COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3116-CR **Cir. Ct. No. 2004CM591**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARIN S. KLUMPYAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed*.

¶1 BROWN, J.[1] Darin S. Klumpyan appeals his convictions for indecent exposure and the order denying his postconviction motion. He claims

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

that the showup[2] in which the complaining witness identified him to police was unnecessary and should therefore have been excluded. He further argues that this showup tainted the witness' later in-court identification of him and that this should also have been disallowed. We disagree and affirm. This is not the usual eyewitness identification case, in which the witness has seen the perpetrator for a brief time under stressful circumstances. Here, the witness had repeated, lengthy encounters and conversations with the perpetrator over two nights before identifying Klumpyan to the police. Her in-court identification therefore had a more than sufficient basis independent of the showup.

¶2 On July 19, 2004, the complaining witness in this case, a 19-year-old woman, was in her apartment at about 2:00 a.m. when there was a knock at the door. She opened the door to see an unfamiliar man who asked for her sister, who also lived in the apartment. The woman responded that her sister was not at home and was probably out walking on Main Street, and the man left. Several minutes later, there was another knock at the door, and the woman opened it to find the same man, who told her that he could not find her sister. The man then asked if the woman "could help him out with a little problem." She looked down to find that the man's zipper was open and his penis was exposed. She told him "no" and closed and locked the door. She estimated that this encounter lasted two or three minutes. After 3:00 a.m. the woman was awakened by a third knock at the door, and she opened the door, thinking it might be her sister. It was the same man, again with his penis showing; he asked her to perform oral sex on him. She

[2] A "showup" is an out-of-court identification in which a suspect is presented alone to a witness, rather than as part of a lineup. ***State v. Wolverton***, 193 Wis. 2d 234, 263 n.21, 533 N.W.2d 167 (1995), *overruled in part by* ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582.

declined and shut the door. There was a fourth knock a few minutes later; this time the man asked whether she was "into chicks." The man then asked her to perform oral sex on him and made other sexual requests. Eventually, the woman closed the door and went back to bed. She estimated that this last encounter took five to ten minutes. She did not call the police that evening.

¶3 Two nights later, the woman again heard a knock at the door around 3:00 a.m. She looked through the peephole to find that it was the same man. This time, she did not open the door, and the man continued to knock intermittently for five or six minutes before stopping. Several minutes later, the woman's sister came home and told her that there was "this weird guy" sitting on an electrical box outside of their apartment, looking at their window. The woman looked out and saw the same man sitting outside, and she called the police. When the police arrived ten or fifteen minutes later, the man was no longer sitting on the box outside.

¶4 One officer went looking for the suspect, described as having facial hair, blue jeans, and a dark T-shirt. Within a few minutes, he encountered a man matching the description walking on a sidewalk near the apartment building. This was Klumpyan. The officer took Klumpyan to the woman's apartment building, where another officer went inside to get the woman to see whether she would identify Klumpyan as the man she had seen earlier. The woman identified Klumpyan.

¶5 Klumpyan was charged with three counts of lewd and lascivious behavior contrary to WIS. STAT. § 944.20(1)(b). The case was tried to a jury. At the trial, the woman and the police officers described in testimony the woman's identification of Klumpyan at the apartment building. The woman also identified

Klumpyan in court as the man who had exposed himself to her. Klumpyan was convicted of all counts, and the trial court denied his motion for postconviction relief. Klumpyan appeals.

¶6 Klumpyan claims that the showup at the apartment building was improper. Therefore, he argues that the testimony describing the woman's identification of him at the showup should have been excluded. He further argues that the showup tainted the woman's in-court identification so that it, too, should have been excluded by the trial court.

¶7 Our supreme court recently established a new test for the admissibility of showup evidence in ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582. Under ***Dubose***, a showup identification is admissible only where it is "necessary." ***Id.***, ¶33. A showup is "necessary" where the police lack probable cause to arrest the suspect or where other exigent circumstances make it impossible to conduct a lineup or a photo array. ***Id.***

¶8 Klumpyan argues that the police had probable cause to arrest him. He also argues that because he was on probation at the time, even without probable cause the police could have contacted his agent to request a probation hold.[3] Thus, the showup was unnecessary and had to be excluded. The trial court examined the facts available to the officers at the time, which we will not detail here, and found that they lacked probable cause. It further found that Klumpyan's probation hold argument was "speculative."

