STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP1595-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ANDRE DAVID NASH,

Defendant-Respondent.

APPEAL FROM AN ORDER GRANTING A MOTION TO SUPPRESS, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE PEDRO COLON, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

JOSHUA L. KAUL
Attorney General of Wisconsin

AARON R. O'NEIL
Assistant Attorney General
State Bar #1041818

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740
(608) 266-9594 (Fax)
oneilar@doj.state.wi.us

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ISSUE PRESENTED

Did the circuit court erroneously grant Defendant-Respondent Andre David Nash's motion to suppress a crime victim's identification of Nash in a lineup?

The circuit court suppressed the identification.

This Court should reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. The parties' briefs will fully develop the issues presented, which can be resolved by applying well-established precedent.

INTRODUCTION

This Court should reverse the circuit court's order suppressing a victim's identification of Nash in a lineup for three reasons. First, the court relieved Nash of his burden to show that the lineup was impermissibly suggestive. Second, the court incorrectly held that the lineup was suggestive. Finally, the court erred by not addressing whether the lineup was reliable despite its supposed suggestiveness. These errors warrant reversal of the court's suppression order or remand for further proceedings.

STATEMENT OF THE CASE

The robberies and the charges against Nash

The State accused Nash of robbing two Family Dollar stores in Milwaukee in December 2017. (R. 1.) Both times, the robber stole laundry detergent and a comforter. (R. 1:1–2.)

In the first robbery, on December 5, the suspect left the building through the emergency exit. (R. 1:1–2.) A store employee, JJ, confronted the robber, who then showed a black revolver and said something like, "[W]hat are you going to do

now?" (R. 1:2.) JJ replied, "[Y]ou win," and went back in the store to call police. (R. 1:2.) JJ described the robber to police as a "black male with a light complexion, wearing a black winter coat and a winter knit hat, black and white in color, with a white circular stripe through the middle of the hat, with a black tassel on top." (R. 1:2.) Police recovered a latent print from the emergency exit door that matched Nash's right palm. (R. 1:2.)

In the second robbery, on December 7, a store employee, KW, saw a person walking toward the exit with the detergent and the comforter. (R. 1:2.) KW asked the person, "So you just gonna steal that? You know I'm gonna call the police, right?" (R. 1:2.) The robber then showed KW a black handgun and left the store. (R. 1:2.) KW told police that the robber was a "black male, wearing a black and white winter cap with a puffy ball on the top, and also wearing a black coat." (R. 1:2.)

Another employee of the second store, CP, reported that when he approached the suspect about paying for the items, the suspect showed him a black revolver. (R. 1:2.)

Surveillance photos from the second store showed the suspect wearing clothes matching those described by the employees from both stores. (R. 1:2.) In addition, Nash's aunt identified him as the robber in the photos. (R. 1:2–3.)

Police arrested Nash on December 16 while he was on an airplane that was about to leave Mitchell International Airport. (R. 7:1; 38:5–7.) There was no warrant for his arrest. (R. 38:6–7, A-App. 108–09.) Instead, the police department "put in a request or a want or something like that." (R. 38:20, A-App. 122.)[1]

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[1] A "want," also called a "temporary felony want," is a notice sent to law enforcement that there is probable cause to arrest someone for a felony and to issue an arrest warrant, but no warrant

(continued on next page)

Detective William Sheehan tried to interview Nash on December 17. (R. 38:19, A-App. 121.) Nash invoked his right to counsel. (R. 38:19, A-App. 121.)

On December 18, Sheehan conducted a lineup. (R. 1:2; 38:10–20.) JJ identified Nash as the robber. (R. 1:2; 7:1–2; 37:4–5; 38:11.)

On December 19, The State charged Nash with two counts of armed robbery. (R. 1.). The circuit court bound Nash over for trial after a preliminary hearing. (R. 37:9.)

Nash's suppression motion and the court's order granting it

Nash moved to suppress JJ's identification, claiming that police had denied him his right to counsel at the lineup, and that it was impermissibly suggestive. (R. 6:1–10.)

The circuit court began the hearing on Nash's motion by asking the State if it wanted to call its first witness. (R. 38:3, A-App. 105.) The State responded that it did not have the burden of proving that the lineup was suggestive. (R. 38:3, A-App. 105.) Nash's attorney replied, "The State's the one who wants to bring in the evidence." (R. 38:3, A-App. 105.) The court asked if either party had evidence to present "[b]ecause we can just close the evidence now." (R. 38:4, A-App. 106.) The State again reminded the court that the burden was on Nash to show that the lineup was suggestive, but it agreed to call Sheehan. (R. 38:4–9, A-App. 106–11.)

Sheehan testified that he chose five fillers for the lineup from people in jail. (R. 38:11–12, A-App. 113–14.) He looked for people of the same race, sex, and similar age, height, and weight as Nash. (R. 38:11–12, A-App. 113–14.) During the lineup, Nash and the fillers wore matching jail uniforms, had bracelets on the same wrists, and all wore flip flops and socks.

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had yet been issued. (R. 18:2 n.1 (citing *State v. Collins*, 122 Wis. 2d 320, 322 n.1, 363 N.W.2d 229 (Ct. App. 1984)).)

(R. 38:14, A-App. 116.) Sheehan also had the men all wear hats to cover their different hairstyles. (R. 38:14, A-App. 116.) And they all were told to do the same thing when presented to the viewers. (R. 38:15–16, A-App. 117–18.) Sheehan also identified a photo of the six lineup participants and said that the fillers were "the best that I had to choose from" of the people currently in the jail. (R. 38:13–14, A-App. 115–16.) Nash was person number two in the photo and the lineup. (R. 39:10, A-App. 137.)

Sheehan also said that Nash requested counsel before the lineup. (R. 38:16, A-App. 118.) Sheehan told him that he was not entitled to an attorney, and that the lineup would be video and audio recorded. (R. 38:16–17, A-App. 118–19.) The part of the lineup showing Nash and the fillers presenting themselves to the viewers was unintentionally not recorded, though. (R. 38:21–22, A-App. 123–24; 41:3–4, A-App. 145–46.) A video of the witnesses viewing the lineup and filling out forms exists, but it is not in the record. (R. 38:21–22, A-App. 123–24.)

The circuit court suppressed JJ's identification. (R. 23, A-App. 101.) It explained that it was doing so because it could not accurately determine how the lineup's participants looked:

> "I can't ascertain to what degree the fairness of his skin, the lightness of his weight, and the color or his shirt can be assessed because I only have one group photo under which all of these young men are shown with similar clothing."

(R. 39:8–9, A-App. 135–36.)

The court also concluded that "procedure wasn't followed," saying that it thought the State should have used a photo array instead of a lineup:

> The procedure indicates that it should be sequential for it not to be suggestive and for these things to be sorted out. These young men must appear

> to be in the same likeness. They don't have to be perfect. Obviously, they don't have to be twins, but they must be arranged in an array that indicates some amount of similarity.
>
> Obviously, we're never going to have everybody be absolutely similar, but I have — and I take notice of many of these motions where I've seen the procedure followed correctly, that is, the officers choose five individuals. They are lined up and in the folders. The folders are being presented. And in this case, none of that was done.

(R. 39:9, A-App. 136.) The court also said that the photo array "procedure" is "encouraged by statute." (R. 38:22, A-App. 124; 39:10, A-App. 137.)

Next, the court criticized the lack of a recording. It said that even if the participants' appearances and the failure to use a photo array did not make the lineup improper, "we have no way of identifying how this occurred because there's no recording of it." (R. 39:9, A-App. 136.)

The court also concluded that Nash's request for counsel "inform[ed]" the constitutionality of the lineup. (R. 39:10, A-App. 137.) It acknowledged that police did not need to honor his request. (R. 39:10, A-App. 137.) But, it added, "[I]f you're going to do a live lineup and you're going to bring five people in and not record it, then at that point you should at least have the aid[ ] of counsel. Who knows what would have happened?" (R. 39:10, A-App. 137.)

Finally, the court commented on the way that JJ chose Nash, describing what happened as "[a]ll of them were shown, and then the witness comes back to identify him." (R. 39:10, A-App. 137.)

The State moved for reconsideration. (R. 18.) It argued that the court had erred by weighing whether Nash had an attorney, failing to address whether the lineup was reliable despite any suggestiveness, and concluding that the State

should have conducted a photo array. (R. 18:4–6.) The court denied the motion. (R. 41:8–11, A-App. 150–53.)

The State appeals the court's order granting Nash's suppression motion. (R. 23, A-App. 101; 35.)

STANDARD OF REVIEW

When reviewing a court's decision to suppress an identification made in a lineup, this Court defers to the circuit court's findings of fact unless clearly erroneous. *State v. Benton*, 2001 WI App 81, ¶ 5, 243 Wis. 2d 54, 625 N.W.2d 923. Whether those facts show a constitutional violation is a question of law that this Court reviews de novo. *Id.*

ARGUMENT

The circuit court erroneously suppressed the victim's identification of Nash.

A. A court can suppress an identification made after a lineup only if the defendant proves that the lineup was suggestive and the State cannot show that the identification was otherwise reliable.

The Constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012). Those means include the rights to counsel, compulsory process, and confrontation, as well as the rules of evidence. *Id.* It is "[o]nly when evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice' have [the courts] imposed a constraint tied to the Due Process Clause." *Id.* (citation omitted).

In the context of lineups, "due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Perry*, 565 U.S. at 238–39. And even then, "suppression of the resulting identification is not the inevitable consequence." *Id.* at 239. "Instead of mandating a *per se* exclusionary rule . . . the Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.'" *Id.* (quoting *Neil v. Biggers*, 409 U.S. 188, 201 (1972)).

To determine whether a court should have suppressed evidence from a lineup, this Court employs the same two-step standard that applies to the circuit court's review of the issue. *State v. Benton*, 243 Wis. 2d 54, ¶ 5. First, the defendant must show that the lineup was impermissibly suggestive. *Powell v. State*, 86 Wis. 2d 51, 65, 271 N.W.2d 610 (1978). This requires the defendant to show that the procedure gave rise to a substantial likelihood of misidentification. *Id.* at 64–65. If the defendant satisfies this burden, the court can still admit the evidence if the State can show that the totality of the circumstances makes the identification reliable. *Benton*, 243 Wis. 2d 54, ¶ 5.

B. The circuit court erred when it granted Nash's suppression motion.

The circuit court made three errors when it granted Nash's suppression motion. First, it placed the burden of proof for the suggestiveness analysis on the State rather than on Nash. Second, none of the factors that the court identified in its decision establish that the lineup was suggestive. Third, the court failed to address whether the identification was reliable despite its supposed suggestiveness. This Court should reverse the circuit court's suppression order.

1. The court misapplied the law when it required the State to prove that the lineup was not suggestive.

The circuit court's first mistake was to force the State, not Nash, to address whether the lineup was impermissibly suggestive. The law put the burden to prove suggestiveness on Nash, and the circuit court erred by making the State disprove that the lineup was suggestive.

The defendant has the burden of showing that a lineup is impermissibly suggestive. *Benton*, 243 Wis. 2d 54, ¶ 5. But here, when the parties arrived for the hearing on Nash's motion, the court required the State to address this issue.

The court began by asking the State if it wanted to call its first witness. (R. 38:3, A-App. 105.) When the State replied that Nash had the burden of first showing suggestibility, defense counsel argued that he had raised the issue in the motion, so the State needed to present evidence. (R. 38:3, A-App. 105.) The court then said that if neither party had any witnesses, "we can just close the evidence now." (R. 38:4, A-App. 106.) The State again reminded the court that Nash had the initial burden. (R. 38:4, A-App. 106.) The court asked the parties if they wanted to resolve the motion on stipulated facts or take evidence. (R. 38:4–7, A-App. 106–09.) The State refused to stipulate to any facts, so it decided to call Sheehan as a witness. (R. 38:7–9, A-App. 109–11.)

The court's actions impermissibly shifted the initial burden of proof to the State. Despite the State's twice telling the court that Nash had to show suggestiveness, it refused to hold Nash to his burden. When the court learned that Nash would not be calling any witnesses to develop the record of what happened during the lineup, it said it could resolve the motion on stipulated facts. That was unacceptable to the State, so it decided to call Sheehan to create a record despite

not having any legal obligation to do so at that point. The court erred by not making Nash prove suggestiveness.

Additionally, the court's complaints in its decision that it did not know what happened during the lineup stemmed from its failure to hold Nash to his burden. The court said that it could not determine whether Nash's skin tone, weight, and shirt color made the lineup suggestive. (R. 39:9, A-App. 136.) It also criticized the lack of a recording and said that, as well as the lack of counsel for Nash, were the reasons it could not determine what happened. (R. 39:9, A-App. 136.)

But the real reason the court did not know whether the lineup was suggestive is that it did not require Nash to present any evidence on the matter. Nash could have called witnesses to testify about how the police conducted the lineup and how the participants looked. The court could have then made factual findings from the testimony. Circuit courts are the finders of fact when a defendant moves to suppress a lineup. *See Benton*, 243 Wis. 2d 54, ¶ 5. And, traditionally, courts made their findings after hearing testimony about what happened, not after reviewing a recording. *See, e.g.*, *Wright v. State*, 46 Wis. 2d 75, 175 N.W.2d 646 (1970). Just because there was an error that caused the lineup not to be recorded did not absolve the court from finding facts or putting Nash to his burden. This Court should reverse the circuit court's decision for its failure to require Nash to prove that the lineup was impermissibly suggestive.

2. The circuit court erroneously concluded that the lineup was impermissibly suggestive.

This Court should also reverse because the circuit court incorrectly held that the lineup was suggestive. The limited factual findings that the court made do not support its decision. And the court further erred by finding suggestiveness based on Nash's not having counsel, the lack

of a recording, and law enforcement's failure to conduct a photo array instead of a lineup.

The circuit court's decision was based, in part, on Nash's appearance and that of the other lineup participants. But the court's few findings on this issue were insufficient to support a finding of improper suggestiveness. After examining the photo of the participants, the court said that it could not assess the fairness of Nash's skin, his weight, or the color of his jail shirt against the fillers. (R. 39:9, A-App. 136.) But if the court could not determine whether police presented Nash "in a manner calculated to attract special attention and make [him] stand out from other persons in that lineup," then it had no basis for concluding that the lineup was suggestive. *Jones v. State*, 47 Wis. 2d 642, 649, 178 N.W.2d 42 (1970).

In addition, the photo of the lineup's participants shows that Nash did not impermissibly stand out from the fillers. (R. 9, A-App. 102.) This is the photo:

(R. 9, A-App. 102.)

It shows the six participants standing in a semicircle. Nash is number two. (R. 39:10, A-App. 137.) All of the men

have facial hair and appear to be the same race. They also appear to all be of similar age, height, weight, and build. Five of the men are wearing black stocking hats, and the sixth, number four, is holding one in his hand. Sheehan testified that they all wore the hats during the lineup to cover their different hairstyles. (R. 38:14, A-App. 116.) He also said that the men all had bracelets on the same wrists and wore matching flip flops and socks. (R. 38:14, A-App. 116.) One pair of the socks and sandals and some of the bracelets are visible in the photo.

The circuit court was wrong to conclude that the men's appearances made the lineup suggestive. The police do not have to search for identical twins in terms of age, race, height, weight or facial features when filling a lineup. *Powell*, 86 Wis. 2d at 67 (quoting *Wright*, 46 Wis. 2d at 86). Here, even though he was limited to the people he could find in the jail, Sheehan did a good job selecting the fillers for the lineup. None of the men stand out from the group in a significant way, let alone in a manner that might violate due process. Even rather substantial differences in characteristics like height and weight "do not make a lineup impermissibly suggestive." *Benton*, 243 Wis. 2d 54, ¶ 10.

Further, to the extent that the court relied on Nash's arguments why the participants' appearances made the lineup suggestive, it erred. Nash complained that he had the lightest skin of the six men and that his jail uniform was faded compared to the others. (R. 6:7.) While, again, the court did not make specific findings about these things, the photo shows that they did not single out Nash from the others. Nash's skin does not appear significantly lighter than the other men. The men have a variety of skin tones, so it is unlikely that any of them would stand out. And there is no reason to think that a slightly faded jail uniform would unfairly lead to Nash's identification. The witnesses did not describe the robber as wearing faded orange jail clothing, and, again, all the

participants were dressed in the same clothes. Finally, these differences would have not been readily apparent since, as Nash has admitted, JJ viewed the participants one at a time rather than all at once. (R. 6:1.)

Similarly, the lineup was also not suggestive because police took steps to minimize the differences in the men's appearances. Besides finding participants that looked similar to Nash, Sheehan also made sure that the men were presented wearing the same clothes and footwear, as well as bracelets on the same wrists. He also had the men all wear stocking hats so they not only would appear with their heads covered, as the robber did, but that any differences in hairstyle would not stand out. And police had JJ view the participants one at a time, so he would not have been directly comparing the men to each other but looking at them individually. The court erred by finding that the lineup was suggestive based on the participants' appearances.

Additionally, the court's belief that police should have used a photo array rather than a lineup does not support its finding of improper suggestiveness. The court said that a sequential photo array is preferred by statute. (R. 38:22, A-App. 124; 39:10, A-App. 137.) It did not, though, identify which statute it was referring to. The State assumes that the court was talking about Wis. Stat. § 175.50, which Nash cited in his suppression motion. (R. 6:5.) But that statute requires police agencies to develop and maintain policies for identification procedures. It does not express a preference for photo arrays over lineups.

If anything, the law prefers lineups over photo arrays. As the supreme court recognized in *Powell*, given the limitations on photography, "the dangers of misidentification are even greater at a photographic display than at a lineup." *Powell*, 86 Wis. 2d at 63 (citation omitted). And regardless, that police could have performed a less suggestive procedure does not make the one they conducted suggestive.

See State v. Ledger, 175 Wis. 2d 116, 131, 499 N.W.2d 198 (Ct. App. 1993).

In addition, the court erred by relying on Nash's not having counsel during the lineup. Nash had not been charged at the time of the lineup, so he was not entitled to have a lawyer present. *See McMillian v. State*, 83 Wis. 2d 239, 243, 265 N.W.2d 553 (1978); *Jones v. State*, 63 Wis. 2d 97, 105, 216 N.W.2d 224 (1974). His lack of counsel thus was not a basis for suppression.

The court recognized this but nonetheless determined that Nash's lack of counsel "inform[ed]" its finding of suggestiveness. (R. 39:10, A-App. 137.) This also was error. The lineup occurred in a certain way that either was or was not suggestive. Whether Nash had an attorney has no bearing on that question, particularly since counsel could have only observed the lineup. *See Ledger*, 175 Wis. 2d at 133–34. The court's concern about counsel instead appeared to be related to its complaint that it could not determine what happened at the lineup. (R. 39:9–10, A-App. 136–37.) But, as explained, that was a result of the court's not putting Nash to his burden to show suggestiveness, not the lack of counsel.

The same is true for the court's finding the lineup suggestive because there was no recording of it. (R. 39:9–10, A-App. 136–37.) The court could have reconstructed what happened by requiring Nash to make his case. In addition, there is no statute or case law requiring identification procedures to be recorded such that the recording error here could even arguably be a basis for suppression.

Finally, the court's criticism of how JJ identified Nash did not provide a basis to suppress. The court said, "All of them were shown, and then the witness comes back to identify him." (R. 39:10, A-App. 137.) It is not clear what the court meant, though it might relate to Nash's argument in his suppression motion that there was a discrepancy between

what JJ told police about his recognition of Nash during the lineup and what the video of him viewing the lineup showed. (R. 6:8–10.) This is not grounds for finding suggestiveness, though, because the court never resolved the supposed conflict or otherwise found any facts about how police conducted the lineup. Whatever the court might have been referring to, it is not grounds to support its decision.

In sum, the circuit court erred by concluding that the lineup was impermissibly suggestive. This Court should reverse, remand, and order the circuit court to admit JJ's identification of Nash.

3. Even if the court properly determined that the lineup was suggestive, it erred by not addressing whether the lineup was nonetheless reliable.

Finally, should this Court agree with the circuit court's holding that the lineup was suggestive, it should still remand for further proceedings on whether the State can show that JJ's identification was reliable. This is the second part of the standard for admitting identification evidence. *Benton*, 243 Wis. 2d 54, ¶ 5. The circuit court did not address reliability, and the record does not contain adequate factual findings for this Court to assess the matter. Remand to allow the court to hold a hearing, take evidence, make findings, and address the issue in the first instance is appropriate if this Court agrees that the lineup was suggestive. *See State v. Anker*, 2014 WI App 107, ¶ 27, 357 Wis. 2d 565, 855 N.W.2d 483; *State v. Nawrocki*, 2008 WI App 23, ¶ 38, 308 Wis. 2d 227, 746 N.W.2d 509.

CONCLUSION

This Court should reverse the circuit court's order suppressing the identification of Nash. Alternatively, this Court should remand for further proceedings on whether the identification was reliable.

Dated this 5th day of July 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

AARON R. O'NEIL
Assistant Attorney General
State Bar #1041818

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740
(608) 266-9594 (Fax)
oneilar@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4142 words.

Dated this 5th day of July 2019.

_____
AARON R. O'NEIL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 5th day of July 2019.

_____
AARON R. O'NEIL
Assistant Attorney General