

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I**

RECEIVED

08-11-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2017AP968CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMEY LAMONT JACKSON

Defendant-Appellant.

**AN APPEAL FROM THE JUDGMENT OF CONVICTION
ENTERED ON FEBRUARY 3, 2015 AND SENTENCE IMPOSED ON
FEBRUARY 3, 2015, IN THE CIRCUIT COURT OF MILWAUKEE
COUNTY, BY THE HONORABLE DANIEL L. KONKOL, AND
ORDER DENYING JACKSON'S MOTION FOR
POSTCONVICTION RELIEF, ENTERED ON MAY 5, 2017, IN THE
CIRCUIT COURT OF MILWAUKEE COUNTY, THE
HONORABLE M. JOSEPH DONALD, PRESIDING**

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Cheryl A. Ward
State Bar No. 1052318
Attorneys for Defendant-Appellant
Jamey Lamont Jackson

Ward Law Office
10533 W. National Ave. Suite 304
West Allis, Wisconsin 53227
Phone: (414) 546-1444
Fax: (414) 446-3812

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	2
ISSUES PRESENTED.....	4
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	4
STATEMENT OF THE CASE.....	4
STATEMENT OF THE FACTS	5
ARGUMENT.....	6
I. JACKSON IS ENTITLED TO A NEW TRIAL DUE TO THE FACT THAT HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL	6
 A. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT CHALLENGING THE IMPERMISSABLY SUGGESTIVE LINEUP	6
II. THERE WAS NOT SUFFICIENT EVIDENCE PRESENTED AT THE TRIAL TO SUPPORT THE JURY'S FINDING OF GUILT.....	10
CONCLUSION	12
FORM AND LENGTH CERTIFICATION.....	13
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12).....	13
APPENDIX CERTIFICATION	14
APPENDIX.....	15

TABLE OF AUTHORITIES

Cases

Supreme Court Cases

- Neil v. Biggers*,
409 U.S. 188, 93 S. Ct. 375,
34 L. Ed.2d 401 (1972)7,8
- Strickland v. Washington*,
466 U.S. 668, 104 S. Ct. 2052,
80 L.Ed.2d 674(1984).....6

Wisconsin Cases

- Powell v. State*,
86 Wis. 2d 51, 271 N.W.2d 610 (1978).....7,8
- State v. Benton*,
2001 WI App 81, 243 Wis. 2d 54,
625 N.W.2d 923.....7
- State v. Doss*,
2008 WI 93, 312 Wis.2d570,
754 N. W.2d 150.....6
- State v. Erickson*,
227 Wis.2d 758, 596 N.W.2d 749 (1999).....6
- State v. Mosley*,
102 Wis. 2d 636, 307 N.W.2d 200 (1981).....7
- State v. Pitsch*,
124 Wis.2d 628, 369 N.W.2d 711(1985).....6
- State v. Poellinger*,
153 Wis.2d 493,451 N.W.2d 752 (1990).....10
- State v. Sanchez*,
201 Wis.2d 219, 548 N.W.2d 69 (1996).....6

<i>Wright v. State</i> , 46 Wis. 2d 75, 175 N. W.2d 646 (1970).....	7
--	---

Wisconsin Jury Instructions

J.I.-Criminal 1343.....	10
-------------------------	----

ISSUES PRESENTED

Did the trial court err by finding that Jackson is not entitled to a new trial based on trial counsel's ineffective assistance of counsel?

Answer by Circuit Court: No

Whether there was sufficient evidence presented at the trial to support the jury's finding of guilt?

Answer by Circuit Court: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The claims raised by Jackson do not present any change in law or warrant an extension in existing law therefore, oral argument and publication are not requested.

STATEMENT OF THE CASE

This is an appeal from a felony case in the circuit court for Milwaukee County. On February 3, 2015, Jackson was convicted by a jury of one count of felon in possession of a firearm. (16,22). On February 3, 2015, the Honorable Daniel L. Konkol presiding sentenced Jackson to 5 years initial confinement and 5 years extended supervision on Count 1. (22, 26, 69). On March 6, 2017 Jackson filed a postconviction motion requesting a new trial based on ineffective assistance of counsel. (46; App. 101-118). On March 8, 2017, the circuit court set a briefing schedule. (47). On April 11, 2017, the State filed a response. (50; App. 119-125). On April 24, 2017, Jackson filed a reply. (51; App. 126-137). Without holding any hearing on the motion, the circuit court, the Honorable M. Joseph Donald, presiding, denied the motion, in an order dated May 5, 2017. (51; App.132-137). Jackson now appeals.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In a criminal complaint filed on June 2, 2014, Jackson was charged with one count of felon in possession of a firearm. (1). The possession of a firearm by a felon charge arose when Jackson was accused of possessing a firearm and shooting at another person. (1). Jackson was a convicted felon at the time of the incident. (1).

The incident occurred on May 21, 2014. (1). The lineup in this case took place on May 30, 2014. The lineup was recorded. From February 2, 2015 to February 3, 2015 a trial was held. Due to the fact that Jackson stipulated at trial that he was a convicted felon, the main issue at trial was identification. At the end of the trial Jackson was found guilty. (69:20-23). The court went straight to sentencing after trial. (69:25-37). On February 3, 2015, Jackson was sentenced to 5 years initial confinement and 5 years extended (69:25-37).

Trial Counsel filed a timely notice of intent to pursue postconviction relief on February 23, 2015. (24). Jackson was assigned two other appellate counsels who subsequently withdrew from the case before undersigned counsel was appointed. The time for filing a postconviction motion or notice of appeal was extended and on March 6, 2017 Jackson filed a postconviction motion requesting a new trial based on ineffective assistance of counsel. (46; App. 101-118). On March 8, 2017, the circuit court set a briefing schedule. (47). On April 11, 2017, the State filed a response to the postconviction motion. (50; App. 119-125). On April 24, 2017, Jackson filed a reply to the State's response. (51; App. 126-131).

Without holding any hearing on the motion, the circuit court, the Honorable M. Joseph Donald, presiding, denied the motion, in an order dated May 5, 2017. (51; App.132-137). A timely notice of appeal was filed on May 22, 2017. (55).

ARGUMENT

I. JACKSON IS ENTITLED TO A NEW TRIAL DUE TO THE FACT THAT HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL

The standard for review for ineffective assistance of counsel is that the circuit court makes factual findings regarding counsel's performance they are upheld unless they are clearly erroneous, but whether counsel's performance was deficient under the constitutional standard presents a question of law, which is reviewed de novo. *See State v. Doss*, 2008 WI 93, ¶23, 312 Wis.2d 570, 754 N. W.2d 150.

To establish ineffective assistance of counsel, a defendant must show both that trial counsel's performance was deficient and that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The standard for determining whether counsel's assistance is effective under the Wisconsin Constitution is the same as that under the Federal Constitution. *See State v. Sanchez*, 201 Wis.2d 219, 235-36, 548 N.W.2d 69 (1996). Performance is deficient if it falls outside the range of professionally competent representation, measured by the objective standard of what a reasonably prudent attorney would do under the circumstances. *State v. Pitsch*, 124 Wis.2d 628, 636-37, 369 N.W.2d 711 (1985). Prejudice is demonstrated where, but for counsel's deficient performance, there was a reasonable probability of a different trial outcome. *State v. Erickson*, 227 Wis.2d 758, 773, 596 N.W.2d 749 (1999).

A. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT CHALLENGING THE IMPERMISSIBLY SUGGESTIVE LINEUP

“‘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. Benton*, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923 (citation and one set of quotation marks omitted).

The test for fairness in a lineup depends upon the totality of the circumstances surrounding the lineup, as explained by our supreme court in *Wright v. State*, “The ‘totality of circumstances’ reference is a reminder that there can be an infinite variety of differing situations involved in the conduct of a particular lineup. The police authorities are required to make every effort reasonable under the circumstances to conduct a fair and balanced presentation of alternative possibilities for identification. The police are not required to conduct a search for identical twins in age, height, weight or facial features.” *Wright v. State*, 46 Wis. 2d 75, 86, 175 N.W. 2d 646, (1970):

Our supreme court, in *Powell v. State*, 86 Wis. 2d 51, 271 N.W.2d 610 (1978), noted that “[i]t is the likelihood of misidentification which violates a defendant’s right to due process.” *Id.* at 64 (quoting *Neil v. Biggers*, 409 U.S. 188, 199 (1972)). *Powell* explained a two-part procedure for determining the admissibility of pretrial identification evidence. *Id.* at 65. The court must first decide whether the defendant has shown that the identification procedure was impermissibly suggestive. *Id.* If the defendant fails to satisfy the burden of showing that the lineup was impermissibly suggestive, the inquiry ends. *State v. Mosley*, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981).

