COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2012AP1854-CR
2012AP1861-CR
2012AP1862-CR

Cir. Ct. Nos. 2009CF5664
2010CF560
2009CF4410

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYNARD RASHAWN JACKSON,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Raynard Rashawn Jackson appeals judgments, following a jury trial, convicting him of first-degree recklessly endangering safety,

possession of a firearm by a felon, and two counts of witness intimidation. He also appeals from the order denying his motion for postconviction relief. We affirm.

BACKGROUND

¶2 This is a consolidated appeal arising from a shooting which took place on September 23, 2009. According to the facts in the record, on the evening of September 23, 2009, Jackson went to the third floor of an apartment building located at 3212 West Wisconsin Avenue, Milwaukee, where his then-girlfriend, Donna Petty, resided. Larry Carter lived in the neighboring apartment. When Jackson arrived at Petty's apartment, Rickey Brown was visiting Carter's apartment. Jackson approached Carter's apartment door looking for a man named "Slick." Brown told Jackson that "Slick" might be downstairs and said that he would go downstairs to check. Brown began to run down the stairs when Jackson pulled out a gun and chased after Brown. According to the criminal complaint, Jackson fired multiple shots in Brown's direction as he chased Brown. Jackson was subsequently arrested and charged with first-degree reckless endangerment of safety by use of a dangerous weapon and possession of a firearm by a felon.

¶3 While in custody, Jackson placed phone calls to Carter and Petty, in which he encouraged them not to testify against him. Jackson was then charged with two counts of intimidating a witness.[1]

¶4 Multiple witnesses testified at Jackson's trial, including Brown, Carter, Petty, and Petty's friend, Shantell Jeffery. None of the witnesses testified

[1] Jackson does not challenge the facts concerning the intimidation of a witness charges on appeal.

to actually seeing Jackson fire a weapon, but all of the witnesses testified that they either heard gunshots shortly after Jackson's arrival, saw Jackson chase Brown, or saw Jackson with a gun at some point prior to the shooting. The jury found Jackson guilty as charged.

¶5 Jackson filed a postconviction motion for relief based on: (1) allegations that the State violated its discovery obligations; (2) ineffective assistance of counsel; and (3) an improper photo array shown to Brown, Carter and Jeffery. Jackson also argued that there was insufficient evidence to support his convictions.[2] The trial court denied the motion. This appeal follows. Additional facts are discussed below as relevant.

DISCUSSION

¶6 On appeal, all but one of Jackson's claims of error depend upon a photo array. Jackson argues: (1) that he was denied due process when the State failed to disclose prior to trial that the photo array it provided to Jackson in pretrial discovery was not the photo array used to identify Jackson, in violation of state discovery statutes; (2) that trial counsel was ineffective for failing to move for a mistrial or for the exclusion of evidence when it became apparent that the photo array provided to the defense was not the photo array used by police; (3) prosecutorial misconduct stemming from the State's failure to preserve the actual order of the photo array; (4) unduly suggestive pretrial identification procedures; and (5) that there was insufficient evidence to convict him of reckless

[2] On appeal Jackson only challenges the sufficiency of the evidence concerning his convictions of reckless endangerment and possession of a weapon by a felon.

endangerment and possession of a firearm by a felon. We disagree and address each argument in turn.

A. The State complied with discovery statutes and did not violate Jackson's due process rights regarding the photo array.

¶7 Jackson argues that the State violated WIS. STAT. § 971.23 (2009-10)[3] when it failed to disclose, prior to trial, that the photo array used by police to identify Jackson was not the photo array that the State provided to Jackson during discovery.

¶8 We analyze alleged discovery violations in three steps, each of which presents a question of law that we review *de novo*. *See* ***State v. Rice***, 2008 WI App 10, ¶14, 307 Wis. 2d 335, 743 N.W.2d 517 (Ct. App. 2007). The first step is to establish whether the State failed to make a required disclosure. ***Id.*** The second step is to determine whether the State had "good cause" for the failure. ***Id.*** "Finally, if the evidence should have been excluded under the first two steps, we decide whether admission of the evidence was harmless." ***Id.*** Meanwhile, a trial court's decision to admit or exclude evidence is discretionary and will not be upset if it has a reasonable basis and was made in accordance with accepted legal standards and the facts of the case. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992).

¶9 WISCONSIN STAT. § 971.23 provides, as material here:

> **(1)** WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or

[3] All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

> his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
>
> ….
>
> (bm) Evidence obtained in the manner described under s. 968.31(2)(b), if the district attorney intends to use the evidence at trial.
>
> ….
>
> (e) Any relevant written or recorded statements of a witness named on a list … and the results of any … comparison that the district attorney intends to offer in evidence at trial.
>
> ….
>
> (g) Any physical evidence that the district attorney intends to offer in evidence at the trial.

¶10 In light of the facts in the record, we are satisfied that the State did not violate its discovery obligations. Detective James Campbell testified at trial about the method by which the witnesses were shown photo arrays with Jackson's picture. Campbell told the jury that 100 photographs of people with characteristics similar to Jackson were chosen by a police department computer program. Five of those photographs, in addition to Jackson's, were shown to the witnesses using a "folder" method. The department also created a lineup reference sheet, which is a black and white photo copy of the actual photographs shown to the witnesses, but not necessarily in the order in which any particular witness viewed them. Campbell explained the method as follows:

> [T]he six photos are taken, a known filler is placed in [folder] one; meaning, that the target of the investigation, in this case, Mr. Jackson, cannot be in folder number one. Folders two through six have photos inside of them and are shuffled at random so that the target, Mr. Jackson, would appear randomly through folders two through six. Folders seven and eight contain blank sheets of paper, which are shown after the photos.

¶11 Brown was the first witness to identify Jackson from the photo array. Campbell testified that he initially shuffled the folders and handed them to Brown one at a time, not knowing which folder contained Jackson's photo. Brown identified Jackson as the shooter after selecting the photograph in the fourth folder—the folder with Jackson's picture. Campbell testified that he did not reshuffle the folders prior to showing the photo array to Jeffery and Carter. Both Jeffery and Carter identified the photograph of Jackson in the fourth folder.

¶12 Although the State did not provide the actual photo array used by Campbell, the State provided Jackson's defense counsel with the lineup reference sheet and a police report explaining the folder method. The lineup reference sheet displayed the same photographs shown to the witnesses, but not in the same order as the photo array. Rather, Jackson's photograph was second on the lineup reference sheet. Therefore, even though Jackson did not have the actual photo array with his photo in the fourth folder, he had copies of the actual photographs used in the photo array. Jackson also had documentation indicating that his picture was in the fourth folder shown to the witnesses. Where the discovery materials disclosed the photos used in the array and indicated the order in which Jackson's photograph was shown to the witness, we conclude that the State did not violate its discovery obligations by not providing the actual photo array prior to trial.

¶13 However, even if we were to find a discovery violation, the error was harmless. The test of harmless error is whether we can conclude that there is sufficient evidence, not influenced by inadmissible evidence, which would convict the defendant beyond a reasonable doubt. *See* ***Wold v. State***, 57 Wis. 2d 344, 356, 204 N.W.2d 482 (1973). The State did not rely on the photo array to identify

Jackson. Jackson's identity was not at issue—four of the witnesses knew Jackson prior to the date of the incident. Brown testified that he saw Jackson visiting Petty in the weeks prior to the shooting; Carter testified that he saw Jackson at Petty's apartment at one point before the shooting; and Jeffery testified that she met Jackson two weeks prior to the shooting, at the same time as Petty. Therefore, regardless of the order of the photographs on the lineup reference sheet and in the photo array, the witnesses would still have identified Jackson and the jury would still have a basis to conclude beyond a reasonable doubt that Jackson was the perpetrator in the crimes charged.

B. Trial counsel did not render ineffective assistance regarding the photo array.

¶14 Jackson also argues that his trial counsel was ineffective for failing to move for a mistrial or for the exclusion of evidence when it became apparent that the photo array provided to the defense was not the array used by police.

¶15 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). *See also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). A defendant claiming ineffective assistance of counsel must prove both that his or her lawyer's representation was deficient, and, as a result, the defendant suffered prejudice. ***Strickland***, 466 U.S. at 687. To prove deficient performance, the defendant must show specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on

either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697. We "strongly presume[]" counsel has rendered adequate assistance. *See* ***id.*** at 690.

¶16 In its decision on Jackson's postconviction motion, the trial court stated that even if Jackson's counsel had moved for a mistrial or for the exclusion of evidence, "there is not a reasonable probability in the slightest that the court would have granted either request." Because the trial court would not have granted either motion, trial counsel's decision not to make either request was not prejudicial within the meaning of ***Strickland.*** Moreover, a jury could still convict Jackson beyond a reasonable doubt because, as we have explained, the photographs were not material to the defense. Counsel cannot be found ineffective for failing to raise meritless motions. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

C. Prosecutorial misconduct regarding the photo array.

¶17 Jackson contends that the "State's construction of an inaccurate and irrelevant photo array and its inclusion in the discovery material provided to the defendant constituted prosecutorial misconduct." In essence, Jackson contends that the prosecutor manufactured evidence in an attempt to mislead him. The record does not support this contention. Jackson did not specifically allege prosecutorial misconduct in his postconviction motion. Accordingly, the trial court did not specifically address the issue in its decision. We are therefore not convinced that Jackson preserved the issue for appeal and decline to address the

issue further.[4] *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727 (Appellants cannot raise issues for the first time in the court of appeals because the trial court must be given an opportunity to review the issue.).

