

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 6, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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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. 2015AP2663-CR**

**Cir. Ct. No. 2014CF2123**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**PATRICK E. MILLER,**

**DEFENDANT-APPELLANT.**

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

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

¶1 PER CURIAM. Patrick Miller appeals a judgment of conviction for theft from a financial institution, as a party to a crime, contrary to WIS. STAT. § 943.81 (2013-14), and an order of the circuit court denying his postconviction motion for a new trial on the ground of ineffective assistance of counsel. Miller

contends that his trial counsel was ineffective because counsel failed to investigate prior to trial statements by the State's key witness. We affirm for the reasons explained below.

### **BACKGROUND**

¶2 Miller was charged with one count of robbery of a financial institution, as a party to a crime. The complaint alleged that on April 3, 2013, a masked African-American male wearing a black hooded sweatshirt entered an Associated Bank branch office located in Madison where he demanded that two bank tellers give him all the money in their registers. The masked male took \$3,394.00 from the registers and left the vicinity of the bank in a red vehicle.

¶3 The complaint alleged that a red Pontiac Sunfire, which matched the description of the vehicle the thief left in, was located near the area of the bank. The driver of the vehicle was identified as Glenn Johnson. The complaint alleged that Johnson identified the bank thief as "Daryl" and that "Daryl's" father is Daryl McCurdy, Sr. The complaint alleged that Daryl McCurdy, Jr., Miller's half-brother, had an alibi at the time of the robbery, and that Miller had in the past used Daryl Jr.'s name. The complaint further alleged that a cellular phone number used by Miller "had been pinging at the time of the [ ] Associated Bank robbery ... in the general vicinity of the Associated Bank" and that on the date of the robbery, calls were made between Miller's phone number and Johnson's phone number.

¶4 Miller pled not guilty. The case was tried before a jury, which found Miller guilty of the lesser included offense of theft from a financial institution.

¶5 Miller filed a postconviction motion for a new trial on the ground of ineffective assistance of counsel. Miller argued that his trial counsel was

ineffective for failing to review recorded statements made by Johnson to police in April 2013. Miller asserted that those statements could have been used at trial to impeach Johnson and the investigating detective, Kevin Linsmeier. The circuit court denied Miller's motion. Miller appeals.

¶6 Additional facts are discussed below as necessary.

## DISCUSSION

¶7 Miller contends that the circuit court erred in denying his postconviction motion for a new trial on the basis of ineffective assistance of counsel. To set aside a judgment of conviction for ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove that counsel's performance was deficient, a defendant must point to specific acts or omissions that were "outside the wide range of professionally competent assistance." *Id.* at 690. To prove prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. *Id.* at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.* Because a defendant must show both deficient performance and prejudice, an appellate court need not consider one prong if the defendant has failed to establish the other. *State v. Chu*, 2002 WI App 98, ¶47, 253 Wis. 2d 666, 643 N.W.2d 878.

¶8 Miller argues that his trial counsel was deficient for failing to review, prior to trial, video recordings of Johnson's interviews with Detective Linsmeier on April 5 and 8, 2013, and to use what Miller characterizes as "numerous inconsistencies" between statements Johnson made during the

interviews and Johnson's and Linsmeier's trial testimony, to impeach Johnson and Linsmeier. In particular, Miller asserts that during the April 2013 interviews, Johnson told Detective Linsmeier that the man who got inside Johnson's vehicle on April 3 was named "Daryl," but that at trial, both Johnson and Detective Linsmeier testified "that Johnson had identified the suspect as Rico and Sam from early on in the investigation." Miller argues that, had trial counsel used this inconsistency to impeach Johnson's and Detective Linsmeier's credibility, there is a reasonable probability that the jury would have found Miller not guilty because the central issues at trial were whether Miller was the masked individual who stole from the Associated Bank on April 3, 2013, and whether Johnson, who was the only witness who directly identified Miller as that individual, was credible.<sup>1</sup>

¶9 We do not address whether the circuit court is correct that trial counsel was deficient for failing to review the recordings of the April 2013 interviews because we conclude that even if counsel's performance was deficient, Miller was not prejudiced by counsel's failure to use Johnson's statements in the interviews to impeach Johnson and Detective Linsmeier at trial.

¶10 On direct examination, Johnson testified as follows:

[Prosecutor] Prior to your involvement in this case, did you know the person you identified as Patrick Miller?

[Johnson] No, I didn't.

[Prosecutor] What did you know him as?

[Johnson] Daryl McCurty, Jr.

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<sup>1</sup> At trial, Johnson identified Miller in-court as the individual who got inside his vehicle near the Associated Bank on April 3, 2013. We note that Miller's ineffective assistance of counsel claim concerns only trial counsel's alleged failure to sufficiently challenge Johnson's credibility on cross-examination.

[Prosecutor] Did he identify himself to you as Daryl McCurty, Jr.?

[Johnson] No, he didn't.

[Prosecutor] Who did?

[Johnson] Me knowing his father and him saying "Little Daryl," I thought he might have been Daryl McCurty, Jr.

....

[Prosecutor] [I]n your dealing with [Miller] prior to your involvement in this case ... what name did you refer to him as?

[Johnson] Street as Rico, Sam. I didn't know his government name.

[Prosecutor] So you knew him by multiple names; is that correct?

[Johnson] Yes.

[Prosecutor] Can you tell us what names you knew him as?

[Johnson] Rico and Sam.

[Prosecutor] ... Prior to your involvement in this case, did you know [Miller] as Daryl?

[Johnson] No.

[Prosecutor] You referred to him as Rico or Sam?

[Johnson] Yes.

¶11 Johnson also testified on direct examination:

[Prosecutor] [D]o you recall telling Detective Linsmeier [During the April 2013 interviews] that the person who got in your car was named Daryl?

[Johnson] Did I say that that was Daryl that got in my car?

[Prosecutor] Yes.

[Johnson] No, I don't recall saying that. I recall saying it was Rico or Sam at that time.

[Prosecutor] And at some point during this investigation, did Detective Linsmeier show you ... a picture of a person?

[Johnson] Yes, he did.

[Prosecutor] And did you identify that person as Daryl, the person who got in your car?

[Johnson] Yes, I did.

¶12 On cross-examination, Johnson testified:

[Defense Counsel] Do you remember telling Detective Linsmeier initially [during the April 2013 interviews] that you didn't know the suspect's name?

[Johnson] I remember saying something along the lines of that, yes.

[Defense Counsel] But then you thought about it, and you thought it was someone named Daryl; is that what you told him?

[Johnson] Yes, I think that's what I did say.

[Defense Counsel] And in that particular conversation, you never told Detective Linsmeier that you also knew this Daryl person as Sam or Rico; isn't that correct?

[Johnson] Yes, I said I knew him as Sam or Rico, yes.

[Defense Counsel] I'm saying isn't it true that you didn't tell him that that day?

[Johnson] That I didn't tell him it was Sam or Rico? I can't recall. When did I say that?

[Defense Counsel] And you told [Detective Linsmeier] you had known this person you were referring to as Daryl for about three years; is that right?

....

[Johnson] That I knew him for three years, yes.

¶13 Johnson's testimony at trial was inconsistent as to the name or names he initially identified Miller by and as to when he told Detective Linsmeier

that he knew Miller as Daryl, Rico, and/or Sam. In addition, Johnson testified on cross-examination that he was not able to recall when exactly he told Detective Linsmeier that the man he drove on April 3, 2013, went by the names “Rico” and “Sam.” Counsel fails to explain how further questioning as to what particular name Johnson identified Miller as during the April 2013 interviews would have further impeached Johnson’s credibility.

¶14 In addition, the jury was aware that during the April 2013 interviews, Johnson admitted that he told Detective Linsmeier “a bunch of different stories” about how Miller came to be in his car following the theft. Johnson testified that before admitting to Detective Linsmeier that he had agreed to pick up Miller near the Associated Bank on April 3, 2013, he initially denied picking up anyone in his vehicle and that he also said that a man he did not know jumped inside his vehicle without permission, pointed a gun at Johnson, and demanded that Johnson drive him. The jury was aware that Johnson had ten prior convictions, that he was charged as a co-defendant in the bank theft, that he had been given immunity for his testimony, and that he was hoping that his testimony at Miller’s trial would influence the outcome of the charges against him.

¶15 The jury was also aware that Johnson admitted to having been addicted to heroin and suffering from withdrawal at the time of the April 2013 interviews. Johnson testified that at the time of those interviews, he was “saying anything other than trying to get [himself] in trouble” and that he “said many things ... [that] [i]t [was] kind of hard for [him] to remember” saying particular things. In light of the substantial evidence challenging Johnson’s credibility at trial, we are confident that trial counsel’s failure to further challenge Johnson’s credibility had no effect on the verdict.

¶16 Turning to Detective Linsmeier's trial testimony, Miller asserts that Linsmeier's trial testimony was inconsistent with Johnson's April 2013 interviews, citing to three specific pages in the transcript of Linsmeier's testimony. The following are those portions of Linsmeier's testimony from those pages that, as best we can tell, are relevant to this case.

[Prosecutor] At some point your investigation led you to Daryl McCurty, Jr.?

[Linsmeier] That is correct.

[Prosecutor] How did that come about?

[Linsmeier] That came about through my interview or interviews with Glenn Johnson.

[Prosecutor] What information did [ ] Johnson give you that led you to Daryl McCurty, Jr.?

[Linsmeier] He gave me the name Daryl.... He gave me some nicknames ... but they were not associated with Daryl McCurty, Jr. They were later determined to be associated with Patrick Miller.

[Prosecutor] But at the time you were first looking at Daryl McCurty, Jr., were you sure whether or not those names were associated with him?

[Linsmeier] I didn't know.

....

[Prosecutor] In the course of interviewing a variety of people during this investigation, were you given various aliases for Patrick Miller?

[Linsmeier] Yes.

[Prosecutor] What [aliases] were you given?

[Linsmeier] The two primary [aliases] were Rico and Sam, Daryl or Daryl McCurty, Jr., those are the ones that were predominant throughout this investigation.

[Prosecutor] Who knew Patrick Miller as Rico?



[Linsmeier] Glenn Johnson did, Earl or Robert Earl Brown did, Heidi Krueger did; her boyfriend, Bryan Gehin did.

[Prosecutor] Who knew Patrick Miller as Sam?

[Linsmeier] Robert Earl Brown did, Heidi did, and –

[Prosecutor] Who knew Patrick Miller as Daryl?

[Linsmeier] Glenn Johnson did.... Bryan Gehin did and Heidi Krueger was aware that he has used that name Daryl also.

[Prosecutor] And this isn't an exhaustive list of who knew him as Rico or Sam or Daryl?

[Linsmeier] It's not.

[Prosecutor] It's just a few people that we have seen testify in the last two days?

[Linsmeier] That is correct.

¶17 Miller asserts that Detective Linsmeier testified that “Johnson had identified the suspect as Rico and Sam from early on in the investigation,” “contrary to what [Johnson’s] recorded statements showed.” However, in that portion of Detective Linsmeier’s testimony that Miller cites to, Detective Linsmeier does not testify that Johnson told him during the April 2013 interviews that the suspect went by the names Rico and Sam. We fail to see how Detective Linsmeier’s testimony was contrary to Johnson’s recorded statements, and even if it was, Miller has not explained to this court why that inconsistency would significantly undercut the credibility of Detective Linsmeier’s testimony. Accordingly, we conclude that Miller has not developed an argument that trial counsel’s failure to challenge Detective Linsmeier’s testimony on the basis that Johnson did not identify Miller as Rico or Sam during the April 2013 interviews was not prejudicial. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address arguments that are insufficiently developed).

## CONCLUSION

¶18 For the reasons discussed above, we affirm.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

