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DISTRICT I

May 29, 2024

To:

Hon. Pedro A. Colón
Circuit Court Judge
Electronic Notice

Hon. Jean M. Kies
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Donald V. Latorraca
Electronic Notice

Bradley J. Lochowicz
Electronic Notice

You are hereby notified that the Court has entered the following order:

2022AP886-CR State of Wisconsin v. Edwin Carraballo (L.C. # 2018CF957)

Before White, C.J., Donald, P.J., and Geenen, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Edwin Carraballo appeals from a judgment of conviction and from an order of the circuit court that denied his postconviction motion for relief. He argues that his trial attorney was ineffective by "failing to object to the out-of-court, and subsequent in-court, identifications made by the victim" in this matter. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] The judgment and order are summarily affirmed.

On November 22, 2017, Milwaukee police responded to an armed robbery complaint at an apartment building. Seventy-two-year-old R.R. reported that he had gone to bed around 1:00 a.m. and was awakened by the sound of a window closing in his bedroom. He observed someone near the window and asked, "What are you doing in here?" The subject told R.R. he wanted money. R.R. got out of bed, showed the subject his empty wallet, and told the subject to leave. The subject produced a weapon and stabbed R.R. in the chest. R.R. fell to the ground. The subject took R.R.'s wallet, then went over to R.R.'s television and began cutting its wires.

R.R. was able to reach his neighbor's apartment. The neighbor called police. The neighbor and R.R. returned to R.R.'s apartment to wait for police. R.R. did not see the subject or where he had gone, but noticed that his television was missing. He also realized his cell phone had been taken. R.R. described the subject to police as a Hispanic male with an accent, who was wearing a black hoodie with the hood up and black pants.

Multiple items in R.R.'s home were collected by police as part of the investigation and swabbed for DNA. A database match led police to Carraballo. In February 2018, R.R. was shown a photo array that included Carraballo. R.R. could not positively identify his assailant, but stated that he might be able to recognize the subject's voice if he heard the person say, "Give me five dollars."

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

On February 28, 2018, police conducted a live lineup with Carraballo and five filler subjects. Carraballo was in the fourth position. During the lineup, each of the participants was instructed to state, "Give me five dollars." R.R. identified Carraballo as the person who stabbed him after hearing his voice. R.R. stated he was fully confident in his identification.

Carraballo was charged in the criminal complaint with burglary and armed robbery. An amended information later added a charge of first-degree reckless injury with use of a dangerous weapon. The case was tried to a jury, which convicted Carraballo on all three charges. The trial court[2] imposed fifteen years' imprisonment for the burglary; twenty-four years' imprisonment for the armed robbery, and twenty-two years' imprisonment for the reckless injury, to be served concurrently.

Carraballo filed a motion for postconviction relief alleging that trial counsel had provided ineffective assistance "for failing to object to the out-of-court, and subsequent in-court, identifications made by the victim." He asserted that the live lineup was tainted and unduly suggestive because R.R. could not identify Carraballo in the prior photo array, and Carraballo "apparently [was] the only person in both" the array and the lineup. The postconviction court[3] denied the motion, concluding that in light of the DNA and other evidence, there was no reasonable probability of a different result at trial even if the identifications were suppressed. Thus, Carraballo suffered no prejudice from his attorney's performance. Carraballo appeals.

[2] The Honorable Pedro A. Colón presided over the trial and imposed the sentence.

[3] The Honorable Jean M. Kies reviewed and denied the postconviction motion.

The requirements for showing ineffective assistance of counsel are well-established. A defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. To demonstrate deficient performance, Carraballo must show facts from which we can conclude that the attorney's representation fell below objective standards of reasonableness. *See* ***State v. McDougle***, 2013 WI App 43, ¶13, 347 Wis. 2d 302, 830 N.W.2d 243. To establish prejudice, Carraballo "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***id.*** (citation omitted). We need not address both elements if the defendant fails to make a sufficient showing on one of them. ***State v. Maloney***, 2005 WI 74, ¶14, 281 Wis. 2d 595, 698 N.W.2d 583.

