IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1715

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TONY EUGENE DOOLIN,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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2 Wayne R. LaFave, et al., *Criminal Procedure* § 7.4(h) (4th ed. 2017 update)
Irving Younger, *The Art of Cross-Examination*, 1 ABA Litigation Section Monograph, 10 (1976)

II. Counsel challenged one witness's identification during testimony and in closing. He was not necessarily ineffective for failing to seek an instruction on eyewitness identification.

Authorities

State v. Hohle, 510 N.W.2d 847 (Iowa 1994)
State v. Shorter, 893 N.W.2d 65 (Iowa 2017)
State v. Tobin, 338 N.W.2d 879 (Iowa 1983)
Iowa R. App. P. 6.903(3)

III. The record supplies sufficient evidence that Doolin was intoxicated, invalidating his concealed weapons permit.

Authorities

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State v. Boleyn, 547 N.W.2d 202 (Iowa 1996)
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IV. The trial court did not abuse its considerable discretion to deny the motion for new trial.

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ROUTING STATEMENT

The Court may retain this matter to address the issue of first impression that Doolin raises. Iowa R. App. P. 6.1101(2)(c). But, the issue surfaces in the context of an ineffective assistance of counsel claim. There is near-universal precedent resolving it. As such, the Court may route this matter to the Iowa Court of Appeals. Iowa R. App. P. 6. 1101(3).

STATEMENT OF THE CASE

Nature of the Case

Tony Doolin was convicted by jury in Black Hawk County District Court of intimidation with a dangerous weapon, a Class C felony; assault while participating in a felony, a Class D felony; and carrying weapons, an aggravated misdemeanor. Iowa Code §§ 708.3, 708.6, 724.4 (2015).

He raises three issues. He contends that counsel was ineffective for failing to challenge his first-time, in-court identification as a due process violation of the Iowa Constitution. He further complains that counsel was ineffective for failing to ask for the uniform instruction on eyewitness identification. Finally, he believes that the district court should have granted his motion for a new trial based on the weight of the evidence.

The Honorable Joel A. Dalrymple presided.

Course of Proceedings

The State accepts the defendant's statement of the procedural history of the case. Iowa R. App. P. 6.903(3).

Facts

Tony Doolin drew a handgun outside the entrance to Flirts, a Waterloo strip club. Tr. Day 2 p. 81, l. 1-p. 83, l. 19. He had been arguing with a woman when a man behind the bouncer pulled a gun. *Id*. p. 85, ll. 11-18. Video surveillance then showed Doolin and another man, later identified as Zuhdija Menkovic, going toward the east parking lot. *Id*. p. 108, l. 1-p. 109, l. 6. It was 1:11 am August 15, 2015. *Id*.

At about the same time, Dalibor Brkovic from St. Louis, was pulling in and phoning his friend, Menkovic. *Id*. p. 4, l. 5-p. 5, l. 22, p. 6, ll. 11-22. Brkovic's passengers exited. *Id*. p. 6, ll. 11-21. Brkovic recalled that Doolin got in the front passenger seat. *Id*. p. 8, ll. 14-21, p. 9, l. 19-p. 10, l. 13. Menkovic saw it, too, but could not identify Doolin specifically. *Id*. p. 44, ll. 1-7.

Doolin offered Brkovic $100 to drive him away. *Id*. p. 10, ll. 14-18. When Brkovic refused, Doolin said, "you have no choice," and pointed a handgun at Brkovic's right side. *Id*. p. 10, l. 19-p. 11, l. 25, p. 13, ll. 6-8.

Menkovic, who stood outside near the driver, told Brkovic to get out. *Id*. p. 47, ll. 1-8. Friends of Doolin went to the passenger side and spoke with him as well. *Id*. p. 15, ll. 15, ll. 2-5, p. 16, ll. 12-13, p. 8, ll. 8-11.

Brkovic turned off the car. *Id*. p. 17, l. 13-p. 18, l. 6. He told the intruder that he could not start the car again because the key was with one of the passengers in the club. *Id*. With an insult, Doolin got out as the police arrived. *Id*. p. 18, ll. 7-21.

Waterloo Police Officer Ryan Muhlenbruch was one who responded to the disorderly conduct call. Tr. Day 1 p. 21, ll. 8-22. He saw Doolin duck down. *Id*. p. 22, ll. 7-17, p. 25, ll. 2-13, p. 26, l. 6. Then, the officer heard a metallic object land. *Id*. He took Doolin into custody, looked under the nearby vehicle, and found a loaded .40 calibre Glock handgun. *Id*. p. 30, ll. 17-23, p. 36, ll. 19-22. The gun was registered to Doolin. *Id*. p. 83, ll. 10-12.

Doolin said he drew the weapon in self-defense and showed Muhlenbruch a concealed weapons permit. *Id*. p. 40, ll. 6-25. He also smelled of alcohol, slurred his speech, and had bloodshot watery eyes. *Id*. p. 41, l. 1-p. 44, l. 18. He refused to perform field sobriety or preliminary breath tests. *Id*. p. 43, ll. 7-14.

Officer Muhlenbruch, who is trained on and deals with intoxicated people on a nightly basis, believed that Doolin was intoxicated. *Id*. p. 41, l. 19, p. 44, ll. 9-18.

Menkovic was unable to identify Doolin at the trial. *Id*. p. 49, l. 7.

Brkovic recalled the scene as "hectic," with witnesses talking to police. Tr. Day 2 p. 18, ll. 8-21. He went inside the club. *Id*. He stayed there until closing, then had breakfast with the club's owner. *Id*. p. 26, l. 2-p. 27, l. 25. He spoke with police later that morning. Tr. Day 1 p. 61, l. 13-p. 62, l. 10, Tr. Day 2 p. 10, ll. 3-13, p. 28, ll. 1-23. He identified Doolin at the trial. *Id*. He testified that he looked in Doolin's face, was focused on the weapon, and paid no attention to what Doolin wore. Tr. Day 2, p. 19, l. 24-p. 21, l. 13.

Brkovic acknowledged that he was shocked. *Id*. p. 28, l. 12-p. 29, l. 18. This, he told defense counsel, explained why he could not describe Doolin at the time. *Id*. Although he remembered Doolin was barehanded, Brkovic still could not recall what Doolin wore. *Id*. p. 30, ll. 1-25. He acknowledged that his memory would have been better closer to the event. *Id*. p. 35, ll. 11-14.

Counsel proposed to Brkovic that his identification was the product of a "one-man lineup," the only person sitting at the table. *Id*. p. 35, ll. 19-21. Counsel further reminded Brkovic that he had not described Doolin to police. *Id*. p. 36, ll. 5-10. Counsel returned to these points in closing arguments. Tr. Day 3, p. 43, l. 18-p. 47, l. 23.

Brkovic explained that he remembered Doolin's face and the gun. *Id*. p. 36, ll. 9-11.

ARGUMENT

I. Unlike a line-up or show-up engineered by police, a first-time, in-court identification occurs in the presence of counsel, a judge, and jury according to the rules of evidence. These and other protections afford a defendant ample due process protection. Counsel was not ineffective for failing to pursue a state constitutional claim resting on an isolated, minority position.

Preservation of Error

Doolin may assert ineffective assistance of counsel for the first time on appeal. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008); *State v. Horness*, 600 N.W.2d 294, 297 (Iowa 1999). Usually the matter must be addressed in postconviction relief. *State v. Bennett*, 503 N.W.2d 42, 47 (Iowa Ct. App. 1993). There, the court can consider a better-developed set of facts. *Id.* The allegedly ineffective attorney can explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *Id.*

The stakes for defense counsel are significant. A finding of ineffective assistance of counsel opens the door to a malpractice claim. Iowa Code §§ 814.11, 815.10(6); *Barker v. Capotosto*, 875 N.W.2d 157, 161, 167-68 (Iowa 2016); *Trobaugh v. Sondag*, 668 N.W.2d 577, 582-83 (Iowa 2003).

The Court will consider the issue only where the record is sufficient to answer it. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999).

Standard of Review

The Court reviews ineffective assistance of counsel claims *de novo*. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992).

Merits

The victim identified Doolin for the first time at trial. Doolin faults counsel for not drawing on the law and literature of pre-trial, police-controlled eyewitness identifications. He believes counsel was ineffective for failing to object on state constitutional grounds, specifically Article I, section 9.

The arguments Doolin offers, however, have found little purchase anywhere. It is true that pre-trial eyewitness identifications have received withering criticism. And some states have discarded or modified the analysis described in *Neil v. Biggers*, 409 U.S. 188 (1972) and *Manson v. Braithwaite*, 432 U.S. 98 (1977) for pre-trial eyewitness identifications. But, with rare exception, courts have treated in-court identifications differently. In short, the dominant view holds that a trial offers protections from irreparable

misidentification that a police-engineered engineered lineup or show-up does not.

Doolin has not proven ineffective assistance of counsel.

A. Principles of ineffective assistance of counsel do not require counsel to assert plausible, yet weak legal claims.

The United States and Iowa constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Iowa Const. Art. I, § 10.[1] To establish ineffective assistance of counsel, a defendant must show that: (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999) citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Ledezma v. State*, 626

[1] Doolin neither cites nor distinguishes between the rights to counsel under the federal and state constitutions. By dint of the general claim of ineffective assistance, the State must presume both provisions are at play. *State v. Halverson*, 857 N.W.2d 632, 634-35 (Iowa 2015); *King v. State*, 797 N.W.2d 565, 571 (Iowa 2011). But, the court should apply established principles in the absence of argument and authority that it should do otherwise. Iowa R. App. P. 6.903(2)(g)(3) (stating failure to cite authority in support of an issue may be deemed a waiver of that issue); *State v. Piper*, 663 N.W.2d 894, 913-14 (Iowa 2003) (overruled on other grounds by *State v. Hanes*, 790 N.W.2d 545, 550 (Iowa 2010) and declining to undertake party's research and advocacy).

