COURT OF APPEALS
DECISION
DATED AND RELEASED

February 21, 1996

No. 95-0047-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAVELLE ALLISON,
a/k/a LEVELL ALLISON,
a/k/a LAVELL ALLISON,
a/k/a LEAVELL ALLISON,
a/k/a LAVELLE ANDERSON,

Defendant-Appellant.

APPEAL from an order of the circuit court for Kenosha County: ROBERT V. BAKER, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Lavelle Allison appeals from an order denying his motion for a new trial and sentence modification.[1] We conclude that the

[1] Sentence modification is not an issue on appeal.

evidence was sufficient to convict Allison of aggravated battery contrary to § 940.19(2), STATS., 1991-92, as a repeater, that he waived his challenge to the manner in which jurors were selected for voir dire and that trial counsel was not ineffective for failing to request a jury instruction on identification. Accordingly, we affirm.

The following facts are undisputed. On May 24, 1993, the victim, Matthew Nelson, had an altercation with four individuals who were creating a disturbance at his place of employment. One of the individuals, later identified as Allison, threw a chunk of concrete at Nelson's back and punched Nelson in the face while holding a rock. While Nelson was struggling with Allison in an attempt to hold him until police could arrive, Allison pushed Nelson down to the pavement. Nelson hit his forehead and nose on the pavement. He suffered a broken nose, severe facial lacerations with permanent scarring, and thoracic back injuries. Nelson's facial lacerations did not require suturing, but they needed to be debrided and cleansed, and antibiotics were applied. After a two-day trial, a jury found Allison guilty of aggravated battery.

On appeal, Allison argues that there is insufficient evidence that he caused Nelson "great bodily harm." Section 940.19(2), STATS., 1991-92, under which Allison was charged and convicted, provides: "Whoever causes great bodily harm to another by an act done with intent to cause great bodily harm to that person or another with or without the consent of the person so harmed is guilty of a Class C felony." Section 939.22(14), STATS., 1991-92, defines "great bodily harm" as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury."

In ***La Barge v. State,*** 74 Wis.2d 327, 246 N.W.2d 794 (1976), the court addressed the "other serious bodily injury" portion of the definition of great bodily harm. The court concluded that the legislature intended the phrase to broaden the scope of the statute "to include bodily injuries which were serious, although not of the same type or category as those recited in the statute." ***Id.*** at 332, 246 N.W.2d at 796. It is a jury question whether the injuries constituted "other serious bodily injury." ***Id.*** at 334-35, 246 N.W.2d at 797-98. The credibility and weight to be given testimony regarding a victim's injuries for purposes of establishing great bodily harm is within the jury's province.

Flores v. State, 76 Wis.2d 50, 60, 250 N.W.2d 720, 725 (1977), *overruled on other grounds,* 123 Wis.2d 1, 365 N.W.2d 7 (1985). The line between great bodily harm, which requires "serious" injury, and mere bodily harm, while not mathematically precise, is one that a jury is capable of drawing. ***Cheatham v. State,*** 85 Wis.2d 112, 124, 270 N.W.2d 194, 200 (1978).

Allison apparently argues that Nelson's injuries did not rise to the level of great bodily harm as a matter of law. While we do not necessarily condone the decision to charge Allison with aggravated battery, there was sufficient evidence adduced at trial to permit the jury to decide whether Nelson suffered great bodily harm, in the form of serious bodily injury.

Having concluded that the jury was properly charged with determining the severity of Nelson's injuries, we turn to whether the evidence is sufficient to uphold the jury's finding that Nelson sustained great bodily harm. Upon a challenge to the sufficiency of the evidence to support a jury's guilty verdict, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force" that no reasonable jury "could have found guilt beyond a reasonable doubt." ***State v. Poellinger,*** 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). We will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** at 507, 451 N.W.2d at 758. It is the jury's province to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *See* ***id.*** at 506, 451 N.W.2d at 757. We conclude that there is sufficient evidence from which the jury could determine that the total effect of Nelson's injuries, as described earlier in this opinion, amounted to "other serious bodily injury," i.e., great bodily harm.

Allison's reliance upon ***State v. Bronston,*** 7 Wis.2d 627, 97 N.W.2d 504 (1959), *overruled on other grounds*, 74 Wis.2d 327, 246 N.W.2d 794 (1976), is misplaced. He contends that ***Bronston*** leaves to the trial court the task of determining as a matter of law whether the injuries rise to the level of great bodily harm. However, we conclude that the more recent case of ***La Barge*** governs. Whether Nelson suffered great bodily harm was properly decided by the jury. *See* ***La Barge,*** 74 Wis.2d at 334-35, 246 N.W.2d at 797-98.

Allison next argues that the manner in which jurors were selected for voir dire violated the statutes governing jury selection and his due process right to be present at every significant phase of the criminal proceeding. The selection of individuals for voir dire is governed by § 756.096, STATS., which directs that those persons be selected in the presence and under the direction of the court. Specifically, Allison objects to the use of a computer program to select individuals for voir dire because the selection occurred outside his and the court's presence and he had no assurance that the selection was truly random.

This challenge is waived because it was first raised on postconviction motion. Allison did not object to the manner in which the prospective jurors were chosen, either before or after the jury was empaneled. Claims of error relating to the assembly of a jury list must be made before the jury is empaneled and prior to trial. ***Brown v. State,*** 58 Wis.2d 158, 164, 205 N.W.2d 566, 570 (1973); *see also* ***Shotwell Mfg. Co. v. United States,*** 371 U.S. 341, 362 (1963) (an objection to the petit jury array is not timely if it is first raised after the verdict).

The application of the waiver rule is appropriate under these circumstances because Allison's claim of error can only be reviewed upon a proper record. Here, there is no record which would permit us to consider the issues raised. Furthermore, had Allison objected at the appropriate time, the trial court would have had an opportunity to address his complaint and establish a remedy, if needed.[2] *See* ***State v. Holt,*** 128 Wis.2d 110, 124, 382 N.W.2d 679, 686 (Ct. App. 1985).

In his reply brief, Allison argues that the State waived its right to argue Allison's waiver because the State did not object when he raised this issue on postconviction motion. A respondent is not held to the same rules of waiver that apply to an appellant. ***State v. Truax,*** 151 Wis.2d 354, 359, 444 N.W.2d 432, 435 (Ct. App. 1989). In arguing that Allison waived his opportunity to object to the manner in which the petit jury was selected, the State, as respondent, seeks to uphold the result reached at trial. Allison seeks to reverse his conviction on

[2] We make no comment on the merits of Allison's challenge to the manner in which individuals were selected for voir dire.

the ground that the jury selection was flawed. *See* ***Holt,*** 128 Wis.2d at 124, 382 N.W.2d at 686. The State's waiver argument suggests that "the appellant's argument in favor of reversal is without merit." ***Id.*** at 124, 382 N.W.2d at 687. The State's argument does not offend principles of efficient judicial administration the way an untimely appellant's argument does, particularly in the absence of the necessary record. *See* ***id.*** at 124, 382 N.W.2d at 686-87.

Finally, Allison argues that his trial counsel was ineffective because he did not request either the short or long form of the jury instruction on identification, WIS J I—CRIMINAL 141. He further argues that counsel's failure to request the long form instruction deprived him of the opportunity to have the jury focus on the various factors relevant to identification which are enumerated in that instruction.

To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that his counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.***

Even if deficient performance is found, a judgment will not be reversed unless the defendant proves that the deficiency prejudiced his or her defense. ***State v. Johnson,*** 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). The 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 129, 449 N.W.2d at 848. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.*** In applying this principle, reviewing courts are instructed to consider the totality of the evidence before the trier of fact. ***Id.*** at 129-30, 449 N.W.2d at 848-49. We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. ***State v. Moats,*** 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990).

The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact. ***State ex rel. Flores v. State,*** 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). An appellate court will not

overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 542 (1992). However, the final determinations of whether counsel's performance was deficient and prejudiced the defense are questions of law which this court decides without deference to the trial court. ***Id.***

The long form of WIS J I—CRIMINAL 141 provides in full:

> The identification of the defendant is in issue in this case.
>
> IF THE ACCURACY OF AN EYEWITNESS IDENTIFICATION IS A MAJOR ISSUE IN THE CASE, ADD THE FOLLOWING:
>
> [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.]

CONTINUE WITH THE FOLLOWING IN ALL CASES:

> If you find that the crime alleged was committed, before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the defendant is the person who committed the crime.

The shorter form of this instruction, the use of which is committed to the trial court's discretion, *see* ***State v. Waites,*** 158 Wis.2d 376, 383-84, 462 N.W.2d 206, 208 (1990), "is identical to the more detailed [or long form] instruction except that the bracketed paragraphs are not included." ***Id.*** at 380 n.2, 462 N.W.2d at 207.

At the postconviction motion hearing, trial counsel testified that alibi and identification were issues at trial. He stated that his failure to request an identification instruction did not result from any tactical decision, rather, "it slipped [his] mind." Counsel agreed that there was no legitimate reason not to request an identification instruction when identification is an issue at trial. The court determined that identification was not a major issue and that the issue had been well litigated.

Allison argues that the absence of an identification instruction deprived the jury of an opportunity to focus on the factors impacting whether the State demonstrated beyond a reasonable doubt that Allison committed the crime. We disagree. Defense counsel's closing argument addressed numerous factors influencing identification.

During closing argument, defense counsel argued that there was reasonable doubt as to whether Allison beat Nelson. Counsel pointed out that descriptions of Nelson's attacker did not include Allison's very prominent front gold teeth. Defense counsel also stressed that the identification of Allison did not occur immediately. Rather, he was identified a few weeks after the crime, and only one witness was able to identify him. Defense counsel also questioned the potential suggestiveness of the manner in which Allison's photograph was displayed to witnesses.

Even though the jury was not instructed on identification, it received instructions on reasonable doubt, WIS J I—CRIMINAL 140, and

credibility, WIS J I—CRIMINAL 300. These instructions, when combined with defense counsel's closing arguments regarding identification, sufficiently focused the jury's attention on the State's burden to establish every necessary fact before Allison could be found guilty. *See* ***Waites,*** 158 Wis.2d at 386, 462 N.W.2d at 210. The jury was adequately informed of the possibility of human error and the need to scrutinize carefully all testimony, including identification testimony.

In light of the foregoing, we do not see a reasonable probability that had counsel requested and received an identification instruction, the result of the proceeding would have been different. *See* ***Johnson,*** 153 Wis.2d at 129, 449 N.W.2d at 848. Therefore, Allison has not demonstrated that his counsel's performance prejudiced him.

By the Court.—Order affirmed.

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