COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1485-CR **Cir. Ct. No. 2008CF2639**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE A. REAS-MENDEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON and KEVIN E. MARTENS,[1] Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

[1] The Honorable Patricia D. McMahon entered the judgment of conviction. Because of judicial rotation, the Honorable Kevin E. Martens presided over the postconviction proceedings and entered the order denying the motion for postconviction relief.

¶1 KESSLER, J. Jose Reas-Mendez was found guilty by a jury of three felonies: burglary while armed, contrary to WIS. STAT. § 943.10(2)(a) (2007-08),[2] second-degree sexual assault with the use of force, contrary to WIS. STAT. § 940.225(2)(a) (2007-08); and armed robbery with the threat of force, contrary to WIS. STAT. § 943.32(1)(b) & (2) (2007-08). Reas-Mendez appeals his judgment of conviction and denial of his postconviction motion based on his claim that his trial counsel was ineffective for failing to obtain suppression of a lineup identification and of the victim's subsequent identification at trial. Reas-Mendez contends that the pretrial lineup in which the victim identified him as her assailant was impermissibly suggestive, thereby violating his due process rights.[3] We conclude that the lineup was not impermissibly suggestive and that trial counsel therefore was not ineffective because Reas-Mendez's motion to suppress the lineup identification would have been denied. We affirm.

BACKGROUND

¶2 This case arose from facts that may be fairly considered a woman's worst nightmare. After spending the evening of May 19, 2008, with her sister, Cherrelle C. returned to her apartment at 9836 West Brown Deer Road, Milwaukee, where she lived alone. She arrived home at around 10:00 p.m., turned on the television in her bedroom and, as was her custom, fell asleep with the television on. According to Cherrelle C.'s trial testimony, "some type of noise"

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

[3] Reas-Mendez filed a supplemental postconviction motion, asserting additional claims that his trial counsel was ineffective for other reasons. Reas-Mendez has elected, however, to pursue only his claim regarding trial counsel's failure to seek suppression of the victim's identifications, therefore abandoning these additional claims. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344, 516 N.W.2d 463 (Ct. App. 1994) ("On appeal, issues raised but not briefed or argued are deemed abandoned.").

woke her up later in the middle of the night. The television was still on when she woke up. She lay still and looked around. She heard "movement noise" on the floor in her room, looked at the floor, and saw a person on his hands and knees at the edge of her bed crawling towards her. Cherrelle C. sat up, prompting her intruder to rise and move to the side of her bed, close to her. Cherrelle C. started screaming.

¶3 Cherrelle C. testified at Reas-Mendez's trial that the intruder was tall, muscular, had a medium build, was wearing a dark jacket and pants, and had a white T-shirt tied behind his head covering his nose and mouth. She could see his eyes, forehead and hair. She also testified that the intruder had a knife in his right hand that was "long" and "really big." She further testified that when she was screaming the intruder told her to "shut up" and to "[g]ive [him] all [her] money." She stated that she stopped screaming, told him where her purse was, and watched as he grabbed it and took her money.

¶4 Cherrelle C. testified that her communication with the intruder was in a mixture of English and Spanish and that the intruder spoke English with a "Spanish dialect." She told the jury that she was still sitting up in her bed when the intruder learned there was no one else in her apartment, at which point he put the knife down and began to climb on top of her. She stated that the intruder attempted to pull down her pajama pants but that she dissuaded him by telling him she was "sick down there" in Spanish. He then moved to rub her breasts and tried to remove her shirt. Although the intruder's face was still covered below his eyes by his T-shirt during this time, Cherrelle C. stated that the two were "face to face" and that her eyes were open as he was on top of her. She also stated that she told the intruder that he should leave because someone may have heard her scream. He agreed, got up, retrieved his knife and asked, in English, "are you going to tell

anyone? Are you going to call the police[?]" The intruder left after she responded that she wouldn't.

¶5 Cherrelle C. testified that she waited for some time before going into the rest of her apartment. She checked her front door and found the deadbolt was locked in place from the inside. Because she had no land line phone, and because the cell phone that had been by her bed went missing after the intruder left, she ran to her sister's home. From there, police were called and the events were reported in the early morning hours.

¶6 Later that morning, on May 20, 2008, unrelated to the sexual assault, the manager of the apartment complex at 9720 West Brown Deer Road flagged down City of Milwaukee police officer Richard Gordy to report a complaint that someone may be in the attic of the building. The building was about 125 yards from the building in which Cherrelle C. lived, across a courtyard. Officer Gordy testified that he investigated the complaint and found Reas-Mendez lying in the attic and subsequently arrested him. About five feet from that building, the officer also found a stainless steel kitchen knife with a black handle, along with a man's blue jacket on the ground.

¶7 Also on May 20, 2008, Cherrelle C. was shown a photo array of full face pictures, including a picture of Reas-Mendez. Cherrelle C. did not identify Reas-Mendez from the photos, and stated that she wanted to see a live lineup. A live lineup was arranged on May 22, 2008. The record indicates that the lineup was composed of four men, all of whom were dressed alike, recruited from the jail, in the same age range, dark skinned, long-haired, and with bandanas covering their faces from the nose down. Each was displayed individually. Each participant was also told to say: "Are you going to tell anyone? Are you going to

call the police?" in English. Because Cherrelle C. had only seen the intruder's partial face, she was not shown the full face of any of the lineup participants. Reas-Mendez was the third man to be displayed in the lineup. After seeing him and hearing him speak, Cherrelle C. promptly and positively identified Reas-Mendez as her assailant without waiting to see or hear the fourth participant.

¶8 Cherrelle C. also testified that on the same day she noticed grass and rocks on the floor in her bedroom and the living room. She also discovered the curtain in front of her living room window was displaced. Police investigated the window, dusted for fingerprints on the outside of the window, and obtained three partial prints. A police fingerprint examiner explained to the jury that one partial print was inadequate for comparison. However, he testified that he compared two of those prints to fingerprints obtained from Reas-Mendez when he was arrested. The examiner told the jury that, in his opinion, "there is no way those fingerprints could have been placed there by any other person" than Reas-Mendez. Reas-Mendez was charged with burglary while armed, second-degree sexual assault with the use of force and armed robbery with the threat of force.

¶9 At trial, Cherrelle C. again identified Reas-Mendez as her assailant. She explained the basis for her identification and the reasons for her certainty at the lineup:

> [Cherrelle C.]: In my bedroom, I was looking at his eyes the whole time because that is the only thing I could see.
>
> And when they had the lineup and they put the bandana on, I could—I looked at their eyes, and I could see that those eyes were so familiar. Because I was so scared, I could remember, I could remember them so well.
>
> ….
>
> [Prosecutor]: Did the voice you heard from person number three, did that play any role in your identification?

> [Cherrelle C.]: Everybody that I heard, as soon as I heard his voice and say the same thing that he said to me, I knew that was him. I knew that was his voice.
>
> ….
>
> [Prosecutor]: … Any chance you think you've made a mistake [in identifying Reas-Mendez]?
>
> ….
>
> [Cherrelle C.]: I know I am positive…. [W]hen he was there and all I could see was his eyes and his face, that is the only thing I really focused on; and when I seen him in the lineup, I knew that was him. I knew that was him there. No doubt it was him.

¶10 Cherrelle C. also described her attacker as having black hair and identified the jacket found by police as "exactly like the same" as the one worn by her assailant and the knife as the same length of the blade held by her assailant. Cherrelle C. was clear in her testimony that her identification of Reas-Mendez at the lineup "had nothing to do with" the photos she had been shown the day before, adding "I didn't even think about the photos when I looked at the faces personally."

¶11 Reas-Mendez was found guilty by the jury on all three charges. On December 21, 2009, Reas-Mendez filed a motion for postconviction relief, alleging that his trial counsel was ineffective for failing to seek suppression of Cherrelle C.'s lineup and in-court identifications of him. Reas-Mendez argued that Cherrelle C. identified Reas-Mendez in a pretrial lineup that was impermissibly suggestive, in part because Reas-Mendez was the only lineup participant that "spoke with a heavy Spanish accent." This faulty identification, Reas-Mendez argued, subsequently led to Cherrelle C.'s in-court identification of him as her assailant. The trial court denied the motion. This appeal follows.

DISCUSSION

¶12 Reas-Mendez argues on appeal that his trial counsel was ineffective for failing to bring a motion to suppress Cherrelle C.'s identification of him at the lineup, which in turn led to her in-court identification.[4] Reas-Mendez relies exclusively on his Spanish accent as the determining factor concerning the claim that the lineup was impermissibly suggestive, and submitted an affidavit from one of the lineup participants, who does not speak Spanish, stating that Reas-Mendez was the only participant who spoke with "a heavy Spanish accent." We discuss the lineup independently of the ineffective assistance claim.

I. The lineup identification.

¶13 "'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.'" ***State v. Benton***, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923 (citation and one set of quotation marks omitted). Whether the facts surrounding a pretrial lineup taint a subsequent identification is a legal issue that we review *de novo*. ***Id.*** (application of facts to constitutional principles is subject to *de novo* review).

[4] Reas-Mendez states that the lineup was also unnecessarily suggestive because he was the only participant whose photograph was used in an earlier photo array from which Cherrelle C. could not identify him. Beyond that single statement, however, Reas-Mendez does not develop the argument further. We decline to abandon our neutrality and develop a party's argument for him and thus we decline to consider this argument further. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

¶14 The test for fairness in a lineup depends upon the totality of the circumstances surrounding the lineup, as explained by our supreme court in ***Wright v. State***, 46 Wis. 2d 75, 175 N.W.2d 646 (1970):

> [A] claimed violation of due process of law in the conduct of a confrontation depends on the totality of circumstances surrounding it … The 'totality of circumstances' reference is a reminder that there can be an infinite variety of differing situations involved in the conduct of a particular lineup. The police authorities are required to make every effort reasonable under the circumstances to conduct a fair and balanced presentation of alternative possibilities for identification. The police are not required to conduct a search for identical twins in age, height, weight or facial features.

Id. at 86 (citation, footnote and one set of quotation marks omitted; ellipses in ***Wright***).

¶15 Our supreme court, in ***Powell v. State***, 86 Wis. 2d 51, 271 N.W.2d 610 (1978), noted that "'[i]t is the likelihood of misidentification which violates a defendant's right to due process.'" ***Id.*** at 64 (quoting ***Neil v. Biggers***, 409 U.S. 188, 199 (1972)). ***Powell*** explained a two-part procedure for determining the admissibility of pretrial identification evidence. ***Id.*** at 65. The court must first decide whether the defendant has shown that the identification procedure was impermissibly suggestive. ***Id.*** If the defendant fails to satisfy the burden of showing that the lineup was impermissibly suggestive, the inquiry ends. ***State v. Mosley***, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981).

¶16 The "overriding question" in determining whether a defendant's rights were violated as a result of an impermissibly suggestive lineup is "'whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive.'" ***Powell***, 86 Wis. 2d at 64-65 (citation omitted). The ***Powell*** court looked to the specific guidelines provided by

Biggers to determine whether the totality of the circumstances made an identification reliable even if a pretrial procedure was suggestive:

> "[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

Powell, 86 Wis. 2d at 65 (citing ***Biggers***, 409 U.S. at 199-200).

¶17 We evaluate the lineup using the factors the court described in ***Powell***. Cherrelle C. had a significant opportunity to observe Reas-Mendez up close and in a very personal way during the crime. She described her assailant as tall, muscular, with a medium build, as wearing a dark jacket and pants and as having a white T-shirt tied behind his head covering his nose and mouth. She could see his eyes, forehead and hair at very close range (he was on top of her) with the light from her television set. She also testified that she was "looking at his eyes the whole time because that is the only thing I could see" and stated that Reas-Mendez's eyes were "so familiar" and she could "remember them so well." Cherrelle C.'s physical description of her assailant is consistent with how Reas-Mendez appears in the lineup photo. She also described the clothing worn by her assailant and the knife carried by him. These items were later found on the ground near the building where Cherrelle C. lived and where Reas-Mendez was arrested. The items were also identified by Cherrelle C. at trial. Further, the lineup identification was within a relatively short time after the assault, when details were likely to still be reasonably fresh in Cherrelle C.'s mind. Cherrelle C. was assaulted and robbed in the early morning hours of May 20, 2008. The lineup occurred at 4:00 p.m. on May 22, 2008. She testified at trial that when she made

the lineup identification, she "was really certain. I knew it was him … No doubt it was him."

¶18 There was nothing inherent in the lineup process in this case that causes us to fear "'a very substantial likelihood of irreparable misidentification.'" *See* ***id.*** at 64 (citation omitted). The police made reasonable and effective efforts "to conduct a fair and balanced presentation of alternative possibilities for identification." *See* ***Wright***, 46 Wis. 2d at 86. The lineup photographic records show four men, all of generally the same build, in the same type of clothing, with dark, shoulder-length hair, approximately of the same age, and wearing bandanas covering their faces from the tops of their noses down.

¶19 Reas-Mendez relies on the affidavit of lineup participant number four to argue that he was the only lineup participant with "a heavy Spanish accent." Although Cherrelle C. testified that her assailant spoke with a Spanish "dialect," she also testified that her identification of Reas-Mendez was based in large part on his eyes and voice. Her testimony was apparently believed by the jury.

¶20 We conclude that Reas-Mendez has failed to show that the lineup identification was the result of any suggestive techniques or that such identification, in the totality of the circumstances here, was infected with the "likelihood of misidentification" which would deprive Reas-Mendez of due process. *See* ***Powell***, 86 Wis. 2d at 64 (citation and one set of quotation marks omitted). Because we conclude that the pretrial identification was proper, we need not consider what impact it had on the trial identification. *See* ***Mosley***, 102 Wis. 2d at 652.

II. Ineffective Assistance of Counsel.

¶21 Reas-Mendez contends that his trial counsel was ineffective for failing to bring a motion to suppress Cherrelle C.'s lineup identification, which led to her subsequent in-court identification. To succeed on a claim for ineffective assistance of counsel, a defendant has the burden of showing both that: (1) his counsel's representation was deficient, and (2) this deficiency prejudiced him so that there is a "probability sufficient to undermine the confidence in the outcome" of the case. ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). "Because the defendant must show both deficient performance and prejudice, reviewing courts need not consider one prong if the defendant has failed to establish the other." ***State v. Chu***, 2002 WI App 98, ¶47, 253 Wis. 2d 666, 643 N.W.2d 878.

¶22 Counsel is not ineffective for failing to bring a motion that would not have been granted. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Because the lineup here was not impermissibly suggestive, counsel was not ineffective for failing to move to suppress the lineup identification of Reas-Mendez. *See* ***State v. Ledger***, 175 Wis. 2d 116, 130-31, 499 N.W.2d 198 (Ct. App. 1993) (lineup procedure was not impermissibly suggestive where victim identified armed robbery defendant based on "slurred" speech and defendant claimed he was the only lineup participant with missing front teeth, in part because victim was able to identify the defendant based on other physical characteristics).

¶23 For all of the reasons explained above, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.