COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1636-CR **Cir. Ct. No. 2006CF76**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH A. LEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. After a five-day trial, a jury convicted Keith A. Lee of first-degree reckless homicide and two counts of armed robbery, all as party to a crime. Lee appeals the judgment on grounds that admitting an

accomplice's statements into evidence violated his right to confront his accusers and allowing in-court identification by the State's witness was inherently suggestive, thereby violating his right to due process. We hold that the accomplice's statement was neither hearsay nor testimonial and the in-court identification was permissible because it had an independent basis. We affirm.

¶2 The case arose from a January 10, 2006 altercation, allegedly over a drug debt, in which Joshua Meyers was shot and mortally wounded. Meyers' half-brother Kristopher Johnston and Ceilya Paez, a friend, were at Meyers' Oshkosh apartment when Victor Thomas and Lee stopped by. Neither Johnston nor Paez had met Lee before. Johnston shook Lee's hand and introduced himself. Lee later produced a gun and made Johnston and Meyers lie face down on the floor. A scuffle ensued. Meyers was shot, and died soon after.

¶3 After taking Johnston's wallet, Paez' cell phone and money from Meyers and Johnston, Thomas and Lee drove off in the Cadillac in which they had come. Thomas called a David Jackson and Christopher Johnson[1] to come and pick him up in Appleton. Jackson and his cousin, Justin Cain, drove a Chevy Impala to Appleton and exchanged cars with Thomas and Lee.

¶4 In the meantime, acting on a tip that a Lashawn Owens may have shot Meyers, police located and pursued Owens in what became a high-speed chase on Highway 41. A crash resulted, causing lane closures, during which a Winnebago county sheriff's deputy observed a Cadillac matching the description of the one in which Thomas and Lee had fled from Meyers' apartment, and

[1] To avoid confusion, from this point we will use "K. Johnston" for Kristopher Johnston and simply "Johnson" for Christopher Johnson.

detained Jackson and Cain. A search of the Cadillac yielded an Illinois traffic warning issued to Lee, a partially completed debit card application bearing Lee's name and address, and store receipts traced to Meyers and K. Johnston. Several hours later, Thomas and Lee showed up in the Impala at a Milwaukee apartment where Johnson was. Johnson drove the pair to a gas station and then dropped Lee off. Soon after, Milwaukee police stopped the Impala. Thomas had in his pants pocket various identification, retail and credit cards of Meyers' and K. Johnston's. Lee eventually was apprehended in Chicago.

¶5 Lee was charged with one count of first-degree intentional homicide and two counts of armed robbery, all as party to a crime, contrary to WIS. STAT. §§ 940.01(1)(a), 939.50(3)(a), 943.32(2), 939.50(3)(c) and 939.05 (2005-06).[2] The main issue at trial was whether Lee or someone else, alone or with Thomas, shot Meyers. Thomas did not testify: he invoked his Fifth Amendment privilege, and refused the State's offer of limited immunity.

¶6 Johnson testified for the State. The prosecutor asked Johnson about a conversation he had with Lee and Thomas several hours after the shooting:

> Q. Did [Lee] say anything to you at that time about getting into something up in Oshkosh?
>
> A. [Lee] said—he talking about my cousins [Jackson and Cain]. He talking about my cousins and they had some type of altercation and then I got out of the car.
>
> Q. At that point, did you speak with Victor Thomas?
>
> A. Yeah.
>
> Q. After you spoke with Victor Thomas, did you get back in the car and speak again with Keith Lee?

[2] All references to the Wisconsin Statutes are to the 2005-06 version.

> A. No, I didn't speak to anybody when I got back in the car. Victor Thomas was speaking.
>
> Q. Do you remember Victor ever telling Keith to say what happened?
>
> A. He sort of asked [Lee] to confirm it.

Johnson also acknowledged telling police that Lee said he had to "'pop' [a] guy" who "kept rushing at him and wouldn't stay down," but the court barred Johnson from testifying that Thomas likewise told him Lee said he had to "pop the punk."

