COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1745-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ERIC L. SMALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES and JEFFREY A. WAGNER, Judges. *Affirmed and cause remanded.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Eric Small appeals from a judgment convicting him of three counts of robbery, as a habitual offender.[1] *See* §§ 943.32(1)(a),

[1] The judgment of conviction incorrectly indicates that Small's convictions on all three counts resulted from a jury trial. On one of the three counts, however, Small pled guilty to
(continued)

939.62, STATS. He also appeals from an order denying his motion for postconviction relief. Small asserts that: (1) the trial court erred in denying his attorney's request to withdraw; (2) the trial court erred in denying his motion to adjourn the trial to a later date; (3) the trial court erred in denying his motion to suppress identification evidence; and (4) he received ineffective assistance of counsel. We affirm and remand for correction of the judgment of conviction as specified in footnote one.

BACKGROUND

Between 6:00 p.m. and 6:30 p.m., on April 25, 1995, Milton Chase went to Office Max in Brown Deer to purchase some office supplies. As he was loading his purchases into his car, a station wagon pulled into an adjacent parking spot. The driver of the station wagon approached Chase, grabbed him, and demanded his wallet. Chase did not immediately surrender his wallet, so the driver punched Chase's head until Chase allowed him to take his wallet. The driver then returned to his car and drove off.

Chase called the police and reported the robbery. He described the robber as a black male who was about six feet tall, weighed over two hundred pounds and was in his early thirties. He also said the robber wore a gray sweat-suit and a dark blue baseball cap. He described the robber's car as a blue Buick station wagon with wood-grain paneling; he said that the car did not have license plates.

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robbery, as a party to the crime. We direct the trial court to correct the judgment of conviction on remand.

At about 8:30 a.m., on Saturday, April 29, 1995, David David drove to his office in Milwaukee. As he parked his car, another car made a U-turn and parked behind him. David went into his office building and, a short time later, a man appeared in the office and demanded David's money. David gave the man his money, and the man then pushed David into a closet and told him to stay there. After about ten minutes, David came out of the closet and called his wife, who then called the police for David.

David told the police that the robber was a black male who was six feet, two inches tall, weighed around two hundred and twenty-five to two hundred and forty pounds, and was approximately thirty years old. David also said that the robber wore a blue baseball cap.

At about 9:40 a.m., on Sunday, April 30, 1995, a woman was robbed in the parking lot of a Kohl's supermarket in Wauwatosa. The police received a dispatch that the robbery suspect had left the scene in a blue station wagon with wood-grain paneling. The police spotted the car and, after a short chase, stopped the car. Small was the driver of the car, and he had one female passenger. Small owned the car, which was a Buick station wagon that did not have license plates.

On May 2, 1995, the police placed Small in a lineup to be viewed by several robbery victims. Both Chase and David identified Small as the person who had robbed them.

Small was tried by a jury and found guilty of robbing Chase and David. He pled guilty to robbery, as a party to the crime, for the robbery of the woman at the Kohl's supermarket. The trial court entered judgment accordingly.

DISCUSSION

1. *Motions to withdraw and to adjourn the trial.*

Prior to trial, Small's attorney, a public defender, made a motion to withdraw from representing Small. As grounds for the motion, Small's attorney alleged that Small was not willing to cooperate with him because he had been unable to keep a scheduled meeting with Small prior to the pretrial hearing. He alleged that he had attempted to communicate with Small at and after the pretrial hearing, but that Small would not respond to his attempts; instead, Small began filing *pro se* pleadings.

At the hearing on the motion to withdraw, Small's attorney further informed the court that Small's refusal to cooperate with him had cost him "significant time" and that he did not feel that he could be prepared for the trial, which was set to begin in one month. The State opposed the motion to withdraw because two public defenders had already been permitted to withdraw from the case at Small's request, and because some of the victims of the robberies for which Small was to be tried were elderly.

The trial court considered the interests of the State and of the victims, and concluded that Small's refusal to communicate with his counsel did not justify permitting counsel to withdraw, especially in light of the fact that Small had already been through two prior public defenders. The trial court noted that the case was almost two years old, and found that Small's inability to work with counsel was a dilatory tactic and an attempt to manipulate the system. After the trial court denied the motion to withdraw, Small's attorney requested that the trial be reset for a later date to enable him to compensate for lost time. The trial court denied the request, concluding that a month was sufficient time for counsel to confer with Small and prepare for trial. Significantly, the trial court noted that

counsel had already received the discovery materials from and conferred with Small's prior attorney, who had represented to the court before her withdrawal that she was prepared to proceed to trial.

