

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 30, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

No. 99-2853-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARLOS D. HOPE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN J. DIMOTTO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Carlos D. Hope appeals his conviction for armed robbery while a habitual criminal, contrary to WIS. STAT. §§ 943.32(1)(b) & 2,

and 939.62.¹ Hope argues that the trial court erred in denying his suppression motion because the police lacked probable cause to arrest him and, as a consequence, his photo taken after his arrest, by which the victim identified him as the robber, was the fruit of an illegal arrest. Hope also submits that the trial court erred in denying his suppression motion because the photo array shown to the witnesses was impermissibly suggestive. We affirm.

I. BACKGROUND.

¶2 On November 10, 1997, an employee of the Wauwatosa Laundry and Dry Cleaners, Diane Roberson, was robbed at gunpoint. Two days later, on November 12, 1997, Christine Kleist, a sales clerk at the Vogue Cleaners, also located in Wauwatosa, was the victim of an attempted armed robbery. In both instances, two men walked into the store, loitered, asked several questions, and then one of the men pointed a gun at the sales clerk and asked for money. In the attempted robbery, the two men fled when the clerk was unable to open the cash register.

¶3 On that same day, at yet another Wauwatosa business, Bartz's Display, which had been robbed just one month before, two employees observed two men acting suspiciously in the store, called the police and stated that they feared that they were going to be robbed. The employees described the men as black males with their hats pulled down covering their faces, making it difficult to view their facial features. The employees told the police that the suspicious men drove away in a grey car traveling eastbound on North Avenue. A short time later,

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise indicated.

the police stopped a grey car on North Avenue containing Hope and three other black men. Although Hope properly identified himself, two of the other three men gave false names. All four men denied having been in Bartz's Display store. When asked where they were coming from, the men were unable to satisfactorily account for their whereabouts. The Bartz's Display employees were brought to the scene, but they could not identify anyone. The police then arrested all four men for the Wauwatosa Cleaners armed robbery and the Vogue Cleaners attempted armed robbery.

¶4 At the police station, the police took pictures of the four men. After adding a fifth picture to this group, the police showed the pictures to Roberson, Kleist and another employee of the Wauwatosa Cleaners who saw the robbers. All three identified Hope as the gunman. Hope was then charged with robbery with threat of force, party to a crime, as a habitual criminal. He filed a motion seeking to suppress his identification, claiming that the photo array was obtained from an "improper warrantless arrest not supported by probable cause and the photo array was overly suggestive." The motion was denied. A jury convicted Hope of the charged crime, and after the trial court found he was a habitual criminal, he was sentenced to thirty-five years in prison.

II. ANALYSIS.

A. Probable Cause

¶5 Hope contends that the trial court erred in not granting his suppression motion because the police lacked probable cause to arrest him. Hope insists that the descriptions of the perpetrators of the armed robbery and the attempted armed robbery were too general to give the police probable cause to arrest him. He also points out that the description of the car parked behind the

Wauwatosa Cleaners at the time of the robbery and the car in which he was riding when arrested did not match. He submits that since the incriminating photograph shown to the witnesses was taken after his improper arrest, the photo must be suppressed.² We disagree and conclude that the police had probable cause to arrest Hope.

¶6 Under the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution, an arrest is invalid unless the police have probable cause to believe the arrested person has committed a crime. *State v. Riddle*, 192 Wis. 2d 470, 475-76, 531 N.W.2d 408 (Ct. App. 1995). The trial court found that, under the totality of the circumstances, the officer had probable cause to arrest Hope for the two earlier incidents at the dry cleaners. An evaluation of the trial court's determination that the police had probable cause to arrest, when the underlying facts are not in dispute, is a question of law that we review *de novo*. *State v. Truax*, 151 Wis. 2d 354, 360, 444 N.W.2d 432 (Ct. App. 1989). Here, the facts leading to Hope's arrest are not in dispute.

¶7 “[P]robable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime.” *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). Probable cause to arrest includes both probable cause to believe that a crime has been or is being committed and probable cause to believe that a specific individual is a criminal actor. *State v. Wilson*, 229 Wis. 2d 256, 267-68, 600 N.W.2d 14

² If Hope is successful in having the photographs suppressed, he asks this court to remand this matter to the trial court to hold a hearing to determine if the in-court identifications should also be suppressed. He also seeks a new trial.