D. The photo array procedure was not unduly suggestive.

¶20 Jackson argues that the identification procedure by which Carter and Jeffery identified him was unduly suggestive. Specifically, Jackson argues that Campbell violated the Department of Justice's "Best Practice Method," which requires shuffling the folders containing suspect photographs before each witness views them.

¶21 Campbell testified that he shuffled the folders prior to Brown's viewing, but did not reshuffle them prior to showing the folders to Carter and Jeffery. Campbell stated that he did not reshuffle the folders so that he could more easily keep track of the responses. This, Jackson contends, was unduly suggestive because "the witnesses may have perceived such things as unintentional voice inflection or prolonged eye contact, in addition to off-handed words or phrases, as messages regarding [Carter's and Jeffery's] selection."

¶22 The State points out, and Jackson does not refute, that no objection was made during trial relating to the failure to shuffle the photographic array. Accordingly, Jackson has not preserved the issue for appellate review. *See* ***State v. Romero***, 147 Wis. 2d 264, 274, 432 N.W.2d 899 (1988) (In order to preserve an issue for appeal a party must object to the error at trial.); ***State v. Alexander***, 2005

[4] To the extent prosecutorial misconduct is implied in Jackson's postconviction motion, we conclude that no misconduct occurred. Our decision is clear that Jackson was not prejudiced by the photo array and no evidence in the record supports Jackson's contention that the State attempted to intentionally mislead him.

WI App 231, ¶15, 287 Wis. 2d 645, 706 N.W.2d 191 ("Arguments not refuted are deemed admitted."). Moreover, Jackson's arguments that Carter and Jeffery *may* have taken cues from Campbell when identifying Jackson are purely speculative. We decline to consider this further.

E. There was sufficient evidence to support the convictions.

¶23 Lastly, Jackson argues that there was insufficient evidence to convict him of being a felon in possession of a firearm and of recklessly endangering safety because none of the testifying witnesses saw Jackson fire a gun.

¶24 When we review a conviction for sufficiency of the evidence, we will not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We may not substitute our judgment for that of the fact-finder. *See* ***id.*** at 506-07. The jury determines the credibility of all witnesses and the weight to be accorded their testimony. *See* ***Bautista v. State***, 53 Wis. 2d 218, 223, 191 N.W.2d 725 (1971). Therefore, "[i]f any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we may not overturn the verdict even if we believe the fact-finder should not have found guilt. ***Poellinger***, 153 Wis. 2d at 507.

¶25 Jackson contends that none of the State's key witnesses—Brown, Petty, or Jeffery—saw Jackson *fire* a weapon. Jackson also argues that because neither a gun nor casings were found in his possession, the jury did not convict him based on adequate evidence. Jackson is incorrect.

¶26 Brown saw Jackson with a gun. He testified that Jackson pointed a handgun at him (Brown) and then chased Brown down a stairwell. Brown testified that he did not look behind him as he was running, but heard multiple shots fired from behind him as he was being chased by Jackson. The jury submitted a question, asking Brown "[i]f you are running away, how can you be sure it was the defendant shooting at you?" Brown responded:

> Because while I'm running, I'm trying to look like to see where I'm at where I need to be to get away. I can see. Especially when he stepped at the last shot he made … you know, I'm looking back at him then anyway because he hollering and yelling.
>
> He coming at me like that with the pistol. I just reached and grabbed the door at that time. As soon as I grabbed the door and pulled it over to the side like that, the bullet went right by the side to the door. Yes. I knew he was shooting at me[.]

¶27 Petty told the jury that when Jackson arrived at her apartment, just before the shooting, she saw that Jackson "had his shirt over a gun." Jeffery testified that she was at Petty's apartment when the shooting occurred. She told the jury that Jackson came to Petty's apartment the night of September 23, 2009, and that she remembers "just hear[ing] gunshots" after Jackson's arrival. Carter told the jury that Brown was at his apartment when he heard Jackson at Petty's neighboring apartment. Carter testified that shortly after Jackson arrived at Petty's apartment, Jackson called out to Carter, whose apartment door was open. Jackson asked Carter if he knew "Slick," at which point Brown came out of Carter's apartment and "headed downstairs." Carter told the jury that Jackson "chased after" Brown and that he (Carter) "just heard gunfire" after Brown and Jackson were out of his line of sight.

¶28 The jury could reasonably infer from the testimony of these witnesses that Jackson possessed a gun and fired shots at Brown. There was sufficient evidence to support Jackson's convictions of felon in possession and reckless endangerment.

CONCLUSION

¶29 For the foregoing reasons, we affirm the circuit court.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.