

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2009-0844, State of New Hampshire v. Kevin C. Whittaker, the court on November 24, 2010, issued the following order:

The defendant, Kevin C. Whittaker, was convicted by a jury of negligent homicide. See RSA 630:3, II (2007). This appeal stems from his subsequent motion for a new trial based upon ineffective assistance of counsel in which he argued that his counsel was ineffective because he failed to consult an accident reconstruction expert. State v. Whittaker, 158 N.H. 762, 764, 767 (2009). To prevail upon an ineffective assistance of counsel claim, a defendant must show, first, that counsel's representation was constitutionally deficient, and, second, that counsel's deficient performance actually prejudiced the outcome of the case. See State v. Sharkey, 155 N.H. 638, 640-41 (2007); Strickland v. Washington, 466 U.S. 668, 687 (1984). The trial court initially denied the defendant's motion on the ground that his counsel's performance was not constitutionally deficient. Whittaker, 158 N.H. at 775. We reversed, holding that "the decision of the defendant's trial counsel not to consult with an accident reconstruction expert was constitutionally defective performance." Id. at 774. We remanded to the trial court to decide, in the first instance, whether defense counsel's deficient performance actually prejudiced the defendant's case. See id. at 775. The trial court ruled that defense counsel's performance did not actually prejudice the defendant's case. The defendant now appeals this ruling. We reverse and remand.

To establish that his counsel's deficient performance actually prejudiced the outcome of his case, the defendant had to show that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 768 (quotation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (quotation omitted). The trial court's ruling on the prejudice prong of the ineffectiveness inquiry raises a mixed question of law and fact. Id. We will not disturb the trial court's factual findings unless they are not supported by the evidence or are erroneous as a matter of law, and will review the trial court's ultimate determination of whether the prejudice prong was met de novo. Id.

To analyze whether there was a reasonable probability that, but for defense counsel's failure to consult with an accident reconstruction expert, the result in this case would have been different, we first examine the context in which this consultation would have occurred. Because the defendant stipulated that he was impaired when he was driving on the night of the accident and that the victim died as a result of injuries sustained when the defendant's car struck him, the only

issue for the jury was whether the defendant's impairment caused the accident. *Id.* at 764. Thus, we begin by examining the State's evidence of causation.

To meet its burden of proving causation, the State relied chiefly upon the testimony of Joseph DiGregorio, whom the court certified as an expert in traffic accident reconstruction. *Id.* at 766. DiGregorio testified that: (1) the defendant was driving thirty-five miles per hour when the accident occurred, which is ten miles over the posted speed limit; (2) the defendant did not see the victim before hitting him; (3) the victim was in the roadway, and was not in the crosswalk when the defendant hit him; (4) the victim was walking, not running, when he was hit; (5) because the victim was wearing blue jeans and a dark fleece, it was difficult to see him on the roadway; (6) the rain and fog also made it difficult to see on the night of the accident; (7) alcohol slows down perception and reaction time; (8) although a precise point of impact could not be calculated, the area of impact was approximately twenty feet to the east of where the victim's hat and sock were located; (9) after hitting the victim, the defendant applied normal braking and came to a stop approximately 167 feet from the area of impact; and (10) the victim came to a rest at approximately 160 feet from the area of impact. *Id.* at 766-67.

This testimony, however, "was not especially probative of the central question before the jury: whether the defendant's impairment had caused the accident." *Id.* at 772. At best, it only allowed the jury to draw the inference that the defendant's impairment caused the accident. *Id.* at 772-73.

The trial court found that the testimony of two non-expert witnesses strengthened this inference. Both witnesses testified that after the accident occurred, they saw a still body off to the side of the road. One witness testified that he "saw some sort of object over to the right-hand side, and as I passed by, I recognized it as a body. . . . I saw it was partway in the road, kind of towards the sidewalk area." The body "[d]id not seem to be moving." He testified that the night was "either rainy or drizzly It was wet, put it that way."