Small argues that the trial court erred in denying his attorney's motion to withdraw. We disagree.

"Whether counsel should be relieved and a new attorney appointed in his or her place is a matter within the trial court's discretion." ***State v. Lomax***, 146 Wis.2d 356, 359, 432 N.W.2d 89, 90 (1988). In deciding whether to permit counsel to withdraw, the trial court, in the exercise of its discretion, should consider, among other things, the impact of withdrawal on the orderly and efficient administration of justice; the convenience or inconvenience to the parties, witnesses and the court; and whether the request seems to be for legitimate reasons, or whether its purpose is dilatory. *See* ***id.***, 146 Wis.2d at 360, 432 N.W.2d at 91; ***State v. Scarbrough***, 55 Wis.2d 181, 187, 197 N.W.2d 790, 793 (1972) ("[T]he right to counsel cannot be manipulated so as to obstruct the orderly procedure for trials or to interfere with the administration of justice."); ***State v. Johnson***, 50 Wis.2d 280, 283, 184 N.W.2d 107, 109 (1971) (the trial court's consideration of a motion to permit counsel to withdraw is an exercise of "discretion that will include consideration of the amount of preparatory work done at public expense and the avoidance of delay or dilatory tactics").

The trial court properly exercised its discretion in denying the motion to withdraw. The trial court considered the appropriate factors, as noted, and found that Small's unwillingness to communicate with counsel was not a legitimate reason to permit counsel's withdrawal; rather, it was a dilatory tactic Small was using to attempt to manipulate the system.

Small also asserts that the trial court erred in denying his motion to adjourn the trial to a later date. Again, we disagree.

"We will not reverse a trial court's ruling on a motion for continuance unless we conclude that the trial court erroneously exercised its discretion. 'On review, we must balance the defendant's right to adequate representation by counsel against the public interest in the prompt and efficient administration of justice.'" ***State v. O'Connell***, 179 Wis.2d 598, 616, 508 N.W.2d 23, 30 (Ct. App. 1993) (citation and quoted source omitted).

The record reveals that when counsel requested the continuance there was a month remaining during which to prepare for trial. Counsel had previously received the discovery materials from Small's former attorney, who had been prepared to proceed to trial. The only reported obstacle to counsel's trial preparation was the defendant's refusal to communicate with counsel. Under these circumstances, the trial court did not erroneously exercise its discretion in denying the motion to adjourn the trial to a later date. Indeed, on the date of the trial, counsel did not request additional time to prepare for trial.

2. *Identification evidence.*

Small argues that the trial court erred in admitting identification evidence. He asserts that the lineup at which the witnesses made their pretrial identifications of him was unconstitutionally suggestive. Specifically, Small asserts that, at the lineup, David pointed to Small and said to his wife, "This is

him." Small asserts that Chase would have seen and heard David identifying him, and that the lineup was therefore impermissibly suggestive.[2]

"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. Wolverton***, 193 Wis.2d 234, 264, 533 N.W.2d 167, 178 (1995) (quoting ***Simmons v. United States***, 390 U.S. 377, 384 (1968)). The defendant bears the initial burden of demonstrating that a lineup was impermissibly suggestive. *See* ***id.*** Once the defendant meets that burden, the burden shifts to the State to demonstrate that "'under the "totality of the circumstances" the identification was reliable even though the confrontation procedure was suggestive.'" ***Manson v. Brathwaite***, 432 U.S. 98, 106 (1977) (quoted source omitted). Whether a lineup is impermissibly suggestive is a constitutional question that we determine *de novo*. *See* ***State v. Kaelin***, 196 Wis.2d 1, 10, 538 N.W.2d 538, 541 (Ct. App. 1995).

