyer. Powell testified that, after he received the letter, he was arrested in an unrelated case and placed in the same jail pod as Hennings. Powell claimed that, while he talked to Hennings, they never discussed why Hennings was in jail. Powell also told the first jury that he did not receive a letter from Hennings's lawyer informing him that Hennings had been charged with a crime until after he was released from custody. This, of course, contradicts his other testimony that he got the letter before he was in Hennings's section of the jail.

¶18 In rebuttal, the State at the first trial called Willie Mitchell, Powell's supervisor at work. Mitchell testified that he did not miss one day of work in May of 1999, that he had never seen Hennings before, and that if Hennings had been sitting in Powell's office for hours, he definitely would have seen him.

¶19 Hennings claims that his trial lawyer was ineffective because the lawyer did not call Powell to testify at the second trial. He contends that his lawyer did not call Powell because the lawyer believed that Hennings was guilty, and that the lawyer also felt responsible for crimes that one of the lawyer's earlier clients had committed after the lawyer got him off.

¶20 At the ***Machner*** hearing, Hennings's trial lawyer testified that he never told Hennings that he believed that Hennings was guilty, and that he never discussed other clients with Hennings. Rather, the lawyer testified that he did not have Powell testify at Hennings's second trial because he did not believe that a jury would credit Powell's testimony: "Mr. Powell's testimony was very, very contradictory. And Mr. Mitchell's testimony, which was a State rebuttal witness -- not to want to use the vernacular -- but, basically, blew Mr. Powell out of the

water." According to the lawyer, he explained to Hennings his reasons for not using Powell, and told Hennings that, when a defendant calls a witness who is not credible, it hurts the defense as a whole. The lawyer testified that Hennings agreed with his assessment and "seemed to not only follow, but welcome the advice I had given him throughout preparation for trial."

¶21 The postconviction court found that the lawyer's decision not to call Powell was a reasonable strategy, implicitly finding credible Hennings's trial lawyer. *See* ***Estate of Dejmal v. Merta***, 95 Wis. 2d 141, 151–152, 289 N.W.2d 813, 818 (1980) (determination of witness credibility left to trial court). It noted that Powell's testimony was not "terribly plausible," and that a jury might consider a bad alibi defense to be a false alibi defense:

> the reality is that when you put on a bad alibi defense, you can shift the issue for the jury from what you might want it to be to the question of: Is this guy putting on a false alibi? And if a jury thinks that a defendant is, that can be a pretty damning thing all by itself.

The postconviction court concluded that a decision to call Powell would have been "extremely risky," and that the trial lawyer's decision not to call Powell was "within the realm of reason." We agree.

¶22 We will uphold counsel's strategic decision if it was rationally based on the facts of the case and the law. ***State v. Felton***, 110 Wis. 2d 485, 502–503, 329 N.W.2d 161, 169 (1983). We agree with the postconviction court that Hennings's trial lawyer made a reasonable decision not to present Powell's testimony. *See* ***State v. Nye***, 100 Wis. 2d 398, 410, 302 N.W.2d 83, 89 (Ct. App. 1981) (decision not to call alibi witnesses where witnesses gave inconsistent statements reasonable), *overruling on other grounds recognized by* ***State v. Shah***,

134 Wis. 2d 246, 397 N.W.2d 492 (1986). Accordingly, Hennings has not shown that the lawyer's performance was deficient.

¶23 Hennings also claims that his second trial lawyer was ineffective because the lawyer did not present an alternate-perpetrator defense. *See, e.g.*, ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984) (alternate-perpetrator defense), *denial of habeas corpus aff'd*, ***Denny v. Gudmanson***, 252 F.3d 896 (7th Cir. 2001). At the second trial, Boyd testified on direct examination that he had picked Hennings's picture out of a photographic array, and also picked Hennings out of a line-up. When asked by the prosecutor, Boyd claimed that there was no "doubt in [his] mind" that Hennings was the shooter. Boyd admitted on cross-examination that, before he had identified Hennings, he saw a picture of Landon Hayes, a man with whom Nash apparently had drug dealings, in a photographic array and had told the police that Hayes had the same facial structure and body build as the shooter. Boyd claimed on redirect examination, however, that he did not tell the police that Hayes was the shooter.

