IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. TONY DOOLIN, Defendant-Appellant.	)))))))))	S.CT. NO. 17-1715

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
HONORABLE JOEL A. DALRYMPLE, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

MARK C. SMITH
State Appellate Defender

MARIA RUHTENBERG
Assistant Appellate Defender
MRuhtenberg@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX
ATTORNEYS FOR DEFENDANT-APPELLANT

FINAL

CERTIFICATE OF SERVICE

On the 14th day of August, 2018, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Tony Doolin, No. 16878-029, FCI Forrest City Low, Federal Correctional Institution, PO Box 9000, Forrest City, AR 72336.

APPELLATE DEFENDER'S OFFICE

MARIA RUHTENBERG
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
MRuhtenberg@spd.state.ia.us
appellatedefender@spd.state.ia.us

MR/sm/4/18
MR/sm/8/18

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issues raised involve substantial issues of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal from conviction and sentence following a jury trial for intimidation with a dangerous weapon, assault while participating in a felony, and carrying weapons in Black Hawk County No. FECR208087.

Course of Proceedings: On September 29, 2015, the State charged the defendant, Tony Doolin, with intimidation with a dangerous weapon in violation of Iowa Code section 708.6 (2015), a class C felony under Count I; assault while participating in a felony in violation of Iowa Code section 708.3 (2015), a class D felony under Count II; and carrying weapons in violation of Iowa Code section 724.4 (2015), an aggravated misdemeanor under Count III. (Trial Information) (App. pp. 5-7). Doolin pled not guilty on October 16, 2015. (Written

Arraignment and Plea of Not Guilty) (App. p. 8). The matter was tried to a jury beginning August 22, 2017. (Trial tr. Day 1, p. 1, L. 1-25).[1] On August 25, 2017, the jury found Doolin guilty as charged on all counts. (Trial tr. Day 3, p. 72, L. 3-25; Order Following Verdict, 9/5/2017) (App. pp. 17-18). On October 3, 2017, Doolin filed a Motion for New Trial, alleging the verdict was against the weight of the evidence. (Motion for New Trial) (App. pp. 19-20). The Motion for New Trial was denied and the court sentenced Doolin to concurrent indeterminate terms of incarceration not to exceed 10 years on Count I, intimidation with a dangerous weapon; 5 years on Count II, assault while participating in a felony; and 2 years on Count III, carrying weapons. The prison term was order to be served consecutively to a federal sentence Doolin was serving. (Sentencing Order, 10/20/2017) (App. pp. 21-25). Doolin filed

[1] In this case there are two transcripts labeled "Day 1" but are not consecutively paginated. One of them includes pretrial discussions between counsel and the court and the other one contains the opening statements and testimony from witnesses. For purposes of this brief, references to "Day 1" transcript refers only to the transcript containing opening statements and testimony and does not in any case reference the pretrial discussions transcripts.

a Notice of Appeal on October 26, 2017. (Notice of Appeal) (App. p. 26).

Facts: On August 15, 2015, Waterloo Police Officer Ryan Muhlenbruch was dispatched to the Flirts Gentleman's Club at 1:17 a.m. on a report of a disorderly situation regarding someone with a gun. (Trial tr. Day 1, p. 19, L. 19-23; p. 21, L. 8-22). When Officer Muhlenbruch arrived, a man, later identified as the defendant, Tony Doolin, caught the officer's eye as he walked through the parking lot. (Trial tr. Day 1, p. 25, L. 2-13). Officer Muhlenbruch watched as Doolin ducked down and he heard a heavy object hit the ground. He drew his gun on Doolin and ordered him to stand up and come out to where he could see Doolin's hands. (Trial tr. Day 1, p. 25, L. 2-25). Doolin complied, and he was handcuffed. (Trial tr. Day 1, p. 27, L. 15-28, L. 18). Officer Muhlenbruch put Doolin in his squad car and looked underneath the vehicle and found a handgun. (Trial tr. Day 1, p. 30, L. 17-23).

When questioned, Doolin informed the officer that another person, a black man with a white hoodie, had pulled a gun on

him in front of the bar so he pulled his out in self-defense. (Trial tr. Day 1, p. 40, L. 6-25). Doolin admitted to possessing the gun and was able to produce his permit to carry a concealed weapon. (Trial tr. Day 1, p. 42, L. 23 – p. 43, L. 2; p. 51, L. 13-18). According to Officer Muhlenbruch, Doolin smelled of alcohol, had slurred speech, and had bloodshot watery eyes. According to Muhlenbruch, these were signs of alcohol consumption. Doolin declined a preliminary breath test, but the officer concluded that Doolin was impaired. (Trial tr. Day 1, p. 41, L. 1 - p. 44, L. 18).

