No. 23-6567

IN THE

SUPREME COURT OF THE UNITED STATES

JONATHAN DAVID WILKE- PETITIONER

vs.

STATE OF WISCONSIN- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

WISCONSIN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Jonathan David Wilke #460976

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QUESTIONS PRESENTED

1. The Wisconsin Court of Appeals held that Jonathan forfeited his argument about Detective Dolan's and T.J.'s testimony about T.J.'s reaction to Jonathan's photo during a photo array. Was the Wisconsin Court of Appeals decision an erroneous application of law?

2. The Wisconsin Court of Appeals held that Jonathan's constitutional right to have his attorney present at a live lineup was violated. But this violation was harmless error. Was this violation harmless error?

3. Should social science be considered during the harmless error analysis in witness identification cases?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

State v. Wilke, Wisconsin Court of Appeals, Case No. 2020AP1995-CR. Judgment entered July 11, 2023.

State v. Wilke, Milwaukee County Circuit Court, Case No. 2017CF3559. Judgment entered October 7, 2020.

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STATUTES

IN THE

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

The opinion of the Wisconsin Court of Appeals court appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was October 30, 2023. A copy of that decision appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Rules of Criminal Procedure 51(b).Preserving a Claim of Error. A party may preserve a claim of error by informing the court--when the court ruling or order is made or sought--of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

STATEMENT OF THE CASE

On April 28, 2017, at approximately 11:30 p.m., victims T.J., D.J., J.J. and A.B. was sitting in a white oldsmobile minivan in an alley at the address of 1922 West Rodgers Street in the city of Milwaukee, Wisconsin (R. 127: 24-25). T.J. was in the front passenger seat of the minivan, D.J. was in the second row of seats behind T.J. J.J. and A.B. was in the last back row of seats (R. 127: 25).

A male starts walking in the alley towards the victims' vehicle (R. 127:27). The male suspect then stops in front of the victims' vehicle and starts looking into the vehicle (R. 127: 27-28). While looking in the vehicle, the suspect pulls a pair of glasses out of his pocket and puts them on his face (R. 127: 28). The suspect then starts going into his pocket and starts pulling out a black handgun (R. 127: 28). T.J. then reaches to the driver side of the vehicle and starts honking the horn (R. 127: 28).

At this time, the suspect shoots T.J. 1 time in the stomach through the front windshield (R. 127: 29). The suspect then walks to the passenger side of the vehicle and shoots 3 more times through the passenger window, striking T.J. (R. 127: 29-30). The suspect then walked to the back of the vehicle and shot another time through the back windshield (R. 127: 30). The suspect then ran across Rodgers street fleeing the scene (R. 127: 63). The suspect did not say 1 word during this entire incident (R. 127: 33).

T.J. was interviewed after she underwent surgery at Froedert Hospital (R. 128: 62). At this time, T.J. described the suspect as a hispanic male, 5' 6"-5' 7" in height, between 140-150 lbs, in his late 20's, wearing square-rimmed glasses, wearing a black jogging suit, wearing beige gloves with blue on the back and the suspect had a silver handgun. This interview occurred on April 29, 2017 at 10:00 a.m. (R. 128: 62-63).

On April 28, 2017, J.J. was interviewed (R. 129: 19). During this interview, J.J. stated a hispanic male with a gray and black hooded sweatshirt and a hood pulled down over his face, wearing black sweatpants and plain black glasses with facial hair on his

chin, used a silver handgun (R. 129: 19-20). J.J. further commented that he is not sure if he could identify the person, as he did not see anything above the subjects nose (R. 129: 30).

On April 29, 2017, D.J. was interviewed (R. 129: 22). During this interview, D.J. described the subject as a hispanic male in his early 30's, approximately 5' 6" with a skinny build, approximately 130 lbs, thinning hair, wearing a brown hoodie with the hoodie halfway up and black jeans. The guy looked like a dope fiend, a term commonly associated with drug addicts (R. 129: 23). He further stated that the guy pulled some glasses from his hoodie, then put the glasses on and the guy pulled a gun from either his waistline or his pocket and started shooting at them (R. 129: 22).

On July 31, 2017, the victims T.J., D.J. and J.J. was shown a photo array (R. 128: 10). D.J. identified Jonathan as the person who shot his mother (R. 128: 17-18). J.J. did not identify anybody in the photo array (R. 128: 20). T.J. did not identify anybody in the photo array (R. 127: 34-35). On August 9, 2017, there was a live lineup conducted (R. 121: 14-16). J.J. and T.J. participated in this live lineup (R. 128: 25). At this time, J.J. identified Jonathan as the person who shot his mother (R. 128: 29-30). T.J. does not make an identification (R. 128: 45).

