COURT OF APPEALS DECISION DATED AND FILED

April 22, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2007AP1059-CR **Cir. Ct. No. 2001CF4308**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARIUS A. BATTLE,

DEFENDANT-APPELLANT.

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

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

¶1 WEDEMEYER, J. Marius A. Battle appeals from a judgment entered after a jury found him guilty of one count of first-degree reckless injury,

with the use of a dangerous weapon, as party to a crime and habitual criminality, contrary to WIS. STAT. §§ 940.23(1)(a), 939.63, 939.05, and 939.62 (2001-02).[1] He also appeals from an order denying his postconviction motion. Battle claims: (1) the evidence is insufficient to support the verdict; (2) the trial court erred in summarily rejecting his claim that his trial counsel provided ineffective assistance; and (3) the trial court erred when it refused to suppress the identification of Battle on the grounds that the photo array used was unduly suggestive. Because the evidence was sufficient to support the verdict; because Battle failed to establish ineffective assistance of counsel; and because the trial court did not erroneously exercise its discretion when it denied Battle's motion to suppress, we affirm.

BACKGROUND

¶2 On the evening of July 31, 2001, there was an incident involving the victim, T.J. Howard, and a group of four men. Howard recognized most of the men in the group from the neighborhood. He knew them by their street names: B.D., Ken and Tattoo. Ken put a gun to Howard's head and made a derogatory remark. Howard responded by asking Ken not to shoot him. Ken pulled the trigger. Howard reached for Ken's gun. Howard also heard another gun firing at him.

¶3 Howard was shot in his left thigh, above his stomach, the right side of his chest, his left arm, once in the groin, and eight times in the right leg. The four men ran off after the shooting and Howard was taken to Children's Hospital.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

During the ambulance ride, he told the people in the ambulance that Ken, Tattoo and B.D. shot him.

¶4 While at the hospital, Milwaukee Police Detective Douglas Williams documented the injuries and collected the recovered bullets from the hospital staff. There were two different types of bullets: one was a .45 caliber bullet and one was a .357 caliber bullet. The detective also came to Howard's room with a photo array. The array consisted of six color photos of black males similar in characteristics to Tattoo. Howard immediately identified Tattoo as one of his assailants. Tattoo was later identified by his real name, Marius A. Battle.

¶5 Battle was charged with second-degree recklessly endangering safety, as a party to a crime, while armed, and as a habitual criminal. The charge was later amended to first-degree reckless injury, while armed, as a party to a crime, and as a habitual criminal. Battle entered a not guilty plea and the case was set for trial.

¶6 During pre-trial proceedings, Battle filed a motion to suppress the identification and requested a hearing. He asserted that the photo array shown to Howard at the hospital was "unduly suggestive." The trial court held a suppression hearing on the motion on April 24, 2002.

¶7 At the hearing, Detective Williams testified about the identification via the photo array presented to Howard at the hospital. Williams indicated that Howard was in the hospital, but was alert and able to speak. Battle's counsel then asked Williams whether Howard was on any sort of medication at the time. Williams responded that he did not know. The court sustained an objection to this line of questioning, ruling it irrelevant. Howard also testified at the hearing. He stated that he remembers the day of the incident, that he was alert at the hospital

and that he had taken Tylenol 3, which has codeine in it for the pain. Howard testified that the medication did not make him feel dizzy or woozy and it did not affect his eyesight or his ability to read.

¶8 At the conclusion of the hearing, the trial court denied Battle's motion to suppress and the case went to trial. At trial, in addition to Howard's testimony, the State also called Corey Sykes, whose street name is B.D. who was one of the four men involved in the assault on Howard the night of the incident. Sykes testified that Battle's street name is "Tattoo." Sykes stated he agreed to testify truthfully in this case in exchange for a plea agreement from the State. Sykes indicated that he was with Battle on the night in question, and that Ken and Battle had guns. Battle had a semi-automatic .45 caliber handgun and Ken had a semi-automatic .357 caliber pistol. The fourth member of the group was identified as Vic, and he had a .40 caliber pistol.

¶9 Sykes told the jury that when the group saw Howard, Battle said "That was the guy that pulled a gun on [me]." The group approached Howard and Ken put a gun to Howard's forehead. Ken said something and Howard said "Don't kill me." Sykes then heard multiple gunshots and believed that more than one gun was fired. Sykes also stated that he saw Tattoo pull out his gun and point it at Howard.

¶10 The jury convicted Battle and he was sentenced to twenty years in prison, consisting of thirteen years of initial confinement and seven years of extended supervision. Judgment was entered. Battle filed a postconviction motion, which was denied. He now appeals.

DISCUSSION

A. Sufficiency of the Evidence.

¶11 Battle contends that the evidence was insufficient to support the verdict. He asserts that because Howard's testimony was inconsistent as to whether Howard actually saw Battle with a gun, that the State failed to satisfy their burden of proof. We cannot agree.

Our standard in reviewing sufficiency of the evidence claims is:

> [we] may not substitute [our] judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted).

¶12 Battle supports this argument by pointing out that Howard testified he could not say with certainty that "Tattoo" had a gun. Rather, Howard saw Tattoo "standing in the background like—like this with something—like he had something in his pocket under his shirt," which Howard believed to be a gun. Battle also points out that Howard testified at the preliminary hearing: "Man, I saw them all with guns." Battle asserts that this testimony and the other evidence are insufficient to support the verdict rendered in this case.

¶13 Based on the standard of review set forth above, we reject Battle's contention. Battle was found guilty of first-degree reckless injury, which has three

elements: (1) the defendant caused great bodily harm to the victim; (2) the harm was caused by criminally reckless conduct; and (3) the conduct showed utter disregard for human life. WIS. STAT. § 940.23(1). Our review of the evidence demonstrates that the State proved each element beyond a reasonable doubt.

¶14 First, the evidence and all reasonable inferences that can be drawn from the evidence showed that Battle caused great bodily harm to the victim. Although there was some inconsistency in Howard's testimony, the jury was entitled to assess which was most credible. Moreover, Sykes's trial testimony confirmed Howard's testimony that Battle shot him. Sykes told the jury that Battle had a .45 caliber gun, that Battle was present, that Battle pointed his gun at Howard and that Battle fired first. Further, the physical evidence implicated Battle as one of the shooters. The bullet recovered at the hospital matched the bullet of the gun that Battle had. From this evidence, the jury could reasonably infer beyond a reasonable doubt that Battle caused great bodily harm to Howard.

¶15 The second element requires proof that Battle's conduct was criminally reckless. The evidence reasonably suggests that Battle initiated the confrontation, that he fired multiple shots on the public street in a group of people and then ran away. Such constitutes criminally reckless conduct.

¶16 The third element requires proof that Battle showed utter disregard for human life. The same evidence supporting the second element supports this element as well. Accordingly, we reject Battle's contention that the evidence was insufficient to support the verdict. There was sufficient evidence in the record from which a reasonable jury could conclude that all three elements were proven beyond a reasonable doubt.

B. Ineffective Assistance.

¶17 Battle also claims that his trial counsel provided ineffective assistance for failing to raise Howard's state of mind in the hospital during the identification, as additional grounds to suppress the identification. The trial court summarily rejected this claim, ruling:

> The defendant's assertion is wholly conclusory and without the requisite factual support to maintain a claim of this nature. Howard's testimony in the suppression hearing provides no support for the defendant's position, and based on his testimony that his pain medication (Tylenol with Codeine) did not affect his eyesight or his ability to read, that it did not make him dizzy or woozy, and that it merely "stopped the pain" – in conjunction with Detective Williams' testimony that Howard was completely alert and immediately identified the defendant from the photo array, there is not a reasonable probability that counsel's failure to pursue the victim's state of mind at the motion hearing would have altered the outcome.

¶18 In reviewing claims of ineffective assistance of counsel, we are governed by the following standards. In order to establish that he or she did not receive effective assistance of counsel, the defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel's errors "were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-

prong, "'[a] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶19 In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez,*** 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently, *see* ***id.*** at 236-37.

¶20 Moreover, 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 finding that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, our review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. ***Id.*** at 318.

¶21 Based on these standards, we agree with the trial court's assessment. The "state-of-mind" issue, although not officially raised, was in fact addressed sufficiently to demonstrate that Howard's state of mind was not an issue that would have resulted in the granting of the suppression motion. Williams's testimony indicates that Howard was alert and able to make a positive identification. Howard testified that he was on Tylenol 3, but that his state of mind was not affected in any way. Accordingly, pursuing the state of mind issue would not have altered the outcome of the suppression motion. Thus, Battle has failed to establish that his trial counsel provided ineffective assistance based on this assertion.

C. Suppression Ruling.

¶22 Battle also asserts that the trial court erred when it denied his suppression motion. Battle claims the photo array was unduly suggestive based on Howard's statement that he knew all of the individuals depicted in the array. We are not convinced.

¶23 We review a motion to suppress in two steps. ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. We will uphold the trial court's findings of fact unless clearly erroneous, but we apply constitutional principles to the facts *de novo*. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 315, 588 N.W.2d 8 (1999). The facts are undisputed and thus, the issue is a legal one.

¶24 Whether an eyewitness identification of a defendant by means of a photo array should be suppressed is governed by ***State v. Mosley***, 102 Wis. 2d 636, 307 N.W.2d 200 (1981), and ***Powell v. State***, 86 Wis. 2d 51, 271 N.W.2d 610 (1978). The standards set forth in these cases were recently affirmed in ***State v. Drew***, 2007 WI App 213, ___ Wis. 2d ___, 740 N.W.2d 404.

> First, the defendant has the burden to demonstrate the out-of-court photo identification was impermissibly suggestive; if the defendant meets this burden, the State has the burden to show that the identification is nonetheless reliable under the totality of the circumstances. ***Mosley***, 102 Wis. 2d at 652, 307 N.W.2d 200 (citing ***Powell***, 86 Wis. 2d at 63-66, 271 N.W.2d 610).

Drew, 740 N.W.2d 404, ¶13. "'It is the likelihood of misidentification which violates a defendant's right to due process. '" ***Powell***, 86 Wis. 2d at 64 (citation omitted).

¶25 Here, Battle argues that the photo array was unduly suggestive because Howard stated he knew all the people in the photo array. He contends that because Howard had "previous familiarity with the faces in the photo line-up, the photo array was unduly suggestive." Battle does not cite to any case law to support this proposition, nor does he explain why knowing the persons depicted in the array impermissibly suggests who shot him.

¶26 Thus, we conclude that Battle has failed to demonstrate that the photo array was impermissibly suggestive. The record reflects that Howard recognized Tattoo from the neighborhood. The detective, who knew Battle to use the street name Tattoo, decided to put Battle's picture in the photo array based on that information. It is undisputed that the other photos chosen for the array were males of the same general age, hairdo, facial type and skin color. It is undisputed that the detective did not do or say anything to suggest to Howard who to pick. It is undisputed that Howard immediately recognized and identified Tattoo as one of his assailants. Thus, there was nothing impermissibly suggestive about the photo array. Based on all of these facts, we conclude that the identification of Battle from the photo array was reliable. The fact that Howard recognized all of the

people depicted in the array from the neighborhood does not affect the reliability of the identification.

¶27 Based on the foregoing, we conclude that Battle failed to satisfy his burden of proving that the photo array was unduly suggestive. We also conclude that the identification was reliable. Accordingly, the trial court did not err in denying the motion to suppress.

By the Court.—Judgment and order affirmed.

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