Doolin was taken to the jail and booked on the weapons charge. Hours later, at approximately 4:30 a.m., Dalibar Brkovic was interviewed at the police station. (Trial tr. Day 1, p. 61, L. 13 – p. 62, L. 10). At trial, Brkovic testified that he was at Flirts that night and is friends with one of the owners. (Trial tr. Day 2, p. 5, L. 20-22). According to him, when he pulled into the parking lot, he stopped to let his passengers out and, at that time, a stranger got in his car and asked him for a ride. (Trial tr. Day 2, p. 9, L. 9-15). This stranger offered him

$100 for a ride, but he refused. The man then pulled out a gun, cocked it, and pointed it at his chest and told Brkovic he had no choice. (Trial tr. Day 2, p. 9, L. 9 – p. 11, L. 22). At that point, other people engaged the gunman in conversation, and, as the police were pulling in the parking lot, the man got out and started running away. (Trial tr. Day 2, p. 15, L. 2-5; p. 18, L. 8-11). Brkovic went into Flirts and stayed until closing time. Thereafter he went to eat breakfast with the owner and others after the club closed. Brkovic then went to the police station, where he talked with police officers. (Trial tr. Day 2, p. 26, L. 2 – p. 27, L. 25). He was never offered a chance to identify the gunman prior to trial but did identify him at the trial. (Trial tr. Day 2, p. 10, L. 3-13; p. 28, L. 1-23).

Brkovic's friend, Zuhdija Menkovic, who was also at Flirts that night, testified at the trial. (Trial tr. Day 2, p. 40, L. 4-15). Menkovic was on the phone with Brkovic outside of the club and was giving him directions to the club. At that time, he noticed a group of people standing outside of the club and one of them had a gun. Menkovic saw Brkovic drive into the

parking lot when a man ran by him and get into Brkovic's car. (Trial tr. Day 2, p. 43, L. 2-18). Menkovic walked up to the driver's side of Brkovic's car and saw that the man was pointing a gun at his friend. (Trial tr. Day 2, p. 47, L. 1-19). He did get a good look at the gunman but was unable to identify him or remember what he was wearing. (Trial tr. p. 48, L. 9-15; p. 58, L. 10-22). The man ran away as the police arrived, and he did not see where he went. (Trial tr. Day 2, p. 50, L. 13 – p. 51, L. 13). The police charged Doolin with assault with a dangerous weapon and assault while participating in a felony in addition to the carrying weapons charge.

Further relevant facts will be discussed below.

ARGUMENT

I. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE IN-COURT IDENTIFICATION.

Preservation of Error and Standard of Review: Claims of ineffective assistance of counsel concern constitutional rights, and the standard of review is therefore de novo. State v. Osborn, 573 N.W.2d 917, 920 (Iowa 1998). Counsel's failure

to preserve error can constitute ineffective assistance of counsel, and, therefore, the Iowa Supreme Court allows an exception to error preservation rules in ineffective assistance of counsel claims. State v. Hrbek, 336 N.W.2d 431, 435-36 (Iowa 1983); State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982).

Discussion: In this case, the identification of the defendant was an in-court show-up style procedure that occurred 2 years after the crime. There was no pretrial identification. The victim was never able to give a description of the offender. At the time of the identification, the defendant was sitting at counsel table next to his lawyer. There is little wonder why the victim identified the defendant. Defense counsel did not object to this procedure. His failure to do so constituted ineffective assistance of counsel.

To prove a claim of ineffective assistance of counsel, the defendant must show (1) trial counsel failed to perform an essential duty, and (2) prejudice resulted. Strickland v. Washington, 466 U.S. 668, 688 (1984). "Ineffective assistance under Strickland is deficient performance by counsel resulting

in prejudice, with performance being measured against an 'objective standard of reasonableness,' 'under prevailing professional norms.'" State v. Maxwell, 743 N.W.2d 185, 195 (Iowa 2008) (quoting Rompilla v. Beard, 545 U.S. 374, 380 (2005)).

Prejudice exists when counsel's failure to perform an essential duty undermines confidence in the outcome of the proceeding. State v. Clay, 824 N.W.2d 488, 496 (Iowa 2012). This "does not mean a defendant must establish that counsel's deficient conduct more likely than not altered the outcome in the case. A defendant need only show that the probability of a different result is sufficient to undermine confidence in the outcome." State v. Maxwell, 743 N.W.2d 185, 196 (Iowa 2008).

The victim in this case, Dalibar Brkovic, a resident of St. Louis, Missouri, traveled to Waterloo, Iowa, on August 15, 2015, to visit a strip club called Flirts. (Trial tr. Day 2, p. 4, L. 7-25). Soon after he arrived at the club, but before he got out of his car, a person he had never seen before got into his car and told him to drive him away from the club. (Trial tr. Day 2, p. 9, L. 9-15).

When he refused this stranger pulled a gun and told him he had no choice. (Trial tr. Day 2, p. 11, L. 16-22). The man held the gun to him for approximately 20 seconds, and then the police began to arrive. (Trial tr. Day 2, p. 15, L. 19-20). The man got out and ran behind the car, and Brkovic did not see where he went after that. He did not see the person being arrested later in the parking lot. (Trial tr. Day 2, p. 35, L. 3-7). Brkovic went into the club and stayed until closing time. Thereafter he went to eat breakfast with friends at a Perkins Restaurant. Around 4:30 a.m., about 3 hours after the incident, Brkovic went to the police station to give a statement. He could not give a description of the man to police. (Trial tr. Day 2, p. 25, L. 1 – p. 26, L. 8; p. 27, L. 17-25). The police, however, told him that the man had been arrested. (Trial tr. Day 2, p. 25, L. 17-24). Brkovic was never shown a photo of the defendant, nor was he offered a line-up. The one and only time he identified the defendant as the man with the gun was more than 2 years later in the courtroom during the trial. At that time he insisted he could "positively" identify the defendant, just because he

remembered his face. (Trial tr. Day 2 p. 28, L. 1 – p. 29, L. 5). He never gave any kind of description of the assailant to anyone other than he was African-American. He gave no description of skin tone, length or style of hair, clothing or jewelry he was wearing, or any other identifying characteristics. (Minutes of Testimony) (Conf. App. pp. 4-27).

"[T]here is almost *nothing more convincing* [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!' " Watkins v. Sowders, 449 U.S. 341, 352, 101 S. Ct. 654, 661 (1981) (Brennan, J., dissenting) (quoting Elizabeth Loftus, Eyewitness Testimony 9 (1979)) (emphasis in original). "Nationwide, more than seventy-five percent of convictions overturned due to DNA evidence involved eyewitness misidentification." State v. Henderson, 27 A.3d 872, 886 (N.J. 2011) (citation omitted). "Thirty-six percent of the defendants convicted were misidentified by more than one eyewitness." Id. (citing Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 8-9, 279 (2011)). Even outside the DNA

exoneration context, scientific research "reveals a troubling lack of reliability in eyewitness identifications." Id. at 888. This is so despite the fact that "eyewitnesses generally act in good faith" and misidentifications are typically "not the result of malice." Id.

"The empirical evidence demonstrates that eyewitness misidentification is 'the single greatest cause of wrongful convictions in this country.'" Perry v. New Hampshire, 132 S. Ct. 716, 738 (2012) (Sotomayor, J., dissenting). "Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by post-event information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures." Id.

Moreover, show-ups consistently lead to more false identifications than lineups. J. Neuschatz et al., *A*

Comprehensive Evaluation of Showups, Advances in Psychology and the Law 65 (2016). A 2011 study of 161 DNA exonerations showed that 53 involved erroneous show-up identifications. Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong.* 52 (2011). Many courts have recognized the scientific consensus concerning the unreliability of show-ups. *See, e.g.,* United State v. Green, 704 F.3rd 298, 307 (4th Cir. 2013) (citing State v. Henderson, 27 A.3rd 872, 903 (N.J. 2011) (explaining that show-ups fail to provide a safeguard against poor memories and make it easier to make mistakes and noting that reliability in the identification quickly declines, with show-ups occurring only two hours after the encounter frequently led to misidentifications)); State v. Lawson, 291 P.2d 673, 707 (Or. 2012) ("[showups are widely regarded as inherently suggestive – and therefore less reliable that properly administered lineup identification"). Even law enforcement advise to avoid show-ups "whenever possible in preference for the use of a photo array or a lineup." International Ass'n of Chiefs of Police, *Model Policy on Eyewitness Identification* 1

(September 2010).

The research also shows that memory decay is irreversible; memories never improve." Henderson, 27 A.3rd at 907 (citing Kenneth A. Deffenbacher et. al, *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 Experimental Psychol.: Applied 139, 142 (2008)). Additionally, studies show that the more time that passes, the greater the possibility that a witness' memory of the offender will weaken. Id. In one study that involved over 500 identifications, the witnesses were exposed to a crime suspect and then asked to identify the person in a photo show-up, either immediately, 30 minutes afterward, or two hours afterward. When the suspect was not the same person in the photo, 82% of those asked immediately after the encounter correctly rejected the photograph. After 30 minutes 56% rejected the photograph and 42% did so after 2 hours. Moreover, after two hours, 58% of the witnesses identified an innocent suspect in the show-up compared to 14% in the lineup. A.D. Yarmey, et. al., *Accuracy of Eyewitness Identification in Showups and*

Lineups, 20 Law & Hum. Behav. 459, 463-464, 466 (1996). In other words, after two hours, a witness is more likely than not to misidentify an innocent person in a show-up. A person would have better odds with a toss of a coin.

Studies have also established that the certainty of the witness is poorly correlated with accuracy in most cases. Confidence in identification correlates with accuracy only "in cases in which the eyewitness-identification test procedures were pristine." J. Wixted & G. Wells, The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis, 18 Psychol. Sci. In the Pub. Int. 10, 14, 19-20, 51-52 (2017). A lineup or photo array is only "pristine" if there is just one suspect, the suspect does not stand out, the witness is told the offender may not be present, the administrator does not know who the suspect is, and the statement of confidence is recorded immediately and prior to feedback. Id. at 15-17. An in-court show-up style identification can obviously never be pristine, especially since witnesses many times feel pressure to identify the person the police suspect and certainly the person

who has been charged. *See* N. Steblay and J. Dysart, *Repeated Eyewitness Identification Procedures With the Same Suspect*, 5 J. of Applied Research in Memory and Cognition 287, 287-288 (2016) ("An in-court identification is inherently suggestive, tantamount to a high pressure show-up."); Green, 704 F.3d at 306-307 (recognizing that a witness who was asked to perform an in-court identification "likely felt pressured to help solve a crime and understandably wanted to be of assistance).

Both the United States and Iowa Constitution guarantee due process of law. U.S. Const. amend. XIV; Iowa Const. art. 1, § 9. Impermissibly suggestive or unreliable identification procedures violate a defendant's right to due process. See Manson v. Braithwaite, 432 U.S. 98, 109, 116, 97 S. Ct. 2243, 2250 (1977); State v. Mark, 286 N.W.2d 396, 403, 405 (Iowa 1979); State v. Ripperger, 514 N.W.2d 740, 744 (Iowa Ct. App. 1994). Identification evidence may be so inherently suggestive or unreliable that due process bars its admission to the jury. Manson, 432 U.S. at116, 97 S. Ct. at 2254.

