COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2098-CR **Cir. Ct. No. 2011CF274**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHANNON E. PARKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. A jury found Shannon E. Parker guilty of robbery with use of force, second-degree sexual assault with use of force, false imprisonment, identity theft, and battery, all as a repeater. He contends the trial

court erred when it denied his motions to suppress the victim's in- and out-of-court identifications of him and to change venue. We disagree and affirm.

¶2 On July 23, 2011, a man forced his way into the Fond du Lac apartment of a woman, D.B. Over the course of about an hour, he beat her, sexually assaulted her twice, ripped her telephone from the wall, took her debit card and forced her to help him change its PIN, and fled with her cellphone. A neighbor called the police. D.B. described her assailant's approximate height, weight, and age, said he had blue eyes, a goatee, upper lip hair, a pierced eyebrow, and a tattoo on his forearm that was "like a snake but not a snake," and described his cap, shoes, pants, and Blackberry-type cellphone. That same day, D.B. tentatively identified Parker as her assailant from a photo line-up composed of six individuals' booking photographs.

¶3 Police learned that four cash transactions had been attempted using D.B's debit card within forty minutes of its PIN being changed. A convenience store's surveillance video showed a man using D.B.'s debit card; he was wearing clothing consistent with what D.B. had said her assailant wore. The detective who viewed the video, Detective Steven Kaufman, recognized the man as Parker.

¶4 On July 25, the day after Parker's arrest and two days after the assault, Kaufman showed D.B. a series of three photographs: one, a tattoo; the second, a pair of shoes; and the third, a full-body shot of a man. According to Kaufman's report, D.B. identified the man as her assailant, and the tattoo and shoes as the ones she had seen on her assailant. The photos were of Parker, his tattoo, and the shoes he was wearing when he was arrested.

¶5 The *Fond du Lac Reporter* and television and radio stations serving the Fond du Lac area covered the case. Without naming Parker, the first article

indicated that a 37-year-old man with a lengthy criminal record who was thought to be tied to three recent area burglaries allegedly attacked and sexually assaulted a woman in her home. The chief of police was quoted as saying that the suspect "brutally physically assaulted … and repeatedly sexually assaulted" the woman in "a pretty shocking event" that was "incredibly traumatic" for the victim. About a week later, the *Reporter* printed a second article, this one naming Parker as the suspect and including his photograph. Similar to the first article, the second said Parker was "accused of brutally attacking" a woman, causing "severe injuries to her face and head," and quoted a veteran police officer as calling the attack "one of the more brutal sex assaults" he had seen in his career. The article, posted on the newspaper's website, reiterated investigators' belief that Parker was involved in recent burglaries. A video of Parker's initial appearance was broadcast on television.

¶6 The sole issue in the case was the identity of the attacker. Parker moved to suppress the out-of-court identifications as impermissibly suggestive.[1] He challenged the six-person photo lineup because he says he has blue eyes, and his was the only photo of a blue-eyed person; D.B. could not have seen her assailant clearly, as she said her glasses were knocked off as soon as she was attacked, the beating caused one eye to swell, and the assailant held a pillow over her face during the first sexual assault to quell her screaming; and she stated "Possible" and "Very possible" in response to two other photos in the array. He challenged the subsequent array because the photos depicted only him, his shoes,

[1] The motion also sought to suppress D.B.'s identification of him at the preliminary hearing. He does not address that argument on appeal.

and his tattoo. He also moved for a change of venue on grounds that the pervasive media coverage made an impartial trial in Fond du Lac county impossible.

¶7 The trial court denied both motions after a hearing. Citing ***Powell v. State***, 86 Wis. 2d 51, 271 N.W.2d 610 (1978), the court concluded that the first pretrial identification procedure was not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." ***Id.*** at 64 (citation omitted). Given that conclusion, the court also concluded there was nothing improper with following up with the Parker-only photos.

