

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 20, 2007

David R. Schanker
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. 2007AP98-CR

Cir. Ct. No. 2004CF4574

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LAM THANH NGUYEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Lam Thanh Nguyen appeals from a judgment of conviction resulting from a jury verdict finding him guilty of one count of burglary of a dwelling while a person was present, and one count of robbery with threat of force, both as a party to a crime, in violation of WIS. STAT.

§§ 943.10(2)(e), 943.32(1)(b), and 939.05 (2003-04), and from the denial of his postconviction motion.¹ Because we determine that the jury had sufficient evidence before it to find guilt beyond a reasonable doubt, that trial counsel did not provide ineffective assistance of counsel, and that a new trial is not warranted in the interest of justice, we affirm.

BACKGROUND

¶2 On the morning of August 14, 2004, Thoi Tran and her five-year-old granddaughter, Christy C.,² were at the home of Christine C., Christy C.’s mother and Tran’s daughter-in-law. Shortly before noon, two men entered the home and demanded to know where the safe was. When Tran told them that she did not know where it was, one of the men took Christy C. into another room, while one man stayed with Tran, putting a towel over her head and telling her to “be quiet, do not speak” or he would shoot her. The man thereafter took Tran down into the basement of the home, threatening that if she would “shout or anything he will shoot.”³

¶3 After the house became quiet, Tran left the basement, ran out of the house and flagged down a car. The driver of the car called the Milwaukee Police Department. After the police were called, but before they arrived, Tran called her

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² The parties refer in their briefs to the five-year-old victim as Christy C., and her mother as Christine C. We do the same.

³ All testimony of Tran quoted in this opinion is the English translation of her words, which were uttered in Vietnamese.

daughter-in-law, Christine C., on someone's cellphone. Christine C. arrived at the home shortly after the police arrived.

¶4 The police found Christy C. in the house, apparently unharmed, though appearing to be "in shock." They then proceeded to get a statement from Tran, using Christine C. and others as interpreters, as Tran spoke almost exclusively Vietnamese. The police also went through the house and Christine C. pointed out where the safe had been located. Only the safe, which had been located in Christine C.'s bedroom, had been taken. The perpetrators were no longer at the residence when police arrived.

¶5 Tran described the perpetrators (through translation by individuals at the scene, but not including Christine C.) as two Vietnamese males, one with a bent back.⁴ The descriptions provided by Tran were put out on the police dispatch while police were conducting their investigation at the residence.

¶6 Milwaukee Police Detective Stephen Rowe arrived at the residence at 1:05 p.m. on the day of the incident and conducted an investigation of the premises which included attempting to retrieve fingerprints and other evidence. No fingerprints were found due to the types and minimal number of surfaces which the perpetrators touched (e.g., towel, blanket, front door knob, doorbell). Rowe testified that it is not unusual to not find fingerprints and that fingerprints are only found about twenty-five percent of the time.

⁴ Tran testified that she later told Christine C. that one was short, one was tall and the short one had a "bent, hunch back." Christine C. testified to the same. Officer Bruce Payne, one of the officers who responded to the residence, testified that he was told that the perpetrators were the same height and that one may have a mustache. Tran testified that she never said either of the perpetrators had a mustache.

¶7 On August 25, 2004, Christine C. took her mother-in-law to BB Nail Salon.⁵ Christine C. did not tell Tran why or where they were going until they arrived at BB's. When they arrived at BB's, Tran did not go in, but Christine C. asked Tran to look through the salon's open door and tell her "among these people you look and see which of those that came to our house." Tran testified that she pointed Nguyen out to Christine C. and then she went "far away ... a distance" from the salon because she was fearful. Tran testified that while Christine C. may have at first identified to police both Nguyen and the owner of BB's, Toan Truong, as the perpetrators, Tran never pointed to Truong, but only to Nguyen. Tran further denied, on cross-examination by Nguyen's counsel, that Christine C. had pointed Nguyen out to her in BB's or that Christine C. had asked "He is the one?"

¶8 Tran testified that she "rarely wear[s] glasses, only wore her glasses to see up close or to watch television, and that she did not need them to see far." Tran was not wearing her eyeglasses at the time of the robbery/burglary or at the time of her identification of Nguyen at the salon. At trial, Tran was wearing her glasses during her direct examination because she knew that she would be required to view photographs. When she returned to the witness stand for cross-examination following a break, she was not wearing her glasses, and she could identify Nguyen from the witness stand, approximately twenty-four feet away.

¶9 There were four men and one woman at BB's when Christine C. and Tran arrived. After Tran had pointed out Nguyen as one of the perpetrators and

⁵ The nail salon where Tran identified Nguyen for police was variously identified as either "BB Nail Salon" or "BeBe Nail Salon." For consistency, we refer to it in the remainder of this opinion as "BB's," "the nail salon" or "the salon."

Christine C. had called 9-1-1, two of the men left the salon. Police Officer Richard Schellhammer responded to the 9-1-1 dispatch and after being told by Christine C. that Tran had pointed Nguyen out as one of the robbers from the August 14 incident, Schellhammer talked with Nguyen. Schellhammer testified that Nguyen first spoke to him in heavily-accented English, with an occasional assist in translation from one of the other Vietnamese individuals present, but that after the discussion became more directed at Nguyen's potential involvement in the robbery and the need for him to come with the police, Nguyen began to speak more and more Vietnamese and then "just kind of acted like he wasn't understanding us too well." Nguyen was subsequently arrested on suspicion of robbery and burglary and taken into custody.

¶10 The following day, Rowe was informed of the identification of a possible suspect in the August 14 robbery/burglary. Rowe prepared a photo array of suspects to show Tran. Because Rowe wanted to ensure that all of the photos were of males of Vietnamese ancestry, Rowe enlisted the services of Milwaukee County Sheriff's Deputy Do Vu, an individual of Vietnamese ancestry, who also assisted in translating for the victims and Nguyen during various points of the investigation. To ensure that the photo identification was as accurate as possible, Rowe presented the photos to Tran one at a time, rather than in an array. From the photos, Tran picked out Nguyen as one of the perpetrators.

¶11 On September 9, 2004, a preliminary hearing was held. Tran testified and made an in-person identification of Nguyen as one of the perpetrators during this hearing. At trial, in February 2005, Tran, for a fourth time, identified Nguyen as one the perpetrators of the August 14, 2004 robbery/burglary, both by pointing to him and by identifying what he was wearing.

¶12 Nguyen had two witnesses at trial: Truong and himself. Truong testified that Nguyen had called him on both the afternoon of the Saturday that the robbery/burglary occurred and on the Sunday of the same weekend, volunteering to Truong in both conversations that Nguyen was in Chicago, though Truong “ha[s] no idea” whether Nguyen was actually in Chicago. Upon re-direct examination by defense counsel, Truong modified this testimony, stating, “I think I said-- Usually talking on the phone if he didn’t come to work, I say, ‘Where are you now?’ And he say he working in Chicago.” Truong, however, also testified that Nguyen had never called him before when he was out of town. Truong testified that he felt upset with and betrayed by Christine C. because she did not tell him what she was really doing when she came to his shop on August 25 with her mother-in-law and when she used his telephone to call 9-1-1.

¶13 Nguyen testified that he went to Chicago to identify possible car dealerships where he could work washing cars. Nguyen testified that the purpose of the August 14 trip was “to give out a card, an ID card and talk to the manager and wash all the cars that are going to be sold,” and “to survey the market to see if the pay was high or not.” Nguyen testified that he telephoned BB’s and spoke to Do (an employee at BB’s), not Truong, on August 14, 2004, and he told her, she did not ask, that he was in Chicago. Nguyen testified that he avoided all the toll roads and never stopped and talked with any dealerships that day.

