STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2020AP001728-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PERCY ANTIONE ROBINSON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in Milwaukee County Circuit Court, the Honorable Michelle A. Havas and the Honorable Lindsey Grady presiding.

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ISSUES PRESENTED

1. Was trial counsel ineffective for not presenting the testimony of two bank employees who witnessed the robbery but who did not identify Mr. Robinson as the robber?

The circuit court denied the motion without a hearing, concluding that Mr. Robinson's motion failed to sufficiently allege prejudice. (80:4); (App. 106).

2. Was trial counsel ineffective for not presenting evidence that two other men had also been identified as the robber?

The circuit court denied the motion without a hearing, finding that Mr. Robinson had failed to establish both deficient performance and prejudice. (80:4); (App. 106).

3. Was trial counsel ineffective for not utilizing an expert on eyewitness identification evidence?

The circuit court denied the motion without a hearing, finding that this testimony would not have changed the outcome of the trial. (80:4); (App. 107).

4. Was trial counsel ineffective for not moving to suppress an eyewitness identification of Mr. Robinson?

The circuit court denied the motion without a hearing, finding that Mr. Robinson failed to establish deficient performance. (80:7); (App. 109).

5. Is the robbery of a financial institution statute facially unconstitutional because it does not require proof that the defendant had an intent to steal?

The circuit court found the statute constitutional and denied the motion. (80:5); (App. 107).

6. Was the evidence sufficient to convict Mr. Robinson?

This issue is being raised for the first time on appeal.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is requested as one of the ineffective assistance claims involves an issue recently decided in an unpublished, but citable, decision from this Court.[1] Oral argument is not requested.

STATEMENT OF THE CASE

An information filed in Milwaukee County Circuit Court charged Mr. Robinson with robbery of a financial institution contrary to Wis. Stat. § 943.87. (5:1). Mr. Robinson was convicted after a jury trial

[1] *State v. Garcia,* Appeal No. 2016AP1276-CR, unpublished slip op,, (Wis. Ct. App. April 10, 2018). (App. 112).

and sentenced to a term of imprisonment. (30:1; 36:1). (App. 101). Mr. Robinson filed a postconviction motion requesting an evidentiary hearing on his claims of ineffective assistance of counsel. (61). The motion also challenged the constitutionality of the robbery of a financial institution statute. (61). The court denied the motion in a written order without a hearing. (80). (App. 103).

This appeal follows. (81).

STATEMENT OF RELEVANT FACTS

Trial Testimony

The State's first witness was S.D., an "international banker" at U.S. Bank's West Capitol Drive location in Milwaukee. (89:63). She was working her usual shift on the date of the robbery, December 18, 2017. (89:64). While "helping out" by filling in as a teller toward the end of her workday, she observed a man (identified later in her testimony as Mr. Robinson) appearing to fill out a "Western Union slip." (89:64-65). According to her trial testimony, the man was wearing a black skullcap and a black jacket with colored lining. (89:69). S.D. remembered that the man was taller than her and that he had a dark complexion. (89:69).

The man waited in line and, when it was his turn, handed S.D. a note stating, "I have a gun, give me the money." (89:67). He instructed S.D. to not give him any dye packs. (89:67). Consistent with her

training, S.D. unhesitatingly complied. (89:67). She handed him a "wad" of bills totaling roughly $1,900. (89:75-76). The man thanked her and walked away. (89:67). As he was leaving, S.D. activated the bank's alarm. (89:67). The entire transaction was captured on surveillance video, which was played for the jury. (89:71). Still photographs showing the robber's face were derived from that video and also presented to the jury. (22; 23).

The next day, December 19, S.D. met with the police and gave a description of the robber. (89:92). She told police that the robber was a dark-skinned black man about 5'9" or 5'10". (89:92-93). He was 20-30 years old and had a mustache. (89:92-93). When compared to the video, S.D. accurately described the robber's clothes, except for his pants, which she believed to have been dark jeans. (89:93).

On December 22, S.D. attended a live lineup arranged by the Milwaukee Police Department. (89:79). She identified Mr. Robinson as the person who had robbed the bank. (89:87). She told the jury she was "100 percent" confident in her identification. (89:88). She also identified Mr. Robinson as the robber during her trial testimony. (89:87).

On cross-examination, the defense used a booking photo of Mr. Robinson taken the day after the robbery to illustrate that the robber in the video had a darker complexion, different facial hair, looked younger, and did not have "worry lines" on his face. (89:96-98; 90:7-11; 27).

Detective Tyler Kirkvold testified that he was dispatched to Mr. Robinson's home after he was arrested as a suspect in this robbery on December 19. (91:7-8). Detective Kirkvold searched Mr. Robinson's car and recovered a single $100 bill. (91:9). Mr. Robinson also had $134.25 on his person at the time of his arrest. (91:10). After his arrest, Mr. Robinson spoke with Detective Michael Alles and told him that he had a $100-a-day heroin habit that he funds by doing "odd jobs." (90:18).

The State also called Meagan Thielecke, who met with Mr. Robinson "in a professional capacity" the morning of the robbery.[2] (91:13). She had previously been shown a still photograph of the robber and identified him as Mr. Robinson. (91:15). Ana Sandoval, also present during that meeting, likewise identified the man in the photograph as Mr. Robinson. (91:21).

