No. 21-_____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTONIO D. SHANNON,

Petitioner,

vs.

RANDAL L. HEPP,

Respondent.

APPENDIX

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In the

United States Court of Appeals

For the Seventh Circuit

No. 20-3256

ANTONIO D. SHANNON,

Petitioner-Appellant,

v.

RANDALL HEPP,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 2:15-cv-00604-WCG — **William C. Griesbach**, *Judge*.

ARGUED SEPTEMBER 13, 2021 — DECIDED MARCH 4, 2022

Before RIPPLE, ROVNER, and SCUDDER, *Circuit Judges*.

ROVNER, *Circuit Judge*. A Wisconsin jury found Antonio D. Shannon and his brother Terry Shannon guilty of one count of first-degree homicide and a related firearms charge. The presiding judge ordered Antonio to serve a prison term of life plus five years, without the possibility of release for extended supervision. The Wisconsin courts affirmed Antonio's conviction and denied his postconviction claims for relief.

Antonio then turned to federal court, seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Antonio alleged that his trial counsel was ineffective in failing to adequately investigate his claim of self-defense, in advising him not to testify in support of that defense, and in neglecting to prepare him to testify, and that his appellate counsel was likewise ineffective in failing to pursue the ineffective assistance claim on direct appeal of his conviction. The district court denied Antonio's petition, concluding that the Wisconsin Court of Appeals' decision rejecting these claims was not an unreasonable application of the U.S. Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). We affirm.

I.

In the early hours of May 7, 2006, Terry Shannon had an argument with Bennie Smith at an IHOP restaurant in Racine, Wisconsin. The two men had links to rival gangs and there evidently was bad blood between them: in the preceding weeks, there had been at least two incidents in which Smith and his cousin Courtney Taylor had fired shots at Terry.[1] Antonio would later testify at a post-conviction hearing that he had been trying to ascertain what the nature of the dispute was between his brother, Smith, and Taylor and how it could be resolved peacefully.

[1] One of the two shooting incidents left a bullet hole in the headrest of the car Terry was driving, and the second resulted in damage to the car's side-view mirror. Antonio would later recall hearing rumors of a third shooting incident. He and the mother of his child, Tiffany Gray, would also describe a fourth incident in which Gray noticed two men loitering on the sidewalk opposite his house. When she told Antonio about the men, he stepped outside and told them to leave. He got into his vehicle to pursue the men and saw Taylor's truck passing nearby. He later told Gray that the incident

Taylor, Calvin Miller, and Kinte Scott were with Smith at the IHOP on May 7. Scott and Taylor would later testify that, during the argument between Smith and Terry, Terry was making gestures suggesting that he was armed. By their account, Smith challenged Terry to a fight: "[W]hy don't you be a man and put your gun down and … we get rid of all this past drama, whatever." R. 25-10 at 178. Terry declined the challenge, and Smith, Taylor, Miller, and Scott left the restaurant.

The four men drove to Taylor's apartment on College Avenue and parked on the street in front of the building. They had previously arranged to meet two women there whom they had encountered earlier in the evening. The women arrived in their own car and parked across the street. Smith, who was in the driver's seat, rolled down his window and he and his companions began talking and flirting with the women.

Shortly before 3:30 a.m., roughly an hour after the argument at the IHOP, Terry and Antonio drove up to the scene on College Avenue and pulled along side of Smith's car. Antonio, who was in the front passenger seat, got out of the car and, according to Taylor, began firing a gun at the four men. Taylor said that he returned Antonio's fire with his own gun, a 9-millimeter Ruger. Antonio then got back into the car with Terry and the car sped off. After setting fire to the car, they fled to Chicago, where they were ultimately arrested some two and a half months later.

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involved "some guys Terry was into it with," including Taylor. R. 25-18 at 94.

Although neither of the Shannons was injured in the shooting, each of the occupants of Smith's car was struck either by a bullet or a bullet fragment; Smith, who was struck a total of eight times, died of multiple gunshot wounds, including a wound to his head that was almost certainly fatal by itself. Police would later ascertain that some 26 shots had been fired from three different guns during the encounter. None of the guns was found, but investigators were able to determine that the bullets had been fired by a Sturm Ruger 9-millimeter (Taylor's gun), a Hi-Point 9- millimeter, and a third gun firing a .40 caliber Smith and Wesson cartridge. According to the prosecution's firearm and toolmark expert, Reginald Templin, the head-shot to Smith was likely fired by the Hi-Point 9-millimeter. Waukesha County Medical Examiner Dr. Lynda Biedrzycki indicated that the fatal head wound was atypical and consistent with the possibility that the bullet responsible for the wound had struck something else before hitting Smith. She agreed with the prosecutor that a bullet that had first penetrated the car's windshield could result in this type of atypical wound. The exchange of shots had left multiple bullet holes in the windshield, although witnesses for both the State and the defense agreed that at least some of those holes were left by bullets fired from the inside rather than outside of Smith's car. With one exception, Smith's wounds were inflicted from the right to left side of his body. R.25-12 at 170. Based on the forensic evidence, the prosecution theorized that Smith was turned to his left, toward the driver's side window, when he was struck, and that the shooter had fired into the car through the windshield from in front of the vehicle. Yet, Taylor said there was no room in front of the car for the shooter to have stood there, R.25-11 at 69, and Scott testified that there was so little room between the Shannon's car and

Smith's that Antonio was unable to get out of his vehicle, R. 25-10 at 183–84.

The Shannon brothers were charged with Smith's killing. They initially pleaded guilty to second-degree reckless homicide, but they were allowed to withdraw those pleas and proceed to trial. Antonio was represented by attorney Richard Hart. The Shannons proffered two alternative defense theories. First, they posited that the bullet that killed Smith was fired from inside of his own car. Toward that end, the defense presented testimony from a crime-scene reconstruction expert who was of the opinion that Smith was killed by someone in his own vehicle, R. 25-15 at 130–153, and from a second witness who said that Scott told him that he had fired a gun from the back seat of the car and had accidentally struck Smith, R. 25-15 at 62–63. Second, the defense argued that if, instead, Antonio was responsible for the shot that killed Smith, that he had only fired in self-defense after someone in Smith's car fired the first shot. Two defense witnesses testified that Miller had told them that Taylor had fired first; one of those witnesses also recounted statements from Miller to the effect that Taylor and Smith wanted to kill Terry Shannon and that Miller believed Taylor had fired the shot that killed Smith. R. 25-15 at 27–28, 47–51.

Terry and Antonio both declined to testify at the trial on the advice of counsel. As relevant here, upon being informed of that decision, the trial judge engaged Antonio in a colloquy pursuant to *State v. Weed*, 666 N.W.2d 485, 498–99 (Wis. 2003), to ensure that his waiver of the right to testify in his own defense was knowing and voluntary. In response to the judge's questions, Antonio confirmed that he understood that the decision whether to testify was "entirely for [him] to make," that

no one had made any threats or promises in an effort to influence his decision, that he had had "the opportunity to discuss [his] decision on whether to testify or not with [his trial counsel]," and that his decision was "[n]ot to testify." R. 25-15 at 212–13. Antonio's counsel, Hart, added that he and his client had been talking about the possibility of Antonio testifying in the months leading up to the trial and that "we discussed the pros and con[s], and I have given him my input and my recommendation, but it's up to him." R. 25-15 at 214.

The jury convicted both Antonio and Terry on two charges, first-degree intentional homicide while armed, in violation of Wis. Stat. § 940.01(1)(a), and intentionally discharging a firearm from a vehicle as a party to a crime, in violation of § 941.20(3)(a).

On direct appeal of his conviction, Antonio, now represented by attorney Mark Rosen, raised a single issue: whether the trial court had improperly excluded testimony from a friend of the Shannons that Kinte Scott told him, in the interim between the argument at IHOP and the shooting, that Smith was upset with Terry and had declared, "I'm gonna f*ck up Terry." *See State v. Antonio Shannon*, No. 2013AP130-CR, 2013 WL 5989695, at *1 ¶4 (Wis. Ct. App. Nov. 13, 2013) (unpublished). That testimony was offered in furtherance of the theory of self-defense. The Wisconsin Court of Appeals agreed with Antonio that Smith's out-of-court statement was admissible as proof of Smith's state of mind and that the trial court had erred in excluding Scott's testimony on this point. *Id.*, at *1 ¶ 8. But the court deemed the error harmless on two grounds. First, the jury had heard testimony from other witnesses that Smith "was out to get" Terry. *Id.*, at *2 ¶10. Second, in view of the trial record, the court discerned no real

possibility that Antonio's self-defense theory would have succeeded even with the help of Scott's excluded statement. "Five witnesses—Courtney [Taylor], Kinte [Scott], Calvin [Miller], and the two young women in the car parked across the street—described a scene of relaxed and friendly flirting and talking, with Bennie [Smith] 'laughing,' 'friendly,' and not appearing 'to be jumpy or nervous.' Having just met the men, the women were impartial witnesses." *Id.*, at *2 ¶11. Moreover, yet another disinterested witnesses, a worker filling newspaper racks with the day's papers, testified that he saw a red car—the same color as the Shannons' vehicle—circling the area moments before he heard shots ring out. *Id.*, at *2 ¶ 12. And the two women parked across the street, along with the three surviving passengers in Smith's car, testified consistently that the gunfire had erupted immediately upon the Shannons' vehicle pulling along side of Smith's car, giving rise to an inference that someone in the Shannons' car had fired first—indeed, Scott and Taylor both said exactly that in their testimony. *Id.* Given what the jury had already heard on both sides of the self-defense theory, the Court of Appeals was unconvinced that Smith's out-of-court statement would have tipped the balance in Antonio's favor. *Id.*, at *2 ¶ 13. The Wisconsin Supreme Court denied review. 843 N.W.2d 708 (Wis. 2014).

Antonio then sought postconviction relief pursuant to Wis. Stat. § 974.06 on the ground of attorney ineffectiveness, among others. Antonio argued that his trial counsel, Hart, had failed to (1) adequately look into the details of his self-defense claim, (2) properly advise him that his testimony was vital to the claim of self-defense, and (3) prepare him to testify. He also argued that his appellate counsel, Rosen, had improperly omitted to argue Hart's ineffectiveness on direct

appeal. The trial court conducted an evidentiary hearing on the claim pursuant to *State v. Machner*, 285 N.W.2d 905, 908–09 (Wis. 1979). Hart and Rosen testified at the hearing, as did Antonio, his mother Mary Myers, and other family members. Hart *inter alia* outlined the nature of his discussions with Antonio concerning the self-defense claim, what he learned from other witnesses about the basis for that claim, what he perceived to be the potential disadvantages of Antonio testifying, and why he did not think it was invariably necessary for a defendant himself to testify in support of a self-defense claim.