¶14 Nguyen also testified in contradiction to Schellhammer’s and Rowe’s testimony. Nguyen testified that he never spoke in English to the police officers on August 25. This testimony directly conflicted with Schellhammer’s testimony that Nguyen began talking with him in English, with some translation assistance at times by one of the bystanders at BB’s. Nguyen also testified that he did not give Schellhammer his Milwaukee address because the officer asked for

identification and his identification gave his address in Minneapolis. Nguyen went on to testify that he did give his Milwaukee address to Rowe. This testimony directly contradicted Rowe's earlier testimony that he first obtained Nguyen's Milwaukee address on September 1, through his own investigation, and that when he went to Nguyen's apartment on that date, he was informed by Nguyen's landlord that Nguyen's roommates had moved out shortly after Nguyen's arrest on August 25.

¶15 During closing arguments, both the State and defense counsel discussed the fact that Tran's eyewitness testimony was key in determining whether Nguyen was a party to the crime of robbery/burglary on August 14, 2004. The State specifically noted the lack of other evidence:

Is this one of the people who did these terrible things to Thoi Tran and her granddaughter? Can we rely on the identification of the victim and find that the evidence here is satisfactory beyond a reasonable doubt and convict. That's the whole question....

[I]n real life you don't always get DNA You don't always get fingerprints.

....

In a certain limited sense you could look at it as it's her word, the victim's word and her reliability and her testimony, believability versus the defendant's denial.

¶16 The jury convicted Nguyen on both counts. Nguyen filed a postconviction motion to vacate his judgment of conviction and for an order either finding him not guilty or granting him a new trial. The postconviction court held a hearing on Nguyen's motion, which included a *Machner*⁶ hearing relating to

⁶ *State v. Machner*, 101 Wis. 2d 79, 303 N.W.2d 633 (1981).

claims of ineffective assistance of trial counsel asserted by Nguyen in his postconviction motion. The trial court denied the motion in its entirety. Nguyen appealed.

DISCUSSION

¶17 On appeal, Nguyen argues that: (1) “the evidence before the jury was insufficient to support a conviction”; (2) he “was denied effective assistance of trial counsel”; and (3) he “should be granted a new trial in the interest of justice.”

I. Evidence was sufficient to support jury verdict

¶18 Nguyen first argues that the evidence was insufficient for the jury to find him guilty beyond a reasonable doubt because the only evidence linking him to the robbery/burglary was the eyewitness testimony of Tran which he claims “was unreliable on a number of levels.” The State argues that the jury had before it the eyewitness testimony of Tran, testimony from Tran and Christine C. regarding the identification made at BB’s, and Nguyen’s testimony regarding his alibi which was inconsistent with his defense witness, and that based on this, the jury had sufficient credible evidence to conclude that Nguyen was guilty of the charges.

¶19

Our task in reviewing the sufficiency of the evidence is to determine whether the evidence at trial, viewed most favorably to the State and to the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact acting reasonably could have found guilt beyond a reasonable doubt. In doing so, we must keep in mind that the credibility of the witnesses and the weight of the evidence is for the trier of fact, and we must adopt all reasonable inferences which

support the jury's verdict. The test is not whether this court is convinced of [defendant]'s guilt beyond a reasonable doubt, but whether this court can conclude that the trier of fact could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true.

State v. Searcy, 2006 WI App 8, ¶22, 288 Wis. 2d 804, 709 N.W.2d 497 (citations omitted). In addition, not only is it the jury's duty to determine the credibility of the witnesses and the weight of the evidence, *State v. Poellinger*, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990), but if there is any possibility that the jury could, from the evidence presented, be convinced that the defendant is guilty, then "an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it," *id.* at 507.

¶20 Only when the evidence that the trier of fact relied upon is "inherently or patently incredible" may an appellate court substitute its own judgment for that of the trier of fact. *State v. Curiel*, 227 Wis. 2d 389, 420, 597 N.W.2d 697 (1999). To be inherently or patently incredible, testimony must be in "conflict[] with nature or fully established or conceded facts."⁷ *Id.* (citation omitted); *State v. Clark*, 87 Wis. 2d 804, 816, 275 N.W.2d 715 (1979).

¶21 In *Ruiz v. State*, 75 Wis. 2d 230, 249 N.W.2d 277 (1977), the State's witness, Garcia, was the only witness to testify to seeing Ruiz stab the victim. *Id.* at 233. Ruiz argued that Garcia's testimony was incredible because it was contrary to the testimony of other witnesses at trial. *Id.* at 233-34. Ruiz argued that all other witnesses, except Garcia, testified that a fight preceded the stabbing,

⁷ "In order to conflict with nature, testimony must present 'physical improbabilities, if not impossibilities,' or be 'intrinsically improbable and almost incredible.'" *State v. Tarantino*, 157 Wis. 2d 199, 219, 458 N.W.2d 582 (Ct. App. 1990) (citing *State v. Clark*, 87 Wis. 2d 804, 816, 275 N.W.2d 715 (1979)).

and thus, Garcia's testimony was incredible. *Id.* at 234. In concluding that Garcia's testimony was not incredible, the court noted, "[t]he jury, as the judge of credibility, had the right to believe the testimony of Garcia and to disbelieve the unanimous testimony of witnesses to the contrary." *Id.* (citations omitted). Furthermore, "[t]he testimony of Garcia could have been disbelieved by the jury," but, because it was not, "it supplied evidence that was sufficient to sustain the conviction of Ruiz." *Id.* at 235. The court stated, "[i]t is only where 'no finder of fact could believe the testimony' that we would be impelled to conclude that it was incredible as a matter of law." *Id.* (citation omitted).

¶22 Here, Tran initially identified Nguyen as one of the perpetrators while they were both at BB's. Tran identified him a second time through her review of a serial line-up of photographs conducted by the police the following day. Tran testified her identification was not based upon Christine C. pointing Nguyen out to her specifically as one of the robbers; rather, when Christine C. asked Tran if one of the men present at BB's was one of the robbers, it was Tran who pointed him out. Furthermore, upon recognizing Nguyen as one of the robbers, Tran testified that she became so frightened because of what he had done to her eleven days earlier, that she refused to stay next to BB's salon and instead moved "far away" from the salon as she waited for police to arrive. Tran made a third identification of Nguyen as the perpetrator at the preliminary hearing and a fourth identification during her testimony at trial.

¶23 Nguyen argues that because Tran did not have her glasses on when she identified him at BB's, and that because of Christine C.'s "suggestiveness of Nguyen" as one of the robbers, Tran's identification of Nguyen at BB's was unreliable. However, Tran testified that she only needed her glasses to see close and to watch television and that she had no problem seeing and recognizing

Nguyen as one of the persons who came into the residence on August 14, threatened her and her granddaughter, and forced her into the basement as he and a partner stole a safe located in the residence.

¶24 Additionally, the jury had before it all of the testimony of the police officers, Christine C., Truong, and Nguyen himself. Nguyen's testimony contradicted Truong's testimony regarding Nguyen's call to BB's on the day of the robbery. Additionally, Nguyen's testimony contradicted itself; first he claimed that he was in Chicago checking on rates paid for car washing at dealerships, but he later testified that he never stopped at a single dealership to inquire as to what rates they paid, he never stopped or spoke to anyone, but he made a telephone call to Do, one of BB's nail technicians, and through Do, informed Truong that he, Nguyen, was in Chicago. Truong, however, testified that Nguyen had actually spoken to him, that Nguyen actually called both Saturday and Sunday to let Truong know his whereabouts, and that Nguyen had never, before that weekend, called Truong to tell him his whereabouts.

¶25 The jury also heard testimony from Christine C. that after Tran's description of the perpetrators, she thought one of them was Nguyen and that she then was on the lookout for him. Christine C. testified that when she found out that Nguyen was at BB's, she went and got Tran without telling her where they were going. When they reached BB's, Christine C. testified that she then asked Tran to look and see if one of the men present was one of the robbers. The police officer who arrived at BB's testified that Tran appeared frightened and that she insisted that Nguyen was one of the robbers.

¶26 We acknowledge that uncorroborated eyewitness testimony is not the ideal. We conclude, however, that the evidence before the jury (including the

police officers' testimony; the four separate identifications by Tran; and the conflicting testimony between Nguyen, his alibi witness, and the police officers), "viewed most favorably to the State and to the conviction," was not "so insufficient in probative value and force that it can be said as a matter of law that no trier of fact acting reasonably could have found guilt beyond a reasonable doubt." See *Searcy*, 288 Wis. 2d 804, ¶22. Accordingly, we determine that there was sufficient evidence from which the jury could convict Nguyen of the charges.

II. Trial counsel did not provide ineffective assistance of counsel

¶27 Nguyen argues that his trial counsel was ineffective for failing to: (1) move to suppress Tran's eyewitness identification; (2) request WIS JI—CRIMINAL 141 on eyewitness identifications; and (3) obtain an eyewitness identification expert witness. The State argues that Nguyen was not denied effective assistance of counsel, and even if any of trial counsel's performance was deficient, Nguyen has not shown that he was prejudiced by any alleged errors, either singly, in combination, or in total.

¶28 In order to prove an ineffective assistance claim, the defendant must satisfy a two-part test: the defendant must prove both that counsel's performance was deficient and that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985) (adopting *Strickland* two-prong test for analyzing ineffective assistance of counsel claims); see also *State v. Johnson*, 133 Wis. 2d 207, 222-23, 395 N.W.2d 176 (1986) (expanding on use of *Strickland* test); *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (test for ineffective assistance of counsel as set forth in *Strickland* and *Johnson* to be applied to challenges of ineffectiveness under the Wisconsin Constitution).

¶29 An attorney’s performance is deficient if the attorney “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (quoting *Strickland*, 466 U.S. at 687) (one set of internal quotation marks omitted). Performance is deficient if it falls outside the range of professionally competent representation. *Pitsch*, 124 Wis. 2d at 636-37. We measure performance by the objective standard of what a reasonably prudent attorney would do in similar circumstances, *see id.* at 637; *Strickland*, 466 U.S. at 688, and we indulge in a strong presumption that counsel acted reasonably within professional norms, *Pitsch*, 124 Wis. 2d at 637. We review the attorney’s performance with great deference and “the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms.” *Johnson*, 153 Wis. 2d at 127. Generally, when a defendant accepts counsel, the defendant delegates to counsel the tactical decisions an attorney must make during a trial. *State v. Brunette*, 220 Wis. 2d 431, 443, 583 N.W.2d 174 (Ct. App. 1998) (citation omitted). “Review of the performance prong may be abandoned ‘[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of prejudice....’” *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990) (citing *Strickland*, 466 U.S. at 697).

¶30 As to prejudice, “[i]t is not enough for a defendant to merely show that the [alleged deficient performance] ‘had some conceivable effect on the outcome.’” *State v. Erickson*, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999) (quoting *Strickland*, 466 U.S. at 693). Rather, the defendant must show that, but for counsel’s error, there is a reasonable probability that the result of the trial would have been different. *Id.*

¶31 A claim of ineffective assistance of counsel presents a mixed question of fact and law. *State v. O'Brien*, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). Upon appellate review, we will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. *Id.* at 324-25. However, the ultimate question of ineffective assistance is one of law, subject to independent review. *Id.* at 325.

A. Failure to move to suppress Tran's identification

¶32 Nguyen's defense at trial was one of mistaken identity; specifically, that Tran misidentified him as one of the robbers/burglars who stole the safe and terrorized Tran and her granddaughter on August 14, 2004. Nguyen argues that this was evident from even the opening statement of the defense and, therefore, trial counsel's failure to move to suppress the identification constituted ineffective assistance of counsel. Nguyen cites *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582,⁸ for the proposition that because the first identification was tainted, it therefore tainted any subsequent identification, making all of Tran's identifications of Nguyen tainted and that this lack of reliability applied not just to police-conducted identification procedures, but also to non-police-conducted identifications. Nguyen cites to *State v. Hibl*, 2006 WI 52, 290 Wis. 2d 595, 714 N.W.2d 194,⁹ for that court's reference to the law which was in effect at the time

⁸ *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, involved a police-conducted show-up identification, and specifically does not apply to non-police-involved identification procedures. *State v. Hibl*, 2006 WI 52, ¶¶31-33, 290 Wis. 2d 595, 714 N.W.2d 194.