Mr. Robinson was the only defense witness. (91:34). He denied being the robber and specifically denied being at the bank on the day of the robbery. (91:35). He told the jury that on the day the robbery was committed, he was recovering from the prior day's heroin, marijuana, and cocaine binge. (91:40). He also told the jury he met with Ms. Thielecke and Ms. Sandoval and then got high on heroin. (91:40).

[2] This was apparently a medical appointment. (88:8). In order to avoid apparently irrelevant or potentially prejudicial material, the State intentionally made the testimony vague on this point. (88:8).

According to Mr. Robinson, heroin puts him to sleep. (91:40).

Closing Arguments and Jury Verdict

At the conclusion of the trial, the State focused on S.D.'s identification and argued to the jury that the other evidence in the case supported her testimony that Mr. Robinson was the robber. (92:14). In the State's view, S.D.'s identification was corroborated not only by circumstantial evidence—Mr. Robinson had two $100 bills in his possession at the time of his arrest—but also by the testimony of Ms. Thielecke and Ms. Sandoval. (92:19-21).

In contrast, counsel for Mr. Robinson identified several reasons to disbelieve S.D.'s identification: (1) her initial description of the robber was inconsistent with Mr. Robinson; (2) the booking photo of Mr. Robinson looked nothing like the man captured on video; (3) Ms. Sandoval—whom the State believed to provide corroboration for S.D.—appeared "to have doubt all over her face" during her testimony. (92:28-30). Counsel argued this was a case of mistaken identity. (92:30).

During deliberations, the jury asked to see the video of the robbery "to make a final decision." (92:37). They also asked to view the still photos. (92:38). Thereafter, the jury found Mr. Robinson guilty of the charged offense. (93:3).

Postconviction Proceedings.

Postconviction Motion

After being sentenced to a term of imprisonment, Mr. Robinson filed a notice of intent to pursue postconviction relief. (33; 40). He then filed a Rule 809.30 postconviction motion raising several issues. (61).

Relevant to this appeal, Mr. Robinson alleged that he had received ineffective assistance of counsel because his lawyer: (1) failed to introduce evidence that two witnesses to the bank robbery did not identify Mr. Robinson as the robber; (2) failed to inform the jury that two other men had actually been identified as the robber; (3) did not call an eyewitness identification expert; and (4) failed to object to an alleged violation of the rule set forth in *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991). When the State produced evidence that Mr. Robinson had received a probable cause determination, counsel withdrew the *Riverside* claim and asserted that counsel should have moved to suppress the identification evidence, as Mr. Robinson was not represented by counsel at the lineup. (72:6).

In addition, Mr. Robinson argued that the robbery of a financial institution statute is

unconstitutional because it does not contain an "intent to steal" element. (61:17).[3]

Trial Court Decision

The court, the Honorable Lindsey Grady presiding, denied the motion in a written order, without a hearing. (80). (App. 103). As to the first ineffective assistance claim, the court concluded that the testimony of witnesses who did not identify Mr. Robinson would not have changed the outcome given the other inculpatory evidence introduced at trial. (80:4); (App. 106). Second, it concluded that evidence referencing other suspects would have been barred by *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (1984). (80:4); (App. 106). The court also concluded that this evidence could not have changed the outcome. (80:4); (App. 106). Third, the court found that an eyewitness expert would not have made a difference given its assessment of the eyewitness evidence, which it believed to be "significantly corroborated." (80:4); (App. 106).

As to the constitutionality of the statute, the circuit court adopted the State's argument and denied the claim without further analysis. (80:5); (App. 107).

[3] Pursuant to Wis. Stat. § 803.09(2m), prior counsel served a copy of the postconviction motion on the Attorney General's Office as well as the relevant legislative offices. (63:1). Undersigned counsel further avers that a copy of this brief has also been served on those parties via U.S. mail.

Finally, with respect to the asserted deprivation of the right to counsel, the circuit court noted that a recent unpublished decision by this Court rejected an identical claim. (80:7); (App. 109). The court not only agreed with this Court on the merits but also found that trial counsel could not be responsible for failing to raise an issue of unsettled law. (80:7); (App. 109).

ARGUMENT

I. Mr. Robinson is entitled to a new trial because he did not receive effective assistance of counsel.

A. Legal principles and standard of review.

A criminal defendant has the right to the effective assistance of counsel under both the state and federal constitutions. U.S. Const. Amend. VI & XIV; Wis. Const. Art. 1, § 7 & 8. To prevail on an ineffective assistance of counsel claim, a defendant must establish that counsel's performance was deficient and that counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

An attorney's performance is deficient if it falls "below objective standards of reasonableness." *State v. Thiel*, 2003 WI 111, ¶ 33, 264 Wis. 2d 571, 665 N.W.2d 305.

To prove prejudice, the defendant must show that counsel's deficient performance was "sufficient to undermine confidence in the outcome." *Thiel*, 2003 WI 111, ¶ 20 (citing *Strickland*, 466 U.S. at 694). Counsel's deficient performance is prejudicial when there is a reasonable probability "that, but for counsel's [deficient performance], the result of the proceeding would have been different," or when counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 694. Whether confidence in the outcome has been undermined is distinct from whether the evidence is sufficient to convict. *State v. Pitsch*, 124 Wis. 2d 628, 645, 369 N.W.2d 711 (1985). A defendant also need not be prejudiced by "each deficient act or omission in isolation." *Thiel*, 2003 WI 111, ¶ 63. Rather, prejudice may be established by the cumulative effect of counsel's deficient performance. *Id*.

In Wisconsin, a defendant can only prevail on an ineffective assistance of counsel claim after presenting the testimony of trial counsel at a postconviction hearing. *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). To obtain such a hearing, the postconviction motion must allege, on its face, "sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

Whether a defendant's motion satisfies that standard is a question of law which this Court reviews *de novo*. *Id*. "However, if the motion does not

raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing," a determination this Court reviews under the erroneous exercise of discretion standard. *Id*.

B. Trial counsel should have made the jury aware that two other witnesses failed to identify Mr. Robinson as the robber.

1. Reasonably competent counsel would have presented this evidence to the jury, especially when pursuing a defense of "mistaken identity."

As set forth in the postconviction motion, S.D. was not the only bank employee who witnessed the robbery.

The first omitted witness was a security guard, Dyshawn Wright. (62:8). Ms. Wright had been working as a security guard for a little over a year at the time of the robbery. (62:8). She was responsible for ensuring bank security and, to facilitate that task, had a defined observation post that allowed her to monitor the entrances and exits. (62:8). She witnessed the suspected robber enter the building with a hood over his head. (62:8). She asked him to remove the hood. (62:8). He asked her why, and she explained that it was a bank policy. (62:8). She then observed him remove the hood, retrieve a "Western

Union" envelope and get in line. (62:8). After the robbery, Ms. Wright viewed a lineup targeting Mr. Robinson. (62:10). She made no identification. (62:10). During a follow-up interview, Ms. Wright stated that while Mr. Robinson appeared "familiar" to her, his complexion was "too light." (62:12).

The second witness, Elishay Taylor, had over 20 years of experience as a bank employee. (62:9). Like Ms. Wright and S.D., she saw the suspected robber take a piece of paper from the Western Union kiosk. (62:9). She immediately became suspicious and "began to watch" the suspect closely until he eventually arrived at the teller window. (62:9). Like Ms. Wright, Ms. Taylor also viewed a lineup targeting Mr. Robinson. (62:11). She likewise failed to make an identification. (62:11).

Trial counsel did not call either bank employee as a witness. Trial counsel also did not attempt to elicit the fact of their non-identification through the detective who arranged the lineup, Detective Marco Salaam. This latter failure is especially problematic, precisely because Detective Salaam was called as a witness to explain the lineup procedure to the jury, meaning trial counsel had an obvious opportunity to question Detective Salaam on this point. (90:29).

As set forth in the motion, trial counsel's failure to introduce evidence regarding two bank employees' failure to identify Mr. Robinson as the robber is deficient performance. As argued therein, the main issue in this case was the robber's identity and, with

that in mind, there is no apparent strategic reason for not presenting evidence that Mr. Robinson was not identified as the robber by two bank employees who witnessed the robbery. (61:8). Here, the State's case revolved around eyewitness evidence, specifically, the identification of Mr. Robinson by S.D. In the State's view, S.D. was *the* key witness, and all other evidence merely served to corroborate or support her identification of Mr. Robinson. (92:14). The State asked the jury to believe S.D., in part, because she was an experienced bank employee who had training and experience enabling her to make a more accurate identification of the suspected robber. (92:14-15). However, the jury was not told that two other experienced bank employees—one of them a security guard specifically tasked with monitoring customers as they entered and exited—failed to identify Mr. Robinson as the suspect. As set forth in the motion, testimony that Mr. Robinson was not identified would have gone to the heart of the controversy and would have cast doubt on the other testimony identifying him as the robber. (61:8).

Reasonably competent counsel would have used this evidence to further support the defense of a mistaken identification. Trial counsel's failure to present the testimony is unreasonable and therefore satisfies the deficient performance prong of the ineffectiveness inquiry.

2. Failure to introduce evidence that Mr. Robinson was not identified as

the robber undermines confidence in the jury's verdict.

Mr. Robinson's motion also adequately alleged prejudice: if identity was the main disputed issue, testimony tending to rebut the other identification evidence has an obvious impact on the jury's assessment of that critical issue. (61:8). While trial counsel did an acceptable job trying to poke holes in the State's evidence via cross-examination, he never offered the jury any concrete evidence that the State's witnesses could have been mistaken. Proof that two other witnesses *did not* corroborate S.D.'s identification lends significant weight to the defense of a mistaken identification. Because the omitted evidence appears reasonably likely to impact the jury's assessment of key testimony on a disputed issue, trial counsel's failure prejudiced Mr. Robinson.

C. Reasonably competent counsel would have introduced evidence that at least two other men were identified as the robber.

1. Reasonably competent counsel would have introduced evidence that there were conflicting identifications, especially when pursuing the defense of "mistaken identity."

As set forth in the postconviction motion, law enforcement's decision to release footage of the

robbery to the media yielded two tips inculpating two separate men.

According to a police report appended to the motion, an anonymous caller told police that after viewing the news, she recognized the robber as a man named Louis Baker. (62:2). A second caller, Mary Nimmer, told police her "heart dropped" when she saw the footage because she believed it was her son, Travis. (62:6). Timothy Toliver, the father of Travis Nimmer's girlfriend, told police that he "immediately thought" it was Travis after seeing the media release. (62:6).

As outlined in the postconviction motion, reasonably competent counsel should have made the jury aware of these other identifications, as they cast doubt on the integrity of the eyewitness statements and support the defense theory of misidentification. (61:11). To the extent the witnesses at this trial were confident that the man they witnessed was Mr. Robinson, counsel could show that other individuals viewed the same evidence and confidently identified someone else entirely. Not only would this be a powerful demonstration as to the shortcomings of eyewitness identification evidence generally, but it would also make the mistaken identity defense more plausible. Here, three sets of witnesses identified three separate suspects. They cannot all be correct, meaning that someone's "confident" identification was, in fact, mistaken.

Of course, reasonably competent counsel could have also used this evidence to further an alternative defense—not just that Mr. Robinson was misidentified, but that some other concrete suspect committed the crime, either Louis Baker or Travis Nimmer. (72:3). In presenting these alternative suspects, counsel would have been able to broaden the scope of the jury's inquiry. Instead of viewing the video during deliberations to confirm whether the man was Mr. Robinson, the jury would now have to compare the recorded image with different suspects who presumably bore some resemblance to the man on the video. This creates an avenue toward reasonable doubt and reasonably competent counsel would not have passed up that opportunity.

2. *State v. Denny,* 120 Wis. 2d 614, 357 N.W.2d 12 (1984) does not excuse trial counsel's failure to present this evidence.

In its order denying the postconviction motion, the circuit court concluded that the evidence was inadmissible under *Denny*, which establishes the legal requirements for presenting evidence of a third-party perpetrator. (80:4); (App. 106). Because the court found counsel could not satisfy the legal prerequisites for admissibility, the court concluded counsel could not be blamed for failing to present this evidence at trial. (80:4). Mr. Robinson disagrees with that conclusion for three reasons.

First, as outlined above, this evidence is relevant to the disputed issue of identification and—if admitted for that purpose—does not need to be analyzed under *Denny*. *Denny* is only applicable when the defendant specifically wishes to argue that some defined alternate perpetrator committed the offense; it does not apply, for example, when the defendant attempts to prove that an "unknown third party" committed the offense. *State v. Scheidell*, 227 Wis. 2d 285, 296, 595 N.W.2d 661 (1999). In those situations where the evidence is being offered to establish some other evidentiary proposition, the normal rules of evidence—rather than *Denny*'s "legitimate tendency" test—apply. *Id*. at 27-28. Thus, so long as the evidence was being offered to prove either that Mr. Robinson had been misidentified or that eyewitness identifications are inherently questionable—and not to prove that either Mr. Baker or Mr. Nimmer actually robbed the bank—the only barrier to admissibility would be Wis. Stat. § 904.01.

The evidence easily clears that low bar because it is obviously relevant to the disputed issues of identity and the reliability of those witnesses claiming Mr. Robinson was the robber. Here, other members of the community were so confident in their identification of the robber that they contacted the police to concretely identify two alternate suspects. In one case—that of Travis Nimmer—the identification was made by a close family member. Assuming, arguendo, that these identifications are mistaken, then this casts doubt on the State's reliance on other eyewitness evidence. If a mother can mistake the

person on video for her son, then this shows the inherently faulty nature of eyewitness evidence, generally, while also calling into question the identifications based on that same video which were obtained from Ms. Thielecke and Ms. Sandoval. More broadly, proof that the robber's appearance seemed to "match" at least two other men opens the door to further questions as to the reliability of the identification evidence in this case.

The jury appeared to place dispositive weight on the video, asking to review it before making their final decision. (92:37). Presumably, they wished to view the video and assure themselves the man depicted therein was Mr. Robinson. However, proof that multiple other people viewed that same footage and identified completely different individuals with a high degree of confidence short-circuits this intuitive approach to determining guilt. Considering the prior identifications, the video evidence appears much more ambiguous and therefore susceptible to an inherently subjective analytical process. Thus, the existence of other identifications is admissible, highly relevant evidence supporting Mr. Robinson's defense at trial.

Second, even if this Court were to apply *Denny* to the Baker/Nimmer evidence, it easily satisfies the test. In *State v. Wilson*, 2015 WI 48, ¶¶ 57-59, 362 Wis. 2d 193, 864 N.W.2d 52, the Wisconsin Supreme Court summarized the applicable test as:

> First, did the alleged third-party perpetrator have a plausible reason to commit the crime? This is the motive prong.
>
> Second, could the alleged third-party perpetrator have committed the crime, directly or indirectly? In other words, does the evidence create a practical possibility that the third party committed the crime? This is the opportunity prong.
>
> Third, is there evidence that the alleged third-party perpetrator actually committed the crime, directly or indirectly? This is the direct connection prong. Logically, direct connection evidence should firm up the defendant's theory of the crime and take it beyond mere speculation. It is the defendant's responsibility to show a *legitimate tendency* that the alleged third-party perpetrator committed the crime.

(Emphasis in original). Here, both parties had motive. Robbing a bank is a profitable crime. Thus, both parties had a "plausible reason" to commit the offense. Additionally, there is evidence that both men were at the scene and actually committed the crime because they were identified as the man in the video.

