COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP118-CR **Cir. Ct. No. 2013CF2459**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENTONYO MORGAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 PER CURIAM. Kentonyo Morgan appeals from a judgment, entered upon a jury's verdicts, convicting him of one count of first-degree reckless homicide while armed with a dangerous weapon and one count of possession of a firearm by a felon. Morgan additionally appeals from an order denying his postconviction motion for a new trial and from those parts of an order denying most of his reconsideration motion. Morgan contends the trial court made several erroneous evidentiary rulings during the trial. We reject Morgan's arguments and affirm the judgment and orders.

BACKGROUND

¶2 Morgan was charged with the May 6, 2013 shooting death of Daniel Gardner. According to the criminal complaint, Gardner and his girlfriend, Qiana House, went to Washington Park with her three-year-old brother. When they reached the playground area, a subject wearing a dark gray hoodie and blue jeans approached and asked, "You remember me?" Neither Gardner nor House knew the man. The man pulled out a gun, which House described as silver with a brown handle, and pointed it at Gardner, who told House to take her brother and run. As House fled, she heard a shot; Gardner had been fatally shot in the torso.

¶3 Police officer Kenneth Lipinski, who was on routine patrol in the park at the time had observed a person jogging slowly, as though not for any exercise purpose. As Lipinski watched the individual, he saw a flash. Lipinski went to the area of the flash and recovered a chrome firearm with a brown handle. Lipinski attempted to pursue the suspect but lost sight of him. Lipinski asked two women nearby if they had seen anyone running in the area; they stated they had seen someone in a white shirt, but the officer could not find anyone matching that description. He did, however, find a black sweatshirt at the base of a tree.

¶4 A detective responding to the scene followed the jogger's path. The detective found a flip phone near where the officer had recovered the gun. On the phone, police found a picture of Morgan with a gold grill in his mouth and a picture of a tattoo on someone's left hand "consistent with" a tattoo on Morgan's left hand. Also on the phone was contact information that matched the information held by Morgan's probation agent.

¶5 Morgan was arrested and interviewed by detectives. He admitted previously owning the recovered phone and taking a photo of himself with the grill in his mouth, but claimed he had not had a cell phone since 2011. He also claimed that, at the time of the shooting, he was taking his girlfriend to the hospital for complications with her pregnancy. He admitted he was supposed to have an appointment with his probation agent that day, but told police he canceled it to take his girlfriend to the hospital. When police checked surveillance video and hospital records, they were unable to find any indication that Morgan or his girlfriend had been at the hospital at the time claimed.

¶6 House viewed a line-up. Although she did not identify anyone as the shooter, she noted that the person in position three—Morgan—looked like the shooter, but she was uncertain because he did not have the same facial hair or a hoodie. She did, however, tell police that she began to shake and got a feeling in her stomach when that person entered. An additional citizen witness selected Morgan from a photo array. Morgan was charged with one count of first-degree intentional homicide while armed with a dangerous weapon and possession of a firearm by a felon.

¶7 After the complaint was filed, DNA analysis was performed on the cell phone, sweatshirt, a plastic bag found in the sweatshirt pocket, and the gun.

The phone, sweatshirt, and bag had DNA from at least two individuals. Morgan and his identical twin were a "source of the major component of the DNA" on these items.[1] The gun had DNA from at least three individuals, but the results were inconclusive as to whether Morgan was a contributor.[2] No useable fingerprints were found on the items tested, though a tool mark examiner testified that the bullet that killed Gardner came from the gun recovered in the park.

¶8 Morgan's case was tried to a jury, which convicted him of first-degree reckless homicide, a lesser-included offense of first-degree intentional homicide, and possession of a firearm by a felon.[3] Additional details about the trial itself will be discussed herein. The trial court imposed sentences totaling sixty-five years' imprisonment.

¶9 Morgan filed a postconviction motion seeking a new trial, claiming the trial court had erroneously: (1) overruled his hearsay objections; (2) overruled his objections to leading questions; (3) overruled his objection to the State's characterization of the DNA evidence; (4) allowed the State to comment on Morgan's character for truthfulness and credibility; and (5) failed to grant a mistrial, which Morgan had moved for on the fourth day of trial. Morgan also claimed the State had engaged in prosecutorial misconduct with its actions, and he sought to vacate "the $250 DNA surcharge," even though $500 in surcharges had

[1] Morgan's DNA is indistinguishable from his twin's, so when we discuss Morgan's DNA throughout, it implicitly includes his twin's DNA. However, Morgan stipulated that his twin was not a suspect in this case, and there is no "twin problem" to address on appeal.

[2] The victim, Gardner, and two other suspects were excluded from all of the items.

[3] The parties do not tell us why the jury was given a lesser-included instruction, but the issue is not relevant to the appeal.

been imposed. The trial court, in a one-paragraph order, "adopt[ed] the State's brief *in toto* as its decision in this case."

¶10 Morgan moved for reconsideration, noting that the order did not expressly address the DNA surcharge and asserting that wholesale adoption of the State's brief was an erroneous exercise of discretion.[4] On reconsideration, the trial court vacated one of the surcharges and more explicitly identified its reasoning for rejecting Morgan's claims of error. Morgan appeals.[5]

DISCUSSION

I. Jailhouse Informant Testimony

¶11 At trial, the State offered the testimony of an informant who claimed that Morgan had confessed a homicide to him. The informant testified, among other things, that he and Morgan were in the same jail pod; that Morgan knew his sister and trusted him; that Morgan knew the girl with the victim could not identify him; that Morgan knew there was DNA evidence; and that Morgan wanted his twin to tell authorities that the hoodie was the twin's.

[4] We caution trial courts against adopting a party's brief *in toto*. While a trial court is not prohibited from adopting a party's brief as its decision, when it does so, it is required to indicate the factors on which it relied when making its decision and state those on the record. *See* ***Trieschmann v. Trieschmann***, 178 Wis. 2d 538, 544, 504 N.W.2d 433 (Ct. App. 1993). In its initial decision denying Morgan's postconviction motion, the trial court failed to satisfy this requirement. The initial failure is ultimately of no consequence in this case, as the trial court elaborated on its reasoning when it denied reconsideration.

[5] Morgan notes that on appeal, he has opted not to raise issues relating to prosecutorial misconduct, the denial of a mistrial, or the remaining DNA surcharge. With respect to the surcharge, however, we note that significant DNA testing was performed in this case, which would support the discretionary imposition of a surcharge. *See* WIS. STAT. § 973.046(1g) (2011-12); ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393.

¶12 Before the informant testified, Morgan attempted to have the testimony excluded as "inherently dangerous" and "prejudicial." After the trial court denied that request, Morgan asked the court to conduct a ***Daubert***-like[6] hearing on the admissibility of the informant's testimony. The court again refused, explaining that Morgan could test the informant's reliability and explore his bias through cross-examination. On appeal, Morgan claims that the informant's testimony should have been excluded because its admission violated his rights to due process and a fair trial.[7]

¶13 Under WIS. STAT. § 904.03, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The test "is not whether evidence is prejudicial but whether it is *unfairly* prejudicial." ***State v. Mordica***, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992). Unfair prejudice occurs where the evidence, if introduced, would tend "to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***Id.***

[6] ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993). A ***Daubert*** hearing is used to determine the admissibility of expert testimony under WIS. STAT. § 907.02 (2015-16).

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[7] Morgan did not object at trial to admission of the testimony on constitutional grounds, nor were the alleged constitutional violations claimed as grounds for relief in his postconviction motion.

¶14 The trial court's decision to admit or exclude evidence is a matter of discretion. *See* ***State v. Nieves***, 2017 WI 69, ¶16, 376 Wis. 2d 300, 897 N.W.2d 363. We do not disturb a discretionary decision if discretion was properly exercised. *See* ***State v. Hunt***, 2014 WI 102, ¶20, 360 Wis. 2d 576, 851 N.W.2d 434. A proper exercise of discretion "contemplates a process of reasoning which depends on facts that are of record or reasonably derived by inference from the record and a conclusion based on logical rationale founded on properly legal standards." ***Mordica***, 168 Wis. 2d at 602.

¶15 The trial court denied Morgan's challenge to the informant's testimony, explaining that the testimony was both probative and relevant. Morgan does not dispute this finding on appeal, nor does he explain what about the informant's testimony was so *unfairly* prejudicial as to require its exclusion. While Morgan complains that the informant had five prior convictions, immediately attempted to ingratiate himself with police upon his arrest, and received a favorable sentence recommendation in exchange for his testimony, Morgan does not explain why cross-examination was an ineffective tool for addressing all of these concerns. We discern no erroneous exercise of discretion in the trial court's admission of the informant's testimony.

¶16 Morgan further invites this court to "require circuit courts to conduct pretrial reliability hearings" before allowing informant testimony. We decline this invitation. Morgan fails to identify any jurisdiction that requires such a procedure, nor is this court aware of any such jurisdiction, and Morgan does not make a compelling argument that we should adopt such a procedure. Further, creating and requiring such a procedure would exceed the scope of our primarily error-correcting role. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997).

II. The State's Representation of the DNA Evidence

¶17 Crime lab analyst Amber Rasmussen testified about the DNA results. She said that Morgan was a possible contributor to the major DNA profile found on the plastic bag; Gardner and two other suspects were excluded as possible contributors. Similarly, Rasmussen determined that Morgan was the source of the major component of the DNA found on both the phone and the sweatshirt.

¶18 Rasmussen also testified that "[t]he presence or absence of [Morgan's] DNA in the mixture obtained from the revolver swabs was inconclusive" and certain samples could not be given any weight because "there were not sufficient types absent to exclude, but there was also not reliable enough data to include" Morgan as a contributor. That is, Rasmussen testified she had insufficient data to say to a reasonable degree of scientific certainty that any of the DNA profiles found on the gun were a conclusive match to Morgan, which was unlike her testimony regarding the other items.

¶19 Based on Rasmussen's testimony, Morgan takes issue with certain questions the State asked when it cross-examined him. He claims the State, by its questions, "repeatedly misrepresented the DNA results for the gun" because its "use of 'matched' and 'match' was misleading, confusing, and misrepresented the analyst's testimony."

¶20 No relevant legal analysis accompanies Morgan's complaint. We note, however, that "[w]hen a defendant alleges that a prosecutor's statements and arguments constituted misconduct, the test applied is whether the statements 'so infected the trial with unfairness as to make the resulting conviction a denial of

due process.'" *See* ***State v. Mayo***, 2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115 (one set of quotation marks and citations omitted).

¶21 We are not persuaded that the State made any misstatements. First, when Morgan's attorney cross-examined Rasmussen, the following exchange occurred:

> Q [Y]ou indicated that you also received a swab … when the gun was processed for DNA, correct?
>
> A Yes, I did.
>
> Q Okay. And there was no DNA found on that.
>
> A There was DNA obtained from the revolver swabs.
>
> Q But not significant enough to make a match, correct?
>
> A There was not sufficient information to deem any inclusionary statements on that profile.
>
> ….
>
> Q Okay. Were you able to determine whether or not … there was more than one contributor to that - - to those insufficient samples?
>
> A There was enough DNA to generate a profile. And it was at least three individuals included in the profile that was obtained.
>
> Q Okay. And the way DNA works is that there's specific markers, correct?
>
> A Yes.
>
> Q Okay. And in this case, you took those three different samples from the gun and tried to see if any of those insufficient may match any of the markers with any of the samples that you were provided before?
>
> A In the case of the profile obtained from the gun, there were numerous types present. And I compared those types to the types from the standards I obtained.

Q Okay. So in this case, you would have tried to see whether or not there were any matching markers to Mr. Williams [another suspect], correct? You would have gone - - known sample by sample in order to determine the loci that you called it? Loci?

A The loci.

Q I'm sorry, the loci. You would have gone through each one of the profiles that you would have received, the known profiles, and see whether or not any of the loci would be marked - - would match one to three of those of Mr. Williams, correct?

A Yes, I look at each one of those five, which is the location on the DNA and compare the types obtained from the known individual to what was seen in the evidentiary profile.

….

Q Okay. You would also have done that to Kentonyo Morgan, correct?

A Yes.

….

Q And there was no matches on the loci, correct? …

….

A And by match, are you referring to each loci or overall?

Q Overall.

A Overall profile match, okay. There was one profile which matched all, but two locations which could not be used for any type of comparison.

Q Okay.

A Or two profiles actually. Excuse me. Should I rephrase?

Q Please.

A There were two profiles which matched at locations that were unsuitable for comparison purposes.

Q But in this case, there was no - - not sufficient to make any inclusionary statement regarding any of the samples that you received the known samples?

A That's correct. I could not use this profile for including anyone.

Q Okay. And what does that mean? What does that statement, inclusionary statement mean?

A The quality of the DNA profile and the amount of types present did not allow for me to make an inclusion. Nobody - - the types present were not reliable enough to say that they are for sure there, or that they are there at enough levels to use for a statistical analysis, to put any sort of weight to any inclusion that could be made.

Q So these samples cannot be given any weight, right?

A That is correct.

¶22 The State then conducted a re-direct examination of Rasmussen:

Q Ms. Rasmussen, you were just finishing up some questions about - - on the gun. And I think you said that two profiles matched for all comparison purposes. Is that the correct language?

A The types present. And two of the profiles were present at all locations suitable for comparison purposes.

Q By profiles, are we talking about the five known standards?

A Yes.

Q And out of those two profiles, which two profiles matched?

A Kentonyo and [his twin] had types present which were present at all locations on the revolver swab mixture profile. However, some of those were low level and were not reliable enough for statistical analysis.

Q So their profiles matched. You just didn't have insufficient evidence to statistically to say - -

[DEFENSE COUNSEL]: Objection, your honor. That has been asked and answered.

THE COURT: Overruled.

[THE STATE:]

Q You just had insufficient data to statistically say they're matched like you could with the other items?

A That is correct.

¶23 In short, the DNA on the gun did match Morgan's DNA profile—Morgan "had types present which were present at all locations on the revolver swab mixture profile." However, the match was not at a statistically significant level that would have allowed Rasmussen to include Morgan as a contributor of the DNA on the gun to a "reasonable degree of scientific certainty" as she could with the other items.

¶24 With respect to the specific cross-examination questions about which Morgan complains, the first question—"This gun that has DNA that indicates you and your brother, right?"—was objected to by defense counsel. The trial court sustained the objection, and Morgan had no objection to the State's rephrased question: "You heard [Rasmussen] talk about, with this gun, that in her findings and testing, the DNA came back as inconclusive with regards to you, right?" The rephrased question is an accurate summary of the testimony.

¶25 The second question to which Morgan objects is part of the following exchange:

Q And your own counsel over here asked [Rasmussen] at the end, well, was there loci or of two profiles that did match on that gun. Do you remember hearing that?

A Yes.

Q And then a follow-up I asked, who were those two profiles that that *loci matched. And she said either you or your brother, right?*

(Emphasis added.) However, this question accurately reflects Rasmussen's testimony that two profiles "were present at all locations suitable for comparison purposes" and those two profiles belonged to Morgan and his brother.

¶26 The final question to which Morgan objects is the State asking, "You're pretty unfortunate, aren't you, Mr. Morgan, that your brother left this coat, your brother leaves this phone and *a gun right in between him seems to match you guys as well*." (Emphasis added.) This, too, is not an inaccurate rephrasing of Rasmussen's testimony.

¶27 "Even if there are improper statements by a prosecutor, the statements alone will not be cause to overturn a conviction. Rather the statements must be looked at in the context of the entire trial." ***Mayo***, 301 Wis. 2d 642, ¶43. In between the second and third portions of testimony that Morgan challenges, the State asked Morgan if he had heard "what [Rasmussen] said, I didn't have enough statistical analysis to say beyond a reasonable doubt - - or excuse me, to a reasonable degree of scientific certainty the two profiles that matched were you or your brother on this weapon, right?"

¶28 The State also noted in its closing argument that while Morgan was "the primary source of the DNA on the phone," the DNA "with regard to this gun, she said it was inconclusive." The State went on to explain that what Rasmussen "told you about inconclusive is there is DNA that's consistent with the defendant, but it's insufficient for me to give a statistical analysis and state that as she could do with the other items. But the key there is he's not excluded" as Gardner and two other suspects were.

¶29 The State did not misrepresent the DNA evidence. Even if its statements were not completely fair or accurate characterizations of Rasmussen's

testimony, they were not so inaccurate that they infected the trial with unfairness and made the resulting conviction a denial of due process. *See* ***id.***

III. Commentary on Morgan's Credibility

¶30 Morgan next contends that he "is entitled to a new trial because the prosecutor provided improper commentary on Mr. Morgan's truthfulness and credibility and the circuit court failed to instruct the jury to disregard the prosecutor's commentary." (Some capitalization omitted.) The prosecutor's allegedly improper commentary came during cross-examination of Morgan:

> Q You heard the testimony about this phone, right?
>
> A Yeah.
>
> ….
>
> Q And that this phone had pictures of you in it, right?
>
> A Yeah.
>
> ….
>
> Q But you told Detective Tarver you hadn't had that since 2011.
>
> A I said one, two, three years.
>
> Q It's changing. This is your left hand with that tattoo of Fox, right?
>
> A Yeah.
>
> ….
>
> Q That was put on that phone in February of this year, Mr. Morgan. How do you explain that?
>
> A Must have took a picture.
>
> Q You said you didn't have that phone for two years.
>
> A I told him that - -

Q *Well, are you lying to him just like [you're] lying to these people?*

….

Q And on the very day that Mr. Gardner was killed, you're supposed to have an appointment with your agent, right?

A Right.

Q And you just happened to miss it because you just don't feel like going to see your agent?

A Right.

Q It's not just because you killed a man.

A No.

Q And you shot him, and you're running, and you've got to get away, that had nothing to do with it?

A No.

Q No. It's because you're playing games and you're smoking weed and you're too high to go see her.

A Right.

Q *That's what you want these people to believe.*

….

Q And on May 6, when the police find this cell phone, this gun and this sweatshirt all within the same path that Officer Lipinski was following, would you agree with me?

A Yes.

Q Where the shooter came from, right?

A Right.

Q And at least two of those items have your DNA on them, right?

A Right.

Q But that's not you placing that cell phone there, that's not you placing that sweatshirt there?

A No.

Q *That's just unfortunate for you?*

A Right.

….

Q Mr. Morgan, [how] do you explain this gun being right between the two of them, the murder weapon?

A If it was missing. I said I can't explain it because I wasn't there.

Q *You're pretty unlucky then, aren't you?*

….

Q You heard from Ms. House say she got the shakes looking at position No. 3 in the lineup, right?

A Right.

Q You were in position 3 in that lineup, weren't you?

A Yeah.

Q Wouldn't you agree with me that's *unlucky, too*?

(Emphasis added.)

¶31 Morgan complains that each of the questions or comments, italicized above, improperly "revealed to the jury the prosecutor's negative opinion or personal beliefs regarding Mr. Morgan's general credibility and truthfulness."

¶32 We conclude that the State's comments were nothing more than "the prosecutor's confronting [Morgan] with what [Morgan] tacitly at least admitted were inconsistencies in his testimony." *See* ***State v. Rodriguez***, 2006 WI App 163, ¶35, 295 Wis. 2d 801, 722 N.W.2d 136. Morgan opened the door to this line of questioning when he gave inconsistent statements about his ownership of the phone and when he evidently lied to the police about being at the hospital when

the homicide occurred. "Having voluntarily taken the stand, [Morgan] was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the truth-testing devices of the adversary process." ***Harris v. New York***, 401 U.S. 222, 225 (1971). We therefore reject Morgan's claim of error.[8]

IV. Hearsay Testimony

¶33 Detective Patrick Pajot testified, over Morgan's objection, about statements House made during the line-up process. House had been unable to affirmatively identify anyone in the line-up as the shooter. However, according to Pajot:

> [House] stated that the person in position No. 3, which was Kentonyo Morgan, when he walked into the room, she believed that was the person that had shot [Gardner].
>
> She said the thing that threw her off was his facial hair was different and he was not wearing a hood up over his head.
>
> She did tell me after the lineup was over that the minute he walked into the room she got a sick feeling in her stomach and her hands started to shake. But she did not feel confident or positive that he was the person, so she circled no.

¶34 Morgan had objected to the lead-in question—"With respect to the lineup, after it was concluded, did she indicate that at least one of the participants caught her attention?"—on hearsay grounds. The trial court overruled the objection. Later, making a record, the State explained that it believed House's

[8] Morgan also claims "the court should have given the required cautionary instruction" but says nothing further on the matter. We do not consider undeveloped arguments. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

statement was admissible as a present sense impression, which the trial court appeared to ratify as a reason for overruling the objection.

¶35 "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). Hearsay is generally not admissible except as otherwise provided by rule or statute. *See* WIS. STAT. § 908.02. "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter," is a present sense impression and is not excluded by the hearsay rule. *See* WIS. STAT. § 908.03(1).

¶36 On appeal, Morgan disputes that House's statement constitutes a present sense impression because there was nothing to establish that her statement was made while House was viewing the line-up or immediately thereafter. Further, the line-up was not contemporaneous with the shooting, undercutting the "contemporaneity" that justifies the present sense impression exception. *See, e.g.*, ***United States v. Brewer***, 36 F.3d 266, 272 (2nd Cir. 1994).

¶37 We take no position with respect to whether House's statement satisfies the present sense impression hearsay exception. Rather, we agree with the State's alternative argument on appeal: House's statement is not hearsay because it was one of identification.[9]

[9] Morgan complains that the State raises this issue for the first time on appeal, but a respondent may advance any argument that would allow us to sustain the trial court's ruling. *See* ***State v. Darcy N.K.***, 218 Wis. 2d 640, 651, 581 N.W.2d 567 (Ct. App. 1998).

¶38 "A statement is not hearsay if … [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is … [o]ne of identification made soon after perceiving the person[.]" WIS. STAT. § 908.01(4)(a)3. This rule "excepts from the hearsay rule all statements of identification made soon after perceiving the suspect or his likeness in the identification process." ***State v. Williamson***, 84 Wis. 2d 370, 389, 267 N.W.2d 337 (1978).

¶39 House testified at trial about her statement to Pajot, indicating she felt a knot in her stomach and her heart was beating faster. She was, therefore, subject to cross-examination about her statement, even if Morgan did not actually cross-examine her about it. *See* ***State v. Miller***, 231 Wis. 2d 447, 470-71, 605 N.W.2d 567 (Ct. App. 1999). While Morgan disputes whether House's statement was "soon after" the line-up, Pajot said she made her statement "after the line[-]up was over." It is apparent from the context and content of Pajot's testimony that House gave her statement in the minutes after having viewed the line-up subjects, as opposed to days or weeks later.

¶40 Morgan also complains that House did not actually identify him because she did not circle "yes" for any of the subjects. But she did, in fact, pick Morgan as the individual she believed shot Gardner—she simply indicated she was not certain enough to circle "yes" on the form. Her degree of equivocation in the identification goes to the weight of her statement, not its admissibility, and could have been explored during cross-examination. Pajot's testimony about House's identification of Morgan was not improperly admitted.

V. A Leading Question

¶41 Relatedly, Morgan complains that House's in-court identification of him came from a leading question. The State referred to House's statement that she had a knot in her stomach and racing heart and asked her if that was "at the lineup itself or when [she] saw a particular person?" She responded that it was when she saw a particular person. The State then asked what Morgan claims was an improper leading question: "In the lineup there, do you have that same feeling today?" Morgan objected, the trial court overruled the objection, and House answered, "Yes."

¶42 "'A leading question is one which unmistakably suggests the desired answer.'" ***State v. Sarinske***, 91 Wis. 2d 14, 45, 280 N.W.2d 725 (1979). Leading questions are "not altogether forbidden," *see* ***State v. Barnes***, 203 Wis. 2d 132, 138, 552 N.W.2d 857 (Ct. App. 1996), though they should be avoided, *see* ***Sarinske***, 91 Wis. 2d at 45. A question that calls for a "yes" or a "no" answer is generally not a leading question. *See, e.g.*, ***Burden v. State***, 775 S.E.2d 183, 185 (Ga. Ct. App. 2015); ***People v. Pearson***, 297 P.3d 793, 825 (Cal. 2013).

¶43 The State's question to House merely called for a "yes" or "no" answer in light of its narrow scope of factual inquiry. *See* ***Burden***, 775 S.E.2d at 185. The question did not, however, imply or suggest the answer. It was, therefore, not a leading question and asking it was not improper.

VI. Probation Agent's Testimony

¶44 Finally, Morgan contends he is entitled to a new trial because "his probation agent's testimony broadcast his probation status and the fact he committed a crime." Morgan objects to the agent's testimony that she supervises

"those who have committed [a] crime and either have been sentenced to probation in lieu of jail time or been in prison and serving extended supervision" and that Morgan had an appointment for an office visit with her on the day of Gardner's death, but he canceled by telling her he was taking his girlfriend to the hospital. Morgan contends the testimony was unduly prejudicial because the agent's testimony implied that he was on probation for a crime. *See* WIS. STAT. § 904.03. The trial court ruled the probative value of the agent's testimony outweighed any undue prejudice. On appeal, Morgan renews his argument that the probation agent's testimony prejudiced him "because it revealed his probation status and the fact that he committed a crime to the jury."

¶45 Assuming without deciding that admission of the probation agent's testimony was error, we conclude the error was harmless. An error "is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (citation omitted).

¶46 First, the jury knew, by virtue of the felon-in-possession charge, that Morgan had committed a crime. Indeed, the trial court read to the jury Morgan's stipulation that he had been convicted of a felony offense in 2012.

¶47 Second, Morgan's attorney, in opening statements, told the jury they would learn that Morgan was in custody for an unrelated event, then elicited testimony from a detective on cross-examination that Morgan had been released from jail a day or two before his arrest in this case. On re-direct examination, the detective explained, without objection, that Morgan had been in jail on a hold by the Department of Corrections. This testimony suggested Morgan's status.

¶48 Third, the agent's testimony about Morgan's reason for canceling his appointment with her—which he also told to police but which police could not verify—was admissible as demonstrating Morgan's consciousness of his guilt. *See* ***State v. Neuser***, 191 Wis. 2d 131, 144-45, 528 N.W.2d 49 (Ct. App. 1995); ***State v. Amos***, 153 Wis. 2d 257, 273, 450 N.W.2d 503 (Ct. App. 1989).

¶49 Finally, Morgan concedes his agent's testimony was admissible to impeach his own testimony because he testified at trial that he was at home at the time of the homicide despite telling his agent he had taken his girlfriend to the hospital. But Morgan contends the agent's testimony was still improper because the agent testified before he did. However, even if it would be more appropriate had the agent's impeachment testimony been introduced after Morgan's testimony, we are confident that a rational jury would have found Morgan guilty even if they had heard the testimony in the "correct" order—that is, Morgan does not demonstrate that hearing the evidence out of order influenced the verdict.

VII. Summary

¶50 Morgan has failed to identify any reversible error. The trial court properly denied postconviction relief.

By the Court.—Judgment and orders affirmed.

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