# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 13, 2025<br>9:19 AM |
| v | No. 365389<br>Kent Circuit Court |
| DARIUS DEVANTE RICHMOND-HAIRSTON,<br><br>Defendant-Appellant. | LC No. 20-003281-FH |

Before: PATEL, P.J., and MURRAY and YATES, JJ.

PER CURIAM.

Defendant, Darius Devante Richmond-Hairston, appeals of right his convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and two counts of possessing a firearm during the commission of a felony (felony firearm), MCL 750.227b. Defendant bases his appeal largely on claims of ineffective assistance of counsel. First, defendant faults his trial attorney for failing to properly investigate the science supporting analysis of shell casings as well as failing to object to the prosecution's expert witness, who testified that certain shell casings came from the same firearm, and the prosecutor's argument that those shell casings were a "match." Second, defendant blames his trial counsel for failing to present evidence showing that the victim had a motive to lie about defendant's involvement in the shooting. Third, defendant criticizes his trial attorney for the manner in which he handled evidence of a gunshot-residue test. We affirm.

## I. FACTUAL BACKGROUND

The charges against defendant were based on shots fired at Allen Battles on the afternoon of January 28, 2020. According to Battles, he was driving a pickup truck home from work when he noticed a white sedan following him. At one point, Battles stopped and the white sedan zoomed past him. Battles then followed the car in an effort to see its license plate. With Battles in pursuit, the white sedan came to a sudden stop and the driver jumped out and fired five or six shots, striking Battles's truck. When the driver got out of the sedan to fire the shots, Battles was able to recognize defendant as the shooter. After firing the shots, the driver returned to the white sedan and Battles drove after him. After a chase that lasted for six or seven miles, defendant parked his car and went

inside a house. Battles ended the chase because he saw more cars and believed that defendant may have called other people to help him.

Battles called the police and, at the direction of a 911 dispatcher, went back to the scene of the shooting. Jason VanSpronsen, a patrol officer with the Grand Rapids Police Department, met Battles at the scene. Officer VanSpronsen spoke to Battles, who described what had happened and identified defendant as the shooter. Battles later testified that he was reluctant to identify defendant as the shooter because defendant is a cousin of Battles's girlfriend. Battles first met defendant 20 years earlier, and he knew defendant quite well because of defendant's relationship with Battles's girlfriend. Battles had also employed defendant on house projects in the past. At defendant's trial, Battles testified that he had not had any disagreements with defendant in the past, and that he knew of no reason why defendant would shoot at him.

Officer VanSpronsen searched the area, finding four shell casings in the road in the general area where Battles said the shooting took place. Officer VanSpronsen also took photographs of a piece of a projectile and damage to the front of Battles's truck caused by projectiles. Battles gave Officer VanSpronsen the location and description of the house defendant entered after the chase. Officer VanSpronsen went to that area and found a house that matched that description, which was a house defendant owned and was the scene of an unrelated shooting in 2019.

After an arrest warrant for defendant was issued, he turned himself in to law-enforcement authorities. Defendant was charged with assault with intent to do great bodily harm, MCL 750.84, discharging a firearm from a vehicle, MCL 750.234a(1)(a), felon in possession of a firearm, MCL 750.224f, and three counts of felony firearm, MCL 750.227b. A three-day jury trial took place in October 2022.

Defendant's trial included presentation of evidence about an unrelated shooting involving defendant that occurred in 2019 at the residence defendant owned. Defendant was shot three times and rushed to the hospital. Carol Sherman, who was helping defendant renovate the house at the time of that shooting, testified that she did not know whether any gunshots came from inside the house, but to her knowledge no shots were fired from inside the house. Weeks after that shooting, Sherman told police officers that after shots came from outside the house, she saw defendant and his brother return fire from inside the house. While at the hospital, defendant was given a gunshot-residue test on his hands, which was negative.

When the police responded to that shooting, they found shell casings inside and outside the house, and they also found a gun in the house. Those shell casings were sent to the Michigan State Police crime laboratory for ballistics testing. There were 13 shell casings found inside the house: three were in one bedroom; and 10 were in a separate bedroom. The gun inside the house "matched four of the casings that were located inside the home . . . ." The other nine casings inside the house were all fired from another gun, which was never recovered.

