COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 98-3271-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEAMON HOOVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 FINE, J. Leamon Hoover appeals from a judgment entered on a jury verdict convicting him of first-degree recklessly endangering safety, *see* WIS. STAT. § 941.30(1), and from the trial court's denial of his motion for

postconviction relief. The crux of Hoover's complaint is that the trial court did not allow him to show his twin brother to the jury. We affirm.

I.

¶2 Hoover was convicted of shooting at Joseph Bynum as Bynum sat in his minivan. According to Bynum's testimony at the trial, he and Hoover argued over some dice and then fought with fists. A little later, Bynum told the jury, Hoover first fired four or five shots at him, and then a second volley of three or four shots. The fusillade left several bullets in Bynum's minivan and shattered a window.

¶3 Bynum testified that he had known both Hoover and his twin brother, Lamont Hoover, for some ten years, as they all lived in the same neighborhood, and that he could tell them apart. In an effort to impeach that testimony by showing the jury that the brothers looked alike, Hoover's lawyer wanted the jury to see Lamont Hoover. The trial court denied the request, and, in a written decision denying Hoover's motion for a new trial, credited Bynum's testimony to the effect that Lamont Hoover had been specially groomed for the trial to look like Hoover. The trial court concluded that showing Lamont Hoover to the jury under those circumstances would be "unfairly prejudicial, confusing and misleading."[1]

[1] Leamon Hoover's lawyer used various ploys in his attempt to have the jury see Lamont Hoover. Some were less than fully forthright. For example, on the morning of the trial's first day, two men sat with the lawyer at counsel table, prompting the trial court to ask whether it was "a two defendant case." The trial court then had the following colloquy with the lawyers:

> THE COURT: I don't understand. This is -- Mr. Hoover is to your right, my left. Right?
>
> [Hoover's lawyer]: That is correct.

(continued)

II.

¶4 All of the allegations of trial-court error turn on the trial court's refusal to let Hoover show his twin brother to the jury. Hoover clothes this argument in four similar cloaks: 1) he claims that "excluding Lamont [Hoover]

> THE COURT: Who is the gentleman to your other right?
>
> [Hoover's lawyer]: He is a family member to assist me during the testimony of the complainant or from whoever. He is necessary for the defense because he is very familiar with the neighborhood and can inform me as to whether or not there's any inconsistencies during the complainant's testimony because I'm not familiar with the neighborhood, I don't know the surroundings, and I need a family member to assist me who does know.
>
> THE COURT: It's not going to happen.
>
> [Prosecutor]: This family member by any chance wouldn't happen to be the defendant's identical brother -- would he -- by any chance?
>
> [Hoover's lawyer]: He sure would.
>
> [Prosecutor]: Oh, gee.
>
> [Hoover's lawyer]: Judge, that has nothing to do with it. Listen, I'm entitled to a right to have an investigator assist me or anybody else assist me in the presentation of the trial.

The trial court did not allow Lamont Hoover to remain at counsel table, and, at that point, excluded him from the courtroom while the jury was present. Later, although Lamont Hoover was not listed as a witness, defense counsel asked the judge for permission to call him as a witness. After hearing an offer of proof, as is permitted by WIS. STAT. RULE 901.03(1) & (2), the trial court ruled Lamont Hoover's proposed testimony not admissible. Hoover does not challenge that ruling on this appeal. Ultimately, the trial court permitted Lamont Hoover to observe the trial as long as he sat in a place where it would be difficult for the jury to see him.

We are concerned with defense counsel's lack of candor in his statements to the trial court—the central focus of his attempts to have Lamont Hoover in the courtroom, either as an "investigator" or "witness," was to display him to the jury. Rather than frankly tell the trial court this, defense counsel tried various schemes to accomplish the same thing. In our view, this comes perilously close to violating SCR 20:3.3(a) ("A lawyer shall not knowingly: (1) make a false statement of fact ... to a tribunal."), and we admonish counsel accordingly.

was a closure of the trial," thus violating Hoover's constitutional and statutory rights to a public trial; 2) he contends that he was denied his right to cross-examine Bynum because the trial court would not permit Hoover to display his twin brother to the jury during Bynum's cross-examination; 3) he argues that the trial court denied him his due-process right to present a defense; and, in a final catch-all argument, 4) he seeks a new trial "in the interest if justice." All of these contentions are without merit.

