STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2017AP1894-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

STEPHAN I ROBERSON,

Defendant-Respondent.

APPEAL FROM AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE, ENTERED IN THE WOOD COUNTY CIRCUIT COURT, THE HONORABLE NICHOLAS J. BRAZEAU, JR., PRESIDING

PLAINTIFF-APPELLANT'S BRIEF AND APPENDIX

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ISSUES PRESENTED

1. An otherwise impermissibly suggestive out-of-court identification procedure is admissible if the State proves that the witness's out-of-court identification was nonetheless reliable under the totality of the circumstances. Before Stephan I. Roberson allegedly shot the victim, the victim and Roberson conducted two drug transactions that cumulatively lasted more than an hour. Based on the totality of circumstances, did the officer's display of Roberson's Facebook picture to the victim result in an unreliable out-of-court identification?

The circuit court answered: Yes.

This Court should answer: No.

2. If an out-of-court identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification, a subsequent in-court identification is inadmissible unless the witness's in-court identification rests on the witness's independent recollection of his or her initial encounter with the suspect. While the circuit court determined that the victim had a sufficient basis to identify Roberson based on two prior meetings that lasted approximately a half hour each, it nonetheless suppressed the victim's in-court identification of Roberson. Did the victim's in-court identification of Roberson rest on the victim's independent recollection of Roberson based on the victim's prior contacts with Roberson?

Circuit court answered: No.

This Court should answer: Yes.

INTRODUCTION

The State appeals the circuit court's order suppressing the victim's out-of-court and in-court identification of Roberson as the person who shot him. During the out-of-

court identification procedure, officers showed the victim, CAS, a single photograph of Roberson from Roberson's Facebook page. CAS identified the person in the photograph as the person who shot him. CAS also identified Roberson at the suppression hearing as the person who shot him. The circuit court determined that the out-of-court identification process was impermissibly suggestive and not reliable. Further, despite finding that CAS had a sufficient basis to identify the shooter from two prior meetings with him that lasted one-half hour each, the circuit court determined that the out-of-court identification tainted CAS's in-court identification of Roberson.

The circuit court erred. Because CAS had a prior relationship with Roberson, the officers' use of a single photograph to identify Roberson was not impermissibly suggestive. But even if it was, the identification was nonetheless reliable based on the totality of the circumstances, including CAS's two prior drug deals with Roberson as well as CAS's contact with Roberson immediately before and after the shooting.

Further, even if the circuit court properly excluded the out-of-court identification, the circuit court erred when it excluded the in-court identification. Based on its finding that CAS had a sufficient basis to identify Roberson based on two prior meetings that lasted approximately a half hour each, the circuit court should have found that CAS's in-court identification rested on an independent source that preceded his out-of-court identification of Roberson.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication as it involves the application of well-settled law to the facts of this case.

STATEMENT OF THE CASE

I. Statement of facts.

On January 20, 2017, Roberson allegedly shot CAS in Roberson's car after CAS told Roberson that another person robbed CAS of marijuana that CAS agreed to sell for Roberson. (R. 4:1–2.)

CAS's first meeting with Roberson. CAS stated that he met a person who went by the name "P" at Walmart toward the end of January 2017. (R. 35, A-App.116).[1] P tapped CAS on the shoulder and asked CAS if he "smoked." (A-App. 116.) CAS replied, "yes." P, who was attempting to obtain marijuana, asked CAS if he could get a "bag." CAS replied, "yes." (*Id.*) P gave CAS a ride in a tannish, gold colored Buick to go get marijuana. (A-App. 116–17.) CAS recalled that P was wearing a sweatshirt with work pants and that he had dreadlocks or cornrows. (A-App. 117.) After CAS helped P purchase marijuana, P drove CAS back to Walmart. CAS gave P his number. (*Id.*) This first meeting lasted a little longer than a half hour. (A-App. 126.)

P contacted CAS the following day because CAS was supposed to obtain more marijuana for P. (A-App. 117.) CAS told P that he could get marijuana, but was later unable to. (A-App. 118.)

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[1] The motion hearing transcript appears in the record at R. 35. The transcript as numbered in the record contains many numbered blank pages and the record page numbers do not reflect the actual page numbers in the transcript. For ease of viewing, the State incorporates a clean version of the transcript into its appendix and citation will be made to the version included in the appendix.

CAS's second meeting with Roberson. P contacted CAS the next day about getting marijuana for P. CAS texted P and said that he could get marijuana, but that P would have to wait until 7:00 p.m. after P got off of work. (A-App. 118.) P came over after 7:00 p.m. and picked up CAS and CAS's brother and sister. After they got the marijuana, P came into CAS's house and asked CAS to sell it for him. (A-App. 118.) P wanted CAS to sell it in "eighths." CAS could not but CAS did know someone who wanted a half ounce. (A-App. 118–19.) CAS described P as wearing a sweatshirt and workpants and having dreadlocks or cornrows in his hair. (A-App. 119.) The second meeting between CAS and P lasted a little longer than a half hour. (A-App. 126.) CAS was later robbed of the marijuana at gun point when he went to sell it. (A-App. 119, 126.)

CAS third meeting with Roberson. CAS texted P and told him that he had been robbed. P picked up CAS in the same car that P had picked up CAS at Walmart. (A-App. 120.) They drove toward the dog park. When P and CAS were talking, P fired a shot past CAS's head. (*Id*.) CAS and P then got into an altercation. P shot CAS in the leg. (*Id*.) P then asked CAS if he was going to tell anyone. CAS replied, "no," and asked P to take him home. (*Id*.) P took CAS home. (*Id*.) CAS stated that this meeting lasted between one and one-half hours to two hours. (A-App. 126.)