The other witness confirmed that the night had been rainy and that the pavement was wet. She testified that she saw an unconscious body in the road, the body's right arm was in the road, just over the white line, and the left arm was bent over the body's chest; the body was leaning against the curbing. She testified that the body's right arm was the first thing that she saw because it was closest to the lines in the road, where she was looking. She swerved to avoid hitting the body's right arm, although she was not sure that the arm was actually far enough into the roadway to require this action.

The trial court found that based upon this testimony as well as additional testimony regarding the effect of alcohol impairment on a person's ability to perceive, react and judge, "the jury could have concluded that on the

night of the accident, an unimpaired, attentive driver would have been able to perceive [the victim] in the roadway and avoid hitting him.” We disagree that this testimony was conclusive as to a non-impaired driver’s ability to see a pedestrian, dressed in dark clothing, walking across the street.

At the motion for new trial, the defendant presented the report and testimony of Carl Lackowicz, a partner in Northpoint Collision Consultants. *Id.* at 773. For his analysis, he accepted the State’s expert’s conclusion that the defendant’s vehicle was traveling at approximately thirty-five miles per hour. He also accepted the State’s expert’s conclusion regarding the likely place of impact. He testified that a non-impaired person driving in optimal (meaning, not rainy or foggy) nighttime conditions would have needed 192 feet “to stop short of being in a collision with the pedestrian.” *See id.* at 774. He testified that it would have taken 192 feet for a non-impaired driver “to complete perception and reaction and come to a safe, controlled emergency stop.” He termed this the “point of no escape.” *Id.* He further testified that based upon testing he conducted in the area at night, “[t]he exemplar pedestrian was not detectable . . . at a hundred and ninety-two feet or at the point of no escape.”

Lackowicz also testified that his nighttime tests showed that “the earliest possible” time at which a driver, regardless of impairment, could have seen something in the roadway was when the driver and the object were two seconds apart. He testified that two seconds would not have given even a non-impaired driver the time necessary to avoid the accident:

Q. If [the defendant] saw [the victim] crossing the street in that exact location at two seconds, what would be the process that would happen?

A. Detection, if -- if at two seconds prior to impact, detection would begin assuming that the pedestrian was now identified as something in the road that was a threat. Two and a half seconds at nighttime perception and reaction would then take place while the driver possesses the data of the threat he has just seen. At the end of the two and a half seconds, the options available to brake, steer. However, in this analysis, this operator is two seconds away from impact. What that means is before he can finish perception and reaction under normal nighttime driving conditions, the average driver will be in collision with a threat a half a second before he can get his foot off the gas pedal. He will not have been able to complete perception and reaction. Therefore, the --

accident or collision at this point is -- it continues to be unavoidable. It's -- it's imminent.

Q. And that's true whether the driver is impaired by alcohol or not, correct?

A. That's correct.

. . . .

Q. And in this case, at that point of no escape, the point of which the vehicle was in motion and unable to be stopped at the point of the presumed collision, was the driver able to see the pedestrian?

A. No.

Q. And there was no way that the accident could've been avoided?

A. From the driver's perspective?

Q. From the driver's perspective.

A. No way.

(Emphases added.) When this case was remanded, the trial court found that Lackowicz's opinion would have been admissible. This testimony could have created a reasonable doubt as to whether the defendant's impairment actually caused the accident. Based upon this testimony, a jury reasonably could have decided that regardless of the driver's impairment, the accident was unavoidable, and, thus, that the defendant's impairment did not cause the accident.

We disagree with the trial court's conclusion that Lackowicz's opinion did not create a reasonable probability that had defense counsel consulted with an accident reconstruction expert, the result in this case would have been different. In this case, where the State offered circumstantial evidence to establish that the defendant's admittedly impaired driving actually caused the accident, defense counsel's failure to consult with an accident reconstruction expert, who could have presented an affirmative case that the defendant's impairment did not cause the accident, prejudiced the defendant's case as a matter of law. The trial court's contrary conclusion was error. We conclude, therefore, that the defendant sufficiently established that there was a

reasonable probability that had his trial counsel consulted an accident reconstruction expert, the result in this case would have been different.

Reversed and remanded.

DALIANIS, HICKS and CONBOY, JJ., concurred.

**Eileen Fox,
Clerk**