STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2022AP001522CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRANDON B. SMILEY

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Postconviction Relief in Jefferson County Circuit Court, Case No. 2020CF000310, The Honorable Robert F. Dehring Jr., Presiding.

BRIEF OF PLAINTIFF-RESPONDENT

Respectfully submitted,
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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not believe that oral argument is necessary since the briefs fully present and meet the issues on appeal. Publication of the opinion is not warranted since the issues involve the application of well settled law.

STATEMENT OF THE CASE

The State filed a Criminal Complaint on August 12, 2020 charging Brandon Smiley with one count of Lewd and Lascivious Behavior contrary to section 944.20(1)(b) of the Wisconsin Statutes. (R. 2:1-3, Def-App.:4-6) The case proceeded to a jury trial on September 13, 2021 and Smiley was found guilty of the single count in the complaint. (R. 109:238, Def-App.:325) The Court entered a Judgment of Conviction on the verdict. (R.109:242, Def-App.:329) On October 26, 2021, the Court sentenced Smiley to a nine month county jail term. (R. 114:15, Def-App:38)

The defense filed a post-conviction motion to set aside the verdict and judgment of conviction alleging Attorney Huebner was ineffective for failing to move for suppression of the out of court identification of Mr. Smiley. (R. 130:1-8, Def-App:16-23) A hearing was held on June 23, 2022 and the motion was denied. (R. 154:1, 41, Def-App.:43, 83) The defense filed a notice of appeal on September 8, 2022. (R. 165:1, Def-App:332)

STATEMENT OF THE FACTS

On June 22, 2020, Officer Wehner was dispatched to the Dollar General Store in the City of Watertown, Jefferson County Wisconsin, arriving at approximately 2:25 p.m. (R. 109:106, Def-App:193). At the store, he met with the complainant Victim 1[1] who reported that a male subject exposed himself to her and ejaculated. (R. 2:1, Def-

[1] The State identifies the Victim with the Pseudonym "Victim 1" Wis. Stats § (Rule) 809.86(4)

App:4) She reported that while she was inside the store she became aware of someone standing nearby while she was kneeling down to look at photo frames. When she stood up, she turned to look and observed a male subject who was near her in the aisle. (R. 109:70, Def. App:157) She looked at him, said "Hi" then turned and started walking toward the front of the store. (R. 109:70, Def-App:157) She heard the male say "hey", prompting her to turn around. When she saw him again she realized he was masturbating and he was ejaculating. (R. 109:70, Def-App:157). She told the male that she was going to tell the manager. (R. 109:71, Def-App.:158) She said she walked to the front of the store and spoke to a clerk advising her what was going on (R. 109:70, Def-App:157).

Victim 1 described the person in the store as between five feet ten inches to six feet tall, with a thin build, either African American or mixed race, with a light complexion. (R. 109:72, Def-App:159). She described his hair as ethnic, that it was not an afro, but it was definitely more coarse. (R. 109:77, Def-App.:164) Victim 1 described the man's clothing as a white t-shirt, baggy black pants or black jeans. (R. 109:72, Def-App:159) She saw him walk to vehicle which she described as a bright blue Chevrolet sedan with ribbon decals or stickers on the trunk. (R. 109:71, Def-App:158) Victim 1 saw him three times while in the store. (R. 109:73, Def-App:160). She initially said hello to him in the aisle. (R. 109:73, Def-App:160) She saw him a second time when she turned and he said "hey", and she looked at him again a third time she watched him leave the store. (R. 109:73, Def-App:160) She told police that

she looked at his face because when someone says "hey" that is where you look. (R. 109:73, Def-App:160)

Approximately a week after the incident, Officer Wehner located a vehicle that matched the description provided by Victim 1 of the vehicle seen leaving the store. (R. 109:113, Def-App.:200) The officer ran the vehicle registration and identified the registered owner of the vehicle. (R. 109:114, Def-App.:201) He interviewed the vehicle owner, who provided the Officer with information that his daughter's boyfriend, Brandon Smiley had access to his vehicle and had driven the vehicle approximately a week ago. (R. 109:115, Def-App:202) The registered owner of the vehicle told the officer that a black male subject was present at the residence. (R. 109:115, Def-App.:202) Brandon Smiley exited the home. (R. 109:115, Def-App.:202) Officer Wehner made contact with Mr. Smiley and noted that he appeared to match the description of the suspect given by Victim 1. (R. 109:120, Def-App:207)

After interviewing Brandon Smiley, Officer Wehner compiled a photo array as part of his investigation. (R. 109:120, Def-App.:207) Brandon Smiley's photo was in envelope #4 of the array. (R. 109:123, Def-App.:210) Officer Wehner testified at trial that he used black and white photos in the array to prevent Mr. Smiley's photo from standing out because he was wearing a bright colored shirt. (R: 109:120, Def-App.:207) The officer testified that the selected photos showed people with similar qualities and appearance to the suspect. (R. 109:120, Def-App.:207) The photo array was

administered by a second officer who was not involved in the case. (R. 109:121, Def-App.:208)

Officer Riedl administered the array on July 9, 2020. (R. 109:163, Def-App.:250) Victim 1 stated that envelope #4 was the best match of all the photos, although she could not be more than fifty percent sure. (R. 109:168, Def-App.:255) At trial, Victim 1 testified that she participated in a photo array at the Police Department after the incident. (R. 109:78, Def-App.:165) She recalled making an identification in the array, but she could not remember which envelope the picture was contained in. (R. 109:79, Def-App.:166) During cross examination by Attorney Huebner, he read excerpts from a police report to Victim 1. (R. 109:83, Def-App.:170) The portion of the report read into the record indicated that Victim 1 selected envelope(s) #1, #4 & #5. (R. 109:83, Def-App:170) Victim 1 told Officer Riedl that she was least sure about envelope #5. (R. 109:83, Def-App:170) As to envelope #1, she was thirty percent or less certain it was the person in the store. (R. 109:83, Def-App:170) Victim 1 kept going back to envelope #4 saying it was the most of a match as compared to the others. She said she was not more than fifty percent sure on envelope #4. (R. 109:83, Def-App.:170) At trial, Victim 1 identified Brandon Smiley as the person she saw in the store. (R. 109:79, Def-App.:166).

At trial, Detective Matthew Lochowitz testified that he obtained GPS information for Brandon Smiley from the Department of Corrections Probation Officer who supervised Brandon Smiley (R. 109:188, Def-App.:275) Three screenshots of the GPS data were given to Detective Lochowitz. (R. 109:188, Def-App.:275) The data

plotted to the Dollar Tree Store in Watertown on June 22, 2020 at 2:18 p.m. (R. 109:188, Def-App.:275), which was near the time law enforcement was dispatched to the store. (R. 109:106, Def-App:193). At the conclusion of the trial, the jury returned a verdict of guilty. (R. 109:238, Def-App.:325)

The defense filed a post-conviction motion to set aside the verdict and judgment of conviction alleging trial counsel was ineffective for not moving to suppress the photo array identification. (R. 130:1-8, Def-App.:16-23) At the post-conviction hearing, Attorney Huebner testified to his reasoning for not filing a motion to suppress the identification. In his analysis of the case, the photo array was not material to the State's case because the identification by Victim 1 was made on scene (R. 160:10, Def-App.:52). Attorney Huebner testified that his line of questioning was whether the person seen leaving the store was the same person who had been seen in the aisle doing the criminal act. (R. 160:10, Def-App.:52). Attorney Huebner testified that the defendant was identified by means of a vehicle the suspect was seen driving away from the scene in, and the registered owner of the vehicle confirmed that Mr. Smiley had access to the vehicle and that he had driven the vehicle and returned by himself on that day. (R. 160:9, Def-App.:51) Further, he was identified on scene in the store. (R. 160:10, Def-App.:52). The trial court ruled that the photograph array was not impermissibly suggestive, and that Attorney Huebner's performance was not deficient. (R. 160:40, Def-App.:62)

