

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 15, 2003

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. 02-2902-CR

Cir. Ct. No. 01-CF-1083

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LIONEL C. WHITEHEAD,

DEFENDANT-APPELLANT.

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

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

¶1 CANE, C.J. Lionel Whitehead appeals his convictions for one count each of armed burglary and armed robbery. Whitehead argues the trial court violated his due process rights when it admitted a victim's identification testimony because of the showup procedure used after he was taken into custody. Specifically, he contends the victim's identification violated due process because

her husband identified Whitehead in her presence immediately before she did. We conclude the identification was reliable and therefore affirm the judgment.

BACKGROUND

¶2 Early in the morning of December 3, 2001, Patricia and Timothy Brown awoke to find a man standing at the foot of their bed. The Browns' bedroom was illuminated by the light from a television at the intruder's back. The man approached the Browns, holding a knife to Timothy's chest and threatening Patricia, and demanded to know where they kept their money. Timothy was able to knock the knife out of the man's hand and he chased the intruder from the bedroom.

¶3 Patricia called 911 as Timothy and the intruder ran through the house. The intruder exited through a screen door and held it shut while Timothy tried to follow him. When Timothy was able to open the door, the intruder told him to stay back and threatened him. Timothy responded the police were coming and the man fled. Floodlights on the Browns' house and garage as well as a light on a neighbor's garage illuminated the Browns' yard. The entire encounter with the intruder took place in less than two minutes.

¶4 Patricia described the man to the 911 operator as a black male wearing dark clothes. When Green Bay police officer David Graf arrived, the Browns described the intruder as a black male, no taller than 5'10", approximately 170 pounds, wearing a dark jacket and knit cap. Graf radioed this description to other officers and, within a few minutes, officer Kevin Dymond radioed that a suspect matching this description had been apprehended running through a nearby intersection.

¶5 Dymond then arrived at the Browns' home with a suspect the police later identified as Whitehead. As Patricia and Timothy both approached the patrol car, Timothy looked inside and yelled, "That's the mother fucker, that bastard." Patricia subsequently identified Whitehead as the intruder.

¶6 Whitehead moved to suppress Patricia's identification, arguing it violated due process because Timothy's identification was impermissibly suggestive to Patricia. The court rejected the motion, concluding the police procedure at the showup was permissible. A jury subsequently convicted Whitehead on both charges. The court sentenced him to two concurrent forty-year sentences, with twenty-five years' confinement and fifteen years' extended supervision. He appeals.

DISCUSSION

¶7 A showup is a procedure where police present a lone suspect to a witness or victim of a crime so that the witness or victim may identify the person as the perpetrator. *See State v. Marshall*, 92 Wis. 2d 101, 119, 284 N.W.2d 592 (1979). Whether any pretrial identification violates due process depends on the totality of the circumstances surrounding the pretrial identification confrontation. *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

¶8 We apply a two-part test when determining whether pretrial identification evidence is admissible. *See Marshall*, 92 Wis. 2d at 117. First, we must decide whether the confrontation procedure was characterized by unnecessary suggestiveness. *Id.* If so, we must further decide whether the totality of the circumstances show that the identification was reliable despite the unnecessary suggestiveness. *Id.* The defendant bears the initial burden of proving that the identification was unnecessarily suggestive. *State v. Wolverton*,

193 Wis. 2d 234, 264, 533 N.W.2d 167 (1995). This burden is met if it can be shown that the identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. See *Powell v. State*, 86 Wis. 2d 51, 61-62, 271 N.W.2d 610 (1978). If this burden is met, the State has the burden to demonstrate that under the totality of the circumstances, the identification was reliable even though the confrontation was suggestive. *Wolverton*, 193 Wis. 2d at 264. Whether the procedure was impermissibly suggestive or reliable despite its suggestiveness are questions of law we review independently. See *State v. Benton*, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923.

¶9 Whitehead argues the showup was impermissibly suggestive because Patricia identified him immediately after Timothy yelled, “That’s the mother fucker, that bastard.” In other words, he claims Patricia only identified him as the intruder because of Timothy’s statements. Whitehead also claims the identification was unreliable under the totality of the circumstances because Patricia’s initial viewing of the intruder was questionable and this gives rise to the likelihood that she was improperly influenced to identify Whitehead by her husband’s comments, not because she recognized him. In support, Whitehead points to the brevity of the encounter between Patricia and the intruder, the poor lighting, the fact she was not wearing her glasses at the time, and the emotional stress the incident caused.

¶10 We do not decide whether Timothy’s statement made the showup impermissibly suggestive because we conclude the identification was nonetheless reliable. The factors we consider in making this determination are: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness’s degree of attention, (3) the accuracy of his or her prior description of the

criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. *Wolverton*, 193 Wis. 2d at 265.

¶11 Several circumstances surrounding the identification lead us to conclude the identification was reliable. Patricia testified she saw the intruder's face during the attack, partly because the intruder grabbed her and drew her toward him. She also said at one point her head was touching his body. Further, it is undisputed the identification took place less than thirty minutes from the attack. In addition, at Whitehead's preliminary hearing, Patricia testified she could not remember whether she or Timothy identified Whitehead first. Finally, at trial, Patricia testified she had ample opportunity to observe the intruder's facial features in the house and said she had no doubt that he was Whitehead. At both the preliminary hearing and the trial, Patricia identified Whitehead, and at trial said she had no doubt he was the intruder. The record establishes Patricia was able to observe the intruder and subsequently identified him as Whitehead a short time after initially seeing him. In addition, her testimony suggests that Timothy's statement did not influence her identification.

¶12 While it is true that the minimal amount of light, time and Patricia's lack of glasses make the chance of misidentification more likely, we cannot conclude they make the identification unreliable. Instead, these are factors properly left to the jury to resolve when considering Patricia's identification testimony. See *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977) (evidence with some element of untrustworthiness is customary grist for the jury mill). Further, we are satisfied that Patricia's failure to remember who identified Whitehead first and her subsequent in-court identifications show Timothy's statement did not influence her identification of Whitehead.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