¶8 As to the motion to change venue, the court concluded that, while some statements in the two *Reporter* articles (the 2011 articles) were of concern, they primarily were "informational" and did not come "anywhere remotely close" to the level of community prejudice necessary to grant the motion.[2] The court stated that if it seemed during voir dire that a fair jury could not be selected, "then we won't pick a jury. Then we'll adjourn the trial and we'll go somewhere else…. Mr. Parker will have a fair trial." It also said the defense could renew the motion if warranted by subsequent developments.[3]

¶9 The jury found Parker guilty after a five-day trial. He appeals. Additional facts will be set forth as the issues warrant.

[2] The court noted that it could not comment on the radio or television coverage because it had not been provided transcripts of those reports.

[3] Indeed, the day before trial began, the same newspaper ran an article (the 2012 article) captioned, "Trial begins Monday for FdL man charged in brutal attack in 2011." Parker renewed his motion on the morning of trial. The court tentatively denied it but said it would "see how the jury selection goes."

A. Whether Out-of-Court Identifications Properly Admitted

¶10 Parker first asserts that the trial court erroneously denied his motion to suppress D.B.'s out-of-court identifications. He contends the over-suggestiveness of each identification procedure made it unreliable, and thus irreparably tainted her in-court identification of Parker at trial.

¶11 In reviewing a motion to suppress, we apply a two-step standard of review. ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. We uphold the trial court's findings of historical fact unless they are clearly erroneous. ***Id.*** We review de novo the court's application of constitutional principles to those facts. ***Id.***

¶12 The test of the admissibility of the out-of-court identifications also has two facets. ***Powell v. State***, 86 Wis. 2d at 65. We first determine whether an identification procedure was impermissibly suggestive. ***Id.*** If the defendant establishes that it was, we then must decide whether the State has shown that, despite the suggestiveness, the procedure was reliable under the totality of the circumstances. ***Id.*** at 65. A "'conviction[] based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" ***Id.*** at 64 (citation omitted).

¶13 Parker complains that the six-person array emphasized his photograph because it contained filler photographs of non-blue-eyed men. The trial court concluded the array was not impermissibly suggestive. After reviewing the six photographs, the court stated:

> I would note that all six photographs had facial hair of varying degrees. Three had actual, actual goatees. The others a little bit less facial hair.
>
> As far as eyes, quite honestly, it's really—it was hard for me to determine. Other than Photos 3 and 6 clearly have dark eyes. Two, four, one and five, it's really hard to tell from booking photographs eye color…. [E]ven looking at … Photo 4 of Mr. Parker, it's hard for me to tell if those eyes are blue or what color.
>
> ….
>
> And again … it's not an exact science…. [Y]ou're working with booking photographs and generalized descriptions…. Based on this record and … my review of the photographs, there is no way that I can conclude that the photo line-up was impermissibly suggestive so as to give rise to a very substantial likelihood of irreparable misidentification…. [B]ased on the victim's description [and] what Detective Kaufman tried to put together—I think it's a rather fair sampling of booking photographs.

¶14 We are satisfied that the court's findings are not clearly erroneous. Kaufman compiled the six-person line-up by taking a recent photo of Parker and choosing jail booking photos of five other men with similar physical characteristics. *See* ***id.*** at 67 (photos "need not be identical"). We, too, have examined the photo array. Because, as Parker himself acknowledges, the pictures are not "high-quality, high-resolution photographs," the subjects' eye color is not easily discernible, let alone "striking or pronounced." ***Id.*** The officer conducting the lineup was not involved in the case, did not know Parker or whether his photo was included or, if so, which photo it was. D.B.'s reaction of "Possible" and "Very possible" to two other photos further underscores that the array was not tilted toward selecting Parker. We are satisfied that the photo lineup was not impermissibly suggestive.

¶15 Likewise, we conclude that the "Parker-only" array—the photographs of Parker, his tattoo, and his shoes taken at the time of his arrest—was not impermissibly suggestive.

