

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TODD NEWMILLER, *Petitioner*,

v.

RICK RAEMISCH, Executive Director, Colorado Department of Corrections, and
CYNTHIA COFFMAN, Attorney General, State of Colorado, *Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

**APPENDIX FOR
PETITION FOR WRIT OF CERTIORARI**

Respectfully submitted,

GAIL KATHRYN JOHNSON
Johnson & Klein, PLLC
1470 Walnut Street, Suite 101
Boulder, CO 80302
gjohnson@johnsonklein.com
(303) 444-1885

Counsel of Record

March 19, 2018

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

- Appendix 1: *Newmiller v. Raemisch*, 877 F.3d 1178 (10th Cir. 2017)
- Appendix 2: *Newmiller v. Raemisch*, No. 15-cv-02461-RPM, 2016 WL 10879213 (D. Colo. July 27, 2016)
- Appendix 3: U.S. District Court Order granting Motion to Clarify (Doc. 28) (Aug. 30, 2016)
- Appendix 4: U.S. District Court Order denying Motion to Alter Order and Judgment (Doc. 29) (Aug. 30, 2016)
- Appendix 5: Order Amending Final Judgment (Doc. 30) (Aug. 30, 2016)
- Appendix 6: Colorado Supreme Court order denying certiorari in state postconviction appeal (*Newmiller v. People*, No. 14SC665, 2015 WL 4623633 (Colo. Aug. 2, 2015))
- Appendix 7: *People v. Newmiller*, 338 P.3d 459 (Colo. App. 2014) (affirming denial of state postconviction relief)
- Appendix 8: El Paso County District Court order denying postconviction relief (unpublished) (Sept. 7, 2010)
- Appendix 9: Colorado Supreme Court order denying certiorari in direct appeal (*Newmiller v. People*, No. 08SC597, 2008 WL 4801502 (Colo. Sept. 22, 2008))
- Appendix 10: Opinion of the Colorado Court of Appeals (unpublished) (May 22, 2008) (affirming conviction on direct appeal)

877 F.3d 1178
United States Court of Appeals, Tenth Circuit.

Todd NEWMILLER, Petitioner–Appellant,
v.
Rick RAEMISCH, Executive Director, Colorado Department of Corrections;
Cynthia Coffman, [Attorney General, State of Colorado](#), Respondents–Appellees.

No. 16-1396
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FILED December 18, 2017

Synopsis

Background: Following affirmance of his conviction in state court for second-degree murder, [2008 WL 2133008](#), petitioner filed federal petition for writ of habeas corpus. The United States District Court for the District of Colorado, No. 1:15-CV-02461-RPM, denied petition. Petitioner appealed.

Holdings: The Court of Appeals, [McHugh](#), Circuit Judge, held that:

[1] rejection of claim that trial counsel performed deficiently by failing to adequately consult with and call medical expert who could have rebutted prosecution's theory that petitioner fatally stabbed victim at beginning of confrontation was not unreasonable application of [Strickland](#), and

[2] rejection of claim that trial counsel were deficient in failing to call trauma specialist surgeon, or seek continuance, after counsel received surgeon's report mid-trial was not unreasonable application of [Strickland](#).

Affirmed.

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:15-CV-02461-RPM)

Attorneys and Law Firms

[Gail K. Johnson](#), Johnson, Brennan & Klein, PLLC, Boulder, Colorado, for Petitioner–Appellant.

Ryan A. Crane, Senior Assistant Attorney General, Criminal Appeals Section ([Cynthia H. Coffman](#), Attorney General, with him on the brief), Office of the Colorado Attorney General, Denver, Colorado, for Respondents–Appellees.

Before [TYMKOVICH](#), Chief Judge, [SEYMOUR](#), and [McHUGH](#), Circuit Judges.

Opinion

[McHUGH](#), Circuit Judge.

The genesis of this appeal is a murder committed during an altercation outside a strip club in Colorado Springs, Colorado. Petitioner Todd Newmiller and several of his friends went to the club to celebrate Mr. Newmiller's birthday. After leaving the club, they had a fight with another group of men, during which Mr. Newmiller fatally stabbed Anthony Madril in the heart. Mr. Newmiller was then charged and convicted of second-degree murder, and sentenced to thirty-one years'

imprisonment. The Colorado Court of Appeals (CCA) affirmed his conviction and sentence. The Colorado Supreme Court denied certiorari review. Mr. Newmiller later challenged the constitutionality of his conviction under [Colorado Rule of Criminal Procedure 35\(c\)](#). After an evidentiary hearing, the state post-conviction court denied relief. The CCA affirmed the denial. And the Colorado Supreme Court again denied certiorari review.

Mr. Newmiller next sought habeas relief in federal district court pursuant to [28 U.S.C. § 2254](#). He argued his trial counsel were ineffective in violation of the Sixth Amendment because they failed to investigate, challenge, and rebut the prosecution's expert medical testimony. The district court ruled trial counsel's performance was deficient and the CCA's conclusion to the contrary was an unreasonable application of [Strickland v. Washington](#), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). But the district court denied relief because Mr. Newmiller failed to show counsel's performance was prejudicial. Mr. Newmiller now appeals. Exercising jurisdiction under [28 U.S.C. §§ 1291](#) and [2253](#), we affirm.

To place our analysis in context, we begin with a robust overview of the facts. We then provide relevant procedural details, beginning with Mr. Newmiller's trial in state court. Next, we summarize the proceedings before the state post-conviction court, that court's ruling on Mr. Newmiller's petition, and the CCA's decision on appellate review. Last, we discuss the federal district court's ruling denying habeas relief.

After completing our review of the factual and procedural history, we address the merits of the district court's denial of habeas relief. Although we agree that Mr. Newmiller is not entitled to relief, we extend appropriate deference to the state court and thus leave undisturbed the CCA's conclusion that trial counsel's performance was not deficient. As a result, we do not reach the prejudice prong of the ineffective-assistance-of-counsel inquiry on which the district court's denial of relief was based.

I. BACKGROUND

A. Factual History

Mr. Newmiller, his brother, Joel Newmiller, *1185¹ and their friends, Brad Orgill, Jason Melick, and Michael Lee (the Newmiller group), went to a strip club in Colorado Springs to celebrate Mr. Newmiller's birthday. *See* [People v. Newmiller](#), 338 P.3d 459, 461 (Colo. App. 2014). As members of the Newmiller group were leaving the club, they had an argument with another group of men also leaving the venue. *Id.* The other group consisted of Mr. Madril, Chisum Lopez, and Charles Schwartz (Mr. Madril's group). *Id.*

¹ To avoid confusion we refer to the defendant, Todd Newmiller, as Mr. Newmiller, and to his brother, Joel Newmiller, as Joel. "Both groups eventually left the club in separate vehicles. About a half block away, [Mr. Madril's] group stopped its pickup truck in the middle of the street." *Id.* As the Newmiller group's Jeep approached the pickup truck, Mr. Newmiller jumped out and ran toward the truck. Joel then parked the Jeep, and Mr. Orgill exited the vehicle, followed by Mr. Melick, Mr. Lee, and Joel. Mr. Lee testified at trial that at least one person from Mr. Madril's group had exited the pickup truck and squared off to fight Mr. Newmiller. But Mr. Lee could not identify who that person was. He testified that he lost track of Mr. Newmiller early in the confrontation.

The two groups confronted each other, and at some point Mr. Madril was stabbed in the heart. *Id.* Mr. Madril and Mr. Orgill also engaged in a fight lasting "30 seconds to a minute." During that fight, Mr. Madril initially knocked Mr. Orgill to the ground. But Mr. Madril soon became "less ... resistan[t]" and actually fell down onto Mr. Orgill. Mr. Orgill testified that the fight "was over really quick."

According to the surviving participants, the entire incident lasted somewhere between a minute and a half and two minutes. Afterward, everyone fled the scene. *Id.* Mr. Madril's group "headed to the hospital but pulled over when the 911 dispatcher told them to wait for an ambulance. [Mr. Madril] was transported to the hospital by ambulance and pronounced dead on arrival." *Id.*

The next day, Mr. Melick, a member of the Newmiller group, "learned that someone had been killed in the same area where the fight had occurred. He placed an anonymous phone call to the police and named [Mr. Newmiller] as the killer." *Id.* Police then arrested Mr. Newmiller. *Id.* A search of Mr. Newmiller's person uncovered a knife. *Id.* "Forensic testing revealed a small amount of blood matching [Mr. Madril's] blood on the blade of the knife." *Id.*

B. Trial

Mr. Newmiller was charged with and tried for second-degree murder. *Id.* "He did not testify at trial, but everyone else involved did. Although there were substantial inconsistencies in the testimony," the testimony and evidence established that no one saw Mr. Newmiller stab Mr. Madril or any of the participants with a weapon before or during the altercation. *Id.* The evidence also confirmed that Mr. Orgill fought Mr. Madril and established that Mr. Newmiller verbally argued with Mr. Lopez. *Id.* It was also "uncontested that [Mr. Newmiller] stabbed one of the truck's tires right before [Mr. Madril's] group drove away." *Id.*

As summarized by the CCA,

The prosecution's theory of the case was that [Mr. Newmiller] stabbed [Mr. Madril] at the very beginning of the confrontation and [Mr. Madril] remained alive for several minutes after he had been stabbed. The prosecution had to *1186 establish that [Mr. Newmiller] stabbed [Mr. Madril] then because other than during the first few seconds after [Mr. Newmiller] and [Mr. Madril] left their respective vehicles, someone from [Mr. Madril's] or [Mr. Newmiller's] group saw either [Mr. Madril] or [Mr. Newmiller] at all times, and no one saw them near each other. The prosecution thus had to show that [Mr. Madril] lived for some time after he was stabbed, during which time he fought with [Mr.] Orgill.

In support of its theory, the prosecution offered testimony from Joel Newmiller ... , [Mr.] Melick, [Mr.] Orgill, and [Mr.] Lee. Joel testified that when [Mr. Newmiller's] group got back in the Jeep after the fight, he became upset after seeing a cut on his brother's ([Mr. Newmiller's]) face. Joel testified that [Mr. Newmiller] attempted to calm him down by saying, "[d]on't worry about it. I slashed their tire and I stabbed one of them." [Mr.] Melick also testified that Joel started "freaking out" because [Mr. Newmiller] had been hit; in response, [Mr. Newmiller] said to Joel, "[d]on't worry. Don't worry, I stabbed him." [Mr.] Melick testified that [Mr. Newmiller] then said to the other occupants of the vehicle, "I stabbed the guy, okay?" and "[y]ou guys don't know nothing about this, okay?"

[Mr.] Orgill and [Mr.] Lee testified that they did not hear [Mr. Newmiller] say anything at that time about stabbing anyone; however, they both testified that when the three of them were at [Mr.] Orgill's house later that night, [Mr. Newmiller] said something like he hoped he had not stabbed anyone or he thought he might have stabbed someone. [Mr.] Orgill, [Mr.] Lee, and [Mr. Newmiller] looked at [Mr. Newmiller's] knife, but no blood was visible.

[Mr.] Orgill's clothes were covered heavily in blood. [Mr. Newmiller] also had some blood on his clothing. As a result, both [Mr.] Orgill and [Mr. Newmiller] burned their clothes.

Id. at 461–62 (footnote omitted).

The prosecution also relied on the expert medical testimony of Dr. George Hertner and Dr. Donald Ritchey. Dr. Hertner is an emergency room physician who examined Mr. Madril when Mr. Madril arrived dead at the hospital. *See id.* at 466.

Dr. Hertner testified he sees about one hundred trauma patients per year and at least ten patients per year who have a [wound](#) to the heart. Dr. Hertner explained death is not always instantaneous when an individual suffers a [wound](#) to the heart. And he averred that he has seen people stand and walk around after suffering a stab [wound](#) to the chest. He testified that it would not surprise him if a person could stay on his feet for one or two minutes after being stabbed in the heart, in part, due to adrenaline's ability to mask the pain and temporarily compensate for blood loss.

As for Mr. Madril's chest [wound](#), Dr. Hertner described it as a "three-inch long laceration," i.e., "a big cut." He testified that he performed an ultrasound on Mr. Madril that showed Mr. Madril "had a large amount of blood in the left side of his chest and possibly around his heart," preventing him from having any cardiac or brain activity. "Basically," Dr. Hertner attested, Mr. Madril "bled out into his chest." Dr. Hertner explained that in this type of situation the blood inside the chest pushes against the lung and prevents the lung from expanding and the heart from beating. He further testified that how rapidly someone perishes after suffering this type of [wound](#) depends on several factors, including the size of the [wound](#), whether the person was active at the time he suffered the [wound](#), and the person's blood pressure. And Dr. Hertner testified that ***1187** the rate at which someone loses blood may be influenced by the pericardium, which is the "sac that surrounds the heart." Dr. Hertner explained that when someone has a hole in his heart, he also usually has a hole in his pericardium. In that case, the heart bleeds into the space between the heart and the pericardium, which may slow the flow of blood and thus the rate at which the patient bleeds out. That said, Dr. Hertner admitted he had "no idea" how long Mr. Madril lived after being stabbed.

Dr. Ritchey is a forensic pathologist who performed Mr. Madril's autopsy. [Newmiller, 338 P.3d at 466](#). Dr. Ritchey testified that Mr. Madril's [wound](#) entered the apex of his heart and punctured a hole in his heart. He further testified that two liters of blood had accumulated within the thoracic cavity. And he testified that it was "extremely likely" Mr. Madril experienced "cardiac tamponade," wherein blood fills in the pericardium surrounding the heart and slows the flow of blood. Dr. Ritchey explained that cardiac tamponade can extend a person's life up to fifteen to twenty minutes after being stabbed, as opposed to dying within one minute. But Dr. Ritchey admitted he arrived at this conclusion based "predominantly on the fact that [Mr. Madril] is known to have lived for some period of time after he was stabbed." And he acknowledged that he had "no way of knowing" exactly how long Mr. Madril lived after being stabbed, and that a person could die from such a [wound](#) in anywhere from "a few seconds to a few minutes."

Mr. Newmiller's counsel, Deborah Grohs and Philip Tate, did not cross-examine Dr. Ritchey about his cardiac tamponade theory. Nor did they call a witness to rebut the testimony provided by either Dr. Hertner or Dr. Ritchey.

On March 8, 2016, the sixth day of witness examination, Ms. Grohs informed the court that she had just received a significant amount of discovery from the prosecution. She stated that Mr. Tate's assistant received a call from the prosecution on March 6, 2016, and then retrieved the materials the next day. The materials included interviews with witnesses who had already testified and with witnesses who had not yet testified. The materials also included the prosecution's interview with Dr. Andrew Berson, a report from Dr. Hertner, and a report from Dr. Ritchey. After the trial court berated the prosecutors for failing to produce these materials in a timely fashion, Ms. Grohs moved for a mistrial.

But before the court ruled on the motion for a mistrial, it became evident that the prosecution actually had made the relevant discovery materials available by February 28, 2006, the day jury selection started. The prosecution explained that although they notified Mr. Tate's assistant that afternoon, she did not collect the materials until March 7, 2016. After realizing her error, Ms. Grohs apologized to the court for accusing the prosecution of wrongfully delaying disclosure of the materials. The court denied the motion for a mistrial.

In its closing remarks, the prosecution argued that Mr. Madril was able to fight Mr. Orgill after being stabbed due to a rush of adrenaline. The prosecution stated:

You heard from the doctors that [a] stab wound with that adrenalin running, he might not have even known or maybe he did. Maybe he knew that he'd been stabbed, but he had no time to do anything because as the defendant's running past him, he's pushing him and Brad Orgill is right there and Brad Orgill and Anthony Madril begin their fight. ...

***1188** You heard from the witnesses that about midway through the fight Anthony Madril started to slow, started to lag, started to look tired, wasn't hitting back, fell down.

Well, folks, that was because he'd already been stabbed in the heart. And as you heard from the doctors, after those few seconds of adrenalin rush, after the heart begins to leak, that's when he would start to fade, and that's exactly what happened. He was able to stay on his feet, just as the doctors told you, for a few minutes, a few seconds. He was able to fight because the nature of the wound, there was still heart—or, I'm sorry, still blood pumping through his veins, pumping to his brain. Because of the fact that the one ventricle was in front of the other, there was blood still going to the aorta. You heard that from Dr. Ritchey. You have the diagram where he explained that to you.

You heard from both the doctors, stab victims don't just fall down the second it happens. They stay on their feet. That's perfectly reasonable and it happens often. The nature of that wound with the pericardium, is actually acting as something of a tourniquet on Mr. Madril's heart. You heard that too that most of the blood was going into the chest cavity, some was coming out, but that was being absorbed mostly by the shirt at first.

Mr. Newmiller was convicted of second-degree murder with a deadly weapon and sentenced to thirty-one years' imprisonment.

C. State Post-Conviction Proceedings

After the CCA affirmed Mr. Newmiller's conviction and sentence on direct appeal, Mr. Newmiller sought post-conviction relief in state court under [Colorado Rule of Criminal Procedure 35\(c\)](#).² Mr. Newmiller claimed, among other things, that his two trial counsel were ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). He argued trial counsel performed an insufficient pretrial investigation into how long Mr. Madril could have lived after being stabbed. If counsel had performed an adequate investigation, Mr. Newmiller maintained, they would have called Dr. Berson—whose opinions were known—to testify at trial and retained an expert in emergency medicine like Dr. David Glaser.

² [Colorado Rule of Criminal Procedure 35\(c\)\(2\)\(I\)](#) provides that “every person convicted of a crime is entitled as a matter of right to make application for postconviction review” on the ground that “the conviction was obtained or sentence imposed in violation of the Constitution or laws of the United States.”

The state post-conviction court held a four-day evidentiary hearing, during which the court received into evidence the prosecution's report discussing its pretrial interview with Dr. Berson. The court also heard testimony from Dr. Glaser, Dr. Robert Bux, and Mr. Newmiller's trial counsel.

1. Dr. Berson

According to the report, Dr. Berson is a trauma specialist surgeon who has treated 500–700 trauma patients, including approximately 100 patients who have suffered stab wounds. Although Dr. Berson was called to the hospital when Mr. Madril arrived, Dr. Berson did not perform any surgical procedures because Mr. Madril was already deceased. But Dr. Berson did perform an ultrasound on Mr. Madril that showed Mr. Madril had a large amount of blood in his chest—about three to four liters of blood. A person of his size would typically have five or six liters of blood.

*1189 In the underlying interview, Dr. Berson described Mr. Madril's wound and explained that someone who sustained that type of wound would bleed out more rapidly than someone with a smaller wound—where cardiac tamponade could occur. Dr. Berson stated that while people and injuries vary, “if the heart suffered a full wall breach ... the person would bleed out from between thirty seconds to a minute.” He further noted that Mr. Madril's injury was “through the ventricle,” and that a person who suffers a “full wall breach” would “pump out ... blood in the body [in] a very short time.”

Dr. Berson next contrasted Mr. Madril's “long laceration” to a small wound or “pin prick” injury to the heart. He stated that, when the heart incurs a small wound, it bleeds into the pericardial sac that surrounds the heart. He explained that “[t]he blood flowing into the sac would compress the heart and impede it beating.” But “in the case of a full wall breach ... the pericardial sac is also breached and does not contain the blood like it would in the case of a pin prick.”

Dr. Berson also opined that the large wound Mr. Madril suffered would not necessarily have resulted in “the spurting of blood out of the body at the time of the wound,” and that “he would not be surprised if the person doing the stabbing did not have much blood” on him. And when asked how long a person might stay on his feet after suffering a wound like Mr. Madril's, Dr. Berson stated “the victim could stay on his feet for approximately a minute or so.” In contrast, when “[a]sked about the possibility of a person being on [his] feet after [suffering] a small puncture wound or the like, [Dr.] Berson stated a person could stay on [his] feet for quite a while.” Finally, he said the amount of time a person could stay on his feet after being stabbed in the heart “would depend on the overall condition of the subject and what adrenaline [he] might have pumped.”

2. Dr. Glaser

Mr. Newmiller also presented expert medical testimony from emergency physician Dr. Glaser, who had treated “a few hundred” stab wounds, including about a half-dozen stab wounds to the heart. Dr. Glaser testified that a patient's ability to survive a stab wound to the heart depends on several factors, such as “the depth and extent of the wound, the amount of blood loss, ... [and] how healthy [the patient was] to begin with.” When asked if it is possible for a treating emergency room physician to estimate how long a deceased patient lived after being stabbed in the heart, Dr. Glaser responded, “I think in general; not because we don't do much in the way to the patient if they already come in dead.”

Dr. Glaser then explained his understanding of cardiac (or pericardial) tamponade. He stated:

Pericardial tamponade occurs when fluid enters [the pericardial] sac and begins to squeeze the heart down to the point where blood, venous return from the body to the heart can't get into the heart anymore; and therefore, cardiac output drops meaning the amount of blood that your heart is pumping drops, and eventually people can die of that condition if it's not reversed.

Dr. Glaser next testified that cardiac tamponade would be evidenced by the presence of blood in the pericardium, by a wound to the heart that would have caused blood to enter the pericardium, and by a showing that the pericardium itself filled and compressed the heart.

