

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2010AP3143-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2005CF117

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

TEREZ LAMAR COOK,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marinette County:
TIM A. DUKET, Judge. *Reversed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. The State appeals an order granting Terez Lamar Cook's WIS. STAT. § 974.06 (2009-10)¹ motion for a new trial based on ineffective

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

assistance of Cook's trial counsel, Alf Langan. The circuit court found Langan deficient in six ways and found that, although the individual instances of deficient performance may not have prejudiced the defense, the cumulative effect of counsel's errors undermined the court's confidence in the outcome. We conclude that Cook failed to meet his burden of establishing deficient performance and prejudice to his defense.²

BACKGROUND

¶2 A jury convicted Cook of armed robbery, armed burglary, three counts of false imprisonment, battery, theft, and mistreatment of an animal causing death, all as a party to a crime and as a repeat offender. The crimes occurred during a home invasion. Two armed men, one of them armed with a hand gun, apparently believing rumors that a large quantity of marijuana could be found at the Harper residence in Peshtigo, entered the house, battered Jimmy Harper, shot the family dog, bound Jimmy, Margaret and Molly Harper with duct tape and stole Sony speakers belonging to Justin Harper.

¶3 Jimmy and Margaret could give detectives no description of the assailants, but their daughter, Molly, provided a general description stating that she believed the assailants were two black men.

¶4 When the assailants left the Harper residence, they ran the car in the ditch. The police quickly determined that the car was related to the home invasion

² The trial judge, for whom we have great regard, rendered a thoughtful and thorough opinion. The State's brief describes the opinion as "patently absurd" and "truly bizarre." Although we disagree with the trial judge's conclusion, we find the State's characterization inaccurate and offensive.

when they found the speakers in the car. Police determined that the car belonged to Ashley Sadowski. When officers questioned Sadowski and her friend, Jessica Babic, the women admitted their role in the crimes.

¶5 Sadowski and Babic admitted they went to a Walmart store with John Egerson and his friend, who was only introduced by nicknames “Rex” and “BN.” The women bought gloves, bandanas and duct tape for the men to use in the home invasion. The women then drove Egerson’s car to the Harper residence with the men following in Sadowski’s car. Sadowski signaled with the taillights when they got to the Harper residence. The women then drove to a park and waited for the men to contact them. The men gave them Egerson’s cell phone and one of his accomplice’s cell phones, and “Rex” kept his other cell phone to call the women when they were finished. After the men ran Sadowski’s car in the ditch, they made three phone calls to the women to find the men and take them from the scene.

¶6 When police learned of the cell phone calls, they checked phone records and determined that the calls came from a phone owned by a Sheboygan woman, Stacy Thede. When the detectives interviewed Thede, she indicated that she purchased the phone for her boyfriend, Terez Cook. Cook, who was present at Thede’s apartment, was taken into custody. The detectives showed Cook’s picture to Sadowski and Babic and they identified him as Egerson’s accomplice in the home invasion. The detectives also took a DNA swab that matched the DNA found on a cigarette found in Sadowski’s car. Cook eventually admitted that he was in Peshtigo and was with Egerson, Sadowski and Babic at the Walmart and after the home invasion, but denied being the fourth perpetrator.

¶7 At trial, Sadowski and Babic identified Cook as the other home invader. Sadowski testified that no one told her she would get immunity in exchange for her testimony but she believed that she would not be charged. At the postconviction hearing, Sadowski testified that she knew she could be charged as a party to the crimes. Babic, out of the presence of the jury, stated that police told her she would not be charged. The prosecutor explained that the women had not been charged, but no one promised them immunity. Langan concurred that the prosecutor told him before trial that the women had not been granted immunity. However, Langan failed to ask in front of the jury whether the State had made any concessions to Babic. Langan also failed to request an accomplice instruction.

¶8 At the trial, Margaret Harper testified that she recognized Cook when she saw him on the morning of the trial because she had a “flashback” and recognized him as one of the assailants by his eyes. Langan did not object to the surprise testimony or request a continuance or a jury instruction. However, in his closing argument, he noted that Mrs. Harper failed to identify Cook’s photo in the police photo array and he questioned her ability to identify Cook only by his eyes.

