COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1267-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: PETER NAZE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. William Robinson appeals from a judgment of conviction entered upon a jury's verdict finding him guilty of armed robbery as party to a crime and false imprisonment as party to a crime, contrary to §§ 943.32(1) and (2), 940.30 and 939.05, STATS. William additionally appeals

from an order denying his motion for postconviction relief.[1] William argues that: (1) his due process rights were violated because his conviction was based on an in-court identification at trial that had been tainted by an impermissibly suggestive pretrial identification; and (2) his trial counsel's conduct in eliciting the pretrial identification and subsequently failing to move the court for its suppression constituted ineffective assistance of counsel. Because the in-court identification at William's preliminary hearing did not arise at the behest of the State, but rather from reasonable trial strategy on the part of his defense counsel, we affirm the judgment and order.

BACKGROUND

¶2 On August 27, 1996, two men robbed a Green Bay liquor store. The store's clerk, Jeff Buzaitis, was the victim and only witness to the robbery. He testified that at approximately 9:30 p.m. on the night of August 27, he was working alone in the store. After hearing the store's door open, he looked up to see two men, one of whom was pointing a gun at Buzaitis's face. The gunman ordered Buzaitis to open up the cash register, leaving his accomplice to empty the register drawer. The gunman then forced Buzaitis to show him to the store's safe and after the gunman emptied the safe's contents, Buzaitis was ordered into a beer cooler as the two robbers made their escape.

¶3 During the police investigation, Buzaitis was shown a photo array from which he identified the gunman. Buzaitis identified an individual who was never ultimately charged with the robbery. In November, after police received

[1] Because the underlying facts of this case involve three brothers, William Robinson, Anthony Robinson and James Robinson, we refer to each using their first names.

information implicating James and Anthony Robinson, brothers of William, Buzaitis was shown two more photo arrays. From one, Buzaitis identified Anthony as the accomplice, and from the other, he identified James as the gunman. Buzaitis subsequently identified James as the gunman at both James's preliminary hearing and trial, as well as Anthony's preliminary hearing and trial. Both Anthony and James were convicted of the robbery. Following Anthony's conviction, and before both his and James's sentencing, Anthony revealed all three brothers' involvement in the robbery to his presentence investigator and indicated that William was, in fact, the gunman. William was then charged with the crime.

¶4 At William's preliminary hearing, he wore an orange prison jumpsuit and sat at the defense table next to his attorney. The State questioned Buzaitis about what happened the night of the robbery, but never asked him to identify William as the gunman. On cross-examination, the following exchange occurred between Buzaitis and defense counsel:

> [DEFENSE COUNSEL]: Mr. Buzaitis, you have testified several times in the past on this matter, have you not?
>
> [BUZAITIS]: Five times.
>
> [DEFENSE COUNSEL]: Five times. Preliminary hearing and trial on the other two defendants; is that correct?
>
> [BUZAITIS]: That's correct.
>
> [DEFENSE COUNSEL]: And is it correct that you did identify one of the participants, the person who held the gun?
>
> [BUZAITIS]: Yes, I did.
>
> [DEFENSE COUNSEL]: And who was that?
>
> [BUZAITIS]: Um, James Robinson.
>
> [DEFENSE COUNSEL]: Did you ever identify William Robinson as being one of the participants?
>
> [BUZAITIS]: I had never seen a picture of him.
>
> [DEFENSE COUNSEL]: Well, have you seen him before today?

[BUZAITIS]: Well, the night of the robbery.

[DEFENSE COUNSEL]: Well, do you recognize him?

[BUZAITIS]: (No response.)

[DEFENSE COUNSEL]: Do you recognize him as being one of the participants?

[BUZAITIS]: Yes.

[DEFENSE COUNSEL]: And which one? What was he doing in there?

[BUZAITIS]: He was the one with the gun.

[DEFENSE COUNSEL]: Well, you indicated before, you identified James Robinson was the one with the gun?

[BUZAITIS]: Yes, I did. Through a picture. Their facial features are quite similar from looking at him right now.

[DEFENSE COUNSEL]: Had you ever seen any of the two men before?

[BUZAITIS]: No, I did not.

[DEFENSE COUNSEL]: And you've never—Other than assuming whether he was in the store or not, since that time, is this the first time you've seen William Robinson?

[BUZAITIS]: Correct.

[DEFENSE COUNSEL]: So you're looking back to the time of the robbery and now are saying this is a person that you could identify?

[BUZAITIS]: Correct.

[DEFENSE COUNSEL]: So your identification in the past was mistaken?

[BUZAITIS]: Correct.

¶5 On direct examination at William's trial, Buzaitis identified William as the gunman. Buzaitis testified that the perpetrators spent seven to ten minutes in the store during the robbery. He further testified that he spent most of the "seven to ten minutes" with the gunman and that he made an effort to study the perpetrators so that he would later be able to give accurate descriptions of them. Buzaitis additionally explained that although William was not the first person he identified as the gunman, there were various factors that made him believe that

William, rather than James, was the gunman. Buzaitis indicated that James's voice was slower and more drawn out than the gunman's. He further testified that he had earlier described the gunman as being 5' 8" tall and approximately 150-155 pounds, while James was closer to six feet tall and approximately 175-180 pounds.[2] Finally, both Buzaitis and Green Bay Police Lieutenant Thomas Molitor testified that Buzaitis had never been shown a photo array that included William's picture.