1. *Relevance of whether Bynum or the jury could tell the Hoover twins apart.*

¶5 A trial court's decision to admit or exclude evidence is a discretionary determination and will not be upset on appeal if it has "a reasonable basis" and was made "'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983) (citation omitted). Evidence is not admissible unless it is relevant. *See* WIS. STAT. RULE 904.02. Evidence is not relevant unless it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. RULE 904.01. A defendant has no constitutional right to present evidence that is not relevant. *See* ***State v. Morgan***, 195 Wis. 2d 388, 432, 536 N.W.2d 425, 441 (Ct. App. 1995), *habeas corpus granted on another ground sub nom.* ***Morgan v. Krenke***, 72 F. Supp.2d 980 (E.D.Wis. 1999). Moreover, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." WIS. STAT. RULE 904.03.

¶6 The relevance of whether Bynum could distinguish the defendant Leamon Hoover from his twin brother Lamont Hoover turns on the whether it was

possible that Bynum actually saw Lamont Hoover fire the shots and, because he could not tell the twin brothers apart, believed that he was seeing not Lamont Hoover but the defendant. In short, whether the brothers looked alike would have been relevant if Hoover asserted a mistaken-identity defense. He did not, and the defense lawyer told the trial court that Lamont Hoover was *not* at the shooting scene. This breaks the chain of relevance, and distinguishes this case from ***Lyons v. Johnson***, 99 F.3d 499 (2d Cir. 1996), upon which Hoover relies, where the alleged look-alike was at the scene of the shooting for which the defendant in that case was convicted. *See* ***id.***, 99 F.3d at 500–501. Thus, despite the extensive dancing around this issue in the trial court, it makes no difference whether Bynum could tell the brothers apart. The trial court did not err in excluding the evidence—either Hoover's attempt to display his brother to the jury, or Hoover's attempt to cross-examine Bynum on whether he could distinguish Lamont Hoover from the defendant. This resolves the defendant's second and third claims of error.

2. *Exclusion of Lamont Hoover from courtroom.*

¶7 As noted earlier, the trial court would not permit Hoover to display his brother to the jury, and, during the first part of the trial, kept him out of the courtroom when the jury was present. In an attempt to circumvent this ruling, Hoover's lawyer asked the judge to let him add Lamont Hoover to the defendant's witness list. The trial court granted Hoover's request, and, as provided for in WIS. STAT. RULE 906.15, excluded Lamont Hoover from the courtroom.[2] As we have

[2] WIS. STAT. RULE 906.15 provides:

> **Exclusion of witnesses. (1)** At the request of a party, the judge or court commissioner shall order witnesses excluded so that they cannot hear the testimony of other witnesses. The judge or

(continued)

seen in footnote one, the trial court determined that Lamont Hoover's proposed testimony was not relevant. Hoover does not contend on this appeal either that the trial court erroneously exercised its discretion in not permitting Lamont Hoover to testify, or that the exclusion under RULE 906.15 once Lamont Hoover was added to the witness list was error. After the trial court decided that Lamont Hoover could not testify, he was allowed to observe the trial as long as he sat in a place where the jury could not easily see him. Thus, Hoover's claim that his right to a public trial was violated focuses on his brother's exclusion from the courtroom for the short period before he was added to Hoover's witness list.

¶8 There is no doubt but that a defendant in a criminal case has a Sixth-Amendment right to a public trial. *See* ***Waller v. Georgia***, 467 U.S. 39, 46 (1984); *see also* WIS. CONST. art. I, § 7; WIS. STAT. § 757.14. Thus, a defendant has the right to have members of the public, including family members, *see* ***In re Oliver***,

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court commissioner may also make the order of his or her own motion.

(2) Subsection (1) does not authorize exclusion of any of the following:

(a) A party who is a natural person.

(b) An officer or employe of a party which is not a natural person designated as its representative by its attorney.

(c) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

(d) A victim, as defined in s. 950.02 (4), in a criminal case or a victim, as defined in s. 938.02 (20m), in a delinquency proceeding under ch. 938, unless the judge or court commissioner finds that exclusion of the victim is necessary to provide a fair trial for the defendant or a fair fact-finding hearing for the juvenile. The presence of a victim during the testimony of other witnesses may not by itself be a basis for a finding that exclusion of the victim is necessary to provide a fair trial for the defendant or a fair fact-finding hearing for the juvenile.

(3) The judge or court commissioner may direct that all excluded and non-excluded witnesses be kept separate until called and may prevent them from communicating with one another until they have been examined or the hearing is ended.

333 U.S. 257, 271–272 (1948); ***United States v. Blanche***, 149 F.3d 763, 769–770 (8th Cir. 1998), observe the trial, unless there is a countervailing "overriding interest," that requires exclusion, ***Waller***, 467 U.S. at 45. For example, and as we have noted, WIS. STAT. RULE 906.15, and Rule 615 of the Federal Rules of Evidence, which is substantially similar to RULE 906.15, allow witnesses to be excluded from the court room until after they have testified, so they cannot shape their testimony from the trial evidence. *See* ***James v. Heintz***, 165 Wis. 2d 572, 582–583, 478 N.W.2d 31, 35–36 (Ct. App. 1991) (recognizing long-standing rule of excluding witnesses); ***Blanche***, 149 F.3d at 769–770 (recognizing validity of witness sequestration in face of constitutional challenge). A trial court may exclude a person from the trial if that "'is essential to preserve higher values and is narrowly tailored to serve that interest.'" ***Waller***, 467 U.S. at 45 (quoted source omitted); *see also*, ***United States v. Sherlock***, 962 F.2d 1349, 1356 (9th Cir. 1989) ("The right to a public trial, however, is not absolute and must give way in some cases to other interests essential to the fair administration of justice."). Here the trial court was rightly concerned that showing the jury Hoover's twin brother would distract the jury from its task of determining whether to believe Bynum, who claimed that Hoover shot at him, or to believe Hoover, who testified that he neither shot at nor saw Bynum that evening. As we have already discussed, whether Bynum could or could not tell the two brothers apart was not a material issue in the trial because there was no contention that Lamont Hoover was at the scene of the shooting and that it was thus a case of mistaken-identity. Thus, the fact that either Bynum *or* the jury might have had trouble distinguishing Lamont Hoover from Leamon Hoover would have been nothing more than a red herring dragged across trial. A trial court has a responsibility to ensure that a jury is not misled by extraneous matters that are not relevant to the material issues. The trial court here cogently recognized that to let the jurors see Lamont Hoover would

divert their attention to, in its words, a matter that was "confusing and misleading." The trial court fully complied with the ***Waller*** dictates. Hoover was not deprived of his right to a public trial.

3. *Hoover's request for a new trial "in the interest of justice."*

¶9 Hoover seeks a new trial under WIS. STAT. § 752.35, which permits us to grant such relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." He raises no new issues, however, but merely clothes old ones in new garb. Larding a final catch-all plea for reversal with arguments that have already been rejected adds nothing; "[z]ero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752, 758 (1976).

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.

¶10 SCHUDSON, J. (*concurring in part; dissenting in part*). Leamon Hoover argues that the trial court: (1) denied his constitutional right to a public trial by excluding his twin brother from the courtroom during some of the trial proceedings; and (2) denied his right of confrontation and his right to present a defense by refusing to allow him to bring his twin brother before the jury in order to challenge the victim's ability to distinguish him from his twin. Hoover also argues that a new trial is required in the interest of justice.

¶11 I agree with the majority's resolution of the public trial issue, and I join in the majority's admonishment of Hoover's trial counsel. I disagree, however, with the majority's resolution of Hoover's challenge to the trial court's denial of his request to display his twin brother and utilize him to assist in cross-examining Bynum. Further, I conclude that the trial court denied Hoover's right to present a defense by ruling that Hoover's twin brother could not testify.

¶12 Bynum testified that on the evening of September 19, 1997, he drove to the Hillside Housing Project in Milwaukee where he encountered Hoover, whom he had known for many years. Bynum said he (Bynum) began shooting dice and asked if others wanted to play. Bynum said Hoover told him he (Bynum) was "making his spot hot" and that he (Hoover) would "have to hurt" him. Bynum said Hoover did not explain what he meant by that but, in any event, they began "tussling." After several minutes, Hoover went to his car; then Bynum went to his minivan. Bynum testified:

> I didn't have the engine started. I was like trying to put my keys in the ignition, then I heard a gunshot, then I heard my window bust out, I look over there, I–guess who I see, I see Leamon like this, shooting like this. I'm like–

> ….
>
> First it was that shot, then there was another shot, then what really–really caught my attention was then I panicked because as I was trying to put my car–to put my keys in my ignition and start my car, that's when I seen my window, then I was like let me get out of here, and I was trying–I was like nervous, trying to put my car in gear so I can get out of there, but it was just like when I finally did and I'm leaving the parking lot–

Bynum further testified that four or five shots initially were fired and that "around about two" hit his car, with one bullet shattering the window over his left shoulder and going through a seat belt. Bynum testified that he then drove away and, on his way to the police station, saw Hoover getting out of his car and shooting at him again.

¶13 Police investigation confirmed the damage to Bynum's minivan. Milwaukee Police Officer Mark Bohlmann testified that he "observed the driver's side passenger window to be completely smashed out" and "bullet holes in the front of the minivan." But no one other than Bynum testified to having witnessed either the shooting or the preceding altercation. Hoover testified and denied any involvement.

¶14 The issue at trial, therefore, was whether Bynum had correctly identified Hoover as the shooter. As the prosecutor explained in his opening statement:

> The only issue in this case is going to be is the shooter the guy who is on trial in front of you, and that will depend basically entirely upon your assessment o[f] credibility of the victim, Mr. Bynum.
>
> ….
>
> [I]t's definitely going to be an identification case. Did the victim identify the right shooter? Do we have the right person on trial?"

Moreover, *in his opening statement, the prosecutor focused on Bynum's ability to distinguish Leamon Hoover from his twin brother, Lamont Hoover*:

> [Bynum] will testify very forthrightly, as he always has, that he knows both Hoover twins well enough to tell them apart. He hasn't had any trouble telling them apart. They've always worn their hair very differently, and he will testify that he didn't have any type of a … relationship with either of the Hoover twins.

¶15 The defense agreed with the prosecutor's statement of the issue. In his opening statement, however, defense counsel, while acknowledging that the evidence would establish Bynum's familiarity with the Hoover twins, maintained that the evidence would establish Bynum's inability to distinguish them. Defense counsel explained:

> You're going to hear testimony that the complainant in this case has a long history of interactions with my client and his brother–his identical twin brother. You're going to hear testimony that when I say identical twin brother, I mean identical. You're going to hear testimony–and I think you will be able to see for yourselves that there's no physical scars on the face to identify one from the other, there's no substantially distinct hair cut–there was none that was referred to the Police Department during the investigation, there was no–no beard, no glasses. There's nothing that would make one stand out from the other, and Mr. Bynum's going to ask you to believe that his identification, which was the result of a two minute conversation with supposedly my client that resulted in a physical fight, that he knows who is who.
>
> You're going to hear testimony from Mr. Bynum that during this brief contact with who he believes my client to be, there was no exchange of names at all. Like, hey, Joe. Hi, Pete. There was absolutely nothing. There was nothing stated that would give any inference of identification. There was no corroborating witness as to what happened. It's Mr. Bynum's word against my client. That's it.

¶16 Bynum's trial testimony confirmed defense counsel's forecast that his identification of Hoover as the shooter was based completely on his

observation. That is, Bynum testified that although the person he identified as Leamon Hoover had responded in a "friendly manner" to his greeting just prior to their confrontation, they did not use any names.

