

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

HARRY L. GANT,

Petitioner,

v.

JEFFREY ENDICOTT, Warden
Redgranite Correctional Institution,

Respondent.

REPORT AND
RECOMMENDATION

04-C-953-C

REPORT

Before the court is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Petitioner Harry Gant, currently an inmate at the Redgranite Correctional Institution,¹ seeks federal relief from an October 24, 2000 judgment of the Dane County Circuit Court finding him guilty of armed robbery, operating a motor vehicle without consent of the owner while possessing a dangerous weapon, first degree reckless injury and false imprisonment. I am recommending that the court deny the petition. Gant defaulted all but two of his claims by failing fairly to present them in state court, and the state courts' adjudication of his remaining claims was neither unreasonable nor contrary to federal law.

I draw the following facts from the court of appeals' opinion in *State v. Gant*, 2004 WI App 109, 273 Wis. 2d 784, 680 N.W. 2d 832 (Ct. App. 2004) (unpublished opinion) and the record:

¹ Gant's transfer to Redgranite makes its warden, Jeffrey Endicott, the proper respondent.

FACTS

On September 18, 1999, Harry L. Gant first met 77-year-old Loren Enerson near the public library in downtown Madison. They began talking and Gant eventually went with Enerson to Enerson's home, which was located in a rural area outside of Madison. At trial, Enerson testified that while he was showing Gant around his property, Gant struck him with something that knocked him out. When Enerson came to, Gant was sitting on his legs and beating him with a brick and a metal rod. Gant trussed Enerson's hands and legs with a rope and Enerson's belt then gagged Enerson with something that he tied around Enerson's neck. Gant took Enerson's keys and his wallet containing about \$350 and drove away in Enerson's truck. Enerson managed to free himself and stagger to the highway and flag down help. He was taken to the emergency room where he required at least 75 stitches to repair deep lacerations to his head, ear and face.

About 12 days later, Madison police learned that Gant had been caught in Indianapolis driving Enerson's truck. Detectives Bill Searls and Dale Anderson drove to Indianapolis where they interviewed Gant. At trial, Searls testified that during the interview, Gant admitted being on Enerson's property and striking Enerson with a brick. According to Searls, Gant said that while out near a shed on Enerson's property, Enerson brushed against Gant's buttocks, causing Gant to "overreact" and strike Enerson with a brick. Gant told Searls that Enerson grabbed a brick and swung at him but missed; Gant then hit Enerson several more times with a brick and a metal rod lying nearby. Gant explained that

he tied Enerson up so he couldn't call the police, and he gagged Enerson because he was yelling. Gant asked the detectives whether Enerson had survived. Gant claimed that Enerson never lost consciousness during the struggle. Gant told Searls that he had not tried to kill Enerson and that he was very sorry for beating him.

At trial Gant admitted beating Enerson, but testified that he had done so in self defense. According to Gant, he had been doing some work for Enerson on the property when he suddenly felt something touch him on the buttocks. Gant turned around to find Enerson brandishing a knife. Gant struck Enerson with a brick and struggled to disarm him. Gant eventually overpowered Enerson, tied him up and left in his truck. Gant denied telling Searls that he had overreacted or that he was sorry for robbing and beating him.

The jury acquitted Gant of attempted first-degree homicide but convicted him of armed robbery, operating a motor vehicle without the owner's consent by use or threat of force, first-degree reckless injury with a weapon and false imprisonment.

Apparently, Gant initiated a direct appeal that he later withdrew. Sometime thereafter, he filed a collateral post-conviction motion pursuant to Wis. Stat. § 974.06 in which he raised various challenges to his conviction and sentence and requested an evidentiary hearing on his claims of ineffective assistance of counsel. The trial court denied the motion without a hearing.

Gant appealed from the denial of his post-conviction hearing. On appeal, he alleged that his trial lawyer was ineffective because he: 1) failed to raise the issue of Gant's

competency; 2) failed to investigate the victim's psychiatric background and failed to seek *in camera* review of his mental health records; 3) failed to object to the prosecutor's improper comments during closing argument; 4) failed to conduct a proper pretrial investigation that would have discovered information with which counsel could have cross-examined Detective Searls; and 5) failed to call Detective Anderson as a witness to impeach Detective Searls. In addition, Gant alleged that the evidence was insufficient to support his conviction for operating a motor vehicle without the owner's consent while armed because there was no evidence that Gant still had the weapon—a brick—at the time he drove off with Enerson's car. The court of appeals rejected Gant's arguments and affirmed the trial court's denial of his postconviction motion.

Gant filed a petition for review in the Wisconsin Supreme Court raising the following claims: 1) trial counsel was ineffective for failing to ask the court to allow Gant to testify that the victim had told him about his past history of violence before the altercation with Gant; 2) trial counsel was ineffective for failing to file a motion for *in camera* review of the victim's mental health records; 3) one of the jury instructions misstated the law, and trial counsel was ineffective for failing to object; and, 4) trial counsel was ineffective for failing to object to the prosecutor's improper statements during closing argument. The supreme court denied the petition for review.

Gant filed the instant habeas petition on December 16, 2004. In an order to show cause entered January 3, 2005, this court construed the petition as raising six main claims

with several subparts, as set forth on page 2 of that order. In light of my conclusion that Gant has procedurally defaulted most of the claims, I have not repeated them here, but incorporate them by reference only.

ANALYSIS

I. Procedural Default: Fair Presentment

The state contends that Gant procedurally defaulted most of his claims because he did not fairly present them to the state courts. Before seeking a writ of habeas corpus in federal court, a petitioner first must exhaust the remedies available to him in state court. 28 U.S.C. § 2254(b)(1)(A). “Exhaustion serves an interest in federal-state comity by giving state courts the first opportunity to address and correct potential violations of a prisoner’s federal rights.” *Perruquet v. Briley*, 390 F.3d 505, 513 (7th Cir. 2004) (citing *Picard v. Connor*, 404 U.S. 270, 275 (1971)). To exhaust state court remedies, a prisoner “must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). In Wisconsin, a “complete round” of the state’s appellate review process includes the filing of a petition for review in the Wisconsin Supreme Court. *Moore v. Casperson*, 345 F.3d 474, 485-486 (7th Cir. 2003).

Moreover, for that opportunity to be meaningful, the petitioner must “fairly present” to each appropriate state court his constitutional claims before seeking relief in federal court. *Baldwin v. Reese*, 541 U.S. 27, 30 (2004). To satisfy this requirement, a petitioner must alert

the state court that he is relying on a provision of the federal constitution for relief. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). A petitioner “fairly presents” a federal claim to the state courts when he articulates both the operative facts and the controlling legal principles on which his claim is based. *Sweeney v. Carter*, 361 F.3d 327, 332 (7th Cir. 2004). Although he need not “cite book and verse on the federal constitution,” *Picard*, 404 U.S. at 278, he must in some manner alert the state courts to the federal underpinnings of his claim. *Duncan*, 513 U.S. at 365-66.

Where, as in this case, the petitioner already has pursued his state-court remedies and there is no longer any state corrective process available to him, failure to satisfy the fair presentment requirement constitutes a procedural default that precludes a federal court from reaching the merits of a petitioner’s claim. *Perruquet*, 390 F.3d at 514. Moreover, because a prisoner who fails to present his federal claim fairly to a state court deprives the state court of the opportunity to consider the claim at all, a federal court will find the claim procedurally defaulted even if the last state court to review petitioner’s claims did not clearly and expressly indicate that its decision rests on a procedural default. *See Coleman v. Thompson*, 501 U.S. 722, 735 & n.1 (1991); *Harris v. Reed*, 489 U.S. 255, 270 (1989) (“[I]t is simply impossible to require a state court to be explicit in its reliance on a procedural default where a claim raised on federal habeas has never been presented to the state courts at all”) (internal quotation and citation omitted) (O’Connor, J., concurring).

For the most part, Gant appears to concede that he did not present all of his claims to the state courts. He argues that he should be found to have fairly presented at least the claims that the Wisconsin Court of Appeals addressed in its decision. However, under *Boerckel*, the fair presentment requirement is not satisfied unless the petitioner fairly presents his constitutional claims at *all levels* of the state's appellate review process. This means that Wisconsin prisoners must present all of their constitutional claims to the Wisconsin Court of Appeals *and* to the Wisconsin Supreme Court.

A review of Gant's briefs in the court of appeals and his petition for review to the state supreme court shows that the only claims that he presented to both courts are his claims that his lawyer was ineffective for failing to object to the prosecutor's improper comments during closings and for failing to seek *in camera* review of Enerson's mental health records.

Gant insists that he also presented his confrontation clause claim in which he challenged Detective Searls' trial testimony about interview notes taken by Detective Anderson, who did not testify at trial. I agree that Gant fairly presented the substance of this claim to the court of appeals. *See* Pet.'s Brief in Chief, attached to Answer, dkt. #7, exh. E, at 45-46 and Letter to Cornelia Clark citing *Crawford v. Washington*, 541 U.S. 36 (2004), as supplemental authority, March 19, 2004, attached to Pet.'s Response to Answer, dkt. #9. However, Gant did not clearly present this claim in his petition for review to the state supreme court. In his petition for review, Gant mentioned Detective Anderson only once,

in a passing reference supporting his claim that the prosecutor improperly vouched for state witnesses. Pet. for Review, dkt. #7, exh. I., at 23. This was not enough fairly to apprise the supreme court that Gant wished to present a confrontation clause claim.

Gant asserts that he provided the state supreme court with the same supplemental authority memorandum based upon *Crawford v. Washington* that he submitted to the court of appeals, and argues that this satisfies the fair presentment requirement. However, the disbursement requests and mail receipts that Gant has submitted fail clearly to prove his assertion that he provided that document to the supreme court or that that court accepted it as an amendment to his petition for review. Moreover, it would have made little sense for Gant to provide the supreme court with “supplemental authority” for a claim that he did not see fit to mention in his original petition for review. Absent a showing that Gant amended his petition for review to include his confrontation clause claim, I must conclude that he did not fairly present that claim to the state supreme court.

Accordingly, with the exception of his two claims of ineffective assistance of counsel, Gant has procedurally defaulted his claims. This conclusion bars this court from granting Gant relief on those claims unless he demonstrates cause for the default and prejudice resulting therefrom, *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977), or, alternatively, convinces the court that a miscarriage of justice would result if his claim were not entertained on the merits. *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986).

Gant has not attempted to show cause and prejudice but he has invoked the miscarriage-of-justice exception. Under this standard, Gant must show that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995). This means that Gant must persuade the court that, in light of *all* the evidence—including evidence allegedly illegally admitted, wrongly excluded, and evidence not available until after trial—that it is more likely than not that “no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Id.* at 327-329. To meet this high burden of persuasion, “a prisoner must have documentary, biological (DNA), or other powerful evidence.” *Hayes v. Battaglia*, 403 F.3d 935, 938 (7th Cir. 2005).

Gant argues that he is innocent because Enerson was the only witness to the crime and he could not recall accurately all of the details of the altercation with Gant. I have read Enerson’s testimony and do not find that it contains any glaring holes or inconsistencies to support Gant’s claim that it was inherently incredible. Moreover, in addition to Enerson’s testimony, the state introduced Gant’s confession that he struck Enerson several times with hard objects, tied him up, stole his wallet and keys and drove away in his truck. Even if the jury might have believed Gant’s suggestion that Enerson made an unwelcome sexual advance, it had at least four evidentiary bases available that would allow it to reject Gant’s self-defense claim: (1) The savagery of the beating that Gant administered in response to the alleged advance; (2) Gant left Enerson trussed up, gagged and perhaps mortally wounded; (3) Gant

stole Enerson's truck and wallet; and (4) Gant admitted to the detectives that he had overreacted. Gant has not presented any new evidence, let alone any evidence so powerful as to demonstrate his actual innocence. Accordingly, this court may not review Gant's defaulted claims.

II. Ineffective Assistance of Counsel: Merits

Gant contends that his lawyer was ineffective for failing to seek *in camera* review of Enerson's mental health records, and for failing to object to improper comments made by the prosecutor during closing argument. This court's review of these claims is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lambert v. McBride*, 365 F.3d 557, 561 (7th Cir. 2004). Under the AEDPA, if a state court adjudicated a constitutional claim on the merits, then a federal court may grant habeas relief only if the state court decision was contrary to, or involved an unreasonable application of Supreme Court precedent, or if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state proceeding. 28 U.S.C. § 2254(d)(1), (2); *Early v. Packer*, 537 U.S. 3, 7-8 (2003); *Lambert*, 365 F.3d at 561.

With respect to his claim that his trial lawyer was ineffective for failing to file a motion for *in camera* production of Enerson's mental health records, Gant alleges that his lawyer was aware that Enerson twice had been admitted to mental hospital and had received electroshock therapy but failed to develop this impeaching evidence. A defendant's due

process right to disclosure of exculpatory evidence possessed by the government might require the government to produce confidential information if the defendant can establish a basis for his claim that the confidential record contains material evidence. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58 & n. 15 (1987). If the defendant makes this preliminary showing, then the state must submit the records *in camera* so the court can determine whether they actually are material to the defense. *Id.* at 59-61.

Wisconsin courts have ruled that *Ritchie* applies even when the information sought by the defense is protected by statute and is not in the state's possession, for example, when the defense seeks the victim's confidential health records. *State v. Shiffra*, 175 Wis. 2d 600, 607, 499 N.W. 2d 719 (Ct. App. 1993); *State v. S.H.*, 159 Wis.2d 730, 736, 465 N.W.2d 238, 240-241 (Ct. App.1990); *In re K.K.C.*, 143 Wis.2d 508, 511, 422 N.W.2d 142, 144 (Ct. App. 1988). To make the preliminary showing of materiality triggering this *in camera* review (referred to in Wisconsin as a *Shiffra* motion), a Wisconsin defendant must demonstrate a "reasonable likelihood" that the records will be necessary to a determination of guilt or innocence. *State v. Green*, 253 Wis. 2d 356, 379, 646 N.W. 2d 298 (2002).

Applying *Strickland v. Washington*, 466 U.S. 668 (1984), the Wisconsin Court of Appeals held that Gant could prevail on his *Shiffra* claim against his attorney if he demonstrated that: 1) Counsel's performance on this point was deficient, namely that under the circumstances it was unreasonable under prevailing professional norms; and, 2) Gant was prejudiced by this deficient performance. As the Seventh Circuit has explained,

“*Strickland* calls for inquiry into degrees; it is a balancing rather than a bright-line approach . . . This means that only a clear error in applying *Strickland*'s standard would support a writ of habeas corpus.” *Holman v. Gilmore*, 126 F.3d 876, 882 (7th Cir. 1997). This is because “*Strickland* builds in an element of deference to counsel's choices in conducting the litigation; § 2254(d)(1) adds a layer of respect for a state court's application of the legal standard.” *Id.* at 881.

Applying *Strickland*, the state appellate court agreed with the trial court that Gant had failed to allege facts showing that his trial lawyer was ineffective for failing to file a motion for *in camera* review of Enerson’s mental health records. Quoting verbatim from the trial court’s order denying Gant’s motion, the court of appeals reasoned:

Gant's postconviction allegations on this issue are insufficient. There is nothing in Gant's motion that connects electroshock therapy treatment or mental health treatment with the lack of ability to perceive and relate facts truthfully, particularly in light of the fact that the medical records indicated that the treatment was conducted "a number of years" prior to the underlying incident. Gant includes no specific factual allegations describing what kind of mental health issues Enerson might have suffered from that would have interfered with or would have alerted counsel regarding Enerson's ability to testify truthfully or accurately. Receiving mental health counseling or treatment in and of itself does not constitute a sufficient showing of relevance or necessity for purposes of making a [motion for an *in camera* review of a victim's medical records]. Finally, Enerson testified and was cross-examined at trial and no testimony was elicited that suggested that he had

trouble perceiving reality or was unable to relate past events accurately thus alerting counsel of the need to file a [motion for an *in camera* review of Enerson's medical records] to pursue a challenge to Enerson's credibility on that basis. Therefore, this court concludes that Gant's allegations of ineffective assistance of counsel on this issue are insufficient to warrant [an evidentiary] hearing.

State v. Gant, 2004 WI App 109 at ¶ 6.

The court of appeals also rejected Gant's argument that evidence of Enerson's psychiatric history would have bolstered Gant's theory of self-defense because it would have showed that Enerson had a history of violent actions. The court explained that information learned about Enerson *after* the attack was irrelevant to Gant's defense insofar as a successful self-defense claim required Gant "to show that he was aware of Enerson's propensity to violence *prior* to the attack, thus provoking in Gant fear that Enerson was about to hurt him." *Id.* at ¶ 8 (citation omitted). The court pointed out that Gant did not meet Enerson until the day of the attack.

This was a reasonable application of *Strickland*. As the appellate court explained, the evidence was insufficient to warrant even filing a *Shiffra* motion, and in any event, Gant was not prejudiced by counsel's omission. Enerson's mental health records were not necessary to prove that Enerson had fabricated a nonexistent attack because Gant acknowledged that he had attacked Enerson. Gant's defense was affirmative: Enerson had provoked the attack by making a sexual advance while holding a knife. As the court of appeals observed, evidence of Enerson's past psychiatric history was irrelevant to Gant's theory because Gant was

unaware of it at the time. In short, Enerson's alleged psychiatric problems in the past were not material to Gant's defense. The court of appeals did not commit clear error when it rejected Gant's ineffective assistance of counsel claim based on counsel's failure to pursue a *Shiffra* motion.

Next, it was not clear error for the court to reject Gant's claim that counsel was ineffective for failing to objecting to prosecutorial comments during closing argument. I have read the parties' closing arguments and I agree with the court of appeals that the prosecutor's comments were not improper. The court of appeals focused on Gant's objection to the prosecutor's statement that in order for the jury to acquit Gant, it would have to find that Searls was lying and that Gant was telling the truth. None of the other remarks to which Gant objects at pages A-18 and A-19 of the petition rise to the level of improper argument. Indeed, many of Gant's complaints are nothing more than Gant's mischaracterization of the record. For example, the prosecutor never told the jury to convict Gant because he had stayed in a homeless shelter and was addicted to crack cocaine.

Apart from this, it was not improper for the prosecutor to argue the comparative reliability of the various witnesses. *See United States v. Sandoval*, 347 F.3d 627, 632 (7th Cir.2003) (prosecutor is entitled to ask jury to weigh relative credibility of witnesses); *United States v. Catalfo*, 64 F.3d 1070, 1080 (7th Cir.1995) (prosecutor permitted to argue that jury should believe one witness over another). A prosecutor may suggest which facts the jury should find so long as her suggestion is based on the record. *See United States v. Morgan*, 113

F.3d 85, 89-90 (7th Cir.1997) (prosecutor's characterization of state witness as "an honest citizen" was supported by the evidence and therefore permissible). A prosecutor may comment on the defendant's credibility and may even call the defendant a "liar," so long as the characterization "reflects reasonable inferences from the evidence adduced at trial rather than personal opinion." *United States v. Goodapple*, 958 F.2d 1402, 1409-10 (7th Cir. 1992). A prosecutor may comment on what the evidence shows and may argue that the defendant is guilty. See *United States v. Auerbach*, 913 F.2d 407, 418 (7th Cir.1990) (finding proper in context prosecutor's comments "there is no reasonable doubt in this case" and that defendant "[did] what he was charged with"). Here, the prosecutor's call for the jury to reject Gant's story was based upon inferences reasonably drawn from the evidence adduced at trial. Therefore, her argument was proper.

It follows from this that the court of appeals correctly concluded that Gant's trial lawyer was not ineffective for failing to object to the prosecutor's comments. However, even if this court were to find that some of the prosecutor's remarks were improper and that Gant's trial lawyer performed unreasonably under prevailing professional norms by failing to object, Gant still would not prevail. None of the prosecutor's comments implicated any of Gant's specific rights and the court instructed the jury that the closing arguments of the attorneys were not evidence. Most important, the weight of the evidence against Gant was substantial. In light of these factors, Gant cannot show that the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

Darden v. Wainwright, 477 U.S. 168, 181 (1986) (citations and quotation marks omitted).

In other words, counsel's failure to object did not make a difference to the outcome.

In sum, the state court of appeals reasonably applied *Strickland* to deny relief on Gant's claims of ineffective assistance of counsel. As a result, Gant is not entitled to federal habeas relief on these claims.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny petitioner Harry Gant's petition for a writ of habeas corpus.

Entered this 20th day of May, 2005.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

May 20, 2005

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Re: ___ Gant v. Endicott
Case No. 04-C-953-C

Dear Counsel:

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 June 6, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by June 6, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

cc: Honorable Barbara B. Crabb, District Judge