After hearing from Hart and the other witnesses, the judge credited Hart's testimony and rejected Antonio's assertion that Hart's conduct and advice with respect to the self-defense claim was ineffective. The court found that: (1) Hart had discussed the self-defense claim with Antonio in general terms; (2) Hart's practice was not to question a client about the details of his account early in the case for ethical reasons; (3) Hart had spoken with Antonio's mother, Mary Myers, however, and was aware of the violent history between Terry, Smith, and Taylor and of Antonio's wish to make peace between the men; (4) Hart viewed Antonio's prospective testimony recounting this history as a double-edged sword, because the prior shootings perpetrated by Smith and Taylor might have caused the jury to doubt that the Shannon brothers went looking for the men on the night of the shooting in order to make peace; (5) the risks of Antonio's testimony also included cross-examination not only on his prior convictions but also the newspaper worker's testimony that Terry's car was circling the scene just prior to the shooting and the fact that Antonio and Terry set fire to the car in the aftermath of the shooting; (6) Hart made a strategic decision to advise his client not to testify; (7) Hart went over the pros and cons of

testifying with Antonio (the court had no doubt on this point), left the decision whether to testify to Antonio, and, had Antonio decided to testify, would have gone over his testimony with him and prepared him to take the stand; (8) Hart had prevailed on self-defense claims in other cases without the defendant's testimony; (9) self-defense remained a consideration throughout the Shannons' trial and Hart argued that defense in closing to the jury; and (10) in view of the circumstances, Hart's performance was objectively reasonable under *Strickland*. Having concluded that Hart's representation was not ineffective, the court did not reach the question of prejudice. R. 25-18 at 156–162.

The court also rejected Antonio's contention that his appellate counsel, Rosen, was ineffective for not arguing Hart's supposed ineffectiveness on direct appeal of Antonio's conviction: Rosen "conducted a very thorough, lengthy investigation with respect to this case" with the help of a retained investigator and concluded that Hart was not ineffective for advising his client not to take the witness stand. R. 25-18 at 172–73. The court therefore denied Antonio's request for post-conviction relief.

The Wisconsin Court of Appeals affirmed. *State v. Antonio Shannon*, No. 2016AP2055, 2019 WL 1147628 (Wis. Ct. App. Mar. 13, 2019) (unpublished). The court noted at the outset of its discussion that Antonio acknowledged he waived his right to testify pursuant to a proper, on-the-record colloquy with the trial judge that satisfied the requirements of *State v. Weed*, *supra*, 666 N.W.2d 485. 2019 WL 1147628, at *2 ¶ 7. The court then explained why, partly in view of that colloquy, it agreed with the lower court that Antonio had not established that his trial counsel was ineffective under *Strickland*:

The circuit court's on-the-record *Weed* colloquy defeats Shannon's ineffective assistance of counsel claim, especially when coupled with evidence adduced at the postconviction hearing. Based on testimony at the *Machner* hearing, the circuit court found that trial counsel went over the pros and cons of whether or not to testify with Shannon, and that Shannon made the ultimate decision to waive his right to testify: "[Trial counsel] gave that opinion, but again, [trial counsel] always made it clear that the ultimate decision was Mr. Shannon's." Indeed, Shannon concedes that he understood at the time of trial that the decision of whether or not to testify was his alone to make. Downplaying the significance of the court's on-the- record colloquy, Shannon now suggests that trial counsel's advice somehow improperly tainted his decision not to testify. We reject Shannon's attempts to avoid responsibility for a difficult but personal decision by laying blame at trial counsel's feet.

Nor do Shannon's complaints about the adequacy of the information provided by trial counsel demonstrate deficient performance. Trial counsel's *Machner* hearing testimony included that he pursued as alternative defenses that Shannon was not the cause of Smith's shooting death or that Shannon was acting in self-defense. He testified that he worked with Terry Shannon's trial counsel on strategy and met with Shannon multiple times both before

and during the seven-day trial to develop strategy based on the evidence that came in. Trial counsel testified that whether the defendant testifies is "always an issue" when raising self-defense, and that "[y]ou have to look at everything and make a judgment call, and all that goes into what I talk to the client about." Trial counsel testified that he had "argued in self-defense before where I didn't put clients on [the stand] and I have been successful at it."

Based on the record and the evidence presented at the *Machner* hearing, the circuit court found that trial counsel discussed the pros and cons of testifying with Shannon and explained to Shannon "that he could not put him on the stand just to testify about self-defense" and that "there were a number of issues that Mr. Shannon would have been questioned on, including the fact that he fled the State with his brother, including the fact that they burned out the car that they were in when the shooting took place, all of which made him look guilty." The court found that trial counsel "told him to keep thinking about it" so he could "make the decision at the last minute depending upon how the evidence went in," and that if Shannon had decided to testify, counsel "would then have prepared Mr. Shannon to testify on his self-defense theory."

We accept the circuit court's factual findings and credibility determinations and conclude

> that trial counsel's performance was objectively reasonable. We will not by hindsight second-guess trial counsel's rational conduct. Trial counsel did not perform deficiently. As such, postconviction counsel's failure to raise this claim does not constitute ineffective assistance of postconviction counsel. *See State v. Ziebart*, 673 N.W.2d 369 ¶ 15 (Wis. Ct. App. 2003).

2019 WL 1147628, at *2–*3, ¶¶ 9–12 (footnote omitted). The Wisconsin Supreme Court again denied review. 931 N.W.2d 526 (Wis. 2019).

Antonio then presented his ineffectiveness claims to the district court. But that court concluded that the state courts had explicitly and reasonably applied *Strickland* in rejecting these claims. *Shannon v. Foster*, No. 15-C-604, 2020 WL 6263005, at *6 (E.D. Wis. Oct. 23, 2020). Among other points, the district court noted that: (1) Hart was not unreasonably concerned that having Antonio recount the details of the prior shooting incidents for the jury risked undermining the notion that Antonio and his brother were seeking to make peace with Smith and Taylor on the night of the shooting and were not trying to ambush them. (2) Antonio's testimony was not essential to the claim of self-defense, in view of the trial judge's finding that the existing evidence was sufficient to create a jury issue on the claim and therefore to instruct the jury on self-defense. (3) In view of the foregoing points, it was not unreasonable for Hart to advise Antonio not to testify. (4) Contrary to Antonio's premise, self-defense was not the only defense available to him at the conclusion of the case. The evidence also supported the notion that the fatal shot to Smith was fired from within his own car. A defense expert had

testified in support of that theory, and several witnesses had recounted statements to the effect that Taylor, not Antonio, had fired the first shot and that Smith was killed by friendly fire. Notwithstanding the adverse testimony from the medical examiner and the prosecution's firearms expert, counsel for both defendants argued that the evidence was insufficient to show beyond a reasonable doubt who was responsible for the fatal shot *and* that Antonio had fired in self-defense after Taylor opened fire first. In the district court's view, neither line of argument was unreasonable in view of the evidence presented to the jury, credibility problems with the State's witnesses, and the State's burden of proof. The fact that the jury returned guilty verdicts did not by itself demonstrate that Hart's trial strategy and counsel was ineffective. *Id.*

II.

In support of his contention that the state courts unreasonably applied *Strickland*, Antonio renews the three arguments he made below. First, he contends that his trial counsel, Hart, did not adequately investigate his claim of self-defense before trial, in that he did not ask Antonio to articulate in any detail his version of the events leading up to the shooting. Second, he contends that Hart unreasonably advised him not to testify while at the same time failing to advise Antonio that his testimony was essential if the claim of self-defense was to have any chance of success. Third, Antonio argues that Hart did not prepare him to take the witness stand, a failure which he insists cannot be justified given how critical his own testimony was to the claim of self-defense.

In order to obtain a writ of habeas corpus, Antonio must show that the state court decision rejecting his claim of attorney ineffectiveness was contrary to, or involved an

unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, 28 U.S.C. § 2254(d)(1), or that the decision was based on an unreasonable determination of the facts, *id.* § 2254(d)(2). The relevant state court decision for purposes of our review is the last state court decision reaching the merits of Antonio's claim, which in this case is the decision of the Wisconsin Court of Appeals. *Weaver v. Nicholson*, 892 F.3d 878, 883 (7th Cir. 2018) (citing *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018)).

Antonio does not argue that the state appellate court's decision is contrary to clearly established federal law. The relevant precedent, of course, is *Strickland*. The Wisconsin Court of Appeals' decision cited *Strickland*, recounted the standard it articulates for a claim of ineffectiveness, and proceeded to apply that standard. 2019 WL 1147628, at *2 ¶8.

What Antonio does argue is that the Wisconsin Court of Appeals' decision represented an unreasonable application of federal law, *i.e.*, that although the court identified the correct legal rule, its decision reflects an unreasonable application of that rule to the facts of the case. § 2254(d)(1). To prevail on such a claim, it is not enough for Antonio to show that the state court's decision was incorrect, or to convince us that we would have granted him relief on his ineffectiveness claim were we entertaining the claim in the first instance. As a federal court addressing a request for a writ of habeas corpus, it is not our role to decide whether the state court's decision was right or wrong. Our role is to assess the reasonableness of the state court's application of federal law. Thus, in order to obtain habeas relief, a petitioner must show that the state court's decision was "objectively unreasonable, not merely wrong; even clear error will not suffice." *Woods v. Donald*, 575 U.S.

312, 316, 135 S. Ct. 1372, 1376 (2015) (per curiam) (quoting *White v. Woodall*, 572 U.S. 415, 419, 134 S. Ct. 1697, 1702 (2014)). By design, this is a difficult standard to meet. *Ibid.* A writ of habeas corpus may issue only if the state court's decision was so lacking in justification that it is beyond the realm of fair-minded disagreement—in other words, that no reasonable jurist could agree with it. *Harrington v. Richter*, 562 U.S. 86, 102–03, 131 S. Ct. 770, 786–87 (2011); *Wilber v. Hepp*, 16 F.4th 1232, 1248 (7th Cir. 2021) (collecting cases), *pet'n for cert. filed*, No. 21-1053 (U.S. Jan. 26, 2022).

Antonio also maintains that in one respect, which we describe below, the Wisconsin Court of Appeals' decision is based on a factual error. 28 U.S.C. § 2254(d)(2). In order to show that the state court's decision was based on an unreasonable determination of the facts, Antonio must show that the factual determination in question is unreasonable in light of the evidence presented in the state court proceeding. *Id.* We presume that the state court's factual determination is correct, and it is Antonio's burden to rebut that presumption by clear and convincing evidence. § 2254(e)(1); *Wood v. Allen*, 558 U.S. 290, 293, 130 S. Ct. 841, 845 (2010).

