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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 REPLY BRIEF

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ARGUMENT

I. The *Dubose*[1] necessity standard does not apply to the witness's out-of-court identification from a single photograph.

Roberson's assumes that *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, established the applicable test for deciding whether to suppress a witness's identification from a single photograph. (Roberson's Br. 5.) He challenges the State's assertion that *Dubose* is limited to in-person police showups and does not extend to photographic identifications. (Roberson's Br. 12, citing State's Br. 12, n.5.)

The State disagrees. Reliability as assessed under an impermissibly suggestive standard, not *Dubose's* necessity standard, guides the admissibility of out-of-court identifications based on photographs, including a single photograph. (State's Br. 11–13.)

In *Dubose*, the supreme court held that an identification obtained from a "showup will not be admissible unless, based on the totality of the circumstances, the showup was necessary." *Dubose*, 285 Wis. 2d 143, ¶ 2. A showup is unnecessary "unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array." *Id*. Said another way, under "*Dubose,* identification evidence resulting from an 'unnecessary' showup is suppressed as inherently too suggestive, without any separate fact-based inquiry into suggestiveness or reliability." *State v. Hibl*, 2006 WI 52, ¶ 26, 290 Wis. 2d 595, 714 N.W.2d 194.

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

But *Dubose* did not treat a photographic identification as a showup. In *Dubose*, the supreme court defined a showup as "an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes." *Dubose*, 285 Wis. 2d 143, ¶ 1, n.1 (citations omitted). Later, in reviewing the record, the court differentiated the witness's identifications of Dubose based on two showups and another identification of Dubose based on a photograph. The court characterized the on-the-street identification procedure, as "the first showup." *Id.* ¶¶ 9, 37. It also identified a second showup: the identification procedure in which "Hiltsley identified Dubose, alone in a room, through a two-way mirror." *Id.* ¶ 10, 14 (referring to this procedure as "the second showup"). In contrast, the court declined to characterize the identification of Dubose from a photograph as a showup. It wrote that "the police still conducted two more identification procedures [after the first showup], another showup and *a photo of Dubose at the police station shortly after Dubose's arrival*." *Id.* ¶ 37 (emphasis added). And when it discussed the shortcomings of the photographic identification, the court maintained this distinction between the showups and the photographic identification: "While our focus is on the *two showups* that occurred here, the *photo identification* by showing Hiltsley a mug shot of Dubose, was also unnecessarily suggestive. . . ." *Id.* ¶ 37 (emphasis added). The court's discussion of the three identifications demonstrates that it intended to maintain a distinction between in-person showups and a photographic identification based on a single photograph.

Further, when the supreme court adopted the "necessity" standard for assessing the admissibility of a showup identification, it effectively abrogated the "impermissibly suggestive" standard applied in prior cases to assess the admissibility of an out-of-court showup identification based on reliability. *Id.* ¶ 33, n.9. Each case that

the court cited involved in-person showups and not photographic identifications. *Id.*[2]

While the third identification of Dubose consisted of the witness's identification of him from a mugshot, the supreme court did not announce a new rule that a single photograph identification is *per se* impermissibly suggestive and subject to *Dubose*'s necessary standard. It did not overrule prior decisions that required lower courts to consider each case related to the admissibility of a single photograph identification "on its own facts." *Kain v. State*, 48 Wis. 2d 212, 219, 179 N.W.2d 777 (1970). It also did not withdraw language from other decisions that followed *Kain* and rejected the suggestion that presenting even a single photograph to a witness was *per se* impermissibly suggestive.[3] Because the supreme court did not expressly overrule the standard

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[2] *See State v. Wolverton,* 193 Wis. 2d 234, 246, 533 N.W.2d 167 (1995) (citizens identified Wolverton seated in squad car); *State v. Streich,* 87 Wis. 2d 209, 212, 274 N.W.2d 635 (1979) (witness identified Streich at police station in hallway and through one-way glass door); and *State v. Kaelin,* 196 Wis. 2d 1, 11, 538 N.W.2d 538 (Ct.App.1995) (witness identified Kaelin at crime scene after he was removed from squad car).

[3] *See, e.g., Dozie v. State*, 49 Wis. 2d 209, 213–14, 181 N.W.2d 369 (1970) ("If the first picture exhibited had been identified by the witness as that of the holdup man, no others would be required to be exhibited. No element of per se suggestiveness is provided by the fact of the singleness of the showing."); *State v. McGee*, 52 Wis. 2d 736, 744, 190 N.W.2d 893 (1971) ("This court has held that the rule of *Simmons v. United States*, [390 U.S. 377 (1968)], does not render all single photo identifications either inadmissible or ipso facto 'impermissibly suggestive,' nor does it require a pictorial simulation of a police lineup."); *Holmes v. State*, 59 Wis. 2d 488, 498, 208 N.W.2d 815 (1973) (same, in a single photograph identification case); and *State v. Myren*, 133 Wis. 2d 430, 443, 395 N.W.2d 818 (Ct. App. 1986) (applying *Kain* standard requiring each case to be considered on its own fact to a single photograph identification).

developed in *Kain* and applied in subsequent decisions for assessing the admissibility of a single-photograph identification, this Court should apply the standards articulated in *Kain* and not *Dubose* in deciding Roberson's case. *See Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997) (this Court is bound by controlling precedent unless the supreme court overrules, modifies, or withdraws language from its prior decisions or a published decision of this Court).

Roberson challenges the State's reliance on *State v. Drew*, 2007 WI App 213, 305 Wis. 2d 641, 740 N.W.2d 404, for the proposition that the *Debose* necessary standard is limited to showups and does not apply to single-photograph identifications. (Roberson's Br. 12–13; State's Br. 12, n.5.) For two reasons, the State contends that it correctly interpreted and applied this Court's decision in *Drew*. First, the supreme court's differentiation between a showup identification and single-photograph identification in *Dubose* demonstrates that the supreme court understood that the two procedures are fundamentally different. Second, the supreme court's decision in *Dubose* did not modify, withdraw, or overrule the standard that the supreme court and this Court had applied in *Kain* and other cases to the review of a single-photograph identification.

Should this Court determine that the *Dubose* standard applies to the single-photograph identification used in Roberson's case, the State contends that the supreme court wrongly decided *Dubose* for the reasons that Justice Wilcox and Justice Rogensack articulated in their dissenting opinions. *See Dubose*, 285 Wis. 2d 143, ¶¶ 54–67 (Wilcox, J., dissenting), ¶¶ 79–97 (Rogensack, J., dissenting). The State recognizes that this Court must follow *Dubose* if it applies to this case because "[t]he supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." *Cook*, 208 Wis. 2d at 189. The

State seeks to preserve its right to challenge the correctness of the supreme court's decision in *Dubose* should either party petition the supreme court for review of this Court's decision in Roberson's case.

II. Roberson's other arguments notwithstanding, CAS's out-of-court identification and in-court identification of Roberson are admissible.

Because Roberson contends that *Dubose*'s necessity standard applies to his case, he suggests in a rather cursory manner that CAS's identification was not reliable. (Roberson's Br. 13.) As the State has argued, the out-of-court identification was not impermissibly suggestive based on the non-suggestive nature of the Facebook photograph itself, the manner in which the officers presented the photograph to CAS, and CAS's prior familiarity with Roberson based on their meetings. (State's Br. 17–20.) Further, even if it was impermissibly suggestive, the out-of-court identification was still reliable based on CAS's significant opportunity to view Roberson before, during, and after the shooting. (State's Br. 20–24.)

Roberson also contends that the circuit court properly excluded CAS's in-court identification because the State could not establish that the in-court identification was not based on the prior out-of-court identification. (Roberson's Br. 15.) While acknowledging CAS's prior meetings with him, Roberson asserts that the nature of the prior contacts—"two 20 to 30 minute encounters"—did not provide an adequate basis for CAS to make an accurate in-court identification of him. (*Id.*) But as the circuit court found as a matter of fact, CAS had a "sufficient basis to identify 'P'" from two prior meetings before the shooting, which "lasted approximately a half hour each." That finding undermines the circuit court's erroneous determination that CAS's out-of-court identification of Roberson tainted his in-court identification.

(State's Br. 27, citing R. 28:3, A-App.103.) Based on the totality of circumstances, CAS's in-court identification of Roberson was reliable, even if the circuit court properly excluded the out-of-court identification.

CONCLUSION

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

Dated this 5th day of March, 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 1,539 words.

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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 5th day of March, 2018.

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