

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 27, 2001

Cornelia G. Clark
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. 01-0900-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-383

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DARRYL E. PIERCE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM C. GRIESBACH, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Darryl Pierce appeals a judgment convicting him of attempted armed robbery and an order denying postconviction relief. He argues that he was denied effective assistance of counsel because defense counsel failed to impeach a key prosecution witness with inconsistent statements. Because Pierce fails to demonstrate prejudice, we affirm the judgment and order.

¶2 In 1998, a male customer in a green T-shirt entered a cafe in downtown Green Bay, approached the owner, asked her about the menu and sat down at a nearby table. The owner, Pamela Steinbrecher, had never seen the man before. He was the only black customer in the restaurant at the time.

¶3 After the waitress brought him his food, he ate a little, and then went to the men's room for what seemed to Steinbrecher as a long time. Upon returning, he asked the waitress for boxes to pack up his remaining food. As Steinbrecher was standing at the front counter with her back to the dining room, she felt a man grab her from behind and place his arm around her neck. She realized that he was holding an object that felt like a small pocketknife to her throat.

¶4 The man told her not to say anything, to turn around and give him all the money in the cash register. Steinbrecher struggled with him over the knife as he swung her around. Steinbrecher loudly yelled "No" and the man let go. Chased by the cook, he ran out the door and escaped.

¶5 Steinbrecher recognized the assailant's voice as that of the black male customer, saw that his arm was black and that he was wearing the same green T-shirt as the customer. Steinbrecher described the assailant as a black male in his late twenties or early thirties, clean shaven, five foot nine inches tall, 220 pounds, wearing a black Nike baseball cap, blue jeans and tennis shoes.

¶6 Steinbrecher called 911 and told the cafe employees not to touch anything on the table where the assailant had been sitting. When the officers arrived, they seized a catsup bottle and other items from that table. Three latent prints were lifted from the bottle, one of which was identified by the State Crime

Lab as matching a print from Pierce's right middle finger. Steinbrecher testified at trial that the catsup bottles were generally wiped off after each use.

¶7 Steinbrecher was shown a photo array that did not include Pierce's photo. She made no positive identification, but noted that one of the photos, while not the assailant, looked similar. Several days later, she was asked to view a second photo array, consisting of six color photos provided by the Racine County Sheriff's Department. Steinbrecher immediately selected Pierce's photo as a person who looked like the assailant, but noted that the assailant's skin color was closer to that of another photo.

¶8 A third photo array was presented to Steinbrecher, which included Pierce's photo taken on the day of his questioning. Steinbrecher did not select Pierce's photo. Instead, she chose another individual's photo as the one resembling the suspect.

¶9 Rosemary Kabacinski, a customer, told officers that she saw the assailant run out the door. She described him as a black male in his twenties, five foot nine or five foot ten inches tall, of average build, with short hair and wearing a green shirt. When she was shown the Racine County photo array, she selected the same two photos as Steinbrecher as the ones most similar to the assailant.

¶10 Coincidentally, the day after the attempted robbery, the police stopped Pierce for an unrelated matter. At that time, they described him as wearing bib blue jeans, a Nike baseball cap, with a shaved head and a goatee.

¶11 A few days later, officers went to a motel where Pierce was staying and asked him to accompany them to the police department for questioning. He asked if he could take a bag of clothes, stating, "I don't think I'll be coming back

so I'll take my stuff.” Pierce was wearing bib overalls, a green sweatshirt, and a black Nike baseball cap. Upon questioning, Pierce described himself as five foot nine inches tall and weighing 220 pounds.

¶12 The trial focused on the assailant's identity. The jury returned a verdict finding Pierce guilty. Pierce brought a postconviction motion alleging ineffective assistance of counsel. The circuit court denied his motion and Pierce appeals.

¶13 Pierce argues that he was denied effective assistance of counsel because defense counsel failed to impeach Kabacinski with inconsistent statements she made to officers. He points out that in her initial statement, Kabacinski indicated that she “did not see the incident take place.” At trial, Kabacinski testified that she “could see what was happening there,” saw the man's arm around Steinbrecher's neck and saw him jump over the counter. She further testified that she had seen the suspect walk past her on the way to the rest room. This observation was not mentioned in the police report.

¶14 Pierce also notes inconsistencies with respect to Kabacinski's photo identification. The officer reported that Kabacinski could not be sure that any of the parties in the photo array were involved. His report read:

When I showed her the photo array, she looked at it carefully for approximately one minutes (sic) and she stated that either Photo #1 which is [Timothy Hill] or Photo #5 which is [Pierce] looked the most similar to the person that was in the restaurant the night it was robbed. She stated she could not be sure if any of these parties were involved, but those two photographs looked the most similar.

¶15 At trial, however, Kabacinski testified that she recognized Pierce when she saw his photo:

Well, I looked at it for quite a while and I said, well, it looks really like this number five on the picture. ... [I]t just looked like him. Well, I kind of looked at another one and said, well, it might be—looked like this guy, but then after the more I looked at number five, I knew it was him.

¶16 Pierce contends that an ordinarily prudent lawyer would have used the two police reports to impeach Kabacinski at trial. Instead, defense counsel failed to do so and at the postconviction hearing offered no reason for this failure. Pierce argues that because this was a close case, defense counsel's deficient performance was prejudicial.

¶17 We disagree that Pierce has shown prejudice. "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. ... Second, the defendant must show that the deficient performance prejudiced the defense." *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985).

¶18 Even if Pierce can show that his counsel's performance was deficient, he is not entitled to relief unless he can demonstrate prejudice. *See Strickland v. Washington*, 466 U.S. 668, 693 (1984). He must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, 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.* Pierce must demonstrate that the failure to impeach Kabacinski deprived him of a "fair trial, a trial whose result is reliable." *Id.* at 687. Whether counsel's deficient conduct prejudiced the defense is a question of law we review de novo. *Pitsch*, 124 Wis. 2d at 634.

¶19 We are satisfied that any deficiency due to failure to impeach Kabacinski was not prejudicial. At trial, defense counsel cross-examined the investigating officer, who testified that when Kabacinski was shown the photo array, “[s]he looked at the photos, she picked out two pictures as being the most similar, one was that of a Timothy Hill and the other one was the picture of Mr. Pierce.” Although the officer’s report was not used on cross-examination, defense counsel brought to the jury’s attention the information in the report that Kabacinski identified Hill and Pierce as most similar. Thus, through cross-examination of the officer, the jury was informed that Kabacinski could not conclusively identify Pierce from a photo array.

¶20 In addition, defense counsel’s alleged deficiencies would have done nothing to rebut the uncontradicted fingerprint evidence. As the owner working seven days a week, Steinbrecher testified that she had not previously seen Pierce visiting her restaurant and that his inquiry about the menu indicated that he was a new customer. She stated that the catsup bottles were normally wiped down after each use. There is no dispute that Pierce’s fingerprint was found on the catsup bottle at the suspect’s table following the attempted robbery. Steinbrecher testified that no one had touched the bottle at Pierce’s table after he fled and before the police arrived.

¶21 Pierce’s argument on appeal is limited to defense counsel’s cross-examination of Kabacinski. In light of Steinbrecher’s testimony, and the corroborating fingerprint evidence, we are satisfied that there is no real probability that impeachment of Kabacinski’s testimony with the officer’s reports would have resulted in a different verdict. Because we conclude that defense counsel’s alleged deficiency is not prejudicial, Pierce’s ineffective assistance of counsel claim must fail.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.21(1)(b)5 (1999-2000).

