

was at a barber shop at 2125 Ridge Avenue, Philadelphia. Detective Seifert proceeded to the barber shop, recognized Martin as the person in the surveillance photograph, and arrested him.

The main issue at trial was identification of defendant. The government called three eyewitnesses who identified Martin as the robber: Sandra Risco ("Risco"), the bank's head teller; Kimberly Smiley ("Smiley"), a security guard; and Margaret Green ("Green"), a customer service representative. According to Ms. Risco's testimony, she was working at the second teller window in the bank when she heard sounds of a struggle. She then saw Martin, holding a gun beneath Smiley's neck; Martin was looking through her window, "right at [her] face." Martin then entered the teller area and removed money from one of the drawers. Following the robbery, Ms. Risco described the robber as a man "a little taller than [her]self," between 130 and 140 pounds, wearing a baseball cap, a blue jacket, and with a "straggly looking face" in need of a shave. She also noticed that the robber moved with an unusual "side to side" walk. She estimated that it was five minutes between the time she saw Martin at the window until he ran out of the bank. On March 27, 1998, Ms. Risco spoke with an FBI agent and identified Martin as the robber from a photo spread of eight black males.

Ms. Smiley, an employee of Scotland Yard Security Company, was working as a security guard in United Bank the day of the robbery. She testified to seeing Martin enter the bank at around 12:30 p.m. that day; she spoke with him briefly, and he left. Approximately fifteen to twenty minutes later, Ms. Smiley saw Martin re-enter the bank carrying a sawed-off shotgun; he pointed the shotgun at her and, after she attempted to push it away, hit her on the head with it. Ms. Smiley testified that Martin pulled her through the bank lobby to the customer service area door, demanded to be buzzed into that area, and, after gaining entry, proceeded through to the teller area while Ms. Smiley remained in the customer service area. Following the robbery, Ms. Smiley described the robber as five foot eight or five foot nine, "scruffy looking," wearing a light blue hooded jacket, dark jeans and a baseball hat. On March 26, 1998, Ms. Smiley identified Martin in an eight person photo spread. Ms. Smiley, in

identifying Martin as the bank robber in court, stated she had looked directly at Martin's face during the robbery.

Ms. Green, the third eyewitness, was working as a bank customer service representative the day of the robbery. She was sitting at her desk in the customer service area when she saw the robber bring Ms. Smiley to the door and demand to be buzzed in. Ms. Green complied, watched the robber enter the teller area, and watched him again as he exited. After the robbery, Ms. Green described the robber as a black male, medium height, medium build, approximately 160 to 170 pounds, and wearing a jacket that zipped up the front. Ms. Green identified Martin as the robber at trial.

The government also called, among other witnesses, Federal Bureau of Investigation ("FBI") Special Agent Ronald Manning. Agent Manning testified he observed Martin walking with a "pigeon-toed" gait while in custody on March 25, 1998, a significant observation because one of the eyewitnesses had described the robber as walking in a "struggling manner" when leaving the bank. According to Agent Manning, no fingerprints matching Martin's were recovered from the crime scene, and neither the money nor the shotgun was ever found.

The defendant called one witness, Richard Vorder Bruegge ("Vorder Bruegge"), an examiner of photographic evidence from the FBI Laboratory Division Special Photographic and an expert in photographic examination. Vorder Bruegge compared an arrest photograph of the defendant with a surveillance photograph from the bank and concluded he could not tell whether the individuals were the same. He offered the opinion that there were many similarities between the two photographs, and testified that he came "very close to making a positive identification."

All of the photographic evidence was presented at trial. The jury viewed the bank video surveillance tape showing the robbery. Numerous surveillance photographs, several of which showed the robber, were also admitted in evidence, as were arrest photographs of Martin and the photo spread from which two of the eyewitnesses identified Martin as the robber. Among the facts the parties stipulated to are that Martin is five feet ten, 175 pounds, born on June 14, 1954, and the robber was

in the bank for approximately one minute.