The standard for reviewing whether an out-of-court identification was properly admitted has two steps. ***Powell v. State***, 86 Wis. 2d 51, 65, 271 N.W.2d 610 (1978). First, the defendant must show that the out-of-court identification was impermissibly suggestive. ***State v. Drew***, 2007 WI App 213, ¶13, 305 Wis. 2d 641, 740 N.W.2d 404. An impermissibly suggestive procedure is one that makes it "all but inevitable" that the defendant would be identified. ***Foster v. California***, 394 U.S. 440, 443 (1969). If the defendant meets this burden, then the State must show that the identification is nevertheless reliable under the totality of the circumstances. ***Drew***, 305 Wis. 2d 641, ¶13.

In general, whether an identification procedure is impermissibly suggestive is decided on a case-by-case basis; there are no *per se* rules of exclusion. *See* ***State v. Benton***, 2001 WI App 81, ¶8, 243 Wis. 2d 54, 625 N.W.2d 923; *see also* ***State v. Dubose***, 2005 WI 126, ¶¶33-34, 285 Wis. 2d 143, 699 N.W.2d 582, *abrogated by* ***State v. Roberson***, 2019 WI 102, ¶¶80-82, 389 Wis. 2d 190, 935 N.W.2d 813. For example, in ***Foster***, wherein the defendant was the only

person to appear in two live lineups, suppression of the pretrial identification was not based solely on that fact but also on elements that made Foster stand out from the other subjects in the identification process. ***Id.***, 394 U.S. at 442-43. In the first lineup, Foster had been taller than the other subjects presented and was wearing a leather jacket like the one the suspect had been wearing. ***Id.*** at 443. There was also a one-on-one confrontation between Foster and the witness—which still did not yield an identification—prior to the second lineup. ***Id.***

Thus, the fact that Carraballo was the only person in both the photo array and the live lineup does not, without more, constitute an impermissibly suggestive photo array. Carraballo does not identify any distinguishing features of his appearance in either the photo array or the lineup that would make him stand out from the other subjects. Moreover, we note that R.R. was not able to confidently identify Carraballo simply by sight; rather, R.R. did not make a positive identification of Carraballo until after he heard Carraballo's voice—a distinguishing feature that could not possibly have been impacted by the photo array. Any motion to suppress R.R.'s identification of Carraballo would have failed. "It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance." ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

We also agree with the postconviction court's conclusion that even if the identification procedures had been unduly suggestive, and trial counsel was thus deficient for failing to move for suppression, the results at trial would have been the same, so Carraballo suffered no prejudice. Carraballo was first specifically identified as a suspect by a DNA hit, not by R.R., and he matched the general description given by R.R. (*i.e.*, a Hispanic male). At trial, the DNA analyst testified that two of the items compared against Carraballo's reference standard actually excluded him as the contributor. However, there was a mixture of DNA on one of the television

wires, and assuming R.R. was one of the contributors to the mixture, "it is at least three quintillion times more likely to observe that STR DNA mixture profile if it is a mixture from [R.R.] and Edwin Carraballo than if it is a mixture of DNA from [R.R.] and a random unrelated individual." Additionally, the apartment building manager testified that Carraballo had previously lived in the building—a fact Carraballo acknowledged—but he had not lived in R.R.'s specific unit, and R.R. testified that he did not have guests stay over.

Carraballo argued that because he "lived in the same apartment building [as R.R..] for a period of time, it is plausible that his DNA could be found inside the victim's apartment." As noted, however, Carraballo never lived in R.R.'s specific unit, and he had not been a resident of the building for several months at the time the offense was committed. The DNA analyst testified that "[t]he longer DNA is on an item the more likely it is that it would [] begin to degrade and we would not be able to obtain profiles." While Carraballo asserts that without R.R.'s identification, there was "just DNA" connecting him to these crimes, he had no relationship with R.R., and there was no reason for his DNA to be on the wire. Even if R.R.'s identification of Carraballo had been suppressed, the verdict would have been the same: a jury could easily infer that there was no reasonable explanation for the presence of Carraballo's DNA on the wire but that he was the one in the apartment committing the burglary.

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals