COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP637-CR **Cir. Ct. No. 2009CF005830**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL S. DENGSAVANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET and STEPHANIE G. ROTHSTEIN, Judges. *Affirmed*.

Before Curley, P.J., Brennan and Brash, JJ.

¶1 BRENNAN, J. Michael S. Dengsavang appeals from a judgment of conviction and the circuit court's order denying postconviction relief. First, Dengsavang claims his trial counsel was ineffective for: (1) opening the door to

testimony on an excluded crime lab shoe print report; (2) failing to object to Detective Hudson's shoe print testimony on evidentiary grounds of double hearsay and improper expert testimony; and (3) failing to expose exculpatory discrepancies in descriptions of the shooter. Additionally he claims that the trial court erred when it limited the scope of questioning at the ***Machner***[1] hearing by limiting testimony to the specific issue of opening the door to the shoe print report, thereby excluding testimony about the alleged discrepancies in descriptions of the shooter.

¶2 The State responds that Dengsavang failed to show that his trial counsel's performance was deficient as to the first two claimed ineffective assistance issues: (1) opening the door on the shoe print report; and (2) failing to object to Detective Hudson's shoe print testimony on evidentiary grounds. Further, even if he could show deficient performance, any such deficiency was not prejudicial. As to the third claimed ineffective representation issue—failure to expose the alleged description discrepancies—the State argues that this issue is not properly before us because Dengsavang abandoned this issue before his first appeal, and this court's remand for a ***Machner*** hearing neither required a hearing on this issue nor permitted it. Thus the State contends that the trial court did not err in excluding testimony about the alleged discrepancies from the ***Machner*** hearing.

¶3 We agree with the State and affirm.

[1] ***State v. Machner***, 101 Wis. 2d 79, 303 N.W.2d 633 (1981)

BACKGROUND

¶4 After a five-and-a-half-day jury trial,[2] Dengsavang was convicted of attempted first-degree intentional homicide, armed robbery with use of force, and burglary, all as a party to a crime.[3] The complaint alleged that on December 13, 2009, Dengsavang, along with two accomplices, while armed and masked, robbed the owners of a Wauwatosa restaurant, The Happy Wok, at gunpoint at approximately 10:15 p.m.; burglarized the restaurant owners' nearby apartment at approximately 10:30 p.m., while their minor child was home; and then shot a responding police officer at approximately 10:38 or 10:42 p.m.

¶5 The restaurant owners called the police and reported that the robbers had taken their apartment keys and had mentioned knowing their minor son was at home. The police pursued the robbers by following shoe prints with a distinctive Nike pattern in the snow from the restaurant to the owners' apartment nearby and then across North 124th Street, subsequently locating Dengsavang in some trees wearing red and black Nike Air sneakers. The restaurant owners' minor son reported that one of the burglars who entered his home was wearing red shoes. The police found several pairs of gloves, winter masks, and hats in the snow between the apartment and the shooting location, along with the keys to the owners' apartment. Two black gloves and a winter mask were found near the scene of Dengsavang's arrest, and his DNA was found on the items.

[2] We note this was a very long trial, with thirty-seven witnesses, more than 300 exhibits, and more than 1000 transcript pages. However, the issues in this appeal are limited to shoe print testimony and alleged description discrepancies. Accordingly, we summarize much of the rest of the background.

[3] The Honorable Rebecca Dallet presided at trial.

¶6 Although no eyewitness identified Dengsavang, the State sought to tie him to the crimes primarily by his shoes with what the police described as a distinctive Nike pattern on the bottom. A shoe print pattern, which the police believed matched the pattern on the bottom of Dengsavang's shoes, was found on a restaurant door that one of the robbers had kicked, on the grounds of the restaurant, leading from the apartment building to the patrol car of the responding officer who was shot, and then leading to a tree where Dengsavang was found hiding. Several people told the police they saw Dengsavang running from the apartment complex to the tree where he was found hiding.

¶7 At a pretrial hearing on June 2, 2010, five days before trial, the attorney[4] for Dengsavang's co-defendant objected to the admission of a crime lab report analyzing digital images of the shoe prints in the snow near the crime scenes as compared to fifteen pairs of Nike shoes. She advised the court that the report had only been given to the defense the day before, which was after the discovery cut-off of May 21, 2010, and just prior to trial. In the report, the crime lab analyst could not state conclusively whether Dengsavang's shoes produced the prints in the snow, but neither could he rule them out. The trial court ruled that due to the late disclosure of the report, the State could only introduce the contents of the shoe print report in its case in chief if defense counsel opened the door first. The court said:

> I'm going to order the State can't use it in its case in chief. If for some reason the defense put on somebody or questioned somebody who talks about analyzing shoes or says something to the effect of well, you could have analyzed them, why didn't you analyze them … those

[4] Attorney Ann Bowe represented the co-defendant at trial.

> would be the kind of situations I will entertain an opening-the-door type issue ….

At his pretrial hearing, Dengsavang was represented by Attorney Daniel Rieck, who was the associate of his trial counsel, Robert D'Arruda.

¶8 In the State's case in chief, the prosecutor called Detective Hudson, one of the crime scene investigators, as a witness. She testified that there were numerous shoe prints leading out of the restaurant, which she photographed. She described the shoe prints as having distinct horizontal lines, and in the middle they had a long rectangle with the word "Nike." She testified that she followed the Nike prints from the restaurant, lost them briefly, and found them again at the restaurant owners' residence, two blocks away. The prosecutor asked Detective Hudson whether the digital images of the shoe prints from the three crime scenes matched the digital image of the bottom of Dengsavang's shoes. She testified that they appeared to match:

> [Assistant DA]: And [the] footprint[5] appears to match the footprints, or the consistency of the footprints that was found on the shoe of Mr. Dengsavang there; is that correct?
>
> [Hudson]: That's correct.

There was no objection to the question or answer from trial counsel at trial.

¶9 Trial counsel, Robert D'Arruda, then cross examined Detective Hudson and opened the door to the crime lab shoe print analysis report. He asked her to confirm that the State crime lab analyzed photographs of the shoe prints,

[5] At times "footprint" is used in the transcript and at most other times "shoe print" is used. There appears to be no testimony about any footprints being discovered, so we conclude the speaker is referring to the shoe prints at issue when using "footprint."

that it could not conclusively determine that Dengsavang's shoes made the prints, and that Dengsavang's shoes were common, mass-produced Nikes:

> [Atty. D'Arruda]: Okay. Were you aware that impressions were sent to the crime lab or those photos and shoes were sent to the crime lab?
>
> [Detective Hudson]: Yes.
>
> [Atty. D'Arruda]: And were you aware that the examiner said that he could not make a positive identification?
>
> [Detective Hudson]: Correct.
>
> ….
>
> [Atty. D'Arruda]: All right. You're aware the crime lab could not positively identify those pictures to the shoes, correct?
>
> [Detective Hudson]: Correct.
>
> [Atty. D'Arruda]: All right. And you're aware too that obviously Nike is a popular selling shoe, correct?
>
> [Detective Hudson]: Correct.
>
> [Atty. D'Arruda]: And many people, perhaps even yourself, own Nike shoes?
>
> [Detective Hudson]: Correct.
>
> [Atty. D'Arruda]: And a lot of the Nike shoes have similar or the same model, would have probably similar sole -- similar soles as this Nike shoe in question, correct?
>
> [Detective Hudson]: Correct.
>
> [Atty. D'Arruda]: Because Nike shoes are mass produced, are they not?
>
> [Detective Hudson]: Correct.

> [Atty. D'Arruda]: They are not -- if somebody is making pottery, you might make one pot one way, another one a different way. When you mass produce a shoe, like an automobile, you can make literally millions of those the same way?
>
> [Detective Hudson]: Correct. There was only one shoe print and one person under a tree.
>
> [Atty. D'Arruda]: Well, like we said, all you could do is visually match that shoe print, correct?
>
> [Detective Hudson]: Correct.
>
> [Atty. D'Arruda]: No positive identification has been made of that footwear impression, has it?
>
> [Detective Hudson]: Not positively, no.

¶10 Later, on redirect, the prosecutor followed up about the crime lab report, and Detective Hudson acknowledged that the State crime laboratory could not definitively identify Dengsavang's shoes as the only shoes that could have made the shoe prints found at the scene. She also agreed that the analyst could not rule out Dengsavang's shoes as capable of making the prints. Detective Hudson's testimony was the only evidence of the shoe print report presented to the jury. The State never attempted to introduce the report or testimony from the crime lab analyst who prepared it. Dengsavang was convicted on all charges by the jury. He sought postconviction relief, claiming that his trial counsel was ineffective on three grounds: (1) failing to prevent the admission of Detective Hudson's testimony about shoe print evidence as both impermissible lay witness opinion and excluded evidence; (2) failure to effectively argue that Dengsavang could not have been the shooter because he was on the phone at the time of the shooting; and (3) failure to impeach the officer with her description of the suspect, which did not

match Dengsavang. After both parties briefed the issues, the trial court denied Dengsavang's motion without a hearing.[6]

¶11 Dengsavang appealed, raising issues solely related to the shoe prints. Notably, he did not raise any issue about the differing descriptions of the shooter. In his appellate brief, Dengsavang stated three issues: (1) whether the trial court erred in allowing the testimony about the crime lab shoe print report; (2) whether trial counsel was ineffective for opening the door to the shoe print report; and (3) whether the trial court erred in denying Dengsavang's postconviction claim of ineffective assistance of counsel without first holding a ***Machner*** hearing.[7] In his section of his appellate brief developing the third issue, Dengsavang made no mention of any basis for a ***Machner*** hearing other than the shoe print issue. Of particular note, he made no mention of any claim of ineffective assistance based on the alleged shooter description discrepancies.

¶12 This court remanded for a ***Machner*** hearing to obtain trial counsel's testimony on why he opened the door to the excluded shoe print report evidence. *See* ***State v. Dengsavang***, No. 2013AP1573-CR, unpublished slip op. (WI App Apr. 29, 2014). We concluded that:

> Dengsavang was entitled to a ***Machner*** hearing on his claim that his trial counsel gave him ineffective assistance when he opened the door to otherwise excluded shoe-print report evidence.

[6] The Honorable Ellen Brostrom presided at the first postconviction hearing.

[7] *See* brief and appendix of the appellant, pp. iii, 13-17, ***State v. Dengsavang***, No. 2013AP1573-CR, unpublished slip op. (WI App Apr. 29, 2014).

Dengsavang, No. 2013AP1573-CR, unpublished slip op., ¶1 (WI App Apr. 29, 2014)

Additionally, in our opinion, we stated in a footnote that although Dengsavang brought other issues in his postconviction motion, he abandoned them on appeal, and, accordingly, we did not address any issues except the claim of ineffective assistance relating to the shoe print evidence.[8]

¶13 The State filed a motion for reconsideration, which we granted, and then reaffirmed our earlier decision stating that "the original result remains the same." ***Dengsavang***, No. 2013AP1573-CR, unpublished slip op. at 2 (WI App May 23, 2014). We did make one modification however, by deleting one sentence in paragraph 17: "Consequently, we remand for a hearing on this specific issue." *Compare* ***Dengsavang***, No. 2013AP1573-CR, unpublished slip op., ¶17 (WI App Apr. 29, 2014). The rest of paragraphs 17 and 18 were repeated and not modified, stating explicitly that Dengsavang was entitled to a ***Machner*** hearing addressing the questioning that opened the door to allowing the otherwise excluded evidence. The paragraphs read as follows:

> ¶17 Dengsavang asserts that trial counsel "presumably failed to make himself aware" of the circuit court's pretrial evidentiary ruling. The State, responding to what it describes as Dengsavang's "speculation" in this regard, theorizes that a reasonable strategic basis existed for opening the door to evidence of the shoe-print report. We conclude that speculation and theorizing—by either party—cannot substitute for testimony from Dengsavang's trial counsel at a ***Machner*** *hearing addressing the questioning that opened the door to allowing the otherwise excluded evidence.* *See* ***id.***, 92 Wis. 2d at 804 (In

[8] *See* ***Dengsavang***, No. 2013AP1573-CR, unpublished slip op., n.6 (WI App Apr. 29, 2014.

> determining the reasons underlying counsel's handling of a case, "it is the better rule, and in the client's best interests, to require trial counsel to explain the reasons.").
>
> ¶18 Upon review of the record, we conclude that the circuit court erred in denying *this allegation* of ineffective assistance of counsel without an evidentiary hearing. Because Dengsavang's motion alleged sufficient facts, that if true, would entitled [sic] him to relief on his claim of ineffective assistance of counsel, we reverse and remand for an evidentiary hearing.

Dengsavang, No. 2013AP1573-CR, unpublished slip op. at 2 (WI App May 23, 2014) (emphasis added).

