COURT OF APPEALS
DECISION
DATED AND FILED

May 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 97-3173-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ALAN W. GURSKY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

HOOVER, J. Alan Gursky appeals a judgment convicting him of two counts of attempted kidnapping, attempted operating a vehicle without the owner's consent, disorderly conduct, causing bodily harm, and one count of robbery by force, all as a repeater. On appeal, Gursky contends that the trial court erred when it denied his motion to suppress statements he made to police, as well

as physical evidence obtained later from that statement, and that the court erred by denying his motion to suppress an out-of-court photographic identification. We reject both assertions and affirm.

On August 18, 1996, police sergeant Donald Kramer was patrolling downtown Appleton in the early morning hours when a woman flagged him down. Another woman, Melissa Howard, ran up to his squad as he came to a stop. Howard told Kramer that a man had attacked and struck her just after she parked her car and was attempting to leave it. She resisted and ended up on the ground with the man on top of her, hitting her, until other people scared him away. The woman who had witnessed the attack described the man as a white male, "smaller in stature, wearing a white T-shirt and jeans." As Kramer spoke with the witness, she pointed to a man in a field about 100 yards away and said, "[I]sn't that him over there?"

Kramer and another officer walked toward the man. The man stopped when he saw them approaching and started walking in another direction. The officers were joined by a third officer, and they began to run to reach the man, later identified as Gursky. Kramer asked Gursky if he had been involved in a "confrontation" in the area of State Street, and the man replied "no." Kramer asked more specifically if he was involved in a confrontation with a young woman at that location, and Gursky said "yes". While at the scene, an officer asked Gursky where the keys to Howard's car were, and he responded by telling the officer, who subsequently located them. Although neither Gursky's brief nor the record is clear, it appears Gursky also made some statements to a different officer while in the police car. Upon arrival at the police department, an officer read Gursky his rights and proceeded to interview him.

Another woman, Billie Knutson, had fought off a man who tried to abduct her in her car three days earlier. She subsequently identified Gursky from a photo array as her attacker.

Gursky contends that the trial court erred by denying his motion to suppress statements made to police, and physical evidence obtained from that statement. The trial court concluded that Gursky's first statement was admissible because it resulted from a ***Terry*** stop. ***Terry v. Ohio***, 391 U.S. 1 (1968). It held that Gursky's apparent statement(s) to an officer while in the squad car were admissible because they were unsolicited and not the product of an investigation. It further concluded that Gursky's statements at the police station did not violate his privilege against self-incrimination because he was read his rights, there was no police coercion, and all evidence "suggest[ed] that the defendant knew exactly what he was doing and made a voluntary choice." The court suppressed Gursky's response to a question posed by Kramer while still at the scene about where to find Howard's keys, pursuant to the State's apparent stipulation. Gursky brought motions to suppress his statements and the out-of-court photographic identification.

We review denial of a suppression motion under a two-prong standard: The trial court's findings of facts will be upheld unless they are against the great weight and clear preponderance of the evidence, ***State v. Waldner***, 206 Wis.2d 51, 54, 556 N.W.2d 681, 683 (1996), and its conclusions of law are subject to de novo review, ***id***. In determining whether a statement was voluntary, we independently examine the record and apply the totality of the circumstances test. ***State v. Kiekhefer***, 212 Wis.2d 460, 470, 569 N.W.2d 316, 323 (Ct. App. 1997).

We conclude that the evidence supports the trial court's finding that Gursky's statement about being involved in a confrontation with a woman was the result of a ***Terry*** stop. Section 968.24, STATS., the codification of ***Terry***, provides:

> After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

One witness pointed out Gursky as possibly being the attacker. Gursky's jeans and a white T-shirt matched the witness's description. Kramer and the officers identified themselves and were wearing uniforms. Kramer asked only two questions. The officers had facts upon which to base reasonable suspicion that Gursky was involved in the crime, and the questions constituted a reasonable inquiry into Gursky's conduct. The findings are therefore not against the great weight and clear preponderance of the evidence.

We further conclude that the court correctly ruled that Gursky's statements at the police station were admissible and not tainted by the suppressed statement regarding the location of Howard's car keys. The controlling case is ***Oregon v. Elstad***, 470 U.S. 298 (1985). In ***Elstad***, the defendant made an inculpatory statement prior to receiving ***Miranda*** warnings. ***Id***. He later made a full statement in compliance with ***Miranda***. ***Id***. The defendant sought suppression of both statements on the grounds that the first was taken in violation of ***Miranda*** and the second because it was supposedly tainted by the violation. ***Id***. at 302. The Supreme Court concluded that although the first statement was suppressed because of a ***Miranda*** violation, the relevant inquiry in determining

whether to suppress the second statement is whether it was made knowingly and voluntarily. ***Id***. at 309. Failure to provide ***Miranda*** warnings initially does not automatically lead to suppression of a later statement made after such warnings have been given; rather, the latter is inadmissible only if the first statement is coerced. ***Id***. A statement is coerced in violation of a defendant's due process rights if it is the product of "physical violence or other deliberate means calculated to break the suspect's will …." ***Id***. at 312. "[A] suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite ***Miranda*** warnings." ***Id***. at 318.

The record supports the trial court's conclusion that the statements made at the police station were voluntary and the result of an intelligent, knowing choice. Gursky signed a waiver form of his rights. Kramer testified that he read Gursky his rights before asking him any questions and that Gursky did not seem disabled, did not want a lawyer, and that Kramer did not make any promises or threats to Gursky. Further, under ***Elstad***, we conclude that the inadmissibility of the statement regarding Howard's keys did not taint the Mirandized statements Gursky made at the police station. Gursky points to no evidence suggesting the suppressed statement was coerced, and our review of the record does not disclose any such indications. Rather, Gursky repeatedly told an officer that he could help find Howard's keys, even though Gursky thought he was referring to his own keys.

Further, despite Gursky's contention, this case is clearly distinguished from ***Kiekhefer***. In ***Kiekhefer***, the defendant's mother allowed police to enter her house to speak with him. ***Id***. at 465-66, 569 N.W.2d at 321. When the agents smelled the odor of marijuana in his room, four agents opened

the door without announcing and immediately handcuffed and patted down the defendant and his friend. ***Id***. at 466, 569 N.W.2d at 321. Without asking for consent to search, one agent twice asked the defendant if there were any controlled substances in the room. ***Id***. When the agents did ask for consent to search, they told the defendant they could do it "the hard way" by getting a warrant, in which case they would "tear this place apart," or "the easy way" by the defendant consenting. ***Id.*** The court of appeals concluded that under the totality of the circumstances, the defendant's subsequent Mirandized statements were coerced and suppressed all derivative physical evidence. ***Id***. at 474, 569 N.W.2d at 324.

The case at bar is clearly distinguishable. The officers walked toward Gursky in an open field and identified themselves. The element of surprise, use of force and the privacy associated with one's bedroom are completely absent. The evidence does not support the inference that Gursky's statement at the police station was caused by the statement taken in violation of the Fourth Amendment. We conclude that the statements at the police station were voluntary, not tainted by the suppressed statement, and therefore admissible.[1]

Gursky also argues that the trial court erred by failing to suppress Knutson's out-of-court photographic identification and the later in-court identification of Gursky. He contends the photo identification was impermissibly suggestive because only Gursky was wearing a T-shirt.[2]

[1] Gursky provides us with no argument demonstrating why his statements in the squad car should be suppressed. We therefore include those statements under the previous analysis and conclude that it was voluntary and not tainted.

[2] Testimony demonstrated that two people in the line-up wore T-shirts. One wore a crew neck T-shirt, while another wore a T-shirt type article of clothing.

Admission or exclusion of evidence lies within the trial court's discretion, and we will not disturb its evidentiary ruling absent an erroneous exercise of discretion. *See* ***State v. Mordica***, 168 Wis.2d 593, 602, 484 N.W.2d 352, 356 (Ct. App. 1992). Whether pretrial identification violates due process depends on the totality of the circumstances surrounding the identification confrontation. ***Powell v. State***, 86 Wis.2d 51, 64-65, 271 N.W.2d 610, 617 (1978). The defendant bears the initial burden of proving the identification was unnecessarily suggestive. *See* ***State v. Kaelin***, 196 Wis.2d 1, 10, 538 N.W.2d 538, 541 (Ct. App. 1995). The defendant meets this burden if it can be shown that the identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. ***Powell***, 86 Wis.2d at 61-62, 271 N.W.2d at 615.

We conclude that Gursky has failed to meet his initial burden that the identification was impermissibly suggestive. The record demonstrates that the identification procedure was fair and reliable. Officer Michael Monroe prepared the police department photo array. He testified that he placed certain criteria in a computer, and the computer gave him groups of twelve photos to examine for possible inclusion in the array. He considered the most important features to be Gursky's receding hairline, his medium to heavy mustache and the fact that he is middle-aged. He testified that he did not work from police reports and was unaware that Gursky was wearing a white T-shirt. He further stated that the type of clothing a suspect wears is not ordinarily included as a criterion unless it were something unusual, unlike a white T-shirt. All the subjects in the photos in the array were casually dressed. Finally, the evidence does not support the contention that the photos were presented to Knutson in an unnecessarily suggestive manner.

Accordingly, we hold Gursky's challenge to the photo identification to be without merit and we affirm the trial court's ruling denying his suppression motion.

By the Court.—Judgment affirmed.

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