COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2805-CR **Cir. Ct. No. 2004CF1072**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD H. MCKAY,

DEFENDANT-APPELLANT.

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

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Edward McKay appeals a judgment convicting him of armed robbery, and an order denying postconviction relief. His postconviction motion alleged ineffective assistance of counsel, and the trial court denied the

motion without a hearing. He contends on appeal that his allegations were sufficient to warrant a hearing on his claim. We disagree, and therefore affirm.

¶2 The perpetrator confronted the victim of the robbery, Lisandra Velazquez, on a sidewalk, grabbed a necklace from her, and escaped in a red car. She described the perpetrator as a black male, approximately thirty years of age, 5' 6", 190 pounds, medium built, dark complexion, unshaven with a round face, sporting a three-inch afro, and wearing a red hooded sweatshirt and tan pants. Her description was similar to a description of McKay the police had on file.

¶3 Velazquez was able to provide police with a partial license plate of the getaway car. A police officer spotted a car fitting the number and description, and stopped it. The driver was McKay's girlfriend, who testified that McKay borrowed the keys to the car for several hours earlier in the day, and had the keys at the time of the robbery. Police also found a red sweatshirt in the car, matching the one all three eyewitnesses described. Velazquez subsequently identified McKay from a police lineup, and identified him as the robber in the courtroom. A police officer testified at trial that another officer identified McKay as a suspect based on "some information on [McKay] from some prior dealings or incident that he had." Counsel did not object to this statement as inadmissible other acts evidence.

¶4 Donnell and Melvin Williams were with Velazquez when she was robbed. Donnell described the perpetrator as a black male, unknown age, 5' 11", 180 pounds, medium built, with a mustache, and wearing a red hooded sweatshirt and blue jeans. Melvin described the perpetrator as a black male, unknown age, wearing a red hooded sweatshirt. Both Donnell and Melvin agreed with Velazquez that the perpetrator escaped in a red car. Neither Donnell nor Melvin

testified at trial, however. Nor did the officer who interviewed them and reported their descriptions. The court sustained the State's objection when defense counsel attempted to get the officer's report of the Williams brothers' descriptions into evidence while questioning another police officer.

¶5 McKay's defense was mistaken identity. He produced an alibi witness who testified to being elsewhere with McKay at the time of day the robbery occurred. The witness, however, was unsure if this occurred on the actual day of the robbery. The witness also testified both he and McKay observed police following a red car containing a person wearing a red hooded sweatshirt, in the same block that a police officer first saw the red car used in the robbery.

¶6 McKay's postconviction motion alleged that counsel ineffectively failed to present the jury with evidence of the discrepancies between the description of the perpetrator Velazquez offered and the descriptions Donnell and Melvin Williams gave police. McKay also alleged that competent counsel would have requested the standard jury instruction on eyewitness identification. Finally, McKay alleged that competent counsel would have objected to the other acts testimony that a police officer identified McKay as a possible suspect from another officer's prior contacts with McKay. The trial court determined the record conclusively showed that McKay did not suffer any prejudice from counsel's alleged omissions.

¶7 To prove ineffective assistance of counsel, the defendant must show that counsel's act or omission was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, the defendant must show a reasonable probability of a different result but for counsel's ineffectiveness. ***Id.*** at 694.

¶8 The circuit court need not hold an evidentiary hearing on an ineffective assistance of counsel claim if the record conclusively demonstrates that the defendant is not entitled to relief on the claim. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This is a question of law that we review de novo. ***Id.***

¶9 The record conclusively shows no prejudice from counsel's failure to produce evidence of eyewitness discrepancies. The discrepancies were, in fact, insignificant. All three eyewitnesses agreed that the perpetrator was a black male wearing a red hooded sweatshirt who escaped in a red car. The evidence was overwhelming that the escape car was the same car police later stopped while McKay's girlfriend was driving it. The only potential conflict in the descriptions was Donnell's estimate that the robber was five inches taller than Velazquez believed him to be, and his description of the robber's pants. Otherwise, all three descriptions were consistent. A reasonable jury would not have considered the Williams brothers' descriptions exculpatory, nor found that they significantly undermined Velazquez's identification of McKay. Additionally, McKay's motion failed to demonstrate that counsel could have located the Williams brothers to testify, nor did it show that, had the brothers been located, they would have testified in a manner helpful to the defense.

¶10 McKay's motion failed to allege facts showing that use of the standard eyewitness instruction, WIS JI—CRIMINAL 141, would have created any probability of a different result. The evidence against him was overwhelming and his defense weak. The instruction consists of common-sense notions about what jurors should take into account in assessing the reliability of eyewitnesses. McKay made no showing that the jurors would have viewed Velazquez's identification and description as less reliable had they heard the instruction.

¶11 The record conclusively shows no prejudice from the testimony about McKay's unspecified prior contacts with a police officer. Arguably, this was evidence of other inferentially bad acts offered for no permitted reason, and thus inadmissible under WIS. STAT. § 904.04(2). The reference, however, was brief, apparently inadvertent, and nonspecific. Given the State's overwhelming evidence of guilt, objecting to it would not have created a reasonable probability of a different result. In fact, it's possible that calling the jury's attention to a passing remark would have harmed McKay.

¶12 Finally, McKay asks this court to exercise its discretionary power and grant him a new trial in the interest of justice. He argues that without evidence of the discrepancies in the eyewitness descriptions of the robber, the real controversy over the robber's identification was not fully tried. However, we have rejected his claim that the discrepancies constituted important exculpatory evidence. Accordingly, we decline to exercise the discretionary authority granted to this court under WIS. STAT. § 752.35.

By the Court.—Judgment and order affirmed.

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