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**STATE OF WISCONSIN
IN SUPREME COURT**

05-21-2019

**CLERK OF SUPREME COURT
OF WISCONSIN**

APPEAL NO. 2017AP1894 CR

**STATE OF WISCONSIN,
Plaintiff-Appellant,**

v.

**STEPHAN I. ROBERSON,
Defendant-Respondent-Petitioner.**

**ON REVIEW OF THE DECISION OF THE
WISCONSIN COURT OF APPEALS, DISTRICT IV,
REVERSING THE ORDER GRANTING A MOTION
SUPPRESS EVIDENCE, ENTERED IN WOOD
COUNTY CIRCUIT COURT, HON. NICHOLAS J.
BRAZEAU, PRESIDING.**

**BRIEF AND APPENDIX OF
DEFENDANT-RESPONDENT-PETITIONER**

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ISSUE PRESENTED

The detective asked, “Would you recognize him if you saw him again?” CAS replied, “Possibly, I mean black people kinda look...,” made a gesture of uncertainty then glanced at the suspect’s photo on a cell phone. Given “showups,” — where police present a single in-person suspect for witness identification — require a showing of necessity for that procedure, should identifications using a single photo of a suspect be likewise inadmissible absent necessity?

**STATEMENT ON ORAL ARGUMENT AND
PUBLICATION**

As in any case which merits this Supreme Court review, oral argument and publication are warranted.

STATEMENT OF THE CASE AND FACTS

This a review of the court of appeals decision reversing the circuit court order suppression of both out-of-court and in-court identifications of Stephan I. Roberson as the shooter of an alleged acquaintance. *State v. Roberson*, No 2017AP1894-CR, 2018 WL 4846813 (Wis. Ct. App Oct. 4, 2018).

The gunshot wound victim (CAS), told investigators a black man he knew as “P” shot him during an altercation in P’s car. He said P picked him up twenty to thirty minutes after another man robbed him at gunpoint and took the marijuana he was selling for P. Instead of getting medical attention, CAS had P drop him off at a house where he tied two belts around his leg and got high. (R.35:13–15, Pet’r’s App.:138–40.)

Later, police received information from a confidential informant that CAS was staying at a house in Wisconsin Rapids and had a gunshot wound. It took two weeks for police to find and interview CAS who was in jail on a probation hold. (R.35:22–23, Pet’r’s App.:147–48.)

CAS explained how he knew P and how the altercation between them went down. One detective asked would he recognize P if he saw him again. CAS, a white male, replied: “Possibly. Black people kind of look...” and made a hand gesture indicating uncertainty. The other detective used his own cell phone to show CAS, Roberson’s Facebook profile photo with Roberson wearing sunglasses.

After CAS nodded yes, the first detective said, “100%?” and CAS said, “100%.” (R.19:09h:39m:30s–R.19:09h:39m:55s, R.35:27–30, Pet’r’s App.:152–55.)

At the suppression hearing the detective testified he did not think a photo array or lineup was necessary, claiming he had other means of identifying the shooter as Roberson. CAS identified Roberson in the courtroom by saying, “He’s over there in orange.” (R.35:16, Pet’r’s App.:141.)

The circuit court suppressed the identifications after an analysis of whether the identification procedure was unnecessarily suggestive and conducive to mistaken identity using the factors delineated in U.S. Supreme Court

case *Neil v. Biggers*¹ and Wisconsin Supreme Court case *Kain v. State*.² The circuit court also found cross-racial identification a factor in its decision. (R.28, Pet'r's App.:120–25.) The State appealed the circuit court's decision.

The court of appeals considered two questions:

- First, whether a “showup³,” includes showing a single photograph to a witness.
- Second, whether, even if the display of a single photograph is not a “showup” were they at liberty to hold that the *Dubose* necessity standard should be extended to single photo identification procedures.

Applying the factors listed in *Biggers* and in Wisconsin Supreme Court case *State v. Hibl*⁴, the court of appeals found the procedure used during the interview of CAS “was sufficiently reliable that a jury should hear and see the evidence of that identification.” The court of appeals rejected the idea that single-photo identification procedures were showups and declined extending the *Dubose* necessity standard to cover them.⁵

¹ *Neil v. Biggers*, 409 U.S. 188 (1972).

² *Kain v. State*, 48 Wis. 2d 212, 179 N.W.2d 777 (1970).

³ A “showup” is an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes. *State v. Wolverton*, 193 Wis. 2d 234, 553 N.W.2d 167 (1995) note 21.

⁴ *State v. Hibl*, 2006 WI 52, 290 Wis. 2d 595, 714 N.W.2d 194.

⁵ *State v. Roberson*, No 2017AP1894-CR, 2018 WL 4846813, ¶ 50 (Wis. Ct. App Oct. 4, 2018).

ARGUMENT

A. The risks of misidentification are the same whether police use a single in-person suspect or a single suspect's photo.

In *Dubose*⁶ this Court wrote: “The research strongly supports the conclusion that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined.” *Id.* ¶ 30. (internal citations omitted).

Prior to *Dubose*, the 1995 Wisconsin Supreme Court case *State v. Wolverton*⁷ allowed admission of showup identifications if, under the totality of the circumstances, such identifications were deemed reliable. But new social science research convinced the *Dubose* court that focusing on the *reliability* of unnecessarily suggestive showup evidence was an unsound approach given that courts could not differentiate between identifications that were reliable and identifications that were unreliable. And because the suggestive procedure itself could influence the witness; a court could not know exactly how reliable the identification would have been without the suggestiveness. *Dubose*, ¶ 31.

The *Dubose* court concluded that evidence obtained from an out-of-court showup is inherently suggestive and inadmissible unless, based on the totality of the circumstances, the procedure was necessary. Also, that showups would not be necessary unless the police lacked probable cause to arrest the suspect or, due to exigent circumstances, could not have conducted a lineup or photo array. *Id.* ¶ 33.

⁶ *State v. Dubose*, 2005 WI 126, 285 Wis. 2d. 143, 699 N.W.2d 582.

⁷ *State v. Wolverton*, 193 Wis. 2d 234, 553 N.W.2d 167 (1995).

B. *Dubose* did not expressly exclude single-photo identifications from the definition of showup.

In *State v. Drew*⁸, the court of appeals considered whether *Dubose* applied to procedures other than showups. It concluded that although the *Dubose* court's discussion of the unreliability of eyewitness identification would *appear to apply* to procedures other than showups, the only procedure for which the court expressly adopts a new test is for showups. Also, that the new test adopted in *Dubose* was based on the necessity of having a showup in the first place and provided no guidance for what “unnecessarily suggestive” might mean in the context of a photo array. The court of appeals questioned, after reading that a “lineup or photo array is generally fairer than a show up ...,” whether the *Dubose* court saw a need to impose a stricter standard for a lineup or photo array. *Drew*, ¶ 17, (quoting *Dubose*, ¶ 33).

They found further support for their finding *Dubose* as limited to showups in *State v. Hibl*⁹. In *Hibl*, a witness spontaneously identified the defendant while speaking with the prosecutor outside the courtroom. This Court found *Dubose* was not “directly controlling” for the “accidental” confrontation yet noted *Dubose* relied, in part, on research that potentially implicates all eyewitness identifications. *Id.* ¶ 32 (internal citations omitted).

The *Hibl* court concluded the “accidental” confrontation between a witness and the defendant in the courthouse was not a showup nor did they intend that *Dubose* necessarily control identifications that do not involve law enforcement procedure. Still, the *Hibl* court went on to say: “the *Dubose* focus on one type of inherently suggestive

⁸ *State v. Drew*, 2007 WI App 213, 305 Wis. 2d 641, 740 N.W.2d 404.

⁹ *State v. Hibl*, 2006 WI 52, 290 Wis. 2d 595, 714 N.W.2d 194.

police procedure does not mean that courts must ignore that potential for unreliability in all other types of eyewitness identifications.” *Id.* ¶¶ 34–35.

The court of appeals concluded in *Drew*, as it did in this case, that reliability, not necessity, determined whether identifications made during inherently suggestive police identification procedures using photos should be admissible. “We therefore conclude that, until the supreme court indicates otherwise, the correct standard for photo arrays is that articulated in *Powell*¹⁰ and *Mosley*¹¹.” *Id.* ¶ 19 (footnote omitted).

C. Using single-photo identifications only when necessary ensures police methods are sound while deterring use of methods known to be inherently suggestive.

Five months after *Dubose* was decided, the legislature enacted 2005 Wisconsin Act 60 as part of cutting edge criminal justice reform to reduce wrongful convictions due mistaken eyewitness identifications. The Act created Wisconsin Statute § 175.50.

175.50 Eyewitness identification procedures.

(1) In this section:

(a) “Law enforcement agency” has the meaning given in s. 165.83 (1) (b).

(b) “Suspect” means a person suspected of committing a crime.

(2) Each law enforcement agency shall adopt written policies for using an eyewitness to identify a suspect upon viewing the suspect in person or upon viewing a representation of the suspect. The policies shall be designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases.

¹⁰ *Powell v. State*, 86 Wis. 2d 51, 63-66, 271 N.W.2d 610 (1978).

¹¹ *State v. Mosley*, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981) 1

(3) A law enforcement agency shall biennially review policies adopted under this section.

(4) In developing and revising policies under this section, a law enforcement agency shall consider model policies and policies adopted by other jurisdictions.

(5) A law enforcement agency shall consider including in policies adopted under this section practices to enhance the objectivity and reliability of eyewitness identifications and to minimize the possibility of mistaken identifications, including the following:

(a) To the extent feasible, having a person who does not know the identity of the suspect administer the eyewitness' viewing of individuals or representations.

(b) To the extent feasible, showing individuals or representations sequentially rather than simultaneously to an eyewitness.

(c) Minimizing factors that influence an eyewitness to identify a suspect or overstate his or her confidence level in identifying a suspect, including verbal or nonverbal reactions of the person administering the eyewitness' viewing of individuals or representations.

(d) Documenting the procedure by which the eyewitness views the suspect or a representation of the suspect and documenting the results or outcome of the procedure. Wis. Stat. § 175.50 (2017-18).

Then in 2010, the Wisconsin Department of Justice (OAG) published its Model Policy and Procedure for Eyewitness Identifications¹²:

In order to implement the most reliable method for the collection of eyewitness evidence, this model policy and procedure recommends that law enforcement officials conduct double-blind, sequential photo arrays and lineups with non-suspect fillers chosen to minimize suggestiveness, non-biased

¹² Model Policy and Procedure for Eyewitness Identifications, <https://www.doj.state.wi.us/sites/default/files/2009-news/eyewitness-public-20091105.pdf>

instructions to eyewitnesses, and assessments of confidence immediately after identifications.

The OAG acknowledged that scientific studies uncovered psychological factors that can cause well-meaning eyewitnesses to make mistakes and that new methods of conducting eyewitness procedures reduce those errors. These new methods represented the best techniques for accurately capturing and preserving eyewitness memories, thereby enhancing the reliability of criminal investigations and prosecutions.

Eyewitness errors have been linked to two psychological factors: 1) unintentional suggestion to witnesses, and 2) the ‘relative judgment process’, which refers to the tendency when viewing a simultaneous presentation (viewing an entire photo array or lineup at once) for eyewitnesses to identify the person who looks the most like the real perpetrator relative to the other people. When the real perpetrator is not in the array, the relative judgment process can lead to misidentification.¹³

The following model procedures address these causes of eyewitness error in a number of ways, but most prominently by recommending the following:

- 1) Utilize non-suspect fillers chosen to minimize any suggestiveness that might point toward the suspect;
- 2) Utilize a ‘double blind’ procedure, in which the administrator is not in a position to unintentionally influence the witness’s selection;
- 3) Give eyewitnesses an instruction that the real perpetrator may or may not be present and that the administrator does not know which person is the suspect;
- 4) Present the suspect and the fillers sequentially (one at a time) rather than

¹³ *Supra* note 12 (citing, Wells, G.L. and Olson, E.A. “Eyewitness Testimony.” *Annual Review of Psychology*, Vol. 54, p. 286-289, 2003.

simultaneously (all at once). This discourages relative judgment and encourages absolute judgments of each person presented, because eyewitnesses are unable to see the subjects all at once and are unable to know when they have seen the last subject;

5) Assess eyewitness confidence immediately after identification;

6) Avoid multiple identification procedures in which the same witness views the same suspect more than once.

The OAG supported its recommendations with scientific rationale, then detailed methods for conducting lineups and photo arrays. In preparation, the OAG cautioned:

Remember that a misidentification is harmful not only because it can lead to a wrongful conviction, but also because it can irreparably taint an eyewitness's memory, making that eyewitness less useful for future identification procedures that might contain the true perpetrator.

