

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ANTWAN MANUEL,

Petitioner,

v.

WILLIAM POLLARD, Warden,
Green Bay Correctional Institution,

Respondent.

REPORT AND
RECOMMENDATION

05-C-701-C

REPORT

Antwan Manuel, an inmate at the Green Bay Correctional Institution, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Manuel challenges the judgment of conviction entered on October 17, 2001 by the Circuit Court for Dane County for attempted first-degree intentional homicide, aggravated battery and other offenses stemming from the shooting of Prentiss Adams on June 25, 2000 in Madison. For the reasons stated below, I am recommending that this court deny relief and dismiss this case.

Manuel contends the state violated his Confrontation Clause right by admitting at trial the out-of-court statements of Derrick Stamps, an eyewitness to the shooting who took the Fifth at Manuel's trial.¹ Manuel also claims that his trial lawyer provided ineffective assistance by failing to impeach Stamps's credibility with evidence of his prior convictions.

¹ In his petition, Manuel also raised a claim that the trial court had erroneously exercised its discretion when it admitted this hearsay evidence under the "recent perception" exception. Manuel now concedes that this is a state law claim not cognizable in this federal habeas action. Traverse, dkt. 8, at 8; *Estelle v. McGuire*, 502 U.S. 62, 67 (1981).

Manuel's conviction generated published opinions from both the Wisconsin Court of Appeals and Wisconsin Supreme Court, which were required to apply the United States Supreme Court's newly-announced rule for analyzing Confrontation Clause claims. *See Crawford v. Washington*, 541 U.S. 36 (2004). Both courts concluded that Stamps's statements were non-testimonial and their admission was not prohibited by *Crawford*. Both courts analyzed the statements under the pre-*Crawford* framework set out in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) and concluded that admission of the statements did not implicate Manuel's right to confront because the statements bore sufficient indicia of reliability. Finally, both courts rejected Manuel's ineffective assistance of counsel claim on the ground that Manuel had not been prejudiced by his lawyer's failure to impeach Stamps's credibility with evidence of his prior convictions.

For reasons explained below, I am recommending that Manuel's petition be denied. The Wisconsin Supreme Court—the last state court to adjudicate Manuel's claims on their merits—carefully reviewed Manuel's claims, analyzed them under the proper Supreme Court precedent, and reached conclusions that were reasonably supported by the facts. As a result, Manuel cannot obtain federal habeas relief. *See* 28 U.S.C. § 2254(d)(1).

Pursuant to § 2254(e)(1), this court presumes that state court determinations of fact are correct, and Manuel has not attempted to rebut this presumption. Accordingly, I have adopted verbatim the state supreme court's findings of fact:

FACTS

On June 25, 2000, shortly after midnight, Adams was driving his vehicle down Fisher Street in Madison, Wisconsin. As he drove by a group of men standing on a sidewalk, one of the men, later identified as Stamps, flagged Adams over to the side of the street. The two spoke about an altercation that occurred between their groups of friends a few days earlier. While Adams remained in his vehicle to speak with Stamps, Manuel allegedly reached around Stamps and shot Adams in the neck. Adams stated that he saw Manuel's face, head, and arm as Manuel reached around the right side of Stamps and fired at Adams. Adams knew Manuel prior to the incident, as he had seen him in the neighborhood approximately 20 times.

Adams immediately drove himself to the hospital. There, he spoke with Detective Alix Olsen. Adams told Olsen the address of where the incident took place and limited details about the shooting. Olsen proceeded to the crime scene where other officers had begun investigatory work. The police did not find much evidence around the scene but they preserved foot impressions left in a muddy spot between the sidewalk and the street on Fisher Street.

Around 4:00 a.m., Olsen visited Adams again in the hospital. Adams recounted the incident again, but this time with more details. He described the car of the shooter and gave the nicknames of both the shooter, "Twin" (Manuel), and the man who waived [*sic*] him down, "Tick" (Stamps).

At about 1:30 p.m. the same day, Olsen yet again visited Adams at the hospital, this time along with Detective Matthew Misener. During this meeting, the detectives showed Adams six photo arrays, with six different pictures in each lineup. Adams identified Manuel as the man who shot him and said he was "a hundred percent sure." Adams also identified a photo of Stamps as the man who waved him over to the side of the street.

