

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 19, 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. 01-2698-CR**

**Cir. Ct. No. 00-CF-1183**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MAGDALENO D. BACA, JR.,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Brown County:  
JOHN D. MCKAY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Magdaleno Baca appeals a judgment convicting him of robbery with use of force following his entry of a no contest plea. Pursuant to WIS. STAT. § 971.31(10) (1999-2000), he challenges the trial court's refusal to suppress two witnesses' identification of him. He argues that the police used

impermissibly suggestive procedures when they presented the witnesses with a photo of Baca. We reject that argument and affirm the judgment.

¶2 Baca was charged with robbing Mikel Raygoza in a bar restroom. Raygoza testified that he had met Baca for the first time earlier in the evening and spent several hours with him drinking and playing pool. Later, they took a cab to another bar where they played pool with Robert Burch for a half hour. Raygoza then went to the restroom. Baca followed him in, punched him and stole his wallet. Burch then witnessed Baca running out of the bar.

¶3 The day after the robbery, a police officer went to Raygoza's house and showed him a photo of Baca that he had acquired from another police agency. Raygoza had indicated that he believed his assailant's name was "Bacardi." Baca's name came up when the police searched their files for "Bacardi" and the officer decided to show Raygoza the picture to see if he could eliminate Baca. Raygoza immediately identified Baca as his assailant.

¶4 Twelve days later, Burch went to the police station and looked at the same photo as well as two other photos taken from a surveillance camera. He immediately identified Baca as the man with whom they had been playing pool.

¶5 The trial court concluded that the procedure utilized in showing Raygoza the photo was not impermissibly suggestive. The court focused on the fact that Baca was not a suspect at the time the officer showed Raygoza the photograph. Baca was a suspect by the time the police showed Burch the photo. The trial court concluded, however, that Burch's identification of Baca was reliable. Baca correctly notes that caselaw does not support the trial court's suggestion that the status of the accused is a determinative factor in deciding whether an identification procedure was unduly suggestive. Nevertheless, we

conclude that the trial court correctly denied Baca's motion to suppress the identifications. *See State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985).

¶6 A criminal defendant is entitled to suppress an identification if the pretrial police procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *State v. Benton*, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923. Baca bears the initial burden of showing that the identification procedure was impermissibly suggestive. Suggestiveness may arise in the manner in which a photo is presented, the officer's words or actions or some aspect of the photo itself. *See State v. Mosley*, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981). If the procedure was impermissibly suggestive, the burden shifts to the State to show that the eye witness identification is nonetheless reliable under the totality of the circumstances. *Benton*, 2001 WI App at ¶5. Factors that determine reliability include the opportunity of the witness to view the criminal at the time of the crime, the witnesses degree of attention, the accuracy of any prior identification, the witnesses level of certainty and the time between the time and the confrontation. *See State v. Wolverton*, 193 Wis. 2d 234, 265, 533 N.W.2d 167 (1995). Whether the identification evidence was obtained in violation of Baca's due process rights is a question of law that we resolve without deference to the trial court. *See State v. Kaelin*, 196 Wis. 2d 1, 10, 538 N.W.2d 538 (Ct. App. 1995).

¶7 Showing Raygoza a single photo of Baca the day after the robbery was not impermissibly suggestive. It is comparable to a "show up" after a crime is committed. Showing a single photo is not per se suggestive, and each case must be examined on its own facts. *See Kain v. State*, 48 Wis. 2d 212, 219, 179 N.W.2d 777 (1970). Nothing the officer did or said suggested that the officer

believed that Baca perpetrated the crime. He merely asked Raygoza “if he could look at the photo and see if the person was familiar to him in any way.” Raygoza identified Baca as the robber without delay. Nothing in the record suggests that Raygoza would have felt any pressure to identify Baca.

¶8 Burch’s identification was reliable under all of the circumstances.<sup>1</sup> Burch had played pool with Baca for one-half hour before the crime and he learned of the crime immediately after it was committed. Burch only had to remember Baca’s face for twelve days, knowing that he had committed a crime and after having observed him in good lighting for one-half hour. Under the circumstances, there is slight likelihood of irreparable misidentification.

*By the Court.*—Judgment affirmed.

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

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<sup>1</sup> The State does not challenge the trial court’s conclusion that the police procedure utilized in Burch’s identification was unduly suggestive.

