COURT OF APPEALS
DECISION
DATED AND FILED

March 22, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1781-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LARRY R. HOLMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Larry R. Holman appeals from a judgment convicting him of attempted second-degree sexual assault as a repeat offender, and from an order denying his motion for postconviction relief. He claims that the witness identification was impermissibly suggestive and that there was insufficient

evidence to support the verdict. For the reasons discussed below, we disagree and affirm.

BACKGROUND

¶2 The charge stemmed from an incident in which a man on a bicycle approached a fourteen-year-old girl in the front yard of her mother's house, engaged her in conversation, sprayed some perfume on her, and then placed his hand under her dress on her inner thigh. At that point, the girl jumped up, screamed for her brother, and ran into the house. The man said he was sorry and rode off before the brother came outside to look for him.

¶3 The girl called the police and described her assailant as a black man around thirty years old, of uncertain height, either bald or with very short hair, and wearing a black and white flannel shirt. Later that evening, the police informed the girl that they had "caught him down by the Omega restaurant." They took her to the restaurant and had Holman stand in front of the squad car, surrounded by officers, with the headlights shining on him. The police asked the girl if Holman was the man who had touched her. She said, with some degree of uncertainty, that she thought it was. The police then told her she needed to be more specific, and she said she was sure it was him. She also identified the bicycle.

STANDARD OF REVIEW

¶4 We apply a mixed standard of review to determine whether procedures leading to the identification of a defendant violated his due process rights. We will sustain the trial court's findings of historical fact unless they are clearly erroneous, but will independently consider whether those facts show that

the defendant's constitutional rights were violated. ***State v. McMorris***, 213 Wis. 2d 156, 165, 570 N.W.2d 384 (1997).

¶5 When reviewing the sufficiency of the evidence to support the verdict, the standard is whether the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found the defendant guilty beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

ANALYSIS

Identification

¶6 An identification procedure which is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" violates due process. ***State v. Wolverton***, 193 Wis. 2d 234, 264, 533 N.W.2d 167 (1995). The initial burden is on the defendant to show that the procedure used was impermissibly suggestive. ***Id.*** Upon such a showing, the burden shifts to the State to demonstrate that the identification was nonetheless reliable under the totality of the circumstances, including the witness's opportunity to view the offender at the time of the crime, the witness's degree of attention, the accuracy of the witness's initial description, the level of certainty demonstrated at the confrontation, and the time between the offense and the confrontation. ***Id.*** at 264-65.

¶7 The procedure in which a sole suspect is presented to a witness for identification is commonly known as a "show up." ***State v. Kaelin***, 196 Wis. 2d 1, 9, 538 N.W.2d 538 (Ct. App. 1995). Although show ups are inherently suggestive to the extent that the witness may infer that the police have reason to believe the suspect is the perpetrator, they are not *per se* impermissible. ***Id.*** at 10-11. For one

thing, they generally have the advantage of occurring while the witness's memory is still fresh. ***Id.*** at 11-12. Thus, in ***Kaelin***, this court held that it was not impermissibly suggestive to allow two witnesses to view a suspect first in the back of a squad car, and then in handcuffs. ***Id.*** at 11, 15.

¶8 We are satisfied that the show up identification procedure used here was no more suggestive that that used in ***Kaelin***. Although Holman was surrounded by officers, he was not in handcuffs or a squad car. The comment by one of the officers that they had caught the man did not give the witness any more reason to believe that the police had caught the right man than she could have inferred from the mere fact of the show up. The request that she be more specific could just as well have led the witness to say no, she was not sure, than yes, she was. Counsel properly brought out the witness's initial hesitation and some minor discrepancies in her description of the offender on cross-examination, but these matters go to the reliability rather than the suggestiveness of the procedure used by the police. *See* ***Kaelin***, 196 Wis. 2d at 13. In light of our conclusion that the show up was not impermissibly suggestive, we need not consider whether the totality of circumstances show that the identification was otherwise reliable. *See* ***id.*** at 10. It also follows that counsel was not ineffective for failing to raise the issue.

Sufficiency of the Evidence

¶9 WISCONSIN STAT. § 948.02(2) (1997-98)[1] prohibits any sexual contact with a person under the age of sixteen. Sexual contact is defined as intentional touching of a person's intimate body parts for the purpose of the

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

offender's sexual gratification or the degradation or humiliation of the victim. WIS. STAT. § 948.01(5)(a).

¶10 Holman argues that the evidence that he touched the girl's inner thigh near her vaginal area is insufficient to show that he intended contact with a prohibited body part. We disagree. The jury was entitled to infer from the totality of the circumstances that Holman would have touched the girl's vagina if she had not jumped up. The fact that he may have been working up to the impermissible contact in increments does not negate this permissible inference regarding his intent.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).