STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2021 AP 1100

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALBERTO RIVERA,

Defendant- Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM AN ORDER DENYING A NEW TRIAL ENTERED ON JUNE 23, 2021, IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
The Honorable Jeffrey A. Wagner, Presiding
Trial Court Case No. 2015 CF 1640

Respectfully submitted:

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Argument

I. FAILING TO SECURE *SUPPRESSION* OF B.J.'S IN-COURT IDENTIFICATION, WHICH WAS TAINTED BY A HIGHLY SUGGESTIVE "SHOW-UP" PROCEDURE, WAS DEFICIENT UNDER THE LAW APPLICABLE BOTH THEN AND NOW, AND PREJUDICIAL UNDER CURRENT LAW, WHICH INFORMS HOW THE ISSUE WILL BE DECIDED FOLLOWING REMAND FROM THIS COURT.

A. The State's Heavy Reliance On *Dubose* Is Misplaced.

The State, claiming Rivera presents "a lot to unpack," (State's Brief, p. 19), relies heavily on *State v. Dubose*, 2005 WI 126, 285 Wis.2d 143, 699 N.W.2d 582, presenting it as the touchstone for analysis of the "show-up" issue. According to the State, ineffective assistance of counsel must be measured under *Dubose,* which was controlling at the time of Rivera's trial, and not under *State v. Roberson*, 2019 WI 102, 389 Wis.2d 190, 935 N.W.2d 813, which had not yet been decided. Rivera addressed both *Dubose* and *Roberson* in his brief-in-chief, but ultimately analyzed the issue under *Roberson,* because such is the law that will control the issue on remand for a new trial. Accordingly, *Roberson,* and not *Dubose,* controls the prejudice inquiry under *Strickland v. Washington,* 466 U.S. 668, 686 (1984). The State eventually concedes this point. (State's Brief, p. 23, fn 5).

The State, however, argues there could be no deficient performance under *Dubose* because *Roberson* changed the law and established a photographic show-up should be treated the same as an in-person show up. The State wrongly positions *Roberson* as announcing some new rule while ignoring the facile equivalence *Roberson* gave the two types of show-ups:

> *Dubose* defined a showup as "an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes." We have no quarrel with that definition. Here, the suspect, Roberson,

> was presented via a single photograph as opposed to being presented singly in person as the suspect was in *Dubose*.

Roberson, at ¶ 47. (Citations omitted).

In this effort to argue Rivera's trial counsel was hamstrung by caselaw establishing a photographic show-up was *ipso facto* permissible, while an in-person show-up was not, the State relies on this Court's decision in *State v. Roberson*, 2018 WI App 71, 384 Wis.2d 632, 922 N.W.2d 317. There are several serious problems with such reliance. This Court's *Roberson* decision was unpublished, which the State neglects to mention. Moreover, this Court's *Roberson* decision was *per curiam*, and consequently cannot even be cited for its persuasive value. Section 809.23(3)**,** Stats. Finally, this Court had not decided *Roberson* at the time of Rivera's trial, nor when he briefed his direct appeal. In other words, the State's argument is based on a non-binding decision that cannot even be cited for its persuasive value, even if it had been decided at the pertinent times, which it had not. This Court should strike and ignore this argument in its entirety.[4]

Rivera has properly noted that at the time his trial and appellate counsel failed to act, *Dubose* offered a less stringent standard ("necessity") for suppression of the single photograph show-up. By demonstrating, under *Roberson,* how the in-court identification of Rivera was fatally compromised by the impermissible photographic show-up, Rivera *ipso facto* demonstrated that such could not have survived scrutiny under *Dubose*. That *Dubose* offered an easier path to suppression informs the deficient performance. That suppression would still be required under *Roberson* informs the resultant prejudice.

Finally, before heading off on its *Dubose/Roberson* tangent, the State recognizes that Rivera advances "necessity" as an important consideration under *Perry v. New Hampshire*, 565 U.S. 228 (2012). (State's Brief, p. 20). And indeed, *Perry* deemed relevant whether the method law enforcement chose to identify a suspect as the perpetrator was "an **unnecessarily**

[4] The State does not include a copy of this Court's *Roberson* decision. *Id.*

suggestive identification procedure," creating a substantial likelihood of misidentification. *Id.*, at 232 n.1, 235. (Emphasis added). Due process concerns arise when law enforcement officers use an identification procedure both suggestive and unnecessary. *Id.* at 238-39, *citing Manson v. Brathwaite*, 432 U.S. 98 107, 109 (1977). The State, however, simply ignores *Perry* and never returns to the matter.

The rest of the State's show-up argument relies on ignoring factual problems surrounding the show-up, presumably because these will be *the State's* factual problems once the burden of proof shifts. B.J. testified the police were the first to float the name "Alberto," and that she saw the name "Alberto" when presented with the single photograph. Consequently, the State is left to rely on the fact it managed to get her to walk back those statements, not an attractive position for the party with the burden of proof. And even were it beyond question that B.J. was the first to reference "Alberto," subsequently showing her a photo with the name "Alberto" on it would only make that situation all the more egregious, and impermissibly suggestive.

Then there is the State's reliance on the idea that B.J. claimed she was well positioned to recognize "Alberto" because she had seen him on several occasions. Once again, this does not square with how she described Hodges' visits to Rivera's apartment, where she remained in the car while Hodges went up to the apartment. Moreover, as Rivera has already noted, the record is devoid of a single description of any face-to-face encounter with Rivera, where it occurred, how long it lasted, whether they spoke, whether conditions were favorable for seeing him, etc. Thus, here too the State will run into burden of proof problems when addressing the *Biggers* factors.

B. The Post-Conviction Court's Adoption Of The State's Brief Was Improper.

In denying Rivera's motion, the court leaned heavily on the State's brief. When explaining why it concluded Rivera had "not set forth a viable claim of ineffective assistance of trial counsel," the court explained its rationale was based on "the reasons set forth in State's postconviction response brief,

which the court adopts and incorporates as part of its decision in this matter." (R226-4). As Rivera has noted, this Court has directed circuit court judges to refrain from this practice. *State v. McDermott*, 2012 WI App 14, ¶ 9, fn 2, 339 Wis.2d 316, 810 N.W.2d 237. By ignoring why this Court deemed such a practice problematic, Rivera's post-conviction court relieved itself from the mental discipline an obligation to state reasons produces, that could have assured the parties that it considered the important arguments, and that would have enabled this Court to know the reasons for the judgment. *Id., citing DiLeo v. Ernst & Young*, 901 F.2d 624, 626 (7th Cir. 1990).

The State, however, would prop up the court's adoption of its brief as its decision by arguing the court added some of its own words:

> Here, the court's adoption of part of the State's brief on one issue was not as wholesale or as stark as the court's adoption in *McDermott*. Rather, the court set forth the relevant legal standard, and the State's brief applying the facts to that standard was concise and straightforward; the court's adoption of a part of the State's brief did not leave any mystery of what it found persuasive.

(State's Brief, p. 23). Here the State tacitly concedes the post-conviction court ran afoul of *McDermott*, but then, playing the apologist, goes on to argue the court did not drop the ball as badly as did the circuit court in *McDermott*.

That the circuit court managed to independently state the applicable legal standard, an issue never in dispute, does nothing to elucidate the real basis for its ultimate decision on a myriad of issues that *were* in dispute. Contrary to the State's claim, the failure to issue its own decision *did* leave the parties and this Court with the mystery of what it found persuasive. Numerous questions remain unanswered.

How did the post-conviction court assess each of the *Biggers* factors? What was its position regarding "the necessity" of the photographic show-up? What role did B.J.'s contradictory statements about the facts surrounding the

identification play? And at the most elemental level, did the circuit court reason that Rivera could not meet his burden of proof, or that he did but the State then met its burden of proof of showing the identification was nevertheless reliable? What did it think of B.J.'s brief glimpse of the perpetrator ("nothing more than seconds") at night, through a tinted window, and with a gun in her face? What did it think of the fact she thereafter was laying down in the third-row of the vehicle with her head down and her arms across her face? How did it square the State's reliance on *Roberson* with the fact that in *Roberson*, suspect and victim had spent two and a half hours together on three separate occasions, over a brief period of time, had been together at a residence, and contemplated an ongoing relationship? All of these inquiries remain a mystery because the circuit court's explanation for its decision was tantamount to: "What the State said."

Once again, this is neither a reasonable approach to deciding issues (especially where a defendant is serving life without parole), nor a proper exercise of discretion. It deprives the defendant of an independent-thinking judge in the first instance, and this Court of the benefit of analysis from the judge that presided over the trial. At a minimum, this Court should reverse and remand for further proceedings that require a real decision from the post-conviction court.

II. SUPPRESSION OF B.J.'S IDENTIFICATION OF RIVERA BASED ON A VIOLATION OF HIS RIGHT TO HAVE RETAINED COUNSEL PRESENT DURING THE LINE-UP PROCEDURE.

A. The Record Establishes Rivera Had Retained Counsel Of *His* Choice Before The Line-Up Procedure, And Requested The Presence Of *His* Counsel For That Procedure, And That Under These Circumstances, *Wright* Has No Application.

The State quibbles with whether Rivera established he had retained Attorney LeBell prior to the line-up procedure. (State's Brief, pp. 29-30). It should be noted the State never disputed this fact during the post-conviction proceedings, nor

did the post-conviction court ever view that as an issue. The State ignores all the evidence supporting Rivera's sworn affidavit. There was time (four months) and a reason (parole warrant) for Rivera to hire counsel. When arrested, Rivera asked for *his* attorney, not *an* attorney. Rivera was first charged only with Felon in Possession of a Firearm (FPF) and lo and behold, Attorney LeBell and/or his office appeared as counsel with Rivera and confirmed it had been retained to represent Rivera on that exact charge. Rivera adequately established he had hired Attorney LeBell prior to the line-up procedure, and the State produced nothing to dispute that fact.

The State does not deny the post-indictment, pretrial line-up is a critical stage at which defendants have a right to counsel. Nor does it dispute the Sixth Amendment guarantees defendants the right to be represented by an attorney of their choice. *Caplin & Drysdale v. U.S.*, 491 U.S. 617, 624–625 (1989). Instead, the State once again relies on *State v. Wright*, 46 Wis.2d 75, 175 N.W.2d 646 (1970), (State's Brief, pp. 29-31), authority the post-conviction court adopted as controlling, though again with no independent analysis. (R226-3).

The parties and this Court are therefore left in the dark as to how the post-conviction court managed to deem *Wright* persuasive and controlling, following Rivera's complete dismantling of the applicability of that case. *Wright*, Rivera now explains for the third time, was decided on the basis of an evidentiary hearing during which the defendant's supposed attorney of choice (but unlike Rivera, not formally retained), contradicted the defendant's claim he had been abandoned without counsel during the line-up procedure. Moreover *Wright* only addressed whether *counsel* was present, not whether *defendant's counsel* was present. Rivera has demonstrated how using *Wright* to resolve this case conflates two distinct issues: (1) the right to one's retained counsel at the line-up; and (2) the right to have the same attorney at both the line-up and the trial. The post-conviction court ignored these problems, and now the State largely does so as well. Rivera trusts this Court will not turn a blind eye to the inapplicability

of *Wright*, and recognize that arguments and decisions based on that case are thus flawed.[5]

B. Trying To Parse Rivera's FPF Charge From His Homicide Charge For Purposes Of His Right To Chosen Counsel During The Line-Up Procedure Is Disingenuous.

The State argues that Rivera's Sixth Amendment right attached only to the FPF charge, and not the more serious charges for which he seeks reversal. (State's Brief, p. 33). This putative distinction is flawed on both sides. First, since Rivera was only charged with FPF at the time of the line-up, the line-up ostensibly was to marshal evidence to support Rivera's guilt on that charge. And it was precisely for that charge (the only one pending) for which Rivera had obtained counsel.

What makes this argument especially disingenuous is that the probable cause portion of the complaint alleging FPF simultaneously and fully explicated probable cause for the homicide charges. (R2-3) ("Ms. Jackson stated that she believed that the defendant had tried to kill her as he must have aimed at her head for the round to strike her as they did . . . She stated she was 100% certain that the defendant was the person who shot her based on her contact with him at least 5 or 6 times in the past"). With this complaint forming the basis for his arrest and forced participation in the line-up, the idea that the line-up process could be unlawful for the FPF charge, yet lawful for the homicide charges is, frankly, specious.

And as Rivera has previously noted during these proceedings, application of the *Blockburger* test is misplaced. The State cites *Texas v. Cobb*, 532 U.S. 162 (2011), as the only

[5] The post-conviction court also fell in step with the State's reliance on *McMillian v. State*, 83 Wis.2d 239, 265 N.W.2d 553 (1978). (R226-3). Its decision is therefore further flawed because *McMillian* involved a lineup recorded by means of audio-video recording where the presence of defense counsel as the eyes and ears for the accused was deemed unnecessary because the camera and microphones served that function for the accused. *McMillian*, 83 Wis.2d at 246. The State now abandons *McMillian* as authority to support its arguments.

authority purportedly supporting this argument. *Cobb*, however, did not involve the right to counsel at a post-indictment line-up, but instead, during a pre-indictment interrogation. Most importantly, Cobb unsuccessfully argued that because he had counsel for an *unrelated* offense (a burglary), his waiver of *Miranda* rights and confession to murder was in violation of his Sixth Amendment right to counsel. *Cobb* does not control this case because the two charges in this case were directly related and inextricably interwoven, and the same criminal complaint established probable cause for both.

III. POST-CONVICTION COUNSEL'S FAILURE TO RAISE THESE CLEARLY STRONGER ISSUES CONSTITUTED IAC.

The State devotes little attention to the actual comparative analysis that is inherent in deciding whether some issues are "clearly stronger" than others. *State v. Starks*, 2013 WI 69, ¶ 6, 349 Wis.2d 274, 833 N.W.2d 146; *State v. Romero-Georgana*, 2014 WI 83, ¶ 4, 360 Wis.2d 522, 849 N.W.2d 668. The only thing the State says about the issues on direct appeal, against which the issues now *sub judice* must be measured, is the following:

> The State disagrees that the claims raised on appeal were "weak." The admission of other-acts is often a point of contention on appeal, and **the sufficiency-of-the-evidence claim wasn't frivolous.**

(State's Brief, p. 34) (emphasis added). While not persuasive, it is at least more than the post-conviction court offered, as it summarily ruled against Rivera without explanation.

Rivera emphasizes the State's remarks about the sufficiency of the evidence for two reasons. First, given the standard of review for sufficiency of evidence claims, it constitutes a tacit admission that the evidence demonstrating Rivera's guilt was not especially strong. Second, arguing that an issue is "clearly stronger" because it is "not frivolous" betrays the weakness of the argument.

The State's remarks about the other issue – "[t]he admission of other-acts is often a point of contention on appeal" – is also based on a non-sequitur. The frequency that an issue is raised on appeal says nothing about its strength. The strength of a particular issue requires a case-by-case analysis, under the specific facts of the case, and how popular the issue might be is irrelevant. As Rivera explained, the issue pertaining to the other acts evidence, the admission of which *Rivera* knowingly triggered when he testified and put identity at issue, was extremely weak given the strong degree of similarity between the prior act and the offense for which Rivera stood trial, and the closeness in time between the two. The State does not dispute this. It therefore cannot complain if this Court takes that matter as confessed.[6] *Charolais Breeding Ranches v. FPC Securities*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Conclusion and Relief Requested

For all the foregoing reasons, Rivera respectfully requests this Court reverse and remand for an evidentiary hearing on his motion.

Dated this 6th day of January, 2022.

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[6] The State also finds it ironic that Rivera noted that arguing sufficiency of the evidence on direct appeal was especially weak since B.J. testified Rivera was the shooter, while also arguing that B.J.'s identifications were unreliable and tainted and should have been suppressed. (State's Brief, p. 34). The State loses sight of the standard of review when sufficiency of the evidence is challenged: the evidence, viewed most favorably to the State, must so lack probative value that no trier of fact could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752 (1990). B.J. testified Rivera was the shooter and no matter how much she might have been impeached, the jury was entitled to believe her core allegation. This Court cannot substitute its judgment for that of the jury. *State v. Hayes*, 2004 WI 80, ¶ 57, 273 Wis.2d 1, 681 N.W.2d 203. This extremely weak issue was dead on arrival.

CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 2,999 words.

Dated this 6th day of January, 2022.

Electronically signed by: Rex Anderegg
REX R. ANDEREGG