

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 14, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 04-1041-CR

Cir. Ct. No. 00CF1171

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BLAINE S. GRAYSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Blaine Grayson appeals a judgment of conviction for one count of causing a child over the age of thirteen to view sexual activity and two counts of causing a child under the age of thirteen to view sexual activity. He argues: (1) there was insufficient evidence to convict him; (2) he received ineffective assistance of counsel when his counsel failed to move to suppress two

of the girls' identifications of him and to request a jury instruction regarding eyewitness identification; and (3) he should be granted a new trial in the interest of justice. We affirm the judgment and order.

BACKGROUND

¶2 The charges against Grayson stemmed from two separate incidents. On June 23, 2000, two juveniles, April and Jennifer, saw a car stopped at a corner. They saw a naked man inside the car touching his penis. They reported the incident to the police and April gave them the license plate number of the car.

¶3 The second incident occurred on July 16, 2000. Two juveniles, Kaila and Breanna, saw a car stopped at an intersection. They saw a man inside the car touching his penis. They reported the incident to the police, describing the car they saw. Shortly thereafter, an officer stopped Grayson, who was driving a car that matched the girls' description. The car had the license plate number April had given them. Grayson was transported to a park where Kaila and Breanna were located. The girls identified Grayson as the man they had seen. The police then contacted April and Jennifer, who went to the police station to identify Grayson. When Grayson was brought in front of them, they stated that they recognized him as the man they had seen on June 23. Further information regarding these identifications are provided in the discussion section.

¶4 Grayson was charged with two counts of causing a child over thirteen to view sexual activity (April and Jennifer), and two counts of causing a child under thirteen to view sexual activity (Kaila and Breanna). The charge regarding Jennifer, count two, was eventually dropped. Grayson pled not guilty to the remaining counts.

¶5 A jury found Grayson guilty of all three remaining counts. The court sentenced him to two years' initial confinement and eight years' extended supervision on count one; four years' initial confinement and ten years' extended supervision on count three; and six years' initial confinement and nine years' extended supervision on count three. All sentences are to run concurrently.

¶6 Grayson filed a postconviction motion arguing the girls' testimony was contradictory and therefore insufficient to establish Grayson's guilt; the girls' identification of him was improperly suggestive and should be suppressed; that he received ineffective assistance of counsel; that he was entitled to a new trial in the interest of justice; and requesting sentence reduction. The court denied Grayson's motion.

DISCUSSION

A. Sufficiency of the Evidence

¶7 When reviewing the sufficiency of the evidence to sustain a verdict, we view the evidence in the light most favorable to the verdict. *See* WIS. STAT. § 805.14(1);¹ *State v. Johannes*, 229 Wis. 2d 215, 221-22, 598 N.W.2d 299 (Ct. App. 1999). We will sustain a verdict that is supported by any credible evidence, even if we might consider contradictory evidence to be more persuasive, leaving the credibility of the witness and drawing of inferences to the jury. *State v. Poellinger*, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990).

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

¶8 The sole issue at trial involved the identity of the man the girls saw on June 23 and July 16, 2000. Grayson argues his conviction is based entirely on April's and Kaila's identifications of him, and that these identifications are not legally sufficient to support his conviction.

¶9 Grayson first argues that April's identification is unreliable. At trial, April testified that Grayson was driving a small white car and in court identified Grayson as the man she saw inside the car. However, at the preliminary hearing, she testified that she had seen a small black car. Grayson also argues that April's identification of him at the police station after the July 16, 2000 incident was the product of an impermissibly suggestive showup procedure.

¶10 Grayson points out inconsistencies in Kaila's testimony as well and argues her identification is also unreliable. After the incident, Kaila described the man she saw as wearing blue underpants and that there was a pair of jean shorts on the front seat of the car. Then at the preliminary hearing, she testified that the man was wearing both shorts and blue underpants, and had no shirt on. This description differed from the description Breanna gave at the preliminary hearing, when she testified the man was wearing white underwear and a teal tanktop. At trial, Kaila testified again that the man was wearing blue underpants and that there were jean shorts on the front seat. She also identified Grayson in court as the man she saw. Breanna testified that she saw no blue underwear. She was also unable to identify Grayson in court as the man she saw. Finally, Grayson again argues that Kaila's identification of him was the result of an impermissibly suggestive show-up procedure.