Photo Array Method #1 uses an independent administrator, someone who does not know the suspect's identity. It lists five detailed steps over five pages. Photo Array Method #2 is for use by investigating officers with safeguards to ensure that they are not in a position to unintentionally influence the witness's selection:

In some situations, it may be difficult to have an independent administrator conduct the array. In those situations, the investigating officer may conduct the array, but only with safeguards to ensure that he/she is not in a position to unintentionally influence the witness's selection. Departments are encouraged to come up with their own methods for meeting this recommendation. One option is to use a computer to randomly present the photos to the witness out of view of the investigator. A simpler and less expensive alternative is the folder system, described below.

1. Gather Photographs. Follow the procedures described in Method #1 for gathering one photo of the suspect, at least five filler photos, and at least two blank photos. Since increasing the number of fillers tends to increase the reliability of the procedure, include as many above the minimum as desired.

2. Prepare the Folders.

a. Gather Folders. Gather folders, each large enough to hold and fully conceal one photograph.

b. Set Aside Lead Filler. Place a filler's photograph in one folder and set that folder aside.

c. Set Aside Two Empty Folders. Take two of the empty folders and set them aside, separate from the filler folder that you have set aside.

d. Place the Other Photos in Folders. Randomly place the other photos (of the suspect and remaining fillers) into the remaining empty folders, one photograph per folder.

e. Shuffle the Folders. Shuffle the folders you are holding, so that you no longer know which folder contains the suspect's photo.

Explanation: This ensures that you will not be in a position to unintentionally influence the witness's selection.

f. Lead with Filler Photo. Place the single photo containing a filler-- the one you set aside earlier-- on the top of your pile.

Explanation: Witnesses are reluctant to identify someone in the first position and, if that person is the suspect, a failure to identify the perpetrator or a misidentification may result.

g. End with Empty Folders. Place the empty folders- the ones you set aside earlier- at the bottom of your pile.

Explanation: You do not want the witness to know when he/she is viewing the last photo. Witnesses who believe they are viewing the last photo may feel

a heightened need to make an identification.

h. Number the Folders.

3. Conduct the Array.

a. Record the Identification Procedure. If practical, record to videotape, audiotape, CD or DVD the entire photo identification procedure. Videotaping is preferable. For information on video and audio recording procedures, see the Wisconsin Department of Justice's Physical Evidence Handbook 8th Edition, p. 39-44.

b. Restrict Availability of Other Results to Witness. Ensure that no writings or information concerning previous identification results are visible to the witness.

c. Bring in the Witness. Seat the witness at a desk or table or otherwise provide a comfortable environment.

d. Position Yourself. Position yourself close enough to the witness to verbally communicate with him/her but in a place where the witness will be able to open a folder and look at the photo without your being able to see the photo.

Explanation: This will make it impossible for you to unintentionally communicate information to the witness about which folder contains the suspect's photo.

e. Instruct the Witness. Give the witness a written copy of the following instruction sheet and read the instruction aloud:

The folders in front of you contain photos. In a moment, I am going to ask you to look at the photos. The person who committed the crime may or may not be included in the photos. Although I placed the photos into the folders, I have shuffled the folders so that right now I do not know which folder contains a particular photo.

Even if you identify someone during this procedure, I will continue to show you all photos in the series.

Keep in mind that things like hair styles, beards, and mustaches can be easily changed

and that complexion colors may look slightly different in photographs.

You should not feel you have to make an identification. It is as important to exclude innocent persons as it is to identify the perpetrator.

You will look at the photos one at a time and, since I have shuffled them, they are not in any particular order. When you open a folder, please open it in a manner that does not allow me to see the photo inside the folder. Take as much time as you need to look at each one. When you have finished looking at a photo, close the folder and hand it to me. I will then ask you, "Is this the person you saw [insert description of act here]?" Take your time answering the question. If you answer "Yes," I will then ask you, "In your own words, can you describe how certain you are?"

Because you are involved in an ongoing investigation, in order to prevent compromising the investigation, you should avoid discussing this identification procedure or its results.

Do you understand the way the photo array procedure will be conducted and the other instructions I have given you?

f. Give the Witness the Folders. Hand the witness the folders one at a time.

g. Question the Witness. After a witness has looked at a photo and handed the folder back to you, ask: "Is this the person you saw [insert description of act here]?" If the witness answers "Yes," ask the witness, "In your own words, can you describe how certain you are?"

h. Document the Witness's Responses. As previously stated, recording to videotape, audiotape, CD or DVD the entire identification procedure is recommended. Whether or not this is possible, document the witness's response using the witness's own words when possible.

1. After identification, a follow-up interview should assess any relevant factors that support the identification, such as: special facial features, hair, marks, etc.

i. Show Every Folder. Even if the witness makes an identification, hand the witness the next folder until you have gone through all the folders containing photographs. If a witness asks why he/she must view the rest of the photos despite already making an identification; tell the witness the procedure requires the officer to show the rest of the photos.

Explanation: Showing all photos in the series ensures that the photo array procedure will reveal as much information as possible. For instance, a witness may make an identification of an early photo, but then change his/her mind after viewing a later photo. This change supplies important information about both the suspect and the witness.

j. Commenting on Selection and Outcome. Do not give the witness any feedback regarding the individual selected or comment on the outcome of the identification procedure in any way. Be aware that witnesses may perceive such things as unintentional voice inflection or prolonged eye contact, in addition to off-handed words or phrases, as messages regarding their selection. Avoid casual conversation comments such as “very good.” Be polite but purposeful when you speak.¹⁴

The passage above illustrates the need to treat eyewitness identifications like any other piece of trace evidence critical to criminal prosecutions. Mishandling eyewitness memory, like any trace evidence, can lead to contamination and can result in failing to identify the true perpetrator or worse – the erroneous identification of an innocent person.

Jurors find eyewitness identification powerful prosecution evidence yet are insufficiently aware of its dangers. They are easily convinced by a witness who takes an oath and confidently declares they saw the defendant commit the crime. The most powerful predictor of guilty verdicts is the level of

¹⁴ *Supra* note 12:13–17.

confidence exhibited by an eyewitness. And while jurors equate confidence with reliability, social science research tells us a witness's confidence in their identification has little to no correlation its accuracy identification. Considering this, it becomes even more difficult for jurors to distinguish accurate identifications from inaccurate ones.¹⁵

The OAG formed purposeful model policy recommendations to avoid as much as possible, the threat of misidentification. In this case, asking CAS to look at a single photo on a cell phone bypassed all the detailed steps for photo array procedures established by the OAG. CAS also heard no instructions before viewing the photo and the detective himself offered "100%" as CAS's level of certainty.

CONCLUSION

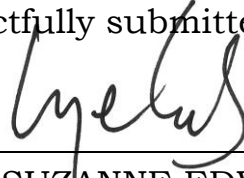
Adopting the *Dubose* standard for admissibility of single-photo identifications merely adds to the definition of showup, situations where police present a witness with of a single suspect photo in lieu of a photo array. It is not a per se exclusionary rule since the State would have the opportunity to illustrate why the procedure was necessary under the circumstances.

The Court should hold single-photo identifications inadmissible absent a necessity for not conducting a proper photo array. Stephan I. Roberson respectfully requests this Court reverse the decision of the court of appeals.

¹⁵ Michael D. Cicchini, Joseph G. Easton, *Reforming the Law on Show-Up Identifications*, 100 J. CRIM. L. & CRIMINOLOGY 381 (2010) at 387.

Dated: May 19, 2019

Respectfully submitted,



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BRIEF CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 3,622 words.

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:

- (1) a table of contents;
- (2) relevant circuit court record entries;
- (3) the findings or opinion of the circuit court; and
- (4) 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 the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, 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.

ELECTRONIC SUBMISSION CERTIFICATION

I hereby certify that the electronic version of Brief and Appendix of Defendant-Respondent-Petitioner in Case No. 2017AP1894-CR is identical to the printed version.

Dated: May 19, 2019



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CERTIFICATE OF MAILING

STATE OF WISCONSIN)
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I, Suzanne Edwards, a licensed Wisconsin attorney, hereby certify on May 19, 2019 that copies Brief and Appendix of Defendant-Respondent-Petitioner in Appeal No 2017AP1894-CR were placed in the U.S. Mail, with proper postage affixed addressed to the following as indicated below:

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