

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Wesley HARshaw PETITIONER
(Your Name)

VS.

United States — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

☒ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

DISTRICT OF COLUMBIA COURT OF APPEALS

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☐ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____, or

☒ a copy of the order of appointment is appended.

Henry G. Denard
(Signature)

**District of Columbia
Court of Appeals**

No. 16-CF-264

WESLEY HARSHAW,

Appellant,

CF3-10725-14

v.

UNITED STATES,

Appellee.

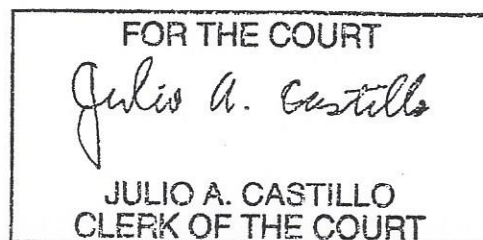
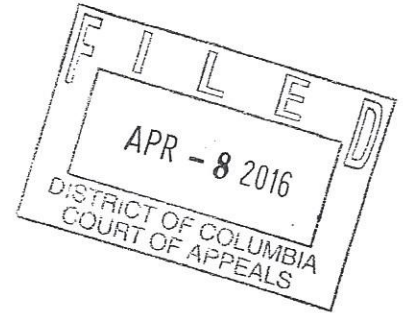
ORDER

On consideration of the notice of appeal, and it appearing that appellant has been found eligible for court appointed counsel, it is

ORDERED that Mindy A. Daniels, Esquire, is hereby appointed to represent appellant in this appeal. It is

FURTHER ORDERED that trial counsel Colleen S. Archer, Esquire, shall transmit all documents pertaining to appeal, including trial exhibits to the newly appointed counsel forthwith. It is

FURTHER ORDERED that counsel for appellant shall immediately take the necessary steps to review the trial court record and to ensure that the transcript(s) necessary to the appeal have been ordered and shall, within 30 days from the date of this order complete and file with this court a single copy of the statement regarding transcript available for completion online. Where transcript(s) necessary for this appeal have been ordered and completed for non-appeal purposes, appellant must advise the Court Reporting and Recording Division to forward said transcript(s) for inclusion in the record on appeal.



No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WESLEY HARSHAW --- PETITIONER

vs.

UNITED STATES --- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI

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March 20, 2018

QUESTION PRESENTED

- I. DID THE PETITIONER SHOW HE HAD INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN HIS MISIDENTIFICATION DEFENSE, WHERE COUNSEL IS IN POSSESSION OF, BUT FAILS TO PRESENT OR ELICIT EVIDENCE OF CRITICAL INCONSISTENCIES ALLUDED TO BY POLICE IN THEIR TESTIMONY REGARDING THE COMPLAINANT'S DESCRIPTION OF HIM TO THEM, AND THE JURY ASKS FOR THAT MISSING EVIDENCE DURING DELIBERATIONS IN DETERMINING WHETHER PETITIONER'S MISIDENTIFICATION DEFENSE WAS VALID? DID THE COURT OF APPEALS ERRONEOUSLY IGNORE THE JURY NOTES?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINION BELOW

The District of Columbia Court of Appeals affirmed Petitioner's armed robbery conviction in an unreported Memorandum Opinion and Judgment in *Harshaw V. United States*, No. 16-CF-264 (September 6, 2017) (Appendix A). On December 20, 2017, the Court of Appeals denied his petition for rehearing and rehearing *en banc* (Appendix B).

JURISDICTION

The D.C. Court of Appeals affirmed Petitioner's convictions in *Harshaw v. United States*, No. 16-CF-264, on September 6, 2017. On December 20, 2017, the Court denied Petitioner's petition for rehearing and rehearing *en banc*. This Court's jurisdiction is invoked under Title 28 U.S.C. 1254(1) and 1257(a), to review the Court of Appeals decision on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the Fifth, and Sixth Amendments of the United States Constitution. The Fifth Amendment guarantees due process and equal protection. The Sixth Amendment guarantees an accused the right to effective assistance of counsel.

Amendment V to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property, be taken for public use, without just compensation.