¶11 We first note that Grayson incorrectly characterizes his conviction as "completely dependent on the purported eyewitness identifications of him by

April ... and Kaila.” Grayson fails to comprehend the significance of the license plate number April reported to the police after the June 23 incident. That number belongs to a vehicle registered to Grayson. This was also the same license number on the white car Grayson was driving when he was apprehended by the police after the July 16 incident. As the trial court noted in its decision denying Grayson’s postconviction motion, “this case is about more than eyewitness identification. The defendant’s car being identified by its plate was crucial evidence.” Grayson never argued the car with the matching license plate was not his, nor that he was not the one driving it on the date April saw the car.

¶12 Breanna also provided testimony linking Grayson’s car to the incidents. She testified that “it looked like there was a fuzzy white spot on [the car] like a square.” She also told the police that the car appeared to be spray painted. The officer who arrested Grayson shortly after Kaila and Breanna reported the incident also testified that the car appeared to have been spray painted or hand painted.

¶13 Grayson noted inconsistencies in April’s testimony regarding the color of the car at the preliminary hearing and the trial. However, while she did say the car was black at the preliminary hearing, in her signed statement to the police on the day of the incident she stated the car was white. April’s testimony at the preliminary hearing was more than nine months after the incident, and she had not reviewed her statement to the police before testifying at that hearing. It is not unreasonable that she might have been somewhat “fuzzy” regarding the color of the car. This is especially true considering April also reported seeing Grayson on a different occasion, that time in a black car. At any rate, her trial testimony regarding the color of the car was consistent with what she reported to the police shortly after the incident.

¶14 Kaila's discrepancies regarding the color of Grayson's underwear are similar. The preliminary hearing took place almost eight months after the incident, and she had not reviewed her statement to the police before testifying. Therefore, again, it is not surprising that she might have some difficulty remembering some details of the incident. Nevertheless, inconsistencies regarding the color of Grayson's underwear do not render her trial testimony wholly incredible.

¶15 Moreover, where there are inconsistencies in the testimony of a witness or between witnesses, the jury may choose to disbelieve either version or make a choice of one version rather than another. *Wirsing v. Krzeminski*, 61 Wis. 2d 513, 525, 213 N.W.2d 37 (1973). Only when the evidence is inherently or patently incredible will we substitute our judgment for that of the factfinder. *Gauthier v. State*, 28 Wis. 2d 412, 416, 137 N.W.2d 101 (1965). That is not the case here. There is nothing in any of the inconsistencies that Grayson points out that makes the girls' identification patently incredible.

¶16 In the next section of this opinion we discuss whether the identifications to the police were the product of impermissible suggestion by the police that Grayson was the perpetrator. For purposes of this section, it is sufficient to say that we conclude that the identifications would have survived a suppression motion. We therefore conclude that, from the girls' testimony, their identifications of Grayson as the perpetrator and the license plate evidence, there was enough information from which a jury could reasonably conclude that Grayson was the man the girls saw.

B. Ineffective Assistance of Counsel

¶17 The familiar two-pronged test for ineffective-assistance-of-counsel claims requires a defendant to prove (1) deficient performance and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are “outside the wide range of professionally competent assistance.” *Id.* at 690. To prove prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. It is not enough, however, “for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693. The defendant’s burden is to show that counsel’s errors “actually had an adverse effect on the defense.” *Id.*

¶18 Our standard for reviewing an ineffective assistance of counsel claim involves mixed questions of law and fact. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Findings of fact will not be disturbed unless clearly erroneous. *Id.* The legal conclusions, however, as to whether counsel’s performance was deficient and prejudicial, present questions of law. *Id.* at 128. Finally, we need not address both *Strickland* prongs if the defendant fails to make a sufficient showing on either one. *Strickland*, 466 U.S. at 697.

1. *Suppression of the Identifications*

¶19 Grayson argues that April’s and Kaila’s identifications of him must be suppressed as the product of unlawful and highly suggestive show-up procedures. Grayson’s attorney did not move to suppress the identifications, so Grayson argues he received ineffective assistance of counsel. However, if the trial court would have properly denied the motion, counsel’s failure to make the motion

was not deficient performance or prejudicial. *See State v. Reynolds*, 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996). The trial court concluded, and we agree, that a motion to suppress would not have succeeded. Therefore, Grayson's counsel's failure to file a motion was not deficient performance and did not prejudice Grayson.

