COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP398-CR **Cir. Ct. No. 2003CF6626**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARREN DENSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO and MEL FLANAGAN, Judges. *Affirmed.*

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

¶1 CURLEY, J. Darren Denson appeals from a judgment of conviction entered after a jury found him guilty of one count of felony murder, two counts of armed robbery and one count of conspiracy to commit armed

robbery. He also appeals from the order denying his postconviction motion.[1] Denson seeks a new trial, contending that his trial was tainted by the introduction of four impermissibly and unnecessarily suggestive in-court identifications.[2] Analyzing this case in the context of ineffective assistance of counsel, we conclude that the in-court identifications were properly admitted and that Denson was not prejudiced by their admission, and therefore, further conclude that Denson's trial counsel did not provide ineffective assistance by failing to object to the introduction of the identifications. Accordingly, we affirm.

I. **BACKGROUND.**

¶2 At about 6:00 a.m. on June 6, 2003, a parking enforcement officer discovered a body, later identified as John Bagin, in the parking lot of a McDonald's restaurant. It was later determined that Bagin had been shot twice in his left cheek, once in his chest, and once in his abdomen, and that he had bled to death from the gunshot wounds. Four days later police found Bagin's purple car. There was a pool of blood and brain matter on the front passenger floor mat.

¶3 On November 12, 2003, at 9:50 p.m., Crystal Weir, Jamie Jesse and two other employees were working at an Arby's restaurant when three men entered the restaurant. Two of the men were wearing black ski masks and one was unmasked. The unmasked man, who had a black gun, leaped over the counter,

[1] The trial and sentencing were presided over by the Honorable Jean W. DiMotto. The postconviction motion was presided over by the Honorable Mel Flanagan.

[2] Denson does not argue ineffective assistance of counsel, but nonetheless we must review his arguments in light of the ineffective assistance of counsel standard because due to his attorney's failure to object to the admission of the identifications, the issue was not preserved for direct review by this court. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31.

told everyone in the store to get down, and demanded that Weir open the safe and empty its contents into a bag. She complied. One of the masked men then demanded that Weir open the cash drawer from the drive-through registry. Weir again complied. While threatening another employee with the gun, the unmasked man then demanded that Weir hand over the keys to her car. She did. The three men then placed all four employees in a cooler and blocked its door with an oven. The four eventually made their way out and, after discovering that the phone was gone, they flagged down police on the street.

¶4 Later that same evening, shortly before 11:00 p.m., Anthony Wetzel, Travaris Kemp, another employee, and a carpet cleaner were working at a different Arby's restaurant when three men entered the restaurant. One man was unmasked and two were wearing black ski masks. The unmasked man had a black gun and told everyone to get on the floor. The gunman then directed Wetzel to rise and, pointing the gun at him, told Wetzel that he knew what to do, which Wetzel interpreted as meaning to open the safe. Wetzel did. Pointing the gun at Wetzel's back, the unmasked man then directed Wetzel to empty the cash drawer from the drive-through. Wetzel complied. Wetzel was then taken to a cooler in the back of the store where Kemp and the other two employees already were. The door of the cooler was closed and two ovens were placed in front of it. Several minutes later they made it out of the cooler, pushed the panic button and waited for police to arrive. They were unable to call police because the phones were gone.

¶5 Later that same night, at about 2:40 a.m., Milwaukee Police Officer Rodney Young observed a car in a rarely-used back parking lot of a Wendy's restaurant. The car had four occupants, was running, and its lights were off. The restaurant was closed at the time. As Young pulled his squad car into the parking

lot, he and his partner noticed that the people in the car were looking at them. The officers wanted to investigate, so they called for backup. When backup arrived, the four occupants were removed from the car. The occupants were Denson, Maurice Calhoun, Christopher Bunch, and Vincent Grady. A search of the car revealed a black gun in the seat pocket in the spot where Denson had been sitting, and a black ski mask. The four individuals were placed in different squad cars. They gave contradictory statements and were arrested.

