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DISTRICT I

December 10, 2024

To:

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Circuit Court Judge
Electronic Notice

George Tauscheck
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Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
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Jacob J. Wittwer
Electronic Notice

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

2023AP979-CR

State of Wisconsin v. Kendrick Banks (L.C. # 2020CF2251)

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).

Before White, C.J., Donald, P.J., and Geenen, J.

Kendrick Banks appeals from his judgment of conviction entered after a jury found him guilty of first degree intentional homicide. Banks argues that the circuit court erred in denying his motion to suppress the identifications made by three witnesses from photo arrays. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Banks was charged in the June 2020 shooting death of Justice Wamubu-Haynes. The shooting occurred in front of a residence near South 25th Street and West Mitchell Street in Milwaukee. Keenen J., a friend of Wamubu-Haynes who lived at the residence, told police that Wamubu-Haynes had arrived at the house and parked on the street; they were talking outside of the vehicle, with Wamubu-Haynes sitting on the hood of his car. Keenen J. said he saw a man come through the gangway between the houses and walk alongside them on the sidewalk. The man then suddenly pulled out a gun and shot multiple times at Wamubu-Haynes. Keenen J. returned fire, and the man ran back through the gangway. Wamubu-Haynes died at the scene.

Two other people in a nearby parked car also witnessed the shooting. V.H. and her adult son, Keandre J., had called police to conduct a welfare check on an elderly relative who lived in the area, and were waiting in their car for the police to arrive. Both saw the shooter “sneaking up” on Wamubu-Haynes and Keenen J., and then start shooting. Those witnesses, as well as Keenen J., described the shooter as wearing some type of mask covering most of his face and a cap, so that just his eyes were visible.

The police obtained surveillance video from a nearby house. The video showed a black Porsche Cayenne with yellow rims pull into the alley near Keenen J.’s residence shortly before the shooting. A man in the passenger seat exited the vehicle holding something behind his back. Approximately thirty seconds later, the man ran back into the alley holding a gun pointed back toward the homicide scene. The man got back into the passenger side of the Porsche, and it drove away.

Additional video surveillance footage from various city cameras showed that the Porsche drove to a residence where Banks’ brother lived. Furthermore, the police were familiar with the

Porsche and its owner, A.L. The police questioned Banks' wife, who confirmed that Banks and A.L. were friends.

Police also interviewed Wamubu-Haynes' girlfriend. She told police that during a break-up with Wamubu-Haynes, she had been romantically involved with A.L. She stated that this relationship had "cause[d] problems" between the two men that had not been resolved.

Additionally, the police discovered that Banks had been treated at a hospital for a superficial bullet graze wound on the night of the shooting. Because it was a gunshot wound, the hospital called the police. Banks told the investigating detective that he had been shot in the Riverwest neighborhood. However, an investigation at that location did not reveal any evidence that a shooting had taken place: no one in the area had seen a shooting or heard gunshots, no bullet casings were located, and there were no shots reported in that area on ShotSpotter.

Keenen J., V.H., and Keandre J. were shown photo arrays that included Banks.² All three of these witnesses identified Banks as the shooter, based on his eyes.

Banks filed a motion to suppress the identification of Banks made by the three witnesses from the photo arrays, on the grounds that they were not reliable and thus unfairly prejudicial to Banks, pursuant to WIS. STAT. § 904.03.³ Banks argued that the witnesses could only see the shooter's eyes, were under the stress of the situation, and had only limited time to make any

² Two other witnesses who were with V.H. and Keandre J. were not able to identify the shooter from a photo array.

³ The motion to suppress was heard and decided in 2020; however, we note that the language of WIS. STAT. § 904.03 is the same in both the 2019-20 version of the statutes and the 2021-22 version.

observations. Banks did not argue that the photo arrays were impermissibly suggestive; rather, his argument focused on the inherent unreliability of eyewitness identification.

The circuit court rejected this argument. The court observed that all three of the witnesses reported watching the shooter approach Wamubu-Haynes prior to any shots being fired, allowing them “time to process” what they were seeing. The court further noted that due to the pandemic, we were “getting used to” seeing people in masks and identifying them. Therefore, the court found that there was nothing “so unreliable” about the identifications that would warrant suppressing them. The court stated that this was not a matter of admissibility, but rather it was up to the jury to determine the weight of the identification evidence after hearing the testimony of the witnesses, including any cross-examination. Accordingly, the court denied Banks’ motion to suppress.

The matter proceeded to trial in October 2021. Keenen J., V.H., and Keandre J. all testified regarding the shooting and their identification of Banks from the photo arrays. The jury also saw the surveillance video of the Porsche and heard testimony that its owner, A.L., was friends with Banks. It also heard testimony that A.L. had been involved with Wamubu-Haynes’ girlfriend. Additionally, the State presented evidence regarding Banks’ treatment for the gunshot wound on the night of the shooting and the lack of evidence that his wound occurred in the location he claimed it did.

