COURT OF APPEALS
DECISION
DATED AND RELEASED

August 19, 1997

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.

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No. 96-2342-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LAMORRIS P. BRITTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. LaMorris P. Britton appeals from a judgment of conviction after a jury found him guilty of armed robbery. He also appeals from an order denying his motion for postconviction relief. He raises numerous issues; we affirm.

I. BACKGROUND

At approximately 8:00 a.m. on November 1, 1994, Ronald Schumacher went to collect rent payments at a triplex he owned on the north side of Milwaukee. Constance Harris, a tenant of the downstairs flat, had telephoned Schumacher that morning and asked him to come pick up her rent money. After collecting the rent for Harris's flat, Schumacher went to the separate entrance for the upstairs flat and ascended the stairs to collect rent from the second floor tenants. When no one answered his knock at the door of the upper flat, he turned to go back downstairs and was confronted by a man pointing a gun at him. When the man demanded money from him, Schumacher, in an effort to escape the gunman, "jumped" him. The two men struggled, a shot was fired, and Schumacher was forced to surrender his wallet, which contained approximately $1,000. Schumacher's assailant fled with the wallet.

On arrival at the scene of the crime, City of Milwaukee Police found Schumacher with a severe abrasion on his head. They also found a 9mm bullet casing at the bottom of the stairs where Schumacher said he had struggled with his assailant as well as a bullet hole in the north wall of the stairwell. During their initial interview of tenants Constance and Alexander Harris, Milwaukee Police Detectives were told by the Harrises that they resided in the downstairs flat with their children, Constance's cousin Sandra Jones, and Jones's children. One week later, however, the Harrises admitted that, in the days just prior to the robbery, Jones's husband, LaMorris Britton, had stayed at their apartment. The Harrises also told the police that in the months prior to the crime, they had seen Britton in possession of a 9mm gun. Shortly thereafter, Schumacher identified Britton in a photo array as his assailant.

On February 8, 1995, Britton was arrested in Minneapolis. Following his extradition, Britton was placed in a five-man lineup at the Milwaukee police station. Viewing the lineup, Schumacher again identified Britton as the person who robbed him.

At trial, the evidence established that Britton's wife and children were residing at the Harrises' residence. Evidence also established that Britton stayed at the residence whenever he wanted to, and Constance Harris testified that Britton had been at the residence shortly before 8:00 a.m. on the day of the robbery. In his defense, Britton testified that he left the Harrises' apartment at 3:00 p.m. on October 31, went to Chicago, and did not return to Milwaukee until November 2 or 3. He further testified that he had never met Schumacher until the proceedings in this case, and that he did not own a firearm and never possessed a gun while living with the Harrises.

II. ANALYSIS

A. Evidentiary Rulings

1. Possession of Handgun

Britton first argues that the trial court erred in allowing Alexander and Constance Harris to testify that they had seen him with a gun on several occasions before the robbery. He contends that the evidence was impermissible evidence of bad character falling within none of the exceptions of RULE 904.04(2), STATS. We disagree.

The admission of evidence rests within the sound discretion of the trial court. ***State v. Plymesser***, 172 Wis.2d 583, 591, 493 N.W.2d 367, 371 (1991). On appeal, we will not reverse a trial court's discretionary decision absent

an erroneous exercise of discretion. ***State v. Evans***, 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). If there is a reasonable basis for the trial court's decision, it will be upheld. *See* ***Plymesser***, 172 Wis.2d 583, 591, 493, N.W.2d 367, 371 (1992). Where the trial court fails to explain the reasons for its decision, we will independently review the record to determine whether it provides a reasonable basis for the trial court's discretionary ruling. *See* ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993).

The prosecution proffered evidence of Britton's prior gun possession to suggest that within weeks of the charged robbery, Britton possessed a gun similar to that possessed by the robber. At the motion in limine, defense counsel objected, claiming that this evidence would be unfairly prejudicial. The trial court denied defense counsel's motion, concluding that: (1) the evidence of Britton's prior gun possession was relevant to the issue of identity; and (2) its probative value was not substantially outweighed by its prejudicial effect. We agree.

Evidence that on multiple occasions in the weeks before the charged robbery, Alexander Harris had seen Britton in possession of a handgun of the same color and caliber as the gun used by the robber is not "character evidence" within the meaning of RULE 904.04(1), STATS. The mere possession of a gun is not a "bad act" within the meaning of RULE 904.04(2). *See* ***State v. Wedgeworth***, 100 Wis.2d 514, 529-30, 302 N.W.2d 810, 818-19 (1981). Thus, testimony that Britton possessed a gun, without more, did not necessarily relate to a character trait, good, bad or otherwise. *See* ***id.***

The gun possession evidence was relevant and probative on identity and opportunity. It was relevant that someone who had been in the immediate vicinity of the robbery just before it occurred, and who had reason to know that the

robbery victim had just collected rent money, was also someone who recently had been seen with a gun similar to that used by the robber. Accordingly, we conclude that the trial court properly exercised discretion in admitting the testimony.[1]

2. Fear of Britton

Britton next argues that the trial court erred in admitting testimony that Alexander and Constance Harris feared him. Two City of Milwaukee Police Detectives testified that the Harrises told them that they feared Britton because of an incident in which he allegedly fired a gunshot into the air and threatened to kill Alexander. Once again, Britton contends that this evidence was of a prior bad act falling within none of the exceptions of RULE 904.04(2), STATS. We disagree.

In his opening statement, the prosecutor suggested that Constance Harris was apt to be a hostile witness and could not be expected to tell the truth about everything. He also told the jury that the Harrises had "described for [police] that they suspected that [Britton] did this" robbery and "why." Defense counsel also referred to the Harrises in his opening and warned that "their statements in court will be inconsistent with what they first gave to the police officers."

On direct examination by the State, Constance Harris admitted that when she was initially questioned by police, she did not mention that Britton had been staying at her apartment. When asked why she failed to include Britton's

[1] Britton also claims that the trial court erred in admitting Alexander Harris's testimony regarding the gun because the State failed to establish a foundation sufficient to show that Harris could identify a 9mm handgun. At trial, however, Britton failed to make a lack-of-foundation objection to Alexander Harris's testimony. Thus, he waived review of this claim. *See* RULE 901.03(1)(a), STATS.; *see also* ***State v. Peters***, 166 Wis.2d 168, 174, 479 N.W.2d 198, 203 (Ct. App. 1991).

name among the list of persons staying at her residence, she answered: "I just didn't. I don't know. I just didn't." She also testified that one week after the robbery, she told the police that Britton had been staying at her apartment at the time of the robbery.

On direct examination by the State, Alexander Harris also admitted that he did not initially tell police that Britton had been staying at the residence, but he added that, during a later interview, he informed the police that Britton had stayed with his family. Over a defense objection, Alexander Harris was asked if the reason for the omission in his earlier statement to police was because he feared Britton; Alexander Harris replied, "no."

After the Harrises testified, the State presented testimony from Detectives Rany Kolosovsky and Victor Wong. Detective Kolosovsky was asked if Constance Harris ever told him why she initially failed to report that Britton was staying at her apartment. Over a hearsay objection, he answered, "yes." Without objection from Britton's counsel, the detective stated that Constance told him that she was afraid to tell. When the prosecutor asked the detective if she said why she was afraid, he answered: "Because the person who … was living with her[,] the defendant, Mr. Britton, was dangerous. He had threatened to kill her husband on one occasion when they were out together." Defense counsel then interposed a relevance objection, which was overruled, and the detective finished his response stating that, according to Constance Harris, Britton "actually fired a handgun on the street right in front of her and her husband" during that incident.

On direct examination, Detective Wong testified, without objection, that Alexander Harris said he had initially failed to tell police that Britton was

living at the Harrises' apartment at the time of the robbery because "he was somewhat fearful for his safety and the safety of his family."

The detectives' testimony constituted admissible evidence impeaching the Harrises' trial testimony with prior statements in which they told the police that they did not reveal Britton's name because they were afraid of him. The prior inconsistent statements were offered for the purpose of impeaching the Harrises' trial testimony to establish that they had a bias and a motive to lie. *See* RULE 906.13(2), STATS; *see also* ***State v. Williamson***, 84 Wis.2d 370, 383, 267, 337, 343 (1978) (bias in favor of a party is never collateral and may be proved by extrinsic evidence). As the State argues, the testimony "was relevant to show that the Harrises possessed a motive to testify falsely in favor of [Britton] on such topics as whether one or both of them had actually seen Britton commit the charged robbery or flee from the scene." Further, the testimony was relevant to explain why Constance and Alexander Harris failed to tell the police initially that Britton had been staying at her residence. Accordingly, we conclude that the trial court properly admitted the detectives' testimony.

B. Ineffective Assistance of Counsel

1. Failure to call Sherman Akins

Britton claims that his trial counsel was ineffective for failing to call Sherman Akins as a witness to substantiate Britton's alibi. He argues that because the defense presented no evidence as to Britton's whereabouts on the morning of November 1, aside from Britton's own testimony, and because the theory of defense was misidentification, evidence of an alibi was critical to his defense. Accordingly, he contends that his trial counsel was ineffective for not calling Akins. Britton also argues that the trial court erred by denying his ineffective

assistance of counsel claim without a ***Machner*** hearing.[2] He alleges that a ***Machner*** hearing was necessary to determine why counsel failed to call Akins. We disagree.

For a defendant to prevail on an ineffective assistance of counsel claim, the two pronged test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), must be satisfied. A defendant "must show that counsel's performance was both deficient and prejudicial." ***State v. Bentley***, 201 Wis.2d 303, 312, 548 N.W.2d 50, 54 (1996). We may dispose of an ineffective assistance of counsel claim if the defendant fails to satisfy either element. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

Nothing in Britton's postconviction pleadings or in the trial record supports Britton's claims of ineffective assistance of counsel. The trial record reflects that Britton's counsel said that he had "no idea" if Akins would be available to testify because he "has not been cooperative." Further, when the trial court asked counsel whether he intended to call Akins, he replied, "Do I intend to call him? I can't answer [that] because I have never met him." Defense counsel thereafter indicated that Britton believed he would be able to have Akins appear for trial but reiterated his own concern by again stating that Akins had been "uncooperative." When trial resumed the following day, there was no further discussion of Akins and he was never called to testify.

The brief accompanying Britton's postconviction motion stated, "It is not clear exactly what time that day Akins saw Britton, but presumably it was at such time as would have prevented Britton from committing this crime in

[2] ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Milwaukee at 8:00 a.m." As the trial court noted in its decision denying the request for a ***Machner*** hearing:

> The defendant filed a notice of alibi naming Sherman Akins as a witness who would testify to his whereabouts on the morning of November 1, 1994. The witness's whereabouts were discussed at the close of the day on August 10, 1995, and it was undetermined at that point in time whether or not he would be called as a witness by the defense. Trial counsel indicated that the possibility of utilizing Sherman Akins would be pursued by his office before the morrow. (Tr. 8/10/95, p. 242) Akins was not called as a witness, and defendant now asserts that counsel's performance was deficient and prejudicial for failing to call Akins as an alibi witness….
>
> A Machner hearing is not a fishing expedition. The defendant is required to produce concrete facts, which if true, would tend to show that his case was prejudiced by the omission…. The defendant has set forth a conclusory presumption on his part and has not presented the court with any facts tending to show that Akins' testimony would have had any impact on the outcome of the trial.

We agree. We review a trial court's decision on whether to hold a ***Machner*** hearing under the two-part test enunciated in ***State v. Bentley***, 201 Wis.2d 303, 548 N.W.2d 50 (1996):

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review *de novo*.
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing ….

Id. at 310-11, 548 N.W.2d at 53 (citations omitted). Further, "'if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.'" ***Bentley***, 201 Wis.2d at 309-10, 548 N.W.2d at 53 (citations omitted). Based on both the trial record and the postconviction motion brief, Britton's argument not only fails to establish deficient performance or prejudice, but remains so speculative and conclusory that a ***Machner*** hearing was not required.

2. Failure to call Sandra Jones

Britton also argues that the trial court erred in refusing to order a ***Machner*** hearing on the issue of whether counsel was ineffective for failing to name Sandra Jones as an alibi witness. Again, we conclude that the trial court correctly denied his motion without a hearing.

At trial, the defense submitted an offer of proof that Jones would testify that on October 31, 1994, Britton left the Harrises' residence and told her that he was going to Chicago. It further alleged that Jones did not see Britton again until November 2, in Kankakee, Illinois. In response, the State argued that the proffered testimony of Sandra Jones should be excluded because defense counsel had failed to notify the State that it intended to call her as an alibi witness pursuant to § 971.23(8), STATS. In response, defense counsel suggested that Sandra Jones was not truly an alibi witness, conceding:

> [Ms. Jones] does not know where [Britton] was on November 1st. All she knows is, and all we're asking this court is, to allow her to testify to, is that on the 31st [of

> October], she saw her husband leave, and the next time she saw him was on November 2nd.

The trial court nonetheless concluded that Jones was an alibi witness and barred the defense from presenting the proffered testimony for failure to give timely notice under § 971.23(8), STATS.

In denying Britton's postconviction motion, the trial court adhered to the rationale of its previous ruling, but concluded that counsel was not ineffective because Jones's testimony would not have operated to "turn the tide in favor of the defendant." While we agree with the trial court's ultimate decision, we disagree with its conclusion that Jones was an alibi witness.

As defense counsel conceded, Jones did not know where Britton was on November 1. Therefore, she could only have testified that he left the Harrises' residence the evening before the robbery and that she did not see him again until a day or two later. Although supportive of Britton's alibi testimony, Jones's testimony did not provide an alibi. Thus, counsel was not ineffective for failing to name Jones as an alibi witness.

III. Trial Court's Refusal to allow Jones to Testify

Britton next claims that the trial court erred in refusing to allow Sandra Jones to testify despite the fact that counsel had not given timely alibi witness notice. Britton correctly argues that "if the State is correct … that Ms. Jones was not truly an alibi witness, this is all the more reason for concluding that the trial court [erroneously exercised] its discretion in refusing to allow Ms. Jones to testify." Britton is correct. However, the error was harmless given that Jones would not have been able to testify as to Britton's whereabouts at the time of the

crime. *See* ***Crane v. Kentucky***, 476 U.S. 683, 691 (1986) (exclusion of proffered defense evidence is subject to harmless-error analysis).

The proffered testimony of Sandra Jones would not have excluded Britton as the robber or cast doubt upon the eyewitness's identification because Jones could not have placed Britton at a location other than the scene of the robbery when the robbery occurred. Britton testified that he left for Chicago at 3:00 p.m. on October 31, 1994, while Sandra Jones, according to the offer of proof, "would testify in detail that the defendant left that evening." Based on the totality of the evidence, such testimony would not have changed the jury's verdict. As the trial court wrote in its decision denying Britton's postconviction motion:

> The testimony in this case is very strong. The victim identified the defendant on three separate occasions. The Harrises, although hostile witnesses for the State, testified that the defendant was living with them, that he carried a gun, and that he was in the apartment in which the victim was robbed at gunpoint on November 1, 1994. The defendant immediately left the vicinity after the robbery and was arrested in Minnesota some months later.

Based on this overwhelming evidence, we conclude that there is no reasonable possibility that Jones's testimony would have affected the jury's verdict. ***State v. Dyess***, 124 Wis.2d 525, 543-45, 370 N.W.2d 222, 230-32 (1985).

E. Photo Identification

Britton next claims that the trial court erred in admitting the photo array identification, which was administered just eight days after the robbery, because Schumacher first stated that he was only ninety percent sure that he had selected the person who robbed him. He argues that this comment reflects an

insufficient level of witness certainty to allow the identification evidence to go before the jury. Britton's argument is specious.

To determine whether a pretrial identification was impermissible, this court applies the same rules as the trial court. *See* ***State v. Haynes***, 118 Wis.2d 21, 31 n.5, 345 N.W.2d 892, 898 n.5 (Ct. App. 1984). First, we decide whether the procedure used was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." ***State v. Powell***, 86 Wis.2d 51, 64, 271 N.W.2d 610, 616 (1978). The defendant bears the initial burden of showing that the state-sponsored identification procedure was impermissibly suggestive. ***Id.*** at 65, 271 N.W.2d at 616. If the procedure was impermissibly suggestive, the State has the burden of showing that the identification is reliable under the totality of the circumstances. ***Haynes***, 118 Wis.2d at 31, 345 N.W.2d at 897. Further, if the reviewing court concludes that the defendant has failed to meet the threshold burden of showing impermissible suggestiveness, it need not reach the second prong of the test concerning reliability under the totality of the circumstances. *See* ***State v. Kaelin***, 196 Wis.2d 1, 10, 538 N.W.2d 538, 541 (Ct. App. 1995).

Britton's failure to assert and establish impermissible suggestiveness in the photo array procedure forecloses further analysis. Thus, the trial court properly refused to suppress the identification.

F. Lineup Identification

Britton also argues that the lineup identification was unreliable because all the lineup subjects wore baseball caps facing backwards on their heads. He contends that "[p]lacing baseball caps on the participants would have greatly altered their appearance from the way Mr. Schumacher's assailant appeared

on November 1, 1994. This calls into question the reliability of the identification made at the line-up." Again, Britton's argument is without merit.

The concern in conducting a corporeal lineup is to ensure that the subjects resemble each other in characteristics relevant to the description of the suspect given by the eyewitness who is to view the lineup. *See* ***State v. Wolverton***, 193 Wis.2d 234, 264, 533 N.W.2d 167, 178 (1995), *cert. denied*, 116 S. Ct. 828 (1996). The goal is to ensure that a particular lineup procedure does not highlight any particular lineup subject in a way that would unduly influence the witness viewing the lineup to choose that subject mistakenly. *See* ***State v. Armstrong***, 110 Wis.2d 555, 576-77, 329 N.W.2d 386, 397, *cert. denied*, 461 U.S. 946 (1983).

Although Britton claims that the trial court should have suppressed the lineup identification because the five subjects were required to wear baseball caps backwards, he offers no authority to support his premise that persons in lineups are required to wear the same clothing as the perpetrator allegedly wore when the crime took place. Further, no evidence suggests that Schumacher stated that the assailant's hair style was critical to his ability to identify his assailant. As Detective Spano testified at trial, the use of baseball caps was merely a means to control the hairstyle differences among the subjects. Accordingly, we conclude that Britton has failed to carry his burden of proving that the lineup was impermissibly suggestive.

By the Court.–Judgment and order affirmed.

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