

ARKANSAS SUPREME COURT HOLDS THAT APPELLANT'S COUNSEL WAS NOT INEFFECTIVE BY FAILING TO USE ALTERNATIVE JURY INSTRUCTIONS, SPECIFICALLY AN INSTRUCTION BASED ON ARKANSAS CODE ANNOTATED § 5-2-406, WHICH THE COURT RULED ONLY APPLIES TO SITUATIONS IN WHICH MULTIPLE DEFENDANTS ARE TRIED TOGETHER AND THE DEGREE OF EACH DEFENDANT'S CULPABILITY MAY DIFFER.

In *Strain v. State*,¹ Rickey C. Strain, Jr., was convicted by a jury in Jefferson County of first-degree murder for the shooting and killing of a man.² Witnesses testified that Strain rode in a car with his co-defendant, who was selling cocaine shortly before the shooting, when the co-defendant had an altercation with the victim and fired a weapon at him.³ The jury found Strain guilty as an accomplice to the murder. His conviction and sentence of 300 months' incarceration was affirmed by the Arkansas Court of Appeals.⁴

Strain's petition for review by the Arkansas Supreme Court was denied, and he subsequently filed a petition in the trial court for post-conviction relief under Rule 37.1 for ineffective assistance of counsel. The trial court denied the petition following an evidentiary hearing, and Strain subsequently appealed that denial to the Arkansas Supreme Court.

Absent a showing that the lower court's findings are clearly erroneous, the appellate court will not reverse a denial of post-conviction relief. In a claim of ineffective assistance of counsel, the standard on review is whether, based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective under the test established in *Strickland v. Washington*.⁵

Under the *Strickland* test, a claimant must establish that his counsel's performance was deficient, and the claimant must also show that he was prejudiced by the deficient performance and was therefore was deprived of his right to a fair trial.⁶ The standard used to determine whether the claimant was prejudiced is whether there is a reasonable probability that the fact-finder's decision would have been different absent counsel's deficient performance.⁷ A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial.⁸ The presumption is very strong that

1. 2012 Ark. 42, at 1, 394 S.W.3d 294, 296.

2. *Id.*, 394 S.W.3d at 296.

3. *Id.* at 4–5, 394 S.W.3d at 298.

4. *Id.* at 1, 394 S.W.3d at 296.

5. *Id.* at 2, 394 S.W.3d at 297 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

6. *Id.*, 394 S.W.3d at 297.

7. *Id.*, 394 S.W.3d at 297.

8. *Strain*, 2012 Ark. 42, at 2, 394 S.W.3d at 297.

trial counsel has performed reasonably, and the claimant has the burden of overcoming this presumption.⁹ To overcome the presumption in favor of effective assistance, the claimant is required to show specific acts, errors, or omissions that, “when viewed from the trial counsel’s perspective at the time of the trial, could not have been the result of reasonable professional judgment.”¹⁰

In his petition, Strain claimed ineffective assistance due to his counsel’s failure to request three specific jury instructions. Strain claimed his counsel should have requested a jury instruction based on Arkansas Code Annotated, Section 5-2-406, which would have specified that Strain was only criminally liable for the degree of the offense consistent with his culpable state of mind.¹¹ The Court held that, although this is a correct statement of the law, it is not a model jury instruction and need only be given to the jury when not included in other instructions.¹²

Strain asserted that he was entitled to an instruction based on Arkansas Code Annotated, Section 5-2-406 as a matter of law.¹³ *Strain cited Jones v. State*¹⁴ to support his contention, and the Court stated that Arkansas Code Annotated, Section 5-2-406 applies to situations in which “two or more defendants are charged and tried together and where the degree of each defendant’s culpability may differ.”¹⁵ However, the Court pointed out that, “although [section 5–2–406] is a correct statement of the law, it is not a model jury instruction[,] and . . . it is unnecessary to give it when its substance is covered by other instructions.”¹⁶ The Court went on to explain that non-model jury instructions are only to be used when trial courts determine that the model instructions are inaccurate regarding the state of the law when applied in a given case, or when the model instructions do not contain the necessary instruction on the subject at hand.¹⁷

In this case, the jury was instructed as to what the State was required to establish in order to convict Strain of the varying degrees of murder and was also instructed that the State must prove that Strain caused the death of the

9. *Id.* at 2–3, 394 S.W.3d at 297.

10. *Id.*, 394 S.W.3d at 297.

11. *Id.* at 5–6, 394 S.W.3d at 299.

12. *Id.* at 7, 394 S.W.3d at 299.

13. *Id.*, 394 S.W.3d at 300.

14. 336 Ark. 191, 984 S.W.2d 432 (1991).

15. *Strain*, 2012 Ark. 42, at 7, 394 S.W.3d 294, 300 (quoting *Jones*, 336 Ark. at 205, 984 S.W.2d 432, 439).

16. *Strain*, 2012 Ark. 42, at 7, 394 S.W.3d 294, 300 (quoting *Wilson v. State*, 364 Ark. 550, 554, 222 S.W.3d 171, 175 (2006)).

17. *Strain*, 2012 Ark. 42, at 7, 394 S.W.3d 294, 300 (citing *Jackson v. State*, 359 Ark. 297, 197 S.W.3d 468 (2004)).

victim with the purpose of causing such death.¹⁸ The jury was informed that a person acts with purpose when “it is his conscious object to engage in conduct of that nature or to cause such a result,” and the trial court also explained to the jury what it means to be an accomplice and the requirements therein.¹⁹

The jury determined that Strain had possessed the mental state required to be convicted of first-degree murder.²⁰ The Court reasoned that, because the jury decided Strain’s mental state as an accomplice was the same culpable mental state required to be convicted of of first-degree murder (and not capital murder), it is clear that a specific instruction based on Arkansas Code Annotated, Section 5-2-406 was unnecessary, as its substance was covered by other instructions.²¹

The Court further noted that Strain provided nothing other than mere conjecture that, even if an instruction derived from Arkansas Code Annotated, Section 5-2-406 had been given, the outcome would have different or positive for him.²² Under the *Strickland* test, the claimant must establish that a different instruction would have been reasonably likely to change the outcome of the trial, in light of all of the evidence.²³ In this case, the outcome would be the same with the different instruction, as the jury would have reached the same conclusion regarding Strain’s culpable mental state.²⁴ Thus, the Court ruled that Strain had not met his burden, and the jury instructions that were given were appropriate and sufficient.²⁵

The Court’s opinion was consistent with its holding in *Jones*. When two or more defendants are charged and tried together, Arkansas Code Annotated, Section 5-2-406 will only apply when the degree of each defendant’s culpability may differ. Additionally, non-model jury instructions should only be used when the model instructions are insufficient in a given case or do not address the particular circumstances in a case.

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18. *Id.* at 7–8, 394 S.W.3d at 300.

19. *Id.* at 8, 394 S.W.3d at 300.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Strain*, 2012 Ark. 42, at 8, 394 S.W.3d 294, 300.

24. *Id.*

25. *Id.*