COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2005AP54-CR **Cir. Ct. No. 1989CF150**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES D. LAMMERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. James Lammers appeals from a judgment of conviction for party to the crimes of arson with intent to defraud an insurer and four counts of arson causing damage to property. He also appeals from an order denying his postconviction motion. He raises claims related to what he

characterizes as a previously undisclosed theory about the fire's origin. He also argues he was denied the fair opportunity to defend himself by the prosecution's concealment of evidence attacking his alibi. We reject his claims and affirm the judgment and order.

¶2 On October 12, 1986, a rural farmhouse owned by Lammers burnt down. Three persons and a family rented the farmhouse and an apartment on the first floor of the partially completed three-story addition to the farmhouse. They lost personal property as a result of the fire.

¶3 It was the prosecution's theory that Lammers, plagued by money and permit problems that prevented his completion of the addition to the farmhouse, persuaded his friend Frank Webster to burn down the farmhouse. Although Webster first denied any involvement in the fire, he testified at trial that Lammers had approached him to help burn down the farmhouse for insurance money. Lammers promised to pay off the loan on Webster's car. Lammers picked a date when the tenants would be absent from the farmhouse. Lammers planned to get the people out of the apartment in the new addition by inviting them to his home the evening of the fire. Earlier on the day of the fire, Lammers and Webster placed at least two five-gallon containers of gas in the house. One container was left upstairs in the addition and one at the top of the stairs in the farmhouse. Webster then went to his girlfriend's house. Upon Lammers' telephone call, Webster returned to the farmhouse and lit a wick in the gas container in the farmhouse.

¶4 The Deputy State Fire Marshall, James Olsen, opined that the fire was deliberately set with the use of a flammable liquid. In answering a hypothetical question posed by the prosecutor, Olsen indicated that if two gas

containers had been left open, one on the second floor of the addition and one on the second floor of the farmhouse, the vapors would spread so that a fire ignited in the farmhouse could immediately ignite the vapors in the addition and quickly involve the entire structure. He believed that witness accounts of seeing flames at the roof where the addition met the farmhouse confirmed this conclusion. This is referred to as the vapor ignition theory and is the focus of Lammers' appellate arguments. On cross-examination, Olsen confirmed that his original conclusion was that the fire originated on the second floor of the addition, traveled to the second floor of the farmhouse, and then down to the first floor of the farmhouse.

¶5 Lammers contends that the prosecution advanced the vapor ignition theory for the first time at trial because Olsen's original opinion that the fire originated on the second floor of the addition was not consistent with Webster's testimony that he lit the container in farmhouse. He points out that at the preliminary hearing Olsen testified only that the fire originated on the second floor of the addition. Olsen also indicated at the preliminary hearing that he had no background in chemistry and was not qualified to test for the presence of an accelerant. Lammers argues he was ambushed by the new theory presented at trial.

¶6 Lammers' postconviction motions included the opinions of chemistry professors that specific conditions would have had to exist before vapor ignition would have occurred, including a lengthy amount of time for the gasoline to evaporate. Because no objection was made at trial to Olsen's testimony about the vapor ignition theory, Lammers argues that his trial counsel was ineffective for not objecting to evidence of the theory and by not requesting a continuance to seek out expert assistance to respond to the prosecution's reliance on the new theory. He contends that the trial court should have granted his motion for a new trial on

the ground of newly discovered evidence consisting of the opinions of chemistry professors that Olsen's theory was scientifically unsound and that specific conditions would have had to exist for vapor ignition to occur.

¶7 Lammers' claims of surprise, ineffective counsel, and newly discovered evidence regarding the vapor ignition theory all require Lammers to establish some degree of prejudice. *See* ***State v. Boyce***, 75 Wis. 2d 452, 457, 249 N.W.2d 758 (1977) (a claim of newly discovered evidence requires the defendant to prove that it is "reasonably probable that a different result would be reached on a new trial"); ***Angus v. State***, 76 Wis. 2d 191, 196, 251 N.W.2d 28 (1977) (showing of prejudice necessary when surprise from unexpected testimony is alleged); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985) (to establish ineffective assistance of counsel, the defendant must demonstrate both deficient performance of counsel and prejudice to his defense resulting from the deficient performance). The lowest threshold of prejudice that Lammers must meet is that our confidence in the outcome is sufficiently undermined. *See* ***Pitsch***, 124 Wis. 2d at 640-42 (the prejudice test for a claim of ineffective assistance of counsel is whether counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable trial outcome; an error is prejudicial if it undermines confidence in the outcome). *Cf.* ***State v. Love***, 2005 WI 116, ¶¶52-54, 284 Wis. 2d 111, 700 N.W.2d 884 (recognizing that potentially the requirement that newly discovered evidence create a reasonable probability of a different result is a higher burden).

¶8 Our confidence in the outcome is not undermined by the vapor ignition evidence at trial or the allegedly newly discovered evidence questioning the vapor ignition theory. First, the reliability of Olsen's testimony was an issue of weight and credibility for the jury. ***State v. Peters***, 192 Wis. 2d 674, 690, 534 N.W.2d 867 (Ct. App. 1995). Lammers elicited Olsen's testimony that he had not

taken chemistry or physic courses. Second, Lammers attacked the vapor ignition theory. His own expert witness testified that the "conditions would have to be just right at the time" for vapor ignition to occur.

