STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2018AP596-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SADIQ IMANI,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND POSTCONVICTION ORDER, BOTH ENTERED
IN MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE WILLIAM S. POCAN AND
THE HONORABLE DAVID A. HANSHER PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

BRAD D. SCHIMEL
Attorney General of Wisconsin

GREGORY M. WEBER
Assistant Attorney General
State Bar #1018533

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 266-9594 (Fax)
webergm@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Statutes

Other Authorities

ISSUE PRESENTED FOR REVIEW

Did the postconviction motion court[1] properly deny Imani's two claims of ineffective assistance of trial counsel without a hearing?

The court implicitly answered "yes."

This Court should answer "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument would add little to the arguments presented in the briefs. This case does not satisfy the statutory criteria for publication.

INTRODUCTION

Most criminal convictions result from the defendant's own unlawful conduct, not from poor legal representation.[2] That maxim accurately describes Imani's case.

A jury found Imani guilty of armed robbery by use of force and false imprisonment, both as a party to the crime. He later claimed his trial counsel, Robert Haney, performed

---

[1] The Honorable William S. Pocan presided at trial. The Honorable David A. Hansher presided over postconviction proceedings.

[2] "If we are to believe the briefs filed by appellate lawyers, the only reason defendants are convicted is the bumbling of their predecessors. But lawyers are not miracle workers. Most convictions follow ineluctably from the defendants' illegal deeds, and nothing the lawyers do or omit has striking effect. Defendants are entitled to competent counsel not so they will win every case, but so the prosecution's evidence and arguments may be put to a rigorous test—so that the legal system gives the innocent every opportunity to prevail." *Burris v. Farley*, 51 F.3d 655, 662 (7th Cir. 1995).

ineffectively by not objecting to use of his one delinquency adjudication and both of his criminal convictions for impeachment purposes under Wis. Stat. § (Rule) 906.09(2), and by advising him to testify and present his alibi at trial without discussing the possibility of impeachment. The postconviction motion court denied Imani's claims without a hearing. He now appeals from the judgment of conviction and the order denying postconviction relief.

The postconviction motion court properly denied both claims because the record conclusively demonstrated Imani was not entitled to relief. Imani cannot prove that he suffered actual prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), and *State v. Erickson*, 227 Wis. 2d 758, 596 N.W.2d 749 (1999). That is because Imani's DNA directly matched DNA found on the mask worn by the robber during the robbery. This Court may have complete confidence in the outcome at trial.

STATEMENT OF THE CASE

Imani does not challenge the sufficiency of the evidence supporting his convictions. The State discusses the facts relevant to the appeal below.

The crimes.

On the morning of August 2, 2013, a single robber followed an employee into the TFC Bank at 7932 North 76th Street. He wore a black mask, and demanded money at gunpoint. He restrained another employee, gathered up over $100,000 in paper currency, put it into a garbage bag and fled, taking the restrained employee's car keys with him. (R. 230:171–73, 185–212; 231:22–24.)

The prosecution charged Imani in 2015 with one count of armed robbery by use of force and one count of false imprisonment, each as a party to the crime. (R. 2; 6; 10; 228:7–8.)

The trial.

Imani demanded a jury trial. (R. 14.) The robber's identity was the key issue.

The prosecution relied on two sets of facts to prove that Imani actually committed the robbery.

First, a dye pack concealed in the stolen money exploded during the robber's escape, staining some of the bills with red dye. (R. 230:55–66.) Shortly after the robbery, some of the stained bills from the robbery showed up at a Milwaukee casino. Security staff caught two friends of Imani's—Sultan Bradley and Debbie Lewis—passing the bills through slot machines. (R. 230:157–59, 168–170; 232:36–37; 233:17.)

Second—and most importantly—Milwaukee police officers secured the bank and its parking lot immediately after the robbery. They found a black mask in the lot, apparently discarded or lost by the robber as he made his getaway. (R. 230:67–71; 232:45–48.)

Imani's DNA directly matched DNA recovered from the inside of the mask. (R. 230:70–71, 109–19, 137–38; 232:70–97.)