The jury found Banks guilty of first-degree intentional homicide. He was sentenced to life imprisonment without the possibility of parole. This appeal follows.

On appeal, Banks renews his argument that the circuit court erred in denying his motion to suppress the photo identifications due to a lack of reliability of that evidence, pursuant to WIS.

STAT. § 904.03. Nevertheless, Banks advocates for the two-step standard of review relating to motions to suppress which raise constitutional implications, where we first review the circuit court’s findings of fact, upholding them unless they are clearly erroneous, and then review *de novo* “the application of constitutional principles to those facts[.]” See *State v. Eason*, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625.

The constitutional principles of due process “may restrict admission of eyewitness testimony” if that identification was “infected by improper police influence,” such as being impermissibly suggestive. *State v. Roberson*, 2019 WI 102, ¶26, 389 Wis. 2d 190, 935 N.W.2d 813 (citation omitted). However, no such due process claim is being made here; Banks only argues that the identifications were unreliable under WIS. STAT. § 904.03. Therefore, we review the circuit court’s decision under the discretionary standard for evidentiary decisions—whether the court erroneously exercised its discretion. See *id.*, ¶62. Accordingly, the circuit court’s decision to admit the evidence will be upheld if the court examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion using a demonstrated rational process. *State v. Mayo*, 2007 WI 78, ¶31, 301 Wis. 2d 642, 734 N.W.2d 115.

Under WIS. STAT. § 904.03, a court may exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Indeed, this standard applies to the circuit court’s determination regarding the admission of identification evidence. *State v. Hibel*, 2006 WI 52, ¶48, 290 Wis. 2d 595, 714 N.W.2d 194 (providing that circuit courts have the discretion to exclude relevant identification evidence if it is “so unreliable that its probative value is substantially outweighed by the danger of prejudice and confusion” (citation omitted)). In applying this standard to

“constitutionally admissible eyewitness identification evidence,” the court should ensure that it “comports with the maxim that ‘reliability is the linchpin in determining the admissibility of identification testimony.’” *Id.*, ¶52 (citation omitted).

In making this determination, a court may “employ[] several factors to assess reliability, based on common sense notions of human perception and memory.” *Id.*, ¶39. These factors include:

the opportunity of the witness to view the criminal at the time of the crime; the witness’s degree of attention; the accuracy of the witness’s prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and the confrontation.

Id. Other factors that may affect the reliability of identification evidence, and may be considered by the circuit court, include: (1) whether the witness identified the perpetrator by choosing “the person who look[ed] the most like the real perpetrator relative to the other people” in the photo array or lineup; (2) the “stressfulness of the event” on the witness; (3) whether the incident involved “weapon focus”; (4) the “cross-racial nature” of an identification; and (5) whether the witness is “given positive feedback during or immediately following the identification.” *Id.*, ¶40 & n.9 (citations omitted). This is not, however, “an inflexible list of factors” that a court must take into consideration; rather, these are factors the court may consider “if appropriate” under the circumstances. *Id.*, ¶54.

The circuit court here considered many of these factors. The court reviewed exhibits of the police interviews with the witnesses which took place immediately after the shooting, and the reports from their viewing of the photo arrays which occurred just a few days later. The witnesses all initially gave similar descriptions of the shooter. Upon viewing the photo arrays,

Keenen J. and Keandre J. immediately and adamantly identified Banks as the shooter, while V.H. took a few minutes before identifying Banks. The court also remarked that being several months into the pandemic at that point, people were used to seeing and identifying others even though they were masked.

The circuit court observed that the witnesses had watched the shooter approach Wamubu-Haynes before the shooting occurred, allowing them time to process the “scene” before the shooting started. Furthermore, the witnesses all stated in their police interviews that they were focused on the shooter prior to the shooting because he looked “very suspicious.” Additionally, the court noted that the witnesses did not all know each other, and were not at the scene as part of the same gathering.

In short, the circuit court reviewed relevant facts relating to the witnesses’ identification of Banks, applied the proper legal standard in determining whether the identifications were sufficiently reliable to allow their admission under WIS. STAT. § 904.03, and reasonably concluded that they were. Therefore, the court did not erroneously exercise its discretion in permitting the identification evidence at trial. *See Mayo*, 301 Wis. 2d 642, ¶31. Accordingly, we affirm Banks’ judgment of conviction.

Upon the foregoing, therefore,

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

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

Samuel A. Christensen
Clerk of Court of Appeals