

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1560

Cir. Ct. No. 2004CF705

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUAN ROBERTO NIETO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
MARK A. WARPINSKI, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Juan Nieto appeals an order denying his postconviction motion after being convicted as party to the crimes of kidnapping, attempted first-degree intentional homicide, and three counts of second-degree

sexual assault with the use of force. Nieto alleges multiple circuit court errors. We reject his arguments and affirm.

BACKGROUND

¶2 The State charged Nieto with kidnapping, sexually assaulting, and attempting to kill Jessica W. by setting her on fire, as party to the crimes with Gregario Morales. Jessica testified that, while leaving a bar in Green Bay on April 18, 2003, she was kidnapped by two men after she refused to party with them. She was taken in their pickup truck to another area where both men sexually assaulted her. She was choked and blacked out several times. She eventually woke up and was on fire, and she heard the men get into their truck and leave. Jessica suffered serious injuries, including second- and third-degree burns to the majority of her body.

¶3 Jessica described the two men to police, and she worked with an artist to create composite sketches of the men. The morning after the incident, Nieto and Morales, who worked together, both came to work hung over and both reported sick and left work early. Within a couple days, their supervisor, Richard Binish, saw the police sketches on television. Binish recognized the persons depicted in the sketches as Morales and Nieto and contacted police.

¶4 On his own initiative, Binish obtained soda bottles discarded by Morales for police to conduct DNA testing.¹ The DNA matched a previously unidentified sample that had been obtained from Jessica. Police obtained a

¹ Binish testified he was frustrated with the lack of police action on his tip, which prompted him to implement a plan to obtain Morales's DNA with the soda bottles.

warrant for Morales's arrest and found him in Roswell, New Mexico. At the time of Nieto's trial, Morales had been convicted following a plea agreement and was awaiting sentencing. At Nieto's trial, Morales testified that he and Nieto carried out the crime. Morales testified Nieto was the driver. In the courtroom, Jessica identified Nieto as the passenger in the truck and as one of her attackers. When asked how certain she was, she stated, "100 percent."

¶5 A jury found Nieto guilty on all charges. Nieto filed a motion for postconviction relief, asserting multiple claims. As relevant here, Nieto claimed: he had a videotape of a news interview given by Morales after Nieto's trial in which Morales admitted lying at Nieto's trial; Jessica's in-court identification of Nieto should have been suppressed because she had seen him in court and his picture in a newspaper before trial; the testimony of Nieto's identification expert was unduly limited; Binish should not have been allowed to give a lay opinion regarding whether the police composite sketch looked like Nieto; the court erroneously excluded evidence of a similar crime in New Mexico that occurred shortly after the crimes at issue here; and the district attorney knowingly allowed Morales to give perjured testimony. The trial court denied the postconviction motion.

DISCUSSION

I. News Interview Videotape

¶6 In his postconviction motion, Nieto alleged:

New evidence has been provided by Mr. Morales to a television reporter at Fox 11 that he lied during the testimony at Mr. Nieto's trial. This information casts extreme doubt upon the veracity of Mr. Morales' testimony, which was at the heart of the case against Mr. Nieto.

At the postconviction hearing, Nieto called Morales as a witness. However, Morales refused to testify without an attorney present. Nieto's counsel requested that the issue be held open so counsel could perform research on whether Morales could be required to testify and the admissibility of the videotaped interview. The court gave counsel time to research and brief the issue.

¶7 Nieto's counsel filed a letter brief to the circuit court opining that Morales had the right to an attorney. Counsel suggested the following procedure. He requested that the court inform Morales of his options, appoint an attorney for Morales if necessary, and that Morales then be called to testify. If Morales invoked his Fifth Amendment right, counsel requested that the videotaped interview be admitted under WIS. STAT. § 908.045(4)² as a "statement against interest of an unavailable declarant." Alternatively, he suggested the State could offer Morales immunity to testify. The court denied the motion.

¶8 Nieto claims we should remand in the interest of justice for the circuit court to employ his recommended procedure. Nieto concedes the court could not make a ruling on the admissibility of the videotaped interview without knowing its contents. He argues we should require the court to follow his recommended procedures so he can enter the videotaped interview into evidence.

