

for a new trial. *People v. Lemke*, 349 Ill. App. 3d 391, 811 N.E.2d 708 (2004) (*Lemke I*). On remand, this time after trial by jury, defendant was again found guilty of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2000)). Defendant again argued ineffective assistance of counsel and that his conviction for murder should be reduced to involuntary manslaughter (720 ILCS 5/9-3(a) (West 2000)). In the second appeal, this court affirmed. In this appeal, defendant argues that the circuit court erred in denying his petition for postconviction relief, arguing, among other points, that trial counsel in the second trial did not understand that the accidental discharge of a firearm could constitute a reckless act and, accordingly, declined to call an expert witness who had testified in the first trial, and was available at the time of the second trial, as to the weapon's design which made it prone to discharge accidentally. For the reasons explained below, we affirm.

¶ 3 FACTS

¶ 4 A thorough recitation of the facts in the second trial, the jury trial, is contained in our decision at 384 Ill. App. 3d 437, 892 N.E.2d 1213 (2008) (*Lemke II*). Any further factual recitation required for our disposition is contained in the analysis below.

¶ 5 ANALYSIS

¶ 6 The basic contention of defendant in this appeal is that his trial counsel at the jury trial rendered ineffective assistance in that counsel did not understand that the accidental discharge of a firearm could constitute a reckless act and, accordingly, declined to call an available expert witness as to the weapon's design. The circuit court denied this petition, noting:

"At the 2002 bench trial, [d]efendant's counsel called Centralia, Illinois policeman Richard Simer as an expert witness in the areas of crime scene investigation and firearms. The gist of Simer's testimony was his opinion that the pistol used could have been fired by either of two ways: by cocking the hammer and

then pulling the trigger or by holding the trigger back and then pulling back and releasing the hammer. He also opined that the barrel of the pistol was below the level of the victim's head at the time of the firing and that the victim was on the top of the four-wheeler or 'up high' and not standing on the ground, when shot. Mr. Simer's affidavit and testimony at the hearing on the post-conviction relief petition established that he would have testified consistently if called for the re-trial and that neither of the new defense attorneys had spoken with him concerning testifying at the retrial.

* * *

Here, it is undisputed that [d]efendant wanted his attorneys to call Detective Simer. However, both trial attorneys testified they had read the transcripts of the first trial, were aware of Detective Simer and his testimony in the first trial, and had concluded that his testimony at the second trial would not be helpful to the defense theory of diminished capacity. [Defendant's attorney] testified as to his belief that Simer would have been bound by the previous testimony (and, in fact, Simer testified at the post-conviction relief hearing that his testimony would have been the same) or have been subject to impeachment. Being aware of the limits of Simer's testimony, there was no pressing need for trial counsel to contact him. The court finds no evidence that trial counsel's choice not to present testimony from Simer was because of any lack of diligence or failure to investigate facts or law, or any other reason other than sound trial strategy.

Defendant apparently argues that Simer's testimony that the gun could have been fired by pulling the trigger back and 'fanning' the hammer would have supported the proposition that [d]efendant did not intend to shoot the victim. However, the court sees nothing in that or any of the rest of Simer's proposed testimony that would have rebutted the undisputed evidence that the gun, when first recovered by the police after

the shooting, had the hammer setting on a live round, inferring that [d]efendant, after firing the gun in whatever manner, affirmatively cocked it, thereby advancing the round. To the extent that [d]efendant wanted to argue the gun went off 'by itself' or by accident, Simer's testimony would not have helped rebut the inference of the affirmative, specific action by the [d]efendant to ready the gun for firing again and the affirmative, specific action of then releasing the trigger.

The other opinion evidence that Simer could have offered, that the victim was standing on the four-wheeler when shot, appears to this court to have been of limited relevance other than as a general attack on the credibility of the State's occurrence witness. Self-defense was not an issue and the exact location of the victim at the time of the shooting was not significant and any potential impeachment value would have been limited.

Furthermore, though [d]efendant now argues that his own testimony, 'as corroborated by the testimony of Detective Richard Simer' would have resulted in a different verdict (Amended Petition, page 7), in fact Simer's opinion on the victim's location was inconsistent with statements given by the [d]efendant on the night of the shooting. In those statements, [d]efendant indicated the victim had either been sitting on the four-wheeler or standing by it at the time of the shooting (Motion to Suppress, Exhibit 3, page 5 and 7, and Exhibit 4, page 4) and, if [d]efendant had testified differently at trial, his earlier statements would have been available for use as impeachment.

For these reasons, the court finds that trial counsel's decision not to present Simer's testimony at the second trial was not erroneous. Even if the court were to find the decision erroneous, the court could not find that it was so erroneous to rise to the level of being so unsound as to constitute a 'failure to conduct any meaningful

adversarial testing' as required for a finding of ineffective assistance of counsel in *Ward*. *People v. Ward*, 187 Ill. 2d 249, 258.

Moreover, examining the conduct of trial counsel in its entirety, the court finds no lack of effort, diligence or competency through pre-trial proceedings and the trial. Trial counsel vigorously attempted to suppress [d]efendant's statements confessing to the shooting, took great effort to locate, retain, and present expert witness testimony on issues other than those on which Simer would have testified, diligently explored potential bias of prospective jurors during *voir dire*, and conducted appropriate cross-examination of the State's witnesses during trial. Defendant failed to establish that trial counsel's performance fell below an objective standard for reasonableness.

Neither did [d]efendant establish the second requirement of the *Strickland* test. To meet that prong, a [d]efendant must show a reasonable possibility that, but for the substandard performance of trial counsel, the trial result would have been different. *People v. Johnson*, 218 Ill. 2d 125, 842 N.E.2d 714 (2005). As noted above, Simer's testimony would have had very limited benefit at best. The court finds nothing to suggest that Simer's testimony, alone or coupled with [d]efendant's testimony on the issues he could have testified to, would have resulted in a different verdict.

* * *

The record is clear that trial counsel advised [d]efendant of his right to testify (R. - 1978, 1979) and that [d]efendant understood that it was his right to testify and it was his decision whether to exercise that right or remain silent. (R - 1978, 1979). Defendant admitted in his testimony at the hearing on his post-conviction petition that he had told the trial court he was aware of his rights at trial and was choosing not to testify (January 10, 2011 Transcript, page 44-45). Though he also said at the post-

conviction relief hearing that he wanted to say more when he was questioned at the trial but was cut off (a contention that is contradicted by the record), it appears that he alleges he only wanted to explain that his attorneys had advised him not to testify (Transcript, page 48). Both the record and [d]efendant's own testimony confirm that [d]efendant was fully cognizant of his right to make the decision about testifying or remaining silent.

Originally, [d]efendant also stated in a sworn affidavit (Exhibit A to the Amended Petition) he believed at the time of the trial that, if he went against trial counsel's advice and testified, he would be stuck with new, less-capable, trial counsel. However, he contradicted that allegation in his testimony at the hearing (Transcript of January 10, 2011 hearing, page 46). In addition, [defendant's attorney] specifically testified at the post-conviction relief hearing that he had, in fact, advised [d]efendant against testifying but also advised him that it was [d]efendant's decision, discussed with [d]efendant the pros and cons of him testifying, and assured [d]efendant that he [defendant's attorney] would do his very best if [d]efendant decided to testify (Transcript, pages 20-21)."

Defendant timely appealed.

