COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2789-CR **Cir. Ct. No. 2012CF000145**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY E. TYREE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Timothy E. Tyree appeals the judgment of conviction for first-degree reckless homicide with use of a dangerous weapon as a

party to the crime. *See* WIS. STAT. §§ 940.02(1), 939.63(1)(b), 939.05 (2011-12).[1] He also appeals the order denying his postconviction motion. We affirm.

BACKGROUND

¶2 Eddie Ellis was shot and killed shortly before 11:30 p.m. on January 4, 2012. According to the criminal complaint, witnesses identified Tyree as the shooter.

¶3 Detective James Hensley interviewed Mickolous Turner at the crime scene. Turner told Hensley he was a friend of Ellis's and was present during the shooting. Turner said that he and Ellis were near an alley next to Ellis's apartment building and were trying to diffuse a fight among a group of women when he heard gunshots. Turner saw two African American men standing near a garbage bin, and one of the men extended his arm and pointed it at Turner and Ellis. Turner saw sparks coming from the end of the man's arm and heard gunshots. He turned and ran away, but heard Ellis yell and saw him fall to the ground.

¶4 According to Hensley's report, Turner described the shooter as an African American man who was approximately six feet tall, had a thin to medium build, and weighed around 160 pounds. Turner said that the shooter wore a black hooded sweatshirt with the hood up, black pants, and carried a handgun. Turner told Hensley he was not sure if he could identify the shooter because of the distance and the fact that the shooter had his hood up, but that he would try if he had an opportunity to do so.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶5 Turner attended a lineup on January 8, 2012, four days after the shooting. The lineup consisted of six men, all African American, ranging in ages from eighteen to twenty-one, in height between 5'11" to 6'3," and weighing from 160 pounds to 230 pounds. All of the men wore the same jail clothing, along with a black baseball cap backward, a covering on their right wrists, and they had some degree of facial hair. Tyree was number five in the lineup, which was his chosen position.

¶6 At trial, Detective James Hutchinson testified that during the lineup, Turner had a "Lineup Identification Form" with him to fill in with the words "Yes" or "No" next to the numbers designating each person in the lineup. Turner circled "No" next to numbers one, two, three, four, and six, but he left the choices next to number five unmarked. When questioned by Hutchinson as to why he left the choices next to number five unmarked, Turner responded that he wanted to identify number five as the shooter but was hesitant to do so because he did not know what the shooter's face looked like. According to Hutchinson, Turner went on to explain that number five resembled the shooter in "body shape, body size, height, physical buil[d] and posture … but he just could not identify the face." Turner told Hutchinson he could not identify the face because he "did not get a good look. It was night." Turner went on to circle "Yes" next to number five.

¶7 When questioned by Tyree's trial counsel as to how he could identify person number five Turner responded: "Because any other person in the lineup didn't fit the description of what I seen." Turner indicated that upon hearing the first shots fired, he froze in place for ten to fifteen seconds, which is when he made his observations.

¶8 After the jury found Tyree guilty, he was convicted and was sentenced to forty years' imprisonment, comprised of twenty-seven years of initial confinement and thirteen years of extended supervision.

¶9 Tyree then filed a postconviction motion arguing (1) his trial counsel was ineffective for failing to seek suppression of Turner's identification of Tyree in a police lineup and (2) the trial court erroneously exercised its discretion when it sentenced him.[2] The trial court order briefing and then denied the motion without holding a hearing.

DISCUSSION

A. Ineffective Assistance.

¶10 To succeed on a claim for ineffective assistance of counsel, a defendant has the burden of showing both that: (1) his counsel's representation was deficient, and (2) this deficiency prejudiced him so that there is a "probability sufficient to undermine the confidence in the outcome" of the case. ***Strickland v. Washington***, 466 U.S. 668, 687, 694 (1984). Counsel is not ineffective for failing to bring a motion that would not have been granted. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶11 Tyree claims his trial counsel was ineffective for failing to seek suppression of Turner's lineup identification. Consequently, to resolve this

[2] Additionally, Tyree argued that his trial counsel should have sought a mistrial based on out-of-court contact between a juror and Tyree's brother. The trial court rejected this claim, and Tyree does not renew it on appeal. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344, 516 N.W.2d 463 (Ct. App. 1994) ("On appeal, issues raised but not briefed or argued are deemed abandoned.").

appeal, we need to consider whether a motion to suppress Turner's lineup identification would have been successful.

¶12 "'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). Whether the facts surrounding a pretrial lineup taint a subsequent identification is a legal issue that we review *de novo*. ***Id.*** (application of facts to constitutional principles is subject to *de novo* review).

¶13 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***, 46 Wis. 2d 75, 175 N.W.2d 646 (1970):

> [A] claimed violation of due process of law in the conduct of a confrontation depends on the totality of circumstances surrounding it.... 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.

Id. at 86 (citation, footnote and one set of quotation marks omitted).

¶14 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 (citation omitted). ***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). If, however, the defendant satisfies the first part of the procedure, the State then must "show that despite the improper suggestiveness, the identification was nonetheless reliable under the 'totality of the circumstances.'" ***Id.***

¶15 Tyree does not get past the first part of the procedure. His argument that the identification procedure was impermissibly suggestive is undeveloped. As the State aptly sums it up:

> Tyree does not offer much to satisfy his burden on this prong, other than to complain that the persons in the lineup were wearing clothes different from what Turner reported the shooter to be wearing, and that Turner stated that he was able to choose number five from the lineup "'[b]ecause any other person in the lineup didn't fit the description of what I seen.'"

The law does not require that police dress persons in the lineup in the clothing in which the witness observed the target. Additionally, to the extent Tyree is using Turner's statement to somehow imply that the police put together a dissimilar lineup, we agree with the State that Turner's remark is being used out of context. Beyond this, we will not abandon our neutrality and make Tyree's argument for him and thus we decline to consider this argument further. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

¶16 We conclude that Tyree has failed to show that the lineup identification was the result of any suggestive techniques or that such identification, in the totality of the circumstances here, was infected with the

"likelihood of misidentification" which would deprive Tyree of due process. *See* ***Powell***, 86 Wis. 2d at 64 (citation and one set of quotation marks omitted).

¶17 Insofar as Tyree is also arguing that his trial counsel was ineffective for not objecting to trial testimony and other evidence relating to Turner's lineup identification, this claim also fails. According to Tyree, his trial counsel should have argued that Turner's identification was more prejudicial than probative. Although there is no citation in Tyree's brief to WIS. STAT. § 904.03, presumably his argument is based on this statute. *See* ***id.*** ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice…."). This is the extent of his argument. Consequently, we again decline to consider it further. *See* ***Gulrud***, 140 Wis. 2d at 730.

¶18 Next, while acknowledging that the central holding in ***United States v. Wade***, 388 U.S. 218 (1967), is not applicable here, Tyree nevertheless claims that the language in that decision applies to the circumstances presented. Specifically, he relies on the language set forth in ***Wade*** to be used when determining whether an in-court identification is admissible. ***Id.*** at 241-42 (when lineup identification is improper, State must prove the in-court identification of the defendant has an "independent origin" that allows the eyewitness to identify the defendant irrespective of the lineup; if the in-court identification has an independent source, the in-court identification is admissible).

¶19 We are not convinced that ***Wade***'s reasoning is applicable here given that there has been no showing that the lineup identification was improper. Rather, what Tyree actually takes issue with is the reliability of Turner's identification, which was a question for the jury to determine. *See* ***State v. Hibl***, 2006 WI 52, ¶53, 290 Wis. 2d 595, 714 N.W.2d 194 ("We emphasize that in most

instances, questions as to the reliability of constitutionally admissible eyewitness identification evidence will remain for the jury to answer."). Tyree does not explain why the jury in this case should have been deemed unable to fulfill its function in this regard.

¶20 Because we are not convinced that a motion to suppress the lineup identification or an objection to the trial testimony or other evidence relating to the lineup would have been successful, Tyree's trial counsel was not ineffective. *See* ***Toliver***, 187 Wis. 2d at 360.

B. Sentencing Discretion

¶21 Tyree also argues that his sentence was excessive. He bases this argument on the fact that the sentence that was imposed deviated from the one recommended in the presentence investigation report. Additionally, Tyree takes issue with the record that the trial court made, which included incorporating the presentence report, as to its reasons for imposing the sentence that it did. He claims it "is void as to the actual specifics the court relied upon to impose the sentence that well exceeded the recommendation by the presentence writer."

¶22 Tyree "submit[s] that he is well aware … that the trial court is not obligated to follow the recommendation by the presentence writer." *See, e.g.*, ***State v. Trigueros***, 2005 WI App 112, ¶9, 282 Wis. 2d 445, 701 N.W.2d 54 ("Trial courts, however, are not required to blindly accept or adopt sentencing recommendations from any source."). Consequently, the portion of his argument centered on the trial court's deviation from the sentence recommended by the presentence report writer is unpersuasive.

¶23 We have reviewed the sentencing transcript and conclude that it adequately sets forth the trial court's reasons for imposing the sentence that it did. *See* ***State v. Gallion***, 2004 WI 42, ¶49, 270 Wis. 2d 535, 678 N.W.2d 197 (The court's sentencing determination will not be disturbed as long as the court considers appropriate factors and gives an explanation of its sentence that shows it has exercised its discretion on a "'rational and explainable basis.'") (citation omitted). The court's sentence of twenty-seven years of confinement and thirteen years of extended supervision was well within the maximum time that could have been imposed and given the circumstances, is not excessive. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (An appellate court will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."). That the trial court could have imposed sentence differently does not constitute an erroneous exercise of discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

By the Court.—Judgment and order affirmed.

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