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November 21, 2017

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You are hereby notified that the Court has entered the following opinion and order:

2016AP2530-CR

State of Wisconsin v. Nevada M. Varese (L.C. # 2015CF2287)

Before Blanchard, Kloppenburg and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

A jury found Nevada Varese guilty of fifth offense operating a motor vehicle while intoxicated and felony bail jumping, based on evidence that he appeared intoxicated when he operated a van through a fast food drive-through lane and then drove to an adjoining gas station. On appeal, Varese challenges the decision of the circuit court to admit, over Varese's objection, eyewitness testimony of a restaurant employee identifying Varese at trial as the apparently intoxicated person who drove through the drive-through lane. Varese argues that admission of

the testimony violated his right to due process because the witness had not made a prior, out-of-court identification memorialized by law enforcement in advance of trial, and the witness's identification of Varese "in court, where [Varese] is sitting at defense counsel table [and] is obviously the person on trial" occurred under circumstances that were too highly suggestive. However, we reject Varese's argument because Varese fails to develop it with citations to relevant legal authority and because he failed to present it to the circuit court. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We affirm.

Varese was arrested and charged with fifth offense operating a motor vehicle while intoxicated and felony bail jumping following a 911 call from Joe Navarro, the manager of an Arby's restaurant, who reported that a drive-through customer appeared to be intoxicated and, after placing an order for food, drove over to, and stopped at, the gas station adjoining the restaurant, before walking back and getting his food. Navarro provided dispatch with descriptions of both the driver and the vehicle he observed. Based on the information provided to dispatch by Navarro, a police officer stopped, and subsequently arrested, Varese at the gas station as Varese was walking towards a parked vehicle that matched the description provided by Navarro.

Between Varese's arrest and trial, police never sought to ask Navarro to identify Varese as the driver whom he observed in the drive-through, for example through use of a photo array or an in-person line up.

Prior to trial, Varese filed a motion in limine to prevent Navarro's in-court identification of Varese. Varese argued that allowing the State to ask Navarro during trial whether the driver

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

was in the courtroom while Varese was sitting at the defense table, when Navarro had not been asked by police to identify the driver before trial, would violate his constitutional rights under *State v. Dubose*, 2005 WI 126, ¶33, 285 Wis. 2d 143, 699 N.W.2d 582 (holding that evidence obtained from a police show-up procedure is inadmissible unless the show-up was necessary under the totality of the circumstances).² The circuit court denied Varese's motion.

At trial, both the State and Varese agreed that the only factual issue that the jury needed to resolve was whether Varese was the driver reported by Navarro.

Navarro testified at trial as follows. On October 21, 2015, he was working as a manager of an Arby's restaurant attached to an adjoining gas station in Madison. One of his employees working at the Arby's drive-through window could not understand a customer. Navarro took over for the employee and instructed the driver to pull up to the window to complete the order, and the driver complied. Navarro opened the window and asked the driver what he was trying to order. The driver's "words weren't really coming out ... so ... we kind of compromised on a sandwich." Navarro took the driver's money. When Navarro turned around to give the change to the driver, the driver was "slumped over the steering wheel." Navarro tried to get the driver's attention, and the driver woke up, took the change, "looked at it weirdly in his hand," and "tossed it towards the passenger side." At that point, Navarro called 911.

Navarro told dispatch that he was concerned about a person "acting really really weird" in the drive-through, and that the person was driving a blue van and was a white male, twenty-five years old, wearing a gray Wisconsin sweatshirt, with brownish hair in a ponytail, and a scruffy beard and mustache.

² "A 'showup' is an out-of court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes." *State v. Dubose*, 2005 WI 126, ¶1 n.1, 285 Wis. 2d 143, 699 N.W.2d 582 (quoted source omitted).

While Navarro was talking to dispatch, the driver “pulled out really fast” into the adjoining gas station area without taking the food he ordered, and Navarro gave dispatch the van’s license plate number. The driver then walked back to the Arby’s restaurant from the gas station area and Navarro “recognized him and ... gave him his food.” When law enforcement arrived at the gas station in response to the 911 call, Navarro did not “go[] out and tak[e] a look at” Varese but told law enforcement when they came into the Arby’s to question him that the driver of the van “was the one that came in, that I saw him get out of the van And I told them that was the guy that just walked off with his food.”

In total, Navarro observed the driver through the “opened” “drive-through window” and “in broad daylight” for about three to five minutes.

When asked on direct examination whether he saw the driver of the van in the courtroom, Navarro identified Varese. “He’s seated right there with a black shirt next to that lady.”

On cross-examination, Varese questioned Navarro’s identification on the ground that Navarro was relying on his expectation that Varese would be seated at the defense table.

[Defense Counsel]: And you believe that the person you saw that day was the same person that the police had arrested; is that correct?

[Navarro]: Yes.

[Defense Counsel]: And that he would be then seated at counsel table; correct?

[Navarro]: Yes.

[Defense Counsel]: And that’s part of how you knew where he was in the courtroom; is that correct?

[Navarro]: Yep.

On redirect examination, the prosecutor asked Navarro, “[a]re you only recognizing [Varese] because of [the expectation that he would be in court], or do you truly recognize him as the

person who was the driver that day?” Navarro answered, “I recognize him from the driver that day.”

