COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP1276-CR **Cir. Ct. No. 2012CF104**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NELSON GARCIA, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed*.

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

¶1 BRENNAN, P.J. Nelson Garcia, Jr., appeals a judgment of conviction for bank robbery. Garcia seeks a new trial on three grounds. He argues that his constitutional right to counsel attached at the point when a court commissioner made a probable cause finding and set bail as the police

investigation continued and he therefore had a Sixth Amendment right to counsel during a subsequent lineup. He argues that the lineup, in which a witness identified him, was unduly suggestive and violated his due process rights, and that the trial court therefore erred when it denied his motion to suppress the lineup identification. Finally, he argues that the trial court's denial of his motion to represent himself—and its failure to give him the opportunity to "reclaim" the right with better courtroom conduct—violated his Sixth Amendment right to represent himself. We reject his arguments and affirm.

BACKGROUND

The police investigation.

¶2 A man robbed a Milwaukee bank on December 27, 2011. The man gave D.L., a teller, a handwritten note. The note said this was a robbery and directed her to put money into a bag he gave her. She did so, and he left the bank. A second teller observed the robbery from nearby, and the robbery was also caught on surveillance video.

¶3 Following release of the video to the media, police received several calls identifying the man in the video as Garcia. Police arrested him on January 2, 2012, at a friend's house where he was staying.

¶4 Within forty-eight hours of his arrest, on January 4, 2012, a Milwaukee County court commissioner reviewed a form known as a "CR-215," titled, "Probable Cause Statement and Judicial Determination." The form, prepared by police, contained a statement alleging that officers had received several calls identifying Garcia in the surveillance video; that the name led officers to find a booking photo of Garcia, which an officer also matched to the

surveillance video; that the two people who lived in the house where Garcia was arrested told police they had known Garcia for years and identified Garcia as the man in the surveillance video; and that Garcia's girlfriend also told police Garcia was the man in the surveillance video. The statement was signed by Detective Ralph Spano. Beneath his signature, the boxes were checked indicating that the commissioner found the following statement true and filled in the amount of bail: "I have reviewed the probable cause statement from the arresting officer. Based on this statement[] I find probable cause to believe that the arrested person committed the offense(s) as listed above[.] Bail is set as follows: $50,000." The form was dated by the commissioner on January 4, 2012, and has the time listed as 1:27 p.m.

¶5 A few hours after Garcia's bail was set, police conducted an in-person lineup with D.L. and the second teller. The two tellers were given standard lineup forms and instructed as to the procedures. Each viewed the lineup. Before collecting their forms, the detective administering the process asked if either had any questions or wished to see the lineup again. One witness said she did want to see it again, and he then ran the lineup a second time. D.L. positively identified Garcia as the robber; the other teller said she was not positive. The detective instructed her that if she was not positive, she should indicate "no" on the form, and she did.

¶6 Garcia was charged with the bank robbery.

Pretrial proceedings.

¶7 According to the court docket, Garcia made an initial appearance on January 7, 2012. The docket includes the following notation:

> Defendant Nelson Garcia in court with attorney Cynthia M. Wynn. Defendant Nelson Garcia in custody.… Defendant is advised this case is assigned to Judge Wagner, Branch 38. Defendant given a copy of the complaint and advised of maximum penalties, right to counsel and right to a preliminary hearing. Court reviewed the complaint and found probable cause to hold the defendant for further proceedings. Defendant is indigent and public defender will provide counsel. Case is adjourned for preliminary hearing in Branch PE. Preliminary hearing scheduled for 01-17-2012[.]

¶8 At the preliminary hearing ten days later, the trial court found probable cause and bound Garcia over for trial. The docket states that Garcia received the information, was arraigned, and pled not guilty.

¶9 The attorney who appeared with Garcia on January 17, 2012, was the first of six attorneys to represent him over the next three years and six months, during which time the case continued through three judicial rotations.

¶10 The first attorney, a public defender, moved to withdraw as counsel in April 2012 and the trial court granted the request based on Garcia's belief that the attorney was not "working in his best interest."

¶11 The second attorney, a public defender, had to leave the case due to an extended medical leave. Garcia objected to the withdrawal of the second attorney.

¶12 The third attorney, a public defender, informed the trial court in December 2012—after Garcia complained to the court that he was not "comfortable" being represented by counsel from the public defender's office—that his office would be appointing new counsel for Garcia because "[w]hat Mr. Garcia really wants is he wants private bar."

¶13 The fourth attorney's motion to withdraw was granted in December 2013 after Garcia filed complaints against him with the Office of Lawyer Regulation (OLR). Garcia explicitly stated that he wished to be represented by counsel and did not wish to proceed *pro se*.

¶14 The fifth attorney appeared at a hearing in January 2014 and a hearing in February 2014; in March 2014, Garcia complained about counsel's failure to follow his wishes and made a lengthy statement on the record, over the objection of counsel, about "why he probably needs to be removed from my case[.]" The trial court took the motion to have counsel withdraw under advisement and at a June 2014 status hearing, Garcia chose to continue with counsel. In July 2014, counsel moved to withdraw, informing the court that Garcia had filed complaints against him with OLR, became harassing and abusive, and "essentially [had] declared war against [counsel]." At both the March and July hearings, Garcia emphasized that he wished to be represented by counsel and did not wish to proceed *pro se*.

¶15 The sixth attorney was willing to proceed with representation; Garcia unsuccessfully attempted in February 2015 to have that attorney removed from the case. The attorney argued a motion to suppress the lineup identification on the grounds that Garcia had been deprived of his right to counsel during the lineup and that the lineup had been unduly suggestive. The trial court denied the suppression motion.

¶16 Garcia filed a motion to proceed *pro se* in May 2015. The motion was heard at the final pretrial hearing in June 2015. The trial court conducted a colloquy with Garcia. The trial court stated that given the answers to the colloquy, it was inclined to grant the motion. The trial court stated, "[I]f it's what you want,

I will do this." It found that Garcia was making a deliberate choice with the awareness of the consequences.

¶17 At that point, the trial court realized that in the colloquy it had misstated the penalty for conviction as twenty-five years when it was forty years, and it corrected the statement. The court then asked Garcia if that new fact changed his decision to proceed without counsel:

> Court: And does that change your decision in any way?
>
> Defendant: There are several things that you are incorrect about.
>
> Court: Yes or no? Does that change your decision in any way?
>
> Defendant: Well, it changes my decision with regards to Attorney Bihler being the standby counsel. I never requested him to be my standby counsel.
>
> Court: Well, he's the one you are going to get. Do you want to represent yourself with Mr. Bihler as standby counsel, or do you want Mr. Bihler to continue as counsel for you? Those are your two choices. Pick one.
>
> Defendant: If I understand, correctly, Your Honor –
>
> Court: Stop. Your choices are to represent yourself, or you can have Mr. Bihler represent you. If you decide to represent yourself, then Mr. Bihler will serve as your standby –
>
> Defendant: You are not allowing me to speak, Your Honor.
>
> Court: You don't get to. Well, this has convinced me right here that there is something going on with Mr. Garcia. Under these circumstances, I can't believe that because this would make a mockery out of the system. He won't answer the Court's questions. I don't know how we could proceed with him as counsel. So, I think that now, Mr. Garcia, himself, has made a sort of record that would, perhaps, require me to deny his request.

¶18 The trial court noted for the record that Garcia's demeanor had been so "argumentative" that the bailiff had moved to Garcia's side in preparation for removing him from the courtroom if necessary. The trial court concluded:

> Under the circumstances, Mr. Garcia's behavior here today has indicated to me that it's not possible for him to represent himself. Because if he cannot conduct himself appropriately at this brief hearing especially under the circumstances where I was indicat[ing] that I'm inclined to grant his request, how is he possibly going to do that in front of a jury during a jury trial. So, at this point based on Mr. Garcia's behavior, I see no choice but to deny his request. And I am doing so.

¶19 The jury convicted Garcia. He was sentenced to fifteen years in prison and ten years of extended supervision. He now appeals.

DISCUSSION

I. Because the *Riverside* hearing did not trigger Garcia's Sixth Amendment right to counsel, he did not have a right to counsel at the time of the lineup.

¶20 Garcia did not have appointed counsel during the lineup when a witness made a positive identification of him. He argues that he had a constitutional right to counsel at that point, and that the violation of that right requires a new trial with the identification evidence suppressed. His argument is that under ***Rothgery v. Gillespie County***, 554 U.S. 191 (2008), his Sixth Amendment right to counsel attached at the point when the commissioner signed the CR-215 form at 1:27 p.m. on January 4, 2012, finding probable cause and setting bail.