Third, *Denny* should not bar admission of this evidence for the simple reason that *Denny* is unconstitutional and, as shown by its application to this case, operates to unlawfully deprive a criminal

defendant of their right to present a complete defense.[4]

Mr. Robinson, like every criminal defendant, has a constitutional right to present a complete defense, including the right to present evidence implicating someone else in the charged crime. *See* U.S. Const. Amends. VI, XIV; Wis. Const. Art. 1, Section 7; *Chambers v. Mississippi*, 410 U.S. 284 (1973). The *Denny* test is constitutionally deficient as it forces defendants to prove all three prongs with a degree of specificity not required to secure a conviction.

For example, when there is strong evidence connecting a third party to a crime, under *Denny*, a defendant could be prevented from introducing this evidence at trial if the defendant is not able to establish motive. The State, however, is not required to establish motive to prove the defendant guilty beyond a reasonable doubt. A defendant wishing to present exculpatory evidence must therefore satisfy a burden for admissibility higher than what the State must satisfy in proving that same defendant guilty. Thus, while a prosecutor who believed the statements of witnesses claiming to identify someone other than Mr. Robinson as the robber may have had a legal

[4] This argument was raised in the circuit court. (72:3). As noted in the circuit court briefing, counsel acknowledges that neither the circuit court nor the Court of Appeals can overrule *Denny*; Mr. Robinson has included this claim so as to preserve it for review by the Wisconsin Supreme Court.

justification, albeit a weak one, to prosecute one or both of those men, Mr. Robinson is precluded from pursuing the same strategy at a trial ostensibly structured to protect his liberty interests. This perverse outcome cannot be constitutional. Thus, the *Denny* test violates the constitutional right to present a defense and should be overruled.

3. Failure to present contradictory identification evidence prejudiced Mr. Robinson.

As set forth in the motion, evidence that someone other than Mr. Robinson was identified as the robber impinges on a central trial question—whether Mr. Robinson was correctly identified as the robber. (61:11). This evidence not only contradicts the State's theory—that S.D. and the other witnesses correctly identified Mr. Robinson—but also buttresses the defense strategy. (61:11). Accordingly, counsel's deficient performance undermines confidence in the ensuing jury verdict.

D. Trial counsel was ineffective for not presenting the testimony of an eyewitness identification expert.

1. An eyewitness identification expert would have made a vital contribution to the defense of mistaken identity; it was unreasonable to omit that evidence.

This case hinged on eyewitness testimony; specifically, the State informed the jury that its case was wholly dependent on S.D.'s identification. (92:22) (Asserting that, if S.D. was mistaken, then the other witnesses would necessarily also have to be mistaken.)

Defense counsel clearly recognized this and argued in closing that the identification evidence was questionable. (92:28). Yet, counsel never supported his arguments—which are not evidence[5]—with testimonial corroboration from an expert witness who would be able to explain the flaws in eyewitness testimony to the jury. As set forth in the postconviction motion, with citation to scholarly research:

> For example, the jury did not hear any information about the fact that mistaken identifications are a leading cause of wrongful convictions in the United States or that in studies of actual police lineups, 36% of witnesses who make an identification chose a known-innocent filler. Nor did the jury hear from an expert that many factors can influence the accuracy of witness identification, such as

[5] WIS JI-Criminal 160 (2020).

> viewing times, distance, duress, elevated emotions, the presence of a visually distracting item, such as a hat, and memory issues with unfamiliar faces.

(61:11-12).

As Justice Brennan once observed, there is often nothing more convincing than an eyewitness capable of confidently pointing an accusatory finger at the defendant. *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting). Yet, the weaknesses of eyewitness identification evidence are also well-known, and, for that reason, it makes sense that competent counsel would seek to address overreliance on eyewitness evidence in a case where the defense is one of mistaken identity, as in this case.[6] As the Second Circuit Court of Appeals recently concluded, expert testimony can be particularly helpful in certain cases, specifically because it allows the defense to uncover sources of unreliability "not readily apparent to a lay jury."

[6] It is notable that the American Psychological Association, recognizing both the problem of overreliance on witness confidence and the usefulness of expert testimony, has taken a strong stand in encouraging such expert testimony in criminal trials. *See* Brief of the American Psychological Association and the Center for Law, Brain & Behavior as Amici Curiae in Support of Defendants-Appellants, *Com. v. Gomes*, No. SJC-11537 (Mass. August 14, 2014) (available online at https://www.apa.org/about/offices/ogc/amicus/gomes-johnson.pdf).

United States v. Nolan, 956 F.3d 71, 81 (2d Cir. 2020).

Given the centrality of the eyewitness identification evidence to this case—and counsel's apparent strategy of attacking that evidence during closing arguments—there is no strategic reason for not presenting expert testimony regarding such identification to support Mr. Robinson's defense. Trial counsel's failure is deficient performance.

2. Prejudice.

As set forth in the motion, an eyewitness identification expert would have "bolstered" Mr. Robinson's misidentification defense. (61:12). Here, the jury was asked to evaluate disputed identification testimony. Yet, jurors were not given crucial assistance—in the form of an expert witness—who could have helped them meaningfully evaluate that testimony and, more importantly, uncover flaws that would cause them to doubt whether the State had satisfied its burden. Accordingly, trial counsel's deficient performance prejudiced Mr. Robinson.

E. Trial counsel should have moved to exclude identification evidence inextricably connected to a violation of Mr. Robinson's Sixth Amendment right to counsel.

