STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2018AP1595-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ANDRE DAVID NASH,

Defendant-Respondent.

On Notice of Appeal from an Order Suppressing Evidence Entered in the Milwaukee County Circuit Court, the Honorable Pedro A. Colon, Presiding.

RESPONSE BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT

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POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Nash welcomes oral argument if it would be helpful to this Court. He does not request publication.

STATEMENT OF FACTS

Allegations from the criminal complaint

The criminal complaint alleged that police responded to an armed robbery complaint on December 5, 2017 at a Family Dollar store located at 930 N. 27th Street in Milwaukee. (1:1). Police spoke with an employee, J.J., who explained that after hearing the emergency exit alarm sound, he observed an individual walking away from the store carrying a comforter and a bottle of laundry detergent. (1:1-2). J.J. called after the person; the person turned around, put the comforter down, produced a black revolver, and said something along the lines of "What are you going to do now?" (1:2). J.J. described the individual as a black male with a light complexion, wearing a black winter coat, and a black knit cap with a white middle stripe and a black tassel on top. (1:2). Police recovered a latent print matching Mr. Nash's right palm from the emergency exit door. (1:2).

On December 7, 2017, police responded to a different Family Dollar store, this one located at 2214

N. 35th Street in Milwaukee. (1:2). Police spoke to K.W., who observed a person walking toward an exit with a bottle of laundry detergent and a comforter. (1:2). K.W. told the person she was going to call the police; the person showed K.W. a black handgun and left the store. (1:2). K.W. told police the person was a black male, wearing a black coat and a black and white winter cap with a puffy ball on the top. (1:2).

Milwaukee police reviewed surveillance footage and believed the suspect in the December 7th armed robbery was wearing the same clothing as the suspect in the December 5th armed robbery. Police spoke with D.C., Mr. Nash's aunt, who identified him from surveillance photos from the December 7th armed robbery. (1:2-3).

On December 18, 2017, J.J. viewed a lineup including Mr. Nash, and identified Mr. Nash as the person he saw, based on his posture, mannerisms, and face. (1:2).

Suppression Proceedings

Mr. Nash filed a motion to suppress his identification. (6:1-11). He argued that he was denied his constitutional right to the presence of an attorney at his lineup and that the lineup was impermissibly suggestive. (6:1-11). The state filed a written response arguing that there was no Sixth Amendment right to counsel at the time of Mr. Nash's lineup and the lineup did not violate Mr. Nash's due process rights because the lineup was not impermissibly suggestive. (7:1-4).

The Honorable Pedro A. Colon conducted a motion hearing on February 22, 2018. (38:1; App.103-127). The court asked the state to call its first witness. (38:3; App.105). The prosecutor explained it was not his burden. (38:3; App.105). The court stated, "All right. Do you have a first witness? Whoever has a witness I'd like to hear it." (38:3; App.105).

The prosecutor responded, "I mean, put it this way, it's a two-prong test to this. It's first his burden to show that it was suggestive, so. That's the law." (38:3; App.105). Defense counsel told the court, "I've raised the issue in the motion. The State's the one who wants to bring in the evidence." (38:3; App.105).

The Court asked whether either party had evidence, "[b]ecause we can just close the evidence now." (38:3-4; App.105-106). The prosecutor replied, "If you're ruling that it was impermissibly suggestive I will present evidence. It's his burden to prove that…." (38:4; App.106). The court again asked how the parties wanted to proceed, and whether they had evidence to present. (38:4; App.106). The parties argued their positions regarding the denial of the right to counsel at the time of the lineup. (38:4-7; App.106-109). The following discussion ensued:

> The Court: And that may[] all be so. I just want to get the evidence somehow. How are you going to resolve the evidence? You can make all of these allegations, and you can make all of these arguments, and they're well taken, but the issue

> is[:] do you want to resolve it with evidence or do you want to resolve it with the stipulation of the facts? And if you do[,] get on with it so that I can decide. And I'll decide it.
>
> And you seem to be both very fervently entrenched in your positions and that's great, but that doesn't get us anywhere[,] not without evidence. Who do you want to call? I know we have three people in the back and I need to take testimony, otherwise, I'll just deem the testimony portion of this closed and I'll just resolve it on the briefs. Is that what you want me to do?
>
> State: Well—
>
> Defense: I would gladly stipulate to the facts that are contained in my motion.
>
> State: Yeah, I'm sure you would.

(38:7-8; App.109-110). The state decided to call a detective to testify. (38:8; App.110). After further dispute about the facts underlying the right to counsel issue, the court stated, "So the issue is, how do we get it into evidence so we know what happened? You don't have any suggestions. Either party doesn't [sic] have suggestions. All right. I'll tell you what—" (38:9; App.111). The prosecutor stated he would call a detective. (38:9; App.111).

Milwaukee Police Detective William Sheehan testified that he was a detective with the robbery task force, and had participated in the investigation into two armed robberies of Family Dollar stores on December 5th and 7th of 2017. (38:10; App.112). He testified that he selected fillers from the Milwaukee County Jail to fill out a lineup in which Mr. Nash was the targeted suspect. (38:11; App.113). He explained that he was restricted to the people in the jail that were available to come from the county jail to the Police Administration Building, and that he typically chose between seven and eight fillers. (38:11; App.113). Detective Sheehan testified that he had seen Mr. Nash prior to selecting fillers, and in selecting fillers, he was looking for the same race and sex, and then age, height, and weight. (38:12; App.114).

Detective Sheehan testified that he chose five fillers to stand in the lineup with Mr. Nash. (38:12-13; App.114-15). He identified Exhibit 1 as a photograph of the six people in the lineup: the five fillers and Mr. Nash. (38:13; 9:1; App.102, 115). Detective Sheehan testified that those five fillers were "the best that I had to choose from that specific day from the inmates available at the county jail." (38:13-14; App.115-16). Detective Sheehan testified that he ensured that all of the individuals were wearing the same clothing, and that none of that clothing was what the suspect was described to have been wearing by the victims. (38:14; App.116). Detective Sheehan testified that he took efforts to ensure they were as similarly dressed as possible.

(38:14; App.116). Detective Sheehan testified that he had the six men wear hats because their hairstyles were significantly different. (38:14; App.116).

Detective Sheehan testified that he did a lineup rather than a photo array because "it was shortly after the incident occurred and Mr. Nash was in custody and available for a lineup." (38:15; App.117). He testified that the benefit of a lineup over a photo array was that the victim or witness could see the mannerisms of the lineup's participants. (38:15; App.117). Detective Sheehan explained that during the lineup, he was with the participants of the lineup. (38:16; App.118).

On cross-examination, Detective Sheehan testified that, prior to conducting the lineup, Mr. Nash voiced concerns that no one in the lineup looked like him. (38:17; App.119). Defense counsel asked Detective Sheehan whether he agreed that Mr. Nash was the lightest-skinned individual in the group of lineup participants; Detective Sheehan answered that he believed "No. 3 and No. 1 were both light complexion as well." (38:18; App.120). Defense counsel asked the detective whether Mr. Nash was the tallest individual; Detective Sheehan did not agree based on the photo and did not independently recall, stating, "I don't think he was." (38:18; App.120). Defense counsel asked Detective Sheehan about the shade and state of Mr. Nash's jail shirt compared to those of the fillers. (38:18-19; App.120-21).

The state and defense rested. (38:21; App.123). The state answered the court's follow-up questions, indicating the lineup itself was not recorded, and that the lineup had been done in lieu of a photo array. (38:21-22; App.123-24). The court observed, "The policy of the department is a photo array." (38:22; App.124). It stated, "In fact there's a state statute that indicates that's the preferred system so that it's fair." (38:22; App.124). The defense noted one reason why a person might want to have an attorney present for a lineup would be to allow them to observe and raise issues if there are concerns about the fairness of the lineup. (38:22; App.124).

The court indicated it would give the parties a decision on the date of trial, and that they could submit additional argument in writing. (38:22; App.124). The court explained it was concerned because, "No. 1 we have a written policy. There's no reason why the photo array should not be used, especially since we have gone through the trouble of having these photos in the file. And secondly, if you're not going to use something in the photo array then you have to record it. And, I think, that's basic fairness." (38:22-23; App.124-25). The state filed an "addendum" to its prior response, focusing solely on the right-to-counsel issue. (11:1-2).

On March 26, 2018, the parties reconvened for trial. (39). The court allowed the parties to argue their positions, first noting it was "really concerned about the reliability of the lineup. Although, I think

the request for counsel informs that reliability, but doesn't determine it by itself." (39:3-4; App.130-31).

The state argued the defense did not meet their burden to prove the lineup was impermissibly suggestive. (39:4-5; App.131-32). The court asked about the defense's burden of proof regarding the unreliability of the lineup. (39:5; App.132). The state answered, "I have the burden of proof. I think it's mentioned in *Powell* [*v. State*, 86 Wis. 2d 51, 66-67, 271 N.W.2d 610 (1978)]." (39:6; App.133). The attorneys agreed they thought it was a preponderance of the evidence standard. (39:6; App.133). The court referenced *State v. Armstrong* and noted the defense has the initial burden to show the identification was unnecessarily suggestive. (39:6; App.133).[1]

The defense then argued that the lineup was unduly suggestive, and that the suggestiveness was compounded by the absence of counsel, particularly when combined with the lack of recording of the

[1] The transcript indicates the judge stated, "[T]he defense has the initial burden to show the identification wasn't necessarily suggestive, and there's some factors that are defined in State v. Armstrong, 110, 55." (39:6; App.133). It is clear that the court is referencing *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W.2d 386 (1983), a Wisconsin Supreme Court case regarding the admissibility of lineups. Undersigned counsel believes, given the court's reference to *Armstrong*, that the court actually said, "[T]he defense has the initial burden to show the identification *was un*necessarily suggestive…" rather than "wasn't necessarily suggestive[.]" (39:6; App.133).

lineup. (39:6-7; App.133-34). Trial counsel argued that, "The purpose of having defense counsel there is not to interfere with the procedures but to be able to observe them. And perhaps video is a sufficient substitute for that, when the video works, but that was apparently not the case here." (39:7; App.134). Trial counsel argued that the biggest issue besides the differences in appearances was Mr. Nash's height and weight, as well as the fact that the lineup participants were wearing jail clothing. (39:7; App.134). The court responded, "So I understand that. I think the photo speaks for itself." (39:7; App.134).

The court explained its ruling:

> So there's several things that I think are unduly suggestive in this case. One is that there are these perhaps—I don't want to call them minor, but I can't ascertain to what degree the fairness of his skin, the lightness of his weight, and the color of his shirt, can be assessed because I only have one group photo under which all of these young men are shown with similar clothing. So the point being is the procedure wasn't followed.
>
> The procedure indicates that it should be sequential for it not to be suggestive and for these things not to be sorted out. These young men must appear to be in the same likeness. They don't have to be perfect. Obviously, they don't have to be twins, but they must be arranged in an array that indicates some amount of similarity.

Obviously, we're never going to have everybody be absolutely similar, but I have—and I take notice of many of these motions where I've seen the procedure followed correctly, that is, the officers choose five individuals. They are lined up and in the folders. The folders are being presented. And in this case, none of that was done.

Now, assuming that doesn't in itself assume it to be—or deem it to be unconstitutional, but in addition we have no way of identifying how this occurred because there's no recording of it.

So in the totality of the circumstances, one is there's some similarities. Whether minor or not, we'll never know. Number two, the procedure wasn't followed, the standard [procedure], and that is encouraged by statute and encouraged by I think every chief of police in this city so we don't have these issues, that is, issues of being unduly suggestive.

While his request for counsel may not have formed the constitutionality of the lineup, it does inform it I think, and he is clearly held by the police. He is requesting a lawyer. That doesn't have to be honored, at least as to the lineup, but I think if you're going to do a live lineup and you're going to bring five people in and not record it, then at that point you should at least have the aid[] of counsel. Who knows what would have happened?

In addition, we have the way in which number two was selected. I believe he was suspect number two. All of them were shown, and then the witness comes back to identify him. I think

> taking it into totality I'm going to grant the motion to suppress. The lineup [] doesn't comport to state law. It doesn't comport to the reliability that we require an eyewitness to identify suspects and eventually defendants.

(39:9-10; App.136-37).

The state sought an adjournment, and filed a motion to reconsider. (39:11-12; 18:1-6; App.138-39). The defense filed a reply. (19:1-5). The court addressed the reconsideration arguments at a hearing on June 21, 2018. (41; App.143). The state asserted that the court had not properly applied the *Powell* test to the facts of the case because the court had not made a finding of impermissible suggestiveness, nor had it found whether the identification was nevertheless reliable. (41:2, 7; App.144, 149). The state argued the first prong of *Powell*, to prove impermissible suggestiveness, had not been met. (41:3; App.145). The state also argued that the lineup was nevertheless reliable under the second prong of *Powell*. (41:5; App.147). The court denied the motion to reconsider. (41:11; 23:1; App.101, 153).

ARGUMENT

I. The circuit court properly suppressed the identification of Mr. Nash.

A. Standard of review and relevant law.

To prevent injustice from mistaken eyewitness identification evidence, the United States Supreme Court held in *Stovall v. Denno*, 388 U.S. 293 (1967), that a criminal defendant has a due process right to exclude evidence resulting from improper pretrial identification procedures. An identification procedure may be impermissibly suggestive if a suspect is presented in a unique manner which is directly related to some important identification factor in the case. *Powell*, 86 Wis. 2d 51, 66-67. Assessing the fairness of a lineup depends on the totality of the circumstances surrounding the lineup. *Wright v. State*, 46 Wis. 2d 75, 86, 175 N.W.2d 646 (1970).

This Court will not alter the circuit court's factual findings unless they are clearly erroneous. WIS. STAT. §§ 805.17(2), 972.11(1); *State v. Benton*, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923. This Court independently reviews the application of constitutional principles to those facts. *State v. Eason*, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625.

When a defendant demonstrates that the out-of-court identification procedure was impermissibly suggestive, the burden shifts to the state to show that under the totality of the circumstances the

identification was nonetheless reliable and should be admitted. *Powell*, 86 Wis. 2d at 66; *State v. Mosley*, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981). To determine if the state has met its burden to show reliability, the court considers the following factors: (1) the opportunity of the witness to view the suspect at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the suspect, (4) the level of certainty demonstrated by the witness at the confrontation, (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972); *see also U.S. v. Wade*, 388 U.S. 218, 241 (1967). The "linchpin" of the admissibility question is whether the eyewitness evidence is reliable. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *Powell*, 86 Wis. 2d at 63-66.

B. This Court should affirm the circuit court's suppression decision.

The state makes three arguments to support its request that this Court reverse the circuit court. (Brief-in-chief p.7). It first argues the circuit court misplaced the burden of proof regarding the suggestiveness prong. Second, it complains that none of the factors the circuit court identified establish that the lineup was suggestive. Third, the state alleges that the circuit court failed to address the reliability prong. Mr. Nash will respond to each argument in turn.

1. The circuit court did not misplace the burden of proof as to suggestiveness.

The state correctly notes that a defendant challenging a lineup has the burden to show a lineup is impermissibly suggestive. However, it wrongly asserts that the circuit impermissibly shifted the initial burden of proof to the state. (Brief-in-chief p.8). The state cherry picks portions of the record in an attempt to show that the court "force[d] the State, not Nash, to address whether the lineup was impermissibly suggestive." (Brief-in-chief p.8). In doing so, the state ignores the bigger picture.

At Mr. Nash's motion hearing on February 22, 2018, the court repeatedly asked both parties—not just the state—to put on evidence in order to proceed with the motion hearing. (38:3-4, 7-8; App.105-06, 109-10). Mr. Nash's trial attorney indicated willingness to stipulate to the facts contained in his suppression motion; thereafter, the state chose to call Detective Sheehan to testify. (38:7-9; App.109-11). That the prosecutor decided to call a witness to testify at a motion hearing while the defense did not call any witnesses did not improperly shift the burden of proof regarding suggestiveness.

The state criticizes the court for its "failure to hold Nash to his burden" and for "not requir[ing] Nash to present any evidence on the matter." (Brief-in-chief p.9). However, the circuit court did not have any obligation to require any party to put on

evidence; indeed, as discussed below, it did not require the state to put on evidence to meet its burden on reliability, and by failing to do so, the state did not prove reliability. Similarly, it was the defense's burden to prove suggestiveness. How to accomplish that goal was up to the defense. To the extent that the state takes issue with the fact that the defense did not call any witnesses or present any testimony, that argument goes more toward whether the defense met its burden on suggestiveness, rather than whether the burden to show suggestiveness was misplaced.

The circuit court clearly understood that the defense had the initial burden to demonstrate the identification's suggestiveness. At the decision hearing, the court referenced *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W.2d 386 (1983), and specifically observed the defense has the initial burden regarding suggestiveness. (39:6; App.133). The circuit court did not misapply the law, and it did not require the state to prove the lineup was not suggestive.

2. The circuit court properly found the lineup was impermissibly suggestive and its factual findings were not clearly erroneous.

The circuit court correctly concluded that Mr. Nash's lineup was impermissibly suggestive. The state complains that the circuit court made "limited factual findings" that "do not support its decision." (Brief-in-chief p.9). However, the state does not argue

that any of the circuit court's factual findings were clearly erroneous. (Brief-in-chief p.9-14). Accordingly, this Court must defer to those findings. *State v. Benton*, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923.

WISCONSIN STAT. § 175.50 requires law enforcement agencies to adopt written policies for eyewitness identification procedures, in order to "reduce the potential for erroneous identifications by eyewitnesses in criminal cases." Section 175.50(5)(d) suggests that law enforcement agencies adopt policies that require "[d]ocumenting the procedure by which the eyewitness views the suspect or a representation of the suspect and documenting the results or outcome of the procedure."

In accordance with WIS. STAT. § 175.50, the Milwaukee Police Department has adopted standard operating procedures regarding eyewitness identification procedures. This includes a section on live lineups, which instructs:

> Fillers should include individuals who are reasonably similar in age, height, weight, and general appearance and are of the same sex and race, in accordance with the witness' description of the suspect. When there is a limited/inadequate description of the suspect provided by the witness, or when the description of the suspect differs significantly from the appearance of the target, fillers should resemble the target in significant features….Make sure that no person stands out from the rest.

Milwaukee Police Department, *Standard Operating Procedure: 240—Eyewitness Identification Procedures*, p.5, (eff. July 7, 2018; reviewed May 16, 2018)[2] (R.App.203-210); *see also* Wisconsin Department of Justice, *Model Policy and Procedure for Eyewitness Identification*, p.3, 18, (Apr. 1, 2010)[3] (photo arrays and lineups should be constructed with non-suspect fillers chosen to minimize any suggestiveness that might point toward the suspect, because unintentional suggestion can occur if one individual stands out from the others due to the composition of the lineup) (R.App.211-217).

As the circuit court found, the lineup in Mr. Nash's case did not adhere to the eyewitness procedures that have been adopted. (39:9-10; App.136-37). Aside from describing the suspect's clothing, the only description J.J. offered was that the suspect was a "black male with a light complexion[.]" (1:2). Contrary to the eyewitness identification instructions, Mr. Nash stands out from the rest of the group based on this very descriptor: his complexion is undeniably the lightest of all the lineup participants. (9:1; App.102); *see Powell*, 86 Wis. 2d at 66-67 (an

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[2] *Available at* https://city.milwaukee.gov/ImageLibrary/Groups/mpdAuthors/SOP/240-EYEWITNESSIDENTIFICATIONPROCEDURES.pdf. (last accessed August 29, 2019).

[3] *Available at* https://www.doj.state.wi.us/sites/default/files/2009-news/eyewitness-public-20091105.pdf. (last accessed August 29, 2019).

identification procedure may be impermissibly suggestive if a suspect is presented in a unique manner directly related to an important identification factor in the case).

None of the other lineup participants could be fairly described as having a light complexion. (9:1; App.102). While the man wearing the number 1 has lighter arms, his face could not be reasonably described as light-complected—and notably, the robbery suspect was wearing a winter coat at the time of the offense. (9:1; 1:2; App.102). Lineup participants numbered 3, 4, and 5 have medium complexions; number 6 has a dark complexion. (9:1; App.102). Detective Sheehan testified that at the time of his lineup, Mr. Nash voiced concern about the fairness of the lineup for this very reason: he was troubled that no one in the lineup looked like him. (38:17; App.119). Indeed, the circuit court found "the photo speaks for itself." (39:7; 9:1; App.102, 134).

The state nevertheless argues, "Nash's skin does not appear significantly lighter than the other men. The men *have a variety of skin tones*, so it is unlikely that any of them would stand out." (Brief-in-chief p.11) (emphasis added). There are multiple problems with this argument.

First, the state's suggestions that Mr. Nash was not singled out in the photo by nature of his complexion and that Nash's skin "does not appear significantly lighter than the other men" are flatly contradicted by Exhibit 1, the color photograph it includes in its brief, and as reproduced in this brief. (Brief-in-chief p.10; 9:1; App.102). Second, this argument concedes that the fillers did not "generally resemble" Mr. Nash in terms of a significant feature—his complexion—given the "variety of skin tones." *See* Winn S. Collins, *Improving Eyewitness Evidence Collection Procedures in Wisconsin*, 2003 Wis. L. Rev. 529, 558 (2003) (Fillers should generally resemble the suspect in significant features). Third, this argument is nonsensical: If the lineup participants have a "variety of skin tones," then it is, in fact, *likely* that the outliers would stand out—specifically, Mr. Nash, the lightest-complected of the group, and number 6, the darkest-complected. Last, this was not a case in which the eyewitness had described the suspect's hairstyle, facial hair, eyes, nose, tattoos, piercings, or any other identifying

features: the record reflects J.J. only described the suspect's clothing, gender, race, and the lightness of his complexion. (1:2); *see United States v. Sanders*, 479 F.2d 1193, 1197 (D.C. Cir. 1973) (Where the defendant was the only one with facial hair in any way comparable to the eyewitness' description, the identification procedure was impermissibly suggestive).

The state also argues that the lineup was not suggestive because it was conducted sequentially, and because "police took steps to minimize the differences in the men's appearances. Besides finding participants that looked similar to Nash, Sheehan also made sure that the men were presented wearing the same clothes and footwear, as well as bracelets on the same wrists." (Brief-in-chief p.12). These steps are insignificant compared to the steps police should have taken: their priority should have been ensuring that the fillers resembled the witness' description of the suspect, and making sure that no one stood out from the rest. *See MPD Eyewitness Identification Procedures*, p.5; (R.App.212).

The state asks this Court to reverse because it believes the circuit court's suggestiveness decision was incorrect. (Brief-in-chief p.9). The state argues that the circuit court "erred by finding suggestiveness based on Nash's not having counsel, the lack of a recording, and law enforcement's failure to conduct a photo array instead of a lineup." (Brief-in-chief p.9-10). This argument reflects far too narrow a view of

what matters in assessing suggestiveness; moreover, it is unsupported by case law.

Rather, the circuit court is entitled to consider the "overall surroundings of the lineup[] conducted in this case" in determining whether it was improperly suggestive. *Wright*, 46 Wis. 2d 75, 85-86. Indeed, the Wisconsin Supreme Court has explained that courts should consider the totality of the circumstances when assessing the fairness of a lineup. *Id.* at 86. "The 'totality of circumstances' reference is a reminder that there can be an infinite variety of differing situations involved in the conduct of a particular lineup." *Id.*

Here, the circuit court properly considered the totality of the circumstances, explaining that while Mr. Nash's unhonored request for counsel did not render his lineup unconstitutional, "it does inform it[.]" (39:9-10; App.136-37). The court's consideration of the police's failure to record Mr. Nash's lineup,[4] and their refusal to honor his request for counsel was

[4] While the police were not required to record Mr. Nash's lineup procedure, the court's consideration of this was warranted, because recording the entire identification procedure is specifically recommended by the Department of Justice, *see DOJ Model Policy*, p.19 (in the section regarding procedures for live lineups, the DOJ's Model Policy recommends, "Record the Identification Procedure. If practical, record to videotape, audiotape, CD or DVD the entire photo [sic] identification procedure. Videotaping is preferable."); (R.App.215).

not erroneous; those factors were relevant under the totality of the circumstances. *Id*.

The state also criticizes the circuit court's belief that police should have used a photo array rather than a lineup and argues that "the law prefers lineups over photo arrays," although it omits the fact that its quote is derived from a United States Supreme Court dissent. *See United States v. Ash*, 413 U.S. 300, 332-333 (1973) (Brennan, J. dissenting). Regardless, the circuit court's objection to the use of the live lineup is fair: Detective Sheehan testified he chose "the best that [he] had to choose from that specific day from the inmates available at the county jail." (38:13-14; App.115-16). Had Detective Sheehan instead compiled a photo array, he could have selected fillers with light complexions to actually match J.J.'s description of the suspect—and match the police's target, Mr. Nash—because he would not have been restricted to the men in the county jail on that particular day.

The circuit court properly concluded the lineup was impermissibly suggestive. Based on J.J.'s description of the suspect, Mr. Nash was the only conceivable choice out of the six lineup participants. *See DOJ Model Policy* p.3 ("If a person who has never seen the perpetrator would be able to guess which person in the array or lineup is the suspect based on knowing only the eyewitness's description of the perpetrator, then the non-suspect fillers may not sufficiently match the description of the

perpetrator."); (R.App.211). This Court should affirm the circuit court's suggestiveness finding.

Should this Court benefit from greater clarity regarding Judge Colon's decision-making, this Court has the power to remand the record to the circuit court for additional proceedings while the appeal is pending, and it can order Judge Colon to enter a written supplemental order that identifies the relevant transcript excerpts and/or other items in the record the circuit court utilized in reaching its decision. *See* WIS. STAT. § 808.075(6);[5] (R.App.201-202).

3. The circuit court properly found that the lineup was not reliable.

The state concedes that the record does not contain adequate factual findings for this Court to address whether the lineup was reliable, despite its suggestiveness. (Brief-in-chief p.14). The state argues that a remand is required because the circuit court did not address whether the lineup procedure was reliable. (Brief-in-chief p.14).

This Court should deny the state's request for two reasons. First, the state is incorrect, because the circuit court made a specific finding regarding reliability: after noting it was "really concerned about

[5] This Court did just that in order to resolve *State v. Conner*, 2012 WI App 105, 344 Wis. 2d 233, 821 N.W.2d 267. *See* 06/08/2012 Court of Appeals Order; (R.App.201-202).

the reliability of the lineup," the circuit court listened to the parties' arguments, and then clearly ruled that the lineup conducted in this case did not "comport to the reliability that we require[.]" (39:3-4, 10; App.130-31, 137).

Second, a remand is not appropriate. The state did not introduce any testimony about J.J.'s opportunity to view the suspect at the time of the crime, J.J.'s degree of attention, the accuracy of J.J.'s prior description of the suspect, or the level of certainty demonstrated by J.J. at the confrontation. *See Biggers*, 409 U.S. 188, 199-200. The record reflects the fifth *Biggers* factor, that the length of time between the crime and confrontation was approximately two weeks: the offense occurred on December 5, 2017, and J.J. viewed the lineup on December 18, 2017. (1:1-2).

Here, the record does not contain adequate factual findings regarding the *Biggers* factors because the state failed to introduce any evidence from J.J. or otherwise, that would prove the results of the unnecessarily suggestive procedure were nonetheless reliable. *Powell*, 86 Wis. 2d at 66. In this case, the state only called Detective Sheehan as a witness at the suppression hearing; however, it did not examine Detective Sheehan regarding any of the *Biggers* factors. (38:10-21; App.112-23).

Where the state presented no evidence on the *Biggers* factors, it failed to meet its burden to prove the identification procedure was reliable despite its

suggestiveness. In *State v. Lopez*, 2001 WI App 265, ¶1, 249 Wis. 2d 44, 637 N.W.2d 468, this Court reversed a circuit court's decision denying a defendant's plea withdrawal request. This Court denied the state's request for a remand, noting:

> At the plea withdrawal hearing, the State did not make any attempts to make a record fulfilling its burden. We do not remand for a hearing to give the State a second opportunity to make an affirmative showing that Lopez's plea was voluntarily entered because we conclude that under [*State v.*] *Nichelson*, [220 Wis. 2d 214, 582 N.W.2d 460 (Ct. App. 1998)] when the State has failed to meet its burden of proof in a plea withdrawal setting, it should not get a 'second kick at the cat.'

Id., ¶24. While this is not a plea withdrawal case, the same logic applies. The state had ample opportunity to present evidence to meet its burden as this case involved a suppression hearing, a decision hearing, a reconsideration hearing, and two rounds of written briefing. (6:1-11; 7:1-4; 11:1-2; 15:1; 18:1-6; 19:1-5; 38:1-25; 39:1-15; 40:1-6; 41:1-15; App.102, 103-57). The state had multiple occasions to meets its burden to show reliability; it failed to do so. To remand for further proceedings would give the state an unjustified additional opportunity to do what it should have done at the suppression hearing. The circuit court appropriately found that the lineup was not reliable. The state did not meet its burden and this Court should affirm the circuit court's order. A remand is inappropriate under these circumstances.

CONCLUSION

For the reasons stated above, this Court should affirm the circuit court's order.

Dated this 30th day of August, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,590 words.

CERTIFICATE OF COMPLIANCE WITH RULE 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 30th day of August, 2019.

Signed:

_____

CARLY M. CUSACK
Assistant State Public Defender

CERTIFICATION AS TO RESPONDENT'S APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); 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 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 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.

Dated this 30th day of August, 2019.

Signed:

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