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 A. COLON, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

The circuit court erroneously suppressed a witness's identification of Andre David Nash in a lineup for three reasons. First, the court put the burden of proof on the State, not Nash, about whether lineup was impermissibly suggestive. Second, its reasons for finding the lineup suggestive were insufficient. Third, the court failed to determine whether the identification was otherwise reliable.

Nash has not refuted any of these reasons in his brief. This Court should reverse the circuit court's decision.

ARGUMENT

I. The circuit court erred by requiring the State to disprove that the lineup was suggestive.

Nash argues that the circuit court did not put the burden on the State to show that the lineup was not suggestive. (Nash's Br. 14–15.) *See State v. Benton*, 2001 WI App 81, ¶ 5, 243 Wis. 2d 54, 625 N.W.2d 923 (stating that defendant has the burden of showing that a lineup is impermissibly suggestive). He claims that the State "cherry picks" the record and "ignores the bigger picture" in making this argument. (Nash's Br. 14.)

Specifically, Nash contends that the State is arguing that the court improperly shifted the burden only because the State called the lone witness at the suppression hearing. (Nash's Br. 14.) Nash points out that the court asked both parties to present evidence, but only the State chose to do so. (Nash's Br. 14.) He further argues that the court did not have any obligation to require either party to put on evidence and that it was up to the defense to decide how to make its case. (Nash's Br. 14–15.)

These arguments ignore what happened in the circuit court. The State called the only witness at the suppression

hearing *because* the court incorrectly failed to hold Nash to his burden of showing suggestiveness. The court began the suppression hearing by asking the State if it wanted to call its first witness, despite the State's reminding it that the initial burden was on the defense. (R. 38:3.) Defense counsel said that he had no obligation to prove his case with evidence because he had raised the issue in the suppression motion. (R. 38:3.) The court then suggested that the parties could stipulate to the facts, which was unacceptable to the State, so it called Detective Sheehan to try to create a record despite the court's error. (R. 38:4–7.)

And while Nash is correct that the court asked both parties if they wanted to present evidence, that does not mean the court properly recognized the defense's burden. The defense thought it could prove suggestiveness using only the allegations in its motion. (R. 38:3.) That was wrong. The hearing was Nash's chance to develop the claims in his suppression motion. *See State v. Radder*, 2018 WI App 36, ¶ 12, 382 Wis. 2d 749, 915 N.W.2d 180. The motion was just the first step for Nash to take in proving his claim. *See id.* And the State was not required to agree to the facts in Nash's motion; if Nash wanted to rely on these allegations to show that the lineup was suggestive, he needed to prove them at the hearing. The circuit court should have required Nash to present evidence of suggestiveness.

Nash also argues that the court understood that he had the burden of proof, and his failure to call witnesses goes only to whether he met that burden. (Nash's Br. 15.) But even assuming that this assertion is correct, as the State argued in its opening brief and argues below, Nash did not prove that the lineup was impermissibly suggestive. Accordingly, this Court should still reverse the circuit court's order suppressing the identification.

II. The circuit court incorrectly determined that Nash had shown that the lineup was suggestive.

Nash next argues that he proved that the lineup was suggestive. (Nash's Br. 15–23.) This Court should reject his arguments.

Nash first notes that the State does not argue that any of the circuit court's factual findings are clearly erroneous. (Nash's Br. 15–16.) That is correct, but as the State explained in its opening brief, those findings were limited and do not establish that the lineup was suggestive. (State's Br. 9–14.)

Next, Nash claims that the lineup did not comply with the Milwaukee Police Department's identification policy, adopted as required by Wis. Stat. § 175.50, or the Wisconsin Department of Justice's model identification policy. (Nash's Br. 16–17.) But suppression is not an available remedy for a violation of section 175.50 or either of the policies. In particular, DOJ's model policy says it is not intended to create any substantive or procedural rights enforceable by a party to a criminal proceeding. (R-App. 211.) Both Nash and the circuit court are wrong that law enforcement's violation of a policy is a basis for finding suggestiveness or suppressing evidence.

Nash also maintains that the court was right to find the lineup suggestive because his skin was lighter than the other participants. (Nash's Br. 17–20.) He notes that the witness who viewed the lineup had described the robber as having light skin. (Nash's Br. 18.) From this, Nash claims, he was not only likely to stand out among the participants, but also to be identified by the witness. (Nash's Br. 18–20.)

This Court should reject these arguments. Nash's claim that he had the lightest skin is based entirely on the photo of the lineup's participants. The circuit court specifically declined to make any findings about Nash's skin tone or whether it made the lineup suggestive, so there is little for

this Court to review on this issue other than the photo. (R. 39:9.) And while the photo shows Nash as having the lightest skin, that does not mean the circuit court properly suppressed the identification. Police do not have to search for identical twins in terms of age, race, height, or facial features when conducting lineups. *Powell v. State*, 86 Wis. 2d 51, 67, 271 N.W.2d 610 (1978).

Further, while it is true that the witness identified the robber as having light skin, this ignores the steps law enforcement took to minimize the differences among the participants. The men all appear to be of similar age, height, weight, and build. They all were dressed the same during the lineup. And police showed the participants to the witness sequentially, which reduced the possibility of the witness comparing the men to each other instead of properly focusing on whether he recognized each man presented to him. The participants' skin tones is but one factor among the "totality of circumstances" for the court to consider in whether the lineup was suggestive. *See Wright v. State*, 46 Wis. 2d 75, 86, 175 N.W.2d 646 (1970). When balanced against the remaining facts, it does not support the circuit court's finding of suggestiveness.

Nash nonetheless contends that none of this matters because the robber's skin tone was the most important factor in the witness's identification. (Nash's Br. 19–20.) And, he argues, the State effectively conceded this in its opening brief when it acknowledged that the participants had a range of skin tones. (Nash's Br. 19.)

But again, Nash minimizes the significant similarities in the participants' appearance and the way the lineup was conducted. And he ignores the circuit court's failure to make any findings related to skin tone, which was attributable to Nash's decision not to present any evidence about the lineup. The variation in the participants' skin tone is not enough by itself to make the lineup suggestive.

Nash next tries to defend the circuit court's reliance on his lack of counsel and the State's failure to record the lineup in finding suggestiveness. (Nash's Br. 20–22.) He claims that these things are both relevant to the totality of the circumstances. (Nash's Br. 20–22.)

This is incorrect. Nash did not have a right to counsel at the lineup, so his not having one is not grounds for suppression. (State's Br. 13.) And the absence of counsel or the failure to record the lineup cannot make it suggestive. The lineup happened a certain way regardless of whether it was recorded or counsel was present. The circuit court's task was to determine what happened, which it did not do because it failed to put Nash to his burden of proving suggestiveness. The circuit court erred when it relied on the lack of counsel and a recording.

Nash also argues that the court was right to find suggestiveness because the State could have conducted a photo array instead of the lineup. (Nash's Br. 22.) This, Nash claims, would have allowed police to find fillers more similar in appearance to him. (Nash's Br. 22.) But the issue is what the police did, not what they could have done, and there is no preference in the law for photo arrays over in-person lineups. (State's Br. 12.) It does not matter that police could have conducted a photo array.

Finally, Nash says that this Court could remand to allow the circuit court to better explain its conclusion that the lineup was suggestive. (Nash's Br. 23.) But there is no reason to do so because it is unlikely that the court could offer a better explanation for its decision. The court's decision suffered from its lack of factual findings about the conduct of the lineup. Without the court making additional findings—which Nash does not ask this Court to order it to do—the court's reasoning would continue to lack a sufficient basis. This Court should not remand to allow the court to further address its decision that the lineup was suggestive.

III. Remand for the circuit court to address reliability is warranted if this Court concludes that the circuit court did not erroneously conclude that the lineup was suggestive.

Nash lastly takes issue with the State's request for a remand in the event that this Court upholds the circuit court's determination that the lineup was suggestive. (Nash's Br. 23–25.) He contends that there is no need for remand because the circuit court already held that the identification was not reliable, and the State failed to present any evidence on the topic. (Nash's Br. 23–25.)

This Court should reject both of these arguments. The circuit court did not address reliability. Nash points to the court's comments expressing concern that the lineup was not reliable and saying that it did not "comport to the reliability that we require an eyewitness to identify suspects." (Nash's Br. 11, 23–24; R. 39:10.) But these do not amount to a conclusion that the lineup was unreliable. As Nash admits, the court did not make factual findings or apply the factors for assessing reliability found in *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972). Instead, the court's decision focused on the conduct of the lineup and whether it was suggestive. A couple of stray comments does not equate to a decision that the lineup was unreliable.

Nash's argument that the State failed to present any evidence of reliability should also fail. It is odd that Nash makes this argument given that he does not think that he had an obligation to present any evidence to show that the lineup was suggestive. And it is essentially for that reason that the State did not present any evidence regarding reliability; Nash refused, and the circuit court did not require him to try to prove suggestiveness. Had Nash made this showing, the burden would have shifted to the State to present evidence of reliability. Thus, remand to allow the court to assess whether

the identification was reliable is appropriate if this Court agrees that the lineup was suggestive.

In addition, Nash's reliance on *State v. Lopez*, 2001 WI App 265, ¶¶ 21–24, 249 Wis. 2d 44, 637 N.W.2d 468, to preclude a remand for the court to take evidence on reliability is misplaced. (Nash's Br. 25.)

Lopez involved a motion to withdraw a plea under *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). *Lopez*, 249 Wis. 2d 44, ¶ 20. Under *Bangert*, once a defendant makes a prima facie case in a written motion, the circuit court must hold a hearing where the State has the burden of refuting the defendant's claim. *Id*. The court held a hearing in *Lopez* but erroneously put the burden on the defendant. *Id*. This Court held that the circuit court erred. *Id*. It then denied the State's request for a remand to allow it to present evidence to meet its burden, explaining that the State had already had its chance. *Id*. ¶¶ 21–24.

Lopez is distinguishable. There, once the court decided to hold a hearing, the State should have known that it had the burden of disproving the defendant's claim. Here, Nash still had the burden of showing suggestiveness despite getting a hearing on his motion, and the court did not hold him to it. Only after the court held that the lineup was suggestive did the burden shift to the State to prove reliability. The court should have allowed the State to present additional evidence at that point.

But even if it is inappropriate to let the State present evidence on reliability, this Court should still remand to allow the circuit court to consider the issue. The court has never addressed reliability even though it needed do so before suppressing the identification. (R. 38:8–10; 41:8–11.) Thus, even if this Court concludes that the State may no longer present additional evidence, it should remand to allow the

court to make findings about whether the identification was reliable.

CONCLUSION

This Court should reverse the circuit court's decision suppressing the identification of Nash, or alternatively, it should remand for further proceedings.

Dated this 16th day of September 2019.

Respectfully submitted,

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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 2283 words.

Dated this 16th day of September 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 16th day of September 2019.

_____
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