N.W.2d 134, 141-42, 145 (Iowa 2001)[2]. However, both elements do not always need to be addressed: if the claim lacks prejudice—as will often be the case—the case may be decided on that basis alone. *Strickland*, 466 U.S. at 697.

There is a strong presumption that counsel performed within the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *Wemark*, 602 N.W.2d at 814. Tactical considerations, even if improvident, insulate the conviction from reversal on an ineffective assistance of counsel claim. *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999). Given the strong presumption of competence, if counsel's conduct "'*might* be considered sound trial strategy,'" then it is deemed so. *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955) (emphasis added)).

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[2] Iowa courts have stated both these elements require proof by a "preponderance of the evidence." *See, e.g.*, *Halverson*, 857 N.W.2d at 635; *Ledezma*, 626 N.W.2d at 142. Federal courts, however, have indicated that this incorrect, at least with respect to proof of prejudice. *Paulson v. Newton Corr. Facility, Warden*, 703 F.3d 416, 420-21 (8th Cir. 2013); *Shelton v. Mapes*, U.S. D.Ct. No. 4:12-cv-00076-JAJ (filed Sept. 9, 30, 2014) *aff'd on appeal* 821 F.3d 921 (8th Cir. 2016). The standard is simply a reasonable probability of a different verdict sufficient to undermine confidence in the verdict.

A breach does not occur if counsel refrains from asserting a meritless issue. *State v. Lopez*, 872 N.W.2d 159, 169 (Iowa 2015); *State v. Hoskins*, 711 N.W.2d 720, 730-31 (Iowa 2006); *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2001). Counsel may have a duty to pursue an open question in Iowa law, if there is a body of authority suggesting the matter is "worth raising." *Millam v. State*, 745 N.W.2d 719, 722 (Iowa 2008). But, counsel is not expected to anticipate changes in the law. *State v. Williams*, 695 N.W.2d 23, 29-30 (Iowa 2005). "Counsel need not be a crystal gazer; it is not necessary to know what the law will become in the future to provide effective assistance of counsel." *State v. Liddell*, 672 N.W.2d 805, 814 (Iowa 2003) (quoting *Snethen v. State*, 308 N.W.2d 11, 16 (Iowa 1981)).

Nor must counsel assert an issue merely because it would not hurt. *See Knowles v. Mirzayance*, 129 S.Ct. 1411, 1419-20 (2009) ("This Court has never established anything akin to [a] 'nothing to lose' standard for evaluating *Strickland* claims."). And, the test is not whether some attorney somewhere would have tried the case differently. *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a

particular client in the same way." *Caldwell v. State*, 494 N.W.2d 213, 215 (Iowa 1992). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 466 U.S. at 693.

A defendant is not entitled to "perfect representation," just an attorney functioning within a normal range of competence. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000); *see also State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008).

Courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." *Strickland*, 466 U.S. at 698; *see also Maxwell*, 743 N.W.2d at 721; *Ledezma*, 626 N.W.2d at 142. "Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel." *Ledezma*, 626 N.W.2d at 143.

As for the second element of the ineffective assistance of counsel claim, "[t]he crux of the prejudice component rests on whether the defendant has shown 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Strickland*, 466 U.S. at

694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*; *cf. Williams v. Taylor*, 529 U.S. 362, 391 (2000) ("there are situations in which the overriding focus on fundamental fairness may affect the analysis").

B. Existing precedent and controversy chiefly pertain to out-of-court identifications.

The federal and state constitutions provide a due process protection against a police-engineered impermissibly suggestive or unreliable pre-trial identification. U.S. Const. Amend. V, XIV; Iowa Const. Art. I, § 9; *Perry v. New Hampshire*, 565 U.S. 228, 248 (2012); *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).

The test for determining whether there has been a violation of due process is whether the identification procedure was "so unnecessarily suggestive and conducive to irreparable mistaken identification," considering the totality of circumstances, that it violated constitutional standards for due process. *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967) (overruled on other grounds by *Griffith v. Kentucky*, 479 U.S. 314, 327 (1987)). "Short of this, the identification evidence and its shortcomings or credibility are for the jury to weigh." *State v. Neal*, 353 N.W.2d 83, 87 (Iowa 1984).

"Reliability is the linchpin in determining the admissibility of identification testimony...." *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977); *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993). In considering claims of undue suggestiveness, courts apply a two-part analysis. *See, e.g., Neil v. Biggers*, 409 U.S. 188, 198-99 (1972); *State v. Rawlings*, 402 N.W.2d 406, 407 (Iowa 1987).

First, the court considers whether an impermissibly suggestive out-of-court identification procedure was employed. *State v. Holderness*, 301 N.W.2d 733, 738 (Iowa 1981). Second, if the court so finds, it then determines whether under the totality of the circumstances the suggestive procedure gave rise to a "very substantial likelihood of irreparable misidentification." *Id*. Thus, "[t]he central question is whether, under the totality of the circumstances, the identification was reliable despite any suggestive or inappropriate pretrial identification techniques." *Carter v. Hopkins*, 92 F.3d 666, 671 (8th Cir. 1996).