Law enforcement's identification of Roberson as the person referred to as P. Investigator Nathan Reblin of the Wisconsin Rapids Police Department learned from other unidentified people that a person who used the name P had shot CAS in the leg. (A-App. 127–29.) Reblin looked at CAS's Facebook page and observed text messages between CAS and someone identified as P. (A-App. 130.) Reblin identified a phone number associated with the person known as P.

Reblin then determined that that phone number was linked to Roberson's Facebook account. (A-App. 127–30.) Reblin saw a profile picture of Roberson on Roberson's Facebook page. (A-App. 132.)

Waupaca County Sheriff's Deputy Kevin Studzinski encountered Roberson on January 31, 2017 during a traffic related matter. (A-App. 138–39.) Studzinski observed a tan colored Buick in a ditch. (A-App. 139.) Roberson waited in Studzinski's squad while another deputy conducted a canine sniff of his car. (A-App. 140.) Roberson took Studzinski's picture while he was seated in a squad car. (A-App. 141.) Studzinski stated that his interaction with Roberson lasted approximately one hour. (A-App. 147.) The following day, Studzinski learned that Wisconsin Rapids was looking for Roberson's Buick. (A-App. 143.)

When Studzinski contacted Reblin, Reblin was aware that Roberson had been in the ditch and that there was a picture of a police officer on Roberson's Facebook. (A-App. 143.) Based on Reblin's information, Studzinski logged into Facebook and saw his picture on Roberson's Facebook page. (A-App. 143–44; R. 22:1.) Studzinski also stated that the person on Roberson's Facebook page is the person whom Studzinski identified in court as Roberson. (A-App. 146.)

CAS's identification of Roberson from Roberson's Facebook page. Approximately two weeks after he was shot, CAS was taken into custody on a probation hold. (A-App. 121–22.) After CAS was treated for wounds on his legs consistent with old gunshot wounds, he spoke with Reblin in the jail. (A-App. 133.) Before CAS identified Roberson as the person who shot him from Roberson's profile picture, CAS

and Reblin discussed the circumstances that led up to the shooting. (A-App. 133.)[2]

Reblin told CAS that he wanted to talk to him about being shot. (R. 19:09h:22m:50s–23m:20s.)[3] CAS stated that a black guy named "P" was involved. (R. 19:09h:23m:36s.) CAS explained that he met P at Walmart. P asked him if he had weed. (R. 19:09h:23m:43s.) CAS confirmed that he had never seen P before in his life. (R. 19:09h:27m:02s.) CAS stated that P told him that he had been trying to get a "bag" for about a week. (R. 19:09h:27m:31s.) CAS got weed for P the first time that they met. (R. 19:09h:23m:58s.)

When Reblin asked CAS about his phone, CAS explained that P bought him a phone. (R. 19:09h:25m:25s.) Reblin stated that he saw texts on that phone with a person named P. CAS confirmed that this was the phone that P gave him. (R. 19:09h:26m:15s.) CAS explained that the day that he first texted P is the day that he first met him. (R. 19:09h:26m:45s.)

CAS located the weed through another person whom CAS identified as "JD." (R. 19:09h:24m:38s.) CAS, JD, and P got the marijuana at another location. (R. 19:09h:27m:55s.) CAS described P's car as a gold Buick Century.

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[2] A DVD that includes Reblin's interview with CAS was marked and received as evidence at the suppression hearing. (A-App. 109–10.) The video is included as a physical record. (R. 19.) The State will cite to specific locations on the recording using the following format: (R. 19:00h:00m:00s). The video image includes a date stamp of February 2, 2017. The interview commenced at approximately 9:22 a.m. (R. 19:09h:22m:00s).

[3] The State provides these details from CAS recorded statement that preceded his identification of Roberson from the Facebook photograph for the purpose of demonstrating that CAS's out-of-court identification was reliable and that CAS's in-court identification of Roberson was based on a source independent of the out-of-court identification. *See* Sections I & II, below.

(R. 19:09h:28m:14s.) After they got the marijuana, P asked CAS to "hustle" it for him. (R. 19:09h:28m:25s.) CAS said that P paid $500 for it. (R. 19:09h:28m:40s.) P gave CAS some marijuana to sell. (R. 19:09h:28m50s.) CAS explained how a guy named Taylor robbed him of the marijuana. (R. 19:09h:29m:04s.) CAS called P and told him that he got robbed. P picked up CAS. They drove toward the dog park and P shot him. (R. 19:09h:30m:25s.) When P shot CAS, P stated "Why did you make me shoot you?" (R. 19:09h:31m:44s, 09h:36m:41s.) Before the shooting, CAS explained that P fired a shot past his head and that CAS punched him in the face, and then P shot him in the leg. (R.19:09h:31m:50s.) CAS described the gun as a .22 or .25. (R. 19:09h:32m:01s.)

During his conversations with P, CAS learned that P was from Milwaukee, had recently moved to the area (R. 19:09h:38m:59s), and that he had just got out of prison (R. 19:09h:39m:11s). P also told CAS that he would not be able to reach him until later in the night because P worked until 7:00 p.m. (R. 19:09h:39m:19s.)

Reblin asked CAS if he could identify the person who shot him. (A-App. 133.) CAS testified that he got a good look at the person who shot him and knew what the shooter looked like before officers showed him Roberson's picture. (A-App. 122.)

Detective Richter then showed CAS Roberson's Facebook profile picture. (A-App. 133–34.) CAS identified the person in the picture as the person who shot him. (A-App. 134.) CAS testified that the person depicted in the photograph that Reblin showed him was the person that CAS knew as P. (A-App. 124–25; R. 20.) Officers did not show CAS any other photographs. (A-App. 125.)

In the recording of Reblin's interview with CAS, Reblin asked CAS if he would recognize P if he saw him again. (R. 19:09h:39m:30s.) CAS replied, "possibly . . . black people kind of look . . ." while making a hand gesture that included opening his hand with his palm facing out and placing it back on his lap. (R. 19:09h:39m:34s.) An investigator then showed CAS his cell phone. (R. 19:09h:39m:41s.) CAS nodded his head. Reblin asked if that was him. CAS replied, "yep." (R. 19:09h:39m:43s.) Reblin asked CAS "100%?" CAS responded, "100%." (R. 19:09h:39m:51s.) After CAS identified P from the cellphone, Reblin and CAS continued to discuss CAS's contacts with P, the circumstances that led to the shooting, and possible court proceedings. (R. 19:09h:39m:55s–09h:57m:20s.)

Reblin did not believe that a photo array was necessary in this case. He explained that he had identified Roberson without CAS. (A-App. 134.) Further, while CAS knew Roberson by his nickname, CAS had more than "a one-time interaction with him." (A-App. 134–35.)

CAS in-court identification of Roberson. CAS identified Roberson as the person who shot him at the suppression hearing. CAS testified that he got a good look at the shooter and he knew what the shooter looked like before Reblin showed him the picture. (A-App. 122.)

II. Procedural history.

The State charged Roberson with first-degree reckless injury, contrary to Wis. Stat. § 940.23(1)(a). (R. 4:1.) Roberson subsequently moved to suppress CAS's and Studzinski's identification of Roberson. (R. 17:1.) Following an evidentiary hearing at which CAS, Reblin, and Studzinski testified (R. 35, A-App. 107–151), the parties briefed the issue (R. 24; 25).

In a written decision, the circuit court concluded that "[t]he chances that a misidentification occurred are unclear." (R. 28:3, A-App. 103.) The circuit court observed:

> [CAS] had every opportunity to observe the defendant at the time of the crime. They were seated in the front seat of a car together after the defendant had come and picked [CAS] up. They drove, but then stopped the car for their confrontation. [CAS]'s degree of attention is difficult to pinpoint. On the one hand, it is likely he was paying attention to the person in this physical confrontation who shot him. However, it is also likely that he was paying attention to the gun and the situation, as well as the robbery that had recently occurred to him. There was no prior description of the criminal to weigh in this case. The level of attention demonstrated by the witness at the confrontation was not significant here. The length of time between the crime and the confrontation in court was approximately two months. While not noted in those factors, it is also relevant at this state to consider [CAS]'s comment to the effect that African Americans look alike. The chances that a misidentification occurred are unclear.

(R. 28:2–3, A-App. 102–03.)

The circuit court further determined that "[CAS] had met 'P' twice before the shooting incident. These weren't meetings in passing; they lasted approximately a half hour each. This Court believes [CAS] has a sufficient basis to identify 'P' from those meetings." (R. 28:3, A-App. 103.)

Based on this record, the circuit court determined that Reblin's proffer of a single photograph of Roberson to CAS unnecessarily suggested Roberson's identification.

> The process is shaky, and the victim making the identification is likewise shaky, so the Court lacks confidence that the identification of "P" by [CAS] is not the result of showing the single photo to him. As such, [CAS]'s identification of [Roberson]'s photo and

> his later identification in court, tainted by his exposure to that photo, are suppressed.

(R. 28:4, A-App.104.) The circuit court suppressed both CAS's out-of-court and in-court identifications of Roberson. (*Id*.)

The circuit court denied Roberson's motion to suppress Studzinski's identification of him. (R. 28:5–6, A-App. 105–06.)

The State appeals.

STANDARD OF REVIEW

This Court applies a two-step analysis when it reviews a motion to suppress to suppress an out-of-court or in-court identification. First, it will uphold the circuit court's factual findings unless they are clearly erroneous. *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582. "[W]hen evidence in the record consists of disputed testimony and a video recording, [this Court] will apply the clearly erroneous standard of review when reviewing the trial court's findings of fact based on that recording." *State v. Walli*, 2011 WI App 86, ¶ 17, 334 Wis. 2d 402, 799 N.W.2d 898.[4] Second, this

[4] In *State v. Jimmie R.R.*, 2000 WI App 5, 232 Wis. 2d 138, 606 N.W.2d 196, this Court applied a de novo standard of review when "the only evidence" on the issue being decided was "the videotape itself." *Id*. ¶ 39. Because the circuit court's decision here did not turn solely on its review of the video tape, the State believes that this Court should apply the deferential "clearly erroneous" standard. If this Court believes that a conflict exists between *Walli* and *Jimmie RR* with respect to the applicable standard of review when this Court reviews video evidence in the record, the State nonetheless asks the Court to apply the deferential standard to resolve this appeal as the State believes that it will prevail under either standard.

Court independently applies the relevant constitutional principles to these facts. *State v. Roberson*, 2006 WI 80, ¶ 25, 292 Wis. 2d 280, 717 N.W.2d 111.

ARGUMENT

I. The officers' decision to present a single photograph of Roberson to CAS did not violate Roberson's due process rights.

A. Legal principles.

An out-of-court identification procedure implicates a defendant's due process rights. *State v. Drew*, 2007 WI App 213, ¶ 12, 305 Wis. 2d 641, 740 N.W.2d 404. Specifically, "[i]t is the likelihood of misidentification which violates a defendant's right to due process . . ." *Neil v. Biggers*, 409 U.S. 188, 198 (1972). While the Supreme Court "condemned" "unnecessarily suggestive" out-of-court confrontations, it declined to adopt a strict rule requiring their exclusion. *Id.* The court subsequently characterized the exclusion of an otherwise reliable identification despite an unnecessarily suggestive identification procedure as a "Draconian sanction." *Manson v. Brathwaite*, 432 U.S. 98, 113 (1977). Instead, "reliability is the linchpin" in determining the admissibility of identification testimony. *Id.* at 114. The question is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Biggers*, 409 U.S. at 199.