Manson v. Braithwaite sets forth the federal due process

test for evaluating a defendant's challenge to identification procedures. The United States Supreme Court there considered but rejected a per se rule of exclusion for impermissibly suggestive identification procedures. Instead, the Court adopted a two-prong test which asks: 1) Whether the procedure was impermissibly suggestive; and 2) If so, whether under the totality of the circumstances the impermissibly suggestive procedure gives rise to a substantial likelihood of irreparable misidentification or whether the identification is ultimately reliable despite the suggestive procedure. Manson, 432 U.S. 98, at 97 S. Ct. at 2249; State v. Taft, 506 N.W.2d 757, 762 (Iowa 1993). The factors that are considered in evaluating reliability include those set out in Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375 (1972), namely:

1) The opportunity of the witness to view the suspect at the time of the crime;
2) The witness' degree of attention;
3) The accuracy of the witness' prior description;
4) The witness' level of certainty;
5) The length of time between the crime and the confrontation.

As dissenting Justice Marshall noted in Manson, however, the notion that an impermissibly suggestive procedure could nevertheless yield a reliable identification is not viable:

> ...[T]his approach was criticized at the time it was adopted and has been subject to continuing criticism since. In my view, this conclusion totally ignores the lessons of Wade. The dangers of mistaken identification are, as Stovall held, simply too great to permit unnecessarily suggestive identifications. Neither Biggers nor the Court's opinion today points to any contrary empirical evidence. Studies since Wade have only reinforced the validity of its assessment of the dangers of identification testimony. While the Court is "content to rely on the good sense and judgment of American juries," the impetus for Stovall and Wade was repeated miscarriages of justice resulting from juries' willingness to credit inaccurate eyewitness testimony.

Manson, 432 U.S. at 119-20, 97 S. Ct. at 2255-2256 (Marshall, J., dissenting).

Since Manson was decided, "scientists and scholars who have evaluated the opinion have uniformly criticized it as insufficient to deter police from using flawed identification procedures and inconsistent with scientific evidence of the best ways to assess the reliability of evidence tainted by such procedures." Nicholas A. Kahn-Fogel, *Manson and Its Progeny:*

An Empirical Analysis of American Eyewitness Law, 3 Ala. C.R. & C.L.L. Rev. 175, 176 (2012). See also Sarah Anne Mourer, *Reforming Eyewitness Identification Procedures Under the Fourth Amendment*, 3 Duke J. Const. L. & Pub. Pol'y 49, 60 (2008) ("[I]n light of today's extensive research in the area of eyewitness identifications and human memory, the rules promulgated by the Supreme Court in the 1970's do not, in fact, adequately safeguard against misidentifications and wrongful convictions."); Suzannah B. Gambell, *The Need to Revisit the Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identifications*, 6 Wyo. L. Rev. 189, 192 (2006) ("The United States Supreme Court has outlined when an eyewitness identification should be allowed in trial. Neil v. Biggers listed factors that, in 1972, the Court believed made an identification reliable despite being unnecessarily suggestive. Based on a large amount of scientific research completed in the past quarter century, several of these factors have been shown to be unreliable.").

Heeding the criticism and scientific developments, several

state courts have diverged from the Supreme Court on state constitutional grounds, finding Manson's "reliability" analysis inadequate and unsound. See Comm. v. Johnson, 650 N.E.2d 1257, 1261 (Mass. 1995) (rejecting Manson "reliability" test and reaffirming application of per se exclusionary rule when identification was unnecessarily suggestive); State v. Dubose, 699 N.W.2d 582, 593-941 (Wis. 2005) (rejecting Manson standard, and holding unnecessarily suggestive identifications will be excluded); People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981) (per se rule of exclusion for unnecessarily suggestive identification procedures); State v. Henderson, 27 A.3d 872, 879 (N.J. 2011) (modifying Manson test for admissibility and articulating additional factors to consider when determining reliability of identification); State v. Lawson, 291 P.3d 673 (Ore. 2012) (revisiting and augmenting the process for testing admissibility of suggestive eyewitness identifications "in light of the recent scientific research").

The Iowa Supreme Court has acknowledged the very real danger of erroneous convictions due to mistaken eyewitness identification.

> Studies have shown the primary cause for the conviction of innocent people in our criminal justice system is mistaken eyewitness identification. Gary L. Wells, Eyewitness Identification Evidence: Science and Reform, 29 Champion 12 (2005). DNA exoneration cases show the conviction of approximately seventy-five percent of innocent persons involved mistaken eyewitness identification. Id.

State v. Folkerts, 703 N.W.2d 761, 763-65 (Iowa 2005).

The United States Supreme Court has held that due process requires exclusion of testimony of a pretrial identification when that identification is unnecessarily suggestive and therefore conducive to mistaken identification. Stovall v. Denno, 388 U.S. 293, 301-302, 87 S. Ct. 1967, 1972-1973 (1967). The Stovall case involved a "show -up" style of identification, where the witness is shown only one person and not a lineup. The Stovall Court noticed that the "practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely

condemned." Id. at 1972. The court held however, that whether a due process violation occurred depended on the totality of the circumstances. Id.

