COURT OF APPEALS
DECISION
DATED AND RELEASED

April 30, 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. 95-1026-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TAN NGOC NGUYEN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed*.

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

PER CURIAM. Tan Ngoc Nguyen appeals from a judgment of conviction, after a jury trial, for three counts of recklessly endangering safety while armed and one count of recklessly endangering safety by use of a dangerous weapon. He also appeals from an order denying his motions for postconviction relief. Nguyen raises four issues on appeal: (1) whether the trial court erred by failing to suppress his statement to the police; (2) whether the

trial court erred by failing to suppress the lineup identifications; (3) whether the trial court erroneously exercised its discretion by refusing to allow an expert witness to testify about Nguyen's psychological profile; and (4) whether the trial court erroneously exercised its discretion by imposing an allegedly harsh and unconscionable sentence. We reject Nguyen's arguments, and affirm.

I. BACKGROUND.

On March 18, 1993, three youths outside Walker Middle School were shot and wounded by a hooded, and handgun-wielding assailant. The assailant also pointed the handgun at another juvenile. Nguyen, a nineteen-year-old Vietnamese immigrant, was arrested shortly after the shooting. While in police custody, he gave two statements to police implicating his involvement in the shootings. After giving his statements, police placed him in a lineup with four other Asian men. Witnesses identified Nguyen as the shooter during the lineup.

At trial, Nguyen attempted to introduce the expert testimony of clinical psychologist Timothy Wiedel. Wiedel would have testified about Nguyen's "psychological profile" and his "immense difficulties in cultural assimilation into American [s]ociety." Nguyen maintained that "[t]his adjustment to American society since his immigration from Vietnam ... contributed to his being fearful, insecure, and highly suggestible," and that this was relevant to the voluntariness of his statements to the police. The trial court concluded that the proffered testimony was irrelevant and excluded it.

The jury found Nguyen guilty on all four counts. The trial court then sentenced him to seven years incarceration on each of the recklessly endangering safety counts, to be served consecutive to each other; and nine months incarceration on the remaining count, to be served concurrent to the other three counts.

Nguyen filed postconviction motions for relief, seeking a reversal based on the same alleged errors he now argues on appeal. The trial court issued an order denying the postconviction motions. We address further relevant facts with each of the separate issues.

II. ANALYSIS.

Nguyen first challenges the voluntariness of the custodial statements he gave to police. He asserts that his limited understanding of English hampered his understanding of the police questions, and that he was intimidated by the presence of Detective Kennedy in the police interview room. Detective Kennedy was 6 feet 4 inches in height and weighed 240 pounds, compared to Nguyen's weight of 140 pounds and height of 5 feet 8 inches. Indeed, Nguyen argues that he did not comprehend English sufficiently to understand what was said to him or to make others understand his responses; that he was handcuffed to a wall during his interrogation; that he confessed because the police threatened to deport his family; that Detective Kennedy yelled at him and called him names; and that he was placed in a holding cell with rival gang members. Accordingly, Nguyen contends that because his statements were not voluntarily given, the trial court should have suppressed them because their admission violated his constitutional due process rights.

Resolving this issue requires us to apply the trial court's factual findings to federal and state constitutional principles. ***State v. Lee,*** 175 Wis.2d 348, 354, 499 N.W.2d 250, 252 (Ct. App. 1993). While we review the trial court's factual findings under the "clearly erroneous" standard, *see* ***State v. Esser,*** 166 Wis.2d 897, 903, 480 N.W.2d 541, 543 (Ct. App. 1992), the application of those facts to the constitutional principles presents a question of law that we review *de novo*. ***Lee,*** 175 Wis.2d at 354, 499 N.W.2d at 252.

When the state seeks to admit a defendant's custodial statement, constitutional due process requires that it make two discrete showings: "First, ... that the defendant was informed of his ***Miranda*** rights, understood them[,] and [knowingly and] intelligently waived them. Second, ... that the defendant's statement was voluntary." ***Id***. at 359, 499 N.W.2d at 255 (citation omitted).

Nguyen's assertion that his statements were involuntary placed on the State the threshold burden to prove by a preponderance of evidence that his statements were voluntary. ***Id.*** at 359-60, 499 N.W.2d at 255. To meet this burden, the State must show that Nguyen made the statements willingly and not as the result of duress, threats, or promises. Once the State made a prima facie case of voluntariness, the burden shifted to Nguyen to present any rebuttal

evidence. ***Id.*** If a defendant fails to present evidence of coercion in rebuttal, further inquiry about balancing the actions of the police with the personality of the defendant is inappropriate. ***State v. Deets,*** 187 Wis.2d 630, 635-36, 523 N.W.2d 180, 182 (Ct. App. 1994).

