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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2021-000607

THE STATE, ... RESPONDENT

v.

WHYZDOM A. L. DOUSE,.....APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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[1] *Neil v. Biggers*, 409 U.S. 188 (1972) (affirming the test to determine whether an out-of-court identification of a defendant was admissible was a totality of the circumstances, analyzed by trial courts in two prongs, the latter prong having five factors.)

TABLE OF AUTHORITIES

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

Whether the court erred, in violation of *Neil v. Biggers*, 409 U.S. 188 (1972), by allowing the identification of appellant as a perpetrator in the shooting by Keyshawn Davis where the police presented Davis with a single photograph of appellant, and asked him if the photograph was of appellant, where the police knew Davis could not independently identify the perpetrators as an eyewitness, and Davis admitted he did not "identify" appellant until he talked to other people about the crime, went on Facebook to investigate, and talked to appellant's girlfriend about whether she had let appellant borrow her car on the night of the shooting, particularly where the court also improperly considered the fact appellant admitted he was the driver of the suspect vehicle on the night of the shooting while ruling the identification was admissible pursuant to *Biggers*?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly admitted Keyshawn Davis's out-of-court identification of Appellant as it was merely confirmatory and did not violate the Due Process Clause or *Neil v. Biggers* because Davis had prior, personal knowledge of Appellant and conducted his own independent investigation to confirm that Appellant and Harold Bates were indeed the two he saw at the scene ever before law enforcement produced the photo?

2. Whether the identification was nevertheless so reliable by a totality of the circumstances even if it was unduly suggestive that there was no substantial likelihood of irreparable misidentification because Davis saw Appellant at close range, was paying attention, described Appellant accurately, was 100% sure Appellant was the driver of the vehicle, and independently gave law enforcement Appellant's name mere hours after the shooting?

STATEMENT OF THE CASE

Appellant was indicted at the November 2019 term of the grand jury for Aiken County for murder. (2019-GS-02-00200).[2] The case was prosecuted by Assistant Solicitors Jacqui Charbonneau, Esq., and Jack Hammack, Esq., and Appellant was represented by Brianne Steiner, Esq., and Nick McCarley, Esq. Tr. 1. On May 24, 2021, Appellant proceeded to trial by jury before the Honorable Clifton Newman pursuant to which Appellant was found guilty as charged. Tr. 1, 364-368. He was sentenced to thirty-three years' imprisonment by Judge Newman on May 27, 2021. Tr. 394. Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a brief in support of his Appeal. This Brief of Respondent follows.

[2] Appellant was also indicted for Domestic Violence Second Degree (2019-GS-02-01999), but the State chose not to pursue or mention it at trial as it was unrelated to the murder charge. Tr. 5, 29. The indictment was eventually *nolle prossed*. (Public Index).

STATEMENT OF FACTS

The Shooting

August 1, 2019

Twenty-year-old Keyshawn Davis got off work at Subway on the afternoon of Thursday, August 1, 2019, and picked up his friend Raven Turner so they could go see people. He drove his silver Hyundai Elantra. Meanwhile, nineteen-year-old Whyzdom Douse ("Appellant") was getting ready to drop off his girlfriend Sonjai Simpkins at Aiken Regional Medical Center for her 7 P to 7 A shift. He drove her 2013 red Hyundai Elantra. She was unaware of anything that would happen next. Whyzdom drove off and began to hunt for Roderick McMillian, with whom he had a beef. ("victim"). He searched a Lucky 7 gas station, the Cushman Apartments, Paces Run, the Village, and Advanced Auto Parts before he returned to the Paces to take a break. He eventually left to pick up Harold Bates in New Ellenton to continue his hunt, knowing that Harold had a gun he could use. Tr. 132-135, Tr. 159-172, Tr. 269, Tr. 272-274, Tr. 278-279.