⁹ *Hibl* involved a case in which a witness who was attending a hearing recognized the defendant in the hallway of the courthouse as the individual who had been driving the vehicle involved in the accident which was the subject of the witness's appearance that day. At the time of the spontaneous identification, the witness was speaking to the prosecutor assigned to the case. *Id.*, ¶¶10, 14-15.

of Tran's identification of Nguyen up through trial, *State v. Marshall*, 92 Wis. 2d 101, 284 N.W.2d 592 (1979). Nguyen argues that the *Hibl* court's comments that "in some future case ... *Marshall* may need to be modified. There may be some conceivable set of circumstances under which the admission of highly unreliable identification evidence could violate a defendant's right to due process, even though a state-constructed identification procedure is absent," demonstrate that where, as here, a question of reliability of an identification is raised, failing to move to suppress the identification is ineffective assistance of counsel. See *Hibl*, 290 Wis. 2d 595, ¶46.

¶33 *Marshall*, however, specifically states that the application of the test for reliability of an identification is premised upon "whether the confrontation was deliberately contrived by the police for purposes of obtaining an eyewitness identification of the defendant." *Id.*, 92 Wis. 2d at 117. While the supreme court noted, *over fifteen months after the verdict in this case*, that "[t]here may be some conceivable set of circumstances [where] admission of highly unreliable identification evidence could violate a defendant's right to due process [absent] a state-constructed identification procedure," circumstances here do not rise to the level of ineffective assistance of counsel where counsel had no ability to know that the *Marshall* holding would be open to modification. *Hibl*, 290 Wis. 2d 595, ¶46. Also, as noted above, there is no suggestion, except from defense counsel during the testimony of both Tran and Christine C. and in his opening statement and closing argument, that Christine C. either coached or bullied Tran into identifying Nguyen as one of the robbers/burglars. Rather, both Tran and Christine C. testified that Tran gave the description to the police while they were at the house investigating the robbery/burglary and that Tran gave that same description to Christine C. at a later time because Christine C. did not listen to the original

description as she was too upset with what happened to her five-year-old daughter. Both Tran and Christine C. also testified that Christine C. never told Tran that she was taking her to BB's to identify Nguyen and when they arrived at BB's, Christine C. told Tran to look to see if any of the men present were also the robbers/burglars. Tran and Christine C. both testified that Tran pointed out Nguyen and that Tran was so upset that she moved "far away" from BB's after the identification. The next day police showed Tran, using a serial, one photo at a time identification process, several pictures of Vietnamese men that resembled the description she gave police, including a picture of Nguyen. Tran was able to immediately pick out Nguyen as one of the robbers/burglars. At the preliminary hearing held approximately two weeks later, Tran again identified Nguyen as one of the robbers/burglars. Based upon the law at the time, i.e., *Marshall*, and on Tran's three separate identifications of Nguyen, Nguyen has not met his burden that his trial counsel failed to "act[] reasonably within professional norms" when he failed to move to suppress Tran's identification of Nguyen at BB's and the photo identification conducted by police the following day. *Johnson*, 153 Wis. 2d at 127.

B. Failure to request jury instruction on eyewitness identifications

¶34 Nguyen next argues that trial counsel's failure to request pattern jury instruction WIS JI—CRIMINAL 141, entitled, "Where identification of defendant is in issue,"¹⁰ constituted ineffective assistance. The State argues that even if the

¹⁰ WISCONSIN JI—CRIMINAL 141 (2000) states:

**WHERE IDENTIFICATION OF DEFENDANT IS IN
ISSUE**

(continued)

trial court had “given the pattern instruction if defense counsel had requested it, that does not mean that defense counsel’s failure to request the instruction was prejudicial” to Nguyen. As noted by the trial court at the hearing on Nguyen’s postconviction motion, trial counsel’s failure to request WIS JI—CRIMINAL 141 was “more problematic” and may have constituted deficient performance.

¶35 Under *Strickland* and its progeny, however, we need not determine whether trial counsel’s failure was deficient if we determine that ultimately it was not prejudicial to Nguyen. See *id.*, 466 U.S. at 687. Here, our review of the record, and specifically the trial court’s findings based upon its review of the trial transcripts, shows that all of the relevant considerations set forth in WIS JI—

The identification of the defendant is an issue in this case.