The Wisconsin Supreme Court noted "[o]ver the last decade, there have been extensive studies on the issue of identification evidence, research that is now impossible for [the court] to ignore." State v. Dubose, 699 N.W.2d 582, 591 (Wis. 2005). After reviewing the recent research, the court concluded "eyewitness testimony is often 'hopelessly unreliable.'" Id. at 592.

> In light of such evidence, we recognize that our current approach to eyewitness identification has significant flaws. After the Supreme Court's decision in Biggers and Brathwaite, the test for showups evolved from an inquiry into unnecessary suggestiveness to an inquiry of impermissible suggestiveness, while forgiving impermissible suggestiveness if the identification could be said to be reliable. Studies have now shown that approach is unsound, since it is extremely difficult, if not impossible, for courts to distinguish between identifications that were reliable and identifications that were unreliable. "Considering the complexity of the human mind and the subtle effects of suggestive procedures upon it, a determination that an identification was unaffected by such a procedure must itself be open to serious question." Because a

> witness can be influenced by the suggestive procedure itself, a court cannot know exactly how reliable the identification would have been without the suggestiveness.

Id. at 592 (quoting State v. Leclair, 385 A.2d 831, 833 (N.H. 1978)).

The Dubose Court adopted a different test regarding the admissibility of show up identifications: "[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." Id. A show up will be not necessary 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. at 594.

In this case, there was no identification procedure prior to trial. Such first time in-court identification situations have been handled differently in various courts. For example, the Sixth and Eighth Circuits have held that the Biggers analysis applies to such in-court identifications because the due process concerns are identical. United States v. Hill, 967 F.2d 226, 232 (6th Cir. 1992); United States v. Rundell, 858 F.2d. 425, 426

(8th Cir. 1988). The Second Circuit has held that when a defendant had advance notice of an in-court identification and "fears irreparable suggestively . . . his remedy is to move for a line-up order to assure that the identification witness will first view the suspect with others of like description rather than in the courtroom sitting alone at defense table." United States v. Brown, 699 F.2d 585, 593-594 (2nd Cir. 1983) (finding objection to in-court identification insufficient and defense counsel should have requested a line-up in a case where there was no pretrial identification and counsel was notified that the witness would identify the defendant at the trial).

The Connecticut Supreme Court recently decided a case involving a first time in-court identification issue and stated that

> we are hard-pressed to imagine how there could be a *more* suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime. If this procedure is not suggestive, then no procedure is suggestive.

State v. Dickson, 141 A.2d 410, 424 (Conn. 2016) (emphasis in

original). The court went so far as to hold that "a first time in-court identification procedure amounts to a form of improper vouching." Id. at 425. The court concluded that "first time in-court identifications, like in-court identifications that are tainted by an unduly suggestive out-of-court identification, implicate due process protections and must be prescreened by the trial court." Id. at 426. Neither of these approaches address the problems with the impermissibly suggestive identification procedures can somehow be rehabilitated into reliable identifications. It makes the most sense to disallow any identification that is impermissibly suggestive.

The Iowa Constitution provides significant protection of individual rights. State v. Cline, 617 N.W.2d 277, 292-93 (Iowa 2000), rev'd on other grounds by State v. Turner, 630 N.W.2d 601 (Iowa 2001) (holding the good faith exception incompatible with the Iowa Constitution); Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009) (Iowa's marriage statute deprives the gay and lesbian people equal protection of the law as promised by the Iowa Constitution); State v. Lyle, 854 N.W.2d

378, 400 (Iowa 2014) (holding all mandatory minimum sentences imposed upon youthful offenders constitutes cruel and unusual punishment in violation of article I, section 17 of the Iowa constitution); State v. Bruegger, 773 N.W.2d 862, 886 (Iowa 2009) (remanding for a new sentencing hearing on whether Iowa Code § 901A.2(3) is unconstitutional as applied.); State v. Cox, 781 N.W.2d 757, 768 (Iowa 2010) (holding statute governing admissibility of prior bad acts evidence based solely on propensity violated the due process clause of the state constitution); State v. Pals, 805 N.W.2d 767, 743 (Iowa 2011) (finding defendant's consent to search vehicle involuntary under article I, section 8).

When interpreting and applying the Iowa Constitution, the Iowa Supreme Court will adopt the United States Supreme Court's interpretation of the federal constitution only when it is based on a convincing rationale. State v. Ochoa, 792 N.W.2d 260 (Iowa 2010); State v Cline, 617 N.W.2d at 285. The rationale of Biggers and Manson is not sound. As Justice Marshall stated in Manson, "[b]y relying on the probable

accuracy of a challenged identification, instead of the necessity for its use, the Court seems to be ascertaining whether the defendant was probably guilty." Manson v. Brathwaite, 432 U.S. at 128, 97 S. Ct. at 2260 (Marshall, J., dissenting). Justice Marshall specifically noted the state courts remain free in interpreting state constitutions "to guard against the evil clearly identified by this case." Id. at 129, 97 S. Ct. at 2260 (Marshall, J., dissenting).