There is no evidence in the record of an innocent explanation for the presence of the mask at the crime scene, or for the presence of Imani's DNA on the mask. The amount of Imani's DNA recovered from the mask exceeded the amount that a simple or casual touch might leave. (*Id.* at 97.) The most likely scenario is that Imani wore the mask during the robbery, breathing in it and on it, and expelling bodily fluids containing DNA on it. (*Id.*)

Not surprisingly, the prosecutor considered the mask "the most important thing in this case." (R. 230:13.)

Before trial, Imani offered an alibi. He claimed to have been in Mississippi on August 2, 2013. (R. 24; 44; 230:19, 21,

23.) The defense filed notices of alibi identifying two prospective alibi witnesses—Barbara Lewis and Debbie Lewis. But the notices did not include Imani as a prospective alibi witness. (R. 24; 44.) The prosecution objected to alibi testimony from Imani for this reason. (R. 228:27–50; 232:116–24.)

Barbara and Debbie Lewis did not appear at trial. Imani chose to testify; he was the only defense witness. (R. 233:4–48.)

Before Imani chose to testify, the prosecutor withdrew his objection to Imani's presentation of alibi testimony. The prosecutor also told the trial court, Imani, and Haney that he would call Heather Deckow as a rebuttal witness if Imani testified. (*Id*. at 5–6.)

The trial court questioned Imani regarding his decision to testify. (*Id*. at 5–8.) Imani showed no hesitation or confusion, and asked no questions. (*Id*.) Haney also told the court he believed Imani had made a knowing, voluntary, and intelligent decision to testify. (*Id*. at 7–8.)

The trial court and the parties then discussed Imani's possible impeachment under section 906.09. (R. 233:8–10.) Imani had one adjudication in 1995, one felony conviction in 1999 for unlawfully possessing a firearm—with the firearm restriction based on the adjudication—and one misdemeanor conviction in 2000 for possessing THC. (*Id*. at 8.)

Haney objected. He asked the trial court to exclude the 1995 adjudication and the 2000 misdemeanor conviction because they were old, and did not significantly impeach Imani's current credibility. (*Id*. at 9.) Haney did not ask the court to exclude the 1999 felony conviction. (*Id* at 9–10.)

The trial court denied Haney's objection and request. The court reasoned that the 1995 delinquency adjudication gave rise to the 1999 felony conviction for unlawfully possessing a firearm, linking them together. The court also

explained that it did not normally exclude adjudications or convictions unless they involved older traffic matters. And the court noted that, unlike Federal Rules of Evidence 606(b), section 906.09 did not operate to exclude adjudications or convictions based on passage of time. (R. 233:10.)

Imani testified that on August 2, 2013, he was in Horn Lake, Mississippi, conducting business. (*Id*. at 13–14.) He told the jury he had paid a girlfriend, "Heather," $150 to take him "down south" at the end of July 2013. (*Id*. at 18.) He also properly conceded his adjudication and his two criminal convictions. (*Id*. at 24.)

In rebuttal, Heather Deckow testified that she had not driven Imani to Mississippi, as Imani had testified. (*Id*. at 78–81, 84–85, 89–90.)

In closing argument, Haney asked the jury to find reasonable doubt. (R. 234:55–61.)

He argued that the prosecution could not prove that the robber actually wore the mask police found in the parking lot. (*Id*. at 62–74.) He asked rhetorically: "The question becomes, if we can't see how [the mask] got there, then who is to say where is the evidence that the mask the gunman wore inside the bank is the same one … as opposed to a similar one … to the one … that is found in the east end of the parking lot"? (*Id*. at 74.) He also hypothesized that someone who knew Imani could have robbed the bank, and deposited Imani's DNA in the mask to implicate him. (*Id*. at 80–104.)

The jury—after examining some of the physical evidence during deliberations—found Imani guilty on both charges. (R. 166; 235:8–10.)

At sentencing, Imani tacitly acknowledged the strength of the State's case—"I'd like to start off by saying I'm sorry for wasting this Court's time and the DA's time."

(R. 236:35.) The trial court imposed concurrent sentences providing for 20 years of initial confinement and 10 years of extended supervision. (R. 176.)

Postconviction proceedings.

Imani's postconviction motion alleged that Haney performed ineffectively by failing to object, on grounds of staleness, to use of his delinquency adjudication and both his criminal convictions for impeachment purposes. (R. 191:2.) He also alleged Haney performed ineffectively by advising Imani to testify without fully explaining to him how Heather Deckow could impeach his alibi testimony. (*Id*. at 3.)

The postconviction motion court denied the motion without a hearing. (R. 203.) The court applied *Strickland* and made seven relevant findings.

First, Haney objected to using Imani's juvenile delinquency adjudication and his misdemeanor conviction for impeachment purposes. (*Id*. at 5.)

Second, the trial court denied the objection because that particular judge said "he generally only excludes traffic matters if they are sufficiently old." (*Id*.)

Third, given the trial court's ruling, "there is no reasonable probability that the court would have excluded the most serious conviction in the defendant's record had counsel objected to its use. . . . [T]he defendant cannot show that he was prejudiced by counsel's failure to object to the use of his felony conviction for impeachment purposes." (*Id*.)

Fourth, even if the trial court erred by not excluding all three delinquency adjudications and criminal convictions for impeachment purposes, "there is no reasonable probability that the prior convictions or adjudication contributed in any material way to the guilty verdicts, and therefore, the error was harmless." (*Id* at 5 n.3)

Fifth, Imani made his own knowing, voluntary, and intelligent decision to testify at trial, as reflected in the colloquy. (*Id*.)

Sixth, Imani's postconviction regret at having testified constituted the type of hindsight and "Monday-morning quarterbacking" reviewing courts should avoid in postconviction proceedings. (*Id*. at 5–6.)

And seventh, Imani failed to demonstrate actual prejudice under *Strickland*, in light of the DNA evidence and linkage between Imani and the stained money passed at the casino. (*Id*. at 6.) "Without a credible explanation to counter the State's evidence, there is no reasonable probability that the outcome of the trial would have been different if the defendant would have chosen to remain silent. Therefore, even assuming counsel was deficient for advising the defendant to present his alibi to the jury, the court finds that his advice was not prejudicial in light of the compelling and uniquely incriminating evidence of guilt." (*Id*.)

STANDARDS OF REVIEW

Ineffective assistance claims present mixed questions of fact and law. *Strickland,* 466 U.S. at 698. Findings of fact receive appellate deference unless clearly erroneous, while determinations of deficient performance and actual prejudice receive de novo review. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

Whether a postconviction motion alleges sufficient material facts to warrant a hearing presents a question of law, reviewed de novo. *State v. Allen*, 2004 WI 106, ¶¶ 9, 13, 274 Wis. 2d 568, 682 N.W.2d 433.

ARGUMENT

The postconviction motion court properly denied Imani's two claims of ineffective assistance of trial counsel without a hearing.

A. The relevant law.

1. Ineffective assistance.

Imani must prove that Haney performed deficiently at trial, resulting in actual prejudice to the defense. *Strickland*, 466 U.S. at 688; *Erickson*, 227 Wis. 2d at 768.

To establish deficient performance, Imani must prove that Haney's performance fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citation omitted).

This Court presumes constitutionally adequate performance within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 689. This Court also rejects attempts by defendants and successor counsel to second-guess trial counsel's decision-making, and attempts to play the role of Monday-morning quarterback. *Weatherall v. State*, 73 Wis. 2d 22, 26, 242 N.W.2d 220 (1976).

With particular application to Imani's first claim of ineffective assistance, Haney did not perform ineffectively if he failed to make an objection that the trial court would have denied. *See State v. Berggren*, 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110.

Deficient performance results in actual prejudice if it creates a reasonable probability that, absent the error, the

result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is one sufficient to undermine confidence in the outcome of the proceeding. *Id*.

Mere assertions of prejudice and speculation about possible prejudice do not satisfy this standard. *Erickson*, 227 Wis. 2d at 773–74. "[D]efects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation." *Mickens v. Taylor*, 535 U.S. 162, 166 (2002).

And when, as here, "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697.

The prejudice analysis turns on the overall reliability of the trial process. "Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). This Court will also review the totality of the trial evidence when assessing actual prejudice. *Strickland*, 466 U.S. at 695.

2. Impeachment with prior convictions under section 906.09.

Section 906.09 permits attack on a witness's character for truthfulness by proof of criminal convictions and delinquency adjudications. Wisconsin law assumes convicted criminals and adjudicated delinquents make less credible witnesses because they do not respect the law. "[T]he more often one has been convicted, the less truthful he is presumed to be." *Nicholas v. State*, 49 Wis. 2d 683, 688, 183 N.W.2d 11 (1971).

While a trial court may exclude evidence of a conviction or adjudication if its probative value is

substantially outweighed by the danger of unfair prejudice, "[t]he language of sec. 906.09, Stats., indicates the intention that all criminal convictions be generally admissible for impeachment purposes." *State v. Kuntz,* 160 Wis. 2d 722, 751–52, 467 N.W.2d 531 (1991).

And while Federal Rules of Evidence 609(b) severely limits the use of a prior conviction to impeach a witness if more than ten years has elapsed since the conviction or the witness's release from any confinement imposed for that conviction, Wisconsin's section 906.09 has no such limitation. "[A]ll prior convictions are relevant to a witness' character." *State v. Gary M.B.,* 2004 WI 33, ¶ 23, 270 Wis. 2d 62, 676 N.W.2d 475; *see also State v. Kruzycki*, 192 Wis. 2d 509, 524, 531 N.W.2d 429 (Ct. App. 1995). Placing strict limitations upon use of criminal convictions based on the passage of time is "administratively impractical." *See Kruzycki,* 192 Wis. 2d at 526 n.4.

3. A defendant's decision whether to testify.

Because the postconviction motion court did not order a *Machner*[3] hearing, we have no sworn testimony regarding Imani's decision whether to testify, and Haney's advice on point. But the presumption of effective representation remains in place.

A criminal defendant has the "ultimate authority to make certain fundamental decisions regarding the case," including whether to testify on his own behalf. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). And a Wisconsin criminal defense attorney has an ethical obligation to abide by that decision "after consultation" with his client. SCR 20:1.2

---

[3] *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

(Scope of representation and allocation of authority between lawyer and client).

But ethical obligations do not establish performance standards under *Strickland*. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions . . . ." *Strickland*, 466 U.S. at 688–89.

This case presents unique circumstances. Imani decided to present alibi testimony, knowing the ultimate source of his alibi—Deckow—would testify after Imani in rebuttal. (R. 233:4–8.) Nonetheless, he gave the trial court full assurances that he wanted to testify. (*Id.*)

Under these circumstances, the State is left to wonder whether any advice Haney may have given Imani on whether to testify—and any advice on what Imani could expect by way of rebuttal—mattered at all here. Imani made his own decision, and there is nothing in the record to suggest Haney coerced him into testifying.

The State has located no cases—and Imani has cited none—involving facts similar to those present here. Additionally, the State has located no cases—and Imani has cited none—where a reviewing court found trial counsel ineffective for advising his client to testify, absent coercion. Because Imani bears the burden of proving both deficient performance and actual prejudice, this Court should weigh the absence of supporting case law against him.

4. The need for a postconviction motion hearing.

To obtain an evidentiary hearing, Imani had to allege material facts significant or essential to the issues at hand. *Allen*, 274 Wis. 2d 568, ¶ 22. He had to allege detailed, nonconclusory facts establishing who, what when, where,

how, and why an alleged error justified a new trial. *Id*. ¶ 23. If the record conclusively showed Imani was not entitled to relief, the postconviction motion court could properly exercise its discretion and deny Imani's motion without a hearing. *Id*. ¶¶ 9, 13.

Given his allegations, Imani had to sufficiently allege both deficient performance and actual prejudice. *State v. Bentley*, 201 Wis. 2d 303, 313–18, 548 N.W.2d 50 (1996). He could not rely on conclusory allegations, hoping to supplement them at a subsequent hearing. *Id*. at 317–18.

B. The record conclusively showed that Imani was not entitled to relief on either of his claims of ineffective assistance.

1. Impeachment under section 906.09.

Imani claimed Haney performed ineffectively by not objecting, "on the basis of staleness," to use of his delinquency adjudication, his misdemeanor conviction, and his felony conviction for impeachment purposes under section 906.09. (R. 191:2.)

This claim lacked merit. The record conclusively demonstrated that Imani was not entitled to relief.

Section 906.09 does not expressly provide for exclusion of adjudications or convictions based on their age. Nonetheless, Haney performed reasonably by objecting to the adjudication and misdemeanor conviction not only because they were old, but also because they proved little, if anything, about Imani's current credibility. (R. 233:9.)

