COURT OF APPEALS DECISION DATED AND FILED

June 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2010AP1315-CR

Cir. Ct. No. 2006CF2227

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK KELLY DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN and RICHARD J. SANKOVITZ, Judges.[1] *Affirmed.*

[1] The Honorable Mel Flanagan presided over trial and entered the judgment of conviction. The Honorable Richard J. Sankovitz entered the order denying the defendant's postconviction motion. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

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

¶1 BRENNAN, J. Patrick Kelly Davis appeals from a judgment of conviction entered after a jury found him guilty of robbery by threat or use of force and from the trial court's order denying his postconviction motion. Davis asserts that he received ineffective assistance of trial counsel. In the alternative, he argues that he is entitled to a new trial in the interest of justice. We disagree and affirm.

BACKGROUND

¶2 In May 2006, the State charged Davis with armed robbery, alleging that he robbed the M&I Bank at 7600 West Layton Avenue on January 13, 2006. On the day of the robbery, Davis, wearing a winter coat, gloves and knit hat, waited in line at the bank for the next available teller. He approached teller Cheri LaChapelle and asked for gold dollars. After LaChapelle returned with the requested gold currency, he handed her a note demanding money. LaChapelle handed Davis several stacks of money, including some marked bills. Davis left, taking the note with him.

¶3 The robbery was captured on the bank's surveillance video. In the days following the robbery, the surveillance video was run on several local news channels, after which the police received an anonymous tip that Davis was the robber in the video.

¶4 During the trial, Davis maintained his innocence, claiming that at the time of the robbery he was at Big Bill's car lot buying a recreational vehicle ("RV"). Big Bill's employee Rosie Zollicoffer testified that she remembered Davis purchasing an RV the day of the robbery. However, Davis admitted during

his testimony that during the course of the sale he left to pick up his brother so that he could buy the RV in his brother's name.[2] The State's theory was that Davis committed the bank robbery during his run to pick up his brother.

¶5 At the close of evidence, but before the trial court turned the case over to the jury, the State amended the charge against Davis from armed robbery to robbery by threat or use of force.

¶6 Throughout the trial, the trial court gave the jury the opportunity to ask questions. Jurors would write down their questions, and the trial court and counsel would then discuss the questions in unrecorded sidebars. If the questions passed muster, the court would ask the witness the question and allow the parties to follow up.

¶7 The jury found Davis guilty of robbery by threat or use of force. The trial court sentenced Davis to four years of initial confinement and four years of extended supervision. Davis timely filed a Notice of Intent to Pursue Post-Conviction Relief and he was appointed postconviction counsel.

¶8 Postconviction counsel filed a no-merit report, which we rejected after receiving a response from Davis. Upon remand back to the trial court, Davis was appointed new counsel, and Davis filed another postconviction motion in the trial court. The trial court denied the motion without a hearing. Davis appeals.

[2] Davis testified that his driver's license had been suspended due to unpaid parking tickets, and therefore, he could not purchase the RV in his own name.

DISCUSSION

¶9 Davis asserts that he received ineffective assistance of trial counsel because counsel: (1) failed to object to certain hearsay statements made by Detective James Bruno; (2) failed to object to Detective Bruno's "expert testimony"; and (3) failed to introduce the Bill of Sale. He further argues that the cumulative effect of all of trial counsel's errors was highly prejudicial and therefore influential on the jury's verdict. In the alternative, he argues that he is entitled to a new trial in the interest of justice. We address each argument in turn.

I. Ineffective Assistance of Counsel

¶10 A defendant claiming ineffective assistance of counsel must establish that: (1) the lawyer was deficient; and (2) the defendant suffered prejudice as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because a defendant must show both deficient performance and prejudice, reviewing courts need not consider one prong if the defendant has failed to establish the other. ***Id.*** at 697.

¶11 To prove deficient performance, the defendant must point to specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "'Effective representation is not to be equated, as some accused believe, with a not-guilty verdict. But the representation must be equal to that which the ordinarily prudent lawyer, skilled and versed in criminal

law, would give to clients who had privately retained his [or her] services.'" ***State v. Felton***, 110 Wis. 2d 485, 500-01, 329 N.W.2d 161 (1983) (citation omitted).

¶12 To satisfy the prejudice aspect of ***Strickland***, the defendant must demonstrate that the lawyer's errors were sufficiently serious so as to deprive him or her of a fair trial and a reliable outcome, ***Johnson***, 153 Wis. 2d at 127, and "must show 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.***

¶13 We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***Johnson***, 153 Wis. 2d at 127. We will not reverse the trial court's factual findings unless they are clearly erroneous. ***Id.*** However, we review the two-pronged determination of trial counsel's performance independently as a question of law. ***Id.*** at 128.

A. Detective Bruno's Hearsay Testimony

¶14 Davis first contends that his trial counsel was ineffective for failing to object to certain statements testified to by Detective Bruno that Davis argues are hearsay: (1) Detective Bruno's reference to what "one person" and a "second individual" at Big Bill's said to him; and (2) Detective Bruno's testimony that the police received an anonymous call identifying Davis in the surveillance video of the robbery. Because Davis was not prejudiced by either statement, his trial counsel was not ineffective for failing to object. *See* ***Strickland***, 466 U.S. at 697.

1. Failure to object to Detective Bruno's reference to what "one person" and a "second individual" said to him.

¶15 First, Davis argues that his trial counsel was ineffective for failing to object to Detective Bruno's explanation about what "one person" and a "second individual" he encountered at Big Bill's said to him. Davis contends that the statements were hearsay and that their admission violated his right to confront the witnesses against him under the Sixth Amendment. *See* WIS. STAT. § 908.02 (hearsay is generally not admissible); ***Crawford v. Washington***, 541 U.S. 36, 68 (2004) (admission of improper hearsay evidence necessarily implicates a defendant's Sixth Amendment confrontation rights). We conclude that even if the statements were hearsay, Davis suffered no prejudice from their admission; therefore, his trial counsel was not ineffective. *See* ***Strickland***, 466 U.S. at 697.

¶16 Davis challenges the following excerpt from Detective Bruno's trial testimony:

> Q Did you ask the Big Bill's employees what type of coat or attire the mobile home buyers were wearing?
>
> A We did.
>
> ….
>
> Q To the first question, what did they tell you?
>
> A The people that I spoke to there?
>
> Q Yes.
>
> A The one person I spoke to that did the – that – the transaction and did the paperwork couldn't remember who the individuals were or what they had been wearing or how many there would have been.
>
> The second individual I spoke to couldn't make any identification or recall who had made the purchase.

¶17 Accepting as true Davis's assertion that Detective Bruno's testimony regarding what "one person" and a "second individual" said to him is hearsay, we conclude that the admission had no prejudicial influence on the jury's verdict. As correctly noted by the trial court, "[n]either statement strengthened the identification of Mr. Davis as the bank robber or contradicted Mr. Davis's alibi." The testimony was inconsequential. Ergo, trial counsel was not ineffective for failing to object.[3] *See* ***Strickland***, 466 U.S. at 697.

2. Failure to object on hearsay or Sixth Amendment grounds to Detective Bruno's testimony that a tipster contacted police identifying Davis.

¶18 Next, Davis argues that his trial counsel was ineffective for failing to object to Detective Bruno's testimony that a tipster called police and told them that Davis was the person featured in the surveillance video of the robbery shown on television. Because Davis cannot show admission of the statement was prejudicial to his case, we conclude that counsel was not ineffective. *See* ***id.***

¶19 As part of the preliminary instructions given to the jury before testimony started, the trial court explained that the parties had entered into one stipulation:

> [I]n this case there is one stipulation at this point, which is an agreement between the parties that these facts may be accepted by the jury as established by the evidence.

[3] Although Davis argues ineffective assistance of counsel, he also asks us to directly address his hearsay claim regarding Detective Bruno's testimony as to what "one person" and a "second individual" said to him. However, by failing to object to the testimony during trial, Davis waived his right to direct appeal, and we address the issue in the context of ineffective assistance of counsel. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31.

> During the course of the investigation in this case, the police received information regarding the defendant, Patrick Davis, as a possible suspect. That's the stipulation.

¶20 Despite hearing the parties' stipulation, the jury submitted a question, which the trial court described as "basically asking what evidence supported Mr. Davis as a suspect in January, why did [the police] start looking at Mr. Davis." In response to the jury's question, the trial court engaged in the following exchange with Detective Bruno:

> Q ….
>
> In January, why did you consider Mr. Davis a suspect?
>
> A On January 17th, we had run a – a film clip of the video that you just seen on the news channels, the Milwaukee news channels, and after the ten o'clock news had ended, we received a phone call that we were informed the individual caller said that the person that he had just seen on the news clip for the M&I Bank robbery was Patrick Davis and gave the address where he resided.

