COURT OF APPEALS
DECISION
DATED AND FILED

November 2, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3242-CR **Cir. Ct. No. 02CF001680**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

D'JUAN T. TURNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. D'Juan T. Turner appeals from a judgment entered after a jury found him guilty of kidnapping Charnell Hicks, without his consent, as party to a crime, contrary to WIS. STAT. §§ 940.31(1)(b) and 939.05 (2001-02).[1]

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

He also appeals from an order denying his postconvicton motion. Turner claims: (1) the in-court identification of him by a co-actor was unduly suggestive; (2) his trial counsel provided ineffective assistance for failing to object to the in-court identification; (3) his trial counsel provided ineffective assistance for failing to request the *falsus in uno* jury instruction; and (4) the trial court erroneously exercised its discretion when it granted the State's request to amend the information to conform to the evidence. Because we resolve each contention in favor of upholding the judgment and order, we affirm.

I. BACKGROUND

¶2 On August 7, 2001, the victim, Charnell Hicks, met with Joel Rhodes in Racine and they drove to Milwaukee. Hicks said they picked up Prentiss Rhodes. They drove around for a while and then went to a car wash at 3302 West Center Street. Hicks said that they met three other individuals at the car wash, whom he recognized: Morris Jones, Charles Bishop and D'Juan Turner. A fourth individual, whom Hicks did not know, was also at the car wash. This person was later identified as Lavelle Walker.

¶3 At the car wash, Walker pointed a gun at Hicks and led him into a back room. Jones, Bishop, Turner and Walker were all in the back room with Hicks. Hicks was ordered to remove his clothes and then he was wrapped in duct tape. The four men demanded that Hicks turn over his money and tell them who had "dope." Hicks was hit with a baseball bat, burned with cigarettes, and struck with a gun on his forehead. At some point, Hicks told the men he had money and drugs in Racine. The group then drove to Racine and Hicks pointed out the house where the drugs and money were located. The group then drove back to the car wash and resumed torturing Hicks. Joel Rhodes came into the room and shot

Hicks in the foot. After some time, all of the others left and only Bishop remained to guard Hicks. When Hicks saw that Bishop appeared to be sleeping, he managed to escape and limp to a nearby house, where the occupants called for help.

¶4 Hicks was taken to the hospital, where he was treated for a gunshot wound to his foot, contusions to the shoulder area and right wrist, and he received six stitches to the right side of his forehead. Turner was arrested and charged with one count of kidnapping as party to a crime. The case was presented to a jury, which found him guilty. Turner was sentenced to twenty-five years' incarceration and twenty-five years' extended supervision. Judgment was entered. Turner filed a postconviction motion, which was summarily denied. He now appeals.

II. DISCUSSION

A. In-Court Identification.

¶5 Turner argues that the in-court identification of him by co-actor Morris Jones was unduly suggestive. The objection raised arises from the following exchange between Jones, who was called as a State's witness, and the prosecutor:

> Q. Do you know Mr. D'Juan Turner?
>
> A. Yes.
>
> Q. And how long have you known Mr. Turner?
>
> A. For a long time. We grew up together. We used to live in the same household.
>
> Q. That's the other individual seated at defense next to defense counsel?
>
> A. Yes.

¶6 Turner argues that the prosecutor was the one who actually identified Turner. He contends that the prosecutor should have asked if the person Jones knew to be Turner was present in the courtroom and, if so, to indicate where Turner was. The State responds that Turner's challenge to the identification goes to weight and credibility rather than admissibility. We agree.

¶7 To comport with due process, an in-court identification cannot be impermissibly suggestive, *see* ***Powell v. State***, 86 Wis. 2d 51, 65, 271 N.W.2d 610 (1978), and must avoid the "'substantial likelihood of irreparable misidentification,'" ***id.*** at 64 (citations omitted). Here, there was no doubt that the identification of Turner by Jones was accurate and reliable. Jones knew Turner for a long time, grew up with him, and even shared the same household. Given these undisputed facts, the prosecutor's question identifying Turner's location in the courtroom does not constitute impermissibly suggestive questioning.

¶8 Further, Turner had the opportunity to challenge Jones's credibility as to the identification and the accuracy of Jones's statements. Turner declined to do so because the identification was accurate.

B. Ineffective Assistance.

¶9 Turner next argues that he received ineffective assistance of trial counsel. He proffers two specific instances which he contends constitute ineffective assistance: (1) counsel's failure to object to the prosecutor's "suggestive" identification of Jones; and (2) counsel's failure to request the *falsus in uno* jury instruction. We reject both contentions for the reasons that follow.

¶10 In order to succeed on an ineffective assistance claim, Turner must prove that counsel's performance constituted deficient conduct, and that such

conduct prejudiced the outcome. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶11 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. *See* ***id.*** at 634. The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court need be given. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

¶12 If an appellant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege with specificity both deficient performance and prejudice in the postconviction motion. ***Id.*** at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. ***Id.*** at 310. If the trial court refuses to hold a hearing based on its findings that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, this court's review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. ***Id.*** at 318.

¶13 Turner first claims that his trial counsel should have objected to the "impermissibly suggestive" identification that Jones made during his testimony. We have already concluded in the first portion of this opinion that the identification was not impermissibly suggestive. Accordingly, counsel's failure to object to a question, which was not objectionable, cannot constitute deficient performance. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Thus, Turner has failed to demonstrate that this claim constituted ineffective assistance.

¶14 Turner's second ineffective assistance claim is that counsel should have requested the *falsus in uno* jury instruction based on the testimony of the victim, Hicks. Turner's argument is that Hicks testified that his captors burned him with cigarettes and that he still has scars from the burns. Turner points out that the medical reports do not indicate any burns and that photographs do not show any scars. As a result, Turner contends that trial counsel should have asked the court to give the *falsus in uno* instruction. We are not convinced.

¶15 The *falsus in uno* instruction[2] is used only if the trial court finds evidence that a witness willfully swore falsely to a material fact. ***Pumorlo v. City of Merrill***, 125 Wis. 102, 111, 103 N.W. 464 (1905). As the State points out, that was not the case here. One of the captors testified that Hicks was burned with cigarettes. This corroborates Hicks's statement to that effect. Turner was free to

[2] *See* WIS JI—CRIMINAL 305 which provides:

> If you become satisfied from the evidence that any witness has willfully testified falsely as to any material fact, you may disregard all the testimony of the witness which is not supported by other credible evidence in the case.

argue, based on the absence of the burns in the medical report and the photographs, that Hicks was mistaken. The jury could then assess his credibility. This was not a factual scenario where the victim's testimony was so incredible and inconsistent that a reasonable person would conclude that he was intentionally testifying falsely.

¶16 Moreover, whether or not Hicks was truly burned with cigarettes was not a pivotal issue in this case. Turner was charged with felony kidnapping—not physical injury. Thus, this minor discrepancy did not have any legal effect on the outcome of the case. It was not *material* evidence as required by the instruction. There was plenty of other evidence to corroborate Hicks's testimony that he was tortured, including being beaten with a baseball bat, struck with a handgun and shot in the foot. This evidence was introduced to prove that force was used to accomplish the crime of kidnapping. It was not used to prove an injury. Based on the foregoing, we conclude that the trial court did not err in summarily denying Turner's claim that he received ineffective assistance of counsel. Turner has not shown that counsel was deficient in failing to request the *falsus in uno* instruction because there was no basis for making such a request. Further, Turner failed to show that the failure to request the instruction prejudiced his case.

C. Amendment of Information.

¶17 Turner's final claim is that the trial court erroneously exercised its discretion when it allowed the State to amend the information to conform to the proof at the close of the evidence. We are not persuaded.

¶18 WISCONSIN STAT. § 971.29(2) provides:

> At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.

¶19 The trial court has the discretion to amend the information at any time as long as the defendant is not prejudiced. ***Wagner v. State***, 60 Wis. 2d 722, 726, 211 N.W.2d 449 (1973). We will not reverse the trial court's decision unless it failed to properly exercise discretion. *See* ***State v. Koeppen***, 195 Wis. 2d 117, 123-24, 536 N.W.2d 386 (Ct. App. 1995). If the record reflects that the trial court has a reasonable basis for its ruling, we will not overturn that decision. *See* ***id.***

¶20 This issue arose because the original information alleged that Turner had imprisoned and held Hicks against his will, but the jury instruction stated that the jury could also find guilt if it found that Hicks had been "secretly confined." In response, the State sought to add the words "secretly confined" to the information in order to conform to the evidence presented at trial. The trial court permitted the amendment.

¶21 Turner claims he was prejudiced by the amendment because he had no ability to disprove that Hicks was secretly confined and that if that term had been in the original information, he would have been able to defend against the charge. The State responds that there is no prejudice because the underlying crime of kidnapping was not amended. *See* ***id.*** at 123. Rather, the additional element of being secretly confined (which is contained within the kidnapping statute) was

added to the information.[3] Thus, the same crime was alleged before and after the amendment.

¶22 The State also points out that the amendment did not prejudice Turner's ability to defend himself because his theory of defense was that he was present only at events leading up to the kidnapping, but was not involved in the kidnapping itself. Therefore, whether or not the victim was secretly confined had nothing to do with Turner's defense.

¶23 Based on the foregoing, we cannot conclude that the trial court erred in permitting the amendment. Turner has failed to demonstrate that he was prejudiced by the amendment and the State has shown that there was a reasonable basis for the trial court's exercise of discretion.

By the Court.—Judgment and order affirmed.

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

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[3] WISCONSIN STAT. § 940.31(1)(b) provides:

> **Kidnapping. (1)** Whoever does any of the following is guilty of a Class C felony:
>
> ….
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> (b) By force or threat of imminent force seizes or confines another without his or her consent and with intent to cause him or her to *be secretly confined* or imprisoned or to be carried out of this state or to be held to service against his or her will[.]

(Emphasis added.)