And the trial court articulated a reasonable basis for overruling Haney's objection. The court denied that objection because (1) Imani's delinquency adjudication was directly related to his felony conviction; (2) the court normally did not exclude adjudications or convictions from consideration unless they involved older traffic matters; and (3) section

906.09 did not limit use of prior convictions based on passage of time, unlike its federal counterpart. (*Id.* at 10.) Imani implicitly concedes the reasonableness of the court's decision by not challenging that exercise of discretion on appeal.

The trial court's ruling demonstrates that, if Haney had asked the court to exclude the adjudication and both criminal convictions, the court would have overruled that objection as well. Haney did not perform deficiently by not making an objection that would certainly have been overruled. *See Berggren*, 320 Wis. 2d 209, ¶ 21.

Imani cited many cases in his postconviction motion involving use of prior convictions for impeachment purposes (R. 191:14–16.) But none of them involved allegations of ineffective assistance based on trial counsel's failure to seek exclusion of such a conviction based on staleness. (*Id.*)

The record conclusively demonstrated that Haney did not perform deficiently by not objecting to the adjudication and both criminal convictions on grounds of staleness.

And even if this Court disagrees, it should still affirm the postconviction motion court. Imani suffered no actual prejudice.

No reasonable probability exists that, if the jury had not known about Imani's adjudication and two criminal convictions, it would have had a reasonable doubt respecting Imani's guilt. Instead, it seems very probable—perhaps even virtually certain—that the jury would have reached the same verdicts even if no reference had been made at all to Imani's adjudication and convictions. That is because the prosecution presented powerful evidence that Imani committed the robbery, and Imani could not satisfactorily rebut it. *Strickland*, 466 U.S. at 695 (reviewing court should review totality of evidence when assessing prejudice).

The actual commission of the charged crimes—the bank robbery and the false imprisonment—went essentially undisputed at trial. The key issue was identity—who did it?

DNA routinely provides compelling evidence of identity. It did so here.

The DNA evidence presented at trial pointed directly at Imani as the robber. Even if Haney had successfully objected to impeachment of Imani's testimony with his adjudication and his two criminal convictions, Imani's testimony contains no innocent explanation for how and why his DNA conclusively appeared in the mask recovered by police at the crime scene.[4] The only reasonable conclusion is that he wore the mask while he committed the charged crimes.

The record on appeal contains no evidence that the mask appeared in the bank's parking lot for innocent or accidental reasons. It was there because the robber wore it during the robbery, and he discarded it, dropped it, or otherwise lost it during his getaway.

Likewise, the record contains no evidence that Imani's DNA appeared on the mask for innocent or accidental reasons. It was there because Imani wore the mask when he robbed the bank. And the amount of DNA recovered from the mask exceeded the amount that would have been left had Imani simply touched the mask casually.

And the record contains no evidence that a mystery or phantom bank robber wore the mask during the robbery, cleaned his own DNA from it during his escape, somehow

---

[4] The jury also knew it could only consider Imani's adjudication and convictions for purposes of gauging credibility. (R. 234:24.) Since Imani offered no testimony regarding the DNA evidence, there was no testimony on point to impeach.

obtained and placed Imani's DNA on it, and then left it behind for police to find.

Imani's DNA appeared on the mask because Imani committed the robbery.

The State also notes the evidence that Imani's friends passed stained money from the robbery at a local casino. (R. 230:157–59, 168–170; 232:36–37; 233:17.) Though not as powerful as the DNA evidence, it links Imani to the robbery as the perpetrator—the source of the stained money.

The probative value of all this evidence was not affected at all by the impeachment of Imani with his prior adjudication and convictions. "Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Fretwell*, 506 U.S. at 369.

Here, the trial process was reliable. This Court may have complete confidence in the verdict.

Imani's corresponding appellate argument certainly should not shake this Court's confidence. (Imani's Br. 21–27.)

As he did in his postconviction motion, Imani cites a host of irrelevant cases, including *Kruzycki*, 192 Wis. 2d 509, which he discusses at some length. (Imani's Br. 22–23.) The cases he cites do not involve claims of ineffective assistance related to section 906.09 impeachment. The cases involve a type of claim not present in this case—a challenge to a circuit court's exercise of discretion in deciding whether to permit impeachment by certain prior convictions. *See, e.g.*, *Kruzycki*, 192 Wis. 2d at 524–27.

Imani also ignores the portion of *Kruzycki* helpful to the State. In *Kruzycki*, this Court recognized that section 906.09 does not contain the same limitations on older conviction as Federal Rules of Evidence 609(b). *Kruzycki*,

192 Wis. 2d at 526 n.4. This Court also noted that the Judicial Council Committee was critical of that limitation in the federal rule, calling it "administratively impractical." *Id.* Because the cases relied upon by Imani do not address section 906.09 in the context of ineffective assistance, they provide little help in assessing the *Strickland* standards here.

Imani's appellate analysis of actual prejudice is also unpersuasive. (Imani's Br. 24–27.) He mimics Haney's attempts to provide innocent explanations for the presence of the mask at the crime scene, and the presence of his DNA in the mask. He suggests that, because the jury deliberated for over four hours, they had difficulty reaching a verdict. And he subjectively declares—over and over again—that the postconviction motion court's finding of no actual prejudice is unreasonable.

His attempt to provide innocent explanations for the incriminating physical and forensic evidence fails for the same reason it failed in the trial court—Imani had no evidence to support it. There is nothing in the record to suggest that the length of jury deliberations meant anything other than the fact that the jurors took their responsibilities seriously, as evidenced by the fact that they asked to examine certain physical evidence during deliberations. (R. 235:4–6.) Indeed, the 45 minute delay in responding to that request (*see id.* at 4), may have lengthened their deliberations.

And it is not surprising that, in both the postconviction motion court and this Court, Imani considers the evidence of his identity as the robber less than conclusive. But again, he has no innocent answer for the presence of the mask at the crime scene, and the presence of his own DNA in the mask. And if he truly believes the evidence lacks probative value, then we should see a challenge to the sufficiency of the evidence on appeal. We do not.

Imani also calls the direct match between his DNA and the DNA contained in the mask "purely circumstantial" evidence of his guilt. (Imani's Br. 24.) He ignores two facts: guilty verdicts may rest entirely on circumstantial evidence, and circumstantial evidence is often a more powerful indicator of guilt than direct evidence. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

So it is here.

Consider: a masked gunman robbed a bank, restrained an employee, and fled through the bank's parking lot. Police secured the scene just after the robbery and discovered a similar mask in the parking lot.

A jury could reasonably—obviously?—conclude the robber wore that mask during the robbery, and dropped it or lost it when he fled. It was the logical, most likely explanation for the mask's presence.

And the mask contained a large quantity of DNA—more than casual contact would have left behind.

And the DNA directly matched Imani's DNA.

A jury could reasonably—obviously?—conclude that Imani, wearing the mask, robbed the bank and then dropped or lost the mask when he fled. Imani was the logical, most likely robber.

And Imani had no plausible way to refute this evidence.

Perhaps Imani needed a miracle to avoid conviction. But the Sixth Amendment does not require lawyers to work miracles. The record conclusively demonstrated that Imani was not entitled to relief on this claim of ineffective assistance.

2. Advising Imani to testify as to his alibi without fully discussing how Deckow's testimony could rebut Imani's testimony.

Deckow's rebuttal testimony thoroughly undercut Imani's alibi testimony. As the trial court noted at sentencing: "Hard to forget. As alibis go, it was perhaps the biggest crash and burn I've seen in the two years that I've been here in felony . . . ." (R. 236:20.)

But that does not end the *Strickland* analysis.

The postconviction motion court denied Imani's second claim of ineffective assistance without a hearing because (1) Imani made his own knowing, voluntary, and intelligent decision to testify at trial; (2) any regret Imani had over that decision constituted impermissible Monday-morning quarterbacking; and (3) Imani suffered no actual prejudice under *Strickland* because, given the strength of the prosecution's case, "there is no reasonable probability that the outcome of the trial would have been different if the defendant would have chosen to remain silent." (R. 203:6.)

The State agrees with all three observations.

The first two observations go to the performance prong of *Strickland*. The absence of a *Machner* hearing limits the State's ability to fully evaluate Haney's performance on appeal.

But no matter what Haney told Imani, Imani knew he did not have to take Haney's advice. He could choose to testify or not testify. And when Imani made that choice, he also knew that the prosecution planned to rebut Imani's testimony with testimony from the same witness Imani planned to name as his alibi witness—Deckow. In spite of that, Imani gave the trial court full assurances that he wanted to testify. (R. 233:5–8.)

The presumption of effective assistance allows this Court to reasonably conclude that Haney advised Imani of the benefits and hazards of testifying and not testifying. And the facts of this case allow this Court to reasonably conclude that Imani made the decision to testify regardless of what Haney told him. He decided that it served his interests to testify. He may regret that decision now. But he and his successor counsel cannot predicate a claim of ineffective assistance on such second-guessing. *Strickland*, 466 U.S. at 689.

The postconviction motion court's third observation goes to the existence of actual prejudice under *Strickland*. Once again, Imani cannot prove that he suffered actual prejudice. The evidence that he robbed the bank was powerful, and undisputed. He cannot show that, had he not testified, there was a reasonable probability of a different verdict on either charge.

To reiterate: Imani's friends were caught passing money taken in the robbery at a local casino. (R. 230:55–56, 157–59, 168–170; 232:36–37; 233:17.) And Imani's DNA directly matched DNA recovered from the black mask police recovered at the crime scene. (R. 230:67–71, 109–19, 137–38; 232:45–48, 70–97.)

Imani did not address this evidence in his trial testimony. In particular, his testimony did not weaken the persuasive value of the DNA evidence one iota. The record on appeal contains no evidence that the mask appeared in the bank's parking lot for innocent or accidental reasons. It contains no evidence that Imani's DNA appeared on the mask for innocent or accidental reasons. And it contains no evidence that a mystery or phantom bank robber wore the mask during the robbery, cleaned his own DNA from it during his escape, somehow obtained and placed Imani's DNA on it, and then left it behind for police to find. (State's Br. 14–16.)

This Court should have complete confidence in the outcome of this case. Again, Imani's corresponding appellate argument should not shake that confidence. (Imani's Br. 21–27.)

Imani opens with the general proposition that "[t]rial counsel who gives improper advice may be prejudicially ineffective." (*Id.* at 27–28.) This proposition is fine in the abstract. But it says nothing about whether, on the facts of this case, Haney performed deficiently in light of Imani's decision to testify.

Imani spends considerable time arguing that his case is analogous to *Pitsch*, 124 Wis. 2d 628. (Imani's Br. 28–30.) *Pitsch* has limited utility here. It involves trial counsel's imprudent reliance on information from the defendant that he had been convicted on two occasions. *Pitsch*, 124 Wis. 2d at 637. Counsel did not check his client's record to determine the correct number. *Id.* After counsel elicited the wrong number of convictions from the defendant on direct examination, the prosecutor established on cross-examination that the defendant had nine convictions, and was able to put the details of the offenses before the jury. *Id.* at 631–32.

Imani devotes the remainder of his argument to repeating what he said in his postconviction motion—that he did not want to testify, that Haney advised him to do so to present his alibi to the jury, that Haney did not tell him how Deckow would probably rebut his alibi testimony, and how he would not have testified if Haney had advised him accordingly. (Imani's Br. 31–33.)

But none of that has any bearing on whether the record conclusively demonstrated that Imani was not entitled to relief.

First, the only issue in controversy at trial was the robber's identity. Was it Imani, or someone else?

Second, the direct match between Imani's DNA and the DNA found in the mask recovered at the crime scene constituted powerful evidence that Imani was the robber. The alternative explanations for the presence of the mask and Imani's DNA suggested by Imani in the trial court, in postconviction proceedings, and on appeal are implausible, improbable, and utterly unsupported by any evidence of record.

Third, even if Haney had successfully done at trial what Imani believes he should have done—kept Imani's adjudication and two criminal convictions from the jury, and fully advised Imani about Dickon's prospective rebuttal testimony—it would not have made a bit of difference. That is because, even under the best of circumstances, Imani's alibi could not explain away the presence of his DNA in the mask discovered at the crime scene.

The record conclusively demonstrated that Imani was not entitled to relief on this claim as well.

CONCLUSION

This Court should affirm Imani's convictions and the order denying his postconviction motion. If this Court disagrees, then it should remand the case to the circuit court with instructions to hold a *Machner* hearing.

Dated at Madison, Wisconsin, this 17th day of July, 2018.

BRAD D. SCHIMEL
Attorney General of Wisconsin

GREGORY M. WEBER
Assistant Attorney General
State Bar #1018533

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 266-9594 (Fax)
webergm@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,517 words.

Dated this 17th day of July, 2018.

_____
GREGORY M. WEBER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of July, 2018.

_____
GREGORY M. WEBER
Assistant Attorney General