STANDARD OF REVIEW

Whether a defendant received ineffective assistance of counsel presents a mixed question of fact and law. *State v. Gutierrez*, 2020 WI 52 ¶ 19, 391 Wis. 2d 799, 943 N.W.2d 870 (2020). Whether counsel's performance constitutes ineffective assistance is legal issue this Court reviews *de novo*. *Id.* This Court upholds the circuit court's factual findings, including findings concerning the circumstances of the case and counsel's conduct and strategy unless they are clearly erroneous *Id.*

ARGUMENT

I. THE CIRCUIT COURT PROPERLY HELD THAT TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT, AND THE TRIAL COURT'S FINDINGS THAT THE PHOTO ARRAY WAS NOT IMPERMISSIBLY SUGGESTIVE AND A MOTION TO SUPPRESS THE ARRAY WOULD NOT HAVE BEEN SUCCESSFUL ARE NOT CLEARLY ERRONEOUS AND SHOULD BE SUSTAINED.

A. Mr. Smiley Bears The Burden of Proving That His Trial Counsel's Performance Was Both Deficient and That He Was Prejudiced by The Alleged Deficient Performance.

In order to establish ineffective assistance of counsel, the defendant must prove that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). When a defendant fails to prove either prong of the test, a reviewing court need not consider the remaining prong. *State v. Hubanks*, 173 Wis. 2d 1, 24-25, 496 N.W.2d 96 (Ct. App. 1992). To demonstrate deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness considering all the circumstances. *Strickland*, 466 U.S. at 688. A defendant must demonstrate specific acts or omissions by counsel fell "outside the wide range of professionally competent assistance". *Id.* at 690. A review of counsel's performance must be highly deferential to counsel's strategic decision making and make every effort to eliminate the distortion of hindsight. *See State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The evaluation should consider counsel's perspective at the time. *Strickland*, 466 U.S. at 689. Counsel enjoys a strong presumption that their conduct falls within the range of

reasonable professional assistance. *Id.* Counsel's representation of a client is not required to be perfect or even good to be constitutionally adequate. *State v. Williquette*, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (1993). A decision by trial counsel to not pursue a meritless argument or motion does not constitute deficient performance. *State v. Harvey*, 139 Wis. 2d. 353, 380, 407 N.W.2d. 235 (1987).

B. Mr. Smiley Cannot Establish That The Photo Array Was Impermissibly Suggestive

Mr. Smiley cannot meet his burden to establish that the composition of the photo array presented to Victim 1 was impermissibly suggestive, a prerequisite to demonstrating that a pre-trial motion had merit and would have succeeded. Mr. Smiley alleges the circuit court finding that the array was not impermissibly suggestive is clearly erroneous because his photo shows someone with lighter skin and brighter eyes than the remainder of the array. He does not argue that the words or actions of the officer who administered the array were suggestive.

Officer Wehner testified at trial that he put together a photo array of six photographs similar to the suspect's qualities and appearance (R. 109:120, Def-App.:207) The photos in this array were printed in black and white, instead of color. (R. 109:121, Def-App.:208) The officer testified that he made this decision to have a black and white photo array because of the bright colored shirt worn by Smiley in the photograph, and that he wanted to prevent Smiley's photo from standing out against the others. (R. 109:121, Def-App.:208) Smiley's photo was in envelope #4 of the photo

array. (R. 109:123, Def-App.:210) The photo array was administered by a separate officer not involved in the investigation. (R. 109:122, Def-App.:209)

Officer Riedl testified that she administered the photo array to Victim 1 on July 9, 2020. (R. 109:163, Def-App.:250) The photos were shown one at a time in accordance with their department policy. (R. 109:166, Def-App:253). Victim 1 expressed interest in three of the photographs identified by their envelope number. (R. 109:166-67, Def-App.:253-54) One of the photos she expressed interest in was envelope #4. (R. 109:167, Def-App:254). Victim 1 expressed her level of certainty as to envelope #4 being about fifty percent. (R. 109:168, Def-App.:255). Envelope #4 contained Mr. Smiley's photograph. (R. 109:123, Def-App.:210) Victim 1 told Officer Riedl that she was the most sure of envelope #4. (R. 109:168, Def-App.:255)

Wisconsin courts use a two prong test for assessing the admissibility of an out of court identification. *State v. Roberson*, 2019 WI 102 ¶ 34, 389 Wis. 2d. 190, 935 N.W.2d. 813. The first prong requires the defendant to establish the out of court identification is impermissibly suggestive. *Id.* If this burden is not met, no further inquiry is necessary. *Powell v. State*, 86 Wis. 2d. 51, 68, 271 N.W.2d 610 (1978). If the defendant meets the burden of establishing impermissible suggestibility, the burden then shifts to the State to show that the identification is reliable under the "totality of the circumstances". *Roberson*, 2019 WI 102, ¶ 35.

Suggestiveness in a photo array used for identification may arise in several different ways including the manner in which the photos are presented or displayed, the words or actions of someone involved in the administration of the array, or by some

aspect of the photos themselves. *Powell,* 86 Wis. 2d at 63 (*citing United States v. Ash*, 413 U.S. 300, 93 S.Ct. 2568 (1973)). No suggestiveness exists when a witness is presented with photographs without any hint of suggestion or encouragement or in any order which may tend to influence their identification. *State v. Mosley*, 102 Wis. 2d 636, 652-653, 307 N.W.2d 200 (1981).

The defense argues that the photos themselves are suggestive because of differences in skin and eye color. A photo array is not per se impermissibly suggestive merely because the individuals in the array have different appearances. *Id.* at 654 (declining to hold that a unique identifying feature *ipso facto* is unduly suggestive). There is nothing in Mr. Smiley's photo that is prominently featured, and his photograph is not otherwise prominently featured within the array itself. (R. 155:2, Def-App.:334) The photographs in the array show six men with similar features, hair lines, and builds. (R. 155:2, Def-App.:334). In the black and white photographs there is little difference in skin tone or color. (R. 155:2, Def-App.:334) The defense argues that the color of Mr. Smiley's eyes appear lighter in the photo. In the description given to law enforcement, Victim 1 does not reference his eye color at all as an identifying factor. (R. 156:1, Def-App.:3) The defense argues that these perceived differences in skin tone and eye color make the array suggestive. There is no requirement that law enforcement seek out individuals who look identical to the defendant. Photographs used in a photo array need not be identical. *Wright v. State*, 46 Wis. 2d 75, 86, 175 N.W.2d 646 (1970). Law enforcement is required to make every effort reasonable under the circumstances to conduct a fair and balanced presentation of alternative possibilities for identification.

Id. "The police are not required to conduct a search for identical twins in age, height, weight or facial features....what is required is the attempt to conduct a fair lineup, taking all steps reasonable under the 'totality of circumstances' to secure such result." *Id.* The photo array presented to Victim 1 conformed to these requirements.

The defense cannot meet their burden to establish that these minor differences rise to the level of impermissible suggestiveness in the array. Without a finding of suggestiveness, the Court need not address the totality of the circumstances prong of admissibility. Therefore, a pre-trial motion challenging the admissibility of the out of court identification would have failed, and counsel's determination that there was no reasonable probability that the out of court identification could be suppressed is reasonable under the circumstances and his performance is not deficient.

C. Even If Mr. Smiley Could Demonstrate That The Array Was Impermissibly Suggestive, He Has Not Demonstrated That The Out of Court Identification And In Court Identification Were Otherwise Inadmissible.

The State is not precluded from using evidence of an identification made under suggestive conditions if it is reliable under the totality of the circumstances. *See Manson v. Brathwaite*, 432 U.S. 98, 113-14, 97 S.Ct. 2243 (1977). It is reliability that is the linchpin in determining the admissibility of identification testimony. *Id.* at 114. The primary evil to be avoided is a "very substantial likelihood of irreparable misidentification". *Powell,* 86 Wis. 2d at 63-64 (quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967 (1968)). Reliability of the identification is judged upon the totality of the circumstances test, which includes consideration of factors including:

> the opportunity of the witness to view the person at the time of the crime, the witnesses degree of attention, the accuracy of the witnesses prior description of the person, the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375 (1972).

The out of court identification of Mr. Smiley is reliable and admissible under the totality of the circumstances factors. Victim 1 testified at trial that she was able to see Mr. Smiley three times inside the store (R. 109:73, Def-App.:160), twice in the aisle of the store, and one additional time as he left. (R. 109:73-75, Def-App.:160-162). Victim 1 testified that she looked him in the face when he said "hey" and she was able to provide a description of his clothing. (R. 109:72-73, Def-App.:159-60) She provided a specific description of the defendant including height, build, skin tone and hair. (R. 109:72, Def-App.:159) She also provided a specific description of the vehicle used to leave the store. (R. 109:71, Def-App.:158) All of these factors point to the conclusion that Victim 1 had multiple opportunities to see Mr. Smiley, and that at the time she was paying a high degree of attention to the situation. When Officer Wehner made contact with Brandon Smiley, the officer observed that he appeared to match the description given by Victim 1, including some of the clothing he was wearing at the time of the contact. (R. 109:118, Def-App.:205) Victim 1's description of Smiley matched his physical features. There was no substantial delay in time between the incident and the administration of the array, which occurred only 17 days later. During the array, Victim 1 selected Mr. Smiley's photo and indicated she was the most sure about his photograph. (R. 155:1-3, Def-App.:333-35) Considering all of the factors in the totality of the circumstances test, the out of court identification was reliable. Victim 1 had

sufficient opportunity to view Mr. Smiley, she provided an accurate physical description that matched what law enforcement observed of Mr. Smiley's physical attributes, and his clothing. The array administration was not unduly delayed, and her responses during the array identified Mr. Smiley's photograph as the one she was most sure of in relationship to the others.

An in court identification made subsequent to a constitutionally defective out of court identification process is not per se inadmissible. *State v. McMorris*, 213 Wis. 2d 156, 167, 570 N.W.2d. 384 (1997)(citing *U.S. v. Wade*, 388 U.S. 218, 240, 87 S.Ct. 1926 (1967)). If an out of court identification is determined to be constitutionally defective, the burden shifts to the State to establish by clear and convincing evidence that the in court identification is derived from an independent source. *Id.* The independent source can be based upon observations of the subject other than the out of court identification. *See id.* at 169-70.

In the *McMorris* case, the Wisconsin Supreme Court applied the *Wade* factors consisting of a multi-prong test in consideration of whether an in court identification is sufficiently free of taint from a constitutionally defective out of court identification process. *Id.* at 169-74. The factors considered in *McMorris* and *Wade* are: the prior opportunity of the witness to observe the alleged criminal conduct, the existence of any discrepancy between the pre-line up description and the accused actual description, any identification of another person prior to the lineup, a failure to identify the accused on a prior occasions, the lapse of time between the alleged crime and the lineup

identification, and the facts surrounding the conduct of the lineup. *Id.* at 168 (citing *Wade*, 388 U.S. at 241). In addressing the overlap between the totality of the circumstances test and the independent source test, the Court did not find these tests to be the functional equivalent of each other and addressed each test separately. *Id.* at 176-77.

