COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0630-CR **Cir. Ct. No. 02CF000846**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FOREST S. SHOMBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Forest Shomberg appeals from a judgment convicting him of second-degree sexual assault, false imprisonment, and two counts of bail jumping. He also appeals from an order denying postconviction relief. The trial court entered judgment after a bench trial. The issues are whether the trial court erred by excluding expert witness testimony and evidence of

Shomberg's willingness to take a polygraph examination. Shomberg also requests a new trial in the interest of justice. We affirm.

¶2 The State charged Shomberg as the perpetrator of a late night assault on a woman walking near the University of Wisconsin-Madison campus. The victim, and a security guard who happened on the scene of the assault, provided descriptions of the assailant. Both subsequently identified Shomberg as the perpetrator during six-person line-ups.

¶3 The State's case relied primarily on the line-up identifications. As part of the defense, Shomberg proffered expert testimony concerning the problematic nature of line-up identifications, and the superiority of sequential identifications. However, the trial court barred testimony from the expert because the court believed that counsel could adequately address the reliability of the identifications, and the method of identification, on cross-examination of the State's witnesses. The court also excluded proffered testimony that Shomberg had volunteered to take a polygraph examination.

¶4 At the close of testimony, the trial court found Shomberg guilty. The court acknowledged that the prosecution turned on the reliability of the two witnesses' identification of Shomberg. In that regard, the trial court found that the two line-up identifications of Shomberg, along with the security guard's in-court identification, proved beyond a reasonable doubt that Shomberg was the assailant. In so holding, the court found that the line-up was not unduly suggestive, or otherwise conducted in less than a fair and impartial manner. The court expressly found credible, testimony that a police officer told the victim that her assailant might not be in the line-up. The court also gave weight to the fact that Shomberg owned a sweater that matched the security guard's description of the assailant's

sweater. Shomberg appeals after the trial court convicted him and denied postconviction relief.

¶5 We need not decide if the trial court erred by excluding Shomberg's expert, because the exclusion was harmless. The potential unreliability of line-up identifications was an issue thoroughly explored at trial, as were the particular circumstances of the two line-up identifications at issue here. In explaining the verdict, the trial court presented a detailed explanation why it found the identifications accurate and reliable. The court's explanation acknowledged the same concerns that the expert would have addressed in his testimony. The test for harmless error is whether it is clear beyond a reasonable doubt that a rational fact finder would have found the defendant guilty absent the error. ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189. We conclude that a rational fact finder would have found Shomberg guilty even if the proffered testimony had been admitted.

¶6 The trial court properly excluded evidence that Shomberg volunteered to take a polygraph examination. Such evidence is admissible only if the defendant shows that he or she initiated the offer to take the test, the test is available to take, the defendant believed the test would be accurate, and the defendant believed that it would be admissible. *See* ***State v. Pfaff***, 2004 WI App 31, ¶¶26-28, 269 Wis. 2d 786, 676 N.W.2d 562. In his offer of proof, Shomberg did not affirm that he believed the test results were admissible. Nor did he offer proof that he believed the test would accurately measure the truth of the subject's statements. Consequently, he did not meet the four-part standard of admissibility, and has no basis to argue that exclusion was an erroneous exercise of discretion.

¶7 We deny Shomberg's request for a new trial in the interest of justice. We may exercise the power of discretionary reversal if it appears from the record that the real controversy has not been fully tried, or it is probable that justice has for any reason miscarried. WIS. STAT. § 752.35 (2001-02).[1] Here, apart from the exclusion of expert testimony, which we have affirmed, Shomberg contends that a new trial is appropriate because he and an alibi witness passed polygraph examinations; the trial court did not hear evidence that Shomberg's heroin use would have reduced his libido the night of the attack; he did not voluntarily waive a jury trial; and important impeachment evidence was not produced concerning a defense witness.

¶8 We conclude that these are not sufficient grounds for a new trial on either ground set forth in WIS. STAT. § 752.35. First, the results of polygraph examinations are inadmissible. *See* ***State v. Greer***, 2003 WI App 112, ¶9, 265 Wis. 2d 463, 666 N.W.2d 518. Second, the only evidence of Shomberg's heroin use was his own brief testimony that he took an unspecified amount on the day in question. Perhaps trial counsel could have developed the issue further, but there is nothing before us suggesting that trial counsel performed deficiently in this regard. Third, Shomberg's claim that he did not voluntarily waive the jury trial is belied by the statements he made during the waiver colloquy. Finally, Shomberg points to untruthful testimony by a prosecution witness concerning that witness's use of alcohol. The witness testified that he had been sober for a year, whereas evidence suggests that he had only been sober for eleven months. The discrepancy is trivial

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

and does not impeach the witness's testimony. In any event, the witness was only peripheral to the State's case.

¶9 Whether taken individually or together, Shomberg's contentions do not warrant a new trial. He received a fair trial with a reliable result.

By the Court.—Judgment and order affirmed.

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