NO. COA19-1055 **TWENTY-SEVEN-A DISTRICT**

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	**From Gaston**
	)	
MARK BRADLEY CARVER	)	

****

BRIEF FOR THE STATE
APPELLANT

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ISSUE PRESENTED

I. WHETHER THE TRIAL COURT ERRED BY AWARDING A NEW TRIAL ON THE BASIS OF NEWLY DISCOVERED EVIDENCE AND INEFFECTIVE ASSISTANCE OF COUNSEL.

STATEMENT OF THE CASE

On 15 December 2008, Defendant Mark Bradley Carver ("Defendant") was indicted for first-degree murder. (R p. 4)

The matter came on for trial by jury at 14 March 2011 Criminal Session of Superior Court, Gaston County, before the Honorable Timothy S. Kincaid, Judge Presiding. (03/11 T p. 1) Defendant was convicted by a jury of first-degree murder. (R p. 7) He was sentenced to life without parole. (R p. 10)

Defendant appealed. By opinion issued 5 June 2012, a majority of this Court found no error at trial. State v. Carver, 221 N.C. App. 120, 126, 725 S.E.2d 902, 906 (2012), aff'd per curiam, 366 N.C. 372, 736 S.E.2d 172 (2013).

On 8 December 2016, Defendant filed with the trial court a motion for appropriate relief (MAR). (R p. 22) The matter came on for an evidentiary hearing at the 2 April 2019 Criminal Session of Superior Court, Gaston County, before the Honorable Christopher W. Bragg, Judge Presiding. (T p. 1) By order filed 12 June 2019, the trial court granted the MAR and awarded Defendant a new trial. (R p. 165) The State filed notice of appeal. (R p. 180)

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The State may appeal from a superior court's order granting a new trial on the basis of newly discovered evidence. N.C.G.S. § 15A-1445(a)(2) (2017); State v. Peterson, 228 N.C. App. 339, 343, 744 S.E.2d 153, 157, disc. review

denied, 367 N.C. 284, 752 S.E.2d 479 (2013).

STATEMENT OF THE FACTS

I. Irina Yarmolenko was murdered on 5 May 2008.

In the spring of 2008, Irina Yarmolenko was a student at UNC Charlotte, where she worked at the University Times newspaper as a photographer. (03/11 T p. 72) During the last week of April 2008, she spoke with her editor about photographing the Olympic trials being held at the Whitewater Center. Her editor gave her directions on how to get there. (03/11 T pp. 74-75)

Around 12:30 p.m. on 5 May 2008, two jet skiers on the Catawba river cruising north of the I-85 bridge saw a blue car on the embankment almost in the water. (03/11 T pp. 35, 49) They found Yarmolenko's body beside the car. (03/11 T pp. 38, 116) She had a rope around her neck. (03/11 T p. 41) Yarmolenko's body was located within a stone's throw of an unoccupied fishing spot and across the river from the Whitewater Center. (03/11 T pp. 40-41)

Detective William Terry with the Mount Holly Police Department was dispatched to the scene. (03/11 T p. 112) He made his way on foot via a dirt path to the river. (03/11 T p. 113) Emerging from the woods, Detective Terry saw a Jeep Wrangler and Corporal Ellison talking with John Beatty. Behind the Jeep, Defendant was loading fishing rods into an S10 Blazer. The isolated fishing spot was behind the YMCA, surrounded by woods. (03/11 T p. 114)

A worn path led from the fishing spot to the top of the embankment where Yarmolenko's body was found. (03/11 T pp. 103-04, 142) Yarmolenko's body was lying beside the car, near the open driver's side door. She was lying on her back with her feet toward the river. Her clothes and her hair were wet. (03/11 T p. 118) Around her neck were a blue ribbon, a hoodie's drawstring, and a blue bungee cord. (03/11 T p. 128) Her hand was grasping the brush. (03/11 T pp. 118, 129) The cause of death was determined to be asphyxia caused by ligature strangulation, a homicide. (03/11 T pp. 321-22)

The car was a blue four door Saturn. (03/11 T p. 122) Tire tracks led from the dirt road, through brush and grass, to the car at the bottom of the hill. The car was resting on a stump at the river's edge. (03/11 T pp. 94-96) Police had the car towed up the embankment, sealed with tape, and transported to a secure garage at the Belmont Police Department. (03/11 T pp. 97-98, 160)

The backseat of the car contained pillows. (03/11 T p. 123) Under the pillows, there was a white bag with flowers on it and blue ribbon straps, one of which was missing. (03/11 T pp. 128, 132) Inside the trunk, police found a bike rack, a tarp, a 35 mm Canon camera, and a bungee cord. (03/11 T pp. 134, 139) The blue ribbon strap and bungee cord matched those found wrapped around Yarmolenko's neck. (03/11 T pp. 128, 134) The exposure-counter indicated two pictures were taken, but there was no film in the camera. (03/11 T pp. 134-35)

On 10 July 2008, after the car was towed, Detective Workman processed the car for DNA. (03/11 T pp. 161, 229-30) He collected forty-four swabs from twenty-two different locations. (03/11 T pp. 231-32) The predominant profile of a swabbing taken from the pillar above the driver's side rear door (item 34-2) matched Defendant's DNA profile. (03/11 T pp. 271-72) The predominant profile of swabbings taken from the front passenger door glass (interior side) and arm rest matched Neal Cassada's DNA profile. (03/11 T pp. 275, 278)

On 15 May 2008, Detective Lloyd Addis spoke with Defendant at his home. (03/11 T p. 99) Defendant said on 5 May 2008 he was fishing with his cousin Neal Cassada near where Yarmolenko's body was found. (03/11 T p. 100) He said he got to the river around 11:30 am. (03/11 T p. 102) Defendant said he saw a man and a woman on jet skis and a black man fishing. (03/11 T p. 103)

On 10 and 12 December 2008, Detective Terry interviewed Defendant. (03/11 T p. 184) Defendant said that when Yarmolenko's body was found he was at the fishing spot where he was seen by Detective Terry. (03/11 T p. 191) He said he heard a scraping sound, and the jet skiers talking. (03/11 T p. 192) Defendant denied seeing Yarmolenko. (03/11 T p. 194) At the same time, he described her as "a little thing or a little girl" who only came up so high (indicating). (03/11 T p. 197) Defendant denied touching her car. (03/11 T p. 194) He could not explain why his DNA was found on the car. (03/11 T p. 196)

II. Defendant was convicted of murder on 21 March 2011.

On 15 December 2008, Defendant was indicted for first degree murder. (R p. 4) The matter came on for trial by jury in March 2011. (03/11 T p. 1) The State's evidence at trial is summarized above. Defendant offered no evidence. (03/11 T p. 337) Defendant was convicted by a jury of first degree murder. (R p. 7) He was sentenced to life without parole. (R p. 10)

Defendant appealed, arguing among other things the trial court erred in denying his motion to dismiss. Over Judge Hunter's dissent, this Court held the evidence was sufficient. Carver, 221 N.C. App. at 126, 725 S.E.2d at 906.

III. Defendant filed an MAR on 8 December 2016.

On 8 December 2016, Defendant filed with the trial court a motion for appropriate relief (MAR) alleging: (1) he received ineffective assistance of counsel (IAC), and (2) he was actually innocent and entitled to relief under the Eighth Amendment. (R p. 22) On 26 July 2018, Defendant filed an amendment to his MAR adding additional claims: (3) new evidence was discovered inculpating another person, (4) the State misrepresented evidence, violating his due process rights, and (5) the State withheld Brady material. (R p. 100) On 8 April 2019, Defendant filed a second amendment to his MAR adding an additional claim: (6) the State knowingly presented false testimony. (R p. 156)

The MAR came on for an evidentiary hearing in April 2019. (T p. 1)

Dr. Vikram Shukla was Defendant's psychiatrist from 2005 until 2011. (T pp. 45, 99) Dr. Shukla testified Defendant complained frequently about pain in his arms and hands. (T pp. 49-50, 52, 61) Dr. Shukla diagnosed Defendant with schizophrenia, entailing paranoid delusions and misperceptions of reality. (T pp. 74-75, 79) But Dr. Shukla testified that Defendant's cognitive capacity was impaired only when he treated him on the seventh floor.[1] (T pp. 69, 91-92)

Ashley McKinney is a psychological associate at Mentor Behavioral Healthcare in Boone. (T p. 112) On 4 November 2016, McKinney conducted an evaluation of Defendant. (T p. 115) McKinney opined that Defendant's IQ was 61, in the extremely low range. (T p. 124) Records from the Department of Corrections indicated Defendant had an IQ of 68 or 73. (T p. 127) McKinney acknowledged that Defendant performed above his putative score. (T p. 172)

Defendant's daughters, Emily and Mary Beth, both testified Defendant is not a good driver. (T pp. 202, 237) Emily said Defendant's memory was not good, and he was not a good liar. (T pp. 205-06) Mary Beth said she and her sister would carry groceries as Defendant struggled from surgery in his arms. (T p. 238) Both testified trial counsel never interviewed them. (T pp. 209, 240)

Defendant's brothers, Frank and Kyle, testified they hunted and fished

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[1] In Gaston County, it is well-known that "the seventh floor" refers to the mental ward at the hospital. (T p. 1059)

with Defendant. (T pp. 268-69, 333) Kyle said Defendant had problems with his hands, with lifting and holding things, and he had carpal tunnel syndrome. (T p. 329) Frank said Defendant would not pick up a forty-pound bag of corn and he had no strength to load a crossbow. (T pp. 269-70, 285) Kyle noted that Defendant had hallucinations so the doctor reduced his medication. (T p. 336) Both brothers testified trial counsel never interviewed them. (T pp. 271, 338)

Defendant's sister-in-law Robin Carver testified Defendant had surgery on his hands and shoulders for carpal tunnel syndrome and he was unable to return to work. (T p. 309) She said he had trouble with everyday tasks, and she helped him fill out forms, as for Medicare, disability, hunting and fishing licenses. (T p. 310) She said Defendant's memory was not good with details. (T p. 311) Robin Carver said trial counsel never interviewed her. (T p. 317)

Maher Noureddine runs a consulting company that evaluates forensic DNA evidence. (T pp. 793-94) He testified that the Scientific Working Group on DNA Analysis Methods ("SWGDAM") issued guidelines in January 2010 for interpreting DNA evidence. (T p. 810-11) The SWGDAM report recommended a threshold for interpretation known as the stochastic threshold. (T pp. 812-13)

An electropherogram is a chart that displays DNA data, and the height of the peaks corresponds to the amount of DNA present. (T p. 815) The analytic threshold defines the height of a peak indicating real data, i.e., an actual allele

contribution from a person. (T pp. 816-17) The stochastic threshold, generally higher, defines the height of the peak at which one can be reasonably confident that one has all the DNA representation at a particular marker. (T p. 814-15) Laboratories set their own stochastic thresholds based on validation studies specific to the laboratory environment and to the kit being used. (T pp. 815-16) The state lab established a stochastic threshold in early 2013. (T p. 821)

Noureddine reviewed the SBI's lab reports in Defendant's case. (T p. 803) He acknowledged that the state lab was following protocols in place in 2008. (T p. 827) But he disagreed with the conclusion that the predominant profile of a swabbing taken from the pillar above the driver's side rear door matched Defendant's DNA profile. (T p. 830) Noureddine opined the sample yielded data that was inconclusive, inadequate for matching purposes. (T pp. 832, 849)

Brant Ratchford represented Defendant at trial. (T p. 1081) Ratchford did not obtain mental health records. (T p. 1097) He believed Defendant was competent. (T pp. 1087, 1193) Funds were approved for a psychological evaluation but Ratchford decided against it. After Ratchford continued to meet with Defendant, he had no question as to Defendant's competency. (T p. 1092)

Ratchford knew Defendant had had surgery for his wrists and arms. (T p. 1096) He knew Defendant was receiving disability payments. Ratchford did not believe Defendant was disabled. (T p. 1103) He knew Defendant told

people he was disabled. But Ratchford observed Defendant on several visits to the crime scene. (T pp. 1096, 1202-04) He knew Defendant could drive a four-wheeler, drive a car, climb a deer stand. (T p. 1096) Ratchford did not obtain medical records; he said they would not be helpful at trial. (T pp. 1097, 1101)

Ratchford consulted with a DNA expert, Ronald Ostrowski. (T p. 1106) Ostrowski was recommended by IDS. (T pp. 1111, 1238) Ratchford relied on Ostrowski's expertise. (T pp. 1145, 1240) Ostrowski said the SBI's results were "good science." He could find no problem with the findings of the State's expert. (T pp. 1112, 1249) Ostrowski offered questions for cross-examining the State's expert and he attended the trial. (T pp. 1110-11) But Ostrowski advised Ratchford not to call him as a witness. (T pp. 1093, 1256) Ostrowski did not prepare a report as Ratchford elected not to call him as a witness. (T p. 1110)

Defendant was also represented by David Phillips, who first represented Neil Cassada but joined Defendant's team when Cassada died before trial. (T pp. 1019, 1083) Phillips was aware Cassada had a heart problem, and had some heart attacks. He did not obtain Cassada's medical records. (T p. 1029) Ratchford and Phillips both talked to Defendant's family. (T pp. 1072, 1288)

Defendant's trial counsel made a decision not to present evidence for the defense. (T pp. 1093, 1267) Regarding the video of Defendant's interrogation, Ratchford did not want to reinforce the fact Defendant identified the victim's

height and weight. (T pp. 1058, 1228) Recognizing the video opened a door, Phillips did not want the jury to know Defendant was a schizophrenic and he had fought with his son for forty-five minutes with a stick. (T p. 1060) Neither wanted to assume any burden of showing – contrary to a rule of defense – that Defendant physically could not have killed the victim. (T pp. 1070-71, 1264-66)

In rebuttal, the State presented testimony from Mackenzie DeHaan, a forensic test supervisor at the state crime laboratory. (T p. 1449) She testified that Karen Winningham performed the DNA testing in Defendant's case, and her results were peer reviewed by Kristin Hughes. (T pp. 1456, 1458) DeHaan agreed with Winningham and Hughes as to the validity of the test results. (T pp. 1474-75) DeHaan disagreed with Noureddine's opinion. (T p. 1484) That science is advancing, she said, did not make prior tests invalid. (T p. 1493)

