

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 19, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1823-CR

Cir. Ct. No. 1998CF993

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON M. BRUCKBAUER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
ROBERT DE CHAMBEAU, Judge. *Affirmed.*

Before Vergeront, P.J., Lundsten and Sherman, JJ.

¶1 SHERMAN, J. Jason Bruckbauer appeals a judgment of conviction for first-degree intentional homicide, as a party to a crime, in violation of WIS.

STAT. §§ 940.01(1) and 939.05 (1997-98).¹ Bruckbauer contends that the judgment of conviction should be vacated and a new trial ordered for two reasons. First, he claims the circuit court erred when it denied his motion to suppress a photo identification of him. Second, he claims the circuit court erred when it denied a motion requesting the court allow the jury to view the scene of the crime at approximately the same time a witness purportedly observed Bruckbauer in the vicinity of the crime scene. We conclude that even if admitting the identification was error, it was harmless error. We further conclude that the denial of the motion to view the scene of the crime at a particular time was an appropriate exercise of the circuit court's discretion. We therefore affirm.

BACKGROUND

¶2 At approximately 8:30 a.m. on the morning of October 22, 1997, Denise Markham, an officer with the Madison Police Department, discovered the dead body of Walter Linder in the driver's seat of a vehicle parked in the parking lot of Reindahl Park. An autopsy revealed that Linder had been killed by a single .380 caliber hollow point bullet to the head. A spent Remington Peters .380 caliber brass casing was located inside Linder's vehicle.

¶3 Richard Cawrse informed Madison police that on October 22, 1997, he left his home for work shortly before 6:00 a.m. and walked along the bike path through Reindahl Park. Cawrse stated that it was still dark outside at the time. He informed police that he observed a vehicle driving on the bike path heading in his direction and that as he approached the crest of a hill, he could see a vehicle,

¹ Bruckbauer's direct appeal rights were reinstated in 2008 on the grounds of ineffective assistance of appellate counsel.

which he later identified as the vehicle in which Linder was found, traveling towards him and an individual running on the bike path in front of the vehicle. He informed police that the individual running in front of the vehicle veered to the individual's right off the path and ran into a dense wooded area adjacent to the path. Cawrse stated that after the individual did so, the vehicle "spun . . . around 180 degrees" before stopping for a moment. He stated that he then observed an individual walking towards the bike path and that he and the individual looked directly at one another.

¶4 On November 4, 1997, Detective Bruce Becker showed Cawrse a six-photo array. The photo array featured six men with closely cropped hair and light colored skin, and included a photo of Bruckbauer. The photo of Bruckbauer in the array was identical to a photograph printed in the WISCONSIN STATE JOURNAL on November 1 beside a picture of Justin Peterson with an accompanying article indicating that they were suspects in Linder's murder investigation. Upon viewing the photo array, Cawrse identified Bruckbauer as the individual he had seen running in Reindahl Park on the morning of October 22. According to Detective Becker, Cawrse pointed to Bruckbauer's photograph and said something to the effect of "[y]eah, that's him" and indicated to Detective Becker that he was 100-percent sure of his identification. When asked afterward, Cawrse acknowledged to Detective Becker that earlier that morning he had seen the photographs of Bruckbauer and Peterson in the WISCONSIN STATE JOURNAL.

¶5 Bruckbauer was ultimately charged with first-degree murder, as a party to the crime, in connection with Linder's death. Prior to trial, Bruckbauer moved the circuit court to suppress evidence of Cawrse's November 4, 1997 photo identification of Bruckbauer. At the hearing on the motion, Bruckbauer maintained that the photo array was overly suggestive because the photograph of

him in the array was the same photograph previously published in the WISCONSIN STATE JOURNAL and that the photo identification should therefore be suppressed. He argued that using a photo in an array identical to that previously printed in the newspaper “unduly suggests to [the witnesses] what [] and who he [or she] has seen.”

¶6 The circuit court denied Bruckbauer’s motion. Stating that “under *State v. Marshall*, 92 Wis. 2d 101, [284 N.W.2d 592 (1979)], [] suppression applies only to intentional police procedures, not to some inadvertent procedure,” the court ruled that the record contained no evidence that Detective Becker’s use of a photograph in the array identical to one printed in the newspaper prior to the photo identification taking place was an intentional act on the part of police and, therefore, suppression was not mandated.

¶7 Prior to the commencement of trial in late January 1999, Parrish, Bruckbauer’s co-defendant, moved the court to permit the jury to view Reindahl Park at the approximate time Linder was killed. Bruckbauer supported the motion. The court agreed to conduct a jury view of the park, but not at dawn. The court observed that the lighting conditions at the time the trial would be held would be different than the lighting conditions present when Linder was killed in October 1997. The court ruled that the view would take place at approximately 8:30 a.m. at the start of trial.

¶8 Bruckbauer was found guilty of first-degree homicide as a party to the crime following a joint jury trial in which Jacob Parrish was also tried for the death of Linder. Bruckbauer appeals his conviction. Additional facts will be discussed as necessary below.

DISCUSSION

MOTION TO SUPPRESS

¶9 Bruckbauer contends the circuit court erred by denying his motion to suppress the out-of-court identification of him by Cawrse from the photo array on November 4, 1997, because the identification was unduly suggestive.

¶10 Our review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact. *State v. Hughes*, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621. When presented with a question of constitutional fact, this court engages in a two-step inquiry. *See id.* First, we review the circuit court’s findings of historical fact and uphold them unless they are clearly erroneous. *Id.* Second, we independently apply the law to those facts *de novo*. *Id.* The facts in question are not in dispute. Accordingly, we focus our discussion on the second inquiry.

¶11 When identification evidence “stems from a pretrial police procedure that is ‘so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification,’” its admission at trial denies a criminal defendant of due process. *State v. Wilson*, 179 Wis. 2d 660, 682, 508 N.W.2d 44 (Ct. App. 1993), *overruled on other grounds by State v. Weed*, 2003 WI 85, 263 Wis. 2d 434, 666 N.W.2d 485, and citing *Simmons v. U.S.*, 390 U.S. 377, 384 (1968). Bruckbauer maintains that the photo array at issue in this case gave rise to a substantial likelihood of irreparable misidentification because the photograph of him used in the array had been printed in the newspaper prior to the identification taking place, giving rise to the substantial likelihood that Cawrse’s identification of Bruckbauer was not based on his memory of having seen Bruckbauer at the park, but instead on his earlier viewing of the photograph in the newspaper. We

conclude that even assuming for the sake of argument that the photo identification procedure in this case was unduly suggestive, any error resulting from the admission of that evidence at trial was harmless.

¶12 If a constitutional error at trial does not affect the substantial rights of the defendant, the error is considered harmless. See *Martindale v. Ripp*, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698. The substantial rights of a party are affected only if it is clear beyond a reasonable doubt that, absent the error, a rational jury would not have found the defendant guilty. *State v. Nawrocki*, 2008 WI App 23, ¶42, 308 Wis. 2d 227, 746 N.W.2d 509 (citation omitted). The burden of establishing harmless error lies with the beneficiary of the error, see *id.*, ¶30, which in this case is the State. Having reviewed the record, we agree with the State that error, if any, resulting from the admission at trial of the identification of Bruckbauer from the photo identification was harmless.

¶13 Several factors have been identified by our supreme court for consideration when evaluating whether a particular error is harmless. These factors include,

the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case.

State v. Mayo, 2007 WI 78, ¶48, 301 Wis. 2d 642, 734 N.W.2d 115.

¶14 Cawrse's identification of Bruckbauer from the photograph did not directly implicate Bruckbauer in the murder of Linder, but merely placed him at the scene of the crime in the early hours of the morning of October 22, 1997.

Cawrse testified that when he viewed the photo array, it was not the first time he had identified Bruckbauer from a photograph. He testified that he first saw the edition of the WISCONSIN STATE JOURNAL showing a picture of two men sought in the killing of Linder. At that time, he picked out Bruckbauer from the two photographs and told a co-worker that Bruckbauer was the man that he had seen in the park on the morning of Linder's murder.

¶15 The jury also heard a great deal of other evidence implicating Bruckbauer in Linder's murder. The testimony of multiple witnesses indicates that Bruckbauer and Linder did not have a cordial relationship. Multiple witnesses testified that Bruckbauer and his wife Mary Bruckbauer, Linder's former girlfriend, had stolen Linder's gaming system and numerous games belonging to him, which they attempted to conceal from Linder. There was testimony that in September 1997, Bruckbauer, Mary, and Linder got into an argument over the gaming system when Linder went to Bruckbauer's residence to retrieve his property. The jury also heard testimony that Bruckbauer and Linder were involved in a fight, after which Bruckbauer stated that he would "take it to another level" with respect to Linder. In addition, there was testimony that the night before Linder's murder, Bruckbauer and other visitors at his home made harassing phone calls to Linder and threw eggs on Linder's vehicle.

¶16 There was evidence presented at trial that Bruckbauer was in possession of the murder weapon when Linder was shot, but that it was later disposed of by Bruckbauer's wife, Mary. The jury heard testimony that in April and May of 1997, Mary purchased three .380 caliber semiautomatic handguns. The jury heard testimony that at the time of Linder's murder, Bruckbauer was in possession of one of those weapons, that he displayed the weapon almost every day, and that he kept it in an air vent in his residence. Bruckbauer's roommate

testified that on the evening of Linder's murder, he looked at Bruckbauer's .380 caliber handgun and observed that it smelled like gunpowder, as though it had recently been fired. The roommate also testified that the gun's clip normally contained hollow point bullets, but that there were no bullets in the clip when he observed it after Linder's murder. The roommate further testified that he later returned the gun to the air vent where it was regularly stored and that he never saw it again.

¶17 The jury heard testimony that when detectives searched Bruckbauer's apartment, including the air vent, they found paperwork for a .380 caliber handgun and a holster, but were unable to locate the gun itself. Multiple witnesses, including Bruckbauer's roommate, testified that Mary asked more than one person to get rid of the gun, and there was testimony that Mary had stated that she had disposed of the gun someplace "where nobody would ever find it."

¶18 There was testimony that on the night of October 21, 1997, Parrish stayed at Bruckbauer's residence. More than one witness testified that a short time before he was murdered, Linder received a call made by Parrish on Bruckbauer's phone in which Parrish told Linder he had been stabbed at Reindahl Park. There was testimony that Linder had gone to the park to search for Parrish, but had been unable to find Parrish and that he was going to go back to Reindahl Park to look for Parrish again. The jury also heard testimony that Mary's accounts regarding the whereabouts of Bruckbauer in the early hours of October 22, 1997, were inconsistent.

¶19 In addition, the jury heard testimony from Terry Keehn, Bruckbauer's cellmate in the Dane County Jail, which directly implicated Bruckbauer in Linder's murder. Keehn testified that Bruckbauer told him that he

was involved in a shooting at Reindahl Park. Keehn testified that Bruckbauer asked him about DNA because Bruckbauer thought evidence taken at the crime scene might turn up some of his DNA. Keehn also testified that Bruckbauer informed him that his gun had been disposed of by Mary who had “taken care of it” and that Mary had scratched off the weapon’s serial numbers.

¶20 Upon our consideration of the *Mayo* factors and the facts of this case, we conclude that there is no reasonable possibility that the jury’s verdict would have been different had evidence of Cawrse’s identification of Bruckbauer from the photo array been excluded. Accordingly, we affirm the circuit court’s decision to deny Bruckbauer’s motion to suppress.

MOTION TO VIEW

¶21 Bruckbauer contends the circuit court erred when it refused to permit the jury to view Reindahl Park at the same time of day as when Linder was murdered.

¶22 Pursuant to WIS. STAT. § 972.06 (2007-08), a circuit court may authorize a jury view of the scene of an offense. Ordering a jury view is a discretionary decision of the circuit court. *American Family Mut. Ins. Co. v. Shannon*, 120 Wis. 2d 560, 565, 356 N.W.2d 175 (1984). “We will not reverse a discretionary determination by the [circuit] court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court’s decision.” *Prahl v. Brosamle*, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987).

¶23 Bruckbauer argues that the court erred in denying an early morning jury view because “there would have been nothing improper” in having the jury

view the park at that time and because it “would have helped the jury make [the] crucial determination” regarding Cawrse’s ability to identify him in the dark and would have helped the jury better “understand, correctly weigh and assess the respective credibility of the evidence.”

¶24 Bruckbauer cites to *State v. Herrington*, 41 Wis. 2d 757, 165 N.W.2d 120 (1969), wherein the supreme court held it was not improper for a circuit court to order a daytime jury view of the scene of a murder which occurred during the daytime and a nighttime jury view of the scene of a murder which took place during the nighttime hours. See *Herrington*, 41 Wis. 2d at 766-67.

¶25 Although the court in *Herrington* held that it is not improper for a jury view to be held when lighting conditions are similar to those present when the offense at issue took place, it did not hold that it is improper for the court *not* to hold a jury view when the lighting conditions are similar and Bruckbauer does not cite to any legal authority which indicates a circuit court is compelled to order a jury view of the scene of an offense under lighting conditions identical to, or even similar to, those present when the offense at issue occurred.

¶26 The purpose of a jury view is to enable the jury to understand the evidence introduced. *Haswell v. Reuter*, 171 Wis. 228, 233, 177 N.W. 8 (1920). The circuit court here explained that the jury view in this case would provide the jury “some sense of distance, placement, [and] a spatial view of the scene.” The circuit court also noted the difficulty in exactly reproducing the lighting conditions from October, the month Linder was murdered, at the time of trial, which took place in the months of January and February. The court stated that it could be explained to the jury during trial that lighting conditions at the time of their view were somewhat different than those at the time of Linder’s murder. An erroneous

exercise of discretion will not be found where the circuit court sets forth a reasonable basis for its determination. *State v. McCall*, 202 Wis. 2d 29, 35, 549 N.W.2d 418 (1996). We cannot say here that the court erroneously exercised its discretion by denying Bruckbauer's request to have the jury view the scene of the crime at the approximate time the crime occurred.

CONCLUSION

¶27 For the reasons discussed above, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