This Court should abandon the Biggers factors that have been shown time and time again to be inaccurate when it comes to reliable identifications. For instances, two of the factors to be considered are the length of time and the witness's level of certainty. As argued above, it is well established that level of certainty has no correlation to accurate identification in show-up situations. In addition, it has been also established that any length of time beyond 2 hours may as well be a coin toss for how reliable the identification is. Although counsel is not required to have a crystal ball to predict the future of the law, this evidence has been out there for years. Indeed,

defense counsel made a good record regarding the absolute unreliability of the in-court identification in this case, but failed to object to it as impermissibly suggestive. This is a failure of an essential duty because counsel should have known that there was case-law and studies for years on the unreliability of show-ups and in court identifications.

Alternatively, if this Court chooses to apply the Biggers factors to this case, the in-court identification still fails the test. The first step of the test, which is whether the procedure was impermissibly suggestive, is easily met. This Court recognized as much Folkerts: "The seating of a defendant next to his or her counsel at the deposition of an eyewitness is so clearly suggestive as to be impermissible." Folkerts, 703 N.W.2d at 765. Surely, a defendant seated next to counsel during a trial is no less impermissibly suggestive. Therefore, turning to the five Biggers factors, it is clear that, under the totality of the circumstances, the in-court identification gave rise to a substantial likelihood of misidentification. The victim in this case had a very short time frame in which to view the suspect at

the time. His testimony was that the man got into the car, told him to drive him somewhere, and then pulled out a gun, that he held to him for approximately 20 seconds. He then left the car. This was a very short encounter. Second, the witness's degree of attention was admittedly very little. He testified that he was focused on the gun and the gun alone. (Trial tr. Day 2, p. 20, L. 3-9). Third, the accuracy of the witness's prior description is nil since there was no prior description. He could not remember what the man looked like 3 hours after the incident, but was somehow certain 2 years later that the defendant was the man in the car. However, he still could not give any description. Fourth, the witness's level of certainty actually works against the State. Despite the lack of a description, the witness was positive in court, with the defendant having been charged with the crime and sitting at counsel table, that he was the man in the car. As stated above, the more certain a witness is, the more likely he is to misidentify. Finally, the length of time between the crime and confrontation here was more than 2 years. The research shows that memory fades

dramatically after 2 hours. There can be no scenario where this witness's first time show-up identification in the courtroom can be deemed to be reliable under the totality of the circumstances. Counsel laid the groundwork but failed to make the objection. This constitutes ineffective assistance of counsel.

The defendant was prejudiced by this failure. Brkovic was the only witness at trial to identify the defendant as the man in the car with the gun. His friend, Zuhdija Menkovic, also testified. He was present during the incident, standing outside the driver's door during the time the man was holding a gun to Brkovic. Although he got a good look at the man, he was unable to make an in-court identification. (Trial tr. Day 2, p. 48, L. 9-15). No other witness to this crime testified at trial. The defense was that they had arrested the wrong man. The State's entire case rested on the identification by Brkovic. Without that, the defendant would not have been convicted. The defendant therefore was prejudiced by counsel's ineffectiveness and is entitled to a new trial.

II. COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST AN INSTRUCTION ON EYEWITNESS IDENTIFICATION.

Preservation of Error and Standard of Review: Claims of ineffective assistance of counsel concern constitutional rights, and the standard of review is therefore de novo. State v. Osborn, 573 N.W.2d 917, 920 (Iowa 1998). Counsel's failure to preserve error can constitute ineffective assistance of counsel, and, therefore, the Iowa Supreme Court allows an exception to error preservation rules in ineffective assistance of counsel claims. State v. Hrbek, 336 N.W.2d 431, 435-36 (Iowa 1983); State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982).

Discussion: The fighting issue at the trial in this case was the identification of the defendant as the man who pulled a gun on the victim. Although defense counsel drew out the weaknesses of the in-court identification, he failed to request the court instruct the jury regarding the law of identification evidence. (Trial tr. Day 2, p. 137, L. 5 – p. 149, L. 23). His failure to do so constitutes ineffective assistance of counsel.

To prove a claim of ineffective assistance of counsel, the defendant must show (1) trial counsel failed to perform an essential duty, and (2) prejudice resulted. Strickland v. Washington, 466 U.S. 668, 688 (1984). "Ineffective assistance under Strickland is deficient performance by counsel resulting in prejudice, with performance being measured against an 'objective standard of reasonableness,' 'under prevailing professional norms.'" State v. Maxwell, 743 N.W.2d 185, 195 (Iowa 2008) (quoting Rompilla v. Beard, 545 U.S. 374, 380 (2005)).

Prejudice exists when counsel's failure to perform an essential duty undermines confidence in the outcome of the proceeding. State v. Clay, 824 N.W.2d 488, 496 (Iowa 2012). This "does not mean a defendant must establish that counsel's deficient conduct more likely than not altered the outcome in the case. A defendant need only show that the probability of a different result is sufficient to undermine confidence in the outcome." State v. Maxwell, 743 N.W.2d 185, 196 (Iowa 2008).

Trial counsel has a duty to know the applicable law,

protect the defendant from conviction under a mistaken application of the law, and make sure the jury instructions correctly reflect the law. See State v. Goff, 342 N.W.2d 830, 837-38 (Iowa 1983); State v. Allison, 576 N.W.2d 371, 374 (Iowa 1998); State v. Hopkins, 576 N.W.2d 374, 379-80 (Iowa 1998).