Amendment VI to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

The complainant, Shu Ngwa who emigrated from Cameroon several years earlier, claimed it was his own ethnicity that accounted for inconsistencies in his height and weight descriptions to police of the Petitioner, whom he did not know but claimed robbed him at gunpoint. On October 13, 2012, between 2:30 and 3:00 p.m. Ngwa, went to the New Century Chinese carry-out that is located in an outdoor plaza with other stores. He spent several minutes picking up his food there and left. Ngwa made a call and had his cell phone to his ear when he passed a man he did not know between the carry-out and post office next door. The man said, "Hello" and Ngwa responded in kind and kept walking. He was on his phone, paying attention to cars, but noticed that same man he said he saw outside the carry-out following him. The man approached him and asked him for the time. Mr. Ngwa told his friend on the phone to "hold on." He looked down at his phone, said it was sometime after 2:00 p.m., and turned to walk away. Ngwa testified at trial the man got really close, put a gun against his tummy and said, "[t]ake out everything you have on you."

He thought the gun was black and had a little tape on it. The man rifled through Ngwa's pockets, took the phone, food, and about sixty or seventy dollars, before he left. Ngwa reported what had happened to a 911 dispatcher. Ngwa described the suspect on the 911 call as black male, late twenties, hairs on his chin, light-skinned, and some clothing detail. Mr. Ngwa did not give the 911 dispatcher a height or weight description. Police arrived on the scene and he gave them a description of the man who robbed him. Five days later Ngwa viewed a nine-person facial photo array that did not include the Petitioner and he picked no one. About a week later, police showed

him another facial photo array that included Petitioner's photo. Ngwa pointed to that photo and said, "The face looked like him. This is the guy."

Ngwa testified at trial he was from Cameroon, and that the Petitioner would be considered light-skinned to him. Petitioner was dark-skinned. Ngwa said in Cameroon they measure in meters, not feet and inches. At trial Ngwa testified the first time he saw Petitioner was outside the carryout. He described him as 5'10" tall and offered proof of what he perceived his own height to be by his driver's license, which indicated he was 5'10" on it. Ngwa was actually around 5'2" tall. Defense counsel asked Mr. Ngwa to stand before the jury. He admitted he described the perpetrator to police as 5'8", and light-skinned. Ngwa at first testified he did not see in court the person who robbed him. Upon being prodded by the prosecutor, he identified the Petitioner.

Metropolitan Police Officer Boykins responded to the scene and took a report from Mr. Ngwa, who appeared upset and flustered. Officer Boykins could only recall at trial the description was of a black male. He called for a detective and ultimately broadcast a more specific lookout of the suspect. The jury never knew exactly what was reported to the officer or what description was broadcast. Officer Boykins was shown his 251 report on cross-examination. He said he wrote what the complainant told him, believed he had other notes, but not in that report. All that was in Officer Boykins 251 for the suspect was, "Black and not of Hispanic origin" and "Unknown suspect". This report did not indicate weight, height, or skin color for the suspect, but the officer believed he was given that information and it was just not in that particular report.

Sergeant Boland testified he showed Mr. Ngwa a nine person facial photo array that did not include the Petitioner. Ngwa did not identify anyone in the first photo array. A second photo array was shown to Mr. Ngwa and he identified the Petitioner. He said the face in the picture

looked like the man who robbed him. Sergeant Boland could not recall any description of the suspect by the victim in this case but assumed he was given one in order to compile the photo array. On cross-examination Sergeant Boland was given a copy of his grand jury testimony to refresh his recollection and asked to review page 4, line 20 to page 5 lines 1-3, indicating a photo array was prepared using a description of the suspect.

The defense called no witnesses. In jury instructions, the jury was told the defense was misidentification in that the complainant gave a description on the date of the robbery that does not match the Petitioner's physical characteristics.

REASONS FOR GRANTING THE PETITION

- I. THIS COURT SHOULD GRANT THE WRIT BECAUSE PETITIONER'S WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL OMITTED FROM THE JURY'S CONSIDERATION GLARING INCONSISTENCIES THE COMPLAINANT GAVE POLICE IN HIS DESCRIPTION OF THE SUSPECT, PREJUDICING HIS MISIDENTIFICATION DEFENSE; THE JURY ASKED FOR THE DESCRIPTIONS ALLUDED TO IN POLICE TESTIMONY AND HUNG AT FIRST ON ACCOUNT OF THE MISSING EVIDENCE; AND THE COURT OF APPEALS FAILED TO CONSIDER THE JURY NOTES IN AFFIRMING PETITIONER'S CONVICTIONS.

Petitioner's defense was misidentification and his defense was read to the jury in closing instructions:

It is the defense's theory of the case that Mr. Harshaw was misidentified by the complainant as the person who robbed him on October 13, 2012.

The defense contends that the complainant gave a description on the date of the robbery that does not match Mr. Harshaw's physical description.

However, trial counsel failed to bring out the disparities between the physical descriptions the complainant gave to police and the characteristics of the Petitioner as to height and weight.

There was no dispute that Petitioner was 6 feet tall, a dark-skinned black male and weighed about 200 pounds. The jury heard Ngwa told police the man who robbed him was light-skinned and 5'8" tall. They did not hear other description the complainant gave police that they alluded to in their testimony, that was highly inconsistent with what the jury heard, because defense counsel never brought it out. The jury noticed the omission, asked for that information twice early on in their deliberations, could not receive it because it was not entered into evidence, and hung at first. They ultimately convicted without it. The cornerstone of the defense was that the description the complainant gave police did not match Petitioner's physical description.

Specifically, appellant points to counsel's failure to put before the jury evidence of 1) Petitioner's specific weight and height as well as the descriptions Ngwa gave to police of the suspect, and which became the subject of jury notes; 2) information Ngwa gave to police stating he first saw Petitioner in the carry-out, which was inconsistent with his trial testimony that he first saw him outside the carry-out.

Counsel did not impeach Ngwa with police reports of further description the officers said he gave, cross-examine the officers to get the favorable description information into evidence, or, call the officers who took descriptions in this case as defense witnesses. Given the nature of the defense encompassed in the jury instruction the defense requested, it follows that it was incumbent on trial counsel to use any admissible evidence in her possession to support the expressly stated defense theory of disparity in description the complainant gave police. "[P]olice testimony ...consisting solely of descriptions or identifications of the complaining witness' assailants are admissible as substantive evidence under the hearsay exception for prior description testimony recognized in *Morris v. United States*, D.C.App., 398 A.2d 333 (1978)." *Warren v. United States*,

436 A.2d 821, 837 (D.C. 1981). Trial counsel failed to use standard impeachment material, police documents in this instance, to show the height and/or weight descriptions given police differed from each other, and, from the characteristics of the Petitioner.

In order to prevail on a post-trial claim of ineffective assistance of trial counsel, appellant must show his trial attorney's performance fell below an objective standard of reasonableness, and, that there is a reasonable probability that the error was prejudicial and casts doubt upon the conviction. *Simpson v. United States*, 576 A.2d 1336, 1337 (D.C. 1990); *Strickland v. Washington*, 466 U.S. 668 (1984). The claim must show sufficient prejudice for the court to consider the issue of an attorney's performance. *Id.*; *Smith v. United States*, 686 A.2d 537 (D.C. 1996), *cert. denied*, 522 U.S. 839 (1997). The Court must determine whether counsel's strategic choices were reasonable given plausible options, whether the evidence was subject to adversarial testing, whether a line of defense was not pursued, the materiality of the omission, and the potential of the conceivable effect on the outcome in determining prejudice. *Id.*

Whether there is a reasonable probability of a different outcome is measured by the nature of the defense at trial and the potential for creation of reasonable doubt in the jurors' minds. *Kigozi v. United States*, 55 A.3d 643 (D.C. 2012). ("[T]he evidence need not itself establish a probability . . . [i]f the jury had a reasonable doubt, there could be no conviction.") *Young v. United States*, 56 A.3d 1184, 1200 (D.C. 2012).

Review of the denial of an ineffective assistance of counsel claim is for abuse of discretion. *Minor v. United States*, 647 A.2d 770, 76 (D.C. 1994). For purposes of appellate review, the trial court's determination of whether counsel was ineffective presents a mixed question of both law and fact. *Cosio v. United States*, 927 A.2d 1106 (D.C. 2007); *Frederick v. United States*, 741 A.2d

427, 436 (D.C. 1999). The Court will accept the trial court's factual findings unless they lack evidentiary support in the record. *Lopez v. United States*, 863 A.2d 852, 861 (D.C. 2004). The Court of Appeals will review of the lower court's legal determinations in an ineffective assistance counsel of claim *de novo*. *Byrd v. United States*, 614 A.2d 25, 30 (D.C. 1992); *Simms v. United States*, 41 A.3d 482, 486 (D.C. 2012) (footnotes omitted).

