

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 24, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2254-CR

Cir. Ct. No. 2009CF234

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD CARLISLE HOLLENBECK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Douglas County: KELLY J. THIMM, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Richard Hollenbeck appeals a judgment convicting him of armed robbery and an order denying his motion for postconviction relief. Hollenbeck contends his trial attorney was ineffective for failing to seek suppression of a witness's testimony identifying Hollenbeck as the perpetrator.

He argues the witness's initial identification of him, which occurred during the preliminary hearing, was the product of an unnecessary and impermissibly suggestive showup. Hollenbeck also contends he is entitled to a new trial in the interest of justice. We reject Hollenbeck's arguments and affirm.

BACKGROUND

¶2 On October 15, 2009, Hollenbeck was charged with armed robbery in connection with the October 12, 2009 robbery of Schultz's Bar in Superior. At the preliminary hearing, Patrick Biver testified he was bartending at Schultz's Bar on the morning of October 12. Shortly before 9 a.m., a man wearing a blue hooded sweatshirt came into the bar, wielding a black handled knife with a six-inch blade. The man waved the knife at Biver and told him to back up. The man then opened a drawer below the till, grabbed a green money bag containing \$3,000, and ran out of the building. When asked whether the man who committed the robbery was present in the courtroom, Biver pointed at Hollenbeck and stated, "He's sitting over at that table right there[.]" Biver observed Hollenbeck was wearing "an orange jump suit."

¶3 On cross-examination, Biver conceded it was "pretty clear" Hollenbeck had just come from the Douglas County Jail. He also admitted he was aware Hollenbeck was wearing handcuffs, and he had seen Hollenbeck "led from the elevator into the courtroom by a sheriff's deputy[.]" Biver acknowledged he had only seen the man who committed the robbery for about ten seconds on October 12, he had never seen the man before then, and he had not seen the man again until the date of the preliminary hearing. In addition, Biver admitted the

man who committed the crime had a goatee, but Hollenbeck did not.¹ However, Biver testified he was certain Hollenbeck was the man who robbed Schultz's Bar. Based on Biver's testimony, a court commissioner found probable cause to believe Hollenbeck had committed a felony and bound him over for trial.

¶4 Biver's trial testimony about the robbery mirrored his testimony from the preliminary hearing. As at the preliminary hearing, Biver identified Hollenbeck as the robber. Biver conceded the robber had a goatee, and Hollenbeck did not, but he asserted, "I can recognize that face. Never forget that face." He specifically testified he recognized Hollenbeck's nose, stating, "It's a nice big nose. I can't forget that nose."

¶5 Detective Jack Curphy testified police obtained surveillance videos from Schultz's Bar and from the nearby Hammond Spur gas station. Based on the videos, police believed two men were involved in the robbery—a robber, and a lookout.

¶6 The surveillance videos were played for the jury. Footage from the Hammond Spur showed a dark colored Dodge Neon with a discolored hood entering the gas station parking lot at about 8:30 a.m. A driver wearing a red sweatshirt and a passenger wearing a blue hooded sweatshirt exited the Neon and walked across the parking lot. Footage from inside Schultz's Bar showed a person in a red sweatshirt entering the bar through the back door at about 8:36 a.m. and leaving through the same door at 8:41. From 8:43 to 8:44, the video showed a

¹ In a letter dated the day after the preliminary hearing, the prosecutor revealed he had asked Biver before the hearing whether "anyone had told him that the person who robbed him had shaved his goatee." Biver responded no one had told him that. The prosecutor then informed Biver that "the defendant may or may not have shaved his goatee[.]"

person looking into the bar intermittently through a window in the back door. At 8:44, a man in a blue hooded sweatshirt entered the bar through the back door, walked toward the restrooms, and left again at 8:47 without entering the bar area. The man in blue reentered the bar through the back door at about 8:56. He went into the bar area and approached the bartender, brandishing a knife. The bartender stepped back, and the man in blue opened a drawer underneath the till and took out a bag. The man ran out of the bar with the bag at about 8:57.

¶7 Curphy testified he located the Neon seen in the surveillance footage in the parking lot of the Driftwood Motel in Superior. The motel manager linked the Neon to room #7, which was registered to Steven Ecklund. On the morning of October 13, Curphy observed a female—later identified as Ecklund’s fiancée, Susan Delvecchio—and a male—later identified as Hollenbeck—leaving room #7 and driving away in the Neon. Delvecchio was driving, and Hollenbeck was sitting in the front passenger seat. Police stopped the Neon and took Hollenbeck into custody.

¶8 Hollenbeck was wearing a grey Carhartt jacket at the time of his arrest. Officers found a digital scale, a folding knife, and \$150 in small bills on his person. A “bayonet-style knife” was found in the console area of the Neon, and Biver later identified it as the type of knife used in the robbery. Officers also found a tan bag in the Neon that contained \$1,310 in small bills and a driver’s license application for Delvecchio. A blue sweater or sweat jacket was draped over the front passenger seat.

¶9 In room #7 at the Driftwood Motel, officers found drug paraphernalia, several knives, and a hand-held portable radio. An identical radio, with a serial number that differed by only two digits, was found outside Schultz’s

Bar. Both radios were programmed to channel 6. Police also found several razors in room #7 and whisker shavings in the bathroom sink.

¶10 Following his arrest, Hollenbeck was questioned by detective Joseph Krieg. Krieg testified Hollenbeck was cooperative, but denied any involvement in the robbery. Hollenbeck told Krieg he left the Black Bear Casino in Carlton, Minnesota, at about 8 a.m. on the day of the robbery, which surveillance video from the casino confirmed. Hollenbeck admitted leaving the casino in the Neon, but he refused to identify the driver. He stated the Neon dropped him off at the Grand Motel in Duluth at around 9 a.m. He and his girlfriend, Teri Schaeffer, then walked across the street to Arby's for breakfast. Police later obtained an Arby's receipt, time stamped 9:29 a.m., that matched the items Hollenbeck reported ordering. Krieg testified it takes twenty-five minutes to drive from the Black Bear Casino to Schultz's Bar, and twelve minutes to drive from the bar to the Grand Motel.

¶11 During a second interview with Krieg, Hollenbeck repeatedly stated he had been in the Acme Tools parking lot adjacent to the Grand Motel on the morning of October 12. Hollenbeck reported that he met a woman named Teresa there and a "mutual consensual sex act" took place. Krieg determined there were security cameras covering the Acme Tools parking lot. However, police failed to obtain the footage from October 12 before it was destroyed.

¶12 Krieg testified Hollenbeck acknowledged buying two hand-held radios at Walmart a few weeks before the robbery. Security video from Walmart confirmed the purchase. Hollenbeck told Krieg he last saw the radios at the Driftwood Motel.

¶13 Steven Ecklund testified for the State. Ecklund stated he was arrested in connection with the Schultz's Bar robbery on January 14, 2010. Before his arrest, Delvecchio had provided him with copies of police reports on the robbery, which included Hollenbeck's statements. After he was arrested, Ecklund aggressively sought a plea deal in exchange for his testimony against Hollenbeck. Ecklund ultimately reached a plea agreement requiring him to testify at Hollenbeck's trial, and he received a time-served disposition for his involvement in the robbery.

¶14 Ecklund testified he had known Hollenbeck for about a month before the robbery, mostly from drinking alcohol and using methamphetamine together. He confirmed that they traveled to Walmart together to purchase hand-held radios. He also testified he and Hollenbeck went to the Black Bear Casino together on the morning of the robbery. After they left the casino, they stopped in Scanlon, Minnesota, and then drove to the Hammond Spur gas station in Superior. Ecklund claimed the original plan was for Hollenbeck to drop him off at Schultz's Bar and then drive the Neon back to Duluth. However, during their trip, Hollenbeck indicated the bar would be easy to rob. Ecklund was not "keen on the idea" because he was a regular at Schultz's Bar, so he suggested Hollenbeck rob a different bar.

¶15 Ecklund testified he walked to Schultz's Bar from the Hammond Spur and ordered a Mountain Dew. When shown the surveillance video from the bar, Ecklund identified himself as the man wearing red. Ecklund testified he left the bar after only a few minutes. He saw Hollenbeck in the bar's back vestibule, and Hollenbeck asked him how many people were in the bar. Ecklund again told Hollenbeck to rob another bar. Both Ecklund and Hollenbeck then returned to the Neon. However, Hollenbeck subsequently went back into Schultz's Bar, and he

came out a few minutes later carrying a bank bag and a knife. Hollenbeck got into the Neon and said, “[G]o,” so Ecklund drove away. Ecklund identified Hollenbeck as the man in the blue sweatshirt shown robbing the bar in the surveillance video.

¶16 Ecklund testified he and Hollenbeck drove to the Grand Motel after the robbery. Schaeffer arrived at the motel in a different vehicle, and she and Hollenbeck walked to Arby’s. At Hollenbeck’s request, Ecklund went to Walgreens to buy razors so that Hollenbeck could shave off his goatee. Ecklund testified Hollenbeck had about \$3,000, mostly in small bills, but he only gave Ecklund “[f]orty bucks to go get razors[.]” Ecklund stated he dropped the razors off in Hollenbeck’s motel room while Hollenbeck and Schaeffer were at Arby’s. He testified the door to the room was unlocked. Ecklund stated he then took a cab back to the Driftwood Motel.

¶17 Hollenbeck testified in his own defense, denying any involvement in the robbery. He testified that, on October 12, he was staying at the Grand Motel with Schaeffer. Ecklund picked him up at the motel at about 3:30 a.m., and they drove to the Black Bear Casino. They left the casino at about 8 a.m., stopped in Scanlon to get high, and then drove back to the Grand Motel. When Hollenbeck arrived at the Grand Motel, Schaeffer was sleeping. He left the motel and went to the Acme Tools parking lot next door, where he had arranged to meet a woman named Teresa who owed him forty dollars. He met Teresa at around nine o’clock. After that, he and Schaeffer went to Arby’s for breakfast.

¶18 Hollenbeck could not recall when he last shaved before his arrest, but he knew it was sometime after he visited the Black Bear Casino on the morning of October 12. He testified he shaved because he was going to be seeing

Schaeffer's daughter and grandson, and he wanted to look nice. Hollenbeck did not recall shaving at the Driftwood Motel and did not know whose whiskers were found in the sink. He denied asking Ecklund to buy him razors. He also testified the door to his motel room locked automatically when closed and could not be opened without a key.

¶19 Hollenbeck was shown two still photographs from the surveillance video from Schultz's Bar. He testified he believed the man in red was Ecklund, but the photograph was "kind of grainy" and he "wouldn't make a positive identification off that[.]" He rejected the suggestion that he was the man wearing the blue hooded sweatshirt. Hollenbeck testified he did not know who that man was, but he had some suspicions. He named two other men in his "crowd" he could be confused with—Jerry Koss, and a man named "Todd Niemi or Todd Baker." He testified Todd was close friends with Ecklund, and both Jerry and Todd sometimes wore goatees.

¶20 Schaeffer also testified for the defense. She stated Hollenbeck was in their room at the Grand Motel when she woke up on the morning of October 12. Hollenbeck waited in the room for fifteen to twenty minutes while Schaeffer got dressed, and then they walked to Arby's together. Schaeffer testified she did not see Ecklund at any time that morning.

¶21 Schaeffer further testified the only jacket she had ever seen Hollenbeck wearing was a Carhartt jacket, and she had never seen him wearing the blue sweatshirt police found in the Neon. She had never seen Hollenbeck with a knife like the one recovered from the Neon. Schaeffer could not say whether the man in the surveillance video of the robbery was Hollenbeck. She agreed that Hollenbeck resembles both Jerry Koss and Todd Niemi/Baker.

¶22 Schaeffer also testified that, after he was arrested, Hollenbeck asked her to locate Teresa, the woman he reported meeting in the Acme Tools parking lot. Schaeffer was initially unable to find Teresa. However, she later ran into Teresa by chance in a convenience store and asked her to contact Hollenbeck's lawyer.

¶23 Teresa Poehls testified Hollenbeck loaned her forty dollars in October 2009. She called Hollenbeck at about 8:30 a.m. on October 12 and arranged to meet him in the Acme Tools parking lot on her way to work. Hollenbeck met her in the parking lot at about 9 a.m. They talked for a few minutes, and she gave him the money she owed. Poehls then drove to work. Poehls confirmed she later ran into Schaeffer in a convenience store, and Schaeffer asked her to contact Hollenbeck's lawyer. Poehls denied being threatened or offered compensation for her testimony. Poehls conceded she had been sharing alcohol and methamphetamine with Hollenbeck about once a week as of October 2009. However, she asserted she had since given up drugs and had been clean for almost a year.

¶24 The jury found Hollenbeck guilty of armed robbery. Hollenbeck moved for postconviction relief, arguing his trial attorney was ineffective for failing to seek suppression of Biver's identification testimony. He also sought a new trial in the interest of justice. The circuit court denied Hollenbeck's motion following a *Machner*² hearing, and this appeal follows.

² See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

DISCUSSION

I. Ineffective assistance

¶25 To succeed on an ineffective assistance of counsel claim, a defendant must show that counsel performed deficiently and that the deficiency prejudiced the defense. *State v. Love*, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. To prove deficient performance, the defendant must show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (quoted source omitted). To prove prejudice, the defendant must show a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Love*, 284 Wis. 2d 111, ¶30. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

¶26 Whether a defendant received ineffective assistance is a mixed question of fact and law. *Johnson*, 153 Wis. 2d at 127. The circuit court’s findings of historical fact will not be overturned unless clearly erroneous. *Id.* However, “[t]he ultimate determination[s] of whether counsel’s performance was deficient and prejudicial to the defense are questions of law which this court reviews independently.” *Id.* at 128.

¶27 Hollenbeck claims his trial attorney was ineffective by failing to seek suppression of Biver’s trial testimony identifying Hollenbeck as the man who robbed Schultz’s Bar. He contends Biver’s trial testimony was tainted because Biver’s initial identification of Hollenbeck, which occurred during the preliminary hearing, was the product of an unnecessary and impermissibly suggestive showup. Hollenbeck therefore contends Biver’s trial testimony should have been

suppressed, pursuant to *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582. In *Dubose*, our supreme court held that evidence obtained from a showup is inadmissible “unless, based on the totality of the circumstances, the showup was necessary.” *Id.*, ¶45. The court further explained a showup will not be 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.*

¶28 The problem with Hollenbeck’s argument is that Biver’s identification of him during the preliminary hearing was not the product of a showup. *Dubose* specifically defined a “showup” as “an *out-of-court* pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes.” *Id.*, ¶1 n.1 (quoted source omitted; emphasis added). The supreme court recently reiterated that “a showup, by definition, is an *out-of-court* pre-trial identification.” *State v. Ziegler*, 2012 WI 73, ¶81, 342 Wis. 2d 256, 816 N.W.2d 238 (emphasis added). Here, Biver’s initial identification of Hollenbeck occurred in court. Consequently, the identification was not the product of a showup, and *Dubose* is inapplicable. See *State v. Hibel*, 2006 WI 52, ¶¶32-33, 290 Wis. 2d 595, 714 N.W.2d 194 (observing that *Dubose*’s holding is limited to showup identifications); *State v. Drew*, 2007 WI App 213, ¶18, 305 Wis. 2d 641, 740 N.W.2d 404 (same).

¶29 Hollenbeck argues “[a] showup procedure that would be impermissibly suggestive if conducted in an adjacent jail cannot be sanitized by moving the process to the courtroom.” He therefore urges us to apply *Dubose*, even though the instant case does not involve an out-of-court identification. However, adopting Hollenbeck’s position would require us to withdraw or modify

language from *Dubose*, *Ziegler*, *Hibl*, and *Drew*. We may not do so. See *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

¶30 Because *Dubose* does not apply in this case, Hollenbeck's trial attorney did not perform deficiently by failing to argue that *Dubose* mandated suppression of Biver's identification testimony. An attorney does not perform deficiently by failing to pursue a meritless motion. *State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

¶31 Moreover, Hollenbeck has not established he was prejudiced by his attorney's failure to seek suppression. Even without Biver's identification testimony, the evidence was more than sufficient for the jury to convict Hollenbeck. Ecklund, who admitted being one of the two men involved in the robbery, identified Hollenbeck as the other perpetrator. Surveillance video showed Hollenbeck and Ecklund leaving the Black Bear Casino together at 8 a.m. on October 12—about one hour before the robbery. Surveillance video from Schultz's Bar showed Ecklund entering the bar at 8:36. At 8:56, the video showed a man in a blue sweatshirt robbing the bar. Based on the resemblance between Hollenbeck and the man in the blue sweatshirt, the jury could have reasonably inferred that Hollenbeck committed the robbery. Further, the State introduced evidence of the travel times between the Black Bear Casino and Schultz's Bar, and Schultz's Bar and the Grand Motel, to establish that Hollenbeck could have committed the robbery between leaving the casino at 8 and purchasing breakfast at Arby's at 9:29.

¶32 Additionally, Hollenbeck was apprehended while riding in the car used in the robbery. He admitted being a passenger in that car on the morning of the robbery. Police found a knife matching the one used in the robbery inside the

car, along with a large amount of cash. They also found a sweatshirt similar to the one worn by the robber. In addition, Hollenbeck admitted purchasing two hand-held radios at Walmart, and police linked the radios to the robbery.

¶33 Further, while the evidence showed that the robber had a goatee, the video clips from Walmart and the Black Bear Casino showed that Hollenbeck also used to have a goatee. Hollenbeck conceded he shaved sometime between leaving the Black Bear Casino on the morning of October 12 and his arrest on October 13. Ecklund testified he purchased razors for Hollenbeck after the robbery, at Hollenbeck's request, so Hollenbeck could shave off his goatee. Police found razors and whisker shavings in room #7 at the Driftwood Motel.

¶34 Finally, although Hollenbeck introduced evidence that he was in the Acme Tools parking lot when the robbery took place, the jury was entitled to disbelieve that evidence. The jury could have reasonably inferred that Hollenbeck's testimony about being in the Acme Tools parking lot was self-serving. The jury could also have reasonably concluded Poehls' testimony was not credible, given her past relationship with Hollenbeck and her previous criminal convictions. The jury could have reasonably discounted Schaeffer's testimony for similar reasons.

¶35 Thus, even if Biver's identification testimony had been suppressed, it is not reasonably probable the trial would have produced a different result. In other words, the admission of Biver's testimony does not undermine our confidence in the outcome. Accordingly, Hollenbeck has failed to establish either deficient performance or prejudice. As a result, the circuit court properly rejected his ineffective assistance of counsel claim.

II. Interest of justice

¶36 In the alternative, Hollenbeck asks us to grant him a new trial in the interest of justice. We may grant a new trial in the interest of justice “if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried[.]” WIS. STAT. § 752.35.³ “Our discretionary reversal power is formidable, and should be exercised sparingly and with great caution.” *State v. Williams*, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. We grant a new trial in the interest of justice “only in exceptional cases.” *State v. Armstrong*, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98 (quoted source omitted).

¶37 This is not an exceptional case warranting discretionary reversal. Hollenbeck argues the real controversy was not fully tried because Biver’s improperly admitted testimony clouded a crucial issue in the case—namely, “whether it was Hollenbeck who aided Ecklund in the robbery.” *See State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996) (We may find the real controversy was not fully tried if the jury heard improperly admitted testimony that sufficiently clouded a crucial issue.). Hollenbeck correctly observes that, to grant a new trial on this basis, we need not conclude a new trial would likely result in a different outcome. *See id.*

¶38 However, Hollenbeck has not established that Biver’s identification testimony was improperly admitted. We have already determined that *Dubose* did not require suppression of Biver’s testimony. Hollenbeck does not argue Biver’s

³ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

testimony should have been excluded on any other grounds. Granting a new trial in the interest of justice under these circumstances would impermissibly extend *Dubose*'s holding. We therefore decline to exercise our power of discretionary reversal.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