¶7 Lee was the main contributor of DNA on a hat found in Meyers' apartment. Paez and K. Johnston both positively identified Lee as one of the two men in Meyers' apartment. K. Johnston testified he "g[o]t a clear look at [Lee]" when he introduced himself to Lee and was "100 percent" sure that Lee shot Meyers. The jury convicted Lee on all counts. Lee appeals.

¶8 On appeal, Lee contends that, since Thomas did not testify, admitting evidence of the conversation among himself, Johnson and Thomas violated the Confrontation Clause,[3] and that allowing Johnson's in-court identification of him was the "ultimate show-up." We address each in turn and will supplement the facts as necessary.

1. Confrontation Clause

¶9 Lee first contends that admitting evidence of conversations Johnson had with Thomas violated Lee's right to confront his accusers. "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the

[3] Although the defense did not renew its objection when the evidence actually was offered, it argued earlier in limine that such evidence should be suppressed.

witnesses against him [or her]." U.S. CONST. amend. VI. Whether the admission of evidence violates an accused's right to confrontation is a question of law, subject to our independent review. ***State v. Williams***, 2002 WI 58, ¶7, 253 Wis. 2d 99, 644 N.W.2d 919. The Confrontation Clause bars admission of an out-of-court testimonial statement unless the declarant is unavailable and the defendant had a prior opportunity to examine the declarant with respect to the statement. ***Crawford v. Washington***, 541 U.S. 36, 68-69 (2004); ***State v. Jensen***, 2007 WI 26, ¶15, 299 Wis. 2d 267, 727 N.W.2d 518. To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. ***Lilly v. Virginia***, 527 U.S. 116, 138 (1999).

¶10 Therein lies the first problem with Lee's argument. Johnson's testimony that Thomas "asked [Lee] to confirm" what happened is not hearsay because it was not offered to prove the truth of the matter asserted. *See* WIS. STAT. § 908.01(3). Johnson simply overheard a comment tantamount to Thomas asking, "What happened?"—a question with no independent substantive value apart from Lee's response. Thomas' query asking Lee "to confirm it" simply set the context for the jury to understand how Lee's statement that he "pop[ped] the guy" came about.

¶11 Further, this does not present a ***Crawford*** situation. Thomas' request to Lee to confirm what happened is not "testimonial" because it does not fit any of the three formulations of testimonial hearsay ***Crawford*** describes: ex parte in-court testimony or its functional equivalent; extrajudicial statements contained in formalized testimonial materials; or statements made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for later use at trial. *See* ***Crawford***, 541 U.S. at 51-52; ***State v. Manuel***,

2005 WI 75, ¶37, 281 Wis. 2d 554, 697 N.W.2d 811. Indeed, what Thomas purportedly said is not really even a statement.

¶12 Nontestimonial hearsay is governed by ***Ohio v. Roberts***, 448 U.S. 56 (1980); ***Manuel***, 281 Wis. 2d 554, ¶3. Under ***Roberts***, a nontestimonial out-of-court statement is admissible if the declarant is unavailable and the statement bears adequate indicia of reliability. ***Roberts***, 448 U.S. at 66, 73; ***Manuel***, 281 Wis. 2d 554, ¶61. In assessing reliability, we consider the totality of the circumstances and factors such as spontaneity, mental state and lack of motive to fabricate. ***Manuel***, 281 Wis. 2d 554, ¶68.

¶13 Here, both prongs are satisfied. Thomas was unavailable because he invoked his Fifth Amendment privilege and refused the State's offer of use immunity, and his request that Lee confirm what happened in Oshkosh bears indicia of reliability because it was a spontaneous comment made without motive to fabricate several hours after the event. We see no confrontation violation.

2. In-court identification

¶14 Johnson was unable to identify Lee in a photo lineup, but eleven days later identified him at trial. Relying on ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, Lee argues that the in-court identification violated his due process rights because his position as defendant was inherently suggestive. The trial court held that ***DuBose*** did not apply because it governs show-ups, and an in-court identification by definition is not a show-up. We review this issue de novo. *See* ***State v. Hibl***, 2006 WI 52, ¶23, 290 Wis. 2d 595, 714 N.W.2d 194.

¶15 In ***Dubose***, our supreme court held that out-of-court identification evidence is not admissible unless the show-up was necessary under the totality of

the circumstances, because such evidence is inherently suggestive. ***Dubose***, 285 Wis. 2d 143, ¶32. Lee argues that Johnson's identification of him, although in court, falls under ***Dubose*** because it was "the ultimate show-up identification due to its inherently suggestive nature." We disagree. For ***DuBose*** to directly control a case, it must involve a show-up as our supreme court has defined it. *See* ***Hibl***, 290 Wis. 2d 595, ¶¶33, 35. A show-up is an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes. ***Dubose***, 285 Wis. 2d 143, ¶1 n.1 (citation omitted). The term "show-up" denotes a police procedure. ***Hibl***, 290 Wis. 2d 595, ¶33.

¶16 An in-court identification is admissible if the court determines that the identification is based on an independent recollection of the witness's initial encounter with the suspect. ***State v. Roberson***, 2006 WI 80, ¶34, 292 Wis. 2d 280, 717 N.W.2d 111. "Spontaneous" identifications generally are for the jury to assess. *See* ***Hibl***, 290 Wis. 2d 595, ¶31. The court retains a limited gatekeeping function under WIS. STAT. § 904.03, however, to determine whether the danger of unfair prejudice, issue confusion or misleading the jury substantially outweighs its probative value. ***Hibl,*** 290 Wis. 2d 595, ¶31. The court assesses the reliability of the identification by considering numerous factors: the witness' opportunity to view the alleged criminal at the time of the crime; the witness' degree of attention; the accuracy of the witness' prior description of the person; the level of certainty the witness demonstrates at the confrontation; the length of time between the crime and the confrontation; the stressfulness of the event for the eyewitness; and whether the event was weapon-focused. ***Hibl***, 290 Wis. 2d 595, ¶¶39-40. Factors causing doubts about accuracy can be attacked by counsel on cross-examination and in closing argument and go to the weight to be given the identification, not its

admissibility. *See* ***State v. Ledger***, 175 Wis. 2d 116, 131, 499 N.W.2d 198 (Ct. App. 1993).

¶17 We see no due process violation in view of the ***Hibl*** reliability factors. Johnson testified at trial that, a few hours after the Oshkosh event, Lee and Thomas came to the apartment where he was, that the three of them left in a car, and that he and Lee conversed while they were alone in the car for a short time when they stopped at the gas station. Johnson also testified that he had seen Lee "a couple times" before January 10, 2006, "[d]riving, riding around" and would recognize Lee if he saw him. Johnson then identified Lee at the defense table. On cross-examination, Johnson acknowledged picking out only Thomas' picture from the photo lineup and telling police that he knew he would be able to identify Lee if he saw him in person. He also acknowledged that, having seen Lee in person only two or three times before the photo lineup, seeing him in person at trial made it easier to identify him. Johnson acknowledged that he was "sure" that the person he identified as Lee was in the car with him the night of January 10, about ten months earlier.

¶18 We also conclude that the trial court satisfied its role as gatekeeper when it admitted Johnson's in-court identification of Lee, seated at the defense table. It allowed defense counsel to challenge the reliability of Johnson's identification by challenging his independent recollection of Lee. "[R]eliability is the linchpin in determining the admissibility of identification testimony." ***Hibl***, 290 Wis. 2d 595, ¶52. The court also instructed the jury that it should consider the reliability of the identification and Johnson's credibility, and cautioned it to evaluate the testimony in light of factors which might affect perception and memory. *See* WIS. JI—CRIMINAL 141. In light of all the evidence before it, it was for the jury to determine how much weight to assign Johnson's in-court

identification vis-à-vis the fact that he did not pick out Lee's picture from the photo lineup.

¶19 The ***Hibl*** factors are informative in eyewitness identification cases but do not entirely address the situation here. A critical distinction is that Johnson was not identifying Lee as the perpetrator of a crime but as someone he had seen on several occasions, and had given a ride to and conversed with. Johnson's perception and memory, therefore, is less likely to be affected by stress as may occur with an eyewitness to a crime.

By the Court.—Judgment affirmed.

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