(Ct. App. 1999). The information must reasonably lead the officer to believe that “guilt is more than a possibility.” *Id.*

¶8 Here, the arresting officer had sufficient facts to believe that Hope had committed the crimes at the dry cleaning stores. First, Hope’s close proximity, in both time and vicinity, to the armed robbery location was a significant factor. The Wauwatosa Cleaners armed robbery took place two days earlier in the same vicinity where Hope was arrested. In fact, as noted in the State’s brief, Bartz’s Display is only two blocks away from the Wauwatosa Cleaners store. Inasmuch as a police officer first spotted the car in which Hope was a passenger two blocks away from Bartz’s Display, it was reasonable to surmise that Hope was in a car within four blocks of the robbery location, two days after the robbery. Further, the police were aware that more than one robbery had occurred in the same general location over the span of two days, increasing the possibility that another robbery would occur nearby.

¶9 Second, and more importantly, Roberson’s physical description of the robber established probable cause because it closely matched Hope’s physical characteristics. Contrary to Hope’s contention that Roberson’s description was general, Roberson gave the police a detailed description. In his brief, Hope summarized Roberson’s description of the gunman given to the police:

“[T]he gunman [w]as a black male, plus or minus 23 years of age, 6 foot 3 inches tall, 180 pounds, medium build, dark complexion, unshaven, wearing a three-quarter length down coat, a black knit skull cap and a large diamond pierced earring in his left ear.”

According to police records, Hope is black, six feet one inches tall, 180 pounds, and, at the time of his arrest, was 23 years old. Hope’s photo, taken when he was

arrested in this case, further supports the victim's description as Hope is depicted as being dark complected and unshaven. Also, Hope had a large diamond pierced earring in his left ear. Thus, Roberson's description correctly estimated Hope's actual age and weight, his complexion, the fact that he was unshaven and had an earring, and her approximation of his height was within two inches.

¶10 Third, the arresting officer knew that the conduct of the robbers of the dry cleaning stores was similar to the behavior observed by the Bartz's Display employees. At the time of the stop, the police could reasonably suspect that two of the occupants of the stopped car were in the Bartz's Display store. Although no Bartz's Display employees could identify the suspicious men, a car with occupants matching their description was spied only two blocks away from the store. Thus, a reasonable officer could suspect that two of the men in the car had been in the store. Consequently, the police could consider the similarity between the behavior of the two men observed at Bartz's Display and that of the two armed robbers at the Vogue Cleaners and Wauwatosa Cleaners robberies. The victims in the robberies reported that the armed robbers lingered in the store until they approached the sales clerks, asked several questions, and then displayed a gun. The Bartz's Display employees stated that the two suspicious men also meandered through the store for a period of time without actually looking at any merchandise. Further, one of the men had his hand in his pocket the entire time, suggesting he was armed. Police suspicions were further heightened when two of the passengers gave false names and could not account for their recent whereabouts.

¶11 Finally, while the descriptions of the car involved in the armed robbery and the car containing Hope were not identical, they were similar. At the time of the Wauwatosa Cleaners robbery, one of the owners of the cleaners saw a car containing at least three black people drive slowly through the alley, stop, and

then back up and drive off. Minutes later, the owner saw the same car in the main parking lot of the store at about the same time as the armed robbery. The owner testified that the car was a four-door sedan, grey in color, with shiny trim around the windows and with a pronounced grill. When Hope was arrested, he was a passenger in a grey four-door sedan.

¶12 Thus, under the totality of the circumstances, we conclude, as did the trial court, that a reasonable officer could have believed Hope was involved in the Vogue Cleaners and Wauwatosa Dry Cleaners robberies. The arresting detective knew Hope was near the crime scene just two days later and knew that robberies were occurring in that area. He also knew that Hope's physical description was almost identical to the description given by one of the victims. Two additional factors supported the officer's probable cause determination: (1) the evasive behavior of Hope's fellow passengers; and (2) the fact that the car Hope was traveling in matched the description of a car carrying two men who were acting suspiciously in Bartz's Display and was also similar to the car thought to be involved in the armed robbery. Consequently, the police had probable cause to arrest Hope for the armed robbery of the Wauwatosa cleaners and the photo was not tainted by an illegal arrest.

B. *Photo Array*

¶13 Whether a photo array is reliable is a question of law that we review independently. *State v. Mosley*, 102 Wis. 2d 636, 652-56, 307 N.W.2d 200 (1981). This court, however, must accept the trial court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2).