In evaluating the evidence relating to identification, you are to consider those factors which might affect human perception and memory and all the circumstances relating to the identification.

Consider the witness’ opportunity for observation, how long the observation lasted, how close the witness was, the lighting, the mental state of the witness at the time, the physical ability of the witness to see and hear the events, and any other circumstances of the observation.

With regard to the witness’ memory, you should consider the period of time which elapsed between the witness’ observation and the identification of the defendant and any intervening events which may have affected the witness’ memory.

If you find that the crime alleged was committed, before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the defendant is the person who committed the crime.

CRIMINAL 141 were provided to the jury during closing arguments. The trial court noted in its decision on the postconviction motion:

With regard to the identification instruction, it's been a little more problematic. Clearly that's in the province of the defense to ask for that instruction if they believe it's appropriate. I've looked at the instruction on a number of occasions and continue to look at it today as it has been presented to the Court.

In reading this instruction, standard pattern jury instruction 141, it is nothing more than a common-sense instruction. It says as follows: I'll read it into the record, but I do want to read it for purposes of reference. "That identification of the defendant is an issue in this case. In evaluating the evidence relating to identification, you are to consider those factors which by perception and memory and all circumstances related to that identification--" All again common-sense. "Witness' opportunity for observation--" That was argued. "How long the observation lasted." That was argued. "How close the witness was." That was argued. "Lighting." I believe that was argued. "Mental state of the witness at the time." I believe that was argued. "Physical ability of the witness to see and hear." Again which was argued. "Circumstances of the observation," I believe is all wrapped up in the arguments of both counsel.

It goes on to say the obvious again that, "With regard to the witness' memory, you should consider period of time which elapsed between the witness' observations and the identification of the defendant and intervening events which may affect the witness' memory."

It goes on to state that, "If you find the crime alleged was committed, before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the defendant is the person who committed the crime." Again common sense.

Would it have been helpful to reiterate that instruction? Possibly. Probably most likely it would. But I think that under all the circumstances and my recollection of the closing arguments and my reading of the transcripts of the closing arguments, I think that counsel pretty much covered most of those areas. That was the crux of this case.

We agree. Based upon our independent review of the record, we determine that trial counsel's failure to request WIS JI—CRIMINAL 141 was not prejudicial in that, based upon all of the evidence and argument before the jury, the defendant has not shown that, but for trial counsel's failure to request the jury instruction, there was a reasonable probability that the result of the trial would have been different. *See Erickson*, 227 Wis. 2d at 773.

C. Failure to obtain an eyewitness identification expert witness

¶36 Nguyen next argues that “his trial counsel performed deficiently when he failed to investigate and obtain evidence from an identification expert that could suggest that Tran’s initial identification, and the subsequent identifications, were unreliable.” In support of his argument in his postconviction motion on this failure by trial counsel, Nguyen attached an expert report of psychologist Lawrence T. White to that motion.

¶37 The State argues that Nguyen: (1) “did not prove that it was constitutionally unreasonable for trial counsel to fail to obtain and offer testimony of an eyewitness identification expert”; (2) “did not prove that the failure to offer such testimony was prejudicial”; (3) “did not offer any evidence to show that it is common practice for the defense to present an eyewitness identification expert in cases involving key identification evidence”; and (4) “did not prove that, if such evidence had been offered, it would have been admitted by the trial court,” and therefore, did not prove that trial counsel’s assistance was ineffective.

¶38 Whether to admit expert testimony is a decision within the sound discretion of the trial court. *State v. Shomberg*, 2006 WI 9, ¶10, 288 Wis. 2d 1, 709 N.W.2d 370 (citation omitted). WISCONSIN STAT. § 907.02 states that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to

understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” However, if “everything that the expert would testify to in essence is within the common knowledge and sense and perception of the jury,” the trial court does not erroneously exercise its discretion by refusing to admit such expert evidence. *Shomberg*, 288 Wis. 2d 1, ¶13 (citation and internal quotation marks omitted).

