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OF WISCONSIN

STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2017 AP 840-CR

JOHNNIE LEE TUCKER,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF
THE MILWAUKEE COUNTY CIRCUIT COURT
HONORABLE ELLEN R. BROSTROM, PRESIDING

APPELLANT'S BRIEF AND APPENDIX

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ISSUE PRESENTED

1. Where the circuit court admitted police testimony identifying Mr. Tucker as "the shooter" based only on review of videotapes, whether

a) this testimony was inadmissible opinion evidence and

b) admission of this testimony was fundamentally unfair violating basic Due Process because it usurped the jury's fact-finding function.

Upon defense objection, the trial court gave a limiting instruction.

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested.

STATEMENT ON PUBLICATION

Counsel requests publication because the opinion here is likely to apply established rules of law to a factual situation significantly different from those in previous opinions and therefore will clarify those rules.

STATEMENT OF THE CASE

1. Nature of the Case

This is a review of Mr. Tucker's criminal conviction by a jury of 1st degree murder and felon with a gun.

2. Proceedings Below

On November 21, 2015, complaint number 15-CF-5039 was filed in Milwaukee County Circuit Court charging Mr. Tucker with violations of §940.01(1)(a)(1st Degree Intentional Homicide), §940.19(5) (Aggravated Battery with use of weapon) and §941.29(2), *Wis Stats.* (1). On that date, Mr. Tucker appeared with appointed counsel. (42). Bail was set at $250,000 and preliminary hearing was set for December 1, 2015. (42:6)

On December 1, 2015, Mr. Tucker waived his right to a preliminary hearing. (3)(43:23-4). Arraignment was held December 17, 2015 during which retained counsel was substituted in (4)(44:3-4) and an information making the identical charges as in the complaint was filed. (5). New counsel entered a not guilty plea to the charges in the information for Mr. Tucker. (44:4).

Mr. Tucker was tried from April 5-8 and 11, 2016 and acquitted of the aggravated battery charge in Count 2 of the information. (18). The court below declared a mistrial on the other counts when the jury could not reach a verdict on them due to deadlock.

(58:15).

On July 11, 2016, the second trial began with jury voir dire. (61:9). That afternoon the State began presenting its witnesses. (62:35). On July 12, 2016, the State continued presenting its evidence (63) and rested that afternoon. (64:81). The defense motion to dismiss was denied. (64:84-85). The defense began presenting its witnesses. (64:85). On July 13, 2016, Mr. Tucker waived his right to testify (65:6-8) and, after a final witness, defense rested. (65:12). On July 14, 2016, the jury returned its verdict of guilty on both counts. (66:7-8). The court entered judgment of conviction and orders a presentence report. (66:9).

On September 23, 2016, the court sentenced Mr. Tucker to life imprisonment with eligibility for extended supervision after 25 years on the murder count and to a concurrent 5 years confinement with 5 years of extended supervision on the felon with a gun count. (67:25-29). The court granted 293 days presentence credit. *Id.*

Notice of Intent was filed September 30, 2016 (36) and Notice of Appeal was filed May 3, 2017. (40).

3. Facts of the Offense

The crime took place outside a bar. (62:36). No witness present at the scene could identify the killer. (63:41-42 [victim's brother did not get good look at killer])(64:86-90 [victim's brother viewed lineup including Mr. Tucker and told police "the person who shot his brother was not in the lineup." at 89, lines 1-12]) (64:7-9 [victim's other brother did not know who was "scuffling" with his brother]). However, the bar's video surveillance cameras recorded the incident and Venita Pugh, the mother of Mr. Tucker's child, though she at times could only see the back of a person, identified Mr. Tucker in the video recording. (68:14-24).

Argument

I. POLICE TESTIMONY IDENTIFYING MR. TUCKER AS "THE SHOOTER" BASED SOLELY ON REVIEW OF THE VIDEO WAS INADMISSIBLE OPINION TESTIMONY VIOLATING BASIC DUE PROCESS.

A. Additional Facts

At trial and before any citizen witness identified Mr. Tucker, Detective Butz was viewing the video recordings and commenting on them. (62:82-63:10). At one point, the detective identified Mr. Tucker, seen in the video the detective was viewing as just entering the tavern, as "the shooter outside." (63:5 [lines 18-20]). Trial counsel objected this was a conclusion only the jury could make. (63:5 [lines 21-25] & 51[line 25] – 52[line 6]). The State argued the detective was entitled to testify to his opinion. (63:6 [lines 2-5]). The court held a sidebar and then gave a limiting instruction. (63:6 [lines 9-24]). Later, the court put the sidebar on the record, explaining her reasoning for allowing the jury to consider the testimony. (63:50-52). (These transcript excerpts are the Appendix.)

B. Standard of Review

Generally evidence rulings are discretionary, but where they are based on an error of law, the reviewing court reverses for erroneous exercise of discretion. *State v. Daniels*, 160 Wis.2d 85, 100, 465 N.W.2d 633 (1991). Furthermore, where the evidence question involves application of a statute, the review is *de novo*. *State v. Franklin*, 2004 WI 38, ¶5, 270 Wis.2d 271. Finally, whether admission of evidence is constitutional is reviewed *de novo*. See, *e.g.*, *State v. Moats*, 156 Wis.2d 74, 93-94, 457 N.W.2d 299, 308 (1990).