On August 5, 2017, Jonathan was charged and had an initial appearance for the shooting described above (R. 1-3). Then on August 9, 2017, detectives conducted a live lineup and failed to have Jonathan's attorney present for this procedure (R. 121: 3). The live lineup was audio and video recorded (R. 16). However, an incident occurred between a Detective Dolan and the victim T.J. at the live lineup, which was not recorded at the live lineup (R. 11: 1). This incident was Detective Dolan asking T.J. why she did not make an identification at the live lineup and made a comment that "no one would get in trouble or go to jail for a 'misidentification'" (R. 11: 1).

On January 14, 2018, Jonathan by his attorney filed a Motion to Suppress Out-of-Court-Identifications (R. 10-11). On August 10, 2018, the trial court held a Motion Hearing on the

motion and denied the motion (R. 121: 1-43). The trial courts' reason for denying the motion was because the live lineup was audio and video recorded (R. 121: 4-16).

On March 9, 2020, Jonathan commenced trial (R. 125-130). Prior to Voir Dire, the State stated on the record that it intended to elicit testimony from T.J. and Detective Dolan that T.J. hesitated on Jonathan's photo during the photo array that she participated in on July 31, 2017 (R. 125: 7). Jonathan objected to the State eliciting the above testimony from T.J. and Detective Dolan, arguing that it's an issue of confrontation and on speculation grounds (R. 125: 10). The trial court overruled Jonathan's objection stating that he doesn't know how he can stop the State from eliciting that testimony (R. 125: 11).

At trial on March 10, 2020, the State elicited testimony from T.J. about her reaction to Jonathan's photo during the photo array (R. 127: 35-36). T.J. stated that she got a spinning, hurt feeling in her stomach and like a sick feeling when seeing one particular photo in the photo array (R. 127: 35). Then at trial on March 11, 2020, the State elicited testimony from Detective Dolan about T.J.'s hesitation on Jonathan's photo during the photo array (R. 128: 21-22). Detective Dolan stated T.J. "looked long and hard at folder number 4 which contained Jonathan's photo" (R. 128: 21-22). And then at trial on March 12, 2020, during the State's rebuttal closing arguments, the State stated: "D.J. was emphatic; T.J. had a sick feeling when she saw his photograph; J.J. said the glasses. All identifications. All credible, positive identifications in Mr. Wilke in doing this" (R. 130: 65).

Jonathan timely appealed his case with the Wisconsin Court of Appeals, arguing via briefs, that it was erroneous for the trial court to admit J.J.'s identification of him at the live lineup and the error was not harmless. Jonathan also argued that it was erroneous for the trial court to admit testimony from T.J. and Detective Dolan about T.J.'s reaction to Jonathan's photo during the photo array, arguing that it is speculative testimony, insinuating that T.J. identified Jonathan during the photo array; when in fact, she did not.

The Wisconsin Court of Appeals held that it was harmless error for the trial court

admitting J.J.'s identification of Jonathan because of D.J.'s identification of Jonathan during the photo array, T.J.'s reaction to Jonathan's photo during the photo array and a detective Saavedra testified that Jonathan became a suspect in this case after an analyst at the State Crime Lab determined that the bullets that were fired at the minivan were fired from the same gun as a bullet found at another crime scene, one at which Jonathan admitted being present. The Wisconsin Court of Appeals also held that Jonathan forfeited his argument about T.J.'s reaction to his photo during the photo array because Jonathan's attorney started her objection stating that there wasn't a legal basis for her objection (Appendix: A).

Jonathan then timely petitioned for review with the Wisconsin Supreme Court arguing that he did not forfeit his argument about T.J.'s reaction to his photo during the photo array, that it was not harmless error when the trial court admitted J.J.'s identification of him at the live lineup and that social science should be a part of the harmless error test in witness identification cases. The Wisconsin Supreme Court denied discretionary review on October 30, 2023 (Appendix: B).

REASONS FOR GRANTING THE PETITION

1. The Wisconsin Court of Appeals erroneously held that Jonathan forfeited an Argument in Conflict with Federal Law and U.S. Supreme Court Precedent.

In paragraph 7 of the Court of Appeals' decision (Appendix: A), the Court held that Jonathan forfeited his right to raise his argument about the trial court allowing testimony at trial about T.J.'s reaction as she was viewing the photo array because Jonathan's counsel conceded there was no legal basis.

The above decision was both a factual and legal error because Jonathan's counsel unequivocally made an objection to the above argument on confrontation and speculation grounds (Appendix "A." C: 10). The trial court also unequivocally considered and made a decision on the argument (A. C: 11).

Jonathan's counsel did first state that she did not have a legal basis to argue against T.J.,

if asked the appropriate question with foundation; it's a credibility issue as to why she may or may not have reacted in some way. (A. C: 9). She also stated that the detective can testify as to what he believes he saw (A. C: 10).