¶14 A pretrial identification procedure may be so unnecessarily suggestive that a defendant's due process rights are violated. *See Stovall v.*

Denno, 388 U.S. 293, 302 (1967). The test for determining whether an out-of-court photographic identification is admissible involves a two-part test: first, the court must determine whether the identification procedure was impermissibly suggestive; if so, then the court must decide whether, under the totality of the circumstances, the out-of-court identification was reliable despite the suggestiveness of the procedures. *State v. Hall*, 196 Wis.2d 850, 878, 540 N.W.2d 219 (Ct. App. 1995), *rev'd on other grounds*, 207 Wis.2d 54, 557 N.W.2d 778 (1997). However, if the photo array is not impermissibly suggestive, then the inquiry ends there. *Id.* The defendant has the burden of proving that the identification procedure was suggestive. *Id.* at 878-79. “Once the defendant meets his or her burden of showing that the identification was the product of an impermissibly suggestive procedure, the burden shifts to the state to show the identification was nonetheless reliable under the totality of the circumstances.” *Id.* Suggestiveness in photographic arrays may arise in several ways: the manner in which the photos were presented or displayed; the words or actions of a law enforcement official overseeing the viewing can lead to improper suggestiveness; and, in some instances, an aspect of the photographs themselves may cause suggestiveness. *Mosley*, 102 Wis. 2d at 652.

¶15 Here, the trial court found that the photo array was not impermissibly suggestive. However, fearing that its ruling might be found to be incorrect, the trial court then examined the evidence under the totality of the circumstances test and found that the photo identifications were reliable.

¶16 Citing *State v. Haynes*, 118 Wis. 2d 21, 30, 345 N.W.2d 892 (Ct. App. 1984), Hope argues that the photo array was impermissibly suggestive. Hope contends that the photo array was improper because his photo was unique as none of the other men depicted in the photos had an earring. We disagree.

¶17 “A photographic procedure which includes a photo which is unique in a manner directly related to an important identification factor may be held impermissibly suggestive.” *Haynes*, 118 Wis. 2d at 30; *see also Powell v. State*, 86 Wis. 2d 51, 67, 271 N.W.2d 610 (1978); *Schaffer v. State*, 75 Wis. 2d 673, 680-81, 250 N.W.2d 326 (1977); *Fells v. State*, 65 Wis. 2d 525, 537, 223 N.W.2d 507 (1974); *United States v. Sanders*, 479 F.2d 1193, 1197 (1973). However, after reviewing the record, we are satisfied that the facts in this case more closely resemble those in *Mosley*, and, like the court in *Mosley*, we determine that the photo array was not impermissibly suggestive.

¶18 In *Mosley*, the photos shown to the armed robbery victims included only one man sporting a tattoo. *Mosley*, 102 Wis. 2d at 653. The victims had previously described the robber as having a tattoo on his arm. While our supreme court explained that it was not approving the suggestive identification method used, it found that the “procedure produced a sufficiently reliable identification.” *Id.* at 655. In the instant case, we also do not approve of the identification method, which could easily have been corrected by requiring Hope to remove his earring, but we are satisfied that the identification was sufficiently reliable.

¶19 Although the circumstances surrounding the photo array here differ from those relied upon in *Mosley*, we conclude the circumstances here also lead to the conclusion that the identification was reliable. Like the tattoos in the photo in *Mosley*, the earring in Hope’s photo is “rather difficult to make out.” Further, the photos of some of the other men’s ears are not well defined, leaving doubt about whether any others also were wearing an earring or earrings. All of the photos were “headshots,” with the facial features of the “suspects” displayed prominently. Identification of Hope’s facial features was the key to the victims’ claim that Hope

was the gunman. Thus, while the photos were arguably suggestive, they were not impermissibly so.

¶20 Moreover, were we to determine that the photos were impermissibly suggestive, we would, nevertheless, find the identifications here reliable and trustworthy under the totality of the circumstances test. All the witnesses unhesitatingly identified Hope as the gunman. Further, all testified that the earring was not the sole or even the first reason for their selection of Hope's photo. Although all three witnesses told the police that the robber was wearing an earring, and they all testified that they noticed the earring in the picture, they also asserted that they identified Hope on the basis of other characteristics, and that the earring was not a significant factor in their identifying Hope as the gunman. One witness stated she based her identification of Hope on his facial features. Roberson said she noticed the shape of Hope's eyes. Kleist testified that she "does portraits," and she recognized Hope's nose, lips and eyes. Thus, because the witnesses relied principally on other features, and not the earring, in identifying Hope, under the totality of the circumstances test, we are satisfied that the identification of Hope was reliable. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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