¶24 Hennings argues that his trial lawyer was ineffective because the lawyer did not present evidence that Hayes might have been the shooter, including evidence that Boyd had initially identified Hayes in a photographic array, Hayes had called Nash's cellular telephone on the day of the shooting to set up a drug deal, and that Hayes lived approximately one block from the scene of the shooting. Again, we disagree.

¶25 At the ***Machner*** hearing, Hennings's trial lawyer testified that his overall theory of defense was misidentification. The lawyer claimed that he did not try to portray Hayes as the shooter because he did not believe that the evidence would be admissible under ***Denny***. *See* ***id.***, 120 Wis. 2d at 624, 357

N.W.2d at 17 (alternate-perpetrator defense admissible if the defendant can show motive, opportunity, and direct connection to the crime). Hennings's lawyer testified that he did not believe there was sufficient evidence of motive or a direct connection to the crime. The lawyer also said that he made a "tactical . . . decision" not to present Hayes as the shooter because it would have opened the door for Boyd's testimony that he was "certain" in his identification of Hennings.

¶26 The postconviction court indicated that, although it did not agree with the trial lawyer's conclusion that the evidence would have been inadmissible under ***Denny***, the lawyer's decision not to present the evidence was "within the realm of reasonable decisions":

> So would there have been some advantages to pursuing Landon Hayes and the phone call and the drug dealing and all of that? There might have been. But it would have been at the risk of emphasizing that Mr. Boyd, when given the chance to pick between various people, was sure it was not Hayes and was confident it was Mr. Hennings. So is it better to leave it as kind of a mystery, just a question about Boyd's identification, the fact that he seems to have picked out somebody else and let it go at that, or is it better to focus on Mr. Hayes? There are advantages and disadvantages to both of those approaches. The bottom line is that the choice made by [Hennings's lawyer] is clearly within the realm of reasonable decisions and was clearly not deficient.

¶27 On our *de novo* review, we agree with the postconviction court that the trial lawyer's strategy was within the realm of reasonable representation. The

fact that this strategy failed does not make the lawyer's representation deficient.[2] *See* ***State v. Snider***, 2003 WI App 172, ¶21, 266 Wis. 2d 830, 847, 668 N.W.2d 784, 792 (defendant's right under the Sixth Amendment is to a "competent lawyer, not to the best lawyer"; therefore, in order to prevail on an ineffective-assistance claim, defendant must show that the trial lawyer's "acts or omissions were outside the broad range of professionally competent assistance"); ***State v. Harper***, 57 Wis. 2d 543, 557, 205 N.W.2d 1, 9 (1973) ("Effective representation is not to be equated, as some accused believe, with a not guilty verdict."); *cf.* ***Yarborough v. Gentry***, 540 U.S. 1, 11 (2003) (defense lawyer need not be a modern-day Clarence Darrow to pass ***Strickland*** muster).

By the Court.—Order affirmed.

Publication in the official reports is not recommended.

[2] Hennings submitted a letter asking us to consider ***Office of Lawyer Regulation v. Schatz***, 2005 WI 10, 278 Wis. 2d 18, 693 N.W.2d 299, as "overlooked authority." In ***Schatz***, Hennings's second trial lawyer had his license revoked for misconduct in unrelated cases. *See* ***id.***, 2005 WI 10, 278 Wis. 2d at 19–22, 693 N.W.2d at 299–301. Aside from general assertions, Hennings does not show how the revocation of Schatz's license is relevant to *this case*. *See* ***State v. Felton***, 110 Wis. 2d 485, 499, 329 N.W.2d 161, 167 (1983) ("the fact that an attorney is ineffective in a particular case is not a judgment on the general competency of that lawyer"). Accordingly, Hennings has not met his burden to show specific acts of counsel that are "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984).