¶21 The post-arrest probable cause determination (the CR-215 form) is the mechanism Milwaukee County employs to satisfy the requirements of ***Gerstein v. Pugh***, 420 U.S. 103 (1975) and ***County of Riverside v. McLaughlin***,

500 U.S. 44 (1991). As the ***Riverside*** court explained, "In ***Gerstein***, this Court held unconstitutional Florida procedures under which persons arrested without a warrant could remain in police custody for 30 days or more without a judicial determination of probable cause." ***Riverside***, 500 U.S. at 52. The Court had required States to "provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty," and required that "this determination must be made by a judicial officer either before or promptly after arrest." ***Id.*** (quoting ***Gerstein***, 420 U.S. at 125) (emphasis omitted). The court explicitly stated that "individual States may choose to comply in different ways" and that its purpose "was to make clear that the Fourth Amendment requires every State to provide prompt determinations of probable cause, but that the Constitution does not impose on the States a rigid procedural framework." ***Id.*** at 53.

¶22 The issue that arose next was that states had widely varying interpretations of what ***Gerstein*** required: "Unfortunately, as lower court decisions applying ***Gerstein*** have demonstrated, it is not enough to say that probable cause determinations must be 'prompt.'" ***Id.*** at 55-56. The lack of clarity had resulted in litigation. One of the practices challenged was the practice of combining the ***Gerstein*** probable cause determination with other proceedings. The Court held that combining the determination with other proceedings was constitutionally permitted as long as the combination hearing was held within forty-eight hours of arrest:

> Under ***Gerstein***, *jurisdictions may choose to combine probable cause determinations with other pretrial proceedings*, so long as they do so promptly. This necessarily means that only certain proceedings are candidates for combination. Only those proceedings that arise very early in the pretrial process—such as *bail hearings* and arraignments—may be chosen.

Id. at 58 (emphasis added). "A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest." ***Id.*** at 57.

¶23 Garcia does not dispute that the requirements of ***Gerstein*** and ***Riverside*** were satisfied in this case. Garcia was arrested on January 2. A judicial officer made the probable cause determination at 1:27 p.m. on January 4 and in the same proceeding set bail—one of the pretrial proceedings that ***Riverside*** explicitly permits to be combined with the probable cause determination—within the required forty-eight–hour window. Garcia was charged and made an initial appearance on January 7. He was arraigned on January 17.

¶24 The ***Riverside*** probable cause determination, though, is central to Garcia's argument about the violation of his right to counsel at the in-person lineup later that evening at which a witness made a positive identification. He argues that his Sixth Amendment right to counsel was triggered by the probable cause determination and the evidence from the lineup should have been suppressed because he had no counsel. He points to the rule that if adversary judicial criminal proceedings have commenced, a lineup procedure is a "critical stage" of the prosecution. ***United States v. Wade***, 388 U.S. 218, 237 (1967). For the proposition that adversary judicial criminal proceedings had commenced, he relies on the rules set forth in ***Kirby v. Illinois***, 406 U.S. 682 (1972) and ***Rothgery***, 554 U.S. 171. ***Kirby*** stated that the point at which the Sixth Amendment right to counsel attaches is when "the government has committed itself to prosecute." ***Kirby***, 406 U.S. at 689. The court rejected Kirby's argument for applying the right to counsel to a pre-indictment identification by a robbery witness in a police station:

> In this case we are asked to import into a routine police investigation an absolute constitutional guarantee historically and rationally applicable *only after the onset of formal prosecutorial proceedings*. We decline to do so.… The rationale of [prior] cases was that an accused is entitled to counsel at any "critical stage of the prosecution," and that a *post-indictment* lineup is such a "critical stage." We decline to depart from that rationale today by imposing a per se exclusionary rule upon testimony concerning an identification that took place long *before the commencement of any prosecution* whatever.

Id. at 690 (emphasis added; quotations and citations omitted).