¶17 Thus, not surprisingly, much of this relatively brief trial presented extensive questioning: (1) of Bynum, from both the prosecutor and defense counsel, about his familiarity with the Hoover twins, and his ability to tell them apart; and (2) of Hoover, from both the prosecutor and defense counsel, about whether he and his twin brother looked alike at the time of the shooting.[3] Much of

[3] Although an exact question "count" is difficult, given that some questions were imprecise and others were compound, an approximate tally of those asked during the direct and cross-examinations of Bynum and Hoover tells something of both parties' heavy concentration on this subject. The transcript reflects the following approximate totals:

Bynum's direct examination by the prosecutor:

Total questions on all subjects: 213

Questions relating to the ability to distinguish the Hoover twins: 35

Bynum's cross-examination by defense counsel:

Total questions on all subjects: 203

Questions relating to the ability to distinguish the Hoover twins: 57 *

* Additional defense questioning of Bynum on his ability to distinguish the twins was foreclosed by the trial court's denial of defense counsel's request to display Lamont Hoover to Bynum during cross-examination.

Hoover's direct examination by defense counsel:

Total questions on all subjects: 86

Questions relating to physical differences/similarities of Hoover twins: 36

Hoover's cross-examination by the prosecutor:

Total questions on all subjects: 42

Questions relating to physical differences/similarities of Hoover twins: 14

the questioning focused on Bynum's ability to distinguish the twins according to their builds and hairstyles, and on whether Lamont had altered his hairstyle in order to look more like Leamon at trial.

¶18 Cross-examining Bynum, defense counsel sought to display Lamont Hoover in order to challenge Bynum's ability to distinguish the twins. After extensive argument, the trial court denied the request, concluding that "whether or not you call it non-testimonial evidence or demonstrative evidence," displaying Lamont to Bynum and questioning Bynum about his ability to distinguish the twins was "not a proper way to pursue an identification." The trial court, however, acknowledged that Lamont was "a potential witness" and, accordingly, excluded him from the courtroom consistent with the witness sequestration order.

¶19 Soon thereafter, the defense attempted to call Lamont as a witness. Defense counsel explained, "He can testify as to inconsistent facts given by Mr. Bynum as to identification, location and whether or not Mr. Bynum even had an opportunity to see him shortly before this incident, which would give Mr. Bynum a basis for comparison." The trial court, commenting that it did not know "what purpose would be served by having [Lamont] testify," asked counsel what he intended to ask Lamont. Defense counsel responded:

> I'm going to ask him whether or not he's had any contact with … Mr. Bynum … two weeks or three days prior to this incident, and had had any conversations with him; I'm going to ask whether or not he had any contact with … Mr. Bynum approximately five days before that.
>
> This goes to impeach [Bynum] … because of the limited contact or lack of contact with my client's brother, which is the … total basis for comparison of this complainant's … saying he can identify the two because he saw Lamont Hoover several days before and they had different haircuts. That is subject to being ... impeached.

¶20 Following additional argument, the trial court instructed defense counsel to write out his questions for the court's consideration. After a recess, the proceedings continued:

> THE COURT: Okay. So did you finish the questions, counsel?
>
> [DEFENSE COUNSEL]: Yes, Judge.
>
> THE COURT: Okay. What are they?
>
> [DEFENSE COUNSEL]: The questions–first of all, I'm going to ask whether or not he had any contact with Joseph Bynum, consistent with Mr. Bynum's statement, three days prior to the incident.
>
> THE COURT: But he wasn't in the courtroom when Mr. Bynum testified. Okay. So I don't know how you're going to do that.
>
> [DEFENSE COUNSEL]: I'll ask him if he had contact three days before the incident.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: Also, ask him if he had eight–approximately eight days before in the same area.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: Ask him if he knows Joseph Bynum. Well, that should be the first question, actually. Um, ask him if he … knows what my client's weight was back in September of '97; ask him.
>
> THE COURT: Wait. Wait. Wait.
>
> [DEFENSE COUNSEL]: There's been testimony by Mr. Bynum that my client has lost weight since he saw him last.
>
> [PROSECUTOR]: So we're going to ask his twin brother to guess what his weight was three months ago?
>
> [DEFENSE COUNSEL]: Ask him if there's any–if he notices any change in the weight of my client; ask him what type of haircut my client had on the date–at or about the time of – this incident occurred; and ask him what type of a haircut he had at or about the time when this incident occurred.
>
> I'm also going to ask him whether or not he knows if … he has seen my client ever use a maroon four-door car. As you may recall, Mr. Bynum testified he'd seen my client use a … maroon car several times before.

THE COURT: So, that's about eight questions.

[DEFENSE COUNSEL]: Yes.

¶21 Following additional discussion, the trial court returned to the issue of whether Lamont would be allowed to testify:

> THE COURT: And who's your second witness going to be?
>
> [DEFENSE COUNSEL]: Ah, Lamont Hoover.
>
> [PROSECUTOR]: State renews its objection and asks that the Court not permit the identical twin to testify, for all the reasons I've already stated on the record.
>
> THE COURT: I'm still somewhat confused as to the relevance of his testimony. He has–if he wasn't there–I mean, what purpose does it serve to have him testify, unless it's–it is, ah, some kind of collateral impeachment? I just don't understand it.
>
> [DEFENSE COUNSEL]: It's not–if it was some collateral issue that was just totally off point and really not relevant, I–I would agree with the Court. However, in this case identification is a big thing.
>
> Now, this witness–Mr. Bynum stated he saw that it was my client.
>
> THE COURT: Is your client–is he going to testify that he was in fact there?
>
> [DEFENSE COUNSEL]: He's–no, he's not.
>
> THE COURT: Then it's not relevant.
>
> [DEFENSE COUNSEL]: Well, it is relevant, because it will go to establish what type of relationship he did have with Mr. Bynum and whether or not Mr. Bynum saw him prior to the incident, and whether or not his basis for comparison is accurate. Because right now the Jury is–the only evidence they have is the testimony from Mr. Bynum that he saw both individuals, both brothers, approximately a week and a week-and-a-half before the incident. I'm going to bring in a witness to impeach that, saying he never saw us there. There was–there was no contact.
>
> [PROSECUTOR]: If that's not collateral–
>
> [DEFENSE COUNSEL]: He's lying to the Court. The point is, the Jury, as part of the credibility of the witness and the basis for the identification, is to say that he knew the difference between the two, and he said the reason he

> knew the difference between the two is because of the different haircut and because of the weight.
>
> THE COURT: And more.
>
> [DEFENSE COUNSEL]: Well, that–those were the primary two concerns that were related to … the officer in this case. And that's what I believe my client is entitled to contradict.
>
> [PROSECUTOR]: But the only issue [defense counsel] keeps coming back to, this identical twin is going to deny any contact with the victim a week or so, or 4 days, whenever it was, before the shooting. If that's not collateral, I don't know what's collateral. Whether or not this–this chance encounter occurred a week before, a month before, or whatever, that's directly collateral impeachment under all the circumstances….
>
> THE COURT: And the Court believes it's so collateral that it's not relevant. And the Court's not going to allow him to testify.

¶22 A trial court's decision to exclude evidence or testimony on the basis of relevance is a discretionary one, and will not be reversed unless the court erroneously exercised discretion or based its decision on "an erroneous view of the law." *See* ***State v. DeMars***, 171 Wis. 2d 666, 492 N.W.2d 642, 645-46 (Ct. App. 1992). As we have explained, however, the trial court's exercise of discretion must "accommodate[] the accused's due process rights to present a defense." ***State v. Johnson***, 118 Wis. 2d 472, 348 N.W.2d 196, 200 (Ct. App. 1984). We emphasized: "One of the essential ingredients of due process in a criminal trial is the right to a fair opportunity to defend against the State's accusations. A corollary to this principle is the right to present relevant and competent evidence." ***Id.*** (citation omitted).

¶23 "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01 (1997-98). Unquestionably, the record in this case establishes that

the display of Lamont Hoover to facilitate the cross-examination of Bynum would have been relevant to Bynum's testimony and to the very matters *the prosecution* had emphasized both in its opening statement and in its direct examination of Bynum. Moreover, the evidentiary record, together with the trial court's extensive colloquy with defense counsel, also established that Lamont Hoover would have provided relevant testimony.

¶24 The State, in its opening statement, acknowledged that identification was the issue and conceded that Bynum's ability to distinguish Leamon Hoover from his twin brother was relevant. As noted, the prosecutor asked, "Did the victim identify the right shooter?" and connected Bynum's credibility to his ability to distinguish the twins. Indeed, even in his opening statement, the prosecutor specifically asserted that the twins have "always worn their hair very differently." The State elicited Bynum's testimony about his opportunities to observe Leamon and Lamont shortly before the shooting, about their "slim" or "stocky" builds, about their hairstyles, and about his ability to distinguish the twins.

¶25 Thus, the State based its faith in Bynum's credibility and identification accuracy on his ability to distinguish the twins. Clearly, therefore, in attempting to display Lamont and call him as a witness, the defense was seeking to litigate the very subjects *the State* deemed relevant to its prosecution of this case.

¶26 Additionally, even though the trial court ruled that Lamont could not be displayed and could not testify, it allowed the State to introduce, over objection, what, in effect, amounted to evidence rebutting what Lamont's appearance might have shown or what his testimony might have provided. As Hoover correctly argues:

> [T]he [S]tate was allowed to introduce three booking photos of Lamont and to have Detective Sims testify Lamont's current hairstyle did not resemble that in any of the photos even though the booking photos were taken from a year before the incident to a year before the trial.… [T]he [S]tate was also allowed to have Bynum testify that Lamont's hair on the day of trial was shorter than he had ever seen it previously. Yet, when defense counsel elicited testimony from Detective Sims that he had seen Lamont outside the courtroom and that he would have trouble telling the two men apart, the court sustained the [S]tate's objection on the grounds it was irrelevant if the officer could distinguish Mr. Hoover from a non-witness.
>
> Thus, in effect, the trial court permitted the [S]tate to rebut Mr. Hoover's misidentification defense without ever allowing it to be presented.

(Record references omitted.) In short, the *relevance* of Lamont's physical appearance and intended testimony was virtually undisputed.[4] The trial court rulings, however, allowed only the State to develop the evidence on these relevant subjects.

¶27 This is not our first encounter with the exclusion of "look-alike" evidence. In ***Johnson***, "a one-witness identification case," ***Johnson***, 348 N.W.2d at 200, "[t]he defense of mistaken identity was supported somewhat by the testimony of a relative, an ex-relative and, primarily, by photographs of an alleged look-alike who happened to be the son of the resident of the house into which the purse-snatcher fled." ***Id.*** We concluded that because the photographs had not

[4] The State's brief to this court concedes:

> So the relevance of any in-court comparison depended on whether both brothers looked sufficiently similar to the way they had at the time of the crime that a person who was unable to tell them apart at the trial would probably not have been able to tell them apart at the time someone shot at the victim.

The State is correct. The relevance *depended* on factors about which the State was permitted to introduce evidence, but the defense was not.

been displayed to the jury during the trial, it was error for the trial court not to allow them to go to the jury during deliberations. ***Id.*** We observed that it was "at least plausible that [the photographs] could have provided the basis for an acquittal" and, therefore, "[u]nder these circumstances, … providing the jury the opportunity to see the photographs was essential to [the defendant's] defense." ***Id.*** Similarly, in ***DeMars*** we cited ***Johnson*** and observed, "In a mistaken identity case, evidence of other suspects matching the defendant's description is not irrelevant." ***DeMars***, 492 N.W.2d at 646 n.4.

¶28 Here, Lamont's physical appearance and testimony would have been relevant to Bynum's credibility and his ability to identify the shooter. Lamont's testimony would have addressed the very matters *the State* put in issue in its opening statement and throughout the trial–whether Bynum could distinguish Leamon from Lamont, and whether Lamont had altered his appearance since the time of the crime. Accordingly, I conclude that Hoover was denied his right of confrontation and his right to present a defense and, therefore, on these related issues, I respectfully dissent.[5]

[5] Hoover, on appeal, has concentrated on the trial court's denial of his request to display Lamont. Inexplicably, however, he has not specifically argued that the trial court erred in not permitting Lamont to testify. Given Hoover's vigorous and thorough litigation of that latter issue in the trial court, and given the close relationship between Hoover's right to display Lamont and his right to call Lamont as a witness, I would "overlook waiver." *See* ***State v. Neuser***, 191 Wis. 2d 131, 528 N.W.2d 49, 53 (Ct. App. 1995) ("[W]e may overlook waiver where the error is so plain or fundamental as to affect the substantial rights of the defendant. We may grant a new trial in the interests of justice pursuant to § 752.35, STATS., where the real controversy has not been fully tried ….") (citation omitted).