While Whyzdom was searching, Keyshawn and Raven picked up Roderick and Richard Carroll at the Cushman Apartments and drove to Richard's aunt's place around 11:30 p.m. Raven drove, Roderick sat directly behind her on the left, Richard was next to her in the backseat, and Keyshawn sat in the front passenger seat. Whyzdom, growing warmer, paused with Harold in a CVS parking lot to roll weed and smoke it (and pop pills). As fate would have it, the two vehicles would finally meet at a red light near downtown Aiken while the foursome were on their way back. Whyzdom pulled up behind their silver Hyundai, and Harold told him, "watch out, that's Blue and them in there." Tr. 27, Tr. 41-42, Tr. 135-139, Tr. 202, Tr. 277-279.

August 2, 2019

Raven pulled up to the intersection of Waterloo Street and Richland Avenue on her way to take everyone home around 1:00 in the morning. The juncture was well-lit by the adjacent

buildings, a couple of streetlights, and the glow of decorative exterior lighting. The light was red, and Waterloo, one-lane, awkwardly lacked a second lane from which to turn right. That's why the red Elantra that went on the grass and squeezed up next to them was so out of place. Whyzdom (driving that red car) and Harold (in the passenger side) glared at them for a whole ten seconds through an untinted window before suddenly firing off 6-7 shots at the back seat of the silver car. No words were ever exchanged. Tr. 42-48, Tr. 53, Tr. 140-142, Tr. 152-153, Tr. 162, Tr. 217-221; State's Exhibits 1 (map of the scene), 6, and 25 to 29 (photos of the scene).

The back two windows of the silver car shattered, and Roderick (in the back left seat), was hit by two bullets. Raven pulled up and turned left onto Richland to take Roderick to Aiken Regional. Law enforcement would later measure the trajectory of the bullets with rods to prove the men were firing at only Roderick and not Richard who was seated in the back seat closest to the gun barrels.[3]Whyzdom turned right on Richland and sped off. He soon pulled up next to an officer who asked him how he was, and he said nothing other than, "I'm fine." He then drove forty minutes back to New Ellenton and to drop off Harold, only to drive forty more minutes back to downtown Aiken to pick his girlfriend up from the hospital at 7 a.m. Tr. 141-142, Tr. 146-149, Tr. 232-237, Tr. 281-284, State's Exhibits 32 to 43 (bullet trajectory photographs).

The Investigation

Sergeant Travis Rice of the Aiken Department of Public Safety was dispatched to the scene of the shooting at 1:15 a.m. and finds one 9 mm shell casing and broken glass on the ground. He soon met with Detective Jonathan Eagerton who was the on-call investigator that

- [3] Other evidence found in Keyshawn Davis' vehicle included bullet holes through the backseat in various locations, a bullet jacket in the plastic of the door, broken glass, blood, etc. Tr. 222, Tr. 232-237; State's Exhibits 32 to 43 (photographs of Davis' vehicle.) Law enforcement also took fingerprints and DNA but tests were inconclusive.

night and a BOLO was put out for the red vehicle. Detective Eagerton then met with Keyshawn at 2:30 a.m. at the hospital and learned that Keyshawn knew the two men in the car but wanted to confirm who they were before he named them. "I have seen them somewhere before. I think I might – I want to say I know them." Keyshawn identified them as two black males around his age, 18 to 20. Eagerton took photos of Keyshawn's vehicle at the hospital. Tr. 34-35, Tr. 111-119, Tr. 148-149, Tr. 153-157, Tr. 213-214; Tr. 220; State's Exhibit 4 (body camera video), State's Exhibit 5 (photos of Keyshawn's vehicle.)

The two parted ways. An hour later, Detective Griffin interviewed Keyshawn again at the police department where Keyshawn gave consent to search his vehicle. After that, Keyshawn talked to two of his friends, word of mouth to Sonjai (whom he knew), and looked on Facebook to confirm that the two men he saw in the vehicle were the two men he though he knew from high school: Whyzdom Douse and Harold Bates. A few hours later, Keyshawn told Detective Eagerton their names and said he knew Sonjai from high school, had her number in his phone, and knew Whyzdom had been driving Sonjai's red Elantra that night. Eagerton went and retrieved photos of Whyzdom and Harold and brought them to Keyshawn's house at 7 a.m.[4] on August 2, 2019, mere hours after the 1:00 a.m. shooting. Eagerton asked him, "is this Whyzdom?" and Keyshawn confirmed that it was. Tr. 35-38, 55-60, Tr. 149-155, Tr. 221, Tr. 225-226, Tr. 248.

Sonjai, who shares a child with Appellant, woke up to lots of messages on her phone later that morning and called the police to give a statement. She told them her boyfriend had her red Elantra while she was at work and had called her during her shift to tell her he had just gotten into with "Lil Blue," aka the victim. She gave law enforcement consent to search her car and

[4] Meanwhile, also at 7 a.m., the Appellant picked up Sonjai from the hospital and dropped her off at her cousin's house to get some sleep.

they found three 9-millimeter shell casings where the windshield wipers are on the hood of her car and another inside it. Tr. 222, Tr. 232-237. Officers found a fourth 9-millimeter shell casing inside her vehicle and SLED confirmed three of the cartridges were from different brands. However, the two bullet fragments recovered from the body of the victim had come from the same 9-mm firearm. Tr. 153, Tr. 223, Tr. 227, Tr. 230; Tr. 237-238; State's Exhibits 47 to 55 (photographs). Law enforcement also recovered the surveillance video footage from the nearby Chandler Law Firm State's Exhibit 3 which showed the two vehicles pulling up to the light and three distinct muzzle flashes. State's Exhibit 3 (disk of law firm surveillance video).

While this was all going on, Whyzdom went to and was late to work at McDonald's at 3:00 p.m. on the 2nd. He began to brag about the fact that he killed somebody, which was overheard by Nyasia Myers, who also knew him from high school, from five feet away. He kept saying, "I killed somebody." "It was over and over and over again." Tr. 179, Tr. 285

August 3, 2019

The Appellant was arrested and brought to the police station for an interrogation at 9:00 a.m. on August 3rd. It was the first time he had talked to them. Detectives Eagerton and Jason Griffin along with another officer sat attended a two-hour interview with Appellant. During the course of the interview, Appellant told five different versions of what had happened and admitted he had lied or was currently lying multiple times. He eventually admitted that he was the one who had been driving Sonjai's car, admitted to being on the corner of Waterloo and Richland, admitting to staring into Keyshawn's vehicle, and admitted to just about everything short of being the actual shooter. He picked Harold Bates out of a lineup and said he was the one who was the actual shooter. He admitted to smoking weed and taking pills that day, and said he had not called 911 after the shooting. Tr. 14-18, R. 229, 239-246, 248; Tr. 270-271; Tr. 277-280,

Tr. 289, Tr. 297; Tr. 300-302; State's Exhibit 56 (unredacted video recorded interview); State's Exhibit 57 (redacted video recorded interview); State's Exhibit 60 (Signed Miranda Form); State's Exhibit 61 (transcript of video interrogation.)

At 5:04 p.m. later that same day, he called his girlfriend Sonjai and tells her, "It was a stupid mistake and a great retaliation." The Appellant and his co-defendant Harold Bates were charged with murder. The victim bled out from the gunshot wound to his chest.[5] Whyzdom was found guilty of murder at his separate trial after the State advanced a hand of one hand of all theory. Whyzdom Douse received thirty-three years' imprisonment. Tr. 61, Tr. 168-172, Tr. 230-231, Tr. 308; Tr. 364-368, Tr. 394; State's Exhibit 16 (redacted jail call disk).

Neil v. Biggers Pre-Trial Hearing

The defense moved pre-trial to suppress the identification under *Neil v. Biggers*, arguing it was unnecessarily suggestive, unnecessary, and unreliable. Assistant Solicitors Jacqueline Charbonneau and Jack Hammack argued for the State, and Brianne Steiner and Nick McCarley argued for the Appellant. Tr. 31.

Detective Jonathan Eagerton

He testified he was an Investigator with the Aiken Department of Public Safety and had twenty-two years of law enforcement experience. He said he had first interviewed Keyshawn Davis about forty-five minutes after the shooting at Aiken Regional Medical Center. He said Keyshawn gave the description of the two as two black males around his age, 18 to 20. "I want to say that I knew them. I have seen them before." Eagerton said he was aware that the Appellant had already provided the names of Douse and Bates three or four hours before the interview

[5] Kelly Rose, pathologist. R. 198, 211.

where Eagerton showed Keyshawn the photos of Whyzdom and Harold Bates. Said Keyshawn told him he had looked up the two on Facebook and had confirmed it was them. Tr. 33-39.

Keyshawn Davis

Keyshawn testified that he did know the Appellant on a personal level but knew who he was from high school and social media. He testified about what he, Raven, and Richard had been doing earlier that evening and what happened when they got to that red light. He said the building beside them was lit and "I could see pretty good." "We are stopped at the intersection, they were staring down . . . ." He told the court that Whyzdom was staring thirty or thirty-five seconds, and that the cars were "pretty side by side." The intersection was a tight so "he was close enough so I could see him" and the window was not tinted. Six or seven shots rang out and he ducked, and the back windows shattered. Tr. 40-44, Tr. 48, Tr. 53

Keyshawn admitted he did not know who the two individuals in the front two seats were at the time of the shooting but told law enforcement the first time he spoke with them at the hospital that he thought he knew them but needed to get further clarification. He spoke to them about twenty to twenty-five minutes after the shooting and told them the suspects fled in a red Hyundai or Honda. He testified he immediately went and asked his friends about the red car and whether it was Sonjai's since he knew she had a similar car from knowing her from Midland Valley. He knew she had a child with the Appellant, so he got his friends to ask her if the Appellant had been driving the car that night. Then he went to Detective Eagerton and told him the names. It was only then that Detective Eagerton went and got the photos and showed them to him to confirm the names. Tr. 44-46, Tr. 48-49, Tr. 53.

He said he was 100% positive the Appellant was the one driving the car shooting at them and that Harold Bates was the passenger. He affirmed he could see their faces and could identify

them. He testified he knew who they were the entire time but did not know their names at the hospital so he wanted to do some research and be positive about it. R. 51-52.

The Court's Examination of Keyshawn Davis

After the solicitor and the defense had asked their questions, the court asked some of its own for a considerable amount of time in order to clarify and develop the testimony. Tr. 53-61.

The Solicitor's Argument: Tr. 31-32, 64-67

The solicitor cited *State v. Liverman* (2012) and argued the identification procedure was not unduly suggestive, but that Keyshawn's ID was merely confirmatory to what he had discovered during his own personal investigation. Alternatively, she admitted the identification was "basically a show-up photograph" which was normally looked upon with suspicion. However, when considering the totality of the circumstances, the identification should be admissible. She then analyzed the five factors from *Neil v. Biggers*: **(1)** The witness's opportunity to view the perpetrator at the time of the crime: Keyshawn testified he was feet from the Appellant, it was bright enough for him to see the Appellant's face, and he could identify the Appellant as the driver. **(2)** The witness's degree of attention: Keyshawn said "I saw them and they were staring down into our vehicle." He was paying attention to what they were doing. **(3)** The accuracy of his prior description of the perpetrator: Keyshawn initially told law enforcement there were two black males in the vehicle whom he recognized and that were about his age and that was true. **(4)** The level of certainty when he was shown the photos: Keyshawn was absolutely certain it was Whyzdom Douse and Harold Bates and signed them and put a date on them. **(5)** The length of time between the confrontation and the identification: mere hours. Tr. 31-32, Tr. 64-67.

"The big thing I'm looking at is, again, according to *Liverman*, it talks about the fact that an identification witness knows the accused remains the significant factor in determining reliability.

The suggested nature of the show-up is mitigated by the witness's prior knowledge of the accused." "And they go onto say that, basically, while the show-up identification is normally considered unduly suggestive, in a case like this, it's merely confirmatory." Tr. 66-67.