¶16 Citing ***State v. Dubose***, 2005 WI 126, ¶37, 285 Wis. 2d 143, 699 N.W.2d 582, Parker contends the "Parker-only" array was unnecessarily suggestive because, on the heels of D.B.'s earlier identification of him, it conveyed the message that police believed him to be the culprit. In ***Dubose***, the identifications were based on two showups—the victim viewing Dubose as he sat alone, first, in the back of a squad car and then in a room at the police station—followed by Dubose's mugshot. ***Id.***, ¶¶9-10. The court concluded that "based on the totality of the circumstances … 'the suggestive elements in this identification procedure made it all but inevitable that [the witness] would identify [the defendant] whether or not he was in fact 'the man.'" ***Id.***, ¶37 (citation omitted).

¶17 Here, by contrast, the "Parker-only" array followed a six-person photo array, recognized by the ***Dubose*** court as "generally fairer." *See* ***id.***, ¶33. Further, as D.B. had described her assailant's clothing, shoes, build, piercings, facial hair, and tattoo in some detail, in this case the "Parker-only" array was a reasonable means to confirm the identification she made from the photo array. ***Dubose*** reinforces the teaching that the suggestiveness determination is dependent upon the totality of the circumstances. *See* ***id.***, ¶33. Said another way, "'each case must be considered on its own facts.'" ***Powell***, 86 Wis. 2d at 64 (citation omitted). The out-of-court identification was not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

¶18 As neither out-of-court identification procedure was impermissibly suggestive, we need not address the second prong, their reliability under the

totality of the circumstances. ***State v. Waites***, 158 Wis. 2d 376, 391, 462 N.W.2d 206 (1990).

¶19 Assuming for argument's sake that the out-of-court identifications should have been suppressed, we still conclude that D.B.'s in-court identification of Parker was properly allowed, as the State showed by clear and convincing evidence that the in-court identification was based on a source independent of the lineup identification. *See* ***State v. McMorris***, 213 Wis. 2d 156, 167, 570 N.W.2d 384 (1997). A court considers the following factors to determine if an in-court identification has an independent source:

> (1) the prior opportunity the witness had to observe the alleged criminal activity; (2) the existence of any discrepancy between any pre-lineup description and the accused's actual description; (3) any identification of another person prior to the lineup; (4) any identification by picture of the accused prior to the lineup; (5) failure to identify the accused on a prior occasion; (6) the lapse of time between the alleged crime and the lineup identification; and (7) the facts disclosed concerning the conduct of the lineup.

Id. at 168.

¶20 Applying the factors, the record supports that D.B. had a source independent of either photo array for identifying Parker. She had ample time to closely observe him during the approximate hour he was in her apartment. The accuracy of her descriptions undercut Parker's theory that, because she had lost her glasses, had a swollen eye, and had a pillow held over her face during the first sexual assault, her observations "had to" have been impaired. Her description of Parker was consistent with his actual physical characteristics and the attire he was wearing when arrested. Any inconsistencies in D.B.'s descriptions themselves or

between them and Parker's actual appearance are de minimis.[4] D.B. was shown the first photo lineup the same day she was assaulted and the second just two days later. The short span of time between the offenses and the identifications reduces the likelihood that the observations she made during the assaults had dimmed so that the photographs impermissibly influenced her in-court identification. Finally, the out-of-court identification procedures were undertaken so as to minimize a suggestive effect or taint D.B.'s in-court identification of Parker as her assailant.

¶21 Even if D.B.'s in- or out-of-court identifications of Parker should have been suppressed, any error was harmless. "An error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" ***State v. Stuart***, 2005 WI 47, ¶40, 279 Wis. 2d 659, 695 N.W.2d 259 (citation omitted). Abundant evidence supports the jury's conclusion that Parker was the man who beat, sexually assaulted, and robbed D.B.

¶22 We summarize the evidence. Shortly after the attack and before being shown any photographs, D.B. described her assailant to the police officer who responded to the initial call, the emergency room nurse who examined her, and the detective who interviewed her at the hospital. She said her attacker, a white male, had blue eyes, a goatee, a right forearm tattoo that looked somewhat similar to a snake, and two or three stud-type piercings in his right eyebrow and

[4] For example, D.B. first estimated Parker was in his late twenties; he was thirty-seven. She was somewhat unsure of his hair color but he wore a cap the entire time and the sides of his head were shaved. She told police at one point that Parker had three steel studs in his right eyebrow but the photo in the Parker-only array showed a two-stud eyebrow ring. She described his tattoo as similar to a snake but not a snake, darker in color and possibly partially green; it proved to be, as Parker describes it, an all-black "interlacing tribal pattern, which could be characterized as a swirl."

was wearing white shorts and older, multicolored canvas shoes with white around the edges. When police located and arrested Parker the next morning, they photographed him, his shoes, and his tattoo. The full-body photograph of Parker, his shoes, and tattoo show a goateed Parker with a right eyebrow piercing and a large "swirl" tattoo on his right forearm wearing light-colored shorts and slip-on multicolored shoes with white around the edge of the sole.

¶23 D.B. testified that after the first sexual assault, Parker asked where her money was. She told him she had none because she paid for everything with checks and a credit or debit card that had a $1000 limit but had not yet been activated. Parker found the debit card and, within D.B.'s hearing, spent about ten minutes on a phone call on his Blackberry trying to activate the card and change its PIN to 2424.

¶24 D.B. testified that her assailant forced his way into her apartment between 3:45 p.m. and 4:00 p.m. U.S. Cellular records showed that between 3:54 p.m. and 4:44 p.m., outgoing calls were placed from Parker's phone to five toll-free numbers, all to financial institutions and credit card services. Two were used to make a PIN change. D.B. testified that he changed it to 2424. The cellphone that police took from Parker the next day was a U.S. Cellular Blackberry. Police were able to access the locked phone using the code 2424. Parker himself testified at trial that the access code was 2424.

¶25 Parker's then girlfriend testified that Parker's favorite number was 2424, that he had a Blackberry, that he used her car on the day D.B. was assaulted, and that the computer-drafted printout of instructions on how to change a PIN that police found in her car was not in the car when Parker took it that morning.

¶26 The PIN-change form found in the girlfriend's car was from Marine Credit Union, where D.B. banked. Both telephone numbers on the form were called from Parker's phone; one call lasted about ten minutes. A Marine Credit Union employee testified that D.B.'s card was activated at 4:39 p.m. on July 23, 2011, and that the PIN was changed at 4:54 p.m. Four unsuccessful attempts to withdraw cash using the card were made after 5:00 p.m. that same day.

¶27 The unsuccessful withdrawal attempts were made at a convenience store located about a three-minute drive from D.B.'s residence. Kaufman testified that the person he viewed on the store's surveillance video using the ATM was wearing light-colored shorts and shoes with a white outline on them. The person's tattoo and shoes were consistent with D.B.'s descriptions, Parker's tattoo, and the shoes Parker was wearing when he was arrested.

¶28 D.B. testified that her assailant gained access to her apartment when she responded to a knock on the door. A man she had never seen before asked if Brian lived there. When D.B. said "no," the man grabbed her by the throat, pushed his way into the apartment, and assaulted her. Brian Peterson testified that he had lived in the apartment building a couple of years earlier and that he and Parker had used drugs together at his apartment. At trial he could not recall the apartment number but a detective testified that Peterson had told him he had lived in apartment 104; D.B. lived in apartment 102.

¶29 A State Crime Lab DNA analyst compared samples taken from D.B. with samples taken from Parker. There was no semen on D.B.'s vaginal swab, so the analyst examined the sample using the Y-STR method, which looks at the Y chromosome, found only in males. The analyst testified that the Y-STR profile was consistent with but not exclusive to Parker's DNA. Statistically, about 450

people in a city the size of Fond du Lac would have that profile. It is clear beyond a reasonable doubt that a rational jury would have convicted Parker even without D.B.'s out-of-court or in-court identifications. Any error in admitting the identifications therefore was harmless.

B. Whether Change-of-Venue Motion Properly Denied

¶30 Parker contends the trial court erred in denying his motion for a change of venue because of prejudicial pretrial publicity. He mainly bases his claim on the three *Fond du Lac Reporter* articles, two of which appeared over a year before trial, the other the day before trial. He argues that, given the nature of the crime and Fond du Lac's relatively small population, the "highly specific, inflammatory" media coverage created community prejudice to which the jury pool could not be immune.[5] He further complains that the most recent article contained inadmissible information, such as Parker's high cash bond and potential sixty-year sentence.

¶31 A change of venue should be granted if there is a reasonable likelihood the defendant will not receive a fair trial. ***Hoppe v. State***, 74 Wis. 2d 107, 110, 246 N.W.2d 122 (1976). We review the denial of a change-of-venue motion under the erroneous exercise of discretion standard. ***State v. Fonte***, 2005 WI 77, ¶12, 281 Wis. 2d 654, 698 N.W.2d 594. We independently evaluate the circumstances, however, "'to determine whether there was a reasonable likelihood of community prejudice prior to, and at the time of, trial and whether the procedures for drawing the jury evidenced any prejudice on the part of the

[5] Parker states that Fond du Lac has a population of 45,000. Jurors are drawn from all of Fond du Lac county, however, making the pool far larger.

prospective or empaneled jurors.'" ***Id.*** (citations omitted). The following factors are considered in evaluating the pretrial publicity: (1) the inflammatory nature of the publicity; (2) the degree to which the adverse publicity permeated the area from which the jury panel would be drawn; (3) the timing and specificity of the publicity; (4) the degree of care exercised, and the amount of difficulty encountered, in selecting the jury; (5) the extent to which the jurors were familiar with the publicity; (6) the defendant's utilization of peremptory and for cause challenges of jurors; (7) the State's participation in the adverse publicity; (8) the severity of the offense charged; and (9) the nature of the verdict returned.

State v. Messelt, 178 Wis. 2d 320, 327, 504 N.W.2d 362 (Ct. App. 1993), *aff'd*, 185 Wis. 2d 254, 518 N.W.2d 232 (1994). Our independent review of the record satisfies us that voir dire ensured an impartial jury, such that the trial court did not erroneously exercise its discretion in denying Parker's motion to change venue.

¶32 In reaching this conclusion, we considered the following: For the most part, the publicity was purely informational. *See* ***Briggs v. State***, 76 Wis. 2d 313, 327, 251 N.W.2d 12 (1977) (purely informational publicity is not prejudicial). The assaults, described in the 2011 articles as "alleged," objectively *were* "brutal" and caused injuries that *were* "severe." While it is true that the police chief editorialized at the press conference, a press conference in and of itself is not objectionable because of the possibility of pretrial publicity. ***Id.*** at 328. The focus is the nature of the press conference and the manner in which it is conducted. ***Id.*** We cannot say that his comments about the "shocking event" or the "incredibl[e] trauma[]" to the victim amounted to either "rabble rousing" or an attempt by the State to influence public opinion against Parker. *See* ***id.*** at 327 (citation omitted). Also, the 2011 publicity occurred about a year before the trial. *See* ***Hoppe***, 74 Wis. 2d at 114 (four-month break before trial contributes to ability

to conduct fair trial despite publicity). One juror who "just vaguely remember[ed]" the 2011 publicity was empaneled, but said she remembered no details and could decide the case on the evidence and the court's instructions. *See* ***Tucker v. State***, 56 Wis. 2d 728, 736 & n.11, 202 N.W.2d 897 (1973) (total ignorance of facts and issues not required, just an ability to render verdict based on the evidence).

¶33 The 2012 article undisputedly was inflammatory, given its rhetoric and its publication on the day before trial. To address it, the trial court conducted a careful voir dire and summarily excused potential jurors who had read the article. Parker points out that he had to use two peremptory strikes to eliminate jurors with some awareness of the pretrial publicity. Where no claim is made that the jurors who actually sat were biased, however, no challenge can be made to the judgment of conviction on the basis that he was wrongly required to use his peremptory challenges. *See* ***State v. Traylor***, 170 Wis. 2d 393, 400, 489 N.W.2d 626 (Ct. App. 1992). The pretrial publicity did not deprive Parker of a fair trial.

By the Court.—Judgment affirmed.

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