COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP968-CR **Cir. Ct. No. 2014CF2307**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMEY LAMONT JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. KONKOL and M. JOSEPH DONALD, Judges. *Affirmed*.

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

¶1 KESSLER, J. Jamey Lamont Jackson appeals a judgment of conviction, following a jury trial, of one count of being a felon in possession of a

firearm. He also appeals the order denying his postconviction motion for a new trial on the basis of ineffective assistance of counsel.[1] We affirm.

BACKGROUND

¶2 On June 2, 2014, Jackson was charged with one count of being a felon in possession of a firearm. According to the criminal complaint, the charges stemmed from an incident that occurred on May 21, 2014, near a City of Milwaukee elementary school playground. On that afternoon, Jackson, along with a few other men, was sitting on steps near the playground when Sylvester Lewis rode by on a mountain bike. One of the men called out to Lewis and accused Lewis of stealing "his 'baby momma's kid's' clothes." Jackson stood up and fired a gun past Lewis's ear. Lewis returned fire, shooting what he estimated to be about eight bullets towards Jackson and the playground. None of the bullets struck Jackson; however, one bullet struck S.G., a ten-year-old girl who was playing on the playground. S.G. was struck in the head and ultimately died from the gunshot wound. The complaint further stated that Lewis admitted to shooting at Jackson and told police that Jackson possessed a gun and fired the first shot.

¶3 On May 30, 2014, Milwaukee police organized a live lineup of six individuals. Three witnesses, ranging in age from twelve to sixteen, viewed the lineup. Jackson was number five in the lineup. Following the lineup, one of the witnesses, B.B., asked if she could view number five again. The entire lineup was walked back in. After the second lineup, each witness was interviewed by separate police officers. The officers also collected the witnesses' supplemental lineup reports.

[1] The Honorable Daniel L. Konkol entered the judgment of conviction. The Honorable M. Joseph Donald entered the order denying Jackson's postconviction motion.

¶4 Detective Carlos Rutherford interviewed B.B. after the lineup. B.B.'s supplemental report identified Jackson with a circle, an asterisk, and a handwritten note saying "that's him, 'Yella.'" Rutherford's interview report indicates that B.B. said she was "one hundred percent positive" that Jackson was involved in the events leading to S.G.'s death because she saw Jackson putting a gun in his waistband and fleeing the scene. She also recognized Jackson as a boy from her neighborhood whom she grew up with. The report also indicates that B.B. recognized Jackson immediately.

¶5 Detective Kevin Klemstein interviewed K.G., S.G.'s sister. K.G. initially circled "no" under all six numbers on the supplemental report, but crossed out the "no" under number five and then circled "yes." Klemstein's interview report states that he asked K.G. to initial the change and asked her why she changed her answer. K.G. stated that she initially circled "no" under number five but then realized she wanted to circle "yes." She knew number five as "TY," observed "TY" with a gun that day, and saw "TY" shoot at "Red."[2]

¶6 Detective Patrick Pajot interviewed T.M. T.M.'s supplemental report had numerous marks on it—she circled "no" for numbers one through four and six, and circled "yes" for number five. She also wrote "looks familiar" next to number five, but crossed it off. Pajot's interview report states that T.M. told Pajot she saw "number five" near the playground on the day of the shooting and noticed that he had a gun in his pants. She also told Pajot that she was positive "the person in position 5" was shooting towards the street and that she recognized number five from "the neighborhood."

[2] "Red" was one of Lewis's known aliases.

¶7 The matter proceeded to trial where all three of the witnesses testified. K.G. testified that on the afternoon of the shooting, she was dancing, singing and running around the school playground with S.G. and their friends. She heard gunshots coming "towards [them]" and she ran to the side of the school. "[A] dude" ran by her and told her that a little girl was shot. K.G. looked towards the playground and saw her sister lying on the ground. She told the jury that she saw two men shooting towards each other. She recognized one of the shooters as a man from her neighborhood. K.G. was also shown the supplemental report from the lineup and was asked why she circled "No. 5." She stated that number five was shooting towards "Red." She also identified Jackson in court.

¶8 T.M. testified that she was at the elementary school playground with her cousins on the afternoon of the shooting. She saw "Jamey," someone she recognized from the area, smoking a cigarette near a bench on the playground. T.M. saw "Jamey" stand up and noticed a gun in his pocket. "Jamey" and "Red" began shooting at each other—"Jamey" shot towards "Red," and "Red" shot towards the playground. T.M. also testified about the lineup, explaining that she circled "yes" for number five because she knew number five and knew him to be involved in the shooting. When asked if she saw "Jamey" in the courtroom, T.M. identified a man in the courtroom gallery who was not Jackson. During a short recess, T.M. told a police officer that the man she identified in the gallery approached her before she took the witness stand and told her not to identify Jackson. When T.M. took the stand again, she explained that she knew the man in the gallery was not "Jamey," but that the man talked to her in the hallway and said, "my nigga didn't do it." She then confirmed that number five from the lineup was indeed Jackson, whom she knew as "T-Y." She then identified Jackson in the courtroom.

¶9 B.B. testified that on the day of the shooting she was walking towards the school when she heard gun shots. She then saw two men run past her with guns. At the lineup, B.B. recognized "No. 5" as one of the men who ran past her with a gun. She stated that she circled "yes" and wrote "Yella" next to number five because of "[h]is yellow skin." She was "100 percent" certain that "No. 5" was one of the men with a gun, as she recognized him from her neighborhood. She also testified that she asked the police officer standing next to her if she could see "No. 5" again and was informed that the entire lineup would have to be brought back. She stated that she did not ask out loud, but rather just asked the officer next to her so that he could hear her.

¶10 Detective Pajot also testified, explaining the lineup procedure and confirming that he heard one of the witnesses ask to see number five again.

¶11 The jury found Jackson guilty as charged. Jackson filed a postconviction motion for a new trial, arguing that his counsel was ineffective for failing to move to suppress the lineup identification evidence. He argued that the lineup was impermissibly suggestive because T.M. and K.G. were present when B.B. asked to see number five for a second time.

¶12 The postconviction court denied the motion without a hearing, stating in its written decision that Jackson failed to show that B.B.'s request influenced T.M. or K.G. in any way. The court also found that the witnesses all gave reliable explanations for their identifications and that even if the trial court had granted a suppression motion, there was not a reasonable probability of a different outcome because K.G. and T.M. identified Jackson in court. This appeal follows.

DISCUSSION

¶13 On appeal, Jackson raises the same argument he raised in his postconviction motion. He also contends that there was insufficient evidence to convict him.

I. Ineffective Assistance of Counsel

¶14 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).

¶15 Jackson contends that counsel was ineffective for failing to move to suppress lineup identification evidence on the grounds that T.M. and K.G. were unduly influenced by B.B.'s request to see "number five" again, thus prejudicing Jackson's case. Consequently, to resolve this appeal, we need to consider whether a motion to suppress Jackson's lineup identification would have been successful.

¶16 "'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*. *See* ***id.*** (application of facts to constitutional principles is subject to *de novo* review).

¶17 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; ellipses in ***Wright***).

¶18 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 (quoting ***Neil v. Biggers***, 409 U.S. 188, 199 (1972)). ***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).

¶19 The "overriding question" in determining whether a defendant's rights were violated as a result of an impermissibly suggestive lineup is "'whether

under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive.'" ***Powell***, 86 Wis. 2d at 64-65 (citation and one set of quotation marks omitted).

¶20 We conclude that Jackson has failed to show that the lineup was impermissibly suggestive. The record shows that when B.B. asked to see number five again, she asked the officer standing next to her, who told her that number five could not be singled out—the entire lineup would have to be shown again. Nothing suggests that K.G. or T.M. even heard B.B.'s request, let alone were influenced by it. Each witness was individually interviewed following the lineup and each witness provided an independent explanation as to how she knew Jackson was one of the shooters. K.G. and T.M. both recognized Jackson from their neighborhood, both saw Jackson with a gun, and both saw Jackson shooting towards "Red."

¶21 Moreover, Jackson has not shown a reasonable probability of a different result at trial had the lineup evidence been suppressed. T.M. and K.G. identified Jackson in court, and B.B. testified that she was "100 percent" certain Jackson was at the school playground with a gun on the day of the shooting.

¶22 Because there would have been no basis for the trial court to grant the suppression motion and because Jackson has not shown a reasonable probability of a different outcome, Jackson's counsel was not ineffective for failing to move to suppress the identification evidence. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369 (counsel is not ineffective for failing to raise meritless motions).

II. Sufficiency of the Evidence

¶23 Jackson also argues that there was insufficient evidence to convict him because K.G. and T.M. gave "confusing" testimony and because T.M. misidentified him in the courtroom.

¶24 "When a defendant challenges a verdict based on sufficiency of the evidence, we give deference to the jury's determination and view the evidence in the light most favorable to the State." ***State v. Long***, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557. Whether the evidence is direct or circumstantial, this court "may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 507, 451 N.W.2d 752 (1990). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Id.*** at 507.

¶25 The testimony presented at trial was sufficient for a reasonable jury to determine that Jackson possessed a firearm. K.G. testified that she was singing and dancing with her sister and their friends when she heard gunshots towards the school. She ran towards the side of the school and was told by a "dude" that a little girl was shot. The little girl was her sister. She testified that she knew one of the shooters as "Red" and recognized the other shooter. K.G. testified about the lineup, stating that she circled number five because that was the person shooting towards "Red." K.G. also identified Jackson in court.

¶26 T.M. also testified about the lineup, telling the jury that she circled "yes" on number five because she recognized him as the person shooting towards "Red." T.M. stated that she knew number five as T.Y. While she did initially misidentify Jackson in court, she explained to the jury that she was approached by a man from the gallery and was told not to identify Jackson. She later accurately identified Jackson in front of the jury.

¶27 B.B. told the jury that Jackson ran past her after the shooting while holding a gun. She also explained her lineup report, telling the jury that she was "100 percent" certain Jackson was one of the men on the scene with a gun.

¶28 Viewing the evidence in the light most favorable to the State and the verdict, we conclude that this testimony was sufficient to establish beyond a reasonable doubt that Jackson possessed a firearm. That Jackson found the witnesses' testimony "confusing" is irrelevant. The jury determines the weight and credibility even of inconsistent testimony and resolves any inconsistencies on its own. ***State v. Daniels***, 117 Wis. 2d 9, 17, 343 N.W.2d 411 (Ct. App. 1983). "[W]e ask only if the evidence is inherently or patently incredible or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." ***State v. Oimen***, 184 Wis. 2d 423, 436, 516 N.W.2d 399 (1994). Clearly the jury found the witnesses credible. We will not overturn the jury's determination.

¶29 For the foregoing reasons, we affirm the trial court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.