

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 29, 2002

Cornelia G. Clark
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. 01-0720-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-923

**IN COURT OF APPEALS
DISTRICT III**

**STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MIGUEL A. COLLAZO,

DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Miguel Collazo appeals a judgment convicting him of armed robbery of a Sentry store and an order denying his postconviction motion. He argues that a photo lineup procedure was unduly suggestive and tainted the store clerk's in-court identification of Collazo. He also argues that the trial court erred when it admitted into evidence store records confirming that

Collazo had a customer identification card because there was no foundation that the clerk was the custodian of the record and this information was irrelevant. Because we conclude that the photo lineup procedure was not unduly suggestive and that any error by admitting the store records into evidence was harmless, we affirm the judgment and order.

¶2 The grocery store clerk, Kevin Moens, was assisting another customer in his checkout line when he noticed that the next customer in line appeared suspicious, with a hood pulled down partially covering his face. His concerns were relieved, however, when he recognized the person as a regular customer, although he did not know his name. When the first customer left, the suspicious person, later identified as Collazo, displayed a gun and ordered Moens to give him the money from the cash register. Moens told police that the robber was a regular customer with a Sentry card and described him as a muscular Hispanic male, approximately 5'6" or 5'8", approximately 180 pounds, with a black goatee and a piercing below his bottom lip. Three days later, a police officer presented

Moens with six photographs.¹ The officer obscured Collazo's piercings on the photo to avoid the possibility that Moens might identify him solely on the basis of the piercings, Moens identified Collazo as the robber.

¶3 At trial, Moens again identified Collazo as the robber. The State also presented testimony from a friend of Collazo who drove Collazo to the store on the night of the robbery. The friend waited in the car while Collazo went inside to get some money. When Collazo left the store two to four minutes later, jogging through the rain, he told the driver "we better go." Collazo gave the driver \$100 and said he had around \$400 at that time. The driver testified that on the night of the robbery, Collazo had a goatee and several piercings, including one below his lower lip.

¶4 We conclude that the photo lineup was not unduly suggestive. We review the trial court's finding of constitutional facts without deference to the trial

¹ The officer and Moens gave contradictory testimony about what the officer said at that time and the trial court has not made a specific finding of fact. The officer testified:

At that time I informed [Moens] that I had a photo lineup that I wanted him to view and to look at the subjects in the photo and see and identify or see if one of them was the suspect in this case. ... I asked him to closely look at the photos and pick out the one that was the suspect and I also asked him to take his time and look over the photos completely and see if one of them was the suspect I advised him to keep in mind that people change their appearance, that people tend to lose weight, gain weight, change their hair, change facial hair, shave. I also asked him to take his time and look completely at the pictures.

Moens testified that the officer merely asked him if he could identify anybody, and he specifically denied that the officer asked him to pick out the suspect or that the officer told him that he believed the perpetrator was in the lineup. Moens confirmed that the officer told him that he must be positive before identifying anybody. We assume in this opinion that the officer used the word "suspect" when he asked Moens to look at the pictures.

court. See *State v. Griffin*, 131 Wis. 2d 41, 49, 388 N.W.2d 535 (1986). Before any photographs were displayed, Moens indicated that he recognized the robber as a man who had shopped in his store approximately once a week for the previous year. Moens gave a thorough, accurate description of the robber. The officer presented the six photographs with no suggestion as to the perpetrator's identity and after taking special care to avoid identification based solely on the piercings. Even if the officer misspoke and asked Moens to identify the "suspect," under the circumstances that statement was not so suggestive as to taint the entire identification. Likewise, the officer's instruction to be positive before identifying anyone does not impermissibly suggest that the perpetrator must have been one of the six individuals.

¶5 The in-court identification was not dependent on the photo lineup. Moens recognized Collazo from before the robbery occurred. His description to the police, the certainty of his identification and Collazo's unique characteristics that were not visible on the photo adequately guarantee that the in-court identification was unrelated to the photo array.

¶6 Further error in admitting Collazo's Sentry card was harmless. The card only served to substantiate Moens' assertion that Collazo was a regular customer in the store. The record establishes no basis for doubting Moens' testimony. Moens' identification of Collazo did not depend on the store records. Collazo himself admitted that he frequented the store. Therefore, even if the store card was irrelevant and the State failed to present sufficient foundation for the business records exception to the hearsay rule, those errors were harmless.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

