COURT OF APPEALS
DECISION
DATED AND RELEASED

March 5, 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. 95-1836-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BENTURA MARTINEZ,

Defendant-Appellant.

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

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Bentura Martinez appeals from a judgment of conviction for eight counts of first-degree sexual assault, one count of armed robbery, and one count of burglary. *See* §§ 940.2251(1)(b), 943.10(1)(a) & (2)(a) and 943.32(1)(a) & (2), STATS.

On appeal, Martinez argues that: (1) the procedures used to identify him were impermissibly suggestive and unreliable and should have been excluded from evidence; (2) his right to confrontation and his right to present a defense were violated when the trial court precluded his full examination of a witness; and (3) the trial court submitted an unconstitutional flight instruction. We affirm.

At trial, Martinez testified that on April 23, 1994, around 6:00 p.m., he left the home of a family friend to visit a local tavern. He consumed a few alcoholic beverages at the tavern and left at approximately 7:30 p.m. for another tavern, where he consumed more alcoholic beverages. He eventually returned to the first tavern, staying there until approximately 2:30 a.m. He then went to his father's home to get some sleep.

The victim's boyfriend, Robert Reynolds, stated that on that same evening, he and the victim returned to his home at 12:30 a.m. and eventually went to sleep. A few hours later, they were awakened in Reynolds's bedroom by a man with a gun, later identified as Martinez. Reynolds was told to "look down" while Martinez repeatedly sexually assaulted the victim. After the sexual assaults, Martinez physically assaulted Reynolds, taking his wallet and forcing him to open a closet safe where he took approximately $700. Martinez then left.

The victim testified that she had never seen Martinez before. The victim described Martinez as an overweight Hispanic male in his twenties. Reynolds, who had met Martinez previously, identified Martinez after looking at fifty or sixty photographs. The photograph selected by Reynolds was then placed with three others for the sexual-assault victim to view. From the four pictures, she chose Martinez as her assailant. Thereafter, the police department conducted a lineup that was viewed by both Reynolds and the victim. The lineup consisted of four Hispanic males, including Martinez. At the time of the lineup, Martinez was twenty-six years old, stood five feet eight inches tall and weighed 220 pounds. The other three men were: (1) twenty-four years old, five feet eight and 230 pounds; (2) twenty-four years old, five feet eight and 180 pounds; and (3) eighteen years old, five feet five and 156 pounds. Both the victim and Reynolds again identified Martinez as the assailant at the lineup. At trial, Martinez moved for the suppression of the identification testimony, alleging that the procedures used were unduly suggestive. The trial court

denied the motion. A jury subsequently convicted Martinez of the sexual assaults, burglary and robbery.

Martinez argues that the procedures used to identify him were impermissibly suggestive and unreliable and should have been excluded from evidence by the trial court. On appeal, a challenge to the suggestiveness of identification procedures raises an issue of law that we review *de novo*. ***State v. Wilson***, 179 Wis.2d 660, 682, 508 N.W.2d 44, 52–53 (Ct. App. 1993), *cert. denied*, 115 S. Ct. 100, 130 L.Ed.2d 48 (1994). We accept a trial court's findings of fact as true unless they are clearly erroneous. ***Id.***, 179 Wis.2d at 682-683, 508 N.W.2d at 53. When examining a challenge to pre-trial identification procedures, we initially decide if the procedures were characterized by "unnecessary suggestiveness." ***Fells v. State***, 65 Wis.2d 525, 537, 223 N.W.2d 507, 514 (1974). If such a situation exists, we must then determine whether "despite the unnecessary suggestiveness, the `totality of the circumstances' show that the identification was nevertheless reliable." ***Id.***

The defendant has the burden to prove that the identification procedures were impermissibly suggestive. ***State v. Mosley***, 102 Wis.2d 636, 652, 307 N.W.2d 200, 210 (1981). If the defendant fails to meet this burden, the inquiry is at an end and the evidence is admissible. ***Id.***

In this case, both the photo array and the lineup were not unduly suggestive. As noted, Reynolds picked out a picture of Martinez after viewing fifty or sixty photographs. The police then showed that picture along with three others to the victim. Martinez argues that the photo array shown to the victim was suggestive because he was the only Hispanic depicted. There is no evidence in the record, however, that Martinez was the only Hispanic in the photo array. The only evidence regarding this issue is the victim's statement that the other three men in the photo array did not look Hispanic to her. Further, all the photo array participants reasonably resembled Martinez in almost all physical characteristics, including that they all had beards.

The lineup procedure used four participants, all clean-shaven Hispanic men dressed in identical jail clothes. Martinez, too, was clean-shaven. Martinez argues that the lineup was impermissibly suggestive due to the differences in age, height, and weight between him and the other participants.

Physical differences in participants do not make a lineup suggestive. *See* ***Powell v. State***, 86 Wis.2d 51, 67, 271 N.W.2d 610, 618 (1978). The lineup need only be reasonably fair. ***Id.*** The law does not require that lineups shown to witnesses include near identical or look-alikes of the witness descriptions. The trial court must look to the totality of the circumstances surrounding the identification to determine whether due process was violated. ***Stovall v. Denno***, 388 U.S. 293, 302, 87 S. Ct. 1967, 1972, 18 L.Ed.2d 1199, 1206 (1967).

All the lineup participants were Hispanic men around the same age. One participant was almost the identical weight and height as Martinez. The remaining two were slightly shorter and lighter. Again, dissimilarities between individuals composing a lineup, standing alone, are insufficient to establish impermissible suggestiveness. As observed in ***U.S. v. Lewis***, 547 F.2d 1030, 1035 (8th Cir. 1976), *cert. denied*, 429 U.S. 1111, 97 S. Ct. 1149, 51 L.Ed.2d 566 (1977), "[p]olice stations are not theatrical casting offices; a reasonable effort to harmonize the lineup is normally all that is required." Martinez also argues that his lineup was suggestive because he has a tatoo on his arm that was exposed during the lineup. The police conducting the lineup made certain that the arms and hands of all the men in the lineup were held behind their backs. The tatoo on Martinez's arm, however, was briefly exposed. Martinez offers no proof that this made the lineup unduly suggestive. There was no evidence that the victim ever saw or was aware of the tatoo before viewing Martinez in the lineup. As noted, Martinez bears the burden of showing that the photographs and lineup were unnecessarily suggestive. Martinez has failed to meet that burden.

Next, Martinez contends that the trial court erroneously limited his cross-examination. Martinez sought to ask Reynolds about his alleged drug dealing activities. Martinez also attempted to elicit evidence relating to the possible presence of an African-American person in Reynolds's apartment, in an attempt to argue that somebody else committed the crimes.

Unless otherwise prohibited, relevant evidence is admissible. RULE 904.02, STATS. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." RULE 904.01, STATS. On cross-examination, the proper test "is not whether the answer sought will elucidate any of the main issues in the case but whether it will be useful to the

trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony." ***State v. Lindh***, 161 Wis.2d 324, 348, 468 N.W.2d 168, 176 (1991) (citation omitted). Cross-examination will not be allowed unless there is a reasonable relation between the evidence sought to be introduced and the proposition to be proved. ***Id.***

The scope of cross-examination is a question committed to the broad discretion of the trial court. ***Id.*** This court will reverse a trial court's limitation or prohibition of cross-examination if the ruling represents an erroneous exercise of discretion. ***Id.***, 161 Wis.2d at 348-349, 468 N.W.2d at 176. This court will affirm if a reasonable basis exists for the trial court's ruling. ***Id.***, 161 Wis.2d at 349, 468 N.W.2d at 176.

As noted, Martinez sought to elicit evidence from Reynolds regarding Reynolds's alleged drug dealing. The trial court excluded this evidence as irrelevant. We agree. Evidence of alleged drug dealing had no tendency to make more or less probable any fact of consequence to the determination of his guilt or innocence. *See* RULE 904.01, STATS.

Martinez further claims that the trial court erroneously excluded questions concerning hair found on Reynolds's bed sheet. Martinez sought to present testimony that a defense expert found two hairs on Reynolds's bed that did not belong to Martinez, Reynolds, or the victim. The defense expert testified that the hair belonged to an African-American of unknown sex. The trial court determined that this line of questioning was irrelevant. We agree. There was no evidence presented to the trial court that the assailant was an African-American male.

Finally, Martinez argues that WIS J I—CRIMINAL 172 regarding flight should not have been given because it impermissibly shifted the burden of proof to him to persuade the jury that he did not flee. We disagree. WIS J I—CRIMINAL 172 instructs the jury that if, from the evidence, it finds that the defendant had fled, the jury could consider that fact.[1] Moreover, Martinez

[1] WIS J I—CRIMINAL 172 provides:

> Evidence of the conduct or the whereabouts of a person after a crime has

waived this issue by failing to object to the instruction at trial. *See* § 805.13(3), STATS.; ***State v. Marshall***, 113 Wis.2d 643, 653, 335 N.W.2d 612, 617 (1983). We do not believe that this is an appropriate case to exercise our power of discretionary review. *See* § 752.35, STATS.

By the Court.—Judgment affirmed.

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

(..continued)

> been committed or after that person has been accused of crime are circumstances which you may consider along with all the other evidence in determining guilt or innocence. Whether or not evidence of such conduct or whereabouts in this case shows a consciousness of guilt, and whether or not consciousness of guilt shows actual guilt are matters exclusively for you, the jury, to determine and you must consider that there may be many reasons unrelated to guilt for such conduct. You must also consider that feelings of guilt do not necessarily reflect actual guilt.