¶14 On remand, the trial court held a ***Machner*** hearing, at which trial counsel and trial counsel's associate testified.[9] Although trial counsel could not recall his specific strategic purpose for opening the door, his trial defense strategy was that Dengsavang was not the shooter, was just in the wrong place at the wrong time, and that just because he was wearing Nikes did not mean he was the shooter—many people wear Nikes. When he was asked if he had a strategic purpose for opening the door to the crime lab report in particular, he said that he "asked questions about it to try to essentially make the argument that there are millions of Nike shoes out there and they cannot specifically say these are Mr. Dengsavang's." Further:

> I was trying to bring it up to draw distinctions because just because he's wearing Nike's doesn't mean that these Nike footprints were his and to let the jury know that: Look, it could have been any one of a million or more than millions of people that have Nike's that could have left that footprint. And it didn't mean because he had Nike's that it was his footprint. That would have been the only strategy why I brought it up obviously.

[9] The Honorable Stephanie G. Rothstein presided at the ***Machner*** hearing.

¶15 As to whether he knew of the trial court's pretrial order excluding the crime lab report unless someone opened the door to it, trial counsel testified that although he was not present at the pretrial and did not have a specific memory of the trial court's pretrial order, his associate was present, and it was his practice to have debriefing after every appearance covered by the associate. Counsel's associate confirmed that practice:

> I would take voluminous notes, more than was probably necessary.
>
> Once I got back to the office, I would take those notes and make them into … more usable form for the assigned attorney …. I would commonly put that piece of paper of notes into the file perpendicular so that it was clearly sticking out. I would put the file on the attorney's chair so it couldn't be missed and I would typically call or at least text the attorney and let them know what happened.

¶16 Additionally, as to why he did not object to Detective Hudson's opinion on the basis of her lack of expertise, trial counsel testified: "Looking back, the only thing I can say now is to try to make the argument that it was an unreliable -- there was no real identification. And there's so many Nike's out there that it could have been anybody with those footprints." He further testified that "it would be my practice that if I knew something that could hurt my client and I didn't have the purpose for bringing it in, I wouldn't bring it in." Trial counsel "thought [he] gave the jury enough for reasonable doubt."

¶17 The State argued against any deficient representation at the remand hearing, pointing out that the only thing excluded by the pretrial order was mention of the crime lab report in the State's case in chief, which did not exclude the police and witness testimony about the shoe prints or the many photographs:

> Shoeprint evidence was admissible. It was admissible through the police officers. It was admissible through

> pictures. All that Judge Dallet excluded was the crime lab analyst coming in and testifying that there was a match ….
>
> And, in fact, if you review the closing arguments of both the state and [trial counsel], [trial counsel] used the shoeprint evidence not from the crime lab person but from everybody to show that Nike shoes are available everywhere. And, in fact, when you review his questions, that was the point he was making, that these shoes are not unique shoes ….

¶18 The trial court held that Dengsavang failed to demonstrate that trial counsel was deficient for opening the door to the excluded report because trial counsel's line of questioning was consistent with his trial defense strategy attacking Dengsavang's identification because the State could not conclusively link the shoe prints at the crime scenes to Dengsavang's common Nike shoes. The court concluded that was a reasonable attempt to raise reasonable doubt in the jurors' minds. The trial court also concluded that Dengsavang failed to demonstrate prejudice. Additionally, the trial court noted that this case involved a "mountain of circumstantial evidence," including thirty-seven witnesses and more than 300 exhibits, and that even if the shoe print evidence from the crime lab report were to be excised, "the jury heard ample evidence to enable them to conclude that the defendant was guilty beyond a reasonable doubt."

¶19 Also at the ***Machner*** hearing, Dengsavang sought to introduce evidence from the police dispatch as to the description of the suspect who shot the officer, and the State objected to that line of questioning as going beyond the scope of this court's remand instructions. Dengsavang argued that the remand was broad and encompassed *any* ineffective assistance of trial counsel. Trial counsel for Dengsavang argued that although this court remanded for a ***Machner*** hearing on only the shoe print ineffective assistance claim, it was merely a justification for a broader ineffective assistance hearing, saying: "Rather, [the court of appeals]

used the argument on the shoeprint report to justify it in discussion." The trial court rejected that argument and concluded that this court had remanded for testimony specifically on the ineffective assistance claim based on the shoe print issue.

¶20 Dengsavang appeals.