The Defense's Argument: Tr. 67-69

The defense argued the identification procedure was suggestive, unnecessary, and that there was a substantial likelihood of a misidentification. They cited *State v. Warner* (Ct. App. 2020) (pending cert at the time), and argued the ID was state action that was unnecessary because there was no need to do a confirmation as officers already had the full names of the suspects. She it was suggestive because Keyshawn was only shown a single photo of each man and asked if it was each man before showing the photo. The defense also analyzed the *Neil v. Biggers* factors. She argued Keyshawn only had mere seconds to view men in the other car and was not able to focus on them. She argued Davis ducked when the shooting started so he was not able to really focus on the faces of the men in the other vehicle. The accuracy of the initial description was only two males about his age and the level of certainty was very strong only because he had time to look on Facebook and ask around. The defense then admitted that Keyshawn was the one who figured out who the Appellant and Mr. Bates were; "it wasn't anything that law enforcement did. It was Mr. Davis going through his own investigation." Tr. 31-32, Tr. 64-69.

The Court's Ruling: R. 69-71

The trial court denied the motion to suppress the out-of-court identification. The court found that Mr. Davis had informed the police as to who was in the car that the shots came from and told them the two names of the suspects. It was only then that an officer produced photographs and asked, "Is this them?" Therefore, the court concluded it was not a typical out-of-court show-up like in *Liverman*. The court then discussed *Liverman* and held the case at hand was not like

Liverman. "The identification under these circumstances meets the test of reliability based on the defendant's independent ability to identify the defendant based on his prior knowledge of the defendant and other circumstances surrounding their encounter that night and his ability to identify them without any police intervention." Tr. 69-70.

Only then did the court say, "Aside from all of that, it's really a nonissue in that the defendant admits he was the driver of the car and admits the shooting occurred. The only issue is what his degree of his culpability [is], if the jury is to believe that he gave this voluntary statement, whether it means he's confessed or he's claiming innocence based on the circumstances." The court then stated that by a preponderance of the evidence the State has shown the identification by Keyshawn Davis did not violate the Due Process Clause of the Constitution nor the mandates of *Neil v. Biggers* and denied the motion to suppress. The court stated the key factor in his decision was Mr. Davis' prior, personal knowledge of the Appellant. Tr. 70-71.

STANDARD OF REVIEW

In criminal cases, the appellate court normally sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). However, "[w]hether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." *State v. Liverman*, 398 S.C. 130, 137-138, 727 S.E.2d 422, 425 (2012); *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). "In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." *Id.* "Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion or the commission of prejudicial legal error." *Moore*, 343 S.C. at 288, 540 S.E.2d at 448; *State v. Heyward*, 432 S.C. 296, 309, 852 S.E.2d 452, 458 (Ct. App. 2020).

ARGUMENT

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identity. An in-court identification of a defendant is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004); *Simmons v. United States*, 390 U.S. 377, 384-385, 394 (1968). If a defendant believes an identification was unnecessarily suggestive or unreliable, he or she should make a pre-trial motion to suppress the identification and the trial court should conduct a *Neil v. Biggers* hearing. *State v. Johnson*, 311 S.C. 132, 133, 427 S.E.2d 718, 718 (Ct. App. 1993); *Biggers*, 409 U.S. 188, 198-199 (1972).

The standard for determining the admissibility of both in-court and out-of-court identifications is whether the identification "was so impermissively suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons*, 390 U.S. at 394; *State v. Gambrell*, 274 S.C. 587, 590, 266 S.E.2d 78, 80 (1980). The United States Supreme Court set forth a two-prong test for trial courts to use when analyzing the above: "A court must first determine whether the identification process was unduly suggestive . . . [o]nly if the procedure was suggestive need the court consider the next question." *Biggers* at 198.