¶21 Davis's trial counsel did not object on either hearsay or Sixth Amendment grounds and failed to request a jury instruction limiting the jury's consideration of the testimony for the permissible purpose of explaining why the police began to suspect Davis. However, we conclude that trial counsel's errors were harmless and did not prejudice the outcome of the trial.

¶22 First, Detective Bruno's testimony imparted little information on the jury that it did not already know and that information that was new was hardly prejudicial. Before Detective Bruno's testimony, the jury had already seen the surveillance video and had been told that the police received information regarding Davis as a suspect. The additional information that the surveillance

video was shown on the news and was the catalyst for the tip hardly affected the outcome of the trial.

¶23 Second, the jury had heard from several other witnesses who identified Davis as the robber in the surveillance video, including two bank employees who had picked Davis out of an in-person line-up, and a third employee who had narrowed the identification down to Davis and one other person. The impact of a fourth anonymous individual identifying Davis from the surveillance video was negligible at best.

¶24 Third, while Davis's counsel failed to request a limiting instruction specifically related to Detective Bruno's testimony about what the tipster said, the trial court gave a carefully worded instruction on eyewitness identification generally:

> The identification of the defendant is an issue in this case, and you should give it your careful attention.
>
> You should consider the reliability of any identification made by a witness, whether made in or out of court.
>
> You should consider the credibility of a witness making an identification of the defendant in the same way you consider credibility of any other witness.
>
> Identification evidence involves an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and later to make a reliable identification.
>
> Consider the witness's opportunity for observation, how long the observation lasted, how close the witness was, the lighting, the mental state of the witness at the time, the physical ability of the witness to see and hear the events, and any other circumstances of the observation.

We agree with the trial court that "it is unreasonable to conclude that the jury inferred from the tip an identification of Mr. Davis robust enough to meet the careful tests set out in the jury instructions."

¶25 In summary, any new information the jury gleaned from Detective Bruno's testimony that the police began investigating Davis after receiving an anonymous tip resulting from a news broadcast of the surveillance video was not substantial enough to change the verdict. Likewise, his trial counsel's failure to request a limiting instruction was harmless. Consequently, trial counsel was not ineffective for not objecting to the testimony on hearsay or Sixth Amendment grounds.[4] *See* ***Strickland***, 466 U.S. at 694.

B. Detective Bruno's "Expert Testimony"

¶26 Next, Davis argues that his trial counsel was ineffective for failing to object to two pieces of "expert testimony" that Davis contends Detective Bruno was not qualified to give. First, he argues that Detective Bruno improperly opined that in-person identifications are more reliable than photo identifications. Second, Davis contends that Detective Bruno improperly testified to the minimum requirements for identifiable fingerprints. We conclude that because both pieces

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[4] Davis also asks us to directly address his hearsay and Sixth Amendment arguments regarding Detective Bruno's testimony about what the tipster said. However, Davis's counsel did not object to the testimony on those grounds during trial. Rather, his counsel objected on the ground that the stipulated facts the parties had presented to the jury adequately addressed the issue of how the police came to suspect Davis and Detective Bruno's additional testimony was unnecessary. To preserve the right to appeal a ruling on the admissibility of the evidence, a defendant must inform the trial court of the specific ground upon which the objection is based. ***State v. Peters***, 166 Wis. 2d 168, 174, 479 N.W.2d 198 (Ct. App. 1991). Because Davis did not do so here, he has waived his right to a direct appeal. Instead, we address his argument within the rubric of ineffective assistance of counsel. *See* ***Carprue***, 274 Wis. 2d 656, ¶47.

of testimony were admissible, trial counsel did not act ineffectively by failing to object to their admission.[5] *See* ***id.*** at 697.

1. Identifications

¶27 During trial, Detective Bruno testified about the photo array and in-person identifications he performed with witnesses of the bank robbery. Several of the witnesses identified Davis as the robber.