Dr. Glaser opined that a large wound to the heart is less likely than a small wound to produce cardiac tamponade. Indeed, he averred that cardiac tamponade “can allow *1190 a small wound to the heart to kill you in a reasonably short period of time after the injury,” but that “it frankly just doesn't make sense ... that [cardiac tamponade] would allow a large wound to not cause significant injury and keep you alive.”

Dr. Glaser also reviewed photos taken at the autopsy and noted that Mr. Madril sustained “a large stab wound.” Dr. Glaser agreed with Dr. Ritchey's finding that the weapon “entered the apex of the heart causing massive internal bleeding leading rapidly to death.” But Dr. Glaser disagreed with Dr. Ritchey's opinion that it was “extremely likely” cardiac tamponade had occurred. Instead, Dr. Glaser opined that “this type of wound would be unlikely to cause pericardial tamponade.” In fact, he opined with a “reasonable degree of medical probability” that cardiac tamponade did not occur

in this case. And he explained “the whole notion of [cardiac] tamponade is that the wound has to be small enough that blood can be contained and pressure within that area can build up to compress the heart. In my opinion the size of this wound would prohibit that.” Further, he said that nothing in the autopsy photos of Mr. Madril’s heart indicated blood had pooled into his pericardium or that cardiac tamponade occurred in this instance.

Dr. Glaser also opined, based on his view of the autopsy photos and the size of the wound, that he “would be surprised if [Mr. Madril] survived more than a minute or two.” But Dr. Glaser admitted it is not possible to know for sure how long someone with that type of wound would have survived and that it would depend on several factors. Importantly, Dr. Glaser acknowledged that Mr. Madril “could have maybe” initiated a fistfight with another individual, although “the size and extent of the wound would have not allowed for a prolonged fight.” He added that “following the first seconds to maybe half a minute or so, this injury would be causing loss of blood pressure, loss of profusion of blood to the brain, and the victim would pass out.”

3. Dr. Bux

The prosecution called Dr. Bux as a rebuttal witness to Dr. Glaser. Dr. Bux testified Mr. Madril experienced some degree of cardiac tamponade that reasonably could have extended his life. *Newmiller*, 338 P.3d at 467. Contrary to Dr. Glaser’s testimony, Dr. Bux stated that the cardiac tamponade could have allowed Mr. Madril to function for a couple of minutes or even longer. *Id.* But Dr. Bux acknowledged it is not possible to determine with any degree of scientific certainty how long a person might live or function after suffering a stab wound to the heart. *Id.* And he explained that survivability depends on a number of factors, of which cardiac tamponade is only one.

4. Trial Counsel

Mr. Newmiller’s trial counsel, Ms. Grohs and Mr. Tate, also testified at the evidentiary hearing. Ms. Grohs had tried several homicide cases and had since become a state trial court judge. Mr. Tate had been a criminal defense attorney for fifteen years and he had tried five homicide cases.

As relevant, counsel testified that they met with Mr. Newmiller and his family several times, visited the crime scene on multiple occasions, hired an investigator, interviewed as many witnesses as they could, hired and later presented at trial a DNA expert, interviewed the doctors involved in the case, performed independent medical research, and consulted a confessions expert. Ms. Grohs also testified that she spent a great deal of time investigating whether Mr. Madril could have fought after being stabbed. For example, she *1191 “read a lot of pathology books trying to find answers and treatises ... [with which she] could confront” Dr. Ritchey. She also interviewed Dr. Ritchey in person and consulted by telephone two independent forensic pathologists in connection with Dr. Ritchey’s anticipated testimony. Ms. Grohs called one pathologist before she interviewed Dr. Ritchey and one after she interviewed Dr. Ritchey. Ms. Grohs described these telephone interviews as being “very serious and businesslike.” During the calls, she provided each pathologist the facts of the case, but she did not provide them with any reports. Ms. Grohs explained she would have called a pathologist to testify at trial if one of them had disagreed with Dr. Ritchey. But all three said the same thing: it is possible for a person to engage in a fistfight for a short period of time after being stabbed in the heart.

As a result, Ms. Grohs and Mr. Tate decided to focus their efforts on the more problematic evidence, such as Mr. Newmiller’s inculpatory statements and the traces of Mr. Madril’s blood found on Mr. Newmiller’s knife. And based on Mr. Newmiller’s insistence that he did not stab Mr. Madril, their theory of defense was that Mr. Newmiller could not have stabbed Mr. Madril because he was nowhere near Mr. Madril during the altercation. According to the defense’s version of events, Mr. Orgill committed the murder during his struggle with Mr. Madril near the end of the confrontation between the groups while Mr. Newmiller was slashing a tire on the opposite side of the pickup truck.

Last, Ms. Grohs testified that she and Mr. Tate reviewed the late-obtained discovery, including Dr. Berson’s report. She acknowledged it would have been favorable to the defense if Dr. Berson’s report contained facts that negated the theory

Mr. Madril experienced cardiac tamponade. And she conceded she could have attempted to call Dr. Berson at trial or request a continuance if his report was in fact favorable to the defense. But she explained “there wasn’t anything in the [late-obtained] discovery that ... would have changed how we examined those witnesses” who had already testified. “I remember feeling lucky that the evidence came out the way that it did because I wasn’t getting discovery and saying, oh, no, you know, I could have done this or something like that.”

D. The State Post-Conviction Court’s Ruling

The state post-conviction court denied Mr. Newmiller’s request for relief, finding neither deficient performance nor prejudice under *Strickland*. The court first found that Ms. Grohs and Mr. Tate are “highly experienced criminal defense attorneys” who “undertook a thorough investigation of the facts” and “carefully review[ed] the discovery.” The court summarized the efforts taken by defense counsel and explained that “[c]ounsel devoted virtually full time to trial preparation for the three weeks preceding trial.” Through those efforts, “counsel arrived at a theory of defense that the defendant never confronted the victim” or “got close enough to the victim to have stabbed him.” The court also highlighted Ms. Grohs’s pre-trial investigation to determine whether Mr. Madril could have fought Mr. Orgill after being stabbed in the heart. The court stated that Ms. Grohs did not consult medical experts in addition to the two forensic pathologists she interviewed “because she believed that the issue was one primarily of forensic pathology.”

The court then concluded that defense counsel’s failure to call Dr. Berson at trial or to ask for a continuance did not constitute *1192 ineffective assistance of counsel under *Strickland*. The court explained:

Assuming that Dr. Berson would have provided testimony to rebut the prosecution’s evidence of cardiac tamponade, the more relevant issue was how long [Mr. Madril] could have functioned after receiving the stab wound, whether or not there was cardiac tamponade. Dr. Berson’s potential testimony: “approximately a minute or so” was, as described below, within the same general time frames as those of Dr. Hertner and Dr. Glaser, and Dr. Ritchey. This time frame is also reasonably within the time frame of eyewitness descriptions of the fight between [Mr. Madril] and [Mr.] Orgill.

The court similarly concluded that defense counsel were not ineffective for failing to retain and/or present testimony from a medical expert such as Dr. Glaser. The court reasoned:

[Ms.] Grohs researched the issue of survivability after [a] stab wound to the heart, she interviewed Dr. Ritchey in person and consulted two independent forensic pathologists in connection with Dr. Ritchey’s anticipated testimony. Since all three said essentially the same thing, she did not believe that she could find [a] credible medical expert to rebut [Dr.] Ritchey. This level of investigation and her decision not to retain a medical expert clearly met the standard of reasonably competent assistance by an attorney acting as a diligent and conscientious advocate.

The court next turned to the prejudice prong of the *Strickland* test. After summarizing the testimony of Dr. Glaser and Dr. Bux, the court concluded there is no reasonable probability that the testimony of Dr. Glaser or Dr. Berson would have resulted in a different result at trial.

E. The CCA’s Decision

The CCA affirmed. In doing so, the CCA first agreed that trial counsel were “highly experienced criminal defense attorneys.” *People v. Newmiller*, 338 P.3d 459, 463–64 (Colo. App. 2014). It then determined that the state post-conviction court’s “conclusion that trial counsel’s pretrial investigation regarding the medical evidence was reasonable is supported

by the record.” *Id.* at 468. The CCA explained the record supports the inference that counsel did not call a medical expert because they did not believe they could find a credible expert to rebut Dr. Ritchey. *Id.* And it found “the record shows that counsel had the requisite knowledge, or had consulted with experts to the degree necessary to acquire such knowledge, to understand the significance of the medical evidence and to competently cross-examine the prosecution’s experts regarding the evidence.” *Id.* The CCA therefore held “counsel’s decision was strategic and adequately informed, and defendant has not overcome the ‘virtually unchallengeable’ presumption that counsel’s decision was objectively reasonable.” *Id.* (quoting *Bullock v. Carver*, 297 F.3d 1036, 1047 (10th Cir. 2002)).

The CCA next rejected the argument that counsel’s performance was deficient because they failed to present exculpatory evidence. *Id.* The CCA reasoned:

All the medical experts agreed that it is not possible to say for sure how long [Mr. Madril] lived after he had been stabbed. Had Dr. Berson been called and testified that [Mr. Madril] would have died within thirty seconds to a minute, the jury would have had to weigh that testimony against testimony by Dr. Ritchey and Dr. Hertner that it is not possible to definitively determine how long [Mr. Madril] could have survived. Consequently, what weight the *1193 jury would have given such testimony is unclear.

Also, unlike the cases cited by [Mr. Newmiller] in which the evidence at issue could have determined the outcome of the case, other evidence that incriminated [Mr. Newmiller] existed that would not have been rebutted by favorable testimony on the medical evidence, such as [Mr. Newmiller’s] statements about stabbing someone and [Mr. Madril’s] blood on [Mr. Newmiller’s] knife.

Id. Thus, the CCA agreed with the state post-conviction court that Mr. Newmiller did not establish his trial counsel’s failure to call a medical expert constituted deficient performance under *Strickland*. *Id.* at 469. The CCA did not address the prejudice prong of the *Strickland* test.

F. The Federal Petition

Mr. Newmiller initiated this federal habeas action in the United States District Court for the District of Colorado on November 6, 2015. Mr. Newmiller again argued that his counsel provided constitutionally inadequate representation under *Strickland*. The district court denied relief. In doing so, the district court observed it was “[o]f critical importance ... whether [Mr.] Madril had the physical ability to engage in that fight [with Mr. Orgill] after sustaining a knife wound that breached the wall of a ventricle in his heart.” The court then stated that although the prosecution provided defense counsel the discovery materials containing Dr. Berson’s report “before the trial started,” “[t]hey were not examined until March 7, 2016, while the trial was in progress.” The court ruled:

The failure of defendant’s counsel to obtain and review the prosecution’s disclosure before trial was unreasonable and resulted in a failure to present contradictory expert opinions on the initial question of where the stabbing occurred. The witnesses all agreed that they never saw the defendant and victim standing close together and did not see that [Mr.] Newmiller had an open knife.

In fact, [Mr.] Tate in his argument suggested the implausible theory that [Mr.] Madril stabbed himself with his own knife when he fought with [Mr.] Orgill as well as [Mr.] Orgill doing the stabbing with some knife that he discarded. He also argued blood stains location. The lack of focus on the issue of temporal survival after this type of wound illustrates the failure of defense counsel to develop the most obvious defense—that [Mr.] Madril could not engage in the fight with [Mr.] Orgill after being stabbed in the heart.

The court explained in a later clarification order that it had ruled “trial counsels’ [sic] failure to review the discovery material available to them and prepare to contradict the medical opinions presented by the prosecution was deficient performance and the [CCA’s] ruling to the contrary was an unreasonable application of *Strickland*.”

The court then observed that while the CCA did not address the prejudice prong of the *Strickland* test, the state post-conviction court did address it, ruling that defense counsel's failure to call a medical witness was not prejudicial. The court deferred to the state post-conviction court's ruling that Mr. Newmiller failed to show prejudice.

Finally, the court granted Mr. Newmiller a certificate of appealability, finding that jurists of reason could disagree with the court's resolution of the *Strickland* claim. Mr. Newmiller now appeals.

II. LEGAL STANDARDS

Before analyzing the reasonableness of the CCA's decision, we first provide (A) the standard of review, (B) an overview of the federal statute governing habeas relief, *1194 and (C) a summary of the *Strickland* standard for ineffective-assistance-of-counsel claims.

A. Standard of Review

[1] [2] We review the district court's "legal analysis of the state court decision *de novo* and its factual findings, if any, for clear error." *Smith v. Duckworth*, 824 F.3d 1233, 1241–42 (10th Cir. 2016) (internal quotation marks omitted). We may affirm "on any basis supported by the record." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011).

B. AEDPA

[3] The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires us to apply a "difficult to meet and highly deferential standard" in federal habeas proceedings under 28 U.S.C. § 2254, one that "demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (internal quotation marks omitted). When a petitioner includes in his habeas corpus application a "claim that was adjudicated on the merits in State court proceedings," a federal court shall not grant relief on that claim under § 2254 unless the state-court decision:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

§ 2254(d)(1)–(2).

[4] [5] Section 2254(d)(1)'s reference to "clearly established Federal law, as determined by the Supreme Court of the United States" "refers to the holdings, as opposed to the dicta, of [the] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). "Federal courts may not extract clearly established law from the general legal principles developed in factually distinct contexts, and Supreme Court holdings must be construed narrowly and consist only of something akin to on-point holdings." *Fairchild v. Trammell*, 784 F.3d 702, 710 (10th Cir. 2015) (internal quotation marks omitted).

[6] [7] Under § 2254(d)(1), a state-court decision is "contrary to" the Supreme Court's clearly established law if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from [that]

precedent.” *Williams*, 529 U.S. at 405, 406, 120 S.Ct. 1495. A state court need not cite, or even be aware of, applicable Supreme Court decisions, “so long as neither the reasoning nor the result of the state-court decision contradicts them.” *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (per curiam).

[8] [9] [10] [11] [12] [13] [14] A state-court decision is an “unreasonable application” of clearly established Supreme Court law if the decision “correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case.” *Williams*, 529 U.S. at 407–08, 120 S.Ct. 1495. Although the term “unreasonable” is “difficult to define,” “it is a common term in the legal world and ... federal judges are familiar with its meaning.” *Id.* at 410, 120 S.Ct. 1495. We undertake this objective unreasonableness inquiry in view of the specificity of the governing rule: “The more general the rule, the more leeway *1195 courts have in reaching outcomes in case-by-case determinations.” *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). Conversely, “[i]f a legal rule is specific, the range may be narrow” and [a]pplications of the rule may be plainly correct or incorrect.” *Id.* Also, “an unreasonable application of federal law is different from an incorrect application of federal law.” *Williams*, 529 U.S. at 410, 120 S.Ct. 1495. As a result, “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly”; “that application must also be unreasonable.” *Id.* at 411, 120 S.Ct. 1495. Even when the state court does not explain its decision, the petitioner must still show that “there was no reasonable basis for the state court to deny relief.” *Harrington v. Richter*, 562 U.S. 86, 98, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). “[A] habeas court must determine what arguments or theories supported or ... could have supported[] the state court’s decision.” *Id.* at 102, 131 S.Ct. 770. And “then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the] Court.” *Id.*; see also *id.* at 101, 131 S.Ct. 770 (“A state court’s determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court’s decision.” (internal quotation marks omitted)); *id.* at 102, 131 S.Ct. 770 (“[AEDPA] preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with [the] Court’s precedents.”). Thus, “even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Id.* at 102, 131 S.Ct. 770.

[15] [16] [17] [18] The Court has “emphasize[d] that review under § 2254(d)(1) focuses on what a state court knew and did.” *Pinholster*, 563 U.S. at 182, 131 S.Ct. 1388. To that end, we measure a state court’s decision against the “Court’s precedents as of the time the state court renders its decision.” *Id.* (internal quotation marks omitted). And we limit our review “to the record that was before the state court that adjudicated the claim on the merits.” *Id.* at 181, 131 S.Ct. 1388. The Court has also stated § 2254(d) “reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.” *Harrington*, 562 U.S. at 102–03, 131 S.Ct. 770 (internal quotation marks omitted). Thus, “a state prisoner must 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.” *Id.* at 103, 131 S.Ct. 770. “If [it seems like] this standard is difficult to meet, that is because it was meant to be.” *Id.* at 102, 131 S.Ct. 770. At all times, “[t]he petitioner carries the burden of proof.” *Pinholster*, 563 U.S. at 181, 131 S.Ct. 1388.

C. Strickland

[19] [20] To determine whether a petitioner’s trial counsel was ineffective, we apply the ineffective-assistance-of-counsel standard articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). “The benchmark for judging any claim of ineffectiveness [is] 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.” *Id.* at 686, 104 S.Ct. 2052.

*1196 [21] [22] [23] A petitioner must satisfy a two-part test to obtain relief under *Strickland*. First, he must show that his counsel’s performance was deficient, i.e., “that counsel made errors so serious that counsel was not functioning as

the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687, 104 S.Ct. 2052. In undertaking this inquiry, we must begin with a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance,” and that “the challenged action might be considered sound trial strategy.” *Id.* at 689, 104 S.Ct. 2052 (internal quotation marks omitted). “There are countless ways to provide effective assistance in any given case.” *Id.* And “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.” *Id.*

[24] [25] To rebut the presumption, the petitioner must show “counsel’s representation fell below an objective standard of reasonableness” under the circumstances and “prevailing professional norms.” *Id.* at 688, 104 S.Ct. 2052; *see also Bullock v. Carver*, 297 F.3d 1036, 1046 (10th Cir. 2002) (stating the “ultimate question ... is whether counsel performed in an objectively reasonable manner”). Even in circumstances where an attorney erred, “[i]t will generally be appropriate for a reviewing court to assess counsel’s overall performance throughout the case in order to determine whether the ‘identified acts or omissions’ overcome the presumption that a counsel rendered reasonable professional assistance.” *Kimmelman v. Morrison*, 477 U.S. 365, 386, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *see Harrington*, 562 U.S. at 111, 131 S.Ct. 770 (“[W]hile in some instances even an isolated error can support an ineffective-assistance claim if it is sufficiently egregious and prejudicial, it is difficult to establish ineffective assistance when counsel’s overall performance indicates active and capable advocacy.” (internal quotation marks omitted)).

[26] [27] [28] [29] No “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.” *Strickland*, 466 U.S. at 688–89, 104 S.Ct. 2052. But counsel has a “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Id.* at 691, 104 S.Ct. 2052. A “decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Id.* “[W]hat investigation decisions are reasonable depends critically” on “information supplied by the defendant.” *Id.* For instance, “the need for further investigation may be considerably diminished or eliminated altogether” if counsel develops a certain line of defense based on what the defendant has said. *Id.*; *see also Bryan v. Mullin*, 335 F.3d 1207, 1219 (10th Cir. 2003) (en banc) (“Although trial counsel has an independent duty to investigate and make a case in defense, counsel also has to be responsive to the wishes of his client.” (internal quotation marks omitted)).

[30] Relatedly, “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052; *see also Bullock*, 297 F.3d at 1047 (stating that strategic or tactical choices “are presumed correct, unless they were completely unreasonable, not merely wrong” (internal quotation marks omitted)). But strategic decisions “made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *1197 *Strickland*, 466 U.S. at 690–91, 104 S.Ct. 2052. “[F]or example, even though counsel’s strategy was ill-informed and thus does not qualify for the virtually unchallengeable presumption of reasonableness, a court reviewing the record before it might still conclude that counsel performed in an objectively reasonable manner.” *Bullock*, 297 F.3d at 1046.

[31] [32] In the end, our “scrutiny of counsel’s performance [is] highly deferential” and undertaken without “the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. “It is all too tempting for a defendant to second-guess counsel’s assistance after conviction.” *Id.* 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.” *Id.*; *see also Bullock*, 297 F.3d at 1048 (stating “the Sixth Amendment does not guarantee an errorless trial, and prevailing professional norms do not require perfection at trial” (internal quotation marks omitted)). Thus, every effort must be made to “reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

[33] [34] [35] [36] [37] Second, a petitioner must show counsel’s deficient performance “prejudiced the defense,” i.e., “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”

Id. at 687, 104 S.Ct. 2052. The petitioner must establish “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, 104 S.Ct. 2052. Thus, “the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” *Id.* at 695, 104 S.Ct. 2052. “The likelihood of a different result must be substantial, not just conceivable.” *Harrington*, 562 U.S. at 112, 131 S.Ct. 770.

[38] [39] [40] “Establishing that a state court’s application of *Strickland* was unreasonable under § 2254(d) is all the more difficult.” *Id.* at 105, 131 S.Ct. 770. Both standards are “highly deferential,” *id.* (internal quotation marks omitted), making our review of an ineffective-assistance claim “doubly deferential” in that we “take a highly deferential look at counsel’s performance through the deferential lens of § 2254(d),” *Pinholster*, 563 U.S. at 190, 131 S.Ct. 1388 (internal quotation marks omitted). Further, “[t]he *Strickland* standard is a general one, so the range of reasonable applications is substantial.” *Harrington*, 562 U.S. at 105, 131 S.Ct. 770. Thus, the inquiry “is not whether counsel’s actions were reasonable.” *Id.* It is “whether there is *any reasonable argument* that counsel satisfied *Strickland*’s deferential standard.” *Id.* (emphasis added); see also *id.* at 102, 131 S.Ct. 770 (stating that “a habeas court must determine what arguments or theories supported or ... could have supported [] the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court”).

III. DISCUSSION

Mr. Newmiller claims his trial counsel provided deficient performance when they (1) failed to adequately investigate before trial and call during trial a medical expert, such as Dr. Glaser, to rebut the prosecution’s experts, and (2) failed to call Dr. Berson to testify after reviewing the exculpatory *1198 report of his interview during trial. The district court concluded that the CCA unreasonably applied *Strickland*. But the court denied relief because Mr. Newmiller failed to show he was prejudiced by counsel’s performance. While we affirm the district court’s judgment, we do so on other grounds. As we now explain, the CCA reasonably applied *Strickland* when it held that trial counsel performed an adequate investigation and did not perform deficiently by declining to call Dr. Berson to testify.

A. Pretrial Investigation

Mr. Newmiller contends his trial counsel deficiently performed by failing to adequately consult with and call a medical expert who could have rebutted the prosecution’s theory that Mr. Newmiller fatally stabbed Mr. Madril at the beginning of the confrontation and that Mr. Madril lived long enough after being stabbed to engage in a fistfight with Mr. Orgill. We conclude it is at least arguable that trial counsel performed an adequate pretrial investigation and reasonably declined to call a medical expert, such as Dr. Glaser, to testify at trial. See *Harrington*, 562 U.S. at 105, 131 S.Ct. 770 (stating the question when applying *Strickland* under § 2254(d) is “whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard”).

[41] [42] [43] As discussed above, “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” *Id.* at 690, 104 S.Ct. 2052. For example, trial counsel’s informed decision not to call a particular witness is a tactical decision and thus a matter of discretion for counsel. See *Ellis v. Raemisch*, 872 F.3d 1064, 1087 (10th Cir. 2017). But strategic decisions made after less than a complete investigation are reasonable only “to the extent that reasonable professional judgments support the limitations on investigation.” *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. We assess a decision not to investigate for “reasonableness” under the circumstances, “applying a heavy measure of deference to

counsel's judgments." *Id.* "[W]hat investigation decisions are reasonable depends critically" on "information supplied by the defendant." *Id.* For instance, the Supreme Court has recognized that "the need for further investigation may be considerably diminished or eliminated altogether" if counsel develops a certain line of defense based on what the defendant has said. *Id.* In the end, the question is whether counsel's actions were objectively reasonable. *Id.* at 688, 104 S.Ct. 2052.

[44] Here, the CCA reasonably concluded that Mr. Newmiller's counsel—Mr. Tate and Ms. Grohs—made a reasonable strategic decision after performing an adequate investigation and consultation with their client. As counsel prepared for trial, "there were any number of hypothetical experts ... whose insight might possibly have been useful." *Harrington*, 562 U.S. at 107, 131 S.Ct. 770. They could have consulted specialists in crime-scene reconstruction, confessions, DNA, serology, trauma, emergency medicine, and forensic pathology. Counsel recognized this, as they interviewed the doctors involved in the case, consulted a confessions expert, and hired and later presented at trial a DNA expert.

Ms. Grohs also investigated whether Mr. Madril could have fought Mr. Orgill after being fatally stabbed in the heart. Ms. Grohs read several pathology books and treatises in preparation for her in-person *1199 interview with Dr. Ritchey. And she consulted two independent forensic pathologists—one before interviewing Dr. Ritchey and one after interviewing him. While Ms. Grohs testified she would have called a pathologist to testify at trial if one of them had disagreed with Dr. Ritchey, both pathologists agreed with Dr. Ritchey that it is possible for a person to engage in a fistfight for a short period after being stabbed in the heart.

Based on this investigation and on Mr. Newmiller's insistence that he did not stab Mr. Madril (as opposed to stabbing him in self-defense), counsel decided their theory of defense would be that Mr. Newmiller could not have stabbed Mr. Madril because he was nowhere near Mr. Madril during the altercation, and that Mr. Orgill must have stabbed Mr. Madril during their fistfight. To that end, counsel decided that instead of consulting a third or fourth pathologist—or calling one of the pathologists Ms. Grohs consulted—they would focus their efforts on defending against the confessions implicating Mr. Newmiller and the small amount of Mr. Madril's blood found on Mr. Newmiller's knife.

[45] Under these circumstances, it is at least arguable a reasonable attorney would abandon further investigation into whether Mr. Madril could have engaged in a fistfight after being stabbed, and instead focus on the other problematic evidence in accord with the defense's theory and the defendant's statements. After all, counsel need not pursue an investigation that, without the benefit of hindsight, would be fruitless and a drain on limited resources. *Harrington*, 562 U.S. at 107–08, 131 S.Ct. 770; see also *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 (stressing that "every effort [must] 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").

To be sure, counsel's defense strategy was ultimately unsuccessful. But that does not mean their representation was so obviously deficient that the CCA's holding to the contrary is unreasonable. See *Harrington*, 562 U.S. at 109, 131 S.Ct. 770; see also *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 ("Judicial scrutiny of counsel's performance must be highly deferential," for "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."). We conclude the CCA reasonably held that counsel's decision to not investigate further or call an expert to rebut Dr. Ritchey's testimony was strategic and adequately informed, and that Mr. Newmiller did not overcome the resulting and virtually unchallengeable presumption that counsel's decision was objectively reasonable.

[46] Mr. Newmiller launches several attacks on the CCA's decision. First, he argues that Ms. Grohs's calls with the two pathologists were "woefully inadequate" and not expert "consultations" in any meaningful sense. He notes that Ms. Grohs shared only the facts of the case with each pathologist, without providing them with any medical reports. Mr. Newmiller maintains that had Ms. Grohs shown actual photographs and autopsy reports to an emergency physician such as Dr. Glaser, she would have learned that a wound as large as the one Mr. Madril sustained is unlikely to cause cardiac

tamponade. But Mr. Madril's ability to function long enough to engage in a fistfight was not dependent upon a predicate finding that he experienced cardiac tamponade. Indeed, the focus at trial was not on whether Mr. Madril experienced cardiac tamponade; it was on whether Mr. Madril could have survived for the short time the witnesses *1200 reported he fought with Mr. Orgill. And every medical expert agreed that even in the absence of cardiac tamponade, Mr. Madril may have been able to fight for a brief period after the stabbing. Thus, Ms. Grohs provided the pathologists with sufficient information for them to arrive at a meaningful conclusion about a victim's ability to fight after being stabbed in the heart. Further, neither *Strickland* nor any other clearly established Supreme Court law requires a particular method of consultation. See *Strickland*, 466 U.S. at 688–89, 104 S.Ct. 2052 (“No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel.”).

Second, Mr. Newmiller insists that his case was one of those rare cases “where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both.” *Harrington*, 562 U.S. at 106, 131 S.Ct. 770. But Ms. Grohs did *consult* with experts concerning a victim's ability to fight after being stabbed in the heart. Thus, Mr. Newmiller seems to contend that his counsel was required to *introduce* expert testimony to rebut the prosecution's expert testimony that Mr. Madril was able to fight Mr. Orgill because Mr. Madril suffered cardiac tamponade after being stabbed. In support, Mr. Newmiller cites *Paine v. Massie*, 339 F.3d 1194 (10th Cir. 2003). In *Paine*, we held that counsel performed deficiently under the applicable standard of care because he failed to call an expert despite asserting a defense that the state courts had held requires calling an expert. See *id.* at 1202 (holding that counsel was ineffective for failing to call an expert on battered woman syndrome because “the professional standard in Oklahoma for an attorney representing a battered woman claiming self-defense” requires counsel, under the state's case law, to “put on an expert to explain [battered woman syndrome] to the jury”). But Mr. Newmiller cites no law requiring counsel to call a medical expert in this situation. Absent such authority, “*Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense.” *Harrington*, 562 U.S. at 111, 131 S.Ct. 770.

[47] Third, in an attempt to sidestep the virtually unchallengeable presumption that counsel's strategic decision was reasonable so long as it was adequately informed, Mr. Newmiller argues that counsel's decision to forego retaining and calling a medical expert was not actually a strategic decision. A state court's finding that an attorney's actions were the product of a strategic decision is a question of fact that must be rebutted by clear and convincing evidence under 28 U.S.C. § 2254(e)(1). See *Bryan v. Mullin*, 335 F.3d 1207, 1221 n.17 (10th Cir. 2003).

In support of this argument, Mr. Newmiller contends that expert testimony refuting the prosecution's theory of how long Mr. Madril could stand and fight would have supported the defense's strategy of showing that Mr. Newmiller could not have stabbed Mr. Madril. But even if it might have been helpful to introduce such expert testimony, it is arguable that a reasonable attorney might elect not to do so in view of the possibility that such testimony could harm the defense. See *Harrington*, 562 U.S. at 108, 131 S.Ct. 770 (stating that, even if expert testimony might support a defense, it is “reasonable to conclude that a competent attorney might elect not to use it” because it “might be harmful to the defense”). For instance, calling an expert on cardiac tamponade may have served only to highlight what *1201 every expert in this case agrees: that Mr. Madril could have functioned long enough to at least initiate a fight with Mr. Orgill. Or it could have drawn undue attention to whether cardiac tamponade occurred, even though the real issue was whether Mr. Madril could have fought Mr. Orgill after being stabbed in the heart—an issue that depends on a number of factors, of which cardiac tamponade is only one. Aside from these dangers, it could have unnecessarily converted the case into a battle of the experts. See *id.* at 108–09, 131 S.Ct. 770 (stating a competent attorney could decline to use expert testimony where it could “transform the case into a battle of the experts”).

Mr. Newmiller further argues that clear and convincing evidence exists to overcome the presumption that counsel's decision to forego retaining and calling a medical expert was a strategic decision. He cites Ms. Grohs's testimony that she would have called a pathologist to testify at trial if one of the pathologists with which she consulted disagreed with Dr. Ritchey. Mr. Newmiller contends her testimony shows her failure to present medical expert testimony was not a strategic

weighing of pros and cons of presenting such evidence, but instead a product of Ms. Grohs's inadequate consultation and investigation. But the testimony actually establishes the opposite. Because Ms. Grohs could not find an expert willing to contradict Dr. Ritchey's opinion, Ms. Grohs decided to focus her limited resources on attacking Mr. Newmiller's alleged confessions and providing an explanation for the traces of Mr. Madril's blood found on Mr. Newmiller's knife. That is, in view of the information available to her, Ms. Grohs made a strategic decision to focus her efforts on pursuing another theory of defense. It is at least arguable that this choice falls within the wide range of reasonable professional assistance.

Finally, the district court concluded that counsel was deficient because they failed to focus on "the most obvious defense" in the case—the "issue of temporal survival after this type of [wound](#)." The district court then determined that any conclusion otherwise constitutes an unreasonable application of [Strickland](#). From our vantage point, it does not appear the district court afforded appropriate deference to the state court's determination—deference that requires a federal court to ask "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." [Harrington](#), 562 U.S. at 105, 131 S.Ct. 770. Indeed, it is unclear how the district court's analysis would have been different without AEDPA's standard of review.

It was within the bounds of a reasonable judicial determination for the CCA to hold that counsel could follow a trial strategy that did not require the use of medical experts concerning the victim's ability to engage in a fight after being stabbed in the heart. This is particularly true where the two experts and the medical textbooks defense counsel consulted all agreed that in such circumstances death might not have occurred instantly.

B. Dr. Berson

Mr. Newmiller next argues that counsel were deficient for failing to call Dr. Berson to testify after they read his report mid-trial. Recall that the prosecution made available on February 28, 2006, the day jury selection started, the discovery materials containing Dr. Berson's report. Due to a miscommunication within Mr. Tate's office, defense counsel did not obtain and review the materials until March 7, 2016, the fifth day of witness examination and after Dr. Hertner and Dr. Ritchey had testified. After reviewing these materials, *1202 including Dr. Berson's report, counsel decided against calling Dr. Berson to testify and did not request a continuance.

Mr. Newmiller does not contend that counsel performed deficiently solely because of their late review of Dr. Berson's report. He instead argues the decision to not call Dr. Berson or to seek a continuance constitutes deficient performance. Relying on [Duncan v. Ornoski](#), 528 F.3d 1222 (9th Cir. 2008), and [Woolley v. Rednour](#), 702 F.3d 411 (7th Cir. 2012), Mr. Newmiller claims Dr. Berson's report rebutted the prosecution's theory that Mr. Madril experienced cardiac tamponade and therefore provided exculpatory evidence. We conclude it is arguable that competent counsel would strategically decline to call Dr. Berson to testify because his report was not exculpatory.

In [Duncan](#), a pre-AEDPA case that the Ninth Circuit reviewed de novo, the court acknowledged the Supreme Court has declined to articulate specific guidelines governing attorney conduct. 528 F.3d at 1233–34. But because AEDPA—and its focus on clearly established Supreme Court law—did not apply, the court applied one of its own "established general principles" governing the reasonableness of attorney conduct. *Id.* at 1234. Under that Ninth Circuit principle, an attorney who fails to introduce exculpatory evidence—"evidence that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict[—]renders deficient performance." *Id.* (internal quotation marks omitted) The court explained that although "it may not be necessary in every instance to consult with or present the testimony of an expert, when the prosecutor's expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance." *Id.* at 1235.

Applying this principle, the court held that defense counsel was deficient for failing to consult an expert concerning “potentially exonerating blood evidence” and for failing to present such evidence at trial. *Id.* at 1235–36. To obtain a conviction, the prosecution had to show that defendant himself intentionally killed the victim or that defendant intended that the victim be killed by an accomplice. *Id.* at 1233. Defense counsel’s theory was that someone other than defendant committed the murder. *Id.* Yet counsel “did not advance any plausible alternative theory or present any specific evidence that he was not the murderer,” even though there was blood sample evidence before the jury that could have shown defendant did not kill the victim. *Id.* at 1235. Counsel had a copy of the police serology report. *Id.* But he did not consult a serology expert, have defendant’s blood tested, or present the results of any such tests at trial. *Id.* According to the Ninth Circuit, this failure amounted to deficient performance. *Id.*

The present case is distinguishable from *Duncan*. First, this case is governed by AEDPA, meaning we may not grant relief unless the state court’s decision was contrary to, or an unreasonable application of, clearly established Supreme Court law. § 2254(d)(1). It is not enough that the state court’s decision may be contrary to, or an unreasonable application of, clearly established Tenth Circuit law. Thus, unlike the Ninth Circuit in *Duncan*, we are not free to rely on our own case law to supply the applicable standard of care; we must instead adhere to the Supreme Court’s rule that there are no specific guidelines governing attorney conduct. Second, Ms. Grohs consulted two expert pathologists to discern whether Mr. Madril could have fought Mr. Orgill after being fatally *1203 stabbed in the heart. Both experts agreed with Dr. Ritchey that it is possible for a person to engage in a fistfight for a short period after being stabbed in the heart. Third, counsel advanced a plausible alternative theory and presented evidence that Mr. Newmiller was not the murderer. Counsel sought to challenge the confessions implicating Mr. Newmiller and the blood found on his knife. And counsel endeavored to persuade the jury that Mr. Orgill stabbed Mr. Madril (or that Mr. Madril stabbed himself) during their fistfight, and that he did so while Mr. Newmiller was slashing the tire at the opposite end of the vehicle. Fourth, as discussed below, **Dr. Berson’s report was not necessarily exculpatory.**

This case is also distinguishable from the Seventh Circuit’s decision in *Woolley*. There, applying de novo review, the court held that defense counsel was deficient for failing to retain an expert to challenge “impeachable testimony” from the prosecution’s expert crime-scene investigator that “effectively hollowed out the core of his client’s defense.” 702 F.3d at 422–23. Counsel knew his client’s testimony turned on the location of the final gunshot, and he had advance notice that the prosecution planned to introduce expert testimony on that issue. *Id.* at 423. Yet he made no effort to retain an expert. *Id.* And it was “undisputed that there was no strategic rationale underlying” that error: counsel testified that “the idea of securing an expert witness ‘never crossed my mind.’ ” *Id.*

[48] But again, our task is not to determine in the first instance whether defense counsel was deficient; it is to determine “whether there is any reasonable argument that counsel satisfied *Strickland’s* deferential standard.” *Harrington*, 562 U.S. at 105, 131 S.Ct. 770. Moreover, the idea of retaining an expert crossed Ms. Grohs’s mind. In fact, she took steps to retain an expert: she interviewed two forensic pathologists, yet strategically decided against calling either to testify. Plus, this case did not turn on whether Mr. Madril experienced cardiac tamponade. The real issue was whether Mr. Madril could have engaged in a fistfight after being fatally stabbed in the heart. When both experts she consulted agreed that Mr. Madril could have stood and fought as described by the witnesses, Ms. Grohs made the reasonable strategic decision to focus on the damning confessions evidence and the blood found on Mr. Newmiller’s knife.

More importantly, neither Dr. Berson’s nor Dr. Glaser’s testimony necessarily would have rebutted the testimony from the prosecution’s experts. All the experts agreed that several factors influence how long a victim can stay on his feet after being stabbed in the heart, of which cardiac tamponade is only one. And there was a general consensus that the victim could have engaged in a fistfight for a short period after being stabbed. Dr. Ritchey testified that while he had “no way of knowing” how long Mr. Madril lived after being stabbed, he believed a person could die from a wound like that sustained by Mr. Madril in anywhere from “a few seconds to a few minutes”; Dr. Berson stated that the amount of time a person could stay on his feet after being stabbed in the heart depends on several factors, but that a person might stay on his feet after suffering a wound like Mr. Madril’s for “approximately a minute or so”; and Dr. Glaser testified

at the state post-conviction hearing that although he “would be surprised if [Mr. Madril] survived more than a minute or two,” Mr. Madril “could have maybe” initiated a fistfight with another person. Even if Dr. Berson’s or Dr. Glaser’s testimony would have rebutted some of the testimony from the prosecution’s *1204 experts, their testimony would not have been exculpatory. As the CCA observed, other evidence incriminating Mr. Newmiller existed that would not have been rebutted by favorable testimony from medical experts: Mr. Newmiller’s confessions and the small amount of Mr. Madril’s blood found on Mr. Newmiller’s knife. See *Newmiller*, 338 P.3d at 468.

Finally, the district court concluded that “[t]he failure of defendant’s counsel to obtain and review the prosecution’s disclosure before trial was unreasonable and resulted in a failure to present contradictory expert opinions” on when the stabbing occurred. But Mr. Newmiller did not argue in state court that his counsel performed deficiently by delaying a week in obtaining the prosecution’s discovery. Even so, the delay did not cause counsel’s failure to present contradictory expert opinions. Counsel reviewed the discovery, including Dr. Berson’s report, and decided against calling Dr. Berson after concluding the new materials did not affect how they would have examined any of the witnesses, including Dr. Ritchey. It is at least arguable that this decision was a reasonable strategic move.

Under the circumstances, the CCA reasonably held that competent counsel could strategically decline to call Dr. Berson to testify because his report was not exculpatory. Thus, we conclude that the CCA did not unreasonably apply *Strickland*.

IV. CONCLUSION

The CCA’s holding that Mr. Newmiller’s ineffective-assistance-of-counsel claim fails under step one of *Strickland* was not an unreasonable application of *Strickland*. Thus, we need not reach step two under *Strickland*.³ See *Ellis*, 872 F.3d at 1085 (“In order to succeed on an ineffective-assistance claim, a petitioner must satisfy both prongs of the *Strickland* test.”). We affirm the district court’s judgment denying Mr. Newmiller habeas relief.

³ Although we need not reach the prejudice prong under *Strickland*, we note that, in deferring to the state post-conviction court’s analysis of that prong, the district court focused on “the sufficiency of the other evidence of guilt.” But prejudice under *Strickland* does not turn on a sufficiency-of-the-evidence analysis. Rather, to establish prejudice, a petitioner must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. As our sister circuits have recognized, whether there was enough evidence to legally support a conviction does not answer whether there was a reasonable probability of a different result arising from counsel’s deficient performance. See *Crace v. Herzog*, 798 F.3d 840, 849 (9th Cir. 2015) (stating that the prejudice test under *Strickland* is “an entirely different inquiry” from the sufficiency-of-the-evidence test); *Saranchak v. Sec’y, Pa. Dep’t of Corr.*, 802 F.3d 579, 599 (3d Cir. 2015) (“*Strickland* prejudice does not depend on the sufficiency of the evidence despite counsel’s mistakes.”).

All Citations

877 F.3d 1178

2016 WL 10879213

Only the Westlaw citation is currently available.
United States District Court, D. Colorado.

Todd NEWMILLER, Applicant,

v.

Rick RAEMISCH, Executive Director, Colorado Department of Corrections,
and Cynthia Coffman, [Attorney General, State of Colorado](#), Respondents.

