**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

November 29, 1995

**NOTICE**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 94-2702-CR**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**OPHEOUS L. SIMMONS,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Racine County: NANCY E. WHEELER, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Opheous L. Simmons appeals from a judgment convicting him of robbery with threat of force contrary to § 943.32(1)(b), STATS., and from an order denying his postconviction motion. We affirm.

The history of the trial court proceedings is necessary to a discussion of the appellate issues. Simmons was charged in November 1991 with armed robbery of the Security Bank in Racine, Wisconsin. Simmons

moved to suppress an out-of-court photographic array which resulted in his identification by one of the bank tellers, Denise King. The trial court denied the motion to suppress. On June 1, 1992, while visiting Racine in custody of the Dodge County Correctional Institution on robbery, disorderly conduct and obstruction charges,[1] Simmons briefly escaped from the courthouse, resulting in additional charges of escape and bail jumping.

On June 16, 1992, Simmons pled no contest in Racine County to armed robbery and escape. Under the plea agreement, the repeater allegation was to be dropped from the armed robbery charge, and the bail jumping, disorderly conduct and resisting charges were to be dismissed and read in at sentencing. Simmons wanted the Dodge and Racine County escape charges consolidated in Racine County as part of his plea agreement.[2] The Racine County prosecutor agreed to contact the Dodge County district attorney's office.

On September 24, 1992, Simmons and the State stipulated that he could withdraw his June 16 plea and the dismissed Racine charges would be reinstated. On October 16, Dodge County filed escape charges based on the June 1 incident. On November 4, Simmons pled guilty in Dodge County to the escape charge and received a one-year sentence consecutive to any sentence previously imposed. On May 24, 1993, Simmons, now represented by Attorney Douglas Henderson, pled no contest to robbery in Racine County, with the armed and repeater allegations deleted. The State agreed to recommend a seven-year prison sentence consecutive to prior sentences and to dismiss the Racine County escape, bail jumping, resisting and disorderly conduct charges.

On postconviction motion, Simmons moved to withdraw his no contest plea, asserted the existence of a new factor requiring resentencing and claimed his trial counsel was ineffective. The trial court rejected Simmons' arguments. Simmons appeals.

---

[1] The latter charges arose in a separate Racine County case.

[2] The court and counsel for the parties discussed the proper venue for the escape charge.

Simmons' first appellate issue relates to the trial court's refusal to suppress a bank teller's identification of him. Simmons argues that King's identification resulted from a suggestive photographic array. A court applies a two-part test to determine whether an out-of-court photographic identification is admissible. ***State v. Haynes,*** 118 Wis.2d 21, 30, 345 N.W.2d 892, 897 (Ct. App. 1984). First, the court must determine whether the identification procedure was impermissibly suggestive. ***Id.*** Second, the court must assess whether, under the totality of the circumstances, the out-of-court identification was reliable, despite the suggestiveness of the procedure. ***Id.*** The defendant has the burden of establishing suggestiveness. *See* ***Powell v. State,*** 86 Wis.2d 51, 65-66, 271 N.W.2d 610, 617 (1978). "Suggestiveness in photographic arrays may arise in several ways—the manner in which the photos are presented or displayed, the words or actions of the law enforcement official overseeing the viewing, or some aspect of the photographs themselves." ***Haynes,*** 118 Wis.2d at 30, 345 N.W.2d at 897.

We review allegations of infirmity in the identification procedure de novo because a question of law is presented. ***State v. Wilson,*** 179 Wis.2d 660, 682, 508 N.W.2d 44, 52-53 (Ct. App. 1993), *cert. denied,* 513 U.S. ___, 115 S. Ct. 100 (1994). However, we accept the trial court's findings of fact unless they are clearly erroneous; the trial court is the final arbiter in determining witness credibility. ***Id.*** at 682-83, 508 N.W.2d at 53.

At the suppression hearing, Detective Herbert Nikolai testified that he laid the photographs out on a table and told King to review them to see if she could pick anyone out. Within a few seconds after the detective arrayed the photographs, King stated, "Oh my God, I think that's the one," and pointed to Simmons' picture. At some point that day or at a later time, the detective confirmed for King that she had selected the suspect's photograph. Nikolai denied making any suggestive movement or remark which would have prompted King to select Simmons' photograph.

King testified that Nikolai told her that he had some pictures to show her and asked her to look at them. She identified Simmons before the rest of the photographs were laid down. After King picked out Simmons' picture, Nikolai told her that Simmons was the suspect. When Nikolai inquired whether King was positive, she said that she was very nervous but that she thought Simmons was the robber but could not "guarantee my life on it."

Simmons argued that the identification should be suppressed because King was only shown three photographs, and the detective's confirmation that she had selected the suspect influenced King's certainty. The State argued that the photographic array was presented properly and that King picked out the robber as soon as his photograph was shown to her.

The trial court found that the investigator did not properly present the photographs to King. Nikolai should have told King to review all of the photographs before identifying one of them and refrained from making any remarks. Nevertheless, the trial court concluded that the array did not suggest an identification.

We agree with the trial court that the manner in which the identification was made was not suggestive. It is clear from King's testimony at the preliminary examination and the suppression hearing that she reacted spontaneously to Simmons' picture[3] and that her reaction was not a result of any comment by Nikolai. The spontaneity of King's reaction undermines Simmons' claim that the photographic array suggested an identification.

Although we do not hold that the array was suggestive, we stress again that courts prefer a completely neutral and unremarkable array. By this we mean presentation of the photographs to the witness so that the witness has an opportunity to simultaneously view the photographs before identifying a suspect. Such a procedure is inherently neutral and does not create potential appellate issues. Nevertheless, we see no connection between the manner of the array and King's identification of Simmons.[4]

---

[3] At the preliminary examination, King testified that she reviewed five or six photographs approximately one and one-half months after the robbery and that Simmons was the third photograph. King testified that she remembered that her exact words were, "Oh my God, that's him."

[4] While King identified Simmons' photograph upon its appearance in the array, she apparently looked at all the photographs because she testified at the suppression hearing that the array presented as an exhibit at the hearing consisted of "the same pictures" she was shown at the bank.

Simmons argues that King's identification of him was equivocal, noting that at one time King said, "Oh my God, that's [the robber]" and at another time she said, "Oh my God, I *think* that's [the robber]." We do not see a material difference between the two statements.

Because the out-of-court identification by photographic array was not impermissibly suggestive, the trial court properly refused to suppress it. Thereafter, the jury was charged with assessing the credibility of King's identification testimony. *See* ***Radford v. J.J.B. Enters.,*** 163 Wis.2d 534, 543, 472 N.W.2d 790, 794 (Ct. App. 1991).

Simmons seeks to withdraw his no contest plea to the Racine County robbery charge on the grounds that it was not knowingly and voluntarily entered because he believed that dismissal of the Racine County escape charge as part of his plea agreement would nullify the Dodge County escape conviction. Simmons also complains that his trial counsel did not advise him that the Dodge County conviction would remain of record after he entered a plea to the Racine charges and that his attorney did not bring the Dodge County conviction to the Racine court's attention at sentencing. The latter claim also forms the foundation for Simmons' argument that the Dodge County conviction was a new factor requiring resentencing.

Plea withdrawal is discretionary with the trial court. ***State v. Spears,*** 147 Wis.2d 429, 434, 433 N.W.2d 595, 598 (Ct. App. 1988). A defendant who wishes to withdraw a no contest plea has the burden of showing by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. ***State v. James,*** 176 Wis.2d 230, 236-37, 500 N.W.2d 345, 348 (Ct. App. 1993). A "manifest injustice" arises where a defendant enters a plea without knowledge of the consequences of the plea. ***Id.*** at 237, 500 N.W.2d at 348. Whether a defendant has made a prima facie showing that his or her plea was entered involuntarily or unknowingly is a question of law which we review independently of the trial court. ***Id.***

The trial court rejected Simmons' request to withdraw his Racine County plea because Simmons, by virtue of his previous contacts with the criminal justice system and his six attorneys in this case, had sufficient understanding of the proceedings. The trial court found that allowing Simmons

to withdraw his Racine County plea would not have any impact on the validity of the Dodge County sentence.

We see no merit to this claim. First, it appears that the Racine County prosecutor's interest in addressing the Dodge County charge related only to the first plea agreement from which Simmons withdrew on September 24. On November 4, Simmons pled guilty to escape in Dodge County. The following May, Simmons appeared in Racine County to enter a no contest plea to the robbery charge and to have several other Racine County charges dismissed. Because Simmons withdrew from the plea agreement in which the status of the Dodge County charge was discussed, the State was not bound to pursue the Dodge County matter as part of the second plea agreement. Second, Simmons did not mention the Dodge County matter at any point in the second Racine County plea colloquy, despite several opportunities to bring this to the Racine court's attention.[5] Simmons has not demonstrated the existence of a manifest injustice necessitating plea withdrawal.

We turn to Simmons' ineffective assistance and new factor claims. At the postconviction motion hearing, Douglas Henderson, who represented Simmons at the second plea hearing and at sentencing, testified that he had no knowledge of the Dodge County conviction and did not recall discussing it with Simmons or bringing it to the trial court's attention.[6] Henderson did not request an update of the presentence investigation report (PSI) which had been completed when Simmons entered his first plea to the Racine County charges because Simmons wanted to be sentenced immediately and advised counsel that a PSI had already been completed. Henderson testified that he answered all of Simmons' questions and that Simmons appeared to understand the conversations they had. He did not recall that Simmons inquired about the Dodge County conviction. He reviewed the July 1992 PSI with Simmons, and Simmons did not point out that the Dodge County conviction was absent.

---

[5] At the second plea agreement hearing on May 24, 1993, the prosecutor put the plea agreement on the record and the court referenced the previously withdrawn plea. Simmons indicated he did not have any questions about either the armed robbery or felony escape charges, had had sufficient time to discuss matters fully with his counsel and did not have any questions of the court.

[6] Henderson admitted that he saw a notation on the June 16, 1992, minutes referring to the Dodge County charge. While he was aware that charges had been filed in Dodge County, he did nothing to determine the status of those charges.

Simmons testified that he told Henderson that he withdrew his first plea in order to address the Dodge County escape charge. Simmons claimed that Henderson told him that a Racine plea would dismiss the Dodge County case. Henderson then returned to testify that he would not have made such a statement because he questions whether a Racine court would have authority to dispose of a judgment of conviction from another county.

To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). However, we need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. ***State v. Moats,*** 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990). Whether counsel's performance prejudiced the defendant is a question of law which we review de novo. ***Id.***

The 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. ***State v. Johnson,*** 153 Wis.2d 121, 129, 449 N.W.2d 845, 848 (1990). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (quoted source omitted). In applying this principle, reviewing courts are instructed to consider the totality of the evidence before the trier of fact. ***Id.*** at 129-30, 449 N.W.2d at 848-49.

The trial court accepted Henderson's testimony regarding his conversations with Simmons about the Dodge County conviction. This was a credibility determination which was within the province of the trial court to make. *See* ***State v. Michelle A.D.,*** 181 Wis.2d 917, 926, 512 N.W.2d 248, 251 (Ct. App. 1994). We agree with the trial court that Simmons did not establish that Henderson's representation prejudiced him. The totality of the circumstances reveals the following: the trial court conducted a thorough plea colloquy; Henderson testified that he had no knowledge of the Dodge County conviction and that Simmons did not bring it to his attention; Simmons had a series of attorneys and exclusive access to information about the Dodge County conviction; and Simmons instructed Henderson to expedite his sentencing by using a PSI which predated the Dodge County conviction. These circumstances significantly undercut Simmons' prejudice claim and do not undermine our confidence in the proceeding.

With regard to Simmons' new factor claim, the trial court acknowledged it was not aware of the Dodge County conviction at the time it sentenced Simmons. In sentencing Simmons, the Racine court relied upon a PSI which predated Simmons' sentencing in Dodge County. The trial court found that Simmons knew that the court was using this PSI and failed to advise the court that it was inaccurate. Also, in exercising his right of allocution at the sentencing hearing, Simmons did not refer to the Dodge County conviction, although this information was clearly available to him. Therefore, the Racine court rejected Simmons' contention that the existence of the Dodge County conviction was a new factor requiring resentencing. The court also found that the sentence was less than the sentence recommended by the State and that Simmons "has essentially benefited by the lack of information about the Dodge County conviction, because he was thereby allowed the benefit of concurrent time as to the sentence from Dodge County." The trial court also rejected Simmons' claim of ineffective assistance of counsel.

We agree with the trial court that Simmons did not demonstrate the existence of a new factor. "A new factor is a fact relevant to imposition of the sentence and not known to the trial court at the time of the original sentencing, either because it did not then exist or because the parties unknowingly overlooked it." ***State v. Kaster,*** 148 Wis.2d 789, 803, 436 N.W.2d 891, 897 (Ct. App. 1989). Whether a fact satisfies this standard presents a question of law. ***Id.***

The Dodge County conviction was not "unknowingly overlooked," and we are unable to discern how, had the trial court been aware of the Dodge County conviction, Simmons would have benefited in his sentencing in Racine County. The trial court properly exercised its discretion. *See* ***State v. Michels,*** 150 Wis.2d 94, 96, 441 N.W.2d 278, 279 (Ct. App. 1989) (sentence modification based on a new factor is within the trial court's discretion).

*By the Court.*—Judgment and order affirmed.

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