¶20 “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. Wolverton*, 193 Wis. 2d 234, 264, 533 N.W.2d 167 (1995) (citation omitted). First, we decide whether the pretrial procedure was “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *Powell v. State*, 86 Wis. 2d 51, 64, 271 N.W.2d 610 (1978). The defendant has the initial burden on this issue. *Id.* at 65. We need not inquire into the reliability of an identification if the defendant fails to meet this initial burden. *Id.* at 62.

¶21 If the defendant shows that the procedure was impermissibly suggestive, the State must prove that the identification was reliable under the totality of the circumstances in order for the identification to be admissible. *State v. Haynes*, 118 Wis. 2d 21, 31, 345 N.W.2d 892 (Ct. App. 1984). The factors to be considered under this part of the analysis are: “the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' 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.” *Powell*, 86 Wis. 2d at 51 (quoting *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)).

¶22 We begin with April's identification of Grayson. Grayson argues her identification was improperly suggestive because the police told her when they called her after Grayson's arrest that they had "caught the guy." April then went to the police station and identified him. In the postconviction motion hearing, the trial court found that the showup was impermissibly suggestive. However, it concluded that the identification was reliable nevertheless and therefore would not have been suppressed. Assuming without deciding that the showup was impermissibly suggestive, we agree with the trial court that the identification was reliable.

¶23 We first look at whether April had the opportunity to observe the criminal at the time of the crime. April was observant enough on the day of the incident to write down the license plate number of the car she saw. She testified that she had seen the car earlier the same day and was trying to find the car again in order to get the license plate number. Second, we look at her degree of attention. She never testified specifically to that effect, but again, she paid enough attention to write down the license plate number. Third, is the accuracy of any prior description, which does not apply here. Fourth is her level of certainty. The trial court stated, "April was apparently certain that the defendant was the man she had previously seen." Grayson does not dispute this, but merely argues that April was first certain she saw Grayson in a black car, then certain she had seen him in a white car. We have already discussed how this inconsistency is not significant. Finally, we look at the time between the crime and the identification, which was twenty-three days. As the trial court noted, there is no indication that April's memory had faded in that time. We conclude that, under the totality of the circumstances, April's identification was reliable even if the show-up was impermissibly suggestive.

¶24 We now turn to Kaila's identification of Grayson. Grayson argues her identification was impermissibly suggestive because when she made the identification, Grayson was handcuffed in the back seat of a police car. Further, he contends that before the identification the police told Kaila they had caught the man she and Breanna had seen. The trial court concluded that the showup was not impermissibly suggestive, and the evidence supports this conclusion.

¶25 The police officer who arrested Grayson after Kaila and Breanna reported the incident testified at trial. He stated that when he attempted to find the car the girls had seen, "[the girls] immediately started verbalizing something that I couldn't hear in my car, but they were pointing directly to the car that was immediately in front of me which at that point was the only vehicle in front of me which was the white car I was following." Kaila described in her statement to the police given an hour after the incident that:

Once we got to Fisk Park we told 2 police officers about what happened, then we went to Fisk Pool. As we were locking up our bikes we saw the man driving by in the white car, & we saw a police car behind him. We pointed at the car & said "that's the guy." A short time later the police came back & they had the man who was in the white car. I told the police that they had the right guy.

Breanna also testified that they were pointing to the car and yelling to the police officer who was following the car that it was the car they had seen. Therefore, in effect, Kaila identified Grayson as the man she had seen even before the police brought him to her to identify.

¶26 Grayson makes much of Kaila's testimony that "the cops came and told us that they had found him." He argues that this was impermissibly suggestive. However, as the State correctly points out, the statement can be interpreted in two ways. One is that the police found the man the girls saw in the

car. The other is that the police found the man who was driving the car they had identified. This second option is particularly reasonable given the girls' statements that they were actively pointing to the car they saw as the police followed it.