[3] A probation hold occurs when the probation officer notifies the police to arrest the probationer and files a document with the jail to authorize the detention. Such a hold is proper if the facts and circumstances of the case show that it is reasonable. ***State v. Goodrum***, 152 Wis. 2d 540, 545-46, 449 N.W.2d 41 (Ct. App. 1989).

¶9 We agree with the trial court's analysis, but we will not rest our decision on this ground. Instead, we focus on the admissibility of the woman's in-court identification of Klumpyan. Klumpyan claims that the showup identification so tainted the woman's memory that the in-court identification must also be excluded. A witness who has participated in an improper showup can still make an in-court identification if it "ha[s] an origin independent of the lineup or [is] 'sufficiently distinguishable to be purged of the primary taint.'" ***State v. McMorris***, 213 Wis. 2d 156, 175, 570 N.W.2d 384 (1997) (quoting ***United States v. Wade***, 388 U.S. 218, 241 (1967)). The State has the burden to show by clear and convincing evidence that the in-court identification is based on observations of the suspect other than the showup. ***McMorris***, 213 Wis. 2d at 167. There are seven factors that courts consider in deciding the question:

> (1) the prior opportunity the witness had to observe the alleged criminal activity; (2) the existence of any discrepancy between any pre-lineup description and the accused's actual description; (3) any identification of another person prior to the lineup; (4) any identification by picture of the accused prior to the lineup; (5) failure to identify the accused on a prior occasion; (6) the lapse of time between the alleged crime and the lineup identification; and (7) the facts disclosed concerning the conduct of the lineup.

Id. at 168.

¶10 Klumpyan claims that the State failed to meet its burden and that we "can have no confidence that [the woman]'s in-court identification was not tainted

by the show-up."[4] To the contrary, we have a difficult time imagining a clearer case of an independent source. Regarding the first factor, as the trial court pointed out, the woman had seen the perpetrator not once, but at least five times over three nights. The encounters were not for several seconds, as in ***McMorris***, 213 Wis. 2d at 169, but for several minutes and involved multiple conversations. There was no obstruction to the woman's viewing and it was at very close proximity. Unlike in many eyewitness cases, this was not a holdup or other extremely stressful situation, particularly during the first encounter, when the perpetrator simply asked to see the woman's sister. *See* ***id.*** at 161. One could almost say that the woman and the perpetrator were acquaintances by the time she made the identification.

¶11 As for the other ***McMorris*** factors, the woman's pre-showup descriptions of the perpetrator, while vague, were not inconsistent with Klumpyan's appearance. She did not identify any other person before the showup, she did not fail to identify Klumpyan at any earlier time, and the time lapse between her last sighting of the perpetrator and her identification of Klumpyan was less than an hour. There was no opportunity for the woman to make a photo identification before the showup and so that factor is not relevant. Only the conduct of the showup identification weighs in Klumpyan's favor, since in ***Dubose*** the court held that showups are inherently suggestive. ***Dubose***, 285 Wis. 2d 143, ¶33. Klumpyan levels other criticisms at the independent basis for

[4] Klumpyan also argues that the trial court erred by applying the ***Wolverton*** factors to determine whether the in-court identification had a basis independent of the showup. *See* ***Wolverton***, 193 Wis. 2d at 265. Our review of the record shows that, though the court earlier discussed ***Wolverton***, it in fact applied the factors from ***State v. McMorris***, 213 Wis. 2d 156, 168, 570 N.W.2d 384 (1997), to determine independent basis. Our supreme court cited ***McMorris*** (though not its factors) with approval when it discussed this issue in ***Dubose***, 285 Wis. 2d 143, ¶38; it therefore appears that the trial court applied the correct factors.

the in-court identification, including that the woman was tired on the first night she encountered the perpetrator and that because she did not intend to call the police, she had no "incentive" to try to remember what the perpetrator looked like. Neither of these complaints is convincing.

¶12 In view of the overwhelming weight of the ***McMorris*** factors, especially the repeated, unobstructed, lengthy and relatively unstressful encounters between the woman and the perpetrator, this is a clear-cut case of an independent source for the in-court identification. Since the in-court identification was valid, it is irrelevant whether the showup was necessary or not; the jury having heard the eyewitness identify Klumpyan in court, testimony about her previous identification of him was merely cumulative.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. § 809.23(1)(b)4.