COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1285-CR **Cir. Ct. No. 2009CF3**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DWIGHT D. SCOTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Dane County: DAVID T. FLANAGAN, Judge. *Affirmed*.

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Dwight Scott appeals a judgment convicting him of burglary and attempted armed robbery, each as a repeat offender, and an order denying his motion for postconviction relief. He contends that he is entitled to a

new trial based upon ineffective assistance of counsel and in the interest of justice. For the reasons discussed below, we disagree and affirm the circuit court.

BACKGROUND

¶2 The charges were based upon allegations that Scott entered a house he knew to be occupied by breaking the glass and frame of a kitchen door. He then pointed a handgun at one of the residents, Kimberly Vodraska, but ran off when another resident, Otis Dawson, confronted him with a rifle. The primary evidence presented at trial was Vodraska's testimony and identification of Scott, and DNA evidence recovered from one of a pair of gloves the intruder dropped on top of the splintered door frame on the kitchen floor. After Scott elected not to testify, the defense rested without calling any witnesses. The jury returned guilty verdicts on both counts.

¶3 Scott filed a motion seeking a new trial based on multiple allegations of ineffective assistance of counsel. The trial court denied the motion without a hearing. Scott appeals. We will set forth additional facts relevant to each claim in our discussion below.

STANDARD OF REVIEW

¶4 We review a circuit court's decision to deny a postconviction motion without an evidentiary hearing under the *de novo* standard, independently determining whether the facts alleged would establish the denial of a constitutional right. *See* ***State v. Bentley***, 201 Wis. 2d 303, 308, 548 N.W.2d 50 (1996).

DISCUSSION

¶5 In order to obtain a hearing on a postconviction motion, a defendant must allege sufficient material facts to entitle him to the relief sought. ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. In the context of a claim of ineffective assistance of counsel, that means the facts alleged would, if true, establish both that counsel provided deficient performance and that the defendant was prejudiced by that performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. No hearing is required when the defendant presents only conclusory allegations or when the record conclusively demonstrates that he or she is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Non-conclusory allegations should present the "who, what, where, when, why, and how" with sufficient particularity for the court to meaningfully assess the claim. ***Allen***, 274 Wis. 2d 568, ¶23.

¶6 Here, Scott's complaint raised five claims of ineffective assistance of counsel, which he has consolidated into four claims on this appeal. We will address the sufficiency of his allegations to support each alleged instance of deficient performance before addressing any cumulative prejudicial effect.

¶7 First, Scott alleged that counsel should have called police officer Denise Markham to the stand. Based upon a police report, Markham would have testified that she had questioned Scott the day before the home invasion about his knowledge that Dawson had an AK-47 in his house. Scott explained that he knew about the weapon because his cousin bought drugs from Dawson. His cousin was considering robbing him, except for "the whole thing is the AK's up there." Scott also mentioned that it looked like someone had tried to rob Dawson before because one of the side doors had a dent in it. In response, Markham advised

Scott that the police would be sitting on the address and he should not attempt to buy drugs there. Thus, Scott argues, Markham's testimony would have supported the proposition that Scott had a strong motive *not* to rob the house.

¶8 The State explicitly declines to offer any argument in response to Scott's contention that counsel's performance was deficient in this regard, so we will assume for the purposes of this opinion that counsel should have called Markham to testify. *See generally* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (an argument to which no response is made may be deemed conceded for purposes of appeal).

¶9 Second, Scott claims counsel should have called Dawson's sister, Angela Racanelli, to testify. Racanelli would have testified that: (1) Dawson knew Scott, thus raising the question why Dawson did not simply name Scott as the intruder in the first place; and (2) pon seeing a picture of Scott on the internet after the home invasion, Vodraska commented to Racanelli that the tattoo on Scott's neck was different from the tattoo on the intruder's neck, contradicting her trial testimony that she did not see the intruder's neck. However, the State points out that Scott did not make any allegation that counsel was aware of Racanelli's existence, much less her potential testimony. Because Scott does not dispute that point in his reply brief, we conclude the motion was insufficient to establish deficient performance on this claim. *See* ***id.***

¶10 Third, Scott claims that counsel should have challenged the admissibility of Vodraska's identification. Scott notes that the procedure used to identify him deviated from the DOJ protocols developed pursuant to WIS. STAT.

§ 175.50 (2009-10)[1] because the Indiana police officer who presented Vodraska with a photo array showed her all the pictures at once rather than sequentially, did not advise her that the intruder's picture might not be among the array, and did not ask her how certain she was about her identification. [2]

¶11 The State does not dispute that the identification procedure used in Indiana failed to comply with current Wisconsin protocols, but contends that alone does not require suppression. We agree. The due process test is whether the procedure used was unduly suggestive, such that the identification was not reliable under the totality of the circumstances. ***State v. Drew***, 2007 WI App 213, ¶13, 305 Wis. 2d 641, 740 N.W.2d 404.

¶12 Scott acknowledges that the identification procedure used here was similar to those upheld in ***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). He argues, however, that social science has advanced considerably since those cases were decided. *See* ***State v. Shomberg***, 2006 WI 9, ¶15, 288 Wis. 2d 1, 709 N.W.2d 370. While we agree that advancements in the scientific understanding of how memory works may be relevant, and an appropriate subject for expert testimony, it does not follow that we can simply declare previously upheld constitutional procedures now unconstitutional. *See generally* ***State v. Clark***, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993) (we are bound by the precedent of our supreme court).

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Vodraska moved to Indiana soon after the crime was committed.

¶13 Here, Scott has not pointed to any facts, apart from the general procedure used, that would show that the Indiana officer who conducted the lineup suggested to the witness that she should pick Scott's photograph. At most, the procedure may have suggested that the police believed the intruder's photo was among those in the array. However, the fact that the witness chose the photograph of a person whose DNA turned out to be on a glove found at the scene provides an independent indicia of reliability for the identification. In sum, since we are not persuaded that a motion to suppress the identification would have been successful, we cannot conclude that counsel performed deficiently by not challenging the admission of the identification.

¶14 Scott's fourth claim is that counsel should have called an expert to testify about the risk of relative judgment inherent in a simultaneous photo array, the phenomenon of weapon focus, the effects of stress on memory, and the lack of statistical correlation between witness certainty and accuracy. He asserts that an expert could also have testified about eye witness reliability in regards to lower accuracy rates when an identification is made based on only a few seconds of viewing the suspect, when a suspect was wearing a head covering, or when the suspect and witness are of different races. Scott incorporates into this claim an additional argument that counsel should have requested Criminal Jury Instruction 141 to highlight the limitations of eyewitness identifications.

¶15 The State has offered no argument contesting Scott's fourth assertion of deficient performance. *See* ***Schlieper***, 188 Wis. 2d at 322. Given the State's implied concession, as well as our own observation that Scott's entire defense was premised upon a misidentification, we will assume for the sake of argument that counsel should have presented expert testimony about the reliability of eyewitness identification and requested an appropriate jury instruction.

¶16 We turn then to the question of prejudice—namely, whether the outcome of the trial would have been different if the jury had known that Scott was aware the house was under police surveillance and that there were a number of factors present in the eyewitness's identification of Scott that have been statistically shown to reduce reliability. We conclude that Scott would have been convicted anyway, based upon the strength of the DNA evidence.

¶17 Scott attempts to downplay the importance of the DNA evidence by pointing to the presence of multiple contributors to the DNA found on the glove, and asserting that evidence produced at trial does not even show that the intruder was wearing gloves. Addressing the second proposition first, we disagree with Scott's characterization of the evidence. Vodraska testified that she could not see through the peephole whether the intruder was wearing gloves when he first attempted to push his way in through the front door, and that he was not wearing gloves when he pointed a gun at her. But the only reasonable inference from the fact that a pair of gloves that did not belong to the residents of the house were found *on top of* the portion of the door frame (that ended up on the kitchen floor when the door was broken down) is that the intruder used the gloves to break through the door and then dropped them.

¶18 As far as the DNA evidence linking the glove to Scott, the jury was made aware that there were multiple contributors to the sample recovered from the glove. However, only one contributor left sufficient genetic material for a complete profile. That person was Scott. It is entirely reasonable to infer that the gloves were most often or most recently worn by the person who left the most genetic material on them. Moreover, since there was insufficient genetic material to identify any of the other contributors, it would be mere speculation that any of

the others would have had been the intruder. We therefore conclude that the record conclusively demonstrates that Scott could not establish prejudice.

¶19 Scott also argues that he should be granted a new trial in the interest of justice. *See* WIS. STAT. § 752.35 (this court has the discretionary power to reverse a judgment of the circuit court "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried"). We may conclude that the controversy has not been fully tried either when the jury was not given the opportunity to hear testimony relating to an important issue in the case, or when the jury had before it improperly admitted evidence which confused a crucial issue. ***State v. Hicks***, 202 Wis. 2d 150,160, 549 N.W.2d 435 (1996). In either case, however, we will exercise our discretionary reversal power only sparingly. ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). For the same reasons that we conclude that Scott was not prejudiced by the absence of testimony from Markham or an expert on eyewitness identification, we conclude that the interests of justice do not require a new trial here.

By the Court.—Judgment and order affirmed.

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