As we have said, *Strickland* is the controlling Supreme Court precedent here. *Strickland* requires Antonio to show both that his attorney's performance was deficient and that it was prejudicial. 466 U.S. at 687, 104 S. Ct. at 2064. To establish that it was deficient, Antonio must show that it fell below an objective standard of reasonableness. *Id.* at 687–88, 104 S. Ct. at 2064. The range of attorney performance that will meet the Sixth Amendment's guarantee of effective representation is wide. *Id.* at 689, 104 S. Ct. at 2065. "No particular set of detailed rules for counsel's conduct can satisfactorily take

account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688–89, 104 S. Ct. at 2065. Our analysis begins with a "strong presumption" that counsel in fact provided effective representation. *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S. Ct. 2574, 2586 (1986). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064. If Antonio is able to show that his counsel's performance was deficient, then he must establish prejudice by showing that there is a reasonable probability that but for his counsel's errors, the outcome of the proceeding would have been different. *Kimmelman*, 477 U.S. at 381, 106 S. Ct. at 2586; *Strickland*, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068.

Strickland sets forth a deferential standard for reviewing attorney effectiveness, and when we are reviewing a claim of attorney ineffectiveness in a habeas proceeding, the constraints that section 2254 imposes render our review "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S. Ct. 1411, 1420 (2009). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105, 131 S. Ct. at 788.

For purposes of context, we begin with a point that the Wisconsin Court of Appeals emphasized: Antonio made the decision not to testify on his own behalf. The facts as found by the circuit court and accepted by the Wisconsin appellate court established that Antonio's trial counsel, Hart, provided

him with an explanation as to the pros and cons of testifying, and properly left the decision to Antonio. Counsel warned Antonio that testifying could undermine his self-defense argument in that it would allow an exploration of his actions that indicated guilt, including the fact that he and his brother set fire to the vehicle they were in and then fled the State. He further cautioned Antonio that testifying would place in his hand the Hi-Point gun that was responsible for the fatal wound to Smith's head: Antonio had told his attorney that he possessed the Hi-Point, and Hart made clear that Antonio could not lie in his testimony. (Recall that although Smith had eight gunshot wounds, the fatal shot to the head was likely from a 9mm Hi-Point, according to Templin.) Those are all proper considerations in determining whether testifying would be beneficial, and it was not deficient performance to present them to Antonio. The trial court, in turn, conducted a *Weed* colloquy confirming that Antonio understood his right to testify and had made a voluntary and intelligent decision not to take the witness stand.

To be sure, the fact that Antonio decided not to testify does not foreclose his claim of ineffectiveness as to Hart. Antonio's claim, properly understood, is that his decision not to testify was tainted by Hart's purported failures of investigation, preparation, and advice vis-à-vis Antonio's prospective testimony—specifically, that Hart did not apprise himself of the details necessary to appropriately advise Antonio on whether or not to testify, that he failed to convey to Antonio that it was imperative Antonio testify in support of the self-defense claim, and that he did not prepare Antonio to take the witness stand should he decide to testify. *See United States v. Goodwin*, 770 F.2d 631, 637 (7th Cir. 1985) ("It is primarily the responsibility of the defendant's counsel … to advise the defendant on

whether or not to testify and to explain the tactical advantages and disadvantages of doing so."); *Rogers-Bey v. Lane*, 896 F.2d 279, 283 (7th Cir. 1990) (applying *Strickland* to petitioner's claim that his counsel improperly advised him not to testify), *modified in other respects by Willis v. Aiken*, 8 F.3d 556, 563-66 (7th Cir. 1993); *cf. Hartsfield v. Dorethy*, 949 F.3d 307, 312–13 (7th Cir.) (ineffectiveness claim is the appropriate vehicle for contention that counsel violated defendant's right to testify), *cert. denied*, 141 S. Ct. 270 (2020). We take these arguments in turn.

Antonio's first argument posits that Hart never delved into the specifics of his self-defense claim with him and therefore lacked sufficient knowledge of the basis for the claim to provide proper advice as to whether Antonio should testify. But there is no reason to believe that Hart lacked a proper understanding of Antonio's possible testimony, including the potential testimony as to the history of the shooting incidents involving Taylor and Smith and his brother Terry Shannon. As the district court noted, Antonio's counsel testified that he did not request specific details of Antonio, not that he did not discuss the case with his client. Indeed, Hart testified at the post-conviction hearing that in advance of the trial he did speak with Antonio generally about what he might say on the witness stand. Hart also discussed the case with Antonio's mother, and from that conversation he was aware of the prior incidents between Terry Shannon and Smith and Taylor. Myers also provided Hart with an affidavit from Shakyra Ellis, the mother of Terry Shannon's children, which described these prior incidents. Accordingly, the Wisconsin circuit court, following the evidentiary hearing, found that Antonio's attorney was aware of the history between Taylor, Smith, and Terry Shannon. There is no basis in the record to

conclude that Antonio's attorney lacked an adequate awareness of the potential testimony Antonio could provide.[2]

Based on his understanding of what Antonio would say in support of his self-defense claim, Hart made a strategic decision to recommend that his client not take the witness stand. In Hart's words, the prospect of Antonio's testimony was a "two-edged sword." R. 25-18 at 12. Certainly it would give Antonio the opportunity to recount what he knew about the prior altercations between his brother and Taylor and Smith (assuming no insurmountable hearsay problems) and to say that it was his intent on the night of the shooting to try and make peace between the antagonists. But Hart viewed it as a stretch to say that Antonio and his brother were pursuing peace when they drove up to Smith's car at 3:30 in the morning armed with a gun. In his view, the jury might infer from the prior confrontations and Antonio's possession of a firearm

[2] Hart testified that, apart from whatever his client might have already told the police, it was his practice not to elicit the specific details of a client's prospective testimony before trial, in order to avoid the ethical quandary that might arise should the client's story change over the course of the trial. Antonio contends that it was improper for Hart to assume that he might lie and to avoid eliciting the pertinent details of his prospective testimony for that reason. We need not pass judgment on Hart's rationale. What is relevant for our purposes is that although Hart did not query Antonio about the specifics of his self-defense claim, he did discuss Antonio's prospective testimony with him in general terms and was aware of the material details of the self-defense claim from Antonio's mother and other sources. The circuit court explicitly found as much, R. 25-18 at 156–58, and the appellate court adopted the circuit court's factual findings, 2019 WL 1147628, at *3 ¶ 12, which dispels Antonio's suggestion that the state courts never addressed whether Hart was properly apprised of what Antonio would say if called to testify.

that the intent of the Shannon brothers was anything but benign. That was a reasonable strategic assessment.

Nonetheless, as Antonio sees things, self-defense was the only viable defense available to him when the time came for him to decide whether to testify or not. The so-called "no-fault" defense, which postulated that the fatal shot was fired by one of the occupants of Smith's car, was in Antonio's view rendered defunct by Templin's testimony that the fatal shot to Smith likely came from a Hi-Point firearm, which happens to have been the make of gun that Antonio was carrying.[3] That left the claim of self-defense, which in Antonio's view stood a chance of success *only* if he took the witness stand to explain why he and his brother had sought out Taylor and Smith that night and that he fired at Smith's car only after the occupants opened fire first and it became necessary for him to defend himself by firing back.

We pause here to address a related factual point. The circuit court found that Hart discussed the pros and cons of testifying with Antonio before he decided not to testify. R. 25-18 at 160. The appellate court in turn noted this finding in the course of rejecting Antonio's claim of ineffective assistance. 2019 WL 1147628, at *3 ¶ 11. Antonio disputes that Hart did any such thing and asserts that the state court's finding was

[3] We accept the premise of Antonio's argument although, as the district court pointed out, there was other evidence at trial pointing to the occupants of Smith's car as the source of the fatal shot and both defense counsel did argue the "no fault" defense in closing. The trial judge, who also presided over Antonio's post-conviction hearing, found that the viability of this defense was "seriously diminished" in light of both Templin's testimony and that of the medical examiner, Dr. Biedrzycki. R. 25-18 at 158–59.

unreasonable in light of the evidence presented. We disagree. Hart testified that he discussed with Antonio why, in his opinion, Antonio should not testify. R. 25-18 at 13–14, 17, 21, 30–31, 43. As the appellate court noted, Hart explained to Antonio that once he took the witness stand, he could not limit his testimony to self-defense and he would be subject to cross-examination about his post-shooting behavior. 2019 WL 1147628, at *3 ¶ 11. The post-conviction court also credited Hart's testimony that he had discussed Antonio's prospective testimony with him in general terms. R. 25-18 at 158, 160. Antonio himself agreed that Hart had consulted with him regarding his testimony and that he understood it was up to him whether or not to take the stand. R. 25-18 at 127, 129-30. Thus, Antonio has not shown by clear and convincing evidence that the state court's factual finding on this point was unreasonable.

This brings us to the heart of Antonio's second argument, which assumes that his testimony could only have strengthened an otherwise weak self-defense case and that it was unreasonable for Hart to advise him not to testify. Hart's obligation, in Antonio's view, was to advise him that his testimony was critical to his claim of self-defense and that he therefore must take the stand if the defense was to stand any chance of success. But this argument fails to recognize that there was other testimony in the record supporting Antonio's self-defense claim; it also fails to recognize that his testimony had the potential to undermine a self-defense argument.

This is not a case in which, absent the defendant's own testimony, no other testimony in the record supported the claim of self-defense. At trial, three witnesses testified that the occupants of Smith's car initiated the shooting and that they

were seeking to kill Terry Shannon. Logan Tyler, a close and longtime friend of the Shannon brothers, testified that Scott, one of the passengers in Smith's car, admitted to him that they had been looking for Terry Shannon after the argument at IHOP and toward that end had first driven by the apartment where the mother of Terry's children was living. R. 25-15 at 61. Scott also admitted to Tyler that when Terry and Antonio later pulled alongside of Smith's car, he (Scott) had fired first from the backseat of Smith's car in a panic and that he accidentally hit Smith. R. 25-15 at 62–63. Fradario Brim testified that Miller, another passenger in Smith's car, told him that Taylor (also in Smith's car) fired first once the Shannons pulled up and that Taylor and Smith had a "beef" with Terry Shannon and wanted to kill him. R. 25-15 at 27–28. Dartavis Shelton said that in a separate conversation with Miller, Miller told him that Taylor admitted to opening fire as soon as the Shannons drove up and to firing the shot that killed Smith. R. 25-15 at 47–51.