¶6 After his arrest, Denson gave three different statements to police. During the first interview on December 13, 2003, he admitted being in Milwaukee on the day Bagin was killed and admitted that he, Calhoun and Bunch had decided to rob a McDonald's to get bail money for a friend of theirs, but claimed that although he had been at the restaurant, he had returned to a friend's house and later found out that Calhoun had shot a man. He also stated that on the day he was arrested he had not planned to rob the restaurant and just wanted to return home to Chicago. During his second interview on November 14, 2003, Denson admitted being at the McDonald's during the shooting, but claimed that he was in the car when he heard one gunshot and then saw Calhoun and Bunch drive away in a purple car and he followed them out of the parking lot. During the last interview on November 16, 2003, Denson admitted that on November 12, 2003, a decision had been made to rob an Arby's restaurant. He admitted that he, Calhoun and Bunch entered an Arby's restaurant and robbed it, and that shortly thereafter they drove to a different Arby's restaurant, where he, Grady and Bunch entered the restaurant and robbed it in a manner similar to how they had robbed the first. Denson admitted carrying a gun during both robberies.

¶7 On November 18, 2003, Denson was charged with one count of felony murder, party to the crime, contrary to WIS. STAT. §§ 940.03 and 939.05;

two counts of armed robbery, party to the crime, contrary to WIS. STAT. §§ 943.32(1)(a) and (2) and 939.05; and one count of conspiracy to commit armed robbery, contrary to WIS. STAT. §§ 939.31 and 943.32(2) (2003-04).[3]

¶8 Denson pled not guilty to all counts. On April 26, 2004, Denson's trial was severed from that of his co-defendants.[4] A jury trial began on May 24, 2004. Jesse, Weir, Wetzel, and Kemp all testified at trial about the two robberies of their respective Arby's restaurants. All four identified Denson in court as the gunman, all four stating that they were sure he was the person they had seen on November 12, 2003. The four witnesses had not seen Denson since the robberies and they had not been asked to identify Denson in a line-up or photo-showup prior to trial.

¶9 Pursuant to a deal with the State, Calhoun, who was charged with the same offenses as Denson, pled guilty to the felony murder and the two armed robbery counts, and agreed to testify for the prosecution. Calhoun's testimony was consistent with Denson's confession to the Arby's robberies, implicating Denson as the gunman in both instances. Calhoun also testified that it was Denson who shot Bagin, and that he stayed behind in the car and then saw Denson and Bunch drive past him in a purple car, which he then followed. Officer Young testified about the events in the Wendy's parking lot, and other police officers

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

The complaint also charged Calhoun and Bunch with the same count of felony murder, and Calhoun, Bunch, and Grady with the same two counts of armed robbery and conspiracy to commit armed robbery. The complaint also charged Jerrice Grashen with aiding a felon.

[4] Denson's defense counsel sought to suppress Denson's statements to police, but the request was denied.

testified about the recovery of Bagin's car and about the items recovered from the car in which Denson and the other co-defendants had been sitting. Denson's statements to police were read into the record. Denson did not testify.

¶10 On May 27, 2004, the jury returned verdicts of guilty on all counts. Denson was sentenced as follows: forty years' imprisonment, comprised of thirty years' initial confinement and ten years' extended supervision for the felony murder, consecutive to any other sentence; twenty years' imprisonment, comprised of ten years' initial confinement and ten years' extended supervision for each of the armed robberies, each consecutive to count one and each other; and twenty years' imprisonment, comprised of ten years' initial confinement and ten years' extended supervision for the conspiracy to commit armed robbery, concurrent with counts one, two and three, for a total of fifty years' initial confinement, and thirty years' extended supervision.

¶11 On January 13, 2006, Denson filed a postconviction motion for a new trial, arguing that because Jesse, Weir, Wetzel, and Kemp identified him for the first time in court, the in-court identifications constituted an improper "show-up" under ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, and ***State v. Hibl***, 2005 WI App 228, 287 Wis. 2d 806, 706 N.W.2d 134.[5] On January 19, 2006, the trial court issued an order denying the motion, reasoning that ***Dubose***

[5] In ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, the supreme court adopted a new test for the admissibility of showup identifications whereby "evidence 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." ***Id.***, ¶33. In ***State v. Hibl***, 2005 WI App 228, 287 Wis. 2d 806, 706 N.W.2d 134, this court extended the ***Dubose*** holding to an identification that took place in a courthouse hallway. ***Id.***, ¶18. The supreme court, however, reversed, refusing to extend the ***Dubose*** rule beyond the showup procedure. ***State v. Hibl (II)***, 2006 WI 52, ¶¶31-35, 290 Wis. 2d 595, 714 N.W.2d 194.

and ***Hibl*** are inapplicable and because "[w]here the witnesses are under oath and available for cross examination, as here, their identifications were not improper and did not constitute 'show-ups' as that term is used." The court added that "[e]ven if they could loosely be characterized as 'show-ups,' which this court finds they are not, there is no prejudice to the defendant in this case," because he "admitted to police that he was the gunman in the two Arby's robberies and waived his right to testify in this defense." Denson now appeals.

II. ANALYSIS.

¶12 On appeal, Denson renews his request for a new trial, arguing that his trial was tainted by the introduction of in-court identifications of him by Jesse, Weir, Wetzel, and Kemp. He maintains that the identifications were "in-court showups" that were impermissibly and unnecessarily suggestive, and admitted in violation of ***Dubose*** and ***State v. Hibl (II)***, 2006 WI 52, 290 Wis. 2d 595, 714 N.W.2d 194. Because both ***Dubose*** and ***Hibl (II)*** were decided after the trial in this case, Denson maintains that they should be applied retroactively.

¶13 Denson is mistaken in framing the issue as one of retroactivity. The deciding factor in analyzing this appeal is that Denson's trial counsel did not object to the admission of the identifications. It is a "fundamental principle of appellate review that issues must be preserved at the [trial] court," and thus, when an objection is not raised at the trial court level, the argument is waived. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Hence, "[t]he absence of any objection warrants that we follow 'the normal procedure in criminal cases,' which 'is to address waiver within the rubric of the ineffective assistance of counsel.'" ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31 (citation omitted). Because Denson's trial counsel did not object

to the introduction of the identifications, the question before us is whether his trial counsel provided ineffective assistance by failing to do so.

¶14 To succeed on an ineffective assistance of counsel claim, the defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To satisfy the prejudice prong a defendant must demonstrate that there is a reasonable probability that, but for counsel's alleged errors, the outcome of the proceeding would have been different. ***Id.*** at 694. A court need not address both components if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶15 Our standard for reviewing this claim involves mixed questions of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The trial court's determination of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. *See* ***id.*** The ultimate conclusion, however, of "whether the attorney's conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law," which we review independently. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

¶16 To determine whether Denson's trial counsel's assistance was ineffective for failing to object to the in-court identifications, we must determine whether they were inadmissible.

¶17 "The admissibility of an in-court identification depends upon whether that identification evidence has been tainted by illegal activity," because

"[i]n general, evidence must be suppressed as fruit of the poisonous tree, if such evidence is obtained by exploitation of that illegality." ***State v. Roberson***, 2006 WI 80, ¶32, __ Wis. 2d __ , 717 N.W.2d 111 (citations and internal quotations omitted). If an independent source exists to make the identification, an in-court identification is admissible, even if it is preceded by an illegal out-of-court identification. ***State v. McMorris***, 213 Wis. 2d 156, 166-67, 570 N.W.2d 384 (1997). Stated differently, an "in-court identification must rest on an independent recollection of the witness's initial encounter with the suspect." ***Roberson***, 717 N.W.2d 111, ¶34. Here, the in-court identifications by Jesse, Weir, Wetzel, and Kemp were clearly based on their independent recollection of their encounters with Denson during the robberies and were clearly not tainted by an illegal identification, because none of the witnesses had seen Denson since the robberies and had not been asked to identify Denson in a line-up or showup. *See* ***id.***

¶18 In ***Roberson***, the supreme court further explained the appropriate inquiry in an appeal that challenges the admissibility of an in-court identification in an ineffective assistance of counsel context:

> Ordinarily, an analysis of the admissibility of an in-court identification shifts to the State the heavy burden of establishing by clear and convincing evidence that the in-court identification was not tainted by [an] illegal activity. However, the question of the admissibility of the in-court identifications in this case arises as part of an ineffective assistance of counsel claim. In an ineffective assistance of counsel claim, *Strickland* "places the burden on the defendant to affirmatively prove prejudice." In determining whether the defendant has met his or her burden of proving prejudice, the reviewing courts are required to consider the totality of the evidence before the trier of fact.

Roberson, 717 N.W.2d 111, ¶35 (citations and footnote omitted).

¶19 Denson, as noted, submits that the identifications by Jesse, Weir, Wetzel, and Kemp should be suppressed as overly suggestive. In so arguing, he relies almost exclusively on ***Dubose*** and ***Hibl (II)***, and claims that the in-court identification constituted an "in-court showup" and appears to assert that the holding of ***Dubose*** should be extended to in-court identifications.

¶20 We are not persuaded by Denson's comparison of ***Dubose*** and ***Hibl (II)*** with this case, because even assuming that they apply retroactively, they do not apply to this case. In ***Dubose***, the supreme court held that "evidence 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." ***Id.***, 285 Wis. 2d 143, ¶33 (citation omitted; emphasis added). The holding is hence specific to showups; namely, "out-of-court pretrial identification procedure[s] 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). In ***Hibl (II)***, reversing the decision of the court of appeals, the supreme court refused to extend the ***Dubose*** rule beyond the showup procedure to an identification that took place in a courthouse hallway. ***Hibl (II)***, 290 Wis. 2d 595, ¶¶31-35. Thus, unlike this case, neither ***Dubose*** nor ***Hibl (II)*** involved *in-court* identifications.

¶21 The distinction between in-court and out-of-court identifications is important. When an identification is made in court, it can be attacked on cross-examination or in closing arguments. *See* ***Powell v. State***, 86 Wis. 2d 51, 67-68, 271 N.W.2d 610 (1978). Any discrepancies that are exposed during such attacks go to the weight, not the admissibility, of the identifications. *See* ***id.*** Here, Denson's trial counsel did in fact cross-examine the witnesses regarding the identifications. With respect to a showup, such attacks by counsel are obviously

not possible. Additionally, because a showup is an "out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes," ***Wolverton***, 193 Wis. 2d at 263 n.21 (citation omitted), it is also evident that, contrary to Denson's contention, an in-court identification is, by definition, not a showup. Accordingly, Denson's argument fails and we conclude that the identifications were not improperly admitted.

¶22 Moreover, even absent the identifications, there was an abundance of evidence against Denson. The remainder of the testimony provided by Jesse, Weir, Wetzel, and Kemp provided a clear account of what took place. Calhoun, having himself pled guilty to the felony murder and both robberies, testified that he participated in the two robberies with Denson and waited outside when Denson shot Bagin. Calhoun's testimony about the robberies was consistent with that of Jesse, Weir, Wetzel, and Kemp. Most significantly, it is difficult to conceive how Denson could have been prejudiced by the identifications, given that he confessed to both of the Arby's robberies and to carrying a gun during both robberies, thereby unequivocally placing himself at the two restaurants at the time of the robberies. Considering the totality of the circumstances, it is clear that even without the identifications there was powerful evidence pointing toward Denson's guilt, and we are satisfied that Denson was not prejudiced by their admission. *See* ***Roberson***, 717 N.W.2d 111, ¶35.

¶23 Because the in-court identifications were properly admitted and because Denson cannot show that he was prejudiced by their admission his trial counsel was not ineffective for failing to object to the admission of the identifications. ***Strickland***, 466 U.S. at 694, 697. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.