¶ 7 We review an appeal on a postconviction petition on the standard of abuse of discretion when the circuit court has conducted an evidentiary hearing, the third stage of the postconviction process. 725 ILCS 5/122-6 (West 2010); *People v. Donoho*, 204 Ill. 2d 159, 788 N.E.2d 707 (2003). The basic requirement to establish ineffective assistance of counsel is that a defendant prove that his counsel made a mistake in the course of representation and prejudice occurred because of the mistake that was made. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984). In order to establish this degree of prejudice, a defendant must demonstrate there was a reasonable

probability that, but for counsel's error, the result would have been different and that that probability is sufficient to undermine confidence in the result. *Strickland*, 466 U.S. at 694-95. The reviewing court determines this question of prejudice by examining the totality of the circumstances in the case before it. *Strickland*, 466 U.S. at 695. As this court stated in *People v. Moore*, 279 Ill. App. 3d 152, 162, 663 N.E.2d 490, 498 (1996):

"The question is not whether the defendant would more likely than not have received a different result without the professional errors of counsel but whether, with their presence, he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

The main point urged by defendant on appeal rests on his counsel's failure to call the firearms expert, Detective Simer. We conclude that defendant's argument lacks a basis in the record. There is a strong presumption that a defense counsel acted on the basis of sound trial strategy (*People v. Coleman*, 183 Ill. 2d 366, 701 N.E.2d 1063 (1998)), which includes determining which witnesses to call at trial. The strategy determined by his counsel in the first trial, as reflected in *Lemke I*, was based on an argument that defendant accidentally killed Alberston rather than committing murder. This court, upon review, determined that defendant's conduct was reckless at the very least and, accordingly, his counsel should have argued the option of finding defendant guilty of involuntary manslaughter.

¶ 8 In the second trial, affirmed in *Lemke II*, defendant did not testify, but pursued a different defense. Counsel attacked the only State witness, Rusty Heindselman, as to his credibility. Heindselman had a number of vulnerable points on credibility, including (1) three methamphetamine-related convictions, (2) throwing a light bulb used to smoke methamphetamine into the bushes on the night of the shooting, (3) arguably being high on the drug while testifying to the contrary, (4) writing a letter to the State's Attorney asking for prison benefits in exchange for truthful testimony, (5) making contradictory statements as to

whether defendant had his walking stick in his hands when the shot was fired, and (6) telling the investigating officers that the shooting was an accident and also that he did not see the shooting because his head was turned. At the second trial, defense counsel did present evidence to the jury and submitted instructions as to involuntary manslaughter.

¶ 9 The second basis of counsel's strategy was the medical condition and intoxication of defendant at the time of the shooting. Defense counsel called an expert in the field of neuropharmacology who testified that defendant both was taking Xanax and was a long-term alcohol abuser. As noted in the cases cited above, defendant had consumed a substantial amount of alcohol prior to the shooting. The doctor described the Xanax/alcohol combination as "catastrophically more disabling than the use of either the drug alone or the alcohol alone." The ultimate conclusion of the doctor was that defendant was profoundly impaired, noting:

"[Defendant] was quite intoxicated on alcohol; that the alcohol was interacting with Xanax; that [defendant] was misperceiving the circumstances at the place this occurred; and that ultimately [defendant] behaved foolishly, I might even say recklessly, as a result of his intoxication."

Our review of the actions of defendant's counsel in the second trial, the testimony at the evidentiary hearing on his postconviction petition, and the order of the circuit court leads us to conclude that counsel in the second trial was not ineffective, but rather chose and executed a sound trial strategy. Further, the record does not indicate any basis upon which we could conclude that counsel misapprehended the effect of our decision in *Lemke I*. We further conclude that defendant knowingly and voluntarily waived his right to testify, albeit reluctantly, upon advice of his counsel. Defendant alleges he was prevented from complaining to the trial court that this was done on advice of counsel, but that circumstance is clear in the record. The postconviction court recognized this, and its conclusion is

supported by the record, as are the rest of the circuit court's findings noted above.

¶ 10 For the reasons stated, we affirm the judgment of the circuit court of Edwards County denying the amended petition for postconviction relief.

¶ 11 Affirmed.