COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3021-CR **Cir. Ct. No. 00-CF-253**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID G. HUUSKO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. David Huusko appeals a judgment convicting him of one count of armed robbery as a habitual offender, party to a crime. He also appeals an order denying his motion for postconviction relief. He argues that the trial court erroneously denied his defense counsel's motion to withdraw and testify on his behalf. Huusko also contends that the trial court erroneously allowed an

in-court identification by a store clerk and that defense counsel was ineffective. We affirm the judgment and order.

BACKGROUND

¶2 In May 2000, after getting high on crack cocaine, Huusko and a companion, Shea Mattice, decided to rob Golden Express, a convenience store in Eau Claire. Mattice, wearing a poncho and armed with a knife, robbed the store of $140 while Huusko drove the getaway car. The following night, Huusko and Mattice decided to rob another convenience store, the SuperAmerica. This time, Huusko, armed with a knife, entered the store, put a $5 bill on the counter and asked the clerk, Kathleen Field, for a pack of Marlboro cigarettes.

¶3 While the cash register was open for Field to make change, Huusko grabbed her wrist and asked for the rest of the money. Field gave the cash box to Huusko, who left the store with $266.69.

¶4 A surveillance camera recorded the holdup. The surveillance video showed a male with a white baseball cap and an inside-out sweatshirt committing the armed robbery at SuperAmerica. Mattice's roommate, Jacob Seig, later testified at trial that the sweatshirt and blond hair sticking out of the baseball cap of the individual in the video resembled Huusko's sweatshirt and hair.

¶5 Mattice was arrested for both armed robberies and gave officers a statement implicating himself and Huusko. Officers executed a search warrant for Huusko's apartment and recovered a knife in the kitchen sink matching the description Field provided. They also recovered a poncho matching the description given by Mattice and a crack pipe from Huusko's bedroom. In addition, they discovered a pack of Marlboro cigarettes in Huusko's car.

¶6 Huusko was charged with two counts of armed robbery, party to a crime. From July 1 through September 2000, Huusko was incarcerated in the same cellblock as another inmate, Marshall King. In September 2000, King met with Huusko's defense counsel, William Schembera. After their meeting, King signed an affidavit stating that on or about June 29, 2000, he had been in the same cellblock as Mattice, who told King that Huusko had no part in the robberies. The affidavit also stated that King and Mattice spoke a few days later, and Mattice told King that he was not going to tell the truth about Huusko's lack of involvement.

¶7 King later retracted this statement and was to be a witness for the State at trial. Before trial, Schembera moved to withdraw as defense counsel because he believed he would be a witness at trial as to the circumstances surrounding his conversation with King. Schembera wanted to testify to the effect that he told King to tell the truth. Huusko and the prosecutor had no objection. The court rejected Schembera's motion. The court reasoned that King's testimony would have little credibility because he had changed his story a number of times. Also, because the prosecutor offered to stipulate that Schembera told King to tell the truth in the affidavit, the court concluded that it probably would not be necessary for Schembera to testify. In addition, the court did not want the trial to be delayed.

¶8 At trial, King testified for the State. He stated that while he and Huusko were incarcerated in the same cellblock, Huusko initially denied participation in the robberies but later owned up to it. King also testified that Huusko asked him to say that Mattice had told King that Huusko was not involved in the robberies, and King agreed to do so. King testified further that when he and Schembera met, Schembera told King to tell only the truth.

¶9 King further testified that the information he gave to Schembera to put in the affidavit was derived from "a story" that he and Huusko had fabricated. The story was that King met with Mattice while in jail and Mattice told King that Huusko had no part in the robberies. King testified that he met with police officers a few months later and told them that the affidavit was true. However, because he feared a possible perjury charge, he now testified that the information in the affidavit was not true.

¶10 On cross-examination, King testified that Schembera told him that he wanted nothing but the truth, did not want to put words in his mouth and did not want King to lie. King admitted that he told Schembera that the affidavit was the truth. King also testified that he had lied to officers a number of times.

¶11 The jury acquitted Huusko of the Golden Express robbery but found him guilty of the SuperAmerica robbery. The trial court denied Huusko's postconviction motion. Huusko's appeal follows.

DISCUSSION

A. Withdrawal of counsel

¶12 Huusko argues that the trial court erroneously denied his pretrial motion for his defense counsel to withdraw and testify on his behalf. Huusko contends that due to the ethical prohibition against an attorney testifying, the court should not have denied defense counsel's motion to withdraw.

¶13 The issue whether an attorney should testify at trial in which he or she is an advocate is addressed to trial court discretion. ***State v. Foy***, 206 Wis. 2d 629, 642, 557 N.W.2d 494 (Ct. App. 1996). Although attorneys are competent to testify for their clients, there is an ethical prohibition against an attorney appearing

as an advocate at a trial in which he or she is likely to be a necessary witness. ***Id.*** at 642-43. "Because of ethical concerns, courts should not usually permit an attorney who is an advocate in a trial to testify in that trial, especially where the value of the testimony is small or collateral to the ultimate issues." ***Id.*** at 643. The ethical rules contemplate a balancing between the interests of the client in continuing to be represented by the same attorney, against prejudice to the opposing party if the attorney acts in both roles. ***Id.*** at 646.

¶14 The record demonstrates that the trial court reasonably exercised its discretion. As the court noted, the prosecutor offered to stipulate that Schembera told King to tell the truth. Therefore, the issue on which Schembera offered to testify, that he told King to tell the truth, was not contested.

¶15 In any event, any error was harmless. An error is harmless if there is no reasonable possibility that the error contributed to the conviction. ***Id.*** at 648-49. A reasonable possibility is one that is sufficient to undermine confidence in the outcome of the proceeding. ***Id.*** at 649. We look to the totality of the record**.** ***Id.***

¶16 As it turned out, King admitted on the stand that Schembera told him to tell the truth. In this way, King testified to the very same information that Schembera wanted to proffer if he withdrew as Huusko's attorney and testified on Huusko's behalf.

¶17 We conclude that it is not reasonably possible that, had the jury heard Schembera's testimony, the outcome would have been different. First, the videotape of the robbery, the testimony of Field, Seig and Mattice, and the corroborating evidence discovered at Huusko's apartment, demonstrated Huusko's participation in the robbery at SuperAmerica. Also, the jury heard King testify

that Schembera told him to tell the truth. Finally, jail records show that King and Mattice were in the same cellblock from June 20 to June 30, 2000. King's affidavit stated that he spoke to Mattice on or about June 29 and "[a] few days later" when Mattice said he was not going to tell the truth at trial. Because records show that the two were not together when the second conversation allegedly took place, the jury could infer that the affidavit was false. As a result, we conclude that there is no reasonable possibility that the trial court's denial of Schembera's motion to withdraw contributed to the conviction.

B. In-court identification

¶18 Field observed Huusko during the robbery and provided officers a reasonably detailed description. At trial, she identified Huusko in court, to which defense counsel objected because there was no lineup comparison. The court overruled the objection and found that Field had identified Huusko as the person she saw in the store. Huusko argues that the trial court improperly allowed Field's in-court identification. We reject his argument.

¶19 On May 16, when Huusko was not a suspect and not yet in custody, Field was shown a photo lineup that did not contain Huusko's photo. She did not identify any individual. The detective's report stated that Field said that she could only identify a picture of the robber if he was wearing glasses and a hat. Because the police did not have a photo of Huusko wearing glasses and a hat, Field was never shown a second photo line-up.

¶20 Huusko makes several challenges to the in-court identification: that Fields said she was stunned at the time of the robbery, that she had only brief contact with the robber several months before the trial, and that she said that she could only identify the robber if he were wearing a hat and glasses. These

challenges go to the weight and credibility of the in-court identification, not its admissibility. ***State v. Myren***, 133 Wis. 2d 430, 440, 395 N.W.2d 818 (Ct. App. 1986). Although Huusko complains that he was seated next to defense counsel during Field's testimony, the mere fact that Huusko was seated at the defense table during the in-court identification fails to establish a due process violation. *See* ***Rodriguez v. Peters***, 63 F.3d 546, 557 (7th Cir. 1995).

¶21 Citing ***Neil v. Biggers***, 409 U.S. 188 (1972), Huusko argues that under the totality of the circumstances test, the in-court identification was improper. Huusko's reliance on ***Biggers*** is misplaced. ***Biggers*** involved an allegedly improper out-of-court identification procedure, followed by an allegedly tainted in-court identification.[1] Field's in-court identification of Huusko was based solely on her contact with him during the robbery, not any photo line-up. Because Huusko claims no out-of-court identification of Huusko, ***Biggers*** and ***Brown*** analyses are inapplicable.

C. Ineffective assistance of counsel

¶22 Huusko argues that he received ineffective assistance of counsel because his defense counsel failed to move to suppress Field's in-court identification of him. He also contends that defense counsel should have requested to voir dire Field. We reject this argument.

¶23 To demonstrate ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance

[1] Huusko also relies on ***State v. Brown***, 50 Wis. 2d 565, 185 N.W.2d 323 (1971), overruled by ***State v. Walker***, 154 Wis. 2d 158, 453 N.W.2d 127 (1990), which concerns an in-court identification tainted by illegality and does not apply.

prejudiced the defense. ***Strickland v. Washington,*** 207 Wis. 2d 258, 273 n.26, 558 N.W.2d 379 (1997). An attorney's failure to pursue a suppression motion is not ineffective when that motion would lack merit. ***State v. Wolverton***, 193 Wis. 2d 234, 264, 533 N.W.2d 167 (1997).

¶24 Huusko's claim of ineffective assistance of counsel is premised on the faulty notion that the in-court identification was inadmissible. Because the in-court identification was admissible, Huusko has not shown deficient performance or prejudice. Consequently, his ineffective assistance of counsel claim fails.

By the Court.—Judgment and order affirmed.

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