[B]ut Jonathan's counsel [continued] the argument making a "standing objection" to testimony from T.J. and the Detective about her viewing of the photo during the photo array; specifically, that she paused when she saw Wilke's photo and had a reaction that was visible to the detective who was administering the photo array (A. C: 10). Counsel objected specifically stating "you know, for purposes of the record, I would argue that it may be an issue of confrontation. I would object on those grounds, but I'm also objecting, just frankly, on speculation grounds." (A. C: 10).

The trial court stated that the detective could testify that he saw T.J. pause while looking at a specific folder and that the folder had a picture of Wilke: "I don't know how I would stop him from doing that." (A. C: 11).

Federal Rules of Criminal Procedure 51(b) only requires an objection to an order or ruling. Also, forfeiture is the failure to make a timely assertion of a right. United States v. Olano, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L. Ed. 2d 508 (1993)(quotation marks and citations omitted). Therefore, the Court of Appeals erroneously held Jonathan forfeited the above argument.

2. Admission of J.J.'s Identification was not Harmless Error.

First, as argued in the Wisconsin Court of Appeals via briefs, T.J.'s reaction to Jonathan's photo during the photo array was erroneously admitted speculative testimony that insinuates that T.J. identified Jonathan as the shooter; when, in fact, she did not identify Jonathan. Therefore, T.J.'s reaction to Jonathan's photo during the photo array, shouldn't be used as part of the harmless error analysis (in the State's perspective).

The State and the Court of Appeals also gave D.J.'s identification of Jonathan too much credit during the harmless error analysis (Appendix A pars. 4-5). D.J. did not

identify Jonathan as the shooter until 3 months after the incident (R. 127: 24-30; 128: 17-18). Jonathan is also a different race than D.J. D.J is a Black male and Jonathan is a Native American male (R. 129: 18). The passage of time effects an eyewitnesses memory and identification by members of other races are especially problematic. State of Wisconsin v. Roberson, 389 Wis. 2d 190 at *234 (2019)(Rebecca Frank Dallet. J, Dissenting(citations omitted).

Our Courts have recognized that extensive research has shown that eyewitness misidentification is the leading cause of wrongful convictions in the United States and that eyewitness identification is almost hopelessly unreliable. *Roberson, id.* A great example of how hopelessly unreliable eyewitness identification is, is the case of Ex Parte Grant, 622 S.W.3d 392 (Court of Criminal Appeals of Texas 2021). In Ex Parte Grant, a man in Texas was convicted of homicide at jury trial because six eyewitnesses identified him as the person they witnessed commit the homicide. But later on, DNA evidence along with another mans' confession to committing the homicide proved that [all] six eyewitnesses [were wrong]. As argued below, social science should be a part of the harmless error analysis in eyewitness identification cases.

Furthermore, the test for "harmless error" is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. U.S. v. Williams, 493 F.3d 763 (7th Cir. 2007); Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L. Ed. 2d 705 (1967). Jonathan argues that the Court of Appeals erroneously held that the admission of J.J.'s identification of Jonathan in the live lineup was harmless error because J.J.'s identification of him obviously contributed to the verdict obtained. *Chapman, id.* With D.J.'s identification of Jonathan, T.J.'s reaction to Jonathan's photo during the photo array presented to the jury, J.J.'s identification of Jonathan in the live lineup, along with the prosecutors' statement during rebuttal closing arguments of "D.J. was emphatic; T.J. had a sick feeling when she saw his photograph; J.J. said the glasses. All

identifications. All credible, positive identifications in Mr. Wilke in doing this." (R. 130: 65), it is obvious that J.J.'s identification contributed to the verdict obtained. *Id.* As cited above, with D.J.'s, T.J.'s and J.J.'s testimony and the prosecutors' statement, the very last thing the jury heard before they started their deliberations, was that ALL the victims who testified, identified Jonathan as the perpetrator. With all of that combined together, this obviously left the jury with no doubt as to Jonathan's guilt.

If J.J.'s identification of Jonathan at the live lineup was correctly suppressed from evidence and T.J.'s and Detective Dolan's speculative testimony about T.J.'s reaction to Jonathan's photo during the photo array was correctly restricted as inadmissible at trial, Jonathan could have argued to the jury that only 1 out of all the victims who testified, identified Jonathan. The State also in turn, could not argue; as it did, as argued above, that ALL of the victims who testified, identified Jonathan (R. 130: 65). This most definitely would have an effect on the jury during their deliberations. Thus, J.J.'s identification of Jonathan in the live lineup; did, in fact, contribute to the verdict obtained. *Williams, id.* Therefore, the trial courts' erroneous admission of J.J.'s identification of Jonathan in the live lineup was not harmless error.