There was also testimony in the record alluding to Antonio's desire to make peace between the parties. Taylor acknowledged in his testimony that Antonio previously had tried to smooth things over between his brother and Smith and Taylor. R. 25-11 at 78. And although Antonio himself never testified, a Racine police officer who knew Antonio as a family friend and had spoken to Antonio while he and his brother were on the run, did testify and recounted Antonio's statement to him that his intent on the night of the shooting was to try and "squash the beef" and "calm things down." R. 25-12 at 182–83.

Therefore, testimony in the record supported the self-defense theory even without Antonio's testimony. Hart in turn

emphasized all of this testimony in his closing argument to the jury. *E.g.*, R. 25-16 at 82–85, 88–90. In view of his prior experience with clients who had prevailed on self-defense claims without testifying, Hart could have reasonably believed that Antonio's testimony was not essential to the success of his defense.

At the same time, there were clear and obvious risks associated with Antonio's own testimony. If Antonio testified, then his testimony would have definitively tied him to the Hi-Point weapon that Templin testified was the likely source of the fatal shot to Smith. Recall that police had not recovered any of the weapons used in the shooting, so unless and until Antonio testified and identified the weapon that he was carrying, there was no testimony tying him to that particular gun. (We can readily assume that the prosecution would have queried Antonio on this point: it argued in closing that because the Hi-Point shells were found outside of Smith's car, Antonio was the individual most likely to have fired the Hi-Point. R. 25-16 at 126.) Antonio's testimony also would have opened the door to questioning as to his criminal history and his actions following the shooting, including the attempt to destroy evidence by setting fire to the vehicle he and his brother were driving and their flight from the State. It may be true that Antonio's criminal history was no worse than that of other key witnesses, and that there was already testimony in the record that he and his brother had set fire to their car and fled Racine after the shooting. But a prosecutor's ability to cross-examine Antonio about these points could only have magnified their significance in the jurors' minds. Antonio also argues that he would have testified that he was trying to smooth over the disagreement between Terry Shannon and Scott, but again, cross-examination by the prosecutor would

undoubtedly have highlighted the circumstances that cast doubt on Antonio's portrayal of himself as a peacemaker.

Third and finally, Antonio contends that Hart was ineffective for failing to prepare him to testify. This argument again assumes that his testimony was critical to the defense and that it was necessarily incompetent not to prepare him for the witness stand. But Hart testified that he would have discussed Antonio's testimony with him if and when Antonio made the decision to testify, R. 25-18 at 28, and the postconviction court credited that testimony. R. 25-18 at 160. As we have discussed, Hart was also aware of the factual basis for the self- defense claim, he discussed the pros and cons of testifying with Antonio, there was other testimony in the trial record supporting a self-defense claim, and there were real risks associated with Antonio testifying. The record indicates that Antonio had information he needed to make an intelligent decision and that he decided not to testify, and there is no dispute that Antonio confirmed for the record his decision not to testify after a proper colloquy with the trial judge. Given that decision, Hart cannot be faulted for failing to prepare Antonio to take the stand.

The Wisconsin appellate court applied *Strickland* to the facts presented and reached a decision that was consonant with *Strickland*'s framework for evaluating attorney effectiveness. Having concluded that the appellate court's finding that Hart provided effective assistance of counsel to Antonio was not unreasonable, we need not separately address whether any purported ineffectiveness on Hart's part prejudiced Antonio.

Antonio pursues a secondary claim that his postconviction counsel, Rosen, was ineffective for failing to argue on direct

appeal that Antonio's trial counsel, Hart, was ineffective. Because the evidence did not show that Hart was ineffective, postconviction counsel was not ineffective in failing to pursue this claim on direct appeal of Antonio's conviction. Appellate counsel is not obliged to make a losing argument. *Whitehead v. Cowan*, 263 F.3d 708, 731 (7th Cir. 2001). For all of the reasons we have discussed, the issue of ineffective assistance was not clearly stronger than the evidentiary issue that appellate counsel did raise on appeal. And in any case, given the state courts' determination that Hart was not ineffective, and our own finding that this determination was not an unreasonable application of *Strickland*, Antonio was not prejudiced by Rosen's decision not to pursue the ineffectiveness claim.

III.

Antonio has not shown that Wisconsin Court of Appeals' decision that his trial counsel provided him with effective assistance represents an unreasonable application of *Strickland* or was based on an unreasonable determination of the facts. Nor has he shown that the state court's decision that his postconviction counsel was not ineffective for failing to pursue the claim on direct appeal was unreasonable. The district court properly denied Antonio's petition for a writ of habeas corpus.

AFFIRMED

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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FINAL JUDGMENT

March 4, 2022

Before
KENNETH F. RIPPLE, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*
MICHAEL Y. SCUDDER, *Circuit Judge*

No. 20-3256	ANTONIO D. SHANNON, Petitioner - Appellant v. RANDALL HEPP, Respondent - Appellee
Originating Case Information:	
District Court No: 2:15-cv-00604-WCG Eastern District of Wisconsin District Judge William C. Griesbach	

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

form name: **c7_FinalJudgment** (form ID: **132**)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ANTONIO D. SHANNON,

Petitioner,

v. Case No. 15-C-604

BRIAN FOSTER,

Respondent.

DECISION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254

On December 18, 2009, following a seven-day trial, a Racine County jury found Antonio Shannon, along with his brother Terry, guilty of one count of first-degree intentional homicide, while armed, and one count of discharging a firearm from a vehicle as party to a crime, in violation of Wis. Stat. §§ 940.01(1)(a) and 941.20(3)(a), respectively. (Since they have the same last name, Antonio and Terry will generally be referred to by their first names.) Antonio was sentenced to life in prison plus five years, without the possibility for release to extended supervision and is now serving his sentence at Waupun Correctional Institution. After unsuccessfully appealing his conviction in state court, Antonio filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, in which he claims that his conviction resulted from ineffective assistance of both his trial and appellate counsel in violation of his rights under the Sixth and Fourteenth Amendments.

BACKGROUND

At around 3:30 a.m. on May 7, 2006, Terry and Antonio Shannon drove up to a car parked in the 600 block of College Avenue in Racine. Terry was driving, and Antonio was in the passenger seat. Four men were inside the parked car. Bennie Smith was in the driver's seat,

Courtney Taylor was in the front passenger seat, and Calvin Miller and Kinte Scott were in the backseat. Almost simultaneously with the Shannon car pulling up to the parked car, a gun battle erupted. All four people in the parked car were hit, and Smith died as a result of a gunshot wound to the head.

About an hour earlier, Terry had gotten into an argument with Smith at a restaurant. Antonio was not with Terry at the time, but Taylor, Miller and Scott were with Smith. Scott and Taylor testified that they did not know what the argument between Smith and Terry was about. They said that Terry was acting like he had a weapon. Taylor said that Smith wanted to fight Terry, but that Terry declined. Scott testified that Smith told Terry, "Why don't you be a man and put your gun down . . . and we get rid of all this past drama, whatever." Dkt. No. 25-10 at 178:03–05. Shortly thereafter, Smith, Taylor, Miller, and Scott left the restaurant without further incident.

After the four left the restaurant, they drove to Taylor's apartment on College Avenue. They had previously arranged to meet a couple of women there. Smith pulled the car over and parked on the street in front of Taylor's apartment. The two women had already arrived and were parked on the other side of the street. Smith rolled down his window and was talking with the two women when the Shannons arrived. It was at that point that the shooting began. Taylor noticed the car coming up from behind them and recognized Terry as the driver and Antonio sitting in the front passenger seat. Taylor testified: "I knew it was gonna be something. It's late at night, this is my house, like ain't nobody coming to talk or do nothing. Like we tried talking before." Dkt. No. 25-11 at 43:23–44:01. Taylor testified that the car stopped next to theirs and Antonio got out and began firing. Taylor returned fire with his own gun, a 9-millimeter Ruger. Antonio then got back into the car, and it sped off.

Police determined that twenty-six shots had been fired from at least three different guns from both inside and outside of the car Smith was driving. The guns, none of which were recovered, included a Sturm Ruger 9-millimeter, High Point 9-millimeter, and a third gun that fired a .40-caliber Smith and Wesson cartridge that was recovered from the back seat of the Smith vehicle. Each of the occupants of Smith's car was struck with bullets or fragments. Smith, the presumed target, had eight gunshot wounds, including a fatal shot to the head. The bullets that killed Smith likely came from a 9-millimeter High Point. Nine High Point casings were found outside of the car. After fleeing the scene apparently unscathed, the Shannons were observed setting the car they were driving on fire. They then fled to Chicago where they were later arrested.

The Shannons initially pleaded guilty to second-degree reckless homicide. They withdrew their pleas before sentencing, however, and proceeded to trial. Antonio was represented at trial by Attorney Richard Hart, and Terry was represented by Attorney John Birdsall. At trial, the Shannons presented alternative defenses: that the shot that killed Smith came from inside his car and thus, they did not cause his death, and alternatively, that someone inside Smith's car fired first and they acted in self-defense. The defense introduced evidence from three witnesses who testified as to statements they said they had heard Taylor, Martin, and Scott make at different times while they were in custody with them. Fradario Brim and Datarvus Shelton testified that Martin told them that Taylor fired first. Brim also testified that Martin told him that Taylor and Smith wanted to kill Terry, and Shelton testified that Martin thought Taylor had fired the shot that killed Smith. Witness Logan Tyler testified that Scott told him that he had fired from the back seat and accidentally shot Smith. Finally, defense expert Greg Martin opined that Smith was killed by a shot from someone in his own vehicle. On the advice of their attorneys, the defendants waived their right to testify on their own behalf. The jury convicted both Terry and Antonio of first-degree

intentional homicide and discharging a firearm from a vehicle as party to a crime, in violation of Wis. Stat. §§ 940.01(1)(a) and 941.20(3)(a).

Both appealed. Antonio, then represented by Attorney Mark Rosen, raised only one issue—whether the trial court erred in excluding as hearsay evidence a statement that Smith had said, "I'm gonna fuck up Terry." Rosen argued that the statement was admissible as a statement of Smith's then-existing state of mind and that it was relevant because it bolstered the claim of self-defense. The court of appeals decided that exclusion of the statement was error, but the error was harmless because it would not have changed the jury's verdict and denied the appeal. The Wisconsin Supreme Court denied Antonio's petition for review on February 19, 2014.

On May 19, 2015, Antonio filed his petition for relief under 28 U.S.C. § 2254 in this court. He immediately moved to stay the case so that he could exhaust his state court remedies on his claims of ineffectiveness of counsel. Antonio then filed a post-conviction motion in the trial court under Wis. Stat. § 974.06, in which he alleged that Hart was ineffective in failing to properly investigate his self-defense claim, in failing to prepare Shannon to testify at trial, and in advising him not to testify. Antonio also claimed that Rosen was ineffective in raising only a single frivolous issue on appeal rather than the stronger issues of his trial attorney's ineffectiveness. At the conclusion of an evidentiary hearing on the motion, the court concluded that Antonio had failed to establish that his attorneys provided ineffective assistance and denied his motion.

Antonio again appealed to the Wisconsin Court of Appeals. That court affirmed the circuit court's order denying his motion for post-conviction relief, and the Wisconsin Supreme Court denied review on June 11, 2019.

Antonio moved to lift the stay of proceedings in this court on July 25, 2019, and sought leave to file an amended petition to fully set forth his now exhausted claims. The case was

reassigned to the undersigned on July 26, 2019, and on July 30, 2019, the court entered an order lifting the stay and allowing 45 days in which to amend. Antonio filed his amended petition on September 11, 2019, and on September 25, 2019, the court entered an order summarily dismissing the case under Rule 4 of the Rules Governing Section 2254 Cases. The court vacated its summary order for dismissal on reconsideration, however, and ordered Respondent to file an answer. The case is now fully briefed. Having considered the entire record, the court now concludes that the petition should be denied.

ANALYSIS

This petition is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254. Under AEDPA, a federal court may grant habeas relief only when a state court's decision on the merits was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" decisions from the Supreme Court, or was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d); *see also Woods v. Donald*, 575 U.S. 312, 315–16 (2015). A state court decision is "contrary to . . . clearly established Federal law" if the court did not apply the proper legal rule, or, in applying the proper legal rule, reached the opposite result as the Supreme Court on "materially indistinguishable" facts. *Brown v. Payton*, 544 U.S. 133, 141 (2005). A state court decision is an "unreasonable application of . . . clearly established federal law" when the court applies Supreme Court precedent in "an objectively unreasonable manner." *Id.* In addition, the determination of a factual issue made by a state court is presumed to be correct unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. This is, and was meant to be, an "intentionally" difficult standard to meet. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so

lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woods*, 575 U.S. at 316 (quoting *Harrington*, 562 U.S. at 103).

Ineffective assistance of counsel claims are evaluated under the standard established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that the standard involves two components. First, the defendant must show that counsel's performance was deficient, that it "fell below an objective standard of reasonableness." *Id*. at 687–88. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Second, "the defendant must show that the deficient performance prejudiced the defense." *Id.* "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

Strickland made clear that judicial scrutiny of counsel's performance is to be "highly deferential" because of the complexity of an attorney's task, the variety of ways of accomplishing it, and to avoid the distorting effect of hindsight:

> It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. There are countless

> ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id. at 689 (internal citations and quotations omitted). As for the prejudice prong, "[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*. at 694.

Superimposing AEDPA's deferential standard for state convictions onto the deferential standard of *Strickland* creates a high bar that is difficult to overcome. The question is not whether the federal court thinks counsel's performance was ineffective and the state court erred. "Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)." *Harrington*, 562 U.S. at 105. When relief is sought under § 2254(d) on a claim of ineffective assistance of counsel, the question concerning counsel's performance is not whether counsel's actions were reasonable. "The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." *Id.* Applying that standard here, the court concludes Antonio's claims must fail.

Antonio argues that Hart's failure to investigate his self-defense claim was unreasonable. More specifically, Antonio argues that Hart's failure to elicit details from him about the event itself and the incidents leading up to event, and Hart's associated failure to follow up on suggestions from Antonio and his mother to interview witnesses to the previous incidents that would have bolstered his self-defense claim constituted deficient performance. Finally, Antonio contends that Hart's recommendation that he not testify made no sense in light of the fact that by the end of the trial, self-defense was his only viable defense. Antonio claims that Hart should have warned him that without his testimony he could not prevail on such a defense.

Hart testified in the post-conviction hearing that it is not his practice to ask defendants in criminal cases to relate specific details of what happened. Instead, to avoid the risk of their disclosing facts that might force him to withdraw or avoid placing them on the stand, he asks them what they have told police. Post-Conv. Hrg. Tr., Dkt. No. 25-18 at 9, 17. But he did not say he did not discuss the case with his client. In fact, Antonio told him about the prior shootings. *Id.* at 13. The hearing on Antonio's first post-conviction motion occurred more than five years after the trial, so understandably, Hart could not recall each conversation in detail. *Id.*

Hart also testified that his investigation included speaking to Antonio's mother, who told him about the shootings a couple of weeks prior to the night Smith was killed. Hart said he decided to "concentrate on eyewitnesses to the shooting" because he felt that the other events could be more damaging than helpful to Antonio since they might undermine the argument that he and his brother were on a "peace mission" and might be viewed as strengthening his motive for the shooting. *Id*. at 10–13. As Hart described it, the past shootings could be a "two edge sword." *Id*. at 12, 18.

And with respect to his advice that Antonio not testify, Hart explained that he was concerned that if he testified, the State would be able to introduce Antonio's criminal record, though Hart acknowledged that Antonio had fewer convictions than several of the State's witnesses. He was also concerned about Antonio's ability to reasonably explain his behavior, including fleeing the state, burning the car they were in, and how it might affect his credibility. *Id.* at 28–29. Hart noted that he had successfully asserted a self-defense claim in past cases in which his client did not testify and believed the record supported the defense here. *Id.* 30–31. The trial court obviously agreed since it submitted an instruction on the defense. Dkt. No. 25-16 at 137.

Based upon this testimony and the entire record in the case, the trial court concluded that Hart's representation was not deficient. The trial court found that Hart knew the history of the prior shootings and concluded that his reasons for not going into them, given the dangers he cited, was reasonable. The court likewise concluded that Hart continued to discuss the case and possible defenses with his client on an ongoing basis throughout the trial. He also consulted with Birdsall, who was representing Antonio's brother. Although the defense that the fatal shot had come from inside the car was significantly undermined in the State's case, it was not eliminated. Self-defense was more viable, and Hart had successfully asserted that defense even when his client did not testify. Given the risks of losing credibility if Antonio took the stand and testified on his own behalf, the trial court concluded that Hart's advice that Antonio not testify was also reasonable. Had Antonio nevertheless decided to testify, the trial court found that Hart would have prepared him. Applying *Strickland*'s deferential standard and based upon the entire record, the court concluded that Hart's performance was objectively reasonable and it was unnecessary to even address the question of prejudice. Antonio's motion was therefore denied. Dkt. No. 25-18 at 156–62.

The Wisconsin Court of Appeals affirmed. It accepted the trial court's factual findings and credibility determinations and concluded that "trial counsel's performance was objectively reasonable." Dkt. No. 25-5 ¶ 12. The appellate court also noted that Antonio had freely and voluntarily waived his right to testify on the record after a full colloquy with the trial judge. The court declined to second-guess trial counsel's rational conduct by hindsight. And since trial counsel did not perform deficiently, the court concluded that post-conviction counsel's failure to raise the claim did not constitute ineffective assistance by him. *Id.*

The state courts having reasonably and explicitly applied *Strickland* in the analysis, I conclude that Antonio is not entitled to relief under § 2254. Hart's concern, that going into the previous shootings, assuming the trial court would have allowed such evidence, created a serious risk of harming Antonio's defense and undermining the claim that Antonio and his brother did not go to ambush Smith and his friends, was not unreasonable. And contrary to his current attorney's contention, Antonio did not have to testify in order to successfully assert self-defense. The trial judge found the evidence sufficient to create a jury issue and so instructed the jury. Hart's advice that Antonio forego testifying on his own behalf was not unreasonable.

In fact, the evidence was such as to allow both defenses. The evidence clearly showed shots being fired from both the inside and the outside of the Smith vehicle. A defense expert testified that the fatal shots had come from inside the vehicle, and in addition, several witnesses recounted alleged statements by those inside the Smith car to the effect that Taylor had fired first and Smith had been killed by friendly fire. Notwithstanding the forensic evidence concerning ballistics and the injuries to Smith, counsel for both brothers argued the evidence was insufficient to establish beyond a reasonable doubt where the fatal shot had come from and that, in any event, Antonio shot in self-defense after Taylor opened fire. Neither argument was unreasonable in light of the evidence presented, the serious credibility problems of several of the State's key witnesses, and the high burden of proof resting with the State. That they were not successful does not demonstrate ineffective assistance of counsel.

CONCLUSION

For the reasons explained above, Antonio Shannon is not entitled to habeas relief on any of his claims. His petition for writ of habeas corpus is therefore **DENIED**, and the Clerk is directed to enter judgment dismissing the case. A certificate of appealability will be issued on the claims

of ineffective assistance of trial and appellate counsel. Although I conclude that Antonio is not entitled to habeas relief on these issues, it is possible that reasonable jurists would believe that Antonio has made a substantial showing of the denial of a constitutional right.

Antonio is advised that the judgment entered by the Clerk is final. A dissatisfied party may appeal this court's decision to the Court of Appeals for the Seventh Circuit by filing in this court a notice of appeal within 30 days of the entry of judgment. *See* Fed. R. App. P. 3, 4.

SO ORDERED at Green Bay, Wisconsin this 23rd day of October, 2020.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

United States District Court

EASTERN DISTRICT OF WISCONSIN

ANTONIO D. SHANNON,

Petitioner,

v.

JUDGMENT IN A CIVIL CASE
Case No. 15-C-604

BRIAN FOSTER,

Respondent.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict

☒ **Decision by Court.** This action came before the Court for consideration.

IT IS HEREBY ORDERED AND ADJUDGED that the petition for writ of habeas corpus is DENIED. A certificate of appealability will be issued on the claims of ineffective assistance of trial and appellate counsel.

Approved: s/ William C. Griesbach
WILLIAM C. GRIESBACH
United States District Judge

Dated: October 23, 2020

GINA M. COLLETTI
Clerk of Court

s/ Lori Hanson
(By) Deputy Clerk

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June 11, 2019

To:

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You are hereby notified that the Court has entered the following order:

No. 2016AP2055 State v. Shannon L.C.#2006CF588

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Antonio D. Shannon, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court

COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2019

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2016AP2055 Cir. Ct. No. 2006CF588

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO D. SHANNON,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Per curiam opinions 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).

¶1 PER CURIAM. Antonio D. Shannon appeals from orders denying his WIS. STAT. § 974.06 (2017-18)[1] original and supplemental postconviction motions. He argues that he is entitled to a new trial (1) because his postconviction counsel provided ineffective assistance by failing to challenge the effectiveness of trial counsel's performance, (2) based on newly discovered evidence, and (3) in the interest of justice. For the reasons that follow, we affirm.

