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. 95-1849-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SALAAM P. JOHNSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed*.

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

PER CURIAM. Salaam P. Johnson appeals from a judgment of conviction, after a jury trial for five counts of armed robbery, threat of force; one count of attempted robbery, threat of force; and one count of robbery, threat of force; for which he received consecutive terms of imprisonment totalling eighty-six years. He raises three issues for our review: whether the trial court erred in failing to suppress his identification at a lineup; whether the trial court

erroneous exercised its discretion in excluding his proffered evidence of an alleged misidentification at a lineup; and whether the trial court erroneously exercised its discretion in admitting evidence of a gun found in the apartment at which he was arrested.[1] We reject his arguments and affirm.

I. BACKGROUND.

Police arrested Johnson for a series of armed robberies at fast food restaurants and a bank located in Milwaukee County. When arresting him at an apartment rented by Trinece Hazelwood, the police found a handgun under a bed. Police conducted a lineup which included Johnson; forty-five witnesses participated. The jury convicted Johnson of all counts. Additional facts are discussed with the relevant issue.

[1] Johnson did not move the trial court for relief from his sentences. He also argues that the court imposed a severe sentence because he exercised his right to a trial by jury. A motion for sentence modification addressed to the trial court was a prerequisite to his appeal challenging the sentence, absent compelling circumstances. ***State v. Meyer,*** 150 Wis.2d 603, 608-09, 442 N.W.2d 483, 485 (Ct. App. 1989). Johnson has shown no compelling circumstance. Because Johnson failed to fulfill this condition precedent to his appeal, we decline to consider the sentencing issue. ***Id.*** at 609, 441 N.W.2d at 486; *see also* § 973.19(4), STATS.

II. ANALYSIS.

A. Lineup suggestiveness.

Johnson argues that the lineup was impermissibly suggestive and that the consequent admission of evidence of his identity violated his due process rights. We disagree.

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 trial court's findings of historical fact, including assessments of credibility, however, will be upheld unless they are clearly erroneous. ***State v. Wilson,*** 179 Wis.2d 660, 682-83, 508 N.W.2d 44, 53 (Ct. App. 1993), *cert. denied*, 115 S. Ct. 100 (1994). First, the appellant must show that the identification procedure was so suggestive that it created a substantial likelihood of misidentification. ***Powell,*** 86 Wis.2d at 64-66, 68, 271 N.W.2d at 616-17. 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.

First, Johnson argues that the large number of witnesses, ninety summoned from thirty-eight robbery complaints, of whom forty-five appeared, "suggested" to all that the perpetrator of crime affecting each witness must be in the lineup. Johnson supplies no authority for this novel proposition. His conjecture is deflated by the fact that thirty-five of the witnesses could not identify any offender on the panel. We deem the argument meritless.[2]

Second, Johnson contends that the witnesses shared information, or at least had the opportunity to share information, among each other. The police divided the witnesses into four groups. An officer advised them not to

[2] RULE 809.19(1)(e), STATS., requires citation to authority. This court is free to disregard an argument that fails to cite to authority. ***State v. Shaffer,*** 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

discuss the lineup. After each viewing, police officers interviewed the group. Although some communication between the witnesses occurred, the record fails to show that they discussed the lineup. Again, Johnson does not cite to authority. The argument lacks merit.

Third, Johnson assails his identification by victim Dennis Givens. Givens was an assistant manager in a Kentucky Fried Chicken restaurant that Johnson robbed. On the day after the offense, Givens identified Johnson from a four-photograph array presented by the police. The officer told Givens that he had selected the perpetrator. Givens appeared at the subsequent lineup and again identified Johnson. Johnson now asserts that, given the conduct of the lineup, there is "no assurance" that Givens had not shared his information with other potential witnesses. Again, we reject this argument because it contains no cite to authority and because our review of the record demonstrates that no discussions about Givens's photographic identification two months earlier ever surfaced.

