



OFFICE OF THE CLERK  
**WISCONSIN COURT OF APPEALS**

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880

TTY: (800) 947-3529

Facsimile (608) 267-0640

Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT I**

March 12, 2024

To:

Hon. Joseph R. Wall  
Circuit Court Judge  
Electronic Notice

Kieran M. O'Day  
Electronic Notice

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

Jill Marie Skwor  
Electronic Notice

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

---

2022AP1988-CR

State of Wisconsin v. Devon Earl Simon (L.C. # 2020CF804)

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).**

Devon Earl Simon appeals from his judgment of conviction, entered upon a jury's verdict, for armed robbery and two counts of substantial battery, all as a party to a crime. He also appeals the order denying his postconviction motion, in which he alleged that his trial counsel was ineffective for eliciting an in-court identification of Simon by a witness who had not previously identified him.<sup>1</sup> Based upon our review of the briefs and record, we conclude at

---

<sup>1</sup> Simon's trial was before the Honorable Joseph R. Wall, and his postconviction motion was heard by the Honorable Danielle L. Shelton. We refer to them both as the circuit court.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).<sup>2</sup> We summarily affirm.

In February 2020, officers from the Milwaukee Police Department responded to a report of an armed robbery at an apartment on West Locust Street in Milwaukee. R.W., who was eighty-four years old at the time, lived in the apartment. R.W.'s home care worker, D.E., and D.E.'s boyfriend, A.H., were also present at the time of the robbery.

A.H. told police that he had heard a knock at the door. When he opened it, he observed two males, one of whom was armed with a metal pipe. He told A.H., "you know what this is, take your ass in the hallway." A.H. complied, and that suspect immediately hit him with the metal pipe. The other suspect, who was armed with a stick, took A.H.'s wallet and cell phone out of his pocket.

R.W. came out into the hallway and attempted to intervene, and the second suspect hit him. The suspects then fled with A.H.'s cell phone and the cash from his wallet. Both A.H. and R.W. were transported to the hospital for treatment. A.H. had a broken orbital bone and required stitches for a laceration on his head. R.W. also required stitches for a laceration on his head.

The police were able to obtain surveillance video from the apartment building's hallway. The video depicted two individuals exit a nearby vacant apartment and approach R.W.'s apartment. The video captured the robbery, showing the first suspect striking A.H. with the metal pipe and the second suspect then going through his pockets. The video also showed the

---

<sup>2</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

second suspect hitting R.W. The second suspect in the video was wearing a blue coat, a multi-colored winter hat, and a medical boot on his left foot.

Eleven days later, two officers on routine patrol observed an individual on the same block of West Locust Street as R.W.'s apartment building. The officers had seen a warrant bulletin relating to the robbery, which included a still picture from the surveillance video. The man they saw was wearing the same blue coat and multi-colored winter hat, and had a medical boot on the same foot as the second robbery suspect. The man, identified as Simon, was arrested and charged with one count of armed robbery and two counts of substantial battery, all as a party to a crime.

After Simon was arrested, the police presented photo arrays to A.H. and R.W. A.H. picked out an individual other than Simon. R.W. was not able to identify anyone from the photo array.

Prior to trial, Simon filed a motion in limine seeking to bar witness testimony relating to the identity of Simon where an earlier out-of-court identification had not been made. The State objected, noting that Simon had provided no basis for concluding that an in-court identification would be so unreliable that it would warrant exclusion. The motion was addressed at the final pretrial conference.<sup>3</sup> The parties agreed that the issue could be rendered moot if the victims were not able to identify Simon at the trial. Therefore, the circuit court decided that they would “deal with it in trial.”

---

<sup>3</sup> The motion was filed by Simon's first attorney; he was represented by new counsel at the pretrial conference.

The matter proceeded to trial in March 2021. Both A.H. and R.W. testified. A.H. confirmed on direct examination that he had identified someone other than Simon from the photo array as one of his assailants. During cross-examination, Simon’s trial counsel elicited testimony that Simon’s picture was included in the photo array—by pointing out Simon, who was seated next to counsel—and that A.H. had not identified him.

During the direct examination of R.W., he was asked about his ability to identify Simon from the photo array, to which he responded “[m]y memory is bad.” During cross-examination, Simon’s trial counsel elicited testimony from R.W. that he had not identified anyone in the photo array. Counsel then again pointed out Simon in court, attempting to confirm with R.W., as he had with A.H., that Simon’s picture was included in the photo array. R.W. responded “[h]e’s the one ... [that] hit me in my arm.” Counsel then confirmed with R.W. that he had not been able to identify Simon in the photo array.

The jury also saw the surveillance video from R.W.’s apartment building along with still photos from the video, which showed one of the suspects wearing a blue coat, a multi-colored winter hat, and a medical boot on his left foot. Additionally, the officers who arrested Simon testified about seeing the warrant bulletin regarding the robbery with the photo of the suspect wearing a blue coat, a multi-colored winter hat, and a medical boot on his left foot, and then seeing Simon, wearing the same thing, while they were on routine patrol on Locust Street.

The jury convicted Simon on all charges. The circuit court imposed sentences totaling nine years of initial confinement to be followed by seven years of extended supervision.

Simon filed a postconviction motion asserting ineffective assistance of counsel, based on his trial counsel eliciting the in-court identification of Simon by R.W. Simon also alleged that

counsel had failed to rebut the credibility of the identification during closing arguments. The circuit rejected Simon's arguments. It observed that trial counsel's attempt to "underscore" R.W.'s failure to identify Simon in the photo array by directing R.W.'s attention to Simon in the courtroom was perhaps a "risky" strategy in hindsight, but that did not render it deficient performance. The court further noted that counsel had highlighted both victims' inability to identify Simon in the photo array.

Furthermore, the circuit court found that Simon had not demonstrated that he was prejudiced by any potential error, based on the strength of the other evidence presented; specifically, the surveillance video of the robbery, and the police officers' testimony regarding their arrest of Simon wearing the same clothing and medical boot as the suspect in the video. Therefore, the court denied Simon's postconviction motion without a hearing. This appeal follows.

On appeal, Simon renews his ineffective assistance of counsel claim relating to the in-court identification of Simon by R.W. In order to establish ineffective assistance, a defendant must show both that counsel's performance was deficient and that such performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if the defendant fails to make a sufficient showing on either one. *Id.* at 697.

Appellate review of an ineffective assistance of counsel claim is a mixed question of fact and law. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not disturb the circuit court's findings of fact unless they are clearly erroneous, but the ultimate

determination of whether counsel's performance fell below the constitutional minimum is a question of law we review independently. *See id.* at 634.

As explained above, the issue regarding Simon's identification by either victim was addressed at the final pretrial conference. Simon's trial counsel, who had not filed the motion, demonstrated his willingness to argue the motion, but also noted his ability to utilize cross-examination to question the reliability of any in-court identification issues that arose. The circuit court ultimately did not decide the motion, but instead allowed the evidence to play out at trial.

That strategy of using cross-examination to address the identification issue, drawing attention to Simon during questioning for emphasis, worked with A.H., and Simon's trial counsel clearly anticipated a similar response during his cross-examination of R.W. Furthermore, after R.W.'s unexpected in-court identification of Simon, the record reflects that counsel attempted to mitigate the effect of the identification by redirecting R.W. to the fact that he was not able to identify Simon in the photo array. In his closing argument, counsel also highlighted both A.H.'s and R.W.'s failure to identify Simon in the photo array.

Decisions related to trial strategy, "even those appearing unwise in hindsight," will not be deemed to be deficient performance "so long as they are 'reasonably founded on the facts and law under the circumstances existing at the time the decision was made.'" *State v. Smith*, 2016 WI App 8, ¶14, 366 Wis. 2d 613, 874 N.W.2d 610. Simon's defense in this matter was based on mistaken identity. Even if drawing R.W.'s attention to Simon during cross-examination was "risky," as suggested by the circuit court, trial counsel did so based on the facts and circumstances as they existed at that time. *See id.* He also attempted to mitigate the effects of R.W.'s in-court identification during the remainder of his cross-examination, as well as during

his closing argument. We therefore conclude that counsel's performance fell "within the wide range of reasonable professional assistance." See *Strickland*, 466 U.S. at 689. As a result, it was not deficient.

Furthermore, even if this was deemed to be a deficiency, Simon has not demonstrated that he was prejudiced by the purported error. To demonstrate prejudice, 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Here, besides the victims' testimony, the evidence included the testimony of the arresting officers who had viewed the surveillance video showing the robbery, and then spotted Simon in the same neighborhood wearing the same clothing as the robbery suspect, including the medical boot on his left foot. The jury also saw the surveillance video from the robbery as well as still photos of the suspect. This evidence was sufficient to support the inferences made by the jury in concluding that Simon was one of the suspects involved in the robbery. See *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990) ("It is well established that a finding of guilt may rest upon evidence that is entirely circumstantial and that circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence.").

As a result, Simon's ineffective assistance of counsel claim fails. See *Strickland*, 466 U.S. at 687. Therefore, the circuit court did not err in denying his postconviction motion without a hearing. See *State v. Allen*, 2004 WI 106, ¶2, 274 Wis. 2d 568, 682 N.W.2d 433 (the circuit court is not required to hold a hearing if the record conclusively demonstrates that the defendant

is not entitled to relief). Accordingly, we affirm Simon's judgment of conviction and the order denying his postconviction motion.

Upon the foregoing,

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*