In determining whether to admit an out-of-court identification, Wisconsin courts have traditionally applied a two-part test. First, the defendant has the burden of establishing that the witness' out-of-court identification resulted from an impermissibly suggestive procedure. Second, if the defendant meets this burden, then the State must prove that the identification was nonetheless reliable

under the totality of the circumstances. *Powell v. State*, 86 Wis. 2d 51, 66, 271 N.W.2d 610 (1978). This Court has applied this two-part test when a defendant alleges that an out-of-court photographic identification is impermissibly suggestive. *Drew*, 305 Wis. 2d 641, ¶ 13.[5]

Courts consider several factors when they assess the reliability of an out-of-court identification procedure. These factors include the witness's opportunity "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." *Biggers*, 409 U.S. at 199–200; *see also Powell*, 86 Wis. 2d at 65.

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[5] The Wisconsin Supreme Court has historically applied this two-part test for assessing the admissibility of out-of-court identifications based on the standards that the U.S. Supreme Court articulated in *Biggers* and *Brathwaite*. *See State v. Wolverton*, 193 Wis. 2d 234, 264–65, 533 N.W.2d 167 (1995). In *Dubose*, the Wisconsin Supreme Court adopted a different standard for assessing whether to admit an out-of-court identification that involved an in-person showup. "We hold that evidence obtained from such a showup will not be admissible unless, based on the totality of the circumstances, *the showup was necessary*." *Dubose*, 285 Wis. 2d 143, ¶ 2 (emphasis added). The supreme court adopted this "necessity" standard based on Article I, Section 8 of the Wisconsin Constitution. *Dubose*, 285 Wis. 2d 143, ¶¶ 36, 39. This Court subsequently determined that *Dubose* necessity standard is limited to in-person police showups and does not apply to out-of-court identifications based on photographs. *Drew*, 305 Wis. 2d 641, ¶ 19. Instead, the standard articulated in *Powell* for assessing the admissibility of an out-of-court identification continues to apply to out-of-court identifications based on photographs. *Id.* ¶¶ 20–22.

Courts have extended the standards articulated in *Biggers* for assessing the reliability of a line-up to out-of-court identifications based on a single photograph. *Manson*, 432 U.S. at 114. This Court has stated that an identification based on a single photo identification is "not per se impermissibly suggestive." *State v. Hall*, 196 Wis. 2d 850, 879, 540 N.W.2d 219 (Ct. App. 1995), *reversed on other grounds*, 207 Wis. 2d 54, 557 N.W.2d 778 (1997) (citation omitted). "A single photo identification is not to be presumed guilty until proved innocent." *Kain v. State*, 48 Wis. 2d 212, 219, 179 N.W.2d 777, 782 (1970). Rather, a court should determine whether an out-of-court identification is inadmissible on a case-by-case basis. *Id.* The question is whether the photographic identification procedure was so impermissibly suggestive as to give rise to substantial likelihood of misidentification. *Id.*[6] As the supreme court explained, a rule that requires each case to be considered on its own facts under this standard "stops far, far short of rendering all [single] photo identifications inadmissible or ipso facto 'impermissibly suggestive.'" *Id.*

[6] In *Kain*, the supreme court used the word "irreparable" to qualify the word "misidentification." *Kain*, 48 Wis. 2d at 219. In *Biggers*, the Supreme Court removed the word "irreparable." It explained: "While the phrase [irreparable misidentification] was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself." *Biggers*, 409 U.S. at 198.

B. CAS's single photo identification of Roberson was not impermissibly suggestive and was reliable under the totality of the circumstances.

1. The circuit court made certain erroneous factual findings that colored its decision.

Here, the circuit court made factual findings concerning the circumstances related to the officers' use of a single photograph to identify Roberson. The circuit court found that when the officer "showed [CAS] a single color photo of the defendant . . . The Detective told [CAS] it was a photo of Stephen I. Roberson and that they believed that was the person who shot him. [CAS] didn't know who that person was." (R. 28:2, A-App. 102.) Based on these factual findings, the circuit court framed the issue as: "The question for the Court, finally, is, did Reblin's proffering of a single photo of the defendant to [CAS] while telling [CAS] that this was the person they thought shot him unnecessarily suggest an identity and is conducive to mistaken identification?" (R. 28:4, A-App. 104.)

The circuit court's factual findings appear to be based on CAS's suppression hearing testimony:

> Q. [Roberson's counsel] Did they show you anybody else's photographs?
>
> A. [CAS] No.
>
> Q. Before they showed you those photographs, did they ask you . . . if you would be able to recognize P from a photograph they were about to show you?
>
> A. Yes.
>
> Q. So they told you the photograph they were about to show you was P?

A. No, they told me it was Stephan I Roberson, which I told them I didn't know who that was.

Q. Okay, and they told you that that was the person they think shot you?

A. Yes.

Q. And when they asked you that question, your response was essentially that black people kind of look alike to you; is that right?

A. I guess, I don't recall what I said.

(A.-App. 125.)

However, Reblin's actual statements, as recorded in his video interview with CAS, contradicted CAS's recollection of the circumstances surrounding CAS's out-of-court identification of Roberson. Before the out-of-court identification, Investigator Reblin used the nickname P or pronouns rather than Roberson's name when he spoke to CAS. (*See, e.g.,* R. 19:09h:39m:00s.) Before officers showed CAS Robinson's photograph, Reblin asked CAS, "If you saw him again would you recognize him?" (R. 19:09h:39m:30s.) CAS replied, "possibly . . . [unintelligible] . . . I mean black people kind of look . . . [unintelligible]." (R. 19:09h:39m:34s.) Reblin asked Richter if he had "that picture for him?" (R. 19:09h:39m:39s.) Richter then showed CAS his cellphone. (*Id.*) The officers did not tell CAS that they were going to show him a photograph of the person who shot him or refer to the person in the photograph as Stephen Roberson. The circuit court's finding that the officers told CAS that they were showing him a picture of the person who shot him was clearly erroneous and colored the circuit court's analysis of Roberson's claim.

The circuit court also stated that "[CAS] is clearly unsure of the characteristics of African Americans." (R. 28:4, A-App. 104.) The circuit court based this determination on

CAS's testimony in which he described P's hairstyle as "the dreadlocks or the corn rows." (A-App. 119.) The circuit court stated that these "very different hairstyles [] further indicate [CAS] is unfamiliar with African American characteristics." (R. 28:3, A-App.103.) The circuit court's analysis assumed an incompatibility between the two hairstyles, that is, a person would wear either locs[7] or cornrows. Roberson's photograph, although not of high quality, shows him wearing what looks like cornrows with short locs at the back of his head. (R. 20.) Thus, even if CAS inarticulately used "or" rather than "and," he described Roberson's hairstyle.

Finally, the manner in which the circuit court framed the legal question raises a question about whether it applied the correct legal standard. The circuit court asked, "[D]id Reblin's proffering of a single photo of the defendant to [CAS] while telling [CAS] that this was the person they thought shot him unnecessarily suggest an identity and is conducive to mistaken identification?" (R. 28:4, A-App. 104.) It then went on to describe the process as "shaky" and suppressed both the out-of-court and in-court identification. (*Id.*) But the standard is not whether an out-of-court identification process is "shaky" or "conducive to mistaken identification." Rather, a circuit court must assess an out-of-court identification, first to determine whether it was "impermissibly suggestive," and second to determine if it was "reliable." *Powell,* 86 Wis. 2d at 66.

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[7] "Locs" replaces the "somewhat negative term 'dreadlocks,' locs is a hairstyle where the hair that one would normally comb or shed locks on itself, creating ropelike strands." *See* https://www.liveabout.com/locs-or-locks-400267 (last viewed December 4, 2017.)

As the State will demonstrate in the next sections, the out-of-court identification procedure was not impermissibly suggestive. But even if it was, it was still reliable under the totality of the circumstances.

2. The out-of-court identification procedure was not impermissibly suggestive.

Roberson did not meet his burden of establishing that CAS's out-of-court identification resulted from an impermissibly suggestive procedure. The fact that CAS identified Roberson from a single photograph alone does not render the out-of-court identification procedure impermissibly suggestive under the facts of this case.

First, Roberson's photograph itself was not impermissibly suggestive. Detective Richter used his cell phone to show CAS a single photograph of Roberson. (R. 19:09h:39m:41s.) Reblin testified that Exhibit 2 was a picture from Roberson's Facebook page. (A-App. 133.) CAS testified that Exhibit 2 was the photograph that Detective Richter showed him and that it was a photograph of the person known to him as P. (A-App. 124.)[8] Unlike a mugshot, which carries with it the implicit suggestion that the person depicted has been arrested or convicted of a crime, Exhibit 2 does not exhibit this type of suggestibility. Instead, it shows Roberson dressed in a dress shirt, bow tie, suspenders, and sunglasses. (R. 20.)

[8] While Exhibit 2 is a black and white photograph, the record reflects that the officers showed CAS a colored version of the photograph. (A-App. 123, 134; R. 20.) Exhibit 2 is a black and white version of a colored photograph that appears on Roberson's Facebook page, which was marked and received as Exhibit 3. (R. 21:1.)

Second, the manner in which the officers presented CAS with Roberson's Facebook photograph was not impermissibly suggestive. Before presenting CAS with Roberson's photograph, Reblin spoke to CAS for over fifteen minutes about Roberson's initial introduction to CAS, the drug deals that CAS arranged for Roberson, and the shooting. (R. 19:09h:22m:50s–19:09h:39m:30s.)

Then, after speaking to CAS about his prior relationship with the person CAS knew as P and the shooting, Reblin asked CAS, "If you saw him again would you recognize him?" (R. 19:09h:39m:30s.) CAS replied, "possibly . . . [unintelligible] . . . I mean black people kind of look . . . [unintelligible]." (R. 19:09h:39m:34s.) Richter used his cellphone to show CAS Roberson's photograph. (R. 19:09h:39m:41s.) CAS appeared to affirmatively nod his head. Reblin asked CAS, "that's him?" CAS replied, "yep." (R. 19:09h:39m:43s.) Reblin asked CAS, "100%?" CAS responded, "100%." (R. 19:09h:39m:51s.) After CAS identified P from the cellphone, Reblin and CAS continued to discuss CAS's contacts with P, the circumstances that led to the shooting, and possible court proceedings. (R. 19:09h:39m:55s–09h:57m:20s.)

The manner in which the officers presented Roberson's photograph to CAS was not impermissibly suggestive. Based on their preliminary conversation with CAS, the officers knew that CAS had a previous relationship with Roberson, whom CAS knew as P. (A-App. 134–35.) The officers were not asking CAS to identify a stranger who had assaulted him, but to confirm the shooter's identity. In cases "in which the protagonists are known to one another," one court has recognized that "'suggestiveness' is not a concern." *People v.*

Gissendanner, 399 N.E.2d 924, 930 (N.Y. 1979).[9] Further, the officers did not make improper comments or engage in improper activities during the out-of-court identification process. *See Foster v. State*, 348 S.W.3d 158, 162 (Mo. Ct. App. 2011) ("Missouri cases have recognized that the showing of a single photograph of a defendant to a witness where there is no improper comment or activity on the part of the officer showing the photograph does not result in impermissible suggestiveness."). Here, where CAS met with Roberson on at least two occasions for approximately one-half hour each in the days preceding the shooting, the officer's use of a single photograph to confirm Roberson's identity with CAS was not impermissibly suggestive.