After completing the photo array, Olsen and Misener met with members of the Madison Gang Task Force and asked them to arrest Stamps and Manuel. Around 6 p.m. on June 25, 2000, police officers and gang task force members followed Manuel in his car before performing a felony stop. Manuel cooperated with the officers and was subsequently arrested. His car was removed from the scene and taken to a police station, where police recovered numerous pairs of shoes from the vehicle's trunk.

Two days later, on June 27, 2000, the police arrested Stamps at the apartment of his girlfriend, Anna Rhodes. When the police took Stamps into custody, Rhodes asked the police why Stamps was being arrested. The arresting officer, Misener, replied that Stamps may have been involved in a shooting and was being arrested on a probation hold. According to Misener, Rhodes responded, "Why, because he was with the guy that shot that dude?" When Misener asked Rhodes for the source of her information, Rhodes said that Stamps told her that he "was there when Twin [Manuel's nickname] shot the guy."

Misener also said that Rhodes told him that Stamps said he was talking to Adams after Adams pulled his vehicle over to the roadside. At that point, Misener stated that

Rhodes indicated that Stamps told her that Manuel "came out of nowhere." Misener then said that Rhodes told him that Stamps told her he heard gunshots and all of a sudden saw Manuel. Stamps did not tell her, however, whether he actually saw Manuel holding a gun.

The State charged Stamps with attempted first-degree intentional homicide as party to a crime, but later dropped the charge. The State charged Manuel with attempted first-degree intentional homicide, aggravated battery, reckless use of firearm, possession of firearm by a felon, bail jumping, and second-degree reckless injury.

The day before Manuel's trial was to commence, Manuel filed a motion in limine, seeking to prevent the admission of statements Stamps made to Rhodes. Manuel argued that Rhodes lacked personal knowledge of the shooting and that Stamps' statements were hearsay. The State claimed that Stamps' statements to Rhodes were admissible under the statement of recent perception exception. *See* Wis. Stat. § 908.045(2) (2001-02).² The State argued that Stamps was simply trying to tell Rhodes about the events with which he had just been involved so that she would have a reason to go with him to a motel. The Dane

² Wis. Stat. § 908.045(2) provides that the following is not excluded by the hearsay rule if the declarant is unavailable as a witness:

A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear.

Wisconsin is one of only four states that has such an exception to the hearsay rule. *See Manuel*, 281 Wis. 2d 554, ¶ 66, 697 N.W. 2d 811.

County Circuit Court, Honorable P. Charles Jones, agreed with the State and denied the motion.

At Manuel's trial, the State called Stamps as a material witness, but he invoked his Fifth Amendment privilege against self-incrimination. Rhodes was also called to testify, but she claimed that she could not recall anything that Stamps told her about the shooting or what she told the police Stamps told her. She merely testified that she learned about a shooting from Stamps the day of the incident and that they then went to a motel for a couple of days. The State then introduced the statements Stamps made to Rhodes regarding the crime through the arresting officer, Misener.

Apparently, as of the time of the trial, Stamps had four prior criminal convictions. This was never raised at trial to impeach Stamps' credibility as it related to the statements he made to Rhodes.

Adams also testified, and again identified Manuel as the shooter. To corroborate Adams' identification, the State called Charles Cates, a footwear examiner at the Wisconsin State Crime Lab. He studied the shoes found in Manuel's trunk and the impressions made on Fisher Street between the sidewalk and the street on the night of the shooting. Cates testified that the impression matched the make, design, and pattern of the K-Swiss brand of shoe worn by Manuel. Thus, he opined that the shoes found in Manuel's trunk probably made the impressions.

The jury convicted Manuel on all charges.

State v. Manuel, 2005 WI 75, ¶¶ 4-16, 281 Wis. 2d 554, 563-566, 697 N.W. 2d 811, 815-817 (2005).

Crawford v. Washington

Manuel filed a motion for a new trial, asserting that: (1) the court erred by denying the motion in limine; (2) Manuel’s confrontation rights were violated by admitting Stamps’s statements; (3) trial counsel was ineffective for failing to argue the confrontation issue; and(4) trial counsel was ineffective for failing to impeach Stamps’s credibility with his four prior convictions.³ The circuit court denied the motion, and Manuel appealed.

While this appeal was pending, the United States Supreme Court issued its decision in *Crawford v. Washington*, 541 U.S. 36 (2004), which marked a change in the Court’s Confrontation Clause jurisprudence. Before *Crawford*, the governing test for determining whether an unavailable witness’s statement against a criminal defendant could be admitted absent a prior opportunity to cross-examine was whether the statement bore “adequate ‘indicia of reliability.’” *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). To meet that test, evidence either had to fall within a “firmly rooted hearsay exception” or bear “particularized guarantees of trustworthiness.” *Id.* In *Crawford*, however, the Court concluded that the *Roberts* test did not protect adequately against the principal evil at which the Confrontation Clause was directed, namely, the admission of out-of-court testimonial statements against

³ Manuel did not challenge the introduction of Stamps’s statement by way of Detective Misener’s testimony regarding what Rhodes told him Stamps had said to her.

the accused. *Crawford*, 541 U.S. at 50-53. After reviewing the history of the Confrontation Clause, the Court held that the Framers intended that statements falling into this “core class” could be admitted *only* if the witness was unavailable and the defendant had had a prior opportunity to cross-examine the witness. *Id.* at 53-56. According to the Court, the constitutional right of confrontation was a procedural guarantee that could not be replaced by a substantive determination of reliability. *Id.* at 61-62. The Court thus jettisoned the *Roberts* “reliability” test with respect to testimonial statements, holding: “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” *Id.* at 68-69. With respect to nontestimonial hearsay, however, the Court held: “[I]t is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.” *Id.* at 68.

Although the *Crawford* Court spoke clearly with respect to the rule that should apply to testimonial hearsay, it “[le]ft for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Id.* However, the Court did provide some guidance on the scope of that term. The Court stated that at minimum, the term applied to “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Id.* As examples of statements that would be “nontestimonial,” the Court referred to business records, statements in furtherance of a conspiracy and “off-hand, overheard

remark[s].” *Id.* at 51, 56. In addition to these polar examples, the Court noted (but did not specifically endorse) three formulations of the "core class of 'testimonial' statements":

1) ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;

2) extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and

3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52 (citations and quotations omitted).

The Wisconsin Appellate Courts' Decisions

The Wisconsin Court of Appeals affirmed Manuel's conviction. *State v. Manuel*, 2004 WI App 111, 275 Wis. 2d 146, 685 N.W. 2d 525. After concluding that the circuit court had properly admitted Stamps's statements to Rhodes under Wisconsin's statement of recent perception exception to the rule against hearsay, the court of appeals then considered whether admission of the statements violated Manuel's constitutional right of confrontation. *Manuel*, 275 Wis.2d 146, ¶¶ 12-16, 685 N.W.2d 525. Starting with *Crawford*, the court determined that Stamps's statements were not testimonial. Noting that the statements were not made to an agent of the government or to someone engaged in investigating the shooting, the court found that the statements neither fell within any of the categories of

statements expressly identified in *Crawford* as testimonial, nor were the types of statements *Crawford* depicted as the " 'primary object' of the framer's concerns in enacting the confrontation clause." *Manuel*, 275 Wis.2d 146, ¶ 21, 685 N.W.2d 525 (citing *Crawford*, 541 U.S. at 50-53).

Noting that the Supreme Court had suggested in *Crawford* that nontestimonial evidence properly admitted under the rules of evidence might require no additional Sixth Amendment scrutiny, the appellate court nonetheless proceeded with "an abundance of caution" and analyzed Stamps's statements under *Roberts*. *Id.*, ¶¶ 22-23. After concluding that Wisconsin's "recent perception" exception is not a firmly rooted hearsay exception, *id.*, ¶ 25, the court concluded that, nevertheless, there were particularized guarantees of trustworthiness surrounding Stamps's statements sufficient to render them reliable even absent cross-examination, namely: (1) the statements were made in good faith and without contemplation of pending litigation; (2) Stamps did not have a motive to fabricate; and (3) the statements were spontaneous, motivated by Stamps's need to explain why he wanted to take Rhodes and their son to a motel. *Id.*, ¶ 27.