In applying the *Wade* factors to this case, many of the prongs are satisfied to support a conclusion that Victim 1's initial observations of Mr. Smiley in the store are not tainted by the photo array. While Victim 1 was not acquainted with Smiley prior to the encounter at the Dollar Store, her opportunity to observe him during the incident was not fleeting. She saw him three times, including two instances where they were located in close proximity to each other in the same store aisle. The victim was able to provide a detailed description of approximate age, height, description of his clothing, his hair style, length and texture, his build and skin tone. Her description given to law enforcement prior to the photo array matched the physical characteristics of Mr. Smiley observed by law enforcement when Officer Wehner had contact with him approximately one week after the incident. During the photo array 17 days later, the victim noted she was most sure of the photograph containing Smiley's image, although she conceded not being more than fifty percent sure at the time. The victim did not identify any other individuals within the array as the person she saw at the store.

Thus, even if Mr. Smiley could have established that the composition of the array was suggestive, he cannot establish that the identifications would have been inadmissible at trial either under the totality of the circumstances test or the independent source test.

D. Mr. Smiley Cannot Establish That He Was Prejudiced by Attorney Huebner's Decision Not to Pursue A Motion to Suppress The Photo Array Because The Motion Would Have Failed, And The Out of Court Identification Was Otherwise Admissible.

The second prong of the ineffective assistance of counsel test requires the proponent to show that they suffered prejudice from the alleged deficiency. *Strickland*, 466 U.S. at 682. In evaluating prejudice, the Court is to consider whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". *Id.* at 694. A reasonable probability is one sufficient enough to undermine confidence in the outcome. *Id.* Counsel's decision based upon a reasonably sound strategy, without the benefit of hindsight are "virtually unchallengeable" and do not constitute ineffective assistance of counsel. *Id.* at 690-691. Even decisions made with less than a thorough investigation may be sustained, if reasonable, given the strong presumption of effective assistance and deference to strategic decision. *State v. Carter*, 2010 WI 40, ¶ 23, 324 Wis. 2d 640, 782 N.W.2d 695 (citing *Strickland*, 466 U.S. at 690-91).

Here, the proponent of the ineffective assistance of counsel claim cannot establish that he was prejudiced by counsel's decision to not challenge the photo array prior to trial. Because Mr. Smiley's photograph and the entire array are not

impermissibly suggestive, as determined by the post-conviction court, and the defense does not argue that the procedural administration of the array was suggestive, any motion to challenge the array would have failed. The circuit court record supports the conclusion that the array was not suggestive, and that Smiley's photo did not stand out from the others. The post-conviction court reviewed the photo array and did not find that Smiley's photograph stood out from the others noting the six photos included subjects all with dark hair, similar hair lines and hair length (R. 160:37-38, Def – App.:79-80) The Court disagreed with the defense assertion the Smiley's eyes were more pronounced than the others finding that another subject within the array had similarly vibrant eyes. (R. 160:38, Def-App.:80) The court further noted that all but one of the photos had dark and light spots, and there was more shininess on Smiley's photo, but it was not suggestive. (R. 160:38, Def-App.:80) The court did not find anything about the array to be suggestive. (R. 160:38, Def-App.:80) While disagreeing with some of Attorney Huebner's analysis, the Court ultimately determined that his decision not to pursue the motion was correct. (R. 160:38, Def-App.:80) Attorney Huebner's tactical decision to forego a pre-trial motion that had no reasonable possibility of success and attack the credibility of the identification at trial was reasonable. Thus, without the establishment of prejudice or deficient performance by trial counsel, the claim for ineffective assistance of counsel fails.

CONCLUSION

Based on the foregoing, the State respectfully requests that this court affirm the judgment and the circuit court's order denying Smiley's post-conviction motion.

Dated this 2nd day of December, 2022.

Electronically Signed By,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm) and (c) for a brief. The length of the brief is 21 pages and 4,183 words.

Dated this 2nd day of December, 2022

Electronically signed by

Theresa A. Beck
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