¶9 Cook’s defense was that David Hall and Egerson perpetrated the crimes. Langan showed the jury a picture of Hall to show his similarities to Cook. Babic testified at trial that Hall did not know about the plan to rob the Harpers and she did not see him with a gun that night when he went to her house about two hours before the robbery to pick up some movies. When Langan asked Sadowski on re-cross-examination whether Hall had a gun the night of the burglary, the prosecutor objected on the ground that the issue was not brought up on redirect examination. Langan then withdrew the question. At the postconviction hearing, Sadowski testified that Hall often carried a gun, but she did not see him with a gun at Babic’s house that night.

¶10 Hall testified at the postconviction hearing and admitted being at Babic's house, but denied having a gun or knowing anything about the home invasion. He admitted knowing Egerson and testified that he picked up the women the next day when they called him for a ride. He indicated that he was with a woman on the night of the crime, but the details of a possible alibi were not presented. Hall also testified that, if subpoenaed he would have testified at Cook's trial. He also testified at the postconviction hearing that he never went to the Harper home with Sadowski prior to the burglary, contradicting Sadowski's testimony that they had gone to the Harper home on previous occasions to look the place over because of the rumor that there was \$30,000 of marijuana in the Harpers' garage.

¶11 The circuit court identified six instances of deficient performance by Langan, the cumulative effect of which prejudiced Cook's defense. The court found Langan's performance deficient: (1) for failing to hire an investigator to find Hall before trial; (2) for failing to object to testimony that Cook temporarily discontinued his interrogation by police; (3) by failing to object to Margaret Harper's in-court identification of Cook; (4) by failing to establish Sadowski and Babic's de facto immunity and failing to request an accomplice instruction; (5) by withdrawing the question to Sadowski whether Hall possessed a gun shortly before the crimes; and (6) by failing to object to hearsay regarding the cell phone records.

DISCUSSION

¶12 To establish ineffective assistance of trial counsel, Cook must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). He

must show that his counsel's representation fell below an objective standard of reasonableness. *Id.* at 688. Judicial scrutiny of counsel's performance is highly deferential and every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Id.* at 689. The court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the challenged action might be considered sound trial strategy. *Id.*

¶13 An error of counsel, even if professionally unreasonable, does not warrant setting aside the judgment if the error had no effect on the judgment. *Id.* at 691. It is not enough for Cook to show that the errors had some conceivable effect on the outcome. *Id.* at 693. Rather, he must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that undermines this court's confidence in the outcome. *Id.* at 694.

Langan's failure to find an investigator to find Hall before the trial.

¶14 Cook established neither deficient performance nor prejudice from Langan's failure to find Hall before the trial. Although Langan was incorrect when he stated his belief that Hall was in prison, and Langan was not aware of how to locate a prisoner, Hall was actually on probation and was officially listed as an absconder at the time. A warrant had been issued for Hall's arrest on other charges. He missed a meeting with his probation officer and the officer was unable to locate Hall at his home. At the postconviction hearing, Hall also testified that his family did not know where he was. However, he denied being in hiding and indicated that he continued to live and work at the same places

throughout the time in question. While it is possible that an investigator could have found Hall before the trial, it was not unreasonable to believe he could not be found or that, if found, he would refuse to testify.

¶15 We also conclude that Cook failed to establish prejudice from Langan's failure to find Hall. At the postconviction hearing, Hall denied any involvement in the home invasion and proffered a possible alibi defense. None of the participants in the crime identified Hall as the fourth participant. While there were discrepancies between Hall's postconviction testimony and Sadowski's testimony regarding whether Hall usually carried a gun and whether he ever joined in surveillance of the Harper residence, those discrepancies are not sufficient to undermine our confidence in the outcome. Establishing Hall's complicity in the crimes by supplying a gun or providing surveillance information would not exonerate Cook. In the absence of any specific reason for Sadowski and Babic to exonerate Hall and falsely accuse Cook, and considering that Sadowski implicated her boyfriend, Egerson, the discrepancies between Sadowski's and Hall's postconviction testimony do not create sufficient doubt that Cook was the second home invader. The extrapolation that Hall rather than Cook perpetrated the crime is too speculative to undermine this court's confidence in the verdict.

Officer's comment on Cook's invocation of his *Miranda*³ rights

¶16 Cook was interviewed by two detectives after his arrest in Sheboygan. After being given *Miranda* warnings and waiving his right to silence, he admitted that he knew Egerson, but denied any involvement in the home

³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

invasion. At trial, without objection, detective Anthony O'Neill identified an exhibit and testified that after taking the statements from Cook, the interview stopped and O'Neill wrote "refused" across the page. The exhibit was never shown to the jury. At the postconviction hearing O'Neill testified that "refuse" referred to Cook's refusal to sign a written statement. The next day, however, after being again informed of his *Miranda* rights, Cook engaged in an interview with the detectives and the jury was informed of Cook's numerous statements on the second day. Cook alleges ineffective assistance of counsel based on Langan's failure to object to O'Neill's comment on the termination of the first day's interview.

¶17 Use of a defendant's silence and response to *Miranda* warnings is not allowed. In this instance, however, Cook did not invoke his right to remain silent, as was shown by his discussions with detectives over a two-day period after being informed of his *Miranda* rights. Even if the jury construed O'Neill's testimony as a statement that Cook refused to speak rather than a refusal to sign a written statement, any adverse inference was minimized by Cook's agreement to speak the next day. The prosecutor did not suggest that any adverse inference should be drawn from Cook's termination of the initial interview. Had Langan objected to O'Neill's testimony, O'Neill could have testified that Cook only refused to sign a written statement. However, in light of all of the evidence presented, we conclude that O'Neill's testimony, even if construed as Cook's invocation of his *Miranda* rights, did not affect the verdict.

Langan's failure to object to Margaret Harper's in-court identification of Cook.

¶18 Citing cases released after Cook's trial, Cook argues that Langan should have objected to Margaret Harper's in-court identification of him because

he was the only black man in the courtroom and the identification was impermissibly suggestive. However, the law as it existed at the time of trial allowed for Margaret Harper's surprise in-court identification testimony. *See State v. Marshall*, 92 Wis. 2d 101, 117-18, 284 N.W.2d 592 (1979). Counsel's performance must be judged by the law as it existed at that time. *Lockhart v. Fretwell*, 506 U.S. 364, 372-73 (1993). Cook argues that under the criteria established in *Marshall*, the identification would have been excluded because the confrontation procedure was unnecessarily suggestive and, under the totality of the circumstances, the identification was not reliable. Much of this argument is based on changes to the law regarding identification that occurred after Cook's trial.

¶19 Likewise, the court's suggestion that Langan should have requested a jury instruction to give the jury the tools necessary to evaluate the eyewitness identification is not based on the law as it existed at the time of the trial. The court also suggested that Langan could have asked for a continuance to better prepare a response to the surprise testimony. It is not clear what additional time would have accomplished. Langan succeeded in informing the jury that Margaret Harper was unable to pick Cook's picture out of a photo array. The jury had an opportunity to see Cook's eyes to determine whether they were so unusual that they could provide the basis for identification. Without the distorting effects of hindsight, we cannot conclude that Langan's approach to the identification issue constituted deficient performance. Furthermore, our confidence in the verdict is not shaken by Margaret Harper's "flashback" identification based solely on Cook's eyes.

Langan's failure to expose Sadowski's and Babic's "de facto immunity"

¶20 Sadowski and Babic were not granted immunity. The jury was informed that they had not been charged. Sadowski testified at trial that no

promises had been made to her by the State and she did not know for sure whether she would be charged. Detective Todd Baldwin testified that no promises had been made to Sadowski in return for her testimony and he never told her she would not be prosecuted. At the postconviction hearing, Sadowski testified that she knew she could still be charged as a party to the crime. Although Langan failed to establish a similar understanding for Babic in the presence of the jury, he learned out of the jury's presence that Babic had not been granted immunity. Langan's failure to establish lack of immunity for Babic before the jury does not constitute deficient performance. While Langan could have further fleshed out the accomplices' desire to curry favor with the prosecutor, there is no reason to believe the prosecutor insisted on testimony inculcating Cook rather than Hall, and no reason to believe the accomplices would think perjury would ingratiate them with the district attorney. Further questioning about Sadowski's and Babic's desire to curry favor with the district attorney would run the risk of enhancing their credibility.

¶21 Cook also faults Langan for failure to ask for an accomplice instruction. While that instruction would have been appropriate, it was not necessary. Both women admitted they initially lied to police. It was obvious that they were highly motivated to cooperate with the district attorney. The general instruction on witness credibility, WIS JI—CRIMINAL 300 (2000), adequately instructed the jury to consider the witnesses' interest in the result, their bias or prejudice, motives for falsifying and all other facts and circumstances that affect credibility. While the instruction on accomplices, WIS JI—CRIMINAL 245 (2000), directs the jury to consider accomplice testimony with caution and great care, we do not believe the outcome of the trial was affected by the jury's failure to receive that instruction.

Langan's performance with regard to whether Hall possessed a gun at Babic's house shortly before the home invasion.

¶22 No witness testified that Hall had a gun similar to the one used in the home invasion when he arrived at Babic's house two hours before the home invasion. When the prosecutor objected to Langan's question whether Sadowski saw a gun at that time, Langan withdrew the question. At the postconviction hearing, the court indicated that it would have overruled the objection. Cook argues that Langan was ineffective for withdrawing the question. At the postconviction hearing Sadowski testified that she saw no gun. Cook has not established prejudice from Langan's failure to pursue that line of questioning. Furthermore, even if Hall had a gun and even if it was the gun used in the home invasion, inculcating Hall does not necessarily exculpate Cook.

Langan's failure to object to hearsay regarding the phone records

¶23 After detectives Baldwin and O'Neill testified about the phone records, the court expressed dismay at the amount of hearsay that had been introduced without objection. Langan responded that he had reviewed the records and discovery and concluded they were authentic. He wrongly assumed that the State would introduce the phone records into evidence, although the State's witness list did not include any phone company employees, and the court indicated it would not allow the State to add a witness mid-trial. Langan instead decided to present evidence through Thede that Cook's cell phone had been lost or stolen before the home invasion. Because Langan failed to make a hearsay objection, the State was not called upon to authenticate the phone records, to establish any hearsay exception or establish O'Neill's basis for determining that the calls were made from a phone Thede bought for Cook.

¶24 While O’Neill’s testimony about the phone records provided some evidence of Cook’s involvement in the home invasion, Cook has not established a reasonable probability that the outcome of the trial would have been different if Langan had objected and the court disallowed O’Neill’s conclusion that the calls were made from Cook’s phone. The phone calls established that a person using Cook’s phone was in Peshtigo at the time of the crime, something that Cook admitted to police. While the phone records were instrumental in the police effort to identify “Rex” or “BN,” the jury did not need to learn how Cook came to the detectives’ attention. The photo identification by Sadowski and Babic and the DNA test resulted from the phone investigation, but it was not necessary for the jury to know that. The phone calls from Cook’s allegedly lost or stolen phone did not constitute the most damning evidence against him. Rather, his admission that he was with the other perpetrators at the Walmart when they bought the bandanas, gloves and duct tape, his DNA found in the get-away car, his accomplices’ identification of him as a perpetrator, his inability to explain why Sadowski and Babic would falsely incriminate him and his failure to account for his whereabouts during the robbery when he admitted being with the perpetrators before and after the robbery establish his guilt without considering the hearsay.

¶25 Whether considered individually or collectively, we conclude that Langan’s conduct does not undermine our confidence in the outcome. While some of his decisions and his explanations for his decisions are questionable, they had only a conceivable effect on the outcome which does not meet the test set out in *Strickland*. See *Strickland*, 466 U.S. at 693.

By the Court.—Order reversed.

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

