COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0581-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CARL H. WAINWRIGHT, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMMANUEL J. VUVUNAS, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Carl H. Wainwright, Jr. was convicted of robbing, with threat of force, while masked and with use of a dangerous weapon, a Racine bank. He appeals pro se from the judgment of conviction and an order denying his motion for postconviction relief. His fifteen separate claims fall into three general categories: prosecutorial discrimination in utilizing peremptory juror strikes,

ineffective assistance of trial counsel and trial court errors denying him the right to present a defense. He seeks a new trial in the interest of justice. We reject Wainwright's plethora of claims and affirm the judgment and the order.

¶2 Wainwright argues that the prosecution peremptorily struck two prospective African-American jurors and by such discrimination violated his right to equal protection as set forth in ***Batson v. Kentucky***, 476 U.S. 79 (1986). Even though there was no objection to the jury impaneled at trial, we choose to address this claim directly because Wainwright contends that trial counsel was ineffective for not making the objection. *See* ***State v. Smith***, 170 Wis. 2d 701, 714 n.5, 490 N.W.2d 40 (Ct. App. 1992), *cert. denied*, 507 U.S. 1035 (1993).

¶3 The record reflects that only one prospective African-American juror was peremptorily struck. The other person Wainwright refers to was never selected to sit on the jury venire and was not subjected to voir dire. We only consider the prosecution's strike against one African-American juror.

¶4 Before the jury was sworn, the prosecution stated its reasons for striking the prospective African-American juror. We must determine whether the prosecutor articulated a race-neutral explanation for the peremptory strike. *See* ***Batson***, 476 U.S. at 98. The reason given need not rise to the level that would justify a challenge for cause. *See* ***id.*** at 97; ***State v. Jagodinsky***, 209 Wis. 2d 577, 584, 563 N.W.2d 188 (Ct. App. 1997). The reason may not be pretextual. *See* ***Batson***, 476 U.S. at 98; ***United States v. Bentley-Smith***, 2 F.3d 1368, 1373 (5th Cir. 1993).

¶5 The prosecution cited the juror's indication that he knew Wainwright, had seen Wainwright playing basketball, had spoken to him a couple of times and that they had mutual acquaintances. The juror first expressed that he

would be unable to decide the case without bias, but later indicated that he could be impartial. The prosecution's motion to strike this juror for cause was denied, but the trial court acknowledged that either side had a basis to use a peremptory strike to remove this juror.

¶6 The prosecution's explanation was legitimate and race neutral. A prospective juror's acquaintance with a party raises a question about the juror's ability to decide the case fairly on the evidence presented. *See* ***Nyberg v. State***, 75 Wis. 2d 400, 405, 249 N.W.2d 524 (1977), *overruled on other grounds by* ***State v. Ferron***, 219 Wis. 2d 481, 493-96, 579 N.W.2d 654 (1998). Moreover, the trial court's acknowledgement that either side would have a basis to strike the juror reflects that the prosecution's explanation is not incredible or pretextual. There was no objectionable use of the prosecution's peremptory strikes.

¶7 We turn to Wainwright's claims of ineffective assistance of counsel. To establish ineffective assistance of counsel, Wainwright must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *See* ***State v. Byrge***, 225 Wis. 2d 702, 718, 594 N.W.2d 388 (Ct. App. 1999).

> The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. In applying this test, we inquire whether, under the circumstances, counsel's acts or omissions were outside the wide range of professionally competent assistance. Trial counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. We also must be careful to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.
>
> As to prejudice, the defendant must show 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.
>
> What occurred at the trial level and what the attorney did or did not do are questions of historical or evidentiary fact. We will not upset the trial court's findings about these matters unless they are clearly erroneous. However, the ultimate conclusion of whether the attorney's conduct resulted in a violation of the defendant's right to effective assistance presents a legal question which we review de novo.

Id. at 719 (citations omitted).

¶8 The first claim is that counsel failed to make a ***Batson*** objection during jury selection. We have concluded that the prosecution had a race-neutral reason for the allegedly discriminatory peremptory strike. Therefore, counsel's failure to object did not prejudice Wainwright. Moreover, counsel indicated that he would have also struck the juror as being unreliable regarding his ability to decide the case fairly.

¶9 Wainwright complains that trial counsel was ineffective for not pursuing a motion to suppress his statement and the identification evidence. A motion to suppress Wainwright's statement was made on both ***Miranda*** and voluntariness grounds. Wainwright's complaint that counsel failed to file such a motion lacks merit. The trial court denied the motion upon finding that Wainwright had been given the proper warnings. The motion was properly denied and Wainwright was not prejudiced by any further pursuit of a motion to suppress his statement.

