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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 REPLY BRIEF

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Introduction

Before turning to respondent State's arguments in detail, counsel suggests 2 points for the Court to keep in mind when considering the State's brief, hereinafter RB. The first is factual. The second is legal.

First, at RB 13, the State denies Detective Butz identified Mr. Tucker "as the shooter," even though the record clearly shows otherwise. (63:5 [lines 18-20]) found in Appellant's Appendix. The State belies its own claim at RB 4-6 where it presents its interpretation of the videos. The State's narration says "Mr. Tucker" entered the bar at time stamp 23:38:29 til 23:39:19 on Channel 3. RB 5, top of page. If the Court examines the transcript at (63:5), it will find Det. Butz was viewing Channel 3 at time stamp

23:39:19 when he testified the person who "just entered the tavern would be the shooter outside." (63:5 [lines 14-20]). That is to say, the officer identified Mr. Tucker as the killer.

Secondly, counsel presented a constitutional Due Process argument that admission of Det. Butz' identification was fundamentally unfair. Appellant's Brief at 6-7, hereinafter AB. The State's brief fails to respond to this argument in any way and so the Court may find it is conceded. *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 97 Wis.2d 97. 108-109, 279 N.W.2d 493 (Ct.App.1979).

Argument

I. The State's cited cases are either inapposite or distinguishable.

The fundamental unfairness here is a police officer who had no previous contact with Mr. Tucker identified him as the killer before the jury heard from any witness who actually had any familiarity with him. See AB 5-7. This "imprimatur problem," as the First Circuit has named it, see AB 5, arises because jurors, and even judges, see Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 Harv. L.Rev. 1995 (2017), tend to treat police as credible experts whether or not they have been so qualified.

The State relies on six cases.

In *U.S. v. White,* 639 F.3d 331 (7th Cir.2011), cited RB 10-12, the witnesses identifying the accused were not police officers but the defendant's sister and his ex-girlfriend who were familiar with him. Similarly, in *U.S. v. Jackman*, 48 F.3d 1 (1st Cir.1995), cited RB 10, the identifying witnesses were the accused's ex-wife and 2 of his acquaintances who were familiar with him.

While the identifying witness in *U.S. v. Stormer*, 938 F.2d 759 (7th Cir.1991), cited RB 10, 12, was a police officer, this officer had worked with the accused for several years when the accused had been on the police force so the officer was very familiar with him. Similarly, in *U.S. v. Allen*, 787 F.2d 933 (4th Cir.1986), cited RB 10, 12, both of the identifying officers knew the accused as the policeman saw him 12 times a year and the other had been his parole officer for years.

The State claims *State v. Small*, 2013 WI App 117, 351 Wis.2d 46, is "instructive," RB 10, but there was no identification issue there as the case was about whether the officer could testify as to what was being said on the video, not who said it, *Small,* ¶13-¶16, so it is distinguishable. Also, distinguishable is *U.S. v, Begay,* 42 F.3d 486 (9th Cir.1994), cited RB 10-13, because although the testifying officer without previous familiarity with the accused was allowed to identify him on the video, the video was of a protest demonstration by 200 American Indians so it was difficult for anyone to pick out any given individual.

So, since *Small* is not on point, and counsel's research, as well as the State's apparently, discloses no Wisconsin cases in point, it seems clear this is a case of first impression in Wisconsin. *Cf. People v. Thompson*, 49 N.E.3d 393 (Ill.2016)(in case of 1st impression, ¶40, state supreme court finds, at a minimum, testifying witnesses identifying from videos and photographs, including police must "have had contact with the defendant that the jury could not possess . . ." ¶50)

II. Admitting Det. Butz' identification violated the Rules of Evidence.

The State relies heavily on the Ninth Circuit *Begay* case, cited RB 10-13, but neglects to tell the Court that circuit's general rule is "the use of lay

opinion identification by policemen or parole officers is not to be encouraged and should be used only if no other adequate identification testimony is available to the prosecution." *U.S. v. Butcher*, 557 F.2d 666 (9th Cir.1977). Following this rule, in *U.S. v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir.1993), where the officer "not only did not know LaPierre, he had never seen him in person. [The officer's] knowledge of LaPierre's appearance was based entirely on his review of photographs and witnesses descriptions . . . ," *Id.,* the court found "this level of familiarity with LaPierre's appearance falls far short" of that required by F.R.E. 701. *Id.* As this case is in point, counsel submits in this case of first impression the Court should follow it because, among other reasons, it is consistent with the scheme developed in *Thompson*, *supra*, ¶50, that the officer, at a minimum, must "have had contact with the defendant the jury would not possess . . ."

III. Prejudice

Counsel agrees the factors the State presents from *State v. Hunt*, 2014 WI 102, ¶27, see RB 14-15, may be considered in determining harmless error.

Turning to them, the nature of the defense was identity and the overall strength of the State's case on identity, as counsel explained in detail at AB 6, was weak. The officer's identification testimony was, of course, important since in the first trial the same videos were shown to the same witnesses and that jury could not come to any verdict. (59:57 [Ms. Pugh])(49:105-122 [Det. Butz])(51:5-8 [Det. Butz]). Counsel submits it is only because of Det. Butz' narration at issue here the jury came to its verdict.

The State claims after the court below's limiting instruction, the jury "understood they were not *required* to accept Det. Butz opinion . . ." RB 16, emphasis added. But the issue here is the jury should not have been exposed to his opinion at all.

Detective Butz' identification prejudiced Mr. Tucker. The State has not met its burden on harmless error.

Conclusion

The First and Fifth Circuits "unequivocally condemn this practice as a tool used by the government to paint a picture of guilt before the evidence has been introduced." *U.S. v. Casas*, 356 F.3d 104, 119 (1st Cir.2004) following *U.S. v. Griffin*, 324 F.3d 330, 349 (5th Cir.2003). The condemned practice is the one used here, where officers without personal knowledge testify to matters of fact, such as identifications, before the prosecution presents any fact witnesses. In this case of first impression in Wisconsin, this Court should similarly condemn such practices as they are completely inconsistent with the basic Due Process right to a fair trial.

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

Dated: April 2, 2018 Respectfully submitted,

_____

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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 1,222 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 April 2, 2018. I further certify that the brief was correctly addressed and postage was prepaid.

Dated: April 2, 2018 So Certified,

Signature: _____

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