COURT OF APPEALS
DECISION
DATED AND RELEASED

May 29, 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. 95-1027-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JASON TYRRELL,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed*.

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Jason Tyrrell appeals from a judgment of conviction, following a jury trial, for first-degree intentional homicide while armed, first-degree recklessly endangering safety while armed, and theft of a firearm. He argues that the trial court should have suppressed his lineup identification and the evidence gained in the search of his room. He also argues

that the trial court improperly failed to sever the theft-of-a-firearm charge from the other two charges. We reject his arguments and affirm.

On April 19, 1994, at approximately 5:00 p.m., Tyrrell fatally shot Marcus Shaw and wounded Charles Jones. Jones and another witness identified Tyrrell as the assailant.

Immediately after the shooting, police officers conducted a search of Tyrrell's bedroom. Tyrrell was living with his grandmother, who gave the police permission to conduct the search. The police found several items that had been stolen ten days earlier from a Milwaukee police officer's car. Tyrrell subsequently admitted that, along with the stolen items found in his bedroom, he had stolen the gun used in the shooting from the police officer's car.

On May 9, 1994, the police conducted a lineup with Tyrrell and three fill-ins. The record does not indicate who viewed the lineup. According to the transcript from the suppression hearing, three or four witnesses to the shooting viewed the lineup and some of them knew Tyrrell by name at the time.

Tyrrell filed a motion to suppress the fruits of the search of his bedroom and his lineup identification. He also filed a motion to sever the theft-of-the-firearm count from the other two counts. The trial court denied these motions.

Tyrrell first argues that the lineup identification should have been suppressed. He contends that the lineup was "impermissibly suggestive" because the people "who filled in the array in no way" resembled him.

This court independently determines whether a lineup procedure is so impermissibly suggestive that it denies a defendant due process. ***Powell v. State***, 86 Wis.2d 51, 64-66, 271 N.W.2d 610, 617 (1978). The appellant must show that the identification procedure was so suggestive that it created a substantial likelihood of misidentification. ***Id.***, 86 Wis.2d at 64-66, 68, 271 N.W.2d at 616-617. If a defendant can prove that the procedure was

"impermissibly suggestive," then the burden shifts to the State to prove that the identification was still reliable under the totality of the circumstances. ***Id.*** at 65-66, 271 N.W.2d at 617.

Tyrrell has failed to meet the burden of proving unnecessary suggestiveness that created a substantial likelihood of misidentification in the lineup procedure. Significantly, there was no dispute as to the identity of the shooter. Tyrrell had admitted that he shot Marcus and Jones; the disputed issue was self-defense. Additionally, there was no evidence presented at trial with respect to the lineup.

Tyrrell next argues that the trial court should have suppressed the evidence gained in the search of his room. The trial court concluded that Tyrrell's grandmother lacked actual authority to consent to the search but, relying on ***Illinois v. Rodriguez***, 497 U.S. 177 (1990), concluded that the police were justified under the circumstances in relying on the grandmother's apparent authority.

We review constitutional issues *de novo*. ***State v. West***, 185 Wis.2d 68, 89-90, 517 N.W.2d 482, 489 (1994). The appellant bears the burden of proving that a search was illegal or that he/she had a reasonable expectation of privacy. ***Id.***, 185 Wis.2d at 89, 517 N.W.2d at 489.

The police do not violate the Fourth Amendment when they search an area in the reasonable, though mistaken, belief that they had proper consent to do so. ***Rodriguez***, 497 U.S. at 186; *see also* ***State v. Whitrock***, 161 Wis.2d 960, 982-983, 468 N.W.2d 696, 705-706 (1991). There is no dispute that the police were given consent to search Tyrrell's room by his grandmother. They had no reason to doubt the grandmother's statement that she was the "keeper of the house" and, therefore, that she had the authority to consent to the search of a bedroom located in her house.

Finally, Tyrrell argues that the trial court improperly joined the theft-of-a-firearm charge because it was not sufficiently related to the other two charges. He also argues that the probative value of the theft-of-a-firearm charge was substantially outweighed by its prejudicial effect.

Under § 971.12(1), STATS., charges may be joined if they "are of the same or similar character or based on the same act or transaction." Once a defendant moves for severance, a trial court must weigh the potential prejudice of joinder "against the interests of the public in conducting a trial on the multiple counts." ***State v. Locke***, 177 Wis.2d 590, 597, 502 N.W.2d 891, 894 (Ct. App. 1993). We will uphold the trial court's decision unless it erroneously exercised its discretion and caused "substantial prejudice" to the appellant. ***Id.*** In evaluating the potential for prejudice, the risk of prejudice arising because of joinder is not significant when evidence of the counts sought to be severed would be admissible in separate trials. ***Id.*** Thus, an "other crimes" analysis is required. ***Id.*** An "other crimes" analysis requires that a court determine whether the evidence fits within one of the exceptions in § 904.04(2), STATS., which includes opportunity and identity. ***Id.*** at 597-598, 502 N.W.2d at 894-895. If the § 904.04(2) step is satisfied, then the court must engage in a § 904.03 balancing of whether any unfair prejudice from the evidence outweighs its probative value. ***Id.***

We conclude that joinder was proper and the trial court did not erroneously exercise its discretion in denying Tyrrell's motion to sever. Tyrrell admitted to stealing the gun and the other items from the police car ten days before the shooting. As the State argues, Tyrrell's admission

> certainly proved [his] ... opportunity to commit the two shootings .... Because there is no dispute that the stolen gun was the same gun used to shoot Shaw and Jones, it is obviously probative of the appellant's identity as the shooter ....

Further, Tyrrell has failed to show that unfair prejudice resulted from joining the theft-of-a-firearm charge with the other two charges. We conclude, therefore, that the trial court did not erroneously exercise its discretion in refusing to sever the theft-of-a-firearm charge from the other charges.

By the Court. – Judgment affirmed.

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