The court of appeals also rejected Manuel's claim that his lawyer was ineffective for failing to introduce Stamps's four prior convictions in order to impeach his credibility after his statements were introduced through Misener, finding that there was no reasonable probability that the outcome at trial would have been different had Stamps been so impeached. *Id.*, ¶¶ 32-34.

The Wisconsin Supreme Court granted Manuel's petition for review. In a unanimous decision, the court rejected Manuel's claims and affirmed his conviction. The court agreed with the court of appeals that the trial court had not abused its discretion in concluding that Stamps's statements to Rhodes were admissible under the recent perception exception to the hearsay rule. *Manuel*, 281 Wis. 2d 554, ¶¶ 31-34. It also agreed that Stamps's statements were not "testimonial" under *Crawford*. The court noted that Stamps's statements were not made at a preliminary hearing, grand jury or trial, nor had they been elicited during a police interrogation; therefore, they did not fall within the "minimums" identified by *Crawford*. *Id.*, ¶ 39. The court also found that the statements were not testimonial under any of *Crawford*'s three "formulations" of testimonial evidence. The court dispensed easily with the first two formulations, finding that Stamps's oral statements to his girlfriend at their apartment clearly were neither ex parte in-court testimony or its functional equivalent nor an extrajudicial statement contained in formalized testimonial materials, such as an affidavit, deposition, prior testimony, or confession. *Id.*, ¶¶ 40-41.

The court devoted most of its attention to considering whether Stamps's statements fell under the third and broadest formulation, namely, whether it was a "statement[] that [was] made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.*, ¶ 42. After reviewing post-*Crawford* cases from other jurisdictions in which the courts had considered the third

formulation, the Wisconsin Supreme Court determined that Stamps's statements were not testimonial:

Stamps made the statements to Rhodes, his girlfriend, during what appears to be a spontaneous, private conversation that occurred shortly after the shooting. There is no dispute that Rhodes is not a government agent, nor is there any contention that Stamps somehow expected Rhodes to report to the police what he told her. By all indications, the conversation was confidential and not made with an eye towards litigation. Absent any evidence that Stamps was attempting to use Rhodes to mislead the police on his own behalf, we conclude that Stamps' statements cannot be considered testimonial under *Crawford's* third formulation.

Id., ¶ 53 (internal citations omitted).

Having concluded that Stamps's statements were not testimonial, the court then considered whether it was necessary to analyze the reliability of the statements under the *Roberts* test, as Manuel contended, or whether their admissibility under the rules of evidence alone was sufficient to ensure their reliability, as the state contended. The court rejected the state's position, concluding that it was "unwise to establish a blanket-rule that blindly trusts the hearsay rules to safeguard constitutional rights." *Id.*, ¶ 59. Noting that the Supreme Court in *Crawford* had declined to overrule *Roberts* and had stated expressly that states were free to continue using *Roberts* when dealing with nontestimonial statements, the court decided to retain the test set forth in *Roberts* for analyzing confrontation claims with respect to nontestimonial statements. *Id.*, ¶ 60.

Applying that test, the state supreme court concluded that Stamps's statements, though not falling within a firmly rooted hearsay exception, bore particularized guarantees of trustworthiness to ensure their reliability:

Stamps' statements were spontaneously made shortly after the shooting. There is no indication that Stamps spoke with a "studied reflection of the situation" or made the statements in bad faith. Nor is there any indication that Stamps made the statements after being provoked by questioning. Instead, Stamps' statements were volunteered statements that were made to his girlfriend, also the mother of his child, and were nothing more than an explanation of where he was and what had occurred and an instigation for what they had to do next (i.e., get to a motel). There is no basis on which to conclude that Stamps made the statements to his girlfriend in anything but in confidence.

We agree with the State that it cannot reasonably be said that Stamps had an ulterior motive to fabricate, as any statement placing Stamps at the scene makes him a potential suspect, or in the very least a person of interest. And as the court of appeals observed, Stamps implicated a fellow gang member, not a member of a rival gang or some other enemy. Therefore, after reviewing the totality of the circumstances, we conclude that Stamps' statements contain sufficient particularized guarantees of trustworthiness to satisfy the Confrontation Clause.

Id., ¶¶ 69-70 (internal citation omitted).

