COURT OF APPEALS
DECISION
DATED AND RELEASED

June 18, 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. 96-2432-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ALLEE BOONE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed.*

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

PER CURIAM. Allee Boone appeals from a judgment of conviction of attempted first-degree murder, armed robbery and felon in possession of a firearm and from an order denying his postconviction motion for a new trial. He argues that the victim's pretrial identification of him was unduly suggestive and that he should be granted a new trial based on newly discovered

evidence and in the interest of justice. We reject his claims and affirm the judgment and the order.

Gerald Green was shot four times and robbed by a man who requested a ride from him. While Green was still in the hospital he was unable to identify his assailant when presented with photo arrays on three occasions. Old pictures of Boone were included in two of the arrays. A recent picture of Boone was included in a fourth photo array shown to Green in the hospital. Green identified Boone as the shooter. Green later identified Boone at a lineup identification where each lineup participant was asked to speak the words used by Green's assailant.

Boone argues that the identification procedure was unduly suggestive because he was the only suspect depicted in more than one of the four photo arrays and he was the only one pictured in the arrays who was also present in the lineup. He also complains that the photo in the fourth array was obviously different in type from the other photos presented in that array. He claims that Green's identification should have been suppressed.

We apply the same rules as the trial court to determine whether an identification is admissible. *See* ***State v. Haynes***, 118 Wis.2d 21, 31 n.5, 345 N.W.2d 892, 898 (Ct. App. 1984). The test to determine whether a witness' identification of a defendant is admissible has two facets. *See* ***Powell v. State***, 86 Wis.2d 51, 65, 271 N.W.2d 610, 617 (1978). First, we decide whether the procedure used during the identification was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *See* ***id.*** at 64, 271 N.W.2d at 616. If the procedure was impermissibly suggestive, the State has the burden of showing that the identification is reliable under the totality

of the circumstances. *See* ***id.*** at 65-66, 271 N.W.2d at 617; ***Haynes***, 118 Wis.2d at 31, 345 N.W.2d at 897.

The defendant bears the burden of establishing any undue suggestiveness. *See* ***Powell***, 86 Wis.2d at 65, 271 N.W.2d at 617. Unnecessary suggestiveness may result from some feature of the persons exhibited for identification that tends to unduly emphasize the suspect, from the manner in which the persons are presented, or from the words or actions of the law enforcement officers overseeing the viewing. *See* ***id.*** at 63, 271 N.W.2d at 616.

The fact that a suspect's picture is the only one to appear in consecutive photo arrays does not automatically create impermissible suggestiveness or a likelihood of misidentification. *See* ***United States v. Stevens***, 935 F.2d 1380, 1392-93 n.16 (3d Cir. 1991). Three different photographs were used of Boone in the photo arrays. The fourth array used a very recent picture of Boone. The trial court noted, and we agree, that Boone's appearance in each of the three photographic arrays varied and it was difficult to determine if indeed the same person was included in each of the three arrays. Although two of the arrays containing Boone's photo were presented to the victim on the same day, the fourth array containing Boone's recent picture was not shown until three days later. The victim did not view the photo arrays at the same time so that a comparison could be made as to who possibly was pictured in each array. The lineup identification did not occur until more than a week after the photo identification.

We do not attach any significance to the fact that Boone was pictured against an outdoor and somewhat cluttered background in the third array when others in that array were pictured against a white cement-block background. Each of the photos in the fourth array was a Polaroid picture. Boone's photo was

not unique in any feature directly related to an identification factor, i.e., tattoos, eyeglasses or facial hair. *Cf.* ***Haynes***, 118 Wis.2d at 30, 345 N.W.2d at 897. We conclude that there was no undue suggestiveness in the identification procedures and we need not address whether the identification was reliable under the totality of the circumstances.[1] *See* ***Powell,*** 86 Wis.2d at 65-66, 271 N.W.2d at 617.

Boone filed a motion for a new trial based on newly discovered evidence. Review of a trial court's decision regarding newly discovered evidence is addressed to the trial court's discretion. *See* ***State v. Johnson***, 181 Wis.2d 470, 489, 510 N.W.2d 811, 817 (Ct. App. 1993). The five criteria for granting a new trial due to newly discovered evidence are: (1) the new evidence was not discovered until after trial; (2) the party moving for a new trial must not have been negligent in seeking to discover such new evidence; (3) the new evidence must be material to the issue; (4) the new evidence must not be merely cumulative to testimony introduced at the trial; and (5) the new evidence must be such that it will be reasonably probable that a different result would be reached on a new trial. *See* ***State v. Boyce***, 75 Wis.2d 452, 457, 249 N.W.2d 758, 760 (1977). Each element must be satisfied. *See* ***State v. Kaster***, 148 Wis.2d 789, 801, 436 N.W.2d 891, 896 (Ct. App. 1989).

The crux of Boone's new evidence was that someone known as "Al," and who looks a lot like Boone, was the shooter. At the postconviction hearing, Boone presented the testimony of four witnesses. Sparkle Hopson testified that the morning after the shooting she was with "Albert" and his

[1] The circumstances of the identification were placed before the jury. Cross-examination of the victim challenged the identification. The jury functionally determined the credibility of the identification. *See* ***State v. Wachsmuth,*** 166 Wis.2d 1014, 1023, 480 N.W.2d 842, 846 (Ct. App. 1992).

behavior indicated his involvement in the shooting. Marcel Ware testified that he was in the vicinity of the shooting and in fact heard the shots. He saw "Al" running from the area with a silver gun. Boone emphasizes that his investigator did not interview Hopson or Ware before his trial.

The trial court denied the motion for a new trial based on new evidence. It concluded that the evidence did not create a probability of a different result at a new trial because the witnesses were incredible. Boone argues that the trial court improperly focused on the credibility of these witnesses.

We acknowledge that in large part the trial court focused on the poor credibility of Hopson and Ware in denying the motion for a new trial. The trial court's determination that there was not a reasonable probability of a different outcome may have been the result of the application of an erroneous legal standard. *See* ***State v. McCallum***, 208 Wis.2d 463, 474-75, 561 N.W.2d 707, 711 (1997) (the correct legal standard is whether there is a reasonable probability that a jury would have a reasonable doubt as to the defendant's guilt, and evidence which is merely "less credible" as opposed to incredible does not necessarily mean that a jury could not have a reasonable doubt). Although the trial court may not have properly exercised its discretion by using the wrong legal standard, we will not reverse if the facts of record or some other reason exists to sustain the trial court's determination. *See* ***Andrew J.N. v. Wendy L.D.***, 174 Wis.2d 745, 767, 498 N.W.2d 235, 242 (1993).

Applying the five criteria needed to support a motion for a new trial, we look at number two: the party moving for a new trial must not have been negligent in seeking to discover such new evidence. Both Hopson and Ware indicated that they were with Brian Hoover when the events they testified to

occurred. Hoover was a defense witness at trial and testified that he heard the gunshots and saw a man, not Boone, running away from the area of the shooting. Hoover was a witness known to the defense. Boone was negligent in not extracting information from Hoover about Ware's presence at the scene of the shooting and his contact with Hopson and "Al" the next day. As to Hopson's and Ware's testimony, the second test of newly discovered evidence is not satisfied.[2]

In his reply brief, Boone appears to anticipate the possibility that we will focus upon whether he should have earlier discovered witnesses Hopson and Ware. He points out that Hoover was only made available to the defense on the first day of trial when Hoover was arrested on an outstanding warrant. The record further shows that in an early interview with police, Hoover had not offered information about the people he was with on the night of the shooting or the next day. The record further shows that Ware was incarcerated in Illinois shortly after the shooting, raising the inference that he was not available to give information. The suggestion is that if Boone never had access to either Hoover or Ware, he cannot be faulted for being unable to get information from them before trial.

While the argument has some facial appeal, the fact is that Boone had Hoover available at the start of and during trial, and he testified. In this period of time, Boone had the opportunity to inquire of Hoover as to his full knowledge of the events on the night in question, including who he was with at the time. There was more than a sufficient opportunity to find out about Hoover and Ware

[2] We reject the State's analysis that Hopson's and Ware's testimony was not relevant or material because it fails to establish a "legitimate tendency" that a third person could have committed the crime as required for admission under ***State v. Denny,*** 120 Wis.2d 614, 624, 357 N.W.2d 12, 17 (Ct. App. 1984). This is not a ***Denny***-type case because the evidence was not collateral as to possible motives to harm the victim. Indeed, Ware would have qualified as a witness to the crime.

during the trial. That the opportunity was not seized upon should not inure to Boone's benefit.

At the postconviction hearing, two sisters, Tyaneshia and Marqueshia Turner, testified that they were at Mary Jammerson's apartment the night of the shooting. They observed "Big Al" bring in a gun and retrieve it a short time later.[3] They heard about the shooting and saw police outside about five to seven minutes after "Big Al" retrieved the gun. The Turners testified that Boone was not "Big Al."

The testimony of the Turner sisters cannot be considered newly discovered evidence. The Turner sisters were subpoenaed by the defense to testify at trial but did not appear. Boone cites their testimony in support of his request for a new trial in the interest of justice. He argues that the jury was not able to hear all the testimony indicative of his innocence—the testimony of Hopson, Ware and the Turners.

We exercise our discretionary power to grant a new trial infrequently and judiciously. *See* ***State v. Ray***, 166 Wis.2d 855, 874, 481 N.W.2d 288, 296 (Ct. App. 1992). A new trial may be ordered where the real controversy has not been fully tried or where there was a probable miscarriage of justice. *See* ***State v. Smith***, 153 Wis.2d 739, 742, 451 N.W.2d 794, 795 (Ct. App. 1989).

Situations in which the controversy has not been fully tried have arisen when a jury was not given an opportunity to hear important testimony that bore on an

[3] This testimony conflicted with other evidence that placed Boone in the vicinity of the shooting. At trial, Jammerson and her daughter Yemanya testified that on the night of the shooting Boone visited their apartment near the shooting, that he left a gun, and that he retrieved it a short time later.

important issue in a case. *See* ***id.*** at 742, 451 N.W.2d at 796. Here, identity was the theory of defense and it was fully litigated. Hoover testified that the man he saw running from the shooting was not Boone. Another witness indicated that he did not see Boone but saw an individual named "Al" in Jammerson's apartment building on the day of the shooting. The witness indicated that "Al" resembled Boone. Other witnesses, including Boone himself, contradicted testimony that he was in the vicinity of the shooting.

We are not persuaded that the real controversy was not fully tried. Reversal based on a miscarriage of justice may be ordered only when this court is persuaded that there is a substantial probability of a different result on retrial. *See* ***id.*** That test is not satisfied.

By the Court.—Judgment and order affirmed.

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