¶28 On re-direct, Bruno testified that, in his experience, it was not uncommon for a witness to be unable to identify a certain person in a photo array, but then identify that same person during a live line-up:

> Q What was the approximate age of the photo that had the defendant in it that you showed to the group of people back in January?
>
> A It was from years before.
>
> Q Is it uncommon, *in your experience*, for people to look at a photo and not be able to make an identification and then look at the person in person and be able to make an identification?
>
> A That's correct.
>
> Q Why is that?
>
> A *Based on my experience* in showing photos and in-person line[-]ups, people are far more able to identify an individual when they see that person standing five, ten feet in front of them, as opposed

[5] Again, Davis asks us to directly address his arguments regarding Detective Bruno's allegedly unqualified expert testimony. However, he admits that his trial counsel did not object to the testimony and that he has waived his right to a direct appeal. We decline his invitation to address the issues directly, and instead, address them only under the rubric of ineffective assistance of counsel. *See* ***Carprue***, 274 Wis. 2d 656, ¶47.

> to looking at a one-dimensional photograph of the individual, especially if the photograph has somewhat of a different characteristics [sic] of appearances.

(Emphasis added.)

¶29 Davis argues that this testimony amounted to an unqualified expert opinion that in-person identifications are more accurate than photo identifications, and that his trial counsel was ineffective for failing to object to the testimony. *See* WIS. STAT. § 907.02 ("If scientific, technical, or other specialized knowledge will assist the trier of fact … a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion."). In short, Davis mischaracterizes Detective Bruno's testimony.

¶30 Detective Bruno did *not* testify that in-person identifications were more accurate than photo identifications; but rather, he gave very limited testimony about his experiences during his twenty-eight years as a police officer. Detective Bruno was certainly qualified and able to give testimony about his personal experiences without being qualified as an expert. *See* WIS. STAT. § 907.01 ("If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.").

¶31 Because it was not improper for Detective Bruno to testify about his experience with photo and in-person identifications, Davis's trial counsel was not ineffective for failing to object to the testimony. *See* ***Strickland***, 466 U.S. at 697.

2. <u>Fingerprints</u>

¶32 Detective Bruno also testified that he was the lead detective investigating the robbery and described his investigation at the scene of the crime, including the collection of fingerprint evidence. Detective Bruno testified that he had identified the area around the teller window as well as the interior and exterior of the glass door of the bank to be dusted for fingerprints. Investigators sent twenty-five latent fingerprints to the crime lab for analysis; however, the lab made no identifications. A copy of the lab report recording the crime lab's conclusions was admitted into evidence.

¶33 The surveillance video from the robbery showed that Davis was wearing gloves throughout the majority of the robbery, but the bank teller testified that at one point Davis took off one of his gloves and tapped his finger on the counter. After Detective Bruno's testimony on sweeping for fingerprints, the jury wanted to know "[i]f the robber took off the glove and tapped on the counter with the index finger, would there be a fingerprint, or how likely would there be evidence?"

¶34 The trial court asked Detective Bruno the jury's question, to which Detective Bruno testified as follows:

> That's gonna be – highly unlikely. Basically, what you do with the – with fingerprints, and how we identify people from fingerprints or palm prints, is if you look, you have ridges, bifurcations, and markings on – on the skin, on the index areas, on the middle finger area, but this is the main area that we look at and how we classify fingerprints and identify fingerprints.
>
> So say you're handling a piece of paper, basically, like the sweats and salts and stuff like that from your skin composition, they get deposited, and they leave those patterns behind, and that's one of those things that we look at.

> Simply tapping your finger like such, okay, on that, first of all, if you have any nail length, you're not gonna leave any data from your fingerprints whatsoever on that counter?
>
> And if you do, it's just a small portion of the tip, and in – basically, what we look for are certain amount of points of identification to make an identification, and usually it's about twelve, thirteen different characteristics in that fingerprint, so you need a pretty sizable area of the fingerprint and the data that's there, the bifurcations, the ridge endings, and stuff like that, to effect an identification.

¶35 Davis argues that Detective Bruno's testimony regarding the fingerprint evidence was expert testimony and that there was nothing in the record to suggest that Detective Bruno had any experience or training in collecting fingerprint evidence, such that he could testify as an expert. *See* WIS. STAT. § 907.02. Therefore, Davis argues his trial counsel erred in failing to object to it.

¶36 The trial court, addressing Davis's claim in response to his postconviction motion, concluded that:

> Although Detective Bruno was not qualified as an expert in the field of fingerprint collection or analysis – the State did not even attempt to qualify him as such – his opinion testimony was admissible nevertheless, if his opinion qualified as a lay opinion.
>
> ….
>
> Detective Bruno's opinion explaining away the absence of Mr. Davis's fingerprints on the teller counter rested on two premises: (1) usable fingerprints come from the pads of the fingers, not the tips; and (2) a person who taps his or her finger makes contact, if at all, with the tip of the finger not the pad. I believe that these opinions could be given by a lay person with experience in observing fingerprint evidence and understanding what part of the finger contains the features which make a usable fingerprint. I believe Detective Bruno had such experience.

