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October 30, 2018

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

2017AP1186-CR State of Wisconsin v. Tyshun Lavell Lemons (L.C. # 2014CF4409)

Before Kessler, P.J., Brash and Dugan, 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).

Tyshun Lavell Lemons appeals a judgment of conviction entered after a jury found him guilty of armed robbery and first-degree recklessly endangering safety by use of a dangerous weapon, both as a party to a crime. The sole issue on appeal is whether the circuit court erroneously admitted evidence that the robbery victim picked Lemons out of a lineup. Upon our

review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We summarily affirm.

The relevant facts are undisputed. M.A. told police that he was standing next to his silver 2006 Hyundai at approximately 8:25 p.m. on September 30, 2014, when two African-American men approached. One of the men, whom police designated as suspect one, pointed a gun at M.A. while the other man, designated suspect two, rifled through M.A.'s pockets and took M.A.'s car keys. The two suspects then drove away in M.A.'s car.

M.A. described his assailants as clean-shaven black men between the ages of eighteen years old and twenty-five years old with thin builds and dark complexions. M.A. said that the gunman was five feet eleven inches tall and the man who took M.A.'s keys was five feet two inches tall.

A few hours after M.A. was robbed, A.S., an adult motorist, saw the occupants of a silver Hyundai shooting at a blue car. A.S. called the police and reported the shootings. Officers who responded to the report saw M.A.'s silver Hyundai with two people inside. When the officers tried to stop the Hyundai, it entered an alley, and the officers then saw two people get out of the car and attempt to flee on foot. The officers immediately arrested both men, one of whom was subsequently identified as Lemons.

Police placed Lemons in a lineup with five men who were not suspects in the case. The lineup procedure required M.A. to observe each participant walk alone into an empty room and then walk out again before another participant entered. Each participant in the lineup wore

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

identical jail clothing and had a wristband on his wrist. M.A. picked Lemons out of the lineup "with 100% certainty" as the man who took M.A.'s car keys. The State charged Lemons with armed robbery and first-degree recklessly endangering safety by use of a dangerous weapon, both as a party to a crime. *See* WIS. STAT. §§ 943.32(2) (2013-14), 941.30(1) (2013-14), 939.63(1)(b) (2013-14), 939.05 (2013-14).

Lemons moved to suppress the lineup identification. He contended that the lineup was impermissibly suggestive because he was too dissimilar in appearance from the "fillers," that is, the other five participants.

The circuit court held a hearing at which the circuit court heard argument and considered the three photographs that Lemons submitted with his suppression motion. The first of these photographs showed the six lineup participants standing in a semi-circle, each with a placard identifying him by his number in the lineup. Lemons was identified as participant two. The second photograph depicted only participant four and the final photograph depicted only Lemons. Neither the State nor Lemons presented any other evidence.

None of the photographs revealed the exact height of any of the six lineup participants. Based on the group photograph, however, Lemons contended that participant four was the only man in the lineup who was as short as Lemons and that the "four other fillers were all at least a few inches taller." Further, Lemons contended that participant four was lighter skinned than Lemons, had longer hair and a slight mustache. Lemons went on to argue that of the two shortest men in the line up, he was the only one who matched M.A.'s description of a person "who was clean-shaven with a dark complexion."

The circuit court examined the pictures and questioned whether Lemons was depicted as clean-shaven. Lemons, by counsel, then conceded that "it looks like he has some sort of real light beard."

The circuit court found that all of the lineup participants had similar facial hair, were of the same race, and wore wristbands. The circuit court did not find any remarkable differences in the heights of the participants and specifically estimated "only about a ... two-inch height difference" between Lemons and participant three. The circuit court concluded that "these aren't five people that look completely different from the defendant" and denied Lemons's motion to suppress the identification.

The matter proceeded to a jury trial, and the jury found Lemons guilty as charged. He appeals, challenging only the decision to deny his suppression motion.

"'A criminal defendant is denied due process when identification evidence admitted at trial stems from a pretrial police procedure that is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" ***State v. Benton***, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923 (citations and one set of quotation marks omitted); *see also* U.S. CONST. amend. XIV; WIS. CONST. art. I, § 8. To suppress an out-of-court identification, a defendant has the initial burden of demonstrating that the procedure was impermissibly suggestive. *See* ***Benton***, 243 Wis. 2d 54, ¶5. If the defendant makes such a showing, the State must demonstrate that the identification was nonetheless reliable. *See* ***id.*** When we review a circuit court order denying a suppression motion, we uphold the circuit court's findings of fact unless they are clearly erroneous, but we consider *de novo* whether the facts demonstrate a violation of constitutional principles. *See* ***id.***

Lemons does not mount a challenge to any factual finding in this case. Thus, our task is to apply undisputed facts to constitutional standards. *See* ***State v. Rutzinski***, 2001 WI 22, ¶12, 241 Wis. 2d 729, 623 N.W.2d 516.

On appeal, as in the circuit court, Lemons relies primarily on his contention that the group photograph of the six lineup participants shows he was the same height as only one of the other men and that "the other four fillers were at least a few inches taller."[2] This contention is wholly inadequate to demonstrate that the lineup procedure was impermissibly suggestive. To the contrary, "differences in height do not make a lineup impermissibly suggestive." *See* ***Benton***, 243 Wis. 2d 54, ¶10 (citing one case for the proposition that a lineup is not impermissibly suggestive where the defendant is "shortest by several inches," and citing a second case for the proposition that a lineup is not impermissibly suggestive where the defendant is three to five inches shorter than the other participants).

Lemons also argues that the lineup was impermissibly suggestive because the only participant who matched him in height "was much lighter skinned, had a different hairstyle, and was not clean shaven." Lemons misunderstands the obligations of officers conducting a lineup. "The police authorities are required to make every effort reasonable under the circumstances to conduct a fair and balanced presentation of alternative possibilities for identification. The 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). Indeed, identical participants are

[2] According to the State in its brief, Lemons claimed during the suppression hearing that lineup participant one was five feet eleven inches tall. We have reviewed the record and determined that Lemons did not make such a claim. The portion of the transcript to which the State directs our attention contains a summary of M.A.'s description of *suspect* one. We add that Lemons does not suggest on appeal that participant one was five feet eleven inches tall.

not only impossible to find but "'also undesirable, because then the witness wouldn't be able to identify the suspect.'" *See* ***United States v. Johnson***, 745 F.3d 227, 230 (7th Cir. 2014) (citation omitted). Here, M.A. had the opportunity to view a group of people who all resembled his description of the assailant who took M.A.'s car keys during an armed robbery. The circuit court concluded that, notwithstanding some variation in the characteristics of those in the lineup, Lemons was not "completely different" from the other five participants and that all six men were similar in significant ways.

Lemons nonetheless contends he is entitled to relief because the lineup in this case did not conform to the recommendations set forth in a model policy that is available to the public on the website of the Wisconsin Department of Justice. *See* BUREAU OF TRAINING AND STANDARDS FOR CRIMINAL JUSTICE, MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION (Apr. 1, 2010), https://www.doj.state.wi.us/sites/default/files/2009-news/eyewitness-public-20091105.pdf (last visited Oct. 29, 2018) (hereinafter MODEL POLICY). The claim fails. Lemons does not demonstrate that the model policy has the force of law.[3] We therefore reject his conclusory suggestion that the model policy nonetheless controls the outcome here. *See* ***Gaethke v. Pozder***, 2017 WI App 38, ¶31, 376 Wis. 2d 448, 899 N.W.2d 381.

Moreover, Lemons does not demonstrate that the lineup violated the model policy. Lemons points to language in the policy providing that "[i]f a person who has never seen the perpetrator would be able to pick out the suspect from the lineup based on knowing only the description given by the eyewitness, then the fillers may not sufficiently match the description of

[3] We observe that the introduction to the model policy states: "These recommendations are not intended to create, do not create, and may not be relied on to create, any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." *See* MODEL POLICY at 1.

the perpetrator." *See* MODEL POLICY at 18. Lemons then suggests that the lineup did not satisfy the concerns addressed in that provision of the policy because he was the only person in the lineup who matched M.A.'s description of the second suspect as a "black male, 18-25 years old, 5'2", thi[]n build, dark complexion [and] clean shaven." The hearing revealed, however, that although M.A. described suspect two as clean shaven, Lemons sported "a light beard" when he participated in the lineup. Accordingly, a person who had never seen suspect two and who knew only M.A.'s description of the perpetrator would not have been able to identify Lemons as the suspect in the lineup.

In sum, we are satisfied that Lemons failed to carry his burden of showing that the lineup in this case was impermissibly suggestive. The circuit court therefore properly denied his motion to suppress the out-of-court identification. *See* ***Benton***, 243 Wis. 2d 54, ¶5. In light of our conclusion that the circuit court did not err, we need not reach the State's alternative argument that any error was harmless. *See* ***State v. Hughes***, 2011 WI App 87, ¶14, 334 Wis. 2d 445, 799 N.W.2d 504 (we decide cases on the narrowest possible grounds). Accordingly,

IT IS ORDERED that the judgment is summarily affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals