

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 10, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See WIS. STAT. § 808.10 and RULE 809.62.*

Appeal No. 2017AP957-CR

Cir. Ct. No. 2013CF1825

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANTHONY HILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: RICHARD T. WERNER and JOHN M. WOOD, Judges. *Affirmed.*

Before Sherman, Blanchard and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Anthony Hill appeals a judgment of conviction and an order denying his postconviction motion.¹ Hill contends that his trial counsel was ineffective by: (1) failing to object to police testimony that an anonymous citizen had reported that Hill committed the robbery; and (2) failing to object to Hill's supervising probation and parole agent's testimony that the agent was 99.9% sure that Hill was the person whose image was captured in a still photograph taken from the surveillance videotape of the robbery. Alternatively, Hill seeks a new trial in the interest of justice. We reject Hill's claims of ineffective assistance of counsel, and we decline to order a new trial in the interest of justice. Accordingly, we affirm.

BACKGROUND

¶2 In August 2013, Hill was charged with the armed robbery of a gas station. At Hill's jury trial, an investigating officer testified that he produced still photographs taken from the surveillance videotape of the robbery and distributed the photographs to the media. The officer testified that he then received information from a citizen who wished to remain anonymous that Hill was the robber. The officer testified that, after receiving that information, the officer contacted individuals who were familiar with Hill to determine whether they could identify Hill in the still photographs taken from the surveillance videotape. The officer testified that he made contact with an individual who had "worked with" Hill, Matthew Barnett, and provided Barnett with the photographs. In fact, Barnett was Hill's supervising probation agent, but the jury was not told this.

¹ The Honorable Richard T. Werner presided over the jury trial and sentencing. The Honorable John M. Wood presided over postconviction proceedings and entered the order denying postconviction relief.

¶3 Barnett testified that he was familiar with Hill and had worked with him professionally. He testified that he had viewed the photographs taken from the surveillance videotape of the robbery, and that he was 99.9% sure that Hill was the suspect in the photographs.

¶4 The jury found Hill guilty. Hill filed a postconviction motion asserting, among other things, that his trial counsel was ineffective by: (1) failing to object to the investigating officer's testimony that he received information from a citizen who wished to remain anonymous that Hill was the robber; and (2) failing to object to testimony by Barnett that Barnett was 99.9% sure that Hill was the suspect in the still photographs taken from the surveillance videotape.²

¶5 The circuit court held an evidentiary hearing, and Hill called his trial counsel as a witness. Trial counsel testified that he did not object to the officer's testimony that a citizen who wished to remain anonymous had informed the officer that Hill was the robber, because he believed the statement was not hearsay and that he had no basis to object. Counsel agreed that the State had offered the testimony to show why the officer had taken steps to investigate Hill, rather than for the truth of the matter asserted. Counsel testified that he did not object to Barnett's testimony because his understanding of the case law was that there was no basis to object to the testimony.

¶6 The circuit court found that there was no basis for defense counsel to object to any of the disputed testimony. The court also found that there was no

² This opinion addresses only the postconviction arguments Hill has pursued on appeal.

probability of a different result absent the claimed errors. The court therefore denied postconviction relief. Hill appeals.

DISCUSSION

¶7 A claim of ineffective assistance of counsel must establish that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish that counsel's performance was deficient, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* This requires a defendant to identify conduct that was "outside the wide range of professionally competent assistance." *Id.* at 690. To establish that the deficient performance was prejudicial, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. The prejudice component is met if the defendant shows "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." *Id.* at 694.

¶8 Hill contends that his trial counsel performed deficiently by failing to object to police testimony that a citizen who wished to remain anonymous had

reported that Hill was the robber in this case.³ Hill argues that the officer's testimony was inadmissible hearsay. *See Wis. Stat. §§ 908.01(3) (2015-16)*⁴ ("‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); 908.02 (providing that, generally, hearsay is not admissible). He contends that any reasonable defense attorney would have objected to police testimony of an out-of-court identification of the defendant. He argues that, absent an instruction that the officer's testimony was not offered for the truth of the matter asserted, the jury would not have known to consider the testimony only as explaining why the officer began investigating Hill. Hill also contends that his right to confrontation was violated when the State offered the police testimony as to the citizen's identification of Hill because, according to Hill, the identification was testimonial. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004) (providing that the Confrontation Clause bars testimonial hearsay unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine). Hill contends that he was prejudiced by his trial counsel's deficient performance because the testimony that the citizen identified Hill as the robber bolstered the State's claim that Hill was the suspect captured in the surveillance videotape of the robbery. He

³ Hill argued in his postconviction motion that his trial counsel was also ineffective by failing to investigate the citizen who had identified Hill to police. At the postconviction motion hearing, Hill's trial counsel testified that he made a strategic decision not to investigate the citizen because he believed the citizen's identification testimony would benefit the State. On appeal, within Hill's argument that his counsel was ineffective by failing to object to the police testimony, Hill states: "To compound the matter, [trial counsel] took no action to determine whether there was indeed a[n] anonymous citizen and if there was, whether that person had a sufficient basis for making the identification." Hill asserts that "[i]t is also not credible that this citizen is unknown to law enforcement." However, Hill does not develop a separate argument that counsel was ineffective based on a failure to investigate.

⁴ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

contends that the out-of-court identification casts serious doubt on the jury's verdict.

¶9 We conclude that Hill has not established that his trial counsel was ineffective by failing to object to the police testimony because Hill has not shown that there is a reasonable probability of a different outcome without that testimony. In the testimony that Hill claims was inadmissible hearsay, the officer stated only that he "received information from a citizen" that Hill was the robber in this case.⁵ The statement lacked any detail as to the citizen's basis for believing that Hill was the robber or any other details as to the citizen, and thus was not particularly strong evidence of Hill's guilt. Rather, the State relied on Barnett's testimony to identify Hill in the photographs taken from the surveillance videotape. The State provided Barnett's testimony that he had worked with Hill and that he was 99.9%

⁵ The disputed testimony is as follows:

Q. And after you created these photographs did you receive any information about a possible suspect?

A. Yes, I did.

Q. And what information did you receive?

A. I received information from a citizen about who the robber was in this case.

Q. And did that citizen wish to remain anonymous?

A. Yes.

Q. And who did that citizen tell you was the armed robber at the Pro Fuels gas station?

A. Anthony Hill.

Q. And what did you do as a result of receiving the information that Anthony Hill was the armed robber?

sure that Hill was the suspect in the photographs. Additionally, the jury viewed Hill and the photographs and had the opportunity to draw its own conclusion as to whether Hill was the individual in the photographs. In light of that other evidence, we conclude that there is no reasonable probability that the jury would have reached a different result absent the single statement that an unidentified citizen had first informed police that Hill was the robber.

¶10 We turn, then, to Hill's claim that his trial counsel was ineffective by failing to object to Barnett's testimony that he was 99.9% sure that Hill was the suspect in the photographs taken from the surveillance videotape. Hill contends that Barnett's testimony was unnecessary because the jury was able to view the photographs and reach its own determination as to whether Hill was the suspect in the photographs. He asserts that Barnett testified as an expert when he set his level of certainty at 99.9%. We are not persuaded.

¶11 As the State argues, Barnett's testimony was admissible lay opinion testimony under WIS. STAT. § 907.01. Lay opinion testimony is admissible if it is: “(1) Rationally based on the perception of the witness[;] (2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue[; and] (3) Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02(1).” *Id.* Barnett's identification of Hill in the photographs was based on his personal knowledge of Hill's appearance from multiple in-person meetings, and thus the testimony was rationally based on Hill's perception. Barnett's identification of Hill in the photographs was helpful to a determination of a fact in issue, that is, whether Hill was the suspect captured on the surveillance videotape of the robbery. In particular, Barnett's testimony was helpful in that he testified that, when he met with Hill, Hill was generally clean shaven as he appeared in the photographs, rather than with facial hair as he

appeared at trial. Barnett's testimony was not based on any scientific, technical, or specialized knowledge, but rather was Barnett's opinion based on his personal observations. Because the testimony was admissible, Hill's counsel was not ineffective by failing to object to that testimony. *See State v. Maday*, 2017 WI 28, ¶55, 374 Wis. 2d 164, 892 N.W.2d 611 (“Counsel’s performance cannot be considered deficient for failing to object to admissible evidence.”).

¶12 Hill also contends that his trial counsel should have questioned Barnett about any possible bias he had against Hill, based on Barnett's role as Hill's supervising probation agent. He asserts that the jury's question during deliberations as to Barnett's job title and business relationship with Hill indicated that Barnett's testimony raised the jury's suspicions about Barnett's relationship with Hill. However, Hill does not point to any evidence that Barnett would have testified that he held any bias against Hill based on Barnett's role as Hill's supervising agent. Thus, Hill has not established that there is a reasonable likelihood of a different outcome had trial counsel questioned Barnett as to whether he held any bias against Hill based on his role as Hill's supervising agent. Moreover, we are not persuaded that the jury's question as to the relationship between Barnett and Hill indicates that trial counsel was ineffective by failing to reveal Barnett's role as Hill's supervising agent to the jury.⁶

¶13 Finally, Hill seeks a new trial in the interest of justice. *See WIS. STAT. § 752.35.* Hill contends that a discretionary reversal is warranted because,

⁶ Hill also asserts that the circuit court's answer to the jury question—that Barnett's job title and relationship to Hill were irrelevant—raised the question of why, then, Barnett's identification of Hill in the photographs was relevant. We fail to follow Hill's logic. As set forth above, Barnett's identification of Hill was based on his personal familiarity with Hill, not on his job title and relationship to Hill.

Hill asserts, the disputed testimony invaded the province of the jury to decide whether Hill was the suspect in the photographs. He argues that the ineffective assistance of his counsel prevented the real controversy from being tried and casts doubt on the reliability of the trial. For the same reasons that we have rejected Hill's claims of ineffective assistance of counsel, we decline to exercise our discretion to order a new trial in the interest of justice. We affirm.

By the Court.—Judgment and order affirmed.

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

