

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 20, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2006AP907-CR

Cir. Ct. No. 2004CF3042

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYRONE KIRPATRICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: ELSA A. LAMELAS and JOHN A. FRANKE,¹ Judges. *Affirmed.*

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

¹ The Honorable John A. Franke presided over this matter through trial and the judgment of conviction. The Honorable Elsa A. Lamelas was assigned to this matter on March 16, 2006, and presided over Kirpatrick's postconviction motion.

¶1 KESSLER, J. Tyrone Kirpatrick appeals from a judgment convicting him of two armed robberies, from: (1) a pretrial order denying his motion to sever; and (2) an order denying his postconviction motion to vacate judgment and for a new trial because trial counsel's failure to move to suppress the lineup identification constituted ineffective assistance of counsel.

¶2 Because we conclude that the trial court did not erroneously exercise its discretion in denying Kirpatrick's motion to sever and further determine that the lineup identification was proper, thereby constituting no ineffective assistance of counsel, we affirm.

BACKGROUND

¶3 Kirpatrick was charged with two counts of armed robbery with threat of force, in violation of WIS. STAT. § 943.32(2) (2003-04).² Count One involved a May 16, 2004, 7:45 p.m. armed robbery of JR News, an adult novelty store located at 831 North 27th Street in Milwaukee. Count Two involved a June 3, 2004, 5:30 p.m. armed robbery of an adult novelty store, Waterfront Video, located at 225 North Water Street in Milwaukee. Both stores were located just off of Wisconsin Avenue, a major thoroughfare in Milwaukee. During trial, evidence was presented of a third robbery, that also took place at JR News, at approximately 9:30 a.m. on May 27, 2004, but which was uncharged and involved a different clerk.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Count One

¶4 During the May 16, 2004 robbery, the robber forced JR News sales clerk, Monta Hughes, to lay face down on the floor while the robber attempted to open the cash register. When the robber could not open the register, he put the revolver to Hughes's head, demanding instructions from Hughes on how to open it. After Hughes gave instructions, and after taking the cash from the register, the robber forced Hughes to the back of the store and into the basement. The robber then fled the store. Hughes contacted police. Hughes identified the robber as a light-skinned African-American male, in his late twenties or early thirties, with a medium build, approximately six feet, with facial hair, wearing a dark-colored, hooded sweatshirt and carrying a revolver.

Count 2

¶5 Waterfront Video sales clerk, Latrenda Dear, was working alone on June 3, 2004, when a robber entered the store, pulled a hood up as he came through the door, and placed a revolver on the counter, saying "you know what to do." Upon Dear answering "you want the money," the robber said "yeah" and Dear opened the register and gave the robber approximately \$200. Dear then contacted police and identified the robber as a light-skinned African-American male, between twenty-five and twenty-seven years of age, approximately six feet, with a mustache and beard, wearing a dark, hooded sweatshirt with red lettering and armed with a silver revolver with a brown handle.

Uncharged robbery

¶6 After the May 27, 2004 robbery of JR News, the clerk, Richard Ruechel, told police that the robber, after taking the money from the cash register,

patted him down, took his wallet from his pants pocket and the police notification button from his shirt pocket, and then forced him to go down to the basement. Ruechel described the robber as a light-skinned African-American male, six feet-five inches tall, slight build, mid- to late-twenties, 175 pounds, wearing a mask, a black, hooded sweatshirt with red lettering on it and armed with a silver revolver.

Police investigation of the robberies

¶7 In addition to interviewing the clerks, police recovered the video surveillance tapes from all three robberies. From the tapes, police were able to obtain still photos of the robber. One of the still photos from the May 16 robbery was used to create a wanted poster. After the May 27 uncharged robbery, police recovered a fingerprint from the door of the store which police identified as belonging to Kirpatrick.

¶8 During its investigation, the Milwaukee police department showed Hughes five photo arrays. Each photo array consisted of six photos. Kirpatrick's photo was included in only the fifth array. Hughes was unable to identify the robber from any of the arrays and after viewing the fifth photo array on June 5, 2004, Hughes asked to be allowed to view a lineup.

¶9 Based on tips which led police to compare a fingerprint from a traffic citation issued to an Antoine Lewis (an alias of Kirpatrick's) to the fingerprint found at JR News after the May 27 robbery, police interviewed Kirpatrick on June 6, 2004. After being read his *Miranda*³ rights, police showed

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

Kirpatrick the wanted poster and asked him if it was a picture of him. Kirpatrick nodded affirmatively, but refused to sign a statement to that effect.

¶10 Both Hughes and Dear were present for the lineup on June 7, 2004. They did not talk with one another, and were separated from each other's view by a divider. Both Hughes and Dear separately identified Kirpatrick as the person who robbed them. The record does not include whether Kuechel, the clerk from the May 27 robbery, was asked to review any photos or a lineup; this may be because the robber during the May 27th robbery of JR News was masked.

Judicial proceedings

¶11 On June 9, 2004, a criminal complaint was filed and Kirpatrick made his initial appearance. On June 16, 2004, Kirpatrick waived his right to a preliminary hearing and an information was filed containing the two counts charged in the complaint. Kirpatrick moved to sever the two counts and a hearing was held on the motion. The trial court ruled that under the three-part test established by *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), and in accordance with *State v. Speer*, 176 Wis. 2d 1101, 501 N.W.2d 429 (1993), the evidence to be presented in support of each count was relevant to the other, and that the factual similarities alleged in both counts were sufficient to “rise[] to a level that meets the case law standards in terms of allowing the permissible inference; that is, that it’s more likely that this defendant is the [robber] because he committed a very similar [robbery]” under the identity exception of WIS. STAT. § 904.04(2). Finally, the trial court held that there was significant probative value in the evidence that outweighed any prejudice to Kirpatrick and, therefore, denied Kirpatrick’s motion. Kirpatrick filed a petition for interlocutory appeal which was denied.

¶12 Kirpatrick then filed a motion to suppress his statements and to suppress the identification derived as a result of his arrest in his home without a warrant and without probable cause. After a hearing on the motion, the trial court found that Kirpatrick had given consent for the arresting officers to enter his apartment and that the officers had probable cause to arrest Kirpatrick. Subsequently, the State moved for permission to introduce evidence at trial about the third, uncharged robbery. The trial court, using a *Sullivan* analysis, concluded that this evidence met an exception in WIS. STAT. § 904.04(2) and was admissible other acts evidence.

¶13 During the trial, both Hughes and Dear made in-court identifications of Kirpatrick as the robber in the May 16 and June 3 robberies, respectively. One of the arresting police officers testified at trial that Kirpatrick's apartment, where the officers found and arrested him, was "maybe three or four blocks" from JR News.

¶14 A jury returned verdicts of guilty on both counts and judgments of conviction were entered. Kirpatrick was sentenced to concurrent sentences of twelve years of initial confinement and ten years of extended supervision with 398 days sentence credit for time served.

¶15 In a postconviction motion to vacate judgment and for a new trial Kirpatrick claimed that his trial counsel had been ineffective by failing to move to suppress Hughes's identification of Kirpatrick because the police procedures used were impermissibly suggestive. The trial court denied the motion without a hearing. Kirpatrick appealed. Additional facts will be provided as needed.

DISCUSSION

1. *Joinder and motion to sever*

¶16 Joinder is governed by WIS. STAT. § 971.12.⁴ We review questions of statutory interpretation *de novo*. See *State v. Locke*, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). Joinder of crimes is appropriate “if the crimes charged ... are of the same or similar character.” WIS. STAT. § 971.12(1). For crimes to be of “the same or similar character,” they “must be [of] the same type of offenses occurring over a relatively short period of time and the evidence as to each must overlap.” *State v. Hamm*, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). Courts have varied in what may constitute a “relatively short period of time.” See, e.g., *Locke*, 177 Wis. 2d at 596 (incidents occurring two years apart

⁴ WISCONSIN STAT. § 971.12 states, in pertinent part:

(1) JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan. When a misdemeanor is joined with a felony, the trial shall be in the court with jurisdiction to try the felony.

....

(3) RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.

occurred “over a relatively short period of time”); *Hamm*, 146 Wis. 2d at 138 (two-year interval between incidents constitutes “a relatively short period of time”); *Francis v. State*, 86 Wis. 2d 554, 561, 273 N.W.2d 310 (1979) (incidents thirty-five days apart satisfy “close in time” requirement). In determining whether “the evidence as to each overlaps,” courts have analyzed this question by employing the Wisconsin Supreme Court’s three-step other acts analysis as set forth in *Sullivan. State v. Gray*, 225 Wis. 2d 39, 49-50, 590 N.W.2d 918 (1999); *see also* WIS. STAT. § 904.04(2).⁵

¶17 To make a determination as to admissibility, the trial court must employ the *Sullivan* three-step analytical framework for other acts evidence. *Gray*, 225 Wis. 2d at 49-50.

⁵ WISCONSIN STAT. § 904.04 states, in relevant part:

Character evidence not admissible to prove conduct; exceptions; other crimes.

....

(2) OTHER CRIMES, WRONGS, OR ACTS. (a) Except as provided in par. (b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(b) In a criminal proceeding alleging a violation of s. 940.225 (1) or 948.02 (1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225 (1) or 948.02 (1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person’s character in order to show that the person acted in conformity therewith.

(1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, *identity*, or absence of mistake or accident?

(2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.

(3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *See* Wis. Stat. § (Rule) 904.03.

Gray, 225 Wis. 2d at 49-50 (citing *Sullivan*, 216 Wis. 2d at 772-73) (internal reference omitted and emphasis added).

¶18 If the other acts evidence is sought to be admitted under the identity exception to WIS. STAT. § 904.04(2), the Wisconsin Supreme Court described the standard for courts to use in evaluating such evidence in *State v. Kuntz*, 160 Wis. 2d 722, 746-47, 467 N.W.2d 531 (1991).

Other acts evidence is admissible to show identity if the other acts evidence has “such a concurrence of common features and so many points of similarity with the crime charged that it ‘can reasonably be said that the other acts and the present act constitute the imprint of the defendant.’” “The threshold measure for similarity with regard to identity is nearness of time, place, and circumstance of the other act to the crime alleged. Whether there is a concurrence of common features is generally left to the sound discretion of the trial courts.”

Gray, 225 Wis. 2d at 51 (citations omitted).

¶19 However, if after analysis of WIS. STAT. § 971.12 and application of the *Sullivan* test under WIS. STAT. § 904.04(2), initial joinder is proper, a motion to sever may nonetheless be granted if a trial court determines that “prejudice would result from a trial on the joined offenses.” *Locke*, 177 Wis. 2d at 597. In making this determination, the trial court must “weigh this potential prejudice against the interest of the public in conducting a trial on the multiple counts.” *Id.* We will reverse a trial court’s decision regarding severance only upon a determination that the trial court erroneously exercised its discretion. *Id.*; see also *State v. Bettinger*, 100 Wis. 2d 691, 303 N.W.2d 585, opinion amended on other grounds by, 305 N.W.2d 57 (1981).

[T]he trial court must determine what, if any, prejudice would result due to a trial on the joined charges. The court must then weigh this potential prejudice against the interests of the public in conducting a trial on the multiple counts. This balancing of competing interests involves an exercise of discretion and a trial court’s determination will not be disturbed on appeal in the absence of an abuse of that discretion.

Bettinger, 100 Wis. 2d at 696 (citations omitted).

¶20 A trial court erroneously exercises its discretion if it applies an incorrect interpretation of the law to an undisputed set of facts. *State v. Oakley*, 2000 WI 37, ¶27, 234 Wis. 2d 528, 609 N.W.2d 786. We will not find that a trial court has erroneously exercised its discretion unless “the defendant can establish that failure to sever the counts caused ‘substantial prejudice’ to” the defendant. *State v. Hoffman*, 106 Wis. 2d 185, 209, 316 N.W.2d 143 (Ct. App. 1982).

¶21 In this case, the trial court conducted the *Sullivan* three-step analysis and found that under the identity exception of WIS. STAT. § 904.04(2), joinder remained proper because the same evidence would be admissible at trial for either

count; therefore, Kirpatrick would not be substantially prejudiced by having the counts tried together.

¶22 Kirpatrick first argues on appeal that his theory of defense was not that the offenses did not occur, but rather that he did not commit them. Consequently, Kirpatrick agrees that his defense leads to the trial court's correct conclusion that the only exception under WIS. STAT. § 904.04(2) applicable to this case is the permissible purpose exception of proof of identity. Kirpatrick then argues that the trial court erred by allowing the two counts to be tried together because the court improperly determined that because the evidence the State proposed to introduce was admissible under *Sullivan*, the joining of the two counts could not be unfairly prejudicial to Kirpatrick.

¶23 The State responds that the counts were properly joined because the crimes “were of the ‘same or similar character’” since “[t]hey involved the ‘same type of offense’” and they “occurred within eighteen-days of one another.” Addressing the severance issue, the State notes that application of the analytical framework of *Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967), is proper⁶ and under *Whitty*, evidence of each of the armed robberies charged “would have been admissible to establish the identity of whomever committed the other armed robbery.” The State concludes that the “probative value of the evidence would not be outweighed by possible prejudice” because “[g]iven all of the evidence against Kirpatrick, he would have been convicted of both armed robberies charges even if the jury had considered each one separately and without evidence of the other.”

⁶ The supreme court, in *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), reaffirmed the analytical framework established in *Whitty*.

Lastly, the State further argues lack of prejudice because the trial court appropriately instructed the jury that:

Now, you must make a separate finding as to each count. You're certainly free to consider all of the evidence as you find it relates to a particular count, but each count is a separate charge and *you must consider each count separately and your verdict on one count must not affect your verdict on the other count.*

(Emphasis added.)

¶24 Finally, the State argues that any error in refusing to sever the counts was harmless because of the overwhelming evidence against Kirpatrick. The evidence included: the three surveillance videos; the wanted poster; Kirpatrick's fingerprint found at the scene of the May 27 robbery; Kirpatrick's admission to police about the fingerprint and the wanted poster; the nearly identical descriptions of the robber made by all three clerks; the in-person lineup where both Hughes and Dear independently identified Kirpatrick as the robber; the in-court identifications by Hughes and Dear of Kirpatrick as the person who robbed them; and the testimony of one of the arresting police officers at Kirpatrick's apartment, where they found and arrested him, was "maybe three or four blocks" from JR News.

¶25 We must first determine whether the other acts evidence was admitted for a permissible purpose. *Sullivan*, 216 Wis. 2d at 772. The trial court denied Kirpatrick's motion to sever because it concluded that the locations of the robberies, the hooded sweatshirt worn by the robber, the relative closeness in time of the robberies, the similarly-described firearm, the similar type of establishment (adult novelty store) robbed, and the physical descriptions of the robber provided by the victim store clerks established "that the level of similarity rises to a level that meets the case law standards in terms of allowing the permissible inference;

that is, that it's more likely that this defendant is the [robber] because he committed a very similar [robbery]." Based on the record, we conclude that the trial court did not erroneously exercise its discretion when it held that the "overlapping evidence" met the identity exception of WIS. STAT. § 904.04(2).

¶26 Under the relevance prong of the *Sullivan* framework, we must determine first "whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action," and second, "whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence." *Id.*, 216 Wis. 2d at 772. "The measure of probative value in assessing relevance is the similarity between the charged offense and the other act." *Gray*, 225 Wis. 2d at 58. "The stronger the similarity between the other acts and the charged offense, the greater will be the probability that the like result was not repeated by mere chance or coincidence." *Id.* (citation and internal quotation marks omitted).

¶27 The trial court found several significant similarities between the two crimes charged and the uncharged third crime.⁷ The description of the robber in all three instances was very similar. The two stores that were robbed were engaged in a similar business enterprise. Both stores were located within a few blocks of the same major Milwaukee thoroughfare. The two charged crimes both occurred in the evening. Both crimes occurred within a couple of weeks of one another. We conclude that the trial court did not erroneously exercise its

⁷ Admission of the uncharged crime as other acts evidence is not being challenged on this appeal.

discretion when it determined that the evidence met the relevancy test of *Sullivan*. The high degree of similarity as to robber description, dates of offense, location, weapon, and nature of the establishment robbed easily satisfy the relevancy requirement of *Sullivan*.

¶28 Finally, we must determine whether the probative value of the evidence of each crime would be outweighed by unfair prejudice in defense against the other crime. See WIS. STAT. § 904.03; *Gray*, 225 Wis. 2d at 51. The trial court discussed the risk analysis and concluded:

The probative value comes from the inference that it is more likely that this defendant committed the [robbery] because he committed a very similar [robbery]. The danger of unfair prejudice comes from the risk that the jury will conclude that it's more likely that the defendant is the burglar because he simply committed another [robbery] and, therefore is – a [robber] and has the character of a burglar and the propensity to commit burglaries generally.