The “overriding question” in determining whether a defendant’s rights were violated as a result of an impermissibly suggestive lineup is “‘whether under the ‘totality of the circumstances’ the identification was reliable even though the

confrontation procedure was suggestive.” *Powell*, 86 Wis. 2d at 64-65 (citation omitted). The *Powell* court looked to the specific guidelines provided by *Biggers* to determine whether the totality of the circumstances made an identification reliable even if a pretrial procedure was suggestive:

“[T]he factors to be considered in evaluating the likelihood of misidentification include 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 65 (citing *Biggers*, 409 U.S. at 199-200).

The incident that the charge arose from occurred on May 21, 2014. The lineup took place on May 30, 2014. The lineup procedure in this case was recorded. The lineup occurred 9 days after the shooting.

There were 5 people that viewed the lineup. These 5 people all viewed the same lineup and could see each other at the lineup. The lineup was viewed once and then B.B. raised her hand and said out loud for all of the other people viewing the lineup to hear stated that she wanted to see number 5 again. (46; App. 101-118). Jackson was in the number 5 position. (46; App. 101-118).

K.G. was interviewed on May 21, 2014. The same day of the incident. She did not identify by name any suspects. (46; App. 113-114). She did not say that she knew any of the suspects. (46; App. 113-114). At the lineup, 9 days later, she told the officer that she did circle no first but then circled yes. (46; App. 116). She told the officer that she knew this person and his name was TY. (46; App. 116). The fact that she circled no but then circled yes shows that she was unsure. When B.B. specifically says out loud that she wants to see number 5 again it unduly influenced K.G. because she

wasnt sure to begin with if it was number 5. On February 2, 2015, K.G. testified at trial that she did not know this person by name or nickname. (67:137). She also testified that she didnt remember why she wrote TY on the identification sheet. (67:141). K.G. also testified that she was 12 years old. (67:117).

The request to specifically see number 5 in the lineup again was unfairly suggestive to the other people at the lineup. K.G.'s identification was not reliable. She could not identify anyone by name or say this is the person that did this when she was questioned about this incident the day that it happened. She at first circled no when she saw Mr. Jackson and then circled yes. Only after B.B. asked to see number 5 again did K.G. then say that she knew number 5 for one year and his name was TY. If she has seen him in the neighborhood and knew his name was TY, why did she not give that information to the police on the date of the incident when she was interviewed. Based on the totality of circumstances, the identification was unreliable.

T.M. was at the lineup and she wrote looks familiar next to number 5, then scribbled out that word and then said yes to number 5. (46:118). She was unduly influenced by B.B.'s request to see number 5 again. On February 2, 2015, T.M. testified at trial that she was 14 years old. (67:165). Further at trial she identifies a person in the gallery as the person she saw that day as Jamey. (69: 168-170,181,188). Then after the person in the gallery leaves she is asked if she sees anybody in the park that night in this room and she says no. (69:189). She testified that Jamey was the person in the audience and TY was Mr. Jackson. (69:197-198). Then she testifies that TY and Jamey are the same person. (69:216-217).

The request to specifically see number 5 in the lineup again was unfairly suggestive to the other people at the lineup. T.M.'s identification was not reliable.

The identification in these proceedings prejudiced the defendant and should have been suppressed. A reasonably prudent attorney would have filed a suppression motion. The entire trial revolved around identification and that was the defense that was used at trial. In suppressing the identification of the lineup there is a reasonable probability that there would have been a different outcome based on the fact that the State would not have been able to use the lineup identification of two witnesses.