Petitioner filed his motion for new trial within seven days of the verdict. Such a motion is governed by a "more lenient" standard than a motion filed later in the process, as it is "substantially unaffected by the usual considerations favoring finality of judgments." *Godfrey v. United States*, 454 A.2d 299 (D.C. 1982) (quoting *Sellars v. United States*, 401 A.2d 974, 979 (D.C. 1979)).

In the arrest report, which counsel did not admit into evidence, it showed Petitioner was 6 feet tall and weighed 200 pounds. The trial judge noted Ngwa stated he was light-skinned but that Petitioner was clearly dark-skinned. There was additional descriptive evidence counsel omitted that spoke to the height and weight of the suspect Ngwa gave to police. An incident based report by Officer Boykins the officer alluded to in his testimony, in addition to the 251 he was confronted with at trial, showed Ngwa told him the robber was 150 pounds and 5'0" tall; a far cry from the 200 pounds Petitioner actually weighed and the 5'8" description of height Ngwa testified to at trial and also told police. Officer Boykins' original report only said the description was for "Unknown suspect," and for race/ethnicity it said, "Black and not of Hispanic origin." He recalled Mr. Ngwa did give him height, weight, and skin color, and he believed he had notes to that effect, but, "[i]t's not in that report", indicating there was another report aside from that particular report he was being shown. Counsel never brought this out and the jury never saw this report. It caused the jury to do counsel's job and seek out the additional descriptive information to determine if appellant's

stated defense gave them a reason to doubt the identification evidence in this case. Sergeant Boland testified that Mr. Ngwa provided the description he referred to in grand jury testimony to Detective Gaffney, the initial detective on the scene

Shortly after the jury retired to deliberate, the jury sent its first note: "Your Honor, could we have the information on the suspect: age, height, et cetera? Thank You." The response by the court was, "I cannot provide any additional information. Your recollection will control as to the testimony that was given." Fifty minutes later, the jury sent out another note asking, "Can we read the grand jury testimony that Sgt. Boland read to himself while on the stand?" The court responded, "That testimony was not admitted into evidence, so I cannot provide it.". Just under an hour later, the jury indicated to the court that they are, "strongly undecided on a verdict. . . do not see us reaching a verdict." The court responded, "Please keep deliberating." The next afternoon the jury reached a verdict

Detective Gaffney's report included additional favorable and impeaching evidence in that now Ngwa told him the robber was medium-skinned black male. Detective Gaffney was not called as a witness. In addition, Ngwa told Detective Gaffney the first time he saw the man who robbed him was inside the carryout. The jury did not know this. Ngwa testified at trial and in the grand jury that the first time he saw him was outside the carry-out. Detective Gaffney's report also indicated the complainant had no visible injuries, but he testified at trial and in the grand jury his head was inflamed.

The trial court concluded that counsel's omissions in impeachment were insignificant because Ngwa's facial description "ultimately . . . carried the day." The jury notes in this case make clear Ngwa's facial description did not end the inquiry for them. It was the jury's quandary

to discern whether the defense theory of the case they listened to in closing instructions held water. It was for them to determine whether, Petitioner's defense that, "the complainant gave a description on the date of the robbery that does not match Mr. Harshaw's physical description" was viable. They attempted to garner the evidence alluded to themselves, through their first two jury notes in rapid succession soon after deliberations started, but to no avail.

Had the jury known police reports indicated descriptions by the complainant that the suspect was 5'0 inches tall, and then 5'8" tall, and 150 pounds, as opposed to Petitioner, who was 6 feet and 200 pounds; had the jury known the complainant first told police he saw the Petitioner inside the carry-out and not outside as he testified in grand jury and at trial; that there were no evident injuries even though he testified his head was inflamed; had the jury known he changed his description of the robber from light-skinned and then to medium-skinned, all of these inconsistencies may have shifted jury deliberations.

Counsel had Officer Boykins report and Detective Gaffney's reports but did not use them to shore up the defense theory of the case: the description given by the complainant did not match the appellant. As a result, the record supports Petitioner's position that if the evidence had been admitted by the defense, "there would have been a reasonable probability of a different outcome." *Strickland, supra*.

