

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 8, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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.

**Appeal No. 04-0213-CR
STATE OF WISCONSIN**

Cir. Ct. No. 02CF000434

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES G. CAMPBELL,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Racine County:
RICHARD J. KREUL, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Charles G. Campbell has appealed from judgments convicting him of attempted burglary, possession of burglarious tools, criminal damage to property, resisting an officer, and misdemeanor bail jumping, all as a habitual offender. The sole issue on appeal is whether the trial court properly denied Campbell's motion to suppress an out-of-court identification made by

Simon Ornelas on April 19, 2002, shortly after the attempted burglary of Dino's Pizza, a restaurant in the city of Racine. Because we conclude that the out-of-court identification was properly admitted into evidence, we affirm the judgments of conviction.

¶2 Ornelas identified Campbell in a showup approximately one hour after the attempted break-in at the restaurant. Campbell moved to suppress Ornelas' identification of him, and an evidentiary hearing was held. On appeal, Campbell contends that he was entitled to suppression of the identification because he proved that the identification procedure at the showup was impermissibly suggestive, and the State failed to meet its burden of proving that the identification was reliable under the totality of the circumstances.

¶3 A defendant is denied due process when identification evidence admitted at trial stems from a pretrial police procedure which is 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 (1995).¹ When challenging an identification made at a showup, the defendant bears the initial burden of demonstrating that the showup was impermissibly suggestive. *Id.* If the defendant meets this burden, the burden shifts to the State to

¹ Citing *State v. Wolverton*, 193 Wis. 2d 234, 533 N.W.2d 167 (1995), and *Powell v. State*, 86 Wis. 2d 51, 271 N.W.2d 610 (1978), as well as other cases relying on *Wolverton* and *Powell*, the State contends that some inconsistency exists in Wisconsin case law as to the standards by which the admissibility of out-of-court identifications are to be judged. When decisions of the supreme court appear to be inconsistent or in conflict, this court follows the most recent pronouncement, which in this case is *Wolverton*. See *Glacier State Distrib. Servs., Inc. v. DOT*, 221 Wis. 2d 359, 368, 585 N.W.2d 652 (Ct. App. 1998). In any event, the record clearly establishes that Ornelas' out-of-court identification of Campbell was reliable and admissible regardless of whether the standards as stated in *Powell* are relied upon, or the standards as stated in *Wolverton* and its progeny are applied.

demonstrate that the identification was reliable under the totality of the circumstances even though the confrontation procedure was suggestive. *Id.* In determining whether an identification was reliable despite the suggestive nature of the police procedure, a court must consider the following relevant factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the degree of attention of the witness; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty evinced by the witness at the confrontation; and (5) the time between the crime and the confrontation. *Id.* at 264-65.

¶4 “In reviewing a trial court’s determination whether a pretrial identification should be suppressed, we apply the same rules as the trial court.” *State v. Benton*, 2001 WI App 81, ¶5, 243 Wis.2d 54, 625 N.W.2d 923. In addition, Campbell contends, and we agree, that because the material facts at the suppression hearing were undisputed, our review of whether Ornelas’ identification of Campbell should have been suppressed is de novo. *See id.* (application of facts to constitutional principles presents an issue of law which we review de novo).

¶5 At the suppression hearing, Ornelas testified that he worked at Dino’s and lived next door. He testified that at approximately 3:45 or 4:00 a.m. on August 19, 2002, he was on his back porch and heard what he thought was the sound of breaking glass. He indicated that he then made noise himself by kicking or slamming his screen door, hoping to startle the intruder. Ornelas testified that he then observed a man dressed in a white shirt and dark pants, running from Dino’s toward the alley behind it. According to Ornelas, the man was twenty-five to thirty feet from him, the area was well lit, and he saw the man for five to ten seconds. He testified that he was able to see the side of the man’s face.

¶6 Ornelas testified that the police arrived about ten minutes after he observed the man. He testified that the police were told that a security video camera operated in Dino's, and that he watched the videotape with the officers in the office at Dino's. He testified that the video camera is located above the back door, and depicted the intruder going toward the window that was subsequently discovered to be broken. Ornelas testified that he could see most of the man's face on the videotape, and that the man was wearing dark pants and a white shirt.

¶7 Ornelas testified that he then returned home, but was called about thirty minutes later by the police, who informed him that they had a suspect. Ornelas testified that a police officer then picked him up, and that he asked the officer if he was sure "about the guy being the same guy as from the videotape." Ornelas testified that the officer said "yes." Ornelas testified that he subsequently was taken to Campbell, and that he answered "yes" when the police asked him if this was the man he saw. Ornelas testified that a "good hour" passed between the time he observed Campbell running and the time he saw Campbell at the showup.

¶8 Ornelas testified that he identified Campbell because he was wearing the same dark pants and white shirt that Ornelas saw in the videotape and observed when the intruder was running. Ornelas testified that he also identified Campbell based upon his face, reiterating that most of Campbell's face could be seen on the videotape. While acknowledging that he was "probably" influenced by the officer's statement that he was sure the person Ornelas was going to view was the same person who was in the videotape, Ornelas stated that "I was sure, too, it was the same guy." After making this statement, Ornelas repeated that he was sure the person he saw was Campbell, and that "in the videotape you can see it's him."

¶9 Based upon Ornelas' testimony that an officer told him he was sure that the person Ornelas was going to view was the same person who was in the videotape, the State concedes that Campbell met his burden of demonstrating that the showup was impermissibly suggestive. Consequently, the issue for our review is whether the State met its burden of proving that the identification was reliable under the totality of the circumstances even though the confrontation procedure was suggestive. We conclude that the State met its burden.

¶10 Applying the five factors set forth in *Wolverton*, we note that Ornelas had not one, but two opportunities to view Campbell before the showup. Initially, he saw the intruder running away from Dino's, observing him for five to ten seconds in a well-lit area from a distance of twenty-five to thirty feet. Although Ornelas acknowledged that he could see only the intruder's clothing and the side of his face, he subsequently viewed a videotape of the intruder, which depicted his clothing and most of his face. Between his live observation and the videotape, he thus had ample opportunity to view Campbell at the time of the crime.

¶11 Applying the second *Wolverton* factor, the evidence also indicates that Ornelas was paying close attention both times he viewed Campbell. His initial observation occurred after he heard breaking glass and made noise in an attempt to flush out the intruder, indicating watchfulness. Ornelas testified at the suppression hearing that he was trying to pay attention to what was going on at Dino's when he heard the glass break. His second observation occurred shortly after the attempted burglary while watching the security videotape in the office of the restaurant, circumstances which permit a conclusion that he had the opportunity to pay close attention, and did so.

¶12 Although the testimony at the suppression hearing does not indicate that Ornelas gave a physical description of the person he observed to the police prior to the showup, he identified Campbell as wearing the same clothes as the person he saw running and in the videotape. His observation that Campbell wore dark pants and a white shirt like the person he saw running and in the videotape thus increased the reliability of his identification of Campbell.

¶13 The final two *Wolverton* factors also support a determination that Ornelas' identification of Campbell was reliable. A short time period between a witness' observation of the perpetrator of the crime and his or her identification of the suspect at a showup makes the identification inherently more reliable. *State v. Kaelin*, 196 Wis. 2d 1, 14, 538 N.W.2d 538 (Ct. App. 1995). Here, only an hour passed between Ornelas' observation of the intruder from his back porch and his identification of Campbell. In addition, he viewed the videotape in the interim between his initial observation of the intruder and the confrontation, further shortening the time between observation and confrontation.

¶14 The final factor to be considered is the degree of certainty exhibited by the witness at the confrontation. Although Ornelas replied "probably" when asked by defense counsel whether he was influenced by the police officer's statement that the person Ornelas was going to view was the same person who was in the videotape, Ornelas' testimony, read in its entirety, establishes that he was independently certain that Campbell was the person he saw running from the scene and on the videotape. Ornelas testified that he could identify Campbell by his clothing and his face. While he stated that he could see only the side of Campbell's face when he was running, he stated that he could see most of his face on the videotape. He testified that based on his observations, he was personally "sure, too, it was the same guy" he saw, and that "in the videotape you can see it's

him.” Ornelas’ degree of certainty at the time of the showup thus supports a determination that his identification was reliable.

¶15 The record compels the conclusion that under the totality of the circumstances, the showup identification made by Ornelas was reliable and admissible at trial. No basis therefore exists to disturb the judgments of conviction.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2001-02).

