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DISTRICT II/IV

August 13, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP447-CR State of Wisconsin v. Marcus D. Jackson (L.C. # 2010CF261)

Before Blanchard, P.J., Lundsten and Sherman, JJ.

Marcus Jackson appeals the circuit court's judgment convicting him, after a jury trial, of one count of armed robbery as a party to a crime. *See* WIS. STAT. §§ 943.32(2); 939.05 (2011-12).[1] Jackson argues on appeal that the circuit court erred in ruling that a police officer's testimony about the statements made to the officer by a witness while the witness was viewing a photo array was inadmissible hearsay. Based on our review of the briefs and record, we

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

Jackson was charged with armed robbery, as a party to a crime, for the robbery of a jewelry store with another man, Vernon Fields. During the robbery, Fields carried a gun and raised it. The store owner pulled out a gun and shot Fields. Security cameras inside the jewelry store captured video of the incident. Fields' DNA was identified on a handgun and in blood discovered in a nearby alley where Fields was found after the robbery. Nearby, police found two surgical gloves that contained DNA that matched Jackson's DNA. A third surgical glove located there had Fields' DNA on it.

Around the time of the robbery, a man named Duward Mays was riding his bike in the vicinity. Mays testified at trial that, at that time, he saw two black men, one of whom was staggering across the street. The other man was walking two to three feet behind the first man. Mays rode another half a block and then turned around and saw that the man who had been staggering had fallen to the ground. Mays approached the man and saw that he was bleeding and had a gun. Mays saw the other man get into a nearby van driven by someone else.

Several months later, a police officer showed a photo array to witness Mays that included a picture of Jackson. During cross-examination of the officer, Jackson's counsel tried to elicit testimony that Mays had not picked out Jackson in the photo array and instead had selected photos of two other persons. The State objected, and the circuit court excluded the officer's testimony about Mays' statements as inadmissible hearsay.

On appeal, Jackson challenges the circuit court's exclusion of the officer's testimony about what Mays did or did not say during the photo array. Jackson argues that the officer's

testimony about Mays' statements should have been admitted either as a present sense impression under WIS. STAT. § 908.03(1) or as an identification statement under WIS. STAT. § 908.01(4)(a)3. Although we agree that, on its face, the question does not appear to have been geared to elicit hearsay, we need not decide the issue because Jackson has failed to establish that the proffered testimony was sufficiently relevant, such that the decision to exclude the testimony was error.

Whether to admit evidence is a decision left to the discretion of the circuit court. ***State v. Jackson***, 216 Wis. 2d 646, 655, 575 N.W.2d 475 (1998). Exceptions to the general prohibition, in WIS. STAT. § 908.02, against hearsay evidence "do not operate in a vacuum such that if testimony falls under a hearsay exception it will be admissible no matter what." ***State v. Jacobs***, 2012 WI App 104, ¶27, 344 Wis. 2d 142, 822 N.W.2d 885, *review denied*, 2013 WI 6, 345 Wis. 2d 402, 827 N.W.2d 96. Under WIS. STAT. § 904.02, "[e]vidence which is not relevant is not admissible."

Here, Jackson fails to establish a reasonable relationship between the evidence sought to be introduced and the proposition to be proved. Jackson argues in broad strokes that Mays' failure to identify Jackson in the photo array was relevant to the issue of Jackson's identity and that the statements were potentially exculpatory in nature. However, the prosecutor here did not look to Mays to identify Jackson as the particular black male who fled in the van. Mays agreed, at trial, that he did "get a look" at the man who got into the van near the scene of the robbery, but also said he could only "vaguely remember" the man and stated only that the man was black.

The proper standard for relevancy on cross-examination is "whether [the answer] will be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative

value of the direct testimony." ***Rogers v. State***, 93 Wis. 2d 682, 689, 287 N.W.2d 774 (1980). Given that Mays never identified Jackson in his testimony or elsewhere in the record, Mays' inability to pick Jackson out of a photo array does not tend to make the existence of any fact that is of consequence to the determination of the action more probable or less probable. *See* WIS. STAT. § 904.01. On that basis, we uphold the circuit court's ruling to exclude the proffered evidence, and affirm the judgment of conviction.[2]

IT IS ORDERED that the judgment is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals

[2] On appeal, we may affirm on different grounds than those relied on by the circuit court. ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995). When we affirm on other grounds, we need not discuss our disagreement with the circuit court's chosen grounds of reliance. *See* ***Liberty Trucking Co. v. DILHR***, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973).