DISCUSSION

1. Trial counsel's opening the door to the shoe print report was neither ineffective nor prejudicial.

¶21 An ineffective assistance of counsel claim presents a mixed question of fact and law. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). This court will not disturb a trial court's findings of fact unless they are clearly erroneous, but we review the trial court's legal conclusions as to deficiency and prejudice for errors of law. *See* ***id.*** at 127-28.

¶22 To establish ineffective assistance of counsel, a defendant must prove that the representation was (1) deficient and (2) prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must highlight specific acts or omissions that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. A lawyer's strategic decisions "are virtually invulnerable to second-guessing." ***State v. Westmoreland***, 2008 WI App 15, ¶20, 307 Wis. 2d 429, 744 N.W.2d 919. There is a "'strong presumption' that [counsel's] conduct 'falls within the wide range of reasonable professional assistance.'" ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364 (citations and one set of quotation marks omitted; bracket in original).

¶23 To prove prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the results of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶24 Dengsavang first argues that trial counsel had no reasonable strategy for opening the door to testimony about the excluded crime lab shoe print report and that testimony at the ***Machner*** hearing failed to reveal any potentially strategic reason for doing so. Dengsavang further argues that "[w]ithout the double hearsay testimony on the contents of the shoeprint report, there *were* no shoeprints insofar as the jury was concerned. There is, accordingly, no discernable and rational strategic basis on record for opening the door to testimony on the contents of the shoeprint report …."

¶25 First, Dengsavang's statement that the record contained no shoe print evidence without the crime lab report is not accurate, as the State points out. Approximately one third of the transcripts in the record—which totals nearly 1000 pages—include testimony from various police officers and eye witnesses who testified regarding their observations of the shoe prints. Numerous exhibits of shoe print photos were admitted. Additionally, the trial court made it clear that the only limit on the shoe print evidence pertained to the State using the crime lab report in its case in chief: "I'm not making any limitations on the prints themselves or the shoes themselves …. The only thing that's new is this expert analysis of the prints."

¶26 Thus, trial counsel knew that the jury was very aware of the shoe prints when he elicited the testimony about the crime lab analysis. And he

testified at the ***Machner*** hearing that his general trial defense strategy was to show that Dengsavang was innocent, that the officer had identified the wrong person, that there was no direct evidence connecting him to the crime, and that he was simply caught in the wrong place at the wrong time. He testified that he asked questions of Detective Hudson about the crime lab report to show that "there are millions of Nike shoes out there and they cannot specifically say these are Mr. Dengsavang's." Accordingly, his opening the door to the crime lab report was consistent with his trial defense strategy overall and was a reasonable strategy.

¶27 Although, at the time of the ***Machner*** hearing, trial counsel could not recall his *specific* strategic purpose for opening the door to the testimony about the report, he did testify: "That would have been the only strategy why I brought it up obviously." His intent was to sow reasonable doubt: "I thought we gave the jury enough for reasonable doubt." Trial counsel summed up that either he was aware of the pretrial ruling and opened the door to strategically help Dengsavang's defense, or he was unaware of the court's pretrial ruling but brought up the inconclusive nature of the report because he thought it would help Dengsavang. We agree.

¶28 Likewise, we concur with the trial court's reasoning at the conclusion of the ***Machner*** hearing that trial counsel's strategy was reasonable. The trial court held that:

> Clearly defense counsel's line of questioning of Detective Hudson was a credible defense strategy calculated to attempt to raise reasonable doubt as to whether his client committed the crimes of which he was accused. The point to be made to the jurors was that *despite* the fact that the shoes worn by the defendant had been compared by an expert to the prints at the scene, his shoes were *not able to be determined to be the same shoes* as the prints found at the scene. This is a strategy obviously designed to raise doubt in the minds of the

> jurors. The corollary argument (i.e. that the shoes *had not been excluded*) is arguably outweighed by failure of the examiner to reach a definite conclusion that the shoes matched. Trial counsel then made the point with the witness that "Nike shoes are mass produced" perhaps by the millions.

¶29 The trial court is the ultimate arbiter of the credibility of trial counsel and all other witnesses at a ***Machner*** hearing. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). The trial court found that the testimony of trial counsel and his associate were credible and that the testimony that trial counsel elicited from Detective Hudson was consistent with Dengsavang's defense that he was an innocent bystander. We will not disturb the trial court's finding. Accordingly, Dengsavang fails to show that trial counsel was deficient in opening the door to the crime lab report testimony.

¶30 Given that the appellant has not proven the first prong of the ***Strickland*** test, we do not need to address the second prong—prejudice. However, we will briefly state that we agree with the State that there is no reasonable probability that Detective Hudson's testimony regarding the crime lab report affected the outcome of the trial. The record demonstrates voluminous circumstantial evidence supporting the jury's verdict of guilt. Detective Hudson's testimony regarding the crime lab report was just a few paragraphs in a sea of testimony linking the shoe prints to Dengsavang. Her opinion was just one opinion among many. The testimony, itself, did not appear to have much probative value for the State, as the only salvageable evidence from the report was that it was *possible* Dengsavang's shoes *could have* made the shoe prints at the crime scene. Even if the jury had not heard testimony regarding the report, the jury still would have heard all of the other, stronger shoe print evidence.

¶31 We briefly address two other bases on which Dengsavang claims his trial counsel was ineffective: failing to object to hearsay and impermissible expert opinion. Specifically, he argues that Detective Hudson's testimony on the contents of the shoe print report was double hearsay, inadmissible under WIS. STAT. § 908.05 (2013-14),[10] and that Detective Hudson's testimony on her opinion of the shoe print match was outside the scope of permissible lay witness testimony. Neither is properly before us.

¶32 First, as to the hearsay issue, Dengsavang abandoned that argument by not mentioning it in his first appeal, as we noted in a footnote to our first decision in this case.[11] Additionally, with regard to his hearsay argument, we agree with the State that Dengsavang's argument is "nonsensical" because it was Dengsavang's trial counsel who elicited the testimony about the crime lab report; trial counsel cannot object to trial counsel's own line of questioning. *See* ***State v. Frizzell***, 64 Wis. 2d 480, 483-84, 219 N.W.2d 390 (1974) (defendant waived objection to the receipt of otherwise excluded evidence that he introduced). Even if it were not a logical black hole for Dengsavang's trial counsel to object to his own line of questioning, Dengsavang cannot demonstrate prejudice based on trial counsel's failure to object on hearsay grounds, as discussed above, with regard to the shoe print report generally.

[10] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[11] *See* ***Dengsavang***, No. 2013AP1573-CR, unpublished slip op., n.6 (WI App Apr. 29, 2014) ("On appeal, Dengsavang abandons the other arguments made in his motion for postconviction relief. As such, we do not discuss them in this decision.").

¶33 As to his expert opinion argument, we have previously ruled in our first appellate decision that we would not consider his expert opinion argument due to his failure to properly develop it:

> We note that Dengsavang also argues—in what amounts to one paragraph, without any citation to legal authority—"that [t]rial [c]ounsel further prejudiced him by failing to object to Detective Hudson's testimony concerning the shoe prints as within the purview of an expert. As a lay-witness, Detective Hudson was not qualified to testify concerning it." (Record citations omitted.) *We agree with the State that this argument is undeveloped and will not address it further. See* ***State v. Pettit***, 171, Wis. 2d 627, 646, 492 N.W.2d 633, (Ct. App. 1992) (court will not consider inadequately developed arguments.)

Dengsavang, No. 2013AP1573-CR, unpublished slip op., ¶19 (WI App Apr. 29, 2014) (emphasis added; brackets in original).

¶34 The remand mandate did not encompass the expert opinion argument, and Dengsavang cannot add this issue in his second appeal. *See* ***State v. Stuart***, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82 (It is a "'longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal.'") (citation omitted). And even if there was any deficiency, Detective Hudson's opinion was of very little significance given the number of witnesses and exhibits regarding the shoe prints.

2. Dengsavang's claims related to the alleged discrepancies in the descriptions of the shooter are not properly before us.

¶35 Dengsavang makes two separate, but related, claims based on what he describes as the shooter's description disparities. First, he argues that trial counsel was ineffective for failing to expose the alleged description disparities. He contends that trial counsel had no reasonable strategy for failing to point out

exculpatory discrepancies in descriptions of the shooter, which trial counsel could have used for impeachment. Next, he argues that the ***Machner*** hearing trial court erred by prohibiting him from offering evidence and argument on this claimed ineffective representation by trial counsel.

¶36 The State counters that this issue is not properly before us for two reasons: (1) because Dengsavang abandoned it before the first appeal; and (2) because of the "law of the case doctrine," which is a "'longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal.'" ***Stuart***, 262 Wis. 2d 620, ¶23 (citation omitted). We agree with the State.

