**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**December 20, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2005AP1583-CR** **Cir. Ct. No. 2002CF342**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LEE POUA YANG,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed*.

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Lee Poua Yang appeals pro se from a judgment convicting him as a repeat offender of false imprisonment and second-degree sexual assault of a child. He also appeals from an order denying his postconviction motion for a new trial on the ground of ineffective assistance of

counsel. We reject his claims of ineffective assistance of trial counsel and affirm the judgment and order.

¶2 Yang was charged with sexually assaulting a fourteen-year-old girl. The victim reported that she asked to use the bathroom in a house where young people were gathered. She was pulled into a bedroom by an Asian male who referred to himself as "Winkle." The victim reported the assault right away and led police to the house where it had occurred. The police entered the home with the permission of the person in charge of the house, a young man who was house-sitting for his sister. Several minors were found to be consuming alcohol and everyone was gathered into the kitchen. The officers indicated they were investigating a sexual assault and asked who Winkle was. Yang identified himself as Winkle.

¶3 At trial only three witnesses testified for the prosecution. One girl indicated that the victim and her friend were already at the house when she arrived. This was contrary to the victim's version that while walking home, she saw a friend at the house and asked to use the bathroom. The witness also indicated that she knew Yang as Winkle. She saw the victim voluntarily go into the bedroom with Yang and that Yang drove the victim home.

¶4 The victim's friend, who was assaulted in a car outside of the residence by another man while the victim was in the bedroom with Yang, testified that the victim had gone into the house to use the bathroom. She tried to get the victim from the bedroom but was told by Yang to get out and to shut the door. She walked away from the house and called her mother for a ride home.

¶5 The victim testified consistent with her report to the police and described in detail the sexual contact that occurred. She left the room and house at

the first opportunity and got a ride home from some guys in a car outside of the house. She denied that Yang drove her home. She also indicated that she had been shown a packet of several pictures while being examined and interviewed at the hospital and that she picked Yang's picture out. A stipulation was read to the jury that "in regard to the alleged photo showup of a single picture or a group of pictures of the defendant to [the victim] at about midnight on October 5, 2002, that the police officer showed her only one photo, and that was a photo of Lor Por Thao[1] wearing a sport coat; and that she was not shown any group of pictures of any suspects."

¶6 The defense presented the testimony of Thao that the victim left the house in the company of Yang and that Yang drove her home. Another witness confirmed that the victim left with Yang.

¶7 The jury found Yang guilty of false imprisonment and second-degree sexual assault of a child. Yang was acquitted of an additional charge of second-degree sexual assault of a child and physical abuse of a child. Yang discharged his postconviction counsel when counsel indicated that there was no merit to an appeal. Yang's subsequent motion for the appointment of counsel was denied upon the conclusion that Yang had knowingly waived his right to counsel. Yang represented himself at the ***Machner***[2] hearing. The trial court wrote a lengthy and thorough decision denying Yang's postconviction motion.

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[1] Lor Por Thao was convicted of assaulting the victim's friend in a car outside of the house.

[2] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶8 Yang argues that the warrantless entry to the house where the assault occurred was without consent and constitutionally illegal, that his admission that he was Winkle should have been suppressed because ***Miranda***[3] warnings were not given, that there was no probable cause for his arrest, that the victim's identification of him was unduly suggestive and unreliable, that the complaint included knowingly false information and should have been dismissed, and that evidence of Thao's contemporaneous assault of the victim's friend should not have been admitted at trial. These claims are reviewable only by a claim of ineffective assistance of trial counsel.

¶9 A claim of ineffective assistance of counsel requires a determination of "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). The defendant must show that counsel's representation was deficient and prejudicial. ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. The test for the performance prong is whether counsel's assistance was reasonable under the facts of the particular case, viewed as of the time of counsel's conduct. ***State v. Pitsch***, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). The test for prejudice is whether our confidence in the outcome is sufficiently undermined. *See* ***Strickland***, 466 U.S. at 694.

¶10 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***Thiel***, 264 Wis. 2d 571, ¶21. The trial court's findings of what counsel did and the basis for the challenged conduct are factual

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

and will be upheld unless clearly erroneous. ***Id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.*** When reviewing a claim of ineffective assistance of counsel, the reviewing court may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶11 We first observe that trial counsel filed a motion to challenge the entry and search of the house. The motion was withdrawn with Yang's express agreement that the motion lacked arguable merit. In fact, Yang wrote counsel a letter agreeing that he lacked standing to object to the search and seizure at the house. Trial counsel testified that he informed Yang that because Yang was a temporary guest at a party at the house, he did not have a constitutional right to privacy in the house. The trial court found that counsel accurately informed Yang of the standing requirement and that nothing in the record called into question the lack of standing. *See* ***State v. Trecroci***, 2001 WI App 126, ¶¶57-59, 246 Wis. 2d 261, 630 N.W.2d 555 (a person temporarily on the premises as an invitee does not have standing in the absence of anything more firmly rooting the guest's relationship with the host and the host's property). Trial counsel does not perform deficiently for following the informed and well-considered instructions of the client. ***State v. Pote***, 2003 WI App 31, ¶37, 260 Wis. 2d 426, 659 N.W.2d 82. As the trial court observed, Yang has not claimed any connection to the house and its owners other than as a temporary guest. He lacked the necessary standing to challenge the consent entry and search and was not prejudiced by trial counsel's failure to pursue such a challenge.