Madison Police Officer Richard Friday testified in pertinent part as follows. He arrived at Arby's in response to Navarro's 911 call to dispatch. He saw a blue van at a gas pump at the gas station adjoining the Arby's matching the description given by dispatch, including color and license plate number. He had been informed by dispatch that the van's driver had gone inside the building, and he positioned himself to see anyone approaching the van from that direction. Officer Friday saw a white male, approximately twenty-five years old, wearing a gray Wisconsin sweatshirt with a beard and ponytail, walking toward the gas pump and holding an Arby's bag. Officer Friday arrested this man, whom he identified as Varese. Officer Friday did not see Varese drive the van on the day of the arrest. Officer Friday then took Varese to the hospital for a blood draw. The blood draw revealed that Varese's blood alcohol level was 0.17, which was above the legal limit.

Varese testified that it was his brother, Valentino, who was driving on October 21, 2015, and that he was riding in the passenger seat when he and Valentino went to the Arby's drive-through. Varese acknowledged that he was the person who interacted with and was arrested by Officer Friday, but that he did not inform Friday that Valentino had been the driver because Valentino was on “jail release” and might “get into trouble.”

On appeal, Varese challenges the circuit court's decision to admit Navarro's testimony identifying Varese as the apparently intoxicated person who drove through the drive-through lane, as violating Varese's right to due process. However, Varese does not develop an argument on appeal similar to the argument that he made to the circuit court in support of his motion in limine.

Before the circuit court, Varese broadly asserted that admission of Navarro's testimony identifying him during trial “would violate the rights guaranteed [him] under the 4th, 5th, 6th,

and 14th Amendments to the United States Constitution; article I, sections 1, 2, 7, 8, 9, and 11 of the Wisconsin Constitution; and *State v. Dubose*” However, in support of that broad assertion, Varese made only the specific narrow argument that the circuit court should interpret the holding in *Dubose*, 285 Wis. 2d 143, ¶33, to stand for the proposition that the potential in-court identification by Navarro was not necessary, and therefore not admissible, because Navarro had not been asked by police before trial to make an out-of-court identification and because the prosecution could still ask police to do this in advance of trial. Reasonably, the State responded to the motion in limine by citing to *Dubose* only, and explaining why *Dubose* is by its explicit language limited to the out-of-court show-up context. There was no reply from Varese. This is the only argument that Varese made to the circuit court at any point regarding the in-court identification.³

Varese makes a different argument on appeal. Without relying on *Dubose* at all, Varese in his initial appellant’s brief urges us to “adopt” a new blanket rule that in-court identifications, “where the defendant is sitting at defense counsel table [and] is obviously the person on trial,” are so inherently suggestive that under the Wisconsin due process clause they should be inadmissible “unless the State shows necessity.”⁴ However, Varese supports this proposition only with citation to one out-of-state case and several articles, none of which address Wisconsin case law. We decline to consider Varese’s new argument on appeal for two reasons. First, it is

³ In his motion in limine, Varese supported his argument by stating the general holding of *Dubose* (which did not include any reference to the concepts he now raises in this appeal), and adding “[s]ee also” citations to two opinions of the Supreme Judicial Court of Massachusetts, without including parentheticals. The circuit court could reasonably have ignored references to non-Wisconsin state authority that was not even briefly explained, or reasonably assumed that they simply repeated the holding of *Dubose*.

⁴ In his initial appellant’s brief, Varese refers inconsistently to “first-time, in-court identifications” and “in-court identifications.” While in his reply brief he focuses on “first-time, in-court identifications,” it is not clear that the rule he proposes is so limited. Whether Varese means for his proposed rule to encompass only first-time in-court identifications or all in-court identifications makes no difference for the purposes of our summary disposition.

unsupported by relevant legal authority. See *Industrial Risk Insurers v. American Eng’g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (“Arguments unsupported by legal authority will not be considered, and we will not abandon our neutrality to develop arguments.” (citations omitted)).⁵ Second, “[a]rguments raised for the first time on appeal are generally deemed forfeited,” *State Farm Mut. Auto. Ins. Co. v. Hunt*, 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633 (quoted source omitted), and Varese fails to give us reason to depart from this general rule here. See also *Townsend v. Massey*, 2011 WI App 160, ¶25, 338 Wis. 2d 114, 808 N.W.2d 155 (“[T]he forfeiture rule focuses on whether particular arguments have been preserved, not on whether general issues were raised before the circuit court.”).

Varese also argues on appeal that the circuit court should have excluded Navarro’s in-court identification under WIS. STAT. § 904.03, or should have given a jury instruction “tailored to counteract the in-court identification.” However, Varese did not articulate, in his motion in limine or otherwise before the circuit court, a challenge to Navarro’s in-court identification under WIS. STAT. § 904.03, nor did he ask the circuit court for a tailored jury instruction to counteract the in-court identification. As stated above, “[a]rguments raised for the first time on appeal are generally deemed forfeited,” and Varese again fails to present us with a good reason here to depart from the general rule. See *State Farm*, 358 Wis. 2d 379, ¶32 (quoted source omitted).

Upon the foregoing reasons,

⁵ Varese attempts in his reply brief to explain how *Dubose* “shed[s] light on” the new rule he proposes, but “[i]t is a well-established rule that we do not consider arguments raised for the first time in a reply brief.” *Bilda v. County of Milwaukee*, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661.

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals