DISTRICT OF COLUMBIA COURT OF APPEALS

No. 23-CO-0332

CALVIN SHAW, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the
District of Columbia
(2012-CF1-011902)

(Hon. Jennifer M. Anderson, Trial Judge)

(Submitted May 2, 2024 Decided September 26, 2024)

Before EASTERLY, HOWARD, and SHANKER, *Associate Judges*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellant Calvin Shaw was convicted by a jury in 2014 of multiple offenses—first-degree murder while armed, seven counts of assault with intent to kill while armed (AWIKWA), three counts of aggravated assault while armed (AAWA), eleven counts of possession of a firearm during a crime of violence (PFCV), and two counts of unlawful possession of a firearm—in connection with two shooting incidents in 2012. In 2017, this court affirmed Mr. Shaw's convictions with the exception of vacating one count of AAWA (and the trial court later granted the government's motion to dismiss that count and the associated PFCV count). Mr. Shaw is currently serving an aggregate term of 117 years of imprisonment.

In 2018, Mr. Shaw filed a motion to vacate, set aside, or correct his sentence under D.C. Code § 23-110, asserting that his trial counsel provided ineffective assistance. After holding a hearing, the trial court denied the motion on the grounds that Mr. Shaw's trial counsel did not perform deficiently and in any event any errors by counsel did not prejudice Mr. Shaw. We affirm.

I. Background

A. The Underlying Events and Trial

As described in this court's Memorandum Opinion and Judgment affirming the bulk of Mr. Shaw's convictions, the first shooting incident took place around noon on April 18, 2012, in the 5000 block of First Street, NW. Jamar Savage-Bey, who witnessed the shooting, identified Mr. Shaw as the person he saw fire at Ali Jamal Al-Mahdi. As Mr. Savage-Bey ran to Mr. Al-Mahdi's aid, Mr. Shaw fired two more shots in his direction. Mr. Al-Mahdi was shot in the abdomen. He was hospitalized and treated for his wounds, which he survived, but he was uncooperative with the police and later disappeared. Mr. Savage-Bey was uninjured.

Mr. Savage-Bey testified that he continued to encounter Mr. Shaw during the weeks following Mr. Al-Mahdi's shooting. On several occasions, Mr. Shaw drove through the neighborhood, made threatening gestures at Mr. Savage-Bey, and flashed a gun at him. In one instance, Mr. Shaw got out of his car and acted as if he were about to shoot Mr. Savage-Bey, who rode off on his bicycle. At trial, the government asked Mr. Savage-Bey if this incident occurred on June 8, 2012, and Mr. Savage-Bey answered that he could not remember. The government then impeached Mr. Savage-Bey with his grand jury testimony, in which he stated that the incident occurred on his birthday, which was June 8, 2012; Mr. Savage-Bey responded that he did not remember that statement and "some of the stuff is not really adding up."

The government's theory at trial was that these incidents culminated in another shooting on July 4, 2012. This shooting also took place in the 5000 block of First Street, NW. Mr. Savage-Bey was there with his friends Travis Avery, Crevontai Key, Eugene Robinson, Demesho Braxton, and Cavito Brown. They were taking turns riding a dirt bike and waiting to attend a local family cookout when they noticed three men in white shirts walking toward them. When the three men got within close range, one of them drew a gun and started firing, and his two companions followed suit. A bullet hit Mr. Avery in the neck and he fell. As they ran in one direction, Mr. Key was fatally wounded, and Mr. Robinson and Mr. Brown were shot in the rib cage and scalp, respectively. Mr. Braxton escaped without injury. Mr. Savage-Bey, who ran in a different direction, also was unhurt. Messrs. Robinson, Braxton, and Savage-Bey all identified Mr. Shaw as the first shooter, from photo arrays and again at trial. In addition, Mr. Braxton testified that while he and Mr. Savage-Bey were waiting to be interviewed by the police following the shooting, Mr. Savage-Bey informed him that Mr. Key had died and that

Mr. Shaw had killed him. Mr. Brown also identified Mr. Shaw as one of the shooters.

At trial, the government presented, among other evidence, the testimony of Messrs. Savage-Bey, Robinson, Braxton, and Brown, and the testimony of Iesha Hicks, who stated that Mr. Shaw visited her on the night of the second shootings, she saw him remove two guns from his waistband, and he said that he had "killed, like, four people" that night. Defense counsel impeached Ms. Hicks with her grand jury testimony, in which she initially said that on the night of July 4 Mr. Shaw did not tell her what he had done and she did not see any guns.

The government also presented cell tower evidence indicating that on the evening of July 4, Mr. Shaw's cell phone moved toward the crime scene just before the shootings, was inactive during the time of the shootings, and then moved away from the crime scene after the shootings.

Mr. Shaw presented one witness—Victoria Harrison, who testified about hostility between Ms. Hicks and Mr. Shaw.

B. The Section 23-110 Motion

As relevant here, Mr. Shaw asserted in his Section 23-110 motion that his attorney, Steven Kiersh, provided ineffective assistance at trial due to three errors: (1) failing to call multiple alibi witnesses who allegedly would have testified that Mr. Shaw was at a cookout during the July 4 shooting; (2) failing to impeach Mr. Savage-Bey with the fact that Mr. Shaw could not have threatened him on June 8, 2012, because Mr. Shaw was incarcerated on that date; and (3) failing to impeach Ms. Hicks with prior inconsistent statements she made to a defense investigator, Alison Horn.[1]

Mr. Kiersh, Ms. Horn, three alibi witnesses, and Mr. Shaw testified at an evidentiary hearing (over two days).

Regarding the alibi issue, Mr. Kiersh testified that he and Mr. Shaw discussed presenting alibi witnesses and that he subpoenaed a number of individuals to court.

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[1] Mr. Shaw also argues for the first time on appeal that his counsel was ineffective for failing to seek a mistrial based on the government's alleged elicitation of false testimony by Mr. Savage-Bey regarding the June 8, 2012, incident. We do not address that claim. *See Bradley v. United States*, 881 A.2d 640, 646 n.5 (D.C. 2005).

He testified that, in his view, an affirmative defense, such as an alibi defense, can be in tension with a reasonable doubt defense, and that an alibi defense is "problematic" and can "diminish your argument regarding reasonable doubt" "unless you have credible witnesses and unless you can clearly establish the alibi time, place, date, location." Mr. Kiersh stated that, after speaking to the alibi witnesses Mr. Shaw had identified, he had "serious concerns" about their credibility. He also thought that the trial was going well for Mr. Shaw because the government's witnesses had been "impeached extensively" and the cell tower evidence was inconclusive and possibly even helpful for Mr. Shaw. Accordingly, he made the "strategic decision" that relying on a reasonable doubt defense was preferable to putting on an alibi defense. Mr. Kiersh added that he consulted with Mr. Shaw and that they "were in complete agreement on not calling these witnesses."

Regarding the June 8, 2012, issue, Mr. Kiersh could not recall whether he knew at the time of trial that Mr. Shaw was incarcerated on that date. He testified, though, that Mr. Savage-Bey was a "hostile" witness who "was giving a lot of contradictory information" and had been "damage[d]," such that a "risk-benefit analysis" could have shown that it was not worth it to have the fact that Mr. Shaw was in jail on June 8 be "the last thing the jury [was] going to hear." Mr. Kiersh stated that his "thought process would have been do I want to put this records custodian up to say my client is in jail on June 8th."

As to the Ms. Hicks issue, Mr. Kiersh testified that, although he could not recall whether, at the time of trial, he saw Ms. Horn's notes regarding Ms. Hicks's inconsistent statements, he would not have impeached Ms. Hicks with that information because she had already been impeached with her contradictory sworn grand jury testimony, and Ms. Hicks's bias had been raised by the testimony of Ms. Harrison. Impeaching Ms. Hicks with a statement given to a defense investigator would have been less "effective."

The trial court denied Mr. Shaw's motion, setting forth its reasoning in an oral ruling and memorializing the decision in a subsequent written order. First, with respect to the alibi witnesses, the court observed that Mr. Kiersh "did what you would expect and want a seasoned defense attorney to do," in that he interviewed the witnesses, subpoenaed them, kept his options open, consulted with the defendant, and made a decision based on the evidence that had come in. The court also found the alibi witnesses, who had testified in the Section 23-110 hearing, not credible, and it observed that the cookout was "not very far from the location of the murder," the alibi witnesses' claims were contradicted by the cell tower evidence, and the witnesses could not establish that Mr. Shaw was at the cookout the entire night. The

court stated that under these circumstances "it was a reasonable tactical decision to forego presentation of an alibi at trial." The court also said, in the alternative, that Mr. Shaw could not show prejudice from the failure to present alibi witnesses because the evidence of his guilt was "compelling."

Second, the trial court noted that Mr. Kiersh posited a strategic reason not to have impeached Mr. Savage-Bey with the fact that Mr. Shaw was incarcerated on June 8, 2012—namely, that Mr. Savage-Bey was already a damaged witness and the impeachment would have resulted in the jury hearing, toward the end of the case, that Mr. Shaw had been in jail for some offense. The court also observed that Mr. Savage-Bey's trial testimony about the June 8 date was equivocal, as he said he did not remember making the statement before the grand jury and some things were "not really adding up." The court thus stated that, even assuming Mr. Kiersh performed deficiently by failing to impeach Mr. Savage-Bey with the information about the June 8 date, the outcome would not have been different and "the fact that he might be off on one date" was insignificant.

Third, the trial court referred to Mr. Kiersh's testimony that impeaching Ms. Hicks with the unsworn notes of Ms. Horn posed risks that outweighed the benefits because Ms. Hicks had already been impeached with her sworn grand jury testimony and her bias. The court also noted that Ms. Horn's notes were not clearly favorable for Mr. Shaw: although a portion indicated that Ms. Hicks said that she did not see Mr. Shaw with a gun, another entry said Ms. Hicks saw "him with a MAC-11," which Ms. Horn understood to be a firearm. At the Section 23-110 hearing, Ms. Horn explained that entry by theorizing that the "him" might have referred to someone other than Mr. Shaw, which the trial court did "not credit . . . at all." The court observed that Mr. Kiersh's decision was strategic and "very smart actually." In the alternative, the court stated that impeaching Ms. Hicks with Ms. Horn's notes "would have made no difference in this case" given the "strength" of the government's evidence.

This appeal followed.

II. Analysis

Mr. Shaw argues that the trial court erred in denying his Section 23-110 motion. We disagree and affirm.

A. Applicable Law and Standard of Review

The Sixth Amendment guarantees the right to effective assistance of counsel. U.S. Const. amend. VI; *see Strickland v. Washington*, 466 U.S. 668, 684-86 (1984). In *Strickland*, the Supreme Court explained that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686.

An ineffective assistance of counsel claim has two prongs. The first is the deficiency prong, which requires the defendant to show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Counsel's performance is deficient if it "fell below an objective standard of reasonableness." *Id.* at 688. The second is the prejudice prong, under which "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "Tactical decisions which may go awry at trial do not constitute ineffectiveness, nor do errors in judgment which become apparent in light of well-reasoned hindsight." *Carter v. United States*, 475 A.2d 1118, 1123 (D.C. 1984) (internal citation omitted); *see also Jones v. United States*, 262 A.3d 1114, 1123 (D.C. 2021) ("We do not second-guess trial counsel's strategic choices because many alternative tactics are available to defense attorneys and their actions are often the products of strategic choices made on the basis of their subjective assessment of the circumstances at trial." (internal quotation marks omitted)).

"Both prongs of an ineffective assistance claim are mixed questions of law and fact." *Dugger v. United States*, 295 A.3d 1102, 1111 (D.C. 2023).

B. Discussion

We agree with the trial court that the three errors by counsel asserted by Mr. Shaw either do not constitute deficient performance or did not prejudice Mr. Shaw.

First, we agree that Mr. Kiersh made an informed strategic decision to forgo an alibi defense under the circumstances of this case. Mr. Kiersh's testimony demonstrated that he considered the matter and made a tactical decision after engaging in sufficient investigation and preparation. *See Strickland*, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ."). We also agree that the

strategic decision was reasonable. Mr. Kiersh had "serious concerns" about the alibi witnesses' credibility. But even if the witnesses could have credibly placed Mr. Shaw at the cookout, they could not rule out the possibility that he left at some point to travel the relatively short distance to the scene of the crime. In short, "[t]he evidence supports that trial counsel pursued the claim, but that the better part of wisdom suggested that the [alibi] defense not be advanced at trial." *Porter v. United States*, 826 A.2d 398, 413 (D.C. 2003), *as amended on denial of reh'g* (Sept. 26, 2006). We decline to second-guess Mr. Kiersh's determination that the alibi defense here would have "diminish[ed]" what he thought (albeit, in retrospect, incorrectly) was a plausible reasonable-doubt defense.[2]

Second, we see no error in the trial court's conclusion that Mr. Kiersh's failure to impeach Mr. Savage-Bey about the June 8, 2012, date did not prejudice Mr. Shaw. We note that a choice to avoid a reference before the jury to a prior arrest can be a reasonable strategic decision. *See Bennett v. United States*, 597 A.2d 24, 27 (D.C. 1991) ("The risk from the admissibility of a prior arrest of the defendant is that 'the jury may infer from the prior criminal conviction that the defendant is a bad man and that he therefore probably committed the crime for which he is on trial.'" (quoting

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[2] Mr. Shaw argues that Mr. Kiersh improperly failed to interview or subpoena the grandmother of one of the alibi witnesses, who Mr. Shaw claimed was at the cookout. The trial court, however, rejected this claim prior to the evidentiary hearing because the grandmother had died by that time and Mr. Shaw had not obtained an affidavit from her regarding whether she would have testified and what she would have said. We see no error in that ruling. *See Jones v. United States*, 918 A.2d 389, 403 (D.C. 2007) ("[W]hile demonstration of the failure to investigate and call witnesses can establish ineffective assistance of counsel, we have required an affidavit or other credible proffer as to the allegedly exculpatory nature of the prospective witnesses' testimony." (internal quotation marks omitted)). Moreover, Mr. Shaw testified at the Section 23-110 hearing that he did not recall telling Mr. Kiersh about the grandmother and Mr. Kiersh said he had no recollection of anyone telling him about the grandmother.

Mr. Shaw also faults Mr. Kiersh for failing to interview "the other 20 or more potential witnesses [from the cookout] that could have provided exculpatory testimony." Even if Mr. Kiersh should have sought to determine who else was at the cookout and locate and interview them, we see no prejudice from his failure to do so where it is highly unlikely on these facts that anyone could have ruled out the possibility that he left for a brief period.

Fields v. United States, 396 A.2d 522, 527 (D.C. 1978))). We decline to rely on that reasoning, however, because Mr. Kiersh did not recall actually making such a judgment at the time. But we agree that there is no reasonable probability that the result of the proceedings would have been different if Mr. Kiersh had pointed out that Mr. Savage-Bey was off about the precise date of uncharged conduct, especially where Mr. Savage-Bey's testimony already showed equivocation about the details of that conduct.[3] Mr. Savage-Bey otherwise identified Mr. Shaw as the shooter on both April 18 and July 4, and any mistake about the date of an incident between those two events would have done little to undermine those identifications, let alone the identifications by the other victims who testified (or the testimony of Ms. Hicks, or the cell tower data). And we can factor into our prejudice calculus the fact that, had Mr. Kiersh introduced evidence of Mr. Shaw's prior incarceration, the jury may very well have drawn an adverse inference from it.

Third, we discern no error in the trial court's determination that Mr. Shaw suffered no prejudice from the failure to impeach Ms. Hicks with Ms. Horn's notes about Ms. Hicks's prior inconsistent statements. Mr. Kiersh impeached Ms. Hicks with her prior inconsistent statement before the grand jury and with Ms. Harrison's testimony about bias. Moreover, impeachment through Ms. Horn would not have been particularly powerful, and indeed might have been counterproductive, as Ms. Horn's notes also indicated that Ms. Hicks referred to someone having a firearm, and any explanation by Ms. Horn that the person to whom Ms. Hicks was referring was not Mr. Shaw would have been of dubious credibility. We do not see a reasonable probability that additional impeachment through Ms. Horn's inconsistent, unsworn notes would have changed the outcome of the trial.

III. Conclusion

For the foregoing reasons, we affirm the Superior Court's order denying Mr. Shaw's Section 23-110 motion.

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[3] Mr. Shaw was in jail only for several days around June 8; accordingly, his incarceration did not entirely or even substantially undermine Mr. Savage-Bey's testimony that Mr. Shaw was a threatening presence between April 18 and July 4, nor did it preclude the possibility that the bicycle incident happened sometime close to, even if not exactly on, Mr. Savage-Bey's birthday.

So ordered.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

Copies emailed to:

Honorable Jennifer M. Anderson

Director, Criminal Division

Copies e-served to:

Deidra L. McEachern, Esquire

Chrisellen R. Kolb, Esquire
Assistant United States Attorney

District of Columbia
Court of Appeals

No. 23-CO-0332

CALVIN SHAW,

Appellant,

v.

2012-CF1-011902

UNITED STATES,

Appellee.

BEFORE: Blackburne-Rigsby, Chief Judge, and Beckwith, Easterly,* McLeese, Deahl, Howard,* and Shanker,* Associate Judges.

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

ORDERED by the merits division* that appellant's petition for rehearing is denied. It is

FURTHER ORDERED that appellant's petition for rehearing en banc is denied.

PER CURIAM

Copies emailed to:

Honorable Jennifer M. Anderson

Director, Criminal Division

Exhibit C

No. 23-CO-0332

Copies e-served to:

David H. Reiter, Esquire

Chrisellen R. Kolb, Esquire
Assistant United States Attorney

kw

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA	
V.	Criminal Action No. 2012 CF1 11902
CALVIN SHAW,	
Defendant.	

Washington, D.C.
Thursday
March 30, 2023

The above-entitled action came on for a motion hearing before the Honorable JENNIFER ANDERSON, Associate Judge, in Courtroom Number 118, commencing at approximately 2:36 p.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

ELIOT FOLSOM, Esquire
Assistant United States Attorney

On behalf of the Defendant:

DEIDRA MCEACHERN, Esquire
6710 Oxon Hill Road, Suite 210
Oxon Hill, Maryland 20748

Reporter: Julie T. Richer, RPR
(202) 879-1279

Exhibit A

Appx. A

P R O C E E D I N G S

COURTROOM CLERK: Your Honor, calling in the matter of 2012 CF1 11902, the United States versus Calvin Shaw. Can I have everyone introduce themselves, starting with government counsel.

MS. FOLSOM: Good afternoon. Eliot Folsom on behalf of the United States.

THE COURT: All right. Good afternoon.

MS. MCEACHERN: Good afternoon, Your Honor. Deidra McEachern on behalf of Calvin Shaw.

THE COURT: All right. Good afternoon.

Mr. Shaw, state your name for the record.

THE DEFENDANT: Calvin Shaw.

THE COURT: All right. Good afternoon.

All right. The Court is prepared to rule. Is there any other issue before I start?

MS. FOLSOM: No, Your Honor, not from the government.

THE COURT: Ms. McEachern?

MS. MCEACHERN: No, Your Honor.

THE COURT: All right. The parties can have a seat. I'll take my mask off. All right. This matter is before the Court upon consideration of defendant Calvin Shaw's D.C. Code Section 23-110 motion for a new trial filed on January 10, 2018, defendant's second unopposed motion to

supplement 23-110 motion with additional affidavits filed on March 16, 2018, defendant's supplement to D.C. Code section 23-110 motion for new trial filed on August 11, 2019 -- and that supplement withdrew the allegation that trial counsel failed to impeach Officer Mason's testimony and withdrew Edgar Lane's affidavit -- and the government's opposition to defendant's D.C. Code 23-110 motion for new trial filed on January 23, 2020.

On March 2, 2020, the Court issued an order setting a hearing for and denying in part defendant's D.C. Code Section 23-110 motion for new trial. That order limited the hearing testimony to the defendant's assertions that trial counsel was ineffective because of the failure, one, to call Dominique Kemp, Leonard Route, and Daquan Beatty -- that's D-A-Q-U-A-N, Beatty, B-E-A-T-T-Y -- as alibi witnesses; to impeach the testimony of Iesha Hicks with testimony from PDS investigator Allison Horn; and three, to impeach the testimony of Jamar Savage-Bey with evidence of defendant's incarceration records. The remaining allegations were denied. A hearing was set for April 24, 2020.

Unfortunately, that hearing could not go forward due to the global pandemic. The Court started the process to writ the defendant back into the jurisdiction, but soon thereafter everything was placed on hold. We were

eventually able to get the defendant here, and the hearing was set for July 28, 2020. The defendant agreed to proceed remotely, which was really the only way that the hearing could take place at that time. On July 28, 2020, then counsel requested a continuance, which the Court granted. The new hearing date was set for October 15, 2020. The defendant then moved to continue that hearing date yet again because he no longer consented to proceeding virtually. The Court granted that motion on August 24, 2020.

On October 26, 2021, the defendant retained Deidra McEachern as counsel, who then filed Calvin Shaw's supplement to motion for new trial on March 11, 2022, which the government filed its opposition to that supplement on July 12, 2022. This latest supplement alleged that trial counsel failed to call Demesho Braxton's father's girlfriend, Jasmine, as a witness; two, that trial counsel also should have questioned Officer Mason about whether she showed or directed Jasmine or any of the other witnesses to the picture; three, trial counsel failed to present and cross-reference cell phone evidence relating to calls made from Mr. Shaw's phone at the time of the shooting with 911 calls and evidence of Mr. Shaw's whereabouts at the time of the calls.

During the entirety of the pandemic the chief judge had a standing order that defendants could not be

writted in from other jurisdictions. The Court was finally able to writ the defendant back to the jurisdiction and hold an evidentiary hearing on these issues, which the Court did on February 17 and March 3, 2023.

Turning to the factual summary of what this case is about, on April 17, 2014, a jury convicted the defendant of first degree murder while armed, seven counts of assault with intent to kill while armed, three counts of aggravated assault while armed, eleven counts of possession of a firearm during commission of a crime of violence, and two counts of unlawful possession of a firearm. Those convictions stem from two separate shooting incidences.

On September 6, 2017, the Court of Appeals affirmed all but one count of aggravated assault. And on February 8, 2018, in response to a motion filed by the government, the Court dismissed one count of aggravated assault and one count of possession of a firearm during the commission of a crime of violence.

This case stems from two shootings, the first of which occurred at noon on April 18, 2012 in the 5000 block of First Street, Northwest. Jamar Savage-Bey identified the defendant as the person that he saw shoot Ali Jamal Al-Mahdi. The defendant fired five or six shots at Ali and two more at Jamar as he ran to Ali's aid. Eight .40-caliber shell casings were recovered from the street. Ali had been

shot in the abdomen but was uncooperative with the police and disappeared.

During the approximately two and a half months before the second shooting, Jamar testified the defendant drove through the area where the first shooting occurred on several occasions. During his drives, defendant would make threatening gestures and flash a gun at Jamar. On one such occasion the defendant waved his gun at several people, including Jamar. One of the dates when this allegedly happened was June 8, 2023, a date in which the parties have stipulated that the defendant was incarcerated.

The second shooting occurred on July 4, 2012 at the same location as the first. Jamar was standing on the 5000 block of First Street, Northwest with friends, Travis Avery, Crevontai Key, Eugene Robinson, Damesho Braxton, and Cavito Brown. The group had intended to attend a cookout at Braxton's father's house and were taking turns riding a dirt bike in the interim. Someone in the group, which I believe was Braxton, announced they saw some KDY youngins coming up. There's some disagreement as to the precise wording, but in any event, KDY stands for Kennedy Street, which is approximately twelve blocks from First Street and is the neighborhood the defendant hails from.

Defendant and two other men, all of whom were wearing white, approached the group. Without exchanging

words, the defendant drew a gun and opened fired on the group that had been waiting for the cookout. The other two men started shooting shortly after the defendant opened fire. A bullet hit Avery in the neck, and he fell to the ground. As the group attempted to flee, Key was fatally shot, Robinson was shot in the rib cage, Brown was shot in the scalp, and Braxton escaped unharmed. Jamar, who had run in a different direction than the rest of the group, was also unharmed. The 911 calls reporting the incident indicated that the shooting began at 7:58 p.m., although I don't think that's actually accurate. That's when they called the -- that's when they called -- that was the subject of a lot of discussion during the trial.

Braxton and Jamar, who did not need to be taken to the hospital, were told to sit together and wait for the police to interview them. While waiting, Jamar told Braxton that Key was dead and that defendant had killed him. He also told Braxton about the first shooting and explained that he felt defendant had been looking for Ali.

The next day, on July 5, 2012, Cavito identified defendant from a photo array as the July 4th shooter. Defendant was arrested on July 8, 2012. On August 3, 2012, Robinson identified the defendant as a shooter from the photo array. On September 20, 2012, Braxton similarly identified defendant from a photo array. October 17, 2012,

Jamar identified defendant from a photo array. Notably, the police used four different photo arrays with the defendant in a different spot each time.

At the outset there were a number of allegations raised in the pleadings for which the defense put on no evidence. Accordingly, the defendant has not met his burden on the following issues, and his motion is denied as to these claims. First that trial counsel failed to call Demesho Braxton's father's girlfriend, Jasmine, as a witness. Two, trial counsel should have also questioned Officer Mason about whether she showed or directed Jasmine or any of the other witnesses to the picture. Three, trial counsel failed to present and cross-reference cell phone evidence relating to calls made from Mr. Shaw's phone at the time of the shooting with 911 calls and evidence of Mr. Shaw's whereabouts at the time of the call.

Those allegations appear to all be raised in Calvin Shaw's supplement to motion for new trial filed on March 1, 2022 by Ms. McEachern. Accordingly, that motion is denied in its entirety.

Now turning to the legal standard that controls here.

(The Court confers with the court reporter.)

THE COURT: To prevail on an ineffective assistance of counsel claim, "the defendant must show that

the counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Kigozi v. United States,* 55 A.3d 643, 650 (D.C. 2012) -- that's quoting *Strickland v. Washington,* 466 U.S. 666 -- excuse me, 668, 687 (1984.) To establish deficient performance, the defendant must "show that counsel's representation fell below an objective standard of reasonableness."

The Supreme Court has directed that the reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, that the defendant must overcome the presumption that under -- that, under the circumstances, the challenged action might be considered sound trial strategy -- *Strickland* at 689 -- and the Supreme Court's admonition that, quote, "Even the best criminal defense attorneys would not defend a particular client in the same way."

It is clear that decisions about which witnesses to present and whether to, how to, and how much to cross-examine a government witness fall well within the realm of tactical decisions and strategic decisions which involve the exercise of professional abilities. *Woodard v. United States,* 738 A.2d 254, 257 (D.C. 1999). See also *Strickland,* 466 U.S. at 689: "A fair assessment of attorney performance requires that every effort be made to eliminate

the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Carter v. United States,* 475 A.2d 1118, 1123 (D.C. 1984): "It is not our function, nor should it be, to second guess these types of judgments." See also *Chatmon v. United States,* 801 A.2d 92, 108 (D.C. 2002): "To satisfy the deficiency prong, the defendant must show that counsel's representations fell below an objective standard of reasonableness and overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."

The District of Columbia Court of Appeals has repeatedly held that a trial attorney's tactical decisions generally do not result in a finding of ineffective assistance of counsel under *Strickland.* See, for example, *Robinson v. United States,* 756 A.2d 448, 458 (D.C. 2000); *Chatmon,* 801 A.2d at 107: Indeed, "Mere errors of judgment and tactics as disclosed by hindsight do not, by themselves, constitute ineffectiveness." *Lane v. United States,* 737 A.2d 541, 549 (D.C. 1999).

To establish prejudice, the defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. "A reasonable probability is one that

undermines confidence in the outcome," *Strickland*, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable."

A defendant therefore bears a heavy burden if he is to prevail in an argument alleging prejudice. The failure to meet either prong of this test -- Constitutional error by counsel or resulting prejudice -- will defeat a claim of ineffective assistance of counsel.

So turning to the specific incidences of ineffectiveness, first the Court deals with defense counsel's failure to call alibi witnesses. The defense asserts that Mr. Kiersh was ineffective because he did not put on an alibi defense. The defendant alleges he was at a cookout at 8th and Madison Streets, Northwest at the time of the murders and that counsel's failure to call those witnesses was ineffective and prejudicial to his case. Counsel cites *Byrd v. United States*, 614 A.2d 25, for the proposition that even if the witnesses can't account for all of the defendant's movements, it was ineffective not to put on those witnesses.

That case is markedly different from the ones before the Court. Mr. Kiersh is a seasoned defense attorney who has been trying homicides since at least 1985. He testified that he had regular contact with the defendant at the jail. He testified that he explained to the defendant

the problems not just with an alibi defense, which has its own unique set of problems, but the problems putting on an affirmative defense where you have a reasonable doubt argument that you want to make to a jury. In his experienced opinion, once you put on an affirmative defense to the jury, the concept or defense of reasonable doubt goes by the wayside.

He further testified that unless it is a firm alibi defense and unless you have credible witnesses and unless you can clearly establish the alibi, time, place, date, location, then you have to think long and hard about the wisdom of putting on that defense because you don't want to diminish your argument regarding reasonable doubt. Importantly, he noted that while putting on an affirmative defense does not legally flip the burden of proof, but he says from his experience from a practical perspective, it certainly creates the potential of doing so.

In this particular case, he interviewed the witnesses and testified that he had significant concerns about their credibility which he shared with the defendant. It was for that reason that he did not present the alibi defense in the opening statement, which he would typically do because he wants the jury to hear about -- from him right away.

Instead, he did what you would expect and want a

seasoned defense attorney to do. He interviewed the witnesses, he subpoenaed them for trial, and did not open on the alibi to keep all his options open. He testified that he did not make a decision about the alibi defense until the government had rested -- had put on its entire case and rested. He said viewing the evidence at that point and the way that it had come in, he felt that going with a reasonable doubt defense was a better option. He consulted with the defendant in the cell block, who agreed with his position. Even though the decision to call witnesses is clearly in the province of defense counsel, he testified that he would have called the alibi witnesses if the defendant had insisted, but the defendant agreed with the decision.

Now, what was the basis for his conclusion that reasonable doubt -- a reasonable doubt defense was a better option? He said that he based it on the fact that during the trial, the government's witnesses were impeached, they were impeached extensively, there was significant credibility issues related to the witnesses on material issues, the cell tower evidence was not conclusive. He actually went and traveled to Raleigh, North Carolina, to talk to the cell phone expert. And he said while he -- he determined that he could not call the cell phone expert himself because it would have really damaged Mr. Shaw's case

because the cell phone expert would have placed that phone near the scene of the murder, but the cell phone expert gave him the best way to cross the government's expert, which he used during the trial.

Defense counsel in turn argues that Mr. Kiersh's strategy was flawed because the defendant was convicted, and so clearly the reasonable doubt defense did not work. That is precisely the distorting effect of hindsight that *Strickland* warned against. So let's look at the alibi defense. Was it as problematic as Mr. Kiersh believed?

The Court heard from three individuals, Dominique Kemp, Leonard Route, and Daquan Beatty. They differed on many facts. First of all, we had Dominique Kemp, who testified that she was concerned she had dementia. She says that she has no independent recollection of the facts. She basically read her prior statement and didn't actually remember anything on the statement. She was reading from the paper.

She testified that she didn't even know if there was a shooting that day because, to quote her, quote, if there wasn't trauma involved for her, she won't remember it because there's so many shootings around there. She did not put two and two together until she was subpoenaed on March 2014, so almost two years later. She testified that it was a large party, took up a lot of space, took up the

entire block, 20 to 30 people, and then later described it as so many people coming and going. Leonard Route, who was throwing the party, described it differently. He said there was no more than 20 people, and at least 10 to 15 of them were children. Daquan Beatty described it as a lot of people there, the whole neighborhood.

If alcohol was served, Dominique said she didn't serve it, didn't mention the champagne that the defendant was allegedly drinking with Daquan. We're not talking about a glass. We're talking about two bottles, according to Daquan. Leonard couldn't say what the defendant was drinking. When asked about the champagne, he said, "I don't remember anything like that." Daquan said everyone was drinking and he and the defendant drank two bottles of champagne.

When asked what time the party started, Dominique said that it made sense to start setting up once it started to get dark. Anything prior to that would not have made since. Leonard said the party started around four or five. Daquan didn't talk about when the party started. He claimed to get there around 6.

Dominique could not say what time the defendant got there or who he was with. Her affidavit is about as general as possible. It says the cookout was around the time of the alleged shooting took place. Don't know the

exact time, when it was getting dark. The murders occurred before it got dark.

Leonard Route, the last time he talked to the defendant was on July 4, 2012. He was not subpoenaed until March 24, 2014, also almost two years later. He claims to remember, almost two years after the fact, that the defendant did not have all white on. That is simply not credible. For example, he could not remember what type of car Dominique Kemp owned at the time despite the fact that she lived two doors down from him and he would see her all the time, did not recall when the defendant arrived or when any women were with him, couldn't say who the defendant was with at the party because, quote, "I can't say he was with this person is because we all friends and we were all out there."

When confronted with his testimony that he was seeing the defendant the whole time, he could not identify a single person. He said: It was friends out there. It was just with different people. We was all walking around, talking around. So far as saying names, that would be like a whole -- like a kid here, a person here. Like, we were all just talking.

Ultimately he agreed that although the defendant was in the vicinity, that Leonard was moving around, cooking the food, making sure folks were taken care of, and had to

make sure everything was good. He admitted that his main focus was on the food and the kids.

Daquan Beatty, he claimed that he got there around 6:00 and left around 8:00 or 8:30 to go to the movies. He was not asked about his knowledge of that night until 2018 six years later; yet he claims to remember what the defendant was wearing, although surprisingly, he could not say with any specificity what he himself was wearing. He said he believed the defendant was wearing something regular like blue jeans. And when asked what he was wearing: I'm a shorts guy going in the summer. That's all I can say.

He said for the most part that he and the defendant were together. He claimed that the defendant wasn't ever out of eye's distance. Might have turned his back for a second, but when he turned around, he was there. And yet when he was asked, "Do you recall him leaving to go get fireworks?" his answer was, "I don't remember," this for the person that was supposedly basically attached at his hip.

He was impeached with a 2009 Maryland conviction for theft and 2013 D.C. conviction for possession with intent to distribute a controlled substance. Probably more notably, he was not subpoenaed to the trial. He came down to see the trial, he testified, because he was concerned for the defendant, whom he considers a good friend.

He was asked the following.

"QUESTION: Did you tell him, Kiersh, that you saw Mr. Shaw and that you could be a perfect alibi witness?

"ANSWER: I don't recall him asking me that question.

"QUESTION: You don't recall him asking you that question? Okay. But did you know that information to be true?

"ANSWER: What information are you talking about?

"QUESTION: That you were with Mr. Shaw the entire evening.

"ANSWER: Yes."

Page 42, lines 13 to 21.

He was asked again.

"QUESTION: But you never told his attorney that you were with him the entire night of July 4th?

"ANSWER: I was never asked."

Page 43, lines 2 to 4.

At the outset, I do not believe that the defendant provided Mr. Kiersh with Beatty's name as a possible witness -- Daquan's name as a possible alibi witness. He clearly subpoenaed the alibi witnesses, even though he did not think their testimony was credible, so there's no reason why he would not have subpoenaed Daquan. But even assuming for some reason that he did know the name and that he didn't

subpoena him, once he talked to Daquan at trial, had he known previously, clearly he would have told him to stick around in case he was needed or at a minimum given him a subpoena.

It defies credibility that Daquan knew he was the defendant's alibi, basically was joined at the hip with him if we're to believe his testimony, never lost sight of him during the critical points, came to court because he was, quote-unquote, concerned about the defendant, but did not mention it to the defendant's lawyer, like: Hey, I have some information that can show that the defendant is innocent. No. He didn't impart that information because, according to him, the lawyer did not ask him. That testimony is incredible.

It is noteworthy that this party is not very far from the location of the murder. The -- Officer Mason testified at trial that it took two minutes to drive from the scene to the Kennedy Street neighborhood, and that was obeying all traffic laws and driving the speed limit, which I'm thinking if you're fleeing from the scene of a murder you're not exactly doing that. And the party was a few blocks further.

The alibi was also a double-edged sword because of the phone records. First, no witness came in here and talked about -- everybody talked about the defendant

enjoying the cookout, but no one talks about the fact that he's on the phone. Yet according to the phone records, his phone was blowing up immediately after the murder. He made approximately -- he made or received approximately 20 calls, yet nobody mentions that.

Second, the cell site records show that he -- the phone and, as the government argued successfully, the defendant was on the move, which again completely undercuts the alibi defense. Cell site records show that from 7:25 to 7:43 the defendant's cell phone was in the area of the defendant's Kennedy Street neighborhood, several blocks north of the crime scene. From 7:47 to 7:51 p.m. the defendant's cell phone was in the same general area but utilized a cell phone tower closer to the crime scene. And from 7:51 to 7:59, there's no -- during the time when the government argued that the murders and the shooting happened, there was no activity on the cell phone. And then from 8:02 to 8:46 p.m., the defendant's cell phone was back in the general area of his Kennedy Street neighborhood and was used 20 times. At trial the Court recalls that the government used a very powerful visual exhibit that showed the movement of the phone and basically the phone moving toward the crime scene and then moving away from the crime scene.

In the Court's opinion, this case illustrates

perfectly the challenge of putting on an alibi defense and the potential hazards. The Court had the opportunity to view the demeanor of the witnesses and assess the credibility or lack thereof of those witnesses. For the reasons discussed, the Court did not find the alibi witnesses credible for the proposition that the defendant was there the entire night. Yes, he was there at some point in time. They contradicted each other, claimed to remember how the defendant was dressed, but could not remember other basic information. Cell phone evidence contradicts their testimony. In short, the Court did not find them credible.

The Court finds that under the circumstances presented in this case, it was a reasonable tactical decision to forego presentation of an alibi at trial. It is clear that, quote, "The decision to call witnesses is a judgment left almost exclusively to counsel," end quote, and thus is a strategic choice. See *Perez v. United States*, 968 A.2d 39, 85 (D.C. 2009). See also *Lopez v. United States*, 863 A.2d 852, 861-62 (D.C. 2004), affirming the trial court's ruling that trial counsel's tactical choice not to call a witness was not constitutionally deficient performance under *Strickland*.

Even if the Court were to find Mr. Kiersh ineffective, which it does not, the defendant could still not be able to establish prejudice. The evidence of the

defendant's guilt in this trial was compelling. As the three shooters approached, one of the individuals, one of the kids out there, stated that he saw "some KDY youngins coming up." The defendant is from the Kennedy Street neighborhood. Immediately after the shooting, Jamar Savage-Bey told Braxton that Poodie was dead and that defendant had killed him. He also told him that the defendant was after Ali, which supports the government's theory for the motive behind the shooting, that the defendant had earlier helped Ali avoid being killed by the defendant and was suffering retaliation for that. The defendant was identified by four different witnesses from four different photo spreads. Phone records showed him in the vicinity of the murder immediately before and heading back to Kennedy Street immediately after. So the Court finds that the defendant cannot establish prejudice in the light of such a strong case.

The defense next asserts that the defense counsel was ineffective for not impeaching Jamar Savage-Bey with the evidence that the defendant was locked up on June 8th and that would have severely undercut his identification of the defendant.

First, the Court is not exactly satisfied that the defendant actually provided Mr. Kiersh with this information. Mr. Kiersh testified that he did not recall it

being mentioned, but given the passage of time he couldn't fairly say one way or the other. But he did say had the defendant told him, he would have sent his investigator over to the jail. Throughout the entire trial, counsel showed himself to be extremely diligent. He was, after all, the attorney who went down to North Carolina to meet with the cell tower expert, which is why I actually remember it, because I've never had anybody request permission and funding to do that.

No one during the course of the hearing presented any notes or other records from Mr. Kiersh's file and confronted Mr. Kiersh with those notes to substantiate that the defendant had actually told him this. And, of course, the defendant has a strong motive to testify that he did tell Mr. Kiersh. And this is not an idle query on the part of the Court, because the defense would have only learned of Savage-Bey's proposed testimony when the government turned over the grand jury transcripts as *Jencks*. So we're talking really basically into the trial, which was the procedure back in 2012. So the Court actually thinks it's unlikely that the defendant gave him this information.

Given the extensive passage of time, the government is at a disadvantage on this issue because Mr. Kiersh simply does not remember with -- positively. Assuming without deciding that the defendant told him this

information, the Court then has to look at what Mr. Kiersh's best guess of what his strategy would be if presented with such information. He testified that there was definitely a downside to the information because if you put it in the defense case, it is the last thing a jury hears that the defendant was in jail less than a month before the murder. The upside is, of course, that you undercut Savage-Bey's ID.