Appellant was a stranger to the complainant. *See Redmond v. United States*, 829 A.2d 229, 234 n.5 (D.C. 2003) (noting that where a witness knows the defendant, an identification "contain[s] strong elements of reliability," and is therefore unlike "eyewitness identifications made by strangers, which may invoke more searching considerations"). The jury notes cut significantly against the trial court's conclusion that the impeachment evidence ultimately was not prejudicial

and Mr. Ngwa's facial identification in the photo array and at trial would have carried the day in any event. The trial court commented at the post-trial hearing that "his description was definitely off. I remember that." Counsel's strategic choices were not reasonable, given plausible options. The omissions were material, and that by omitting the evidence of description, she failed to use what favorable evidence she had, and, shot the defense in the foot by acting like the information did not exist. This is not trial strategy; they are costly omissions. Trial counsel failed to use what she had to strengthen the defense of misidentification, and as a result, failed to meaningfully test the positive identification the complainant made in court, and in a photo array out of court before that. *Smith v. United States*, 686 A.2d 537 (D.C. 1996), *cert. denied*, 522 U.S. 839 (1997).

In its facts section, the Court of Appeals specifically recites two jury notes and their focus on obtaining identification evidence alluded to but not fleshed out in testimony. When denied that evidence, a third note told the court they were deadlocked. MOJ p. 3 (Appendix A). The Court acknowledges the complainant in this case was to some extent confused in his identification. MOJ p. 5. Petitioner complained on appeal of numerous omissions by counsel that went to his misidentification defense, mostly contained in police reports of police witnesses Boykins and Gaffney in defense counsel's possession. The MOJ states, "His explanation that he was unfamiliar with American weights and measures was plausible, the jury apparently accepted it," MOJ p. 5. They accepted it, but under protest as indicated by their notes to the judge during deliberations.

The jury notes are not addressed other than factually by the Court. There is no gauge or discussion of the notes in the Court's legal analysis, even though they went to the heart of Petitioner's argument that this was direct, persuasive, non-speculative, and on the record evidence

that counsel's omissions were prejudicial. We often do not have jury notes and can only speculate on what the jury found important in their deliberations. In this case the jury notes show the prejudice of counsel's omissions but are ignored or apparently were not considered by the Court of Appeals. It would appear to be a miscarriage of justice if the Court overlooks, or does not consider in an obvious manner in its opinion, record evidence that Petitioner brought before it that strongly and potentially persuasively supports Petitioner's arguments.

Whether there is a reasonable probability of a different outcome is measured by the nature of the defense at trial and the potential for creation of reasonable doubt in the jurors' minds. *Kigozi v. United States*, 55 A.3d 643 (D.C. 2012). ("[T]he evidence need not itself establish a probability . . . [i]f the jury had a reasonable doubt, there could be no conviction.") *Young v. United States*, 56 A.3d 1184, 1200 (D.C. 2012).

The Court's opinion fails to measure the jury notes that specifically went to the defense at trial and Petitioner's complained of omissions by trial counsel. The jury did not just accept the identification before it and return a swift guilty verdict. More identification evidence was alluded to in the police officer's testimony and they said they wanted it in their notes to the judge during deliberations. They made clear they wanted the identification evidence and that they were deadlocked soon thereafter. The jury accepted the government's evidence ultimately on identification, but only after they could not get the identification evidence they desired. The only reason they did not have this evidence was a result of counsel's complained of omissions, for which she gave no articulable reasons at the post-trial hearing.

"[P]olice testimony ...consisting solely of descriptions or identifications of the complaining witness' assailants are admissible as substantive evidence under the hearsay exception

for prior description testimony recognized in *Morris v. United States*, D.C.App., 398 A.2d 333 (1978).” See *Warren v. United States*, 436 A.2d 821, 837 (D.C. 1981).

The MOJ does not parse through the jury notes. It offers no explanation of why the jury notes would not persuade the Court that counsel’s omissions were prejudicial. Appellant must therefore assume the jury notes were absent from the Court’s consideration of his claims. The jury notes are relevant, material, and persuasive evidence that they jury specifically wanted to consider the identification evidence contained in the police officers’ reports. This is precisely the evidence that was omitted by defense counsel and what Petitioner complained of on appeal. There was not just one, but many instances of differing identification evidence as to height, weight, and complexion of the robber. All were relevant to the misidentification defense he posed to the jury and the complainant’s credibility and all were omitted by defense counsel, and the jury focused on those omissions.

As an aggregate claim appellant posed counsel’s failure to show the Detective’s report showed the complainant stated he initially saw the robber inside the carryout. This was opposite his absolute certainty at trial where he testified he first saw the man that robbed him outside the carryout. This was a powerful fact to show the complainant is recalling one person he saw, and where, and then possibly confusing that with another person he saw in a different place. The jury was unaware of this piece of impeachment evidence. Moreover, the disparity of where he saw the perpetrator first and that disparity would have nothing to do with him being from Cameroon where they use metrics. This would have undermined the complainant’s testimony that any confusion in identification was where he came from six years ago.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision of the D.C. Court of Appeals.

Respectfully submitted,



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APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 16-CF-264

WESLEY HARSHAW, APPELLANT,

v.

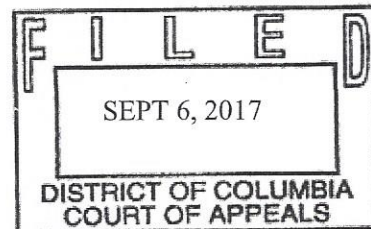
UNITED STATES, APPELLEE.

Appeal from the Superior Court
of the District of Columbia
(CF3-10725-14)

(Hon. Jennifer M. Anderson, Trial Judge)

(Argued May 23, 2017)

Decided September 6, 2017)



Before GLICKMAN and BECKWITH, *Associate Judges*, and NEBEKER, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: After a jury convicted appellant Wesley Harshaw of armed robbery,¹ he moved for a new trial on grounds that his trial attorney provided ineffective assistance of counsel by failing to take several actions in support of his misidentification defense. The trial court held an evidentiary hearing and denied Mr. Harshaw's motion. Finding no error, we affirm the judgment of the Superior Court.

I.

The government presented the following evidence at trial. On the day of the offense in this case, Shu Ngwa was working as a health aide at the apartment of a client on Bladensburg Road when he walked out to pick up Chinese food at a carryout restaurant nearby. As he walked back to his client's home—talking on his

¹ D.C. Code § 22-2801 (2012 Repl.). All subsequent D.C. Code citations are to the 2012 Replacement Volume.

phone while he walked—a man he passed said hello to him, and he responded “Hi” and continued walking. The man followed him into a parking lot and asked him what time it was, and when Mr. Ngwa took his phone from his ear to check the time, the man pulled out a black gun, pressed it to Mr. Ngwa’s stomach, and said, “Take out everything you have on you.” Mr. Ngwa testified that he denied having anything on him, and the man then hit him on the forehead with the gun, reached into his pocket and took sixty or seventy dollars in cash, grabbed Mr. Ngwa’s cell phone and the carryout food, and ran off. When Mr. Ngwa returned to his client’s home, his client called 911, and Mr. Ngwa got on the phone with the dispatcher and described his assailant as a light-skinned black man. When the police arrived he told them, too, that the robber was light-skinned.

Police broadcast a lookout and canvassed the surrounding area but did not find the suspect. Five days after the robbery, police showed Mr. Ngwa a photo array containing the photograph of a suspect named Kenneth Purvis and eight other men who were not suspects, but Mr. Ngwa said none of the men pictured in the array was the person who robbed him. Eight days later, Mr. Ngwa picked appellant Wesley Harshaw out of a second photo array, saying, “The face looks like him” and “This is the guy. This is the guy.” Mr. Ngwa also identified Mr. Harshaw in the courtroom during trial.

Mr. Harshaw presented a defense of misidentification through cross-examination of the government’s witnesses and in closing argument. When Mr. Ngwa, after consulting his driver’s license, testified that he was 5’10”, Mr. Harshaw’s trial lawyer, Betty Ballester, pressed him on whether he had told the police that his assailant was 5’8”—something Mr. Ngwa eventually confirmed—and invited the jury to assess the two men’s relative height by having each of them stand and face the jury. On redirect Mr. Ngwa testified that his home country of Cameroon used the metric system and he was not used to measuring in feet and inches. With respect to Mr. Ngwa’s description of the robber’s skin color, the trial judge observed in a bench conference that Mr. Harshaw was “clearly not light-skinned,” which is how Mr. Ngwa had described the robber. Mr. Ngwa himself testified that Mr. Harshaw would be considered light-skinned in Cameroon, where he said people generally have very dark skin. The jurors had the opportunity to draw their own conclusions when Mr. Harshaw stood before them and when he sat at counsel’s table. Ms. Ballester also tried, with mixed results, to establish that police initially focused on Kenneth Purvis as a suspect because Mr. Ngwa’s description of the robber matched Mr. Purvis more closely than it matched Mr. Harshaw.