¶12 Yang contends that there was no probable cause for his warrantless arrest and that trial counsel should have challenged the arrest and the resulting in-

court identification of him at the preliminary hearing. He believes it was insufficient that the victim identified her assailant as an Asian male named Winkle because there were several Asian males at the house. Trial counsel indicated that he intended to challenge the arrest via the withdrawn motion challenging the entry and search of the house.[4] Trial counsel also explained why a claim that the arrest lacked probable cause was without merit.

¶13 A person may be arrested without a warrant if "[t]here are reasonable grounds to believe that the person is committing or has committed a crime." WIS. STAT. § 968.07(1)(d) (2003-04).[5] At the time of his arrest, the police knew that the victim had been assaulted by an Asian male known as Winkle. Yang identified himself as Winkle. This was sufficient to support probable cause for the arrest.[6] Further, even if there was not probable cause for the arrest, it does not require dismissal of the charges. *See* ***State v. Smith***, 131 Wis. 2d 220, 240, 388 N.W.2d 601 (1986) (an illegal arrest is not a jurisdictional defect). An illegal arrest only results in the suppression of evidence obtained as a result of the arrest.

[4] We do not terminate our consideration of the issue at this point because it is not clear that Yang was informed that any challenge to the arrest would be waived by withdrawing the motion.

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

[6] To the extent that Yang contends he was arrested as soon as everyone was rounded up in the kitchen and his driver's license was confiscated, we reject that notion. The police were there to investigate an alleged assault. But there was also underage drinking discovered at the house. Yang was an adult. Yang was subject to investigatory detention for the purpose of investigating the assault and underage drinking. *See* ***State v. Gruen***, 218 Wis. 2d 581, 589-90, 582 N.W.2d 728 (Ct. App. 1998) ("[T]he Fourth Amendment is not violated when law enforcement officers, in appropriate circumstances, detain and temporarily question a suspect, without arrest, for investigative purposes."). He was also subject to arrest for participation in the underage drinking.

***Id.*** at 240-41. Yang has not identified any evidence that resulted from his arrest. Thus, he was not prejudiced by trial counsel's failure to challenge the arrest.

¶14 Yang next claims that he was entitled to ***Miranda*** warnings as soon as everyone was placed in the kitchen and asked for identification. Yang characterizes his detention in the kitchen as lasting "several hours" and that the inquiry about whether he was Winkle came directly to him several hours after the officer left with Yang's driver's license. He contends trial counsel was ineffective for not moving to suppress Yang's admission that he was Winkle. Trial counsel explained that he did not seek to suppress the admission because the police had the right to ask general questions when arresting someone, the victim had already identified Yang from his driver's license,[7] and suppression would have served no purpose given the theory of defense that the contact did not occur as the victim indicated.

¶15 As earlier noted, the detention in the kitchen did not necessarily place Yang under arrest. All occupants in the house were detained and treated in the same manner. Although Yang contends the detention went on for several hours, there is no hard and fast time limit rule. ***State v. Gruen***, 218 Wis. 2d 581, 590, 582 N.W.2d 728 (Ct. App. 1998). "'In assessing a detention for purposes of determining whether it was too long in duration, a court must consider "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it is necessary to detain" the suspect. In making this assessment, courts "should not indulge in unrealistic

[7] The trial court found that it was uncertain whether the victim was shown Yang's driver's license.

second-guessing."'" ***Id.*** at 590-91, quoting ***State v. Wilkens***, 159 Wis. 2d 618, 625-26, 465 N.W.2d 206 (Ct. App. 1990). Here officers were detaining the occupants of the house while other officers interviewed the assault victims at the hospital. There is no viable claim that the detention was so long that it transformed the detention into an arrest before Yang's self-identification or formal arrest.

¶16 Inquiry about Yang's identification as Winkle could be considered "administrative routine questioning" and not the equivalent of express questioning. ***State v. Cunningham***, 144 Wis. 2d 272, 279, 423 N.W.2d 862 (1988). However, because the police knew the victim identified the assailant as Winkle, a question posed directly to Yang may fall into that category of inquiry that the police should know is reasonably likely to evoke an incriminating response from a suspect and thus become the equivalent of interrogation. *See* ***id.*** at 277. We cannot conclude that a motion to suppress the self-identification completely lacked merit.

¶17 Thus, we consider whether Yang was prejudiced by trial counsel's failure to file a motion to suppress his admission that he is Winkle. First, the police had other ways of identifying Yang as Winkle. Three people identified Yang as Winkle at trial. Second, the theory of defense was that the victim was lying about the type of conduct that occurred. The defense theory accepted that Yang was the person in the bedroom with the victim. As trial counsel assessed, misidentification was not a viable theory of defense in light of the number of

people that saw Yang with the victim.[8] Yang was not prejudiced by the failure to pursue suppression under ***Miranda***.

