STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP1347-CR

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

STEVEN TYRONE BRATCHETT,

Defendant-Appellant-Petitioner.

PLAINTIFF-RESPONDENT'S RESPONSE IN OPPOSITION TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

ANNE C. MURPHY
Assistant Attorney General
State Bar #1031600

Attorneys for Plaintiff-
Respondent State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9224
(608) 294-2907 (Fax)
murphyac@doj.state.wi.us

INTRODUCTION

The State of Wisconsin opposes Steven Tyrone Bratchett's petition for review of the court of appeals' unpublished decision affirming his convictions for burglary, armed robbery, and attempted third degree sexual assault, all with penalty enhancers and as party to a crime, and the order denying Bratchett's postconviction motion for a new trial after a hearing alleging ineffective assistance of counsel. *State v. Bratchett,* No. 2020AP1347-CR (Wis. Ct. App. November 9, 2021) (unpublished) (Pet-App. 3–43.) Bratchett contends that review of the decision affirming the admission of the victim's photo identification of Bratchett, after independently applying well-established factors to conclude that the identification was sufficiently reliable (Pet-App. 3–4), is warranted to determine if the court "correctly appli[ed] the reliability test for admission of an eyewitness identification as recently reaffirmed in *State v. Roberson,* 2019 WI 102, 389 Wis. 2d 190, 935 N.W. 2d 813." (Pet. 4.) Bratchett also seeks review of the decision that Bratchett's trial counsel's strategy was not deficient to determine if the court of appeals correctly applied the well-established "objective standard of reasonableness." (Pet. 4.) Finally, if this Court accepts review, Bratchett asks this Court to review the five other claims that the court of appeals rejected. (Pet. 4–5.)

Bratchett has not presented "special and important reasons" for review such as a real and significant constitutional question, the decision is not in conflict with controlling opinions nor ripe for reexamination, and review is unnecessary to clarify, develop or harmonize the law related to claim that is not factual in nature. Wis. Stat. § (Rule) 809.62(1r). Bratchett seeks review of the court of appeals' application of well-established law, alleging error by the court

of appeals. This is not an error-correcting court.[1] This Court should deny the petition.

BACKGROUND

The charges against Bratchett stemmed from a home invasion by two men who forced their way inside the victim S.D.'s apartment near the Marquette University campus. (Pet-App. 4.) The man who S.D. later identified as Bratchett threatened to shoot S.D., stole her cell phone and debit card, demanded her access code, told S.D. to go into her bedroom, sit on the bed, take off her clothes, and grabbed and tugged on her shorts. (Pet-App. 4.) After Bratchett and his co-actor fled, police found S.D.'s phone and wallet, which contained Bratchett's fingerprints, near the apartment building and next to Bratchett's identification card. (Pet-App. 5.)

Bratchett filed a motion to suppress S.D.'s photo array identification testimony. (Pet-App. 5.) After a hearing, the court denied Bratchett's motion, holding that although the photo array was impermissibly suggestive, the State had shown that S.D.'s identification was sufficiently reliable. (Pet-App. 5.) The jury returned guilty verdicts on all three counts. (Pet-App. 6.)

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[1] *See State v. Mosley*, 102 Wis. 2d 636, 665, 307 N.W.2d 200 (1981) ("It is not the primary purpose of this court . . . merely to correct error in trial court proceedings[,] a function now largely met by the court of appeals[,] but instead to oversee and implement the statewide development of the law."); *State v. Minued*, 141 Wis. 2d 325, 328, 415 N.W.2d 515 (1987) ("It is not this court's institutional role to perform this error correcting function."); *State ex rel. Dep't of Nat. Res. v. Wisconsin Ct. of Appeals, Dist. IV*, 2018 WI 25, ¶ 43, 380 Wis. 2d 354, 909 N.W.2d 114 ("The criteria for granting [a petition for review] . . . do not encompass correcting an appellate tribunal's simple error of law.").

Bratchett filed a postconviction motion seeking a new trial based on multiple claims of ineffective assistance counsel and, after conducting two *Machner*[2] hearings, the court denied his motion. (Pet-App. 6.) Bratchett appealed, raising three categories of issues: (1) trial court errors related to admission of evidence; (2) ineffective assistance of counsel; and (3) sufficiency of the evidence. (Pet-App. 6.) The court of appeals denied all of Bratchett's claims and affirmed the judgment of conviction and the order denying Bratchett's postconviction motion. (Pet-App. 4)

Relevant to this petition for review, the court of appeals held that under the totality of circumstances, "S.D.'s identification was reliable and not in violation of Bratchett's right to due process." (Pet-App. 13.) Additionally, the court of appeals concluded that Bratchett was not entitled to a new trial on the attempted third-degree sexual assault count based on his ineffective assistance claim, because counsel's defense strategy to focus on S.D.'s low level of confidence in her identification and to argue that Bratchett was not the perpetrator was reasonable and not deficient performance. (Pet-App. 18–19.)[3] The court of appeals affirmed the judgment of conviction and order denying Bratchett's postconviction motion. (Pet-App. 31.) Bratchett seeks review by this Court. (Pet. 1–32.)

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

[3] In his dissent, Judge Dugan concluded that the State failed to prove that S.D.'s identification was reliable, and that trial counsel was ineffective for failing to cross-examine S.D. on "her inconsistent statements as to what the subject said to her in bedroom." (Pet-App. 32.)

DISCUSSION

Bratchett's petition for review fails to meet the criteria for review by this Court.

Bratchett makes three arguments in support of his petition for review. First, he claims that this Court should reexamine the admission of S.D.'s identification testimony, to "label[] this evidence as too unreliable for admission, give teeth the reliability standard in Wisconsin," and "address an issue of serious concern that will have an obvious impact on circuit court litigation throughout Wisconsin." (Pet. 6.) Second, Bratchett claims that review is warranted of the decision denying his claim that counsel was ineffective for not impeaching S.D. about the precise wording of what Bratchett said to her during the robbery and attempted sexual assault, asking this Court to "reverse the court of appeals' problematic assessment of trial counsel's alleged strategic choices" and arguing that "clarification of this point will help to assist legal actors to accurately apply legal standards." (Pet. 6–7.) Third, Bratchett claims that if this Court accepts review, it should "review the remaining issues in the brief." (Pet. 7.)

Bratchett's claims for review do not come within the statutory criteria for supreme court review enunciated in Wis. Stat. § (Rule) 809.62(1r). Bratchett has not satisfied the criteria that the case present a significant question of constitutional law, a need for this Court to develop, clarify, or harmonize the law on a question that is not factual in nature, or is in conflict with other decisions. This Court should deny the petition for review for the reasons explained below.

A. Bratchett has not shown special and important reasons warranting review of the lower courts' application of well-established law to conclude that S.D.'s identification testimony was sufficiently reliable

The court of appeals denied Bratchett's claim that the circuit court erred in admitting S.D.'s identification testimony, agreeing with the circuit court that the photo array was impermissibly suggestive because Bratchett's photo was the only photo with a neck tattoo and two moles on his face, but concluding that the State had met its burden to prove that "under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. *Neil v. Biggers*, 409 US. 188, 199 (1972)." (Pet-App. 6–7.)[4] The court of appeals examined the *Biggers* factors—S.D.'s opportunity to see Bratchett at the time of the crime; her degree of attention; the accuracy of her description; her level of certainty of her identification; and the time between the crimes and her identification of Bratchett—and concluded that the State had met its burden to show that S.D.'s identification had strong and convincing indicia of reliability. (Pet-App. 12–13). The court of appeals determined that the circuit court had observed S.D.'s testimony, "found her credible, and concluded that there were sufficient indicia of reliability to admit her testimony, which was subject to cross examination." (Pet-App. 13–14.) The court concluded "that under the totality of the circumstances, the factors support that S.D.'s identification was reliable and not in

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[4] This Court recently reaffirmed the *Biggers* factors, holding that "reliability [is] the linchpin in determining the admissibility of identification testimony" and "[d]ue process does not require the suppression of evidence with sufficient 'indicia of reliability.'" *State v. Roberson*, 2019 WI 102, ¶ 3, 389 Wis. 2d 190, 935 N.W.2d 813 (citation omitted).

violation of Bratchett's right to due process" and thus, that circuit court properly admitted S.D.'s identification testimony. (Pet-App. 13–14.)

Bratchett seeks review of the decision that S.D.'s identification was sufficiently reliable and did not violate Bratchett's due process rights, asking this Court to hold that S.D.'s identification "was insufficiently reliable, thereby reaffirming that the due process clause's prohibition against unreliable eyewitness evidence is a meaningful constitutional protection." (Pet. 14.) Bratchett spends much time arguing that the photo lineup was "so intrinsically bad" and "flawed," although he ultimately admits that the court of appeals was "correct" when it concluded that the photo array was impermissibly suggestive. (Pet. 15–18.) Bratchett complains that the State did not meet its "burden to produce sufficient indicia of reliability capable of 'outweighing' that suggestiveness," relying on the dissent's analysis to argue that the identification was "patently unreliable" and that this Court should review the court of appeals' decision determining that S.D.'s identification "satisfied *all five* of the reliability factors set forth in *Neil v. Biggers*, 409 US. 188 (1972.)" (Pet. 20–21.) Bratchett's reliance on the dissent asks this Court to review the court of appeals' decision for correctness. That is not adequate justification for review. *See Minued,* 141 Wis. 2d at 328. Moreover, Bratchett's claim that this Court "must accept review and reverse" the court of appeals decision applying the well-settled law governing the standard for the admissibility of identification testimony, "thereby demonstrating that this standard matters and that there is a least a hypothetical 'floor' for the admissibility of eyewitness identification evidence" (Pet. 21) is meritless. This Court is not required to accept review because Bratchett has not met the criteria for review of the court of appeals' decision.

Review by this court is not warranted by "a real and significant question of federal constitutional law" and would not "help develop and clarify an area of law." Wis. Stat. § (Rule) 809.82(1r)(a)(b). Bratchett has not shown that the law governing this case needs developing, clarifying, or harmonizing. Whether the court of appeals properly applied the five factors set forth in *Biggers* and *Roberson* to determine if S.D.'s identification was sufficiently reliable is not law development, but instead is mere error correction.

Here, the court of appeals did not error. It correctly applied the law to its findings of fact related to S.D.'s identification, concluding that the State had shown that S.D.'s identification of Bratchett was sufficiently reliable. The dissent's opposite determination does not merit review by this Court. This Court should deny Bratchett's petition for review.

B. Bratchett has not shown special and important reasons warranting review of the decision that his counsel's strategy was not deficient and denying his ineffective assistance claim.

For similar reasons, this Court should deny review of Bratchett's claim that his counsel was ineffective for not impeaching S.D. related to the specific wording of her statement to police and her testimony. Bratchett failed to show the criteria meriting review of the decision that counsel's strategy not to impeach S.D. on her statements about what Bratchett said to her during the robbery and attempted sexual assault was not deficient performance.

The court of appeals determined that the "overarching defense strategy" was "to attack the sufficiency of the identification of the suspect," focus on S.D.'s "sixty to seventy percent certainty in her identification" of Bratchett, and argue that Bratchett was not the perpetrator. (Pet-App 16.) In light of this reasonable strategy, Bratchett's counsel did

not perform deficiently by not impeaching S.D. related to the "inconsistencies between her statements made to police" that during the incident, Bratchett said to her, "you better not be lying to me, don't fuck with me," and S.D.'s testimony that Bratchett said to her, "I will fuck you. You better not be lying to me." (Pet-App. 17.) The court of appeals rejected Bratchett's claim that his "counsel's failure to pursue this line of questioning undermines confidence in the verdict." (Pet-App. 18.) Based on counsel's testimony at the two *Machner* hearings, the court of appeals concluded that Bratchett was not entitled to a new trial on the attempted third-degree sexual assault count because counsel's strategy to "focus[] on S.D.'s less than 100% confidence in her identification" was "not irrational," and questioning S.D. about her "recollection of the precise wording employed by the suspect would not have aided in his defense." (Pet-App. 19.)

Bratchett seeks review by this Court of this decision, arguing that counsel's strategy not to impeach S.D. related to her statement in the police report and her testimony at trial was "objectively unreasonable." (Pet. 23.) Bratchett claims that this Court should reexamine the decision, find that counsel performed deficiently, "hold that counsel's deficient performance undermined confidence in the jury verdict with respect to the sexual assault charge," and "remand for a new trial on that count." (Pet. 27–28.) Again, Bratchett seeks error correction. He has not stated adequate grounds for this Court to review the decision affirming the order denying his ineffective assistance claim.

Bratchett has failed to articulate an argument that his ineffective assistance claim presents a "real and significant question of federal or state constitutional law" or show a need "to develop, clarify or harmonize the law" related to claim that "is not factual in nature." Wis. Stat. § (Rule) 809.62(1r)(a) and (c)3. The court of appeals' application of well-established legal standards does not present a significant constitutional

question, nor does its decision conflict with controlling case law. Wis. Stat. § (Rule) 809.62(1r)(d). The court of appeals applied the clearly stated legal standards that there is a "strong presumption" that counsel acted within "professional norms" and had a reasonable strategy that is "virtually unassailable in an ineffective assistance of counsel analysis." *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *State v. Maloney*, 2004 WI App 141, ¶ 23, 275 Wis. 2d 557, 685 N.W.2d 620. "Counsel's decisions in choosing a trial strategy are to be given great deference." *State v. Balliette*, 2011 WI 79, ¶ 26, 336 Wis. 2d 358, 805 N.W.2d 334. Moreover, the issue of whether Bratchett's counsel was deficient for not impeaching S.D. on the exact wording of what she told police versus what she testified that Bratchett said to her during the incident is *exceptionally* "factual in nature"; thus, it is not subject to review by this Court.

Relying on the dissent, Bratchett argues that counsel's strategy was "objectively unreasonable" and that "this Court should accept review to reaffirm fundamental principles applicable to ineffectiveness claims, resolving the inherent dispute in this case as to the proper amount of deference owed to counsel's strategic judgments" under controlling law. (Pet. 26–27.) But the fact that there was a vigorous dissent in the court of appeals does not make this petition worthy of review. The majority and dissent came to different conclusions about how settled law applies to the facts of this case. The dissent concluded that Bratchett was entitled to a new trial on the attempted third-degree sexual assault count because his counsel's trial strategy was objectively unreasonable, and the majority concluded that he was not because his counsel's strategy to focus on S.D.'s level of confidence in her identification and argue that Bratchett was not the perpetrator was imminently reasonable. A difference of judicial opinion in a highly fact-driven analysis is not a basis for this Court's review.

In sum, Bratchett has failed to meet the criteria for review of the court of appeals' decision. The conclusion that his counsel's strategy to focus on S.D.'s level of certainty that Bratchett was her assailant, and not to impeach her on the specifics of what the assailant said to her, was not deficient performance, is in accord with well-established law and does not merit review by this Court. This Court should deny the petition for review.

C. Bratchett has not met the criteria for review by this Court on his remaining legal claims.

Finally, Bratchett argues that if this Court accepts review, it should address the remainder of his "legal claims." (Pet. 28–30.) Bratchett wholly fails to show that these remaining claims that were rejected by the court of appeals merit review by this Court.

Bratchett's other claims on appeal were (1) that the circuit court erred by admitting into evidence his photo identification card showing him wearing an orange shirt (Pet-App. 15.); (2) that his counsel was ineffective in numerous other ways and that he suffered "cumulative prejudice" (Pet-App. 19–27); and (3) that the evidence was insufficient for the jury to reach the guilty verdict on the attempted third-degree sexual assault count. (Pet-App. 27–30.) The court rejected all of these claims, holding that (1) the circuit court's decision to admit Bratchett's photo identification card was a "reasonable exercise of discretion." (Pet-App. 15); (2) Bratchett's counsel did not perform deficiently in any respect and Bratchett was not prejudiced by any of the alleged deficiencies, concluding that its "confidence in the outcome of the trial is not undermined whether we view the allegations of error individually or cumulatively." (Pet-App. 27); and (3) there was sufficient evidence for the jury to return the guilty verdict on the attempted third-degree sexual assault count. (Pet-App. 30.) As Bratchett admits, these "issues do not independently

merit review and are instead presented as an opportunity for error correction." (Pet. 7.) Even if this court accepts review of the issues Bratchett claims merit review, these other issues merely seek alleged error correction, which is not the function of this Court. *See Mosley*, 102 Wis. 2d at 665.

CONCLUSION

Bratchett does not point to any "special and important reasons" for this Court to grant his petition for review. Wis. Stat. § (Rule) 809.62(1r). In its decision, the court of appeals correctly applied well-established legal standards. The petition does satisfy the criteria for review set forth in Wis. Stat. (Rule) § 809.62(1r). This Court should deny the petition for review.

Dated this 16th day of December 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Anne C. Murphy
ANNE C. MURPHY
Assistant Attorney General
State Bar #1031600

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9224
(608) 294-2907 (Fax)
murphyac@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b) and 809.62(4) (2019–20) for a response produced with a proportional serif font. The length of this response is 3030 words.

Anne C. Murphy
ANNE C. MURPHY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULE) 809.19(12) and 809.62(4)(b) (2019–20)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rule) 809.19(12) and 809.62(4)(b) (2019–20).

I further certify that:

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

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

Dated: December 16, 2021.

Anne C. Murphy
ANNE C. MURPHY
Assistant Attorney General