COURT OF APPEALS
DECISION
DATED AND RELEASED

August 13, 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. 95-2855-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHESTER HILL,

Defendant-Appellant.

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

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

PER CURIAM. Chester Hill appeals from a judgment of conviction entered after a jury found him guilty of two counts of armed robbery (party to a crime), two counts of kidnapping (party to a crime), and three counts of first-degree sexual assault, contrary to §§ 943.32(2)(b), 939.63, 939.05, 940.31(1)(a), and 904.225(1)(b), STATS.

Hill raises two issues of error: (1) whether the trial court erred in denying his motion to suppress the identification testimony of the victim; and (2) whether the trial court erred in excluding evidence of a third party defense. Because the identification procedure used by the State was not impermissibly suggestive, and because the trial court did not erroneously exercise its discretion in excluding evidence of a third party defense, we affirm.

I. BACKGROUND

On August 4, 1994, two men displaying a sawed-off shotgun approached Kiya E. and her companion, Samuel Johnson, while they were parked in a car near North 20th Street and West Wisconsin Avenue, in the City of Milwaukee. The two men ordered Kiya and Johnson to surrender their valuables; commandeered the car; and then drove around the city, with Kiya and Johnson in the car, until they reached an undesignated alley. One of the men ordered Johnson into the trunk of the car. The other man grabbed Kiya and led her down the alley where he ordered her to remove her clothing and then performed three acts of sexual assault.

After Kiya was released, she returned home and called the police. She was examined at the sexual assault treatment center and subsequently showed police the crime scene. Three days later, in a police department lineup, Kiya identified Hill as the man who had assaulted her and Delano Craig as Hill's accomplice. The basis of her identification of Hill was his face, physical build, and defective eye. Johnson identified Craig in the lineup, but was unable to identify Hill. In a separate trial, Craig was found guilty of the same charges but his sentencing was adjourned until after he could testify for the State against Hill. Hill did not testify on his own behalf and, as a defense, argued there was reasonable doubt that he had actually committed the crimes charged.

Prior to trial, Hill moved to suppress his identification from the police lineup as impermissibly suggestive, and moved to admit third party defense evidence. The trial court denied both motions. Hill now appeals.

II. DISCUSSION

A. Identification/Suppression.

Hill first claims that the trial court erred in refusing to suppress his identification made from the police department lineup. When determining whether pre-trial identification evidence, i.e., a police conducted lineup, should have been suppressed, we apply a two-step test. ***State v. Marshall***, 92 Wis.2d 101, 117, 284 N.W.2d 592, 599 (1979). First, we must decide whether the lineup was conducted under circumstances of impermissible suggestiveness. ***Id.*** If we answer this question affirmatively, we must then determine whether the totality of the circumstances demonstrates that the identification was nevertheless reliable in spite of the impermissible suggestiveness. ***Id.*** The defendant has the burden of demonstrating impermissible suggestiveness. ***State v. Mosley***, 102 Wis.2d 636, 652, 307 N.W.2d 200, 210 (1981). If this burden is not met, no further inquiry is required. ***Id.*** Thus, we first examine whether the lineup used here was impermissibly suggestive. This is a constitutional question that we decide *de novo*. ***State v. Kaelin***, 196 Wis.2d 1, 10, 538 N.W.2d 538, 541 (Ct. App. 1995).

At trial, Kiya testified that she identified Hill based upon his face, his physical build, his stature, his color and his defective or lazy eye. Hill argues he was made more conspicuous by the fact that he differed in skin tone, height, and weight from the others in the lineup. He argues that these differing characteristics, when coupled with the fact that he was the only individual in the lineup with a "lazy eye," produced impermissible suggestiveness. We are not persuaded.

The trial court, after hearing testimony of two officers who assisted in conducting the lineup, the testimony of Kiya, and reviewing the exhibit evidence, correctly paraphrased the appropriate legal standards for examining an impermissible suggestiveness claim. It then made findings of fact that all six of the participants in the lineup (with the exception of number three) were of similar height,[1] weight, and skin tone. In addition, no conversations occurred during the course of the lineup; the supervising detectives remained

[1] This finding can be reasonably inferred by a reading of the trial court's explicit comment while it was making other findings: "My observation of the-of the picture, as shown in Exhibit 2, suggests that, ah, they are all, except for perhaps No. 3 who's a little taller than the rest, ... that they all are similar in ... height."

with the participants in the lineup and viewers of the lineup throughout; and there was no indication that anything irregular occurred.

The record demonstrates that the lineup consisted of Hill and his companion, Craig, along with four other fillers. All were black males and with the exception of filler number three, all ranged from 6'1" to 6'3" in height. Again with the exception of number three, they all ranged in weight from 170 to 200 lbs. Hill's skin tone, while lighter than four of the other fillers, was of the same hue as filler number three. It appears that all had some degree of facial hair.

Hill places heavy emphasis on the victim's observance of a lazy or squinty eye to demonstrate impermissible suggestibility. The record points to an opposite conclusion. Although the victim did mention that Hill's squinty eye was one factor she used in identifying Hill, her identification was not solely based on that characteristic. She also based her identification on the wholeness of his face and his total physical appearance. Moreover, after the lineup, Kiya told one of the supervising detectives that the squinty eye feature of Hill's right eye was not as noticeable as it was on the night of the incident. The photo of the lineup supports that observation. The supervising detectives were aware of this physical characteristic and attempted to find a filler with the same characteristic, but were unsuccessful.

Based on the foregoing, we conclude that the lineup in this case was not impermissibly suggestive. Hill's claims of physical characteristic disparities are unfounded. We conclude from our review that the fillers in the lineup were sufficiently similar in physical characteristics to Hill to satisfy his due process rights. "While it might be a better practice to use in a lineup persons whose every feature matches, neither due process of law nor common sense requires such a procedure." ***Mallard v. State***, 661 S.W.2d 268, 277 (Tex. App. 1983). Moreover, due process does not require that exact clones of the suspect be used as fillers. ***Wright v. State***, 46 Wis.2d 75, 85-86, 175 N.W.2d 646, 651-52 (1970).[2] We conclude that the supervising detectives followed all

[2] It is apt to recall Justice Robert W. Hansen's graphic observation in ***Wright v. State***, 46 Wis.2d 75, 175 N.W.2d 646 (1970): "If an Eskimo were to be involved in a burglary in Vernon county, it is not to be expected that the sheriff would seek to locate or send to the Arctic for tribesman who could pass as brothers." ***Id.*** at 86, 175 N.W.2d at 652. A federal case also offers poignant analysis:

procedures reasonably necessary under the circumstances to achieve a fair result and thus, no impermissible suggestiveness occurred. Accordingly, we need go no further in our analysis.

B. Third Party Defense.

Hill next claims that the trial court erred by refusing to allow the admission of evidence indicating that a third party, Ronald D. McCane, committed the crimes that Hill was accused of committing.

To succeed in introducing evidence that a third party may be responsible for crimes alleged against an accused, the accused must show "'a legitimate tendency' that the third person could have committed the crime." ***State v. Denny***, 120 Wis.2d 614, 623, 357 N.W.2d 12, 17 (Ct. App. 1984). This test is satisfied if motive and opportunity on the part of the third party are shown, and if there is "some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances." ***Id.*** at 624, 357 N.W.2d at 17. Although an accused is not required to establish the guilt of a third person with that degree of certainty required to sustain a conviction in order for this type of evidence to be admitted, evidence that simply affords a possible ground of suspicion against another person should not be admitted. ***Id.*** at 623, 357 N.W.2d at 17.

A review of a trial court's evidentiary ruling whether the "legitimate tendency" test has been met is conducted under the erroneous exercise of discretion standard. ***State v. Oberlander***, 149 Wis.2d 132, 140-44, 438 N.W.2d 580, 583-84 (1989).

Hill presents four factors to support the proposed connection between McCane and the crimes charged in this case: (1) McCane committed a strikingly similar crime seven weeks after the instant offense; (2) there is

(..continued)
"Police stations are not theatrical casting offices; a reasonable effort to harmonize the lineup is normally all that is required." ***United States v. Lewis***, 547 F.2d 1030, 1035 (8th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977).

evidence that suggests that McCane's accomplice was the former girlfriend of Craig; (3) Craig knew McCane; and (4) McCane and the defendant are similar in appearance. In addition, Hill asserts that the connections between McCane and this incident were not so remote in time, place or circumstances. We are not convinced.

In denying Hill's motion to introduce this evidence, the trial court concluded that the proffered evidence "doesn't provide anything more than grounds for suspicion based upon those representations that have been made and does not rise to any level ... necessary under Denny case legitimate tendency standard." In reviewing a trial court's basis for resolving this type of motion, we are not restricted to the precise rational stated by the court but may independently review the record to ascertain whether there is any independent basis in the record to sustain the trial court's exercise of discretion. *See* ***Hammen v. State***, 87 Wis.2d 791, 800, 275 N.W.2d 709, 714 (1979).

A review of the evidentiary motion record reveals the following. The crimes committed by both Hill and McCane were similar in nature and perpetrated in the same general area of the city, although McCane's admitted actions took place seven weeks later. Although it is argued that the physical characteristics of Hill and McCane are similar, the record belies this conclusion for three reasons. First, McCane is 5' 7" tall, whereas Hill stands 6' 2" tall. Second, the victims never wavered from their estimate that the accused was not less than 5' 11" tall. Lastly, there is no evidence to support Hill's counsel's suggestion that McCane also had a lazy right eye.

What is absent from the record is also significant. Hill offered no proof that McCane had a motive to rob and kidnap Johnson or to rob, kidnap and sexually assault Kiya. Secondly, there was no showing that McCane had an opportunity to commit the charged crimes. Finally, Hill presented no evidence connecting McCane with the charged crimes.

The trial court noted the presence of a positive identification of Hill and a confession by his accomplice. After applying the standard required by Denny, it incisively observed that "the evidence that's in the record ... doesn't provide anything more than grounds for suspicion" The purpose of the legitimate tendency test is "to place reasonable limits on the trial of collateral

issues ... and to avoid undue prejudice to the [state] from unsupported jury speculation as to the guilt of other suspects." ***Denny***, 120 Wis.2d at 622, 357 N.W.2d at 17 (citation omitted). Based on our review of the record, the trial court did not erroneously exercise its discretion in refusing to admit Hill's third party defense evidence because Hill failed to show that there was a legitimate tendency that McCane could have committed the crimes.

By the Court. – Judgment affirmed.

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