Finally, the court rejected Manuel's claim that his trial lawyer was ineffective for failing to impeach Stamps's credibility by introducing evidence of his four prior convictions. After noting that Manuel's claim was governed by the two-part test for ineffectiveness set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the court found that the claim failed because Manuel could not make the second showing, namely, that "there [was] a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, ¶ 72. The court articulated two rationales for its conclusion: first, Stamps's credibility had been sufficiently attacked even without the evidence of the prior convictions, and second, there was overwhelming evidence in support of the verdict. *Id.*, ¶¶ 74-75. The court explained:

The jury heard that Stamps was a member of a gang, and Misener, the officer who took Rhodes' statement as to what Stamps told her, testified that Stamps was arrested and taken to jail on a probation hold. We agree with the State that it is fair to say that most people know that an individual has been convicted of a crime if he or she is on probation. As the court of appeals concluded, "that fact is not so obscure as to be beyond the knowledge of the average juror." *Manuel*, 275 Wis.2d 146, ¶ 32, 685 N.W.2d 525. With Stamps' status as a criminal made clear, "the exact number of convictions might have incrementally weakened the credibility of the witnesses, [but] this decrease is not enough to establish a reasonable probability that the jury would have reached a different verdict." *State v. Trawitzki*, 2001 WI 77, ¶ 44, 244 Wis.2d 523, 628 N.W.2d 801.

In addition, more importantly, there is overwhelming evidence that supports the verdict. *See Strickland*, 466 U.S. at 696, 104 S.Ct. 2052 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). The victim, Adams, identified Manuel as the shooter through both a photo array conducted shortly after the shooting and at trial. The identification was not premised on a momentary glimpse of the shooter. Adams indicated that he was positive Manuel was the shooter, as Adams had seen Manuel around the neighborhood many times before. Moreover, the State presented circumstantial physical evidence that linked Manuel to the crime scene. Cates, the State Crime Lab analyst, testified that the shoes taken from the trunk of Manuel's car were consistent

with the footprints that were preserved at the crime scene. Thus, because Stamps' credibility had been sufficiently attacked, and because the evidence against Manuel was overwhelming, we conclude that Manuel cannot establish that he was prejudiced by his trial counsel's performance.

Id.

ANALYSIS

I. Standard of Review

Pursuant to 28 U.S.C. § 2254(d), this court must accord special deference to the conclusions reached by the Wisconsin Supreme Court. Specifically, this court may not grant Manuel's application for a writ of habeas corpus unless the state supreme court's adjudication of his claims

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

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

28 U.S.C. § 2254(d).

Because Manuel makes no claim that the state supreme court's adjudication of his claims turned upon any "unreasonable" determinations of fact, § 2254(d)(1) provides the operative standard. The "contrary to" clause of § 2254(d)(1) pertains to pure questions of law. *Lindh v. Murphy*, 96 F.3d 856, 868-69 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997). A state court decision is contrary to Supreme Court precedent if the

state court applies a rule that contradicts the governing law set forth in Supreme Court cases, or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

The “unreasonable application” clause of § 2254(d)(1) pertains to mixed questions of law and fact. *Lindh*, 96 F.3d at 870. A state court decision is an unreasonable application of Supreme Court precedent if the state court identifies the correct governing legal rule but applies it unreasonably to the facts of its case. *Williams*, 529 U.S. at 407. An unreasonable application of federal law is different from an incorrect application of federal law. *Id.* at 410.

[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 411.

In a case involving a flexible constitutional standard, a state court determination is not unreasonable if the court “takes the rule seriously and produces an answer within the range of defensible positions.” *Mendiola v. Schomig*, 224 F.3d 589, 591 (7th Cir. 2000). *See also Lindh*, 96 F.2d at 871 (“[W]hen the constitutional question is a matter of degree, rather than of concrete entitlements, a ‘reasonable’ decision by the state court must be honored.”). The reasonableness inquiry focuses on the outcome and not the reasoning provided by the state court. *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997). A decision that is at least

minimally consistent with the facts and circumstances of the case is not unreasonable. *Henderson v. Walls*, 296 F.3d 541, 545 (7th Cir. 2002). *See also Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002) (AEDPA requires that state-court decision be unreasonable, which means something well outside the boundaries of permissible differences of opinion).

As these authorities make clear, only in extraordinary cases can a petitioner overcome the hurdle imposed by § 2254(d). This is not such a case.

II. Confrontation Clause

Manuel contends that the Wisconsin Supreme Court unreasonably applied *Crawford* when it concluded that Stamps's statements were not testimonial. I presume that Manuel is attacking the supreme court's conclusion that Stamps's statements were not testimonial under *Crawford*'s third formulation, for he cannot reasonably contend that Stamps's statements were made in the context of any judicial proceeding or police interrogation or were contained in any formalized legal document.⁴

Manuel does not argue in this court that it was unreasonable for the state supreme court to conclude that Stamps's statements were not "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Even so, I will presume that he wishes to offer the same arguments

⁴ In his briefs before the Wisconsin Supreme Court, Manuel argued that the statements were testimonial only under the third formulation. Answer, dkt. 5, exh. B, at 22.

he presented to the state supreme court. There, Manuel argued that Stamps, who witnessed the crime and was known to the victim, must have believed at the time he spoke to Rhodes that the police would be interviewing him, either as a suspect or as a witness, and that they would interview Rhodes as a potential alibi witness for Stamps. Manuel argued that

[Stamps] had to have known that Rhodes would tell the police about his statement to her, because that statement was extremely pertinent to the investigation (it specifically identified the perpetrator of this crime), and because it did *not* directly implicate Stamps, her boyfriend.

* * *

Stamps had to have known that once the police had this statement, he would either be called as a witness against Manuel, or the statement would be introduced against Manuel at his trial.

Def.-App.'s Br. and App., dkt. exh. B., at 24.

This is a plausible interpretation of the circumstances surrounding Stamps's statements to Rhodes. It's possible that Stamps reasonably believed when he was talking to Rhodes about the shooting that she would pass his statements to the police, and that he expected the statements to be used in a subsequent prosecution. However, it's equally possible that Stamps held no such belief, spoke spontaneously to his girlfriend to explain why they needed to go to a motel, did not expect Rhodes to blab to the police, and never dreamed his statements would surface in a criminal prosecution.

Where, as here, the facts before the state court allow two reasonable but competing conclusions, this court must defer to the choice made by the state court even if this court

might have reached the opposite conclusion. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). A state court decision cannot be “unreasonable” if fair-minded jurists could disagree over the proper legal conclusion to be drawn from the facts. *Id.*, at 664-665. In concluding that Stamps’s statements were not testimonial, the Wisconsin Supreme Court carefully analyzed *Crawford*, cases from other jurisdictions, and the parties’ arguments. Because the court took *Crawford* seriously and reached a conclusion “within the range of defensible positions,” its application of *Crawford* was reasonable. Accordingly, § 2254(d)(1) precludes this court from granting habeas relief to Manuel on this claim.

This could end the analysis of Manuel’s Confrontation Clause claim. Although the state court went on to analyze whether Stamps’s statements were reliable under *Roberts*, *Crawford* strongly suggests that such analysis is not constitutionally required. 541 U.S. at 68 (nontestimonial hearsay “could be exempted from Confrontation Clause scrutiny altogether”). Although the state supreme court decided that Wisconsin ought to retain the *Roberts* test, this decision and the court’s subsequent application of *Roberts* to Stamps’s statements probably is a matter of state law not cognizable on federal habeas review.

That said, the Supreme Court has not expressly overruled *Roberts*. Accordingly, out of an abundance of caution, I will assume that the state supreme court’s application of *Roberts* may be reviewed under §2254(d).

Roberts holds that when a hearsay declarant is unavailable for cross-examination at trial, his statement cannot be admitted at trial consistent with the Confrontation Clause

unless it bears adequate “indicia of reliability.” 448 U.S. at 66. This reliability requirement can be met if the evidence either falls within a “firmly rooted” hearsay exception or is supported by a showing of “particularized guarantees of trustworthiness.” *Id.* A statement bears a “particularized guarantee of trustworthiness” if it is clear from the circumstances in which the statement was made that the crucible of cross-examination would be of marginal utility. *Idaho v. Wright*, 497 U.S. 805, 820 (1990). The question is whether, from the circumstances in which the statement was made, the court can suppose that the declarant is particularly likely to be telling the truth. *Id.* at 822.