Martin emphasizes that the witnesses had a limited period in which to observe the robber. About eighty surveillance photographs were taken during the robbery, at a frequency of once every 0.75 seconds. The photos showed that none of the three witnesses had a direct, unobstructed view of the robber, although the witnesses testified otherwise.

Martin also points to inconsistencies in the witnesses' initial descriptions of the robber during the police interviews. Ms. Risco described the robber as 5'7" to 5'8" tall, and weighing between 130 and 140 pounds. Ms. Smiley described him as 5'8" to 5'9" tall, and weighing approximately 150 pounds. Martin is 5'10" tall, and weighs 175 pounds. Also, surveillance photos show the robber had a mustache and wore a baseball cap with a logo. Ms. Risco testified at trial that she never mentioned the mustache or logo in her initial statement to the police.

During its direct examination of Detective Seifert, the government elicited the following testimony concerning the circumstances of Martin's arrest:

Q: Now, directing your attention to approximately March 25th, 1998, were you on duty that day?

A: Yes, I was.

Q: By that time, had you seen this photograph once or more than once?

A: More than once.

[...]

Q: And were you familiar with that photograph by then?

A: Yes, I was.

Q: On that day, did you arrest anybody?

A: Yes, I did.

Q: Who did you arrest?

A: I arrested the defendant, Mr. Martin.

Q: Where did you arrest him?

A: Inside the barber shop at 2125 Ridge Avenue in Philadelphia.

Q: And had you gone there hoping that he would be there?

A: Yes.

Q: Why were you looking for a person matching this photograph?

A: To arrest him for bank robbery.

Q: Did you go into the barber shop when you when there that day?

A: Yes, I did.

Q: And did you have -- were you by yourself or with other persons?

A: I was with other persons.

Q: When you went into the barber shop, was there more than one person inside, or only one person?

A: There was more than one.

Q: And you arrested this defendant?

A: Yes, I did.

Q: Again, what did you arrest him for, as opposed to somebody else in the barber shop?

A: I recognized him as being the person in this photograph, which is a surveillance photo taken the day of the robbery of the bank robber.

Q: Now, at the time that you arrested Mr. Martin, did you know his full name?

A: No, I did not.

Q: Did you have any name for him?

A: We had received the name of Rob, only Rob, R-O-B.

(Tr. 6/30/98, 161-63.) Trial counsel for Martin did not move in advance to preclude the government from introducing Detective Seifert's identification of Martin as the person in the surveillance photograph. Nor did counsel object during the testimony.

During cross-examination of Detective Seifert, defense counsel elicited the following testimony concerning the informant who had told Detective Seifert that the man in the surveillance photo worked in the barber shop:

Q: Okay. And you had received information that day, as you indicated by indicating you had the name Rob from a woman named Edna Cook, is that correct?

A: That is correct, sir.

Q: Okay. And Edna Cook had seen that photograph that you have or a copy of that photograph that you have, and had indicated to you that she thought that that was Rob, is that fair to say?

A: That's correct.

Q: And so armed with that information, you went to a

location where Edna Cook said that this person Rob was, my client, and went in there and you found him inside, and today you're indicating that you think that the individual pictured in that photograph is my client, Rob Martin, is that fair to say?

A: It is him.

Q: Well, it is him? How do you -- did you -- do you have fingerprints --

A: Well it looks like him.

Q: -- from the bank?

A: It looks like him.

Q: It looks like him. Thank you.

(Tr. 6/30/98, 164-65.) On re-direct, the government re-elicited Detective Seifert's testimony on this topic, but the defense objected to the identification:

Q: You were asked some questions about how you knew this was the person in the photograph. Aside from your own belief, was there any other information you were relying on?

A: An indication from the informant and --

Q: Ms. Cook?

A: Ms. Cook, and he looked like the man in the picture.

Q: How -- in your own opinion, how closely does he resemble that picture?

A: It looks exactly like --

MR. WILSON: Objection, your Honor. That's for the province of the jury in this case.

THE COURT: Sustained. Also, it's not appropriate redirect.

(Tr. 6/30/98, 165-66.)

Trial counsel had available two witnesses whose testimony, according to Martin, would have strengthened Martin's defense by providing an alibi. Tyrone Polk and Mark El were co-workers of Martin at the barber shop. According to the defense investigator, Mr. Polk would have testified that he was in and out of the barber shop on the date of the robbery, but that Martin was there every time Mr. Polk returned. Mr. El would have testified that he too was in and out of the barber shop, and although he could not recall whether Martin was there every time Mr. Polk returned, Martin was at work that day. They also would have testified that Martin is ill with heart problems, and that he loses his breath easily. Although both witnesses were in the courthouse and prepared to testify, trial counsel chose not to call them.

The jury convicted Martin, and he was sentenced to imprisonment for life under 18 U.S.C. § 3559(c), the "three strikes" statute. Counsel was appointed to represent Martin in post-trial proceedings. Martin moved for Judgment of Acquittal under Federal Rule of Criminal Procedure 29. See United States v. Martin, 2000 WL 233217, *1 (E.D. Pa. 2000). Martin argued the evidence was insufficient to identify him as the robber, and that he was prejudiced by prosecutorial misconduct in the prosecutor's closing argument. The motion was denied.

Martin then challenged the application of the "three strikes" provision, under which he was sentenced to life on the basis of two prior convictions. See United States v. Martin, 2001 WL 493199, *1 (E.D. Pa. 2000). Relying on Apprendi v. New Jersey, 530 U.S. 466 (2000), Martin argued that because his prior convictions were not charged in the indictment nor found by the jury, the court could not use them to determine his sentence. The motion was denied. Martin appealed his conviction and sentence to the Court of Appeals, who affirmed both. See United States v. Martin, 46 Fed.Appx. 119 (3d Cir. 2002).

II. JURISDICTION, TIMELINESS, AND STANDARD OF REVIEW

The court has jurisdiction under 28 U.S.C. §§ 2255 and 2241. AEDPA imposes a one-year period of limitation on the filing of a Section 2255 motion. 28 U.S.C. § 2255. The period begins to run from the latest of:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Id.

After the Court of Appeals affirmed Martin's conviction and sentence, Martin, 46 Fed.Appx. at 119, Martin petitioned the Supreme Court of the United States for a writ of certiorari. Martin's conviction became final when the Court denied the petition on March 10, 2003, Martin v. United States, 538 U.S. 915 (2003). See United States v. Vega, 285 F.3d 256 (3d Cir. 2002). Martin's motion was timely filed less than one year later.¹

Under Section 2255, a prisoner in federal custody may attack the validity of his sentence. Once his chance to appeal has been waived or exhausted, courts are entitled to presume he stands fairly and finally convicted. United States v. Frady, 456 U.S. 152, 164 (1982). Section 2255 allows the court to examine jurisdictional errors, constitutional violations, proceedings that resulted in a "complete miscarriage of justice," or events that were "inconsistent with the rudimentary demands of fair procedure." United States v. Timmreck, 441 U.S. 780, 784 (1979).

A claim for ineffective assistance of counsel is examined under the two-prong test of Strickland v. Washington, 466 U.S.

¹ Although the clerk stamped Martin's pro se motion "filed" on March 11, 2004, a pro se Section 2255 motion by an incarcerated prisoner is deemed filed on the date he delivers it to prison officials for mailing to the district court. Burns v. Morton 134 F.3d 109, 113 (3d Cir. 1998). The envelope containing Martin's motion was postmarked March 9, 2004, showing that he presented it to prison officials prior to the expiration of the one-year deadline.

668 (1984). First, the defendant must show trial counsel's performance fell below an objective standard of reasonableness. Id. at 688. Second, the defendant must affirmatively prove prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. The court may consider that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Id. at 696. Also, the court may consider the cumulative effect of multiple counsel errors. See McNeil v. Cuyler, 782 F.2d 443, 451 (3d Cir. 1986).

The court must review Martin's claim with the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689. Martin bears the burden of showing counsel's representation was unsound. Id. at 690. Counsel cannot be ineffective for failing to raise meritless claims, and counsel's strategic choices are reviewed with a strong presumption of correctness. See id.; Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir.1996).

III. DISCUSSION

Martin argues trial counsel committed three errors that violate an objective standard of reasonableness, and these errors

individually and cumulatively resulted in prejudice sufficient to undermine confidence in the outcome of his trial.

A. Seifert's identification testimony

Martin argues trial counsel was ineffective for failing to preclude or object to Detective Seifert's identification testimony, and eliciting her testimony on the informant's identification.

Martin contends Detective Seifert's identification testimony was inadmissible as lay opinion because she was not an eyewitness to the robbery. Under Federal Rule of Evidence 701², assuming Detective Seifert was not qualified as an expert on this issue, her testimony would only have been admissible if it was "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Fed. R. Evid. 701. Some courts require that the witness had prior contact with the defendant. See United States v. Henderson, 68 F.3d 323, 326 (9th Cir. 1995); United States v. Jackman, 48 F.3d 1, 4 (1st Cir.

² Rule 701 provides:

Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

1995); United States v. Towns, 913 F.2d 434, 445 (7th Cir. 1990); United States v. Allen, 787 F.2d 933, 935-37 (4th Cir. 1986), judgment vacated on other grounds, 479 U.S. 1077 (1987); United States v. Farnsworth, 729 F.2d 1158, 1160 (8th Cir. 1984); United States v. Borelli, 621 F.2d 1092, 1095 (10th Cir. 1980); United States v. Calhoun, 544 F.2d 291, 295-97 (6th Cir. 1976); United States v. Robinson, 544 F.2d 110, 113 n.4 (2d Cir. 1976). There is no Third Circuit case on point.

Martin argues Detective Seifert's testimony was particularly damaging because of her status as a law enforcement officer, and a witness who was not subject to the stress and excitement of the robbery itself. In closing arguments, the government referred to Detective Seifert's identification testimony and her status as a law enforcement officer. Martin contends trial counsel should have moved in limine to preclude Detective Seifert's testimony or objected to it at trial.

Martin also contends his trial counsel compounded the error by eliciting hearsay testimony concerning the identification by the informant, Ms. Cook. Martin argues evidence of this identification was especially harmful because Ms. Cook knew Martin.

Martin argues that without Detective Seifert's identification testimony and the hearsay statement from Ms. Cook, there is a reasonable probability that the outcome would have

been different. Martin emphasizes that the photographic and eye-witness evidence was less than overwhelming, and that the additional testimony pushed the jury past the "tipping point" to a guilty verdict.

The government argues trial counsel's failure to preclude or object to the identification testimony was the result of a strategic decision within the bounds of reasonable professional judgment. The government describes trial counsel's strategy as an attempt to attack the surveillance photographs. Trial counsel introduced the evidence of Ms. Cook's identification in an attempt to show that Detective Seifert could not have identified the subject without the help of someone else.

The government contends the jury was entitled to know the circumstances of Martin's arrest, and Detective Seifert's testimony was appropriate "background" information necessary to put the event in context. The statement from Ms. Cook was not hearsay, because it was not submitted for the truth of the matter asserted; rather, it was offered to show the effect on the listener (Detective Seifert's seeking the subject of the photograph at the barber shop).

The government also argues that there is no iron-clad rule against identification testimony from an arresting officer. See United States v. Jackson, 688 F.2d 1121 (7th Cir. 1982) (permitting a non-eyewitness to testify that defendant was

pictured in a surveillance photograph). The government argues that the impact of this additional testimony was insufficient to change the outcome, because the jury relied heavily on the surveillance photographs and the eyewitness testimony.

Martin points to no precedent that this conduct violated an objectively reasonable professional standard. It could have been a strategic decision on the part of trial counsel, and Martin does not present sufficient evidence to meet his burden of proving otherwise. There was a substantial amount of evidence the jury could have relied on apart from Detective Seifert's statements. In addition to testimony from the eyewitnesses, the jury viewed surveillance photographs of Martin, and he was before the jury for their own examination. There is not a reasonable probability that the jury would have found Martin not guilty had Detective Seifert's testimony been excluded or not elicited. This claim will be denied.

B. Counsel's failure to request a cautionary identification charge

Martin argues trial counsel should have requested a jury instruction to treat the identification evidence with caution. See United States v. Barber, 442 F.2d 517 (3d Cir. 1971). In Barber, the court required that jury instructions regarding identification must satisfy the following:

In any case raising the question whether the defendant was in fact the criminal actor, the jury will be instructed to resolve any conflict or uncertainty on

the issue of identification. The jury will be instructed that identification may be made through the perception of any of the witness' senses, and that it is not essential that the witness himself be free from doubt as to the correctness of his opinion. The identification testimony may be treated by the jury as a statement of fact by the witness: (1) if the witness had the opportunity to observe the accused; (2) if the witness is positive in his identification; (3) if the witness' identification testimony is not weakened by prior failure to identify or by prior inconsistent identification; and (4) if, after cross-examination, his testimony remains positive and unqualified. In the absence of any one of these four conditions, however, the jury will be admonished by the court that the witness' testimony as to identity must be received with caution and scrutinized with care. The burden of proof on the prosecution extends to every element of the crime charged, including the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime for which he stands charged.

Id. at 528 (citing Commonwealth v. Kloiber, 106 A.2d 820, 826-27 (Pa. 1954)). Martin argues the four conditions laid out above were not all satisfied in this instance, so the jury should have been instructed "that the witness' testimony as to identity must be received with caution and scrutinized with care." Barber, 442 F.2d at 528.

Regarding the first condition, there were questions about some of the witnesses' opportunity to observe the robber because of the short time period and their obstructed views. There were prior failures to mention salient physical features of the robber and inconsistencies in their descriptions to the police. Martin argues trial counsel's failure to request this instruction was therefore objectively unreasonable. See, e.g., Freeman v. Class,

95 F.3d 639, 642 (8th Cir. 1996)(no reasonable trial strategy for failure to request a charge cautioning the jury on the credibility of an accomplice's testimony); United States v. Span, 75 F.2d F.2d 1383, 1389-90 (9th Cir. 1996) (ineffective assistance of counsel for failure to request charge on self-defense). Pennsylvania state courts have found ineffective assistance of counsel for failure to request jury instructions regarding identification as well. See Commonwealth v. McKnight, 453 A.2d 1, 2 (Pa. Super. Ct. 1982).

Martin contends there was no strategic reason not to request the instruction, so trial counsel's failure to do so was objectively unreasonable. Because the identification issue was central to the case, and the evidence was not overwhelming, the absence of this instruction prejudiced the defense.

The government argues this claim is not cognizable on a § 2255 petition because the standard of review for a failure to give a jury instruction is for abuse of discretion. United States v. Coyle, 63 F.3d 1239, 1245 (3d Cir. 1995). The government contends that since Martin failed to request the instruction at trial or object to the failure to give it, he must also show plain error. United States v. Antico, 275 F.3d 245, 265 (3d Cir. 2001).

Second, the government emphasizes that the court gave the jury a comprehensive instruction on identification testimony,

proffered by Martin's trial counsel. Jury instructions must be considered in their totality. The instructions given by the court emphasized the importance of the identification testimony, and informed jurors of the various factors they could consider in evaluating the identification testimony. Also, the government's case was based more heavily on the surveillance photographs than the eyewitness testimony.

Third, the government contends the conditions required by Barber for the cautionary instruction were not present in this case. The Barber instruction is only necessary when the witness's testimony is "too inconclusive, contrary, and uncertain to be the basis of a legal conclusion." United States v. Bamberger, 456 F. 2d 1119, 1125 (3d Cir. 1972). In Barber, fifteen persons approached two FBI agents, and three to four of them assaulted each agent. The eyewitnesses in Barber were confused, and their identifications were shifting and uncertain. In this case, there was only one robber, and the government argues the eyewitnesses' identifications were certain and unwavering, and identified Martin unequivocally.

The government misstates the standard of review for this claim. The claim is ineffective assistance of counsel, not a direct challenge to the jury instruction. The cases the government cites were challenges to jury instructions (or the lack thereof) on direct appeal, not ineffective counsel claims on

habeas.

We agree with Martin that there is no strategic justification for counsel's failure to request the instruction, but we also agree with the government that Barber would not necessarily require a cautionary instruction in this case. Compared with the witnesses in Barber, the eyewitness testimony here was comparatively certain and relatively consistent. Additionally, because the jury examined the surveillance photographs and carefully compared them with Martin in person, Martin has not shown there would be a reasonable probability of a different outcome had the jury received the Barber instruction. This claim will be denied.

C. Trial counsel's failure to call available alibi witnesses

Martin argues that had trial counsel called Mr. Polk and Mr. El, they would have testified that Martin was at the barber shop on the day of the robbery, although neither of them was there all day. They also could have testified that Martin suffered from heart disease and easily lost his breath.

Defense counsel has a constitutional duty to conduct thorough investigations and call witnesses in support of a defense. See, e.g., United States v. Kauffman, 109 F.3d 186, 190-91 (3d Cir. 1997) (finding ineffective assistance of counsel for failure to investigate insanity defense when counsel had a psychiatric report supporting it). Trial counsel did investigate

the witnesses, but Martin contends there was no reasonable basis for the failure to call them at trial. Martin concedes that his alibi was not airtight, but points out that it is rare for an alibi to be airtight, and an airtight alibi may not have the ring of truth. Also, Martin argues the witnesses, by testifying that Martin had been working, would have removed the purported motive for robbery.

Trial counsel conducted the required degree of investigation. Trial counsel had the witnesses available in court and ready to testify, yet chose not to call them; that suggests the decision was strategic. It was not an objectively unreasonable decision, since neither witness could provide Martin with an airtight alibi. Neither witness could testify Martin was at the barber shop at or near the time of the robbery. In an interview with FBI agents, Mr. Polk admitted Martin did not keep regular hours. Also, Mr. Polk had been convicted of multiple felonies, all of which would have been admissible for impeachment. The FBI interview of Mr. El showed he was unable to testify as to the exact whereabouts of Martin. Mr. El said Martin routinely left work in the afternoon, around the time the bank was robbed.

Martin has not met his burden of showing trial counsel made an objectively unreasonable strategic decision not to call the alibi witnesses. This claim will be denied.

Finally, even considering the potential cumulative prejudice of any arguably unreasonable mistakes by trial counsel, there was abundant evidence on which the jury could have and would have relied. Most importantly, the jury's ability to compare surveillance photographs of the robber with Martin himself, in corroboration with the testimony of three eye witnesses, provided ample evidence of Martin's guilt. There was no reasonable probability of a different outcome had trial counsel acted differently.

IV. CONCLUSION

For the reasons above, Martin's motion will be denied. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. :
 :
 ROBERT EARL MARTIN : CRIMINAL NO. 98-178

ORDER

AND NOW this 16th day of May, 2005, upon consideration of Robert Earl Martin's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (Doc. No. 92) and the government's response (Doc. No. 104), it is **ORDERED** that:

1. The motion is **DENIED**.
2. Because there is no probable cause to issue a certificate of appealability, no certificate of appealability shall issue.

_/s/ Norma Shapiro__

Norma L. Shapiro, S.J.