COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP71-CR **Cir. Ct. No. 2011CF3900**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ALEXANDER JEROME WILEY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Reversed and cause remanded.*

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. The State charged Alexander Jerome Wiley with first-degree reckless homicide, while armed, as a party to a crime. *See* WIS. STAT. §§ 940.02(1), 939.63(1)(b) & 939.05. The circuit court prevented Arnetta

Childress from testifying that Wiley and another killed a man. The State appeals. We reverse.

I.

¶2 Late one evening in August of 2011, the police went to the scene of a reported shooting on North 15th Street in the City of Milwaukee. They found Darrin Moore, in his van, shot through the head. Moore died from the wound. Childress told the police she saw the shooting. She said that "she was hanging out in the alley behind a vacant house at 3250 N. 15th Street" when three men came into the alley. She said that she recognized the men from the neighborhood, and identified two by their nicknames: "Fat Man" and "June." According to Childress, "Fat Man" told her to "Get your ass up out the alley." Childress left the alley. A short time later, she saw a van driving southbound on 15th Street, and saw "Fat Man" and "June" "run towards the van … and beg[i]n shooting multiple times into the car." Childress said that she saw the van crash and "Fat Man" and "June" run away.

¶3 Childress described "June," as recorded in a police report, as: "B/M, mid to late teens, 5'4-5", 200 lbs., heavy build, dark complexion, dreadlocks, wearing a gold diamond earring in his right ear, striped khaki shorts and a white tank top. She related that June lives in the single family house located on the south/east corner of 15th and Concordia with a lady named Denise."

¶4 Childress identified "Fat Man" from a photo-array lineup and identified "June" from a separate photo-array lineup. She said that "June" was Wiley. Wiley sought to suppress the identification because he was the only one in the array with "an obvious physical defect in his right eye." The circuit court

agreed that the photo array was unduly suggestive. The issue then turned to whether Childress would be permitted to nevertheless identify Wiley during a trial.

¶5 During the suppression hearing, the State brought out that Childress knew Wiley from her neighborhood and thus could identify him independently of the suggestive photo-array:

> [Prosecutor]: Ms. Childress, … Are you familiar with the area of around 15th and Ring?
>
> A Yes.
>
> Q Have you lived in that area?
>
> A Yes.
>
> Q How long have you lived there, ma'am?
>
> A Over 10 years.
>
> Q And were you living in that area back on August 2nd of 2011?
>
> A Yes.
>
> Q While living in that area … did you … know a person by the … nickname of June or June Bug?
>
> A Yes, yeah.
>
> ….
>
> Q Is that a person you had seen in that area?
>
> A Yes.
>
> Q How long had you know[n] that person or seen that person?
>
> A … in-between the range of five to ten years.
>
> Q All in that area of 15th and Ring?
>
> A Yeah.
>
> Q Did you meet him?

> A Meet-- I mean, you know, not like somebody you just know, you-- I'm well known. You just know from being in the hood, and, you know.
>
> Q Somebody you would see?
>
> A Yeah, just know, you know, knowing going [sic—growing?] up, just know them, not like somebody personally introduce me to him, you just know. I grow up around people. You see people. You know them.

The circuit court then asked Childress some questions:

> THE COURT: How many times do you think you saw this person that you knew as June or June Bug.
>
> [Childress]: Oh, a lot.
>
> THE COURT: Like, more than five?
>
> [Childress]: Yeah, more than 10, yeah.
>
> [Prosecutor] … You knew him between five to ten years.
>
> I know this is difficult, but given let's say a typical year, how often would you see this person?
>
> [Childress]: Half of the year.
>
> ….
>
> A Hundred and some days out the year that you probably see that person.
>
> THE COURT: Okay.
>
> [Childress]: That's the number.
>
> THE COURT: So you're saying you would see him every other day for a year?
>
> [Childress]: Yeah, practically every day.
>
> THE COURT: Okay. Practically every day but every other day at least?
>
> [Childress]: Yeah.

> [Prosecutor]: Would that be each year for this five-to-ten-year period?
>
> A Give or take, yeah.
>
> Q Did-- To your knowledge, did this person June or June Bug live in that area as well?
>
> A Yeah. I don't know exact where he lived, but, yeah.
>
> Q You would see him in that area?
>
> A Yeah, a lot.

¶6 Wiley's lawyer asked Childress: "When you saw a person you indicate as June or June Bug in the neighborhood, you saw him enough times to know that he had a problem, a defect in his right eye; is that right?" Childress answered: "Yeah, I know him. I call it the lazy eye."

¶7 The circuit court then asked Childress a few more questions:

> [THE COURT]: The times you would see Mr. Wiley, what was he doing?
>
> [Childress]: Hanging out on the corner. He's in the neighborhood. I know my neighbors. I know about my neighbors, like what you said, just hanging out on the corner.
>
> THE COURT: Which corner?
>
> [Childress]: On 15th of--15th and Concordia, 15th and Ring, 14th and Ring.
>
> THE COURT: So on any one of those corners?
>
> [Childress]: Hanging out in the alley, hanging in the alley, you know.
>
> ….
>
> THE COURT: … Are you the kind of person who regularly goes for walks every day so you would see all these different corners?

[Childress]: Yeah, I be outside a lot, Your Honor.

¶8 When the circuit court asked if Childress had told the police "where to find him, or where you seen him before, or how you knew him?", Childress answered: "One of the interviews I told him, well, you know, they be hanging out there. … I told them about, you know, where majority I see them hang out on the house, on the corner of 15th and Concordia where they sell loose cigarettes at, you know."

> THE COURT: So you're saying you told the police the guys you saw--the guy seen buying loose cigarettes at--
>
> [Childress]: No, hanging out on that corner by the loose cigarette house.
>
> THE COURT: Oh--
>
> [Childress]: Because I go there and buy loose cigarettes.
>
> THE COURT: You know where the corner was?
>
> [Childress]: Yes.

¶9 Wiley's lawyer asked Childress: "Now, you were smoking crack earlier that evening, correct?" Childress answered, "No" but the circuit court interceded: "This isn't really helping. This may be useful for trial, but I'm trying to figure out whether before she was shown the photo array she had an independent basis for even knowing who Mr. Wiley was." When Wiley's lawyer tried to argue that the drug information was relevant, the circuit court rejected the argument:

> That's how these cases go down in the standard case where it's a one-time viewing of a person … but that's not the State's argument here.

> The State is not arguing these witnesses got such a good look that their good look by itself makes their identification reliable.
>
> ….
>
> So what I'm trying to find out is, is it true that these people knew him from the neighborhood, therefore, would have an independent basis to know who he was before they saw him in the line up.

The circuit court told Wiley's lawyer that he could "explore [the crack use] with the jury, but that's not what I need to know and decide whether" there is an independent basis to "identify Mr. Wiley."

¶10 After the hearing on Wiley's suppression motion, the circuit court issued a written decision suppressing Childress's in-court identification because "too many doubts were raised about her testimony during the hearing on December 20, 2011 for me to conclude that [Childress's] familiarity with Mr. Wiley is clear and convincing: (1) At the time she says she saw him, she was, or recently had been, smoking crack. (2) Like Devon Sutton, she gave a fairly detailed description of the person she says she saw, yet failed to mention anything about what is most immediately recognizable about him – his eye. Her physical description of him is akin to describing Moshe Dayan without mentioning the eye patch or Ste[ph]en Hawking without mentioning the wheelchair. (3) Her explanation of how she came to know Mr. Wiley was too vague for someone who says she saw him as often as she says she did." The circuit court found that:

> For these reasons, I am not persuaded clearly and convincingly that [Childress] ha[s] any basis independent of the photo array for identifying Mr. Wiley, and therefore … may not be asked to make an in-court identification of him. Too great a possibility exists that [her] only basis for identifying him is the result of the suggestive photo array.

II.