Civil Action No. 15-cv-02461-RPM

|
Signed 07/27/2016

Attorneys and Law Firms

[Gail Kathryn Johnson](#), Johnson & Klein, PLLC, Boulder, CO, Amy Dell Trenary, Appeal to Justice, LLC, Broomfield, CO, for Applicant.

[John Jacob Fuerst, III](#), Ryan Alan Crane, Colorado Attorney General's Office, Denver, CO, for Respondents.

Opinion

ORDER DENYING APPLICATION AND FOR DISMISSAL

[Richard P. Matsch](#), Senior District Judge

*1 In this application pursuant to [28 U.S.C. § 2254](#), Todd Newmiller seeks to vacate his conviction and sentence of 31 years imprisonment for second degree murder claiming that his two retained lawyers failed to provide effective assistance, depriving him of the protection of the Sixth Amendment to the United States Constitution.¹ Trial of this charge was held in the District Court of El Paso County, Colorado, in 2006. The conviction and sentence were affirmed by the Colorado Court of Appeals in May, 2008, and the Colorado Supreme Court denied certiorari. The claims made here were contained in a Motion for Post-conviction Relief Pursuant to [Rule 35\(c\) of the Colorado Rules of Criminal Procedure](#) in September, 2009. After a four-day evidentiary hearing the district court denied relief in a detailed order on September 7, 2010.

¹ The defendant was represented by Deborah Grohs and Philip Tate, both experienced defense counsel.

The Colorado Court of Appeals affirmed that order in a published opinion on July 3, 2014, [People v. Newmiller](#), 338 P.3d 459 (Colo. Ct. App. 2014). Certiorari was denied and this application was timely filed on November 6, 2015. The issues have been fully briefed and the state court record of proceedings are on file. Oral argument was heard on July 8, 2016.

The Supreme Court decision in [Strickland v. Washington](#), 466 U.S. 668 (1984) established the standard for determining deficient performance of counsel as objective reasonableness and the requirement that the deficiency prejudiced the defense. To obtain relief in this court the applicant must show that the state court's adjudication was contrary to or involved an unreasonable application of *Strickland* or was based on an unreasonable determination of the facts in light of the evidence presented. [28 U.S.C. § 2254\(d\)\(2\)](#).

The evidence introduced at trial was summarized in the decision on direct appeal and in the published opinion affirming denial of the [Rule 35\(c\)](#) motion.

The victim, Anthony Madril, died from a knife stab wound to his heart sustained during an altercation between two groups of young men that began at a strip club in Colorado Springs and ended with a fight on a street not far from the club. The victim was a passenger in a pickup truck with Chisum Lopez and Charles Schwartz, the driver. The defendant was a passenger in a Jeep vehicle driven by his brother, Joel Newmiller, with Brad Orgill, Mike Lee and Jason Melick as additional passengers. When the truck left the club's parking lot the Jeep followed and both vehicles came to a stop on a city street. Todd Newmiller jumped out of the Jeep before it was fully stopped and approached the passenger side of the truck. Lopez and Madril jumped out of the truck. The sequence of following events is not clear from the testimony of all who were present, excluding the defendant and Madril. They were all intoxicated and the time was early morning.

What is clear is that Brad Orgill and the victim fought during which they both went to the ground. Schwartz pulled Madril into the cab of the truck and drove off after the defendant stabbed a rear tire with a knife. The dispatcher receiving a 911 call instructed Schwartz to stop and wait for an ambulance. Madril was taken to a hospital where he was pronounced dead. The time of death is not known.

*2 Orgill's clothes were covered with the victim's blood. The prosecution's contention, accepted by the jury, was that the defendant stabbed Madril when he first got out of the truck, before Madril's fight with Orgill. Of critical importance was whether Madril had the physical ability to engage in that fight after sustaining a knife wound that breached the wall of a ventricle in his heart.

As Justice O'Connor observed in *Strickland*, the function of defense counsel in a criminal case "is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690.

Justice Stevens in *United States v. Cronin*, 466 U.S. 648, 656 (1984) wrote:

The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.

A criminal trial is a test of the prosecution's evidence and the role of the defendant's lawyer is to challenge that evidence sufficiently to raise a reasonable doubt in the minds of the jurors that the accused is guilty of the crime charged. That requires adequate investigation into the information that is available to understand the events and circumstances of the basis for the charge. Rule 16 of the Colorado Rules of Criminal Procedure is in aid of that obligation, requiring the prosecuting attorney to make available to defense counsel material and information described in the rule, including that which "tends to negate the guilt of the accused as to the defense charged...." Colo. R. Crim. P. 16, Part I, (a)(2).

In approaching the defense of this charge it must have been apparent that most people would expect that a man stabbed in the heart would have an immediate reaction. Movies and television shows depicting such events would condition that belief. The need to overcome that expectation would be the biggest burden for the prosecution and the greatest vulnerability of the case.

In what is said to be common practice, the prosecutor's office gave notice to Mr. Tate's office that discovery materials were available. The subject papers were given to defense counsel before the trial started.² They were not examined until March 7, 2006, while the trial was in progress. The discovery packet included a written report of an interview of Dr. Andrew Berson, a trauma specialist surgeon who had been called to the hospital to attend to Madril who was dead on arrival so could not be treated. Dr. Berson reportedly said that he gave an ultrasound examination of Madril revealing an estimated three to four liters of blood in the chest cavity. He described the wound and opined that blood would pump out into the body in a very short time but would not spurt out at the time of the stabbing. Dr. Berson estimated that the victim of this type of wound "could stay on his feet for approximately a minute or so."

2 The rule requires disclosure no less than 35 days before trial. Mr. Tate's office was notified at some time not clear in the record. Ms. Groh testified at the [Rule 35\(c\)](#) hearing that she moved for mistrial when she first read this interview report, not knowing that it had been made available before the beginning of the trial. The motion was denied for that reason.

The discovery packet also included a report from Dr. Ritchey, the coroner, and a report of Dr. Hertner, the emergency room physician who examined Madril on arrival at the hospital. At trial, Dr. Ritchey testified that a person stabbed into the heart may bleed into the pericardium which could put pressure on the heart slowing the bleeding and such a victim may survive up to twenty minutes. Dr. Hertner had a similar opinion and this "cardiac tamponade" could have slowed the rate of bleeding enough to allow Madril to fight with Orgill.

*3 Defense counsel did not call any qualified medical witness to contradict these opinions. At the [Rule 35\(c\)](#) hearing, Dr. David Glaser, an emergency room physician testified that after seeing autopsy photos of the [wound](#) he thought it would not be possible for cardiac tamponade to occur. He opined that Madril could have initiated the fight and continue for a very short period of time but "following the first seconds to maybe half a minute or so, this injury would be causing loss of blood pressure, loss of profusion of blood to the brain, and the victim would pass out." Ex. XX, Tr. 8/11/10 at 58:23–59:1. He then said the victim would have died within a minute or two and it was difficult to imagine being able to continue to function for more than a couple minutes. Dr. Berson did not testify at the post-conviction hearing.

The prosecution made use of the testimony of the doctors in closing argument. Mr. Tate did not discuss it in his argument and failed to urge that it was counter-intuitive to believe a person stabbed in the heart could fight with Orgill and get into the truck.

The failure of defendant's counsel to obtain and review the prosecution's disclosure before trial was unreasonable and resulted in a failure to present contradictory expert opinions on the initial question of where the stabbing occurred. The witnesses all agreed that they never saw the defendant and victim standing close together and did not see that Newmiller had an open knife.

In fact, Tate in his argument suggested the implausible theory that Madril stabbed himself with his own knife when he fought with Orgill as well as Orgill doing the stabbing with some knife that he discarded. He also argued blood stains location. The lack of focus on the issue of temporal survival after this type of [wound](#) illustrates the failure of defense counsel to develop the most obvious defense—that Madril could not engage in the fight with Orgill after being stabbed in the heart.

This court is required to accept the state court's factual findings unless they are an unreasonable interpretation of the evidence. In the order denying post-conviction relief the district judge wrote that counsel undertook a thorough investigation of the facts "carefully reviewing the discovery." Ex. 12, p.3.

That is not only unsupported but contradicted by the evidence before the court. The Colorado Court of Appeals said that

The postconviction court's conclusion that trial counsel's pretrial investigation regarding the medical evidence was reasonable is supported by the record and we decline to disturb it on review.

[People v. Newmiller](#), 338 P.3d 459, 468 (2014).

Neither court acknowledged the evidence of the failure of counsel to review the discovery before the trial was well into the presentation of evidence.

To obtain relief from this failure of his attorney, Newmiller must show prejudice. In *Strickland* the Court said that the applicant must show a reasonable probability that the outcome would have been different.

The Colorado Court of Appeals did not address that issue because it affirmed the district court's finding that counsel was not ineffective. The District Court did address it as to the failure to call medical experts notwithstanding finding that failure was not unreasonable.

The district judge considered the prosecution's additional evidence submitted at the post-conviction hearing in evaluating the testimony of D. Glaser and the presumed testimony of Dr. Berson who was not called as a witness at that hearing. The court noted that the fight could well have been completed within a minute or so and that the theory of cardiac tamponade was not the relevant issue.

There was significant testimony implicating the defendant, including the testimony of his brother as to statements made when the defendant got back into the Jeep and that of Orgill when the group was at his house when the defendant was wiping the blade of his knife and DNA evidence that Madril's blood was on Todd Newmiller's knife.

*4 It is difficult to apply the *Strickland* standard for prejudice. Justice Marshall in his dissenting opinion criticized the prejudice standard and would have held that a "proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not...constitute due process." *Strickland*, 466 U.S. at 711. Yet the law is clearly established and must be followed. While most courts have apparently considered it to require a verdict of acquittal, a more realistic view would be that but for counsel's failure to challenge the prosecution's medical opinion testimony with that of Dr. Berson and Dr. Glaser, at least one juror may have had a reasonable doubt of the defendant's guilt giving a hung jury as a result.

The difficulty is that this court must give deference to the state court's view of the sufficiency of the other evidence of guilt. Given that limitation this Court must accept that there is a failure of the applicant to show prejudice from the failure of the trial attorneys to prepare for and meet the medical opinions supporting the prosecution's claim that the fatal wound was inflicted before the victim's fight with Orgill.

The applicant has also claimed that his lawyers failed to seek jury instructions for lesser included offenses. As the state judges all agreed that was a reasonable trial strategy. To argue for any lesser included offense would seriously weaken the defense theory of the case, that the defendant did not stab Madril.

At the Rule 35 (c) hearing the defense called John Koziol, a crime scene investigator, who testified that he had reconstructed the crime scene and opined that the small bloodstains at the area where the prosecution claimed the stabbing occurred were most likely from the victim's minor wounds and the absence of blood on Todd Newmiller's jacket and the fact that Orgill was covered in blood made it more likely that Orgill had stabbed the victim. He also thought that the victim's knife found in the truck could have inflicted the fatal wound during the fight. The prosecution called a contradictory witness and the district judge found him to be more credible. Comparing that additional testimony to that of the prosecution's trial witness on these subjects supports the finding that the failure to call Koziol was not unreasonable and therefore not ineffective assistance.

The applicant contends that there was a conflict of interest affecting Tate's advisement to the defendant on his right to testify. The state court found no conflict and adequate advisement and these findings are reasonable and supported by the record.

The applicant asserted a Fourteenth Amendment due process violation under *California v. Trombetta*, 467 U.S. 479, 488–89 (1984) because there was a black substance on the defendant's knife blade which was not present when it was examined at the CBI laboratory. There is no explanation as to when or how it disappeared. The existence of that substance would appear to be from stabbing the tire. That was never a fact in dispute and the minor corroboration of it would not be considered the destruction of exculpatory evidence under *Trombetta* as the state judges reasonably concluded.

Upon the foregoing, it is

ORDERED that the application for habeas corpus under [28 U.S.C. § 2254](#) is denied and this civil action is dismissed.

All Citations

Slip Copy, 2016 WL 10879213

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 15-cv-02461-RPM

TODD NEWMILLER,

Applicant,

v.

RICK RAEMISCH, Executive Director, Colorado Department of Corrections, and
CYNTHIA COFFMAN, Attorney General, State of Colorado,

Respondents.

ORDER CLARIFYING ORDER DENYING APPLICATION AND FOR DISMISSAL

After reviewing the Applicant's Motion to Clarify Order (Doc. 25) and to assist in any appellate review, the Court grants the motion and now makes explicit that the trial counsels' failure to review the discovery material available to them and prepare to contradict the medical opinions presented by the prosecution was deficient performance and the Colorado Court of Appeals ruling to the contrary was an unreasonable application of *Strickland*.

SO ORDERED.

DATED: August 30, 2016

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 15-cv-02461-RPM

TODD NEWMILLER,

Applicant,

v.

RICK RAEMISCH, Executive Director, Colorado Department of Corrections, and
CYNTHIA COFFMAN, Attorney General, State of Colorado,

Respondents.

ORDER DENYING MOTION TO ALTER ORDER AND JUDGMENT

After review of the arguments made in the Applicant's (Petitioner's) Motion to
Alter Order and Judgment (Doc. 26) and finding them not persuasive, it is

ORDERED that the motion is denied.

DATED: August 30, 2016

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 15-cv-02461-RPM

TODD NEWMILLER,

Applicant,

v.

RICK RAEMISCH, Executive Director, Colorado Department of Corrections, and
CYNTHIA COFFMAN, Attorney General, State of Colorado,

Respondents.

ORDER AMENDING FINAL JUDGMENT

A judgment dismissing this civil action was entered on July 27, 2016, based on this Court's Order Denying Application and for Dismissal. On August 23, 2016, the Applicant (Petitioner) filed a Motion in the Alternative to Alter and Amend Order and Judgment to Issue a Certificate of Appealability (Doc. 27) and a Motion to Alter Order and Judgment (Doc. 26). That motion (Doc. 26) has been denied by a separate order.

This Court must determine whether to issue a Certificate of Appealability to permit an appeal. Finding that the Applicant has raised the issue of a violation of the Sixth Amendment by ineffective assistance of counsel by a substantial showing and that jurists of reason could disagree with this Court's resolution of that issue, Todd Newmiller is granted a Certificate of Appealability pursuant to Rule 11(a) of the Rules Governing Section 2254 cases. The request for a certificate is denied on his claim under *California v. Trombetta*, 467 U.S. 479 (1984).

SO ORDERED.

DATED: August 30, 2016

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior Judge

2015 WL 4623633

Only the Westlaw citation is currently available.
Supreme Court of Colorado.

Todd William NEWMILLER, Petitioner

v.

The PEOPLE of the State of Colorado, Respondent.

No. 14SC665

|

AUGUST 3, 2015

Court of Appeals Case No. 10CA2139

En Banc

Opinion

*1 Petition for Writ of Certiorari DENIED.

All Citations

Not Reported in P.3d, 2015 WL 4623633

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338 P.3d 459
Colorado Court of Appeals,
Div. II.

The PEOPLE of the State of Colorado, Plaintiff–Appellee,
v.
Todd William NEWMILLER, Defendant–Appellant.

Court of Appeals No. 10CA2139
|
Announced July 3, 2014

Synopsis

Background: Defendant convicted of second-degree murder filed motion for postconviction relief based on claims of ineffective assistance of counsel. Following evidentiary hearing, the District Court, El Paso County, John N. McMullen, J., denied motion, and defendant appealed.

Holdings: The Court of Appeals, [Berger, J.](#), held that:

- [1] counsel's decision not to request instructions for reckless manslaughter and negligent homicide as lesser included offenses of second-degree murder was objectively reasonable;
- [2] counsel's failure to request instruction on lesser non-included offense of accessory to crime was objectively reasonable;
- [3] counsel's decision not to hire and call medical expert to testify regarding cardiac tamponade and period of victim's survival following fatal stab wound to heart was matter of reasonable trial strategy;
- [4] counsel's failure to call expert in crime scene reconstruction was not outside wide range of professionally competent assistance; and
- [5] defendant was not entitled to postconviction relief on claim that trial counsel was acting under actual conflict of interest that affected counsel's ability to adequately advise defendant about his right to testify.

Affirmed.

***461** El Paso County District Court No. 04CR5770, Honorable John N. McMullen, Judge

Attorneys and Law Firms

[John W. Suthers](#), Attorney General, Patricia R. Van Horn, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff–Appellee

[Douglas K. Wilson](#), Colorado State Public Defender, [Andrew C. Heher](#), Deputy State Public Defender, Denver, Colorado, for Defendant–Appellant

Opinion

Opinion by JUDGE [BERGER](#)

¶ 1 Defendant, Todd William Newmiller, appeals the district court's order denying his [Crim. P. 35\(c\)](#) motion for postconviction relief. We affirm.

I. Background

A. Facts

¶ 2 Defendant, his brother, and their friends, Brad Orgill, Jason Melick, and Michael Lee, went to a strip club in Colorado Springs to celebrate defendant's birthday. When the group was leaving the club, they had an altercation with another group, consisting of the victim, Chisum Lopez, and Charles Schwartz, regarding a comment someone in the victim's group had made to a dancer.

¶ 3 Both groups eventually left the club in separate vehicles. About a half block away, the victim's group stopped its pickup truck in the middle of the street. Defendant's group stopped its Jeep behind the truck. The two groups confronted each other, and at some point during that confrontation, the victim was stabbed in the heart.

¶ 4 All the participants, including the victim, fled from the scene. The victim's group headed to the hospital but pulled over when the 911 dispatcher told them to wait for an ambulance. The victim was transported to the hospital by ambulance and pronounced dead on arrival.

¶ 5 The following day, Melick learned that someone had been killed in the same area where the fight had occurred. He placed an anonymous phone call to the police and named defendant as the killer. Defendant was arrested and a search of his person uncovered a knife. Forensic testing revealed a small amount of blood matching the victim's on the blade of the knife.

B. Trial

¶ 6 Defendant was charged with second degree murder. He did not testify at trial, but everyone else involved did. Although there were substantial inconsistencies in the testimony, the record establishes that no one saw defendant stab the victim, no one saw defendant confront the victim, and no one saw any of the parties with a weapon that night before or during the fight. The record also establishes that during the altercation, Orgill exchanged punches with the victim and defendant verbally argued with Lopez. It was uncontested that defendant stabbed one of the truck's tires right before the victim's group drove away.

¶ 7 The prosecution's theory of the case was that defendant stabbed the victim at the very beginning of the confrontation and the victim remained alive for several minutes after he had been stabbed. The prosecution *462 had to establish that defendant stabbed the victim then because other than during the first few seconds after defendant and the victim left their respective vehicles, someone from the victim's or defendant's group saw either the victim or defendant at all times, and no one saw them near each other. The prosecution thus had to show that the victim lived for some time after he was stabbed, during which time he fought with Orgill.

¶ 8 In support of its theory, the prosecution offered testimony from Joel Newmiller (defendant's brother), Melick, Orgill, and Lee.¹ Joel testified that when defendant's group got back in the Jeep after the fight, he became upset after seeing a cut on his brother's (defendant's) face. Joel testified that defendant attempted to calm him down by saying, “[d]on't worry about it. I slashed their tire and I stabbed one of them.” Melick also testified that Joel started “freaking out” because defendant had been hit; in response, defendant said to Joel, “[d]on't worry. Don't worry, I stabbed him.” Melick testified that defendant then said to the other occupants of the vehicle, “I stabbed the guy, okay?” and “[y]ou guys don't know nothing about this, okay?”

¹ All of these persons except Melick testified in accordance with plea agreements.

¶ 9 Orgill and Lee testified that they did not hear defendant say anything at that time about stabbing anyone; however, they both testified that when the three of them were at Orgill's house later that night, defendant said something like he hoped he had not stabbed anyone or he thought he might have stabbed someone. Orgill, Lee, and defendant looked at defendant's knife, but no blood was visible.

¶ 10 Orgill's clothes were covered heavily in blood. Defendant also had some blood on his clothing. As a result, both Orgill and defendant burned their clothes.

¶ 11 Defendant was convicted of second degree murder with a deadly weapon and sentenced to thirty-one years imprisonment.

C. Direct Appeal

¶ 12 A division of this court affirmed defendant's conviction and sentence on direct appeal. *People v. Newmiller*, (Colo.App. No. 06CA1402, 2008 WL 2133008, May 22, 2008) (not published pursuant to C.A.R. 35(f)). The supreme court denied defendant's petition for writ of certiorari.

D.Crim. P. 35(c) Motion

¶ 13 Defendant moved for postconviction relief pursuant to [Crim. P. 35\(c\)](#), claiming that his trial attorneys rendered ineffective assistance of counsel. After holding a hearing, the postconviction court issued a lengthy and comprehensive written order denying the motion.

¶ 14 Defendant appeals. Specifically, he argues that his trial attorneys, Attorney 1 and Attorney 2, were ineffective because (1) they failed to request instructions on lesser included offenses and did not consult with and advise defendant regarding lesser included offenses; (2) they failed to request an instruction on the lesser nonincluded offense of accessory to crime; (3) they failed to offer testimony from a medical expert and failed to consult with and retain an expert in crime scene analysis; and (4) Attorney 1 labored under an actual conflict of interest that affected his advice regarding defendant's right to testify and both attorneys failed to adequately consult with and advise defendant regarding testifying.

II. Law

[1] ¶ 15 A criminal defendant is constitutionally entitled to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To obtain relief based on ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the

defense. *Ardolino v. People*, 69 P.3d 73, 76 (Colo.2003) (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). The defendant bears the burden of proving both prongs of the *Strickland* test. *Dunlap v. People*, 173 P.3d 1054, 1061 (Colo.2007).

¶ 16 Counsel's performance is deficient if the defendant shows that counsel's representation "fell below an objective standard of reasonableness." *Ardolino*, 69 P.3d at 76 (citing *463 *Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052). Judicial scrutiny of counsel's performance is highly deferential. *Id.* (citing *Strickland*, 466 U.S. at 698, 104 S.Ct. 2052). The court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Davis v. People*, 871 P.2d 769, 772 (Colo.1994) (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). Because hindsight is almost always accurate, it is easy for a court evaluating an ineffective assistance claim to point to some action counsel should have taken. A reviewing court therefore must make "every effort ... to eliminate the distorting effects of hindsight ... and to evaluate [counsel's challenged] conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

¶ 17 To establish prejudice, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Ardolino*, 69 P.3d at 76 (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052). A reasonable probability does not mean that counsel's deficient performance more likely than not altered the outcome in the case. *Id.* (citing *Strickland*, 466 U.S. at 693–94, 104 S.Ct. 2052). Rather, a reasonable probability means a probability sufficient to undermine confidence in the outcome. *Id.* (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052).

¶ 18 A claim of ineffective assistance of counsel presents a mixed question of law and fact. *Dunlap*, 173 P.3d at 1063. In reviewing a postconviction court's findings on a mixed question of law and fact, we defer to the court's findings of fact as long as they are supported by the record but review its conclusions of law de novo. *Id.* The ultimate determination of whether an attorney rendered ineffective assistance of counsel is a question of law we review de novo. See *People v. Brown*, 250 P.3d 679, 681 (Colo.App.2010).

III. Defendant's Ineffective Assistance Allegations

A. Failure to Request Lesser Included Offense Instructions

¶ 19 Defendant argues that trial counsel's failure to request lesser included offense instructions and consult with and advise him on lesser included offenses constituted ineffective assistance of counsel. He asserts that strong evidence supported such instructions; that the evidence showed at least a reasonable probability of conviction on a lesser offense; and that there was no downside to having the jury so instructed.

¶ 20 Defendant testified at the [Crim. P. 35\(c\)](#) hearing that neither of his attorneys discussed with him the possibility of requesting instructions on lesser included offenses, including reckless manslaughter and negligent homicide. Attorney 1 testified that he did not recall discussing lesser included offenses with defendant, but that jury instructions were Attorney 2's responsibility. Attorney 2 testified that she did not remember specifics regarding jury instructions or lesser included offenses, but that she assumed she had considered and discussed with Attorney 1 whether any lesser included offenses would have been helpful to the defense. She testified that she was sure that if she had thought it was appropriate, she would have asked for a lesser included offense instruction.

¶ 21 However, she testified that the defense was, from the beginning, an "all-or-nothing" case:

[M]y feeling coming into the case is I was thinking that the best course of action would be a self-defense case.... [But] when I met [defendant], it was I did not do this; it wasn't a self-defense case....

[So] I was in a bit of a disagreement with the road we were going down, but [defendant] was absolutely adamant that he did not do this, and the course was going to be the way it was.

She therefore explained that if a lesser included offense instruction had been given, “[i]t would have been one of those kind of awkward situations where a defense attorney is arguing he did not do this, but if you think he did, then find him guilty of something less than second-degree murder, which is not always a great way to go.”

¶ 22 The postconviction court found that both of defendant's trial attorneys were “highly experienced criminal defense attorneys,” a finding which is supported by the *464 record. At the time of defendant's trial, Attorney 1 and Attorney 2 had about thirteen years and nineteen years of criminal defense experience, respectively. The court further found that both had tried a “very large number of felony cases,” with Attorney 1 having tried five homicide cases and Attorney 2 having tried nineteen.

¶ 23 The court concluded that counsel's failure to request a lesser included offense instruction or consult with defendant on the matter did not constitute ineffective assistance. It explained:

At all times, [defendant] was insistent upon his innocence and considered the case to be an all-or-nothing case. Thus it was understandable that [Attorney 2] did not consult with [defendant] and highly probable that consultation would not have resulted in a request for a lesser offense instruction. [Attorney 2] was a highly experienced criminal defense lawyer, she and [Attorney 1] had thoroughly prepared the case, and after the presentation of the People's case, [Attorney 2] was confident that there was at least a reasonable likelihood of acquittal. Instructing the jury on a lesser included offense would have risked conviction of the lesser offense instead of an outright acquittal.

We agree with the court that defendant has not established that his trial attorneys were constitutionally ineffective in this area.

[2] [3] ¶ 24 Colorado law provides that “[t]he decision whether to request jury instructions on lesser offenses is a tactical decision that rests with defense counsel after consultation with the defendant.” *Arko v. People*, 183 P.3d 555, 556 (Colo.2008). We disagree with defendant that because *Arko* requires consultation, failure to consult is per se unreasonable under the first prong of *Strickland*. Rather, the relevant inquiry is whether “counsel's assistance was reasonable *considering all of the circumstances*” or whether, “*in light of all the circumstances*, the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 688, 690, 104 S.Ct. 2052 (emphasis added).

¶ 25 Therefore, to determine whether counsel's decision not to request lesser included offense instructions was objectively reasonable, we must examine counsel's entire performance as it relates to this matter, especially because counsel retains the ultimate decisionmaking authority on this issue. See *Van Alstine v. State*, 263 Ga. 1, 426 S.E.2d 360, 363 (1993) (concluding that, although it is critically important for defense lawyers to consult with defendants in such matters as whether to request lesser included offenses, the failure to follow this practice in every case does not constitute ineffective assistance of counsel as a matter of law, and the inquiry rather must focus on the consequence when that practice has not been followed).

[4] ¶ 26 The Tenth Circuit has explained that “the general presumption of objective reasonableness requires [a defendant] to ‘overcome the presumption that under all the circumstances, the challenged action *might* be considered sound trial strategy.’” *Bullock v. Carver*, 297 F.3d 1036, 1046 (10th Cir.2002) (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). Counsel's decision in this case not to request lesser included offense instructions clearly could have been a sound trial strategy; both Attorney 1 and Attorney 2 testified at the postconviction hearing that they had believed there was a good chance for an acquittal. A lesser included offense instruction risked a compromise verdict in which the jury convicted defendant of a lesser included offense rather than acquitting him outright. Given defendant's participation in a deadly

encounter, even if the jury did not believe he committed murder, the presence of lesser included offenses would have created a substantial risk that the jury would convict defendant of some offense.

¶ 27 “[W]here it is shown that a particular decision was, in fact, an adequately informed strategic choice, the presumption that the attorney’s decision was objectively reasonable becomes ‘virtually unchallengeable.’ ” *Id.* at 1046 (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052) (emphasis omitted). The record shows that counsel had thoroughly investigated the facts of the case. Moreover, given the state of the evidence at the close of the prosecution’s case, it was not unreasonable *465 for counsel to believe acquittal was a real possibility and consequently to not consider lesser included offense instructions.

¶ 28 Except in situations where counsel was plainly incompetent, most courts that have considered this issue have concluded that the decision not to request lesser included offense instructions was a reasonable trial strategy. *See, e.g., State v. Grier*, 171 Wash.2d 17, 246 P.3d 1260, 1273 (2011) (concluding that the failure to request lesser included offense instructions did not constitute deficient performance because based on the evidence and defense theories, “acquittal was a real possibility albeit a remote one” and “defense counsel reasonably could have believed that an all or nothing strategy was the best approach to achieve an outright acquittal”); *see also Butcher v. Marquez*, 758 F.2d 373, 376–77 (9th Cir.1985); *Heinlin v. Smith*, 542 P.2d 1081, 1082 (Utah 1975); *cf. Richards v. Quarterman*, 566 F.3d 553, 569 (5th Cir.2009) (concluding that defense counsel’s failure to request a lesser included offense instruction on assault was deficient and not a strategic decision because counsel misunderstood the law governing lesser included offenses and failed to recognize it was entirely possible that the jury would not believe the defendant’s claim of self-defense but would also believe he did not kill the victim).²

² The only Colorado case that addresses whether defense counsel’s failure to request a lesser offense instruction constituted ineffective assistance of counsel is *People v. Aguilar*, 2012 COA 181, ¶¶ 13–16, 317 P.3d 1255. In *Aguilar*, the division concluded that because the trial court could have properly denied a tendered lesser offense instruction, the defendant could not prove that counsel’s performance was deficient in this regard. *Id.* at ¶ 16. The situation in *Aguilar* thus was different from the situation here because in this case, it likely would have been error for the trial court to have denied a tendered lesser included offense instruction on negligent homicide or reckless manslaughter.

¶ 29 We agree with these courts and conclude that counsel made an adequately informed strategic decision to not request lesser included offense instructions, and defendant has not rebutted the “virtually unchallengeable” presumption that the decision was objectively reasonable. *Bullock*, 297 F.3d at 1046 (internal quotation marks omitted).

¶ 30 Accordingly, counsel’s failure to request lesser included offense instructions and to consult with defendant on the matter did not constitute deficient performance under prong one of *Strickland*. Because defendant has not established that counsel’s failure in this respect met the first prong of *Strickland*, we do not address the second prong, prejudice. *See Strickland*, 466 U.S. at 697, 104 S.Ct. 2052 (“[A] court [need not] address both components of the inquiry if the defendant makes an insufficient showing on one.”).

B. Failure to Request an Accessory Instruction

¶ 31 Defendant argues that his trial counsel were ineffective because they failed to request an instruction on the lesser nonincluded offense of accessory to crime. The postconviction court concluded that the failure to request this instruction did not constitute ineffective assistance because there did “not appear to have been any factual basis for an instruction on the lesser offense of [a]ccessory” given that “the evidence was that the defendant burned his own clothes, not Orgill’s.” The court also explained:

[A] finding of guilty of accessory would have required a jury finding beyond a reasonable doubt that another person, presumably Orgill, had committed the homicide. Such a finding, which the

jury could have made with or without an accessory instruction, would have assured the defendant's acquittal of the charge of murder. The jury in fact rejected the finding (that Orgill committed the crime) necessary to have convicted the defendant of accessory.

We agree with the court that counsel's failure to request an instruction on accessory did not constitute ineffective assistance.

[5] [6] ¶ 32 “A lesser non[]included offense is an offense less serious than the charged offense, arising from the same facts but containing at least one element different from those in the original charge.” *People v. Garcia*, 17 P.3d 820, 826 (Colo.App.2000). A defendant has the right to have the jury instructed on a lesser nonincluded offense as part of the defendant's theory of the case “if *466 there is a rational basis in the evidence to support a verdict acquitting [the defendant] of [the] greater offense ... and convicting [the defendant] of the lesser offense.” *People v. Trujillo*, 83 P.3d 642, 645 (Colo.2004) (internal quotation marks omitted).

[7] ¶ 33 “A person is an accessory to crime if, with intent to hinder, delay, or prevent the discovery, detection, apprehension, prosecution, conviction, or punishment of another for the commission of a crime, he renders assistance to such person”; “[r]ender assistance” means, among other things, “[c]onceal, destroy, or alter any physical or testimonial evidence that might aid in the discovery, detection, apprehension, prosecution, conviction, or punishment of such person.” §§ 18–8–105(1), (2)(e), C.R.S.2013. To be convicted under the accessory statute, a defendant must know that the principal committed the crime, which requires a showing that the defendant had “knowledge of the general character of the underlying offense.” *Barreras v. People*, 636 P.2d 686, 688 (Colo.1981).

[8] ¶ 34 We conclude defendant has not shown that counsel's performance was deficient in failing to request an accessory instruction because defendant has not overcome “ ‘the presumption that under all the circumstances, the challenged action *might* be considered sound trial strategy.’ ” *Bullock*, 297 F.3d at 1046 (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052) (some internal quotation marks omitted). Counsel's failure to request an instruction on the lesser nonincluded offense of accessory clearly could have been a sound trial strategy for the same reasons that the failure to request instructions on lesser included offenses could have been: submission to the jury of a lesser offense risked conviction on that offense rather than outright acquittal if the jury did not believe defendant was guilty of second degree murder. Also, instructing the jury on a lesser nonincluded offense carries an additional risk, not present in the lesser included offense context: that a defendant will be convicted of both the charged offense and the lesser nonincluded offense. *People v. Skinner*, 825 P.2d 1045, 1047–48 (Colo.App.1991).

¶ 35 Defendant did not introduce any evidence that the failure to request an instruction on accessory could *not* have been considered a sound trial strategy from the perspective of counsel at the time, nor has he shown that a misunderstanding of law or lack of investigation into the facts of the case contributed to counsel's failure in this respect. We therefore conclude that defendant has not rebutted the presumption that counsel's failure to request an instruction on accessory was objectively reasonable.

¶ 36 Accordingly, defendant has not demonstrated that counsel's failure to request a lesser nonincluded instruction on accessory to crime constituted deficient performance. Because defendant has not established that counsel's failure in this respect met the first prong of *Strickland*, we do not address the prejudice prong. See *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052.

C. Failure to Call Expert Witnesses

¶ 37 Defendant argues that his trial attorneys were ineffective because they failed to present testimony from an expert witness in medicine and failed to consult with and hire a crime scene analysis expert. We disagree.

1. Medical Expert

¶ 38 At trial, the prosecution called Dr. George Hertner, an emergency room physician who saw the victim when he arrived at the hospital. Dr. Hertner, qualified as an expert in emergency medicine, testified that death is not always instantaneous with the type of wound that the victim suffered.

¶ 39 The prosecution also presented testimony from Dr. Donald Ritchey, who had performed the autopsy on the victim, as an expert in forensic pathology. Dr. Ritchey testified that it was extremely likely that after the victim was stabbed, blood pooled in his pericardium (the sac enclosing the heart) and slowed the flow of blood from the wound, an occurrence known as pericardial or cardiac tamponade. In his opinion, the cardiac tamponade prevented the victim from immediately bleeding out, and thus the victim could have lived for some period of time after he was stabbed, supporting the prosecution's theory that defendant could have stabbed the *467 victim before the victim fought with Orgill. Dr. Ritchey testified that cardiac tamponade could make the difference between someone dying within a minute versus within fifteen to twenty minutes.

¶ 40 At the [Crim. P. 35\(c\)](#) hearing, defendant offered testimony from Dr. David Glaser as an expert in emergency medicine. Dr. Glaser testified that "in general," it is possible for a treating emergency room physician to estimate how long a deceased patient would have lived following a stab wound to the heart. He also testified that the type of wound the victim suffered would be unlikely to cause cardiac tamponade and that he would be surprised if the victim had survived more than a minute or two after the wound was inflicted, with two minutes being the upper limit. On cross-examination, Dr. Glaser admitted that he agreed with Dr. Ritchey and Dr. Hertner that it is not possible to know for sure how long someone with the type of wound the victim suffered would have survived and that it would depend on various factors. He also answered affirmatively when asked whether the victim could have engaged in a fight for a short period of time after having been stabbed.

¶ 41 The prosecution called Dr. Robert Bux at the [Crim. P. 35\(c\)](#) hearing as a rebuttal witness to Dr. Glaser. Dr. Bux testified that it is not possible to determine specifically how long somebody will live after receiving a stab wound to the heart. He testified that the victim had some degree of cardiac tamponade while he was still alive and that the tamponade reasonably could have extended the victim's life. He explained that there is no way to know how long the victim lived after the wound was inflicted but he disagreed with Dr. Glaser that the victim would have been dead within a minute. Rather, he thought it was possible the victim could have survived and functioned for a couple of minutes or even longer.

¶ 42 Also introduced at the [Crim. P 35\(c\)](#) hearing was evidence regarding a report prepared by the prosecution discussing a pretrial interview with Dr. Andrew Berson, an emergency room trauma surgeon. Dr. Berson's report, which had been provided to the defense during discovery, described the type of wound the victim suffered and opined that someone with that type of wound would bleed out between thirty seconds and a minute, versus someone with a smaller wound where cardiac tamponade could occur.

¶ 43 The postconviction court concluded that defendant did not establish that the failure to call a medical expert like Dr. Glaser or Dr. Berson constituted ineffective assistance of counsel. It found that Attorney 2 had researched the issue of survivability after a stab wound to the heart, interviewed Dr. Ritchey in person, and consulted two independent forensic pathologists in connection with Dr. Ritchey's anticipated testimony. The court concluded that this level of investigation and the subsequent decision not to retain a medical expert clearly met the standard of reasonably competent assistance. The court further found that it was probable that had the defense called Dr. Glaser or Dr. Berson at trial, the prosecution would have been permitted to call Dr. Bux in rebuttal. It concluded:

Given the limitations on medically or scientifically putting specific time estimates [on] survivability, the consensus on the factors affecting survivability, the closeness of the medical experts' time estimates [regarding how long the victim could have lived after the stab wound], and evidence of the probable length of the fight, it is unlikely that testimony by Dr. Berson or Dr. Glaser would have had any impact on the result of the trial.

¶ 44 Defendant now argues that the postconviction court's conclusion that trial counsel's performance was not deficient in failing to call Dr. Berson at trial is erroneous. He claims the court failed to acknowledge the significance of Dr. Berson's potential testimony, which he asserts would have been exculpatory because Dr. Berson's survival time frame—between thirty seconds and one minute—rebutted and contradicted the prosecution's theory of guilt. He similarly argues that the court erred in not concluding that trial counsel was deficient for failing to hire an expert like Dr. Glaser.

[9] [10] ¶ 45 Counsel has a duty to make reasonable investigations. *468 *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. A reasonable investigation means one that is “sufficient to reveal potential defenses and the facts relevant to guilt.” *Davis*, 871 P.2d at 773. The postconviction court's conclusion that trial counsel's pretrial investigation regarding the medical evidence was reasonable is supported by the record, and we decline to disturb it on review.

¶ 46 The United States Supreme Court explained in *Strickland* that “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” 466 U.S. at 690, 104 S.Ct. 2052. In other words, if counsel's decision was strategic and adequately informed, defendant must overcome the “virtually unchallengeable” presumption that counsel's decision was objectively reasonable. *Bullock*, 297 F.3d at 1047 (internal quotation marks omitted).

¶ 47 The postconviction court's inference that counsel did not call a medical expert because they did not believe they could find a credible medical expert to rebut Dr. Ritchey is supported by the record: Attorney 2 testified at the *Crim. P. 35(c)* hearing that had the experts she consulted disagreed with Dr. Ritchey regarding how long defendant could have lived, they would have testified. Also, the record shows that counsel had the requisite knowledge, or had consulted with experts to the degree necessary to acquire such knowledge, to understand the significance of the medical evidence and to competently cross-examine the prosecution's experts regarding the evidence. *Cf. Pavel v. Hollins*, 261 F.3d 210, 224 (2d Cir.2001) (“[T]here is no indication in the record that [counsel] had the education or experience necessary to assess relevant physical evidence, and to make for himself a reasonable, informed determination as to whether an expert should be consulted or called to the stand.”); *Hutchinson v. People*, 742 P.2d 875, 881 (Colo. 1987) (“Without [expert] assistance, an attorney may be unable to rationally determine technical and evidentiary strategy or to properly prepare for cross-examination of the prosecution's witnesses or for presentation or rebuttal of physical evidence.”).

¶ 48 We therefore conclude that counsel's decision was strategic and adequately informed, and defendant has not overcome the “virtually unchallengeable” presumption that counsel's decision was objectively reasonable. *Bullock*, 297 F.3d at 1047 (internal quotation marks omitted); *cf. Pavel*, 261 F.3d at 223 (The decision not to call a medical expert to testify as to the significance of the physical evidence presented by the prosecution “might well have been beyond reproach if it had been based on appropriate strategic considerations, or if it had been made by [counsel] following a sufficient investigation.”).

¶ 49 Nevertheless, defendant argues that counsel's performance was deficient in this regard because failure to present exculpatory evidence is ordinarily deficient unless some cogent tactical or other consideration justified it, and counsel offered no such explanation here. See *Griffin v. Warden*, 970 F.2d 1355, 1358 (4th Cir.1992); see also *Duncan v. Ornoski*, 528 F.3d 1222, 1234 (9th Cir.2008); *Richey v. Bradshaw*, 498 F.3d 344, 362 (6th Cir.2007); *Pavel*, 261 F.3d at 217–18. We disagree with defendant that testimony by Dr. Berson or Dr. Glaser necessarily would have been exculpatory.

¶ 50 All the medical experts agreed that it is not possible to say for sure how long the victim lived after he had been stabbed. Had Dr. Berson been called and testified that the victim would have died within thirty seconds to a minute, the jury would have had to weigh that testimony against testimony by Dr. Ritchey and Dr. Hertner that it is not possible to definitively determine how long the victim could have survived. Consequently, what weight the jury would have given such testimony is unclear.