¶37 First, Dengsavang abandoned the issue in his first appeal. The State points out that when Dengsavang appealed to this court the first time, his appellate brief makes no mention of any claim of trial counsel deficiency based on failure to impeach with the alleged shooter description discrepancies. Although Dengsavang had raised this issue in his first postconviction motion below, he did not do so in his appeal. On appeal, he limited his ineffective assistance argument to trial counsel's mishandling of the crime lab shoe print report and Detective Hudson's opinion on the shoe prints. Accordingly, the State did not brief that issue on the first appeal.

¶38 We specifically addressed his abandoned issues in a footnote in our decision. We stated that while Dengsavang had raised other issues before the trial court at his first postconviction motion, he had *abandoned* all but the shoe print related claim on appeal. ***Dengsavang***, No. 2013AP1573-CR, unpublished slip op., n.6 (WI App Apr. 29, 2014) ("On appeal, Dengsavang abandons the other

arguments made in his motion for postconviction relief. As such, we do not discuss them in this decision."). By abandoning it, he left standing the postconviction court's order denying his claim of ineffective assistance based on an alleged failure to expose or impeach through use of alleged differing descriptions of the shooter. The postconviction court had ruled that the shooter description discrepancies were negligible and did not impact the verdict given the voluminous evidence supporting Dengasavang's involvement in the crimes. The court concluded: "There is no reasonable probability that the jury would have set aside all of that evidence based upon negligible inconsistences in [the officer's] description of the shooter."[12] The postconviction court's order as to the descriptions stands. *See* ***Stuart***, 262 Wis. 2d 620, ¶23.

¶39 We also conclude that the trial court correctly limited the testimony in the ***Machner*** hearing to the shoe print report because that was consistent with this court's mandate. While a trial court exercises discretion on remand, it must give effect to the appellate court mandate and not be inconsistent with the mandate as to any issue "settled by such decision." *See* ***Fullerton Lumber Co. v. Torborg***,

[12] The trial court, the Honorable Ellen R. Brostrom presiding, held that "the court finds no ineffective assistance of counsel's" failure to impeach the officer with the alleged discrepancies in the description of the shooter:

> Given [the officer's] limited opportunity to observe the shooter, the fact that the shooting took place at night, and the fact that the shooter was wearing black clothing, hooded and standing about 30 feet away when he started firing at the officer, it is not surprising that the officer's description did not match on all fours with the defendant's physical characteristics. In any case, as the State suggests, there was plenty of compelling circumstantial and physical evidence connecting the defendant to the crime scenes and these crimes. There is no reasonable probability that the jury would have set aside all of that evidence based upon negligible inconsistencies in [the officer's] description of the shooter. (Footnote omitted.)

274 Wis. 478, 483-84, 80 N.W.2d 461 (1957), *superseded on other grounds by* WIS. STAT. § 103.465 ("On remand the [trial] court has jurisdiction to take such action as law and justice may require under the circumstances as long as it is not inconsistent with the mandate and judgment of the appellate court."). The trial court "is left free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not presented or settled by such decision." ***Fullerton Lumber*** at 484.

¶40 Our mandate here was clear. We agreed with Dengsavang that on remand he was entitled to trial counsel's testimony on whether counsel had a "reasonable strategic basis … for opening the door to evidence of the shoe-print report." ***Dengsavang***, No. 2013AP1573-CR, unpublished slip op., ¶17 (WI App Apr. 29, 2014). This mandate was not changed in the Errata.[13] Dengsavang had offered no argument other than the shoe print issue as a basis for an ineffective assistance claim. The State had not had a chance to respond to any other argument, and, hence, the ***Machner*** hearing's scope was specified as limited to the shoe print issue. This court directed the trial court to conduct a ***Machner*** hearing on the "questioning that opened the door to allowing the otherwise excluded testimony." ***Dengsavang***, No. 2013AP1573-CR, unpublished slip op., ¶16 (WI App Apr. 29, 2014). We did not direct the trial court to conduct a ***Machner*** hearing on the impeachment issues related to alleged description disparities, and, accordingly, the trial court appropriately followed our mandate.

¶41 For all of the foregoing reasons, we affirm.

[13] *See* ***Dengsavang***, No. 2013AP1573-CR, unpublished slip op. at 2 (WI App May 23, 2014).

By the Court.—Judgment and order affirmed.

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