COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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. 02-2775-CR **Cir. Ct. No. 00-CF-323**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY B. SULLIVAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Timothy B. Sullivan appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. The issue on appeal is whether he received ineffective assistance of trial counsel. Because we conclude that he did not receive ineffective assistance of trial counsel, we affirm the judgment and order.

¶2 Sullivan was convicted after a jury trial of one count of lewd and lascivious behavior and one count of attempted false imprisonment. The court sentenced him to twenty-two months of initial confinement and eight months of extended supervision on the false imprisonment charge, and three years of probation on the lewd and lascivious behavior charge, to be served consecutive to the other sentence. The charges arose from two separate incidents involving the same victim. In the first, Sullivan exposed his penis to the victim after she got out of her car in a parking lot. This incident occurred on Thursday, November 16, 2000, at about 6:00 p.m. in Fond du Lac. On Sunday, November 19, 2000, Sullivan again approached the victim as she got out of her car in a different parking lot, grabbed the pocket of her jeans, and tore the pocket as she fled.

¶3 Sullivan brought a motion for postconviction relief in the circuit court alleging ineffective assistance of trial counsel. The court held a hearing on the motion. The court denied the motion finding that Sullivan had not established that he received ineffective assistance of trial counsel. Sullivan appeals.

¶4 Sullivan once again argues that he received ineffective assistance of trial counsel. He asserts that his trial counsel was ineffective on five grounds: (1) he failed to object to the admission of testimony about a "sex pamphlet" found in Sullivan's residence; (2) he did not object to references to a prior, unrelated incident involving Sullivan; (3) he did not request an adjournment to obtain the testimony of an expert; (4) he did not ask the court to reconsider its order denying Sullivan's motion to suppress the identification of Sullivan by the victim; and (5) he did not object to certain statements the prosecutor made in closing arguments.

¶5 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** at 697. We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted).

¶6 Sullivan first asserts that his trial counsel should have objected to the admission into evidence of a pamphlet the police found in his residence. Two police officers testified at trial that they saw the pamphlet in Sullivan's residence and that it was entitled "Anytime, Anywhere Sex." One of the officers testified that it said on the back of the pamphlet: "how to have great sex in outdoor places including parking lots." Sullivan argues that trial counsel should have moved to exclude this testimony on the grounds that it was improper other acts evidence. The trial court found, however, that this was not other acts evidence but was relevant direct evidence. We agree.

¶7 In this case, both of the incidents occurred in a parking lot. The pamphlet mentioned sex in parking lots. The testimony concerning the pamphlet was part of the "panorama of evidence" used to support the identification of Sullivan as the assailant by suggesting a blueprint for the charged criminal activity. *See* ***State v. Johnson***, 184 Wis. 2d 324, 348-49, 516 N.W.2d 463 (Ct.

App. 1994) (Anderson, P.J., concurring). The pamphlet was evidence of conduct that was a prelude to the crime charged and was directly probative of the crime.[1] Since the evidence was not other acts evidence, then Sullivan's trial counsel was not ineffective for failing to object to its admission.

¶8 Sullivan next asserts that his trial counsel was ineffective because he did not object to repeated references to an incident which occurred at a YMCA. He asserts that the testimony violated a pretrial order. Before trial, the State moved to introduce evidence that two months before the incident here, the police had contact with Sullivan about an incident in a hot tub at the local YMCA. On November 19, 2000, the same day as the second parking lot incident, Sullivan came into the Fond du Lac police department carrying some papers and wanting to discuss the YMCA incident with one of the officers. Apparently Sullivan had just received the summons and complaint and wanted to discuss what he was supposed to do. He made some reference to wanting to go "the counseling route." This happened at about 3:40 p.m. on November 19. The incident in the parking lot occurred just about an hour later. The State wanted to introduce this testimony to refute Sullivan's claim that he was not in Fond du Lac on November 19. Sullivan sought to exclude the testimony about why he had come to the police department that day. The court agreed that the jury could hear that Sullivan was there and the officers talked to him, but did not need to hear why Sullivan was there. The court ruled that there would be no reference to Sullivan's statement that he wanted counseling.

[1] Since we conclude that the testimony was relevant direct evidence, we need not address the State's alternative argument that it was admissible other acts evidence.

¶9 During the testimony at trial, one of the officers stated that he had previously had contact with Sullivan because of an incident at the YMCA. He said that when Sullivan came to the police station on November 19, he had with him some kind of paperwork which appeared to be "a summons or some type of paperwork to show up for a court trial." He also said he assumed it was related to the incident at the YMCA because he saw that "the charge that was developed out of that case, was in print on the front cover of the paperwork he showed me." During its deliberations, the jury sent a note which made reference to some of this testimony. The note stated: "Even though the YMCA incident is irrelevant to this case, the number of times it was mentioned may cause us doubt in whether prior acts count, is that reasonable doubt."

¶10 In deciding the motion for postconviction relief, the trial court found that the testimony did not violate the pretrial order, and therefore a defense objection was not warranted. In the alternative, the court concluded that Sullivan could not establish prejudice because the jury's note indicated that the jurors recognized that the incident was irrelevant. We agree with the trial court that Sullivan has not established that he was prejudiced. Although the jury heard that there was a previous charge against Sullivan, it did not learn of the nature of that charge or that there was any conviction resulting from that charge. Further, we agree with the trial court that the jury's note shows that the jury recognized that the incident was irrelevant to this case. Since there was no prejudice, then Sullivan did not receive ineffective assistance of counsel on this basis.

¶11 Sullivan next asserts that his counsel was ineffective because he did not seek an adjournment to obtain the testimony of Steven Penrod, an expert on eyewitness identifications. Defense counsel had asked that Penrod be allowed to

testify by telephone. The State objected to this request and the court denied it because the jury would not be able to properly assess his credibility.

¶12 Sullivan argues that defense counsel should have sought an adjournment to obtain this testimony. At the postconviction motion hearing, trial counsel testified that he had considered seeking an adjournment at trial but decided against it. Counsel said he was uncertain whether the testimony would be admitted, and he was concerned that the State might ask Penrod questions which would help the prosecution's case.

¶13 The trial court concluded that trial counsel's decision was a reasonable trial strategy. We agree with this conclusion. Counsel was concerned that the testimony might have helped the State's case. Further, he was not certain that the testimony would have been admitted. Whether to allow expert testimony on factors affecting the reliability of eyewitnesses identification is a discretionary decision with the trial court. ***State v. Hamm***, 146 Wis. 2d 130, 142, 430 N.W.2d 584 (Ct. App. 1988). The relevancy of such testimony depends on whether it would assist the jury in considering the issues. ***Id.*** Much of Penrod's testimony, as demonstrated by the offer of proof at the postconviction hearing, spoke to common knowledge regarding eyewitness identification. When the mistaken identity "is claimed to have resulted from facts which similarly affect all persons' ability to accurately perceive, rather than a certain defect or disability from which a particular witness is claimed to suffer, the need for expert testimony would seem to diminish significantly." ***Id.*** at 148 (quoting ***Hampton v. State***, 92 Wis. 2d 450, 461, 285 N.W.2d 868 (1979)). Given the testimony as described in the offer of proof, it was reasonable for counsel to conclude that the testimony may not have been helpful and may have been excluded. This was a strategic decision rationally

based on the facts and law and does not support a claim of ineffective assistance of counsel. *See* ***Elm***, 201 Wis. 2d at 464-65.

¶14 Sullivan next argues that his trial counsel was ineffective when he did not move for reconsideration of the pretrial motion to suppress the victim's identifications of Sullivan. Sullivan contends that the police officer who conducted a show-up identification at the police station told the victim she would be viewing a two-person show-up, that one of them was a police officer, and he may have said one of them was the suspect.

¶15 However, the trial court found in ruling on Sullivan's motion for postconviction relief that the officer's testimony was not that certain. He agreed that he had told her she would be viewing two individuals at the police station, but when asked directly whether the victim was told that this would be a two-person line-up, he answered no. He also testified that he did not tell her that one of them was a suspect, but then later said it was possible that he had said that. The victim also testified that she did not recall the officer telling her that one of them was a suspect. The trial court concluded that even had Sullivan's counsel moved for reconsideration on this issue, the court would have denied the motion.

¶16 We see nothing in this case to suggest that the identifications were so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." ***State v. Benton***, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923 (citation omitted). To determine whether an identification was reliable, the court should consider: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime

and the confrontation. ***State v. Wolverton***, 193 Wis. 2d 234, 264-65, 533 N.W.2d 167 (1995).

¶17 Here, the victim saw her assailant on two different occasions; she was very close to him during the incidents and paid close attention to his appearance; her descriptions generally matched Sullivan's appearance; she demonstrated certainty in her identification and expressed that she exercised caution in making the identification because she did not want to accuse the wrong person; and the time between the criminal events and her identification was short. Since we conclude that the identification was not impermissibly suggestive, counsel was not ineffective when he did not move to revisit the suppression issue.

¶18 The final basis for Sullivan's claim that he received ineffective assistance of trial counsel is that his counsel did not object to improper statements made by the prosecutor during closing argument. Specifically, Sullivan asserts that the prosecutor improperly referred to the "sex pamphlet" the officers found in his residence. The prosecutor stated:

> If a person, whether it's Mr. Sullivan or somebody else, has to look at a pamphlet and think about being able to encounter a woman under those circumstances, you know, taking my pants off or grabbing her, here is the ideas in this pamphlet about meeting women in that way. The officer didn't read the pamphlet but he looks at the back. [The officer] looks at the back of it, and here's a little blush about it, having great sex in open places like parking lots.

Sullivan argues that this misstated the evidence because the officers did not read the pamphlet. But the prosecutor corrected himself and specifically said that the officer did not read the pamphlet. Closing argument is the lawyer's opportunity to tell the jury how the lawyer views the evidence. ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). "A prosecutor may comment on the

evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors." ***Id.*** In this case, the prosecutor properly referred to the pamphlet, corrected himself when he suggested the officer had read the inside, and then detailed the evidence. We see nothing improper in this statement. Since the prosecutor's comments were not improper, trial counsel was not ineffective for failing to object to these comments.

¶19 Because we conclude that Sullivan has not demonstrated that he received ineffective assistance of trial counsel, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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