

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 7, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2332-CR

Cir. Ct. No. 2007CF17

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JACOB T. YANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dunn County:
WILLIAM C. STEWART, JR., Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. Jacob Yang appeals a judgment of conviction for armed robbery. Yang argues the trial court erroneously exercised its discretion and deprived him of his right to present a complete defense when it limited inquiry

into whether the physical evidence had been DNA tested. We disagree and affirm the judgment.

BACKGROUND

¶2 After the State filed a notice of intent to introduce DNA evidence at trial, Yang moved to exclude the evidence on the basis it was irrelevant or unduly prejudicial. The crime lab report indicated a partial DNA profile was developed from a ski mask. However, the report stated because a partial profile was also obtained from a control sample, the profile obtained from the mask could not be used to identify the contributor. Yang's motion also asserted the crime lab analyst stated the statistical evaluation of DNA results was not valid for Asian populations. Therefore, Yang argued, the DNA results only showed he could not be excluded as the contributor from a group of persons of unknown dimension.

¶3 Following a hearing, the court issued a written order excluding the DNA results.¹ The court, however, did not directly rule on Yang's motion. Instead, the court excluded the evidence based on a violation of WIS. STAT. § 971.23(9),² which requires forty-five days' advance notice if a party wishes to introduce DNA evidence at trial. In the event timely notice is not provided, para. (9)(c) permits a court to waive the notice requirement for good cause, if the court concludes no party will be prejudiced.

¹ The hearing was held on October 24, 2007. However, there is no transcript in the record on appeal, nor is there a minute sheet.

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 The court's order stated "a good faith argument can be made" that Yang would be prejudiced by a waiver. It then observed that Yang could "not be identified with any significant probability as a previous wearer of the mask" and that the only conclusion the crime lab analyst could draw was that Yang could not be excluded as the source. The court further stated, "Although a good faith argument can be made that the proffered DNA evidence is relevant and not unduly prejudicial, the degree of the relevance or the potential impact on the State's case ... is not substantial."³

¶5 The court concluded if it "were to grant an adjournment of the trial and the defense retains an expert, the principal areas of testimony would arguably move closer to the theoretical and speculative, given the limitations posed by the quantity and quality of the DNA sample in this case."⁴ Thus, the court decided further delay was neither in the interest of justice nor the rights of the parties. But, the court ruled, "If during the trial the defense argues or infers that the State failed to undergo appropriate DNA investigation with regard to the ski mask, then the State will be allowed to offer said evidence in rebuttal."

¶6 At trial, Yang's counsel cross-examined the officer who had removed various items from the car Yang was arrested in and from which the ski mask was recovered. When asked why he wore gloves, the officer responded,

³ Regrettably, the State misrepresents the record. It asserts, "The court concluded that the evidence was relevant and not unduly prejudicial." It further misrepresents that the court "found that if it waived the notice requirements[,] Yang would suffer prejudice."

⁴ It is unclear whether Yang argued in the alternative for an adjournment to obtain expert analysis of the DNA results or the court addressed the issue on its own motion. WISCONSIN STAT. § 971.23(9)(c) provides that a "court may in appropriate cases grant the opposing party a recess or continuance."

“That way, we don’t put our DNA or fingerprints on the evidence taken and we then don’t disturb the DNA or any of the fingerprints that were previously on the items.” Later, after counsel had asked the officer five questions about handling various items to preserve fingerprints and DNA evidence, the State requested a sidebar. The court subsequently excused the jury and solicited arguments.

¶7 Yang argued he complied with the pretrial order because he did not mention the ski mask and it was the officer who first mentioned DNA. The State contended the repeated questioning about each of the items that were not DNA tested implied that nothing, including the ski mask, was tested. The court first stated, “[W]hen it comes to DNA I put the word ‘infer’ in there for the exact purpose that [the State] spoke of.” It then observed:

There comes a point in time when you make such a big deal by way of your questioning, even though it doesn’t relate directly to the ski mask, when the inference can be drawn that the state has failed to do any DNA investigation[,] which we all know is not true.... [I]f I hear any more multiple questions dealing with this issue, then you will have stepped over the line and the state will be allowed to present that evidence.... [A]t some point when you say okay we’ve got 15 or 20 other pieces of evidence and you keep talking about DNA, DNA, DNA, the inference is going to overlap and be considered by this jury as applicable [to the ski mask].

¶8 The State then noted it had an explanation it could present as to why they did not submit the other items for DNA testing. The State asserted it chose to test the mask because it was the most likely to contain DNA, it would be unreasonable to test everything, and it would not be very significant even if the other items found with Yang had his DNA on them. Finally, regarding subsequent witnesses, the court ruled, “You can ask about processing in general and fingerprints specifically.... [I] don’t believe that it’s proper ... [to] specifically inquire of any witness about any more DNA. If they want to testify to that and

they opened the door, that's a different story[.]” The court also warned the parties its rulings applied to closing arguments.

DISCUSSION

¶9 Yang argues the trial court erroneously exercised its discretion by modifying its order, which deprived him of his right to present a complete defense. We will sustain an evidentiary ruling if the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. *State v. Sullivan*, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). This court determines as a matter of constitutional fact whether exclusion of evidence offered by a defendant violated the constitutional right to present a defense. *State v. Muckerheide*, 2007 WI 5, ¶18, 298 Wis. 2d 553, 725 N.W.2d 930. We review questions of constitutional fact independently, while benefitting from the trial court's analysis. *Id.*

¶10 Yang asserts the State's failure to thoroughly investigate the case, including the failure to test numerous items for fingerprint or DNA evidence, was a substantial part of his defense. He argues the police officers' effort, or lack thereof, in investigating the crime was relevant and admissible, and contends the court had no reason to limit his inquiry in that regard. We conclude the trial court reasonably limited Yang's questioning and did not deprive him of his right to present a defense.

¶11 While Yang takes issue with the trial court's modification of its pretrial ruling, we agree with the State that the court merely clarified its order. There is no inconsistency between the rulings. The purpose of both the pretrial order and the exclusion of questions was to prevent Yang from implying the State failed to process any evidence for DNA. That implication would have misled the

jury. Yang already benefitted from the court's exclusion of the potentially inculpatory or confusing ski mask DNA evidence that might have been interpreted as tying him to the crime. He was not entitled to a double benefit by then implying the State had not tested anything for DNA when, in fact, the State had submitted for analysis the piece of evidence believed most likely to yield meaningful results.

¶12 Further, Yang was able to focus the jury on the lack of DNA testing through his repeated references to the subject prior to the State's objection. He was also still able to present his defense that the police investigation was sloppy. In closing argument, Yang repeatedly asserted the police had "tunnel vision," stressing their failures to try to recover fingerprints from, or otherwise examine, a BB gun; to conduct a traditional or voice-recognition lineup; to investigate an alibi defense, leading to the potential loss of evidence; to hire an expert to analyze a surveillance video; and to preserve the vehicle and its contents, implying there may have been more ice fishing evidence, consistent with a friend wearing the ski mask.

¶13 In fact, it is unclear what exactly it is Yang complains he was unable to present at trial. Yang does argue, however, he was prevented from presenting the lack of DNA evidence to the jury. We disagree. The lack of DNA evidence would have been apparent to the jury—none was presented. The court ruled only that Yang could not imply or argue the State failed to submit anything for DNA analysis. The court did not preclude Yang from stressing, in closing argument, the obvious fact that the State had presented no DNA evidence.

¶14 We further observe Yang could have attacked the State's failure to conduct adequate DNA testing if he so chose. Yang employs a number of colorful

metaphors to demonstrate the position this would have put him in because doing so would have allowed the State to introduce the ski mask DNA evidence. However, as the trial court noted, that evidence was not likely to have a substantial impact on the case.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

