COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2157-CR **Cir. Ct. No. 01CF000116**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LOREN C. ALLIET,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Loren C. Alliet has appealed pro se from a judgment convicting him of armed robbery, committed while concealing his identity. He has also appealed from an order denying his motion for postconviction relief.

¶2 Alliet raises four issues on appeal: (1) whether the trial court denied him due process by dismissing his postconviction motion as a sanction; (2) whether the trial court erroneously exercised its discretion by permitting Charity Millard and Ryan Cook to identify him at trial; (3) whether prosecutorial misconduct deprived him of a fair trial; and (4) whether he was denied effective assistance of counsel.[1] Because none of these issues have merit, we affirm the judgment and order.

¶3 Addressing the first issue, we note that Alliet filed a fifty-six page motion for postconviction relief on April 10, 2003. At a hearing held on May 13, 2003, the trial court expressed doubt as to whether Alliet was entitled to an evidentiary hearing on his motion, but nevertheless scheduled a hearing for May 29, 2003. Subsequently, the trial court removed the hearing from its calendar and, on June 10, 2003, it issued a memorandum decision denying Alliet's motion.

¶4 In its decision, the trial court explained its reasons for removing the May 29, 2003 hearing from the calendar. It noted that the clerk's office had received fourteen subpoenas from Alliet, requesting the production of various witnesses for the May 29, 2003 hearing. The trial court noted that the subpoenas were received on May 20, 2003, with additional information concerning them received on May 23, 2003. The trial court also noted that many of the subpoenas

[1] In his reply brief, Alliet also moves to strike the State's respondent's brief on the ground that it was untimely. He argues that the State moved for an extension of its briefing time only in court of appeals case no. 03-3462-CR, another appeal by him. Alliet's motion is denied. This court extended the time for the State to file its respondent's brief in this case to April 30, 2004, and the brief was filed on that date. Although the State's motions contained the wrong case number, it was clear that the motions applied to this case. Alliet's appeal in case no. 03-3462-CR was on a completely different briefing schedule, and the State was represented by a different attorney in that case.

were incomplete and contained little or no information as to the addresses of the individual witnesses. The trial court noted that in a cover letter to the clerk of the circuit court, Alliet suggested measures the clerk could take to obtain the complete addresses, including consulting a local phone book before delivering the subpoenas to the sheriff's department for service.

¶5 The trial court also noted that no arrangements had been made for service fees. It stated that based upon these problems, it was clear to the court that the requested witnesses could not be subpoenaed in a timely fashion for the May 29, 2003 hearing. It stated that it therefore had removed the hearing from its calendar.

¶6 After providing this explanation, the trial court stated that it believed that Alliet's actions provided it with a sufficient basis to deny his motion in its entirety, noting that his conduct caused a delay of an unrelated case involving Alliet which had been scheduled for trial on May 29, 2003, and wasted a day of the trial court's calendar. The trial court stated: "While the Court believes the dismissal of the motion as a sanction for the Defendant's dilatory tactics is justified, the Court will address the merits of the Defendant's motion as well."

¶7 It is clear from the trial court's decision that while it believed dismissal of Alliet's motion was warranted as a sanction, it also resolved the motion on its merits. Alliet objects to this procedure on the ground that he was deprived of the opportunity to present witnesses and evidence in support of his motion. However, it is well established that a trial court may deny a postconviction motion without holding a hearing if the defendant fails to allege sufficient facts in his or her motion to raise a question of fact, if he or she presents only conclusory allegations, or if the record conclusively demonstrates that the

defendant is not entitled to relief. ***State v. Curtis***, 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998). Based upon these standards, the trial court properly denied Alliet's motion on its merits without holding an evidentiary hearing.[2]

¶8 The trial court addressed Alliet's claims of prosecutorial misconduct, ineffective assistance of counsel, and improper admission of the Cook and Millard in-court identifications in its memorandum decision. That decision is well reasoned, thorough, and supported by the record. We adopt much of the trial court's analysis in addressing the issues renewed by Alliet on appeal.

¶9 The record conclusively establishes that the trial court properly admitted the Millard and Cook in-court identifications. Alliet was convicted of the armed robbery of a Perkins restaurant at approximately 10:00 or 10:30 p.m. on April 4, 2001. Millard and Cook were working, respectively, as a waitress and manager at the time of the robbery.

¶10 On the morning of trial, Alliet's trial counsel, Attorney F.M. Van Hecke, moved the trial court to prevent Millard and Cook from identifying Alliet in court.[3] The trial court was informed that Millard and Cook had both observed Alliet being led through the courthouse hallway into the courtroom before trial, and had then told the prosecutor that they could both identify him as the person who robbed Perkins. The prosecutor relayed this information to Van Hecke, who

[2] Because we conclude that the trial court properly denied Alliet's postconviction motion on the merits without holding an evidentiary hearing, we need not resolve whether dismissal of the motion as a sanction was warranted. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (If this court affirms a trial court order based on one ground, it need not address others.).

[3] Alliet subsequently discharged Van Hecke and elected to proceed pro se before opening statements began. The trial court ordered Van Hecke to continue as standby counsel.

filed a motion in limine, noting that the robber had been masked and that neither witness had previously identified Alliet.

¶11 The trial court subsequently permitted the in-court identifications. Millard and Cook both identified Alliet as the person who committed the robbery. Cook testified that the robber had a gun in his hand, and said, "C'mon, you got to help me play this joke on Tiffany." Cook indicated that the robber put the gun in his back and ordered him to open the safe, which he did. According to Cook's testimony, the robber also said that even though he wanted Tiffany and Cook to think it was a fake gun, it was a real gun.

¶12 Alliet argues on appeal that Millard and Cook's hallway identifications of him were unduly and impermissibly prejudicial and suggestive, and necessitated suppressing their in-court identifications of him.[4] A defendant is denied due process when identification evidence admitted at trial stems from a pretrial police procedure which 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 (1995). In determining whether identification testimony must be excluded, the trial court must decide whether the confrontation procedure was characterized by unnecessary suggestiveness. ***State v. Marshall***, 92 Wis. 2d 101, 117, 284 N.W.2d 592 (1979). If it was, the court must then decide whether the totality of the circumstances shows that the identification was nevertheless reliable. ***Id.*** However, before either part of this

[4] We note that at trial, Millard and Cook were not asked by the prosecutor whether they had identified Alliet as the robber when they saw him in the courthouse hallway. They were not asked about any other pretrial identifications of him because they had not participated in any pretrial identification proceedings. Millard and Cook simply identified Alliet at trial as the person they saw commit the robbery.

analysis is applied, it must first be determined whether the confrontation was deliberately contrived by the police or prosecutor for purposes of obtaining an eyewitness identification. ***Id.***

¶13 "In reviewing a trial court's determination whether a pretrial identification should be suppressed, we apply the same rules as the trial court." ***State v. Benton***, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923. However, the trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** The issue of whether the facts warrant suppression is a legal issue we review de novo. ***Id.***

¶14 Multiple reasons exist for affirming the trial court's order denying Alliet's challenge to the admission of the in-court identifications made of him by Millard and Cook. Initially, we note that Alliet waived his right to challenge Millard's in-court identification of him. When given an opportunity to argue the motion in limine, he stated: "I think basically maybe if Charity truly believes that she can identify this person, I don't think that should be not allowed.… I find it hard to believe that Charity can identify this person, but I don't see if that's her personal belief that it should be held out." Because he did not oppose the admission of Millard's in-court identification of him, Alliet waived his right to challenge its admission on appeal. *See* ***State v. Washington***, 142 Wis. 2d 630, 635, 419 N.W.2d 275 (Ct. App. 1987).

