COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2452-CR **Cir. Ct. No. 2005CF553**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MELVIN L. KELLAM,

DEFENDANT-APPELLANT.

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

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Marvin Kellam appeals from a judgment convicting him of first-degree sexual assault with use of a dangerous weapon, armed robbery, intimidating a victim, and taking and driving a vehicle without the owner's consent. We conclude that the circuit court did not err when it refused to

suppress either the victim's out-of-court identification of Kellam or Kellam's inculpatory statements. In the alternative, if the court should have suppressed any of Kellam's statements, that error was harmless. Further, the court did not err when it refused to instruct the jury on the lesser included offense of second-degree sexual assault because the evidence did not warrant the instruction. We affirm.

¶2 Kellam argues that the out-of-court identification of him via a photo array was impermissibly suggestive and therefore the victim's in-court identification was tainted and should have been suppressed.

¶3 In reviewing a motion to suppress, we will uphold the circuit court's findings of fact unless they are clearly erroneous. ***State v. Drew***, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404, *review denied*, 2008 WI 6, 306 Wis. 2d 48, 744 N.W.2d 297. However, we independently review the application of constitutional principles to those facts. ***Id.***

¶4 "The standard for the admissibility of identification based on photo arrays was articulated in ***Powell v. State***, 86 Wis. 2d 51, 63-66, 271 N.W.2d 610 (1978), and reaffirmed in ***State v. Mosley***, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981)." ***Drew***, 305 Wis. 2d 641, ¶13.[1] "A criminal defendant is denied due process when identification evidence admitted at trial stems from a pretrial police procedure that is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" ***State v. Wilson***, 179 Wis. 2d 660,

[1] Like the court in ***State v. Drew***, 2007 WI App 213, ¶19, 305 Wis. 2d 641, 740 N.W.2d 404, *review denied*, 2008 WI 6, 306 Wis. 2d 48, 744 N.W.2d 297, we reject Kellam's attempt to extend the standards for the admissibility of a show up identification as set out in ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, to the admissibility of an identification from a photo array.

682, 508 N.W.2d 44 (Ct. App. 1993), *citing* ***Simmons v. United States***, 390 U.S. 377, 384 (1968). "[T]he defendant has the burden to demonstrate the out-of-court photo identification was impermissibly suggestive; if the defendant meets this burden, the State has the burden to show that the identification is nonetheless reliable under the totality of the circumstances." ***Drew***, 305 Wis. 2d 641, ¶13. If the defendant does not meet his or her burden, the inquiry concludes. ***Mosley***, 102 Wis. 2d at 652.

¶5 At the suppression hearing, Detective Bentz, who investigated the crimes committed by Kellam, testified that on May 16, 2005, three days after the assault, he asked the victim to view a photo array at the police station. The victim was aware that a suspect was in custody, but the suspect's photograph had not appeared in a newspaper report about the arrest, and the victim confirmed she had not seen any photos of the suspect prior to viewing the photo array. The detective explained that he was going to show the victim six photographs to see if she could identify her assailant. The detective did not suggest that the assailant was in the array, and the victim did not ask whether the assailant was among the photographs. All subjects in the photographs were dressed in jail garb, and the detective endeavored to match the appearance of the five other subjects to Kellam's appearance. In less than a minute, the victim identified Kellam as her assailant. The detective did not comment on the victim's selection of Kellam's photograph.

¶6 The court found that the circumstances surrounding the photo array were not unduly suggestive. "Suggestiveness in photographic arrays may arise in several ways—the manner in which the photos are presented or displayed, the words or actions of the law enforcement official overseeing the viewing, or some aspect of the photographs themselves." ***Mosley***, 102 Wis. 2d at 652. The

detective confirmed that the victim had not seen any photographs in the media, he did not ask the victim if her assailant was in the array, and the subjects in the photographs resembled each other. These findings of fact are not clearly erroneous. The court considered the proper factors and found no suggestiveness in the photographs or their presentation to the victim.

¶7 On appeal, Kellam argues that the detective, who knew that Kellam was included in the array, did not protect against unintended influence. Kellam cites no authority for this proposition, and there is no evidence in the record that the detective behaved inappropriately during the identification. In both ***Powell*** and ***Mosley***, the officers who assembled the photo arrays also presented the photo arrays to the victims. ***Powell***, 86 Wis. 2d at 59-60; ***Mosley,*** 102 Wis. 2d at 640. The victims' photo identifications were not deemed unduly suggestive in those cases. ***Powell***, 86 Wis. 2d at 68; ***Mosley***, 102 Wis. 2d at 654.