The supreme court's reasoning in *Kain* suggests that a witness's prior familiarity with a defendant is a basis for determining that a single photograph identification was not impermissibly suggestive. In *Kain*, the defendant drank beer at a tavern and then asked an employee, who had previously seen the defendant at the tavern, for a case of beer. After the employee left the bar area to get the beer, she heard a thump. She exited the bar's side door and placed the case outside. The defendant, who was leaving the tavern in a hurried way, told the employee that he had placed the money on the counter, picked up the beer, and left. The employee later discovered money missing from a cigar box. *Kain*, 48 Wis. 2d at 214. Officers showed the employee a

[9] Other courts have also determined that a single photo identification is not impermissibly suggestive when the victim identifies an assailant previously known to him or her. *See, e.g., Neukam v. State*, 934 N.E.2d 198, 201 (Ind. 2010); and *State v. Liverman*, 727 S.E.2d 422, 427 (S.C. 2012) ("The suggestive nature of a show-up is mitigated by the witness's prior knowledge of the accused.").

single photograph of the defendant. The supreme court determined that there was no basis to object to the photo identification on the ground that it was impermissibly suggestive in part because the employee recognized the defendant as someone whom she had previously seen at the tavern. *Id*. at 219–20.

Like the victim in *Kain*, CAS knew Roberson, albeit by street name "P," before the shooting. Based on the record, the circuit court appropriately found that CAS met P twice before the shooting. "These weren't meetings in passing; they lasted approximately a half hour each." (R. 28:3, A-App. 103.) The shooting occurred during a third meeting after P picked up CAS after CAS was robbed of the marijuana that CAS agreed to sell for P. This meeting lasted approximately one and a half hours. (R. 28:1–2, A-App. 101–02.)

The officers' presentment of a single photograph to a person who knew Roberson from prior contacts that cumulatively exceeded two hours was not impermissibly suggestive.

3. CAS's out-of-court identification of Roberson was reliable under the totality of the circumstances.

Even if CAS's out-of-court identification of Roberson was the product of an impermissibly suggestive procedure, it was still reliable under the totality of the circumstances.

CAS had a significant opportunity to view Roberson before, during, and after the commission of the crime. Just days before the shooting, Roberson introduced himself to CAS at Walmart as P. Roberson asked CAS if he could obtain marijuana for him. CAS then got into Roberson's gold Buick and went to another location to obtain marijuana. The

meeting lasted approximately one-half hour. (R. 28:1, A-App. 101.) They exchanged phone numbers, communicating the following day about obtaining marijuana. (*Id.*) The next day, Roberson met with CAS, who had located marijuana for Roberson. During this meeting, which lasted approximately a half hour, CAS agreed to sell marijuana for Roberson. (*Id.*)

While Roberson did not provide his name to CAS, Roberson made no effort to conceal his identity. CAS and P exchanged phone numbers and texted with one another. (R. 28:1, A-App. 101; 19:09h:25m:25s–09h:26m:45s.) Roberson shared information about himself with CAS, saying he was from Milwaukee, had recently moved to the area (R. 19:09h:38m:59s), and had just got out of prison (R. 19:09h:39m:11s). CAS also learned that Roberson was not available until later in the evening because of Roberson's work schedule. (R. 19:09h:39m:19s.)

CAS met with Roberson a third time after CAS told Roberson that he had been robbed. Roberson picked up CAS and they drove to the dog park. Roberson stopped the car and produced a handgun. Roberson fired past CAS's head. CAS then punched Roberson in the face, who responded by shooting CAS in the leg. Roberson took CAS home after the shooting. (R. 28:1–2, A-App. 101–02.)

While the circuit court recognized that CAS "was paying attention to the person in this physical confrontation who shot him[,]" it also commented that it was "also likely that [CAS] was paying attention to the gun and . . . the robbery that recently occurred to him." (R. 28:3, A-App. 103.) But the shooting itself was not the product of a brief, momentary encounter between two strangers. The circuit court found that the meeting between Roberson and CAS at which the shooting occurred lasted an hour and a half to two hours. (R. 28:2, A-App. 102.) The circuit court's decision

places almost no weight on the fact that Roberson picked up CAS after CAS called Roberson to tell him that he had been robbed, that they drove to the dog park together, and that Roberson drove CAS home after CAS got shot. (A-App. 119–120.) After he shot CAS, Roberson rhetorically asked him, "Why did you make me shoot you?" (R. 19:09h:31m:44s, 09h:36m:41s.) CAS had three encounters with Roberson that allowed CAS to make a reliable out-of-court identification of Roberson.

The other *Biggers'* factors also support the conclusion that CAS's identification of Roberson was reliable. A relatively short period of time elapsed between the shooting and CAS's identification of Roberson. CAS testified that the shooting occurred in late January. (A-App. 116.) The circuit court determined CAS was taken into custody approximately two weeks after the shooting. (R. 28:2, A-App. 102.) CAS identified Roberson on February 2, 2017 while he was in custody. (R. 19:09h:39m:40s.)

CAS demonstrated a high level of certainty in his out-of-court identification of Roberson. In the video, when Richter showed him Roberson's Facebook picture, CAS appeared to immediately and affirmatively nod his head. Reblin asked if that was him. CAS replied, "yep." (R. 19:09h:39m:43s.) Reblin asked CAS, "100%?" CAS responded, "100%." (R. 19:09h:39m:51s.)[10]

[10] As part of its totality of the circumstances assessment under *Biggers*, 409 U.S. at 198, the circuit court found that CAS did not provide a prior description of the shooter. (R. 28:2, A-App. 102.) This finding is not clearly erroneous. While CAS recalled what the shooter was wearing during their prior meetings and his hair style (A-App. 117, 119), the record does not suggest that officers requested or that CAS offered a detailed physical description of the person he knew as P and whom CAS claims shot him.

Based on the totality of the circumstances, including most importantly, the significant time that CAS spent with Roberson before, during, and after the shooting, CAS's out-of-court identification of Roberson was reliable. Prior precedent supports this conclusion.

In *Manson*, an undercover officer identified Manson as the person who sold him narcotics from a single photograph. The undercover officer testified that he stood at the door within two feet of the respondent for two to three minutes. *Manson*, 432 U.S. at 114. Based on the undercover officer's description, another officer left Manson's photograph on the undercover officer's desk. The undercover officer identified Manson as the dealer *Id*. at 101. Applying the *Biggers'* analysis, the Supreme Court determined that there was not a "very substantial likelihood of irreparable misidentification" under all of the circumstances of the case. *Id*. at 116 (citation omitted).

In *Hall*, an undercover officer purchased cocaine on two occasions from the defendant, who used an alias. *Hall*, 196 Wis. 2d at 858. During the first transaction, the undercover officer had an opportunity to see Hall for two or three minutes from 15 to 20 feet away. *Id*. at 879–80. After the first transaction, a fellow officer showed the undercover officer a picture of Hall and asked if he recognized the person in the photograph. The undercover officer identified Hall as the person from whom he had purchased the cocaine the previous evening. *Id*. at 859. While the undercover officer could not identify any particular feature of Hall, it was "evident" to the officer that the person in the photograph was the same person. *Id*.

In contrast to the undercover officers in *Manson* and *Hall* who only had only a few minutes to view the dealers, CAS spent over two hours with Roberson. On two occasions before the shooting, they discussed and consummated drug

deals and talked about other topics, as well, including Roberson's background. During their meetings which lasted a half hour each, they quickly developed a potentially mutually advantageous relationship facilitating drug deals. CAS recalled the car that Roberson drove, the clothing he wore, and other information about Roberson's background, including his release from prison, his move from Milwaukee, and his work schedule. Then, Roberson and CAS spent at least an hour and a half together on a third occasion when the shooting occurred. CAS's prior contacts with Roberson, level of certainty, and the short period between the shooting and identification support the conclusion that CAS's out-of-court identification was reliable under the totality of the circumstances. Based on this record, the circuit court erred when it suppressed CAS's out-of-court identification based on a single photograph.

II. Even assuming that CAS's out-of-court identification of Roberson was impermissibly suggestive and unreliable, the out-of-court identification process did not taint CAS's in-court identification of Roberson.

A. Legal principles.

Evidence must be suppressed as a fruit of the poisonous tree when the evidence is obtained through the exploitation of an illegality. *Roberson*, 292 Wis. 2d 280, ¶ 32. But the exclusionary rule "*does not reach backward to taint information that was in official hands prior to any illegality*." *Id.* ¶ 33 (citation omitted, emphasis in original).

"The admissibility of an in-court identification depends upon whether that identification evidence has been tainted by illegal activity." *Roberson*, 292 Wis. 2d 280, ¶ 32. A court will set aside a conviction based on an eyewitness identification at trial that followed a pretrial identification

by photograph "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Powell*, 86 Wis. 2d at 64, *quoting Simmons v. United States*, 390 U.S. 377, 384 (1968). Thus, a circuit court may still admit the in-court identification if it determines that the witness's in-court identification is based on an independent source. *Roberson*, 292 Wis. 2d 280, ¶ 34. "[T]he in-court identification must rest on an independent recollection of the witness's initial encounter with the suspect." *Id.* ¶ 34.

The State must prove by clear and convincing evidence that the in-court identification was based on the witness's observations of the defendant that were independent of and preceded the improper out-of-court identification process. *Id.* ¶¶ 35, 68.

In determining whether an in-court identification is sufficiently removed from the primary taint, i.e., the tainted out-of-court identification process, Wisconsin courts have applied the seven factors identified in *United States v. Wade*, 388 U.S. 218, 242 (1967). *Roberson*, 292 Wis. 2d 280, ¶ 35, n.14 (citations omitted.) These factors include:

> (1) the prior opportunity the witness had to observe the alleged criminal activity; (2) the existence of any discrepancy between pre-lineup description and the accused's actual description; (3) any identification of another person prior to the lineup; (4) any identification by picture of the accused prior to the lineup; (5) failure to identify the accused on a prior occasion; (6) the lapse of time between the alleged crime and the lineup identification; and (7) the facts disclosed concerning the conduct of the lineup.

Id. ¶ 35, n.14 (citations omitted.)

The absence of a prior relationship between a witness and a defendant does not foreclose a witness's in-court identification. In *Rozga v. State*, 58 Wis. 2d 434, 206 N.W.2d

606 (1973), a victim was allowed to provide an in-court identification based on her observation of her assailant during the attack even though the police conducted an improper out-of-court identification procedure. The supreme court determined that the victim's identification was permissible because it was based "on her own personal knowledge and observation at the time of the offense." *Id.* at 443.

In *State v. Mosley*, 102 Wis. 2d 636, 307 N.W.2d 200 (1981), a robbery victim testified that his in-court identification of a defendant, who was masked, was based on the defendant's face, as seen through a stocking, and body build, as opposed to any tattoos that the witness observed during a potentially impermissibly tainted out-of-court identification procedure. The supreme court held that the witness's in-court identification "was sufficiently independent of the photo-identification to avoid any taint." *Id.* at 656.