¶15 The trial court also determined that the State had not participated in any way in setting up the hallway encounter for purposes of obtaining an eyewitness identification. Nothing in the record provides any basis for disturbing this determination. Because the record indicates that the encounter between Alliet and Millard and Cook was a chance encounter which occurred while Alliet was

being led into court, and that it was not part of a police procedure directed towards obtaining additional evidence, suppression of the in-court identifications was unwarranted. *See* ***Marshall***, 92 Wis. 2d at 118. Moreover, even if the State could be deemed to have arranged the encounter, there was nothing about it that was unnecessarily suggestive and conducive to irreparable mistaken identification. As noted by the trial court, Millard and Cook were going to see Alliet seated at the defendant's table as soon as the trial began. Seeing him being escorted into the courtroom for trial was not so suggestive as to encourage them to misidentify him in their in-court identifications.[5]

¶16 Although we conclude that the trial court properly admitted the in-court identifications of Alliet by Millard and Cook, we also agree with the State that even if error occurred, it was harmless. An error is harmless if there is no reasonable possibility that the error contributed to the conviction. ***State v. Sullivan***, 216 Wis. 2d 768, 792, 576 N.W.2d 30 (1998).

¶17 In this case, the evidence of Alliet's guilt was overwhelming even without the in-court identifications by Millard and Cook. Alliet's friends,

[5] Alliet repeatedly argues that the identifications by Millard and Cook were unreliable, citing to inconsistencies in the evidence and Cook's failure to identify him at the preliminary hearing. However, contrary to Alliet's contention, the trial court correctly determined that Cook was never asked to identify Alliet at the preliminary hearing as the person who robbed the restaurant. In any event, inconsistencies between the witnesses' statements and their testimony at trial, and claims that Millard and Cook could not see the robber well because his head was covered with a stocking or mask of some kind, went to the weight and credibility of the in-court identifications, not their admissibility. Alliet had an opportunity to cross-examine Millard and Cook and heard the trial court inform them that they were free to go after their testimony. Although he now objects that he was unable to recall them to the stand during the defense portion of his case, he was representing himself during the trial. The responsibility for failing to question Millard and Cook more extensively regarding their identifications during cross-examination, or failing to request that they remain to testify during the defense portion of the case, was therefore Alliet's, and provides no basis for relief on appeal.

Tiffany Gaedke, Cameron Kaplan, and Katie Conley testified at trial, and their prior statements to police were admitted. Tiffany was Alliet's roommate and a waitress at Perkins.[6] She was working on the night of April 4, 2001, but was wearing a nametag with someone else's name on it.

¶18 In a statement given to police on April 6, 2001, Tiffany stated that Alliet was out of work and told her that he needed money and was going to rob the safe at Perkins. She stated that at approximately 10:15 p.m. on April 4, 2001, she observed Alliet standing by the counter at Perkins. She indicated that Alliet had a nylon stocking over his face, but that she could see through it. She stated that he had a backpack with him. She stated that when she got home, she saw the same backpack sitting on the floor of her living room, next to her BB gun. She testified that the BB gun was kept in a cabinet in her bedroom, and that she had last seen it several months before the robbery. In her statement, Tiffany also indicated that she found $100 for rent money on top of her entertainment center, along with a note that said: "Here is rent. I don't trust the numbers on the bills." She stated that Alliet told her the next day that he did not get a lot, only $100 or $200.

¶19 The police searched the apartment shared by Alliet, Tiffany, and Conley, and recovered a note from the entertainment center, a backpack and a BB gun. The note said: "I don't trust the numbers, like to launder it. Loren." Testimony indicated that the backpack was recovered from the floor alongside the couch, and the BB gun was about a foot away under a chair. In addition, as noted

[6] We refer to Tiffany Gaedke by her first name rather than her last name because the testimony indicated that the robber referred to "Tiffany" during the course of the Perkins robbery.

earlier, Cook testified that the robber specifically mentioned Tiffany by name during the robbery.

¶20 Additional statements made by Kaplan on April 6, 2001, and by Conley on April 10, 2001, were admitted at trial. Kaplan indicated that in the months before the robbery, Alliet told him that he wanted money to leave the state and could rob a bank or a Pick 'N Save or Perkins. Kaplan also indicated that Alliet asked him and Conley to pick Alliet up at a location near the Perkins restaurant at about 10:30 p.m. on April 4, 2001. Kaplan's statement indicated that after they picked Alliet up, he was counting money in the backseat, and stated that he got about $650 and thought he "could have got more." Conley's statement was consistent with Kaplan's, indicating that Alliet was counting money in the backseat, and told her that he held up the manager at Perkins. In addition, Kaplan's statement that Alliet told him he got $650 was consistent with the evidence as to the amount stolen from Perkins, which was $696.