During the trial, Ashleigh Vogel—a firearms and toolmark examiner at the Michigan State Police forensics laboratory—testified as an expert witness who was qualified in the field of firearm and toolmark analysis. She explained that it was possible to determine whether shell casings came from the same gun, even if she could not inspect the gun, because unique, individual marks would be left on the shell casings when the bullet was fired. She then reviewed the shell-casing evidence

in the case. When she tested the shell casings from the 2020 incident involving Battles and entered that information into the database, she was notified that there was a potential association with shell casings recovered from the 2019 shooting. She compared the casings from the two incidents under a microscope and found "that evidence from [the 2020 shooting] . . . was identified as having been fired in the same firearm as the 40 caliber casings that were submitted on that [20]19 case[.]" She agreed when the prosecutor asked whether the nine 40-caliber shell casings from the 2019 shooting and the four 40-caliber shell casings from the 2020 shooting were consistent and identified as being "fired from the same firearm." Defense counsel cross-examined Vogel by asking three questions about the timing of when the laboratory received the shell casings for the 2019 shooting and when the laboratory received the shell casings from the 2020 shooting at Battles. In closing argument, the prosecutor referred to that testimony several times, arguing that the shell casings from the 2019 shooting matched those from the 2020 shooting, thereby tying defendant to the 2020 shooting.

Defendant did not dispute that the 2020 shooting involving Battles occurred, but he insisted that he was not the shooter. Defense counsel probed whether anybody may have had some reason to target Battles, and the testimony revealed that Battles was convicted of federal drug charges but received a reduced sentence because of his cooperation. Battles testified that he had not received any threats or harassment since he was released from prison, but he did acknowledge that his house had been burned down three times since his release.

Defendant also presented an alibi in the form of testimony from his former girlfriend, who claimed that defendant had been with her the entire day when the shooting took place. She asserted that defendant had accompanied her to the social security office and then to Chuck E. Cheese. The jury rejected those defenses and convicted defendant of Counts I (assault with intent to do great bodily harm less than murder), II (felony firearm), V (felon in possession), and VI (felony firearm). In contrast, the jury found defendant not guilty of Counts III (discharge of a firearm from a motor vehicle) and IV (felony firearm).

After he was sentenced, defendant moved for a new trial and requested that the trial court hold a *Ginther* hearing.[1] Defendant argued that he was entitled to a new trial because he received ineffective assistance of counsel when defense counsel failed to challenge the prosecutor's claim that the shell casings matched. Defendant acknowledged that he was not aware of any Michigan caselaw that supported his argument that the shell-casing testimony was inadmissible, but he cited cases from other jurisdictions that he claimed called into question the validity of expert testimony that various shell casings matched. Defendant also contended that his trial counsel was ineffective because he failed to offer evidence to establish that Battles had a reason to falsely accuse defendant of being the shooter. Defendant asserted that defense counsel should have presented evidence that Battles had paid defendant $10,000 to do home-repair work, that Battles was dissatisfied with that work, and that defendant refused to refund the money to Battles. Finally, defendant insisted that defense counsel failed to adequately rebut the prosecutor's minimization of the significance of the gunshot-residue test that was performed on defendant's hands after the 2019 shooting.

The trial court conducted a *Ginther* hearing that featured the testimony of defendant's trial counsel, Jeffrey Kirchhoff, and Dr. Stephen Batzer. An affidavit from Kirchhoff was admitted as

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

evidence, and Kirchhoff adopted the statements in the affidavit as his testimony. Addressing the shell-casing evidence, Kirchhoff testified that he was not aware of any caselaw that cast doubt on the science behind those examinations. Kirchhoff said he made the decision not to cross-examine Vogel, the prosecutor's toolmark expert, very thoroughly because he believes juries typically give police officers more credence and he did not want to confront the officer. Instead, his plan was to minimize the amount of testimony about the shell casings.

Kirchhoff concluded that the reports about the shell casings were scientifically sound and that the same gun was used in both shootings. Based on his conclusion, he did not conduct research into whether the ballistic evidence had been called into question and he did not consult with any experts. Kirchhoff said he now knew there was reason to question that evidence, and he believed it would be helpful to consult with an expert. With his current knowledge, he believed he should have contested the evidence under *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), he would have objected to the expert's opinion that the shell casings came from the same gun, and he would have objected to the statements in the prosecutor's closing argument that the shell casings from the two shootings were a match.

Dr. Stephen Batzer testified that he wrote a report, which was admitted at the hearing. The prosecution objected to qualifying Dr. Batzer as an expert, and the trial court ultimately concluded in a written opinion that Dr. Batzer was unqualified to testify as an expert in firearms and toolmark examination, but it noted that that conclusion did not dispose of defendant's motion. On the subject of toolmark examinations, Dr. Batzer testified that it is not scientifically valid, based on the current science, to conclude with 100% confidence that certain shell casings were fired from the same gun. Thus, it would not be appropriate to state that two shell casings were a "match" or to say for a fact that two shell casings came from the same gun. In his opinion, it would be accurate to say certain shell casings were "consistent with" each other, but any phrase implying 100% certainty, such as "it's the same" or "it's a match," would be inaccurate. He conceded it could be probable that two shell casings were fired from the same gun. He said there has "never been an error rate developed" for such testing, and there is disagreement about the error rate of the analysis. He opined that the accuracy of shell-casing matching depends on the skill of the examiner, and shell-casing matching is not an objective test.

Addressing the specific shell casings in defendant's case, Dr. Batzer explained that he was not testifying that the shell casings were inconsistent with being fired from the same gun. In fact, he stated in his report that the analysis showed that the casings "are consistent with being fired out of the same firearm[.]" He testified that if defendant had contacted him, he would have helped to develop a plan for cross-examination. He made clear that the scientific validity of the conclusions had been questioned for a number of years.

Attorney Kirchhoff also testified about the decision not to introduce evidence of the dispute between defendant and Battles. He said that he discussed it with defendant, and "after going over them numerous times, I made the strategic decision not to open that can of worms and try to get into it." The trial court pointed out that the dispute could have given defendant a motive to shoot at Battles, and Kirchhoff testified that that was one of the reasons why he chose not to introduce that evidence. Regarding the gunshot-residue test, Kirchhoff stated his opinion that those tests are "absolute crap." He also said he had no basis to disagree with the testimony that gunshot residue could be easily wiped off "because it's true," and he expressed his belief that gunshot-residue tests

are unreliable. Defendant suggested that the negative gunshot-residue test was instrumental in the decision not to charge defendant in connection with the 2019 shooting. Kirchhoff testified that he did not offer evidence about the decision not to charge defendant for the 2019 shooting based upon the gunshot-residue test because it could open the door to damaging questions.

After the hearing, both parties submitted briefs. Defendant argued that if defense counsel had investigated the issues regarding toolmark analysis, he would have been able to cross-examine the prosecution's expert witness more effectively and challenge the prosecutor's arguments about the significance of the shell casings. Defendant argued that by failing to conduct that investigation, his trial counsel's performance fell below an objective standard of reasonableness. Defendant also insisted that he was prejudiced by that ineffective assistance because the prosecutor relied heavily on the matching shell casings, and they were the only physical evidence supporting the claim that defendant was the shooter. Defendant also insisted that his trial counsel was ineffective for failing to introduce evidence of the dispute between Battles and defendant over the $10,000 construction project. Defendant claimed that Battles's credibility was an issue in the case, and that trial counsel should have pointed out that Battles was lying when he testified that he did not know of any reason defendant would shoot at him. He also reiterated that trial counsel was ineffective for allowing a non-expert to testify about the gunshot-residue test.

The prosecutor highlighted that Dr. Batzer had not testified that there was a false positive in the case, that he did not conduct his own analysis of the shell casings, and that he acknowledged the testimony that the shell casings were "consistent with" each other was not objectionable. She asserted that defendant could not overcome the strong presumption that defense counsel provided effective assistance. She noted that defense counsel did challenge the shell-casing evidence, albeit on other grounds, and that defense counsel's strategy was to downplay the importance of the shell-casing evidence, which was consistent with the defense's theory that defendant had not fired a gun in either the 2019 or the 2020 shooting. Even if defense counsel provided ineffective assistance, the prosecutor argued that defendant had not established that the error was outcome-determinative. The prosecutor described the trial attorney's decision not to present evidence discrediting Battles as "objectively reasonable considering the circumstances," and asserted that such evidence would have painted defendant in a negative light. With respect to the gunshot-residue test, the prosecutor argued that defendant had failed to establish that the decisions trial counsel made were objectively unreasonable.