¶9 We reject Nieto's argument. Nieto does not argue the court erred by failing to implement his recommended procedures. He also cites no authority permitting us to order the circuit court to follow his procedures or to otherwise

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

remand in the interest of justice under these circumstances.³ His argument is inadequately developed. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (This court need not address undeveloped arguments.).

¶10 Even if we had the power to remand as Nieto requests, we would not do so. Despite any obstacles to admitting the videotaped interview into evidence, Nieto never entered the videotaped interview into the record with an offer of proof. We therefore have no idea what testimony, if any, Morales recanted. We only have Nieto's vague allegations. A party cannot complain about the exclusion of evidence unless an offer of proof is made advising the court in sufficient detail the nature of the evidence to be presented. See *State v. Brown*, 2003 WI App 34, ¶¶17-20, 260 Wis. 2d 125, 659 N.W.2d 110. The court could not have determined whether anything on the tape might help Nieto without knowing what Morales said. See *State v. Hoffman*, 106 Wis. 2d 185, 217, 316 N.W.2d 143 (Ct. App. 1982). Any claim regarding the court's failure to admit the videotape was forfeited. See *id.* at 222.

¶11 Further, because recantations involve an admission that a witness lied under oath, they are inherently unreliable. *State v. Mayo*, 217 Wis. 2d 217, 226, 579 N.W.2d 768 (Ct. App. 1998). Thus, to be admissible, the recantation must be corroborated by other newly discovered evidence, at least to the extent of establishing circumstantial guarantees of the recantation's trustworthiness. *Id.*; *State v. McCallum*, 208 Wis. 2d 463, 477-78, 561 N.W.2d 707 (1997). There is no indication that Morales's alleged recantation was reliable. Again, without

³ Nieto does not attempt to rely on WIS. STAT. § 752.35, which permits this court to grant a *new trial* in the interest of justice if the real controversy has not been fully tried or if for any reason justice has miscarried.

knowing the contents of the videotape, it is unclear what, if any, recantation occurred. Regardless, there is no newly discovered evidence corroborating the recantation and providing sufficient guarantees of its trustworthiness. *See McCallum*, 208 Wis. 2d at 477-78.

II. Victim Identification

¶12 Nieto claims the court erred by failing to suppress Jessica’s in-court identification of him as one of her attackers. Nieto argues police were required to perform a photo array under *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, and the failure of police to do so resulted in an overly suggestive identification of Nieto by Jessica.

¶13 When reviewing a court’s decision on a motion to suppress evidence, we apply a two-step standard of review. *See State v. Hibel*, 2006 WI 52, ¶23, 290 Wis. 2d 595, 714 N.W.2d 194. We uphold a circuit court’s findings of fact unless clearly erroneous. *Id.* We review independently the application of constitutional and legal principles.⁴ *Id.*

¶14 In *Dubose*, our supreme court adopted standards for the admissibility of out-of-court show up identifications. *See Dubose*, 285 Wis. 2d 143, ¶2. The court held that an identification resulting from a show up is impermissibly suggestive and violates due process unless the show up was

⁴ Generally, the reliability of a witness’s in-court identification of a defendant is a question for the jury, though the circuit court may, in its discretion, exclude the evidence under WIS. STAT. § 904.03 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.” *See State v. Hibel*, 2006 WI 52, ¶31, 290 Wis. 2d 595, 714 N.W.2d 194. Nieto does not challenge the court’s exercise of discretion, instead relying solely on allegedly defective police procedures.

necessary. *Id.*, ¶33. A show up is necessary when it is required to establish probable cause for an arrest or because, due to exigent circumstances, a lineup or photo array cannot be performed. *Id.*

¶15 Relying on *Dubose*, Nieto argues “a show up or media identification of Nieto’s eventual photograph was unnecessary” and that police procedures implicitly conveyed to Jessica that Nieto was guilty. He argues “the identification of Nieto by [Jessica] occurred as a result of media information, an artist’s sketch, and a potential courthouse identification of Mr. Nieto in jail garb. Obviously said procedures violate the dictates of *State v. Dubose*.” Before trial, Jessica had seen Nieto’s photograph in a newspaper and she had seen him at a prior court hearing. Nieto contends *Dubose* required police to use an objective, reliable identification procedure such as a photo array.

¶16 Nieto misreads *Dubose*. *Dubose* addresses show up identification admissibility. *Hibl*, 290 Wis.2d 595, ¶32. Nieto concedes a show up identification was unnecessary here and that no show up procedure was used. *Dubose* is therefore inapplicable. Unlike the show up procedure in *Dubose*, one cannot reasonably discern any impermissible police action from Jessica seeing Nieto’s photo in a newspaper or seeing him previously in court. Further, the composite sketch was drawn at Jessica’s direction, not merely shown to her for identification.

III. Expert Testimony

¶17 Nieto claims the court erroneously limited the testimony of his identification expert, Dr. Lawrence White. Nieto argues that while White was allowed to testify generically regarding problems with misidentification of

criminal suspects, he was not allowed to make any specific references to the circumstances in Nieto's case.

¶18 We review the court's ruling on the scope of permissible expert testimony for an erroneous exercise of discretion. *See Hampton v. State*, 92 Wis. 2d 450, 457-58, 285 N.W.2d 868 (1979). "An appellate court will sustain a discretionary act if it finds that the trial court ... examined the relevant facts, ... applied a proper standard of law, and ... using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995).

¶19 In *Hampton*, our supreme court upheld a trial court's exercise of discretion when limiting expert testimony regarding witness identification. *See Hampton*, 92 Wis. 2d at 452, 457-58. In that case, the trial court allowed the expert to testify about the factors that can affect eyewitness identification, but prohibited the expert from testifying about applying those factors to the circumstances of that case or rendering an opinion as to the witness's reliability. *Id.* at 458. In *State v. Wilson*, 179 Wis. 2d 660, 677-78, 508 N.W.2d 44 (Ct. App. 1993), *overruled on other grounds by State v. Weed*, 2003 WI 85, ¶43, 263 Wis. 2d 434, 666 N.W.2d 485, we affirmed a court's discretionary decision not to allow an identification expert to testify where the trial court determined the testimony would impermissibly comment on the witness's credibility.

¶20 The court's ruling on expert testimony here was similar to that in *Hampton* and *Wilson*. After hearing testimony from Dr. White during an offer of proof, the court determined which aspects of White's testimony would be helpful to the jury. The court permitted White to testify about the effects of stress, post-event information, and length of exposure on witness identification. Considering

Hampton and *Wilson*, the court decided not to permit White to testify in such a way as to suggest an opinion on Jessica's credibility. This was a proper exercise of the court's discretion.

IV. Binish's Identification

¶21 Nieto also challenges Binish's testimony that he recognized Morales and Nieto from the composite sketches. Nieto contends Binish should only have been allowed to testify that the sketches looked similar to Morales and Nieto. He argues Binish's testimony was beyond the scope of lay witness opinion testimony permitted under WIS. STAT. §§ 907.01 and 907.02 and should have been excluded by the circuit court.

¶22 Whether to permit lay opinion testimony is a discretionary determination for the circuit court. *Vonch v. American Standard Ins. Co.*, 151 Wis. 2d 138, 150, 442 N.W.2d 598 (Ct. App. 1989). WISCONSIN STAT. § 907.01 provides:

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

WISCONSIN STAT. § 907.02 addresses expert testimony.⁵ Under § 907.01, a witness who is not testifying as an expert may testify in the form of an opinion,

⁵ WISCONSIN STAT. § 907.02 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

even if relating to an ultimate issue to be decided by the jury, as long as the opinion does not address a legal concept for which the jury requires definitional instructions. *Lievrouw v. Roth*, 157 Wis. 2d 332, 351-52, 459 N.W.2d 850 (Ct. App. 1990).

¶23 The court properly exercised its discretion when permitting Binish’s testimony. As the circuit court noted, Binish was familiar with both men because he worked with them on a daily basis. The testimony also explained why Binish contacted police and ultimately obtained a DNA sample from Morales. *See* WIS. STAT. § 907.01. With a proper foundation established for Binish’s testimony, the court properly concluded Binish’s testimony was admissible. The testimony was rationally based on Binish’s perceptions and helped the jury understand his other testimony. *See* WIS. STAT. § 907.01.

V. New Mexico Crime Evidence

¶24 Nieto claims the circuit court erroneously prevented him from presenting evidence of another crime where a woman was raped and set on fire in New Mexico twelve days after the incident here. Nieto relied on the fact that the New Mexico crime occurred 150 miles from the location where Morales was found. Nieto pointed to a man that he claims looks like him and resided with Morales in New Mexico. Nieto suggested this man aided Morales in the crime against Jessica in Green Bay before committing the crime in New Mexico.

¶25 To introduce evidence that a third party committed a crime, there must be a “legitimate tendency” that the third person could have committed the crime. *State v. Denny*, 120 Wis. 2d 614, 623, 357 N.W.2d 12 (Ct. App. 1984). While the legitimate tendency test does not require a defendant to show a third person’s guilt to the degree of certainty associated with a conviction, “evidence

that simply affords a possible ground of suspicion against another person should not be admissible.” *Id.* The question is whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime. *Id.* at 623-24.

¶26 Whether to admit evidence of the New Mexico crime was a discretionary determination for the circuit court. *See id.* at 625. Applying *Denny*, the court considered the similarity of the crimes but noted there was no similarity of place and no evidence providing a direct connection between the third person and the crime committed in Wisconsin or New Mexico. The court relied not only on the distance between the New Mexico and Wisconsin crimes, but also the 150-mile distance between the New Mexico crime and the residence where the third person allegedly lived with Morales. The court’s conclusion was reasonable, and we uphold it as a proper exercise of discretion.

VI. Morales’s Testimony

¶27 Finally, Nieto claims the court erred by not declaring a mistrial after Morales gave “potentially perjurious” testimony. He relies on the fact that Morales’s version of events described himself as the truck’s passenger, whereas Jessica identified Nieto as the passenger. Nieto also relies on comments made by the prosecutor after Morales’s testimony suggesting he believed Morales was switching his and Nieto’s roles and that Morales may have perjured himself. The prosecutor subsequently qualified his reference to perjury as a bad choice of words. The circuit court declined to grant a mistrial, stating “I’m not satisfied that there is any indication that Mr. Morales perjured himself. I think it is for the trier of fact to determine [whose] story about what happened [is] more credible here.”

¶28 Whether to grant a mistrial lies within the sound discretion of the circuit court. *State v. Bunch*, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). When determining whether to grant a mistrial, the question is whether, in light of the whole proceedings, the basis for the mistrial request is sufficiently prejudicial to warrant a new trial. *Id.*

¶29 Nieto focuses on whether the district attorney knowingly put Morales on the witness stand to give perjured testimony. He emphasizes that Morales's testimony was different from Jessica's and asserts one of them must be lying.

¶30 We reject Nieto's claim. Nieto's argument avoids addressing the dispositive inquiry of whether the alleged perjury was sufficiently prejudicial to grant a new trial. Instead, he focuses on the discrepancy between Jessica's and Morales's testimony about who did what. The jury heard both versions of events, and it was the jury's role to resolve issues of credibility. *See State v. Whiting*, 136 Wis. 2d 400, 421, 402 N.W.2d 723 (Ct. App. 1987). Further, all counts against Nieto were charged as party to a crime. Nieto offers no basis for concluding that accepting one version of events over the other would have affected the outcome of his trial. He therefore presents no basis for concluding the court erred when declining to grant a mistrial. *See Bunch*, 191 Wis. 2d at 506.⁶

⁶ Nieto asserts an additional claim, which is that if any individual circuit court error does not rise to the level of prejudicial error, the accumulation of error justifies a new trial. Because we conclude the court did not err, there is no need to address this argument.

By the Court.—Order affirmed.

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

