COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2879-CR
2008AP268-CR

Cir. Ct. No. 2005CF302

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEW A. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: WILLIAM W. BRASH and JEFFREY A. KREMERS, Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Lew A. Brown appeals from a judgment of conviction and orders denying his two postconviction motions for relief. Brown

was convicted of two crimes after a jury trial: being a felon in possession of a firearm, contrary to WIS. STAT. § 941.29(2)(a) (2005-06);[1] and possession of a short-barreled shotgun, contrary to WIS. STAT. § 941.28(2). Brown was also convicted of fleeing an officer, contrary to WIS. STAT. § 346.04(3), based on his guilty plea. Brown argues that all three convictions should be overturned and a new trial should be held on all three charges because the trial court erroneously denied his request to change attorneys prior to entering his guilty plea on one charge and going to trial on the other two.[2] In the alternative, he argues that this court should reverse his two firearms convictions because his trial counsel failed to obtain and use a photograph in Brown's defense. We conclude that the trial court did not erroneously exercise its discretion when it denied Brown's implicit motion to change attorneys. We further conclude that Brown was not prejudiced by his trial counsel's deficient performance. For these reasons, we affirm.

BACKGROUND

¶2 The following facts are based on the criminal complaint, numerous pre-trial hearings and testimony from Brown's trial. On January 11, 2005, Milwaukee Police Officer Michael Meade was driving in his unmarked vehicle

[1] Contrary to what is stated on the amended Judgment of Conviction, Brown was not convicted of these two possession charges as a party to a crime. Although he was originally charged as a party to a crime, the charges ultimately presented to the jury did not include the party-to-a-crime status. Upon remittitur, the trial court is directed to issue a second amended Judgment of Conviction that removes the party-to-a-crime references.

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] This case was originally assigned to the Honorable Michael B. Brennan. It was transferred to the Honorable William W. Brash, who conducted several hearings prior to trial and the trial. The Honorable Jeffrey A. Kremers decided the postconviction motions.

just before 7:00 p.m. when he was flagged down by a group of citizens in the street. They told Meade that a robbery had just occurred and pointed to a vehicle, a dark-colored Jaguar, driving away from the area. Meade said he followed the vehicle without activating his vehicle's lights or sirens because he was alone and did not want to confront what could be armed individuals. Meanwhile, he informed the dispatcher about the situation.

¶3 Next, a marked patrol car began to follow Meade. At that point, the Jaguar increased its speed and began to run stop signs. Meade activated his vehicle's lights and sirens and pursued the Jaguar. During the pursuit, Meade saw something fly from the passenger side of the vehicle, but he did not stop to inspect it; the object was never recovered.

¶4 The Jaguar lost control on the road, spun around and ran into a minivan. Meade saw one person exit the passenger side of the Jaguar and another jump out the rear driver's side window. Both of those persons ran away and Meade did not pursue them.

¶5 The driver, later identified as Brown, remained in the vehicle, unable to exit due to damage to the driver's door. Meade said Brown appeared "stunned." Brown was removed from the vehicle and arrested.

¶6 Meade said he did not see anything get thrown from the vehicle when it crashed, but he saw a sawed-off shotgun lying in the gutter, next to the driver's side of the vehicle. He estimated the shotgun was one to two feet from the driver's door, although he said he could not remember whether the shotgun was closer to the rear door or the driver's door.

¶7 The shotgun was tested for fingerprints, but none were found. The barrel measured 11.25 inches and the shotgun had an overall length of 24.5 inches. Based on these measurements, the shotgun did not meet legal length requirements and was a "short-barreled shotgun" as that term is used in WIS. STAT. § 941.28(1)(b).

¶8 Detective Ricky Burems interviewed Brown at the police station after he was arrested. Burems testified at trial that Brown told him he and some friends "armed … themselves with firearms" and went to a home to confront people who sold some bad drugs to a friend of Brown. Burems said Brown would not identify the people he was with or identify the type of firearms they had. Burems said Brown admitted that he fled from the scene in a vehicle and was involved in the accident.

