COURT OF APPEALS
DECISION
DATED AND RELEASED

June 12, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0344-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD C. LEE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Donald C. Lee appeals pro se from a judgment of conviction of armed robbery and from an order dismissing his motion for postconviction relief. He argues that his postconviction motion should not have been dismissed for his inability to serve a copy on the prosecution, that the trial court lacked personal jurisdiction over him due to violations of the extradition laws, that an in-court identification at the preliminary hearing tainted identification evidence at trial and that the evidence is insufficient to support the conviction. We conclude that the identification evidence was not tainted and affirm the conviction.

The conviction is for the armed burglary of a gas station on January 13, 1992. The station attendant picked Lee out from a photo array. Lee was brought to Wisconsin from Illinois on a governor's warrant. After sentencing, Lee filed a pro se postconviction motion and appendix which exceeded 100 pages in length. The State was not served with a copy of that motion and moved for dismissal on the ground of lack of service.

Lee argues that his constitutional right to meaningful access to the court was violated when the trial court dismissed the motion for postconviction relief for Lee's failure to serve the State. However, we need not address this claim because the issues raised on appeal are preserved for review without the necessity of a postconviction motion.[1] Section 974.02(2), STATS., provides that a defendant is not required to file a postconviction motion in the trial court prior to an appeal "if the grounds are sufficiency of the evidence or issues previously raised." *See* ***State v. Hayes***, 167 Wis.2d 423, 426, 481 N.W.2d 699, 700 (Ct. App. 1992).

Lee contends that the trial court lacked personal jurisdiction over him because of the violation of extradition laws. We have previously addressed this contention in Lee's appeal from the denial of his petition for a writ of habeas corpus, ***State ex rel. Don Campbell, a/k/a Donald Lee v. Alan Kehl, Sheriff of Kenosha County***, No. 93-0309, unpublished summary order (Wis. Ct. App. Dec. 29, 1993). There we addressed Lee's claim that he had been illegally extradited from Illinois and that his extradition violated his constitutional due process rights and § 976.03, STATS., the Uniform Criminal Extradition Act. We rejected his claims and affirmed the denial of a writ of habeas corpus.[2]

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[1] Lee correctly points out that upon his explanation that he lacked sufficient funds to serve a copy of the motion, the trial court suggested a copy be provided by the clerk of the circuit court. While we do not give countenance to the State's insistence on strict compliance with the procedural requirement for service, particularly in light of Lee's indigency and that it ultimately received a copy of the motion, the State is not attempting to benefit from its conduct by claiming waiver on appeal. The State concedes that the issues presented by the appeal are properly preserved without a postconviction motion.

[2] We take judicial notice of our order in the earlier appeal. *See* § 902.01, STATS.

We are not required to again address the merits of Lee's claim that the trial court lacked personal jurisdiction. Issue preclusion, or collateral estoppel, limits relitigation of issues that have been litigated in former proceedings. ***A.B.C.G. Enters. v. First Bank Southeast***, 184 Wis.2d 465, 473, 515 N.W.2d 904, 907 (1994). For the first action to bar a second action under claim preclusion, there must be an identity of parties and an identity of causes of action or claims in the two cases. *See* ***DePratt v. West Bend Mut. Ins. Co.***, 113 Wis.2d 306, 311, 334 N.W.2d 883, 885 (1983). Whether issue preclusion applies is a question of law. ***Heggy v. Grutzner***, 156 Wis.2d 186, 192, 456 N.W.2d 845, 848 (Ct. App. 1990). We conclude that Lee is collaterally estopped from obtaining a second review of the issue.

We turn to the issue of whether the identification evidence at trial was tainted. Immediately before the preliminary hearing, the gas station attendant was invited into the courtroom and asked if he recognized Lee as Lee, in jail clothes and handcuffs, entered the courtroom. Lee contends that this one-on-one "show-up" identification tainted the subsequent in-court identifications.

Due process is denied when an in-court identification is admitted which 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, 52 (Ct. App. 1993) (quoting ***Simmons v. United States***, 390 U.S. 377, 384 (1968)), *cert. denied*, ___ U.S. ___, 115 S. Ct. 100 (1994). On appeal, a question of law is presented which we consider de novo. ***Id.*** at 682, 508 N.W.2d at 52-53.

We must first determine whether the one-man "show-up" identification at the start of the preliminary hearing was impermissibly suggestive. *See* ***id.*** at 682, 508 N.W.2d at 52. We summarily conclude that it was.[3]

[3] Little can be said in defense of the officer's conduct of directing the eyewitness to Lee's appearance prior to the commencement of the preliminary hearing. The State does not argue that the procedure was permissible.

We next determine whether under the totality of the circumstances the in-court identification was sufficiently reliable to be admitted at trial. ***Id.*** The factors we consider when determining reliability include the witness' opportunity to observe the perpetrator at the time of the crime, his degree of attention, the accuracy of his descriptions, the level of certainty that he demonstrated when making the identification and the length of time between the crime and the identification. *See* ***Powell v. State***, 86 Wis.2d 51, 65, 271 N.W.2d 610, 617 (1978).

Here, the gas station attendant was confronted by a man with a gun who reached in front of him to empty the contents of the cash register. The robber was in the attendant's line of vision for about thirty seconds. Nine days after the robbery, and six months before the preliminary hearing, the attendant picked Lee from a photo lineup. Lee does not argue on appeal that the photo lineup was impermissibly suggestive.[4] The photo lineup was impeccable, including the conversion of colored photos of similar-looking suspects to black and white photos so as to match Lee's photo. The police officer indicated that the attendant picked Lee's photo without hesitation. At the preliminary hearing the attendant identified Lee, stating, "He didn't have the beard at the time but that's him."

The witness had made a strong and unsuggested identification before the impermissibly suggestive "show-up." We conclude that the in-court identification was reliable under the totality of the circumstances.[5]

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[4] Lee only challenges the eyewitness' confidence in selecting Lee's photo from the array. Lee hinges his argument on the witness' comment as he pointed out Lee's photo that "that's the one that looks the most like the man that robbed me." Even if the comment suggests that the witness was not sure, it only bears on reliability and does not render the photo lineup impermissibly suggestive.

[5] In passing, Lee argues that his Sixth Amendment right to counsel was violated because counsel was not present during the "show-up" identification at the start of the preliminary hearing. We will not address arguments inadequately briefed and which lack citation to proper legal authority. ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). Without further development of the argument, we cannot fathom what relief could be afforded in light of the conclusion that the in-court identification was properly admitted.

The final issue is whether the evidence was sufficient to support the conviction. Lee argues that the attendant's identification was "less than certain," that the robber was clean shaven and he had a beard and mustache in January 1992, that the car which was in his possession and seen in the vicinity of the robbery was inoperable at that time and that an inculpatory statement given by his brother was recanted. In short, he argues that his version of the facts requires acquittal.

Lee fails to recognize that our review of the sufficiency of the evidence is to determine whether the evidence, *viewed most favorably to the State and the conviction*, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.[6] ***State v. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992). Viewing the evidence most favorably to the State, there is credible evidence to support the jury's finding of guilt.

The gas station attendant identified Lee as the robber. Even if the attendant candidly admitted that he could not be positive, it was a matter for the jury, not a reviewing court, to determine the credibility of the witness and the weight of his testimony. *See* ***State v. Wachsmuth,*** 166 Wis.2d 1014, 1023, 480 N.W.2d 842, 846 (Ct. App. 1992). The jury viewed a videotape of the robbery and still pictures made from that tape. There was also strong circumstantial evidence that a car belonging to Lee's former girlfriend and left in Lee's possession was in the vicinity of the robbery. Although there was testimony that the car was inoperable, that does not render the circumstantial evidence incredible as a matter of law. We defer to the jury's function of weighing and sifting conflicting testimony in part because of the jury's ability to give weight to nonverbal attributes of the witnesses. *See* ***State v. Wilson***, 149 Wis.2d 878, 894, 440 N.W.2d 534, 540 (1989).

The same is true with regard to the statement given to the police by Lee's brother that Lee said he had committed an armed robbery in Wisconsin and the police were looking for him. While Lee's brother recanted this

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[6] In suggesting that the issue is whether the jury's verdict is contrary to the weight of the evidence, Lee cites the wrong standard of review of the sufficiency of the evidence.

statement at trial, he did so only after contact with Lee. It was for the jury to determine which version of the brother's story was the truth.

By the Court.—Judgment and order affirmed.

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