COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2669-CR **Cir. Ct. No. 2005CF1097**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO R. MARTINEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Antonio R. Martinez appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues that the jury instructions violated his constitutional right to a unanimous jury, and that a photo array used to identify

him was unduly suggestive. We conclude that the jury instructions properly directed the jury to consider both counts of the crime charged. We also conclude that even assuming the photo array may have been unduly suggestive, under the totality of the circumstances, the identification of Martinez was valid. We affirm.

¶2 Martinez was charged with two counts of first-degree intentional homicide while armed as an habitual offender, one count of possession of a firearm by a felon, one count of obstructing an officer as an habitual offender, and one count of operating a firearm while intoxicated as an habitual offender. Prior to trial, Martinez moved to suppress evidence on the basis that photo arrays used had been unduly suggestive. The circuit court denied the motion.

¶3 At trial, the two victims of the attempted homicides testified that Martinez had shot them. Another witness testified that he knew Martinez before the night of the incident and was able to identify him as the person who shot the two victims. Other witnesses also identified Martinez. The jury convicted Martinez on all counts.

¶4 After trial, Martinez moved for postconviction relief arguing that the jury instruction on attempted homicide was confusing because it did not really explain that there were two separate counts: one for each victim. The circuit court held a hearing on the motion. The circuit court concluded that the instruction was not confusing, and denied the motion.

¶5 Martinez renews his argument to this court that the jury instruction on attempted homicide was confusing, and consequently violated his right to a unanimous verdict. When instructing the jury, the court said:

> If you're satisfied beyond a reasonable doubt that the defendant intended to kill Richard Smetana and/or Nicholas

> Seeger, and the defendant's acts demonstrated unequivocally that the defendant intended to kill and would have killed Richard Smetana, and/or Nicholas Seeger except for the intervention of another person or some other extraneous factor, you should find the defendant guilty of attempted first degree homicide.

The court went on to say:

> To explain to you here again, Counts 1 and 2 are the same crime charged but with respective different victims. So I've read the instruction once but the same language I just read applies to both Counts 1 and 2. The difference is that Count 1 has the name of victim Richard Smetana and Count 2 has the name of victim Nicholas Seeger.

¶6 Martinez argues that the "and/or" language in the instruction was confusing to the jury because the jury could have thought that the circuit court meant that Martinez could be found guilty of any count of attempted first-degree intentional homicide if he attempted to kill either Smetana and/or Seeger. We disagree.

¶7 First, Martinez acknowledges that his trial counsel did not object to jury instruction. "We have the discretionary power to review a waived instructional error if the error goes to the 'integrity of the fact-finding process.'" ***State v. Hatch***, 144 Wis. 2d 810, 824, 425 N.W.2d 27 (Ct. App 1988) (citation omitted). As we did in ***Hatch***, we will address the claimed error in this case.

¶8 When determing whether an instruction was confusing, we may consider whether the "overall meaning" was communicated to the jury. ***Id.*** at 826. ***Hatch*** also involved two charges of attempted first-degree homicide. ***Id.*** at 824. The circuit court gave an instruction that was remarkably similar to the one given here. Before giving the instruction, the court explained to the jury that for one count it was necessary that the jury find the defendant intended to kill the first victim, and as to the second count it was necessary that the jury find that the

defendant intended to kill the second victim. ***Id.*** at 826. We concluded that the "the instructions, taken in their entirety, render any error harmless because the overall meaning communicated by the instructions was a correct statement of the law." ***Id.***

¶9 Similarly, we agree with the circuit court that the instruction in this case was not confusing. Further, even if the instruction itself was confusing, the explanation given by the court immediately following the reading of the instruction communicated to the jury a correct statement of the law. We reject Martinez's argument that he was denied his right to a unanimous jury verdict.

¶10 The next issue is whether the circuit court erred when it denied Martinez's motion to suppress evidence. Martinez argues that the photo array shown to witnesses by the police was unduly suggestive. Assuming without deciding that the array was overly suggestive, we nonetheless conclude that the circuit court properly denied the motion.

¶11 Even if a photo display is impermissibly suggestive, however, the court may consider whether under the totality of the circumstances, the "very substantial likelihood … of misidentification" has been avoided. ***State v. Mosley***, 102 Wis. 2d 636, 655, 307 N.W.2d 200 (1981) (citation omitted). The court should consider:

> ". . . the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

Id.

¶12 In this case, the evidence was such that the photo arrays were almost superfluous. Both of the victims identified Martinez. Both of them saw Martinez before and while he shot them. Both of them described Martinez accurately, including that he had a ponytail and a tattoo on his neck. Another witness knew Martinez before the incident and named Martinez as the shooter before he was even shown the photo arrays. The other three witnesses who viewed the arrays also had sufficient opportunity to see Martinez during the crime, and accurately described him. It simply defies reason that all of these people could have gotten the identification wrong. Based on this, we conclude that under the totality of the circumstances, these factors avoided the likelihood of misidentification.

¶13 Consequently, we conclude that the circuit court did not err when it denied Martinez's motion to suppress. For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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