Courts in other jurisdictions have concluded that a witness's prior familiarity with a defendant establishes a sufficient independent basis for an in-court identification and counters any tainted out-of-court identification. *See Commonwealth v. Ali*, 10 A.3d 282, 303 (Pa. 2010). Cases recognizing a "confirmatory identification exception" rest on the rationale that when an eyewitness knew the witness before the crime occurred, "it would be less likely that the police procedure would be unduly suggestive and that the judicial identification would be tainted." *Simons v. State*, 860 A.2d 416, 422 n.1 (Md. App. 2004) (citing cases). In determining whether a witness was "impervious to suggestion," courts consider several factors including the "details of the extent and degree of the protagonists' prior relationship, their encounters, and how they knew one another." *People v. Graham*, 725 N.Y.S.2d 145, 148 (N.Y. App. Div. 2001).

The Wisconsin Supreme Court "has applied the *Wade* test to determine the admissibility of in-court identifications subsequent to lineups that violated the accused's Sixth Amendment right to counsel." *State v. McMorris*, 213 Wis. 2d 156, 168, 570 N.W.2d 384 (1997). It has also applied the *Wade* test to out-of-court identifications such as show-ups that do not violate the Sixth Amendment, but were obtained through a procedure that violated due process, *Dubose*, 285 Wis. 2d 143, ¶ 43, or was purportedly tainted by an illegal arrest. *Roberson*, 292 Wis. 2d 280, ¶ 35, n.14.

B. Because CAS's in-court identification rests on an independent ground that precedes the challenged out-of-court identification, the circuit court erred when it suppressed CAS's in-court identification.

Here, the circuit court determined that CAS had a "sufficient basis to identify 'P'" from two meetings before the shooting, which "lasted approximately a half hour each." (R. 28:3, A-App. 103.) Despite this finding and without applying the proper legal standards for assessing whether CAS's in-court identification had an independent source, the circuit court erroneously concluded that CAS's out-of-court identification of Roberson tainted CAS's in-court identification. (R. 28:3, A-App. 103.) [11]

[11] At the suppression hearing, CAS identified Roberson as the person who shot him and who went by the name "P." (A-App 122–23.) The State's position is that neither CAS's in-court identification of Roberson at the suppression hearing nor his anticipated in-court identification of Roberson at trial was the product of a tainted out-of-court identification procedure.

Applying the factors for assessing the reliability of an in-court identification, *Roberson*, 292 Wis. 2d 280, ¶ 35, n.14,[12] CAS's in-court identification was based on a source independent of his out-of-court identification. First, and most significantly, CAS had a significant opportunity to observe Roberson before, during, and after the shooting. CAS spent approximately one-half hour on each of two occasions in the days before the shooting with Roberson. He also spent at least an hour and a half with him on the third occasion when he was shot, not only picking CAS up before the shooting, but giving him a ride home after the shooting. (R. 28:1–2, A-App. 101–02.)

Further, CAS did not identify anyone other than Roberson as the person who shot him. CAS also did not fail to identify Roberson when given an opportunity to do so. At most, only two weeks lapsed between the shooting and CAS's identification of Roberson, not a significant lapse of time. Based on the video recording of the out-of-court identification, the officers did not engage in inappropriate behavior to encourage CAS to identify Roberson. Reblin, without referring to Robinson by name, merely asked CAS if he would be able to identify the person who shot him if he saw "him" again. Richter showed CAS Roberson's Facebook photograph on a cellphone. The officers did not tell CAS that this was the shooter. (R. 19:09h:39m:40s.) While the officers did not ask CAS to provide him with a detailed physical

[12] The *Wade* factors presume that the out-of-court identification was based on a line-up. *Roberson*, 292 Wis. 2d 280, ¶ 35, n.14. Not all of these factors squarely work when the out-of-court procedure involved the use of photographs or an in-person showup. But courts have determined that *Wade* applies in assessing whether an independent source supports an in-court identification. *See Dubose*, 285 Wis. 2d 143, ¶ 38.

description of Roberson before showing CAS Roberson's photograph, the failure to obtain this description is but one factor in the analysis.

Based primarily on CAS's extensive interaction with Roberson before the shooting, CAS's in-court identification was based on an independent source. CAS's brief viewing of Roberson's Facebook profile picture did not give rise to a substantial likelihood that CAS's out-of-court identification of Roberson tainted his in-court identification.

The admission of CAS's in-court identification rests on a stronger independent basis than the in-court identifications than the supreme court previously upheld. *See Rozga*, 58 Wis. 2d 434, and *Mosley*, 102 Wis. 2d 636. If the supreme court has upheld in-court testimony in cases where the witnesses only had a limited opportunity to view their assailants under stressful conditions, the circuit court should have found an independent basis for CAS's in-court identification of Roberson based on CAS's past meetings with Roberson. CAS spent considerable time with Roberson under other than stressful circumstances. CAS twice rode with Roberson in his car when they went to purchase marijuana. They also texted with each other. Roberson was sufficiently confident in his relationship with CAS that he asked CAS to sell marijuana for him. CAS's viewing of Roberson's Facebook photograph simply did not taint his in-court identification of Roberson.

Based on the totality of the circumstances, an independent source supported CAS's in-court identification of Roberson. Even if the circuit court properly excluded CAS's out-of-court identification of Roberson, it erred when it excluded CAS's in-court identification of Roberson.

CONCLUSION

The State respectfully requests this Court to reverse the circuit court's order granting Roberson's motion to suppress CAS's out-of-court identification and in-court identification of him.

Dated this 22nd day of December, 2017.

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 7,877 words.

_____
DONALD V. LATORRACA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

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 22nd day of December, 2017.

_____
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Assistant Attorney General

Appendix
State of Wisconsin v. Stephan I. Roberson
Case No. 2017AP1894-CR

Description of document	Page(s)
State of Wisconsin v. Stephan I. Roberson, No. 2017CF0076, Wood County Circuit Court Decision, dated August 4, 2017	101–106
Transcript of Motion Hearing held March 23, 2017	107–151

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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 by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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DONALD V. LATORRACA
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I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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