¶8 Kellam argues that the photographs should have been shown sequentially rather than simultaneously and that more than one array should have been shown to the victim. Again, Kellam cites no authority for these propositions.[2] We will not develop a litigant's argument for him. *See* ***Riley v. Town of Hamilton***, 153 Wis. 2d 582, 588, 451 N.W.2d 454 (Ct. App. 1989).

¶9 We agree with the circuit court that Kellam did not meet his burden to show that the photo array was unduly suggestive. Because we have concluded

[2] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

that the out-of-court identification from the photo array did not violate Kellam's due process rights, the victim's in-court identification was also proper.

¶10 Kellam next argues that his inculpatory statements should have been suppressed because they were given in violation of his ***Miranda***[3] rights. Kellam had three encounters with law enforcement while he was in the station holding cell. First, Detective Bentz spoke with Kellam, but he left when Kellam invoked his right to counsel after being given his ***Miranda*** rights. Second, Kellam got the attention of Officer Wilson and asked to speak with Detective Bentz. Third, Detective Bentz returned to Kellam's cell at Kellam's request and they had further discussions.

¶11 Upon review of the suppression hearing transcript and the law, we conclude that Kellam's pre-***Miranda*** statement during the first encounter that he placed a car key on his girlfriend's window sill was volunteered and not responsive to the detective's inquiry. Therefore, the circuit court correctly declined to suppress the statement. Kellam's post-***Miranda*** statement during the third encounter divulging the location of the victim's stolen vehicle is problematic. While the circuit court concluded that Kellam initiated further contact with the police, the court did not expressly find that Kellam waived his ***Miranda*** rights. Accordingly, we conclude that if the circuit court erred in refusing to suppress any of Kellam's statements, the error was harmless because very strong evidence of Kellam's guilt was adduced at the jury trial.

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶12 Kellam argues that his inculpatory statements should have been suppressed because they were given in violation of his ***Miranda*** rights.

> Under ***Miranda*** [***v. Arizona***, 384 U.S. 436 (1966)], police may not interrogate a suspect in custody without first advising the suspect of his or her constitutional rights. Statements obtained in violation of ***Miranda*** must be suppressed. When reviewing a circuit court's decision on a motion to suppress, we will uphold the circuit court's findings of fact unless clearly erroneous. Whether those facts show a violation of ***Miranda*** is a question of law reviewed without deference.

State v. Torkelson, 2007 WI App 272, ¶11, 306 Wis. 2d 673, 743 N.W.2d 511 (citations omitted), *review denied*, 2008 WI 115, 310 Wis. 2d 708, 754 N.W.2d 851. We are bound by the circuit court's credibility determination. ***State v. Bermudez***, 221 Wis. 2d 338, 346, 585 N.W.2d 628 (Ct. App. 1998).

¶13 When a suspect invokes his or her ***Miranda*** right to counsel, interrogation must cease. *See* ***State v. Hambly,*** 2008 WI 10, ¶13, 307 Wis. 2d 98, 745 N.W.2d 48, *citing* ***Edwards v. Arizona***, 451 U.S. 477 (1981). However, if the suspect initiates contact with law enforcement after invoking his ***Miranda*** right to counsel, interrogation may resume. ***Id.*** A suspect who has previously invoked his or her ***Miranda*** right to counsel must be shown to have voluntarily, knowingly and intelligently waived that right. *See* ***Hambly***, 307 Wis. 2d 98, ¶91.

¶14 We also keep the following principles in mind as we examine the suppression proceeding. Not all interactions between a suspect and law enforcement constitute interrogation within the meaning of ***Miranda.*** Interrogation includes express questioning and the functional equivalent of express questioning. ***Hambly***, 307 Wis. 2d 98, ¶46. The inquiry is whether the words or actions of the law enforcement officer are those that the officer "should know are reasonably likely to elicit an incriminating response." ***Id.*** (citation omitted). An

officer's statement of the charges to the suspect is not express questioning. ***Id.***, ¶51.

¶15 We turn to the evidence adduced at the suppression hearing. With regard to the first encounter, Detective Bentz testified that he had contact with Kellam at approximately 1:00 p.m. on May 13, 2005 at the police department while Kellam was in custody. The assault at a church had occurred at approximately 10:00 that morning.

¶16 As far as the detective knew, no one had interviewed Kellam before the detective entered the holding cell. Kellam asked why the detective wanted to speak with him. The detective responded that it related to the incident at the church. Kellam denied any knowledge of the incident, so the detective asked him if they could speak about a domestic violence allegation lodged by Kellam's girlfriend. Detective Bentz explained that the domestic violence inquiry arose because Kellam was under a 72-hour restraining order barring contact with his girlfriend. Kellam's girlfriend called police while police were looking for a suspect in the church assault. She stated that Kellam arrived at her residence driving the white Honda whose license plate matched the vehicle being sought by police in connection with the church assault. The white Honda was stolen from the sexual assault victim by her assailant.

¶17 The detective asked whether Kellam would give him a statement about the contact with his girlfriend. Kellam started explaining that he went to his girlfriend's apartment, left a car key on the window sill and knocked on her

window.[4] Kellam wanted to know why he had been arrested. At that point, the detective interjected that Kellam needed to receive his ***Miranda*** rights and read the rights to Kellam. Kellam stated that he wanted a lawyer, and he wanted to know the charges he faced. Detective Bentz told him that because Kellam had requested counsel, the detective could not discuss the charges and directed Kellam to the arrest sheet. The detective stated that information about the charges would be forthcoming once the white Honda was located. Nothing else was discussed during the approximately three minutes the detective was with Kellam in the holding cell. No promises, threats or threatening physical contact occurred during this interaction. Kellam did not ask for any comforts and did not appear to be under the influence of any difficult circumstance.

¶18 On redirect, Detective Bentz testified that when he inquired about exchanging information about the Honda for the charges, Kellam stated that he did not know anything about a Honda.

¶19 The testimony regarding the second encounter was as follows. Officer Wilson testified that he arrested Kellam on the day of the assault and placed him in a holding cell. Officer Wilson approached the holding cell in response to a noise from the cell, after Kellam invoked his ***Miranda*** rights during the first encounter with Detective Bentz. Kellam told Officer Wilson that he wanted to speak with the detective to give him some other information. This was the extent of Officer Wilson's contact with Kellam after he placed him in the

[4] The car key was for a vehicle Kellam and his girlfriend shared, not for the white Honda owned by the victim and stolen from her by her assailant.

holding cell. No threats or promises were made, and Kellam did not ask for any comfort items. Officer Wilson did not discuss the ***Miranda*** rights with Kellam.

¶20 On cross-examination, Officer Wilson conceded that he was aware that police were looking for a Honda in connection with the sexual assault. Kellam told Officer Wilson he would disclose the vehicle's location to the detective if he was informed of the charges. However, Officer Wilson did not ask Kellam anything about the vehicle or initiate any conversation with Kellam.

¶21 Detective Bentz testified as follows about the third encounter. Ten minutes after he left Kellam's holding cell after the first encounter, Detective Bentz spoke with Officer Wilson. Officer Wilson told the detective that Kellam had rapped on the cell window and said he would divulge the whereabouts of the Honda if police would tell him the charges against him. Based upon this information, the detective returned to Kellam's holding cell. The detective did not re-read the ***Miranda*** rights at the start of the third encounter.

¶22 Kellam offered to tell the detective the whereabouts of the Honda in exchange for information about the charges. Detective Bentz asked Kellam if he was willing to waive his ***Miranda*** rights and speak without counsel present. Kellam stated that he wanted to waive those rights, and Detective Bentz informed Kellam that he was being charged with armed robbery and vehicle theft. Kellam then asked about other charges, and the detective reminded Kellam that they were going to exchange information about the charges for the Honda's location. Kellam disclosed the Honda's location, and the detective then told him he was also being charged with the church sexual assault. Kellam denied the assault. Kellam agreed to give a statement, so he and the detective adjourned to the interview room where the detective began reading the ***Miranda*** rights waiver form to Kellam.

Kellam interrupted and stated that he was dating the married victim, whatever happened between them was consensual, and he had had a fight with his girlfriend. Detective Bentz finished reading the ***Miranda*** waiver form, but before Kellam signed the waiver form, Detective Bentz asked him the victim's name. Kellam said he could not say because she was married. Kellam then demanded counsel. The detective returned Kellam to the holding cell without further conversation. Kellam never signed the ***Miranda*** waiver form. The third encounter lasted a total of fifteen minutes.

¶23 Kellam, who did not testify at the suppression hearing, argued to the circuit court that he was functionally interrogated by Detective Bentz during the first encounter before he received his ***Miranda*** rights. By asking Kellam if he would give a statement first about the church assault and then about the domestic violence incident, the detective asked questions designed to elicit incriminatory information before he gave the ***Miranda*** rights. The detective also engaged in a conversation about the Honda, which was linked to the church assault. After all this occurred, the detective gave the ***Miranda*** rights. The same pattern obtained with regard to the third contact. During the third encounter, the detective sought a statement and discussed the charges without renewing the ***Miranda*** rights or confirming a waiver of those rights. Kellam also questioned the credibility of Officer Wilson's claim that Kellam asked to see the detective.

¶24 The circuit court found that Detective Bentz and Officer Wilson were credible, even if their testimony was not always echoed in their reports. The court found that with regard to the first contact between Kellam and Detective Bentz, Kellam initiated the conversation, was not interrogated before he received his ***Miranda*** rights, and he interrupted the detective during the giving of the ***Miranda*** rights. The court found that the detective did not interrogate Kellam

when he entered the holding cell, introduced himself and said he wanted a statement. Kellam asked about what. The detective responded about the church. Kellam then stated that he did not know anything. The court found that Kellam's response that he did not know anything about the church was a response voluntarily given by Kellam after Kellam inquired about the reason for the encounter, and was not the result of interrogation. The detective then turned to the domestic violence incident, and Kellam started asking questions about the basis for his arrest. The detective read the ***Miranda*** rights and left when Kellam invoked his right to counsel. These findings are not clearly erroneous.

¶25 With regard to the second contact, the court found that Kellam initiated the contact by getting Officer Wilson's attention and asking to speak to the detective about the vehicle in exchange for information about the charges. Officer Wilson did not interrogate Kellam. These findings are not clearly erroneous.

¶26 With regard to the third contact, the court found that Detective Bentz should have immediately reviewed the ***Miranda*** rights with Kellam to confirm that he intended to waive those rights. Although the court determined that Kellam's statements did not comply with ***Miranda***, the court also determined that Kellam volunteered that he was dating the victim and that anything that happened between them was consensual. The court did not undertake the ***Miranda*** rights waiver analysis which would have included consideration of Kellam's "background, experience and conduct." *See* ***Hambly***, 307 Wis. 2d 98, ¶91.

¶27 The court found that Kellam did not experience any threats, promises, inducements, physical force or lengthy encounters. The court concluded

that everything Kellam said was voluntary and denied the motion to suppress Kellam's statements.

¶28 On appeal, Kellam argues that his pre-***Miranda*** statement that he placed a car key on his girlfriend's window sill should have been suppressed. We disagree and conclude that Kellam's statement was not the result of interrogation and was not responsive to the detective's inquiry about whether Kellam wanted to make a statement relating to the domestic violence case. An objective observer would not have concluded that the detective's inquiry—do you want to give a statement—would be likely to elicit an incriminating response, rather than the "yes" or "no" an objective observer would have expected. *See* ***Hambly***, 307 Wis. 2d 98, ¶47 (citation omitted).

¶29 Kellam also argues that information about the Honda's location was obtained in violation of his ***Miranda*** rights. Kellam told Detective Bentz the location of the vehicle before the detective read the ***Miranda*** rights waiver form during the third encounter. The circuit court found that Kellam initiated the encounter, but the court did not explicitly find that Kellam waived his ***Miranda*** rights even though the detective testified that Kellam waived those rights.

¶30 The absence of findings from the circuit court about whether Kellam waived his ***Miranda*** rights hampers our analysis.[5] We conclude that even if the

[5] We have considered whether a suspect's initiation of police contact after invoking ***Miranda*** rights automatically waives those rights. A footnote in ***State v. Hambly***, 2008 WI 10, 307 Wis. 2d 98, 745 N.W.2d 48, discusses this and cites to ***Oregon v. Bradshaw***, 462 U.S. 1039 (1983). ***Hambly***, 307 Wis. 2d 98, ¶69 n.81. In ***Bradshaw***, the Court stated that whether the suspect initiated a conversation after invoking ***Miranda*** rights and whether the suspect waived the ***Miranda*** rights are separate inquiries. ***Bradshaw***, 462 U.S. at 1044-45. We do not have sufficient findings from the circuit court to undertake the waiver analysis.

circuit court should have suppressed any statement made by Kellam, that error was harmless. In ***State v. Hale***, 2005 WI 7, 277 Wis. 2d 593, 691 N.W.2d 637, the court articulated the following harmless error rule for constitutional error: "An error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the [result].'" ***Id.***, ¶60 (citation omitted). A court evaluating an error for harmlessness may consider, among other factors, the nature and overall strength of the State's case. ***Id.***, ¶61.

¶31 Kellam's defense was that he did not assault the victim, or steal her cell phone or vehicle. The evidence adduced at trial was more than sufficient to convict Kellam of the charged offenses without his revelation about the location of the victim's vehicle. The victim identified Kellam at trial as her assailant. He had visited the church to use the telephone one or two months before the assault, and on the day of the assault, she spent thirty to forty-five minutes with Kellam.

¶32 The victim's assailant stole her cell phone and vehicle. Kellam used the victim's cell phone to call his girlfriend (one such call came in while the police were with the girlfriend). Kellam also drove the victim's vehicle to his girlfriend's residence. The girlfriend reported Kellam's visit and the vehicle he was driving to the police. The victim's cell phone was found stuffed under the rear seat of the squad car into which Kellam was placed after he was arrested.

¶33 The victim testified that her assailant threatened to cut her throat while holding a metal object on a key chain to her throat. Upon his arrest, Kellam had a key chain with a utility knife attachment.

¶34 Forensic testing matched biological material obtained from the victim to biological material obtained from Kellam and excluded 99.7 percent of the African-American male population from the donor of the male sample.

¶35 The foregoing evidence was strong and compelling evidence of Kellam's guilt. And, none of this evidence depended upon any of Kellam's statements to police to the extent such statements were admitted at trial. We are satisfied beyond a reasonable doubt that the erroneous admission of any statement did not contribute to Kellam's conviction and was therefore harmless error.

¶36 Finally, Kellam argues that the circuit court erred when it refused to instruct the jury on second-degree sexual assault, a lesser-included offense of first-degree sexual assault. *See* ***State v. Price***, 111 Wis. 2d 366, 377, 330 N.W.2d 779 (Ct. App. 1983). "The submission of a lesser included offense instruction is proper *only* when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." ***State v. Wilson***, 149 Wis. 2d 878, 898, 440 N.W.2d 534 (1989). We review this question independently of the circuit court. ***Id.***

¶37 The jury was instructed on first-degree sexual assault. First-degree sexual assault is an assault by use or threat of use of a dangerous weapon or an article the victim reasonably believed was a dangerous weapon. WIS. STAT. § 940.225(1)(b).[6] The question is whether under a reasonable view of the evidence, the jury could have found that Kellam did not use a dangerous weapon so that Kellam would have been acquitted of first-degree sexual assault and convicted of second-degree sexual assault. WIS. STAT. § 940.225(2) (second-degree sexual assault occurs by use or threat of force or violence).

[6] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶38 The victim testified that she let Kellam into the church to use the telephone. When he finished using the telephone, he grabbed her by the collar and held a metal object to her throat. She heard key chain noises. Kellam demanded money or he would slit her throat. The victim believed that threat because Kellam held a metal object against her neck. At the time of his arrest, Kellam was found with a utility knife attachment on his key chain.

¶39 Kellam forced the victim upstairs to her office to obtain money from her purse. Kellam took her cell phone and car keys. When she protested the impending sexual assault, Kellam shoved her, slapped her and then assaulted her. The victim, remembering Kellam's earlier threat to slit her throat, determined that it would be wiser to cooperate to avoid injury.

¶40 Kellam argues that the victim was compelled to submit to the sexual assault because he slapped her, not because he used a dangerous weapon. He also argues that his threat to slit the victim's throat was too attenuated from the actual assault to compel the victim's submission. That was not the victim's testimony. The victim was compelled to submit to the assault because she feared injury by the object Kellam had earlier held to her neck as he threatened to slit her throat. That Kellam used or threatened to use a dangerous weapon is the reasonable view of the evidence.

¶41 There was no basis to acquit Kellam of first-degree sexual assault and convict him of the lesser-included offense of second-degree sexual assault. The court did not err when it declined to instruct the jury on second-degree sexual assault.

By the Court.—Judgment affirmed.

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