COURT OF APPEALS
DECISION
DATED AND RELEASED

May 22, 1996

No. 94-0982-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD J. MATTA,
a/k/a DONALD J. JOHNSON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Donald J. Matta, a/k/a Donald J. Johnson, appeals pro se from a judgment convicting him of attempted entry to a building without the owner's consent in violation of §§ 939.32 and 943.10(1)(a), STATS., possession of burglary tools in violation of § 943.12, STATS., and obstructing an officer in violation of § 946.41(1), STATS. He also appeals from an order denying his motion for postconviction relief. We affirm both the judgment and the order.

Matta's first objection is to two pretrial identifications made of him by Robert Dowe, who subsequently identified him at trial. Matta claims that his constitutional rights were violated because he was not afforded counsel, or informed of his right to counsel, at these crucial pretrial proceedings. He also contends that the identification procedures were unduly suggestive and subsequently tainted the in-court identification made of him by Dowe.

Matta never moved to suppress the identifications, so no evidentiary record was created on this issue. However, at a postconviction hearing on Matta's claim of ineffective assistance of trial counsel, Matta's trial counsel testified that he did not pursue a suppression motion because after reviewing the preliminary hearing transcripts and police reports with Matta, he concluded that a suppression motion would have no merit.[1] We agree.

Dowe's identification of Matta was challenged on credibility grounds at trial. Dowe testified that while walking to a Superamerica in Oconomowoc, Wisconsin, at 10:15 p.m. on October 9, 1991, he heard a banging noise coming from the side of a store named Feldschneider's Meats. He testified that he was approximately fifty feet away from the store when he heard the noise and that he observed the shadow of a person standing between an open screen door and the door to the building, swinging a bar against the interior door. Dowe testified that the person had his back to him, but that after making his purchase at Superamerica, he again observed the person hitting the door. He testified that he then saw the person start walking toward the front of the building and under a street light. He described the person as a male, approximately 5 feet, 8 inches tall, weighing approximately 150-160 pounds, with black, wavy hair and wearing a red, hooded long-sleeved sweatshirt. He further testified that when the man turned, he observed a big, round emblem on the back of the sweatshirt which was yellow or light in color. He testified that he called the police from his apartment, from which he could observe the man walking away from the scene.

[1] Matta's trial counsel testified that he was not Matta's original attorney but reviewed the record for purposes of considering a suppression motion after he was appointed to the case.

Evidence indicated that Dowe's description was dispatched to police officers in the area. Shortly after receiving the dispatch, Officer Allen Czarnecki observed a vehicle pass him in the downtown business area near Feldschneider's. Because the driver had dark hair and was wearing a red, hooded sweatshirt, Czarnecki stopped the vehicle. After stopping it, he observed a large crowbar on the floor of the car, and when the driver leaned forward, he observed a large emblem on the back of his sweatshirt. Czarnecki testified that the driver, later identified as Matta, told him that he was driving to Milwaukee, which was in the opposite direction from which the vehicle was headed. While Matta remained stopped, Dowe was brought to the scene by another officer and identified Matta as the person he saw at Feldschneider's. Matta was subsequently taken to the police station, where Dowe again identified him after viewing him through a one-way glass.

Matta contends that the first showup was unduly suggestive because, by its very nature, showing a suspect singly to a witness is highly suggestive. He contends that the suggestiveness of the showup was increased because he was handcuffed and in the custody of the police for unrelated charges when Dowe observed him. Matta also refers to the second identification at the police station as a lineup and contends that he was entitled to have counsel at it.

