COURT OF APPEALS
DECISION
DATED AND RELEASED

October 16, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2618-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHRISTOPHER A. FROST,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Christopher Frost appeals from judgments of conviction for first-degree sexual assault with a dangerous weapon in violation of § 940.225(1)(b), STATS., and burglary as a repeater contrary to § 943.10(1)(a), STATS. Frost pleaded guilty after the trial court denied his motions to suppress a "show-up" identification and inculpatory statements he made in police custody.

The issues are whether the identification procedure at the police department was unduly suggestive and conducive to irreparable misidentification, whether a police officer's alleged disposal of evidence requires reversal, and whether the trial court erred by refusing to order postconviction neurological testing. We affirm on all issues.

J.G. was the victim of an early morning sexual assault in her home. Police officers later found a billfold on the scene containing Frost's driver's license. At a hospital, within three hours of the assault, a police officer showed J.G. the license. She immediately and emphatically identified Frost as the man who assaulted her. J.G. then went to the police station where police allowed her to view Frost through a one-way observation glass. Frost was alone in the room on the other side of the glass, dressed in a jail uniform with his feet possibly still shackled. J.G. became excited and again emphatically identified him as her assailant. At the suppression hearing she testified that she did not realize he was wearing jail clothes and did not see shackles when she observed him.

Later, while still in custody, Frost admitted the assault and provided two taped confessions. The second became necessary because the first tape recording proved unintelligible. Frost moved to suppress J.G.'s identification of him at the jail as unduly suggestive. In moving to suppress his confession, he testified that he was in custody for two hours before he received his ***Miranda*** warnings and signed a waiver form, that his subsequent request for an attorney were disregarded and that an officer yelled at him once during the interrogation. The trial court denied both motions.

Frost initially pleaded not guilty by reason of mental disease or defect and moved for a neurological examination on evidence of a brain injury he

suffered four years before the assault. Initially, Frost requested an examination by a neurologist, but the trial court denied his request. The court agreed to appoint a psychiatrist pursuant to § 971.16, STATS., and to reconsider its position if Frost could convince the court that a neurologist would be able to present relevant evidence. Frost again moved for a neurologist and the court granted him the motion. However, Frost's counsel was not able to find a neurologist who was willing to examine Frost and then testify. A neuropsychologist examined him instead, but neither the psychiatrist nor the neuropsychologist concluded that Frost could succeed with an insanity defense. Consequently, Frost withdrew his NGI plea and agreed to plead guilty.

After Frost's conviction, postconviction counsel brought a motion for a neurology examination at county expense, after a prison MRI examination revealed injuries that, in one doctor's opinion, "may be reflected in significant personality alterations, specifically emotional behavior and inappropriate control." The trial court denied the motion.

On review of a pretrial identification, we first determine whether the police procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." ***State v. Wolverton***, 193 Wis.2d 234, 264, 533 N.W.2d 167, 178 (1995). If we determine that the procedure was impermissibly suggestive, we then review whether, under the totality of the circumstances, the identification was nevertheless reliable. ***Id***. Factors that are relevant to the second inquiry include the witness's opportunity to view the perpetrator, the witness's degree of attention, the accuracy of any prior description of the perpetrator, the witness's certainty, and the time between the crime and the identification. ***Id***. at 264-65, 533 N.W.2d at 178.

J.G. did not identify Frost under impermissibly suggestive circumstances. Show-ups, or one person lineups, may inevitably convey a suggestive inference, yet are not per se impermissibly suggestive. ***Wolverton***, 193 Wis.2d at 264, 533 N.W.2d at 178. Something more is necessary and, here, there was nothing more. Police officers did not tell J.G. that Frost was a suspect, or was already under arrest for the assault. They merely informed her that he "could be involved," and she could "see if it was him or not." Those were commonsense observations and not impermissibly suggestive statements. Frost would have a persuasive case had J.G. seen shackles on his legs, or recognized his jail clothing, but she did not. In short, nothing in the circumstances surrounding the show-up created a substantial likelihood of irreparable misidentification of Frost as J.G.'s attacker.

In any event, the identification is reliable under the totality of the circumstances. J.G. closely observed her attacker in good lighting. She showed spontaneous excitement and emphatically identified Frost at the show-up, which occurred within three hours of the assault. J.G.'s prompt and definite identification thoroughly redeemed the identification from any taint of impermissible suggestiveness.

In his brief, Frost contends that the initial photo identification, using his driver's license, was also impermissibly suggestive. However, Frost never raised that issue in the trial court, and it is now waived. ***Wirth v. Ehly,*** 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145 (1980).

Frost voluntarily confessed. He contends that he received delayed ***Miranda*** warnings and that his subsequent requests for counsel were disregarded. However, police officers testified that ***Miranda*** warnings were promptly given and

that Frost never subsequently requested counsel. The trial court expressly found that testimony credible, and those credibility determinations are not subject to review. ***Turner v. State***, 76 Wis.2d 1, 18, 250 N.W.2d 706, 715 (1977). As for the instance where a police officer yelled at Frost, there is no evidence that the officer verbally threatened Frost or made any threatening or intimidating gestures. Nor was there evidence of any other impermissible course of activity accompanying the episode. Frost cannot reasonably contend that a brief episode of yelling, without more, rendered his confession involuntary.

Frost next seeks an unspecified remedy because police did not retain the unintelligible recording of his first confession. Frost did not raise this issue in the trial court and, consequently, never offered proof that the discarded tape contained exculpatory evidence. This issue, raised for the first time on appeal, is waived. ***Wirth***, 93 Wis.2d at 443-44, 287 N.W.2d at 145. We also deem it waived by Frost's guilty plea. *See* ***State v. Riekkoff***, 112 Wis.2d 119, 122-23, 332 N.W.2d 744, 746 (1983).

The trial court properly denied Frost's request for postconviction neurological testing at county expense. Frost contends that the examinations he received before he entered his plea were not sufficient to adequately determine the effects of his brain injury on his legal culpability. Whether true or not, Frost chose to proceed with those examinations and withdrew his NGI plea based on their results. He therefore waived the issue. Although the trial court might have subsequently ordered additional testing on newly discovered evidence, Frost did not present such evidence. He reported only that his prison examination revealed injuries that might significantly affect his personality and behavior. That fact was known before he entered his plea and was the basis of the testing that was ordered and performed.

By the Court.—Judgments affirmed.

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