In a written opinion, the trial court stated that defendant had failed to overcome the strong presumption that defense counsel's performance at trial was effective, and that defendant had also failed to show that he was prejudiced by counsel's performance, so it denied defendant's motion. The trial court characterized the issue as "whether trial counsel was ineffective for failing to further investigate the shell casing evidence or consult an expert." The trial court explained that defense counsel made a pretrial motion to exclude the shell-casing evidence, that he intentionally did not attack the police expert witness, and that he attempted to minimize the focus on the shell casings. The trial court held that these were strategic decisions that were not objectively unreasonable. The trial court also ruled that defendant had not established prejudice because, even if defense counsel had objected to use of the word "match," Vogel still would have been permitted to testify that the shell casings were probably fired from the same gun. It also noted that the Association of Firearm and Tool Mark Examiners permitted the use of such conclusions, and that Michigan courts had not ruled against their use. The trial court also concluded that defense counsel was not ineffective for

choosing not to present evidence that could have established that defendant had a reason to shoot Battles, and that was reasonable strategy. The trial court found it was reasonable for trial counsel to fear that introducing such evidence could have opened the door to damaging information about defendant. Finally, the trial court decided that trial counsel was not ineffective for failing to rebut the prosecution's minimization of the gunshot-residue test. Defendant now appeals.

## II. LEGAL ANALYSIS

Defendant's entire appeal turns on claims of ineffective assistance of counsel that the trial court rejected.[2] A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v Shaw*, 315 Mich App 668, 671; 892 NW2d 15 (2016). In addressing such a claim, this Court reviews for clear error a trial court's findings of fact and reviews de novo questions of law. *Id*. A trial court's findings are clearly erroneous "if this Court is definitely and firmly convinced that the trial court made a mistake." *Id*.

To obtain a new trial based on ineffective assistance of counsel, a defendant must establish that (1) defense "counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). To prevail on that claim, a defendant "must overcome a strong presumption that the assistance of his counsel was sound trial strategy[.]" *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). This Court cannot "substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). With all these standards in mind, we shall consider each claim of ineffective assistance of counsel in turn.

### A. SHELL-CASING EVIDENCE

Defendant criticizes several aspects of the manner in which his trial attorney handled the shell-casing evidence. Those criticisms of defense counsel's performance are largely based on the

[2] At times in his brief and reply, defendant indicates that his argument on appeal is not only based on ineffective assistance of counsel, but also on a separate claim of error grounded on this Court's decision in *People v Coy*, 243 Mich App 283; 620 NW2d 888 (2000). Defendant insists that "[i]f the *Coy* analysis is adopted for shell-casings, a new trial should have been granted regardless of whether the trial lawyer was ineffective." In his reply brief, defendant contends that defense counsel was ineffective, but also asserts that the trial court erred in its "failure to consider *Coy* and its reasoning about a 100% match." But a close review of the analysis that defendant presents to this Court reveals that his argument focuses exclusively on the claim that he received ineffective assistance. This is consistent with his motion for new trial in the trial court, which discussed *Coy*, but only in the context of the argument that defense counsel was ineffective. That motion did not argue that there was a basis for a new trial "regardless of whether the trial lawyer was ineffective." Thus, to the extent that defendant now presents a direct challenge to the trial court's decision to admit Vogel's testimony or a direct claim of prosecutorial misconduct based on the prosecutor's use of the word "match" in closing argument, those issues have been abandoned, so they will not be considered. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("Failure to brief a question on appeal is tantamount to abandoning it.").

holding in *People v Coy*, 243 Mich App 283; 620 NW2d 888 (2000). In *Coy*, this Court concluded that "the information that defendant's DNA could not be excluded as that present on a knife and a doorknob" was not admissible without "any supplemental probability or statistical analysis giving meaning to the fact of the potential DNA match, i.e., to what extent was it likely that defendant represented an individual who contributed to the mixed samples." *Id*. at 296-297. Here, defendant insists that the holding in *Coy* is applicable to testimony from toolmark examiners that certain shell casings "match," i.e., were fired from the same gun. The *Coy* decision addressed DNA evidence, rather than shell-casing evidence, and the flaw in the prosecution's presentation of DNA evidence was the lack of any statistical evidence about the certainty of a match. Simply put, the prosecution presented evidence that defendant "could not be excluded as a donor of the DNA recovered from the knife blade and the doorknob," which raised a real possibility of a false match. *Id*. at 295. The *Coy* decision does not stand for the proposition that expert testimony on DNA is inadmissible, nor does *Coy* prohibit an expert witness from testifying about the probability of a match. Instead, *Coy* merely stands for the unremarkable proposition that expert testimony suggesting a DNA match is impermissible if it provides no quantification of the likelihood of a match.

In stark contrast, defendant's claims concern shell-casing evidence, which not only enjoys a distinguished history within and beyond the legal system, *United States v Brown*, 973 F3d 667, 704 (CA 7, 2020), but also routinely yields admissible determinations of a "match." See, e.g., *id*. at 703-704 (upholding admission of expert testimony that there was a "match between 5.7 x 28mm casings from the Jonte Robinson shooting and comparable casings from the Simmons shootings"). In *Brown*, the United States Court of Appeals for the Seventh Circuit carefully analyzed, but then ultimately rejected, the defendants' "complain[t] that there are no objective, quantitative standards for determining whether two ammunition components 'match.' " *Id*. After doing so, the Seventh Circuit approved the trial court's admission of testimony from several expert witnesses concerning "matches" based on toolmark analysis of bullets and casings. *Id*. at 704. In light of the reasoning and holding in *Brown* and similar decisions cited in that case, the trial court's admission of shell-casing evidence, including the pronouncement of a "match," was perfectly permissible.[3]

Against that backdrop, defendant's claims concerning the shell-casing evidence in this case ring hollow. Defendant identifies the following testimony from Ashleigh Vogel, the prosecution's firearms and toolmark expert, as improper:

> Prosecutor. Are the nine 40 caliber shell casings [from the 2019 shooting] and the four 40 caliber shell casings [from the 2020 shooting] all consistent and identified of being fired from the same firearm?
>
> Vogel. That's correct.

Additionally, defendant cites several instances during the prosecutor's closing argument in which he used the word "match" when discussing the shell casings found at the 2019 shooting and those found at the 2020 shooting at issue in defendant's trial. The analysis in *Brown* renders all of those

[3] "Although the federal courts of appeals decisions are not binding," this Court may follow them if we "find their analyses and conclusions persuasive." *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 235 (2004). We find *Brown* especially persuasive here.

statements acceptable. Accordingly, any objection to those statements would have been futile, and "[f]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Beyond that, defendant has presented no authority, binding or otherwise, from a Michigan court on the subject of shell-casing evidence. That lack of Michigan authority dooms defendant's claim that his attorney was ineffective because "[d]efense counsel 'cannot be deemed deficient for failing to advance a novel legal argument.' " *People v Crews*, 299 Mich App 381, 400; 892 NW2d 898 (2013), quoting *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996). Here, as in *Reed*, no Michigan authority holds that the testimony and argument concerning shell-casing evidence is inadmissible. *Reed*, 453 Mich at 695. Moreover, in *Crews*, this Court ruled that defense counsel was not ineffective because "defense counsel would have had to argue . . . on the basis of unclear, undefined statutory language without any Michigan caselaw to provide guidance on the issue." *Crews*, 299 Mich App at 400. Defendant's attorney's performance was not deficient just because he did not take actions which, as defendant acknowledges, were not supported by Michigan law.

## B. VICTIM'S MOTIVE TO LIE

Next, defendant faults his attorney for failing to present evidence that Battles and defendant had a dispute about $10,000, which Battles had paid to defendant for home repairs. At trial, Battles testified that he had no problems with defendant and he knew of no reason defendant would shoot at him. On appeal, defendant contends that his trial attorney should have offered evidence of the monetary dispute between the two men, as it would have established that Battles had a motive to falsely accuse defendant of being the shooter, and it would have revealed that Battles lied when he testified that he did not know of any reason defendant would shoot at him.

At the *Ginther* hearing, defense counsel testified that, after talking about the evidence with defendant "numerous times," defense counsel "made the strategic decision not to open that can of worms and try to get into it." The trial court noted that this evidence "may give Battles a motive to misidentify [defendant], but also it could give [defendant] a motive to shoot at [Battles]." The trial court asked defense counsel if that was why he chose not to pursue admission of that evidence, and defense counsel responded that that was one of the reasons. The evidence shows that defense counsel considered the benefits and consequences of presenting that evidence, and there is a strong presumption that his decision constituted sound trial strategy under the circumstances. See *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Here, defendant has not overcome the strong presumption. Indeed, the circumstances show that defense counsel made a wise choice. The jury heard Battles testify that defendant had no motive to shoot at him, and defense counsel emphasized that lack of motive in his opening statement and his closing argument. If the defense had presented the evidence defendant now identifies, it would have established a potential motive for defendant to shoot at Battles, thereby strengthening the case against defendant. Hence, defense counsel made a sound strategic decision not to introduce evidence that would have revealed defendant's motive to shoot at Battles. That sound decision cannot possibly be treated as deficient performance.