Contrary to Matta's contention, he had no right to counsel at either identification proceeding. The Sixth Amendment right to counsel is offense specific and does not attach until the commencement of the prosecution. ***State v. Coerper***, 199 Wis.2d 216, 222, 544 N.W.2d 423, 426 (1996). While a defendant has a right to counsel at a lineup after a formal prosecution has been commenced by the filing of a complaint or information, ***State v. Taylor***, 60 Wis.2d 506, 522, 210 N.W.2d 873, 882 (1973), this was not the case here. The initial showup where Matta's vehicle was stopped was purely an investigatory stage. Moreover, while the second showup occurred at the police station, formal prosecution had not yet been commenced, nor was Matta subjected to a lineup.[2] He therefore had no right to counsel at these proceedings.[3] *See* ***State v. Russell***, 60 Wis.2d 712, 720, 211 N.W.2d 637, 641 (1973).

[2] While Matta refers to the identification procedure at the police station as a lineup, it was actually a showup. A showup is a procedure where a lone suspect is presented by the

We also reject Matta's argument that the identification proceedings were unduly suggestive. The defendant bears the initial burden of proving that an identification proceeding was unduly suggestive. ***State v. Wolverton,*** 193 Wis.2d 234, 264, 533 N.W.2d 167, 178 (1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 828 (1996). This burden is met if it can be shown that the identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. ***State v. Kaelin***, 196 Wis.2d 1, 10, 538 N.W.2d 538, 541 (Ct. App. 1995). If this burden is met, the burden shifts to the State to prove that the identification was reliable under the totality of the circumstances even though the initial confrontation was suggestive. ***Wolverton***, 193 Wis.2d at 264, 533 N.W.2d at 178.

Showups are not per se impermissibly suggestive. ***Id.*** In fact, a showup, proximate in time and place to the commission of the crime, promotes fairness by assuring reliability while the witness' memory is fresh. ***Kaelin***, 196 Wis.2d at 11-12, 538 N.W.2d at 541. Moreover, a showup may be the preferred procedure because if no identification is made, the suspect may be released and the police can continue their investigation. ***Id.*** at 12, 538 N.W.2d at 541.

Matta contends that these principles do not justify the initial showup because when he was stopped he was placed in custody for traffic violations. He contends that a showup therefore was unnecessary to determine whether he should have been released. The defect in this argument is that regardless of whether Matta was properly in custody for other offenses, the police had a legitimate interest in determining whether he could be identified as the perpetrator of the attempted entry. If Dowe had informed them that Matta was not the man he observed, the police would then have known to continue their search.

(..continued)
police to a witness to a crime for identification purposes. ***State v. Kaelin***, 196 Wis.2d 1, 9, 538 N.W.2d 538, 540 (Ct. App. 1995).

[3] It appears that Matta also believes that he had a right to counsel under ***Miranda v. Arizona***, 384 U.S. 436 (1966). However, the right to counsel under ***Miranda*** protects defendants against self-incrimination during custodial interrogation. ***State v. Coerper***, 199 Wis.2d 216, 222-23, 544 N.W.2d 423, 426 (1996). It is inapplicable to the showups that occurred here.

Because Matta's clothing and dark hair matched the description of the person observed by Dowe and because he was observed in the vicinity of the crime scene shortly after the crime occurred, with a crowbar on the floor of his car and an explanation of his activities which was inconsistent with the direction in which he was heading, the police acted reasonably in bringing Dowe to the scene for purposes of an attempted identification.[4] The mere fact that Matta was shown to Dowe while in the custody of the police and wearing handcuffs does not render the showup suggestive or impermissible. *See* ***id.*** at 12-13, 538 N.W.2d at 541-42.

Because no other evidence regarding the initial showup provides a basis for determining that Matta was displayed to Dowe in a manner which impermissibly suggested that he was guilty, no basis exists for concluding that evidence of that identification should have been suppressed or that trial counsel should have moved to suppress it. Similarly, a showup is not unduly suggestive merely because it takes place at a police station. *See* ***Russell***, 60 Wis.2d at 720, 211 N.W.2d at 641. Since the showup that occurred at the police station was merely a follow-up to the identification that had already been made by Dowe at the scene of Matta's arrest and nothing in the record provides a basis for concluding that the circumstances under which Matta was displayed rendered a misidentification likely, no basis exists to conclude that it was impermissibly suggestive.[5] *See* ***id.*** Because the showups were not impermissibly suggestive, we need not reach the issue of whether Dowe's in-court identification of Matta was otherwise reliable under the totality of the circumstances.

Matta next challenges his conviction of obstructing an officer in violation of § 946.41(1), STATS. Although his arguments overlap and are

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[4] According to Matta, he is taller and heavier than the man described by Dowe to the police and has brown hair rather than black hair. While these discrepancies were properly relied on by Matta's counsel at trial to challenge the credibility of Dowe's identification, they do not render the showup impermissibly suggestive.

[5] Matta argues that because exigent circumstances were not present, the police should have provided him with a lineup at the police station rather than permitting Dowe to identify him a second time by observing him singly through a mirror. However, the law does not require a lineup. *See* ***State v. Isham***, 70 Wis.2d 718, 724-25, 235 N.W.2d 506, 510 (1975).

confusing, he appears to contend that the evidence was insufficient to support his conviction, that the obstruction charge should have been severed from the other counts, that the prosecutor engaged in misconduct related to the obstruction count and that his trial counsel was ineffective for failing to conduct adequate discovery on this charge.

In reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence presented at trial to find the requisite guilt, an appellate court may not overturn a verdict. ***Id.*** at 507, 451 N.W.2d at 758. It is the function of the trier of fact—not the appellate court—to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from it. ***Id.*** at 506, 451 N.W.2d at 757.

The offense of obstructing an officer has three elements: (1) the defendant obstructed an officer; (2) the officer was doing an act in his official capacity and with lawful authority; and (3) the defendant knowingly obstructed the officer (that is, the defendant knew or believed that he or she was obstructing the officer). ***Henes v. Morrissey***, 194 Wis.2d 338, 353, 533 N.W.2d 802, 808 (1995). Section 946.41(2)(a), STATS., defines "obstructs" to include knowingly giving false information to an officer with the intent to mislead the officer in the performance of his or her duty. ***State v. Caldwell***, 154 Wis.2d 683, 688, 454 N.W.2d 13, 15 (Ct. App. 1990).

The evidence presented at trial clearly permitted the jury to find that Matta knowingly gave conflicting and false information regarding his identity to the police with the intent to mislead them. Czarnecki, who stopped Matta's vehicle, testified that it had no registration or license plate, but that Matta handed him an application for registration and a copy of a birth certificate showing the name of Donald Matta and a birth date of May 25, 1961. Officer Glenn Welnack, who brought Dowe to the scene, testified that when he ran a record check on this birth date, it came back as "not on file" in both Wisconsin and California, even though Matta told him he had a California

driver's license.[6] Welnack testified that they searched several states, but nothing was produced from the information Matta gave him, a fact he thought was unusual because a person generally would have some contacts which would appear, at least through traffic records.

Welnack further testified that Matta continued to insist that his birth date was May 25, 1961, even after being told by Welnack that this information was failing to produce any record identification on him. Welnack testified that he told Matta that he would be charged with obstructing if he was lying, but that Matta always claimed when speaking to Welnack that his birth date was May 25, 1961, and never gave Welnack any alternative dates to check even when made aware of the difficulties the police were encountering. Welnack testified, however, that he overheard Matta give Detective Michael Dodd a different birth date. Dodd testified that Matta told him his birth date was May 25, 1958, but never indicated that records identifying him might exist under another date or that he had previously provided other investigating officers with another date. Welnack testified that running record checks using these two birth dates, plus a third that came up during the checks, eventually produced records identifying Matta.

Matta argues that he provided the different dates to assist the officers in ascertaining his identity after he realized that they were encountering difficulties, an argument emphasized by his trial counsel in closing argument. He also contends that he should not be penalized for insisting that his birth date was May 25, 1961, because that, in fact, is his real birth date.

The jury was entitled to find Matta's explanation of the events to be incredible. The officers' testimony did not indicate that Matta told them that his birth date was 1961, but that he was sometimes mistakenly listed with a birth date of 1958. Rather, the officers' testimony indicated that Matta told one officer that his birth date was in 1961 and told another that his birth date was in 1958. Based on the testimony indicating that he did this without explaining that

[6] Welnack testified that when the California search failed to produce information regarding Matta's identity, Matta told him that his California license must have expired. Welnack testified that information regarding a license generally would still be produced in the search, even if a license had expired.

both dates previously had been used in his records, the jury could reasonably find that he gave these dates in an attempt to mislead, rather than assist. Particularly in light of Welnack's testimony that Matta never provided him with any alternative date even when Welnack informed him of the difficulties the police were encountering, the jury could reasonably infer that Matta provided a different date to Dodd in an attempt to further hinder proceedings.

Matta appears to believe that because many police, corrections and court records list his birth date as May 25, 1961, they conclusively establish that it is his actual birth date and he therefore could not be charged with obstructing because he provided the officers with that date. This argument fails because regardless of which date is Matta's true birth date, the obstruction arose from the manner in which Matta provided different dates to the officers. Because Matta could have only one real birth date, at least one of the dates provided by him had to be false. Since the jury could also reasonably infer that he provided the false information with the intent to mislead, he was properly convicted of obstruction.

Matta also contends that his trial counsel was ineffective for failing to adequately conduct discovery as to this issue and failing to file a pretrial motion to dismiss on the ground that he provided his correct birth date. While Matta's trial counsel testified at the postconviction hearing, he was not questioned as to what discovery he conducted on the obstruction issue or why he did not file a motion to dismiss related to that issue. Therefore, the issue of whether he was ineffective in regard to those matters will not be considered on appeal. *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). However, we point out to Matta that the complaint and amended complaint set forth facts establishing probable cause to believe that he was guilty of obstructing. Just as his claim regarding his correct birth date provides no basis for concluding that the evidence at trial was insufficient, it also would have provided no basis for dismissing the obstructing charge.

Matta also contends that the State engaged in misconduct by failing to produce printouts or teletypes before trial which would have identified him as "Donald J. Matta, D.O.B. 5/25/61; Don Johnson 5/25/58, place of birth California." He contends that such records were available at the time of trial and would have nullified the obstruction charge. He also contends that records containing this information must have been received by or available to

the police at the time of his arrest, and that the police therefore must have testified falsely when they stated that they could not obtain information about him when they ran a record check based on the information he initially provided.

These issues provide no basis for relief. Matta made allegations at the postconviction hearing but produced no evidence which established that the police actually obtained teletypes or printouts containing all of this information and clearly identifying Matta when they ran a record check based on the information initially provided by him. Consequently, to the extent that he is attempting to allege newly-discovered evidence, the attempt fails.

To the extent that Matta is alleging that the prosecutor engaged in misconduct by failing to disclose exculpatory evidence, this argument also fails. The Crime Information Bureau (CIB) records submitted by Matta at the postconviction hearing listed his name as "Don Johnson" with a birth date of May 25, 1958. The name of "Donald Matta" with a birth date of May 25, 1961, appeared further down in the document, along with numerous other "names used." The police acknowledged at trial that they eventually obtained identifying information after searching under different dates and merely denied receiving information when they first used only the name of "Donald Matta" with a date of birth of May 25, 1961. Consequently, even if the prosecutor's files contained a similar CIB report prior to trial, we perceive no basis in the record for concluding that it was exculpatory or that the prosecutor otherwise engaged in misconduct.

Matta also contends that the trial court erroneously exercised its discretion by denying his motion to sever the obstructing charge from the charges of attempted entry of a building and possession of burglary tools. Absent an erroneous exercise of discretion, we will not disturb a trial court's refusal to sever properly joined charges. *See* ***State v. Hall***, 103 Wis.2d 125, 140, 307 N.W.2d 289, 296 (1981). In considering a motion for severance, the trial court must determine what, if any, prejudice would result from a trial on the joined charges. ***State v. Bettinger***, 100 Wis.2d 691, 696, 303 N.W.2d 585, 588, *modified*, 100 Wis.2d 691, 305 N.W.2d 57 (1981). When evidence of both counts would be admissible in separate trials, the risk of prejudice arising from joinder generally is not significant. ***Id.*** at 697, 303 N.W.2d at 588.

Matta contends that the trial court's refusal to sever the obstruction charge prejudiced him in the other cases by making the jury aware that he had "numerous alias's [sic] of record." However, evidence that Matta gave police conflicting identifying information during an investigation of the attempted entry charge was relevant. It permitted the inference that rather than being mistakenly stopped by police, Matta was, in fact, the perpetrator of the crime at Feldschneider's and was attempting to elude police by providing false information concerning his identity. Since the trial court could properly determine that the evidence was therefore admissible in the trial of the burglary-related charges, Matta has not demonstrated that severance was improperly denied.[7]

Matta's final argument is that the trial court erred by excluding evidence of Dowe's prior convictions and by refusing to permit him to question Dowe concerning other charges pending against him. Whether to allow evidence of a prior conviction for impeachment purposes under § 906.09, STATS., lies within the discretion of the trial court. ***State v. Kruzycki***, 192 Wis.2d 509, 525, 531 N.W.2d 429, 435 (Ct. App. 1995). Evidence of a prior conviction may be excluded if the trial court determines that its probative value is substantially outweighed by the danger of unfair prejudice. Section 906.09(2). The lapse of time since the conviction, including whether the witness was incarcerated or free during that time, is a factor to consider in determining whether evidence of a conviction should be admitted. ***Kruzycki***, 192 Wis.2d at 525, 531 N.W.2d at 435.

The record here indicated that Dowe's prior convictions were from 1976—almost sixteen years before this trial. The record also indicated that Dowe was placed on probation at the time of his 1976 convictions and required to serve 100 days in the county jail. Based on the remoteness of the convictions and the fact that Dowe was incarcerated for only a short period of time in the

[7] In the section of his brief discussing severance, Matta also asserts that the trial court abused its discretion by failing to issue a "curative instruction to the jury in regards to multiplicitous charges, so that the jury be clear as to the fashion to apply the evidence." Because this contention is not supported by legal argument or citation to the record demonstrating that a particular instruction was requested at trial, we will not consider it. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992); RULE 809.19(1)(e), STATS.

intervening years, the trial court properly exercised its discretion in excluding evidence of the prior convictions.

We also reject Matta's claim that the trial court denied him his constitutional rights when it refused to permit him to question Dowe at trial regarding three counts of sexual assault pending against him in Waukesha county. Matta wanted to question Dowe concerning the charges to show that Dowe was biased or motivated to fabricate evidence to curry favor with the prosecutor and the trial court judge. After hearing an offer of proof on the issue, the trial court refused to permit the questioning.

During questioning for purposes of the offer of proof, Dowe admitted that a complaint had been filed against him in October 1992, approximately one month before Matta's trial, charging him with three counts of sexual assault based on acts allegedly occurring in 1987 or 1988. Dowe testified that an investigation was commenced against him in August 1992, at which time he made a statement to the police concerning the sexual assault allegations. He also admitted that an information had been filed, that he had waived his right to a preliminary hearing and that the case was assigned to the same judge who was presiding at Matta's trial. Dowe indicated that his attorney had been told that the prosecutor would be recommending a prison term of twenty years if he was convicted. He testified that he had not been offered any promises or consideration in exchange for his testimony against Matta, but that he would like it if the district attorney's office or the trial court looked upon him with favor if he ultimately was convicted of the pending charges. He also indicated that he was never asked whether he wanted to cooperate in this case in exchange for consideration in his own case.

The exposure of a witness' motivation in testifying is a proper function of the constitutionally protected right of confrontation and cross-examination. ***State v. Lindh***, 161 Wis.2d 324, 346, 468 N.W.2d 168, 175 (1991). Nevertheless, trial courts retain wide latitude to impose reasonable limits on such cross-examination based on concerns of prejudice, confusion of the issues or the presentation of evidence which is only marginally relevant. ***Id.*** Evidence must be relevant to be admissible and, even if relevant, may be excluded if its probative value is substantially outweighed by other factors, including the risk of unfair prejudice. ***Id.*** at 346-47, 468 N.W.2d at 175.

Evidentiary determinations are a matter of trial court discretion. ***Id.*** at 348, 468 N.W.2d at 176. Appellate courts will reverse a trial court's determination to limit or prohibit cross-examination offered to show bias only if the trial court's determination represents a prejudicial misuse of discretion. *See* ***id.*** at 348-49, 468 N.W.2d at 176. An erroneous exercise of discretion will not be found if a reasonable basis exists for the trial court's determination. ***Id.*** at 349, 468 N.W.2d at 176.

After hearing the offer of proof, the trial court concluded that evidence concerning the pending charges was not so probative on the issues of bias or motive as to be relevant to this case. It attached great significance to the fact that Dowe had testified at the preliminary hearing regarding his observations on the night of Matta's arrest and that this testimony was given almost ten months before Dowe was alerted to the fact that he was the subject of an investigation. It concluded that it would be stretching the imagination to believe that Dowe had a motive to fabricate his observations on October 9, 1991, the night Matta was arrested, in the event he was ever charged in the future with sexual improprieties. It also noted that the charges against Dowe were proceeding through the court system in a timely fashion, that there was no evidence of any foot-dragging or manipulation of the system by the prosecution after the charges were reported to their office and that there was no evidence of offers of benefits in exchange for Dowe's cooperation. It noted that different prosecutors were involved and concluded that questioning regarding the charges was not warranted merely because the prosecutors were from the same district attorney's office or because Dowe's pending case had been randomly assigned to the same trial court judge. Based on these factors, it concluded that the pending charges were irrelevant and that reference to them "would perhaps prejudice this witness' testimony."

Based on the factors discussed by the trial court, we find no grounds to disturb its exercise of discretion or to determine that Matta's confrontation rights were denied. This is not a case such as those cited by Matta where charges against a witness were reduced, dropped or delayed in exchange for his or her testimony, or where the witness was a suspect in the crime with reason to focus suspicion on the defendant. It is also distinguishable from the situation in ***Lindh***, where the expert witness being challenged for bias first submitted his report favorable to the State after he became aware that allegations of criminal conduct had been referred to the district attorney's office,

and from there to a special prosecutor for investigation. ***Id.*** at 339-40, 468 N.W.2d at 172.

As discussed by the trial court, it would be complete speculation to conclude that Dowe had a motive to contact police and fabricate his identification of Matta in October 1991 on the chance that he would be charged in the future for events that had occurred years earlier when no evidence indicated that the events were even the subject of investigation at the time. Moreover, Dowe testified at trial only concerning the observations he made on the night of Matta's arrest, consistent with his previous testimony at the preliminary hearing. Since no reasonable basis existed to believe that he had a motive to fabricate his preliminary hearing testimony or his statements to police, both of which were given in October 1991, there was also no reasonable basis to conclude that he was motivated to fabricate his testimony at the time of Matta's trial. *Cf.* ***id.*** at 350, 468 N.W.2d at 177 (holding that there was no reasonable possibility of bias, motive or interest on the part of a witness during the period before he knew allegations of criminal conduct had been referred to the district attorney for investigation). This is particularly true in the absence of evidence that any promises or consideration were offered to Dowe in exchange for his testimony at trial.

By the Court.—Judgment and order affirmed.

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