

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I**

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2017AP968CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMEY LAMONT JACKSON

Defendant-Appellant.

**AN APPEAL FROM THE JUDGMENT OF CONVICTION
ENTERED ON FEBRUARY 3, 2015 AND SENTENCE IMPOSED ON
FEBRUARY 3, 2015, IN THE CIRCUIT COURT OF MILWAUKEE
COUNTY, BY THE HONORABLE DANIEL L. KONKOL, AND
ORDER DENYING JACKSON'S MOTION FOR
POSTCONVICTION RELIEF, ENTERED ON MAY 5, 2017, IN THE
CIRCUIT COURT OF MILWAUKEE COUNTY, THE
HONORABLE M. JOSEPH DONALD, PRESIDING**

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. JACKSON IS ENTITLED TO A NEW TRIAL DUE TO THE FACT THAT HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL

To establish ineffective assistance of counsel, a defendant must show both that trial counsel's performance was deficient and that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The standard for determining whether counsel's assistance is effective under the Wisconsin Constitution is the same as that under the Federal Constitution. See *State v. Sanchez*, 201 Wis.2d 219, 235-36, 548 N.W.2d 69 (1996). Performance is deficient if it falls outside the range of professionally competent representation, measured by the objective standard of what a reasonably prudent attorney would do under the circumstances. *State v. Pitsch*, 124 Wis.2d 628, 636-37, 369 N.W.2d 711 (1985). Prejudice is demonstrated where, but for counsel's deficient performance, there was a reasonable probability of a different trial outcome. *State v. Erickson*, 227 Wis.2d 758, 773, 596 N.W.2d 749 (1999).

A. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT CHALLENGING THE IMPERMISSIBLY SUGGESTIVE LINEUP

“‘A criminal defendant is denied due process when identification evidence admitted at trial stems from a pretrial police procedure that is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.’” *State v. Benton*, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923 (citation and one set of quotation marks omitted).

The test for fairness in a lineup depends upon the totality of the circumstances surrounding the lineup, as explained by our supreme court in *Wright v. State*, "The 'totality of circumstances' reference is a reminder that there can be an infinite variety of differing situations involved in the conduct of a particular lineup. The police authorities are required to make every effort reasonable under the circumstances to conduct a fair and balanced presentation of alternative possibilities for identification. The police are not required to conduct a search for identical twins in age, height, weight or facial features." *Wright v. State*, 46 Wis. 2d 75, 86, 175 N.W. 2d 646, (1970):

Our supreme court, in *Powell v. State*, 86 Wis. 2d 51, 271 N.W.2d 610 (1978), noted that "[i]t is the likelihood of misidentification which violates a defendant's right to due process." *Id.* at 64 (quoting *Neil v. Biggers*, 409 U.S. 188, 199 (1972)). *Powell* explained a two-part procedure for determining the admissibility of pretrial identification evidence. *Id.* at 65. The court must first decide whether the defendant has shown that the identification procedure was impermissibly suggestive. *Id.* If the defendant fails to satisfy the burden of showing that the lineup was impermissibly suggestive, the inquiry ends. *State v. Mosley*, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981).

The "overriding question" in determining whether a defendant's rights were violated as a result of an impermissibly suggestive lineup is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Powell*, 86 Wis. 2d at 64-65 (citation omitted). The *Powell* court looked to the specific guidelines provided by *Biggers* to determine whether the totality of the circumstances made an identification reliable even if a pretrial procedure was suggestive:

"[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity

of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation *Powell*, 86 Wis. 2d at 65 (citing *Biggers*, 409 U.S. at 199-200).

The lineup was impermissibly suggestive. K.G. was interviewed on May 21, 2014. The same day of the incident. She did not identify by name any suspects. (46; App. 113-114). She did not say that she knew any of the suspects. (46; App. 113-114). Then 9 days later, at the lineup, she told the officer that she did circle no first but then circled yes (as to number 5). (46; App. 116). She told the officer that she knew this person and his name was TY. (46; App. 116). The fact that she circled no but then circled yes shows that she was unsure. When B.B. specifically says out loud that she wants to see number 5 again it unduly influenced K.G. because she wasn't sure to begin with if it was number 5. Also, K.G. didn't identify any suspects by name or nickname during her interview on May 21, 2014, yet after B.B. says out loud that she wanted to see number 5 again then K.G. states that she now knew this person and his name was T.Y. If she has seen him in the neighborhood and knew his name was TY, why did she not give that information to the police on the date of the incident when she was interviewed. The line-up identification of Jackson was not reliable under the totality of the circumstances.

T.M. was at the lineup and she wrote looks familiar next to number 5, then scribbled out that word and then said yes to number 5. (46:118). She was unduly influenced by B.B.'s request to see number 5 again. Further at trial she identifies a person in the gallery as the person she saw that day as Jamey. (69: 168-170,181,188). Then after the person in the gallery leaves she is asked if she sees anybody in the park that night in this room and she says no. (69:189). She testified that Jamey was the person in the audience and TY was Mr. Jackson. (69:197-198). Then she testifies

that TY and Jamey are the same person. (69:216-217). The line-up identification of Jackson was not reliable under the totality of the circumstances.

Further B.B. asked out loud in a confined setting that she wanted to see number 5 again. It is unreasonable to think that K.G. and T.M. did not hear her say this.

The identification in these proceedings prejudiced the defendant and should have been suppressed. A reasonably prudent attorney would have filed a suppression motion. The entire trial revolved around identification and that was the defense that was used at trial. In suppressing the identification of the lineup there is a reasonable probability that there would have been a different outcome based on the fact that the State would not have been able to use the lineup identification of two witnesses.

The trial testimony of both K.G. and T.M. was confusing. K.G. testified at the trial that she did not know the name or nickname of the person she identifies as Jackson. (67:137). She then testifies that she wrote the name TY on the lineup identification sheet but then testifies that she didnt remember why she wrote TY on the identification sheet. (67:141). Further, in her testimony K.G. says that she could only describe one person to the police which was the person that ran towards her which was the person without the gun. (67:161). T.M. identifies a person in the gallery as the person she saw that day as Jamey. (69: 168-170,181,188). Then after the person in the gallery leaves she is asked if she sees anybody in the park that night in this room and she says no. (69:189). She testified that Jamey was the person in the audience and TY was Mr. Jackson. (69:197-198). Then she testifies that TY and Jamey are different people. (69:197-198). Then she testifies that TY and Jamey are the same person. (69:216-217). She also testifies that she learned the name Jamey from the TV. (69:218). She testifies hat she saw his picture on TV and it looked like TY and they said his name was Jamey. (69:218).

The testimony of both K.G. and T.M. at trial was confusing and if the identification in the lineups would not be able to be used there is a reasonably probability that there would have been a different outcome.

II. THERE WAS NOT SUFFICIENT EVIDENCE PRESENTED AT THE TRIAL TO SUPPORT THE JURY'S FINDING OF GUILT

Jackson argues that the evidence presented a trial was insufficient to find him guilty.

When the defendant challenges the sufficiency of the evidence to support a conviction, the standard of review is, “an appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752 (1990).

On February 2, 2015, K.G. testified at the trial. She testified that she did not know the name or nickname of the person she identifies as Jackson. (67:137). She then testifies that she wrote the name TY on the lineup identification sheet but then testifies that she didnt remember why she wrote TY on the identification sheet. (67:141). Further, in her testimony K.G. says that she could only describe one person to the police which was the person that ran towards her which was the person without the gun. (67:161).

K. G.'s testimony was confusing she testified about only seeing one person a person without the gun yet then proceeded to identify Jackson as someone with a gun. She said during the lineup that she wrote down that he was TY but then couldnt remember why she wrote that name down. Her testimony is so

jumbled that no trier of fact could reasonably find her identification of Jackson credible.

T.M. identifies a person in the gallery as the person she saw that day as Jamey. (69: 168-170,181,188). Then after the person in the gallery leaves she is asked if she sees anybody in the park that night in this room and she says no. (69:189). She testified that Jamey was the person in the audience and TY was Mr. Jackson. (69:197-198). Then she testifies that TY and Jamey are different people. (69:197-198). Then she testifies that TY and Jamey are the same person. (69:216-217). She also testifies that she learned the name Jamey from the TV. (69:218). She testifies that she saw his picture on TV and it looked like TY and they said his name was Jamey. (69:218).

T.M.'s testimony was confusing. She identifies someone in the gallery as the person being there. She talks as if TY and Jamey are the same person and then not the same person. She also testifies about seeing Jamey's picture on TV. Her testimony is so muddled that no trier of fact could reasonably find her identification of Jackson credible.

In viewing the evidence provided, no trier of fact could reasonably find that the evidence provided proved beyond a reasonable doubt that Jackson possessed a firearm.

CONCLUSION

For, the reasons stated above Jackson asks this Court to reverse the decision of the circuit court and remand for a new trial or a hearing to address the claim of ineffective assistance of counsel or in the alternative reverse the finding of guilt and remand to the trial court to dismiss the case.

Respectfully submitted this
6th day of October, 2017.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is **1,853** words.

Respectfully submitted this
6th day of October, 2017.

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CERTIFICATION OF ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief report 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: October 6, 2017

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