¶27 Kaila also testified that when the police first brought Grayson to her for identification, she was not sure he was the man they saw. She then moved to the front of the car and then recognized Grayson from his moustache. This shows that Kaila was not merely making the identification based on any police suggestions that Grayson was the perpetrator. Instead, she hesitated to identify him until she was able to get a better look at him to be sure he was the man she saw. Under these circumstances, we conclude that Kaila's identification was not the result of an impermissibly suggestive showup. Because Grayson has not met his burden of showing that the identification was impermissibly suggestive, we need not determine whether Kaila's identification was otherwise reliable. *See Powell*, 86 Wis. 2d at 52.

¶28 If Grayson's counsel had made a motion to suppress April's and Kaila's identifications of him, the motion would not have succeeded. Therefore, his counsel's failure to do so cannot be deficient performance or prejudicial. *See Reynolds*, 206 Wis. 2d at 356.

2. *Jury instruction regarding eyewitness identification*

¶29 Grayson argues he received ineffective assistance of counsel because his counsel failed to request a jury instruction on eyewitness identification. This instruction would advise the jury how to evaluate the girls' recollection of the

incidents.² Grayson maintains his counsel’s performance was deficient because he admitted at the *Machner*³ hearing that he had no tactical reason for failing to request the instruction. Grayson further contends he was prejudiced by this failure because the case “rested entirely upon the eyewitness identifications of Grayson as the man the girls saw.” We conclude that Grayson was not prejudiced and therefore his counsel was not ineffective for failing to request the instruction.

¶30 Grayson has not shown that the outcome of the trial would have been different if the eyewitness identification instruction had been given. First of all, as we have noted, this case was not based entirely on the girls’ identification of him, as Grayson argues. There was also license plate evidence that was a substantial factor in Grayson’s conviction. Therefore, even if the jury had been

² In his memorandum to the trial court in support of his postconviction motion regarding ineffective assistance of counsel, he refers to WIS JI—CRIMINAL 141 as the instruction he believes his counsel should have requested. Grayson does not mention this specific instruction in his brief to this court, but refers only to “any jury instruction on eyewitness identification.” We assume that this refers to WIS JI—CRIMINAL 141. This instruction states:

In evaluating the evidence relating to the identification of the defendant as the person who committed the alleged crime, you are to consider those factors which might affect human perception and memory. You are to consider all the circumstances relating to the identification.

Consider the witness’ 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.

With regard to the witness’ memory, you should consider the period of time which elapsed between the witness’ observation and the identification of the defendant and any intervening events which may have affected the witness’ memory.

³ See *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

specifically instructed regarding eyewitness testimony, there was other evidence from which the jury could conclude Grayson was the perpetrator.

¶31 The trial court gave three other reasons, with which we agree, explaining why Grayson was not prejudiced. The jury was given several opportunities to question the girls' credibility. First, the jury received the standard instruction on witness credibility and reasonable doubt. The jury was told to "evaluate the clearness or lack of clearness of the witness' recollections," "the opportunity the witnesses had for observing and for knowing the matters the witness testified about," and "all other facts and circumstances during the trial which tend either to support or to discredit the testimony." Therefore, the jury was aware that it could reject any of the girls' testimony if it found the testimony incredible or their recollections suspect. Second, Grayson's attorney cross-examined the girls regarding their recollection of the incidents and the credibility of their identifications. Finally, Grayson's attorney urged the jury during his closing argument to conclude that the identifications were improperly suggestive and that there was reasonable doubt as to whether Grayson was the man they saw.

¶32 From these things, the jury was certainly aware that it could have found the girls' testimony and identifications of Grayson to be incredible. It did not do so. Therefore, we conclude that Grayson was not prejudiced by his attorney's failure to ask for an instruction on eyewitness testimony. Consequently, he did not receive ineffective assistance of counsel.

C. New Trial in the Interest of Justice

¶33 Grayson argues he is entitled to a new trial in the interest of justice because he claims the case was not fully and fairly tried. His argument is based on his prior argument that the girls' identifications of him should have been

suppressed and that he received ineffective assistance of counsel as a result. However, we have already determined that a motion to suppress the identifications would have been unsuccessful and therefore he did not receive ineffective assistance of counsel. Therefore, Grayson is not entitled to a new trial.

By the Court.—Judgment and order affirmed.

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