¶18 Yang maintains that the victim was shown his driver's license and that a singular photo display is an unduly suggestive identification procedure. He faults trial counsel for not "flushing these assertions out at a suppression hearing." To be clear, a motion challenging the victim's identification was filed and denied. Yang does not argue error in the trial court's ruling that Yang had not met his initial burden of proving that the photo identification was impermissibly suggestive. Rather, he contends trial counsel failed to investigate and establish that the victim was shown Yang's driver's license and the falsity of the victim's testimony that she was shown a packet of pictures from which she identified Yang.

¶19 We turn directly to the prejudice prong of the ineffective assistance analysis. Accepting Yang's proposition that the victim was shown his driver's license and that such a single photo identification procedure was unduly suggestive under the circumstances, we conclude Yang was not prejudiced by counsel's conduct. A successful motion would merely have resulted in suppression of the victim's out-of-court and perhaps in-court identifications. *See* ***State v. Dubose***, 2005 WI 126, ¶18, 285 Wis. 2d 143, 699 N.W.2d 582 (the due process right of criminal suspects to be free from confrontations that are unnecessarily suggestive is enforceable by exclusion at trial of evidence of the constitutionally invalid identification). Even if the victim's photo identification of Yang was suppressed, she could still identify her assailant as a man called Winkle.

[8] Trial counsel testified that there were many people at the party who Yang wanted to present as witnesses that would have taken the position that Yang went into the bedroom with the victim.

Other witnesses identified Yang as being in the bedroom with the victim and as the person known as Winkle. Further, a stipulation was read to the jury that the victim was just shown a single picture and that the picture was of Thao, not Yang. By the stipulation Yang was able to establish that the victim was lying about the initial identification made of Yang. It was a significant point of impeachment which could not have been made if the identification evidence was suppressed. Yang's closing argument used that point to demonstrate that the victim was lying about certain things. That strategy was in part successful since Yang was acquitted on two counts. Yang was not prejudiced by trial counsel's failure to pursue suppression of the victim's photo identification evidence.

¶20 Yang next argues that the criminal complaint included knowingly false information because it states that the victim picked Yang out of photo array and that was stipulated to not be true. He claims trial counsel should have filed a motion for a ***Franks-Mann***[9] hearing and dismissal of the complaint for a failure to establish probable cause. The trial court found that this claim fails on its face. We agree. The criminal complaint does not allege that the victim picked Yang's photo from an array. It alleges that the victim identified Yang at a preliminary hearing held before the first criminal complaint against Yang was dismissed. The complaint cannot be attacked because it omitted that the victim may have testified falsely at that preliminary hearing about picking Yang's picture from photo array.

[9] ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978) (where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, a hearing should be held to determine the falsity and whether the affidavit continues to establish probable cause with the offending information excised); ***State v. Mann***, 123 Wis. 2d 375, 385-86, 367 N.W.2d 209 (1985) (***Franks*** permits an attack on a criminal complaint where there has been an omission of critical material where inclusion is necessary for an impartial judge to fairly determine probable cause).

That is a credibility question which is not tested by the complaint. It was not deficient performance to pursue a meritless ***Franks-Mann*** motion. "It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance." ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

¶21 Yang also argues that trial counsel should not have advised him to waive his preliminary hearing on the second filed complaint because of the falsity of the victim's identification. However, at the time of the preliminary hearing on the second complaint, it was not known to counsel that the victim's identification testimony was false. That information came to light much later. Further, as the trial court explained, Yang mistakenly believes that the preliminary hearing tests the sufficiency of the complaint. There is no basis to conclude that trial counsel was ineffective with respect to Yang's waiver of the preliminary hearing.

¶22 The final claim is that trial counsel should have objected at trial to evidence that Thao sexually assaulted the victim's friend on the same evening in a car outside the house. Yang claims there was insufficient evidence to support his conviction and thus, the jury must have relied on the fact that his friend Thao was convicted of a sexual assault on the same evening.

¶23 Yang and Thao were not tried together for the sexual assaults that occurred the same night at the same place. Yang's reliance on joinder principles is misplaced. Moreover, Yang grossly misrepresents the record when he asserts that the victim's friend's testimony "consisted of her assault." There was only one minor reference in that girl's testimony to the fact that she was questioned by officers that evening about an assault on her. The only other reference to Thao's assault was from a police officer who indicated that a number of officers were

involved because two assaults were reported. It was clarified for the jury that Thao was the person accused of the second assault. The jury did not hear one detail of the other assault. Thao's involvement in the other assault that evening was not mentioned in closing argument. There was no possibility that the limited mention of the other assault contributed to Yang's conviction. Yang was not prejudiced by trial counsel's failure to object. We conclude that Yang was not denied the effective assistance of trial counsel.

*By the Court.*—Judgment and order affirmed.

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