COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2947-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUAN SMITH,

DEFENDANT-APPELLANT.

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

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

¶1 CURLEY, J. Juan Smith appeals from the judgment entered following a jury trial, convicting him of delivery of cocaine, contrary to WIS. STAT. §§ 961.16(2)(b)(1) and 961.41(1)(cm)(1).[1] Smith asserts that the trial court:

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

(1) erroneously exercised its discretion in denying his motion to adjourn the jury trial; (2) erred when it denied his motion to suppress his photo identification; (3) erred in ruling that Smith's displaying his gold front teeth to the jury would waive his Fifth Amendment right not to testify; and (4) erred in finding sufficient evidence was adduced at trial to support his conviction. We affirm.

I. BACKGROUND.

¶2 On September 14, 1999, at approximately 7:50 p.m., Timothy Graham, an undercover officer, purchased cocaine at a home located in the 1300 block of North 36th Street. The officer approached the house and had a conversation about buying drugs in the yard with a woman he had met previously. The woman entered the house and, shortly thereafter, a man came out onto a porch and indicated he would be right down. The man then appeared at the door where he sold cocaine to the officer. As a result of the sale, a search warrant was issued for the home, but the man who sold Graham the cocaine was not present when the warrant was executed. Smith was later identified after Graham viewed two photos supplied by a fellow officer who told him that the photos were of people previously seen at the home.

¶3 Smith was charged with delivering cocaine and bound over for trial. Following his arraignment, the trial court set a trial date of January 5, 2000, and a pretrial date in early December. On December 22, 1999, Smith's attorney filed a notice of alibi pursuant to WIS. STAT. § 971.23(8). However, the motion was not filed at least fifteen days before trial as the statute requires. On January 4, 2000, Smith's attorney filed a motion requesting an adjournment of the trial, claiming that she had not had time to find several alibi witnesses due to Smith's arrest and incarceration and her vacation. The trial court denied the motion.

¶4 The trial court then conducted an evidentiary hearing and denied Smith's motion to suppress the identification. A jury trial followed. During the trial, Smith's attorney sought to have Smith display his two front gold teeth to the jury because Graham did not recall that the drug dealer had gold teeth. The trial court denied the request, reasoning that Smith's display of his teeth to the jury would be a waiver of his right not to incriminate himself. The jury convicted Smith of the charge. After the guilty verdict was returned, Smith made a motion requesting the court to grant judgment in his favor, notwithstanding the jury's verdict. He claimed that there was insufficient evidence in the record to uphold the conviction. The trial court denied the motion.

II. ANALYSIS.

¶5 Smith first argues that the trial court erroneously exercised its discretion in denying his request for an adjournment. Whether to grant a motion for a continuance lies within the discretion of the trial court; and the exercise of that discretion will not be disturbed on appeal except where it is clearly shown that the court erroneously exercised its discretion. ***State v. Leighton***, 2000 WI App 156, ¶27, 237 Wis. 2d 709, 616 N.W.2d 126. When a defendant requests a continuance to locate an alibi witness, the trial court should consider three factors: "whether the testimony of the absent witness is material, whether the moving party has been guilty of any neglect in endeavoring to procure the attendance of the witness, and whether there is a reasonable expectation that the witness can be located." ***State v. Williams***, 2000 WI App 123, ¶15, 237 Wis. 2d 591, 614 N.W.2d 11 (citation omitted). "A defendant's failure to make a satisfactory showing on one or more of the three considerations is grounds for denying his or her motion for a continuance." ***Id.*** After applying the ***Williams*** factors, we are satisfied that the trial court properly exercised its discretion.

¶6 Smith's attorney told the trial court that, despite meeting with Smith three times after he was charged, Smith did not alert her to the existence of the alibi witnesses until she met with him in early December. She did not meet with him earlier due, in part, to Smith's incarceration on another charge. She explained that because she went on vacation in late December, she was prevented from contacting all the witnesses before trial, although she did file a notice of alibi on December 22, 1999. In denying the motion, the trial court noted that it had alerted the parties at the pretrial that the case would be tried on January 5th.

¶7 Clearly, the first and third ***Williams*** factors are favorable to Smith. The missing witnesses were material to Smith's defense as they would have, allegedly, testified that Smith was with them at a different address when the crime was committed. There also existed a "reasonable expectation" that the witnesses could be located since the police were able to find all the witnesses.

¶8 The second ***Williams*** factor, whether "the moving party is guilty of any neglect in endeavoring to procure the attendance of a witness," weighs against Smith. The delay in locating witnesses is directly attributable to Smith's actions. In the first three conferences with his attorney, Smith failed to advise her that he was elsewhere at the time of the drug buy, and he failed to give her the names and addresses of the witnesses who could have attested to his whereabouts. Further, although Smith was incarcerated while the case was pending, the record reflects that he was in a local jail and was not, presumably, prevented from either writing or phoning his attorney, a member of the State Public Defender's Milwaukee Office. Indeed, in explaining her request for an adjournment, Smith's attorney conceded that "Mr. Smith should have been more diligent." Moreover, as noted, while Smith's attorney claimed not to have sufficient time to locate the witnesses who were relatives and friends of Smith's, the State was able to locate and

interview the witnesses in less than two weeks.[2] Consequently, Smith failed to "make a satisfactory showing on one or more of the three considerations" and the trial court properly denied his request.[3]

¶9 Next, Smith submits that the trial court erred in failing to grant his motion seeking suppression of the photo identification. He claims that the identification violated his due process rights because the procedure used by the police was unnecessarily suggestive, rendering the identification unreliable.

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[2] The State did not object to the tardiness of Smith's notice of alibi, and one of Smith's alibi witnesses did testify at trial.

[3] The dissent states that "the trial court provided no decision reflecting any factual findings," and, therefore, concludes that an evidentiary proceeding is necessary to determine whether Smith was guilty of neglect. However, as the dissent recognizes, the trial court stated in its denial that it had "listened to [defense counsel's] explanation" before denying the motion. This explanation by Smith's defense counsel included the following:

> Mr. Smith had not attended certain office appointments while I represented him early on in the case, and I was informed on basically around the 10th of December, he was in custody on another matter ….
>
> …. I went and visited Mr. Smith in the jail and, at that time, [] he gave me some additional information ….
>
> …. During December 13th to 15th, I was in court every day. Despite some attempts, I wasn't able to reach any of the witnesses.
>
> …..
>
> And then on the 23rd, I left for vacation for approximately two weeks.

Clearly, the explanation revealed that both Smith and his attorney had been neglectful. Therefore, when the trial court explained that it had considered Smith's explanation, which occurred just moments before, we presume it took these facts into account. *See* ***Moonen v. Moonen***, 39 Wis. 2d 640, 646, 159 N.W.2d 720 (1968) (appellate court affirms if a trial court reached the result that the evidence would sustain had a specific finding supporting that result been made). Placing the trial court's decision in context, it did not erroneously exercise its discretion in denying Smith's motion.

¶10 A defendant is denied due process when identification evidence admitted at his trial stems from a pretrial police procedure that is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." ***Simmons v. United States***, 390 U.S. 377, 384 (1968). Undue suggestiveness of the procedure employed, however, does not automatically require suppression of the identification evidence. ***Neil v. Biggers***, 409 U.S. 188, 198-99 (1972). Because "reliability is the linchpin in determining the admissibility of identification testimony," ***Manson v. Brathwaite***, 432 U.S. 98, 114 (1977), the question of whether a pretrial identification procedure violates due process depends on the totality of the circumstances surrounding the confrontation, ***Biggers***, 409 U.S. at 199; *see also* ***State v. Waites***, 158 Wis. 2d 376, 391, 462 N.W.2d 206 (1990); and ***Powell v. State***, 86 Wis. 2d 51, 64-65, 271 N.W.2d 610 (1978).

¶11 A defendant who seeks to suppress evidence of an eyewitness identification bears the initial burden to establish that the identification process was impermissibly suggestive. ***Powell***, 86 Wis. 2d at 65-66. Thus, Smith was required to show that the process used in identifying him was impermissibly suggestive. If impermissible suggestiveness is found in the identification procedure, then the burden shifts to the state to demonstrate that, despite the infirmity, the identification was nevertheless reliable under the totality of the circumstances. ***Id.*** In determining reliability, the corrupting effect of suggestiveness is to be weighed against the circumstances that suggest reliability. ***Brathwaite***, 432 U.S. at 114; ***Simos v. State***, 83 Wis. 2d 251, 255, 265 N.W.2d 278 (1978).

¶12 On appeal, a question of law is presented. *See* ***State v. Mosley***, 102 Wis. 2d 636, 652-56, 307 N.W.2d 200 (1981); ***Powell***, 86 Wis. 2d at 62-68. A

reviewing court may make an independent determination of the ultimate question of reliability. ***Id.*** However, a trial court's findings of historical fact will not be disturbed unless they are clearly erroneous. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶13 The trial court found that Smith failed to meet his initial burden of showing that the identification process was impermissibly suggestive. In ***Mosley***, the court set out the following three ways in which suggestiveness may arise: "the manner in which the photos are presented or displayed, the words or actions of the law enforcement officer overseeing the viewing, or some aspect of the photographs themselves." ***Mosley***, 102 Wis. 2d at 652. Here, no evidence was presented that the manner in which the photos were presented was suggestive, nor does Smith argue that the displaying officer's words or actions were suggestive. Rather, Smith complains that the use of only two photos, taken of people known to have been at the home during the execution of an earlier homicide search warrant, render the photos impermissibly suggestive. We disagree.

¶14 The two photos shown to Graham were of Smith and his brother. While the photos are not in the record for viewing, because of their familial relationship, we may assume that there may have been some resemblance between the photos. However, even if the photos were dissimilar, we need not automatically conclude that the photo array was impermissibly suggestive. Single photo identifications are not, per se, impermissibly suggestive. *See* ***Kain v. State***, 48 Wis. 2d 212, 218-19, 179 N.W.2d 777 (1970); *c.f.* ***Holmes v. State***, 59 Wis. 2d 488, 497-98, 208 N.W.2d 815 (1973) (holding that element of suggestiveness is not satisfied where photographs were shown in sequence, one at a time). Here, Smith has presented little evidence that permits a finding of suggestiveness. The photos were taken of the two brothers when they were present at the home during

a homicide investigation. The officer who showed the photos to Graham did not know whether either of the depicted men had ever been charged with a crime following the investigation. Nor did the officer providing the photos know if either brother was involved in the drug dealing. The fact that the photos were selected because the men had previously been in the house did not make the photos "impermissibly suggestive." Thus, Smith failed to meet his initial burden, the inquiry ends, and we sustain the trial court's denial of the motion to suppress the photo identification.

¶15 Smith also argues that the trial court erred in ruling against his request to display his gold teeth to the jury. Smith contends that, because Officer Graham's initial report made no mention of the drug seller having gold front teeth, Graham's identification of him was unreliable. Smith elected not to testify. However, he requested that he be allowed to display his two gold front teeth to the jury. The trial court rejected his request, ruling that if Smith showed his teeth to the jury, he would be giving up his right not to testify and would be subject to cross-examination. Smith contends the trial court erred as his showing of his gold teeth was akin to other "'non-testimonial' evidence such as voice samples, handwriting samples, and even DNA hair and blood tissue." Again, we disagree.

¶16 "The privilege against self-incrimination 'protects an accused … from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature.'" ***State v. LaPlante***, 186 Wis. 2d 427, 437, 521 N.W.2d 448 (Ct. App. 1994), (citing ***Pennsylvania v. Muniz***, 496 U.S. 582, 589 (1990) (citations omitted)). The opposite maxim is equally true. Once an accused gives up the right not to incriminate himself and testifies, the State is entitled to cross-examination. ***State v. Patino***, 177 Wis. 2d 348, 378, 502 N.W.2d 601 (Ct. App. 1993). Finally, to be "testimonial," an

accused's communication "must itself, explicitly or implicitly, relate [to] a factual assertion or disclose information." ***LaPlante***, 186 Wis. 2d at 437 (citation omitted).

¶17 Here, Smith was not requesting that the jury see that he happened to have gold front teeth on the day of trial, as that fact would have been irrelevant. What Smith was actually attempting to do was to tell the jury that, on the date of the drug buy, he had gold front teeth. This request was non-verbal conduct that contained a testimonial component. Smith's request was to have the jury view his teeth and, thereby, indicate that he had the gold teeth on the day of the drug buy. This would have been offered to prove that the officer misidentified him as the seller because the officer would have noticed his gold teeth if, in fact, he had been the drug dealer.[4] Thus, had Smith been allowed to display his teeth, he would have given up his right to remain silent. The trial court correctly determined that Smith's display of his teeth would result in a waiver of his right not to testify.

¶18 Finally, Smith argues that the trial court erred in failing to grant his post-verdict motion requesting judgment in his favor because the State failed to present sufficient evidence to convict him of delivery of cocaine. Ordinarily, an appellate court will not reverse a conviction for insufficiency of the evidence unless the evidence, when viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Johnson***, 2001 WI App 105, ¶23, 244 Wis.2d 164, 628 N.W.2d

[4] This evidence was ultimately submitted through the testimony of a witness who testified that, on the day in question, Smith had two gold front teeth and a person could readily see his teeth when talking to him.

431. Smith's sole argument in this regard is his belief that the identification process was unduly suggestive. Having determined that the photographic identification was proper, we need not discuss this issue further. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶19 SCHUDSON, J. (*concurring in part; dissenting in part*). Although I agree with the majority's resolution of the substantive issues Smith raises, I write separately because I conclude that Smith was entitled to an evidentiary hearing on his claim that the trial court erred in denying his request for a continuance.

¶20 The majority acknowledges that Smith established the first and third of the three factors under ***State v. Williams***, 2000 WI App 123, ¶15, 237 Wis. 2d 591, 614 N.W.2d 11, to gain a continuance. *See* majority at ¶7. The majority concludes, however, that "[t]he second ***Williams*** factor, whether 'the moving party is guilty of [any] neglect in endeavoring to procure the attendance of a witness,' weighs against Smith." Majority at ¶8. Although, for the reasons the majority mentions, that factor may weigh against Smith, defense counsel's statements to the trial court suggest that the evidence may tip the scales the other way.

¶21 As summarized in Smith's brief to this court, on the trial date, defense counsel said that the request for a continuance was justified by numerous factors, including: (1) that date was the first trial date set in the case; (2) Smith had been in custody at a facility unknown to defense counsel until shortly before trial; (3) upon finally locating Smith, defense counsel learned of the existence of numerous alibi witnesses; (4) defense counsel had done her best to locate the alibi witnesses; (5) defense counsel had filed an alibi notice; (6) the one alibi witness counsel had located had confirmed Smith's alibi; (7) counsel had been on vacation from December 23, 1999 to January 3, 2000, just two days before the trial date; and (8) the co-defendant's counsel did not object to a continuance.

¶22 Denying Smith's request for a continuance, the trial court said little more than:

> [W]e were aware this matter was set for trial today. Mr. Smith was aware of that. I've listened to [defense counsel's] explanation as to why you want the request for an adjournment and, to be candid with you, and I understand that you want more time to prepare, but given the age of the case, given the fact that … when we set the trial date, I made it very aware that, since it was outside the ninety days—that I was doing everything I could at that to accommodate people, and the case is going to get tried today….

Thus, the trial court provided no decision reflecting any factual findings or analysis of Smith's request, and the record is far from conclusive on the issue of whether Smith was "guilty of any neglect in endeavoring to procure the attendance" of the alibi witnesses. *See* ***Williams***, 2000 WI App at ¶15.

¶23 Therefore, remand for an evidentiary hearing on whether Smith was entitled to a continuance to secure his alibi witnesses for trial is appropriate and, accordingly, on this issue, I respectfully dissent.