STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP1625-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MELVIN LIDALL TERRY,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING MOTION FOR A NEW TRIAL ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE STEPHANIE ROTHSTEIN AND THE HONORABLE MARK A. SANDERS, PRESIDING, RESPECTIVELY

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. Whether the circuit court properly denied Melvin Lidall Terry's motion to suppress eyewitness Shawn Clifton's identification of him as the shooter.

   The circuit court said yes.

   This Court should say yes.

2. Whether any error in the admission of Clifton's testimony was harmless beyond a reasonable doubt.

   The circuit court did not answer this question.

   This Court should say yes.

3. Whether the circuit court properly denied Terry's postconviction motion without a hearing because the record conclusively established that Terry had not shown prejudice from counsel's performance.

   The circuit court said yes.

   This Court should say yes.

INTRODUCTION

After an apparent drug-deal gone wrong, Terry shot Naurice Elliott in the head as Elliott and his best friend, Thomas,[1] attempted to flee from Terry. Multiple people—including Thomas and Tiffany Carter, Terry's girlfriend—either identified Terry as the shooter or placed him at the scene with a gun. Before trial, Terry unsuccessfully moved to suppress evidence from some of these witnesses on the ground that their identification stemmed from either a

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[1] The State is using a pseudonym for the surviving victim's name to comply with Wis. Stat. § 809.86(4).

showup or an impermissibly suggestive process.

During the five-day trial at which the State presented more than a dozen witnesses, Terry's defense was that the State had the wrong man and that the witnesses had incorrectly identified him. The jury disagreed and found Terry guilty of first-degree reckless homicide, first-degree recklessly endangering safety, and possessing a firearm as a felon.

Terry moved for postconviction relief, arguing that his attorney was ineffective for not presenting an expert witness on the risks inherent in eyewitness identification. The circuit court denied his motion without a hearing, reasoning that testimony from an expert witness explaining to the jury that humans are fallible would not have changed the jury's verdicts because the evidence against him was overwhelming.

Undeterred, Terry has renewed his arguments in this appeal. He says that the circuit court should have declined to allow the State to present evidence from one of the eyewitnesses because it came from an unnecessary showup or because it was the result of an impermissibly suggestive process. He also argues that he was entitled to a hearing on his claim that counsel was ineffective for not presenting the expert testimony on the risks of eyewitness identification. Both of Terry's arguments are without merit, and both ignore the overwhelming amount of evidence against him.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

STATEMENT OF THE CASE

On June 18, 2013, Naurice Elliott died from a gunshot wound to the head. (R. 189:23–24; 192:42.) He had been shot while he was a passenger in a car that his best friend, Thomas, was driving. (R. 189:15, 23, 49.) Numerous witnesses implicated Terry in the shooting. (R. 187:50–65; 189:9–27; 190:102–03; 191:49.) As a result, the State charged Terry with first-degree reckless homicide, first-degree recklessly endangering safety, and being a felon in possession of a firearm. (R. 3.)

A. Pretrial suppression hearing

Before trial, Terry moved to suppress evidence from two eyewitnesses, Cheryl Kubik and, relevant to this appeal, Shawn Clifton. (R. 4; 17.) Terry argued that Kubik's and Clifton's identifications stemmed from impermissible showups, in violation of *Dubose*.[2] (R. 4.) The court held a hearing on the motion at which Clifton, who had identified Terry as the shooter, and Kubik testified. (R. 178; 199.)

Clifton was present at the shooting, which occurred in a residential alley in Milwaukee. (R. 189:9, 24–27.) Clifton said that in the aftermath, an officer named Detective Gomez[3] asked him to come to Gomez's car so that Clifton could identify whom he had seen with the gun. (R. 199:25.) When Clifton did so, he saw three people—all of whom he thought were male—sitting on a sidewalk. (R. 199:25–26.) Clifton said that he recognized one of the men as the person

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[2] *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582.

[3] Gomez did not testify at the hearing or at trial.

he had seen shoot the gun in the alley. (R. 199:26.) Clifton then walked past the people on the sidewalk and got into Gomez's car. (R. 199:26.) Gomez then backed the car up and told Clifton, "I want you to look over [at the people on the sidewalk] and identify who [the shooter] was." (R. 199:27.) Clifton told Gomez what he had seen. (R. 199:27–28.)[4] Clifton said that Gomez did not pressure him to make an identification, nor did Gomez tell him whom to identify. (R. 199:29.)

The court noted that the parties had stipulated to some facts, including that officers responded to information that shots had been fired in the 400 block of North 34th Street in Milwaukee on June 18, 2013. (R. 179:6–7.) The officers started asking neighbors questions and one of these neighbors was Kubik. (R. 179:7.) The court concluded that there was "absolutely nothing" impermissibly suggestive about how the police employed an identification process used with Kubik because it was Kubik who "initiated the identification." (R. 179:8–9.)

But the court called the procedure involving Clifton "more troublesome." (R. 179:9.) The court noted that "Detective Gomez did not follow his agency's procedures" when he asked Clifton to identify whom he saw with the gun. (R. 179:6.) Nevertheless, even though Gomez's procedure created a "high risk" of misidentification, other factors indicated that Clifton's identification of Terry was reliable. (R. 179:10–12.) Specifically, the court first noted

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[4] This part of the hearing is unclear. The State asked Clifton, "Did you tell the detective what you had seen?" and Clifton answered, "Yes." (R. 199:27–28.) Presumably, Clifton identified Terry.

that Gomez did not say that "he believed that one of [the] three people was the shooter" or that the man "in the white t-shirt [was] the shooter." (R. 179:10.) The court also found that Clifton had no motivation to lie, had nothing to lose by not identifying the shooter, and was credible. (R. 179:11.) The court said that "even if" it were to find that Gomez's procedure "was so impermissibly suggestive," Terry was not entitled to suppression because the State had met its burden of proving that under the totality of the circumstances, the identification was reliable enough to go before the jury to decide. (R.179:12–13.) Thus, the court denied Terry's motion and the case proceeded to trial.