¶ 51 Also, unlike the cases cited by defendant in which the evidence at issue could have determined the outcome of the case, other evidence that incriminated defendant existed that would not have been rebutted by favorable testimony on the medical evidence, such as defendant's statements about stabbing someone and the victim's blood on defendant's knife. Cf. *Duncan*, 528 F.3d at 1235 (counsel's failure to consult an expert regarding “potentially exonerating blood evidence” and present such evidence at trial was “objectively unreasonable”); *Pavel*, 261 F.3d at 224–25 (in the face of a “glaring mismatch” between the physical medical evidence in the case and the allegations against the defendant, counsel's failure to consult an expert and to be prepared to call the expert at trial was objectively unreasonable); *Richey*, 498 F.3d at 363–64 (counsel's failure to consult with retained expert regarding whether the prosecution's conclusions were scientifically accurate, when testimony of other available experts would have “severely undermined” the case against the defendant, was deficient performance).

¶ 52 We therefore agree with the postconviction court that defendant has not shown that counsel's failure to call a medical expert constituted deficient performance under the first prong of *Strickland*. Because defendant has not established deficient performance, we do not address prejudice. See *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052.

2. Crime Scene Analysis Expert

¶ 53 At trial, the prosecution presented testimony from Kimberly Bjorndahl, a crime scene technician who had conducted the bloodstain analysis and crime scene reconstruction in this case. At the *Crim. P. 35(c)* hearing, the defense called John Koziol, an expert in crime scene investigation analysis and reconstruction. Koziol testified that, based on the bloodstains found at the scene of the stabbing, the victim most likely sustained the stab wound at the location where the witnesses had seen Orgill and the victim fall to the ground during their fight. As to the bloodstains that were probably made before that point, he disagreed with Bjorndahl that they could not have come from other minor injuries the victim had suffered. Rather, he believed the source of those bloodstains was most likely blood from the victim's minor wounds. He did agree with Bjorndahl, however, that it was not possible to establish definitively, based on the bloodstains, from what wound or area of the body the blood came.

¶ 54 Koziol also testified that the absence of any of the victim's blood on defendant's jacket and the fact that Orgill was covered in blood made it more likely Orgill had stabbed the victim. In contrast, Bjorndahl testified at trial that it was possible the assailant did not have any blood on his clothing. As to whether a knife found on the seat of the truck where the victim had been sitting after he was stabbed could have been the murder weapon, Bjorndahl testified that it was “not logical” because the knife was found in a closed position with no blood on the blade. Koziol testified the knife could have inflicted the wound during the victim's fight with Orgill. Koziol further expressed concern over how defendant's knife was handled when it was in police custody and stated that there was a large opportunity for contamination, in that the victim's blood could have been transferred to the blade of defendant's knife at that time.

¶ 55 The prosecution called Jeff Saviano, a forensic consultant who had worked with Bjorndahl on the case, to rebut Koziol's *Crim. P. 35(c)* hearing testimony. Saviano, qualified as an expert in crime scene reconstruction and bloodstain pattern, testified that he disagreed with Koziol on several points. Saviano testified that

- none of the victim's wounds other than the stab wound were capable of causing the bloodstains at the scene;
- the spot where Orgill and the victim fell to the ground was not necessarily where the victim was stabbed;

- just because defendant did not have blood on his jacket did not mean he had not stabbed the victim; and
- the police had not mishandled defendant's knife during processing and contamination was unlikely.

Saviano testified that his ultimate opinion was that it was equally likely that defendant or Orgill had stabbed the victim.

¶ 56 Attorney 2 testified that she did not think about hiring an expert in crime scene analysis because in her pretrial interview with Bjorndahl and in Bjorndahl's report, Bjorndahl stated she did not know exactly what happened and it was possible Orgill had stabbed the victim. Attorney 2 thus believed that parts of Bjorndahl's testimony would be very favorable to the defense and could independently establish reasonable doubt. Moreover, *470 she effectively cross-examined Bjorndahl to make the point that Bjorndahl could not say for sure that defendant rather than Orgill stabbed the victim.

¶ 57 The postconviction court concluded that, considering Attorney 2's extensive experience in retaining experts in homicide cases and her thorough knowledge of the facts of the case, her failure to call a crime scene expert regarding bloodstain pattern analysis did not constitute deficient performance. The court further found that, as to prejudice, if both Koziol and Saviano had been called as witnesses at trial, it is likely that Saviano's testimony would have been far more persuasive because Saviano had far more training and expertise in the area of bloodstain pattern analysis than Koziol and Saviano's testimony was supported by other evidence. The court thus concluded that it was highly unlikely that, had the defense called a bloodstain pattern analysis expert such as Koziol at trial, the results of the trial would have been any different.

¶ 58 The postconviction court reached the same conclusion regarding defense counsel's failure to present expert testimony to rebut Bjorndahl's testimony that it was not logical the victim's knife caused the fatal wound. The court explained:

Bjorndahl's opinion was ... based more upon logic than expertise. Koziol's opinion challenged that logic based upon a statement attributed to the victim [Schwartz testified that right before the fight the victim said something like, "I've got a knife, let's go"], not upon crime scene analysis expertise. The jury had all of the above facts and could draw its own conclusions.... Failure to call an expert on a matter more properly the subject of lay testimony is not ineffective assistance of counsel, and it is difficult to imagine how expert testimony on this matter would have affected the result of the trial.

¶ 59 Lastly, the postconviction court found that Koziol's testimony regarding potential contamination of defendant's knife was speculative and unpersuasive. Accordingly, the court concluded that the failure to call an expert on this issue did not constitute deficient performance nor would it have changed the result of the trial.

[11] ¶ 60 We agree with the postconviction court that defendant has not shown that, in light of all the circumstances, counsel's failure to call a crime scene reconstruction expert was "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. "[T]rial counsel need not introduce expert testimony on his [or her] client's behalf if he [or she] is able effectively to cross-examine prosecution witnesses and elicit helpful testimony." *Reinert v. Larkins*, 379 F.3d 76, 95 (3d Cir.2004). Given Attorney 2's justifiable belief that she could effectively cross-examine Bjorndahl, we conclude that counsel's decisions in this area were not objectively unreasonable, especially considering the postconviction court's finding, which is supported by the record, that Attorney 2 had extensive experience with experts in criminal trials. See *Williams v. Head*, 185 F.3d 1223, 1228 (11th Cir.1999) ("Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel." (internal quotation marks omitted)).

¶ 61 Because defendant has not established that counsel's performance was deficient for failing to call a crime scene analysis expert, we do not address whether defendant was prejudiced by this failure. See *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052.

¶ 62 We therefore conclude that defendant has not established that counsel's failure to call medical and crime scene analysis experts constituted ineffective assistance.

D. Failure to Advise Defendant Regarding His Right to Testify

¶ 63 Defendant argues that his trial attorneys were ineffective because Attorney 1 labored under an actual conflict of interest affecting his ability to advise defendant on his right to testify and counsel failed to consult with and erroneously advised defendant regarding testifying. We reject defendant's arguments.

*471 1. Conflict of Interest

[12] ¶ 64 At the time of trial, defendant was subject to a deferred sentence in a felony vehicular eluding case in which he was represented by Attorney 1. Under Colorado law, evidence of a guilty plea entered in a deferred sentencing stipulation may be used to impeach a defendant who has elected to testify. *People v. Vollentine*, 643 P.2d 800, 802 (Colo.App.1982). Defendant argues that Attorney 1 had an actual conflict of interest that foreclosed him from objectively determining whether there was a basis to collaterally attack the judgment or withdraw defendant's plea in the eluding case, particularly as pertained to whether Attorney 1 rendered ineffective assistance of counsel in that case.

[13] [14] [15] ¶ 65 A defendant may prevail on an ineffective assistance of counsel claim without establishing prejudice if he or she can show that an actual conflict of interest adversely affected the adequacy of trial counsel's representation. *Dunlap*, 173 P.3d at 1073; see also *Cuyler v. Sullivan*, 446 U.S. 335, 349–50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). “A conflict of interest exists when the attorney's ability to represent a client is materially limited by the attorney's own interests.” *People v. Delgadillo*, 2012 COA 33, ¶ 9, 275 P.3d 772. Conflicts are actual or potential, with an actual conflict of interest being one that is “real and substantial.” *People v. Harlan*, 54 P.3d 871, 878 (Colo.2002) (internal quotation marks omitted).

[16] ¶ 66 The postconviction court found that no evidence was presented that the prospect of impeachment by the use of the guilty plea affected defendant's decision not to testify and that no evidence was presented that there was any defect in the guilty plea underlying the deferred judgment. These findings are supported by the record. Defendant thus cannot show that any conflict of interest on Attorney 1's part affected the adequacy of his representation because there is no evidence in the record that there was any legal basis to collaterally attack the deferred judgment or withdraw the plea, and thus nothing to suggest that doing so was a plausible defense strategy. See *United States v. Stantini*, 85 F.3d 9, 16 (2d Cir.1996) (to prove that a conflict adversely affected the adequacy of counsel's representation, the defendant must “demonstrate that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests” (internal quotation marks omitted)); see also *Quince v. Crosby*, 360 F.3d 1259, 1264 (11th Cir.2004).

2. Failure to Consult and Erroneous Advice

¶ 67 Defendant argues that counsel failed to adequately consult with him and erroneously advised him regarding his right to testify, and their failure in this regard constituted deficient performance and prejudiced his defense. This is the extent of defendant's argument on appeal as to this issue.

¶ 68 The postconviction court found that Attorney 1 discussed the case with defendant on multiple occasions and Attorney 1's advice to defendant on this matter was within the range of competence demanded of attorneys in criminal cases. For these reasons and others, the court concluded defendant did not establish ineffective assistance of counsel. Because the court's findings are supported by the record, we decline to disturb the court's findings or conclusion. *See also People v. Venzor*, 121 P.3d 260, 264 (Colo.App.2005) (declining to review issues presented in a perfunctory or conclusory matter).

IV. Conclusion

¶ 69 The order is affirmed.

JUDGE [CASEBOLT](#) and JUDGE [DAILEY](#) concur.

All Citations

338 P.3d 459, 2014 COA 84

FILED-DISTRICT & COUNTY COURTS-EL PASO CO., CO	
DISTRICT COURT, EL PASO COUNTY, STATE OF COLORADO Court Address: 270 South Tejon Street, Colorado Springs, CO 80903	SEP 7 - 2010 Division <u>Sr. Judge</u> By KMC
▲ COURT USE ONLY ▲	
Plaintiff: People of the State of Colorado Defendant: Todd Newmiller	Case Number: 04CR5770 Division/Courtroom: 10
ORDER RE: MOTION FOR POST-CONVICTION RELIEF	

THE COURT, having considered defendant's Motion for Post-Conviction Relief, the response, evidence presented at the hearing on the motion, and the trial record, enters the following order.

1. On May 24, 2009 the defendant was convicted upon a jury verdict of second degree murder, a class 2 felony. He was subsequently sentenced to a term of 31 years to the Colorado Department of Corrections. His conviction was upheld on direct appeal in an unpublished opinion by the Colorado Court of Appeals. In this Crim. P. 35(c) motion he seeks to overturn his conviction on grounds of ineffective assistance of counsel, and erroneous advisement of his right to testify. In his Supplemental Motion defendant seeks to overturn his conviction on the ground that trial counsel had an actual conflict of interest which impacted his advice to the defendant on whether defendant should testify at trial. The court first addresses the ineffective assistance of counsel claims.
2. The parties do not dispute the law applicable to a claim of ineffective assistance of counsel. In order to prevail on such a claim a defendant must

establish by a preponderance of the evidence that: 1) counsel's performance was deficient; and 2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, 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. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The proper standard for attorney performance is that of reasonably effective assistance. *Id.* at 687. Judicial scrutiny of counsel's performance must be highly deferential making every effort to eliminate the distorting effects of hindsight. *Id.* at 689. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* Tactical decisions such as what witnesses to call and what trial strategy to employ require sophisticated training and skill and are within the province of counsel. See *Arko v. People*, 183 P.3d 555,557(Colo.2008). Strategic choices made after a thorough investigation of the law and the facts are virtually unchallengeable. *Strickland*, 466 U.S. at 690. Additional principles will be set forth in connection with specific claims.

Experience and pretrial investigation regarding expert witnesses

3. In assessing a claim of ineffective assistance of counsel for failure to consult and/or call an expert witness, it is appropriate to consider counsel's experience, skill and pretrial investigation. See *Arko*, 183 P.3d at 557,559; *Strickland* 466 U.S. at 690.
4. Trial counsel, Deborah Grohs (Grohs) and Philip Tate (Tate) were both highly experienced criminal defense attorneys. Each had tried a very large number of felony cases. Tate had tried five homicide cases, Grohs had tried 19. Tate was retained within days of the homicide and Grohs shortly thereafter. Soon after being retained, Tate hired Mr. Dew, a private investigator, to assist him

in preparation of the case. From the outset, counsel undertook a thorough investigation of the facts with an eye toward developing a theory of defense. The investigation included, but was not limited to: consulting with the defendant and his family on numerous occasions; visiting both the Conrad and Wooten Street scenes on several occasions; carefully reviewing the discovery; interviewing all of the eyewitnesses who consented to be interviewed; reviewing and making copies of videotapes of law-enforcement interviews with witnesses; and interviewing law-enforcement witnesses. Counsel devoted virtually full time to trial preparation for the three weeks preceding trial. Based on the defendant's insistence on his innocence and on their pretrial investigation, counsel arrived at a theory of defense that the defendant never confronted the victim at the scene on Conrad Street and never got close enough to the victim to have stabbed him. This theory was supported by the statements and later trial testimony of two eyewitness friends of the victim, Chisum Lopez (Lopez) and Charles Schwartz (Schwartz).

5. Because of her experience in dealing with expert witnesses, Grohs took the responsibility for experts. She consulted with experts on the two most damaging pieces of evidence against the defendant: his admissions, and the DNA evidence of the victim's blood on defendant's knife. The expert on confessions declined to participate because the victim's blood found on the defendant's knife corroborated defendant's admissions. The DNA expert was retained and testified for the defendant at trial. Aware that the prosecution's theory was that the defendant stabbed the victim at the outset of the confrontation on Conrad Street, Grohs investigated the possibility of expert testimony to refute that theory by showing that after the stab wound to his heart, the victim would not have been able to engage in the fight with Orgill as described by witnesses. To that end, Grohs read treatises on the subject and consulted with an independent forensic pathologist before interviewing Dr. Ritchey who had performed the autopsy on the victim. Grohs interviewed Dr.

Ritchey in person. He told her that a person's ability to function after a fatal wound such as that suffered by the victim depended upon a number of factors including age, physical condition, adrenaline and level of intoxication. He further stated that it was possible for the victim to have fought with Orgill after receiving the fatal wound. Grohs consulted with a second forensic pathologist after the interview with Dr. Ritchey. Both of the forensic pathologists she consulted said essentially the same thing as Dr. Ritchey. Based on this, Grohs concluded that she would not be able to present credible forensic pathologist testimony to challenge Dr. Ritchey. She did not consult other medical experts, such as an emergency medicine specialist, because she believed that the issue was one primarily of forensic pathology.

Failure to present medical expert at trial

6. Defendant contends that his trial counsel were ineffective in failing to retain and call a medical expert on the issue of whether the victim could have engaged in the fight with Orgill after having suffered a stab wound to the heart. The court first addresses the failure to call Dr. Berson who is the subject of an independent claim of ineffective assistance of counsel - failure to call an expert witness whose opinions were essentially known, as opposed to failure to retain an expert (Glaser). The court then addresses Dr. Glaser. Exhibits referred to below are hearing exhibits unless otherwise noted.
7. Defendant contends that trial counsel were ineffective in failing to call a Dr. Berson or in failing to move for a continuance at trial in order to do so. Dr. Berson was a trauma surgeon who had been called to the hospital to treat the victim but did not do so because the victim had died prior to arrival. On February 28, 2006, the day the trial started, the district attorney first made available to trial counsel a copy of an interview with Dr. Berson, Exhibit XX. Because of some miscommunication in Mr. Tate's office, counsel did not

become aware of the interview until March 7, 2006 during the trial. Counsel did not move for a continuance, and neither party called Dr. Berson at trial.

8. Neither party called Dr. Berson as a witness at the hearing on this motion. Thus, what his trial testimony would have been is somewhat speculative. Based on Exhibit XX, it can be inferred that he would have testified that: a) contrary to Dr. Ritchey's trial testimony, cardiac tamponade either did not occur or was unlikely; b) the type of the injuries suffered by the victim would not necessarily have resulted in the spurting of blood out of the body at the time of the wound and he would not be surprised if the person doing the stabbing did not have much blood on him; c) at the time of the injury there might be some blood coming out of the wound and after approximately a minute you would expect more blood to come out; d) a person suffering a large heart wound, as did the victim, could stay on his feet for "approximately a minute or so"; e) the ability of a person to stay on his feet after a stab wound to the heart would depend on the overall condition of the subject and what adrenaline was pumped; f) where a stab wound victim is excited, endorphins are released which, along with the adrenaline, will mask pain.

9. The court finds that the defendant has not established his ineffective assistance of counsel claim as to Dr. Berson. Assuming that Dr. Berson would have provided testimony to rebut the prosecution's evidence of cardiac tamponade, the more relevant issue was how long the victim could have functioned after receiving the stab wound, whether or not there was cardiac tamponade. Dr. Berson's potential testimony: "approximately a minute or so" was, as described below, within the same general time frames as those of Dr. Hertner and Dr. Glaser, and Dr. Ritchey. This time frame is also reasonably within the time frame of eyewitness descriptions of the fight between the victim and Orgill. Importantly, b) through e) above would likely have been more favorable to the prosecution than to the defense, and b) and c) are inconsistent with the hearing testimony of defendant's crime scene analysis

expert, John Koziol (Koziol). He testified at the hearing on this motion that it was likely that blood would have gushed out of the victim at the time he was stabbed. Given the circumstances above, court concludes that the failure to call Dr. Berson or to ask for a continuance did not constitute ineffective assistance of counsel.

10. Similarly, the court concludes that defendant has not established that his trial counsel were ineffective in failing to retain, and/or present testimony from a medical expert such as Dr. Glaser. As found above, Grohs researched the issue of survivability after stab wound to the heart, she interviewed Dr. Ritchey in person and consulted two independent forensic pathologists in connection with Dr. Ritchey's anticipated testimony. Since all three said essentially the same thing, she did not believe that she could find credible medical expert to rebut Ritchey. This level of investigation and her decision not to retain a medical expert clearly met the standard of reasonably competent assistance by an attorney acting as a diligent and conscientious advocate. See *People v. Jacobs*, 596 P.2d 1187(Colo.1979)(restating the *Strickland* standard for effective assistance of counsel). Notwithstanding the finding that defendant has not established his claim of ineffective assistance of counsel with regard to medical experts, the court will proceed to make findings regarding claimed prejudice resulting from counsel failure to call a medical expert at trial.

11. To establish prejudice, defendant presented the testimony of Dr. Glaser, a board certified emergency medicine physician. Although having extensive experience treating trauma victims in emergency rooms, including approximately 200 stab wound victims, Dr. Glaser has treated only six victims of stab wounds to the heart. Of those, only three had expired before arriving at the emergency room. As relevant to the issue of the victim's ability to function after receiving a stab wound to the heart, Dr. Glaser testified, in substance, that: a) emergency room physicians are generally not able to

establish how long a person lived after a fatal stab wound; b) survivability factors would include the depth and size of the wound, reports of witnesses, and the age and state of health of the victim; c) he agreed with the trial testimony of Dr. Hertner, the emergency room physician who treated the victim, that he (Hertner) wouldn't be surprised if somebody receiving a wound of this sort was able to stay on his feet for one or two minutes (Trial 3-2-06, pp. 141-2); d) he concurred with Dr. Ritchey's autopsy finding that the victim suffered a massive wound leading rapidly to death; e) he disagreed with Dr. Ritchey's trial testimony that it was extremely likely that the victim experienced cardiac tamponade which could have made a difference between somebody dying within a minute versus 15 or 20 minutes (Trial 3/6/06, p. 48); f) because of the size and nature of the victim's wound, cardiac tamponade did not occur in this case.

12. In rebuttal to Dr. Glaser, the People called Dr. Bux, a board certified forensic pathologist and the El Paso County Coroner. It is probable that had the defense called Dr. Glaser or Dr. Berson at trial, the prosecution would have been permitted to call Dr. Bux in rebuttal. Dr. Bux has performed approximately 1400 autopsies on homicide victims, approximately 200 of whom died of stab wounds - many of stab wounds to the heart. Dr. Bux testified, in substance, that: a) a great number of variables affect functioning after a stab wound that turns out to be fatal and there is no scientific way to say with any degree of certainty how long a person might function; b) factors affecting an estimate of the time that a deceased stab-wound victim survived include witness observations, physical evidence at the scene, and the age and health of the victim; c) the autopsy finding of 100 ml of blood in the pericardial sac indicates that the victim did experience cardiac tamponade; d) whether or not cardiac tamponade was present does not determine how long the victim survived after the stabbing. It is one of a number of factors.

13. The court is not persuaded that had defendant called a medical expert such as either or both Doctors Glaser or Berson, that there is a reasonable probability that the result of the trial would have been different. There was basic agreement among all of the medical experts that survivability after a stab wound to the heart depends upon a number of factors of which cardiac tamponade is only one. Cardiac tamponade was one of many issues addressed by Dr. Ritchey's testimony, but it was not a major issue in either side's closing argument and does not appear to have been a major issue at trial. The more important issue was how long the victim could have functioned after the stab wound, with or without cardiac tamponade. On that issue there was a general consensus among all the medical experts at the low end of approximately a minute or two. Grohs elicited from Dr. Ritchey at trial that the victim's stab wound caused massive internal bleeding leading rapidly to death, and that that could be a few seconds to a few minutes (Trial 3/6/06, p.80). Medical expert time estimates were reasonably within the time frame of the eyewitness descriptions of the fight between the victim and Orgill, taking into account that most of the witnesses were intoxicated and in a high state of excitement. Given the limitations on medically or scientifically putting specific time estimates of survivability, the consensus on the factors affecting survivability, the closeness of the medical experts' time estimates, and evidence of the probable length of the fight, it is unlikely that testimony by Dr. Berson or Dr. Glaser would have had any impact on the result of the trial.

Failure to call it a crime scene analyst expert

Bloodstain pattern analysis

14. Defendant contends that trial counsel were ineffective in failing to retain and present testimony from a crime scene analyst expert. The court is not persuaded. As stated above, after an extensive investigation of the facts counsel decided to proceed on the theory, supported by eyewitnesses Lopez

and Schwartz, that the defendant was physically not in a position to have stabbed the victim. As part of their investigation, counsel considered the report of the prosecution's crime scene expert, Kimberly Bjorndahl (Bjorndahl). That report stated, in substance, that based upon her evaluation of the physical evidence, Bjorndahl could not determine who did the stabbing. Grohs believed that such testimony would be favorable to the defendant. That is, after a thorough investigation of the crime scene even the People's expert could not say who did the stabbing. Ms. Grohs saw no need to retain a defense expert who would be impeachable for bias. Bjorndahl did, in fact, testify at trial that she could not determine from the physical evidence who did the stabbing (Trial 3/10/06 p.18) and could not rule out either the defendant or Orgill as the assailant (Trial 3/10/06 p. 47). Considering Grohs' extensive experience in retaining experts in homicide cases and her thorough knowledge of the facts of the case, the court does not find that failure to call a crime scene analysis expert (as relevant here on bloodstain pattern analysis) constituted ineffective assistance of counsel. The court will, nevertheless, make findings regarding prejudice.

15. To establish prejudice defendant presented the testimony of Koziol, who qualified as an expert in crime scene analysis and reconstruction. Koziol testified on several subjects, including bloodstain pattern analysis, although he had quite limited training on that subject. Koziol testified, in substance, that in his opinion: a) the blood droplets on the ground (shown in numerous photograph exhibits) at markers 1 through 5 came from injuries to the victim's nose and hand rather than from the stab wound; b) the bloodstain pattern and the large amount of blood in the area of marker 11 made it probable that the victim was stabbed and immediately started gushing out blood in that area; c) this made it more likely that Orgill, with whom the victim was fighting at that location, inflicted the stab wound; d) the gross amount of blood on Orgill's clothing and the absence of blood on the defendant's clothing make it more likely that Orgill stabbed the victim. Thus, the essential difference between

Bjorndahl and Koziol was that based on her analysis of the crime scene Bjorndahl could not opine who did the stabbing, while Koziol rendered the opinion that it was more likely Orgill.

16. In rebuttal to Koziol, the People called Jeff Saviano (Saviano) who, as an El Paso County Sheriff's Deputy, had worked with Bjorndahl on the case. He has since left the sheriff's office and is a private consultant on crime scene investigation. Saviano has had substantially more training and experience in bloodstain pattern analysis than Koziol. Saviano has also published an article on the subject, is cited in a textbook on the subject, and teaches bloodstain pattern analysis as part of courses he teaches at a community college and to law enforcement officers. Saviano testified, in substance, that in his opinion:
- a) based on the autopsy report, the injuries to the victim's hand and nose were only superficial and were incapable of depositing the 70 blood droplets between markers 1 and 5 and the 160 blood droplets in increasing numbers between markers 1 and 10;
 - b) photographs at the Wooten Street scene show no blood in the victim's nose or mouth, no downward bloodstain pattern on his face as would have been expected had the victim been bleeding down from the cut on the bridge of his nose, and no wipe pattern which would be expected if paramedics had wiped off blood left by a downward pattern;
 - c) what appears to be dried blood around the victim's mouth and nostrils in Exhibit E is not blood, but purge, a gastrointestinal fluid;
 - d) it is probable that the blood droplets on the street between markers 1 and 10 were from the stab wound to the victim;
 - e) he disagreed with Koziol's opinion that the pattern and amount of blood at marker 11 indicated that the stabbing took place at that location because the heart is in deep structure and there would have been a substantial amount of internal bleeding before blood gushed out of the victim's body as it did at marker 11;
 - e) blood on Orgill's clothing and the absence of blood on the defendant's clothing indicates that Orgill and the victim were fighting at the time the victim bled out, not that Orgill stabbed the victim at that time.
 - f) as to the absence of blood on the defendant's clothing,

Koziol failed to take into account testimony that shortly after the incident the defendant burned his shirt that may have had blood on it; g) Koziol's reliance on the trial testimony of Orgill that when he punched the victim the victim's nose exploded is not warranted because Orgill's observation was made when he was intoxicated and in a fight and is inconsistent with the medical and photographic evidence of the injury to the bridge of the victim's nose.

17. The court finds that if both Koziol and Saviano had been called as witnesses at trial it is likely that Saviano's testimony would have been far more persuasive. Saviano has had far more training and has far more expertise in the area of bloodstain pattern analysis than does Koziol. His testimony regarding the improbability of injuries to the victim's hand and nose accounting for the number of blood droplets from markers 1 through 10 is supported by the description of those injuries in the autopsy report, Exhibit LL, by Dr. Ritchey's testimony (Trial 3/6/06 pp. 33,34), and by photographs showing the victim's head, Exhibits 1, 2, 3, 5 and 6. That same evidence indicates that the substantial amount of blood on the victim's arms and hands as shown in Exhibits F and G was from the stab wound not from injuries to the victim's hand. Saviano's testimony that the wound would have initially resulted in substantial internal bleeding, before bleeding out, is supported by the testimony of Dr. Hertner (Trial 3/2/06 pp.139, 140, 142) and the autopsy finding of 2 liters of blood in the victim's chest cavity. In contrast, Koziol's opinion that blood gushed out at the time the wound was inflicted lacked any apparent medical or scientific basis. In summary, it is highly unlikely that had the defense called a bloodstain pattern analysis expert such as Koziol at trial, the results of the trial would have been any different.

The victim's knife as the cause of the fatal wound

18. Defendant contends it was ineffective assistance of counsel to have failed to call an expert to rebut Bjorndahl's testimony that she did not think that the

victim's knife caused the fatal wound because it was not logical. Bjorndahl testified at trial that the closed folding knife found in the front seat of the Schwartz truck where the victim had been sitting had transfer bloodstains on the outside but no blood in the interior or on the blade other than that portion of the blade exposed to the outside. (Trial 3/13/06, pp.27,28). She testified that it was not logical that that knife inflicted the injury to the victim because someone would have to wipe the knife off, close it back up, put it on the front seat of the truck, and then transfer stains on the top of it. (Trial 3/13/06, p.30). Koziol disagreed with the above opinion, not based on any crime scene analysis, but on the testimony by Schwartz that before getting out of the truck on Conrad Street, the victim stated "I've got a knife, let's go." (Trial 3/3/06, p.98).

19. Even assuming that trial counsel had been aware of Bjorndahl's above testimony prior to the trial, it was not ineffective assistance of counsel to fail to present expert testimony in rebuttal. Bjorndahl's opinion was, as stated, based more upon logic than expertise. Koziol's opinion challenged that logic based upon a statement attributed to the victim, not upon crime scene analysis expertise. The jury had all of the above facts and could draw its own conclusions, weighing Bjorndahl's logic against the victim's purported statement, in light of all of the evidence in the case. This is what they were asked to do in closing arguments on the subject, which were made without reference to anyone's expertise. (Trial 3/15/06, pp. 32, 68-72). Failure to call an expert on a matter more properly the subject of lay testimony is not ineffective assistance of counsel, and it is difficult to imagine how expert testimony on this matter would have affected the result of the trial.

Contamination of the defendant's knife

20. The People's DNA expert testified at trial that the victim's blood was found in three different places on the defendant's knife. Defendant contends that the

failure to present the testimony of an expert such as Koziol deprived the defendant of "persuasive evidence" that it was likely that the trace amounts of the victim's blood found on the defendant's knife were the result of contamination. Defendant bases this contention on trial evidence of the loss of the black residue on defendant's knife while in law enforcement possession and improper handling of the knife, i.e. placing it on a carpet in the sheriff's office for photographing in an area where, defendant claims, witnesses had walked.

21. Evidence at the hearing and at trial established that Detective Richer recovered the knife from the defendant on the afternoon of November 20, 2004, approximately 12 hours after the stabbing of the victim. Detective Richer kept control of the knife until putting it into evidence later that afternoon. (Trial 3/7/06 p.179). Prior to putting the knife into evidence, Detective Richer photographed it laying on a carpet in the sheriff's office, Exhibit VV, where witnesses to the incident did, or may have walked. The court is unaware of any evidence of which witnesses, if any, may have walked in the area of the photograph, or when, in relation to the time the knife was photographed. Saviano testified that for the knife to have been contaminated with the victim's blood at the time that the photograph was taken, the wet blood of the victim would had to have been on the carpet. No hearing evidence and no trial evidence brought to the court's attention, or of which the court is aware, shows that there was any reasonable probability of the victim's wet blood being on the carpet at the time of the photograph or at any other time. After being photographed, the knife was kept in evidence in a sealed manila envelope (Trial 3/7/06 p.152) and was held as evidence of a CCW charge against the defendant and stored separately from the homicide evidence. Given the above, contamination in the manner suggested by the defendant is essentially speculative.

22. Koziol's testimony that loss of the black residue on the knife while in police custody suggests contamination is not persuasive. First, Koziol's testimony did not point out any defects in the chain of custody of the knife. On the other hand, Saviano's hearing testimony, Exhibit 19, and Strub's trial testimony (Trial 3/10/06, p. 44) raise a substantial question as to whether the black residue was removed prior to the knife being received at CBI for testing. Further, it appears likely that the black residue was removed as a result of swabbing and/or stabbing the knife into a tire five times as part of CBI testing. In any event, the court is unaware of any trial or hearing evidence providing any factual basis to support Koziol's suggestion that contamination occurred in connection with the black residue being removed from the knife. Absent such facts, that prospect is essentially a matter of speculation.

23. In contrast to defendant's theories above, trial counsel elicited substantial evidence that the victim's blood could well have been transferred to the defendant's knife through direct and indirect contact between the defendant and Orgill and physical objects in the hours following the stabbing. See, Trial 3/8/06, pp. 112-115; Trial 3/9/06, pp. 150-198; Trial 3/13/06, p.157-159. The likelihood of contamination of the defendant's knife with the victim's blood in this manner is far less speculative than the possibilities suggested by the defendant's expert, Koziol. Contamination of the knife through defendant's contact with Orgill and other objects shortly after the stabbing was also addressed at length in defendant's closing argument (Trial 3/15/06, pp. 62-68). In summary, the court concludes that failure to call an expert on the issue of contamination of defendant's knife did not constitute ineffective assistance of counsel nor would it have changed the result of the trial.

Counsel's consultation with defendant about testifying

24. Defendant contends that counsels' claimed failure to adequately discuss with the defendant whether or not defendant should testify constituted ineffective assistance of counsel. As to this contention, the court finds that: a) in the course of pretrial preparation, Tate discussed the case with the defendant and defendant's family on numerous occasions; b) Tate discussed with the defendant whether the defendant should testify a few times briefly prior to trial; c) in his discussions with the defendant about the facts of the case Tate found the defendant to be reticent and fuzzy, although the defendant was insistent upon his innocence; d) Dew, the defense investigator, conveyed to Tate that in his (Dew's) discussions with the defendant about the facts of the case he found the defendant to be evasive and that it was difficult to get the defendant to answer questions directly; e) Grohs has no specific recollection of discussing with the defendant whether he should testify; f) Tate thinks that he told the defendant that they could make the necessary points in support of their theory of the case through Lopez, but that this could not be determined until after the prosecution had rested; g) Tate believes that he told the defendant that he (Tate) believed that it was not worth the risk for the defendant to testify since his testimony might be inconsistent with Lopez's testimony; h) neither Tate nor Grohs advised the defendant not to testify in stronger terms than the foregoing ("g"); i) the trial was contentious and Tate was concerned about defendant's ability to maintain control on cross-examination; j) Tate does not recall discussing with the defendant the defendant's vehicular eluding deferred judgment because Tate was not worried about impeachment since it was for a nonviolent, non-weapons related traffic offense; k) after the prosecution rested, Tate believed that there was significant reasonable doubt; l) the trial court gave a thorough Curtis advisement which included offers for the defendant to discuss the matter of testifying with his attorney; m) Tate would have interrupted the Curtis advisement if the defendant had indicated to him he wanted to discuss

testifying; n) assuming that the defendant's inclination had been to testify as he stated in his testimony at the hearing on this motion, he did not make his wishes known to trial counsel in any reasonably clear terms prior to trial or during the Curtis advisement and stated just the opposite to the court at the Curtis advisement; o) in light of the thoroughness of the Curtis advisement and the defendant's responses, the court does not find persuasive defendant hearing testimony that he was too intimidated by the situation to request time to further discuss testifying with his attorney.

25. Defendant's criminal defense expert, Mr. Canney, rendered the opinion, without benefit of the testimony of Tate or Grohs, that counsels' failure to more adequately discuss whether the defendant should testify at trial constituted ineffective assistance of counsel. While discussion was limited, the court is not persuaded that defendant has established a claim of ineffective assistance of counsel. As Mr. Canney testified, clients rely heavily on their attorney's advice regarding whether they should testify. It follows that attorneys have a responsibility to give clients advice, which the attorney believes, is in the client's best interest. The court concludes that Tate's advice to the defendant, that essentially it would be better if the defendant did not testify, was clearly within the range of competence demanded of attorneys in criminal cases. See *Strickland* 466 U.S. at 687. Tate had reasons for concern based on the defendant's reticence, equivocation and fuzziness in discussing the facts, the risk that the defendant's testimony would be inconsistent with that of Lopez whose testimony was expected to, and did establish facts to support defendant's theory of the case, and how the defendant would hold up under cross-examination. Tate conveyed his position to the defendant in terms not likely to have impaired the defendant's free will in deciding whether to testify. Defendant clearly made known his decision to the court at the Curtis advisement.

Failure to seek a jury instruction on a lesser offense

26. Defendant contends that trial counsel's failure to discuss with the defendant and request an instruction on a lesser offense constituted ineffective assistance of counsel. As to this claim, the court finds that: a) because the defendant insisted on his innocence, counsel did not discuss with him either plea-bargaining prior to trial or requesting a lesser offense at trial; b) Grohs, who handled the instructions, told the defendant that he could attend the instruction conference but that his presence wasn't necessary; c) the court also advised the defendant that he could be present at the instruction conference; d) the defendant chose to waive his presence; e) there was a reasonable probability that had it been requested a lesser included offense instruction on either, or both reckless manslaughter and criminally negligent homicide would have been given based on Orgill's testimony that within hours after the stabbing the defendant said something like: 'I think I might have stabbed someone' and 'I hope I didn't stab someone' (Trial 3/8/06, pp. 67,68); f) the only evidence of which the court is aware relating to an accessory instruction is that a couple of hours after the homicide, Orgill and defendant each burned articles of his own clothing, (Trial 3/8/06, pp. 70,74); g) Grohs has no specific recollection of considering requesting an instruction on a lesser offense. If she did not do so it was because from the outset the defendant insisted on his innocence and considered the case to be an all-or-nothing case; h) Grohs objected to the People's request for a heat-of-passion sentence mitigator instruction based upon the defendant's position that it was an all-or-nothing case and on her level of confidence in obtaining an acquittal; i) the defendant testified at the hearing on this motion that in his mind it was an all-or-nothing case and that he probably would not have wanted an instruction on any lesser offense; j) the defendant's theory of the case instruction was totally inconsistent with a lesser offense instruction.

27. The decision to request a lesser offense instruction is strategic and tactical in nature and is therefore reserved for defense counsel. *Arko v. People*, 183 P.3d 555, 558, 559 (Colo. 2008). The decision requires sophisticated training and skill which attorneys possess and defendants do not. *Id* at 559. The decision should be made, however, after consultation with the defendant. *Id* at 560.

28. Based upon the above facts, the court is not persuaded that failure to request a lesser offense instruction or to consult with the defendant on the matter constituted ineffective assistance of counsel. At all times, the defendant was insistent upon his innocence and considered the case to be an all-or-nothing case. Thus it was understandable that Grohs did not consult with the defendant and highly probable that consultation would not have resulted in a request for a lesser offense instruction. Ms. Grohs was a highly experienced criminal defense lawyer, she and Tate had thoroughly prepared the case, and after the presentation of the People's case Gross was confident that there was at least a reasonable likelihood of acquittal. Instructing the jury on a lesser included offense would have risked conviction of the lesser offense instead of an outright acquittal. See C.R.S. 18-1-408(6).

29. There does not appear to have been any factual basis for an instruction on the lesser offense of Accessory to crime, C.R.S. 18-8-105. That statute requires proof that one render assistance to another who committed the crime, not to ones self. Here the evidence was that the defendant burned his own clothes, not Orgill's. In addition, a finding of guilty of accessory would have required a jury finding beyond a reasonable doubt that another person, presumably Orgill, had committed the homicide. Such a finding, which the jury could have made with or without an accessory instruction, would have assured the defendant's acquittal of the charge of murder. The jury, in fact, rejected the finding (that Orgill committed the crime) necessary to have convicted the defendant of accessory.

Conflict of interest in attacking prior guilty plea

30. Defendant contends that Tate had an actual conflict of interest which prevented him from objectively advising the defendant on the possibility of suppressing or excluding evidence of defendant's deferred judgment to vehicular eluding. As to this claim the court finds: a) on February 12, 2004 the defendant entered a plea of guilty to the charge of vehicular eluding and was granted a deferred judgment; b) as of the time of trial the deferred judgment had not been revoked, nor had defendant successfully completed the deferred judgment; c) Tate represented the defendant in the case for which he received the deferred judgment; d) because the deferred judgment was to a nonviolent non-weapons-related traffic offense, it did not occur to Tate to move to suppress or to collaterally attack the plea of guilty; e) Tate did not discuss attacking or suppressing the deferred judgement plea with the defendant; f) prior to the Curtis advisement the defendant understood from Mr. Tate that the deferred judgment could be used to impeach the defendant's testimony at trial; h) the court also explained the impeachment possibility to the defendant during the Curtis advisement; i) no evidence was presented that the prospect of impeachment by the use of the guilty plea affected the defendant's decision not to testify; j) no evidence was presented that there was any defect in the guilty plea underlying the deferred judgment.

31. At the hearing on this motion, Mr. Canney testified that Tate had an "actual conflict" which prevented him from attacking or moving to suppress the deferred judgment because, having represented the defendant on the deferred judgment, Tate was not in a position to objectively assess grounds for attacking or suppressing the deferred judgment. Under the above facts and the then prevailing law, the court disagrees.

32. An attorney who puts himself in the position of arguing his own incompetence in order to protect a client's interests has an impermissible conflict of interest. See *Murphy v. People*, 863 P2d 301(Colo.1993); see also, *Riley v. District Court*, 507 P2d 464(Colo.1973) (where a defendant alleges that a guilty plea was the result of his attorney's ineffective assistance, the attorney representing him on the plea cannot represent the defendant in a Crim. P. 35(b) proceeding). In the context of a claim of ineffective assistance of counsel, prejudice based on conflict is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance. *Strickland*, 466 U.S. at 692.

33. The court is unaware of any authority that an attorney having represented a defendant on a prior plea is barred by a conflict of interest from determining whether or not there are any legal impediments to attacking or suppressing the plea, particularly where, as here, the attorney has no factual basis for believing that his representation on the plea was ineffective, and the defendant is not making such a claim. In any event, the court finds no actual conflict in this case. Under Colorado law prevailing at the time of trial, the defendant was legally precluded from making a collateral attack on his prior guilty plea, *People v. Manzanares*, 85 P3d 604(Colo.App.2003), and legally precluded from moving to withdraw his guilty plea. *People v. Anderson*, 703 p.2d 650(Colo.App.1985). Defendant has suggested no other procedural or legal basis for suppressing his plea which might have involved a claim of ineffective assistance of counsel with regard to the entry of the plea. Thus Tate's potential conflict was not actual.

Erroneous advisement by the court and counsel as to defendant's right to testify.

34. Included in defendant's motion, but not pursued at the hearing on the motion, is defendant's claim that both the court and counsel erroneously advised that should he testify he could be impeached with his deferred judgment to vehicular eluding. As to this claim, the court makes the same findings as it did with regard to the conflict of interest claim above. The court rejects this claim because under the law prevailing at the time of trial, a guilty plea to a felony for which a deferred judgment was granted could be used as a felony conviction for purposes of impeachment. *People v. Vollentine*, 643 P.2d 800(Colo. App.1982). That being the case, the trial court had no discretion to prohibit the use of the deferred judgment for impeachment purposes. See *People v. Silva*, 987 P. 2d 909.919 (Colo.App.2007).

ORDERED: Defendant's motion for post-conviction relief is denied.

DATED THIS 7th DAY OF SEPTEMBER, 2010.

BY THE COURT:



John N. McMullen

Senior Judge

9-7-10 CC: DA + ATD.

K. Cronan

2008 WL 4801502

Only the Westlaw citation is currently available.

Supreme Court of Colorado,

En Banc.

Todd W. NEWMILLER, Petitioner

v.

The PEOPLE of the State of Colorado, Respondent.

No. 08SC597.

|

Sept. 22, 2008.

Court of Appeals No. 06CA1402.

*1 Petition for Writ of Certiorari DENIED.

All Citations

Not Reported in P.3d, 2008 WL 4801502

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People v Newmiller, T.

COLORADO COURT OF APPEALS

Court of Appeals No.: 06CA1402
El Paso County District Court No. 04CR5770
Honorable Gil Martinez, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Todd William Newmiller, Jr.,

Defendant-Appellant.

JUDGMENT AND SENTENCE AFFIRMED

Division V

Opinion by: JUDGE ROY

Graham and J. Jones, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced: May 22, 2008

John W. Suthers, Attorney General, Patricia R. Van Horn, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Isaacson Rosenbaum P.C., Blain D. Myhre, Denver, Colorado, for Defendant-Appellant

Defendant, Todd William Newmiller, Jr., appeals the judgment of conviction entered upon a jury verdict finding him guilty of one count of second degree murder with a deadly weapon, a class two felony, § 18-3-103, C.R.S. 2007. He also appeals the sentence imposed. We affirm.

These proceedings arose from an early morning confrontation at a strip club that escalated into a fight, a stabbing, and the death of the victim. Defendant, his brother, a friend, and two acquaintances were leaving the strip club when insults were exchanged with the victim, the victim's friend (the driver), and the driver's cousin. Representatives of the strip club intervened both in the club and later in the parking lot. The victim's party drove away, followed shortly thereafter by defendant's party.

A few blocks away, both vehicles stopped on a deserted street. There is some confusion as to what exactly transpired next, that is, no one could account for the location and activity of defendant and the victim at all times. It is, however, clear that the victim and the driver's cousin exited their vehicle and were immediately confronted by defendant and his friend. It is also clear that at the end of the confrontation (1) defendant was at the rear of the vehicle

transporting the victim and his party, where he punctured a tire with a knife; (2) the victim and defendant's friend were engaged in a fight at the front of that vehicle; and (3) both the victim and defendant's friend had substantial amounts of the victim's blood on their clothes. The parties looked on while defendant's friend and the victim engaged in the fight. During the fight, defendant and the cousin argued on the opposite side of the victim's vehicle.

Upon returning to his party's vehicle, the victim told his associates that he thought he had been stabbed. As they drove away they called the emergency dispatcher, who sent an ambulance to meet them and transport the victim to the hospital, where he was pronounced dead from a stab wound to the heart.

Upon returning to defendant's party's vehicle, it was discovered that defendant's friend had a significant amount of the victim's blood on his clothes, which they believed to have resulted from a bloody nose. They departed the scene, dropping off various members at their cars or homes along the way. Defendant's associates all testified, with different phrasing and details, that at some point after the fight, defendant stated, "I slashed their tire and I stabbed one of them," or that he hoped he had not stabbed

someone. Defendant, his friend, and one acquaintance went to the friend's home, where they examined and found no blood on defendant's knife, following which defendant wiped the knife. They then burned items of their clothing on which they had discovered blood.

The next day, defendant and his friend were stopped by police. One of the officers discovered defendant's knife in his coat pocket and arrested him for carrying a concealed weapon. The police interviewed the involved parties and subsequently arrested defendant for the victim's murder. All the other members of defendant's party were given plea agreements, which required them to testify at defendant's trial.

The prosecution's theory was that defendant stabbed the victim early in the confrontation when defendant and the victim were in close proximity and the victim was able to carry on a fight with defendant's friend because of a rush of adrenaline. The defense theory was that the victim was stabbed at the very end of the confrontation, possibly by defendant's friend, at which time defendant was slashing the tire at the opposite end of the vehicle.

A jury found defendant guilty of second degree murder by the use of a deadly weapon. The trial court sentenced him to a term of thirty-one years in the custody of the Department of Corrections.

This appeal followed.

I.

Defendant first and primarily contends that the trial court erred by denying his motion to dismiss or for sanctions, which alleged that the prosecution failed to preserve potentially exculpatory material, that is, a black flakey substance on the blade of defendant's knife. We disagree.

The knife seized from defendant's jacket was immediately examined by police detectives. While they were unable to identify any blood on the knife, they observed an unidentified black substance at the base of the blade. The detectives did not collect any of the black substance, but photographed the open knife and put it into a sealed evidence bag. The knife was not a part of the initial submission to the crime laboratory, but was later located and submitted. The lab technician found no black substance on the knife or in the accompanying evidence bag, but did find traces of both the victim's and defendant's blood on the knife blade.

Defendant filed a motion for dismissal or sanctions based on the destruction of the black substance on the knife blade. The trial court denied the motion after a hearing. The court found that the black substance was inadvertently lost or destroyed by the state, but there was no indication that it had apparent exculpatory value.

Defendant argues that the trial court erred in so concluding. It is undisputed that the slashing of the tire, at which time the victim was in front of the vehicle and defendant was at the rear, was the last event prior to the departure from the scene by all the parties. Defendant argues that the black substance substantiated his claims that he stabbed the tire with the knife and that his statement about “stabbing one of them” referred to a tire and not to the victim or one of his group. He also argues that the black substance had significance in determining the sequence of events. Defendant reasons that if the black substance was determined to be tire residue and blood was found only on its upper surface, it would substantiate his theory that the presence of the victim’s blood resulted from a transfer from his friend’s clothing, which had substantial amounts of the victim’s blood on it. In addition, defendant asserts that the presence of the black substance on the

knife would refute the prosecution's claim that he scrubbed the knife before the police seized it. The prosecution does not dispute that defendant slashed the tire or that the victim was stabbed before the tire was slashed.

The prosecution argues that there was no evidence that the police intentionally lost or destroyed the black substance. The prosecution also argues that the detectives did not have any idea as to what the black substance was, and so it could not have had apparent exculpatory value before it was lost or destroyed. The prosecution finally argues that defendant had comparable, alternative evidence available in the form of witness testimony and photographs.

Evaluation of evidence and the application of a legal standard to that evidence present mixed questions of fact and law. We defer to a trial court's findings of historical fact when they are supported by the record, and review its conclusions of law de novo. *People v. Ray*, 109 P.3d 996, 998-99 (Colo. App. 2004).

To establish a due process violation for failure to preserve exculpatory evidence, a defendant must establish that (1) the evidence was destroyed by state action; (2) the evidence possessed

apparent exculpatory value before it was destroyed; and (3) the defendant is unable to obtain comparable evidence by other reasonably available means. *California v. Trombetta*, 467 U.S. 479, 488-89, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984); *People v. Braunthal*, 31 P.3d 167, 173 (Colo. 2001); *People v. Victorian*, 165 P.3d 890, 893 (Colo. App. 2007). If the evidence was not apparently exculpatory but was merely potentially useful, a defendant must demonstrate that the state agents acted in bad faith in losing or destroying the evidence. *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S.Ct. 333, 337-38, 102 L.Ed.2d 281 (1988); *People v. Wyman*, 788 P.2d 1278, 1280 (Colo. 1990); *Victorian*, 165 P.3d at 893.

In *Youngblood*, the state failed to preserve semen samples from the victim's body and clothing. The state appellate courts reversed the defendant's conviction on the ground that if the state had preserved the evidence it might have exonerated the defendant. The United States Supreme Court reinstated the conviction, stating that the Due Process Clause does not require reversal for destruction of evidence "of which no more can be said than that it could have been

subjected to tests, the results of which might have exonerated the defendant.” *Id.* at 57, 109 S.Ct. at 337.

Similarly, in *People v. Scarlett*, 985 P.2d 36, 39 (Colo. App. 1998), when a truck involved in a vehicular homicide was damaged while in police custody, a division of this court affirmed the defendant’s conviction, stating that “[s]peculative assertions regarding the possible exculpatory effect had the evidence been available for testing are not sufficient” to meet the burden of proving apparent exculpatory value.

Here, the trial court concluded, with support in the record, that the black substance was destroyed by state action because it was under the continuous and exclusive control of the state at the time it was lost or destroyed. We agree with the trial court that the black substance did not itself have apparent exculpatory value before it was destroyed. Neither defendant nor the police officers conclusively identified the black substance. Defendant concedes that even if the black substance was tire material, it would have been exculpatory only if the blood was found on its upper surface. The lab technician testified that the victim’s blood was found in a different region of the blade.

In our view, evidence that must fulfill a series of unproven contingencies or assumptions is not apparently exculpatory but is merely potentially useful. *See People v. Eagen*, 892 P.2d 426, 428 (Colo. App. 1994); *People v. Schrecongost*, 796 P.2d 45, 47 (Colo. App. 1990), *aff'd*, 810 P.2d 1068 (Colo. 1991). Further, because defendant has never asserted, and in oral argument conceded that there is no evidence that the police acted in bad faith, his claim must fail under the *Youngblood* standard. *Youngblood*, 488 U.S. at 57-58, 109 S.Ct. at 337.

Accordingly, we conclude that the trial court did not abuse its discretion by denying defendant's motion for dismissal or sanctions.

II.

Defendant also contends that prosecutorial misconduct in the form of improper closing arguments and late disclosure of evidence deprived him of a fair trial. We conclude that there was no plain error.

A.

In both principal and rebuttal closing arguments, the prosecutors commented on the credibility of the witnesses. Referring to the testimony of defendant's friend and acquaintances,

one prosecutor stated that “[t]hey’re not making stuff up after the fact.” A little later, she followed with: “And they’re not about to come in here and lie to you and say that they [heard defendant say something] when they didn’t.” In rebuttal, another prosecutor also added that had defendant’s friend intended to frame defendant by lying about the events, he could have told a more cohesive story, but instead “came in here and told the truth.”

Also in rebuttal, this prosecutor opened with a statement that defense counsel’s closing argument was “guessing, imagination, and speculation. . . . And on top of that, it was a misrepresentation of the facts.” At this juncture, the trial court warned him that he could not say that defense counsel’s closing argument was a lie and suggested that he focus on other areas. The prosecutor moved on and later concluded his rebuttal with the statement: “[The victim], our victim. The sins in the dark by a dark man carrying a dark knife need to go and have some punishment for them.” The trial court then instructed the jury to disregard any statements regarding punishment. Defendant made no objections to either closing argument.

Defendant argues that the prosecutors' closing arguments represented attempts to improperly bolster their case, to denigrate defense counsel, and to inflame the jury's passions. He argues that their improper remarks tipped the balance toward an unjust conviction and require reversal.

In the absence of a contemporaneous objection, we review an assertion of prosecutorial misconduct under a plain error standard. Crim. P. 52(b); *Harris v. People*, 888 P.2d 259, 267 (Colo. 1995). Prosecutorial misconduct constitutes plain error only when it is flagrant and egregiously improper. *People v. Wallace*, 97 P.3d 262, 268 (Colo. App. 2004). Further, the misconduct must so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *Id.* at 268-69.

We consider the severity and frequency of the misconduct, any curative measures taken by the trial court, and the likelihood that the misconduct was a material factor leading to the defendant's conviction. *People v. Washington*, 179 P.3d 153, 168 (Colo. App. 2007) (*cert. granted* Dec. 17, 2007). A few brief, isolated comments in an overall prosaic summation do not warrant reversal under the

plain error standard. *Domingo-Gomez v. People*, 125 P.3d 1043, 1053 (Colo. 2005).

The prosecution is entitled to respond to defense counsel's theories and arguments. *People v. Dunlap*, 124 P.3d 780, 809 (Colo. App. 2004). While it is improper for counsel to express his or her personal belief as to the truthfulness of witnesses, counsel may draw reasonable inferences from the evidence that address the credibility of the witnesses. *Wilson v. People*, 743 P.2d 415, 418 (Colo. 1987). A prosecutor may employ rhetorical devices and oratorical embellishment as long as it does not induce the jury to determine guilt based on prejudice, passion, or irrelevant issues. *Washington*, 179 P.3d at 168.

Here, the prosecutors' comments were isolated remarks in a long summation of the evidence. While the prosecutors urged the jury to find the prosecution witnesses credible despite inconsistencies in their stories, they did not offer personal opinions about the credibility of any witness. In the context of the entire closing argument, the prosecutor's rebuttal statements were more oratorical embellishment than elements of a scheme to improperly sway the jury. Even if some of the prosecutors' comments were

improper, they were not flagrant or glaringly or tremendously improper, and the trial court cured any impropriety by stopping the prosecution from going too far and by telling the jury to disregard certain statements.

B.

We are also not persuaded by defendant's assertion of prosecutorial misconduct premised on the failure to disclose certain evidence prior to the second day of trial in violation of Crim. P. 16.

On the second day of trial, the prosecutors delivered to defense counsel a tape recording of two 911 calls and the reports of two police officers who interviewed witnesses. The prosecutors stated that they had only recently received the evidence and they did not know why it was received at such a late date. The prosecutors also stated their intent to call one of the police officers to testify that day. The trial court precluded the prosecution from calling the untimely disclosed witnesses, and defense counsel did not seek a continuance. Accordingly, we fail to perceive any reversible error. *See People v. Sepeda*, 196 Colo. 13, 21, 581 P.2d 723, 729 (1978) ("late endorsement is not reversible error unless the

defendant makes a timely request for a continuance which is denied”).

III.

Defendant also contends that the trial court erred in refusing to accept his tendered theory of defense instructions. We are not persuaded.

Defendant tendered and the trial court refused three theory of defense instructions. The trial court rejected the first two because they stated defendant’s beliefs as to certain events and, because defendant did not testify, there was no evidence upon which to predicate the instructions. The court rejected portions of the third instruction because they were redundant of other instructions. The trial court issued the following instruction embodying defendant’s theory of the defense:

[Defendant’s] defense is that he did not stab [the victim]. [Defendant] asserts that he was not in a confrontation with [the victim] on Conrad Street. [Defendant’s] defense is that he does not know how [the victim] got stabbed. [Defendant] believes that either [defendant’s friend] stabbed [the victim] with a knife, or that [the victim] was injured with his own knife during the fight he had with [defendant’s friend].

Defendant argues that the trial court's instruction omitted key elements of his theory of defense for which evidence was presented, including (1) that he did not confess to stabbing the victim; (2) that there was no blood visible on the knife when it was examined at his friend's house; and (3) that any blood discovered on the knife was transferred there from defendant's friend's clothes.

A defendant is entitled to a theory of defense instruction if the record contains any evidence to support it. *People v. Nunez*, 841 P.2d 261, 264-65 (Colo. 1992). However, a trial court may refuse to give a tendered instruction that is more argumentative than instructive, or that simply calls attention to specific points of evidence. *People v. Inman*, 950 P.2d 640, 645 (Colo. App. 1997). Moreover, it is unnecessary to give instructions that are already encompassed in other instructions. *People v. Phillips*, 91 P.3d 476, 483 (Colo. App. 2004). No error occurs when, the instructions being considered as a whole, the defendant's theory could be argued under the instructions given by the court. *People v. Trujillo*, 83 P.3d 642, 645 (Colo. 2004).

A.

Here, the first two of defendant's tendered and rejected instructions contained a statement as to what defendant meant when he said "stabbing one of them." Indeed both instructions were a series of representations of what defendant believed, meant, knew, or observed. For instance, the first instruction stated in pertinent part:

[Defendant] never stated that he stabbed a person. [Defendant] stated in the Jeep that "I stabbed a tire, I stabbed one of them."
[Defendant] was referring to tire. [Defendant] made this statement in an effort to calm his brother . . . who was driving fast and erratically going after the [victim's] pickup truck. [Defendant] made the statement to his brother to keep them from any further conflict.

The second instruction was identical except it did not contain the first sentence in the above quote.

Similarly, the third alleged omission, "that any blood discovered on the knife was transferred there from defendant's friend's clothes," is a statement of belief. The first tendered instruction states, in pertinent part:

[Defendant] believes that he got a small amount of [the victim's] blood on his knife by being near [defendant's friend] who was

covered by [the victim's] blood. [Defendant] believes that [the victim's] blood was transferred by touching [defendant's friend] or touching things that [defendant's friend] had previously touched. [Defendant] believes that the blood was then transferred to the knife when he opened and closed the knife at [defendant's friend's] house.

The second tendered instruction was identical.

Instructions related to a defendant's beliefs are not appropriate when, as here, the defendant did not testify and no evidence was presented as to the defendant's state of mind. *See People v. Dillon*, 655 P.2d 841, 845 (Colo. 1982). In addition, the instructions were argumentative in that they attempted to draw inferences from the evidence. *Inman*, 950 P.2d at 645.

B.

Defendant also argues that the trial court erred in failing to instruct the jury "that there was no blood visible on the knife when it was examined at defendant's friend's house." We disagree.

The first tendered theory of defense instruction stated: "Either [defendant's acquaintance] or [defendant's friend] suggested that [defendant] examine his knife to see if it had any blood on it. The three men looked at the knife and there was no blood on it." The

second tendered instruction was identical except for the first sentence in which the order was transposed.

The instruction called the jury's attention to a specific item of evidence and was, therefore, inappropriate. *Id.* Further, it stated a conclusion that there was no blood on the knife, which was an inference defendant wanted the jury to make, rather than that the men did not observe any blood on the knife, which was the fact in evidence. Finally, it was contained in instructions that were improper for other reasons previously discussed.

Therefore, we conclude that the trial court did not abuse its discretion in refusing an instruction containing the requested language.

IV.

Defendant finally contends that the trial court determined his sentence based on an improper consideration. We disagree.

At defendant's sentencing hearing, the trial court heard testimony from both the victim's and defendant's families and friends. The trial court considered the seriousness of the offense and the resulting death; defendant's nonviolent history, history of alcohol problems, and potential for rehabilitation; defendant's

respectful behavior in court and in custody; and defendant's empathy with the victim's family, if not his remorse, as exhibited in his sentencing statements. It also considered whether the minimum sentence would diminish the seriousness of the crime and undermine respect for the law. The trial court then sentenced defendant to thirty-one years custody of the Department of Corrections, stating: "And the fact that I don't give you the minimum is because you took somebody's life, and that life can never be brought back again." The trial court also stated that it did not give the maximum sentence because of the mitigating factors it noted.

Defendant argues that the trial court based its sentence on an inappropriate consideration when it declined to give the minimum sentence based on his taking of the victim's life. He argues that every murder conviction is based on the taking of a victim's life and the trial court's reasoning would result in no minimum sentences, contrary to the clear intent of the legislature.

A trial court's decision regarding sentencing will not be overturned absent a clear abuse of discretion. *People v. Roadcap*, 78 P.3d 1108, 1114 (Colo. App. 2003). We must uphold a sentence

that is within the required range, is based on appropriate considerations as reflected in the record, and is factually supported by the circumstances of the case. *People v. Fuller*, 791 P.2d 702, 708 (Colo. 1990).

When exercising its sentencing discretion, a trial court must consider the nature and elements of the offense, the character and rehabilitative potential of the offender, any aggravating or mitigating factors, and the public interest in safety and deterrence. § 18-1-102.5, C.R.S. 2007; *People v. McAfee*, 104 P.3d 226, 231 (Colo. App. 2004). Second degree murder using a deadly weapon is a class two felony with a presumptive sentencing range of sixteen to forty-eight years. *See* §§ 18-1.3-401, -406, 18-3-103, C.R.S. 2007.

Here, the trial court did not consider facts that were demonstrably false or outside the record. *See People v. Pourat*, 100 P.3d 503, 505 (Colo. App. 2004). It considered the nature of the offense, defendant's character and rehabilitation potential, aggravating or mitigating factors presented by defendant's and the victim's families and friends, and the effect of the sentence on the public. Notwithstanding the trial court's concluding statement, the record shows that it considered the appropriate and required

factors and imposed a sentence within the presumptive range. See *People v. Howell*, 64 P.3d 894, 898 (Colo. App. 2002).

Therefore, we conclude that the trial court did not abuse its discretion in imposing defendant's thirty-one-year sentence.

The judgment and sentence are affirmed.

JUDGE GRAHAM and JUDGE J. JONES concur.