



In Appellant's Proposition VII, he argues reversal is warranted based on trial counsel's failure to develop evidence available at trial indicating that the sole eyewitness misidentified Appellant as the robber. To prevail on his claim, Appellant "must show both deficient performance and prejudice." *Grant v. State*, 2002 OK CR 36, 58 P.3d 783, quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Our cases define prejudice as a reasonable probability that "the result of the proceeding would have been different." *Grant*, at ¶ 82. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

We accord considerable weight to the findings of the District Court, but this Court must ultimately determine whether counsel's allegedly deficient performance resulted in a verdict that is unreliable. Contrary to the findings of the District Court, there are circumstances in which effective assistance may require that trial counsel take reasonable steps to develop evidence that a misidentification has occurred. Cf. *People v. Ortiz*, 586 N.E.2d 1384, 224 Ill.App.3d 1065 (Ill.App. 5 Dist., 1992) (finding reversal required where counsel did not use available procedures to develop evidence that another person perpetrated offense, and theory was left "virtually unexplored"). Such steps may include a timely request for an *in camera* hearing to inquire of the eyewitness about possible misidentification. Cf. *Sanders v. State*, 1980 OK CR 49, ¶ 12-13, 612 P.2d 1363, 1365-1366 (trial court conducted *in camera*

hearing to permit development of defense evidence of possible misidentification); *Frick v. State*, 1981 OK CR 108, ¶ 17, 634 P.2d 738, 741-42 (trial court properly conducted *in camera* hearing to afford defense counsel opportunity to question eyewitness extensively about identification and subsequent events); *Young v. State*, 1975 OK CR 25, 531 P.2d 1403 (right to develop evidence *in camera* on reliability of identification is dependent on timely request by counsel). Counsel was unaware of available means for developing the evidence to support his theory of misidentification; he essentially abandoned the attempt to develop it in the face of the District Court's *in limine* ruling prohibiting counsel from alluding, in front of the jury, to the possibility that another individual arrested for similar robberies was the robber in this case.

Trial counsel was in possession of the photographic evidence that ultimately caused the eyewitness here to testify at the evidentiary hearing that his "100 percent sure" identification of Appellant at trial was mistaken. While there is inherent risk in the development of this type of evidence, the eyewitness' unshakeable identification of Appellant on direct examination at trial virtually guaranteed Appellant's conviction, unless evidence supporting misidentification was developed and presented to the jury. Under these circumstances, trial counsel's failure to take reasonable steps to examine the eyewitness *in camera* and develop this misidentification evidence was objectively deficient.

The Court finds there is a reasonable probability that trial counsel's development of this evidence would have resulted in a different outcome at trial. In testimony at the evidentiary hearing, the eyewitness retracted his earlier identification based on the very evidence counsel failed to develop, and actually identified another individual as the robber. Following the evidentiary hearing, the District Court found that the testimony of the eyewitness "undermines any confidence about the accuracy or reliability of his trial testimony." The record supports this conclusion. There is no question that Appellant suffered prejudice from counsel's omission. The conviction is reversed.

### **DECISION**

The Judgment and Sentence of the District Court of Tulsa County is **REVERSED**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE TOM GILLERT, DISTRICT JUDGE

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OPINION BY LEWIS, J.

CHAPEL, P.J.: **CONCURS**

LUMPKIN, V.P.J.: **CONCURS IN RESULT**

A. JOHNSON, J.: **CONCURS**

C. JOHNSON, J.: **CONCURS IN PART/DISSENTS IN PART**