¶37 The admission of a lay witness's opinion testimony rests largely in the trial court's discretion, and its decision will not be set aside unless it erroneously exercised that discretion. ***Simpson v. State***, 62 Wis. 2d 605, 609, 215 N.W.2d 435 (1974); ***State v. Wright***, 2003 WI App 252, ¶49, 268 Wis. 2d 694, 673 N.W.2d 386. The determination of whether the trial court erroneously exercised its discretion must be made based upon the particular facts and circumstances of each individual case. *See* ***Wright***, 268 Wis. 2d 694, ¶49. We will uphold the trial court's decision if the record shows that it in fact exercised discretion and there was a reasonable basis for its decision. ***Schwab v. Baribeau Implement Co.***, 163 Wis. 2d 208, 215, 471 N.W.2d 244 (Ct. App. 1991).

¶38 Applying those standards of review here, we uphold the trial court's determination that it would have admitted Detective Bruno's testimony as proper lay witness testimony under WIS. STAT. § 907.01. Section 907.01 permits a lay witness to testify to those opinions or inferences the lay witness has "which are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Here, the trial court correctly observed that Detective Bruno's testimony was that "(1) usable fingerprints come from the pads of the fingers, not the tips; and (2) a person who taps his or her finger makes contact, if at all, with the tip of the finger not the pad." Both of those observations were based on his perceptions as a police officer, and were not "scientific, technical, or other specialized knowledge" that required expert testimony. *See* WIS. STAT. § 907.02.

¶39 In sum, the trial court properly exercised its discretion in holding that Officer Bruno's testimony about the absence of fingerprints at the scene was admissible lay witness testimony. Because the testimony was properly admitted

into evidence, Davis's counsel was not ineffective for failing to object. *See* ***Strickland***, 466 U.S. at 697.

C. Failure to Introduce the Bill of Sale

¶40 Davis also argues that his trial counsel was ineffective for failing to introduce the Bill of Sale, which documented the RV purchase on which his alibi was founded. He contends that the Bill of Sale corroborated his own and Zollicofer's testimony that he was at Big Bill's the day of the robbery and that "[g]iven the fact that Zollicofer had the bill of sale in front of her during her testimony, it would have been a small matter to offer the exhibit into evidence." We conclude that trial counsel's failure to introduce the document did not prejudice Davis's case. *See* ***id.***

¶41 Davis is correct that it certainly would have been a small matter for his counsel to introduce the Bill of Sale to the jury. However, its introduction would have had no impact on the verdict. First, Zollicofer testified from the Bill of Sale on the stand; it was clear to the jury that the document existed. Second, the Bill of Sale listed Kenneth Davis (Davis's brother) and not Davis as the purchaser. The State never contested the fact that Davis's brother bought an RV from Big Bill's on the day of the robbery. The introduction of the document would have added nothing to Davis's defense; both the State and Davis conceded that the Bill of Sale existed and that Davis's brother was listed as the purchaser.

¶42 In summary, we conclude that the failure to introduce the Bill of Sale did not prejudice Davis, and therefore, trial counsel was not ineffective for failing to do so. *See* ***id.***

D. Cumulative Effect of Errors

¶43 Davis asserts that the cumulative effect of the foregoing instances of trial counsel's alleged ineffectiveness prejudiced him and warrants a new trial. We disagree. Lumping together failed ineffectiveness claims does not create a successful claim. As our supreme court has often repeated, "[a]dding them together adds nothing. Zero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).[6]

II. Interest of Justice

¶44 In a last ditch effort to save his appeal, Davis argues that even if we conclude that his trial counsel was not ineffective, the trial court's admission of improper hearsay evidence coupled with Detective Bruno's allegedly impermissible expert opinions resulted in the real controversy not being tried. *See* WIS. STAT. § 752.35. As we set forth earlier in this decision, Davis waived his right to raise those issues on appeal when he did not object to them during trial. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31. Furthermore, we disagree that the real controversy was not tried.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

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[6] Given our holding, we also reject Davis's argument that he was entitled to an evidentiary hearing on his postconviction motion. The record conclusively demonstrates that Davis is not entitled to the relief he seeks. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.