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.

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT

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ARGUMENT

I. Counsel was deficient for failing to inform the jury that two witnesses to the crime did not identify Mr. Robinson as the robber.

The State alleges it was not unreasonable to refrain from presenting evidence with what it believes to be "limited value;" the witness' lack of an identification is "not evidence" that Mr. Robinson was not the robber. (State's Br. at 24). The State also alleges the evidence was weak because neither "Wright [nor] Taylor had the same opportunity to observe Robinson's facial features up close for any extended period of time." (State's Br. at 24-25).

However, evidence that two witnesses did not identify Mr. Robinson as the suspected criminal is categorically relevant, and highly probative, evidence which supports his claim of innocence; at the very least, a reasonable jury could rely on that evidence to find a "reasonable doubt" existed.

The State is also mistaken that the evidence was so unreliable that trial counsel had no obligation to present it. Ms. Wright was a trained security guard specially tasked with closely scrutinizing people entering the bank. (62:8). She also had a conversation with the suspected robber prior to the robbery. (62:8). She had a specific recall of the suspect's complexion, asserting that Mr. Robinson's skin tone was "too light." (62:12). Ms. Wright's account has sufficient

information in it which, if credited by the factfinder, could have resulted in an acquittal.

As to Ms. Taylor, she told the police that she closely watched the robber as he made his way toward the teller window. (62:9). She was a highly experienced bank employee with a sufficient opportunity to view the suspect. Yet, she did not identify Mr. Robinson as that person. Her lack of an identification is a relevant piece of evidence that a reasonable juror could have used to establish a reasonable doubt.

The State is essentially asking this Court to weigh the omitted testimony and to privilege one witness, S.D., over two others. However, that is quintessentially a jury function. Because the jury could have credited Ms. Wright and Ms. Taylor's testimony over S.D.'s—or merely given S.D.'s testimony less weight considering the omitted testimony—counsel performed deficiently.

II. Counsel was deficient for not presenting evidence that persons other than Mr. Robinson were identified as the robber.

The State claims that *State v. Denny,* 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984) does not permit the introduction of this evidence. (State's Br. at 25). Mr. Robinson's brief offered three arguments as to why *Denny* should not excuse trial counsel's failure.

First, *Denny* does not apply when the evidence is offered to prove a proposition other than third-party guilt—for example, to prove that the identification

evidence is unreliable or to support a claim of mistaken identification. As analogical support, Mr. Robinson cited *State v. Scheidell*, 227 Wis. 2d 285, 296, 595 N.W.2d 661 (1999) for the proposition that the *Denny* rule is not ironclad and does not govern every conceivable scenario in which evidence of another suspect is introduced at trial.

The State misreads Mr. Robinson's brief, arguing that *Scheidell* does not apply to this case. (State's Br. at 26). Mr. Robinson never argued that *Scheidell* governed the admission of this evidence, however. The State's lengthy argument is a non sequitur and completely irrelevant to Mr. Robinson's claim. It does not address the actual argument—that evidence of other suspects would be admissible to prove the unreliability of identification evidence presented at trial—thereby conceding that issue in Mr. Robinson's favor.

Second, if the evidence *was* offered to prove third-party guilt, then it satisfies *Denny*. As to the first prong, motive, robbing a bank is a profitable crime and therefore both men clearly had a motive to commit the crime. The State claims this is an overly "generic" interpretation of the motive prong and that "no case" has ever interpreted *Denny* "so loosely." (State's Br. at 27). Respectfully, what other motive evidence could be established for robbing a bank? Robbing a bank is not like committing a murder where some deeply personal motive must be uncovered; people rob banks because they want money.

Next, the State claims there was no "direct evidence" because the citizen identifications pointing to other men—derived from their viewing of the surveillance footage—is categorically incapable of constituting direct evidence of criminality. (State's Br. at 27). This is a problematic and patently unfair reading of *Denny*. The State disseminated the video to obtain an identification of the robber; now that citizens have viewed that video and picked out someone other than Mr. Robinson, their identification is somehow irrelevant. The argument is an *ipse dixit* request for affirmance and should be rejected.

Finally, the State asserts that trial counsel could not have been ineffective for not challenging *Denny's* constitutionality. (State's Br. at 28). The Sixth Amendment and its Wisconsin counterpart require, however, that counsel render "reasonably competent" assistance; acquiescence to case law which is in tension with preexisting constitutional guarantees is categorically unreasonable. The right to present a defense, as guaranteed in the state and federal constitutions, is not only clear enough for counsel to identify a violation, *State v. Maloney*, 2005 WI 74, ¶ 29, 281 Wis. 2d 595, 698 N.W.2d 583, but it also clearly "trumps" any judge-made law constraining it.

III. Counsel was deficient for not presenting expert testimony to challenge the identification evidence.

The State argues that no published Wisconsin case has directly addressed this alleged deficiency.

(State's Br. at 29). The State's reading of the deficient performance prong is unduly cramped. Because the deficient performance prong is fact-intensive, and counsel is responsible for making hundreds of decisions over the course of a trial, it is unreasonable to insist that a defendant *must* have a case directly on-point explaining why a particular strategic decision is unreasonable. Instead, this Court must apply the constitutionally-required deficient performance inquiry and determine whether, under the facts of this case, counsel's strategic decision was reasonable or not.

The State does not make much of a reasonableness argument, instead pointing out that the reliability of expert testimony could be explored on cross-examination. (State's Br. at 29). This ignores the arguments set forth in Mr. Robinson's brief, which explained the unique power of eyewitness evidence and the need for an expert to help the lay jury evaluate and uncover sources of unreliability.

IV. Counsel was deficient for not challenging the identification derived from a violation of Mr. Robinson's right to counsel.

Long-standing precedent from the United States Supreme Court establishes that the procedure utilized in this case violated Mr. Robinson's Sixth Amendment right to counsel. These precedents are not new; the most recent case—*Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 211 (2008)—has been the law of the land for over a decade.

The State, however, disagrees that the procedure was unlawful. The thrust of the State's argument is that Milwaukee County's probable cause procedure did not initiate criminal proceedings against Mr. Robinson. (State's Br. at 31). The State does not directly address the binding U.S. Supreme Court cases directly controlling nor does it acknowledge the federal district court opinions which have applied those precedents to this exact procedure.

Instead, it relies on *Jones v. State*, 59 Wis. 2d 184, 207 N.W.2d 890 (1973), a case which obviously predates both *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) as well as *Rothgery*. *Jones* merely states the rule—since refined in *Riverside* and *Rothgery*—that the appointment of counsel is not required until the defendant is facing a formal accusation. *Jones* is simply not on-point; its dated language does not account for subsequent precedential developments and should not control.

The State also argues that a personal appearance was required to initiate criminal proceedings; because Milwaukee County utilizes a paper protocol, the State argues that this could not trigger the right to counsel. (State's Br. at 33). This is a mistaken reading of the law because the United States Supreme Court has never recognized this "requirement" as being dispositive to the inquiry as to whether criminal proceedings have initiated.

The State also appears to draw a distinction between probable cause procedures required by

Riverside and the type of procedure required to initiate criminal proceedings under *Kirby v. Illinois*, 406 U.S. 682 (1972). (State's Br. at 33). This is baffling argumentative strategy, because *Rothgery*—which concerned a probable cause procedure—demolishes the State's binary construction.

As set forth in the brief, the Milwaukee County procedure is nearly identical to the procedure found to initiate criminal proceedings in *Rothgery*; it does not matter that no complaint or information had yet been filed. Under *Rothgery*, the formalized probable cause proceeding required by *Riverside* does initiate criminal proceedings and, because the Wisconsin procedure is substantially identical to the practice analyzed in *Rothgery*, that case—and not the dated decision in *Jones*—controls.

The State then argues that trial counsel could not have been ineffective because "controlling" Wisconsin law was against him. (State's Br. at 32). This is nonsensical. To assert that a lawyer must be bound by the generic language (which does not independently rebut the claim) in *Jones* and therefore ignore 40 years of intervening precedent from our nation's highest court is categorically unreasonable; it distorts and does violence to the deficient performance inquiry.

The same can be said for the State's invocation of the unpublished decision in *State v. Garcia,* Appeal No. 2016AP1276-CR, unpublished slip op., (Wis. Ct. App. April 10, 2018). (State's Br. at 32-33). (Supp. App.

134-155). That decision carries no precedential weight; trial counsel in this case had "no duty to research or cite it." Wis. Stat. § 809.23(3)(b). The State suggests, wrongly, that the issuance of this non-binding decision is sufficient to make the law so unsettled that counsel can be forgiven for not filing a motion to suppress. (State's Br. at 33). It would be highly unusual, however, for an unpublished decision of this Court to trump a published decision of the United States Supreme Court; reliance on the unpublished decision instead of those binding precedents is prima facie unreasonable.

The State is simply incorrect to assert that no case was sufficiently on-point to compel any action from reasonably competent counsel. (State's Br. at 33). As set forth in the brief-in-chief, there is ample United States Supreme Court precedent compelling the conclusion that Milwaukee County's procedure initiates criminal proceedings; there are also numerous federal court decisions which have directly evaluated the procedure and made that conclusion.

V. Trial counsel's deficient performance prejudiced Mr. Robinson.

The State argues that constitutionally cognizable prejudice did not occur due to "strong and compelling evidence" of guilt. (State's Br. at 34). The State rests much of its argument on the identification of S.D. (State's Br. at 34). If trial counsel had performed competently, however, that identification would have been suppressed—meaning the jury would

not have been presented with evidence that the State argued was central to its case. And, while the State puts forth a conclusory argument that her in-court identification would have been independently admissible, that argument is undeveloped. It is also premature, as the circuit court has had no opportunity to conduct fact-finding on that issue.

Even if S.D.'s identification *was* admitted at trial, the rigid focus on her identification conveniently ignores the two witnesses who also witnessed the robbery and who did not identify Mr. Robinson. Faced with conflicting testimony, the jury would have the task of assessing credibility and reliability. Because a juror could reasonably choose to privilege the account of either uncalled witness over S.D., the reliability of this jury verdict is in question. The State has not proven that the accounts of either Ms. Wright or Ms. Taylor were somehow incredible as a matter of law; the omission of that evidence necessarily creates a material inconsistency that can only be resolved by the trier of fact. *Rohl v. State,* 65 Wis. 2d 683, 695, 223 N.W.2d 567 (1974).

The same is true for the statements of the two witnesses who viewed the video and identified Mr. Robinson as the person therein. (State's Br. at 35). Once again, evidence that was not presented at trial—the statements of witnesses who viewed the same video but picked out some other person, as well as the proposed input of an eyewitness expert—problematize any reliance on this evidence. When placed in proper

context, the evidence is susceptible to a competing inference that Mr. Robinson was wrongly identified.

Next, the State argues that presentation of the video erases any prejudice, as the jury was entitled to draw their own conclusions from the video. (State's Br. at 35). Yet, elsewhere in its brief the State has also argued that video identifications are somehow less reliable than in-person ones. (State's Br. at 27). Here, the jury's evaluation of the video was obviously colored by testimony exclusively centering on Mr. Robinson; had the jury been told that other witnesses—including witnesses who were physically present—did not identify Mr. Robinson as the man on tape, then once again a reasonable juror would have a doubt as to Mr. Robinson's guilt. Moreover, counsel for Mr. Robinson also presented evidence that the man on the video did not resemble the booking photograph of Mr. Robinson. (89:96-98; 90:7-11; 27).

Finally, the State points to Mr. Robinson's possession of two $100 bills, arguing this is inherently suspicious conduct for an indigent drug addict. (State's Br. at 35). The State also highlights alleged inconsistencies in Mr. Robinson's testimony as to the source of the money. (State's Br. at 35-36). Yet, evidence that Mr. Robinson possessed money—when that money was never connected back to the robbery via serial numbers or other evidence—is inherently ambiguous and certainly not sufficient to entitle a jury to convict.

VI. The evidence was insufficient.

First, the State argues that the jury was not instructed on this element, although it also concedes this is an element of the offense. (State's Br. at 9). The right to be found guilty beyond a reasonable doubt cannot be ignored simply because the jury was not instructed on an element of the offense. The elements are what they are; to allow a conviction to stand simply because the jury was not instructed on an essential element cannot be consistent with basic constitutional principles.

Next, the State suggests that counsel waived the sufficiency claim by not objecting to the deficient jury instructions. (State's Br. at 9). Yet, the State cites no case law in support. The State had an obligation to prove Mr. Robinson guilty in conformity with the law as set forth in the statutes; Mr. Robinson had a right to have the jury "determine each element of the crime." *State v. Hauk*, 2002 WI App 226, ¶ 32, 257 Wis. 2d 579, 652 N.W.2d 393. To allow the issue to be waived results in a conviction that cannot satisfy the right to be found guilty beyond a reasonable doubt on *all* the elements.

Finally, the State argues that there was sufficient evidence. (State's Br. at 9). The State points to the testimony of the banker regarding the bank's operations as well as some signage ostensibly visible in the video played to the jury. (State's Br. at 9). Yet, that evidence alone—while perhaps suggestive—does not conclusively prove, beyond a reasonable doubt,

that the bank was "chartered" for the purposes of the statute.

Accordingly, the evidence was insufficient to convict.

VII. Mr. Robinson is withdrawing his claim that the statute is unconstitutional.

The State expends significant effort in its brief addressing Mr. Robinson's argument that the statute is unconstitutional, the second issue (after ineffectiveness) raised in Mr. Robinson's brief.

After careful review of the State's arguments and the authorities cited, Mr. Robinson therefore withdraws his claim arguing that the statute is constitutional.

CONCLUSION

For the reasons set forth in the briefs, Mr. Robinson therefore asks this Court to grant the relief requested herein.

Dated this 18th day of May, 2021.

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 2,656 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 18th day of May, 2021.

Signed:

Electronically signed by Christopher P. August
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