COURT OF APPEALS
DECISION
DATED AND RELEASED

March 4, 1997

NOTICE

Nos. 96-0544-CR; 96-0545-CR & 96-0546-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Abdullah Refeeq Beyah,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Abdullah Refeeq Beyah appeals from judgments entered after the trial court found him guilty of multiple counts of armed robbery, attempted armed robbery and conspiracy to commit armed robbery as party to a crime, contrary to §§ 943.32(1)(a)&(b)&(2), 939.641(2), 939.31, 939.05, and 939.32, STATS. Beyah raises two issues: (1) whether the trial court erred in denying his motions to suppress his confessions; and (2) whether the lineup

was impermissibly suggestive. Because the trial court did not err in denying Beyah's suppression motions and because the lineup was not impermissibly suggestive, we affirm.

I. BACKGROUND

On June 17, 1987, at 9:30 p.m., two women observed a suspiciously parked car in an alley adjacent to Farrell's Shop Rite store in Wauwatosa. They noted the license plate number, BKN 622. While in the Farrell's store, the two women saw a man who had been in/near the suspicious car enter the store and rob the cashier. The robber took $864.98 from the cashier and used a .22 or .25 caliber handgun.

After the robbery, police were advised to look for the suspicious auto that the women had observed. Officer Randall Burnett spotted the car with the license plate BKN 622, and pulled the car over. Officer Wayne Harris arrived to assist. Beyah was the passenger in the car. The police searched Beyah and found $864.98 in his pockets and a .22 caliber handgun in his waistband. Beyah was transported to the Wauwatosa Police Department where he was interviewed by Detective William Gehrking at approximately 10 p.m.

Gehrking testified at the suppression hearing, indicating that Officer Harris was present for the start of the interview, but after that Harris was "coming and going." Gehrking said that Beyah appeared relatively calm and collected. Gehrking advised Beyah of his ***Miranda*** rights, which Beyah waived. Beyah told Gehrking that he wanted to talk about a lot of things in addition to the Farrell's crime. Gehrking testified that no one threatened or touched Beyah and there was no hint of coercion.

Beyah admitted robbing Farrell's and also confessed to a robbery of the Brewery Credit Union in 1986, several robberies in New Orleans, and several robberies in the Milwaukee area. The interview ended and Beyah signed a written statement at 1 a.m.

Detective John Brockel of the Wauwatosa Police Department also testified at the suppression hearing. Brockel re-interviewed Beyah the following morning (June 18th) at 8 a.m. Brockel testified that Beyah was friendly and cooperative and not coerced in any way.

Beyah, however, offered conflicting testimony at the suppression hearing. He said that Harris threatened him and beat him up and the only reason he confessed was because he wanted to avoid another beating. The trial court made a specific finding that Beyah's testimony was not credible. As a result, the trial court concluded that the confession was not coerced and denied Beyah's motion to suppress.

Beyah also moved to suppress the statements he made to Milwaukee police officers. At that suppression hearing, Milwaukee Police Detective Robert Simons testified that he questioned Beyah at about 2 a.m. on June 18, 1987, at the Wauwatosa Police Department. Simons advised Beyah of his rights and he waived them. Beyah admitted to committing the Brewery Credit Union armed robbery as well as an armed robbery at Krueger Bakery in Milwaukee. Simons said Beyah was not coerced in any manner and was not deprived of food, water, or restroom facilities.

Milwaukee Police Detective Kenneth McHenry interviewed Beyah on June 18, 1987, after he was transferred to the Milwaukee Police Department. McHenry testified that Beyah was advised of his rights and waived them. Beyah talked with McHenry about his involvement in an attempted armed robbery of a Sentry Food Store. McHenry said there was no coercive conduct.

Beyah testified that the Milwaukee police officers did not mistreat him in any way. Beyah theorized, nonetheless, that Harris's earlier mistreatment also polluted his confessions to the Milwaukee officers. The trial court again ruled that Beyah had not confessed under coercion and denied his motion to suppress the confessions given to the Milwaukee officers.

Beyah also claimed that the lineup was impermissibly suggestive because he had certain characteristics that made him stand out: he had the

lightest skin of the lineup participants, he was the oldest, had a smaller build than the others and he had different facial hair. The trial court ruled that the lineup was not impermissibly suggestive.

Following the trial court's denial of Beyah's suppression motions, Beyah waived his right to a jury trial. The trial court found him guilty. He now appeals.

II. DISCUSSION

A. Coerced Confession.

Beyah first claims that the police coerced him into giving incriminating statements and confessing to the crimes charged. The standard of review on this issue involves a mixed question of fact and law. ***State v. Owens***, 148 Wis.2d 922, 926, 436 N.W.2d 869, 871 (1989). We will not overturn findings of evidentiary or historical facts unless they are clearly erroneous. ***Id.*** In addition, credibility determinations are left to the trier of fact to decide. ***Norwood v. State***, 74 Wis.2d 343, 363-64, 246 N.W.2d 801, 812 (1976), *cert. denied*, 430 U.S. 949 (1977). The ultimate determination of whether the confession was voluntary, however, is a legal one that we review independently. ***Owens***, 148 Wis.2d at 926-27, 436 N.W.2d at 871.

To demonstrate the voluntary nature of the defendant's statement, the state must show, by the greater weight of the credible evidence, that the defendant was willing to give the statement and that the statement was not the result of duress, threats, coercion, or promises. ***State v. Lee***, 175 Wis.2d 348, 360, 362-65, 499 N.W.2d 250, 255, 256-57 (Ct. App. 1993). Determination of whether a statement is voluntary requires a balancing of the personal characteristics of the defendant against the coercive or improper police pressures. ***State v. Pheil***, 152 Wis.2d 523, 535, 449 N.W.2d 858, 863 (Ct. App. 1989). The balancing need not be done, however, "unless there is some improper or coercive conduct by the police." ***Id.***, *see* ***Colorado v. Connelly***, 479 U.S. 157, 164-67 (1986) ("coercive police activity is a necessary predicate to the finding that a confession is not

'voluntary'"); ***State v. Clappes***, 136 Wis.2d 222, 235-36, 401 N.W.2d 759, 765 (1987).

The only evidence in the record supporting coercive conduct by the police is Beyah's testimony. The trial court, however, found that Beyah's testimony was not credible. Beyah claims that this finding was clearly erroneous. He cites ***Hill v. State***, 91 Wis.2d 315, 319-21, 283 N.W.2d 585, 586-88 (Ct. App. 1978) for the proposition that absent any testimony to rebut Beyah's claim, the trial court is bound to accept Beyah's testimony. We do not agree.

As noted earlier, the trial court in this case was the arbiter of credibility. It had the benefit of observing Beyah's demeanor while he testified. There is nothing in the record that renders the trial court's finding clearly erroneous. ***Hill*** does not require the trial court to accept Beyah's testimony in the absence of any rebuttal testimony. ***Hill*** involved a very different situation because in ***Hill*** the unrebutted testimony came from a prosecutor, whose testimony was ruled credible. ***Id.*** In the instant case, Beyah's unrebutted testimony was found to be incredible. Accordingly, the fact finder was free to reject Beyah's claims of coercion. *See* ***State v. Fry***, 131 Wis.2d 153, 182-83, 388 N.W.2d 565, 578 (fact finder may reject defendant's unrebutted testimony simply on the basis that he has self-interest in outcome), *cert. denied*, 479 U.S. 989 (1986).

Therefore, we conclude that the trial court did not err in denying Beyah's motion to suppress his confession to the Wauwatosa police officers. Likewise, because we have concluded that no coercion existed with respect to his initial confession, it logically follows that no coercion existed with respect to his subsequent confession. This is true because Beyah's theory to suppress the confession to the Milwaukee police officers relied entirely on the actions of the Wauwatosa police officers.

The trial court determined that Beyah's testimony was not credible. All of the other evidence in the record demonstrates that the police did not engage in any coercive activity. Accordingly, we conclude that Beyah's confessions were given voluntarily.

B. Impermissibly Suggestive Lineup.

Beyah also claims that the lineup evidence should have been suppressed because it was impermissibly suggestive. Specifically, he argues that he had the lightest skin of all the lineup participants, was significantly older, was significantly smaller in stature and had unique facial hair. The trial court rejected Beyah's claim.

Resolution of whether an identification procedure denied a defendant due-process is a question of law, subject to *de novo* review, *see* ***Powell v. State***, 86 Wis.2d 51, 62-68, 271 N.W.2d 610, 615-18 (1978), although the trial court's findings will be accepted as true unless clearly erroneous, § 805.17(2), STATS.

A 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." ***Simmons v. United States***, 390 U.S. 377, 384 (1968). The defendant bears the initial burden of showing that the state-sponsored identification procedure was impermissibly suggestive. ***Powell***, 86 Wis.2d at 65, 271 N.W.2d at 617. If impermissible suggestiveness is found in the identification procedure, the burden shifts to the state to show that, despite the infirmity, under the totality of the circumstances, the identification nevertheless was sufficiently reliable to be admitted at trial. ***Id.***, 86 Wis.2d at 65-66, 271 N.W.2d 617.

In this case, Beyah claims that the lineup was impermissibly suggestive because his physical characteristics were dissimilar to the other participants in the lineup. We have reviewed the lineup photo and are not convinced that the lineup was so impermissibly suggestive so as to give rise to a "very substantial likelihood of irreparable misidentification." Beyah's specific complaints are without merit. He claims that he has the lightest skin of all of the participants. Although this appears to be true, it is not so much lighter than the other participants as to render the lineup impermissibly suggestive. This same conclusion holds true with respect to Beyah's other complaints regarding age, stature and facial hair. All of the lineup participants appear to be around

the same age and all of the participants appear to be relatively close in stature. Moreover, at least three of the participants have facial hair.

Controlling law indicates that a lineup need only be reasonably fair. ***Powell***, 86 Wis.2d at 67, 271 N.W.2d 618. It is not necessary for the police to find participants who are all identical twins to the defendant. ***Id.*** Because we have concluded that the lineup was not impermissibly suggestive, we need not engage in the second prong of the standard—considering whether under the totality of the circumstances, the identification procedure was sufficiently reliable. ***Id.***, 86 Wis.2d at 65-66, 271 N.W.2d 617.

By the Court. – Judgments affirmed.

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