B. Trial testimony

1. Thomas testified that Elliott struck Carter and that Terry shot Elliott shortly after.

The State presented testimony from Thomas detailing the lead-up to the shooting, which involved a drug deal gone wrong. Thomas testified that on June 18, 2013, he and Elliott were driving around Milwaukee in a red Cadillac looking for drugs to buy. They ran into Tiffany Carter and Terry at a gas station; there, Thomas and Elliott bought marijuana and cocaine from Carter. (R. 189:10, 14; 190:83–86; 191:15–29, 63–65.) According to Thomas, after they left the gas station and Elliott smoked the marijuana, Elliot believed that there was a problem with the drugs. (R. 191:24, 63–65.)

Elliott and Thomas drove until they relocated Carter, who was walking alone and whom they followed in their car. (R. 191:29–30.) Elliott then directed Thomas to pull the car over. (R. 191:29–31.) Thomas did so, Elliott got out, and punched Carter, drawing blood. (R. 191:31–34.) Thomas then

got out of the car, told Elliott to "leave it alone," and persuaded him to get back in the car. (R. 191:33–36.)

When Elliott and Thomas were back in the car, they saw Terry "peek" at them from the corner of an adjacent alley. (R. 191:36–40.) Thomas then followed Elliott's direction to drive the car into that alley. (R. 191:42–43.) According to Thomas, once they were in the alley, Terry confronted the two, saying, "You hit my bitch, P." (R. 191:43–45.) As Terry walked toward the car, Thomas noticed that Terry had a gun. (R. 191:47.) Elliott told Thomas to get them out of the alley, but Thomas was unable to do so before Terry fired at the car, hitting Elliott. (R. 191:48–57.) Thomas then drove Elliott to the hospital. (R. 191:51–52.) Elliott died from a gunshot wound to his head. (R. 192:42.)

Thomas testified that he was "1000" percent certain that Terry was the man that had shot Elliott. (R. 191:57.) He said, "I know the person. Like it goes through my mind everyday who shot him. I do not have no discrepancy about pointing nobody out who shot my best friend, man." (R. 191:85.)

2. Carter testified that Elliott had hit her and to seeing Terry with a gun.

Carter testified that she dated Terry for a couple of years, loved him, but broke up with him when "this thing happened." (R. 190:79, 83.) According to Carter, on June 18, 2013, she was at the home of Kenneth Terry, Terry's brother, who lives in the 400 block of North 33rd Street, when she and Terry decided to walk to a gas station. (R. 190:85–87.) At the gas station, Carter said that they had "contact" with Thomas, whom she did not previously know. (R. 190:88–89.) As she walked back from the station alone,

Terry having disappeared, she noticed she was being followed by a red Cadillac. (R. 190:89–90.)

Carter said that a man, whom she identified as Elliott by his photograph, got out of the car and said to her, "[W]here dude at?" (R. 190:91–93; 191:18.) Carter testified that she believed that Elliott was referring to Terry. (R. 190:93.) Elliott also asked Carter twice, "Where's my money?" and he tried to grab her purse. (R. 190:94.) When Carter grabbed it back, Elliott hit her twice, drawing blood. (R. 190:94–95.) Carter said she ran off and hid in some bushes in the alley. (R. 190:95–96.)

Once in the bushes, she looked around to see if she was still being followed and she saw Terry at the end of the alley. (R. 190:97.) Carter said that she then ran toward Kenneth's house, running past Terry. (R. 190:98–99.) Once in the house, she heard two gunshots. (R. 190:99–100, 122.) Carter said she did not see who shot the gun and, at first, said that she "wasn't paying attention" when asked if she had seen anything in Terry's hand. (R. 190:98–99.) But, shortly thereafter, Carter admitted that Terry had had a small handgun in his hand when she saw him in the alley. (R. 190:102.) She denied having seen him shoot the gun. (R. 190:103.)

At the request of the State, the court declared Carter an adverse witness. (R. 190:112.) The State then played a video of Carter's deposition in an earlier hearing. (R. 190:118–19.) After the video was shown, Carter again admitted that she had seen Terry with a gun in the alley. (R. 190:119–20.) When the State asked her why she told the jury that she had not seen him with a gun, she initially said she did not know, but then admitted that it was because she had once loved Terry. (R. 190:121.) She also admitted that she

told detectives that she said to Terry that he did not have to use the gun, he could have just fought Elliott. (R. 190:123–24.)

3. Multiple eyewitnesses testified that Terry had the gun.

Kubik testified that on June 18, 2013, she was with her sister on her porch on North 34th Street in Milwaukee when she noticed a red Cadillac parked across the street with two African-American men in it. (R. 187:50–58.) She saw the car drive off, and then saw an African-American man come running out of the house across the street from her—424 North 34th Street ("the 424 house")—and chase after the car. (R. 187:58–62.) The man was wearing a white shirt with writing on it and he had blue underwear on that was sticking six to eight inches above his pants. (R. 187:60–61.) Kubik also noticed his hair: he had short braids or dreadlocks. (R. 187:59–60.)

Kubik then heard a gunshot. (R. 187:65.) Around this time, Kubik saw an African-American woman wearing a do-rag by the back door of the 424 house, which was near an alley. (R. 187:62–64.) Then Kubik saw three people—the woman, the man who chased the car, and a third man—walking quickly and entering the 424 house. (R. 187:64–66.)

Debra Leighton, Kubik's sister, testified that she also noticed the red Cadillac and the man with blue underwear running after it. (R. 188:33–40.) Leighton said that shortly after the car and the man went out of her sight, she heard the gunshot. (R. 188:41–42.) Leighton, too, noticed that three people—two men and a woman with a do-rag—were in the alley and then went into the 424 house. (R. 188:42–43.)

Milwaukee Police Officer Michael Lopez testified that he was dispatched to the scene. (R. 189:68–72.) Lopez said

that he interviewed Leighton in connection with the shooting. (R. 189:76–77.) Leighton and Kubik both said that while they were talking to Lopez, they saw the three people (the two men and the woman) leave the 424 house and start to get into a car. (R. 187:67–68; 188:44–45.) Both women relayed this to Lopez. (R. 187:68; 188:45.) Lopez then ran over to the car and told the occupants to stop the car. (R. 187:69; 189:78–79.)

Lopez testified that he had the car's occupants—later identified as Terry, Tiffany Carter, and her brother, Xavier Carter—sit on the curb, but he did not handcuff them. (R. 189:79–84.) Lopez said that Terry was wearing a white shirt with a multi-colored front. (R. 189:84.) Terry was not wearing a jacket. (R. 189:84–85.)

Clifton testified that on June 18, 2013, he was arriving home from work in the midafternoon, parking his truck in the alley by his home when he noticed a man in the alley. (R. 189:9–17.) Clifton said that the man was African-American, about six feet, two inches tall, with a medium build, and had "corn rolls" in his hair. (R. 189:17–18.) He said the man was wearing sunglasses, a white t-shirt with bright graphics, dark jeans, and a jean jacket with bleach stains. (R. 189:19–21.) Clifton also noticed that the man had a gun. (R. 189:21.)

Clifton testified that the man looked as if he were looking for someone, and Clifton "felt [the man's] intent was to shoot someone." (R. 189:23.) Clifton backed his truck up and saw the man raise his arm up with the gun, "pointing at someone down at the end of the alley." (R. 189:24.) Clifton said he saw the man's "possible target": a man running out of the alley. (R. 189:24.) Clifton then saw the man shoot the gun once. (R. 189:25–27.)

Clifton described the shooter to the responding officer. (R. 189:32–34.) Clifton testified that a detective then asked him to accompany him to his car to "drive past some suspects that they had on the curb." (R. 189:34.) Clifton and the detective then walked through the alley to North 34th Street where there were three people sitting on the curb. (R. 189:34–35.) Clifton described the people as sitting "[r]ight in front of where [the detective] brought" him, about a foot and a half away from him. (R. 189:35–36.) When Clifton got into the detective's car, he pointed out that the shooter was the man in the group of three that had dreadlocks and a shirt with colors on it. (R. 189:36–37.)

Antoinette and Morgan Funches both testified that they were attending their brother's eighth-grade graduation party in the 400 block of North 33rd Street in Milwaukee on June 13, 2013, when they heard a gunshot.[5] (R. 188:85–96, 100, 119–120, 126.) The sisters described how, before they heard the gunshot, they saw a black man with "dreads"[6] nearby. (R. 188:99–103, 124–30.) Antoinette described the man as having a dark complexion, about six feet tall with a slender build, around 27 years old, and wearing white shoes, bleached pants, and a bleached jean jacket. (R. 188:102–05.) She saw that he was carrying a shiny object. (R. 188:105–06.) Morgan, too, said that the man was wearing a "blue jean outfit," and that he had a dark complexion and a slender build. (R. 188:129–30.) Morgan testified that she saw the man was carrying a silver gun. (R. 188:126–30.)

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[5] Antoinette testified that she heard four or five gunshots. (R. 188:100.)

[6] Antoinette described the man's hairstyle as "dreads," whereas Morgan said that he had either "single braids" or "single dread." (R. 188:130.)

Milwaukee Police Detective Dennis Devalkenaere testified that he showed Kubik a photo array with Terry's picture in it. Although Kubik did not select any of the photos as being the man she had seen running after the Cadillac, she was "leaning" toward picking Terry's picture. (R. 188:9, 21–23.) Devalkenaere said that Kubik was afraid of misidentifying the man. (R. 188:21.) Devalkenaere also said that when he was escorting Terry to a line-up, Terry called either him or another detective, "P." (R. 192:59, 63–64.) Terry told him that "P" stood for "peon." (R. 192:67.)

Milwaukee Police Detective Timothy Graham testified that he showed Clifton a photo array that included Terry's picture. (R. 190:34, 58.) And while Clifton, like Kubik, did not select Terry's picture as the man that he saw in the alley with the gun, Clifton focused on the picture of Terry and asked Graham if he had any more pictures of Terry that he could see. (R. 190:57–59.) Graham showed Leighton the photo array with similar results; Leighton did not positively identify Terry, but she focused on his picture over the others. (R. 190:57.)

Graham also testified that he was involved in processing the crime scene. (R. 190:37–38.) He said that although a search of the 424 house did not uncover a gun, he found a bleach-stained jean jacket on top of a bed. (R. 190:28, 49–53.)

DNA analyst Patricia Dobrowski testified that blood found in the alley came from Carter. (R. 192:13, 26–27.) And Doctor Wieslawa Tlomak, a medical examiner in Milwaukee, confirmed that Elliott died from a gunshot wound to the head. (R. 192:34–35, 42.)

The jury convicted Terry of all three counts and the court sentenced him to a total term of 25 years' initial

confinement, to be followed by 15 years' extended supervision. (R. 121.)

Terry moved for postconviction relief, arguing that his counsel was ineffective for failing to present expert testimony on the limitations of eyewitness identifications. (R. 148.) The court denied the motion without a hearing, reasoning that there was no probability of a different result had the jury heard that eyewitness identifications have their shortcomings. (R. 163.)

Terry appeals. (R. 164.)

ARGUMENT

I. The circuit court properly denied Terry's motion to suppress Clifton's pretrial identification of Terry as the shooter.

This Court may affirm the denial of Terry's motion to suppress on either of two grounds: first, as discussed in this Part, Clifton's pretrial identification of Terry as the shooter was admissible, or alternatively, on the ground that the admission of the evidence was harmless error, as discussed in Part II. Although it appears as the second argument in this brief, harmless error likely presents the simplest and narrowest grounds for affirmance. *State v. Blalock*, 150 Wis. 2d 688, 703, 422 N.W.2d 514 (Ct. App. 1989) (stating that appellate courts should decide on the narrowest grounds). Nevertheless, the court's decision denying the motion to suppress was correct, for the reasons below.

A. Standard of review.

Appellate courts employ a two-step analysis when reviewing a trial court's denial of a motion to suppress. *State v. Eason*, 2001 WI 98, ¶ 9, 245 Wis. 2d 206, 629 N.W.2d 625.

In the first step, the courts review the circuit court's findings of fact, which are upheld unless the findings are clearly erroneous. *See State v. Martwick*, 2000 WI 5, ¶ 18, 231 Wis. 2d 801, 604 N.W.2d 552. But the second step requires the courts to independently apply the facts to constitutional principles. *State v. Dubose*, 2005 WI 126, ¶ 16, 285 Wis. 2d 143, 699 N.W.2d 582.

B. Law relating to out-of-court identification procedures.

Police out-of-court identification procedures implicate a defendant's right to due process under both the United States and Wisconsin constitutions. *See Manson v. Brathwaite*, 432 U.S. 98, 99 (1977); *Dubose*, 285 Wis. 2d 143, ¶ 36. It is the likelihood of misidentification that violates the defendant's right. *Powell v. State*, 86 Wis. 2d 51, 64, 271 N.W.2d 610 (1978).

Under the federal constitution, when a court is faced with a motion to suppress evidence from a showup,[7] the court asks whether the evidence was the product of an impermissibly suggestive procedure. *Brathwaite*, 432 U.S. at 105–06. If it was, the court then examines whether the evidence is nonetheless reliable. *Id.* at 113–14. Under federal law, "reliability is the linchpin in determining the admissibility" of eyewitness identifications. *Id.* at114.

In Wisconsin, evidence from a showup is not admissible at trial unless, "based on the totality of the circumstances, the showup is necessary." *Dubose*, 285 Wis.

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[7] A "showup" is an out-of-court practice in which a suspect is presented singly to a witness for potential identification. *Dubose*, 285 Wis. 2d 143, ¶ 1 n.1.

2d 143, ¶ 2. A showup is considered necessary when there is an absence of probable cause to arrest the suspect or when the police are unable to conduct a lineup or photo array. *Id.*

But even where a showup is necessary, police still must exercise care to limit the suggestiveness of the procedure. *State v. Nawrocki*, 2008 WI App 23, ¶ 22, 308 Wis. 2d 227, 746 N.W.2d 509. For example, showups "conducted in police stations, squad cars, or with the suspect in handcuffs" visible to the witness are all suggestive. *Dubose*, 285 Wis. 2d 143, ¶ 35. If the showup was impermissibly suggestive, then the evidence from it must be suppressed. *Id.* ¶¶ 2, 35–36.

And if the procedure was not a showup and instead another form of out-of-court identification, Wisconsin courts apply a two-part test to determine whether the identification is admissible.[8] *See Powell v. State*, 86 Wis. 2d 51, 65, 271 N.W.2d 610 (1978). First, the defendant must establish that the identification stemmed from an impermissibly suggestive procedure. *Id.* But because "most eyewitness identifications involve some element of suggestion," only

[8] Wisconsin courts applied this two-part test to examine the admissibility of all out-of-court identifications until *Dubose*. *Dubose*, 285 Wis. 2d 143, ¶¶ 26–27. In *Dubose*, the Wisconsin Supreme Court adopted a new standard when examining the admission of out-of-court showup identifications. *Id.* ¶¶ 2, 33. The court held "that evidence obtained from such a showup will not be admissible unless, based on the totality of the circumstances, the showup was necessary." *Id.* ¶ 2. The "necessity" standard is based on Article I, Section 8 of the Wisconsin Constitution. *Id.* ¶¶ 36, 39. This standard seems to be limited to identifications from showups. *See State v. Drew*, 2007 WI App 213, ¶ 19, 305 Wis. 2d 641, 740 N.W.2d 404.

eyewitness identifications with "the taint of improper state conduct" must be suppressed. *Perry v. New Hampshire*, 565 U.S. 228, 244–45 (2012). Hence, if the defendant fails to show that the identification was impermissibly suggestive, then the inquiry ends and the evidence is admissible. *State v. Mosley*, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981).

If the defendant proves that the identification process was impermissibly suggestive, the burden then shifts to the State to show that the identification was nonetheless reliable under the totality of the circumstances. *Powell*, 86 Wis. 2d at 64–65. To determine the reliability of the identification, courts examine factors that could lead to misidentification, such as "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." *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972).

C. The circuit court properly denied the suppression motion because there was no showup, the identification process was not impermissibly suggestive, and the identification was reliable.

For Terry to be entitled to the suppression of Clifton's identification of him when he was seated on the curb, he must show that the identification process was a showup, that the showup was unnecessary and impermissibly suggestive.

Alternatively, he must show that even if the procedure Gomez employed was not a showup, the process was impermissibly suggestive and the identification was unreliable.

He has not satisfied either standard.

1. The identification was not the result of a showup.

As a preliminary matter, the State notes that the circuit court did not appear to determine whether Gomez's procedure was a showup and, accordingly, whether the identification was necessary under *Dubose*. (R. 179:9–10.) Instead, the court concluded that even if the procedure employed was impermissibly suggestive, Clifton's identification of Terry was reliable under the totality of the circumstances. (R. 179:9–12.) Even if the circuit court overlooked an analytical step, however, this Court may nevertheless affirm the trial court's decision to deny the suppression motion. *See State v. Hurley*, 2015 WI 35, ¶ 29, 361 Wis. 2d 529, 861 N.W.2d 174 (stating that an appellate court may affirm if there are facts in the record that support the trial court's decision).

In order for Gomez's procedure to qualify as a showup, it must have been an out-of-court identification, involving State action, and with a *single* suspect. *Dubose*, 285 Wis. 2d 143, ¶ 1 n.1. Here, there is no dispute that when Clifton identified Terry on the sidewalk, Terry was sitting with Carter and Xavier, her brother. Clifton said that he believed all three people on the curb were men. (R. 199:26.) Thus, police did not present Terry to Clifton *singly*. Even excluding Carter, a woman, from the equation, the procedure does not meet the definition of a showup because police did not present only Terry to Clifton for identification.

2. Even if the procedure that Gomez employed was a showup, it was necessary and not impermissibly suggestive.

Even if the procedure was a showup, the procedure was necessary because, at the time it was performed, someone had just shot a man in the head and the police did not have probable cause to arrest anyone for the crime. *See Dubose*, 285 Wis. 2d 143, ¶ 2 (stating that showups are admissible when necessary, such as when police lack probable cause to arrest). Probable cause requires that the totality of the circumstances show a substantial likelihood that the suspect committed a crime. *See State v. Lange*, 2009 WI 49, ¶ 38, 317 Wis. 2d 383, 766 N.W.2d 551.

Here, before the showup, police did not have the requisite quantum of evidence necessary to arrest Terry for a crime. Just before the showup, police knew that there had been shots fired, a man in a red Cadillac had been shot in the head, and that Kubik and Leighton had seen a man resembling Terry chasing a red Cadillac. But neither Kubik nor Leighton had seen Terry with a gun.

Clifton described the shooter to Lopez, who seemed to fit Terry's general description, but Clifton described the shooter as wearing a specific jean jacket and when Terry came out of the 424 house, he was not wearing a jacket. Based on Kubik's and Leighton's having seen the Carters and Terry going into and leaving the 424 house around the time of the shooting, police had reason to believe that the Carters and Terry may have been involved in whatever had happened in the alley, but they did not have probable cause to believe that Terry (or either of the Carters) had committed a crime. Thus, without probable cause to arrest Terry or the Carters, the showup was necessary. *See Dubose*, 285 Wis. 2d 143, ¶ 2.

And, because any ostensible showup here was necessary, Clifton's identification would be inadmissible only if the showup were impermissibly suggestive. *See Nawrocki*, 308 Wis. 2d 227, ¶ 22. Here, there is no evidence that the identification process was impermissibly suggestive. Gomez walked Clifton to where the three individuals were seated on the curb and had Clifton get into his squad car. The three people were not handcuffed, and were clearly not in a police station or in a police car, which tends to carry the inference of guilt. *See Dubose*, 285 Wis. 2d 143, ¶ 35. Although it did not appear that Gomez instructed Clifton that the shooter may or may not be on the curb, which is best practice, and instead told him to look at the people and identify "who it was,"[9] Clifton said that he did not feel pressured to identify someone or that Gomez suggested whom to identify. (R. 199:29.) In addition, because Clifton had independently recognized Terry as the shooter when he walked by him—and in the absence of any other impermissibly suggestive factors—Gomez's instruction alone does not make the identification process overly suggestive.

Terry emphasizes that Clifton was "extremely nervous, scared, and furious at Det. Gomez" for the manner in which he did the curbside identification,[10] but he does not explain—nor is it clear—why that is legally or factually significant to the question whether the procedure was suggestive. Indeed, Clifton's frustration with Detective Gomez would have seemingly made him less inclined to make any identification at that point, and therefore would have cut against the conclusion that the procedure was

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[9] (R. 199:27.)

[10] Terry's Br. 17.

suggestive. In any event, Clifton made clear that he did not feel pressured to identify anyone at all. (R. 199:29.)

3. And even if the procedure were impermissibly suggestive, Clifton's identification was reliable.

If this Court determines that the procedure was not a showup, but was impermissibly suggestive, the evidence is admissible if the State can demonstrate that Clifton's identification of Terry was nonetheless reliable. *Powell*, 86 Wis. 2d at 64–65. Here, the State has amply met that burden.

Clifton had sufficient time to view the shooter under good lighting conditions and from a short distance. Clifton was focused on the shooter and able to give a detailed description of him, which included the shooter's hairstyle and clothing. Clifton was clear that he had walked by the shooter on the way to Gomez's car. And Clifton identified him shortly after the crime. All of these factors weigh in favor of the conclusion that Clifton's identification of Terry as the man that Clifton saw in the alley with the gun was reliable. *See Biggers*, 409 U.S. at 199–200.

In addition, as the circuit court noted, Clifton had no motivation to lie and nothing to "gain or lose by identifying or not identifying anyone." (R. 179:11.) Despite Terry's protestations to the contrary, there are no significant countervailing factors that give rise to a "substantial likelihood of misidentification." (R. 179:12.)

In sum, the police procedure here was not a showup as defined by *Dubose*. Even if it was a showup, it was necessary under the circumstances and not impermissibly suggestive. And if it were not a showup, but somehow unnecessarily suggestive, the identification was reliable.

But this Court need not reach the question of Clifton's identification because even if the court improperly admitted this evidence, Terry is not entitled to relief because, as discussed below, its admission was harmless beyond a reasonable doubt.

II. Any error in the admission of Clifton's testimony was harmless given the overwhelming evidence of Terry's guilt.

A. Standard of review and relevant law.

Most errors, even constitutional ones, can be harmless. *Neder v. United States*, 527 U.S. 1, 8 (1999). This is certainly true in the context of erroneously admitted evidence. The harmless error rule "is an injunction on the courts" to address if it has found error. *State v. Harvey*, 2002 WI 93, ¶ 47 n.12, 254 Wis. 2d 442, 647 N.W.2d 189.

The test for harmless error is "essentially consistent with the test for prejudice in an ineffective assistance of counsel claim." *Id.* ¶ 41. The only distinction between the two tests is that under the harmless error test, the State bears the burden of proof. *Id.*

The test is not whether there was sufficient evidence absent the error, but whether this Court can conclude beyond a reasonable doubt that a rational jury would have returned guilty verdicts without the error. *State v. Weed*, 2003 WI 85, ¶¶ 29–30, 263 Wis. 2d 434, 666 N.W.2d 485.

B. Here, a jury would have found Terry guilty even without Clifton's testimony.

To start, if this Court were to conclude that Clifton's curbside identification of Terry was the product of an impermissible showup, the description that Clifton gave to

police *before* the identification would still be admissible at trial. In that description, Clifton told police that the shooter was a black man with "corn rolls" who was wearing a denim jacket with bleach stains and a white shirt with a multi-colored design on it. (R. 189:68, 72–73.) But even assuming that all of Clifton's statements would be excluded, the evidence against Terry was overwhelming. It showed all of the following occurred during the day on June 18, 2013:

1. Thomas and Elliott were involved in a drug transaction with Carter and Terry. Elliott was upset about the drug deal and punched Carter, drawing blood, which was found in the alley of the 400 block of North 33rd Street.

2. Terry, Carter's boyfriend, then confronted Elliott and Thomas about punching Carter, saying, "You hit my bitch, P." Thomas saw Terry with a gun. Thomas saw Terry shoot at him and Elliott. Thomas saw that Elliott was shot and drove him to the hospital, where he died.

3. A police officer heard Terry call him "P" derisively, which Terry said stands for "peon."

4. Carter saw Terry with a gun in the alley just before she heard two gunshots.

5. Kubik and Leighton saw a man come out of the 424 house before the gunshot, chase a red Cadillac, and return to the 424 house just after the gunshot; Kubik and Leighton said that the man was African-American and wore his hair in dreadlocks or braids.

6. Morgan and Antoinette Funches both saw a man with dreadlocks near the alley in the 400 block of North 33rd Street shortly before they heard a gunshot. Morgan saw the man with a silver gun; Antoinette saw him holding something shiny. Antoinette saw the man wearing a bleached jean jacket; Morgan said he was wearing a "blue jean outfit."

7. As police were asking Kubik and Leighton questions, they saw the man they had seen chasing the red Cadillac come out of the 424 house.

Taken together, the evidence against Terry shows that the jury would have reached only one conclusion even without Clifton's testimony: that Terry shot at Thomas and Elliott, killing Elliott.

There is no basis for Terry's assertion that there is "supportive evidence in the record of more than one person with whom Terry could have been confused."[11] Terry attempts to show that there was more than one man in the alley by emphasizing small differences between the witnesses' recollections, such as Clifton's assertion that the shooter wore sunglasses or Kubik's failure to mention the man was wearing a jean jacket. But as Terry stresses in the second part of his brief, humans are not perfect. Despite the differences in some of the descriptions of the shooter, the consistent thread is that there was *one* African-American man in the alley with dreadlocks or braids. And Terry, who met that physical description, was in the alley just before the gunshots were heard, and just after.

In addition, the two people who knew and who were interacting directly with Terry at the time of the shooting identified him as the shooter. Thomas testified that he was certain that Terry, whom he knew from the drug transaction that he and Elliott had made moments earlier, was the shooter. Carter, Terry's girlfriend, testified that she saw Terry with the gun and chastised him for escalating the argument. And Terry had a motivation to shoot.

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[11] Terry's Br. 30.

What's more, is that despite Terry's assertion that he did not attempt to flee the scene,[12] he was caught doing exactly that, when he, Carter, and Xavier left the 424 house shortly after the shooting, got in a car, and seemingly would have driven away but for the police stopping them. And while there was no gun found or fingerprint evidence, Carter's blood was in the alley, which corroborated both Thomas's and Carter's testimony of what happened before the shooting. In addition, police found a bleached jean jacket in 424 house, which was what the Funches saw the shooter wearing.

Thus, excluding Clifton's testimony, six[13] people put either Terry or a person matching Terry's description in the alley at the time of the shooting. At least three of these people put him there with a gun. And more specifically, Thomas and Carter put him there, with the gun and with a motive to shoot at Thomas and Elliott. No reasonable jury would have returned a verdict other than guilty.

Accordingly, even if the circuit court should have excluded Clifton's testimony regarding the curbside identification, and even if it had in fact excluded all of Clifton's testimony, any error in its admission was harmless. Terry is not entitled to relief based on the alleged showup procedure.

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[12] Terry's Br. 22.

[13] These include both Funches sisters, Leighton, Kubik, Carter, and Thomas.

III. The circuit court properly denied Terry's postconviction motion without a hearing because the record conclusively established that Terry suffered no prejudice from counsel's performance.

A. Standard of review and relevant law on the denial of a postconviction motion alleging ineffective assistance of counsel without a hearing.

When a defendant appeals from a postconviction court's decision to deny a motion without a hearing, this Court examines whether the postconviction motion alleged facts that, if proven, show that the defendant is entitled to relief on his ineffective assistance of counsel claim. *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334. If the record conclusively establishes that the defendant is not entitled to relief, the circuit court may in its discretion deny the motion without a hearing. *State v. Allen*, 2004 WI 106, ¶ 16, 274 Wis. 2d 568, 682 N.W.2d 433.

This Court reviews de novo whether the postconviction motion was sufficient to warrant a hearing. *Balliette*, 336 Wis. 2d 358, ¶ 18.

B. Law on ineffective assistance of counsel.

Wisconsin follows the familiar two-part *Strickland*[14] test for claims of ineffective assistance of counsel. *Allen*, 274 Wis. 2d 568,¶ 26. This means that to succeed on a claim that counsel was ineffective, "[a] defendant must prove both that

[14] *Strickland v. Washington*, 466 U.S. 668 (1984).

his or her attorney's performance was deficient and that the deficient performance was prejudicial." *Id.* (citing *Strickland*, 466 U.S. at 687). An attorney's performance is considered deficient when he or she was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* And a defendant is prejudiced by that performance when he or she can show that there is a reasonable probability that but for counsel's deficiency, the result would have been different. *Id.* A defendant must satisfy both prongs of the test to prevail on the claim. *Id.*

C. The postconviction court correctly concluded that Terry failed to establish any prejudice from his attorney's failure to present testimony from an expert witness on the risks of eyewitness identification.[15]

To the postconviction court, Terry argued that counsel should have "present[ed] the testimony of an expert witness regarding the unreliability of various eyewitness identifications in" his case. (R. 148:1.) Specifically, Terry argued that an expert on the risks inherent in eyewitness identifications would have allowed him to present the jury with a scientific basis to question the reliability of the witnesses who testified that they saw him at the scene. (R. 148.)

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[15] By arguing that Terry has not shown prejudice, the State is not conceding that Terry has shown deficient performance. But it is not necessary to address deficient performance because counsel's decision not to present expert testimony did not prejudice Terry. *See State v. Elm*, 201 Wis. 2d 452, 462, 549 N.W.2d 471 (Ct. App. 1996) (stating that a court need not address the other prong of *Strickland* if a defendant cannot make a showing on the other).

In support of his argument, Terry attached to his motion a report from Professor Brian Cutler, which set forth ways on how there was a heightened risk in Terry's case that witnesses had falsely identified him as the shooter. (R. 148:18–32.) But, as the circuit court thoroughly outlined in its decision denying Terry's motion, Cutler's report does nothing to undermine confidence in the verdict, a requirement for Terry to show prejudice and, correspondingly, ineffective assistance of counsel.

To start, Cutler's expert testimony had little applicability to Terry's case. His report offers general points about ways in which eyewitness identifications can be erroneous and speculates on ways in which the witnesses in Terry's case could have erred. But Cutler's report offers no opinion on the accuracy of the identifications in this case. (R. 148:19.) In that way, Cutler's report ignores—in the words of the circuit court—the facts "that lend credibility to the witness identifications, such as the overarching consistency of the witnesses' statements, the clarity of their recollections, [and] the short period of time between when the witnesses observed the events and identified [Terry.]" (R. 163:8.)

Moreover, Cutler's report cites the difficulty eyewitnesses may have in making identifications depending on different factors, such as the amount of time the witness has to make the observation, stress, divided attention, the subject's distance, the lighting conditions, or whether the subject is wearing a disguise. (R. 148:24–26.) But that those things can make identifications more difficult is common knowledge. Indeed, the jury was instructed that the value of identification evidence "depends on the opportunity the witness had to observe the offender at the time of the offense" and that it must "[c]onsider the witness' opportunity

for observation, how long the observation lasted, how close the witness was, the lighting, the mental state of the witness at the time, the physical ability of the witness to see and hear the events, and any other circumstances of the observation." (R. 193:100.) The court further instructed the jury that it should "consider the period which elapsed between the witness' observation and the identification of the defendant and any intervening events." (R. 193:100.) The court cautioned that the jury must "consider those factors which might affect human perception and memory and all the influences and circumstances relating to the identification." (R. 193:100–101.) Cutler's testimony and report would have added nothing of value to the jury's own common sense and the court's instruction.

