COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP75-CR **Cir. Ct. No. 2000CF2388**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL H. CALLAHAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Dykman, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Daniel Callahan appeals a judgment convicting him of robbery by use of force, and an order denying postconviction relief. His conviction followed a jury trial in which the State relied on eyewitness testimony to prove its case. The issues are whether the evidence was sufficient to find guilt,

whether counsel performed effectively, and whether Callahan should receive a new trial in the interest of justice. We affirm.

¶2 The State charged Callahan with attempted robbery, robbery and armed robbery, in connection with criminal acts committed in three stores. His first trial ended in acquittal of armed robbery, and a mistrial on the other two counts because the jury could not agree on a verdict. On retrial of the two unresolved counts, the jury acquitted Callahan of attempted robbery and found him guilty of robbing Lakeside Liquors in Madison.

¶3 The robbery at Lakeside Liquors occurred after dark. A witness outside the store saw the perpetrator enter and run out, and described him as Caucasian, possibly Latino, 5 foot 9 inches to 5 foot 11 inches, and 190 pounds.

¶4 The owner of the store, Duane Blaney, was the State's key witness. He testified that the perpetrator entered the store and asked for change. When he opened the cash register the man pushed him, grabbed some money, and ran out. The entire encounter took about thirty seconds. Blaney subsequently described the man as 5 foot 10 inches, 190 pounds, wearing a cap and sunglasses, with slightly dark skin. He told an investigating police officer that the perpetrator had a mustache, but testified at trial that the perpetrator did not have facial hair. He identified Callahan as the perpetrator out of a lineup and, at trial, stated that he was ninety-nine percent certain of his lineup identification.

¶5 Blaney also testified that he had never seen Callahan before. However, a defense witness testified that Callahan had, at one time, been Blaney's frequent customer. Blaney offered different accounts at different times as to whether the perpetrator spoke with a slight Spanish accent.

¶6 We conclude the jury heard sufficient testimony to convict Callahan of robbery. Essentially, Callahan argues that Blaney did not get a very good look at the perpetrator, and there were so many inconsistencies, inaccuracies and gaps in his identification of Callahan that no reasonable jury could convict based on it. However, the responsibility for reconciling inconsistencies in the testimony lies with the jury, and its resolution of the inconsistencies is not subject to this court's review. *See* ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). It is also the jury's prerogative to determine the weight given an identification. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). In this case, the jury exercised its prerogative to accept Blaney's identification of Callahan notwithstanding the fact that Blaney provided inconsistent descriptions and had only a brief look at the robber. Once the jury accepted Blaney's identification, his testimony provided the necessary support for the verdict. *See* ***id.*** (We affirm unless evidence, when viewed most favorably to the verdict, is so insufficient that no reasonable jury could find guilt).

¶7 We also conclude Callahan received effective assistance from trial counsel. To prove ineffectiveness a defendant must show that counsel acted below a reasonable standard of performance, and that counsel's acts or omissions were prejudicial. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Callahan contends that his trial counsel negligently failed to call an expert witness to testify on the problematic nature of eyewitness identifications. However, the problems with Blaney's identification were adequately explored on cross-examination. Callahan has not shown that expert testimony was necessary to understand the significance of those problems, which included the brevity of contact, the stress of the situation, and the subsequent inconsistent descriptions. Expert testimony is necessary only if the issue before the jury is beyond the

general knowledge and experience of the average juror. ***State v. Whitaker***, 167 Wis. 2d 247, 255, 481 N.W.2d 649 (Ct. App. 1992). In this case, an average juror could easily understand the problems associated with Blaney's identification of Callahan.

¶8 Additionally, at the postconviction hearing, counsel did not offer testimony from an expert in the field of eyewitness identification. We can only speculate as to what such an expert might say in testimony, and whether that testimony could have changed the trial's outcome. *See* ***State v. Gordon***, 2003 WI 69, ¶23, 262 Wis. 2d 380, 663 N.W.2d 765 (to establish prejudice from counsel's error a defendant must show a reasonable probability that, but for the error, the result of the proceeding would have differed).

¶9 Finally, we decline Callahan's request to use our discretionary authority under WIS. STAT. § 752.35 (2003-04)[1] to grant him a new trial in the interest of justice. He contends that without an expert testifying on eyewitness identification, the real controversy in interest was not tried. As noted, however, the problems with the State's identification evidence were elicited through cross-examination. The real controversy was tried, although not in a manner Callahan would now prefer.[2]

By the Court.—Judgment and order affirmed.

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

[2] Callahan also contends that the trial court should have granted him a new trial. His argument in support of this contention, however, simply restates his claim that his trial counsel was ineffective, a claim we have rejected.

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