COURT OF APPEALS
DECISION
DATED AND FILED

November 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0456-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN K. JOHN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County: LARRY JESKE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Brian John appeals a judgment convicting him of robbery with the use of force, substantial battery with intent to cause substantial harm, and kidnapping, all as party to a crime, entered upon his no contest pleas. John was sentenced to concurrent terms totaling eighteen years in prison. John

argues that the trial court erroneously denied his suppression motion and that the identification procedure at the preliminary hearing was impermissibly suggestive. We reject his arguments and affirm the judgment.

¶2 The criminal complaint alleges that John and a female accomplice entered the home of an eighty-six-year-old man. They beat and robbed him, forced him into his car and drove him to Milwaukee. A warrant was issued for John's arrest. Police also obtained a search warrant for the Theodore Merrill residence in Polk County.

¶3 The affidavit supporting the warrant stated that FBI agent D. Fitzgerald was advised that John's accomplice had contacted her mother, asking her to retrieve her from Merrill's residence. It asserted that the Polk County Sheriff's Department conducted surveillance and confirmed that John and his accomplice were in Merrill's apartment. The affidavit described the crime and stated that the victim identified the fugitives. The affidavit stated that a .25 caliber semi-automatic handgun was taken from the victim, who was abducted at gunpoint, and that no weapon had been recovered. It also stated that a concerned citizen who was familiar with John and his accomplice advised the Polk County sheriff that both fugitives were in the apartment.

¶4 John was arrested in Merrill's residence. Fourteen hours after his arrest, after being advised of his ***Miranda*** rights[1] and signing a waiver form, he gave an oral statement. During the next two days, John gave two written statements.

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶5 John brought a motion to suppress his statements and any other evidence obtained as a result of his allegedly illegal arrest. He maintained that his arrest was illegal because the affidavit supporting the search warrant was insufficient. After the suppression hearing, the trial court denied the motion.

¶6 John first argues that the trial court erroneously denied his motion to suppress his statements based upon the insufficient affidavit to support the search warrant.[2] Because John failed to demonstrate a legitimate expectation of privacy in Merrill's residence, his argument must be rejected.

¶7 This court will independently determine whether the facts underlying a particular search and seizure satisfy constitutional demands. *See* ***State v. Whitrock***, 161 Wis.2d 960, 973, 468 N.W.2d 696, 701 (1991). The Fourth Amendment to the United States Constitution and art. I, § 11, of the Wisconsin Constitution prohibit unreasonable searches and seizures. *See* ***State v. McCray***, 220 Wis.2d 705, 709, 583 N.W.2d 668, 670 (Ct. App. 1998). Due to the similarity of these provisions, Wisconsin courts look to the United States Supreme Court's interpretation of the Fourth Amendment for guidance in construing the state constitution. *See* ***id***. at 709-10, 583 N.W.2d at 670.

¶8 "The test for determining whether an individual has standing to raise a Fourth Amendment issue examines 'whether the person who claims the protection of the [Fourth] Amendment has a legitimate expectation of privacy in the invaded place.' A legitimate expectation of privacy is one which 'society is prepared to recognize as reasonable.'" ***Id***. (quoted source omitted). The elements to be considered are:

[2] The only evidence John seeks to have suppressed is his statements.

> (1) whether the defendant had a property interest in the premises, (2) whether he was legitimately (lawfully) on the premises; (3) whether he had complete dominion and control and the right to exclude others; (4) whether he took precautions customarily taken by those seeking privacy; (5) whether he put the property to some private use; and (6) whether the claim of privacy is consistent with historical notions of privacy.

McCray, 220 Wis.2d at 709-10, 583 N.W.2d at 671.

¶9 The proponent of a motion to suppress bears the burden of establishing the reasonableness of the alleged privacy expectation by a preponderance of the credible evidence. ***Id***.; *see also* ***Whitrock***, 161 Wis.2d at 972, 468 N.W.2d at 701 ("As the United States Supreme Court stated in ***Rawlings v. Kentucky***, [448 U.S. 98, 104 (1980)], '[p]etitioner, of course, bears the burden of proving not only that the search ... was illegal, but also that he had a legitimate expectation of privacy ....'"); *See also* ***State v. Rewolinski***, 159 Wis.2d 1, 16, 464 N.W.2d 401, 406 (1990) ("[I]t is clear that the defendant bears the burden of proof on the question of whether his subjective expectation of privacy was reasonable ....").

¶10 Here, it is undisputed that John was arrested at Merrill's residence pursuant to a warrant authorizing a search of Merrill's residence. John presented no evidence at the suppression hearing that he had a reasonable expectation of privacy in Merrill's residence. Therefore, John asserts no basis to suppress his statements as a result of the execution of the search warrant at Merrill's residence.