1. Additional factual background.

Mr. Robinson was arrested for this offense on December 19, 2017 at 6:35 P.M. (80:5); (App. 107). Thereafter, police prepared a CR-215 probable cause affidavit. (70:2-3); (App. 110-111). The form was presented to Commissioner Robert Webb "at or about" 2:15 P.M. on December 21, 2017. (80:6); (App. 108). Commissioner Webb determined that there was probable cause and signed the form. (70:3); (App. 111). It is undisputed that this document was signed at an "ex parte" hearing and that Mr. Robinson was neither present for the document's review nor was he provided a copy thereof. (80:6); (App. 108). It is also undisputed that the lineup procedure occurred after this document was signed, but before Mr. Robinson was provided counsel. (80:6); (App. 108).

2. Clearly established law shows that the CR-215 review initiated adversary criminal proceedings against Mr. Robinson such that he was entitled to counsel at all critical stages that followed, including the lineup. Accordingly, it was unreasonable not to file a motion to suppress.

This case involves three interrelated constitutional protections.

First, the United States Supreme Court has held that an arrested suspect has the right to a judicial determination of probable cause within 48

hours of their arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

Second, it is also axiomatic that the Sixth Amendment right to counsel attaches "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

Third, it is well-established that once criminal proceedings have commenced—and the right to counsel is established—then police must provide notice to and allow counsel to be present at any ensuing in-person lineup. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967). Failure to comply with this requirement results in a harsh sanction: if the defendant's right to counsel is violated at a pre-trial lineup procedure, then any identification obtained by virtue of such a lineup is inadmissible at trial unless the defendant makes an intelligent waiver of his Sixth Amendment right to counsel. *Wade*, 388 U.S. at 231, 237.

As it is undisputed that Mr. Robinson was not afforded the assistance of counsel at the lineup where he was identified as the robber, the dispositive question is whether that right was activated—and subsequently violated—by the "paper" probable cause hearing conducted in this case. If so, then the lineup that was conducted prior to the appointment of counsel was a critical stage of the prosecution at

which Mr. Robinson was as much entitled to the aid of counsel as at his trial. *Wade*, 388 U.S. at 237.

Considering *Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 211 (2008), the answer to this question is clearly "yes." That case involved a substantially identical procedure:

> The arresting officer submitted a sworn "Affidavit Of Probable Cause" that described the facts supporting the arrest and "charge[d] that ... Rothgery ... commit[ted] the offense of unlawful possession of a firearm by a felon-3rd degree felony," After reviewing the affidavit, the magistrate "determined that probable cause existed for the arrest." The magistrate informed Rothgery of the accusation, set his bail at $ 5,000, and committed him to jail, from which he was released after posting a surety bond.

Id., at 196 (citations omitted). The hearing occurred without any involvement of a prosecutor. *Id.*, at 198. The Court held that this probable cause hearing marked the commencement of adversary criminal proceedings against Rothgery, such that he was entitled to counsel at all critical stages of the prosecution that followed. The Court said:

> This Court has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty. The question here is whether attachment of the right also requires that a public prosecutor (as distinct from a police

> officer) be aware of that initial proceeding or involved in its conduct. We hold that it does not.

Id., at 194 (citations omitted).

Thus, these binding authorities clearly establish that Mr. Robinson had a right to counsel at the time the lineup was conducted. Because that constitutional protection was ignored, long-standing precedent requires the suppression of the ensuing identification. Given that identification's centrality to the prosecution's case, reasonably competent counsel would have moved to suppress it. To do otherwise is manifestly unreasonable.

The circuit court disagreed for two reasons. While its legal analysis is not binding on this Court, the arguments nonetheless merit brief discussion.

First, the circuit court concluded that this Court's prior decision in *State v. Garcia*, Appeal No. 2016AP1276-CR, unpublished slip op,, (Wis. Ct. App. April 10, 2018), provides compelling persuasive authority in resolving Mr. Robinson's legal arguments.[7] (80:7) (App. 109). However, a rigorous

[7] Although the Wisconsin Supreme Court agreed to review *Garcia*, the Court split 3-3 without issuing a substantive opinion. *State v. Garcia*, 2019 WI 40, ¶ 1, 386 Wis. 2d 386, 925 N.W.2d 528. That tie vote had the effect of affirming this Court's decision. *Gruhl Sash & Door Co. v. Chicago, M. & St. P. Ry. Co.*, 173 Wis. 215, 180 N.W. 845 (1921); *State v. Fitzgerald*, 2019 WI 69, ¶ 34, 387 Wis. 2d 384, 929 N.W.2d 165. However, *Garcia* remains unpublished, (continued)

analysis of that opinion shows that there are manifold problems with this Court's resolution of the issue and that the "persuasive" force of the resulting opinion is therefore considerably diminished.

The most glaring problem is an overreliance on a hyper-technical distinction between the CR-215 process and the nearly identical procedure assessed in *Rothgery*. In *Garcia*, this Court noted that in *Rothgery* the Supreme Court made a glancing reference to the "first appearance." *Garcia*, Appeal No. 2016AP1276-CR, ¶ 27. (App. 122) Thus, this Court concluded, wrongly, that the holding of *Rothgery* is limited to a hearing where the defendant physically appears. *Id.* However, there is no reason to suppose that when the Court said "first appearance" it meant *only* a physical appearance by the accused. While it is true that Rothgery physically appeared before the judicial official, nothing in the opinion suggests that the Supreme Court found this fact dispositive in reaching its holding. *Garcia* is therefore based on an erroneous reading of controlling United States Supreme Court precedent and is insufficiently "persuasive" for that reason.

Moreover, this Court's reference to the "brought before" language in *Garcia* also conflicts with *State v. Koch*, 175 Wis. 2d 684, 698, 499 N.W.2d 152, 160 (1993), holding that compliance with *Gerstein v.*

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meaning it has no precedential weight. Wis. Stat. § 809.23(3)(a).

Pugh, 420 U.S. 103 (1975) and *Riverside* does not require a physical court appearance by the accused. If an accused can be figuratively "brought before" a magistrate on paper, there is no basis to conclude he cannot figuratively "appear" on paper as well.

That is not the only analytical shortcoming, as this Court also found it constitutionally significant that unlike the CR-215 form used in Milwaukee County, the form in *Rothgery* used the word "charges." As a basis for denying relief, this Court therefore emphasized that no criminal "charges" had been filed against Garcia. *Garcia*, Appeal No. 2016AP1276-CR, ¶ 28. (App. 123). However, this is an erroneous distinction. The Supreme Court in *Rothgery* was plainly not referring to the filing of formal "charges" by a prosecutor, as the Court specifically held that the probable cause proceeding initiated adversary criminal proceedings and triggered the right to counsel regardless of whether a prosecutor was even aware of the proceeding. *Rothgery*, 554 U.S. 205-206. When the Court in *Rothgery* spoke of "charges" it was plainly referring to accusations. Thus, the Court held that the probable cause proceeding was "the point at which the arrestee [was] formally apprised of the accusation against him." *Id*., at 195. The accusation in *Rothgery*, like the one here, was an accusation by a police officer.

Accordingly, a close reading of the cited persuasive authority reveals that *Garcia* has obvious shortcomings and, for that reason, has little persuasive value. Thus, the "persuasive" legal

analysis in *Garcia* does not foreclose a finding of constitutionally cognizable deficient performance.[8]

The circuit court's second basis for denying relief is not as nuanced and rests on a conclusion that counsel could not have been deficient for failing to raise an unsettled legal claim. (80:7); (App. 109). While an attorney is "generally" insulated from a finding of ineffectiveness in cases where the law is genuinely "unsettled," *State v. Breitzman*, 2017 WI 100, ¶ 49, 378 Wis. 2d 431, 904 N.W.2d 93, here, the issue was not "unsettled." The legal prerequisites for the motion are established United States Supreme Court precedents which have been in existence for decades; "the law or duty is clear such that

[8] The federal district courts have reviewed Milwaukee's CR-215 procedure on several occasions. In two criminal cases, the United States District Court for the Eastern District of Wisconsin found that this procedure triggered the right to counsel. *United States v. West*, No. 08-CR-157, 2009 WL 5217976 (E.D. Wis. Mar. 3, 2009); *United States v. Mitchell*, No. 15-CR-47, 2015 WL 5513075 (E.D. Wis. Sept. 17, 2015), aff'd, 657 F. App'x 605, 2016 WL 6427284 (7th Cir. 2016). In two other cases alleging a civil rights violation, the same court agreed that the CR-215 form appeared to trigger the right to counsel, but also held that this principle was not "clearly established" for the purposes of qualified immunity law when applied to the specific facts of those two cases. *Jackson v. Devalkenaere*, No. 18-CV-446-JPS, 2019 WL 4415719, at *3 (E.D. Wis. Sept. 16, 2019), appeal dismissed, No. 19-2942, 2019 WL 8334497 (7th Cir. Dec. 6, 2019); *Ross v. Jacks*, No. 19-CV-496-JPS, 2019 WL 4602946, at *3 (E.D. Wis. Sept. 23, 2019).

reasonable counsel should know enough to raise the issue." *State v. McMahon*, 186 Wis.2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994).

Moreover, *Garcia* does not impact this analysis. *Garcia* is an unpublished and non-binding opinion which cannot modify preexisting United States Supreme Court precedent. If this Court allows the existence of a single unpublished decision to render the issue sufficiently unsettled such that no reasonable lawyer would file a motion to suppress, this will have inadvertently elevated that decision above the authorities it claims to interpret, in contravention of Wis. Stat. § 809.23. Accordingly, counsel should have filed a motion to suppress. Because he did not, deficient performance resulted.

3. Exclusion of S.D.'s identification would have radically changed the evidentiary landscape at trial.

Mr. Robinson also alleged that failure to seek suppression of S.D.'s identification prejudiced him. (72:8). Here, the prejudice is obvious. At trial, the State was heavily reliant on S.D.'s identification when it urged the jury to convict Mr. Robinson. (92:14). But-for that identification—by the person who saw the robber face-to-face and in-person—there is a reasonable probability of a different result. The State would have been reliant on weak circumstantial evidence, such as the proof that Mr. Robinson had a small amount of cash on his person and in his car when he was arrested. Instead of an

identification by someone who viewed the robber in the flesh, the State would have been dependent on identifications by witnesses who were shown photographs—and, as counsel pointed out, that photograph was blatantly inconsistent with Mr. Robinson's booking photo. (89:96-98; 90:7-11; 27). Accordingly, failure to suppress this identification prejudiced Mr. Robinson.[9]

II. Wis. Stat. § 943.87 is facially unconstitutional.

A. Legal standard and standard of review.

The constitutionality of a statute is a question of law which this Court reviews *de novo*. *Matter of Commitment of C.S.*, 2020 WI 33, ¶ 13, 391 Wis. 2d 35, 940 N.W.2d 875. Because Mr. Robinson has brought a facial challenge to the statute, this Court must "presume that the statute under review is constitutional and the burden is on the party challenging the statute to prove that it is unconstitutional beyond a reasonable doubt." *Id.*, ¶ 14.

[9] The State may choose to argue that S.D.'s identification at trial was truly "independent" from the earlier, impermissible identification procedure. *Wade*, 388 U.S. at 240. As it is the State's burden to prove an independent source, *see id*. Mr. Robinson reserves the right to reply to any such arguments following the State's response.

B. Because the statute lacks an intent to steal element, it is overbroad and impermissibly vague.

According to the jury instructions for robbery of a financial institution, there are four elements that the State must prove:

> (1) (Name financial institution) was a financial institution;
>
> (2) (Name financial institution) was the owner or had the custody or control of [money] [property];
>
> (3) The defendant took and carried away [money] [property] from an individual or from the presence of an individual;
>
> (4) The defendant acted forcibly.

WIS JI-Criminal 1522 (2020).

However, the statute omits one crucial legal component—a requirement that the defendant had an intent to steal. In the absence of an intent to steal element, the robbery of a financial institution statute violates substantive due process because it is overbroad and vague; it proscribes conduct that the state has no authority to condemn. U.S. Const. Amend. XIV; Wis. Const. Art. 1, § 1; *see State v. Starks*, 51 Wis. 2d 256, 186 N.W.2d 245 (1971) (holding that Wisconsin's vagrancy statute was unconstitutional because the statute failed to define

with precision the distinction between criminal and noncriminal conduct and thus may be used to criminalize conduct which is beyond the legitimate reach of the state's police power).

For example, without an intent to steal element, a person could be charged with robbery of a financial institution for forcibly demanding and leaving with his own money. Consider the following hypothetical: an individual enters a financial institution with the intent to withdraw money from his personal account. The service is poor, and the customer easily frustrated. As the teller reaches into the drawer to retrieve a stack of bills, the angry customer says to that person, "You better give me my damned money or else." The customer clenches his fists and flexes his biceps for emphasis. The frightened teller hands over an amount of money consistent with the customer's withdrawal slip and the customer walks away.

Under the current iteration of the law, that person has just committed robbery of a financial institution: (1) The bank is clearly a financial institution; (2) The bank had custody or control over the money in the drawer; (3) The customer took and carried away money; (4) The defendant clearly threatened to use force against the teller.

Moreover, if intent to steal is not an element, the statute violates equal protection. U.S. Const. Amend. XIV; Wis. Const. Art. 1, § 1. Equal protection requires that there exist reasonable and practical

grounds for the classifications drawn by the legislature. *State v. McManus*, 152 Wis. 2d 113, 130-31, 447 N.W.2d 654 (1989). There is no rational basis to require intent for other crimes such as robbery, pursuant to Wis. Stat. § 943.32 (includes intent scienter), and theft from a financial institution, pursuant to Wis. Stat. § 943.81 (includes "knowing" and "intent" scienters), but not robbery of a financial institution. Therefore, if robbery of a financial institution does not require intent to steal, the conviction must be vacated on appeal.

III. The evidence was insufficient to convict Mr. Robinson.

A challenge to the sufficiency of the evidence is evaluated via the "reasonable doubt standard of review." *State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). This Court must evaluate the available evidence in the light most favorable to the finding of guilt and ask whether "the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true." *Id.* (*citing Johnson v. State*, 55 Wis. 2d 144, 148, 197 N.W.2d 760 (1972)). A conviction obtained absent sufficient evidence is a violation of Mr. Robinson right to due process of law. U.S. Const. Amend. XIV; Wis. Const. Art. I. § 1.

The crime for which Mr. Robinson was convicted and sentenced, Wis. Stat. § 943.87, prohibits the robbery of a "financial institution." To qualify as such, the establishment in question must

be "chartered." *State v. Eady*, 2016 WI App 12, ¶ 8, 366 Wis. 2d 711, 875 N.W.2d 139. This is an essential element of the offense. *Id*.

Here, there was no discussion as to whether the bank was "chartered." While proof of the bank's charter can be established circumstantially, here there was no discussion of the "day-to-day operation of the bank" nor was there any paper evidence—like a bank deposit slip—recovered. *See id*., ¶ 12. Aside from being told the name of the bank—U.S. Bank—the jury was never given any other information that would allow them to conclude that this bank satisfied the statutory requirement.

Accordingly, the evidence was insufficient to convict.

CONCLUSION

Mr. Robinson respectfully requests that, for the reasons outlined herein, this Court reverse the circuit court and grant the relief requested herein.

Dated this 29th day of January, 2021.

Respectfully submitted,

Electronically signed by Christopher P. August
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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 7522 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, including the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 29th day of January, 2021.

Signed:

Electronically signed by Christopher P. August
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