COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-2253 **Cir. Ct. No. 92-CF-1778**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO L. FORD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

Before Vergeront, P.J., Dykman and Deininger, JJ.

¶1 PER CURIAM. Antonio Ford appeals from an order denying his petition for habeas corpus brought under ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). We affirm.

¶2 In 1994, Ford was convicted on three counts of armed robbery after a jury trial. He pursued an appeal in this court under WIS. STAT. RULE 809.30 (1999-2000).[1] The issue raised by his attorney in that appeal was sufficiency of the evidence. We affirmed the judgment. In 1999, Ford filed a habeas corpus petition in circuit court alleging that his counsel was ineffective by failing to raise certain additional issues in his postconviction proceedings. The circuit court denied the petition without a hearing.

¶3 On appeal, Ford argues that the circuit court erred by denying his motion without explanation, and that we should therefore review the motion de novo. We do so, but not because of this argument. De novo review is the usual standard for a circuit court's denial of a postconviction motion without a hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). We have previously recognized that when the defendant is alleging ineffective assistance of counsel in postconviction proceedings, a ***Knight*** petition is similar to a postconviction motion under WIS. STAT. § 974.06. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996). We see no reason not to apply the same standard of review to both.

¶4 As the State notes, Ford's brief on appeal does not offer any argument in support of the issues raised in his habeas petition. However, the petition itself was lengthy and contained legal argument. The State responded to those arguments in its brief, and we will consider them in reviewing this appeal.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶5 Ford's first claim is that his counsel should have argued that the circuit court erred at his trial by excluding certain testimony by an investigator hired by Ford. The investigator would have testified that a victim of one of the robberies was unable to identify Ford as the robber when shown a group of photos, including Ford's. The circuit court sustained the State's objection that the testimony should be excluded as a discovery violation, and because it was "extrinsic evidence to impeach a witness on a prior inconsistent statement under 906.13(2)." The court excluded both the photos themselves and the investigator's testimony about them.

¶6 In his habeas petition, Ford does not argue that the circuit court's ruling was an erroneous exercise of discretion under Wisconsin evidentiary law. Instead, he argues that the court's ruling denied him his constitutional right to present a defense. Even if exclusion of the evidence was a constitutional violation, however, the violation is subject to harmless error analysis. ***Crane v. Kentucky***, 476 U.S. 683, 691 (1986). We conclude that any violation here was harmless. The jury already had ample reason to doubt the victim's identification of Ford, including the fact that the robber's face was partially covered; that the victim had earlier looked at someone other than Ford and said it was possible he was the robber; and that the victim did not identify Ford in a police photo display until four months after the robbery. In addition, the conviction of Ford on this count did not depend solely on this identification. Ford was also implicated in a statement to police by someone else who was involved in the robbery.

¶7 Ford's habeas petition also alleged that his counsel should have argued that the prosecutor knowingly allowed police officers to leave the jury with a false impression concerning his accomplice, James Davis. The jury was told about a statement Davis made implicating Ford. According to Ford, the false

impression arose when police testified that Davis was not offered a deal or otherwise promised anything if he cooperated with police. Ford claims this was a false impression because at Davis's sentencing the prosecutor informed the court that Davis had cooperated. Ford's argument fails because this statement at Davis's sentencing is not inconsistent with the officers' testimony. The fact that the prosecutor gave that information to the court does not mean that Davis was previously told by anyone that it might occur. There was no basis for an appellate argument.

¶8 Ford also alleged that his counsel should have argued that officer testimony about the content of Davis's statement to police should have been excluded as hearsay. When Davis was called as a prosecution witness, he declined to answer the prosecutor's questions. However, Ford's attorney then cross-examined him, and during that cross-examination and the redirect examination that followed, Davis said that the statements he made to police were not true, that Davis committed the robberies by himself, and that Ford had not been involved. The prosecution then called two police officers who testified as to the content of Davis's statement implicating Ford. The State argues that the officers' testimony was properly admitted because Davis's statements were prior inconsistent statements under WIS. STAT. § 908.01(4)(a)1. We agree that there was no ground for an appellate argument here.

¶9 Finally, Ford claimed that his counsel should have argued that the circuit court erred by denying his request for a directed verdict on two counts at the close of the State's case. When a defendant moves for a dismissal or a directed verdict at the close of the prosecution's case and the motion is denied, the introduction of evidence by the defendant waives the motion for a directed verdict, if the entire evidence is sufficient to sustain a conviction. ***State v. Simplot***, 180

Wis. 2d 383, 399-400, 509 N.W.2d 338 (Ct. App. 1993). Here, Ford presented witnesses after the motion was denied, and therefore we apply the usual test for sufficiency of the evidence. We affirm unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***Id.*** at 400-01. This is an argument that Ford's appellate counsel did indeed make in Ford's direct appeal in 1995, and we rejected it. Our view of the evidence has not changed.

By the Court.—Order affirmed.

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