¶21 The evidence implicating Alliet as the person who committed the armed robbery of Perkins on April 4, 2001, was thus overwhelming.[7] Therefore, even assuming for the sake of argument that it was error to admit the identifications by Millard and Cook, the error was harmless beyond a reasonable doubt.

¶22 Alliet's claim of prosecutorial misconduct is equally without merit. First, he contends that the prosecutor withheld exculpatory information concerning

[7] Alliet repeatedly argues that the statements by Tiffany, Kaplan and Conley were unreliable in light of their trial testimony. However, the statements, which were given to the police within two to six days of the robbery, were part of the evidence at trial. In conjunction with the remainder of the evidence, they provided overwhelming evidence of Alliet's guilt.

the confrontation in the hallway before trial. However, as already discussed, nothing in the record provides a basis to conclude that the prosecutor was involved in this encounter. In any event, for all of the reasons already discussed, the evidence was properly admitted and, even if any error occurred, it was harmless.

¶23 Alliet also contends that, in his closing argument, the prosecutor mischaracterized testimony concerning the BB gun. We conclude that the trial court properly rejected this argument.

¶24 Initially, we note that Alliet did not raise an objection to the prosecutor's discussion of the BB gun in the closing argument. A defendant waives his or her objection to improper final argument by failing to make a timely motion for mistrial. The motion must be made before the jury returns its verdict. ***State v. Davidson***, 2000 WI 91, ¶86, 236 Wis. 2d 537, 613 N.W.2d 606.

¶25 We also agree with the trial court that the record provides no basis for concluding that the prosecutor's closing argument was inappropriate. An attorney is allowed latitude in his or her closing argument, and it is within the trial court's discretion to determine the propriety of counsel's statements and arguments. ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). A prosecutor may comment on the evidence, detail the evidence, and argue from it to a conclusion. ***Embry v. State***, 46 Wis. 2d 151, 160, 174 N.W.2d 521 (1970). The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979).

¶26 In his closing argument, the prosecutor argued to the jurors that they could infer from the evidence that the BB gun found by the backpack in Alliet's

residence was the gun used in the Perkins robbery. The prosecutor's argument was a reasonable conclusion based upon the evidence. The evidence indicated that Cook saw a gun, and the robber commented on whether it was a fake gun or a real gun. The evidence also indicated that Tiffany recognized Alliet as the robber, saw that he had a backpack with him, and saw the backpack in her living room the next day near a BB gun which she had last seen in her bedroom months before the robbery.[8] As set forth by the State, Cook's testimony linked the gun to Tiffany and the possibility that the gun Cook saw was a "fake" gun. Tiffany's statements linked the BB gun with Alliet and the backpack used in the robbery. The prosecutor engaged in no misconduct when he reasonably suggested that the jury could infer from the testimony that the BB gun taken from the apartment was the one used in the robbery.

¶27 Contrary to Alliet's contention, there was nothing inconsistent between this argument and the prosecutor's statement to the trial court during the jury instruction conference indicating that "we don't have the gun so we don't know whether it was a gun or a BB gun. We're not sure." This statement by the prosecutor merely informed the trial court that no gun had been recovered at the scene of the crime, and that the State did not know for certain what particular gun

[8] Alliet objects to statements by the prosecutor in closing argument indicating that Tiffany last saw the BB gun in her dresser drawer, and that nylons were also found in her dresser drawer. He contends that these statements misstate the evidence. We disagree. In her statement, Tiffany indicated that the BB gun was kept in a cabinet in her bedroom. At trial she acknowledged stating that the BB gun was kept in her nightstand. In his closing argument, the prosecutor referred to both "cabinet" and "dresser drawer" in describing where Tiffany last saw the BB gun. The testimony and statement given by Tiffany permitted the prosecutor to draw the inference he did in the closing argument. Even if there is some ambiguity as to precisely where Tiffany kept the BB gun, the issue is insufficient to warrant relief on appeal. Similarly, the prosecutor's statement that "guns were brandished" and "[t]here was [sic] masked men" did not mislead the jury into believing there was more than one robber at the April 4, 2001 Perkins robbery.

was used during the robbery. However, a reasonable inference from the evidence was that Tiffany's BB gun was taken and used by Alliet in the robbery, and the prosecutor was entitled to draw that conclusion in his closing argument.

