COURT OF APPEALS
DECISION
DATED AND FILED

June 5, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1756-CR **Cir. Ct. No. 00-CF-956**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY D. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Dykman, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Anthony Johnson appeals a judgment convicting him of being party to the crimes of burglary while armed with a dangerous weapon and two counts of armed robbery with use of force. He also appeals an order denying his motion for postconviction relief. Johnson claims that he was denied due process and effective assistance of counsel because neither his preliminary

hearing nor his trial attorney objected to an in-court identification as being overly suggestive, and that trial counsel also should have done more to impeach two witnesses. We affirm for the reasons discussed below.

BACKGROUND

¶2 Two men forced their way into an apartment and robbed the three occupants at gunpoint. One of the victims told police he recognized one of the suspects as a customer at the gas station where he worked, and was able to identify the suspect on the gas station's surveillance tape. When the police tracked down the suspect from the surveillance tape, he admitted his involvement in the robbery and named "Ant Man" as his accomplice.

¶3 Aware that Anthony Johnson had used the street name "Ant" in the past, the police put Johnson's picture in a photo array. They showed the array to two of the victims, who tentatively pointed out Johnson, but were unable to make a positive identification. Johnson was nonetheless charged, based on the other suspect's identification of him from the photo array.

¶4 At the preliminary hearing, Johnson was brought into the courtroom in shackles and prison garb past the one victim who had not previously been shown the photo array, Jesse Spohn. When Spohn was called to testify shortly thereafter, he identified Johnson, the only black man in the courtroom, as one of the perpetrators. Counsel offered no objection. Nor did successor counsel raise an objection or move to suppress at trial, when Spohn repeated his identification. The other two victims had left the state by the time of trial and could not be located. The other suspect, however, did testify and identified Johnson as his accomplice.

STANDARD OF REVIEW

¶5 Because counsel offered no contemporaneous objection to Spohn's identification of Johnson, either at the preliminary hearing or at trial, Johnson raises the issue of suggestive identification in the context of plain error or ineffective assistance of counsel. Johnson's complaints regarding the cross-examination of two of the State's witnesses likewise fall within the framework of ineffective-assistance-of-counsel claims.

¶6 A court may take notice of "plain errors affecting substantial rights although they were not brought to the attention of the judge." WIS. STAT. § 901.03(4) (2001-02).[1] To obtain relief under the plain error doctrine, a defendant must establish that a constitutional error occurred at trial and that the error was clear or obvious. ***State v. Frank***, 2002 WI App 31, ¶25, 250 Wis. 2d 95, 640 N.W.2d 198. The State then bears the burden of showing beyond a reasonable doubt that the error was harmless. ***State v. King***, 205 Wis. 2d 81, 93, 555 N.W.2d 189 (Ct. App. 1996).

¶7 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's findings about counsel's actions and the reasons for them, unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985); *see also* WIS. STAT. § 805.17(2). However, whether counsel's conduct violated the defendant's constitutional right to the effective

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

assistance of counsel is ultimately a legal determination, which this court decides *de novo*. ***Pitsch***, 124 Wis. 2d at 634.

¶8 The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland***, 466 U.S. at 687. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To satisfy the prejudice prong, the defendant must show that "counsel's errors were serious enough to render the resulting conviction unreliable." ***State v. Swinson***, 2003 WI App 45, ¶58, Nos. 02-0395-CR and 02-0396-CR. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Id.***

ANALYSIS

Identification

¶9 Wisconsin applies a two-part test to determine whether pretrial identification evidence is admissible or should be suppressed. The first question is whether the confrontation procedure was unnecessarily suggestive. If the defendant can show that it was, the burden shifts to the State to show that the identification was nonetheless reliable under the totality of the circumstances. ***State v. Kaelin***, 196 Wis. 2d 1, 9-10, 538 N.W.2d 538 (Ct. App. 1995).