I believe that there's very significant probative value here. I find that the danger of unfair prejudice is not substantially – does not substantially exceed or outweigh the probative value here. So I find that under the *Sullivan* analysis the evidence is admissible, and the motion to sever based on unfair prejudice is denied.

¶29 Because the trial court applied the proper legal standard and described its reasoning on the record, the trial court properly exercised its discretion when it found that, under the *Sullivan* framework, the “overlapping evidence” was admissible.

2. *Identification procedures*

¶30 Kirpatrick next argues that his due process rights were violated by law enforcement procedures which were “impermissibly” and “unnecessarily suggestive.” Because his trial counsel did not raise this issue before or during

trial, Kirpatrick further argues that his trial counsel was ineffective for not moving to suppress Hughes's identification of him on the grounds that Kirpatrick was the only person in the lineup that had also been in one of the photo arrays Hughes saw during the time between the May 16 robbery and the June 7 lineup.

¶31 The State argues that because the identification evidence was admissible, the trial court properly denied Kirpatrick's postconviction motion.

¶32 "A criminal defendant is denied due process when identification evidence admitted at trial stems from a pretrial police procedure that is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *State v. Benton*, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923 (citation omitted). When we review "a trial court's determination whether a pretrial identification should be suppressed, we apply the same rules as the trial court." *Id.* The issue of whether the fact that an individual's photo and his appearance in a subsequent lineup as the sole "repeat" taints the subsequent lineup identification is a legal question that we review *de novo*. *Id.* (citing *State v. Eason*, 2000 WI App 73, ¶3, 234 Wis. 2d 396, 399, 610 N.W.2d 208, *rev'd on other grounds*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625).

¶33 The Wisconsin Supreme Court, in *Powell v. State*, 86 Wis. 2d 51, 271 N.W.2d 610 (1978), set forth a two-part analytical framework for determining the admissibility of pretrial identification evidence. *Id.* at 65. "First, the court must determine whether the identification procedure was impermissibly suggestive." *Id.* If it finds that the procedures were impermissibly suggestive, the court must then "decide whether under the totality of the circumstances the out-of-court identification was reliable, despite the suggestiveness of the procedures." *Id.*

As to the first part, the defendant has the burden. *State v. Mosley*, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981). “If this burden is not met, no further inquiry is necessary. If it is met, however, the burden shifts to the [S]tate to show that ... the identification was nonetheless reliable under the ‘totality of the circumstances.’” *Id.*

¶34 The Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972), held that “unnecessary suggestiveness alone does not require the exclusion of the evidence. The overriding question is, ‘whether under the “totality of the circumstances” the identification was reliable even though the confrontation procedure was suggestive.” *Powell*, 86 Wis. 2d at 64 (quoting *Biggers*, 409 U.S. at 199). The Wisconsin Supreme Court, in specifically noting that it has followed the *Biggers* approach, stated: “[T]he issue to be decided is not so much a matter of suggestiveness as it is ‘whether, under the totality of the circumstances, the identification was reliable.’” *Powell*, 86 Wis. 2d at 65 (citations and one set of quotation marks omitted). While the Wisconsin Supreme Court recently rejected this test in circumstances relating to show-up identifications, see *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, the court did not explicitly extend its holding in *Dubose* to encompass photographic or physical lineups. *Id.*, ¶33. Consequently, *Biggers* and *Powell* remain the measure for determining admissibility of out-of-court identifications which are not the result of a show-up identification procedure. See *Dubose*, 285 Wis. 2d 143, ¶33.

¶35 Suggestiveness in the procedures concerning photographic arrays may arise from: (1) “the manner in which the photos are presented or displayed;” (2) “the words or actions of the law enforcement official overseeing the viewing;” or (3) “some aspect of the photographs themselves.” *Mosley*, 102 Wis. 2d at 652.

¶36 Police presented five photo arrays, of six individuals each, to Hughes over the course of two weeks, the final display on June 5. Kirpatrick was not included in the first four sets of photo arrays because he was not a suspect at that time. Copies of these photo arrays (as well as of the lineup) are in the record and demonstrate that all of the men meet the general description of the robber Hughes gave to police immediately after the robbery. Kirpatrick does not argue that the police officers who showed Hughes the photo arrays in any way attempted to influence Hughes to choose one of the photographs. After viewing the final photo array, Hughes told police that he would prefer to make the identification from a lineup. The record does not establish that law enforcement used suggestive procedures, under *Mosley*, in the method or manner of presenting the photo arrays.

¶37 Through leads developed by police from informants, Kirpatrick was identified as one of the possible robbers. He was located and arrested on June 6. On June 7, both Hughes and Dear were brought in to view the lineup. During the lineup, police had both Kirpatrick and the other participants wear similar clothes, asked all of them equally to “step to the center of the room face forward” and do quarter turns to ensure that the victims were able to view them all from a number of angles. Police instructed both Hughes and Dear that “they didn’t have to feel obligated to pick anyone out.” A divider separated Hughes and Dear during the entire lineup procedure. Police cautioned them to “not [] talk to each other about what they see” or “to make any outward suggestions or identifications.” Although Kirpatrick was the only individual included in both the June 5 photo array and in the June 7 lineup, the trial court noted, after reviewing the photos of each of the arrays in the record, that the lineup had “a scrupulous similarity between the physical appearance of these persons and consistency with the description given by the victims of the armed robberies.” We agree.

¶38 The trial court, in its response to Kirpatrick's postconviction motion, noted:

Given the number of photographs that Hughes viewed, it is unlikely that he would be able to recall the images of all 18⁸ men. Even if he remembered defendant's picture from one of the photo arrays, there could not but have been some degree of uncertainty regarding whether any of the other 18 were in the lineup. Therefore, even if he recognized Kirpatrick in the lineup, there would have been some degree of uncertainty as to whether others whose photographs he had been shown might also be in the lineup. Moreover, Hughes had no way of knowing what police were thinking or knew about Kirpatrick. Again, if Hughes remembered seeing Kirpatrick's picture, he could just have easily concluded that Kirpatrick was a filler, given that Hughes had failed to identify him earlier.

(Footnote added.)

¶39 The record does not establish that the manner in which Kirpatrick's identity was displayed was impermissibly suggestive. Kirpatrick's photo was only one of thirty which were shown to Hughes over approximately two weeks. All of the individuals in the arrays were similar in appearance. The lineup procedures demonstrate a strong attempt to have all four individuals be as similar in appearance as possible. Nothing in the manner in which the police conducted the lineup, including their instructions to Hughes and Dear, establish any attempt to influence Hughes into identifying Kirpatrick as the JR News robber. There is no evidence that Hughes recognized Kirpatrick from the earlier photo array. If he had, it is just as plausible that he would have considered Kirpatrick a "filler" because he had not picked Kirpatrick from the photo array. We conclude that the

⁸ The trial court may have made an error as to the total number of photographs displayed. Our count from the record discloses thirty photographs. The total number is not material to our decision.

record does not establish that the identification procedures used by law enforcement were impermissibly suggestive.

¶40 Because we conclude that the photographic/lineup identification procedures were not impermissibly suggestive, we do not need to examine whether the identification provided “was otherwise reliable under the totality of the circumstances.” *Powell*, 86 Wis. 2d at 68. We affirm the trial court’s conclusion that the photographic/lineup identification by Hughes was admissible and did not violate Kirpatrick’s due process rights.

3. *Assistance of counsel*

¶41 Kirpatrick argues that his trial counsel was ineffective for not moving to suppress Hughes’s identification of Kirpatrick from the lineup due to the procedures used being “impermissibly and unnecessarily suggestive.” The two-part test for determining ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984), requires a defendant to prove both that counsel’s performance was deficient and that the deficient performance was prejudicial. *Id.* at 687; *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). The defendant must prove both in order to be entitled to relief; accordingly, if the performance was not prejudicial, there is no need to find that it was deficient. *Strickland*, 466 U.S. at 697; *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To show prejudice, the defendant must demonstrate “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

¶42 Because we conclude that the identification procedures used in this case were proper, we also conclude that a motion to suppress identification using those procedures would have been properly denied. Therefore Kirpatrick was not prejudiced, and, accordingly, received no ineffective assistance of counsel because his trial counsel did not move to suppress Hughes's out-of-court identification of Kirpatrick.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.