With respect to the reliability prong of the analysis, courts examine five relevant factors:

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

Braithwaite, 432 U.S. at 114-15.

If the identification procedure is sufficiently reliable under the totality of the circumstances, the evidence should be left for the jury to weigh. *Braithwaite*, 432 U.S. at 116; *Mark*, 286 N.W.2d at 405, 407.

Doolin challenges the validity of eyewitness identification, in general. He draws on propositions that eyewitness testimony is especially forceful and overestimated in its value. *See* Appellant's Pr. Br. pp. 25, 26 (citing *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) and *Perry*, 132 S.Ct. at 738 (Sotomayor, J., dissenting). He relies on statistics which say 75% of wrongful convictions involve eyewitness testimony, 36% of which were

misidentified by more than one witness. *Id*. p. 24 (quoting *State v. Henderson*, 27 A.3d 872, 886 (N.J. 2011)). He identifies police "show-ups" as particularly untrustworthy. *Id*. p. 25-26 (citing *United States v. Green*, 704 F.3d 298, 307 (4th Cir. 2013) (relying on *Henderson* regarding the weaknesses of police show-ups) and *State v. Lawson*, 291 P.2d 673, 707 (Ore. 2012) (stating police "showups... less reliable than properly administered lineup identification")). He provides studies on the rate of memory fade and the poor correlation between accuracy and confidence in showups. *Id*. p. 27-28. Therefore, Doolin writes, some states have abandoned the *Braithwaite* "reliability" analysis. *Id*. p. 33.

In support of this latter proposition, Doolin cites five cases that address pre-trial eyewitness identifications. *Id*. (citing *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1261, 1265 n.2 (Mass. 1995) (a divided court parting with *Braithwaite* and every state[3] but one and prohibiting admission of a pre-trial identification through a "showup"); *State v. Dubose*, 699 N.W.2d 582, 593 (Wis. 2005) ("We conclude that evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the

[3] Including Iowa. *State v. Thornton*, 506 N.W.2d 777, 779-80 (Iowa 1993).

totality of circumstances, the procedure was necessary."); *People v. Adams*, 423 N.E.2d 379, 384 (N.Y. 1981) (excluding out of court showup identification, but affirming conviction where defendant was "properly identified at trial by five witnesses" two of whom did not attend the showup); *Henderson*, 27 A.3d at 879 (rejecting *Braithwaite* and developing multi-factored analysis of pretrial identifications); *Lawson*, 291 P.3d at 685-89, 698 (re-formulating rule of evidence for admitting identifications made in several pre-trial settings)).

This authority governs evaluation of pre-trial, out-of-court identifications, such as lineups and showups. "A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances, the [*Braithwaite*] Court said, is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place." *Perry*, 132 S.Ct. at 726. That aim is no longer in play when the only identification occurs in court. *Id*. Hence, *Braithwaite* does not apply to unprompted, out-of-court identifications. *Id*. at 725-26.

At the moment, a split divides federal courts over whether *Neil v. Biggers* and *Manson v. Braithwaite* apply to in-court identifications. *Compare United States v. Correa-Osorio*, 784 F.3d 11, 19-20 (1st Cir. 2015) ("One could argue either way" whether *Neil v. Biggers* applies to in-court identifications after *Perry* and concluding in-court identification was not unduly suggestive); *United States v. Bush*, 749 F.2d 1227, 1232 (7th Cir. 1984) (holding *Biggers* and *Braithwaite* do not apply to in-court identification); *United States v. Dormire*, 784 F.2d 1361, 1368-69 (9th Cir. 1986) (leading case on the subject and holding same); *United States v. Whatley*, 719 F.3d 1206, 1216 (11th Cir. 2013) ("*Perry*" makes clear... the requirements of due process are satisfied in the ordinary protections of trial.") *with Kennaugh v. Miller*, 289 F.3d 36, 47 (2nd Cir. 2002) (applying *Biggers/Braithwaite* analysis to in-court identification); *United States v. Greene*, 704 F.3d 298, 308 (4th Cir. 2013) (same and concluding identification was unnecessarily suggestive); *United States v. Rogers*, 126 F.3d 655, 658 (5th Cir. 1997) (applying *Braithwaite* and concluding identification was unnecessarily suggestive but not sufficiently prejudicial to overturn conviction); *United States v. Hill*, 967 F.3d 226, 232 (6th Cir. 1992) (applying

Biggers/Braithwaite analysis and upholding witness' in-court identification); *United States v. Rundell*, 858 F.2d 425 427 (8th Cir. 1988) (applying *Biggers/Braithwaite* analysis).

But, Doolin posits something different, that not only does the *Biggers/Braithwaite* analysis not apply, but that in-court identifications are inherently suggestive and therefore objectionable. Thus, all of the federal authority establishes a duty below what Doolin's proposes. As will be discussed in the following section, published case law does not support such a duty. The bulk of jurisdictions hold that the protections afforded by trial itself determine whether to admit first-time, in-court identifications.

C. The protections afforded criminal defendants at trial minimize the risk of irreparable misidentification, as the overwhelming majority of courts recognize.

The courts are, of course, concerned about mistaken eyewitness identification. *See State v. Folkerts*, 703 N.W.2d 761, 763-65 (Iowa 2005) (discussing mistaken eyewitness identification as source of seventy-five percent of erroneous convictions). But Iowa recognizes that a witness may properly identify a defendant at trial if that identification originates independently from a tainted pre-trial procedure. *State v. Webb*, 516 N.W.2d 824, 829 (Iowa 1994).

To prevail, Doolin must satisfy this Court that Article I, section 9 requires abandonment of the *Biggers* analysis for first-time, in-court identifications and counsel here was ineffective for failing to so object. Alternatively, he proposes that if the court retains the *Biggers* analysis, the identification here failed it.

Taking up the first proposition, due process does not itself protect a defendant from unreliable evidence. *Perry*, 132 S.Ct. at 723. Rather, it affords a defendant the means to persuade a jury that the evidence should not be credited. *Id*. He may expose testimony as biased or the product of poor perception by virtue of several tools: the right to counsel, the right to compulsory process; and the right to confrontation. *Id*.; Iowa Const. Art. I, § 10. The rules of evidence offer their own protections. Rules of professional conduct limit the prosecution to the pursuit of justice, not conviction. *State v. Graves*, 668 N.W.2d 860, 870-71 (Iowa 2003). There is also the matter that the identification occurs in the presence of the judge and jury who can assess its validity for themselves. And, judge or jury would do so with the benefit of any testimony, cross-examination, or expert evidence on the topic of eyewitness identification.

It is only where evidence is so "extremely unfair that its admission violates fundamental conceptions of justice" that notions of due process would impede its admission. *Perry*, 132 S.Ct. at 723 (citing *Dowling v. United States*, 493 U.S. 342, 352 (1990)). Short of this, there is a prevailing view that the judicial system should have access to all relevant information in ascertaining the truth. *Mason v. Robinson*, 340 N.W.2d 236, 242 (Iowa 1983). That is why, for example, courts permit testimony that may be biased.[4] It allows evidence from a witness whose perception of events may be faulty. But, with the benefit of counsel, confrontation, and compulsory process, a defendant may show the true value of any identification. From there, a defendant may rebut the identification with lay or expert testimony and hammer home the point in closing argument. A general eyewitness identification instruction may be used. Finally, a defendant may only be convicted on proof beyond a reasonable doubt.

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[4] The classic example is testimony by a defendant's mother: admissible, but not persuasive. *See* Irving Younger, *The Art of Cross-Examination*, 1 ABA Litigation Section Monograph, at 10 (1976) (stating once the mother's relationship is shown "[n]ot one more question is necessary; even a beginner could recognize it. No jury is going to believe that woman's testimony. She is the defendant's mother. You have [shown] bias or interest.").

There are two cases that would limit a first-time, in-court identification...although they do not share a common foundation. A bare majority of the Connecticut Supreme Court could not conceive of a more suggestive identification than picking a defendant sitting at counsel table (and who may have been one of only two African-American males in the room). *State v. Dickson*, 141 A.3d 810, 822-23 (Conn. 2016). Relying on federal constitutional principles, that Court crafted a prophylactic rule whereby to identify a defendant at trial, the State had to first request it; if not allowed, the district court could permit a non-suggestive identification procedure be employed; otherwise, no identification would be allowed. *Id*. p. 836-37. The dissent excoriated the majority for failing to adhere to *Perry* or, if it would depart from federal principles, to do so under its own constitution. *Id*. p. 845, 859, 861-62 (Zarella, J., dissenting; Espinosa, J., dissenting).

Massachusetts has crafted a procedure as a matter of common-law, not constitutional law, whereby the state may only introduce a first-time, in-court identification if there is "good reason." *Commonwealth v. Crayton*, 21 N.E.2d 157, 169-70, n.16 (Mass. 2014). A "good reason" may include that the witness knows the perpetrator

or the witness is an arresting officer who is also an eyewitness. *Id*. at 170.

On the other side of the balance, thirteen courts have concluded that the rigor of trial practice affords a defendant sufficient due process when a first-time, in-court identification occurs. The first of these warrants a lengthy quotation, because its thinking echoes through most of the remaining cases:

> We have never directly addressed whether a first-time in-court identification triggers application of the same due process protections that apply to suggestive pretrial identifications. We now decide it does not. Our conclusion is driven by the fundamental differences between identifications derived from state action prior to trial and those that occur in the courtroom. A pretrial identification ordinarily involves only the police and the witness, and how the identification is later evaluated at trial depends largely on those participants' recollections of it. An in-court identification, in contrast, occurs in the presence of the judge, the jury, and the lawyers. The circumstances under which the identification is made are apparent. Defense counsel has the opportunity to identify firsthand the factors that make the identification suggestive and to highlight them for the jury. We also note that there are other ways, though not used in this case, in which the risks of in-court misidentifications can be either minimized in practice or pointed out to the jury. Expert witnesses can testify about the problems

> inherent in first-time in-court identifications; the trial court may grant a defendant's request for an in-court lineup or to be seated somewhere other than counsel table for the identification.[5]

Young v. State, 374 P.2d 395, 411-12 (Alaska 2016); *see also State v. Goudeau*, 372 P.3d 945, 979-81 (Ariz. 2016) (upholding first-time, in-court identification given lack of police action and trial setting protections); *Byrd v. State*, 25 A.3d 761, 765-66 (Del. 2011) (same relying on *United States v. Domina*, 784 F.2d 1361 (9th Cir. 1986) among others); *Pitts v. State*, 747 S.E.2d 699, 702-03 (Ga. Ct. App. 2013) (same); *People v. Rodriguez*, 480 N.E.2d 1147, 1151 (Ill. Ct. App. 1985) (same); *Northington v. Commonwealth*, 459 S.W.3d 404, 408-11 (Ky. Ct. App. 2015) (same); *McCoy v. State*, 147 So.2d 333, 350 (Miss. 2014) (same); *People v. Brazeau*, 759 N.Y.S.2d 268, 271 (N.Y. Sup. Ct. App. Div. 2003) (same); *State v. King*, 934 A.2d 556, 559-61 (N.H. 2007) (same); *State v. Caporasso*, 495 S.E.2d 157, 160 (N.C. Ct. App. 1998) (same); *State v. Hickman*, 330 P.3d 551, 571-72 (Ore. 2014) (same); *State v. Lewis*, 609 S.E.2d 515, 518-19 (S.C.

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[5] There is, however, no constitutional right to any particular procedure, such as an in-court lineup or seating away from counsels' tables. *United States v. Domina*, 784 F.2d 1361, 1368 (9th Cir. 1986); *Byrd v. State*, 25 A.3d 761, 767 (Del. 2011); *State v. Hickman*, 330 P.3d 551, 572 (Ore. 2014).

2005) (same); *Hogan v. State*, 908 P.2d 925, 929-30 (Wy. 1995) (same).

Two of the states cited above, Oregon and New York, follow this rule notwithstanding heightened sensitivity to *pre-trial* suggestive identifications. *Compare Brazeau*, 759 N.Y.S.2d at 271 (recognizing due process protections of trial for in-court identification) *with Adams*, 423 N.E.2d at 384 (employing *per se* exclusion of out-of-court suggestive identification); *Hickman*, 330 P.3d at 571-72 (declining to employ evidentiary rule announced in *Lawson*, 291 P.3d at 685-89, 698 in due process challenge to in-court identification).

So, controversy over eyewitness identifications notwithstanding[6], there would be little reason for counsel think it worth raising the notion Article I, section 9 precludes a first-time, in-court. This is to say nothing of the still more remote notion that it

[6] The State recognizes that effective representation implies vigorous advocacy, *State v. Vance*, 790 N.W.2d 775, 785 (Iowa 2010), and academic commentary has shown hostility toward in-court identifications. *See, e.g.*, 2 Wayne R. LaFave, et al., *Criminal Procedure* § 7.4(h) (4th ed. 2017 update); Dakota Kann, Note, *Admissibility of First Time In-Court Eyewitness Identifications: an Argument for Additional Due Process Protections in New York*, 39 Cardozo L. Rev. 1457, 1486-90 (Apr. 2018). Counsel may have a duty to search for a "solid" legal theory, *State v. Effler*, 769 N.W.2d 880, 895 (2009) (Appel, J., concurring), but that effort here would have yielded only a sliver.

requires a prophylactic rule such as that envisioned in Connecticut or Massachusetts.

Similarly, whether Brkovic's identification satisfied some or all of the *Biggers/Braithwaite* factors would be a matter for the jury to decide. As a tool for excluding a pre-trial identification, it is off-point an in-court identification. Nevertheless, the identification was reliable. Of the *Braithwaite* factors, two militate against reliability: the length of time since the event and Brkovic's inability to describe his assailant's clothing shortly after the event. Otherwise, Brkovic had, if you will, a front-row seat to the encounter, he was certain he recognized Doolin, and his attention was tightly focused.

Counsel bore no duty to exclude the in-court identification. His task was to employ the usual tools of trial work to persuade the jury that it should not credit the identification. Doolin has not proved ineffective assistance of counsel.

II. Counsel challenged one witness's identification during testimony and in closing. He was not necessarily ineffective for failing to seek an instruction on eyewitness identification.

Preservation of Error and Standard of Review

The State accepts the defendant's statement of error preservation and the nature of review. Iowa R. App. P. 6.903(3).

Merits

Identification was, of course, an important issue in this case. Although counsel did not seek an additional instruction on eyewitness identification, he did cross examine the witnesses on the issues it embraced, as well as argued them in closing. And, the jury received a variety of other instructions that allowed it to focus on the potential weaknesses of the identification. The record as it stands is not adequate to show ineffective assistance of counsel.

Counsel drew the jury's attention to several facts that might undermine the in-court identification. Police did not secure a positive identification of Doolin when he (Doolin) was in custody. Tr. Day 1 p. 61, l. 24-p. 62, l. 12. The victim waited over an hour before talking with police. Tr. Day 2 p. 25, ll. 1-4. When he did, he could not recall the assailant's clothing. *Id*. p. 27, ll. 17-25. He did not provide a description to the police. *Id*. p. 29, ll. 1-18. He did not recall looking at a photo-array. *Id*. p. 28, ll. 6-11. He made no identification in the two years between the event and trial. *Id*. ll. 12-22. All he remembered was a "face and the gun." *Id*. p. 36, ll. 9-14.

From this, counsel argued in closing the significance of the two-year delay and Brkovic's inability to remember the assailant's clothing. Tr. Day 3 p. 43, l. 18-p. 45, l. 20. Taking the tack that perhaps Brkovic was not credible at all, counsel argued it was not reasonable—despite the alleged trauma of an armed assault—to spend hours in a strip club and a restaurant for breakfast before speaking with police. *Id*. Even so, counsel argued "major red flags" impacted the identification. *Id*. p. 47, ll. 17-23. "[W]hat happened was what's known as a one-man lineup. There's only one man here." *Id*.

This, counsel continued, was in contrast to the lack of identification by Menkovic or any of Brkovic's passengers. *Id*. p. 48, ll. 7-18. This, counsel argued, was despite the police telling Menkovic that "yeah, that guy, he went to the Tahoe and dropped a gun underneath." *Id*. p. 49, ll. 2-11.

The jury did not receive the uniform instruction on eyewitness identifications. Iowa Model Jury Instr. No. 200.45. In short, that instruction informs the jury that it may consider the witness's opportunity to view the person at the scene of the crime. *Id*. *If* there was identification after the crime, the jury must "consider whether it was the product of the witness's own recollection." *Id*. It could

consider the length of time between the crime and the next opportunity to see the defendant. *Id.* It instructs that identification from a group of similar individuals is more reliable than when a defendant is presented alone. Finally, it allowed the jury to consider any instances when the defendant made an inconsistent identification or failed to. *Id.*

Thus, not all of the instruction would have been helpful. Brkovic had a perfect opportunity to view Doolin. There was no testimony that Brkovic's recollection could be anything other than his own. And there had never been an instance where Brkovic failed to identify Doolin. The balance, however, was explored at trial and in argument: two years had passed and Doolin was alone to be identified. Finally, jury did receive instructions on direct and circumstantial evidence, inconsistent statements, perception and bias, and the like. Jury Instr. Nos. 11-14; App. 9-12.

The State assumes that the trial court might have given the uniform instruction on identification, if it had been asked. *See State v. Hohle*, 510 N.W.2d 847, 849 (Iowa 1994) (upholding court's refusal to give eyewitness identification instruction); *State v. Tobin*, 338 N.W.2d 879, 880-81 (Iowa 1983) (same). That is not the point. *State*

v. Shorter, 893 N.W.2d 65, 86 (Iowa 2017). The question is whether counsel breached a duty causing *Strickland* prejudice. *Id.*

Shorter controls. There, an eyewitness saw the perpetrator at "point-blank" range in a well-lit area and identified him from a photo-array within 24 hours. *Shorter*, 893 N.W.2d at 86. The uniform instruction could have, therefore, hurt as much as helped. *Id.*

So too here. Although the identification came two years after the event, the witness had a perfect vantage point. Two years did pass since the initial event and the identification occurred in the courtroom. But, the witness never failed to identify Doolin. And, the instructions—to say nothing of what counsel actually argued—gave a "clear avenue of attack." *Id.* So, as in *Shorter*, it is not necessarily clear that a reasonable likelihood exists that the eyewitness instruction would have changed the result. *Id.*

III. The record supplies sufficient evidence that Doolin was intoxicated, invalidating his concealed weapons permit.

Preservation of Error

The State accepts the defendant's statement of error preservation. Iowa R. App. P. 6.903(3); *see* Tr. Day 2, ll. 128, l. 7-p. 131, l. 13.

Scope and Standard of Review

The Court on appeal reviews sufficiency challenges for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). A verdict of guilty is binding on appeal if supported by substantial evidence. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011).

Merits

The weapons charge turned on whether Doolin's permit to carry a concealed weapon was invalid because he was intoxicated.[7] Iowa Code §§ 724.4(1), 724.4C (2017). Officer Ryan Muhlenbruch testified that Doolin exhibited an odor of alcoholic beverages, had slurred speech and bloodshot eyes, and was—in his opinion—intoxicated. *See* Tr. Day 1 p. 41, l. 1-p. 43, l. 14. There was sufficient evidence for a rational juror to agree.

Iowa Code section 724.4(1) prohibits carrying concealed weapons within city limits. This prohibition does not apply to those with a permit issued according to Iowa Code section 724.4(4)(*i*). And,

[7] After Doolin's offense, the Legislature amended this provision. *See* 2017 Iowa Acts (87 G.A.) chs. 69, 170. He does not contend this amendment is germane. Appellant's Pr. Br. p. 50, n.3.

the permit is invalid when the holder is intoxicated as provided in Iowa Code section 321J.2(1). Iowa Code § 724.4C. Relevant here, section 321J.2(1) prohibits operation of a motor vehicle while "under the influence of an alcoholic beverage...." Iowa Code § 321J.2(1)(*a*).

As such, the jury was informed "under the influence" was when one or more of the following were 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 Instr. No. 31; *see also* Jury Instr. Nos. 27, 29, 30; App. 16, 13, 14, 15.

Officer Muhlenbruch had nightly experience with intoxicated people in his career. Tr. Day 1 p. 41, ll. 16-22. He described what he meant by slurred speech and bloodshot watery eyes, as well as their significance related to intoxication. *Id*. p. 42, ll. 12-22. Finally, the jury had the benefit of the recording from Officer Muhlenbruch's vehicle. *See* St. Ex. G *passim*.

Bloodshot, watery eyes, slurred speech, and the odor of intoxicating beverages are the classic signs of alcohol intoxication. *See State v. Morgan*, 877 N.W.2d 133, 137 (Iowa 2016) ("[C]ommon indicia of intoxication include an odor of alcohol, bloodshot and watery eyes, slurred speech, and an uncooperative attitude."); *State v. Boleyn*, 547 N.W.2d 202, 204 (Iowa 1996) ("Boleyn's eyes were watery and bloodshot, his speech was slurred, and he seemed confused."). The slurred speech shows a loss of bodily control.

The impulsivity of trying to get Brkovic to drive him away was telling. That Doolin hid and tried to discard the weapon as soon as police arrived was telling. *See State v. Wilson*, 878 N.W.2d 203, 216-17 (Iowa 2016) (flight from police supported inference of guilt). It was probably not necessary for officer Muhlenbruch to add his expert opinion.

In reviewing challenges to the sufficiency of evidence supporting a guilty verdict, courts consider the evidence "in the light most favorable to the State and make all reasonable inferences that may fairly be drawn from the evidence." *State v. McPhillips*, 580 N.W.2d 748, 753 (Iowa 1998); *see also Williams*, 695 N.W.2d at 27-28; *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003). In ruling on

sufficiency challenges the court does not resolve conflicts in the evidence, assess the credibility of witnesses, or weigh evidence. *State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006). Circumstantial evidence is as compelling as direct evidence. *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002). The factfinder decides whether to accept or reject it. *State v. Laffey*, 600 N.W.2d 57, 59 (Iowa 1999).

The district court did not err to deny the motion for judgment of acquittal.

IV. The trial court did not abuse its considerable discretion to deny the motion for new trial.

Preservation of Error and Standard of Review

The State accepts the defendant's statement of error preservation and the nature of review. Iowa R. App. P. 6.903(3).

Merits

The rules of criminal procedure allow defendants to seek a new trial when the verdict is "contrary to the evidence." Iowa R. Crim. P. 2.24(2)(b)(6). "Contrary to the evidence" means contrary to the weight of the evidence. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). "The 'weight of the evidence' refers to 'a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other.'" *Nguyen v. State*, 707

N.W.2d 317, 327 (Iowa 2005) (quoting *Ellis*, 578 N.W.2d at 658 and *Tibbs v. Florida*, 457 U.S. 21, 37-38 (1982)). The motion for a new trial is addressed to the discretion of the court, where it may assess the credibility of witnesses. *Id.*

However, it is a power to be used "carefully and sparingly," lest it diminish the role of juries to decide facts. *Ellis*, 578 N.W.2d at 659. Trial courts may grant new trials only in exceptional cases where the evidence preponderates *heavily* against the verdict. *Id.* Even if the evidence is nearly balanced or different minds could fairly arrive at different conclusions, the district court should not disturb the verdict. *State v. Reeves*, 670 N.W.2d 199, 203 (Iowa 2003). Even if a trial judge would have reached a different conclusion, the judge may only set aside the verdict and impose the case on another jury when the verdict is incorrect due to mistake, prejudice, or other cause. *Id.*

It is the rare trial without divergent testimony, even wildly differing or inconsistent evidence. The jury, however, enjoys a front-seat view to the witnesses and can weigh their relative credibility better than the court on appeal can working from a cold transcript. The jury enjoys the prerogative and bears the duty to sort out the conflicting testimony and assign all of it such weight as it deserves. A

jury is entitled to believe all, some or none of any witness's testimony without interference. *McPhillips*, 580 N.W.2d at 753; *State v. Phanhsouvanh*, 494 N.W.2d 219, 223 (Iowa 1992); *State v. Brown*, 466 N.W.2d 702, 704 (Iowa Ct. App. 1990).

The victim positively identified Doolin. He had the vantage and time to see Doolin. He recognized Doolin at trial. Doolin, for his part, acted more than a little suspicious when he hid and discarded the weapon. Whether Doolin was intoxicated, acting in self-defense, or intimidating a driver to get away was the stuff of jurors' work. The district court did not abuse its considerable discretion to deny the motion in arrest of judgment.

CONCLUSION

The district court judgment should be affirmed.

REQUEST FOR NONORAL SUBMISSION

The State does not believe oral argument is necessary.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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