**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**December 5, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2006AP82** **Cir. Ct. No. 1994CF2994**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RUFUS PATERSON WEST,**

**DEFENDANT-APPELLANT.**

APPEAL from orders of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 CURLEY, J. Rufus P. West appeals *pro se* from the order denying his postconviction motion, after a jury convicted him of armed robbery while concealing his identity, and one count of possession of a firearm by a felon. He also appeals from the order denying his motion for reconsideration. West

contends that the trial court erred as a matter of law in ruling that ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, does not apply retroactively to his case because he is pursuing a collateral appeal rather than a direct appeal. We conclude that even assuming that ***Dubose*** applies retroactively, and that it applies to the facts of this case, resulting in the trial court erroneously admitting evidence of a showup identification, it is clear beyond a reasonable doubt that a reasonable jury would have found West guilty, even absent the evidence of the showup. Accordingly, any alleged error resulting from the trial court's failure to apply ***Dubose*** retroactively is harmless. Therefore, we affirm.

## I. BACKGROUND.

¶2 On August 8, 1994, at approximately 10:15 p.m., Brenda Lotten was returning home. As she stepped out of her car she was approached by a black man, approximately five foot nine inches tall, who was wearing a black jacket, black baseball cap turned backwards, and a blue bandana across his face that covered his mouth and nose. While holding a gun against her neck, the man demanded that she hand over her purse. She handed him her off-white purse that contained her wedding ring, sixty dollars, credit cards and her driver's license. The man told Lotten to turn around and run and she did.

¶3 A neighbor of Lotten's, David Sweet, witnessed Lotten being confronted by a man from his window and chased the man down the street after he saw Lotten run off. Sweet got close enough to the man to notice that he was wearing tan pants, a dark jacket, and a backwards baseball cap that bore the bulldog logo of Georgetown University. Sweet stopped chasing the man when the man ran into a yard.

¶4 At the same time, Lawrence Schimke, a Milwaukee Police Officer who was on neighborhood foot patrol (riding a bicycle) in the vicinity, observed a man three quarters of a block away, running hunched over with his hands across his belly as if he was either hurt or holding something. Schimke approached the man and saw that there was something underneath his clothing, but when he asked the man to stop, the man ran off. Schimke dropped his bicycle and gave chase on foot. The man pulled out a black gun and pointed it toward Schimke, but soon dropped it and ran into a driveway where he dropped a purse from underneath his clothing. Schimke caught up with the man in the driveway and placed him under arrest. The gun and the purse remained within Officer Schimke's view until Milwaukee Police Officers Richard Wroblewski and Michael Placzek arrived at the scene to assist. The man was identified as West.

¶5 Upon his arrest, West was placed in the back seat of a squad car but was later removed. After his removal, Placzek searched the back seat and found a blue bandana tucked between the seat cushions in the spot where West had been sitting. Later that evening, Lotten and Sweet were brought to the site of West's arrest. Lotten identified the purse West had dropped as hers, the bandana found in the squad as the one worn by the robber, the gun West had dropped as the one the robber held against her neck, and the black baseball cap and black jacket that West was wearing as the clothes worn by the robber. She could not, however, identify West's face. Sweet stated that while he was also unable to tell by the face, West's clothes and build matched those of the man he had chased.

¶6 West was charged with armed robbery while concealing his identity, contrary to WIS. STAT. §§ 943.32(1)(b) & (2) and 939.641(2) (1993-94),[1] and possession of a firearm by a felon, contrary to WIS. STAT. § 941.29(2) (1993-94), both as a habitual criminal. He pled not guilty and the case was tried to a jury.

¶7 At trial, Lotten identified her purse and all the items inside, the blue bandana recovered from the squad car, the gun, the baseball cap and the jacket. She testified that she had seen all of the items twice before: at the time of the robbery and later the same evening when police had West in custody. She also stated that she was unable to identify the robber by his face. Sweet similarly identified the jacket and the baseball cap worn by the man he had chased, but was unable to identify the man by his face. Schimke identified the overalls, the baseball cap and the jacket West wore during the chase, the gun West had thrown, the purse he had dropped, and Lotten's driver's license, which had been in the purse. He also specifically identified West as the person he chased and arrested. Wroblewski identified West and testified that prior to commencing his shift he searched the squad and found nothing, and that after the search the only person to occupy the back seat was West. Placzek also identified West and testified that after West was removed from the squad he searched the squad and recovered a bandana tucked between the seats where West had been sitting.

¶8 West testified in his own defense. He stated that he was "tackled" by police, and although he admitted wearing the jacket, baseball cap and overalls, he denied wearing a bandana, having a gun or throwing a purse. The jury found

[1] All references to the Wisconsin statutes are to the 2003-04 version unless otherwise noted.