C. Discussion

1. The officer's identification testimony did not conform to Evidence Code § 907.01, *Wis. Stats.*

The court below found: "This is an appropriate lay opinion under 907.01." (63:51 [line 1]). But the officer's testimony was not "rationally based on [his own] perception, *id.*, subsec. (1). because he had no personal knowledge of who the shooter was. See, *e.g.*, *U.S. v. Earls*, 704 F.3d 466, 472-473 (7th Cir. 2012)(where officers had never personally met accused before identifying him from photos, they could not act as thirteenth jurors and testimony inadmissible under F.R.E. 701). And see *State v. King*, 205 Wis.2d 81, 92, 555 N.W.2d 189 (Ct.App.1996)(because uniformity with federal evidence rules was "overriding principle" in adoption of Wisconsin rules, therefore "Federal case law interpreting a federal rule is persuasive authority in construing an analogous state rule.").

Det. Butz' testimony creates what the federal 1st Circuit has identified as "the imprimatur problem." *U.S. v. Flores-De-Jesus*, 569 F.3d 8, 17-21 (1st Cir.2009). The problem is: 1) "because juries may place greater weight on evidence perceived to have the imprimatur of the government," *U.S. v. Casas*, 356 F.3d 104, 120 (1st Cir.2004), an identification by an officer without personal knowledge "effectively usurp[s] the jury's role as a fact-finder." *U.S. v. Meises*, 645 F.3d 5, 16 (1st Cir.2011) and 2) when the officer testifies to such an identification in advance of any witness claiming personal knowledge, this is "an attempt to bolster the credibility of [a] later witness[ ]." *Flores-De-Jesus*, *supra*, at 26.

As it is the exclusive province of the jury to decide the facts, it is clearly prejudicial error "when the witness is a government agent whose testimony – as

here – is effectively a judgment on the question of guilt or innocence." *Meises*, *supra*, at 17. What the video showed was a factual issue for the jury to decide, not the officer. As to bolstering, it is error to bolster the credibility of a witness, here Venita Pugh, who was the only witness to make an identification, before her credibility was attacked. See *State v. Johnson*, 149 Wis.2d 418, 427, 439 N.W.2d 122 (1989)

Therefore, since the officer had insufficient personal knowledge to enable him to identify Mr. Tucker, it was error to admit his testimony. See *U.S. v. Cruz*, 285 F.3d 692, 699-700, n. 4 (8th Cir.2002)(officer's ID of accused from photograph inadmissible as he had no previous dealings with accused); *U.S. v. Griffin*, 324 F.3d 330, 348-349 (5th Cir.2003)(agent's ID of photo of accused on chart as participant in crime inadmissible).

2. Admission of the officer's identification testimony was fundamentally unfair because it usurped the jury's fact-finding authority.

Mr. Tucker's sole defense was identity. (62:26 [lines 18-23 defense opening argument]). No witness present at the scene could identify the killer and after the victim's brother viewed a lineup with Mr. Tucker in it he told the police "the person who shot [my] brother was not in the lineup." (64:89 [lines 1-12]). (This same brother had a handgun at the time and place of the killing and was firing it then. (63:35-37)) The jury had only the video to decide guilt or innocence. The jury in the previous trial could not do so, acquitted Mr. Tucker of one charge and a mistrial was declared. (58:15). The only witness who properly identified Mr. Tucker in the video, Venita Pugh, was shown to have a motive to lie. (64:76 [line 9] – 77 [line 19] Mr. Tucker threatened restraining order against her lover.) That is to say, this was not a strong case against Mr. Tucker.

So when the officer, who knew Mr. Tucker only from the video he was viewing, identified Mr. Tucker as "the shooter outside," (63:5 [lines 18-20]), he "usurped the jury's function." *U.S. v. Grinage*, 390 F.3d 746, 749-751 (2d Cir.2004)(officer's testimony phone calls he had not participated in were drug sales calls was inadmissible). As an experienced detective (62:77 [lines 3-7]) he was presented to the jury "with an aura of expertise and authority which increased the risk that the jury would be swayed by his testimony, rather than rely on its own interpretation [of the video.]" *Grinage* at 751.

It is, of course, well settled basic Due Process requires an accused cannot be punished unless a jury finds the facts of his or her guilt. *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S.Ct. 2348 (2000). By usurping the jury's fact-finding authority, this basic rule was violated.

3. Prejudice

The time honored Wisconsin test for prejudicial error, whether constitutional or not, was laid down in *State v. Dyess*, 125 Wis.2d 525, 543, 370 N.W.2d 222 (1985). To avoid reversal, the State has the burden of showing "there is no reasonable possibility that the error contributed to the conviction." *Id.* In light of the weakness of the State's case described above, counsel submits the State cannot meet this burden. The trial court's limiting instruction nowhere told the jurors the officer's identification should be disregarded and in fact told them they were entitled to the "investigative conclusions" of the officer! (63:6 [lines 9-24].

Conclusion

Counsel respectfully submits the foregoing demonstrates the Court should reverse and remand for a new trial.

Dated: January 15, 2018 Respectfully submitted,

_____

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APPELLANT'S APPENDIX CERTIFICATION

I hereby certify this appendix complies with §809.19(2)(a) and contains: 1) a table of contents; 2) relevant trial court record entries; 3) the findings or opinion of the trial court; and 4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and names of juveniles, with a notation that the portions of the record have been so produced to preserve confidentiality and with appropriate references to the record.
Dated: January 15, 2018

So Certified,

Tim Provis
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CERTIFICATIONS

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) & (c) for a brief produced with a proportional serif font.

The length of this brief is 1,755 words.

ACCURACY CERTIFICATION

I hereby certify that the electronic copy of this brief conforms to the rule contained §809.19(12)(f) in that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first class mail on January 16, 2018. I further certify that the brief was correctly addressed and postage was prepaid.

Dated: January 16, 2018 So Certified,

Signature: _____

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