¶6 On cross-examination, defense counsel asked Buzaitis when he first identified William as the gunman. After Buzaitis indicated that it was at the preliminary hearing, the following exchange occurred:

> [DEFENSE COUNSEL]: That was just fairly recently though?
>
> [BUZAITIS]: Yes.
>
> [DEFENSE COUNSEL]: On the trials, and all the proceedings occurred right after the robbery, you clearly identified under oath that James was the gunman; isn't that correct?
>
> [BUZAITIS]: That is correct.
>
> [DEFENSE COUNSEL]: And now a couple years later you've changed your mind. You're saying it's William?
>
> [BUZAITIS]: Correct.

¶7 Both James and Anthony testified against William at trial, indicating that although it was Anthony's idea to rob the store, William was the gunman and James drove the getaway car. Marla Robinson, James's wife, testified that she

[2] At the time of his conviction, William was 5' 8" tall and weighed approximately 120 pounds.

heard a conversation in which James asked William where the safe was located in the store and William told him it was "about a foot off the ground."[3]

¶8 William testified on his own behalf that although he was in Escanaba, Michigan, the night of the robberies, his family wanted him to admit to being the gunman so that James would receive a lighter sentence. Defense witnesses supported William's alibi. In his closing argument, defense counsel posited that Anthony and James were not credible witnesses, that Buzaitis had previously identified two different individuals as the gunman and that William's alibi was supported by his witnesses.

¶9 The jury found William guilty, and he subsequently filed a postconviction motion asserting that he was denied due process and effective assistance of counsel. At the hearing on his postconviction motion, William's trial counsel testified that his emphasis on Buzaitis's identification of William was part of his trial strategy. Defense counsel indicated his impression that Buzaitis was "ready to identify anybody paraded before him as the gunman." Consequently, he "tried to emphasize the fact that [Buzaitis] had identified first by a picture somebody that wasn't even at the scene, then … James, and now … [William]."

¶10 When asked why he had not requested a judicial or courtroom lineup, counsel explained that he wanted to emphasize Buzaitis's past misidentifications rather than focusing on his present identification of William. He further testified that he had not moved the court to suppress Buzaitis's preliminary hearing identification of William because it was his strategy "to

[3] Marla clarified that James wanted to know where the safe was to assist in his own defense. James had a hip disability "and he … could not have stooped down to the floor into a safe without holding onto something or losing his balance to get up."

emphasize during the trial that [Buzaitis] had misidentified—he identified two other people previously, how upset he was at the time, that he was not in a position to have effectively identified anybody." The trial court denied William's postconviction motion and this appeal followed.

ANALYSIS

¶11 William argues that his due process rights were violated because his conviction was based on an in-court identification at trial that had been tainted by an impermissibly suggestive pretrial identification. William urges this court to apply the test for impermissibly suggestive identifications, as discussed in ***State v. Wolverton***, 193 Wis.2d 234, 533 N.W.2d 167 (1995).

¶12 The ***Wolverton*** court recognized that "[a] criminal defendant is denied due process when identification evidence admitted at trial stems from a pretrial *police procedure* that is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" ***Id***. at 264, 533 N.W.2d at 178 (quoting ***Simmons v. United States***, 390 U.S. 377, 384 (1968)) (emphasis added). ***Wolverton*** involved identification evidence admitted at trial that stemmed from a police showup, wherein a witness was asked to identify the defendant as he sat in the back of a squad car. *See* ***id***. at 262-63, 533 N.W.2d at 177. Emphasizing that police showups are not per se impermissibly suggestive, the ***Wolverton*** court held that a "criminal defendant bears the initial burden of demonstrating that a showup was impermissibly suggestive," and if that burden is met, "the burden shifts to the state to demonstrate that 'under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive.'" ***Id***. at 264, 533 N.W.2d at 178 (quoting ***Manson v. Brathwaite***, 432 U.S. 98, 106 (1977)). William argues that although his

preliminary hearing identification did not result from any State action, his identification is nevertheless analogous to the police showup in ***Wolverton*** and should therefore be analyzed under the same test used by the ***Wolverton*** court. We disagree.

¶13 William's preliminary hearing identification resulted solely from questioning by William's defense counsel, as part of his defense strategy. The ***Wolverton*** test for police-motivated identification procedures alleged to be impermissibly suggestive is therefore inapplicable to the instant case and the issue becomes whether William was denied effective assistance of counsel.

¶14 In order to show that his Sixth Amendment right to the effective assistance of counsel has been violated, William must show: "(1) that his lawyer's performance was deficient; and, if so, (2) that 'the deficient performance prejudiced the defense.'" ***State v. Eckert***, 203 Wis.2d 497, 506, 553 N.W.2d 539, 543 (Ct. App. 1996) (quoting ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). In reviewing a claim of ineffective assistance of counsel, "[t]he issues of performance and prejudice present mixed questions of fact and law." ***Eckert***, 203 Wis.2d at 507, 553 N.W.2d at 543. "Findings of historical fact will not be upset unless they are clearly erroneous, and the questions of whether counsel's performance was deficient and, if so, whether it was prejudicial are legal issues we review de novo." ***Id***. (internal citations omitted).

¶15 The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. *See* ***Strickland***, 466 U.S. at 688. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."

Id. at 689 (citation omitted). Here, trial counsel's performance was not deficient, but rather, evinced a reasonable trial strategy. Counsel attempted to challenge Buzaitis's ability to identify the gunman and reasonably chose to focus on Buzaitis's past misidentifications rather than on his present identification of William.

¶16 Even, however, were we to determine that trial counsel's performance was deficient, William has failed to show that this performance was prejudicial. To establish prejudice, William "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id***. at 694. Reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome." ***Id***. Here, the testimony of Anthony, James and James's wife, Marla, supported William's conviction. Although there was some testimony to the contrary, "[i]t is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." ***State v. Poellinger***, 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990). Because William has failed to show that his counsel's performance was either deficient or prejudicial, we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.