West guilty on both counts, and he was sentenced to twenty-eight years' imprisonment on the armed robbery count, and six years' imprisonment on the possession of a firearm count, to be served concurrently, consecutive to any other sentences.[2]

¶9 On West's direct appeal, the public defender who represented him filed a no-merit report. Concluding that any challenge to the conviction lacked arguable merit, this court summarily affirmed the judgment of conviction, *see* ***State v. West***, No. 96-3348-CRNM, unpublished slip op. (Wis. Ct. App. Mar. 13, 1997). The supreme court denied West's petition for review. In 2003, West filed a WIS. STAT. § 974.06 postconviction motion, alleging ineffective assistance of postconviction counsel. The trial court denied the motion, this court affirmed the denial, *see* ***State v. West***, No. 03-0963-CR, unpublished slip op. (WI App Jan. 14, 2005), and the supreme court denied West's petition for review.

¶10 On December 8, 2005, West filed a WIS. STAT. § 974.06 postconviction motion, based on the supreme court's recent holding in ***Dubose***, that evidence obtained from an out-of-court showup identification is inadmissible unless necessary in light of the totality of the circumstances. ***Id.***, 285 Wis. 2d 143, ¶45. West argued that ***Dubose*** should be applied retroactively to his case, and that under ***Dubose***, the evidence obtained from the showup identifications by Lotten and Sweet on the night he was arrested should be suppressed, and his convictions reversed. The trial court denied the motion on grounds that ***Dubose*** applies only

[2] This sentence reflects the time to which West was sentenced after he successfully moved for resentencing on grounds that his decision to proceed *pro se* at the original sentencing did not reflect an awareness of the possible disadvantages of proceeding *pro se* or of the maximum possible sentence.

to non-finalized cases heading for appeal, and retroactively to cases pending on direct appeal, and therefore does not apply to this case. West filed a motion for reconsideration which was denied. This appeal follows.[3]

## II. ANALYSIS.

¶11 In 2005, the Wisconsin Supreme Court recognized the growing concerns regarding the reliability of eyewitness testimony, and noted that "[t]he research strongly supports the conclusion that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined." ***Dubose***, 285 Wis. 2d 143, ¶30 (citation omitted). For this reason, the supreme court adopted a new test for the admissibility of showup identifications:[4]

> [E]vidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary. A showup will not be necessary, however, unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array.

***Id.***, ¶33. Generally, new constitutional rules of criminal procedure are applied retroactively to any cases not yet final on appeal. *See* ***State v. Koch***, 175 Wis. 2d 684, 694, 499 N.W.2d 152 (1993).

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[3] West also filed a separate petition for a writ of *habeas corpus*. On May 5, 2006, this court denied West's petition on grounds that West had failed to meet the requirements for *habeas* relief because *habeas* relief will not be granted on claims previously raised in postconviction motions and West's petition reiterated the same claims he raised in this first WIS. STAT. § 974.06 motion. *See* ***State v. West***, 2006AP435-W, unpublished slip op. (WI App May 25, 2006).

[4] "A 'showup' is an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes." ***State v. Wolverton***, 193 Wis. 2d 234, 263 n.21, 533 N.W.2d 167 (1995) (citation omitted).

¶12 It appears undisputed that the identifications made by Lotten and Sweet were showups, and that during the showups, Lotten and Sweet identified West based on items of clothing and other items, rather than his physical features.

¶13 West contends that the trial court erred as a matter of law in holding that ***Dubose*** does not apply retroactively solely on grounds that he is pursuing a collateral appeal, rather than a direct appeal, and submits that when applied to his case, ***Dubose*** warrants reversal of the trial court's decision.

¶14 The State does not respond to West's argument regarding retroactivity. Rather, the State assumes, without conceding, that ***Dubose*** does apply retroactively, and argues that the ***Dubose*** holding applies only to cases in which an identification is made based on the suspect's physical features, and not to cases like West's where an identification is made based on clothing or other inanimate objects. In the alternative, the State contends that even if ***Dubose*** applies retroactively and applies to the identifications made in this case, the admission of the evidence indicating that a showup occurred did not cause West any harm, because the trial testimony of Lotten, Sweet, Schimke, Wroblewski and Placzek, combined with the physical evidence itself, pointed to West as the only possible perpetrator.[5]

[5] In his reply, West asserts that the State is precluded from arguing that ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, does not apply to identifications made based on clothing and other objects and that the showups did not cause him any harm because the State never raised these arguments at the trial court. He also claims that because the State does not respond to his argument that ***Dubose*** applies retroactively, the State has conceded that it does.

(continued)

¶15 We will assume, without deciding, that ***Dubose*** applies retroactively and that the ***Dubose*** rule applies to the identifications made in this case, and we thus assume that the court improperly admitted the evidence about the showup.

¶16 Improperly admitted evidence justifies reversal only if the erroneous admission affected the substantial rights of the party seeking reversal. WIS. STAT. § 805.18(1); *see* ***State v. Britt***, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996) (evidentiary error subject to a harmless error analysis). "An error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" ***State v. Hale***, 2005 WI 7, ¶60, 277 Wis. 2d 593, 691 N.W.2d 637 (citation omitted). "In other words, if it is 'clear, beyond a reasonable doubt that a rational jury would have convicted absent the error,' then the error did not 'contribute to the verdict.'" ***State v. Weed***, 2003 WI 85, ¶29, 263 Wis. 2d 434, 666 N.W.2d 485 (citation omitted). In determining whether an error is harmless, we are to consider some or all of the following factors: "the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the

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Contrary to West's claim, the State has not conceded that ***Dubose*** applies retroactively, as the State explicitly stated that "[b]ecause this court can resolve this appeal in the State's favor without deciding whether ***Dubose*** applies retroactively, the State will assume (but does not concede) that ***Dubose*** applies retroactively," and added that "[i]f the court concludes that it must address the retroactivity of ***Dubose*** in order to decide the appeal, the State requests an opportunity to file a supplemental brief on that issue." Additionally, this court may affirm the trial court's holding on a theory or reasoning different than that relied on by the trial court, *see* ***Holt v. Holt***, 128 Wis. 2d 110, 125, 392 N.W.2d 679 (Ct. App. 1985), and with respect to harmless error, if harmless error applies, courts are required to address it regardless of whether the parties raised it, *see* ***State v. Harvey***, 2002 WI 93, ¶47, n.12, 254 Wis. 2d 442, 647 N.W.2d 189.

nature of the State's case, and the overall strength of the State's case." ***Hale***, 277 Wis. 2d 593, ¶61.

¶17 Employing a harmless error analysis, we are satisfied that even absent the evidence of the showup identification, the testimony presented at trial, together with the physical evidence, showed a continuous chain of events that would have convinced the jury beyond a reasonable doubt that West was the perpetrator.

¶18 At trial, Lotten testified that the man who robbed her was "wearing a black jacket, a blue banda[n]a," that covered his nose and mouth, and a "black baseball hat turned backwards." She stated that the man was black, had a slim build and was approximately five foot nine inches tall. She testified that the man "put a gun in the left side my neck and told me to give [him] my purse," and she thought he was going to shoot her, so she handed him her off-white purse that contained sixty dollars, a wedding ring, credit cards, and a driver's license. Sweet testified that after seeing a man point something at Lotten and seeing Lotten run away, he chased the man down the street and that the man "had a pair of tan pants on, dark jacket, and a baseball cap on backwards," and that he "could just tell by the little bulldog on the back that it was a Georgetown hat."

¶19 Schimke testified that after observing a man running hunched over and asking the man to stop, he chased the man when the man took off running. Schimke testified that when he was no more than two arms lengths away from the man, the man pointed a black revolver at him, and that as he started to unholster his service weapon, the man dropped the gun. He testified that the man then entered a driveway where he dropped a purse that had been concealed underneath his clothing. Schimke also indicated that he then caught up with the man and that

both the gun and the purse remained in his view until assistance arrived. At trial, Schimke identified the gun West dropped, the purse West dropped and its contents, as well as the baseball cap, jacket and bib overalls West wore the night in question. He also identified West as the person he chased and arrested.

¶20 Wroblewski testified that prior to beginning his shift, as a matter of regular procedure, he searched the squad car in which West was later placed and stated that the search revealed nothing. He also identified West as the person with whom he had contact upon his arrival at the scene. Placzek also identified West and the clothing he wore on the night of his arrest, and testified that after West was removed from the back seat of the squad, he did a routine search of the back seat because a suspect had been sitting there. He testified that during the search he recovered a bandana stuffed between the seat cushions.

¶21 At trial, Lotten identified the off-white purse that West had dropped from underneath his jacket, and the items the purse had contained, including a wedding ring, driver's license and credit cards, as hers. She also identified the blue bandana that was recovered from the squad car as the one worn by the robber, the black jacket and black baseball cap police recovered from West when he was arrested as the clothing the robber wore, and the gun that West pointed at Officer Schimke and dropped as the gun the robber held against her neck. Sweet identified the Georgetown baseball cap and jacket that West wore when he was arrested as the same baseball cap and jacket worn by the man he chased.

¶22 West himself also confirmed that on the night he was arrested he had worn the black jacket and Georgetown baseball cap that were identified by Lotten, Sweet, Officer Schimke, Officer Wroblewski and Officer Placzek.

¶23 We are satisfied that these facts provide a sequence of events that would have convinced the jury beyond a reasonable doubt that West was the perpetrator. The State's evidence implicating West as the robber was overwhelming, irrespective of the showup identifications. *See* ***Hale***, 277 Wis. 2d 593, ¶61.

¶24 As a result, we are convinced that, even assuming that the admission of the evidence of the showup identifications was erroneously admitted, it is clear beyond a reasonable doubt that a reasonable jury would have found West guilty regardless of the error. *See* ***id.***, ¶60. The alleged error was therefore harmless. *See* ***id.*** Consequently, we affirm.

*By the Court.*—Orders affirmed.

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