¶11 John contends, however, that the State did not raise this issue at the hearing on the suppression motion, thereby waiving this issue. *See* ***Steagald v. United States***, 451 U.S. 204, 209 (1981) ("The Government, however, may lose its right to raise factual issues of this sort before this Court when it has made contrary

assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation."). Here, the State raised the issue in a timely fashion. At the suppression hearing, the prosecutor specifically argued that John failed to meet his burden: "We don't know what the defendant's expectation of privacy in that property was, and the defendant's expectation of privacy is a burden that the defendant has to meet …." Because the record unequivocally demonstrates that the State preserved its argument, John's contention must fail.

¶12 John further argues that "although it was not introduced at the suppression hearing, the record contains substantial evidence that Mr. John did in fact have a reasonable expectation of privacy in the Theodore Merrill residence." John argues that we should review his statement to authorities introduced as an exhibit at the ***Miranda-Goodchild*** hearing two weeks before the suppression hearing to determine John's interest in the invaded premises.[3] John also suggests we remand the matter to the circuit court to permit the parties to present "whatever evidence is available."

¶13 We reject these approaches. John offers no authority for his proposition that it is unnecessary to present relevant evidence at his motion hearing, but that the circuit court should sua sponte scour the entire record to determine whether it may contain evidence supporting a defendant's motion. Because John failed to meet his burden of proof at the suppression hearing, his argument fails.

[3] In his statement, John said: "We ended up staying at Teddy Merrill's apartment until we were arrested October 5th."

¶14 Next, John argues that the trial court should have suppressed his statements because the police violated the "no knock" rule. The record shows that John failed to raise this issue before the trial court. Therefore it is not preserved for appellate review. *See* ***State v. Cabon***, 210 Wis.2d 597, 610-11, 563 N.W.2d 501, 505 (1997). Because the record fails to support any basis for John to challenge the validity of the search warrant executed at Merrill's residence, we reject his challenge to the denial of his suppression motion.[4]

¶15 Next, John argues that the identification procedure during the preliminary hearing was impermissibly suggestive. He argues that the victim knew that the defendant would be seated next to his defense counsel and that the police told him John would be present in court. We conclude that this is an insufficient basis upon which to claim an impermissibly suggestive identification procedure.

¶16 The defendant bears the initial burden of proving that the identification was unnecessarily suggestive. ***State v. Kaelin***, 196 Wis.2d 1, 10, 538 N.W.2d 538, 541 (Ct. App. 1995). This burden is met if it can be shown that the identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. *See* ***Powell v. State***, 86 Wis.2d 51, 61-62, 271 N.W.2d 610, 615 (1978). If this burden is met, the State has the burden to demonstrate that the identification was reliable even though the confrontation was

[4] For example, John argues that ***State v. Kiper***, 193 Wis.2d 69, 532 N.W.2d 698 (1995) controls. He contends that in order for a search of Merrill's residence to be valid, ***Kiper*** requires the State to show probable cause that John resided there. John relies on the following language: "Because there is insufficient evidence to conclude that Wanie resided in Kiper's apartment," Kiper's arrest was invalid. *See* ***id.*** at 85, 532 N.W.2d at 706. The record established that Kiper had a legitimate expectation of privacy in his own residence. Consequently, ***Kiper*** has no application here. Because our decision is dispositive, we do not address John's remaining arguments. ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

suggestive. ***State v. Wolverton***, 193 Wis.2d 234, 264, 533 N.W.2d 167, 178 (1995). "[U]nnecessary suggestiveness alone does not require the exclusion of the evidence." ***Powell***, 86 Wis.2d at 64, 271 N.W.2d at 617. The overriding question is "whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive." ***Id***. (quoted source omitted).

¶17 Because we need not inquire into the reliability of the victim's identification if John failed to meet this initial burden, *see* ***id***. at 62, 271 N.W.2d at 615, we first address whether the identification was impermissibly suggestive. This is a constitutional question we decide de novo. *See* ***State v. Woods***, 117 Wis.2d 701, 715, 345 N.W.2d 457, 465 (1984). We conclude that under the circumstances presented here, the identification procedure at the preliminary hearing was not impermissibly suggestive.

¶18 John does not challenge the out-of-court identification procedure. He does not allege prosecutor misconduct. He does not complain that he stood out physically from others in the courtroom. *See* ***United States v. Archibald***, 734 F.2d 938 (2nd Cir. 1984) (defendant only black man in the courtroom). The only suggestive circumstance he identifies is that he sat at counsel table and that police told the victim that the defendant would attend his preliminary hearing. This circumstance alone is not enough to establish an impermissibly suggestive identification procedure. *See* ***United States v. Bush***, 749 F.2d 1227, 1232 (7th Cir. 1984) ("The only suggestive circumstance identified by defendant is that he sat at counsel table. This circumstance alone is not enough to establish a violation of due process."). Without more, any uncertainty regarding identification would be for the jury to consider at trial. *See* ***id***.

¶19 We conclude that John failed to demonstrate a legitimate privacy expectation in Merrill's residence. He also failed to preserve his challenge concerning the alleged "no knock" violation. As a result, we need not address his remaining Fourth Amendment arguments. We also conclude that the record fails to support his claim of an impermissibly suggestive in-court identification procedure at the preliminary hearing. As a result, we affirm his conviction.

By the Court.—Judgment affirmed.

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