COURT OF APPEALS
DECISION
DATED AND FILED

June 7, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1035-CR **Cir. Ct. No. 2002CF437**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY L. HOWARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed*.

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

¶1 CURLEY, J. Larry L. Howard appeals, *pro se,* from the judgment convicting him of one count of robbery, threat of force, contrary to WIS. STAT.

§ 943.32(1)(b) (2003-04),[1] and from the order denying his postconviction motion. Howard claims that his conviction should be overturned because: (1) he was "denied his constitutional right to due process, when he was forced to use two peremptory challenges to remove prospective jurors, who could not be fair or impartial"; (2) there was insufficient evidence to convict him; (3) the trial court committed reversible error "when it did not read the jury the [jury instruction for] the lesser included offense of Theft from a Person"; (4) the trial court "erred in admitting out of court and in-court identifications of [him] into evidence"; and (5) his trial counsel "was … ineffective and did not exercise (his) full rights within the court." We disagree and affirm.

I. BACKGROUND.

¶2 Catherine McGlaston testified that on January 14, 2002, she left her apartment to go to a neighborhood store. Due to an existing medical problem, McGlaston depends on a motorized wheelchair for mobility. On her way to the store she passed the house of a friend, Annie Finney, who was talking to a man wearing red pants on the porch of her home. She also noticed what she thought was a black GMC Jimmy truck parked in front of Finney's house. Later, she saw the same man and what appeared to be the same truck that was parked in front of Finney's house at the store. On her way back from the store, she again saw the truck pass her and then make a u-turn. Shortly thereafter, she heard someone behind her say something, and when she turned, she saw the man who had been on Finney's porch, with a knife in his hand. The man displaying the knife said:

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

"[G]ive me your wallet out of your pocket." McGlaston gave him the wallet, containing thirty dollars, and saw the man return to the black truck.

¶3 Back at her apartment, McGlaston called her friend to find out the name of the man on her porch and, after learning it, she called the police and reported the robbery. She told the police the man's name and also told them that since the man had been behind her in line in the store, his picture should be on the surveillance video.

¶4 The police showed McGlaston a photo array and she picked Howard's picture out of the photos. On the strength of McGlaston's identification and other corroborating information obtained by the police, Howard was arrested and charged with armed robbery. A preliminary hearing was held, at which time McGlaston identified Howard as the robber. Howard was then bound over for trial. Later, McGlaston was shown the surveillance video and she again identified Howard as the robber. A jury trial was held and Howard was convicted of the lesser-included charge of robbery, threat of force. He was sentenced to six years of initial confinement, to be followed by five years of extended supervision. He now appeals.

II. ANALYSIS.

A. Peremptory challenge claim.

¶5 Howard's first argument is that he was "improperly denied his right to exercise full peremptory challenges under [WIS. STAT.] § 972.03"[2] because he

[2] WISCONSIN STAT. § 972.03, as applicable to Howard, permitted four peremptory challenges.

was forced to use one of his peremptory strikes to remove a juror, a Milwaukee police officer, who personally knew the officer who assisted the assistant district attorney who prosecuted the case.[3] Howard complains that this juror was not unbiased, as he knew the court officer involved in the case, and should have been stricken.

¶6 We first observe that Howard did not move to strike the juror for cause. Consequently, he has waived the right to raise this issue on appeal. *See* ***State v. Hartman***, 145 Wis. 2d 1, 9-10, 426 N.W.2d 320 (1988) (failing to object at trial waived right to claim error on appeal); *see also* ***Holmes v. State***, 76 Wis. 2d 259, 272, 251 N.W.2d 56 (1977). However, Howard may raise this issue in the context of a claim of ineffective assistance of trial counsel.

¶7 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his or her attorney's performance was deficient and that he was prejudiced as a result of his or her 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). To prove deficient performance, the defendant must show specific acts or omissions of his or her attorney that fall "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. 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—

[3] Howard often refers to having had to use two peremptory strikes; however, he has supplied us with no information concerning the second juror, so we have confined our inquiry to the identified juror. In the trial court's postconviction order, the trial court claimed that after reviewing the *voir dire* record, it could find no evidence of any juror who claimed to be unable to be fair and impartial. *See* ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 453, 405 N.W.2d 354 (Ct. App. 1987) (It is not the court of appeals' obligation to search the record for facts supporting a party's arguments.).

deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697. We strongly presume counsel has rendered adequate assistance. ***Id.*** at 690. However, "[t]he questions of whether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law, and we do not give deference to the decision of the [trial] court." ***Pitsch***, 124 Wis. 2d at 634.

¶8 Here, Howard's attorney did not provide ineffective assistance for failing to move to strike the Milwaukee police officer for cause because this allegedly biased potential juror was ultimately stricken from the panel. Pursuant to the holding in ***State v. Lindell***, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223, Howard has no viable claim of error. In that case, the supreme court held that a defendant is not entitled to an automatic reversal when he uses a peremptory challenge to remove a juror who should have been stricken for cause. *See* ***id.***, ¶¶5, 52, 120, 131. In doing so, the supreme court abandoned the earlier holding in ***State v. Ramos***, 211 Wis. 2d 12, 564 N.W.2d 328 (1997), that required a conviction to be overturned if a defendant was forced to use a peremptory challenge to strike a biased potential juror: "We conclude that the ***Ramos*** case should be overruled because our good intentions did not produce good results. The time has come to acknowledge error and move forward." ***Lindell***, 245 Wis. 2d 689, ¶120. Here, as in ***Lindell***, the allegedly biased juror was removed. As a result, Howard's jury consisted of impartial jurors. Thus, Howard's attorney was not ineffective for failing to seek the juror's removal for cause, and Howard is not entitled to a new trial.

B. Insufficient evidence claim.

¶9 We next address Howard's argument that insufficient evidence was presented at trial to convict him. Howard notes that the crime of robbery, threat of

force, has four elements. The State needed to prove that: (1) McGlaston was the owner of property; (2) Howard took property from McGlaston or from the presence of McGlaston; (3) Howard took the property with the intent to steal it; and (4) Howard threatened the imminent use of force against McGlaston with the intent to compel McGlaston to submit to the taking or carrying away of the property. *See* WIS JI—CRIMINAL 1477.

¶10 Howard first argues that the State failed to prove that McGlaston had any money at all. Second, he argues that McGlaston originally described the man who robbed her as wearing different clothing, and that she identified the suspect as driving a GMC Jimmy truck, when he was driving a Chevrolet Blazer. Third, he submits that the State did not prove there was any threat of force. He notes that no weapon was introduced into evidence. He contends that the jury must not have believed McGlaston's testimony that she was robbed at knifepoint because he was not convicted of armed robbery. He reasons that if the jury did not believe there was a knife, then there was no evidence of any threat of force whatsoever. We are unpersuaded by his contentions.

¶11 The standard for reviewing a challenge to the sufficiency of the evidence is stated in ***State v. Blaisdell***, 85 Wis. 2d 172, 270 N.W.2d 69 (1978):

> When the defendant challenges the sufficiency of the evidence, the test is whether the evidence adduced, believed, and rationally considered by the jury was sufficient to prove the defendant's guilt beyond a reasonable doubt. Conversely stated, the test is whether when considered most favorably to the State and the conviction, the evidence is so insufficient in probative value and force that it can be said as a matter of law that no trier of facts acting reasonably could be convinced to that degree of certitude which the law defines as "beyond a reasonable doubt."

Id. at 180-81 (citations omitted). Moreover, "it is not necessary that this court be convinced of the defendant's guilt but only that the court is satisfied the jury acting reasonably could be so convinced." ***Id.*** at 181. Further, as stated in ***State v. Toy***, 125 Wis. 2d 216, 371 N.W.2d 386 (Ct. App. 1985):

> It is the jury's task, [not the reviewing] court's, to sift and winnow the credibility of the witnesses. We review sufficiency of evidence claims most favorably to the jury's findings. It is certainly allowable for the jury to believe some of the testimony of one witness and some of the testimony of another witness, even though their testimony, read as a whole, may be inconsistent.

Id. at 222 (citations omitted).

¶12 Here, the testimony of McGlaston establishes all the elements of the crime of robbery, threat of force. McGlaston testified that she had thirty dollars in her purse when she left to go to the store to buy bread, and that the robber forced her to give it up when he displayed a knife. Further, McGlaston's original description of the robber was very close to a description of the robber given later. Moreover, she was adamant in her belief that Howard was the robber. She claimed that the robber had nothing over his face and she got a good look at him. We note that she consistently identified him from the photo array, in the surveillance video, at the preliminary hearing, and at trial. While she may have been mistaken about the exact make of the truck, she consistently identified it as being a black jeep-type truck. She believed it was a "Jimmy." Howard drove a Chevrolet Blazer. Pictures of the two cars displayed to the jury reflected their similarity.

¶13 There was also corroboration for McGlaston's observations. James Finney testified that Howard had been at his mother's house on the day in question and that Howard was driving a dark Chevrolet Blazer. Howard, himself, admitted

he was at the Finney home, and was wearing a red jogging suit that day. He also admitted that he was in the surveillance video because he bought some gas there.

¶14 Howard's argument that because he was convicted of the lesser-included offense of robbery, threat of force, the State did not meet its burden of proof, is also without merit. The question is whether the State presented sufficient proof of the charged offense, not whether the jury opted to convict him of a lesser offense. Moreover, the jury verdict, to stand, need not be logical or consistent. We find the case of ***State v. Thomas***, 161 Wis. 2d 616, 468 N.W.2d 729 (Ct. App. 1991), instructive. In ***Thomas***, we explained: "The fact that a not-guilty verdict is inconsistent with another verdict finding the defendant guilty does not require, or by itself permit, reversal of a judgment entered on the finding of guilt, since there is no way of knowing whether the inconsistency was the result of leniency, mistake, or compromise[.]" ***Id.*** at 631 (citations omitted). Applying that logic here, we must affirm the verdict convicting Howard of robbery, threat of force, even though the victim testified that a knife was shown to her at the time the robber asked for her money, because this inconsistency may have been the "result of leniency, mistake, or compromise." We are satisfied that sufficient evidence was presented. McGlaston testified she saw a knife in Howard's hand and, as a result, she was forced to give him her money. This was ample evidence to support the jury's verdict.[4] The absence of a knife being admitted into evidence goes to the weight of the evidence; it does not vitiate the charge or the verdict.

[4] It may be, as the State has suggested, that the jury convicted him of the lesser-included offense in order to give Howard a "break." Another possibility to explain the fact that the jury chose to convict him of the lesser-included offense may be because McGlaston did not mention the knife in her initial account of what transpired. It was only when she was prompted by the prosecutor that she mentioned the knife:

(continued)

C. Lesser-included offense jury instruction claim.

¶15 Next, Howard asserts both that the trial court committed reversible error when it failed to read the instruction for the lesser-included offense of theft from person, and that his attorney provided ineffective assistance of counsel by not requesting this jury instruction.

¶16 We first observe that the trial court committed no error because it is under no duty or obligation to instruct the jury on a lesser-included offense unless one of the parties asks for it. *See* ***State v. Myers***, 158 Wis. 2d 356, 364, 461 N.W.2d 777 (1990) ("It is not error for the circuit court to fail to instruct *sua sponte* on a lesser included offense."). We next assess whether Howard's attorney's failure to ask for the theft from person instruction constituted deficient performance. We have previously set out the ***Strickland*** test for assessing a claim of ineffective assistance of counsel. We will not repeat it here. Howard is

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> Q. So the person – then that same person approached you from the front or from behind as you're wheeling along?
>
> A. He approached from behind.
>
> Q. And then what happened?
>
> A. And as I turned around he was right over me as he said, give me your wallet.
>
> ….
>
> Q. What was [the defendant] holding, if anything, when you turned around?
>
> A. He was holding a knife.
>
> Q. Where was he holding the knife?
>
> A. In his right hand.

obligated to show that his attorney's performance was deficient and that he was prejudiced as a result.

¶17 Whether the evidence adduced at trial permits the giving of a lesser-included offense instruction presents a question of law. ***State v. Wilson***, 149 Wis. 2d 878, 898, 440 N.W.2d 534 (1989). "The submission of a lesser-included offense instruction is proper *only* when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." ***Id.*** In deciding whether this evidentiary standard is met, the evidence must be viewed in the light most favorable to the defendant, but the evidence supporting submission of the lesser-included offense must also be relevant and appreciable. ***State v. Fleming***, 181 Wis. 2d 546, 560-61, 510 N.W.2d 837 (Ct. App. 1993).

¶18 We first look to see whether a request for the lesser-included offense instruction would have been granted. Here, there are no reasonable grounds in the evidence to support an acquittal of the greater charge and a conviction for the lesser-included charge of theft from person. The victim claimed that the robber had a knife in his hand when he asked her for her money. No conflicting evidence was admitted that suggested the robbery took place under different circumstances. Thus, had a request been made for the theft from person jury instruction, the trial court would have denied it. Consequently, trial counsel's failure to ask for it was not deficient performance because he cannot be faulted for failing to make a motion that would not have been granted. *See* ***State v. Golden***, 185 Wis. 2d 763, 771, 519 N.W.2d 659 (Ct. App. 1994).

D. Identification claim.

¶19 Howard's next argument is that the trial court erred in admitting the out-of-court and in-court identifications into evidence. He bases this claim on his belief that the in-court identifications flow from his unlawful arrest and, thus, should have been suppressed, and that the out-of-court identification from a photo array was improper. Again, Howard failed to raise these issues in the trial court and his claims can only be reviewed in an ineffective assistance of counsel context. In order for Howard to succeed, he must show that his attorney's failure to raise these issues constituted deficient performance, and he must also show that he was prejudiced by the omission.

¶20 We disagree with Howard's claim that his arrest was improper and, therefore, any identifications following it should have been suppressed under the "fruits of the poisonous tree doctrine,"[5] because the police had probable cause to arrest him. "Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). Here, the victim told the police she had been robbed by an armed man whom she had seen on her neighbor's porch earlier that day, and who was driving a black jeep-type vehicle and wearing red pants. Her neighbor supplied the name of the man, and the neighbor's son told the police that Howard was the man talking to his mother that

[5] Howard has provided no citation for this phrase. We believe he is referring to the doctrine set forth in ***Wong Sun v. United States***, 371 U.S. 471, 484-88 (1963) (Evidence obtained either during or as a direct result of an unlawful invasion is barred from being admitted at trial as it is "fruit of the poisonous tree.").

morning. Clearly, on the strength of this information, the police had probable cause to arrest Howard. Consequently, Howard's attorney was not performing deficiently when he failed to file a motion challenging the arrest.

¶21 With respect to the photo array, Howard claims that the photo array was impermissibly suggestive because "it looks as if the Defendant is the only picture in the array that has a white background behind him. All of the other pictures have a dark background." Again, to prevail on this issue, Howard must show that his attorney's failure to file a motion challenging the photo array constituted deficient performance and that he was prejudiced as a result.

¶22 The test for determining whether an out-of-court photographic identification is admissible or, on review, whether the out-of-court identification was properly admitted, was set forth in ***Powell v. State***, 86 Wis. 2d 51, 65, 271 N.W.2d 610 (1978): "First, the court must determine whether the identification procedure was impermissibly suggestive. Second, it must decide whether under the totality of the circumstances the out-of-court identification was reliable, despite the suggestiveness of the procedures." A defendant seeking to suppress identification evidence bears the initial burden of establishing that the identification procedure employed was impermissibly suggestive. ***Id.*** at 66. Both the degree of any suggestiveness and the ease with which it could have been avoided must be considered. ***Simos v. State***, 83 Wis. 2d 251, 256, 265 N.W.2d 278 (1978). Unnecessary suggestiveness may result from some feature of the photo of the suspect that tends to unduly emphasize the suspect, the manner in which the photos are presented, or the words or actions of the law enforcement officers conducting the identification procedure. ***Powell***, 86 Wis. 2d at 63.

¶23 Here, however, we need not apply the test because, as the state points out, "the original of the photo array is not in the appellate record. It is the appellant's burden to ensure that the record is sufficient to address the issues raised on appeal." *See* ***Lee v. LIRC***, 202 Wis. 2d 558, 560 n.1, 550 N.W.2d 449 (Ct. App. 1996).[6] When the record is incomplete, an appellate court will assume the missing material supports the circuit court ruling under attack. *See* ***State v. Holmgren***, 229 Wis. 2d 358, 362 n.2, 599 N.W.2d 876 (Ct. App. 1999). Thus, we must assume that the photo arrays would support the trial court's determination that "[t]here is no showing that the photo arrays or identification of the defendant by the victim was the result of improper procedure." As a result, trial counsel cannot be found to have performed deficiently for failing to challenge the photo arrays in a motion.

E. Other claims of ineffectiveness of trial counsel.

¶24 Finally, Howard lists a number of ways in which his attorney was ineffective. This list includes counsel's: failure to object to other acts evidence; failure to cross-examine McGlaston on her claim that she had no vision problems and only wore glasses for reading; disregarding Howard's suggestions on questioning the witnesses; communicating his ideas to the prosecutor; and failing to call defense witnesses, to name a few. We reject his arguments.

¶25 First, many of Howard's arguments are based upon conclusory allegations. For instance, nothing in the record supports his argument that the victim wore "very high prescription glasses," or that his attorney was

[6] There is a very blurred photocopy of the photo array in the record. It is impossible to say with any certainty whether any of the backgrounds were white.

communicating Howard's ideas to the prosecutor. The other arguments are undeveloped. He does not explain what other acts evidence was admitted or how his attorney could have prevented the information from being introduced as evidence; nor does he identify all of the witnesses he would have called and what they would have said. Finally, even assuming that these claims were "deficiencies," Howard has failed to show how they prejudiced him. He has not established that there was a reasonable probability that, had his attorney performed in the manner that Howard wishes, the result of the trial would have been different. Consequently, we determine that Howard has not proved that his attorney was ineffective. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.