¶10 Wainwright's complaint about the absence of a motion to suppress identification evidence is not developed. This court need not consider issues which the appellant does not develop. *See* ***Bartley v. Thompson***, 198 Wis. 2d 323,

341-42 n.10, 542 N.W.2d 227 (Ct. App. 1995); ***State v. Panno***, 151 Wis. 2d 819, 832 n.4, 447 N.W.2d 74 (Ct. App. 1989).

¶11 Wainwright contends that trial counsel had a conflict of interest because counsel had accounts at the bank robbed and knew some of the victims. He claims that counsel's cross-examination of the victims was affected by his personal dealings with those persons. A defendant who alleges that counsel had an actual conflict of interest need not show specific prejudice to succeed in establishing a claim of ineffective counsel. *See* ***State v. Foster***, 152 Wis. 2d 386, 392-93, 448 N.W.2d 298 (Ct. App. 1989). However, the defendant must demonstrate that his or her attorney actively represented conflicting interests and that an actual conflict adversely affected counsel's performance. *See* ***id.***

¶12 Trial counsel testified that during the investigative stage of the case he told Wainwright that he was a customer of the bank. Counsel also indicated that he did not personally know the two bank employees who appeared as witnesses at trial and that he had no association with those witnesses, except that one teller had waited on him a couple of times. This brief contact with one of the witnesses did not create loyalty to the witness which competed with counsel's obligations to Wainwright. Counsel was not actively representing competing interests. Additionally, counsel's cross-examination of the bank witnesses was thorough.

¶13 Wainwright also suggests that trial counsel had a conflict of interest because counsel wanted to date Wainwright's seventeen-year-old girlfriend. Counsel explained the contact he had with Wainwright's girlfriend. That contact revolved around her status as a principal witness for the defense, although there was one occasion where counsel gave the woman a ride and sat with her in a diner

waiting for friends to return home. The girlfriend denied that counsel made any attempts to date her or win her affections. There was no actual conflict of interest which affected counsel's performance.

¶14 Wainwright faults trial counsel for not raising the issue of whether Wainwright was competent to stand trial. Counsel is required to raise competency whenever there is reason to doubt that the defendant is competent to proceed. *See* ***State v. Johnson***, 133 Wis. 2d 207, 220, 395 N.W.2d 176 (1986). Competency is not questioned if it appears that the defendant has the mental capacity to understand the proceedings or assist in his or her own defense. *See* ***State v. Garfoot***, 207 Wis. 2d 214, 222, 558 N.W.2d 626 (1997).

¶15 A week before his arrest, Wainwright started taking Prozac, an anti-depressant. Two days before his arrest, Wainwright had taken an overdose of the drug and became very sick. He claims that the "strong medication," the overdose, the resultant memory loss and confusion, and a suicide attempt in jail should have raised concerns about his competency to proceed. Trial counsel testified that he was aware Wainwright had been taking Prozac, but that he was not informed of any suicide attempts in jail. Counsel did not believe that there was any reason to doubt Wainwright's ability to understand the proceeding or assist in the defense. Counsel indicated that his assessment was based on the extensive discussion he had with Wainwright about the case and the "lack of any type of medical type of history regarding any type of mental illness or suicidal thoughts." Wainwright's testimony at the suppression hearing and at trial was coherent and focused and did not suggest an inability to understand or assist in the defense. We agree that there were no circumstances suggesting that Wainwright was incompetent to proceed. The failure to question Wainwright's competency was not deficient performance.

¶16 We next consider Wainwright's claim that trial counsel was deficient for not objecting to comments in the State's closing argument. He claims that the State repeatedly vouched for the credibility of its witnesses. He cites comments whereby the State suggested that the police officers had no motive to lie and that Wainwright and his family were biased and therefore could be lying.

¶17 The line between permissible and impermissible argument is drawn where the State goes beyond reasoning from the evidence and suggests that the jury arrive at a verdict by considering factors other than the evidence. *See* ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). The State may urge the jury to believe its witnesses as long as there is no expression of personal opinion about the credibility of those witnesses. *See* ***State v. Johnson***, 153 Wis. 2d 121, 133 n.11, 449 N.W.2d 845 (1990). The State may point out the bias that exists in the testimony of family members because bias may be implied when a person is related to a party. *Cf.* ***State v. Gesch***, 167 Wis. 2d 660, 667, 482 N.W.2d 99 (1992) (examining the problem of unconscious bias between related persons). The State's closing argument did not improperly comment on the credibility of the State's witnesses. The argument pointed out the lack of bias and implied bias of the witnesses on both sides. Counsel was not deficient for not objecting.

¶18 Wainwright also contends that the State misrepresented the record during closing argument when it commented that Wainwright admitted that the shoes in evidence at trial made the prints at the scene of the bank robbery. When asked if the shoes and shoe prints were similar, Wainwright replied, "Right. You can say that's probably the same shoe." The State properly represented the evidence. The same is true with respect to the State's comments about the coat worn by the robber but never recovered or put into evidence. There was evidence

about the coat and Wainwright's failure to have the same coat after the robbery. There was nothing objectionable in the State's closing argument and counsel was not deficient for not interrupting with objections.

¶19 The final claim of ineffective counsel is that counsel failed to investigate where the ski mask and shoes were purchased. Wainwright suggests that counsel should have had hairs from the ski mask tested to see if they matched Wainwright's hair sample and should have called witnesses from the shoe trade to testify about the thousands of similar shoes sold in the Racine area.

¶20 A defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). Wainwright has not established that the ski mask contained hairs suitable for testing. As to the shoes, the shoes worn by the robber were size 8½ Reeboks. Even evidence that a great number of that size shoe were sold in the Racine area would not have detracted from the fact that the shoe prints led to the house Wainwright was visiting before and after the robbery and that the shoes were recovered from an apartment where Wainwright had stayed. Wainwright's claims that further investigation would have changed the outcome is speculation and are not sufficient to support a conclusion that trial counsel was constitutionally deficient.

¶21 The next category of alleged errors to be addressed are those best generalized as trial court errors. Wainwright first contends that the trial court denied him his constitutional right to present a defense by refusing to allow evidence that similar robberies took place while Wainwright was in jail. An offer of proof is a precondition to a claim that there was an erroneous exclusion of

evidence. *See* ***State v. Williams***, 198 Wis. 2d 516, 538, 544 N.W.2d 406 (1996). Wainwright made no offer of proof with respect to the other crimes and the issue is waived.

¶22 Even considering the merits of the exclusion ruling, we conclude that the trial court did not erroneously exercise its discretion. ***State v. Scheidell***, 227 Wis. 2d 285, 595 N.W.2d 661 (1999), sets forth the test of admissibility of other acts evidence when evidence of a similar crime committed by an unknown third party is proffered by the defendant on the issue of identity. The court must balance the probity of the evidence, considering the similarities between the other act and the crime alleged against the considerations contained in WIS. STAT. § 904.03 (1997-98),[1] utilizing the framework set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998), and ***Whitty v. State***, 34 Wis. 2d 278, 294-95, 149 N.W.2d 557 (1967). *See* ***Scheidell***, 227 Wis. 2d at 306. Similarities between the other acts evidence and the charged crime must be shown to do more than raise conjecture or speculation. *See* ***id.*** at 305. "[T]he threshold measure for similarity in the admission of other acts evidence with regard to identity is nearness of time, place, and circumstance of the other act to the crime alleged." ***Id.***

¶23 Wainwright cites the robbery of a jewelry store and gas station. He has not shown any similarities between the other robberies and the one for which he was convicted other than the general description of the perpetrator as a short, light-weight, African-American male, who placed his hand in a pocket to simulate a gun. It is not enough that the police may have originally believed the crimes to

[11] All references to the Wisconsin Statutes are to the 1997-98 version.

be related. Further, evidence of the other crimes does not foreclose the possibility that Wainwright committed those crimes as well. Wainwright was not arrested until after those robberies occurred.

¶24 Wainwright also contends that evidence of a confession elicited by his girlfriend should have been excluded. Police may not purposely use a private citizen to elicit a confession in violation of a suspect's right to counsel. *See* ***State v. Nicholson***, 187 Wis. 2d 688, 694-95, 523 N.W.2d 573 (Ct. App. 1994). Four factors determine whether a private citizen has been used as an agent of the police: (1) whether the citizen or police initiated contact between them; (2) whether the citizen or police suggested that the citizen talk to the suspect; (3) whether the citizen or police suggested what should be said to the suspect; and (4) whether the citizen or police controlled the circumstances under which the meeting with the suspect took place, and whether police control was extensive or only incidental. *See* ***id.*** at 695.

¶25 There is no basis in the record for Wainwright's contention that the police plotted to elicit a confession from him and threatened to charge his girlfriend if she did not elicit a confession. It was Wainwright's girlfriend who suggested that she be allowed to talk to Wainwright. She suggested that Wainwright would listen to her. Although Wainwright's girlfriend was made aware that she was subject to being charged for conspiracy, no threats were issued. The officers explained that Wainwright's cooperation and admission of the crime would work to his favor. The officers did not orchestrate his girlfriend's phraseology. While the officers were nearby when Wainwright's girlfriend spoke to him and they could hear the conversation, they did not participate or extensively control the situation. The officers acted on the girlfriend's desire to talk to

Wainwright. She was not an agent of the police and there was no ground to exclude the statements he made in the conversation.

¶26 As a claim of trial court error, Wainwright renews his claim that his competency to stand trial should have been examined. We have already determined that there was nothing to raise questions about his competency. There was no error by the trial court in not examining the issue.

¶27 Wainwright claims that the trial court was biased against him and exhibited that bias by taking two peremptory strikes from the parties and striking two potential jurors for cause. There is a presumption that a judge is free of bias and prejudice. *See* ***State v. McBride***, 187 Wis. 2d 409, 414, 523 N.W.2d 106 (Ct. App. 1994). To overcome the presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge is prejudiced or biased. *See* ***id.*** at 415. We look to whether there are objective facts demonstrating actual bias. *See* ***id.*** at 416.

¶28 First, Wainwright was not denied the statutory number of peremptory strikes; he was afforded five peremptory strikes. *See* WIS. STAT. § 972.03. Two jurors were struck for cause—one on Wainwright's motion because he believed that Wainwright was guilty, and the other because of a severe hearing disability. The trial court's ruling does not suggest bias despite Wainwright's characterization that these two persons "had characteristics, as well as spoke like black men."

¶29 Wainwright also suggests that the trial court assumed that the African-American male struck by the State was a gang member and exhibited bias by an examination to that effect. The trial court did not directly ask that prospective juror if he was a gang member. The trial court explained that due to

Wainwright's former gang membership, the court attempted to see if the prospective juror was from a rival gang. This does not demonstrate judicial bias but was an attempt to clarify the juror's ability to fairly serve.

¶30 On the day of sentencing, trial counsel was permitted to withdraw because Wainwright had expressed dissatisfaction with counsel's service. A new attorney was appointed right away and sentencing was adjourned for three weeks. Wainwright parlays this turn of events into a claim that the trial court was biased because it permitted counsel to withdraw. We summarily reject this contention. The trial court conducted an appropriate inquiry regarding the motion to withdraw and Wainwright's new attorney expressed no misgivings about being unprepared at the adjourned sentencing hearing.

¶31 We also summarily reject Wainwright's claim that the trial court exhibited bias by commenting on what it believed to be lies told by Wainwright and his family. The lack of a defendant's veracity at trial is an appropriate factor at sentencing. *See* ***Knecht v. State***, 68 Wis. 2d 697, 699, 229 N.W.2d 649 (1975).

¶32 Wainwright challenges the sufficiency of the evidence to sustain his conviction. However, he utilizes the wrong standard of review by citing to ***State v. Wyss***, 124 Wis. 2d 681, 694, 370 N.W.2d 745 (1985), *overruled by* ***State v. Poellinger***, 153 Wis. 2d 493, 505, 451 N.W.2d 752 (1990) (when a conviction is based on solely circumstantial evidence, the conviction is sustained "if a reasonable trier of fact could be convinced that the evidence is strong enough to exclude to a moral certainty every reasonable hypothesis of innocence"). Under the present state of the law, the standard of review when the defendant challenges the sufficiency of the evidence to support a conviction is the same whether it is a direct or circumstantial evidence case. *See* ***Poellinger***, 153 Wis. 2d at 501-02.

We may not reverse a conviction on the basis of insufficient evidence "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." ***Id.*** at 501. It is the function of the jury to decide issues of credibility, to weigh the evidence and to resolve conflicts in the testimony. *See* ***id.*** at 506.

¶33 Not only did Wainwright admit to the police and his girlfriend that he committed the bank robbery, but the footprints leading away from the back door of the bank stopped only a couple of houses from the home of Wainwright's sister. The knit ski mask worn by the robber was found along the trail of footprints. Shoes belonging to Wainwright's girlfriend, which Wainwright admitted he also wore, were recovered from a Racine home where Wainwright stayed. It was not necessary to prove that Wainwright actually had a gun during the robbery. It is enough if the robber does something to make the victim believe that he or she is armed. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 12-13, 496 N.W.2d 96 (Ct. App. 1992). There was evidence that Wainwright had his hand in his pocket to make it appear that he had a weapon. The evidence was sufficient to convict Wainwright.

¶34 Finally, Wainwright seeks a new trial in the interests of justice based on the alleged errors we have already addressed and rejected. A final catch-all plea for discretionary reversal based on the cumulative effect of nonerrors cannot succeed. *See* ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992). If we have not addressed with specificity some particular aspect of Wainwright's plethora of issues, we deem it as lacking sufficient merit or importance to warrant individual attention. *See* ***State v. Waste Management, Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147, *cert. denied*, 439 U.S. 865 (1978) ("An

appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

By the Court.—Judgment and order affirmed.

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