At trial, the State introduced two statements made by Nguyen. The first was made to Detective Steven Spingola shortly after Nguyen's arrest. Nguyen admitted he was a member of a street gang, but denied any involvement in the shootings at those who he claimed were members of a rival street gang. The second statement was made to Detective Kennedy four days later. Nguyen stated that his friend attended Walker Middle School and had been roughed up by members of a rival gang, so Nguyen got a gun and went to the school to protect his friend. Nguyen stated that he recognized several members of the rival gang, became nervous and afraid, heard someone say "shoot them," and shot the gun—purposely aiming low.

As evidence that Nguyen's statements to the police were voluntary, both Detectives Spingola and Kennedy testified that Nguyen made the statements attributed to him, that he was willing to give the statements, and that no threats or promises were used to coerce him into making the statements. We agree with the trial court that this testimony met the State's prima facia burden to show that Nguyen's statements were voluntary.

None of the challenges Nguyen now raises to the voluntariness of his statements is sufficient to undermine or rebut the State's prima facia showing. While Nguyen is correct that language difficulties can influence the voluntariness of a statement, *see* ***State v. Santiago,*** 198 Wis.2d 82, 92, 542 N.W.2d 466, 471 (Ct. App. 1995) ("`[L]anguage difficulties may impair the ability of a person in custody to waive [***Miranda***] rights in a free and aware manner.'" (citation omitted)), *petition for review granted*, 94-1200-CR (Wis. S. Ct. Jan. 16, 1996), the record belies that Nguyen's language skills meaningfully affected his ability to understand the detectives' questioning or his ability to voluntarily make a statement. Both detectives testified that Nguyen spoke in English and understood their questions. Nothing in the evidence that Nguyen presents undermines this testimony. Thus, Nguyen has made an insufficient showing that his English-language skills invalidated the voluntariness of his statement.

Further, we agree with the trial court that Nguyen failed to show any coercion on the part of the police. The trial court found that none of the circumstances surrounding the interviews with Nguyen rose to the level of coercion. Nothing that Nguyen argues on appeal makes these findings "clearly erroneous." Thus, the trial court properly denied Nguyen's motion to suppress his statements to police.

Nguyen next argues that the lineup was unduly suggestive. He alleges that although he is of Asian ancestry, he looks Hispanic, and that all of the others in the lineup were Asian. He concludes that when witnesses viewed the lineup they immediately identified him from his allegedly Hispanic mien. He charges that the police "crafted extremely suggestive lineups" which accentuated these supposed Hispanic features. Nguyen also complains that the five-person lineup portrayed undue height disparity. The men ranged from five feet tall to five feet, nine inches tall. He finally argues that these out-of-court identifications impermissibly contaminated the subsequent in-court identifications.

Nguyen's challenge to the admissibility of out-of-court identification placed upon him the initial burden to establish impermissible suggestiveness of the identification procedure. *See* ***Powell v. State,*** 86 Wis.2d 51, 56, 271 Wis.2d 610, 617 (1978). If suggestiveness appears, it became Nguyen's duty to show that such was unnecessary. ***Simos v. State,*** 83 Wis.2d 251, 256, 265 N.W.2d 278, 279 (1978). Nguyen must show both suggestiveness and the "ease" of its avoidance. ***Id.***

Nguyen's argument points to no impermissible suggestiveness in the record. His assertion that he was the only Asian in the lineup who appeared Hispanic is unaccompanied by reference to the record. The contrary appears. A victim, Maurice Ward, testified that all persons in the lineup resembled Hispanics. As to height, Nguyen conceded that two of the four participants were approximately as tall as he, five feet, eight inches. We cannot conclude from the record before us that any alleged height disparity was unduly suggestive. We conclude that Nguyen failed to establish impermissible suggestiveness. Our analysis need not proceed further.

Nguyen next argues that the trial court misused its discretion by excluding from evidence the opinions of clinical psychologist Timothy C. Wiedel who was employed full-time at the Milwaukee County Mental Health Complex. Dr. Wiedel did a psychological profile of Nguyen. Nguyen asserted that this profile would have assisted the jury to explain his language difficulties which were evident from his failure to complete a Minnesota Multiphasic Personality Inventory and his difficulties in adjusting to life in Milwaukee since his arrival from Vietnam. Nguyen contends that the profile would have aided the jury in evaluating the reliability of his incriminating statements to police officers.

The opinion of an expert is admissible if it is relevant and if it assists the trier of fact to understand the evidence or determine a fact in issue. ***State v. Morgan***, 195 Wis.2d 388, 416, 536 N.W.2d 425, 435 (Ct. App. 1995); RULE 907.02, STATS.; *see also* RULE 904.01, STATS. Whether expert testimony assists the trier of fact is a decision within the discretion of the trial court. ***Id.*** at 417, 536 N.W.2d at 435.

The trial court determined that the profile was irrelevant because it did not address the voluntariness of Nguyen's statements to the police, nor did it address the credibility of his statements to Detective Patrick Kennedy. We affirm the trial court because the record fails to establish the relevancy of the testimony. Dr. Wiedel offered to show that Nguyen's adjustment problems arose from his immigration to this country. Dr. Wiedel failed to tie this maladjustment either to voluntariness or reliability of statements to the police. He would have testified that Nguyen was a suspicious, almost paranoid, person. Again, this is irrelevant because, without more, it does not develop Nguyen's testimonial unreliability. Also, testimony of Nguyen's proneness to the suggestions of persons in whom he places trust says nothing about the reliability of his statements to the officers. The trial court did not misuse its discretion to exclude Nguyen's profile from evidence.

Finally, Nguyen challenges his sentence. He argues that the trial court: violated his rights under the Fifth, Eighth, and Eleventh Amendments to the United States Constitution; failed to consider mitigating circumstances; and imposed a harsh and unconscionable sentence. Nguyen, however, does not develop his constitutional contentions beyond the summary caption of his brief,

nor does he cite to authority for it.[1] We limit our analysis to his argument that his sentence was harsh and unconscionable.[2]

> Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. We recognize a "strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably." This court is reluctant to interfere with a trial court's sentence because the trial court has a great advantage in considering the relevant factors and the demeanor of the defendant. The defendant must show some unreasonable or unjustifiable basis in the record for the sentence imposed.

State v. Echols, 175 Wis.2d 653, 681-82, 499 N.W.2d 631, 640-41 (citations omitted), *cert. denied*, 114 S. Ct. 2461 (1993).

Nguyen argues that his sentence—three years consecutive on the three recklessly-endangering-safety-while-armed counts, and nine months concurrent on the fourth count of recklessly endangering safety by use of a dangerous weapon—was an erroneous exercise of sentencing discretion because it was based on an improper factor and because the court placed undue emphasis upon one factor, the seriousness of the offense.

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[1] ***State v. Scherreiks,*** 153 Wis.2d 510, 520, 451 N.W.2d 759, 763 (Ct. App. 1989). We declined to address a constitutional argument relating to sentencing which was not developed and not supported by citation to authority.

[2] Nguyen did not raise the sentencing issue before the trial court, nor did the court decide it. Ordinarily this court will not determine an issue raised for the first time on appeal; ***Segall v. Hurwitz,*** 114 Wis.2d 471, 489, 339 N.W.2d 333, 342 (Ct. App. 1983); however, the parties have briefed this issue and its resolution completes the appellate argument.

First, Nguyen alleges that the trial court improperly considered his admission at sentencing that he was a member in the Latin Kings street gang. He argues that he was charged with no gang-related activity, nor even proven to be a gang member; thus, the trial court should not have considered his gang membership at sentencing. He is wrong.

In a wide-ranging and lengthy statement, the trial court carefully analyzed the factors upon which Nguyen's sentence was based. They included, among others, the nature of the offenses, Nguyen's needs, and the public weal. These were the proper factors the court had to address. ***Id***. The trial court referred to Nguyen's involvement in gang activities, from which the community needed protection. Membership in a group which advocates commission of criminal acts relates to Nguyen's future endangerment to society; his associates are likely to encourage commission of additional crime. *See* ***Dawson v. Delaware,*** 503 U.S. 159, 166 (1992). Gang membership is not an improper factor for a sentencing trial court to consider.

Nguyen argues that the trial court overemphasized the seriousness of the shootings while down-playing other factors, including Nguyen's lack of family support and the abusive environment in which he lived. As stated above, a trial court has wide discretion after considering the three basic sentencing factors: the seriousness of the offense, rehabilitative needs of the defendant, and public protection—to place emphasis on one or another. ***State v. Hamm,*** 146 Wis.2d 130, 154, 430 N.W.2d 584, 595 (1988). Nguyen fails to demonstrate from the record that the senseless shooting of three teenage boys on a playground is a lesser factor. The trial court understandably viewed the three shootings as a horrific and completely unjustified act. As to Nguyen's second argument—that the trial court did not give enough emphasis to Nguyen's allegedly abusive and hostile environment and his family's failure to give him sufficient support—it was considered by the trial court and given an emphasis which we cannot say was a discretionary misuse. Nguyen's sentence was neither harsh nor unconscionable given the nature of the crimes for which he was convicted.

III. SUMMARY

In sum, none of the arguments presented by Nguyen show reversible error. Accordingly, we affirm the judgment and the order.

By the Court.—Judgment and order affirmed.

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