¶9 Burems said that he wrote a summary of his conversation with Brown and read it to him. Burems said Brown did not offer any changes or corrections, but told Burems he did not want to sign the report. The trial court admitted Burems's written report into evidence. The report states: "They took guns with them just in case the people in the house had guns" and "Brown does not wish to identify the people who were with him or say what type of gun he had."

¶10 Detective Ramona Ruud was present for some of Burems's interview with Brown. She testified at trial that she heard Brown say that he went to a house "to confront some individuals that had sold bad drugs to a friend of his" and that Brown was not sure if the people in the house had weapons, "so he and the people he was with took weapons with them as well." Ruud said Burems's

written report was consistent with what she heard, and she confirmed she remembered hearing Brown say he had a gun.

¶11 Brown was charged with four crimes: armed robbery with use of force, party to a crime; possession of a firearm by a felon, party to a crime; fleeing an officer; and possession of a short-barreled shotgun, party to a crime.[3] After a preliminary hearing, Brown was bound over for trial. After a series of delays related to scheduling of witnesses and attorneys, the parties appeared for trial on October 24, 2005.

¶12 The trial court called the case and noted that it appeared there was still one outstanding motion to be decided, and then the jury could be selected. Trial counsel then brought to the court's attention an issue that had arisen between him and Brown:

> [COUNSEL]: I just asked Mr. Brown, there's some sense of dissatisfaction, so I asked him before we get the jury over here, if there's anything he wants to say to you. I don't know if there is or not.
>
> [BROWN]: Yes, there is.
>
> THE COURT: What?
>
> [BROWN]: Well, I'm not satisfied with my attorney's representation at this point. In the past I thought everything was okay, whatever, but he told me he don't feel we have a defense. I know we don't have anything prepared.
>
> Since our last court date [September 6, 2005], I have called him every week since, and this is the time that I heard from him today. I mean, I don't know if his schedule is overloaded where he doesn't have time for me, whatever.

[3] Another man, Alvin Harris, was also charged in the same complaint with armed robbery and being a felon in possession of a firearm, but the charges against him were ultimately dismissed without prejudice on September 6, 2005, on the State's motion.

> I would think within the whole month he would return one of those phone calls.
>
> I have a feeling we don't have a defense. I know that can't be in my interest period so. [sic]

¶13 In response, the trial court inquired about the history of the case and observed that no issues concerning the attorney-client relationship had previously been raised. The court asked counsel to respond to Brown's concerns. Counsel said he talked with Brown on September 22, although that conversation concerned Brown's pre-trial release as opposed to the substance of his defense. Counsel said his advice to Brown had always been that he believed there was "no defense" and that Brown should consider a plea. Counsel said when he met with Brown earlier in the day, Brown mentioned seeking a second opinion on his defense and that was the reason counsel brought the issue to the court's attention.

¶14 The State opposed any adjournment of the case. It noted that Brown had had four hours that day to meet with his trial counsel to talk about the case. The State speculated that the reason Brown wanted to seek new counsel was to delay the case and give him more time on in-house monitoring, which he had been on since the speedy trial time limits were exceeded. The State added that it believed Brown was seeking a delay because he knew he did not have a strong defense.

¶15 Brown disputed the State's implications, asserting that he wanted to go to trial, but not with an attorney who did not believe they could win. When asked, Brown said he could not identify any information trial counsel had not followed up on, but added that he and trial counsel had not communicated enough about the case. Brown's comments suggested that his primary concerns were the

lack of returned phone calls and trial counsel's opinion that the defense case was weak.

¶16 Finally, trial counsel said that both he and Brown knew the case well, but acknowledged that until this day, he had not so bluntly told Brown his opinion concerning the weakness of the defense case. Trial counsel indicated that he was ready to proceed and try the case.

¶17 Although Brown never officially moved to substitute counsel, and there was no discussion about whether the public defender's office would give Brown a second attorney, the trial court interpreted Brown's comments as a motion to substitute counsel. The trial court noted that the only purported breakdown in communication had occurred between September 6 and the trial date (about seven weeks). The court also recognized that trial counsel had admitted that he failed to return Brown's calls. It found:

> The parties, up until recently, didn't appear to have a communication issue.… [T]here seems to be a breakdown in [telephone] communication between the parties … from September 22nd until today's date.
>
> But the bigger issue from this Court's assessment seems to be the fact that [trial counsel] has now had that "frank discussion" with Mr. Brown, and it's not something that was received well by Mr. Brown, thus giving him pause or giving rise to a question as to whether or not [trial counsel] was the right person to go forward on this matter.

¶18 The trial court concluded that there had been a communications issue between Brown and trial counsel, but the conflict was based in part on Brown's unhappiness with trial counsel's honest assessment of the case, which trial counsel was bound to give. The court found there had not been a total lack of communication between the parties. It said it also found the timing of Brown's

request to be "very suspect." The court denied Brown's request to substitute counsel. The trial was continued to the next day.

¶19 Prior to selecting a jury, the State moved to dismiss the robbery charge without prejudice. In addition, Brown pled guilty to the charge of fleeing an officer; the trial court accepted Brown's plea and he was convicted of that charge. With two charges remaining, the trial court observed that the charges would no longer proceed as party-to-a-crime offenses and said it had prepared updated jury instructions to reflect that.

¶20 A jury was selected and the one-day trial commenced. Meade, Burems and Ruud testified for the State. Brown elected not to testify and called no witnesses. The officer and detectives testified as detailed above. In closing argument, trial counsel essentially conceded the charge of being a felon in possession of a firearm, acknowledging that the jury had heard no evidence to contradict the detectives' statements that Brown admitted he and his friends armed themselves with guns. Trial counsel focused on defeating the charge of possessing a short-barreled shotgun, arguing that the shotgun belonged to one of the other passengers in the vehicle. Counsel argued that the position of the gun suggested Brown did not drop it out the window, and that the evidence instead supported the theory that the person who exited the backseat of the car dropped the gun. Counsel noted that Brown was stunned by the accident, and that Meade had not seen anyone throw the shotgun from the vehicle.

¶21 After deliberating, the jury submitted two written questions to the trial court: "Does the defendant own the Jaguar?" and "If there is a weapon and 3 persons in the car are they all in possession of the weapon?" The trial court discussed the questions with counsel and both parties agreed to give the jury the

following answer: "You must rely on your individual & collective memories as to the testimony & the instructions as given to you by the Court."[4]

¶22 The jury found Brown guilty of both charges and he was convicted. The trial court sentenced Brown as follows. On the charge of being a felon in possession, he received a total sentence of eight years, comprised of three years and six months of initial confinement, and four years and six months of extended supervision. He was given a concurrent four-year sentence for possessing a short-barreled shotgun, consisting of two years of initial confinement and two years of extended supervision. Finally, he received a three-year sentence for fleeing an officer, consisting of one year of initial confinement and two years of extended supervision, consecutive to the charge of being a felon in possession of a firearm. After sentencing, the case was reassigned to a different trial court.

¶23 A different lawyer was appointed to represent Brown for postconviction matters. Brown filed a postconviction motion seeking to withdraw his guilty plea to the charge of fleeing, on grounds that his guilty plea was the result of: (1) ineffective assistance of counsel concerning the effect of the guilty plea;[5] (2) the erroneous denial of his motion to substitute counsel; and (3) the unconstitutional deprivation of his counsel of choice. He moved for a new trial on the two weapons charges on grounds that: (1) his trial counsel provided ineffective assistance by failing to obtain photographs that police officers took of

[4] The discussion between the parties and the trial court was not transcribed. However, the trial court summarized the result prior to calling the jury back to report its verdict.

[5] Brown explicitly abandons this argument on appeal and we do not discuss it further.

the accident scene; (2) the trial court erroneously denied his motion to substitute counsel; and (3) he was unconstitutionally deprived of his counsel of choice.