¶28 Alliet's final argument is that he was denied effective assistance of counsel. To establish a claim of ineffective assistance, an appellant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, an appellant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** "Even if deficient performance is found, judgment will not be reversed unless the defendant proves that the deficiency prejudiced his defense." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "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." ***Strickland***, 466 U.S. at 694.

¶29 In analyzing an ineffective assistance claim, the court may choose to address either the deficient performance prong or the prejudice prong. ***State v. Williams***, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11. If it concludes that the defendant made an inadequate showing with respect to one component, it need not address the other. ***Id.***

¶30 As previously noted, Alliet discharged Attorney Van Hecke and elected to proceed pro se on the morning of trial. The trial court ordered Van Hecke to continue as standby counsel. On appeal and in his motion for

postconviction relief, Alliet contends that Van Hecke performed deficiently in his pretrial preparation and investigation, and as standby counsel.

¶31 We conclude that the trial court properly denied Alliet's claim that he was entitled to a new trial because Van Hecke provided ineffective assistance as standby counsel at trial. A defendant has a right to be represented by counsel or to represent himself or herself, but not both. ***Moore v. State***, 83 Wis. 2d 285, 300, 265 N.W.2d 540 (1978). The decision to appoint standby counsel is for the convenience of the trial court and is not tied to a defendant's constitutional right to counsel. ***State v. Cummings***, 199 Wis. 2d 721, 754 n.17, 546 N.W.2d 406 (1996). It follows that when Alliet waived his right to counsel in favor of proceeding pro se, he also waived his right to allege that he was denied his right to effective assistance of counsel at trial. We therefore will not address Alliet's arguments challenging the assistance provided to him by Van Hecke while serving as standby counsel at trial.

¶32 The trial court also properly denied Alliet's claim of ineffective pretrial representation. A trial court, in the exercise of its discretion, may deny a postconviction motion alleging ineffective assistance without holding an evidentiary hearing if the defendant fails to allege sufficient facts in his or her motion to raise a question of fact, if he or she presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. ***Curtis***, 218 Wis. 2d at 555 n.3. Whether a postconviction motion alleges facts which, if true, would entitle a defendant to relief is a question of law which we review de novo. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

¶33 Alliet contends that Van Hecke was ineffective because he failed to contact Millard to set up a pretrial line-up, did not adequately investigate the conditions of the hallway confrontation on the morning of trial, and did not adequately attempt to locate a woman named Brenda Kaddatz to testify that she loaned Alliet money on April 4, 2001, thus providing an alternative explanation for the cash he had that night.[9]

¶34 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. ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). A defendant must base a challenge to his or her representation on more than speculation. ***Id.***

¶35 As to each of his claims regarding inadequate investigation, Alliet fails to allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. Alliet's claim that Millard would not have picked him out of a line-up is pure speculation. Similarly, Alliet failed to allege what details concerning the hallway confrontation should have been discovered by trial counsel in an investigation. Most importantly, as already discussed, any error in the admission of the in-court identifications made by Millard and Cook was harmless. As a result, trial counsel's failure to investigate those matters further cannot be deemed prejudicial.

[9] Alliet also alleges that Van Hecke rendered ineffective assistance when, after filing a motion to suppress the statements of Tiffany, Kaplan and Conley, he had to be informed that Conley had given more than one statement. However, since counsel moved at the suppression hearing to suppress both of Conley's statements, Alliet's allegations provide no basis for determining that counsel was ineffective.

¶36 For similar reasons, Alliet's claim that trial counsel performed deficiently when he failed to locate Kaddatz fails. As determined by the trial court, even if such a witness could have been produced to testify that she loaned Alliet money on April 4, 2001, this testimony did not refute the evidence from Tiffany, Conley and Kaplan indicating that Alliet got money by robbing the Perkins restaurant. Because the record provides no basis to conclude that further investigation and location of Kaddatz by counsel would have affected the outcome of the case, the trial court properly denied Alliet's postconviction motion without holding an evidentiary hearing.

By the Court.—Judgment and order affirmed.

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