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April 3, 2018

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

2016AP2235-CR

State of Wisconsin v. Rosetta L. Bracken (L. C. No. 2013CF4166)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Rosetta Bracken appeals a judgment of conviction for first-degree reckless homicide. She challenges the lineup in which a witness to the homicide identified her as the shooter as impermissibly suggestive. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition and affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21 (2015-16).¹

Bracken was charged with first-degree intentional homicide, by use of a dangerous weapon. According to the criminal complaint, police were dispatched to a reported shooting at approximately 3:05 a.m. in the City of Milwaukee. Upon arrival, officers observed an unresponsive white female who appeared to have been shot in the head. The victim was transported to a hospital and died as a result of three gunshot wounds to the head. The police received an anonymous call to look for three subjects: “Rosie,” “Robin,” and a black male known as “Black” or “Blue.” The tipster had heard a woman identified as Robin Jackson talking about the shooting on the phone and stated Jackson had information that a woman named Rosie was involved. The tipster further indicated that Rosie lived with Jackson, and that Rosie was known to carry a gun and was a very hostile and dangerous person.

Based on this information, police made contact with Robin Jackson. Jackson told police that Rosie Bracken was her sister, and that Bracken had told her that Bracken killed the victim because she believed the victim had set her up to be robbed. Jackson told police the victim had called Bracken for a ride, and when Bracken arrived to pick her up, two masked men with guns attempted to rob Bracken and the victim. During a struggle, Bracken heard the victim say, “Black leave her alone.” That led Bracken to believe the victim set her up.

Jackson also stated that Bracken told her that she was able to get away and back to her car. While she was driving, she saw the victim walking in an alley and picked her up. Bracken

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

also saw an individual known as “Black” walking in the area and picked him up. Bracken also picked up her husband. Bracken drove around and, at one point, the victim was able to jump out of the car. Black chased her, but Bracken got out of the car and also chased the victim and shot her three times in the head.

Police also spoke to a citizen witness who lived near the shooting. The citizen stated that, sometime in the early morning on the day at issue, she heard the sound of car doors slamming and peeked out her front window. When she did so, the citizen observed a black female later identified as Bracken and a white female who was sobbing and yelling quite loudly. The citizen heard the victim yelling, “Rosie, I didn’t do it. It wasn’t me. I didn’t do it, Rosie. Please, believe me.” The citizen observed the black female turn toward the victim and yell out, “Bitch, yes you did and now you know what’s coming next.” The citizen observed the white female immediately drop to her knees and put both of her arms in front of her face. The citizen then observed the black female raise what appeared to be her right arm, point a gun in the direction of the victim, and fire three times in the direction of the victim. The citizen heard the shots and saw muzzle flashes.

The citizen witness subsequently identified Bracken from a lineup. A detective responsible for filling the lineup worked from a photograph of Bracken and information that she was 5 feet 2 inches and 101 pounds. He chose five female inmates from the Milwaukee County Jail who looked as similar as possible to Bracken, “basically the same age group, same height, weight, or at least close to it, and same complexion color as well.” The detective did not consider hair style because that is something that can easily be changed or covered.

Bracken chose to be number four in the lineup. The lineup participants entered the viewing room separately. The participants completed a set of quarter turns, and each said, “Bitch, yes you did” two times. At the conclusion of the viewing, the citizen witness asked to see number four again, so the whole series of participants was run again, one at a time, but with no turns or speaking.

The citizen witness identified number four as the assailant. The citizen witness told the detective what led to her decision:

She believed that [number four] was the person right away but she wished to see and focus more on her entire body. And then she said that after viewing it the second time, it was no doubt and I asked her what was it about No. 4 and she said: Well, it was her age, her complexion, her build, the way she moved as she entered and exited the room, and then she also said it was the bass in her voice on the part of the phrase when it said “you did.” And she said on that, there’s no doubt that that’s the person that she had previously described.

Bracken moved to suppress the citizen witness’s statement on the grounds the lineup was unduly suggestive. The circuit court denied the motion, giving weight to the fact that the subjects of the lineup were not viewed next to each other, and the identification was based in part on the assailant’s voice. Bracken then pleaded no contest to first-degree reckless homicide. The court imposed a sentence of twenty-five years’ initial confinement and twenty years’ extended supervision. Bracken now appeals, arguing the lineup participants “were so different from Ms. Bracken as to make the lineup impermissibly suggestive.”²

² The original challenge in the circuit court was to both the procedure used and the contents of the lineup. However, Bracken’s trial counsel conceded that “there [was] no real challenge to the way that the lineup was conducted.” Thus, Bracken challenges only the makeup of the lineup on appeal.

In assessing the admissibility of pretrial identification evidence, we must initially decide whether the defendant has shown that the identification procedure was impermissibly suggestive. See *Powell v. State*, 86 Wis. 2d 51, 65, 271 N.W.2d 610 (1978). Our analysis ends if the defendant fails to satisfy his or her burden in this regard. *Id.* at 68. If the defendant satisfies the initial step, the State must demonstrate that despite the suggestive procedure, the identification was reliable under the totality of the circumstances. *Id.* at 64-65. Police are not required to conduct a search for identical twins in age, height, weight, or facial features. *Wright v. State*, 46 Wis. 2d 75, 86, 175 N.W.2d 646 (1970). What is required is the attempt to conduct a fair lineup, taking all steps reasonable under the totality of the circumstances to conduct a fair and balanced presentation of alternative possibilities for identification. *Id.*

Here, Bracken has failed to demonstrate that the lineup identification process was impermissibly suggestive. A review of the photographs in the record on appeal confirms the police successfully gathered individuals, with the exception of “number two,” with similar physical characteristics within a reasonable range.³ The lineup consisted of six women, including Bracken. The detective picked five other individuals of similar race, build, complexion, size, and age. Each person in the lineup was dressed identically in rather loose-fitting jail clothing. Bracken did not stand out in the lineup. The makeup of the lineup was reasonable and not impermissibly suggestive despite the minor differences in appearance.

Furthermore, the manner in which the police conducted the lineup mitigated any differences in physical characteristics. Each person was brought out individually and asked to

³ Number two in the lineup had a lighter complexion.

turn around in the same way. Because the members of the lineup were only viewed individually, as opposed to side-by-side, differences in height, weight, and skin tone would be less obvious to the citizen witness. As the circuit court aptly noted, the citizen witness was also instructed to “[k]eep in mind that things like hair styles ... can easily be changed.”

Bracken insists that individuals in the lineup were not similar enough in appearance. She contends “one of the women had significantly lighter complexion than Ms. Bracken and the women had dissimilar hair styles.” She also complains “the women ranged in weight from 130 pounds to 183 pounds and their heights ranged from 5’2” to 5’5”.” However, the law does not require each person in the lineup to be nearly identical to the target. Rather, police need only ensure fairness, i.e., that one person is not highlighted over another. *See Jones v. State*, 47 Wis. 2d 642, 649-50, 178 N.W.2d 42 (1970). The members of the lineup in the present case were chosen so that Bracken did not stand out. The photographs show the women were not so dissimilar in appearance as to make the identification procedure unreliable. Rather, the participants provided a fair and balanced presentation of alternative possibilities. Most importantly, Bracken ignores the fact that the citizen witness chose number four in the lineup because of the way she moved and the bass in her voice. The citizen witness simply chose the person who matched what she had seen and heard, and rejected those who did not. Bracken has not shown the lineup was impermissibly suggestive.

Therefore,

IT IS ORDERED that that the judgment is summarily affirmed. WIS. STAT.
RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals