COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. **2012AP587-CR**
2012AP588-CR
2012AP589-CR
2012AP590-CR

Cir. Ct. Nos. **2009CF4148**
2009CF4173
2009CF5801
2010CF1596

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEONTAYE TERREL LUSK,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Deontaye Terrel Lusk appeals the judgments of conviction in four Milwaukee County cases and the orders denying postconviction relief. Lusk was charged and convicted by a jury of thirteen felonies in four cases,

all of which were joined for trial. On appeal of all cases, Lusk argues that joinder of his cases for trial was improper and prejudicial to his defense. Lusk also argues that a photo lineup shown to one witness, Katie Dean, was unduly suggestive and that Dean's identification should have been excluded. We conclude that under the facts alleged in the criminal complaints, joinder of these cases for trial was proper under applicable Wisconsin law. We also conclude that under the facts of this case, the photo lineup was not suggestive. We affirm.

BACKGROUND

I. Procedural History.

¶2 These are consolidated appeals from four cases in which Lusk was charged with multiple offenses occurring in the Spring and Summer of 2009.

¶3 In Milwaukee County Case No. 2009CF05801,[1] Lusk was charged with one count each of: armed robbery with the threat of force, as a party to a crime; recklessly endangering safety by use of a dangerous weapon; physical abuse of a child by recklessly causing harm by use of a dangerous weapon; and possession of a firearm by a felon. The charges all stemmed from events occurring on April 9, 2009. The complaint also charged Lusk with one count of armed robbery by threat or use of force for events occurring on July 11, 2009.

¶4 In Milwaukee County Case No. 2010CF001596, Lusk was charged with one count of armed robbery by use of force for events occurring on May 9, 2009. An information also charged Lusk with one count each of: first-degree

[1] We identify the cases against Lusk by case number only in our "Procedural History" section; however, later in our opinion we identify the charges against Lusk by the date on which the various offenses occurred.

intentional homicide, as a party to a crime; armed robbery by the use of force; and being a felon in possession of a firearm, for events occurring on July 12, 2009.

¶5 In Milwaukee County Case No. 2009CF004148, Lusk was charged with one count each of: first-degree intentional homicide by use of a dangerous weapon; attempted armed robbery by use of force; and possession of a firearm by a felon. The charges stemmed from events occurring on June 21, 2009.

¶6 Lastly, in Milwaukee County Case No. 2009CF04173, Lusk was charged with armed robbery, by threat of force, for events occurring on July 12, 2009.

¶7 In total, Lusk was charged with thirteen crimes, alleged to have occurred between April 9, 2009 and July 12, 2009. Over Lusk's opposition, the State sought to join three of the cases against Lusk (the complaint underlying Case No. 2009CF04173 for the events of July 12, 2009, had not yet been filed). The trial court granted the State's motion. After charges were issued in the final case, the State sought to join it along with the already consolidated cases. Again over Lusk's opposition, the trial court granted the motion and consolidated all four cases for trial.

II. Factual Background.

A. The Charges.

¶8 The State asserts that "[t]he prosecutor filed the joinder motions long before trial, and the [trial] court decided the motions well before trial began and necessarily decided the motions based on facts recited in the criminal complaints, not on evidence presented at trial or at a motion hearing." Lusk does not dispute

this, thus we also rely on the criminal complaints and informations for the factual basis needed to decide the joinder issues in this appeal. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not rebutted are admitted). To minimize the confusion occasioned by multiple trial court case numbers and different appellate case numbers, we describe the charges here by the date on which the complaints alleged they occurred, and where material to the issues on appeal include the victim(s) of, and witnesses to, the crimes charged.

April 9, 2009

¶9 According to police interviews of multiple witnesses, on April 9, 2009, Deondre Gilbert, Shakeem Love, Ray Bolden, and C.C.[2] were inside Gilbert's vehicle parked in the area of 3314 North 21st Street, Milwaukee, when they were approached by three men. One of the men—identified in the complaint as Lusk—approached the passenger-side window and asked, "[w]hy are you seated behind my trap house[?]," which Gilbert understood to mean a drug house. Lusk then pointed a handgun into the car and asked, "What you all got[?]" Lusk then hit C.C., who was seated in the front passenger seat, with a gun and took her purse.

¶10 One of Lusk's accomplices—identified in the complaint as Timothy Carter—started talking "smack," at which point Gilbert said that "everyone needed to calm down" and that "it was[] 'cool.'" Lusk responded, "[w]hat's cool nigga," reached into the car over C.C., and shot Gilbert in the right hip. Gilbert

[2] At the time the complaint in this case was issued, C.C. was a minor.

fled from the car and ran until he fell down in a nearby cemetery, where he was found and transported to a hospital.

¶11 As a result of these events, Lusk was charged with armed robbery with the threat of force, as a party to a crime; recklessly endangering safety by use of a dangerous weapon; physical abuse of a child by recklessly causing harm by use of a dangerous weapon; and possession of a firearm by a felon.

May 9, 2009

¶12 According to police statements, on the morning of May 9, 2009, at 2:25 a.m., police were dispatched to the Plan B Tavern, 3621 North Teutonia Avenue, Milwaukee, in response to an armed robbery complaint. Reco Haney and Eddie Metts had left the tavern and went to Haney's truck, which was parked outside the tavern. As Haney and Metts were getting into the truck, two men approached them from across the street. One of the men—identified in the complaint as Lusk—approached Haney pointing a chrome .45 semi-automatic pistol at him and stated, "Lay it down bitch." Lusk went through Haney's pockets, took Haney's credit and debit cards and Haney's car keys. Lusk and his partner (who also had a gun and had robbed Metts) got into Haney's truck and drove away. Inside of Haney's truck was a fully loaded, all-black Lorcin 9mm semi-automatic pistol, owned by Haney, which Lusk and his partner drove away with. Lusk was charged with armed robbery by use of force, as a party to a crime, for the robbery of Haney.

June 21, 2009

¶13 At 2:24 a.m. on the morning of June 21, 2009, police responded to a shooting at the intersection of North 24th Street and West Nash Street, Milwaukee. Upon arrival, police found the body of Eric Garrett lying in front of the address of 3713 North 24th Street. Multiple people, including Kimberly Neal, were surrounding Garrett's body when police arrived. Neal told police that beginning at about 1:30 a.m., she was seated on the hood of a friend's automobile, while Garrett was sitting on the trunk of another car facing her. Other people were out in the area to socialize. Before she sat on the car, Neal noticed two men on the west side of North 24th Street walking towards her. One of the men she later identified as Lusk. Lusk, who was armed with a black semi-automatic handgun, approached Garrett and asked, "What's your name?" Garrett replied, "My name is Eric, do I know you?" Lusk then asked, "Eric, what you got in your pocket?" Garrett replied, "Nothing, what do you mean what do I got in my pocket?" With what Neal described as a mean look on his face, Lusk then said, "What do you got in your pocket?" When Garrett again replied, "Nothing," Lusk shot one shot at Garrett, blowing Garrett off the car. The person Neal had seen with Lusk said, "Shoot his nigga too, shoot her too, shoot that bitch too." Lusk turned to Neal, looked her in the face and said, "Oh, you better thank God tonight, you're lucky." Lusk and the man he was with ran away.

¶14 An autopsy report revealed that Garrett died as a result of the gunshot wound. A bullet was recovered from Garrett's body and a 9mm Luger brass casing was recovered near the curb where the two vehicles were parked. As a result of his actions toward Garrett, Lusk was charged with first-degree intentional homicide by use of a dangerous weapon and attempted armed robbery

by use of force. An amended information also charged Lusk with being a felon in possession of a firearm.

July 11, 2009[3]

¶15 According to statements taken from Dwaun Bailey, Bailey was walking towards his home on the night of July 11, 2009, near the area of 3421 North 20th Street, Milwaukee. A man—identified in the complaint as Lusk—approached Bailey "pointing a large silver revolver and demanding money." Bailey told Lusk that he didn't have any money, only an iPod. Lusk yelled at Bailey, saying "you better have some money," at which point two other individuals approached Lusk. One of the other individuals told Lusk "Hurry up lets [sic] get out of here." Lusk searched Bailey's pockets, took Bailey's iPod, and fled the scene.

¶16 Lusk was charged with armed robbery with the threat of force as a result of Lusk's action with Bailey.

July 12, 2009

¶17 On the morning of July 12, 2009, Milwaukee police were again dispatched to the area near the Plan B Tavern, 3621 North Teutonia Avenue. A

[3] The criminal complaint identifies the date as both July 11, 2009 and July 12, 2009. At the preliminary hearing, the prosecutor identified the date as July 12, 2009; Bailey testified to a sequence of events that began about 10:30 p.m., when he got off of work and drove to his father's house, where the robbery occurred in the alley behind the house. The information specifies the date as July 11, 2009. At trial, Bailey testified that the encounter occurred on July 11, 2009. Also at trial, Milwaukee Police Lieutenant Jeffrey Norman testified that he responded to a robbery report at about 1:00 a.m. on July 12, 2009, and spoke with Bailey at that time. Consequently, the record shows that the robbery occurred at some point between 10:30 p.m. on July 11 and 1:00 a.m. on July 12.

witness, Katie Dean, told police that she was leaving the tavern at approximately 1:55 a.m. She had gone to the tavern with her nephew, Jugady Banks. The complaint states that Banks crossed the street to talk to an acquaintance. When Banks saw Dean walking to her car, he also headed to the car. Dean said that as she approached her car—parked in the area of 3633 North Teutonia Avenue—she saw three men robbing her nephew. Dean said that she looked through the passenger side window of her car (Banks was in the driver's seat) and saw a man—identified in the complaint as Lusk—go through Banks's pocket and take a packet of cigarettes. A second man—identified in the complaint as Carter—was holding a gun and also going through Banks's pockets. A third man acted as a lookout.

¶18 Banks told police that as he approached the driver's side of his car, Carter approached him, said, "[g]ive me everything you got," stuck a gun in Banks's side, and ordered Banks to open the driver's door and sit in the driver's seat. Carter went through Banks's pockets, and took a pack of cigarettes. Then a second man, who Banks had seen inside the Plan B Tavern, went through Banks's pockets. After Carter took the cigarettes he told Banks to "pull off before they 'air the area out,'" which Banks took to mean they were going to shoot him in his car. Banks drove away, picked up Dean, and left.

¶19 At around the same time, Anthony Heard was driving his friend John Brown to the parking lot at 3633 North Teutonia Avenue. Heard saw a group of men in the parking lot who appeared to be beating another individual. Brown got out of Heard's car to go to his own car parked in that parking lot. The group of men surrounded Brown and one of them (who had a gun) told Brown to lie on the ground. Heard did not hear Brown's response but did hear a gunshot. Heard

stepped on the gas, drove away, and saw Brown fall to the ground through his rear view mirror.

¶20 A witness to Brown's shooting, Dennis Avant, told police that he was at the Plan B Tavern at about 10:30 p.m., the night of July 11, 2009. While at the tavern, Avant saw two people whom he knew: Carter, who Avant knew as "Tim," and Lusk, who Avant knew as "Burns." Avant left the tavern at about 2:00 a.m. and headed towards the parking lot, at which time he saw four people standing near the side of the tavern. Specifically, Avant saw an older man (Brown)[4] surrounded by three younger men, two of whom were Lusk and Carter. Avant told police that he saw Carter point a gun at Brown, telling Brown to empty his pockets. When Brown responded, "I ain't got anything," Carter shot his gun into the air, prompting Brown to frantically empty his pockets. Lusk somehow obtained the gun from Carter, pointed it at Brown, and said, "stop playing with me. Break yourself." Carter ripped a necklace off of Brown's neck. Brown continued to protest that he didn't have anything and made a turning move as though to run away. Lusk then shot Brown and fled in a vehicle with Carter and their other partner. Avant approached Brown after he saw Lusk and his partners flee. Avant saw that Brown was still breathing, but left the scene rather than call for help.

¶21 Brown died from the gunshot wound. The medical examiner described a front-to-back gunshot wound to the abdomen, which he ruled a homicide. Police recovered a fired .40 caliber Smith & Wesson Fiocchi spent cartridge casing in the gutter line of 3633 North Teutonia, a fired bullet from a

[4] This "older man" was Brown, although Avant did not know his name.

Pontiac parked in front of the parking lot at 3600 North Teutonia, and a spent .380 R & P casing from the parking lot.

¶22 For the murder of Brown, Lusk was charged with first-degree intentional homicide by use of a dangerous weapon, as a party to a crime, and being a felon in possession of a firearm. For the robbery of Banks, Lusk was charged with armed robbery with the threat of force, as a party to a crime.

B. The Motion for Joinder.

¶23 Over Lusk's opposition, eventually all of the charges against Lusk were joined for trial. The trial court noted that all four of the cases against Lusk involved charges stemming from crimes of a similar nature. Specifically, in discussing whether to join the case stemming from the May 9, 2009 robbery of Haney and the July 12, 2009 robbery and murder of Brown with the other cases, the trial court stated:

> So they are similar to the other incidents even -- The charge is not the case. It's whether the type of offense is the same, is this the same type of offense. These incidents are very similar to the other incidents in terms of the way in which they were conducted. These were allegedly robberies with a weapon being a handgun. This is similar to the other cases. There is a similar[ity] which I think is [a] significant way in which the robbery is conducted.
>
> The -- They involve talking to the victims about emptying their pockets, giving them all they've got. Those are similarities. There's also similarities in the shootings with pistol whippings of the victims, so I do think that the modus operandi here is similar, that can go to identification which I think is a key component.
>
> It's something that is significant under other acts, identity, intent, plan as a system of criminal activity as

> well, and I think that [other] acts based on that that these do come in.
>
> Additionally, looking at the short period of time, this is a very short period of time. There's case law that allows the time to be much more significant and here we have the longest span between the first and the fifth incident of 95 days, but some of these occur [the] same day or within one day of each other. So there's a very short period of time, and, additionally, looking at the area, it's also extremely close….
>
> We're looking at the maximum area here between the crimes of being .68 miles and others are shorter. So I do think that they are occurring within a short period of time and it's important also and over the short period of distance. I do think under the analysis they are admissible as other acts and that does go toward allowing them to be joined together, … You know, all evidence is prejudicial, but the standard is not if it's prejudicial but the balance of the prejudice against the interests of the public in conducting a joint trial, and given the fact that there are other acts evidence as well that I believe would be admissible, that argument is not very strong. So there's [not sufficient] prejudice that I find to disallow joinder.
>
> So I'm going to join the last case with the remaining four cases so they're all joined together.

C. Dean's Identification of Lusk.

¶24 Prior to trial, Lusk also challenged the admissibility of Dean's identification of Lusk as the man who robbed her nephew. In his motion to suppress identification evidence, Lusk argued that the manner in which police showed Dean photographs of Lusk was unduly suggestive. Specifically, Lusk argued that his photograph differed from the other photographs of individuals in the photo lineup because Lusk was the only individual wearing a black T-shirt. The others in the photo lineup were wearing white T-shirts. In her description to police, Dean stated that one of the men she saw rob her nephew was wearing a white T-shirt, and that the others were in black. Lusk argued that Dean's

description made the clothing of the individuals in the photo lineup relevant and his photograph stood out.

¶25 At the photo lineup, Dean was shown six individual photographs. Lusk's photograph was the second photograph shown to Dean. She identified Lusk immediately.

¶26 The trial court denied Lusk's motion to suppress Dean's identification, stating:

> [T]he challenge was that Mr. Lusk was in a different colored shirt; … and that the other individuals were in a different colored shirt, and that somehow … that makes this unduly suggestive. Now, Ms. Dean was shown the photos in the array method in which she was viewing them one at a time. And I think it's significant that that's how she viewed them, because it's not like looking at all six of them, where one person stands out from the background. Instead, she saw [the photos] one at a time. So remembering what they may have been wearing at the time she saw them, it doesn't mean that she knew exactly what they were wearing.
>
> ….
>
> Also the positioning is very significant. She had only seen one other photo. She identified him as number two. And so standing out from [the] others, he was truly only wearing something different than the first photo. As far as she knew later, she would see the other photos and he was wearing something different than all the others, but she didn't know that at the time.

¶27 After an eleven-day jury trial, Lusk was convicted on all charges and sentenced to life in prison without the possibility of release. Lusk now appeals all of the judgments of conviction and the orders denying his postconviction motions.

DISCUSSION

¶28 On appeal, Lusk argues that his cases were improperly joined because the underlying charges were not of the same or similar character. Lusk also argues that Dean's out-of-court identification violated his due process rights and should have been excluded from his trial. We discuss each issue separately.

I. Joinder.

¶29 In his brief, Lusk argues that "it was error to join the homicide incidents with the other incidents." Specifically, he contends that the "facts underlying the fatal shootings … distinguish those incidents from the others with which Lusk was charged, making them different types of offenses for the purpose of joinder." We disagree.

¶30 WISCONSIN STAT. § 971.12 (2011-12)[5] governs joinder, severance, and consolidation of crimes for trial. It provides:

> **(1)** JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, … are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan.…
>
> ….
>
> **(3)** RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes … in a complaint, information or indictment or by such joinder for trial together, the court may order separate

[5] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

> trials of counts, … or provide whatever other relief justice requires.…
>
> **(4)** TRIAL TOGETHER OF SEPARATE CHARGES. The court may order 2 or more complaints, informations or indictments to be tried together if the crimes and the defendants, if there is more than one, could have been joined in a single complaint, information or indictment. The procedure shall be the same as if the prosecution were under such single complaint, information or indictment.

¶31 We interpret statutes independently from the trial court. *See* ***State v. Williams***, 2002 WI 58, ¶8, 253 Wis. 2d 99, 644 N.W.2d 919. "Whether crimes were properly joined in a complaint is a question of law. The joinder statute is to be construed broadly in favor of initial joinder." ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982) (internal citation omitted).[6]

¶32 WISCONSIN STAT. § 971.12(4) permits joinder of charges for trial "if the crimes … could have been joined in a single complaint." Section 971.12(1) allows joining multiple crimes in a single complaint, when the crimes "are of the same or similar character or are based on the same act or transaction…." Crimes are "of the 'same or similar character'" when they are "the same type of offenses occurring over a relatively short period of time and the evidence as to each must overlap." ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988)

[6] The State argues that the trial court's decision on joinder is an exercise of discretion, which must be sustained if there are facts and a rational reasoning process in the record which supports the joinder conclusion. ***State v. Hoffman***, 106 Wis. 2d 185, 208-09, 316 N.W.2d 143 (Ct. App. 1982), does not appear to support that conclusion. Discretion comes into play when a trial court must determine whether to sever already joined charges because prejudice would result from the joined charges. ***Id.*** at 209. If the court makes such a finding, it must then "'weigh this potential prejudice against the interests of the public in conducting a trial on the multiple counts.'" ***Id.*** (citation omitted). It is the balancing of those competing interests where discretion is exercised, which "'will not be disturbed on appeal in the absence of an [erroneous exercise] of that discretion.'" ***Id.*** (citation omitted). Because Lusk's appeal concerns whether the initial joinder of his charges was appropriate, rather than whether the charges should have been severed, we review Lusk's arguments under the joinder statute, independent of the trial court.

(citation omitted). "It is not sufficient that the offenses involve merely the same type of criminal charge." ***Id.***

¶33 Here, Lusk opposed joinder of the different charges, but the record does not contain a motion to sever under WIS. STAT. § 971.12.[7] Of particular significance is the lack of a motion to sever the armed robbery or attempted armed robbery charges in the two cases which also involved first-degree intentional homicide. We conclude that the trial court correctly permitted the joinder of the multiple charges against Lusk. Lusk acknowledges that the two homicides "are undeniably similar to each other," but argues that they "differ in kind from all of the other incidents insofar as they incorporate the shooting deaths of the robbery victims." He contends that there are "substantial differences between the homicides and the remaining offenses, as well as differences that are inherent to even the non-homicide offenses."

¶34 WISCONSIN STAT. § 971.12(1) specifically allows charging "[t]wo or more crimes … in the same complaint, information or indictment … if the crimes charged … are based on the same act or transaction…." Lusk does not appear to challenge the joinder of the homicide and attempted robbery of Garrett. However, to the extent that he does, we conclude that all of these charges were based on the same act or transaction and are appropriate in the same complaint or information. Lusk's attempt to rob Garrett in the early morning of June 21, 2009, occurred mere seconds before he shot Garrett with the gun he illegally possessed. The inextricable factual overlap among the charges—first-degree intentional homicide

[7] We are not considering requests for severance pursuant to WIS. STAT. § 971.12, but only whether the trial court properly joined the charges under the statute.

by use of a dangerous weapon, attempted armed robbery by use of force, and felon in possession of a firearm—justified joining those charges in a single trial.

¶35 Similarly, the charges of the first-degree intentional homicide (as a party to a crime) of Brown in the parking lot near the Plan B Tavern around 2:00 a.m. on July 12, 2009 (when Brown tried to flee), armed robbery (the taking of Brown's necklace), and felon in possession of a firearm, present an inextricable factual overlap among the three charges. Both homicides involve remarkably similar fact patterns of violence, threats, use of a handgun, robbery, and ultimately, murder.

¶36 Lusk argues that the various robberies and acts of violence were not similar because of factual differences among them and because of the time between the first and last event. We disagree. Our decision in ***Hamm*** is instructive on this issue. In that case, we approved joinder of two incidents—one which occurred in 1983, and one which occurred in 1985. *See* ***id.***, 146 Wis. 2d at 135-37. Both incidents involved armed burglary and first-degree sexual assault. ***Id.*** The similarities between the acts in each incident tended to establish the identity of the criminal. ***Id.*** at 138. In each incident, the perpetrator entered a home in the small hours of the morning armed with a knife, was disguised, and committed a sexual assault. ***Id.*** Each incident occurred in apartments on the same street within a few hundred feet of each other. ***Id.*** Two of the three assaults occurred in adjoining apartments and the perpetrator entered and exited through windows facing the same wooded area. ***Id.*** "In each case the perpetrator entered unarmed but armed himself with a knife taken from the premises, [and] concealed his face with a towel taken from the premises." ***Id.*** The evidence in both incidents overlapped. ***Id.*** We concluded that where crimes "are greatly similar

and the [evidentiary] overlap is substantial," a period as long as fifteen or eighteen months may qualify as "relatively short." ***Id.*** at 140.

¶37 There is a similar significant evidentiary overlap in this case. Both homicides occurred after armed robbery attempts involving confronting the victim with a handgun and demanding money. Either attempted armed robbery or completed armed robbery is charged in all of the criminal complaints. Violence involving a handgun is involved in all of the events. All of the events charged occurred within a relatively short proximity—in a geographic area bounded on the east by North Teutonia Avenue, on the west by 24th Street, on the south by the 3300 block and on the north by the 3600 block.[8] Lusk was accompanied by one or more partners in all of these crimes and he engaged his victims prior to attempting to rob them. It is not required that the facts be identical; the facts must only be such that the crimes are "of the same or similar character" under the joinder statute. We conclude that each crime here was factually of the same or similar character and thus properly joined.

[8] We take judicial notice of the fact that Milwaukee streets are generally laid out like graph paper; the north-south streets are numbered, while the east-west streets are named. A few exceptions to this general approach are a relatively small number of angle streets that cut through the "graph." One of these angle streets is North Teutonia Avenue. Teutonia Avenue is the next street east of North 21st Street (although separated by a cemetery at the location of several of these crimes) for most of the area in which these crimes occurred.

Beginning in the downtown area going north towards the county line, Milwaukee street addresses change numbers in each block. Thus the 2100 block of one street will be followed in the next north block by 2200 on the same street. This numbering pattern repeats in the same numerical sequence on all parallel and angle streets. Thus, the criminal activity here occurred in a range east to west of five blocks, and a range north to south of four blocks (3300 block to the 3700 block).

¶38 Lusk goes on to argue that even if the charges against him were of the same or similar character, he was prejudiced by the joinder of his cases. We disagree.

¶39 If the charged offenses are properly joined for trial, it is presumed that the defendant will suffer no prejudice from the joinder. ***State v. Linton***, 2010 WI App 129, ¶20, 329 Wis. 2d 687, 791 N.W.2d 222. The defendant may rebut that presumption. ***State v. Leach***, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985). This requires a showing of substantial prejudice to the defense; some prejudice is not enough. ***Hoffman***, 106 Wis. 2d at 209-10. "The danger of prejudice arising from the jury's exposure to evidence that the defendant committed more than one crime is minimized when the evidence of both counts would be admissible in separate trials." ***Id.*** at 210. In other words, if evidence of one count would be admissible at a separate trial on another count under WIS. STAT. § 904.04(2), the defendant suffers no substantial prejudice from the joinder of the two counts. *See* ***Hoffman***, 106 Wis. 2d at 210-11.

¶40 Here, if the cases against Lusk were not joined and multiple trials were conducted, evidence of the non-joined offenses would have been admissible as other acts evidence under WIS. STAT. § 904.04(2). *See* ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998) (evidence of other acts admissible if for a permissible purpose, if relevant, and if probative value substantially outweighs danger of unfair prejudice). The substantial evidentiary overlap between the offenses included reasonable geographic and temporal proximity, possession and use of a firearm, intimidating behavior by Lusk, and the frequent involvement of one or more accomplices to commit armed robbery, either completed or attempted. Evidence from the various completed or attempted armed

robberies would have been probative of Lusk's motive (stealing), intent to steal, plan (threaten with a gun to get the victims' property), or identity in the other completed or attempted armed robberies. Each of the two homicides was directly linked to an armed robbery. In one, the weapon used in a later homicide was a weapon the owner left in a truck which Lusk stole in an earlier armed robbery; in the other, the homicide took place as part of an armed robbery. The overlapping similarities in how the crimes were committed, together with the reasonable geographic and temporal proximity of the crimes, and the direct link between specific properly joined armed robberies and a homicide, satisfy the probative value criterion for admission. Lusk has not shown substantial prejudice necessary to overcome the propriety of the joinder.

II. Dean's Out-of-Court Identification.

¶41 Lusk also contends that Dean's out-of-court identification should have been suppressed. Because Lusk was the only member of the photo array wearing a black T-shirt, he contends that the photo lineup was unduly suggestive.

¶42 A criminal defendant is entitled to suppress an identification if the pretrial police procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." ***State v. Benton***, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923 (citations and two sets of quotation marks omitted). Lusk bears the initial burden of showing that the identification procedure was impermissibly suggestive. *See* ***id.*** Suggestiveness may arise in the manner in which a photo is presented, the officer's words or actions or some aspect of the photo itself. *See* ***State v. Mosley***, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981).

¶43 Lusk's only argument is that because he was the sole member of the photo array wearing a black T-shirt, while the others all wore white shirts, the array was unduly suggestive. In her statement to police, Dean said that one of her nephew's attackers wore a black shirt and another wore "a white T[-]shirt." At the time of her identification, Dean was presented with eight folders, six of which contained photos and two of which were empty. Each folder was viewed individually. Dean reviewed the folders in sequence and circled either "yes" or "no" after viewing each folder with a photo, thus indicating whether the photo matched her memory of a person she saw during the attack on Banks. Lusk's photo was in the second folder Dean viewed, thus she had seen only one other photo and did not know whether the remaining four photos showed a person wearing a black or white T-shirt. Consequently, Lusk's photo could not have stood out at that point as unique in the array; the uniqueness (impermissible suggestiveness, in Lusk's view) would have become apparent only in retrospect.

¶44 The sole fact that Lusk was wearing a black T-shirt, under the circumstances of Dean's description of the robbers, does not make the array unduly suggestive. The pictures in an array "need not be identical." ***Powell v. State***, 86 Wis. 2d 51, 67, 271 N.W.2d 610 (1978). There is no evidence that the police steered Dean towards Lusk's photo, or did anything to influence her immediate identification of Lusk. We conclude that the trial court properly admitted Dean's out-of-court identification of Lusk.

¶45 For the foregoing reasons, we affirm the trial court.

By the Court.—Judgments and orders affirmed.

Not recommended for publication in the official reports.