In the instant case, fair-minded jurists could disagree whether Stamps’s statements were sufficiently reliable to survive Confrontation Clause scrutiny under *Roberts*. The state supreme court found that these factors weighed in favor of reliability: Stamps made his statements spontaneously, that is, not in response to any questioning; the statements were made to his girlfriend, as opposed to someone investigating the crime; and the statements were made to explain where he had been and why they needed to get to a motel. These considerations all were relevant under *Roberts* and they reasonably support the court’s determination that Stamps was telling the truth when he spoke to Rhodes.

It is possible, as Manuel argued, that Stamps fabricated his statements in order to deflect suspicion away from himself, but this possibility cannot help Manuel obtain federal habeas relief. Merely suggesting an alternative explanation does nothing useful because the Wisconsin Supreme Court could not have acted “unreasonably” when it chose between two

possible interpretations of the circumstances attendant to Stamps's statements. Under a general balancing test like that of *Roberts*, the range of reasonable judgment under § 2254(d) is wide.⁵ *Alvarado*, 541 U.S. at 664 (the more general the rule, the more leeway courts have under § 2254(d)(1) in case-by-case determinations).

Perhaps one could argue that the state supreme court applied *Roberts* unreasonably because it focused on the absence of evidence showing that Stamps was lying, when it should have been determining whether there were affirmative reasons to rebut the presumption that a hearsay statement is unreliable. *See Wright*, 497 U.S. at 821 (“[U]nless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement.”); Def.-App.’s Br. and App., dkt. 5, exh. B., at 32 (attacking court of appeals’ decision on this basis). However, any “negative” language used by the state supreme court was in response to Manuel’s claim that Stamps had an ulterior motive to fabricate. The court found that indicators of such fabrication were absent, noting that Stamps’s statements were not exculpatory insofar as he admitted being at the scene and that Manuel and Stamps were members of the same gang, making Stamps’s statements more reliable than if he had implicated a member of a rival gang or some other enemy. Overall, in spite of its having described some of the circumstances

⁵ Indeed, the Court indicated in *Crawford* that one reason it was abandoning the *Roberts* test as a means of protecting the right of confrontation in cases of testimonial hearsay was the test’s inherent unpredictability. 541 U.S. at 61-62 & n.10.

surrounding the making of Stamps's statement in terms of factors that were *not* present, the court's analysis indicates that it properly understood and applied the *Roberts* test. The Wisconsin Supreme Court's conclusion that Stamps's statements were admissible under *Roberts* was reasonable.

III. Ineffective Assistance of Counsel

Finally, Manuel contends that his trial lawyer provided constitutionally defective performance because he failed to impeach Stamps's credibility with his four prior convictions. To establish a Sixth Amendment violation, a defendant must establish first, that his lawyer's performance was deficient, and second, that he suffered prejudice as a result of his lawyer's errors. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove prejudice, the defendant must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*, at 694. A court need not address the defective performance prong if the defendant cannot show prejudice. *Id.*, at 697.

As the Court of Appeals for the Seventh Circuit has explained, "*Strickland* calls for inquiry into degrees; it is a balancing rather than a bright-line approach . . .". *Holman v. Gilmore*, 126 F.3d 876, 882 (7th Cir. 1997). Adding to this the deference required by § 2254(d)(1) means that "only a clear error in applying *Strickland*'s standard would support a writ of habeas corpus." *Id.*

The Wisconsin Supreme Court did not commit clear error when it found that Manuel's ineffective assistance claim failed under the prejudice prong of *Strickland*. The court concluded that the impeachment evidence would have had only a marginal impact on Stamps's already-damaged credibility and on the outcome of the trial, given the weight of the other evidence against Manuel. These were conclusions that fair-minded jurists could draw from the evidence. Manuel is not entitled to habeas relief on this claim.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the petition of Antwan Manuel for a writ of habeas corpus be DENIED.

Entered this 7th day of April, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

April 7, 2006

Antwan B. Manuel
Reg. No. 406832
P.O. Box 19033
Green Bay, WI 54307-9033

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Re: ___ Manuel v. Pollard
Case No. 05-C-701-C

Dear Mr. Manuel and Attorney Weber:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before April 24, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by April 24, 2006, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

cc: Honorable Barbara B. Crabb, District Judge