¶25 ***Rothgery*** addressed the question of "whether attachment of the right [to counsel] also requires that a public prosecutor (as distinct from a police officer) be aware of that initial proceeding or involved in its conduct." ***Id.***, 554 U.S. at 194-95. In that case, the defendant had been arrested without a warrant and "*brought ... before a magistrate*, as required by [Texas statute]." ***Id.*** at 195 (emphasis added). At the defendant's appearance before the magistrate, "[t]he arresting officer submitted a sworn 'Affidavit Of Probable Cause' that described the facts supporting the arrest and '*charge[d]* that … Rothgery … commit[ted] the offense of unlawful possession of a firearm by a felon[.]'" ***Id.*** at 196 (emphasis added). The Court said that there was no formal label for this procedure in Texas but that this procedure "combines the Fourth Amendment's required probable-cause determination with the setting of bail, and is the point at which the arrestee is formally apprised of the accusation against him." ***Id.*** at 195. The Court held there were three requirements before the right to counsel attached: (1) a personal appearance; (2) a formal accusation; and (3) restrictions on liberty:

> This Court has held that the right to counsel guaranteed by the Sixth Amendment applies *at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty*. *The question here is whether attachment of the right also requires* that a public prosecutor (as distinct from a police officer) be aware of

> that initial proceeding or involved in its conduct. *We hold that it does not*.

Id. at 194 (emphasis added).

¶26 Garcia argues that in his case, "adversary judicial criminal proceedings commenced on January 4, 2012 at 1:27 p.m. when there was a judicial determination of the existence of probable cause … and bail was imposed as a condition of his release." Garcia argues that the facts here are parallel to the facts in ***Rothgery*** because in each case there was an arrest, there was a sworn probable cause affidavit, there was a judicial finding of probable cause, there was a bail determination, and there was notice to the defendant of the law he was accused of breaking.[1] Garcia is wrong about both the law and the facts.

¶27 The law Garcia cites does not apply here because the facts of that case are distinguishable. Although Garcia acknowledges in his brief's fact section that he *was not present* when the probable cause determination was made, he does not acknowledge, let alone address, the significance of this fact. There is no constitutional requirement that a defendant be present for the ***Riverside*** probable cause determination, so there was nothing improper about his absence when the commissioner made the determination. Garcia argues that ***Rothgery's*** holding applies to his hearing, even though he made no personal appearance. He is wrong. The holding in ***Rothgery***, where the defendant did personally appear, expressly states that the Sixth Amendment right to counsel applies at the "first appearance."

[1] Garcia argues that when the probable cause determination was made, "the defendant was informed of the law the police accused him of breaking." He provides no citation to the record to support that assertion, and we located no support for it. However, evidence that Garcia had been given a copy of the CR-215 would not change the analysis because no controlling precedent provides authority for the proposition that the right to counsel can attach where a defendant is not present to be told of the accusations against him.

Rothgery, 554 U.S. at 194. But Garcia never made a personal appearance. ***Rothgery*** did not involve a scenario where no personal appearance was made, and it gives no indication that it contemplates such an application. In fact, ***Rothgery*** uses the phrase "initial appearance" throughout the opinion when discussing the starting point of a prosecution.

¶28 The facts about the documents at issue in the cases are also different. Garcia wrongly equates the probable cause form in his case with the probable cause/charging form in ***Rothgery***. In ***Rothgery***, the sworn affidavit form also added that the defendant was "charged." *See* ***id.*** at 196 (document also included "*charges* that … Rothgery … commit[ted] the offense of unlawful possession of a firearm by a felon[.]") (emphasis added). The Court specifically held that under Texas's procedures, the defendant's personal appearance and the presentation of the probable cause/charging form "is the point at which the arrestee is formally apprised of the accusation against him." ***Id.*** at 195. In Garcia's case, the motion hearing testimony was very clear that the probable cause document did not accuse or charge Garcia but merely, as required, set forth to a neutral magistrate the probable cause for the *arrest*. When trial counsel asked the detective about the process for the CR-215 form and what gets written on it, the detective answered, "You're writing the probable cause for this person *being arrested for this offense*." When the detective was asked if the determination was a court proceeding, he answered, "Not a court proceeding. We bring it to the D.A.'s office and stuff *later for charging*. But it's not something that it goes with him for the – transfer in to the jail." (Emphasis added.) The detective also testified that the CR-215 was not taken to the D.A.'s office to get approved. When asked to confirm that there were no criminal charges filed at that time, he responded, "Correct."

¶29 Garcia misapprehends the holding of ***Rothgery***. He argues that that "language from ***Rothgery*** stat[es] there are two elements to determine whether criminal proceedings have commenced: a probable cause determination and the setting of bail." There are actually three elements. The Court specifically held that the Sixth Amendment right to counsel attaches only (1) when the defendant makes "the first appearance before a judicial officer," (2) when "a defendant is told of the formal accusation against him," and (3) when "restrictions are imposed on his liberty." *See* ***Rothgery***, 554 U.S. at 194.

¶30 Garcia makes much of the setting of bail as dispositive of his status as an accused, but we note that ***Riverside*** specifically held that the probable cause determination could be combined with other early procedures, specifically mentioning bail hearings, so long as it was held within the forty-eight–hour window. *See* ***id.***, 500 U.S. at 57-58. As is clear in ***Rothgery***, setting of bail does not transform a probable cause determination hearing into an "adversary criminal judicial proceeding" absent the existence of the remaining elements—"the first appearance before a judicial officer at which a defendant is told of the formal accusation against him[.]" *See* ***id.***, 554 U.S. at 194.

¶31 ***Rothgery*** controls this analysis, and its clear requirements are not satisfied here. Therefore, the trial court did not err when it denied Garcia's motion to suppress on the grounds of a violation to his Sixth Amendment right to counsel.

II. The lineup did not violate Garcia's due process rights because the lineup was completely run through a second time without singling out Garcia.

¶32 "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 (quoting ***Simmons v. United States***, 390 U.S. 377, 384 (1968)). 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. Haynes***, 118 Wis. 2d 21, 31 n.5, 345 N.W.2d 892 (Ct. App. 1984). First, we decide whether the pretrial procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." ***Benton***, 243 Wis. 2d 54, ¶5 (citation omitted).

¶33 The factors to be considered in evaluating the likelihood of misidentification include the following:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

¶34 The defendant has the initial burden on this issue. ***Benton***, 243 Wis. 2d 54, ¶5. If the defendant shows that the procedure was impermissibly suggestive, the State must prove that the identification was reliable under the totality of the circumstances in order for the identification to be admissible. ***Haynes***, 118 Wis. 2d at 31. The trial court's findings of fact, of course, may not be disturbed unless they are "clearly erroneous." WIS. STAT. § 805.17(2) (2015-16)[2] (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)). The

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

legal question of whether a second viewing of a lineup in full taints a subsequent identification is a legal issue that we review *de novo*. *See* ***Benton***, 243 Wis. 2d 54, ¶5 (application of facts to constitutional principles is subject to *de novo* review).

¶35 Garcia's due process challenge to the lineup is based on the fact that the officer administering the lineup asked the two witnesses before accepting their lineup identification forms if they would like to see the lineup again. Garcia bases his challenge on language from the Model Policy and Procedure for Eyewitness Identification, issued by the Wisconsin Department of Justice Bureau of Training and Standards for Criminal Justice. In that policy, one section states, "Only upon request of the witness, the witness may view one or more of the subjects again after the lineup has been completed." It further states that "the lineup administrator should never suggest additional viewing."

¶36 The lineup administrator, Detective Patrick Pajot, testified that after "the first run-through," he asked if the witnesses wanted to see the lineup again. He testified that one witness wanted to see one of the people in the lineup again, and the second wanted to see either one or two again. He did not allow that; rather he told them the police "would have to show them the entire lineup over." He then did so.

¶37 He then met with the witnesses separately. First he met with the teller who had been nearby during the robbery. She told him she was *not* positive that lineup participant number four, Garcia, was the robber even though he "seemed to have the same youthful face and facial features" as the person she had seen. Pajot told her that if she was not positive, she should "circle no" beside number four. She did so.

¶38 Pajot then met with D.L., the teller who had been robbed, who told him that number four was the robber, and that she was a hundred percent positive. She marked her lineup form accordingly.

¶39 Garcia has the burden of showing that the suggestion of the second run-through of the lineup tainted the identification. He argues that WIS. STAT. § 175.50(2) requires law enforcement departments to adopt policies for lineup procedures and § 175.50(3) requires that the agencies "biennially review policies" related to lineup procedures.[3] He argues conclusorily that the lineup violated the

[3] WISCONSIN STAT. § 175.50 includes the following sections:

> (2) Each law enforcement agency shall adopt written policies for using an eyewitness to identify a suspect upon viewing the suspect in person or upon viewing a representation of the suspect. The policies shall be designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases.
>
> (3) A law enforcement agency shall biennially review policies adopted under this section.
>
> (4) In developing and revising policies under this section, a law enforcement agency shall consider model policies and policies adopted by other jurisdictions.
>
> (5) A law enforcement agency shall consider including in policies adopted under this section practices to enhance the objectivity and reliability of eyewitness identifications and to minimize the possibility of mistaken identifications, including the following:
>
> (a) To the extent feasible, having a person who does not know the identity of the suspect administer the eyewitness' viewing of individuals or representations.
>
> (b) To the extent feasible, showing individuals or representations sequentially rather than simultaneously to an eyewitness.

(continued)

statutes and was "*per se* illegal." There is no factual basis for this conclusion, and even if there were, that is not the standard by which the suggestiveness of lineups is measured.

¶40 The factors that case law requires us to apply to determine the likelihood of misidentification are as follows: (1) "the opportunity of the witness to view the criminal at the time of the crime," (2) "the witness' degree of attention," (3) "the accuracy of the witness' prior description of the criminal," (4) "the level of certainty demonstrated by the witness at the confrontation," and (5) "the length of time between the crime and the confrontation." *See* ***Neil***, 409 U.S. at 199-200.

¶41 Garcia argues that the third and fourth factors weigh in favor of a finding of likelihood of misidentification because D.L.'s prior description of the robber wrongly stated that he had not worn gloves, that the bag he held was green, and that he was five feet, four inches tall. Garcia is five feet, nine inches tall. Surveillance video showed that the robber was wearing gloves. The recovered bag was not green. He also argues that the certainty factor is not satisfied here because D.L. did not positively identify him until after the second lineup.

> (c) Minimizing 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 eyewitness' viewing of individuals or representations.
>
> (d) Documenting the procedure by which the eyewitness views the suspect or a representation of the suspect and documenting the results or outcome of the procedure.

¶42 We disagree. Each of the factors weighs against the likelihood of misidentification. D.L., the witness who identified Garcia in the lineup, was the teller who was face-to-face with the robber during the robbery. As for the degree of attention she had paid, she told police she had "concentrated solely on the perpetrator's face because he had a hood up over his face." Although there were minor variations from D.L.'s original description (whether the robber wore gloves, what color the bag was, and how tall the robber was), D.L.'s own account was that she had focused on the robber's face. The level of certainty D.L. exhibited after the second run-through was "one hundred percent" certainty; she told the lineup administrator that she had been almost certain based on the first run-through and had hesitated only because his facial hair "looked a little bit different on him." The length of time between the December 27 robbery and the January 4 lineup was eight days. Garcia does not argue that the eight-day delay in the lineup made misidentification likely. Applying these factors, we conclude that Garcia has not met his burden to show that the lineup was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *See* ***Benton***, 243 Wis. 2d 54, ¶5 (citation omitted).

III. The trial court did not err when it denied Garcia's motion to represent himself because his conduct was obstructionist to the point that he forfeited the right to do so.

¶43 The Sixth Amendment and Article I, § 7 of the Wisconsin Constitution give a defendant the right to conduct his own defense. Article I, § 7 gives this right explicitly: "In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel." *See* WIS. CONST. art. I, § 7. "The Sixth Amendment does not explicitly establish this right but it is 'necessarily implied by the structure of the Amendment.'" ***State v. Klessig***, 211 Wis. 2d 194, 203-04, 564 N.W.2d 716 (1997) (quoting ***Faretta v. California***, 422 U.S. 806, 819 (1975)).

"When a defendant seeks to proceed pro se, the circuit court must insure that the defendant (1) has knowingly, intelligently and voluntarily waived the right to counsel, and (2) is competent to proceed pro se." ***Id.*** "If these conditions are not satisfied, the circuit court must prevent the defendant from representing himself or deprive him of his constitutional right to the assistance of counsel." ***Id.*** at 203-04. "However, if the defendant knowingly, intelligently and voluntarily waives his right to the assistance of counsel and is competent to proceed pro se, the circuit court must allow him to do so or deprive him of his right to represent himself." ***Id.*** at 204.

¶44 Balanced against this right is the State's interest in avoiding any interference with the orderly administration of justice and in preserving the integrity of the trial process. ***Hamiel v. State***, 92 Wis. 2d 656, 672, 285 N.W.2d 639 (1979). Untimely requests for new counsel and for permission to proceed *pro se* are suspect: "[The two rights] are not intended to allow the defendant the opportunity to avoid or delay the trial for any unjustifiable reason." ***Id.*** at 673. Therefore, "[e]leventh-hour requests are generally frowned upon as a mere tactic to delay the trial." ***State v. Lomax***, 146 Wis. 2d 356, 361-62, 432 N.W.2d 89 (1988) (upholding denial of substitution of counsel). If the court grants an eleventh-hour request to proceed *pro se,* it must also grant a continuance to allow the defendant the time to prepare a defense. ***Hamiel***, 92 Wis. 2d at 674. Further, "a defendant can forfeit Sixth Amendment rights through his or her own disruptive and defiant behavior." ***State v. Cummings***, 199 Wis. 2d 721, 757, 546 N.W.2d 406 (1996) (citations omitted). "[T]he triggering event for forfeiture is when the 'court becomes convinced that the orderly and efficient progression of the case [is] being frustrated[.]'" ***Id.*** at 752-53 n.15 (quotations and citations omitted).

¶45 Whether an individual is denied a constitutional right is a question of constitutional fact that this court reviews independently as a question of law. ***Id.*** at 748. "Questions of constitutional fact are sometimes referred to as mixed questions of fact and law, requiring the court to determine what happened and whether the facts found fulfill a particular legal standard." ***State v. McMorris***, 213 Wis. 2d 156, 165, 570 N.W.2d 384 (1997). A trial court's findings of historical or evidentiary fact are upheld unless they are clearly erroneous. ***Id.*** "[W]hether the historical or evidentiary facts satisfy the relevant constitutional standard" is determined *de novo*. ***Id.***

¶46 Garcia argues that the trial court deprived him of his right to proceed *pro se* because his conduct did not satisfy the legal standard for doing so.[4] For this proposition, he cites to language from ***Illinois v. Allen***, 397 U.S. 337, 343 (1970), as the standard by which his conduct should be measured: conduct that is "so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on[.]" ***Id.*** ***Allen*** was discussing the standard under which a defendant can constitutionally be *removed from his trial* and the trial can "continue in the defendant's absence" even though it will result in the loss of the defendant's confrontation clause rights, among others. ***Id.*** at 342. The ***Allen*** test is not the applicable test here. The test is whether the trial court "[became] convinced that

[4] Garcia also argues that "the court erred because it never gave Mr. Garcia the opportunity to be re-instated as his own counsel, which the ***Allen*** court mandates." The language to which he cites does not support that proposition: "Once lost, *the right to be present* can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." ***Illinois v. Allen***, 397 U.S. 337, 343 (1970). ***Allen*** does not stand for the proposition that a defendant has the right to be reinstated as his own counsel after he has forfeited that right.

the orderly and efficient progression of the case [was] being frustrated." ***Cummings***, 199 Wis. 2d at 752-53 n.15 (citation omitted).

¶47 Under the unusual facts of this case, the trial court had a colloquy with Garcia to determine that he was knowingly and voluntarily giving up his right to proceed with counsel, and it found that he was. Immediately thereafter, however, the trial court noted the true prison exposure Garcia would be subject to upon conviction, and it asked Garcia four times directly, using yes or no questions, whether that new information would change his mind about proceeding *pro se*. Garcia refused to answer the first three yes or no questions, and when the court asked a fourth time, Garcia interrupted the court.

¶48 Garcia argues that the interchange with the trial court is insufficient grounds to satisfy the legal standard for denying his motion to proceed *pro se*. We disagree.

¶49 The test is whether the court "[became] convinced that the orderly and efficient progression of the case [was] being frustrated." ***Id.*** The trial court made a thorough record of its rationale for determining that Garcia had forfeited his right to proceed *pro se*. It noted that the repeated refusal to answer the court's questions came in a brief motion hearing at which Garcia was getting what he wanted, and it noted that this made it unlikely that Garcia would display the kind of restraint necessary for an orderly and efficient jury trial. The trial court reasoned that this was indicative that the real purpose of the motion was, in fact, to frustrate the orderly and efficient progression of the case. It noted the overwhelming evidence that Garcia had, for three and a half years, done exactly that. He had obtained four changes of counsel due to his disagreements with and complaints about them, including to the State OLR, with the resulting trial delays.

The trial court's analysis is amply supported by the voluminous record in this case, which is replete with examples of Garcia's disregard for the constraints of the courtroom and his insistence on making long prepared statements asserting various unfounded legal arguments and accusations. We affirm the factual findings of the trial court as to this issue, and we conclude that there was no constitutional violation in the denial of Garcia's motion to proceed *pro se*.

¶50 For these reasons, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.