¶39 We first review Nguyen’s proposed expert report. Many of its conclusions in the second section of the report are based upon facts which are contradicted in the record. For example, in the second paragraph of the section, White states that Tran “spoke to the officer via her step-daughter Christine C[.] who acted as an interpreter.” It was the testimony of the officer, Tran and Christine C. that Tran primarily spoke to the officer through other individuals, not Christine C. Second, Nguyen’s claim that Tran was likely to dismiss non-Vietnamese individuals, thereby shrinking the pool of potential choices, is not relevant here because individuals in the photo lineup were specifically selected because they were Vietnamese, rather than merely “Asian males.” Additionally, the report’s statement that Christine C. directed Tran to identify the robber from the men at BB’s is also not supported by the testimony of Tran and Christine C. Both Tran and Christine C. denied that Christine C. asked Tran specifically if Nguyen was the one who had robbed Christine C.’s house. More conclusions contained in the report are based upon facts not in the record in this case. For example, the expert states that when a weapon is present, this may influence the focus of the victim, yet Tran saw no weapon (and only learned later from her granddaughter that the other robber had a gun). Nguyen has not established that he was prejudiced by trial counsel’s failure to obtain an eyewitness identification

expert and, accordingly, Nguyen’s trial counsel did not provide ineffective assistance. Furthermore, Nguyen has not established that the report (or testimony following the contents of the report) would have been admitted by the trial court.

III. New trial in the interest of justice

¶40 Finally, Nguyen argues that because his “only defense in this case was that of a mistaken identification” and because “[t]hat issue was neither fully, nor fairly tried, because an important expert witness, one who could have testified regarding eyewitness identifications, was never requested by Nguyen’s trial counsel,” “justice miscarried” and as a result, he is either entitled to having his judgment reversed, citing *State v. Harp*, 161 Wis. 2d 773, 776, 469 N.W.2d 210 (Ct. App. 1991), or, alternatively, he is entitled to a new trial in the interest of justice, citing *Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). The State argues that “Nguyen has failed to show that his case is the rare, exceptional case that deserves a new trial [citing *Vollmer*, 156 Wis. 2d at 11] even though the evidence was sufficient to support the conviction, no trial court error is alleged, and trial counsel did not provide constitutionally ineffective assistance.”

¶41 Whether to grant a new trial in the interest of justice, for the reasons asserted by Nguyen, are questions we review *de novo*. See *State v. Mayo*, 2007 WI 78, ¶28, ___ Wis. 2d ___, 734 N.W.2d 115 (This court must “review the record to determine if a new trial is warranted in the interest of justice.”). WISCONSIN STAT. § 752.35¹¹ provides that an appellate court may grant a new trial in the

¹¹ WISCONSIN STAT. § 752.35, entitled “Discretionary reversal,” states:

In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may

(continued)

interest of justice “if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried.” *Id.*; see *State v. Williams*, 2000 WI App 123, ¶17, 237 Wis. 2d 591, 614 N.W.2d 11. In examining a claim for a new trial in the interest of justice, our supreme court recently considered whether a trial had been “so infect[ed] ... with unfairness” that either the real controversy had not been fully tried, or that there was a miscarriage of justice. *Mayo*, 734 N.W.2d 115, ¶65. In order to conclude that justice has miscarried, we must first determine that there is a substantial probability of a different result on retrial. *Id.*, ¶30 (citing *Vollmer*, 156 Wis. 2d at 19). In making this determination, we need to “consider whether trial counsel rendered ineffective assistance.” *Williams*, 237 Wis. 2d 591, ¶22.

¶42 As noted above, we have determined that there was sufficient testimony and evidence produced at trial from which a jury could have found that Nguyen was guilty of the charged counts beyond a reasonable doubt. We have also determined that under the circumstances here, Nguyen’s counsel was not ineffective for failing to: (1) move to suppress Tran’s identifications; (2) request WIS JI—CRIMINAL 141; or (3) retain an eyewitness identification expert. Accordingly, Nguyen is not entitled to a new trial.

By the Court.—Judgment and order affirmed.

reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Not recommended for publication in the official reports.

