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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2022AP1522-CR

STATE OF WISCONSIN

Plaintiff-Respondent

v.

Case No: 22AP1522CR

Circuit Court Case No. 20CF310

BRANDON B. SMILEY

Defendant-Appellant

Appeal from the Jefferson County Circuit Court

Case No. 20CF310

The Honorable Robert F. Dehring Jr. Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT, BRANDON SMILEY

KIRK D. HENLEY

Attorney for Brandon Smiley

State Bar No. 1107974

The Law Office of Kirk Henley, LLC

P.O. Box 511820

MILWAUKEE, WI 53203

attykirkhenley@gmail.com

(414) 678-1718

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE FOR HIS FAILURE TO MOVE TO SUPPRESS THE OUT OF COURT IDENTIFICATION OF MR. SMILEY.

- a. The photo array was impermissibly suggestive because Mr. Smiley was the only light skinned black man presented in the photo array and therefore the only individual depicted in the photo array who shared that feature with the victim's description.**

While it is correct to say that a photo array is not per se impermissibly suggestive merely because the individuals in the array have different appearances, *State v. Mosley*, 102 Wis. 2d 636, 652-653, 307 N.W.2d 200 (1981), "[t]here have been cases which have declared that a photographic identification procedure which includes a photo which is unique in a manner directly related to an important identification factor may be held impermissibly suggestive." *Powell v. State*, 271 N.W.2d 610, 618, 86 Wis.2d 51, 66-7, (Wis. 1978) citing *Fells v. State*, 65 Wis.2d 525, 223 N.W.2d 507 (1974).

Here, the photo of Mr. Smiley is unique amongst the other photos in the array because that photo is the only photo in which the man pictured has light skin and the remainder of the individuals pictured in the array clearly have dark skin. That the person was light skinned is an important identification factor that was used in the description given to the officers by the victim. Because Mr. Smiley's photo was unique amongst the other photos and the reason for that uniqueness was an important identification factor, this court should determine that the photo array was impermissibly suggestive.

- b. The in-court identification cannot be cleared from the taint of the impermissibly suggestive photo array.**

The state correctly points out the primary evil to avoid where a photo array is impermissibly suggestive is a "very substantial likelihood of irreparable misidentification". *Powell*, 86 Wis. 2d at 63-64. The burden is shifted to the state to prove that the in-court identification is free of the taint of the impermissibly suggestive photo array. *State v. McMorris*, 213 Wis. 2d 156, 167, 570 N.W.2d. 384 (1997). The state cannot meet their burden that the in-court identification is free of this taint.

The first factor of the *Biggers* test is the opportunity of the witness to view the person at the time of the crime. *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375 (1972). The state points out that the victim had three opportunities to view the person during the incident. Nowhere in the record does it reflect that the victim knew the person or had any prior interactions with the person prior to the incident. The interaction between the person and the victim were the product of a brief, momentary encounter between two persons.

That the interactions were brief means that the victim did not have much opportunity to see the person that masturbated in front of her at the store.

The second factor of the *Biggers* test is, the witness' degree of attention. *Id.* The victim's degree of attention during these interactions was very likely focused on the person's penis and not his face. The victim reports that she saw the person grabbing his penis and masturbating. Because the victim reports that she saw the person grabbing his penis and masturbating, it is reasonable to conclude that the victim was focused on the person's penis and hands and not the person's face. The last time that the victim reports that she saw the person is at the time he was leaving the store. If this is true, then the victim likely was able to see how tall the person was and his hair style but not his face as he was likely facing the exit not the isle where the victim was located. Additionally, the focus on the person's penis and hands during those interactions allowed for the victim to observe the person's light skin color which was one of the few descriptors that she provided to the officers. The state continues to argue that the victim does not include the eyes of the person as part of the description in her report made to the police. This further bolsters the conclusion that the victim's focus was not on the face of the person.

The third factor of the *Biggers* test, the accuracy of the prior description of the person. *Id.* The description of the person which the state argues is "specific" is a very basic description involving height, skin tone, build, and hair style. (State's brief 16). Specifically, the victim described the person as five feet ten inches to six feet tall, a thin build, either African American or mixed race, with a light complexion, with coarse hair that was ethnic but not an afro, wearing a white shirt and baggy black pants. (R.109:72,79). This description could be of many people in the community who are young light skinned black men and therefore does not strengthen the state's position.

The fourth factor of the *Biggers* test is the level of certainty demonstrated by the witness during the confrontation. *Biggers*, 409 U.S. at 199-200. The state argues that the victim determined that she was most certain regarding Mr. Smiley's photo however, the state does not include that the certainty of the victim was below 50% at the time that the photo array was administered. (R.155:3). The certainty of the victim never raises above 70%. (R.109:79).

The fifth factor of the *Biggers* test is the length of time between the crime and the confrontation. *Biggers*, 409 U.S. at 199-200. Here the photo array was administered over two weeks after the crime occurred. While this length of time is not extreme, under the totality of the circumstances and the other factors in this matter show that the state cannot meet their burden of showing that the in-court identification was free of the taint of the impermissible photo array.

- c. Because the photo array was impermissibly suggestive and the in-court identification cannot be clear of the taint of the impermissibly suggestive photo array, Mr. Smiley meets his burden of showing that trial counsel was deficient and that he was prejudiced by that deficient performance.**

The State's argument regarding Mr. Smiley's trial counsel's performance rests on the argument that the suppression motion lacked merit. (State's Brief, 12, 20). However, the reverse of that argument is that if the motion to suppress the identification through the photo array was meritorious and likely successful, the performance was ineffective. Deficiency in performance is where an attorney's performance falls below an objective standard of reasonableness under all of the circumstances surrounding the case. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984). Not pursuing a motion to suppress identification evidence in a case where identification is a critical trial issue should be considered below the objective standard of reasonableness.

Because the motion had merit and was should have been successful, this Court should determine that Mr. Smiley was prejudiced by his trial counsel's failure to argue that motion. Prejudice to determine ineffective assistance is defined as "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *State v. Guerard*, 2004 WI 85, ¶ 43, 273 Wis. 2d 250, 682 N.W.2d 12 (citing *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In the current case, identity of the person who masturbated in front of the victim is an important aspect of trial.

During trial, the state questioned the victim regarding the photo array and asked the victim whether she had identified someone during the photo array prior to her in-court identification of Mr. Smiley. (R.109:79). Had the identification prior to trial been suppressed and the in-court identification from the victim been determined inadmissible through that motion, the state would have only been able to rely on circumstantial evidence to rely on for identification at trial. That the state would have only been able to rely on circumstantial evidence at trial should create a reasonable probability that the outcome of the trial would have been different. That there was a reasonable probability that the outcome would have been different means that the deficient performance was prejudicial to Mr. Smiley.

CONCLUSION

For the above reasons, this Court should reverse the decision of the circuit court and remand this case to the circuit court.

Dated at Milwaukee, Wisconsin this 16th day of December, 2022.

Respectfully submitted

Electronically Signed by Kirk D. Henley

KIRK D. HENLEY

Attorney for Brandon Smiley

State Bar No. 1107974

The Law Office of Kirk Henley, LLC

P.O. Box 511820

MILWAUKEE, WI 53203

attykirkhenley@gmail.com

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BRANDON B. SMILEY

Defendant-Appellant

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief in that it is proportional serif font, minimum printing resolution of 300 dots per inch, 13-point body text. The text is 13-point type and the length of the brief is 1388 words.

Dated this 16th day of December, 2022.

Respectfully submitted

Electronically Signed by Kirk D. Henley

KIRK D. HENLEY

Attorney for Brandon Smiley

State Bar No. 1107974

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