¶11 The State does not challenge the circuit court's suppression of the out-of-court photo-array identification. Rather, the State claims it proved by clear and convincing evidence that Childress could independently identify Wiley because she knew him from the neighborhood and that the suggestive photo array did not taint that ability.

¶12 We apply the same rules as the circuit court when reviewing whether a pretrial identification should be suppressed. ***State v. Benton***, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 60, 625 N.W.2d 923, 926. The defendant has the burden to prove that the pretrial procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." ***Ibid.*** (quoted source and internal quotation marks omitted). If the defendant satisfies that burden, the State must prove that "the in-court identification has an *independent source*," ***State v. McMorris***, 213 Wis. 2d 156, 167, 570 N.W.2d 384, 389 (1997) (emphasis added), and is free of taint, ***Powell v. State***, 86 Wis. 2d 51, 66, 271 N.W.2d 610, 617 (1978). Our review involves "a question of constitutional fact, which is a mixed question of fact and law." ***State v. Roberson***, 2006 WI 80, ¶25, 292 Wis. 2d 280, 300, 717 N.W.2d 111, 121. We will, of course, uphold the circuit court's findings of fact unless they are "clearly erroneous." *See* ***id.***, 2006 WI 80, ¶25, 292 Wis. 2d at 300–301, 717 N.W.2d at 121. Whether the facts satisfy the "clear and convincing" standard, however, is a question of law that we review independently. ***Ibid.***; ***Benton***, 2001 WI App 81, ¶5, 243 Wis. 2d at 60, 625 N.W.2d at 926.

¶13 As we have seen from the circuit court's written decision, it found Childress's testimony about knowing Wiley from the neighborhood too "vague" to

satisfy the clear and convincing standard. This finding is clearly erroneous because Childress's testimony was *not* vague. Significantly, the circuit court did not indicate either at the suppression hearing or in its written decision that it did not believe her testimony, and Wiley's assertion to the contrary on this appeal is not supported by the Record.

¶14 Oddly, although the circuit court correctly, in our view, cut Wiley's lawyer off when he tried to explore whether Childress used cocaine that night, its written decision gives that alleged cocaine use as a basis for its decision to prevent Childress from identifying Wiley as one of the men who killed Moore. Whether Childress used cocaine that night had nothing to do with whether she knew and had known Wiley from her neighborhood. Similarly, whether she told or did not tell the police that Wiley had something wrong with one of his eyes also did not bear on whether she was telling the truth when she said she knew Wiley from her neighborhood. Indeed, it would be just as likely (and, of course, wholly speculative one way or another, given our Record) that having seen Wiley so much, she just ignored his eye problem because she was so used to it. In any event, neither her cocaine use that night or her not telling the police about Wiley's eye did not, as the circuit court opined, make "vague" her testimony about having known Wiley for a long time.

¶15 As we have seen, Childress testified that she knew Wiley from the neighborhood, that she saw him hanging out on a neighborhood corner "practically every day" or "every other day" for five to ten years. She identified the specific corners where she saw Riley, explained why she was on those corners, that they grew up in the same "hood," and that she called his eye defect his "lazy eye." Childress thus had an independent basis for knowing Wiley before she saw the photo array, and, in fact, had known him for a long time *before* she even saw the

photo array. Thus, the suggestive line-up did not taint Childress's identification of Wiley. *See* ***United States v. Wade***, 388 U.S. 218, 241–242 (1967) (when lineup identification is improper, State must prove the in-court identification of the defendant has an "independent origin" that allows the eyewitness to identify the defendant irrespective of the lineup; if the in-court identification has an independent source, the in-court identification is admissible).

¶16 The circuit court's erroneous finding that Childress's testimony about how long she knew Wiley was vague led it to prevent Childress from identifying Wiley at trial as one of the men who killed Moore. The State met its burden that her in-court identification of Wiley was "independent" of the suggestive photo array. *See* ***McMorris***, 213 Wis. 2d at 160, 570 N.W.2d at 386; ***Powell***, 86 Wis. 2d at 66, 271 N.W.2d at 617. We reverse the circuit court's order and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded.

Publication in the official reports is not recommended.