Further, Cutler's report and testimony largely addresses problems that can occur when eyewitnesses identify strangers. But Terry ignores that there were no positive identifications in this case by the witnesses to whom Terry was a complete stranger; specifically, Clifton, Kubik, and Leighton declined to identify Terry from photo arrays because they were not certain. Rather, here, the most significant eyewitness identifications of him as the shooter came from Thomas, who had just participated in a drug deal with him, and Carter, his own girlfriend. Cutler's testimony would not cause the jury to doubt these two identifications because they were not strangers to Terry.[16]

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[16] In the postconviction court and on appeal, Terry repeatedly questions Thomas's identification based on a "confirmation bias" theory, which Cutler referred to as "commitment effect." (R. 148:13, 29.) Under Terry's theory, because Thomas saw Terry at the gas station before the shooting, he "may have" been more likely to misidentify Terry in the alley. (R. 148:13.) Terry's suggestion is that because Thomas had *just* seen him and had a passing awareness of him means that

Finally, Terry cannot show any prejudice from his counsel's decision not to hire an expert witness on the limitations of eyewitness identification because testimony on this subject would have had no effect on the outcome of the trial. The evidence against Terry was overwhelming. And although some of the witnesses had discrepancies in their descriptions of Terry, none of these differences were of consequence. Had Cutler testified as Terry sets forth, there is no reasonable probability of a different result.

If the jury had heard expert testimony that there are fallibilities in eyewitness identifications, it still would have had to reconcile the fact that so many witnesses testified that they had seen a man near the same alley, at the same time, matching a very unique—as Terry says—description,[17] just before they heard gunshots. And the jury still would have known that Terry, Carter, Elliott, and Thomas had just been involved in a drug deal that had led to Elliott's punching Carter near the same alley. And even if an expert had called into question Thomas's ability to identify Terry accurately, the jury would have still had to weigh the fact that Thomas's self-declared "1000%" certainty that Terry killed his friend lined up with Carter's testimony that she saw her boyfriend with a gun in the alley.[18]

Thomas is *more* likely to misidentify Terry than he would be were Terry a stranger to him. Surely this is taking the risks of eyewitness identification too far. *See generally Perry v. New Hampshire*, 565 U.S. 228 (2012) (acknowledging both the importance and the fallibility of eyewitness identifications.)

[17] Terry's Br. 14.

[18] The State concedes that Carter's statements have been inconsistent, but disputes Terry's characterization that her testimony that Terry was in the alley at the time of the shooting with a gun was "not significant evidence." (Terry's Br. 25.)

Thomas said that he and Elliott had just bought drugs from Carter, who had been with Terry, when Elliott became angry at some aspect of the transaction. Thomas said Elliott confronted Carter and punched her. Thomas said Terry confronted them, calling them "P." The jury heard that Terry called two police officers "P" later, telling them that it meant "peon."

Thomas told the jury that Terry shot at them, killing Elliott. Thomas was not equivocal: he was "1000%" certain that Terry was the person who killed his friend. Other than Thomas's five convictions and Thomas's understandable hesitancy to disclose the drug deal,[19] Terry has offered no plausible reason to doubt Thomas's credibility or his singularly certain testimony that Terry shot Elliott. And he has offered no motive for Thomas to falsely accuse Terry while the real killer of his best friend walked free.

Kubik testified that she saw a black man, with braids or dreadlocks, run out of a house across the street from hers, chasing a red car.[20] A few minutes later, she heard a gunshot. She then saw a woman and two men, including the one she had just seen running, go back into the house across the street. The description of the man that Kubik saw matched the description of the man that Leighton, and the Funches sisters saw around the same time. And Morgan Funches saw the man with a gun.

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[19] (R. 191:53.)

[20] Kubik is white. (R. 163:10.) Terry repeatedly emphasizes the general risks of cross-racial identification but, as noted by the postconviction court, he has offered no evidence that cross-racial identification was an issue *in this case*. (R. 163:10.) And he ignores that the two most significant witnesses against him—Thomas and Carter—are both black. (R. 57; 60.)

In addition, Carter—Terry's girlfriend—admitted that she saw Terry in the alley with a gun. She said that she had denied that she had seen him with it earlier because she was in love with him.

Although it may not have been unreasonable to present the testimony of an expert witness to attempt to undermine the memories of the witnesses, it is unreasonable to suggest that doing so would have had any effect on the result in this case. Even if an expert had testified in the manner Terry suggests, there are simply too many consistent statements, a plausible motive, and only one reasonable explanation for what happened in the alley for the jury to have returned any other verdict than the one it did.[21]

Accordingly, because the record conclusively demonstrates that Terry was not prejudiced by the lack of expert testimony on eyewitness identifications, he was not entitled to a hearing on his claim of ineffective assistance of counsel. This Court should therefore affirm. But if this Court disagrees, at most Terry is entitled to a remand for a *Machner*[22] hearing on this claim.

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[21] In addition to the evidence recited in this section, the State points to the overwhelming evidence of Terry's guilt set forth in both the statement of the case and in Part II of this brief in support of its argument that Terry has failed to show any prejudice from the absence of an expert witness on eyewitness identification.

[22] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court affirm the judgment of conviction and the order denying postconviction relief.

Dated February 13, 2018.

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 8,295 words.

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KATHERINE D. LLOYD
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I hereby certify that:

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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 13th day of February, 2018.

_____
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