¶24 The trial court denied Brown's motion without a hearing. The court said it had examined the trial transcript concerning Brown's request for new counsel and concluded that the trial court did not erroneously exercise its discretion. The court noted: "This was the day of the trial, counsel was prepared to try the case, and the reasons for the request were insufficient." The trial court also rejected Brown's constitutional claim concerning his counsel of choice, recognizing Brown's concession that the trial court was bound by supreme court precedent on that issue.

¶25 The trial court addressed Brown's assertion that trial counsel provided ineffective assistance by failing to obtain photographs that the police officers took and which were listed on discovery provided by the State. In particular, Brown argued that his counsel should have obtained and then used at trial a photograph showing the shotgun on the ground next to the vehicle. The court rejected this argument, concluding that Brown had not shown he was prejudiced by trial counsel's alleged error. The court explained:

> A copy of the photograph is attached to his motion as Exhibit D, which shows the sawed-off shotgun lying in the street a couple of feet beyond the driver's side back passenger door. This, he contends, would have supported his theory that he had nothing to do with the shotgun. He submits that Officer Meade's testimony that the gun was found one to two feet from the defendant in the driver's seat created a false impression that *he* had tossed the gun out of the driver's window.
>
> The court finds that there is not a reasonable probability that the absence of the picture undermined confidence in the outcome. The jury heard testimony that Officer Meade was unsure if the shotgun was closer to the driver's door or the back passenger's door on the ground. It also heard that

> the defendant had given a statement to Detective Ricky Burems stating that "they"—i.e. the three of them in the vehicle—"had firearms." … The jurors were instructed about possession of a firearm….
>
> … The jurors could reasonably have concluded that the defendant had access to and actual physical control over the shotgun and any of the other guns in the vehicle. The photograph does not alter or contradict this conclusion; moreover, the photograph does not exonerate the defendant or create a reasonable doubt that the defendant had nothing to do with the shotgun. The court is satisfied … that the outcome of the trial would have been no different had counsel obtained and presented a copy of the photograph. Thus, the defendant has failed to show any prejudice from his counsel's alleged deficient performance.

¶26 Brown appealed the judgment and the order denying his postconviction motion. On August 15, 2007, we reversed and remanded for a ***Machner***[6] hearing on the ineffective-assistance-of-trial-counsel claims.[7] *See* ***State v. Brown***, No. 2006AP2831-CR, unpublished slip op. at 2 (WI App Aug. 15, 2007). At the ***Machner*** hearing, trial counsel conceded that he failed to recognize references to photographs in the discovery the State provided. He said he never asked for the photographs, and that this was simply an error on his part, rather than a strategic decision. He stated: "I should have had the photographs. I probably would have put it in." When asked if he thought the photograph Brown identified in his motion would have affected the outcome of the trial, trial counsel responded: "It may have. I'm bothered by the fact that I missed the photographs."

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

[7] We declined to address the arguments concerning the denial of Brown's request to substitute counsel. ***State v. Brown***, No. 2006AP2831-CR, unpublished slip op. at 2 (WI App Aug. 15, 2007). Ultimately, this court reinstated that portion of the trial court's original postconviction order and Brown was permitted to appeal that issue. That appeal, 2008AP268-CR, has been consolidated with the appeal of the trial court's second postconviction order, 2007AP2879-CR.

¶27 The trial court concluded that trial counsel was deficient for not seeking the photographs, but concluded that Brown had not been prejudiced. The court said that it found "absolutely no prejudice to the defense" based on the failure to seek the photographs. The court explained that because possession can be shared with one or more persons, "how that shotgun got there is really of little or no consequence and I'm at a loss really to see how this advances the defendant's defense theory." This appeal follows.

DISCUSSION

¶28 Brown presents three primary issues on appeal, arguing: (1) the trial court erroneously denied Brown's request to substitute attorneys; (2) Brown was deprived of his constitutional right to counsel of his choice; and (3) Brown is entitled to a new trial because trial counsel failed to obtain and use the photograph of the shotgun. We note at the outset that Brown concedes that this court lacks authority to recognize a constitutional right to counsel of choice for defendants who have appointed counsel because we are bound by ***Mulkovich v. State***, 73 Wis. 2d 464, 474, 243 N.W.2d 198 (1976). However, Brown explains that he has raised and briefed this issue at the trial court and before this court to preserve it for potential review by the Wisconsin Supreme Court. We do not address it. We examine the remaining two issues in turn.

I. The trial court did not erroneously exercise its discretion when it denied Brown's implicit request to substitute counsel.

¶29 Brown argues that the trial court erroneously denied his October 24, 2005, request for a new attorney, and that he is therefore entitled to withdraw his guilty plea and receive a new trial on the weapons charges. "In situations involving appointment of new counsel, a [trial] court's exercise of discretion is

triggered by a defendant's presentation of a substantial complaint that could be interpreted as a request for new counsel." ***State v. McDowell***, 2004 WI 70, ¶66, 272 Wis. 2d 488, 681 N.W.2d 500. "When a substantial complaint is made, the trial judge should inquire whether there are proper reasons for substitution." ***Id.*** On appeal, courts "employ the factors set forth in ***State v. Lomax*** to determine whether withdrawal of counsel and the appointment of new counsel was warranted under the circumstances of [the] case." ***McDowell***, 272 Wis. 2d 488, ¶72 (citing ***Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988)).

¶30 In ***Lomax***, the court stated that to evaluate whether a trial court's denial of a motion for substitution of counsel was an erroneous exercise of discretion,

> a reviewing court must consider a number of factors including: (1) the adequacy of the court's inquiry into the defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case.

Id., 146 Wis. 2d at 359. ***Lomax*** continued:

> We believe these factors are consistent with the factors previously set out by this court. For instance, in ***State v. Johnson***, 50 Wis. 2d 280, 285 n.4, 184 N.W.2d 107 (1971), this court stated the defendant must show "good cause" to warrant substitution of counsel.
>
> In ***Phifer v. State***, 64 Wis. 2d 24, 31, 218 N.W.2d 354 (1974), this court set out six factors for trial courts to consider in the exercise of their discretion when there is a request for substitution of trial counsel with the associated request for a continuance.

Lomax, 146 Wis. 2d at 360. ***Lomax*** identified the six factors recognized in ***Phifer***: (1) the length of the delay requested; (2) whether "the 'lead' counsel has

associates prepared to try the case in his absence [whether there is competent counsel presently available to try the case]"; (3) whether the defendant had requested and received other continuances; (4) the convenience or inconvenience to the parties, witnesses and the court; (5) whether the delay seems to be for legitimate reasons, or whether its purpose is dilatory; and (6) other relevant factors. ***Lomax***, 146 Wis. 2d at 360 (citation and internal quotation marks omitted; bracketing supplied by ***Lomax***).

¶31 ***Lomax*** offered guidance on how the ***Phifer*** factors should be analyzed by the trial court, stating:

> A judge should make a meaningful inquiry when the motion for change of counsel is made rather than summarily deny it and then conduct a retrospective hearing after the trial. The hearing may not take more than minutes. When all of the defendant's complaints about counsel are known to the judge, judicial discretion may be exercised in application of the factors in ***Phifer***. If defendant's complaints do not meet the test, then the trial may proceed. On the other hand, if the defendant's reasons are sufficient, it is better that new counsel be appointed at this juncture of the case and the trial delayed. A subsequent charge of an inadequate defense may be thwarted or avoided by a timely hearing on the motion. The trial judge presiding over the evidentiary hearing will be informed of the specific reasons for the defendant's dissatisfaction with his counsel, and the court will be able to evaluate those reasons and determine whether new counsel should be appointed.

Lomax, 146 Wis. 2d at 362.

