COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1323-CR **Cir. Ct. No. 2013CF5648**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAYVON M. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM W. BRASH and MARK A. SANDERS, Judges. *Affirmed*.

Before Sherman, Kloppenburg and Fitzpatrick, JJ.

¶1 PER CURIAM. Trayvon Smith appeals a judgment of conviction and an order denying postconviction relief.[1] Smith contends that he was denied the effective assistance of counsel at trial, that the sentence imposed by the circuit court was unduly harsh, and that the evidence was insufficient to sustain the jury verdicts. For the reasons set forth below, we reject those contentions. We affirm.

¶2 Smith was charged with two counts of armed robbery and one count of operating a vehicle without the owner's consent. At trial, the victims, R.F. and K.W., testified as follows. R.F. and K.W. were delivering newspapers in K.W.'s vehicle, with K.W.'s young daughter sleeping in the backseat, when a man approached the car and banged on the car window with a gun. The man demanded that R.F. and K.W. exit the vehicle. R.F. and K.W. exited the vehicle with K.W.'s daughter, and the man demanded R.F.'s personal property. R.F. gave the man her phone and money, and the man then drove away in K.W.'s vehicle. R.F. and K.W. separately participated in photograph array identification procedures at the police station, and each identified Smith's photograph as the man who had robbed them.

¶3 Detective Timothy Wallich testified that he conducted the photograph array procedures with R.F. and K.W. Wallich detailed the process he followed as to the photograph array procedures. On cross-examination, defense counsel highlighted that Wallich had failed to follow some of the procedures in the Milwaukee Police Department Standard Operating Procedures for photograph array identifications. Wallich acknowledged that the operating procedures direct

[1] The Honorable William Brash III presided over trial and sentencing. The Honorable Mark Sanders issued the order denying postconviction relief.

the officer administering the identification process to place the photographs into unmarked folders and then shuffle the folders before numbering them, so that the officer does not know which folder contains the suspect's photograph. Wallich acknowledged that he did not follow that procedure, but instead placed the photographs into pre-numbered envelopes according to the numbering generated by a police department computer system, and that he therefore knew which envelope contained Smith's photograph. Defense counsel also highlighted that Wallich's knowledge of which folder contained Smith's photograph during administration of the photographic array was inconsistent with WIS. STAT. § 175.50 (2015-16).[2] *See* §§ 175.50(5)(a) and (c) (providing that a law enforcement agency shall consider including in its eyewitness identification policies: "To the extent feasible, having a person who does not know the identity of the suspect administer" the procedure, and "[m]inimizing factors that influence an eyewitness to identify a suspect or overstate his or her confidence level in identifying a suspect, including verbal or nonverbal reactions of the person administering" the procedure).

¶4 Smith was convicted on the jury's verdicts and sentenced to nine years of initial confinement and five years of extended supervision. Smith moved for postconviction relief. He argued that his trial counsel was ineffective by failing to move to exclude the photograph array evidence prior to trial and then failing to object to the evidence at trial. Alternatively, Smith sought sentence modification on grounds that the circuit court erroneously exercised its sentencing

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

discretion and imposed an unduly harsh sentence. The circuit court denied the motion without a hearing. Smith appeals.

¶5 We first address Smith's claim that the evidence was insufficient to sustain the jury verdicts. Smith contends that the evidence was insufficient because there was no physical evidence linking him to the crimes, and a fingerprint recovered from the driver's side door of K.W.'s vehicle matched an individual named Clarence Young. Smith contends that the evidence supported a finding that Young committed the crimes, rather than Smith. We are not persuaded.

¶6 A claim of insufficiency of the evidence requires a showing that "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." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We conclude that Smith has not made that showing here.

¶7 Armed robbery is committed by taking property from the person or presence of the owner, with intent to steal, by use or threat of use of a dangerous weapon. *See* WIS. STAT. § 943.32(2). Operating a motor vehicle without the owner's consent is committed by intentionally taking and driving a vehicle without the owner's consent. WIS. STAT. § 943.23(2). At trial, R.F. and K.W. testified that their assailant displayed a gun, took personal property from R.F., and drove away in K.W.'s vehicle during early morning hours. They each separately identified Smith in photographic arrays as their assailant. Another State's witness testified that, around 7:00 a.m. on the morning of the robbery, she observed a silver vehicle parked next door to her house at 2454 West Clark Street in

Milwaukee, and saw two men run from the vehicle to a bus stop, where they got on a city bus. The witness testified that she recognized the man who exited the driver's side as Smith, and that she knew Smith from the neighborhood. R.F. and K.W. identified a silver vehicle located at 2452 West Clark Street in Milwaukee as K.W.'s vehicle that was taken in the robbery. The State also offered police testimony that Young's fingerprint was found on the driver's side door of K.W.'s vehicle; that an officer had observed Smith and Young together on multiple occasions; that Smith at first denied that he knew Young but then admitted that he knew him; and that a phone call from R.F.'s phone shortly after it was taken in the robbery was made to another known associate of Smith's. This evidence, if deemed credible by the jury, was sufficient to support the jury verdicts. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 326, 588 N.W.2d 8 (1999) ("It is within the province of the jury to decide issues of credibility, to weigh the evidence and resolve conflicts in the testimony.").

¶8 Next, we address Smith's claim of ineffective assistance of counsel. Smith contends that his trial counsel was ineffective by failing to file a pretrial motion to exclude the victims' photograph array identifications. He also contends that his counsel was ineffective by failing to object to the photograph array testimony at trial. Smith argues that his trial counsel should have moved to exclude the evidence or objected at trial to its admission because the photograph identification procedures deviated from standard practices in the police operating procedure and WIS. STAT. § 175.50. We disagree.

¶9 A claim of ineffective assistance of counsel must show that counsel's performance was deficient, and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To show deficient performance, the defendant must establish that counsel's

representation fell below objective standards of reasonableness. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To show prejudice, the defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. A defendant must prove both deficient performance and prejudice, and thus a failure to prove either one defeats the claim. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). A defendant is entitled to an evidentiary hearing on a postconviction motion if the motion alleges sufficient facts that, if true, would warrant the relief sought. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶10 Smith contends that his trial counsel performed deficiently by failing to move to exclude the photograph array evidence prior to trial and by failing to object to the evidence at trial. However, Smith merely asserts in conclusory fashion that his trial counsel should have moved to exclude or objected to the evidence based on Wallich's deviations from standard practices in administering the photograph array identifications. Smith fails to develop any argument as to how those deviations rendered the out-of-court identifications inadmissible.

¶11 A defendant seeking to exclude an out-of-court identification bears the burden of showing that the identification was "impermissibly suggestive." *See* ***State v. Drew***, 2007 WI App 213, ¶13, 305 Wis. 2d 641, 740 N.W.2d 404. A pretrial identification procedure is impermissibly suggestive if it "give[s] 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. An identification procedure may be impermissibly suggestive because some aspect of the photographs unduly emphasized the suspect, because the manner in which the photographs were exhibited was suggestive, or because the words or actions of the

officer administering the procedure was leading. ***Powell v. State***, 86 Wis. 2d 51, 63, 271 N.W.2d 610 (1978). Here, Smith does not explain how Wallich's deviations from standard practices during the photograph array identification procedures resulted in impermissibly suggestive identification procedures. Because Smith has not explained why a motion to exclude or an objection to the evidence would have had merit, he has not shown that his trial counsel was ineffective by failing to pursue either one.[3] *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) ("[T]rial counsel was not ineffective for failing or refusing to pursue feckless arguments.").

¶12 Lastly, we address Smith's argument that he is entitled to sentence modification. Smith contends that the circuit court erroneously exercised its sentencing discretion and imposed a sentence that is unduly harsh. Smith argues that the circuit court failed to consider probation as a first alternative. He also argues that the court placed too much weight on the presentence investigation report (PSI). Smith contends that the PSI was tainted by its emphasis on Smith's refusal to accept responsibility for his actions based on his claim of innocence. Smith also argues that the sentencing court erred by considering the Risk Assessment Form prepared by the Milwaukee Police Department and submitted by the State, which Smith asserts was highly prejudicial to Smith by listing all contacts police had with Smith without providing the context of each incident. He also contends that the circuit court failed to consider his rehabilitative needs.

[3] Smith also contends that his trial counsel was ineffective by failing to obtain videotape surveillance from the stores near where the stolen vehicle was found and telephone records related to the stolen phone. Because Smith did not raise this argument in the circuit court, we will not consider it for the first time on appeal. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments that are raised for the first time on appeal are generally deemed forfeited).

Finally, Smith argues that the fourteen-year sentence imposed by the circuit court is unduly harsh in light of the fact that Smith is a young man, that he has not committed many significant adult crimes, that he was working to provide for his family at the time of the current offenses, and that he has a young daughter. We are not persuaded.

¶13 A challenge to a circuit court's exercise of its sentencing discretion must overcome our presumption that the sentence was reasonable. ***State v. Ramuta***, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483. A court should consider probation as the first alternative and impose probation unless probation would unduly depreciate the seriousness of the offense. ***State v. Gallion***, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court must explain the objectives and factors considered, which will vary from case to case. ***Id.***, ¶¶40-43. Ultimately, "[t]he circuit court possesses wide discretion in determining what factors are relevant to its sentencing decision," ***id.***, ¶68, and has wide discretion as to the weight to give to each sentencing factor, *see* ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20. A sentence is unduly harsh "'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.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted). We have explained that "'a sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***id.*** (quoted source omitted).

¶14 Here, the circuit court explained that it considered probation, and determined that probation was not appropriate because it would unduly depreciate the seriousness of the offenses. The court acknowledged Smith's claim of innocence. The court also noted that the PSI writer interpreted Smith's claim of innocence as a failure to take responsibility and lack of remorse, but that the opinion in the PSI was just one person's opinion, which the court considered along with everything else that was presented at sentencing. After defense counsel objected to the State's submission of the Risk Assessment Form, the court explained that it focused its sentencing considerations on Smith's record of convictions rather than the police contacts listed in the Risk Assessment Form. The court also noted that Smith has rehabilitative needs, but that the sentence needed to serve as a deterrence as well. Ultimately, the fourteen-year sentence imposed by the court was well within the maximum Smith faced, and was therefore not unduly harsh. *See* WIS. STAT. §§ 943.32(2) (armed robbery is a class C felony); 939.50(3)(c) (class C felony punishable by up to $100,000 fine and forty years of imprisonment); 973.01(2)(b)3. (term of initial confinement for class C felony may be up to twenty-five years); 943.23(2) (operate vehicle without owner's consent is a class H felony); 939.50(3)(h) (class H felony punishable by $10,000 fine and six years of imprisonment); 973.01(2)(b)8. (term of initial confinement for class H felony may be up to three years). We therefore have no basis to disturb the court's exercise of its sentencing discretion.

By the Court.—Judgment and order affirmed.

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