¶2 Bennie Smith, K.S., C.M., and Smith's cousin, C.T., were together in a parked car, when Shannon pulled up in a car driven by his brother, Terry. A gun battle erupted almost immediately. Smith was killed and the passengers in his car were injured. Unscathed, the Shannon brothers jetted away and a short time later were observed torching their vehicle. Following a seven-day joint jury trial, both were found guilty of first-degree intentional homicide and discharging a firearm from a vehicle. Neither brother testified at trial.

¶3 On direct appeal, Shannon, by counsel, argued that the circuit court erroneously excluded as hearsay testimony offered by a third party that the victim said he was "gonna fuck up Terry." We affirmed Shannon's convictions, concluding that although exclusion of the statement was error, it was harmless because the jury heard testimony which supported an inference that Smith and his passengers "were looking for Terry and initiated the shootout when he drove up," thereby functionally conveying the same theory of self-defense. ***State v. Shannon***, No. 2013AP130-CR, unpublished slip op. at ¶10 (WI App Nov. 13, 2013). We observed that in addition to evidence of Smith's aggression, the jury

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

heard testimony suggesting that K.S. or C.T. killed Smith. *Id.*, ¶13. The jury "either did not believe some, or all, of that testimony or found it less compelling than evidence demonstrating that the Shannons literally came gunning for Bennie and his companions." *Id.* The latter evidence included the consistent testimony of five witnesses who said that the scene before the shooting was "relaxed and friendly," that Smith did not appear "jumpy or nervous," and that the shooting began when the Shannons' car pulled up. *Id.*, ¶13.

¶4 Shannon filed a postconviction motion under WIS. STAT. § 974.06 alleging that trial counsel provided ineffective assistance by failing to (1) adequately investigate Shannon's self-defense claim, (2) prepare him to testify at trial, and (3) properly advise him whether to testify. The motion further alleged that postconviction counsel was ineffective for failing to raise this claim as part of Shannon's direct appeal. Following an evidentiary hearing, the circuit court determined that neither trial nor postconviction counsel provided ineffective assistance, and it denied Shannon's § 974.06 motion.

¶5 Shannon appealed. Upon his motion, we remanded the case to the circuit court so that Shannon could file a supplemental postconviction motion alleging newly discovered evidence. The circuit court heard and denied Shannon's supplemental claim. Shannon appeals the denial of both postconviction motions.

Shannon is not entitled to a new trial based on the ineffective assistance of counsel.

¶6 At trial and before the close of evidence, counsel informed the circuit court that Shannon would not testify. The circuit court conducted an on-the-record colloquy with Shannon about his right to testify. Shannon told the

court that he understood he had a constitutional right to testify or not to testify and knew that the decision was "entirely for [him] to make." Shannon also confirmed that no one had made any threats or promises to influence his decision and that he had "the opportunity to discuss [his] decision on whether to testify or not with [trial counsel]." Shannon told the court he had decided "Not to testify."

¶7 Shannon acknowledges that he waived his right to testify in a proper colloquy on the record at trial, thus satisfying the requirements of ***State v. Weed***, 2003 WI 85, ¶¶40-43, 263 Wis. 2d 434, 666 N.W.2d 485 (circuit courts must engage criminal defendants who decide not to testify in a colloquy to determine whether their waiver of the fundamental right to testify at trial is voluntary and intelligent). However, he maintains that trial counsel provided ineffective assistance by advising him not to testify at trial.

¶8 Absent a sufficient reason, a defendant is procedurally barred from raising claims in a WIS. STAT. § 974.06 postconviction motion that could have been raised in a prior postconviction motion or appeal. *See* § 974.06(4); ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-86, 517 N.W.2d 157 (1994). Here, Shannon asserts as his sufficient reason postconviction counsel's ineffectiveness. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668. A defendant asserting the ineffective assistance of counsel must demonstrate that counsel performed deficiently and that the deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. To prove prejudice, the defendant must demonstrate that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. We apply a mixed standard of review. ***State v. Mayo***, 2007

WI 78, ¶32, 301 Wis. 2d 642, 734 N.W.2d 115. The circuit court's factual findings are upheld unless clearly erroneous. *Id.* "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." *Id.*

¶9 The circuit court's on-the-record *Weed* colloquy defeats Shannon's ineffective assistance of counsel claim, especially when coupled with evidence adduced at the postconviction hearing. Based on testimony at the *Machner*[2] hearing, the circuit court found that trial counsel went over the pros and cons of whether or not to testify with Shannon, and that Shannon made the ultimate decision to waive his right to testify: "[Trial counsel] gave that opinion, but again, [trial counsel] always made it clear that the ultimate decision was Mr. Shannon's." Indeed, Shannon concedes that he understood at the time of trial that the decision of whether or not to testify was his alone to make. Downplaying the significance of the court's on-the-record colloquy, Shannon now suggests that trial counsel's advice somehow improperly tainted his decision not to testify. We reject Shannon's attempts to avoid responsibility for a difficult but personal decision by laying blame at trial counsel's feet.

¶10 Nor do Shannon's complaints about the adequacy of the information provided by trial counsel demonstrate deficient performance. Trial counsel's *Machner* hearing testimony included that he pursued as alternative defenses that Shannon was not the cause of Smith's shooting death or that Shannon was acting in self-defense. He testified that he worked with Terry Shannon's trial counsel on strategy and met with Shannon multiple times both before and during the seven-

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

day trial to develop strategy based on the evidence that came in. Trial counsel testified that whether the defendant testifies is "always an issue" when raising self-defense, and that "[y]ou have to look at everything and make a judgment call, and all that goes into what I talk to the client about." Trial counsel testified that he had "argued self-defense before where I didn't put clients on [the stand] and I have been successful at it."

¶11 Based on the record and the evidence presented at the ***Machner*** hearing, the circuit court found that trial counsel discussed the pros and cons of testifying with Shannon and explained to Shannon "that he could not put him on the stand just to testify about self-defense" and that "there were a number of issues that Mr. Shannon would have been questioned on, including the fact that he fled the State with his brother, including the fact that they burned out the car that they were in when the shooting took place, all of which made him look guilty." The court found that trial counsel "told him to keep thinking about it" so he could "make the decision at the last minute depending upon how the evidence went in," and that if Shannon had decided to testify, counsel "would then have prepared Mr. Shannon to testify on his self-defense theory."

¶12 We accept the circuit court's factual findings and credibility determinations and conclude that trial counsel's performance was objectively reasonable. We will not by hindsight second-guess trial counsel's rational conduct. Trial counsel did not perform deficiently. As such, postconviction counsel's failure to raise this claim does not constitute ineffective assistance of postconviction counsel. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

Shannon is not entitled to a new trial based on newly discovered evidence.

¶13 Shannon's supplemental WIS. STAT. § 974.06 postconviction motion alleged the existence of newly discovered evidence. At an evidentiary hearing on the motion, an inmate named Duanne Townsend testified that he met C.T. in prison around 2008. Townsend was serving a life sentence. On one occasion, he was sitting with C.T. and two other inmates, Eugene Sills and Darquice Streeter, when C.T. described a shooting involving "the Shannon brothers." According to Townsend, C.T. stated that the shooting had initiated not from the Shannons' car, but from the car C.T. was in with his cousin Smith. Townsend also stated that C.T. said that he had shot Smith in the head "by accident," and called himself "bogus" because he let "Shannon and his brother do time for something that he actually did." Townsend said C.T. "started laughing." At the time, Townsend did not know the Shannons, but he met Terry Shannon in 2012 and realized he was one of the "Shannon brothers" from C.T.'s story. However, Townsend did not tell anyone else about what C.T. said until he contacted Shannon's attorney in the summer of 2017.

¶14 Sills testified that he knew both C.T. and Streeter, but that he did not know or recognize Townsend, and that he did not know anything about Smith's homicide. C.T. testified that he knew and was housed with Townsend, but that they never discussed Smith's shooting because it was "a personal matter," and because C.T. did not "even know the guy like that": "[Townsend] was in a different gang, so we didn't communicate as much." C.T. also testified that he knew Streeter and Sills from prison but that he would not have discussed Smith's death with them. C.T. also testified that he would not "have discussed it in a joking manner" because it was his cousin and "it's not a laughing or joking

matter." C.T. definitively stated that he knew "for sure that I never discussed this matter with" Townsend.

¶15 The circuit court denied Shannon's supplemental postconviction motion. The court agreed that Townsend's affidavit testimony was new evidence and that it was material, but suggested it was cumulative, noting that the jury heard similar evidence at trial, including that the fatal shot came from inside Smith's car. The circuit court determined that the jury "either did not believe some or all of the testimony or found it less compelling than evidence demonstrating that the Shannons literally came gunning for [Smith] and his companions. So this alleged conversation in combination with all of the other testimony does not justify a new trial. It does not create a reasonable probability of a different result." The circuit court also addressed Townsend's statement in light of the evidence presented at trial, noting that there was testimony from numerous impartial witnesses implicating Shannon in the shooting along with evidence evincing the Shannons' consciousness of guilt. The circuit court concluded that "based on all that testimony, this one alleged conversation, I repeat, does not create a reasonable probability of a different result, and the motion is denied."

¶16 A defendant seeking a new trial based on newly discovered evidence must prove by clear and convincing evidence all of the following: (1) the evidence was discovered after trial, (2) "the defendant was not negligent in seeking the evidence, (3) the evidence is material to an issue in the case," and (4) the evidence is not merely cumulative to the evidence that was introduced at trial. ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60. If all four factors are proven, "then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." ***State v. Plude***, 2008 WI

58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. A trial court's decision whether to grant or deny a newly-discovered evidence motion is reviewed for an erroneous exercise of discretion. ***State v. Edmunds***, 2008 WI App 33, ¶14, 308 Wis. 2d 374, 746 N.W.2d 590.

¶17 Shannon's newly discovered evidence claim fails. Even if Townsend's testimony is new and material, Shannon has failed to show that it is not merely cumulative, given that the jury heard and did not believe evidence that someone else shot Smith. *See* ***Avery***, 345 Wis. 2d 407, ¶25. In fact, the jury specifically heard testimony that C.M. said that C.T. killed Smith.