¶32 In the instant case, the trial court explicitly cited ***Lomax*** and considered the three considerations identified in that case. However, no party asked the trial court to analyze the six ***Phifer*** factors, and the court did not do so. On appeal, Brown argues the factors should have been considered, and that they weighed in favor of granting his request to receive new counsel. In response, the

State contends that the Wisconsin Supreme Court "now regards ***Lomax***'s three factors rather than ***Phifer***'s six factors as the appropriate framework for a circuit court to decide a request like Brown's and for an appellate court to review a circuit court's decision on a request like Brown's." In support, the State cites ***McDowell***, 272 Wis. 2d 488, ¶¶66-76, where the supreme court analyzed whether the trial court should allow the defendant a new attorney, without discussing ***Phifer***'s six factors.

¶33 Even if we assume that ***McDowell***'s lack of reference to ***Phifer*** was an oversight and that ***Lomax*** still requires trial courts to explicitly consider the six factors ***Phifer*** enumerates, we affirm the trial court's exercise of discretion because it is clear that the court properly considered the information provided to it and reached a rational decision. *See* ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737 ("Although the proper exercise of discretion contemplates that the circuit court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court's discretionary decision.").

¶34 We begin with the ***Lomax*** factors. First, we consider "the adequacy of the court's inquiry into the defendant's complaint." *See* ***id.***, 146 Wis. 2d at 359. The trial court spent considerable time asking Brown about his concerns and reviewing what had occurred between Brown and his counsel in the past. The discussion spanned twenty-three pages of transcript. Both parties were provided an opportunity to offer information and their arguments about Brown's concerns. On appeal, Brown argues that the trial court's inquiry into his complaint was inadequate and takes issue with the trial court's conclusions. We are unconvinced that the inquiry was deficient. In ***Lomax***, the supreme court concluded that the trial court's inquiry was inadequate where the discussion was extremely brief,

consisting primarily of the defendant raising the issue and the trial court telling the defendant: "Well, this is the date for trial.… We are going to proceed to trial today," without conducting any inquiry into the defendant's concerns. *See* ***id.*** at 358. The inquiry in Brown's case was entirely different. The trial court asked numerous thoughtful questions, repeatedly sought input from the parties and Brown, and employed a reasonable analysis. The inquiry was adequate.

¶35 Next, we consider the timeliness of the motion. ***Id.*** at 359. ***Lomax*** explained that

> [e]leventh-hour requests are generally frowned upon as a mere tactic to delay the trial. Since the trial judge may have had good reason to protect his calendar and the time set aside for a trial, the defendant's motion, which was made on the day of trial, may be suspect. However, it is possible that the conflict between the defendant and counsel arose on the day of trial and therefore the request for change of counsel was timely. Timeliness must be balanced with the third consideration, whether the alleged conflict between the defendant and attorney is so great that it likely resulted in a total lack of communication that prevented an adequate defense.

Id. at 361-62. Here, the request was made on the scheduled date of the trial. The trial court called Brown's concern "very suspect," but did not make detailed findings about the timing of the request. Rather, the trial court focused its attention on the third consideration: "whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case." *See* ***id.*** at 359. The trial court concluded that there was not such a total lack of communication. It noted that there had been no indication of new evidence that would require trial counsel to seek an adjournment or further time to follow up on information.

¶36 The trial court's findings are supported by the record. At the time the trial court decided Brown's implicit motion, there were no indications that any facts needed investigating, or that Brown and his counsel needed more time to prepare a defense. Thus, while trial counsel accepted fault for not returning Brown's phone calls, he indicated that he was still prepared to proceed, even if he was not optimistic about the strength of Brown's case.

¶37 Brown argues that if this court applies the ***Phifer*** factors, it should conclude that he should have been allowed to substitute counsel. We disagree. The record supports the trial court's implicit findings that continuing the case, which had already been delayed numerous times (although not due to any action by Brown) would inconvenience the parties and the court. Also, there was no discussion at all concerning whether Brown would be granted another attorney by the public defender (especially where the trial court found that there was not a total breakdown of communication), and what type of delay might be required. Based on the circumstances presented, the trial court did not erroneously exercise its discretion when it denied Brown's implicit request to substitute counsel.

II. Brown is not entitled to a new trial because his trial counsel's deficient performance was not prejudicial.

¶38 Brown argues that his trial counsel's failure to obtain and use the scene photograph constituted ineffective assistance of counsel, and that he is therefore entitled to a new trial. We reject his argument.

¶39 To prove ineffective assistance of counsel, a defendant must show: (1) deficient performance by his or her lawyer; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must point to specific acts or omissions of the lawyer that are "outside

the wide range of professionally competent assistance." ***Id.*** 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 (1990).

¶40 To satisfy the prejudice aspect of ***Strickland***, the defendant must demonstrate that the lawyer's errors were sufficiently serious to deprive him or her of a fair proceeding and a reliable outcome. ***Strickland***, 466 U.S. at 687, 694. ("The 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.").

¶41 Conclusions by the trial court whether the lawyer's performance was deficient and, if so, prejudicial, present questions of law that we review *de novo*. ***Johnson***, 153 Wis. 2d at 128. Finally, we need not address both ***Strickland*** aspects if the defendant does not make a sufficient showing on either one. ***Id.***, 466 U.S. at 697.

¶42 Here, both parties agree with the trial court's conclusion that Brown's trial counsel's failure to obtain and use the scene photograph was deficient performance. Thus, the crucial issue is whether this deficiency was prejudicial. Brown argues he was prejudiced because the

> sole issue at trial was who owned the shotgun that was found next to Brown's car. If Brown did not possess the shotgun, then he was not guilty of the crime of possession of a short-barreled shotgun … or of being a felon in possession of a firearm.… As the jurors were told, "[P]ossess means the defendant knowingly had actual physical control of a shotgun," although the jury also was told that possession could be shared. No witness saw Brown, who was trapped in the driver's seat, throw[] anything out of the car. In addition, a man fled out the rear

> passenger window on the driver side. The location of the shotgun therefore was key.

(Record cites omitted.) Having had an opportunity to review the entire record, including the ***Machner*** hearing and the trial court's analysis, we disagree with Brown's analysis.

¶43 Contrary to Brown's arguments at the trial and on appeal, his potential ownership of the short-barreled shotgun was irrelevant because under Wisconsin law, one need not own a shotgun to possess it. *See* WIS JI—CRIMINAL 920. The jury was properly instructed consistent with this jury instruction. The trial court told the jury:

> Possess means the defendant knowingly had actual physical control of the firearm. An item is in the person's possession if it's in an area over which the person has control and the person intends to exercise control over the item.
>
> It is not required that the person own an item in order to possess it. What is required is that the person exercised control over the item.
>
> Possession may be shared with another person. If a person exercises control over an item, that item is in the person's possession even though another person may also have similar control.

¶44 Based on these instructions, the jury did not have to find that Brown owned the gun or even touched the gun. It could determine that in the context of the overall scheme to confront some drug dealers, Brown exercised control over the shotgun and that the control was shared with his cohorts. The record supports this determination. The shotgun was found next to the car that Brown was driving. Two detectives testified that Brown admitted that he and some other people armed themselves with guns (plural) and went to a home to confront some people who sold bad drugs to Brown's friend. Based on this evidence, the jury could

reasonably find that the shotgun had been in the physical possession of someone in the vehicle, that Brown was aware of the shotgun and that he exercised control over it pursuant to his plan to confront the drug dealers in combination with the other armed people in his vehicle. The placement of the shotgun after the vehicle crashed was not crucial to this finding. The jury could reasonably determine that the shotgun had come from the vehicle and that the detectives' testimony concerning Brown's admissions was accurate.

¶45 In short, we are unconvinced that there is a reasonable probability that the result would have been different if trial counsel had obtained the scene photograph and introduced it at trial. The photograph might have supported trial counsel's closing argument that Brown's accomplice dropped the shotgun in the gutter when he fled, but that would not negate Brown's possession of the shotgun, which can be inferred from his admissions to the detectives and the other facts presented. Because we conclude that trial counsel's error was not prejudicial, we affirm the judgment and the orders denying Brown's motion for a new trial.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.