COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-1763-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSEPH M. RUCKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Judgment reversed and cause remanded.*

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

PER CURIAM. Joseph M. Rucker, appeals from the judgment of conviction, following a jury trial, for two counts of second-degree recklessly endangering safety while armed, party to a crime. He argues that the trial court: (1) misused its discretion and denied him due process and a fair trial by not addressing the prosecutor's

alleged misconduct; (2) improperly denied his motion to suppress identification or, at the very least, improperly denied his request for an evidentiary hearing on the motion; (3) improperly refused to review *in camera* the juvenile court and probation records of two alleged accomplices; (4) erroneously exercised discretion in denying his request to remove a juror who had contact with his mother on the second day of the trial; and (5) erred under state law and denied him due process by excluding exculpatory polygraph test results and related expert testimony. In this appeal, we only address Rucker's second and third claims. We conclude that the trial court erred in failing to hold a hearing on Rucker's identification suppression motion and in failing to review *in camera* the juvenile court and probation records. Accordingly, we reverse.

On August 21, 1993, shots were fired into a jeep occupied by Norberto Garcia, his wife and child, near an intersection where Rucker and three friends were located. The evidence indicated that the shots were fired by one or two of the persons in or near the car in which Rucker and his friends had arrived at the scene. The issue at trial was whether Rucker was the shooter (or one of the possibly two shooters).

According to trial testimony, Mr. Garcia was subpoenaed to Rucker's preliminary hearing but was not called to testify. He did, however, see Rucker in court at the preliminary hearing and did identify him when Rucker's name was called and he walked to the defendant's place in the courtroom. Twenty months later, and just prior to Mr. Garcia testifying at Rucker's trial, the prosecutor and a detective showed him two police department photographs–one of Rucker and one of Dyonne Wright (one of the friends at the shooting scene with Rucker)–each bearing the arrest date of August 22, 1993. They asked Mr. Garcia whether he could identify the persons in the photos. Mr. Garcia did so, identifying them as the shooters.

The defense, learning of the preliminary hearing identification and the photo identifications during the trial, requested a hearing outside the presence of the jury to determine whether Mr. Garcia's pre-trial identifications of Rucker resulted from impermissibly suggestive police/prosecutor conduct and whether his in-court identification of Rucker should be suppressed.[1] The trial court denied his request ruling that defense counsel could address the identification issue in cross-examination.

Under §§ 971.31(2) and (4), STATS., "all issues of fact arising out of [a motion to suppress evidence] *shall* be tried by the court without a jury." (Emphasis added.) Moreover, under § 971.31(2), a defendant is entitled to bring a motion to suppress evidence during the course of trial when "surprised by the state's possession of such evidence."

In this case, the State concedes that Mr. Garcia's preliminary hearing "viewing" of Rucker "was suggestive," and further concedes that Mr. Garcia "was shown" the photos just before testifying "under circumstances which suggested that authorities believed the pictures depicted participants in the shooting." The State argues, however, that such suggestiveness does not necessarily mean that Mr. Garcia should not have been allowed to identify Rucker in court because such an identification may be admissible despite impermissible pre-trial procedures. *See* ***State v. Mosley***, 102 Wis.2d 636, 652-56, 307 N.W.2d 200, 210-12 (1981). While that principle is clear, it does not trump Rucker's right to litigate the identification issues outside the jury's presence where the parties would be free to pursue areas of questioning that could very well go beyond

[1] The State does not dispute that Rucker requested such a hearing. We do note, however, that despite defense counsel's request to have the court reporter at the side bar conference where the trial court considered his request, the trial court conducted the side bar off the record. We direct the trial court's attention to the importance of maintaining such proceedings on the record. *See* ***State v. Mainiero***, 189 Wis.2d 80, 93 n.3, 525 N.W.2d 304, 310 n.3 (Ct. App. 1994).

what might be appropriate during cross-examination at trial. Indeed, as Rucker argues in his reply brief, "the State ignores [his argument regarding the] right to a hearing on the identification issue." *See* ***State v. Clark***, 179 Wis.2d 484, 492, 507 N.W.2d 172, 175 (Ct. App. 1993) (arguments not refuted are deemed admitted). Rucker was entitled to the hearing.

Rucker also asked the trial court to review *in camera* the juvenile court and probation records of the three juveniles who were with him at the shooting scene. The trial court denied Rucker's motion reasoning that Rucker already had access to Wright's and Willis's statements through police reports. Remarkably, the trial court also declared:

> [F]or Courts of Appeals to say that the trial judge should go through the juvenile court records and determine whether there's anything exculpatory for the defense, I think, is very presumpt[u]ous….
>
> How do I know what's exculpatory for the defense and it ends up putting me in a position of an adversary, so I'm going to deny the motion….

"[I]f a defendant makes a preliminary showing that the [juvenile] records contain evidence material to his defense, he is entitled to an *in camera* review by the trial court of those records." ***State v. S.H.***, 159 Wis.2d 730, 738, 465 N.W.2d 238, 241 (Ct. App. 1990). Here, clearly, the trial court based its refusal on two misconceptions of law.

First, the fact that Rucker had access to certain police reports in no way limited his potential legal entitlement to other reports. Simply stated, if the juvenile records contained exculpatory information, Rucker would be entitled to them regardless of whether he already had other reports. Second, it is anything but presumptuous for appellate courts to require trial courts to conduct *in camera* reviews. Conducting such inspections is, at times, essential to a trial court's duty to assure a defendant's access to

exculpatory evidence while, at the same time, protecting against improper or unnecessary invasions of confidential records. *See* ***State v. Munoz***, 200 Wis.2d 391, 397-400, 546 N.W.2d 570, 572-73 (Ct. App. 1996). When trial courts fulfill this duty they sometimes must make difficult analyses or forecasts of what may be exculpatory. In doing so, however, they certainly do not assume "a position of an adversary."[2]

The State does not dispute that Rucker made a sufficient preliminary showing to gain the requested *in camera* review. Instead, citing ***K.K.C. v. DeLeu***, 143 Wis.2d 508, 422 N.W.2d 142 (Ct. App. 1988), the State contends that Rucker was not entitled to have the trial court conduct an *in camera* review because he failed to apply to the juvenile court for disclosure of the juvenile records. The State is wrong.

K.K.C. addressed a request to a juvenile court for records under § 48.78(2), STATS. *See* ***id.*** at 509-11, 422 N.W.2d at 143-44. ***K.K.C.*** expressly noted:

> [The defendant] has not moved the trial court in his criminal cases to make an *in camera* review of the agency records. If he does so, [***Pennsylvania v. Ritchie***, 480 U.S. 39 (1987)] establishes that he is entitled to such a review by the trial court, provided he makes a preliminary showing that the files contain evidence material to his defense.

Id. at 511, 422 N.W.2d at 144. Rucker's request in this case was not to the juvenile court under statutory authority, but rather, to the trial court based on his due process rights under ***Ritchie***. Under ***Ritchie*** and ***K.K.C.***, he was entitled to have the trial court review the records, *in camera*.

[2] We also note a third error in the trial court's rationale that also may have influenced the trial court's decision. The trial court stated that juvenile adjudications of delinquency could not be used for impeachment. The trial court was wrong. *See* ***Davis v. Alaska***, 415 U.S. 308, 319-20 (1974).

Accordingly, we remand this case to the trial court to conduct the required evidentiary hearing on Rucker's motion to suppress identification, and to conduct the required *in camera* review. Should the trial court then conclude that Rucker's claims lack merit, it shall reinstate the judgments of conviction. Should the trial court conclude, however, that any of Rucker's claims has merit, it shall conduct further proceedings as appropriate. Should Rucker seek further review by this court following the completion of his case in the trial court, he may, of course, again ask this court to consider the issues we have not addressed in this decision.

By the Court.–Judgment reversed and cause remanded.

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