¶18 Even if we assume that Townsend's statement satisfies the four-pronged test for newly discovery evidence, there is no reasonable possibility its admission at trial would have led to Shannon's acquittal. Townsend's proffered testimony is of questionable value, given that Townsend did not witness the shooting; that he is serving a life sentence; that Sills, who was also allegedly present, does not remember C.T.'s ever discussing Smith's shooting, let alone admitting that he killed Smith; and that C.T. vehemently denies that he would have ever talked to Townsend about Smith's death. Additionally, Townsend's statement would not have sufficiently impacted the plethora of other evidence presented at trial supporting the jury's guilty verdict. *See* ***Plude***, 310 Wis. 2d 28, ¶33. When viewed in light of the evidence presented at trial, we agree with the circuit court that this "one alleged conversation" between Townsend and C.T. while in prison "does not create a reasonable probability of a different result."

Shannon is not entitled to a new trial in the interest of justice.

¶19 Shannon argues that he is entitled to a new trial in the interest of justice "[r]egardless of whether prior counsel are deemed ineffective" because "the absence of [Shannon's] testimony" along with "C.T.'s corroborating admission to Townsend that those in Smith's car shot first deprived [Shannon] of the evidence necessary to establish the self-defense that was his only viable defense to the charges." Under WIS. STAT. § 752.35, this court has authority to grant a new trial in the interest of justice if it appears that (1) the real controversy has not been fully tried or (2) it is probable that justice has for any reason miscarried. Reversal in the interest of justice is exercised infrequently and reluctantly, *see* ***Avery***, 345 Wis. 2d 407, ¶38, and only "in exceptional cases," *see* ***State v. Kucharski***, 2015 WI 64, ¶23, 363 Wis. 2d 658, 866 N.W.2d 697.

¶20 Shannon argues that the real controversy was not fully tried. He relies on ***State v. Cuyler***, 110 Wis. 2d 133, 327 N.W.2d 662 (1983), where the Wisconsin Supreme Court granted a new trial in the interest of justice because two police officers were excluded from testifying about the defendant's character for truthfulness. We agree with the State that Shannon's reliance is misplaced. First, the testimony at issue in the instant case is not the credible, disinterested testimony of third parties regarding the defendant's character, but instead is Shannon's own self-interested testimony about the events surrounding the shooting and the third-party testimony of Townsend. Second, Shannon's testimony was not "excluded." Rather, he waived his constitutional right to testify after a colloquy with the circuit court. A defendant may not waive the right to testify in order to avoid the pitfalls of cross-examination regarding detrimental facts, and then, after being convicted, argue that his or her valid waiver provides a basis to receive a new trial. We reject

Shannon's attempt to make an end-run around the *Strickland* standard by framing his argument as an interest-of-justice claim.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY

STATE OF WISCONSIN, Case No.

Plaintiff, 06-CF-588

-vs-

ANTONIO SHANNON,

Defendant.

TRANSCRIPT OF POST CONVICITON HEARING

Record made in the above-entitled matter before the HONORABLE FAYE M. FLANCHER Circuit Court Branch 8, on the 15th day of July, 2016.

A P P E A R A N C E S

W. RICHARD CHIAPETE, Esq., District Attorney, Racine County, appeared on behalf of the State of Wisconsin.

ROBERT R. HENAK, Esq., Attorney at Law, Milwaukee, Wisconsin, appeared on behalf of the Defendant, who appeared in person, in custody.

Jane Slaght
Official Court Reporter
(262)636-3762

we were just meeting our obligations on that. So I agree this is not a close case. It clearly is an issue or an example of one of the clearest that I have seen where the lawyer simply acted unreasonably and it had a significant impact on the outcome of the case and, therefore, I ask that the Court grant a new trial based on that.

THE COURT: Thank you. The case, the landmark case regarding ineffective assistance of counsel is Strickland v. Washington, 104 S. Ct. 2052, a 1984 United States Supreme Court case.

The issue is whether Mr. Hart's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced just results.

As indicated, there's a two-prong test, both deficient performance and prejudice. It is the defendant's burden to show that counsel's representation fell below the objective standard of reasonableness and that there was prejudice so as to deprive the defendant of a fair trial with a reliable result.

The defendant must show affirmatively by a reasonable probability that but for Mr. Hart's unprofessional errors, the result of the proceeding

would have been different.

I've heard the testimony today of Mr. Hart, Mr. Rosen, and we'll get to Mr. Rosen in just a minute; he was appellate counsel. Mary Myers, Mr. Shannon's mother; Shakyra Ellis, the mother of Terry Shannon's children; Tiffany Gray, the mother of Antonio Shannon's children; Mr. John Shannon, Antonio Shannon's father, and Antonio Shannon.

Specifically with respect to Mr. Hart's testimony he testified that he did indeed conduct an investigation, spoke on numerous occasions to Mary Myers.

He testified that Ms. Myers believed her children were not guilty and did present things from her perspective. She had very specific views on how the case should proceed and did discuss with Mr. Hart prior shootings involving Courtney Taylor and Bennie Smith.

While one of the memos may have indicated that Antonio Shannon was the target of the prior shootings with Courtney Taylor and Bennie Smith, clearly Terry Shannon was the target according to the testimony today. But it's clear to me that Mr. Hart knew of this history and in fact talked about it later on, and I will get to that in a minute.

These handwritten memos by Mr. Hart, Exhibits 3 and 4, also Exhibit 1 which is a handwritten memo, in my opinion just show how Mr. Hart documented his files.

In no way do I believe that these memos were ever intended to document word-for-word a history of what was going on on any particular day during trial or during as the case proceeded, but in fact were reminders to him of the issues as they arose to trigger his memory on other things.

With respect to the testimony that we heard today from Ms. Myers, Ms. Ellis, Ms. Gray and Mr. Shannon for that matter with respect to these prior shootings, again Mr. Hart was aware of it and it was clearly based on his testimony part of his strategy to keep that out of the record as much as possible.

His view was that he would be hard-pressed to argue that Mr. Shannon's little brother was being shot at on multiple occasions, on an occasion where a bullet actually hit the headrest of Ms. Ellis in the car; another incident where the car door was shot, an incident where the mirror was shot.

To say that they came in peace, they came in peace carrying weapons with the seat down, but they came in peace. As for trial strategy I cannot say that that was unreasonable. So Mr. Hart knew of all of this

history between Bennie Smith and Courtney Taylor and Terry Shannon and Antonio Shannon, but I do believe based on the testimony it was part of his strategy to keep as much of that out of the record as possible.

With respect to Mr. Shannon's right to testify, Mr. Hart testified that he reviewed with Mr. Shannon daily, reviewed with him, told him to keep thinking about it, that he would make the decision at the last minute depending upon how the evidence went in.

He testified that he spoke generally of what Mr. Shannon would testify to if he did decide to testify, but testified that it wasn't ethical for him to pinpoint him on his testimony before trial.

As the case went in one of the defenses was that the cause of Mr. Smith's death was that someone within Mr. Smith's own car fired the weapon and self-defense.

Clearly in the State's case, and having had the benefit of presiding over the trial and hearing and recalling the testimony, we had Mr. Templin's testimony in that regard which clearly diminished that defense.

You also had the testimony of the medical examiner, Dr. Lynda Biedrzycki who was very credible. My recollection was that she not only described the

bullet wounds, but the head wound in particular was described as atypical. So not only Mr. Templin's testimony, but the medical examiner's testimony seriously diminished the first defense, again, that someone in Mr. Smith's own car caused the fatal wound.

The second was self-defense and Mr. Hart testified that self-defense was always a consideration in this case. There was nothing maybe in a memo to indicate that.

Again, Mr. Hart -- and let me just say this. Mr. Hart has testified in this Court on numerous occasions on significant cases including homicide cases, and it is my experience, quite honestly, that he takes the most difficult cases, cases where there's been one or more prior attorneys and he comes in to do the trial. And indeed Mr. Hart was appointed after Mr. Shannon was allowed to withdraw his plea, a motion that was also heard before me.

So clearly self-defense was always a consideration. He didn't need something in writing in one of his own memos to remind him of that.

He testified -- and it is a hard decision for defense attorneys because there is a trade off. While it's difficult to prove self-defense without a defendant's testimony, Mr. Shannon was very specific on

how he wanted the case argued. He was very specific with Mr. Hart that he didn't want any lesser included defenses. Nothing short of acquittal was going to be acceptable for Mr. Shannon, and he did argue self-defense at the conclusion of the trial in his closing arguments to the jury.

He testified that while difficult, he has had cases where he argued self-defense before a jury where the defendant has not testified and that was successful.

Again, his testimony, Mr. Hart's testimony, which I find very credible was that once a client decides to testify, and I have no doubt based on Mr. Hart's testimony that he did indeed go over all of the pros and cons with Mr. Shannon.

Had Mr. Shannon made the decision to testify, Mr. Hart testified that he would have gone over what Mr. Shannon would have testified to and would have then prepared Mr. Shannon to testify on his self-defense theory.

But as I noted earlier in the record, Mr. Hart testified that you can't just limit that examination to self-defense, and he had to look at all of these other factors, the entire package, I think was the phrase that Mr. Hart used.

The fact that Mr. Shannon and his brother fled the State, that they burned out the car that was used in the shooting, the prior convictions, yeah, there were only three prior convictions, but that was only one small part of this entire picture.

We had testimony from the employee for the Racine Journal Times who was delivering papers and he saw -- he saw that car Mr. Shannon's car circled several times before he heard the barrage of shots. I remember him testifying that he went to get help to no avail.

Testimony from numerous officers. Mr. Rod (phonetic), the citizen who witnessed two black males trying to start that red car on fire in front of his home. All of these other things went into consideration when Mr. Hart was going over Mr. Shannon's right to testify or not.

An attorney I believe has an obligation to give their opinion on what they think a client should do. Mr. Hart gave that opinion, but again, Mr. Hart always made it clear that the ultimate decision was Mr. Shannon's. And in fact Mr. Hart testified that Mr. Shannon spoke with family members asking for their input based upon how the State's case went in. So all of the factors went into consideration.

Based on Mr. Hart's testimony today, I cannot find that his conduct rose to a level where his representation fell below an objective standard of reasonableness based upon the totality of the testimony that went in, and based upon his trial strategy. I think Mr. Hart's performance was objectively reasonable and, therefore, I agree with Mr. Chiapete today, I don't get to the second prong, the prejudice, the prejudice prong. So the motion for a new trial is denied.

With respect then to appellate counsel, Mr. Henak, Mark Rosen?

MR. HENAK: Yes, your Honor. Mr. Rosen raised a single issue that yes, it was quite clear that there was error, but as the Court of Appeals recognized, there was absolutely no way that it could have had any impact on the case given the way that the evidence was presented at trial. Neither the other cause defense nor the self-defense was in any way viable.

So when we look at the issues, the appellate ineffectiveness question is whether the issues that should have been raised or the defenses that should have been raised were clearly stronger than the issue that was raised.

determination. They were denied Mr. Shannon's testimony.