3. Social Science Should be a Part of the Harmless Error Analysis in Witness Identification Cases and State Supreme Courts Across the Country are Starting to Adopt Social Science in Witness Identification Cases.

When a defendants' constitutional rights has been violated in witness identification cases, Jonathan argues that social science should be a part of the harmless error analysis. Under the current harmless error analysis, courts give witnesses' identification too much credit as Jonathan argues that the Wisconsin Court of Appeals gave D.J.'s identification of him too much credit as well as T.J.'s reaction to Jonathan's photo during the photo array (which Jonathan argues was erroneously admitted into his trial). With the extensive research on eyewitness identification, Jonathan thinks that today's society is ready to recognize that

eyewitness identification cases are very problematic and delicate cases.

State Supreme Courts across the country are recognizing the problems that plague eyewitness identification cases and that defendants should enjoy more rights in such cases. The Connecticut Supreme Court recognized that "Courts across the country now accept that (1) there is at best a weak correlation between a witness' confidence in his or her identification and its accuracy (2) the reliability of an identification can be diminished by a witness' focus on a weapon (3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events (4) cross-racial identifications are considerably less accurate than same race identifications (5) a person's memory diminishes rapidly over a period of hours rather than days or weeks (6) identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure (7) witnesses are prone to develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another. This list is not exhaustive. See: State v. Guilbert, 306 Conn. 218, 49 A.3d 705 (2012)(citations omitted).

The Connecticut Supreme Court adopted a reliability standard in witness identification cases. See: State v. Harris, 330 Conn. 91, 191 A.3d 119 (2018). The New Jersey Supreme Court did the same. See: State v. Henderson, 208 N.J. 208, 27 A.3d 872 (2011).

The Supreme Judicial Court of Massachusetts used social science on eyewitness identification to adopt a new model jury instruction for eyewitness identification cases. Commonwealth v. Gomes, 407 Mass. 352, 22 N.E.3d 897 (2015). The Supreme Court of Hawai'i used social science on eyewitness identification to adopt a new specific jury instruction on eyewitness identification evidence. State v. Cabagbag, 127 Hawai'i 302, 277 P.3d 1027 (2012). The New York Court of Appeals held that where a witness's

identification of a defendant is at issue, and the identifying witness and defendant appear to be of different races, a trial court is to give, upon request, a jury charge on the cross-racial effect. People v. Boone, 30 N.Y.3d 251, 91 N.E.3d 1194, 69 N.Y.S.3d 215 (2017).

The Supreme Court of Washington recently held when the due process clause of the Fourteenth Amendment compels exclusion of eyewitness identification evidence that (1) was obtained by an unnecessarily suggestive police procedure and (2) lacks reliability under the totality of circumstances, trial courts must apply relevant, widely accepted modern science on eyewitness identification at each step of the test. State v. Derri, 199 Wash.2d 658, 511 P.3d 1267 (2022). The Wisconsin Supreme Court also disagrees with itself on whether or not, defendants should enjoy more rights in eyewitness identification cases. State v. Roberson, 389 Wis. 2d 190 (2019)(Rebecca Frank Dallet, J. dissenting).

The Supreme Court of the United States also considered social science to overturn notable decisions including: criminalization of consensual same sex intimate conduct in Lawrence v. Texas, 539 U.S. 556, 123 S.Ct. 2472, 156 L. Ed. 2d 508 (2003); imposition of the death penalty on the mentally ill and juveniles in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L. Ed. 2d 335 (2002); Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L. Ed. 2d 1 (2005); imposition of mandatory life without parole sentences on juveniles in Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455 (2012); and the seminal case of Brown v. Board of Educ., 347 U.S. 483, 74 S.Ct. 686, 98 L. Ed. 2d 873 (1954).

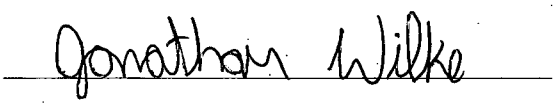
Jonathan isn't arguing that social science should be used to interpret our Constitution, Jonathan argues that social science should be used in the harmless error analysis in witness identification cases. Jonathan argues that the issue of using social science in the harmless error analysis in witness identification cases is now ripe for examination in this Court. Therefore, Jonathan respectfully requests this Court to GRANT this petition to answer this question.

CONCLUSION

WHEREFORE, for the reasons stated above, the petition for a writ of certiorari should be GRANTED.

Dated this 30th day of November 2023

Respectfully Submitted,



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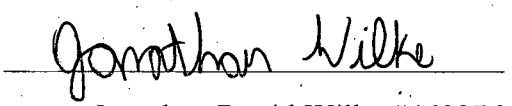
CERTIFICATION OF WORDS

I hereby certify that this PETITION contains 4495 words produced with proportional serif font.

Respectfully Submitted,



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