COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2171-CR **Cir. Ct. No. 2002CF1472**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN R. HAAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: M. JOSEPH DONALD and MICHAEL B. BRENNAN, Judges.[1] *Judgment vacated, orders reversed, and cause remanded with directions.*

Before Wedemeyer, Fine and Kessler, JJ.

[1] The Honorable M. Joseph Donald presided over the trial and entered the judgment of conviction. The Honorable Michael B. Brennan issued the orders denying the postconviction motions.

¶1 FINE, J. John R. Haas appeals a judgment entered after a jury found him guilty of attempted burglary, as an habitual criminal, *see* WIS. STAT. §§ 943.10(1)(a), 939.32, 939.62 (2001–02), and possession of burglarious tools, *see* WIS. STAT. § 943.12 (2001–02). He also appeals orders denying his postconviction and amended postconviction motions. Haas claims that his due-process rights were violated when: (1) an out-of-court show-up identification was admitted at trial; and (2) the police destroyed exculpatory evidence.[2] We agree, and reverse and remand for a new trial. Accordingly, we do not discuss his claim that his trial lawyers gave him constitutionally deficient representation. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

I.

¶2 On March 9, 2002, a security guard at the American General Insurance building on West Virginia Street in Milwaukee told a police officer who had been dispatched to the building that she had seen a man cut telephone wires to an adjacent building. She pointed to a man carrying a black duffle bag. The man was Haas. The officer walked over to Haas, and found a crowbar in the duffle bag and a screwdriver and a wire cutter in Haas's pocket. The officer placed Haas in the back of a police car and brought Haas back to where he had left the security guard. The security guard told the police that Haas was the person whom she had seen cutting the wires.

[2] "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. Dubose***, 2005 WI 126, ¶1 n.1, 285 Wis. 2d 143, 148 n.1, 699 N.W.2d 582, 584 n.1 (internal quotation marks omitted).

¶3 Before trial, Haas filed a *pro se* motion to suppress as impermissibly suggestive the security guard's show-up identification and any subsequent in-court identification. He also requested production of the clothing he was wearing when he was arrested. Haas's first trial lawyer withdrew and the trial court never ruled on Haas's motion.

¶4 A few days before Haas's trial, Haas's second lawyer also moved for the production of the clothing Haas was wearing when he was arrested. On the first day of the trial, Haas asked whether the clothing was "going to be [t]here." The State told the trial court that it did not bring the clothing because: (1) it did not plan to use it; and (2) there was no request for it. The trial court then told Haas: "You have an attorney here. We are going to go forward with the trial."

¶5 The security guard testified at both the preliminary examination and at the trial. During her testimony at both proceedings, she identified Haas as the man whom she had seen cut the wires.

¶6 Haas's contention that law enforcement improperly destroyed exculpatory evidence turns on what the security guard said he was wearing when he allegedly cut the telephone wires, and what he asserts he was wearing when he was arrested. A police report drafted by one of the arresting officers described Haas as wearing a "Green Bay Packer cap/blue jacket w/blue jeans." (Uppercasing omitted.) At Haas's preliminary examination, the security guard testified that the man she saw cut the wires wore blue jeans, a black hooded sweatshirt jacket, and a black knit hat. At the trial, she testified that Haas was wearing a "[b]lack jacket, with a hoodie. I believe a dark hoodie [and a] skull cap, a dark color. It was like, I think, dark; dark blue, black." One of the arresting officers told the jury that when Haas was arrested he "might have been" wearing a

green and yellow cap, but could not remember if it was a Green Bay Packers cap. The officer also "seem[ed] to recall a black hooded sweatshirt," but could not positively say what Haas was wearing. Haas was convicted.

¶7 After the trial, Haas's postconviction lawyer sought discovery of the clothing Haas was wearing when he was arrested. The postconviction court ordered the clothing produced, concluding that "the defendant could use such evidence to attack the eyewitness's credibility." In a letter to the postconviction court and Haas's lawyer, an assistant district attorney asserted that, according to Milwaukee County Sheriff's Department records, Haas's clothing, which consisted of "one blue jacket and one multi-color jacket," was "disposed of on August 10, 2002."

¶8 Haas filed a postconviction motion raising issues that, other than the destruction-of-the-clothing matter, are not material to this appeal. Haas also filed an amended postconviction motion, again asserting that the on-the-scene show-up violated his rights. *See* ***State v. Dubose***, 2005 WI 126, ¶33, 285 Wis. 2d 143, 165–166, 699 N.W.2d 582, 593–594 (show-up unnecessary unless police lacked probable cause or exigent circumstances).

¶9 The trial court denied Haas's postconviction motions, concluding that the show-up identification was necessary because without it the police did not have probable cause to arrest Haas, and that the State did not have a duty to preserve Haas's clothing.

II.

¶10 The relevant facts are not in dispute, and our review is *de novo*. *See* ***id.***, 2005 WI 126, ¶16, 285 Wis. 2d at 154, 699 N.W.2d at 587.

A. *Show-up.*

¶11 ***Dubose*** held that:

> [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., 2005 WI 126, ¶¶33, 39, 285 Wis. 2d at 165–166, 172, 699 N.W.2d at 593–594, 596–597 (relying on the due-process clause in article I, section 8 of the Wisconsin Constitution). "This test requires the court to determine whether (1) the showup procedure was necessary under the totality of the circumstances, and, if necessary, (2) that care was taken to minimize the suggestiveness of the procedure." ***State v. Nawrocki***, 2008 WI App 23, ¶22, No. 2006AP2502-CR.

¶12 Haas acknowledges that ***Dubose*** was decided after his trial, but argues that it applies to this case because new constitutional rules of criminal procedure apply retroactively to cases not yet final on appeal. *See* ***State v. Koch***, 175 Wis. 2d 684, 694, 499 N.W.2d 152, 158 (1993). We agree. The State contends, however, that "retroactivity is not the problem for Haas" because he waived his substantive claim by "not pursu[ing] a challenge to [the security guard]'s out-of-court identification of him before or during trial." (Footnote omitted.) We disagree. Haas raised this issue before the trial in his *pro se* motion. Accordingly, the issue has been preserved for review.

¶13 Haas claims that the show-up identification was not necessary under the first part of ***Dubose*** because the police had sufficient probable cause, absent the show-up identification, to arrest him. We agree.

¶14 "'Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime.'" ***Koch***, 175 Wis. 2d at 701, 499 N.W.2d at 161 (quoted source omitted). When Haas was initially detained and searched, the police had reason to believe that at the very least he was violating the law by unlawfully possessing burglary tools, and they could have arrested him for that crime. *See* WIS. STAT. § 943.12 (2001–02). Accordingly, the security guard's out-of-court show-up identification was unnecessary and should have been suppressed.

¶15 The jury heard about the security guard's on-the-scene identification of Haas as the man she had seen cut the wires, and the State has not demonstrated that receipt of this significant piece of evidence was harmless beyond a reasonable doubt. *See* ***State v. Hale***, 2005 WI 7, ¶60, 277 Wis. 2d 593, 612–613, 691 N.W.2d 637, 647. We thus reverse the order denying Haas's amended postconviction motion, vacate the judgment, and remand for a new trial. On remand, the trial court is to determine whether the security guard's in-court identification of Hass should have been suppressed because it was tainted by the show-up identification. *See* ***State v. Roberson***, 2006 WI 80, ¶34, 292 Wis. 2d 280, 305, 717 N.W.2d 111, 123 (The admissibility of an in-court identification following an inadmissible out-of-court identification depends on whether "'the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'") (quoted source omitted).[3]

[3] Haas also claims that the security guard's preliminary-examination identification should have been suppressed. We do not address that issue because there was no request for an interlocutory appeal and the in-court-identification issue will be resolved on remand. *See* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108, 110 (1991).

B. *Exculpatory Evidence.*

¶16 A defendant's due-process rights are violated if the police: (1) do not preserve evidence that is apparently exculpatory, even if they do not act in bad faith; or (2) act in bad faith by not preserving evidence that is potentially exculpatory. ***Arizona v. Youngblood***, 488 U.S. 51, 57–58 (1988); ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294, 297 (Ct. App. 1994). Haas claims that the State violated the first standard. Under this standard: (1) the evidence must have had exculpatory value that was apparent before the evidence was destroyed; and (2) the defendant would not be able to get comparable evidence by other reasonable means. ***California v. Trombetta***, 467 U.S. 479, 489 (1984); ***State v. Oinas***, 125 Wis. 2d 487, 490, 373 N.W.2d 463, 465 (Ct. App. 1985).

¶17 Regarding the first part of the test, Haas argues that the exculpatory value of his clothing became apparent after the security guard testified at the preliminary examination. He points out that the security guard's description at the preliminary examination of his clothing as a black hooded sweatshirt jacket and a black knit hat conflicted with the police report's description of a blue jacket and a Green Bay Packers cap. Haas thus claims that the clothing he was wearing when he was arrested was clearly exculpatory because it could have been used at trial to impeach the security guard. We agree.

¶18 The security guard was the sole witness to the crime. Her identification of Haas was a major part of the State's case. The only evidence linking Haas to the attempted burglary was her identification of him and the tools he had. Given the discrepancy between the security guard's testimony and the police report's description of Haas's clothing, the State should have expected it to

"play a significant role in [Haas's] defense" at trial. ***Trombetta***, 467 U.S. at 488 (State's duty to preserve evidence limited to "evidence that might be expected to play a significant role in the suspect's defense.").

¶19 Haas also contends that the second part of the test is met because the police report is not an adequate substitute for his clothing. Again, we agree. The report's description of Hass's clothing is cursory and incomplete. It does not indicate either whether the jacket had a hood or the color of the Green Bay Packers hat. Accordingly, Haas's due-process rights were violated when the police destroyed this evidence. We thus reverse the order denying Haas's postconviction motion and remand to the trial court for a determination of the appropriate sanction. *See* ***id.***, 467 U.S. at 487 ("when evidence has been destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing … the … evidence"); ***State v. Harris***, 2008 WI 15, ¶105, No. 2006AP882-CR (trial court must exercise its discretion to mitigate the effects of State's failure to fulfill mandatory discovery obligations).

By the Court.—Judgment vacated, orders reversed, and cause remanded with directions.

Publication in the official reports is not recommended.