And what is clear from his testimony is that could have resulted very easily in a totally different result, and for that reason, the real controversy was not fully tried under the legal standards repeatedly addressed by the Supreme Court in cases like Kyler (phonetic) and Hicks (phonetic). This is exactly the kind of case where an interests of justice claim should be granted.

THE COURT: Thank you. Again, with respect to Attorney Mark Rosen, the standard that the Court applies to an ineffective assistance of appellate counsel is the same standard for trial counsel, the Strickland standard.

And again, that first prong is that the defendant must prove that the appellate representation was constitutionally defective or that it fell below that objective standard of reasonableness.

Mr. Rosen testified that he was appointed to do the appeal. He was not independently retained. He testified that he completely reviewed Mr. Hart's file and discussed with Mr. Hart the file, understood what the issues were.

Exhibit No. 6 was the large packet of motions to extend that were filed and orders from the Court of Appeals in that regard.

It's apparent that Mr. Rosen conducted a very thorough, lengthy investigation with respect to this case. The information given to him by Mary Myers, you know, again he retained an investigator to independently do an investigation in this case. He was asked about whether he believed Mr. Hart was ineffective in his representation and he answered that no.

He explained how Mr. Hart hired experts; the issue of the first defense, again causation, that Mr. Smith was killed from a firearm shot within Mr. Smith's vehicle, was fully litigated.

Mr. Hart and Mr. Birdsall jointly retained an expert on that. All of that information was presented to the jury. He could not make an argument that Mr. Hart was ineffective.

With respect to the self-defense theory, again, Mr. Rosen also noted that Mr. Hart argued self-defense in closing; the argument was presented to the jury in argument.

In his opinion Mr. Hart was not ineffective in that regard. He made the record, and again, didn't

think that Mr. Hart was ineffective for not putting Mr. Shannon on the stand.

With respect to the interests of justice theory, Mr. Rosen testified that he is familiar with the challenge and he certainly has litigated it before. He didn't believe it was appropriate here to bring as a stand-alone issue. Mr. Rosen testified that typically when he has brought an interests of justice claim, it's done in conjunction with either an ineffective assistance of counsel issue or some other appellate issue; not as a stand alone. But because there was no viable ineffective assistance of counsel claim in his opinion here, he didn't bring it.

I can't find Mr. Rosen ineffective for failing to bring it as a stand-alone issue; again, not on the record that we have here, so I cannot find based on the testimony that Mr. Rosen was ineffective.

One more thing I want to say. I just saw one of my notes on this, because Mr. Shannon testified that Mr. Rosen filed the brief before meeting with Mr. Shannon. Mr. Rosen's testimony was just the opposite, and I find Mr. Rosen's testimony more credible in that regard.

Mr. Rosen testified that he did meet with Mr. Shannon at the prison before the brief was filed.

Certainly he recalls getting the letter from Mr. Shannon. That was marked as Exhibit No. 5. He understood that Mr. Shannon was not happy with his brief, but certainly appellate counsel has obligations to make those decisions on what to argue to the Court of Appeals based on the record as well.

Mr. Shannon could have filed something independently, and it is my understanding that he did not do that. So again, I don't get to the second prong of prejudice finding that Mr. Rosen's performance was not constitutionally defective at the appellate level. Anything else for the record today, Mr. Henak?

MR. HENAK: Just I believe that the Court might have misstated. I believe that Mr. Shannon actually said that he did visit with Rosen before, but Rosen did not send him a copy of the brief before it was filed.

THE COURT: I apologize if I misstated that.

MR. HENAK: Yeah. Yeah, and I just have one quick question. The Court indicated something about Shannon could have filed something on his own. I don't understand.

THE COURT: With respect to, you know, if Mr. Shannon was not happy with the brief filed by Mr. Rosen, I think Mr. Shannon could have filed his own

supplemental brief. I don't think there's anything in the record indicating that he did.

MR. HENAK: And I would just note for the record that he didn't, but also it's my understanding that having done appeals for almost 30 years that the Court of Appeals would not accept anything as long as you have --

THE COURT: Okay.

MR. HENAK: -- as long as you are represented by counsel.

THE COURT: By counsel.

MR. HENAK: Yes, your Honor. I will put together an order which essentially will simply say for the reasons stated on the record on July 15th the motion is denied.

THE COURT: Thank you very much.

MR. HENAK: And I will submit that to the Court probably early next week.

THE COURT: All right, thank you, Mr. Henak. Anything else for the record today, Mr. Chiapete?

MR. CHIAPETE: No, your Honor, thank you.

THE COURT: Thank you, everyone.

(PROCEEDINGS CONCLUDED)

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February 19, 2014

To:

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You are hereby notified that the Court has entered the following order:

No. 2013AP130-CR State v. Shannon L.C.#2006CF588

A petition for review pursuant to Wis. Stat. §§ 808.10 and (Rule) 809.32(4) having been filed on behalf of defendant-appellant-petitioner, Antonio D. Shannon, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Diane M. Fremgen
Clerk of Supreme Court

COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2013AP130-CR **Cir. Ct. No. 2006CF588**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO D. SHANNON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Antonio ("Tony") Shannon appeals from a judgment convicting him after a jury trial of first-degree intentional homicide while armed and discharging a firearm from a vehicle, as party to a crime. Tony

contends that the trial court erroneously excluded as hearsay a statement that actually was an exception to the hearsay rule and that was material to his defense. While we agree that exclusion was error, we affirm because it was harmless.

¶2 Tony's brother, Terry Shannon, and Bennie Smith had a confrontation outside an IHOP restaurant. About an hour later, Bennie, Calvin Miller, Kinte Scott and Courtney Taylor were in a parked car on a city street conversing and flirting with two women they had met for the first time that night. The women were in their parked car on the other side of the street. Tony and Terry drove up and pulled alongside the men's car. An immediate shoot-out between the cars' occupants ensued. Bennie was killed.

¶3 The Shannons offered two theories of defense at their joint trial: (1) that Bennie was shot and killed by someone in his car, and (2) that the Shannons acted in self-defense. The jury returned guilty verdicts. Tony appeals. Additional facts will be supplied as the discussion requires.

¶4 Only the self-defense theory is at issue. During the trial, Tony sought to introduce the testimony of Logan Tyler, a long-time friend of the Shannons. Logan would testify that Kinte told him that Bennie was upset with Terry after the IHOP incident and had said, "I'm gonna fuck up Terry." The trial court sustained the State's objection that the proffered testimony was hearsay.

¶5 "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citations omitted). A decision based on an error of

law constitutes an erroneous exercise of discretion. ***State v. Jorgensen***, 2003 WI 105, ¶12, 264 Wis. 2d 157, 667 N.W.2d 318.

¶6 Tony contends the trial court erred in excluding the double-layered statement that Bennie told Kinte who told Logan that Bennie said he was "gonna fuck up Terry" because it was admissible under WIS. STAT. § 908.03(3) (2011-12)[1] as a statement of Bennie's "then existing state of mind."

¶7 The State analyzes the statement as hearsay-within-hearsay. As to the Kinte-to-Logan segment, Kinte denied on cross-examination that he made the statement to Logan. Logan's excluded testimony thus was nonhearsay because it was "[i]nconsistent with the declarant's [Kinte's] testimony." WIS. STAT. § 908.01(4)(a).

¶8 The Bennie-to-Kinte portion was hearsay, however, because it was offered for the truth of the matter. To bolster his claim of self-defense, Tony wanted to show that Bennie meant it when he said he was "gonna fuck up Terry." The hearsay nonetheless was admissible as "[a] statement of the declarant's [Bennie's] then existing state of mind … such as intent, plan, motive, design, mental feeling …." WIS. STAT. § 908.03(3). "[A] statement of a present intent to do an act in the future is admissible to prove that the declarant acted in conformity." ***State v. Everett***, 231 Wis. 2d 616, 630, 605 N.W.2d 633 (Ct. App. 1999) (citation omitted). We agree that excluding Logan's statement was error.

¶9 The erroneous exclusion of evidence does not warrant a new trial if the error was harmless. *See* ***State v. Harris***, 2008 WI 15, ¶85, 307 Wis. 2d 555,

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

745 N.W.2d 397. The test for harmless error is "whether there is a reasonable possibility that the error contributed to the conviction. A reasonable possibility is a possibility sufficient to undermine our confidence in the conviction." ***State v. Williams***, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919 (citations omitted).

¶10 We conclude the error was harmless. First, the jury heard other testimony, including from Logan, that at least Bennie was out to get Terry. It heard that Kinte "got into it" with Terry at the IHOP, that the situation "escalated," that Terry and Bennie got into a confrontation in which both were "aggressive," that Bennie "wanted to fight" Terry but Terry repeatedly said, "I ain't gonna fight," and that when Bennie, Calvin, Kinte and Courtney left the IHOP, they drove to "where Terry Shannon baby mama was living." The jury reasonably could have inferred that the men were looking for Terry and initiated the shootout when he drove up. Therefore, the testimony the jury did hear "functionally conveyed the same theory of defense." ***Everett***, 231 Wis. 2d at 631.

¶11 Next, as the State cogently argues, the error also was harmless because there is no reasonable possibility that Tony's self-defense theory would have succeeded. *See* WIS. STAT. § 939.48(1); *see also* WIS JI—CRIMINAL 805, 815. Five witnesses—Courtney, Kinte, Calvin and the two young women in the car parked across the street—described a scene of relaxed and friendly flirting and talking, with Bennie "laughing," "friendly," and not appearing "to be jumpy or nervous." Having just met the men, the women were impartial witnesses.

¶12 A wholly impartial witness, a newspaper employee filling newspaper racks, testified that he saw a red car[2] circling the area just minutes before hearing

[2] The Shannons drove a red car.

ten shots. The women and the three survivors in Bennie's car all testified that shooting immediately began when the Shannon vehicle pulled up, leading to the reasonable inference that someone in the Shannon vehicle fired first. Kinte and Courtney testified that Tony shot first.

¶13 The jury had before it evidence of Bennie's aggression toward Terry, of prodding him to fight, of going to his "baby mama" house, and of Bennie's and Courtney's stated desire to kill Terry. It even heard evidence that Kinte said he killed Bennie and that Calvin said Courtney killed him. It either did not believe some, or all, of that testimony or found it less compelling than evidence demonstrating that the Shannons literally came gunning for Bennie and his companions. If the more specific evidence did not persuade the jury to acquit Tony, the vague "I'm gonna fuck up Terry" would not have tipped the balance in favor of believing that Tony acted in self-defense. We conclude there is no reasonable possibility that the error contributed to the conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.