

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 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. 2008AP1238-CR

Cir. Ct. No. 2006CF6794

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT L. GEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Robert L. Gee appeals from a judgment of conviction for armed robbery to challenge the denial of his suppression motion. The issue is whether the lineup at which he was identified was impermissibly suggestive because he was practically bald, and most of the other lineup

participants were only balding. We conclude that a six-man lineup consisting of men with similar physical characteristics, including very short-cropped hair in various degrees of balding to match the complainant's description of the suspect as having "short hair," was not impermissibly suggestive. Therefore, we affirm.

¶2 Gee, wearing a hooded gray sweatshirt, approached bank teller Nicholas Turner. After a brief conversation, Gee handed Turner a note that said, "give me the money or I'm going to blow your f...cking head off." Turner described the robber as "a black male, 35 years of age, 6 foot, 220 pounds, dark complected, short hair, unknown if facial hair, wearing a gray sweater."¹

¶3 Gee was arrested three days after the robbery and a lineup was conducted the following day. Milwaukee City Police Detective Ralph Spano selected five other individuals with similar characteristics to the subject ("fillers") to comprise a line-up. Spano testified at the suppression hearing that he "viewed photographs and reviewed descriptions – weights, heights, ages of individuals that were in the classification section [at the County Jail]" and also considered race and hair in selecting the fillers. Spano testified that each lineup participant entered the room and turned as directed to allow Turner to view (through a one-way mirror from an adjacent room) each participant individually, from the front, back and both sides. Turner identified Gee as the bank robber, mentioning that the robber was bald.

¹ Although Turner testified that Gee was wearing "[a] hooded gray sweatshirt," his description to the police that was used to construct the lineup, described Gee as "wearing a gray sweater."

¶4 Gee moved to suppress the identification as impermissibly suggestive. After hearing testimony and viewing photographs of the lineup participants, the trial court found that “the similarity of the photographs, [a]re adequately similar based upon height, weight, hair, race certainly [and clothing],” and denied the motion.

¶5 A jury found Gee guilty of armed robbery with the threat of force as a party to the crime, in violation of WIS. STAT. §§ 943.32(2) (2005-06) and 939.05 (2005-06). The trial court imposed a twenty-five-year sentence to run consecutive to any other sentence, comprised of fifteen- and ten-year respective periods of initial confinement and extended supervision. Gee appeals to challenge the denial of his motion to suppress his identification.

¶6 To demonstrate that an out-of-court pretrial identification violated due process, the defendant first must prove that the identification was impermissibly suggestive. *See State v. Mosley*, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981); *Powell v. State*, 86 Wis. 2d 51, 65-66, 271 N.W.2d 610 (1978). Impermissible suggestiveness may result when the line-up participants do or do not display a unique characteristic particular to or different from that of the accused. *See Mosley*, 102 Wis. 2d at 654. To summarize the police responsibilities in constructing a lineup:

The police authorities are required to make every effort reasonable under the circumstances to conduct a fair and balanced presentation of alternative possibilities for identification. The police are not required to conduct a search for identical twins in age, height, weight or facial features.... What is required is the attempt to conduct a fair lineup, taking all steps reasonable under the “totality of circumstances” to secure such a result.

Powell, 86 Wis. 2d at 67 (citation omitted). We review an order denying suppression pursuant to a mixed standard of review: we uphold the trial court’s factual findings unless they are clearly erroneous, and we independently determine whether the identification was impermissibly suggestive, and therefore violative of due process of law. See *State v. Dubose*, 2005 WI 126, ¶16, 285 Wis. 2d 143, 699 N.W.2d 582.

¶7 Gee challenges the denial of his suppression motion, contending that his baldness was a unique characteristic, and the fact that the other lineup participants were not “completely bald” rendered the lineup impermissibly suggestive. First, Turner described Gee as having “short hair, unknown if facial hair”; he did not describe him as bald until after he had identified him in the lineup. Second, all of the lineup participants had “short hair,” and most were balding.

¶8 The trial court described each lineup participant individually. It described the first participant as having

some very short hair, but clearly is bald in large portions of his head, particularly those that would show from underneath the hood. And the photographs ... reflect the person at the time of the robbery. Clearly, there’s a hood. You can kind of see into the hood on the sides and a little bit at the top, but would reflect that the person has either very short hair or could be balding.

Two, again, has very short hair, is bald, high forehead; also, the corners at the front of the head also balding going back.

The defendant is substantially bald. From the picture, it looks like he could have some short hair underneath there as well.

Four has the longest hair in the pictures, kind of a frizzy and it looks like something coming down the back. However, there was a hood on, that had he had that hair,

again, he has a very high forehead. He has the balding in the front corners.

Five, again, very high forehead that's balding and those corners going back were balding.

Six, again, is substantially almost all bald with a little bit of very short hair on the top of his head that, again, wouldn't necessarily show through the hood under the circumstances. So the Court does not find that the photographs were in any way dissimilar to make the lineup unduly suggestive.

The trial court accurately described the photographs of the lineup participants.

¶9 We reject Gee's challenge. First, the lineup participants had very "short hair," which was consistent with Turner's description to police.² Gee would be more accurately described as having a shaved head that reveals some close-cropped hair, as opposed to being completely or naturally bald. Second, each was balding with close-cropped hair, rendered less distinctive by the robber having been seen wearing a sweatshirt hood at the time of the crime. This six-man lineup constituted a fair and balanced panel of men with similar physical characteristics presenting alternative possibilities for identification as the robber. There was nothing distinctive or suggestive of the six men's varying degrees of baldness to target or exclude them as the robber described to have "short hair" that was wearing a sweatshirt hood. We independently conclude that the lineup was not impermissibly suggestive.

By the Court.—Judgment affirmed.

² Turner mentioned that Gee was bald after he had identified him. Police constructed the lineup from Turner's description of "short hair," confirmed by Gee's appearance to police upon arrest; Gee appeared balding with very short or close-cropped hair.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5. (2007-08).

