COURT OF APPEALS
DECISION
DATED AND FILED

April 30, 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. 01-2248-CR **Cir. Ct. No. 99CF4346**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH A. GLASS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Keith A. Glass appeals from the judgment of conviction entered after a jury convicted him of armed robbery, party to a crime, contrary to WIS. STAT. §§ 943.32(2) and 939.05 (1999-2000).[1] Glass claims:

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

(1) because the photographic array used to identify him was impermissibly suggestive and unreliable under the totality of the circumstances, evidence regarding this identification procedure should have been excluded; and (2) the evidence was insufficient as a matter of law for a conviction. We disagree and affirm.

I. BACKGROUND.

¶2 On July 29, 1999, at approximately 6:30 p.m., a man sat in his 1998 Lexus in the parking lot of a restaurant waiting for a friend, whom he was meeting for dinner. As he listened to messages on his cellular phone, two men approached his automobile. One of the men opened the driver's side door, pointed a gun in his face, and ordered him out of the vehicle. When the victim stepped out of the vehicle, the gunman grabbed the phone out of his hand and ordered him to lie on the pavement. The victim replied, "No problem," to which the second robber stated, "You better believe it's no problem." The victim then lay on the ground as the two suspects drove away. The victim immediately called the police and reported his vehicle stolen. When the police arrived, he gave physical descriptions of his assailants.

¶3 The Lexus was recovered on August 25, 1999. The police found Glass's fingerprints on the outside of the driver's door and on a CD inside the Lexus. Two witnesses also came forward to state that a man named Angelo Ewing had been seen driving the Lexus on a regular basis since it was stolen. On August 26, 1999, the police showed the victim two photo arrays. He identified Ewing as the gunman and Glass as his accomplice.

¶4 On March 21, 2000, Ewing pled guilty to the charge of armed robbery. On June 19, 2000, Glass stood trial for his part in the armed robbery.

Before trial, Glass argued that the victim's identification of him from the photo array should be suppressed because the array was impermissibly suggestive. Specifically, Glass argued that only his picture depicted an individual with an "Afro" as described by the victim in his prior physical descriptions of the second robber.[2] The trial court denied Glass's motion to suppress the photo identification, concluding that all six of the men in the array looked similar, *i.e.*, all were African-American males in their late teens or early twenties with medium to large builds and relatively long hair.

¶5 At trial, Glass maintained that he had been with his girlfriend at her residence on the night of the crime, and that another individual named Anton Pegas had been Ewing's accomplice. In Glass's defense, Ewing testified that Pegas, rather than Glass, was his accomplice in the armed robbery. However, during its cross-examination of Ewing, the State attacked Ewing's credibility, established that Glass was one of Ewing's "closest friends," and highlighted inconsistencies between Ewing's testimony and prior statements he had given to the police. The State also called Pegas as a rebuttal witness, who testified that he was not with Ewing when the Lexus was stolen. On June 21, 2000, the jury weighed the evidence and convicted Glass of armed robbery.

[2] The victim had described the second robber as an African-American male in his late-teens or early-twenties, approximately 6'1" to 6'2", medium build, scruffy, with hair that was growing out into an "Afro." An "Afro" is defined as "[a] rounded, bushy hairstyle," AMERICAN HERITAGE DICTIONARY 85 (2nd College Edition), "as naturally grown originally by [African-Americans]," OXFORD DESK DICTIONARY AND THESAURUS 14 (American Edition, 1997).

II. ANALYSIS.

A. The photo array was not impermissibly suggestive.

¶6 Glass claims that the photo identification violated his due process rights because the photo array used by the police was impermissibly suggestive. "A criminal defendant is denied due process when identification evidence admitted at trial stems from a pretrial police procedure that is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" ***State v. Wilson***, 179 Wis. 2d 660, 682, 508 N.W.2d 44 (Ct. App. 1993) (citing ***Simmons v. United States***, 390 U.S. 377, 384 (1968)). We review a trial court's determination of whether a pretrial identification should be suppressed *de novo*. *See* ***State v. Benton***, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923. The trial court's findings of fact, however, are accepted as true unless clearly erroneous. *See* ***Wilson***, 179 Wis. 2d at 682-83.

¶7 The analytic framework by which such claims are evaluated was set forth in ***Powell v. State***, 86 Wis. 2d 51, 271 N.W.2d 610 (1978):

> The test for determining whether an out-of-court photographic identification is admissible or, on review, whether the out-of-court identification was properly admitted has two facets. First, the court must determine whether the identification procedure was impermissibly suggestive. Second, it must decide whether under the totality of the circumstances the out-of-court identification was reliable, despite the suggestiveness of the procedures.

Id. at 65. Thus, the defendant has the initial burden to prove that the photo identification was impermissibly suggestive. *See* ***State v. Mosley***, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981). "If this burden is not met, no further inquiry is necessary." ***Id.*** "If it is met, however, the burden shifts to the state to show that

despite the improper suggestiveness, the identification was nonetheless reliable under the 'totality of the circumstances.'" ***Id.***

¶8 "The validity of any photographic identification requires a case-by-case application of the rule to the particular facts of each case…." ***Powell***, 86 Wis. 2d at 63. "Suggestiveness in photographic arrays may arise in several ways – the manner in which the photos are presented or displayed, the words or actions of the law enforcement official overseeing the viewing, or some aspect of the photographs themselves." ***Mosley***, 102 Wis. 2d at 652. The parties agree that the first two considerations are not a problem in the instant case. The source of any potential suggestiveness, therefore, arises from Glass's assertion that he was the only individual wearing an Afro in the six photos.

¶9 However, simple examination of the six photos involved in the array reveals that Glass's photo was not the only one in which the subject had an Afro comparable to that described by the victim. *See* ***Powell***, 86 Wis. 2d at 67 (concluding that where examination of the photos involved reveals that all the photos are similar in relevant aspects, the array is not impermissibly suggestive). We agree with the trial court's summary of the array:

> [T]here were six African-American males there and the [c]ourt can see that. They are in their late teens, early 20's. Some have facial hair, some don't. [T]heir hair is all relatively long based upon my observation of the photographs. They're medium to larger built based upon the [c]ourt's observation of their faces – at least their faces are relatively full.
>
> [T]he [c]ourt doesn't believe that … it's unduly suggestive in any way and [ ] will not suppress the array.

¶10 Our independent examination of the array indicates that at least two, and possibly three, photos other than Glass's depict individuals with Afros that are

growing out as described by the victim. Further, Glass's Afro is not particularly striking or pronounced compared with the others'. As the supreme court noted in ***Powell***, the photos need to be similar, but not identical:

> 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 … to secure such result.

Id. at 67 (citations omitted).

¶11 We conclude that the trial court's findings of fact regarding the nature of the photo array are not clearly erroneous. Therefore, although the men depicted in the photo array were not identical, they were similar enough with respect to their age, race, facial features, facial hair, and hairstyles such that the array was not impermissibly suggestive. Because we agree with the trial court that the photo array was not impermissibly suggestive, we need not inquire whether the identification was, nonetheless, reliable under the totality of the circumstances.

B. There is sufficient evidence of Glass's guilt.

¶12 Glass also claims that the evidence was insufficient for a jury to conclude beyond a reasonable doubt that he was guilty of armed robbery as a party to the crime. Glass argues that the following evidence supports his conclusion: (1) the victim's identification of Glass as the second robber was "suspicious" based on the allegedly suggestive photo array; (2) Ewing identified Pegas as the second robber; (3) Pegas's testimony contained inconsistencies; and (4) Glass had an alibi for the time of the crime.

¶13 The test for overturning a jury's verdict based on insufficient evidence is set forth in ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990):

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Id. at 507 (citation omitted). Thus, the test is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt. *See* ***id.*** at 503-04. Rather, the test is whether this court can conclude that the jury could have been so convinced by evidence that it had a right to believe and accept as true. *See* ***id.*** Further, in reviewing the evidence, we are guided by the principle that the credibility of witnesses and the weight given to their testimony are matters left to the jury's judgment, and where more than one inference can be drawn from the evidence, we must accept the inference drawn by the jury. *See* ***Whitaker v. State***, 83 Wis. 2d 368, 377, 265 N.W.2d 575 (1978).

¶14 First, as we have already concluded above, the photo array was not unduly suggestive. Therefore, because Glass had the opportunity to attack any allegedly unreliable evidence, including the photographic identification by the victim, on cross-examination and in closing arguments, *see* ***Powell***, 86 Wis. 2d at 68, the effect to be given to the identification was a matter for the jury. *See* ***State v. Powers***, 66 Wis. 2d 84, 93, 224 N.W.2d 206 (1974). Viewing the photo array and the victim's identification in the light most favorable to the State and the

conviction, we conclude that the jury could have drawn appropriate inferences from this evidence to support Glass's conviction.

¶15 Second, the final three bases of Glass's argument all concern witness credibility. In ascertaining witness credibility, the jury is the final arbiter. *See* ***Wilson***, 179 Wis. 2d at 683. Merely because the evidence is in conflict or because there is evidence that might support a different result, we will not substitute our judgment for that of the jury. *See* ***State v. Edmunds***, 229 Wis. 2d 67, 73, 598 N.W.2d 290 (Ct. App. 1999). In the present case, while more than one inference can be drawn from the evidence, we must follow the inference that supports the jury's finding because that evidence is not incredible as a matter of law. *See* ***Poellinger***, 153 Wis. 2d at 506-07. Accordingly, we conclude that the evidence, viewed most favorably to the state and the conviction, is sufficient such that a reasonable jury could have found beyond a reasonable doubt that Glass committed this crime.

¶16 Based upon the foregoing reasons, the trial court is affirmed.

By the Court.—Judgment affirmed.

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