¶10 A suggestive identification is one in which the suspect is shown to the witness under circumstances which suggest to the witness that those presenting the suspect believe him to be guilty, such as having the suspect handcuffed. *See* ***United States v. Wade***, 388 U.S. 218, 234 (1967) (citing Frankfurter, The Case of Sacco and Vanzetti 31-32). Factors to be considered in determining whether an identification procedure was unnecessarily suggestive include: the opportunity of the witness to view the suspect at the time of the crime; the witness's degree of attention; the accuracy of the witness's prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and the confrontation. ***Neil v. Biggers***, 409 U.S. 188, 199-200 (1972).

¶11 We agree with Johnson that the identification here was unnecessarily suggestive under the ***Neil*** factors. Spohn observed the suspect for less than a minute during the commission of the robbery, during which time Spohn admitted he was "stoned"; Spohn's initial description of the suspect as 5'6" to 5'7" varied by several inches from Johnson's actual height of 5'11"; Spohn's confidence in identifying Johnson was undermined by the fact that Johnson was handcuffed, dressed in prison garb, and was the only black man in the courtroom at the time of the confrontation; and four months had passed between the robbery and the identification.

¶12 We are not persuaded, however, that it is clear or obvious that the State would have failed in its burden to show that the identification was nonetheless reliable under the totality of the circumstances had the State been given the opportunity to do so in response to a suppression motion. First and foremost, Spohn's identification was corroborated by the identification of Johnson by the other suspect. While the other suspect might have had a motive to shift

blame from himself to another, there was no reasonable explanation given for why he would have falsely named Johnson as his accomplice once he confessed to his own involvement. In addition, the two other witnesses also tentatively picked Johnson out of photo arrays. Although they were not positive, those witnesses' identifications of Johnson closer to the time of the robbery add some weight to the reliability of Spohn's later identification. Therefore, we cannot conclude that the admission of Spohn's identification of Johnson at trial was plain error.

¶13 With regard to counsel's performance, Johnson's first attorney testified that he had not—and could not have, under existing local procedures—obtained the police reports or other discovery prior to the preliminary hearing. Consequently, the first attorney was not even aware at the time of the preliminary hearing that Spohn was identifying Johnson for the first time in court. Given the limited facts within counsel's knowledge, as well as the fact that any perceived improper identification could be later challenged by a suppression motion, we cannot conclude that Johnson's first attorney performed deficiently by failing to object to the identification at the preliminary hearing or to request an in-court lineup or other procedure.

¶14 In contrast, Johnson's second attorney did realize after obtaining discovery that there was a potential problem with Spohn's identification. The second attorney testified that the only reason she did not bring a suppression motion was because she was unaware that there was a legal basis for one. Instead, she attempted to bring to the jury's attention the length of time between the robbery and Spohn's identification, the relative brevity of the encounter, and the fact that Spohn was "stoned" at the time of the robbery.

¶15 Even assuming counsel's failure to attempt to suppress Spohn's identification constituted deficient performance, however, we are not convinced that Johnson was prejudiced by it. We again note that the other suspect identified Johnson as his accomplice, and that there was no reasonable explanation presented as to why the other suspect would falsely implicate Johnson after confessing his own involvement. We therefore cannot conclude that Johnson's second attorney provided ineffective assistance by failing to object to Spohn's identification at trial or not trying to suppress it.

Impeachment

¶16 Johnson also contends that his second attorney failed to elicit some prior inconsistent statements by Spohn and the other suspect regarding which of the two suspects had done what during the robbery, and whether any of the victims knew the suspect who testified against Johnson from prior drug dealings and another robbery. The transcripts show, however, that counsel spent a good deal of time attempting to impeach both witnesses with prior inconsistent statements regarding the sequence of events during the robbery. We are not persuaded that counsel's failure to ask other specific questions along the same lines fell outside reasonable professional norms. In addition, counsel had a strategic reason for failing to pursue whether Spohn or one of the other victims knew the other suspect from prior drug dealings or another robbery—namely, potential testimony from other witnesses that Johnson had also been involved in the prior robbery. Defense counsel obtained, and Johnson approved on the record, a stipulation that the State would not pursue additional charges against Johnson for the other robbery if counsel did not pursue that line of questioning. Again, we find no deficient performance and thus no denial of effective assistance of counsel.

By the Court.—Judgment and order affirmed.

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