Iowa has a uniform instruction addressing eyewitness identification.[2] "As long as a requested instruction correctly

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[2]**200.45 Eyewitness Identification.** The reliability of eyewitness identification has been raised as an issue. Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to see the person at the time of the crime and to make a reliable identification later.

In evaluating the identification testimony of a witness, you should consider the following:

1. If the witness had an adequate opportunity to see the person at the time of the crime. You may consider such matters as the length of time the witness had to observe the person, the conditions at that time in terms of visibility and distance, and whether the witness had known or seen the person in the past.

2. If an identification was made after the crime, you shall consider whether it was the result of the witness's own recollection. You may consider the way in which the defendant was presented to the witness for identification, and the length of time that passed between the crime and the witness's next opportunity to see the defendant.

states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction." State v. Kellogg, 542 N.W.2d 514, 516 (Iowa 1996).

Under these circumstances, Doolin's attorney had a duty to be aware of the significant scholarship and court decisions across the country bearing on the issue of eyewitness identification. He breached a duty by failing to request a jury instruction to educate the jury on the issue. As well, Doolin was prejudiced by his attorney's failure. The instruction would have explained to the jury that it should consider such factors as the time lapse between the incident and the identification and the weaknesses of show-up identifications and compared to line-up identification. These sorts of considerations were vital to the defense, as the eyewitness was the critical part of the

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3. An identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.

4. Any occasion in which the witness failed to identify the defendant or made an inconsistent identification.

State's case. The defendant was therefore prejudiced by counsel's failure to request the instruction. The convictions should be reversed and remanded for a new trial.

III. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF CARRYING WEAPONS.

Preservation of Error and Standard of Review: The court reviews challenges to sufficiency of the evidence for corrections of errors at law. State v. Hearn, 797 N.W.2d 577, 579 (Iowa 2011). Error was preserved in this case because the defendant made a motion for judgment of acquittal at the end of the State's case, alleging there was insufficient evidence of carrying weapons because the defendant had a valid permit to carry. (Trial tr. Day 2, p. 128, L. 7-23). The court denied the motion, finding that the defendant was intoxicated, invalidating the permit to carry. (Trial tr. Day 2, p. 128, L. 24 – p. 131, L. 13).

Discussion: In reviewing challenges to the sufficiency of evidence, the court considers all of the evidence viewed "in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence." State

v. Williams, 695 N.W.2d 23, 27-28 (Iowa 2005). A verdict will be upheld only if substantial evidence in the record supports it. State v. Nitcher, 720 N.W.2d 547, 556 (Iowa 2006). The court considers all the evidence presented, not only inculpatory evidence. State v. Keopasaeuth, 645 N.W.2d 637, 640 (Iowa 2002). Evidence is considered substantial if it can convince a rational jury that the defendant is guilty beyond a reasonable doubt. Williams, 695 N.W.2d at 27-28. In reviewing a challenge to the sufficiency of the evidence, the relevant question is whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See* State v. Turner, 345 N.W.2d 553, 555-556 (Iowa 1983); State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980). The evidence presented "must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981).

Iowa Code section 724.4(1) (2015) states:

> Except as otherwise provided in this section, a person who goes armed with a dangerous weapon concealed on or about the person, or who, within the limits of any city,

> goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver, commits an aggravated misdemeanor.

This section does not apply when "[a] person who has in the person's possession and who displays to a peace officer on demand a valid permit to carry weapons which has been issued to the person, and whose conduct is within the limits of that permit." Iowa Code § 724.4(4)(i) (2015). Additionally, a permit to carry is invalid "if the person to whom the permit is issued is intoxicated as provided in section 321J.2(1)." Iowa Code § 724.4(C) (2015).[3] In this case, the defendant, Tony Doolin, admitted to possessing the firearm, but produced a permit to the arresting officer. (Trial tr. Day 1, p. 51, L. 13 – p. 52, L. 17). The issue at trial was whether the permit was invalid due to Doolin's alleged intoxication. The court instructed the jury as follows regarding the carrying weapons charge:

> The State must prove all of the following elements of Carrying Weapons as charged in Count 3:

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[3] This section was amended in 2017 to remove the language which invalidated the permit altogether and made it a serious misdemeanor to possess a dangerous weapon while under the influence of alcohol. Iowa Code § 724.4(C) (2017).

1. On or about the 15th day of August, 2015, the defendant was armed with a pistol or loaded firearm.
2. The defendant was within the city limits of Waterloo, IA.
3. The defendant did not have a valid permit to carry weapons.

If the State has proved all of the elements, the defendant is guilty of Carrying Weapons. If the State has failed to prove any one of the elements, the defendant is not guilty.

(Jury Instruction No. 27) (App. p. 13). The Court also instructed the jury:

> Concerning element number 3 of Instruction No. 27, the defendant asserts he possessed a valid permit to carry. The state asserts the defendant's permit to carry was invalid due to the alleged intoxication of the defendant.
>
> A permit issued to an individual is invalid if the person to whom the permit is issued is intoxicated.