II. THERE WAS NOT SUFFICIENT EVIDENCE PRESENTED AT THE TRIAL TO SUPPORT THE JURY'S FINDING OF GUILT

Jackson was found guilty by the jury of possession of a firearm by a felon. Jackson argues that the evidence presented a trial was insufficient to find him guilty.

In order to convict an individual for the charge of possession of a firearm by a felon, the State must prove beyond a reasonable doubt the following elements: (1) the defendant possessed a firearm; (2) the defendant had been convicted of a felony before the date of the offense. J.I.-Criminal 1343.

When the defendant challenges the sufficiency of the evidence to support a conviction, the standard of review is, “an appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752 (1990).

Jackson contends that the testimony presented by the State's witnesses was insufficient to find the defendant guilty. Jackson did not contest that he was

previously convicted of a crime so the only issue for the jury was whether or not he possessed a firearm.

On February 2, 2015, K.G. testified at the trial. She testified that she did not know the name or nickname of the person she identifies as Jackson. (67:137). She then testifies that she wrote the name TY on the lineup identification sheet but then testifies that she didnt remember why she wrote TY on the identification sheet. (67:141). Further, in her testimony K.G. says that she could only describe one person to the police which was the person that ran towards her which was the person without the gun. (67:161).

K. G.'s testimony was confusing she testified about only seeing one person a person without the gun yet then proceeded to identify Jackson as someone with a gun. She said during the lineup that she wrote down that he was TY but then couldnt remember why she wrote that name down. Her testimony does not show that Jackson possessed a firearm beyond a reasonable doubt.

T.M. identifies a person in the gallery as the person she saw that day as Jamey. (69: 168-170,181,188). Then after the person in the gallery leaves she is asked if she sees anybody in the park that night in this room and she says no. (69:189). She testified that Jamey was the person in the audience and TY was Mr. Jackson. (69:197-198). Then she testifies that TY and Jamey are different people. (69:197-198). Then she testifies that TY and Jamey are the same person. (69:216-217). She also testifies that she learned the name Jamey from the TV. (69:218). She testifies hat she saw his picture on TV and it looked like TY and they said his name was Jamey. (69:218).

T.M.'s testimony was confusing. She identifies someone in the gallery as the person being there. She talks as if TY and Jamey are the same person and then not the same person. She also testifies about seeing Jamey's picture on TV. Her testimony does not show

that Jackson possessed a firearm beyond a reasonable doubt.

In viewing the evidence provided, no trier of fact could reasonably find that the evidence provided proved beyond a reasonable doubt that Jackson possessed a firearm. All of the above evidence combined is insufficient to establish that the defendant was guilty of possession of a firearm by a felon.

CONCLUSION

For, the reasons stated above Jackson asks this Court to reverse the decision of the circuit court and remand for a new trial or a hearing to address the claim of ineffective assistance of counsel or in the alternative reverse the finding of guilt and remand to the trial court to dismiss the case.

Respectfully submitted this
9th day of August, 2017.

Cheryl A. Ward
State Bar No. 1052318

Ward Law Office
10533 W. National Ave. Suite304
West Allis, WI 53227
Telephone: (414) 546-1444
Facsimile: (414) 446-3812
Attorney for Appellant-Defendant

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is **2,285** words.

Respectfully submitted this
9th day of August, 2017.

Cheryl A. Ward
State Bar No. 1052318
Ward Law Office

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief report filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: August 9, 2017

Cheryl A. Ward
State Bar No. 1052318
Ward Law Office

APPENDIX CERTIFICATION

I hereby certify that filed with this brief either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stats. §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings, or opinion of the trial court; (3) a copy of any unpublished opinion cited under §909.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken for a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juvenile and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: August 9, 2017

Cheryl A. Ward
State Bar No. 1052318
Ward Law Office

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 17AP968

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMEY LAMONT JACKSON,

Defendant-Appellant.

INDEX TO APPENDIX

1. Motion for Postconviction Relief
(17AP968, R. 46).....App.101-118
2. State's Response to Defendant's Motion for
Postconviction Relief
(17AP968, R.50).....App.119-125
3. Defendant's Reply to State's Response to
Defendant's Motion for Postconviction Relief
(17AP968, R.51).....App.126-131
2. Decision and Order
(17AP968, R.52).....App.132-137