## C. GUNSHOT RESIDUE

Finally, defendant asserts that his trial attorney was ineffective in addressing the evidence about the gunshot-residue test, which was conducted on defendant's hands after the 2019 shooting.

At trial, the evidence showed that defendant's hands were tested for gunshot residue at the hospital after the 2019 shooting, but no residue was found. A crime-scene technician testified that gunshot residue could be easily wiped off and that the tests were not very reliable. Defendant contends on appeal that his defense counsel should have objected to the lay testimony that the residue could be easily wiped off and that the tests are unreliable, that counsel should have presented evidence that the negative result of that test was instrumental in the decision not to charge defendant for the 2019 shooting, and that counsel should have obtained an expert "who could have supported the meaning of the gunshot residue test."

1. FAILURE TO OBJECT TO LAY TESTIMONY

Defendant claims his trial attorney's performance was deficient because counsel failed to object to the testimony that the gunshot-residue test was unreliable and that residue could be easily wiped off. At the *Ginther* hearing, the trial attorney opined that, in fact, gunshot-residue tests are unreliable and gunshot residue can be easily wiped off. Defendant has not demonstrated that those beliefs are incorrect. Beyond that, defendant has not established that an objection to that testimony would have been successful, i.e., that that testimony was inadmissible in light of MRE 701, which permits a lay witness to testify in the form of an opinion if that opinion is based on the perception of the witness and helpful to understanding the witness's testimony or to determine a fact in issue. Failure to "raise a futile objection does not constitute ineffective assistance of counsel." *Ericksen*, 288 Mich App at 201.

2. INADEQUATE PRESENTATION OF EVIDENCE OF NEGATIVE TEST

Regarding defense counsel's decision not to attempt to introduce evidence that the negative gunshot-residue test was instrumental in the decision not to charge defendant for the shooting that took place in 2019, defendant has not established that defense counsel was ineffective. The factual predicate for that claim is, at best, questionable. Defendant's appellate brief asserts "the negative [gunshot-residue] test was instrumental in a decision not to charge [defendant], for example, with felon in possession" in connection with the 2019 shooting. In an affidavit, defendant's trial counsel stated that it was his "understanding that [defendant] was not charged in the 2019 shooting because of the negative [gunshot residue] test." But at the *Ginther* hearing, defendant's trial attorney stated that he recalled "somewhere along the lines somebody saying it [i.e., the gunshot-residue test] was positive in one of the reports, but [he] couldn't get the whole report." On this record, defendant has failed to establish the factual predicate for the claim that the negative gunshot-residue test was the basis for the decision not to charge defendant in connection with that shooting.

To be sure, defendant's trial attorney presented evidence to the jury that defendant did not have gunshot residue on his hands after the 2019 shooting, thereby providing evidence to suggest that defendant had not fired a gun during the 2019 incident. But defendant's trial attorney did not have evidence to prove that the negative gunshot-residue test served as the basis for a decision not to charge defendant in connection with the 2019 shooting. Nor was that point vital to the defense. Instead, defense counsel furnished evidence and then argued to the jury that defendant did not fire a gun during the 2019 incident. In other words, defense counsel did everything he could to make use of the negative gunshot-residue test. That effort cannot constitute ineffective assistance.

### 3. FAILURE TO OBTAIN AN EXPERT

Defendant's criticism of his trial counsel for failing to find an expert to explain the meaning of the gunshot-residue test comes to us without any evidentiary support. Defendant has identified no such expert, and he has failed to describe any testimony from such an expert that would have had any bearing on the outcome of the trial concerning the 2020 shooting. Without a showing that the proposed testimony would have benefited defendant, defense counsel cannot be characterized as ineffective. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). In sum, nothing in the record convinces us that defendant's trial counsel provided deficient representation that rises to the level of a constitutional concern.

Affirmed.

/s/ Sima G. Patel
/s/ Christopher M. Murray
/s/ Christopher P. Yates