Pursuant to an evidentiary hearing and by order filed 12 June 2019, the trial court granted Defendant's MAR on the basis of ineffective assistance of counsel and newly discovered evidence. (R p. 175) It rejected Defendant's claims of actual innocence, Brady violations, and the alleged misrepresentation of evidence. (R p. 172) It found Defendant established ineffective assistance by showing counsel failed to investigate: his medical history, his intellectual abilities, and touch DNA. (R pp. 167-68) It also concluded Noureddine's report was newly discovered evidence entitling Defendant to a new trial. (R p. 174)

STANDARD OF REVIEW

When reviewing a ruling on an MAR, the appellate court must determine whether the findings of fact are supported by evidence, whether the findings support the conclusions of law, and whether the conclusions of law support the order entered. State v. Mbacke, 365 N.C. 403, 406, 721 S.E.2d 218, 220, cert. denied, 568 U.S. 864, 184 L. Ed. 2d 116 (2012). Findings regarding counsel's performance are reviewed in light of the information available to counsel at the time and not with the benefit of hindsight. State v. Frogge, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005). The determination that certain evidence constitutes newly discovered evidence is a conclusion of law subject to de novo review. State v. Rhodes, 366 N.C. 532, 536, 743 S.E.2d 37, 39 (2013) (de novo); see also id. at 537 n.1, 743 S.E.2d at 40 n.1 (finding was conclusion of law.).

ARGUMENT

I. THE TRIAL COURT ERRED BY GRANTING THE MAR.

A defendant cannot establish IAC without showing prejudice. Evidence created after a defendant's trial does not constitute newly discovered evidence. Here, the trial court found ineffective assistance absent a showing of prejudice, and it found newly discovered evidence in a report that was not written until five years after Defendant's trial. The trial court erred in granting Defendant's MAR, and the order awarding a new trial should be reversed.

A. The Trial Court Acted Under a Misapprehension of Law.

1. A finding of IAC requires a determination of prejudice.

To establish ineffective assistance of counsel, a defendant must show: (1) counsel's performance was deficient, and (2) resulting prejudice to the defense. Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984); accord State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). Deficient performance may be established by showing counsel's representation fell below an objective standard of reasonableness. Wiggins v. Smith, 539 U.S. 510, 521, 156 L. Ed. 2d 471, 484 (2003). To establish prejudice, a defendant must show that but for counsel's errors the result of the proceeding would have been different. Id. at 534, 156 L. Ed. 2d at 493; State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286, cert. denied, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

Prejudice may be dispositive. If it is easier to dispose of an IAC claim due to lack of prejudice, the trial court need not consider deficient performance. Strickland, 466 U.S. at 697, 80 L. Ed. 2d at 699; State v. Phillips, 365 N.C. 103, 122, 711 S.E.2d 122, 138 (2011), cert. denied, 565 U.S. 1204, 182 L. Ed. 2d 176. In any case, absent a showing of prejudice, a defendant's IAC claims fail. State v. Livengood, 206 N.C. App. 746, 751, 698 S.E.2d 496, 500, disc. review denied, 364 N.C. 609, 704 S.E.2d 276 (2010); State v. Adams, 156 N.C. App. 318, 325, 576 S.E.2d 377, 382, disc. review denied, 357 N.C. 166, 580 S.E.2d 698 (2003).

2. Evidence created since the trial is not newly discovered.

A defendant may by MAR raise the claim that evidence is available which: was unknown or unavailable at trial, could not with due diligence have been discovered or made available then, and has a direct and material bearing on his guilt or innocence. N.C.G.S. § 15A-1415(c) (2017). This statute codifies the rule developed by caselaw for granting a new trial for newly discovered evidence. State v. Rhodes, 366 N.C. 532, 536, 743 S.E.2d 37, 39 (2013).

"Newly discovered evidence is evidence which was in existence but not known to a party at the time of trial." State v. Nickerson, 320 N.C. 603, 609, 359 S.E.2d 760, 763 (1987). In order for a new trial to be granted on the ground of newly discovered evidence, it must appear that:

> (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial.

Rhodes, 366 N.C. at 536, 743 S.E.2d at 39. The defendant has the burden of proving the new evidence could not with due diligence have been discovered or made available at the time of trial. Id. at 537, 743 S.E.2d at 40.

3. The trial court here misapprehended the law.

"[W]here rulings are made under a misapprehension of the law, the orders . . . may be vacated and the case remanded for further proceedings, modified or reversed, as the rights of the parties and the applicable law may require." State v. Cornell, 281 N.C. 20, 30, 187 S.E.2d 768, 774 (1972).

In the present case, the trial court posited that counsel must fully and thoroughly investigate a case before deciding whether to offer evidence at trial. (R p. 166) It noted instances where counsel failed to conduct any investigation into relevant information, and determined counsel's failure to investigate was not reasonable. (R pp. 167-68, 172-74) The trial court concluded "[t]he defense has met its burden of proof and has established its [IAC] claim[.]" (R p. 174)

The trial court also recited the seven-factor test for newly discovered evidence. (R pp. 169-70) It noted that Noureddine's report addressed issues regarding DNA sample 34-2, and that he opined the sample was inadequate for comparison and should have been deemed inconclusive. (R pp. 170-71) The trial court determined Noureddine's report satisfied the seven-factor test for newly discovered evidence. It concluded that "[t]he defense has met its burden of proof and has established its newly discovered evidence claim[.]" (R p. 174)

The trial court erred in granting the MAR. With regard to the IAC claim, the trial court found Defendant satisfied the Strickland test absent a showing

of prejudice. Indeed, it made no findings or conclusions regarding prejudice. There is no indication in the order that the trial court understood it was necessary for Defendant to show that that, but for counsel's alleged errors, the result of the proceeding would have been different. See Wiggins, 539 U.S. at 534, 156 L. Ed. 2d at 493; Phillips, 365 N.C. at 122, 711 S.E.2d at 138. The trial court thus acted under a misapprehension of law in awarding a new trial based on ineffective assistance of counsel, and the order should be reversed.

With regard to the newly discovered evidence claim, the trial court found Noureddine's report – dated 20 November 2016 – is newly discovered evidence. Indeed, according to the trial court, Noureddine's "report (DE 54), testimony and opinions" satisfied the seven-factor test. (R p. 174) There is no indication in the order that the trial court understood that evidence not in existence at the time of trial does not constitute newly discovered evidence. See Nickerson, 320 N.C. at 609, 359 S.E.2d at 763; Rhodes, 366 N.C. at 536, 743 S.E.2d at 39. The trial court thus acted under a misapprehension of law in awarding a new trial based on newly discovered evidence, and the order should be reversed.

B. The Trial Court Erred by Finding Ineffective Assistance.

1. Counsel's performance is evaluated for reasonableness.

Strategic choices made after thorough investigation of law and facts are "virtually unchallengeable." Strickland, 466 U.S. at 690, 80 L. Ed. 2d at 695.

"Counsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." State v. Fletcher, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), cert. denied, 537 U.S. 846, 154 L. Ed. 2d 73 (2002). "[T]actical decisions – such as which witnesses to call, which motions to make, and how to conduct cross-examination – normally lie within the attorney's province." State v. Brown, 339 N.C. 426, 434, 451 S.E.2d 181, 187 (1994), cert. denied, 516 U.S. 825, 133 L. Ed. 2d 46 (1995).

"[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91, 80 L. Ed. 2d at 695. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. . . . [A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. at 691, 80 L. Ed. 2d at 695; accord State v. Todd, 369 N.C. 707, 711, 799 S.E.2d 834, 838 (2017).

In Frogge, the defendant was convicted of two counts of first-degree murder and sentenced to death. Id. at 230, 607 S.E.2d at 629. The defendant later filed an MAR alleging IAC in failing to investigate and offer evidence that

at the time of the murders the defendant was suffering from residual effects of a prior head injury. Id. at 234, 607 S.E.2d at 631. The trial court found that counsel knew of the defendant's head injury, but did not sufficiently investigate the potential mitigation evidence, and that the defendant was prejudiced by counsel's failure to present expert testimony. Id. at 239-40, 607 S.E.2d at 634. Upon review, our Supreme Court noted counsel had done some investigation and relied upon their expert's opinion. Id. at 241-42, 607 S.E.2d at 635. Citing out-of-state cases for the rule that counsel is not required to shop around for a more favorable expert opinion, our Supreme Court concluded that counsel's performance was not objectively unreasonable. Id. at 245, 607 S.E.2d at 637.

2. Defendant failed to show deficient performance.

In the present case, Defendant alleged in his MAR that he received ineffective assistance when counsel failed: to investigate his intellectual limitations (to challenge his competency), to present a DNA expert or adequately cross-examine the State's expert (to challenge the DNA evidence), to present the interrogation video (to challenge his admission to knowing the victim's height), or to obtain and present his medical records (to show he was physically incapable of committing the crime). (R pp. 40-46, 103-111)

At the hearing on the MAR, trial counsel described Defendant as intellectually competent. (T p. 1087) Ratchford had multiple discussions with

Defendant, he said, and he did not believe a psychological evaluation was necessary. Ratchford testified, "I had absolutely no question as to his competency." (T p. 1092) As for introducing the video-taped interrogation, Ratchford did not want to reinforce the fact that Defendant had identified the victim's height and weight. (T pp. 1058, 1228) Moreover, offering the video potentially opened the door to other, more prejudicial evidence. (T p. 1060)

Counsel was aware of Defendant's diagnosis of carpal tunnel syndrome, of his past surgery to his arms and hands, and that he claimed to be disabled. (T pp. 1029-30, 1096, 1103) But Ratchford also knew there was evidence that Defendant could drive a car, drive a four-wheeler, hunt and fish. This evidence belied Defendant's claims. (T p. 1096) Ratchford testified, "[f]rom what I saw, and from what I was able to observe, he was not disabled." (T p. 1103) Given the evidence to the contrary, counsel elected not to take on the burden of showing Defendant was unable to commit the crime. (T pp. 1070-71, 1264-66)

As for the DNA evidence, Ratchford relied on the expertise of Ostrowski, an expert recommended by IDS. (T pp. 1111, 1238-39) As Ratchford explained,

> [Ostrowski] walked me through what he was looking at while he was looking at it, the loci, electropherograms, what this meant, what that meant. It was not an in-depth discussion at all, and I do not consider myself an expert in DNA. That's why I got an expert and relied on him and his opinion in our discussions concerning the evidence.

(T p. 1240) Ratchford used Ostrowski's proposed cross-examination. (T pp. 1110-11) But, given his assessment of the State's evidence, Ostrowski advised Ratchford not to call him as a witness. (T p. 1256) Further, Ostrowski told counsel it was not necessary to meet with the State's DNA experts. (T p. 1157) Ratchford testified that IDS does not provide an endless supply of DNA experts to shop around until someone gives you an answer you want. (T p. 1258)

Defendant failed to show he received ineffective assistance of counsel. To be sure, counsel did not seek a psychological assessment and he did not obtain Defendant's medical records. But counsel explained during the hearing how their professional judgment supported these limitations on investigation.

Given his own observations, Ratchford could not in good faith raise an issue of Defendant's competency. (T p. 1092) Further, counsel made a strategic decision not to offer evidence of Defendant's alleged disability. (T pp. 1264-67) As Ratchford said, noting Judge Hunter's dissent, "the decision not to present evidence . . . was reasonable, absolutely reasonable, and justified." (T p. 1267)

As for the DNA evidence, trial counsel reasonably relied on the opinion and assistance of the expert recommended by IDS. Counsel was simply not required to shop around for a more favorable expert opinion. Frogge, 359 N.C. at 243, 607 S.E.2d at 636. Defendant consequently failed to show he received ineffective assistance of counsel, and his IAC claims should have been rejected.

3. The trial court erred by finding ineffective assistance.

The trial court found that counsel failed: to obtain any medical records or information as to Defendant's carpal and radial tunnel surgeries and other health related issues; to interview any family members or friends of Defendant who could describe and discuss his physical limitations; to obtain Cassada's medical records; or to interview any family members or friends of Cassada who could describe and discuss his physical limitations. (R p. 167)

The trial court also found that Defendant suffers from some level of intellectual disability. It found Defendant's intellectual disabilities were supported by the testimony of family members. The trial court declared that evidence of Defendant's intellectual disabilities would be relevant regarding statements he made during his interrogation. (R pp. 167-68)

The trial court also found that counsel failed adequately to investigate, educate themselves, and become familiar with DNA evidence. It found that counsel's case file contained little information about Ostrowski – no reports, no CV – and that counsel failed to meet with or discuss the testimony of the State's DNA experts. The trial court noted that, lacking further investigation, counsel could not challenge Ostrowski's opinions. (R pp. 168-69)

The trial court concluded that these failures to investigate were not reasonable, and that Defendant had established IAC. (R pp. 172-74)

The trial court erred by endorsing Defendant's IAC claim.

In the first place, a number of the findings are not supported by evidence. Counsel testified they were aware of Defendant's diagnosis for carpal tunnel syndrome, his surgeries, and his claim of disability. (T pp. 1029-30, 1096, 1103) This contradicts the finding that counsel failed to obtain any *information* regarding Defendant's surgeries or health related issues. (R p. 167) Further, counsel testified they talked to Defendant's family members. (T pp. 1072, 1288) To be sure, some of Defendant's family testified they were not interviewed. But this evidence does not support the trial court's sweeping findings that counsel failed to interview any family members of Carver or Cassada. (R p. 167)

Co-counsel stated at the hearing that he did not want the jury to know that Defendant was a schizophrenic who had been confined to the mental ward. (T pp. 1059-60) If counsel failed to seek a psychological evaluation or interview Defendant's psychologist, this must be understood in the context of the prejudice that would result from eliciting such evidence at trial. (R p. 168)

Ratchford testified that Ostrowski instructed him in rudimentary DNA science. He relied on Ostrowski's expertise. (T pp. 1145, 1240) This contradicts the finding that counsel failed to investigate, educate themselves, or become familiar with the DNA evidence. (R p. 168) Given the evidence of Ostrowski's contribution to the defense, the content of counsel's case file is irrelevant.

In the second place, the trial court erred in finding deficient performance. As stated above, counsel's strategic decision not to present evidence was reasonable given the circumstances. Concluding counsel's failure to obtain medical records and interview witnesses was unreasonable, the trial court did not specify what such an investigation would have revealed that counsel did not already know. Cf. Adams, 156 N.C. App. at 325, 576 S.E.2d at 382. It essentially concluded counsel's strategy was ineffective because unsuccessful. But that is not the measure. See Frogge, 359 N.C. at 241, 607 S.E.2d at 635.

The trial court also ruled unreasonable counsel's failure *independently and adequately* to research, investigate and educate himself on DNA science. It concluded that, in light of the State's DNA evidence, counsel's strategic choice not to present evidence after a less than full, complete, and thorough investigation was not a reasonably supported professional judgment. (R p. 173) On the contrary, counsel's reliance on Ostrowski was not unreasonable. Counsel had no obligation to shop around until they found an expert willing to offer a more favorable opinion. See Frogge, 359 N.C. at 245, 607 S.E.2d at 637.

In any event, Defendant failed to show prejudice. The trial court made no findings or conclusions regarding prejudice because there was none to find. Defendant failed to establish ineffective assistance of counsel, and the trial court erred by awarding a new trial on that ground.

C. The Trial Court Erred by Finding Newly Discovered Evidence.

1. The burden of showing newly discovered evidence.

In Rhodes, police found cocaine in a home the defendant shared with his parents. Rhodes, 366 N.C. at 533, 743 S.E.2d at 38. At trial, the defendant's mother and father testified the drugs did not belong to the defendant. Id. at 534, 743 S.E.2d at 38. The defendant was convicted of possession with intent to manufacture, sell, or deliver cocaine and possession of drug paraphernalia. Id. The defendant later filed an MAR alleging newly discovered evidence in a statement made by the defendant's father to a probation officer that the drugs belonged to him. Id. The trial court found this evidence satisfied the seven-factor test and awarded a new trial. Id. at 534-35, 743 S.E.2d at 38-39.

Upon review, our Supreme Court held the trial court erred by granting the MAR. Id. at 535, 743 S.E.2d at 39. "When the information presented by the purported newly discovered evidence was known or available to the defendant at the time of trial," it said, the evidence does not satisfy the test. Id. at 537, 743 S.E.2d at 40. But information implicating the defendant's father "could have been made available by other means." Id. at 538, 743 S.E.2d at 40. As this information was available to defendant before his conviction, "the trial court erred in concluding that defendant had newly discovered evidence under [Section] 15A-1415(c)." Id. at 538, 743 S.E.2d at 40-41.

2. Defendant failed to present newly discovered evidence.

In the present case, Defendant's first amendment to his MAR raised a claim of new evidence. He alleged there was no indication in the defense file that trial counsel was aware of the SWGDAM guidelines released in 2010. Defendant argued that, though the evidence supported his IAC claims, should the court determine counsel was not ineffective then the SWGDAM guidelines should be considered new evidence entitling him to a new trial. (R p. 109-10)

At the hearing on the MAR, Defendant presented the testimony of Maher Noureddine, a consultant on forensic DNA evidence. (T p. 794) Noureddine disagreed with the State's DNA test results. (T p. 830) Based on his review, Noureddine opined that the sample (34-2) yielded data that was inconclusive, inadequate for matching purposes. (T pp. 832, 849) Defendant offered, and the trial court admitted, Noureddine's report, Defense Exhibit 54. (T p. 1515) Noureddine's report reflects the opinion he gave at the hearing: applying a stochastic threshold, the sample should be deemed inconclusive. (R p. 177)

Defendant failed to present newly discovered evidence entitling him to a new trial. In the first place, as noted above, newly discovered evidence is evidence which was in existence but not known to a party at the time of trial. Nickerson, 320 N.C. at 609, 359 S.E.2d at 763. Noureddine's reinterpretation of the DNA evidence in Defendant's case, rendered 20 November 2016 at the

earliest, was not evidence in existence at the time of his trial. (R p. 176) It therefore does not constitute newly discovered evidence as a matter of law.

Further, when the information presented by the allegedly new evidence was known or available to the defendant at the time of trial, the evidence does not satisfy the test. See Rhodes, 366 N.C. at 537, 743 S.E.2d at 40. To the extent Defendant argued the 2010 SWGDAM guidelines were new evidence, he failed to show they were previously unavailable. Indeed, he blamed trial counsel for not highlighting the issue "through cross-examination and the use of a defense expert." (R p. 106) Defendant thus recognized that the underlying information – if not Noureddine's opinion – was available at the time of trial. It therefore does not constitute newly discovered evidence.

Finally, a defendant is not entitled to relief when the new evidence merely tends to contradict, impeach, or discredit testimony of a former witness. Rhodes, 366 N.C. at 536, 743 S.E.2d at 39. Here, the State's experts testified at trial that the DNA sample, item 34-2, matched Defendant's DNA profile; Noureddine, retroactively applying a stochastic threshold, disagreed. (T p. 830) Defendant concluded that failure to apply a stochastic threshold as Noureddine recommended meant "it's not reliable DNA" evidence. (T p. 1573) He offered Noureddine's testimony solely to contradict or discredit the State's experts. It therefore does not constitute newly discovered evidence.

3. The trial court erred in awarding a new trial.

The trial court noted that Defendant asked it to find newly discovered evidence "in the form of scientific advances in DNA testing." (R p. 169) It found that the SWGDAM report was published in 2010; that the report recommended a stochastic threshold; and that the state crime lab established a stochastic threshold in 2013. Regarding Nourredine's opinion that sample 34-2 contained insufficient data for any reliable matching, it found this opinion "was not contradicted by any evidence offered by the State." (R pp. 170-71) The trial court found that the DNA evidence was the "basis" for Defendant's conviction, and it declared the State's test results were "doubtful at best based on advances in the testing, analysis, and interpretation of DNA mixtures." (R pp. 171-72)

The trial court applied the seven-factor test as follows: (1) Noureddine's testimony and report constituted newly discovered evidence, (2) Noureddine's report, testimony, and opinions are probably true, (3) Noureddine's report, testimony, and opinions are competent, material, and relevant, (4) "Trial counsel and Dr. Ostrowski were unaware of The Scientific Working Group on DNA Analysis Methods' (SWGDAM) 2010 report regarding the analysis of DNA mixtures," (5) Noureddine's report, testimony, and opinions are not merely cumulative, (6) Noureddine's report, testimony, and opinions do not tend only to contradict, impeach, or discredit a former witness, and (7)

Noureddine's report, testimony, and opinions are of such a nature as to show that in another trial a different result will probably be reached. (R p. 174)

The trial court erred by awarding relief for newly discovered evidence.

In the first place, the trial court erred in its findings of fact. Noureddine testified he disagreed with the DNA test results offered by Winningham and Hughes at trial. (T p. 830) DeHaan testified she disagreed with Noureddine's opinion. (T p. 1484) The trial court found, however, that Noureddine's opinion was not contradicted by any evidence offered by the State. (R pp. 170-71)

The finding that the State's test results were "doubtful at best" depends on the doubt supposedly cast on the results by Noureddine's opinion. (T p. 172) The trial court was free to credit Noureddine's testimony over the testimony of three experts offered by the State. But insofar as the purpose of Noureddine's testimony was to discredit the State's evidence, the trial court erred in finding that his opinion was not contradicted by any evidence offered by the State.

In the second place, the trial court erred in its application of the seven-factor test. Noureddine's report, Defense Exhibit 54, is dated 20 November 2016. (R p. 176) In six of the seven factors, the trial court identified the newly discovered evidence as Noureddine's report, testimony, and opinions. (R p. 174) As stated above, however, Noureddine's report was not in existence at the time of trial, and it does not constitute newly discovered evidence as a matter of law.

The trial court simply omitted the fourth factor: that due diligence was used and proper means were employed to procure the testimony at trial. This is perhaps not surprising given the inconsistency with Defendant's IAC claim. It may be true – as the trial court found in place of this factor – that counsel was unaware of the 2010 SWGDAM guidelines. But that does not mean the information was unavailable, or that counsel was ineffective for not seeking it.

As for the sixth factor, the trial court ruled Noureddine's opinion does not tend only to contradict, impeach, or discredit a former witness. (R p. 174) This conclusion is not supported by the findings. The trial court found the State's DNA test results were doubtful at best, meaning the trial court credited Noureddine's testimony over the testimony of the State's experts. (T p. 172) If as the trial court essentially found Noureddine's opinion rendered the State's evidence doubtful, then it necessarily erred in concluding that Noureddine's opinion does not tend merely to discredit the testimony of a former witness.

The State does not concede the DNA test result were doubtful. Indeed, insofar as the trial court found Defendant's conviction was based on the DNA evidence, and that the State's test results were unreliable, it seems to have challenged this Court's holding that the evidence was sufficient, if only just. See Carver, 221 N.C. App. at 123, 725 S.E.2d at 905. In any event, the proper vehicle for challenging the reliability of biological evidence is through a motion

for postconviction DNA testing, not an MAR. See N.C.G.S. § 15A-269 (2017); State v. Howard, 247 N.C. App. 193, 204-05, 783 S.E.2d 786, 794 (2016) ("no provision of subsection 15A-1415(b) authorized the trial court to . . . order a new trial on the basis of 'favorable' post-conviction DNA test results."). The trial court erred therefore in concluding Defendant was entitled to a new trial on the basis of newly discovered evidence.

CONCLUSION

WHEREFORE, the State respectfully requests that this Court reverse the trial court's 12 June 2019 order awarding Defendant a new trial on the basis of ineffective assistance of counsel and newly discovered evidence.

Electronically submitted this the 24th day of January, 2020.

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CERTIFICATE OF COMPLIANCE WITH RULE 28 (j)(2)

Undersigned counsel certifies that the State's Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it is printed in thirteen-point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by Word, the program used to prepare the brief.

Electronically submitted this the 24th day of January, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing BRIEF FOR THE STATE upon the DEFENDANT by emailing a PDF version of same, addressed to his ATTORNEY OF RECORD as follows

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