Mr. Kiersh testified that, "In recreating it, this witness," Savage-Bey, "was so hostile and impeached so thoroughly that I would expect that my thought process would have been that we did the damage we needed to do to him." And so you do a risk-benefit analysis, and it could very well have been detrimental for just this witness to come on at the end of the case and say this young man was in jail on June 8th.

In addition, I think, when you look at the testimony, Mr. -- Jamar was impeached with that he had testified earlier in the grand jury about this incident; but when you look at the testimony, it's not at all clear that he had agreed that he had seen the defendant on June 8th. When the government asked about the incident, almost every other thing he kind of reluctantly agreed to. He was a very hostile witness, did not want to be here. But when he was asked about this, he said, "I'm having a hard time remembering this statement. I don't remember writing the

statement, and some of the stuff is not really adding up." Transcript 468, lines 115 to 117.

So I think the damage is kind of minimal. Did it matter? Even if I assume it was ineffective, I don't believe the outcome would have been different. This was not a stranger-on-stranger crime. It happened in broad daylight. The defendant knows Mr. Shaw. He saw him almost every day after the April incident. So the fact -- and the defendant, according to him, was doing this stuff kind of constantly. So the fact that he might be off on one date has very little insignificance.

And I think it's important to note despite the fact that he believes that the defendant shot at him twice, he made it very clear that he did not want to testify, so you can't argue that he's out to get the defendant. He describes a small four-door silver car which matches -- which was -- which matches the car that the defendant had access to during the time period of this -- of that shooting because he was seeing Victoria Harrison, and she allowed him to drive her car. And also immediately after the July 4th shooting, he tells Braxton that the defendant was looking for Ali, which I think further buttresses that the two were kind of connected.

So the Court does not find that even if it was ineffective, which I think is a very hard finding to make

here given the posture of the case, the Court believes that it would not have made a difference.

Finally, as to the third and final issue, the defendant argues that defense counsel should have called PDS investigator Allison Horn to impeach Iesha Hicks with statements that she gave on July 12th to Horn and/or -- I think it was to Horn and/or to the PDS attorney that she did not see the defendant with a gun and has never seen him with a gun. So first, just as kind of an aside, I think there was a tricky ethical issue here for defense counsel, because the defendant himself told Mr. Kiersh that Iesha had seen him with a Mac, a Mac 10 I think it was.

Now, Allison Horn kind of stepped away from that. The government presented her with her notes when she met with him. She and defense counsel met with him at the jail. And under her -- under the notes, there was that he was at Iesha's house, and he didn't know what time he got there. He was drunk. And the very next line is Iesha saw him with a Mac 11 -- a Mac 10, I think it was. Whatever, it was clearly a gun. And Ms. Horn said: I don't know who that is; that could have been in another interview. The Court does not credit that testimony at all. It's on the same page -- it's under the date, and it's right after when the defendant is talking about Iesha Hicks.

That document is in Mr. Kiersh's file, so he knows

the defendant has said that Iesha Hicks has seen him with a gun. But in any event, what Mr. Kiersh testified is that he's not going to put on the investigator with unsworn testimony if he has grand jury testimony. He said, first of all, it's cumulative. If it's not sworn, it does not have the impact of sworn testimony. In this case, obviously, you can only consider the unsworn testimony for impeachment, but for the sworn testimony you can actually consider it as the truth of what happens. His position was: Why run the risk? He impeached her with her bias. He called Victoria Harrison to further impeach her. He viewed it as there are significant pitfalls, and it kind of undercuts his case. The investigator works for PDS, was there on behalf of the lawyer for PDS, was an advocate for the client for PDS. He said it just didn't make sense to go through all of that for the potential pitfalls.

Instead what he did was, which the Court believes was way more effective, I think, in particular in this case because it's not like that Ms. Hicks went down to the U.S. Attorney's Office and was pressed and pressed and pressed and gave -- finally gave different evidence. The testimony at trial was that nobody knew that she had this information that the defendant, A, told her that he had killed four people and that she saw him with guns that night. Nobody knew she had that information. They were doing their basic:

We're going to talk to probably everybody that he knows. So they had no idea. They're not pressing her.

She goes into the grand jury. She tells the lie that she hasn't seen him with a gun; he didn't say anything. And then she asked to step out. And then she comes outside, and she kind of cracks under the pressure of testifying under oath. So it all comes down to the fact that it was under oath, and that's the difference. So calling in a PDS investigator to highlight that when she's talking to somebody who's working on behalf of the defendant she's happy to say this, it doesn't -- it works many times. I don't think it works in this situation.

And I think the way that Mr. Kiersh used that was strategic, and I think it was very smart actually. He basically says this is someone who is willing to lie under oath. She either lied the first time or she lied the second time. You cannot believe her. And I think, especially given his knowledge of what Mr. Shaw had said to her, I think that was the smartest way to use that. So the Court does not find that that was ineffective to not have called Ms. Horn. And even if the Court were to find that it was ineffective, which the Court does not, again, it would have made no difference in this case, given how the Court has described the strength of the case.

Accordingly, the Court denies the defendant's

motion.

All right. Mr. Shaw will be returned back to BOP.

MS. MCEACHERN: May I go in the back, Your Honor?

THE COURT: Yes, yes.

(Hearing adjourns at 3:17 p.m.)

CERTIFICATE OF REPORTER

I, Julie T. Richer, an Official Court Reporter for the Superior Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced, upon the motion hearing in the case of UNITED STATES OF AMERICA V. CALVIN SHAW, Criminal Action No. 2012 CF1 11902, in said Court, on the 30th day of March 2023.

I further certify that the foregoing 28 pages constitute the official transcript of said proceedings, as taken from my computer realtime display, together with the audio sync of said proceedings.

In witness whereof, I have hereto subscribed my name this 16th day of June 2023.

Julie T. Richer, RPR

Official Court Reporter