COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP938-CR **Cir. Ct. No. 2006CF282**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRUCE J. MORGAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

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

¶1 KESSLER, J. Bruce J. Morgan appeals from a judgment of conviction for forgery (uttering), contrary to WIS. STAT. § 943.38(2) (2005-06),[1] and from an order denying his motion for postconviction relief. Morgan argues that the trial court erred when it: (1) denied his motion to suppress identification evidence based on a photo array; (2) concluded there was sufficient evidence to support his conviction; and (3) denied his ineffective assistance of counsel claim. We reject his arguments and affirm the judgment and order.

BACKGROUND

¶2 Morgan was charged with one count of uttering a forged writing based on an incident that occurred on November 3, 2005, at a Walgreens store. Specifically, the State alleged that Morgan signed a credit card slip for a purchase made using the credit card of a woman named Nicole Mastaglio. A store clerk who conducted the transaction identified Morgan as the man who presented the credit card and signed the credit card slip, by picking Morgan's photograph from a photo array and by identifying him on a store videotape.

¶3 Prior to trial, Morgan moved to suppress the store clerk's identification that was based on the photo array. At the hearing on his motion, Morgan argued that the photo array was impermissibly suggestive because the photographs contained the dates that the photographs were taken.[2] The trial court denied the motion, concluding there was no evidence that the sixteen-year-old

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] Morgan also argued that the men in the photo array looked different from one another in terms of physical appearance, age and clothing. He does not raise that issue on appeal, so we do not discuss it.

store clerk who identified Morgan from the photo array was aware that the series of numbers at the bottom of each photograph included the date the photograph was taken.

¶4 Also prior to trial, the State moved to introduce other acts evidence that in 2003 Morgan was convicted of breaking a window of a car parked in Sheridan Park in Cudahy, taking a purse which contained a credit card, and using the credit card. The State asserted the act was similar to the instant case, because Mastaglio's purse that contained her credit card was also stolen after someone smashed the window of her vehicle, which was parked in Sheridan Park. For reasons discussed below, the trial court granted the motion.

¶5 At trial, Morgan's defense was that he was not the man who used Mastaglio's credit card at the Walgreens on November 3, 2005. Although Morgan did not testify, his sister testified that Morgan was with her on the day someone stole Mastaglio's purse and used her credit card at the Walgreens.

¶6 The jury found Morgan guilty. He was sentenced to five years of imprisonment, consisting of two years and six months of initial confinement and two years and six months of extended supervision.

¶7 Morgan filed a motion for postconviction relief, arguing that there was insufficient evidence to support his conviction and that his trial counsel was ineffective with respect to the State's motion to admit the other acts evidence. The trial court denied Morgan's motion without a hearing, for reasons discussed below. This appeal follows.

DISCUSSION

¶8 Morgan argues that the trial court erred when it: (1) denied his motion to suppress identification evidence based on a photo array; (2) concluded there was sufficient evidence to support his conviction; and (3) denied his ineffective assistance of counsel claim. We reject his arguments and affirm the judgment and order.

I. Motion to suppress identification based on a photo array.

¶9 Morgan argues the trial court erroneously denied his motion to suppress evidence that the store clerk identified him using a photo array. In reviewing a motion to suppress, we must accept the trial court's findings of fact unless they are clearly erroneous, but the correct application of constitutional principles to those facts presents a question of law, which we review *de novo*. ***State v. Drew***, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404. ***Drew*** recognized that "[o]ut-of-court identification procedures implicate the defendant's right to due process" and summarized the applicable standard for admissibility: "[T]he defendant has the burden to demonstrate the out-of-court photo identification was impermissibly suggestive; if the defendant meets this burden, the State has the burden to show that the identification is nonetheless reliable under the totality of the circumstances." ***Id.***, ¶¶12-13.

¶10 Here, Morgan argues that the photo array was impermissibly suggestive because the array "unduly and unnecessarily highlighted the date that the police took [each] photograph." Morgan explains that this was problematic in his case because the date of his photograph was three days after the alleged crime and was the only photograph in the photo array that was taken in 2005. He argues: "[T]his factor impermissibly suggests that [Morgan's] photograph was taken so

very shortly after the incident in question because he was in custody for that incident. None of the other photographs suggest such an inference. Such an inference is illegal."

¶11 At the motion hearing prior to trial, testimony was presented that the police department normally eliminated signs and placards from photographs used in photo arrays by placing a cutout over the photographs, but in this case the detective neglected to use a cutout. As a result, when the store clerk viewed the six photographs, each photograph showed a man with the words "Police Department Greendale, WI" below the man's face. Below those words was a series of numbers, some larger than others, that were separated by dots, dashes and spaces, such as: "0·4·0·7·0·5·0·7-·2-5--04" and "7·6· ·4-0-6·1·1-·0-6-05."[3]

¶12 The trial court denied Morgan's motion, rejecting Morgan's argument that the numbers on the photographs made the photo array impermissibly suggestive. It noted that the store clerk who testified at the motion hearing was not asked any questions concerning whether the numbers had any significance to him. The trial court explained its reasoning based on the motion hearing:

> [There was] not one question as to whether or not he understood what those numbers meant one way or the other. So how can I guess from that? As far as he knows, it's kind of like when you have a checking account you have … 30 numbers. Of those 30, 12 [numbers constitute] your account number. The other [numbers] are routing numbers for the federal reserve banks. That kind of thing.

[3] These two examples are presented as they appeared in the actual photographs, copies of which were shown to the trial court and included in the appellate record. The second example appeared at the bottom of Morgan's photograph.

> To an individual who doesn't know what this stuff all means, you know, I can't guess what he thought about that because I never heard any testimony about it.
>
> ….
>
> Obviously, what we have here is we have a young guy who is not overly sophisticated in how he did things or what he did.

These findings are not clearly erroneous.[4]

¶13 Moreover, on appeal, Morgan does not appear to challenge the trial court's finding that there was no evidence the store clerk actually knew the significance of the numbers on the photographs. Rather, he argues, without citation to authority, that the trial court and this court should not consider whether the photographs would have been suggestive to the individual who actually viewed them, but instead must decide whether they were objectively suggestive. Given Morgan's lack of citation in support of this assertion, we need not address this argument. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980) (We need not address arguments unsupported by citation to authority.). Nonetheless, we conclude that even looking at the photo array without consideration of who ultimately viewed it, Morgan has failed to meet his burden of proving that the photographs were impermissibly suggestive.

¶14 We are unconvinced that an objective person looking at the photographs in this case would immediately recognize that the final digits of each series of numbers represented a date. Even if one recognized a date, it does not

[4] Indeed, after the motion hearing, at trial, the store clerk was asked about the numbers and testified that he had not noticed the numbers were different from one another, did not know what the numbers meant, and had not based his identification of Morgan on the numbers in the photographs.

automatically follow that the viewer would believe the person in the most recent photograph had been arrested in connection with the crime at issue, as Morgan claims. In short, we agree with the trial court that Morgan has not met his "burden to demonstrate the out-of-court photo identification was impermissibly suggestive." *See* ***Drew***, 305 Wis. 2d 641, ¶13. Thus, the trial court did not err when it denied the suppression motion.

II. Sufficiency of the evidence.

¶15 Morgan argues that he is entitled to acquittal because there was insufficient evidence to convict him of the crime of forgery. On appeal, a conviction will not be reversed unless the evidence, viewed most favorably to the State and to the conviction, is so insufficient as a matter of law that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶16 In his postconviction motion, Morgan challenged the sufficiency of the evidence on grounds that he had not committed forgery because "the evidence at trial was that [Morgan] signed <u>his</u> <u>own</u> name to that credit card slip." (Emphasis in original.) He noted that at trial, the store clerk examined the credit card receipt (Exhibit 7) and testified as follows:

> Q. Now, is there a name of the person whose card that it is on Exhibit Number 7?
>
> A. Yes.
>
> Q. Can you tell me what it says?
>
> A. Nicole M. Mastaglio.
>
> ….
>
> Q. And is there a line for a person to sign there?

> A. Yes.
>
> Q. And did someone sign something?
>
> A. Yes.
>
> Q. Can you read it?
>
> A. It says "B" and then like an "M" and a swirl.
>
> Q. Who signed that?
>
> A. Bruce.
>
> Q. When you say "Bruce", is that the person you identified in court?
>
> A. Yes.

Morgan argued that this testimony proved he signed his own name to the credit card slip, and therefore the credit card slip could not "have been falsely made to appear to have been signed by another person," which is an element of the crime of uttering a forged writing. *See* WIS JI—CRIMINAL 1492.

¶17 The trial court rejected this argument, explaining that:

> the credit card receipt does not definitively establish that it is the defendant's signature. The only person who testified about the signature on the credit card slip was [the store clerk]. When asked to read the signature on the receipt, he stated that it "says 'B' and then like an 'M' and a swirl." The defendant argues that this testimony established that he signed his own name on the credit card slip because his first name starts with a "B" and his last name starts with an "M." This is certainly one inference that *could* be drawn from [the clerk's] testimony but it is not the only possible inference that could be made. In the court's view, the signature is largely indecipherable. There appears to be a single initial for the first name which arguably looks like a "B" but also resembles an "N" or an "M." or an "R." The last name is a scrawl which is completely illegible. Under these circumstances, a jury could reasonably conclude that the signature was falsely made to appear to have been signed by another person.

(Emphasis in original; record citation omitted).

¶18 We agree with the trial court's analysis.[5] Even if we set aside the trial court's own interpretation of the writing (which Morgan urges us to do), the only other testimony on the matter—that of the store clerk—was that the signature featured a "B" and an "M." The credit card receipt was also admitted into evidence. Based on the testimony and the receipt itself, the jury could have concluded that the signature said something other than Bruce Morgan, and was therefore falsely made. Like the trial court, we cannot say that the evidence, viewed most favorably to the State and to the conviction, was so insufficient as a matter of law that no reasonable trier of fact could have found guilt beyond a reasonable doubt. *See* ***Poellinger***, 153 Wis. 2d at 501. Therefore, we, like the trial court, reject Morgan's challenge to the sufficiency of the evidence.

III. Ineffective assistance of counsel.

¶19 Morgan argues his trial counsel was ineffective. A defendant claiming ineffective assistance of counsel must establish that: (1) the lawyer was deficient; and (2) the defendant was prejudiced as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To satisfy the prejudice prong of this two-prong test, the defendant must demonstrate that counsel's errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** If a reviewing court determines that a defendant has failed to satisfy either prong of the ***Strickland*** test, it need not consider the other one. ***Id.*** at 697.

[5] Having viewed the photocopy of the credit card receipt, we also agree with the trial court's description of the writing that appears.

¶20 In his postconviction motion, Morgan argued that his trial counsel provided ineffective assistance by failing to effectively argue against the admission of other acts evidence. Whether other acts evidence is admissible is determined by a three-part test that was established in ***State v. Sullivan***, 216 Wis. 2d 768, 771-72, 576 N.W.2d 30 (1998). ***State v. Muckerheide***, 2007 WI 5, ¶20, 298 Wis. 2d 553, 725 N.W.2d 930. ***Muckerheide*** summarized the applicable law:

> [A] court must first determine whether the other acts evidence is offered for an acceptable purpose under [WIS. STAT.] § 904.04(2). Second, a court must determine whether the other acts evidence is relevant under [WIS. STAT.] § 904.01. Third, a court must determine whether the probative value of the other acts evidence is 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.

Muckerheide, 298 Wis. 2d 553, ¶20 (citations omitted).

¶21 The State moved to admit other acts evidence that on November 16, 2003, Morgan broke the window of a car parked at Sheridan Park in Cudahy, took a purse from the car, and used a credit card that was in the purse to attempt to make various purchases. Morgan was ultimately convicted of forgery for the 2003 incident. The State sought to admit this evidence for purposes of establishing intent, plan or scheme, modus operandi, and absence of mistake or innocent conduct.

¶22 Trial counsel objected to the admission of the evidence on several grounds. However, the trial court granted the State's motion to introduce the other acts evidence for purposes of showing motive, plan and knowledge.

¶23 Morgan argued in his postconviction motion that trial counsel was deficient because counsel did not argue

> that the present crime was materially different than the prior crime. This, because Defendant signed the victim's name in the prior crime, and allegedly signed his own name in the present case. This is a marked dissimilarity. The two charged crimes are different crimes. The issue of similarity of the two crimes should have been resolved with an analysis of how Defendant presented the credit card slips. This defeats any showing of modus oprandi, plan and knowledge. The plans were different. If Defendant signed the card in the present situation, with the same plan, he would have utilized the cards similarly. He would have forged Nicole Mastaglio's signature in the present situation. Instead, he chose not to do so. Hence, the plan was different. Defense counsel failed to argue this material dissimilarity.

¶24 The trial court denied Morgan's postconviction motion, concluding that trial counsel did not provide ineffective assistance. The court explained:

> [Morgan's] ineffective assistance claim is premised upon his conclusion that the 2003 offense and the 2005 offense are materially dissimilar because [Morgan] signed the victim's name in the 2003 offense and his own name in the 2005 offense.… [However,] the evidence did not definitively establish that [Morgan] signed his own name in the 2005 offense; that was merely one inference that could have been drawn from the evidence. Even if trial counsel had made this argument, it would not have altered the court's ruling on the State's motion *in limine* to allow evidence of the 2003 conviction to be admitted at trial. These offenses were of such a similar nature (both involved purses taken after a car break in at the same location, taking of a credit card and making purchases) that whether the defendant signed the victim's name in one offense and his own name in another would not have been a significant distinction for purposes of the court's analysis in deciding to admit the 2003 conviction as other acts evidence under [WIS. STAT. § 904.04(2)].

¶25 On appeal, Morgan reiterates the arguments he presented to the trial court. He contends that "the evidence is overwhelming that [he] signed his own name on the credit card slip," and that "the two crimes are completely dissimilar, both factually and legally." In effect, Morgan is challenging the trial court's conclusion that the other acts evidence was relevant, the second inquiry in the

three-part test for other acts evidence. *See* ***Muckerheide***, 298 Wis. 2d 553, ¶20. He also asserts on two occasions that "[t]he danger of unfair prejudice, confusion of the issues, or misleading the jury far outweighs the probative value of the other acts evidence." We reject Morgan's argument, for the same reasons as the trial court.

¶26 Even if trial counsel had presented Morgan's argument, it would not have been successful. Contrary to Morgan's assertions, the two acts were remarkably similar. Regardless of whether Morgan signed his own name (which, contrary to Morgan's assertion, was not proven at trial), the acts were sufficiently similar to be relevant. They both involved thefts from purses from cars in the same location, and the subsequent use of the credit cards. Morgan has not developed his argument that the evidence failed the third prong of the other acts evidence test, and we decline to develop that issue for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (We generally do not consider arguments that are inadequately developed.). Suffice it to say, we conclude that the trial court did not erroneously exercise its discretion when it admitted the other acts evidence, and trial counsel's alleged deficiency was therefore not prejudicial. Thus, Morgan was not denied the effective assistance of counsel. *See* ***Strickland***, 466 U.S. at 687.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

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