COURT OF APPEALS
DECISION
DATED AND FILED

October 25, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2244-CR **Cir. Ct. No. 2006CF6606**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARTIEAS YENOM SHANKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Artieas Yenom Shanks appeals from a judgment of conviction, entered upon a jury's verdict, convicting him of two felonies. He complains that the circuit court erred by admitting at trial "opinion" testimony

from a police detective about a photographic lineup she conducted. Because we conclude that the circuit court properly admitted the testimony, we affirm.

BACKGROUND

¶2 Three or four men attacked Thomas Lowe late one evening, beat him and robbed him at gunpoint. Lowe viewed a photographic lineup and identified Shanks as one of the assailants. The State charged Shanks with armed robbery and with substantial battery while armed with a dangerous weapon, both as a party to a crime. At trial, Shanks claimed that he did not commit the crimes and that he was misidentified as a perpetrator during the lineup procedure.

¶3 Detective Shelondria Tarver conducted the photographic line-up. She testified during her direct examination about the process of preparing a photographic array, placing photographs of suspects into folders, and displaying the folders to a witness. She described for the jury how Lowe selected Shanks's photograph from the folders of photographs in this case. Shanks cross-examined Tarver about the identification procedure, and the exchange included the following:

> Q: Now, the key points [sic] in putting together a photo array is to avoid suggestiveness, correct?
>
> A: That is correct.
>
> Q: That is, for instance, you wouldn't want all White fillers, other pictures, and one Black defendant to take an extreme –
>
> A: Yes.
>
> Q: --correct? Because that would point out the obvious. It would be pretty suggestive; correct?
>
> A: Yes.

¶4 Under further cross-examination, Tarver testified that a law enforcement officer conducting a photographic lineup is "not supposed to know which folder the suspect['s picture] is in," and that the officer should not sit next to the witness who will examine the array "because there aren't supposed to be any subtle messages or anything like that sent by [the officer]." She testified that she displayed the photographs to Lowe at his home but that she was "not sitting side-by-side with him" during the procedure.

¶5 The State next conducted redirect examination, and Tarver testified in greater detail about how she instructed Lowe about the lineup procedure, shuffled the folders of photographs, and showed them to Lowe one folder at a time. The direct examination continued:

> Q: Is Mr. Shanks – is there anything in this photo array that you see, Exhibit No. 5, that points to Mr. Shanks?
>
> [Defense counsel]: Object the jury can draw that conclusion. We don't need that type of an answer.
>
> THE COURT: Well this is redirect. The witness was questioned extensively about how she conducted the array. At this point, I'm going to overrule the objection and allow the witness to answer the question if she understands the question.
>
> A: There is nothing suggestive about this photo array that would point out Mr. Shanks exclusively.

¶6 The jury found Shanks guilty as charged. He appeals, arguing that the circuit court improperly overruled his objection to the State's question about the photo array.

DISCUSSION

¶7 Whether evidence is admissible lies in the circuit court's sound discretion. ***State v. Brewer***, 195 Wis. 2d 295, 305, 536 N.W.2d 406 (Ct. App.

1995). We will not overturn a discretionary decision if the circuit court examined the facts of record, applied a proper legal standard and, using a rational process, reached a reasonable conclusion. ***Id.***

¶8 Shanks contends that the circuit court erred by permitting the State to ask Tarver whether anything in the photo array "points to Mr. Shanks." Tarver, he argues, was no better able than the jury to make that determination. In his view, the State sought information that was unhelpful and therefore irrelevant and inadmissible under WIS. STAT. § 904.01 (2009-10).[1] We reject the claim. Shanks ignores the context of the State's redirect examination and misunderstands the specific question that the State asked.

¶9 Shanks cross-examined Tarver at length about the identification procedure in an effort to show that the photographic lineup failed to "avoid suggestiveness." "Suggestiveness in photographic arrays may arise in several ways—the manner in which the photos are presented or displayed, the words or actions of the law enforcement official overseeing the viewing, or some aspect of the photographs themselves." ***State v. Mosley***, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981). A suggestive identification procedure risks an unreliable identification. *See* ***id.*** The State sought to refute any inference that the lineup failed in its purpose of aiding in identifying Lowe's attacker. Thus, the State asked whether anything about the photographic array pointed to Shanks. Shanks objected, contending that the jury had no need for the information. In his brief to

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

this court, he expands on that objection, asserting that the jurors "could have examined the pictures themselves."

¶10 In fact, testimony about the photographic array could and did give the jury substantial information about the lineup that was not available merely by looking at the photographs. *Cf.* ***id.*** Indeed, Shanks probed for such information, and, unsurprisingly, the State responded with inquiries designed to allow Tarver to expand on her testimony that nothing arose in the photographic line up that would lead a viewer to select Shanks. Nonetheless, Shanks objected to the State's inquiry, but the circuit court correctly noted the context of the question, namely, that Shanks cross-examined Tarver "extensively about how she conducted the array." The circuit court did not err by permitting the State to seek the same kind of information that Shanks elicited regarding whether the identification procedure compromised its reliability. *See* ***State v. Cydzik***, 60 Wis. 2d 683, 690, 211 N.W.2d 421 (1973) (circuit court has broad discretion with respect to the scope of redirect examination).

¶11 In short, the State sought information from Tarver about whether the photographic array was conducted in a manner that would assist Lowe in determining who attacked him. The inquiry flowed from Shanks's cross-examination of the witness and was entirely proper. To the extent, if any, that Tarver's response went beyond the scope of the question posed when she opined that "there was nothing suggestive about this photo array," we note that Shanks did not move to strike the response. *See* WIS. STAT. § 901.03(1)(a) (relief may not be predicated upon erroneous admission of evidence absent, *inter alia*, a timely and specific motion to strike).

¶12 Moreover, Tarver's opinion was not objectionable. Shanks asserts that it improperly invaded the province of the jury, but an opinion is not improper for that reason.

¶13 Pursuant to WIS. STAT. § 907.04, the opinion of a non-expert witness "is admissible even though it 'embraces an ultimate issue to be decided' by the jury." ***Lievrouw v. Roth***, 157 Wis. 2d 332, 351, 459 N.W.2d 850 (Ct. App. 1990) (citation omitted). Thus, testimony is not objectionable merely because the jury may be required to decide the issue that the witness addressed. Shanks's claim for relief on this basis must fail.

¶14 Shanks also asserts that Tarver's testimony ran afoul of the rule that "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). This contention is wholly without merit. "Under ***Haseltine***, an attorney may not ask a witness to testify about the truthfulness of another witness' testimony." ***State v. Patterson***, 2010 WI 130, ¶58, 329 Wis. 2d 599, 790 N.W.2d 909. Tarver was not asked to and did not testify about Lowe's truthfulness. She testified about how she conducted the lineup.

¶15 Shanks observes that the State did not lay a foundation to qualify Tarver as an expert in the area of eyewitness identification. Nonetheless, he posits that this court might consider whether Tarver's testimony was admissible if offered as the opinion of an expert witness, and he analyzes why, in his view, the testimony was improper expert opinion. We do not reach that question because Tarver did not testify as an expert on the issue of eyewitness identification. *See* ***Area Bd. Of Vocational, Technical and Adult Educ., Dist 4 v. Town of Burke***,

151 Wis. 2d 392, 400, 444 N.W.2d 733 (Ct. App. 1989) (we do not decide hypothetical cases or give advisory opinions).

By the Court.—Judgment affirmed.

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