During its deliberations, the jury sent three notes to the judge. The first asked whether the jury could “have the information on the suspect? age, height, etc.?”, to which the court replied that it could not provide any additional information. As to the second note, the court denied the jury’s request for grand jury testimony that a police witness had read on the stand because that testimony was not admitted into evidence. The third note suggested a deadlock and stated that the jury was “strongly undecided on a verdict.” The court instructed the jurors to keep deliberating, and the next day they convicted Mr. Harshaw of armed robbery and acquitted him of several gun-related charges, apparently unconvinced that the gun used in the robbery was a real gun.²

Prior to sentencing, Mr. Harshaw filed a motion for new trial, contending that his trial lawyer’s actions deprived him of his Sixth Amendment right to the effective assistance of counsel. The court appointed new counsel, held an evidentiary hearing, and ultimately denied Mr. Harshaw’s motion for new trial.

II.

On appeal, Mr. Harshaw argues that his trial counsel, Ms. Ballester, was ineffective (1) in failing to introduce more specific evidence—other than Mr. Harshaw’s physical appearance before the jury—establishing the discrepancy between Mr. Harshaw’s height and weight and the description Mr. Ngwa gave to police, and (2) in failing to make use of video footage from the carryout restaurant that the police knew about but failed to recover.³

² In addition to armed robbery, Mr. Harshaw was charged with possession of a firearm during a crime of violence, D.C. Code § 22-4504 (b); unlawful possession of a firearm during a crime of violence, D.C. Code, § 22-4503 (a)(1), (b)(1); carrying a pistol outside the home or place of business without a license (CPWL), D.C. Code, § 22-4504 (a)(1); and possession of an unregistered firearm, D.C. Code, § 7-2502.01 (a). The government dismissed the CPWL charge during trial, and the other charges were submitted to the jury.

³ Mr. Harshaw also argues that Ms. Ballester was ineffective in failing to present to the jury evidence indicating that Mr. Ngwa initially told the police he first saw Mr. Harshaw inside the carryout restaurant, rather than outside. In Mr. Harshaw’s view, “[t]his information went further than just undermining Mr. Ngwa’s ability to remember and identify,” because “[t]he jury could have connected the dots” between this discrepancy and the missing video. Without
(continued...)

To prevail on an ineffective assistance of counsel claim, Mr. Harshaw “must demonstrate both that his trial attorney’s performance fell below an objective standard of reasonableness and that there is a reasonable probability that the error affected the outcome of the trial to his prejudice.” *Simpson v. United States*, 576 A.2d 1336, 1337 (D.C. 1990) (quoting *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)). “In evaluating counsel’s performance, the reviewing court must indulge a strong presumption that counsel’s conduct fell within a wide range of reasonable professional assistance.” *Chatmon v. United States*, 801 A.2d 92, 107 (D.C. 2002). Both the performance and prejudice prongs of the ineffective assistance of counsel analysis are mixed questions of law and fact. *Cosio v. United States*, 927 A.2d 1106, 1123 (D.C. 2007) (en banc). We defer to the trial court’s factual findings unless they lack evidentiary support but review legal determinations de novo. *Id.*

Mr. Harshaw first argues that it was “incumbent on trial counsel to use any admissible evidence in her possession to support the expressly stated defense theory” that Mr. Ngwa’s description of the suspect did not match Mr. Harshaw. He points, in particular, to the incident report indicating that Mr. Ngwa’s assailant was five feet tall and 150 pounds and to an affidavit in support of the arrest warrant describing Mr. Harshaw as six feet tall and 200 pounds, respectively—evidence that Mr. Harshaw was one foot taller and fifty pounds heavier than the robber Mr. Ngwa described.

At the hearing on Mr. Harshaw’s new trial motion, Ms. Ballester testified that she was aware of several ways of proving Mr. Harshaw’s height—including (1) an affidavit in support of the arrest warrant giving Mr. Harshaw’s height and weight as six feet and 200 pounds, (2) a case summary report by Officer Boykins giving Mr. Harshaw’s height and weight as 5’11” and 180 pounds, and (3) a tape measure—and she was also aware that Mr. Ngwa had described the robber to one officer as five feet tall and 150 pounds, but she presented none of this evidence to the jury. Ms. Ballester testified that she and Mr. Harshaw were satisfied with how the case was coming in and did not feel the need to present other witnesses.

(...continued)

more concrete information on where those dots might have led the jury if it connected them or how this could have played into Mr. Harshaw’s defense of misidentification, we cannot say that Ms. Ballester’s failure to exploit this contradiction in Mr. Ngwa’s statements prejudiced Mr. Harshaw.

While there was no obvious downside to presenting more concrete evidence regarding Mr. Harshaw's size, we are not persuaded that the failure to present this evidence prejudiced Mr. Harshaw. As an initial matter, Ms. Ballester had great difficulty at trial getting Mr. Ngwa to agree that he told the police his assailant was 5'8". His explanation that he was unfamiliar with American weights and measures was plausible, the jury apparently accepted it,⁴ and it was only bolstered by the presence of police reports in which Mr. Ngwa also described the robber as 5'8" and 5'11". Mr. Ngwa's professed difficulty with our system of weights and measures would have provided an equally plausible explanation for his description of his robber as an unusually short man. Even if Ms. Ballester made an unreasonable decision not to try to convince the jury that Mr. Ngwa believed his assailant was only five feet tall, given Mr. Ngwa's confusion, it is not reasonably likely that the jury would have been more swayed by a larger disparity between his description of the assailant and Mr. Harshaw's actual build.

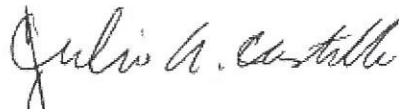
With respect to the surveillance video footage from the carryout restaurant, Mr. Harshaw's argument in this regard is not that Ms. Ballester should have obtained the video, but that she should have done more with the fact that the government had failed to obtain the video. Ms. Ballester testified at the hearing that a police report from one of the responding officers indicated that a clerk at the carryout told him there was surveillance video that might show the robbery, that the surveillance camera was in working order, and that the footage could be picked up anytime. She further stated that a prosecutor told her he did not think the government ever got the footage but he would check. Ms. Ballester did not follow up with the prosecutor, she said, because Mr. Harshaw "thought he could be on that video." She further testified that she would have had to introduce evidence regarding the video footage through a detective whom the government never called as a witness—a witness Ms. Ballester was reluctant to call herself because he had investigated other robberies in which Mr. Harshaw was a suspect and she did not want to risk any of that information coming out. Instead, Ms. Ballester tried to present evidence of the existence of surveillance cameras near the scene of the offense through Mr. Ngwa—a tactic that was unsuccessful, as Mr. Ngwa said he had no idea if there were cameras.

⁴ Mr. Harshaw's brief describes Mr. Ngwa's explanation of the skin color disparity—that what's considered dark-skinned here might be considered light-skinned in Cameroon—as "relatively plausible."

We are not persuaded that Ms. Ballester's decisionmaking in this regard constituted ineffective assistance of counsel. Mr. Harshaw cannot show that Ms. Ballester's decision not to take advantage of the government's failure to recover or preserve video evidence caused him prejudice. Evidence regarding the government's lapse would not have lent meaningful support to the defense of misidentification, particularly given the absence of other evidence to bolster a contention that the government was hasty or biased in investigating the case. And Ms. Ballester was still able to point to the lack of objective proof such as video footage in her closing argument. Under these circumstances, there is no reasonable probability that the outcome in this case would have been different had Ms. Ballester presented evidence of the government's failure to obtain the surveillance video.

For the foregoing reasons, we affirm the judgment of the Superior Court.

ENTERED BY DIRECTION OF THE COURT:



JULIO A. CASTILLO
Clerk of the Court

Copies to:

Honorable Jennifer M. Anderson

Director, Criminal Division

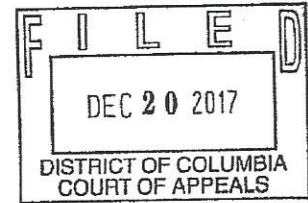
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Assistant United States Attorney

Mindy A. Daniels, Esquire

APPENDIX B

**District of Columbia
Court of Appeals**



No. 16-CF-264

WESLEY HARSHAW,

Appellant,

v.

CF3-10725-14

UNITED STATES,

Appellee.

BEFORE: Blackburne-Rigsby, Chief Judge; Glickman *, Fisher, Thompson,
Beckwith *, Easterly, and McLeese, Associate Judges; Nebeker *, Senior
Judge.

ORDER

On consideration of appellant's petition for rehearing or rehearing *en banc*, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it
appearing that no judge of this court has called for a vote on the petition for rehearing *en
banc*, it is

FURTHER ORDERED that the petition for rehearing *en banc* is denied.

PER CURIAM

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