

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 21, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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**Appeal No. 2014AP224-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2011CF1615

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE C. GIBSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: WILLIAM E. HANRAHAN, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Willie Gibson appeals a judgment, entered upon a jury's verdict, convicting him of burglary as a party to a crime. Gibson also appeals the order denying his motion for postconviction relief. Gibson argues that the circuit court erred by denying his pretrial motion to suppress statements made to police officers and by admitting certain testimony regarding Gibson's

identification on surveillance video. Gibson also contends that he was denied the effective assistance of trial counsel. We reject these arguments, and affirm the judgment and order.

BACKGROUND

¶2 The charge in this case arose from allegations that Gibson entered a bank in Oregon after business hours, without consent, and with the intent to steal. Gibson's pretrial motion to suppress statements made to police was denied after a hearing, and the matter proceeded to trial. At trial, Oregon police officer Cole Miller testified that he had contact with Gibson at approximately 2:40 a.m. on July 4, 2011, when he noticed Gibson standing outside a vehicle in a hardware store parking lot. According to Miller, Gibson indicated that he was having vehicle problems and his wife was coming to pick him up. Miller further testified that he subsequently saw Gibson walking down the street, approximately two blocks from the bank.

¶3 Miller testified that he received a report that the bank's alarm had been triggered, and responded to the bank at approximately 4:40 a.m., although he did not observe any obvious damage. On the morning of July 5, 2011, a caterer discovered that a window into the community room located on the bank's lower level had been smashed out and a boom box stereo system tipped over. Police obtained video surveillance showing a black male carrying a crowbar walking out of the bank through the entrance doors to the community room at approximately

4:45 a.m.¹ on the morning of the burglary. The surveillance video was played for the jury at trial.

¶4 Miller testified that, when asked to view the video, he recognized Gibson, noting that Gibson was wearing the same clothing from their earlier contact—a white T-shirt, dark pants, and black-rimmed glasses. Miller acknowledged that, although he had logged his contact with Gibson, the police report—including a description of Gibson and what he was wearing—was not documented until after he saw the surveillance video.

¶5 Police Lieutenant Karey Clark testified that he and Detective Jennifer Pagenkopf first interviewed Gibson at the office of Gibson’s probation agent, Christine Kamin. Clark stated that, when interviewing Gibson, he suggested DNA was found on the door of the bank and then asked Gibson if he was in the bank. Clark testified that Gibson “shook his head in the affirmative like yeah and put his head down,” while mumbling “mm-hmm.” Clark further testified that, when he asked Gibson what he was doing in the bank, Gibson explained that he was being “nosey,” because he had heard the bank alarm and wondered if the person responsible for triggering the alarm had left something behind. According to Clark, Gibson stated that he was in the lower level of the bank and exited through a double-door system, which was consistent with the movements of the suspect on the surveillance video. Gibson, however, told Clark that he did not break into the bank, but was acting as a lookout for an individual named Marlin.

¹ Although the video indicated it was 5:02 a.m., there was testimony that the time noted on the video was approximately seventeen minutes fast.

¶6 Detective Jennifer Pagenkopf testified that, during her interview with Gibson, Gibson indicated that, in the early morning hours of July 4, 2011, he was at a party in Oregon with an individual named Marlin.² Gibson told Pagenkopf that, while driving back to Madison with Marlin, they had car trouble and pulled into a hardware store parking lot. According to Gibson, Marlin walked back to his residence to get money for gas, and Gibson remained with the vehicle. Gibson further told Pagenkopf that, after his contact with Officer Miller, Gibson walked around Oregon for approximately one hour, including near the bank, and then returned to Madison with Marlin. Over defense counsel's objections that the video spoke for itself, both Clark and Pagenkopf testified that they recognized Gibson as the individual in the surveillance video.

¶7 Gibson, the only defense witness, testified that, after leaving a party in Oregon, he had car trouble and contacted his wife for a ride. Gibson recalled that his wife and a neighbor picked him up just after 2:00 a.m., following his encounter with Miller, and he arrived at his home on Moorland Road in Madison around 3:00 a.m. Gibson denied making any admission of the burglary to either Clark or Pagenkopf. Gibson conceded that Clark mentioned DNA evidence, but testified that he may have said "mm-hmm" only in a sarcastic manner when asked if he was in the bank.

¶8 After Gibson referred to his suspended driver's license, the State was allowed to call his probation agent, Kamin, to rebut the inference that Kamin had no reason to call Gibson to her office the day police interviewed him. Kamin

² When Pagenkopf asked for more information about Marlin, Gibson stated that he did not know Marlin's last name, and he was unable to provide an address or phone number for Marlin, indicating only that Marlin lived "a ways south" of the hardware store parking lot.

testified that she saw Gibson driving and also learned that he was a suspect in the bank burglary. Kamin testified that, when she was shown a still shot from the surveillance video, she “had no doubt” the person in the video was Gibson. Kamin recounted that she advised Gibson to report to her office to make a statement about driving with a suspended license, but did not mention the burglary to him despite the fact that she arranged for the officers to interview Gibson at her office.

¶9 The jury found Gibson guilty of the crime charged. Gibson filed a postconviction motion alleging that he was denied the effective assistance of trial counsel. The motion was denied after a *Machner*³ hearing, and this appeal follows.

DISCUSSION

¶10 Gibson argues that the circuit court erred by denying his pretrial motion to suppress the statements he made to Clark and Pagenkopf at his probation agent’s office. Gibson contends that, because his probation agent instructed him to tell the truth, the statements were legally compelled in violation of the Fifth Amendment to the United States Constitution because Gibson answered the officers’ questions out of fear that failing to do so would result in the revocation of his probation. Assuming without deciding that the challenged statements should have been suppressed, we conclude that the court’s admission of these statements was harmless in light of the other evidence of Gibson’s guilt.

³ *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

¶11 A constitutional error is harmless if it is “clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.” See *State v. Harvey*, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)). In conducting a harmless error review, an appellate court “examine[s] the erroneously admitted evidence and the remainder of the untainted evidence in context to determine whether the error was harmless.” *State v. Harris*, 199 Wis. 2d 227, 256, 544 N.W.2d 545 (1996).

¶12 Here, the jury viewed the surveillance video and heard testimony placing Gibson in the area of the bank around the roughly 4:00 a.m. time frame of the burglary. As noted above, Miller testified regarding his initial contact with Gibson in the hardware store parking lot and subsequent sighting of Gibson walking down the street about two blocks from the bank. Miller also testified that, when he later saw images from the surveillance video, he recognized the individual as Gibson and noted that Gibson was wearing the same clothing and glasses on the video as Miller saw him wearing earlier that morning. Gibson’s probation officer also testified that she identified Gibson from a still shot of the surveillance video. Because this was strong evidence of Gibson’s guilt, there is no reasonable possibility that, without the challenged statements, a rational jury would have reached a different verdict.

¶13 Next, Gibson contends that the circuit court erred by permitting Clark and Pagenkopf to give “improper opinion testimony” identifying Gibson as the suspect in the surveillance video. The admissibility of evidence lies within the circuit court’s sound discretion. *State v. Pepin*, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). To merit a new trial based on erroneously admitted evidence, there must be a reasonable possibility that the error contributed to the

outcome of the proceeding, sufficient to undermine our confidence in the outcome. See *Martindale v. Ripp*, 2001 WI 113, ¶¶30-32, 246 Wis. 2d 67, 629 N.W.2d 698.

¶14 Even assuming that the circuit court erred by admitting this testimony, Gibson’s identification by Clark and Pagenkopf was only part of the identification evidence. Their testimony was duplicative of other evidence of Gibson’s identification made by Miller and Gibson’s probation agent Kamin. Moreover, because the jury watched the surveillance video, jurors could use their own judgment in assessing whether the person in the video was recognizable and whether witnesses accurately recognized Gibson as the person. Under these circumstances, there is no reasonable possibility that the jury would have reached a different result even if the challenged testimony had been excluded.

¶15 Next, Gibson contends that he was denied the effective assistance of trial counsel. To establish ineffective assistance of counsel, Gibson must show that his counsel’s performance was not within the range of competence demanded of attorneys in criminal cases and that the ineffective performance affected the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶16 In order to establish deficient performance, a defendant must show that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* However, “every effort is made to avoid determinations of ineffectiveness based on hindsight.... [A]nd the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms.” *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). In reviewing counsel’s performance, we judge the reasonableness of counsel’s conduct based on the facts of the particular case as they existed at the time of the conduct and determine

whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. *Strickland*, 466 U.S. at 690. Because “[j]udicial scrutiny of counsel’s performance must be highly deferential ... the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689 (quoted source omitted).

¶17 The prejudice prong of the *Strickland* test is satisfied when the attorney’s error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* We may address the tests in the order we choose. If Gibson fails to show prejudice, we need not address whether counsel’s performance was deficient. *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶18 Gibson asserts that his trial counsel was ineffective by failing to subpoena Gibson’s wife, Concerceria Johnson, or to present phone records at trial that would confirm Gibson’s numerous calls to Johnson in the early morning hours of July 4, 2011. Gibson argues that Johnson would have bolstered Gibson’s testimony that he called his wife for a ride; that she arrived with a neighbor after 2:00 a.m. to jump start his car; and that he arrived home in Madison at 3:00 a.m.⁴ The phone records confirmed that Johnson received at least eight calls from

⁴ Gibson testified at trial that his wife drove him in his car back to Madison because his license was suspended and he did not know if Officer Miller “was still around.” Johnson, however, testified at the *Machner* hearing that she left in her car and Gibson left in his. According to Johnson, however, she and Gibson arrived home within five minutes of each other.

Gibson's number in the early morning hours of July 4, 2011, with the final call occurring at approximately 1:23 a.m.

¶19 Gibson, however, fails to establish that he was prejudiced by these alleged deficiencies. Johnson estimated that she and Gibson arrived at their home in Madison between 2:30 and 3:00 a.m., but Johnson conceded that she did not know if Gibson remained home because she went to bed. Even assuming the veracity of her estimated timeline, the burglary did not occur until well after 4:00 a.m., so neither Johnson's testimony nor the phone records establish an alibi at the time of the crime.

¶20 Next, Gibson claims that trial counsel was ineffective by "mishandling" the testimony of his probation agent. Specifically, Gibson faults counsel for (1) failing to stipulate to Gibson's revoked driving status in order to keep probation agent Kamin from testifying; (2) failing to object when Kamin's testimony went beyond Gibson's driving status into identifying Gibson from a surveillance video still; and (3) failing to move for a mistrial when Kamin referenced Gibson's revocation.

¶21 Gibson contends that, if counsel had stipulated to Gibson's revoked driving status, he could have avoided the substantial risk of prejudice inherent when a probation agent testifies. *See State v. Ingram*, 204 Wis. 2d 177, 186, 554 N.W.2d 833 (Ct. App. 1996) ("evidence from a parole agent is inherently prejudicial"). Gibson acknowledges, however, that it was a reasonable strategic decision to use his probationary status to support the claim that his statements to police at Kamin's office occurred under coercive circumstances. Thus, it appears that Gibson's suggested stipulation would have similarly resulted in disclosing that Gibson was on some sort of supervision status related to some prior offense or

contact with law enforcement. Gibson, therefore, has failed to establish that his proposed stipulation would have led to a different result at trial.

¶22 Gibson argues that trial counsel was deficient by failing to object when Kamin went beyond the scope of the rebuttal testimony to identify Gibson from the surveillance video. As noted above, however, the jury viewed the surveillance video, and Kamin's identification testimony was duplicative of Miller's identification testimony. Ultimately, counsel's deficiency, if any, in failing to object does not undermine our confidence in the outcome.

¶23 Gibson also claims that trial counsel was ineffective by failing to move for a mistrial when Kamin referenced his revocation. During redirect examination, a prosecutor asked Kamin to confirm that she no longer worked out of the same office and that she had not had access to her file regarding Gibson "for some time." Kamin responded: "Right. It's been over a year, and I haven't had any reason to look at it since we went to a revocation, and after that I haven't touched it." Gibson asserts that this reference to "revocation" would have warranted a mistrial, as it confirmed to the jury that Gibson had been revoked because of the burglary. We disagree. There was no reason for the jury to think that Gibson was revoked for the burglary rather than for driving with a revoked or suspended license. Ultimately, we have no reason to disturb the circuit court's conclusion that this was a purely inadvertent and "somewhat equivocal" reference to revocation and, therefore, not a basis for a mistrial. Gibson's derivative ineffective assistance argument therefore fails. See *State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel not ineffective for failing to pursue meritless claim).

¶24 Finally, Gibson contends that trial counsel was ineffective by failing to request a cautionary instruction as to “other acts” evidence. Gibson asserts that a cautionary instruction was necessary to inform the jury that it could not use Gibson’s probationary status as evidence that he likely committed the burglary or as a general basis to impeach his credibility. In light of the overwhelming evidence of Gibson’s guilt, as discussed above, Gibson has failed to establish that he was prejudiced by this claimed deficiency of trial counsel. To the extent Gibson asserts that counsel’s deficiencies resulted in cumulative prejudice, counsel’s alleged deficiencies, either separately or cumulatively, do not undermine our confidence in the outcome.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