The record contains no evidence that the lineup was impermissibly suggestive. At trial, David testified that when he saw Small at the lineup, he whispered to his wife, who was standing next to him, "This is him." Contrary to Small's argument, however, David testified that he did not point to Small during

[2] In his pretrial motion to suppress the identification evidence, Small argued that the lineup, which was conducted on May 2, 1995, was impermissibly suggestive because he was assigned the number two position in the lineup and the calendar above the suspects read in part, "Today is 2." On appeal, Small does not assert that the lineup was suggestive because of the date on the calendar; rather he argues that David's identification of him rendered the lineup suggestive. It therefore appears that Small challenges only Chase's identification testimony, which, he claims, was influenced by David's identification; Small presents no argument or evidence that David's initial identification was the result of an impermissibly suggestive procedure.

the lineup procedure. Likewise, Chase testified that he did not see or hear anyone identify Small during the lineup. Moreover, the evidence discloses that during the identification procedure, the identifying witnesses were spaced apart and each witness was accompanied by a law enforcement officer to ensure that the witnesses did not communicate with one another. There is thus no evidence to support Small's claim that David's conduct rendered the lineup impermissibly suggestive.

3. *Ineffective Assistance.*

Small's final argument is that he received ineffective assistance of counsel. He asserts that his attorney was deficient because he failed to present testimony from an alleged alibi witness. He asserts, without elaboration, that the witness, his cousin, Debra Towns, "would have provided an alibi for the defendant on the robbery involving Milton Chase." Brief of the Defendant-Appellant at 7. Small also asserts that his attorney was generally unprepared for trial, and that he was deficient in failing to give an opening statement and in advising Small to plead guilty to one of the robbery charges while the trial was in progress.

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was deficient and that the deficient performance produced prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis.2d 219, 232–236, 548 N.W.2d 69, 74–76 (1996). To prove deficient performance, a defendant must identify specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. Counsel's performance is to be evaluated from counsel's perspective at the time of the challenged conduct. *See* ***id.*** Counsel is strongly presumed to have rendered

effective assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *See* ***id.*** To show prejudice, the defendant must demonstrate "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.***, 466 U.S. at 694.

Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633–634, 369 N.W.2d 711, 714 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis.2d 353, 376, 407 N.W.2d 235, 245 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. *See* ***Pitsch***, 124 Wis.2d at 634, 369 N.W.2d at 715.

As noted, Small does not elaborate as to what the alleged alibi witness would have said or how the testimony would have affected the outcome of the trial. In his postconviction motion, however, Small incorporated his notice of alibi, which asserted that on "April 25, 1995, around 7:52 p.m.," Small was "at his cousins' home on 2745 N. 19th Street, Milwaukee, Wisconsin." We conclude that the foregoing testimony is insufficient to establish a reasonable probability that, but for counsel's alleged deficiency, Small would have been acquitted of the Chase robbery.

Chase testified that he went to the Office Max on April 25, 1995, between 6:00 p.m. and 6:30 p.m. He testified that a blue Buick station wagon with wood-grain paneling pulled up next to him while he was loading his purchases into his car, and that Small got out of the driver's side of the car, approached him

and demanded his wallet. Chase testified that Small punched him until he surrendered his wallet, and that Small then drove off in his car, which had no license plates.

Similarly, the officer to whom Chase immediately reported the robbery testified that Chase described the robber's car as a blue Buick station wagon with wood-grain panels and without license plates. Another officer testified that Small was later apprehended while driving a blue Buick station wagon that completely matched Chase's description.

In light of the testimony indicating the timing of the Chase robbery and the reliability of Chase's identification, the alleged alibi witness's proffered testimony is insufficient to create a reasonable probability that Small would have been acquitted of the Chase robbery. Testimony that Small was with his cousin at 7:52 p.m. does not refute Chase's testimony that Small robbed him at the Office Max earlier that evening. Moreover, Chase's detailed and accurate description of Small's car was compelling evidence in support of Small's conviction.

We also reject Small's additional claims of ineffective assistance because, in both his brief to this court and in his postconviction motion, Small has failed to adequately allege how he was prejudiced by those claimed deficiencies. Small's general assertions are insufficient to support his claim of ineffective assistance of counsel. *See* ***Strickland***, 466 U.S. at 690–694 (to prevail on a claim of ineffective assistance of counsel a defendant must identify specific acts or omissions that constitute deficient performance and demonstrate how the deficient performance prejudiced the defense); ***State v. Bentley***, 201 Wis.2d 303, 309–310, 548 N.W.2d 50, 53 (1996) (conclusory allegations are insufficient to entitle a

defendant to a hearing on a claim of ineffective assistance of counsel; the defendant must allege sufficient facts to raise a question of fact).

We therefore affirm the judgment of conviction and the order denying postconviction relief. We remand this cause for correction of the judgment of conviction as specified in footnote one.

By the Court.—Judgment and order affirmed and cause remanded.

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