

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 15, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2009AP1575-CR

Cir. Ct. No. 2007CF979

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY B. FLOWERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
JAMES L. MARTIN, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Gregory Flowers appeals a judgment convicting him of fifth-offense operating while intoxicated and operating after revocation. He contends that the circuit court committed reversible error by denying his motion to suppress an unlawful showup identification. We conclude that, even if

admitting the identification evidence was error, it was harmless error. We therefore affirm.

¶2 At five o'clock in the morning, two on-duty emergency medical technicians (EMTs) saw a car leave the travelled portion of a highway and stop in a ditch. They stopped to assist and observed only one occupant of the vehicle, who refused an offer of help and instead walked away from the scene. A police officer soon arrived and the EMTs gave him a description of the man who left the scene. The officer broadcast that description and a few minutes later another officer stopped Flowers in a nearby parking lot. The EMTs went to the scene of the stop and identified Flowers as the person they observed get out of the ditched vehicle. He was arrested and subsequently charged in this proceeding.

¶3 Before trial, Flowers moved to suppress any evidence of the EMTs' identification of him as the person they saw in the vehicle, as the product of an unlawful showup identification. *See State v. Dubose*, 2005 WI 126, ¶33, 285 Wis. 2d 143, 699 N.W.2d 582 (evidence obtained from an out-of-court showup is inadmissible if, among other reasons, police had probable cause to arrest suspect anyway). The circuit court denied the motion and the State introduced the EMT identifications at trial. On appeal Flowers contends that the court prejudicially erred when it permitted the State to use the on-scene identifications when the detaining officer already had probable cause to arrest him.

¶4 The State concedes that the EMT identifications were inadmissible under *Dubose*. However, we conclude that admitting the identifications into evidence was harmless because Flowers agreed at trial that he was the person the EMT's saw in the ditched vehicle. According to the account of the incident Flowers gave the jury, he was a passenger in the car, which his nephew was

driving, and by the time the EMTs arrived he was the only person in the vehicle because his nephew had already left the scene. In closing argument counsel for Flowers acknowledged that he was “obviously” in the car when it went into the ditch, and that the EMTs “certainly” saw him getting out of the car. The only issue that remained in dispute was whether he was the passenger or driver of the vehicle, and the show-up identifications had no bearing on that issue.

¶5 The test for harmless error is whether the beneficiary of the error proves beyond a reasonable doubt that it did not contribute to the verdict. *State v. Harris*, 2008 WI 15, ¶42, 307 Wis. 2d 555, 745 N.W.2d 397. An alternative statement of the test is whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *Id.*, ¶43. The State’s use of identifications to prove that Flowers was in the ditched vehicle, when in fact he admitted he was in it, was harmless under either version of the test.

By the Court.—Judgment affirmed.

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