(Jury Instruction No. 29) (App. p. 14). Regarding the issue of intoxication, the Court instructed that "[a] person is intoxicated if the person is under the influence of an alcoholic beverage or other drug or a combination of such substances." (Jury Instruction No. 30) (App. p. 15). The court defined "under the influence" as follows:

> A person is "under the influence" when, by drinking liquor and/or beer, one or more of the following is true:
> 1. His reason or mental ability has been affected.
> 2. His judgment is impaired.
> 3. His emotions are visibly excited.

4. He has, to any extent, lost control of bodily actions or motions.

(Jury Instruction No. 31) (App. p. 16).

The only evidence at trial that Doolin was under the influence of alcohol was the testimony of the Officer Muhlenbruch. He testified that the defendant smelled of alcohol, had slurred speech, and had bloodshot and watery eyes. In the opinion of the officer, this was evidence of alcohol consumption and it was his opinion that he was impaired. (Trial tr. Day 1, p. 41, L. 1-10; p 44, L. 9-19). No other witness who came into contact with Doolin that evening testified that he appeared to be under the influence of alcohol. There was no evidence that he had been drinking. The video of the squad car where the defendant was placed upon being detained shows the conversation between Doolin and the officer. In that video he does not slur his speech or otherwise sound intoxicated. (State's Ex. G).

There was no evidence that Doolin's reason or mental ability was impaired or that he was visibly excited. He had not

lost control over his bodily actions or motions. Other than the opinion of the officer, there is no other evidence that his judgment had been impaired. There was mere speculation based on the police officers alleged observations of the defendant's appearance, which is not proof beyond a reasonable doubt that Doolin was under the influence of alcohol such that it would invalidate his valid permit to carry a weapon. There was insufficient evidence therefore that the defendant was guilty of the Carrying Weapons charge and the court should vacate that conviction and remand for judgment of acquittal on that count.

IV. THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL.

Preservation of Error and Standard of Review: The standard of review for claims that the trial court erred in denying a motion for new trial based on the claim that the verdict is contrary to the weight of the evidence is for abuse of discretion. State v. Adney, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001), citing State v. Ellis, 578 N.W.2d 655, 659 (Iowa 1998).

An abuse of discretion occurs only where the grounds for the district court's decision are clearly untenable or unreasonable. State v. Reeves, 670 N.W.2d 199, 202 (Iowa 2003).

This issue is preserved because the defendant filed a Motion for New Trial based on Iowa Rule of Criminal Procedure 2.24(2)(b)(6), which allows the court to grant a new trial when the verdict is contrary to the law or evidence. (Motion for New Trial; Post-Trial Motions and Sentencing tr. p. 3, L. 5-9) (App. pp. 19-20). The court held a hearing on this motion and subsequently denied it. (Post-Trial Motions and Sentencing tr. p. 5, L. 23 – p. 8, L. 4).

Discussion: The defendant filed a Motion for New Trial and argued to the court that the verdict was contrary to the evidence that the defendant was the person who committed the crimes in this case. (Post-Trial Motions and Sentencing tr. p. 3, L. 5 – p. 4, L. 25). On a claim challenging the weight of the evidence, the court must grant a new trial if the jury's verdict is contrary to law or evidence. Iowa R. Crim. P. 2.24(2)(b)(6). A verdict is contrary to the evidence when it is against the greater weight of

the evidence that was presented at trial. State v. Taylor, 689 N.W.2d 116, 133-134 (Iowa 2004). Unlike the sufficiency standard, where the district court evaluates the evidence from a standpoint most favorable to the State and assumes the truth of the prosecution's case, the weight-of-the-evidence standard allows the court to balance the evidence and consider the credibility of witnesses. Id. at 134.

This case hinged entirely on the credibility of the identification from Brkovic. This in-court identification was not credible. As set out in detail in Brief Point I, this witness never was able to give a description of the assailant. He could not do that at the police station three hours after the event, nor could he do it 2 years later at the trial. (Trial tr. Day 2, p. 25, L. 1 – p. 26, L. 8; p. 27, L. 17-25). He only gave a conclusory identification of the defendant, sitting at counsel table and was certain, explaining that he remembered his face. (Trial tr. Day 2, p. 28, L. 1 – p. 29, L. 5). He never gave any details about the man's face or why he was able to recognize it. He was not a credible witness. The defendant was not the only person at the

club that night with a gun, and, without any specific identifying characteristics or description, there is really little reason to believe that the defendant was the assailant. (Trial tr. Day 2, p. 83, L. 20-25). The greater weight of the evidence is that the eyewitness was not credible, and, without him, the State has no case. The court abused its discretion by denying the defendant's motion for new trial.

CONCLUSION

For the foregoing reasons, the Appellant requests the court grant a new trial under Sections I, II, and IV, and a judgment of acquittal for the Carrying Weapons charge under Section III.

CONDITIONAL REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument if this Court believes oral argument may be of assistance to the Court.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.65, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH
State Appellate Defender

MARIA RUHTENBERG
Assistant Appellate Defender

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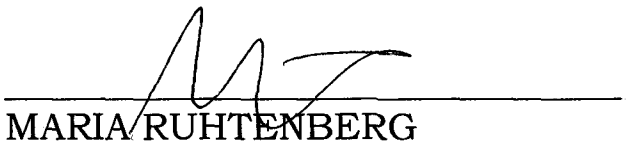

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MARIA RUHTENBERG
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
mruhtenberg@spd.state.ia.us
appellatedefender@spd.state.ia.us