¶9 Of more significance is the testimony from Lammers' own expert witness. He identified three, possibly four, points of origin: the second floor addition, couch in the first floor apartment of the new addition, waster paper basket in the first floor apartment of the new addition, and possibly the stairwell leading to the second floor of the new addition. He opined that the fire in the farmhouse had traveled from the addition. He ruled out any point of origin in the stairwell of the farmhouse. But Lammers' expert also conceded that a scenario of gasoline vapors being ignited was not beyond the realm of possibility. He also agreed that vapors could follow a pipe tray between the two parts of the building. Although he ruled out any possibility of the fire originating in the stairwell of the farmhouse because there was less damage there, he agreed that a fire in an enclosed, fully walled area would burn more slowly than the open area presented by the unfinished second floor of the addition.

¶10 Lammers' expert testimony established that the fire was intentionally set. Even though the expert's opinion did not corroborate Webster's account that he lit the gas container in the farmhouse, the jury could rely on the expert's opinion as to the start of the fire and still find Lammers guilty of being a party to the crime of arson. It was not necessary that every aspect of Webster's account be corroborated by expert testimony about the origins of the fire. The jury was free to accept portions of Webster's testimony and to reject portions of it. *See* ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988). Webster's testimony revealed memory gaps sufficient to permit an inference that he may have lit the other container of gas. Parts of Webster's account concerning

Lammers' involvement in planning the fire were corroborated, including Lammers arranging for the addition's tenant and infant son to come to his home and the multiple phone calls to Webster that night to convince him to complete the plan. Webster had no apparent reason to burn down the home of his close friend or to falsely confess to doing so. There was evidence that Lammers was experiencing money and permit problems in completing the addition to the farmhouse, that he had told others he would burn the place down for insurance money or to keep it from his wife in a divorce proceeding, and that days before the fire, he had checked his insurance on the farmhouse. Although Lammers presented an alibi defense that he was working on his car all day on the day of the fire, the evidence was such that he could have slipped away long enough to help Webster set up the containers of gas. There was sufficient evidence that Lammers was involved in the arson such that our confidence in the outcome is not undermined. For a lack of prejudice and a lack of a reasonable probability of a different result in a new trial, Lammers' claims of surprise, ineffective assistance of counsel, and newly discovered evidence fail.

¶11 We turn to Lammers request that we order a new trial under WIS. STAT. § 752.35 (2003-04),[1] because the surprise admission of unqualified evidence on the vapor ignition theory prevented the real controversy from being tried. A new trial may be ordered without finding the probability of a different result on retrial when we conclude that the real controversy has not been fully tried. ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

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

> [S]ituations in which the controversy may not have been fully tried have arisen in two factually distinct ways: (1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried.

Id.

¶12 Lammers claims to satisfy both circumstances. He argues the admission of the vapor ignition theory was improper and clouded a crucial issue. He also argues a jury should hear expert testimony questioning the vapor ignition theory. However, we exercise our discretionary power to grant a new trial infrequently and judiciously. *See* ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). We are not convinced that pinpointing the exact origin of the fire was a crucial issue. As we have already recognized, there was no dispute that the fire was arson and other evidence pointed to Lammers' involvement in the arson. Further, our review of the experts' testimony convinces us that the potential origins of the fire, and how that corroborated or conflicted with Webster's admission of setting the fire, was fully litigated. We are not convinced that the real controversy was not fully tried and we reject the request for a new trial.

¶13 The remaining issue surrounds Lammers' alibi defense. Lammers, Joe Bins, Glen Theel, and Wallace Theel testified that Lammers was at Theel's Auto Body all day on the day of the fire working on a car and therefore not available to accompany Webster to the property to set the containers of gasoline in place. In rebuttal the prosecution called Lieutenant David Adams who testified that during a 1987 interview, the Theel brothers never indicated any specific dates when Lammers was working on the car in their garage or that Bins had helped

Lammers with the car. The officer was not listed on the prosecution's response listing potential alibi-rebuttal witnesses. Lammers argues that admitting the officer's testimony violated WIS. STAT. § 971.23(8)(d). That section requires the prosecution to give notice of any witnesses it might call in rebuttal to "discredit the defendant's alibi." ***Id.***

¶14 The State responds that the officer was not a true alibi rebuttal witness because he only impeached the credibility of the alibi witnesses and did not place Lammers at the scene of the crime. *See* ***Tucker v. State***, 84 Wis. 2d 630, 639, 267 N.W.2d 630 (1978) ("the state must reciprocate by providing the names of people who will testify that the defendant was at the scene of the crime"). Lammers contends the ***Tucker*** decision does not limit the plain meaning of the statute. We do not decide the apparent anomaly between the statute and ***Tucker***.

¶15 Assuming without deciding that the officer was an alibi rebuttal witness and that Lammers' objection to the officer's testimony was sufficient,[2] we conclude that the error, if any, in admitting the officer's testimony was harmless. "The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. A reasonable possibility is a possibility sufficient to undermine our confidence in the conviction." ***State v. Williams***, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919 (citations omitted).

¶16 Officer Adam's testimony was very brief and vague as to the context in which he had interviewed the Theel brothers. It appeared that the interview was

[2] When the officer was called as a rebuttal witness, Lammers objected that proper discovery had not been provided. The State contends the objection did not convey that there had not been compliance with WIS. STAT. § 971.23(8)(d).

not directly related to the investigation of the fire. On cross-examination, Lammers elicited that the officer had not asked the Theel brothers about any particular dates that Lammers was at their garage. This suggested that it was not that significant that the Theel brothers had not offered information that Lammers was with them on the day of the fire. Moreover, as we have already observed, there was sufficient credible evidence of Lammers' involvement in the arson, including potential gaps in the time period covered by the alibi witnesses that would have permitted Lammers to go with Webster to the farmhouse. Our confidence in the outcome is not undermined by the admission of the evidence attacking the credibility of two of the alibi witnesses. For the same reason, we deny Lammers' request for a new trial in the interests of justice because of the admission of the alibi rebuttal evidence.

By the Court.—Judgment and order affirmed.

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