Last, Johnson complains that he stood out in the lineup because his hair was longer than the others. He reasons, again without citation to authority, that because the witnesses were convinced that their culprit was in the lineup, they instinctively would select the stand-out with the long hair. The trial court demolished this *non sequitur* by noting that all four lineup participants were of approximate same age, height, complexion and wore similar attire. It concluded that the minor hirsute difference did not constitute impermissible suggestiveness. This finding of fact is not clearly erroneous. *See* ***Wilson,*** 179 Wis.2d at 682-83, 508 N.W.2d at 53. We agree with the trial court's conclusion that Johnson has failed to sustain his burden that his lineup was impermissibly suggestive.

B. Alleged misidentification evidence.

Count six of the criminal complaint charged Johnson with the robbery of a bank. The State based its prosecution upon a bank teller's description of the offender and upon the teller's identification of Johnson at the lineup. By the time of Johnson's preliminary hearing, the State became convinced that he was not the perpetrator of the bank robbery. The teller had misidentified Johnson, and the guilty person apparently had been apprehended

and faced federal prosecution. Further, the State recognized that a bank surveillance tape cleared Johnson of the bank robbery. The trial court granted the State's motion for voluntary dismissal.

At his trial, Johnson proffered two witnesses—the teller and another who had misidentified him as the bank robber. He argues that they "serve as an example of how witnesses can be mistaken in identification at the lineup." The trial court determined that this evidence was irrelevant. *See* RULE 904.01, STATS. (defining relevant evidence). It noted that numerous reasons can be ascribed to the bank's misidentifications, none of which necessarily pertain to the other offenses.[3]

A trial court possesses great discretion in determining whether to admit or exclude evidence. ***State v. Evans,*** 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). We will reverse such a determination only if the trial court erroneously exercises its discretion. ***Id.*** "A proper exercise of discretion consists of the court applying the relevant law to the applicable facts in order to reach a reasonable conclusion." ***State v. Jackson,*** 188 Wis.2d 187, 194, 525 N.W.2d 739, 742 (Ct. App. 1994). The trial court reasoned that a misidentification in one case says nothing about identification in another, and entirely discrete, case. We agree. Evidence of Johnson's misidentification in the bank robbery does not make a fact that is of consequence in the other cases more or less probable than it would be without the evidence. The trial court did not erroneously exercise its discretion.

C. Handgun evidence.

Johnson contends that the trial court erroneously exercised its discretion by admitting into evidence a loaded 9mm, fifteen-round handgun. An arresting officer found it under a bed at an apartment where the officer arrested Johnson. The police first tried his mother's house and, failing to find him there, went to this apartment which was leased by Johnson's girlfriend,

[3] Each offense was discrete, occurred at different times and places, and involved different victims.

Trinece Hazelwood. Johnson had an apartment in the same building. Hazelwood identified the handgun as Johnson's.

Johnson argues that the handgun is irrelevant to the issues because the evidence fails to establish Johnson as owner of the handgun or that it was used in any of the robberies. Again, the standard of review is whether the trial court erroneously exercised its discretion by admitting the evidence. ***Evans***, 187 Wis.2d at 77, 522 N.W.2d at 557.

The trial court admitted the handgun into evidence over Johnson's objection. It determined, as gleaned from the context of the record at the time of the handgun's admission, that the State need not prove Johnson's ownership. Evidence indicates that when Johnson was arrested he admitted that the gun was his and told the police where he purchased it. It is conceded in the record that the crimes involved the use of, or pretended use of, a handgun. We conclude that the trial court, within the exercise of its discretion, properly determined that the handgun was relevant. *See* ***Thompson v. State,*** 83 Wis.2d 134, 144, 265 N.W.2d 467, 472 (1978) (a weapon found in a defendant's possession after the crime that could have been used in the crime is admissible even though the record in inconclusive whether it is the crime-weapon).

In sum, we reject all of Johnson's arguments and affirm.

By the Court.—Judgment affirmed.

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