If it indeed finds the procedure was suggestive, the second prong is to determine whether the out-of-court identification was "nevertheless so reliable that no substantial likelihood of misidentification existed." *Biggers* at 198; *State v. Moore*, 343 S.C. 282, 287, 540 S.E.2d 45, 447 (2000) (cleaned up). "The central question in determining admissibility of an out-of-court identification is whether under the totality of circumstances the identification was reliable even though the confrontation procedure was suggestive." *Foster v. California*, 394 U.S. 440, 443

(1969); *Traylor*, 360 S.C. at 81, 600 S.E.2d at 526-27; *State v. Stewart*, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980). "Reliability of the eyewitness identification is the lynchpin of the evaluation" of whether improper police conduct created a substantial likelihood of misidentification. *Biggers*, 409 U.S. at 201; *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977).

Short of circumstances that show a very substantial likelihood of irreparable misidentification, the evidence of identification (including circumstances and weight to be given identification) are for the jury. *Stewart,* 275 S.C. 447, 451, 272 S.E.2d 628, 630 (1980); *Manson v. Brathwaite*, 432 U.S. at 116. Regarding show-ups, although one-on-one show-ups have been sharply criticized, an out-of-court dentification should not be kept from the jury if, under all the circumstances, the identification was reliable notwithstanding any suggestive procedure. *Moore*, 343 S.C. at 287, 540 S.E.2d at 447-448 (quoting *Jefferson v. State*, 206 Ga. App. 544, 425 S.E.2d 915, 918 (1992); *Traylor*, 360 S.C. at 82, 600 S.E.2d at 527 (emphasis added). The "admission of evidence of a show-up without more does not violate due process." *Biggers*, 409 U.S. at 198.

Unless the circumstances are such that admitting the identification would be fundamental unfair to the defendant,[6] it should be admitted and considered by the jury because: "The Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. Constitutional safeguards available to defendants to counter the State's evidence include the Sixth Amendment right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), compulsory process, *Taylor v.*

- [6] "Only when evidence is 'so extremely unfair that its admission violates fundamental conceptions of justice,' *Dowling v. United States*, 493 U.S. 342, 352 (1990), have we imposed a constraint tied to the Due Process Clause." *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012); *see also State v. Warner*, 872 S.E.2d 638, 644 (S.C. 2022).

Illinois, 484 U.S. 400 (1988), and confrontation plus cross-examination of witnesses, *Delaware v. Fensterer*, 474 U.S. 15 (1985)." *Perry v. New Hampshire*, 565 U.S. at 237. The jury weighs everything including witness credibility and uncertainty or uncertainty of identification by the witness. *State v. Washington*, 323 S.C. 106, 111-112, 473 S.E.2d 479, 481-482 (Ct. App. 1996).

"The Supreme Court of the United States has repeatedly emphasized "that due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive *and* unnecessary." *State v. Wyatt*, 421 S.C. 306, 310-311, 806 S.E.2d 708, 710 (2017) (quoting *Perry* at 238-239; *Biggers* at 198; *Liverman* at 138) (emphasis added). The point is fairness. *See Stovall v. Denno*, 388 U.S. 293, 298 (1967) (*abrogated by U.S. v. Johnson*, 457 U.S. 537 (1982) on different grounds.) "A rule requiring automatic exclusion . . . would go too far . . . when an identification is reliable despite an unnecessarily suggestive police identification procedure, automatic exclusion is a Draconian sanction, one that may frustrate rather than promote justice." *Brathwaite*, 432 U.S. at 112, *Perry*, 565 U.S. at 239 (cleaned up).[7]

I.

The trial court properly admitted Keyshawn Davis's out-of-court identification of Appellant as it was merely confirmatory and did not violate the Due Process Clause or the standards set out in *Neil v. Biggers*.[8] Davis had prior, personal knowledge of Appellant and conducted his own independent investigation to confirm that Appellant and Harold Bates were indeed the two he saw in the car ever before law enforcement produced the photo.

Appellant argues that even though Keyshawn Davis conducted his own independent investigation in order to confirm the Appellant's identity before the detective conducted the

[7] Besides fairness, the intent of the appellate courts in creating these procedures is to deter improper police conduct. If suppression will not effectively deter police, that should be a significant factor to weigh toward admissibility of the identification. *Biggers*, 409 U.S. at 198.

[8] *Neil v. Biggers*, 409 U.S. 188 (1972) (affirming the test to determine whether an out-of-court identification of a defendant was admissible was a totality of the circumstances, analyzed by trial courts in two prongs, the latter prong having five factors.)

show-up, the act of showing Davis a single photo was a tainted, "sham" state action, and the entire identification should be suppressed. IBOA at 15. The State disagrees. In *Perry v. New Hampshire*, the Supreme Court of the United States firmly held that identification due process procedures do not apply when an identification is not procured by state action. "The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." *Biggers*, 409 U.S. at 198. Again, the evidence of a show-up without more does not violate due process." *Manson* 432 U.S. at 106.

"Show-up procedure, normally considered unduly suggestive, is 'merely confirmatory' when the witness knows the accused." *State v. Liverman*, 398 S.C. at 135, 141-142, 727 S.E.2d at 427-28; *State v. Taylor*, 594 N.W.2d 158 (Minn. 1999); *People v. Rodriguez*, 79 N.Y.2d 445 (1992) (explaining the Confirmatory Identification Exception: "A court's invocation of the 'confirmatory identification' exception is thus tantamount to a conclusion that, as a matter of law, the witness is so familiar with the defendant that there is 'little to no risk' that police suggestion could lead to a misidentification.'")The reasoning behind this takes into account the "unnecessary" consideration of the first *Neil v. Biggers* prong of "unnecessarily suggestive." If the witness knows the perpetrator (or suspect), is a formal identification procedure really necessary?[9]

Each case should be considered on its own facts. *Simmons*, 390 U.S. at 384. In this case, Keyshawn Davis told law enforcement at the hospital, less than an hour after he saw Whyzdom Douse face-to-face as Douse shot into his vehicle, that he recognized the Appellant and his

[9] "What triggers due process concerns is police use of an unnecessarily suggestive identification procedure." *Perry*, 565 U.S. at 232 n.1.

passenger but needed to confirm the identity before providing the name. He did not guess. Guessing would have been far worse; guessing is what puts innocent people away. Instead, he decided to show some integrity and confirm his suspicions before pointing the finger at the Appellant. He pulled up the Appellant's photo on Facebook and then talked to some people and confirmed that the Appellant had been driving his girlfriend's red Elantra that night. Keyshawn Davis knew that Sonjai Simpkins drove a newer red Elantra because he knew her well; her number was in his phone. That gave him the confidence that he would not be pointing his finger at an innocent man. He did his due diligence and only after provided Appellant's name to officers. How many people can rattle off names of acquaintances regularly without looking them up on social media anyway, especially after a stressful situation?

Keyshawn Davis' identity of Appellant was merely confirmatory, as the solicitor argued at the pre-trial *Neil v. Biggers* hearing and the trial court properly held. There is absolutely no evidence in the record that law enforcement asked or even suggested that Keyshawn do independent research. Therefore, Davis's identity of Appellant had no state action involved. By doing his own research,[10] Davis was confirming his own suspicion that Whyzdom Douse was the man he recognized driving the car that night. Therefore, the Appellant's due process rights were not triggered, and the trial court did not have to conduct a *Neil v. Biggers* hearing. This Court should affirm.

II.

Even if the identification was unduly suggestive, the identification was nevertheless so reliable by a totality of the circumstances that there was no substantial likelihood of irreparable misidentification. Davis saw Appellant at close range, was paying attention, described Appellant accurately, was 100% sure Appellant was the driver of the vehicle, and told law enforcement Appellant's name hours after the shooting.

[10] The impact of media, including television, newspapers, or social media, e.g. on an identity will be discussed in the next section.

Appellant argues that the identification fails both prongs of the *Neil v. Biggers* test and that there was therefore irreparable misidentification occurred because Keyshawn Davis only saw Appellant for "seconds," Davis ducked when the bullets started flying, he initially only said the two in the vehicle were black males around his age, and his certainty about his ID was only because he looked at social media and talked to others. The State disagrees. While there are many arguments to be made that Davis's identification was not unnecessarily suggestive, the solicitor all but conceded it was because Detective Eagerton showed Davis a single photo, so Respondent chooses to focus on the second prong instead: reliability. It is the linchpin, afterall.

Davis's identification of Appellant was extremely reliable. *Neil v. Biggers* and *Liverman*, among many others, instruct the trial courts that if it determines the identification procedure was both suggestive and unnecessary, the court must "then determine 'whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." *Biggers*, 409 U.S. at 198-199; *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426. The trial court did so, and in fact denied the motion to suppress based on reliability. And rightly so. The court, after hearing both the solicitor and the defense analyze the five factors for determining reliability by a totality of the circumstances as set forth in *Biggers* and other cases, weighed the evidence and found the identity reliable by a preponderance of the evidence.

"The factors to be weighed against the corrupting effect of a suggestive identification procedure in assessing reliability" and that explore the relationship between suggestiveness and misidentification are: **(1)** the witness's opportunity to view the perpetrator at the time of the crime; **(2)** the witness's degree of attention; **(3)** the accuracy of the witness's prior description of the perpetrator; **(4)** the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Biggers*; *Manson*.

Neil v. Biggers itself involved an unnecessarily suggestive show-up that nonetheless did not require suppression because, under the totality of the circumstances, after analyzing the above factors, the victim's identification of the defendant was reliable. *Biggers*, 409 U.S. at 198-200. She viewed her assailant for a considerable amount of time under adequate light, provided police with a detailed description of her attacker long before the show-up, and had no doubt the defendant was the person she had seen. *Id*. at 200. *Manson v. Brathwaite* also involved an unnecessarily suggestive identification procedure that did not require suppression. *Manson*, 432 U.S. at 115-116. Like in this case, only one photo was used in a show-up in Manson, but the Court found there was not a substantial likelihood of irreparable misidentification because the witness viewed the defendant in good light, provided a thorough description, and was certain of the identification. *Id*. The totality of the circumstances weighed in favor of admission.

Here, the totality of the circumstances also weighs in favor of admission because they demonstrate that Keyshawn Davis's identification was reliable. First, he had testified he had the opportunity to view the perpetrator, Whyzdom Douse, very close up when he drove his vehicle right up next to and lined up his window with the window behind which Davis was sitting. Multiple witnesses testified about how the area was well-lit, and Davis immediately told law enforcement he recognized the two individuals and could identify them after confirming his suspicions. Second, Davis testified he was paying attention: he said he noticed the two men staring into his vehicle for ten seconds or more before the shooting. Third, his description was accurate. He first told law enforcement that the shooters were two black males around his age, 18 to 20. That was accurate. Then he gave law enforcement an accurate description of the car they were in, down to the stickers on the back window. That was accurate.

Fourth, he was one-hundred percent sure both when he told Detective Eagerton the names of Whyzdom Douse and Harold Bates, second when he confirmed their names and faces when he viewed the photographs with the detective, and third, both at the pre-trial hearing and during his in-court identification at trial that Whyzdom Douse was the driver of the vehicle. He never wavered on that.[11] Fifth, the length of time between the shooting and the identification was mere minutes then mere hours. By a totality of the circumstances, the factors weigh in favor of reliability. The trial court also rightly found the same and based his denial of the motion to suppress on it in a methodical way during the pre-trial hearing.

To circle back and briefly address our first argument again and address our second all in one go, in *State v. Liverman*, our Supreme Court held that a witness' prior knowledge of the accused "remains a significant factor in determining reliability" and mitigates even the extreme suggestiveness of a show-up." *Liverman*, 398 S.C. at 135, 141-142, 727 S.E.2d at 427-28. This Court in *State v. Singleton* similarly held that no substantial likelihood of irreparable misidentification such that the identification was unreliable as a matter of law existed (by a totality of the circumstances) because she had prior personal knowledge of the defendant. *State v. Singleton*, 395 S.C. 6, 14, 716 S.E.2d 332, 336 (Ct. App. 2011). Prior knowledge of the defendant seems to trump all other factors and step heavily on the scale in favor of admissibility of an identification. Why? Because reliability is far more certain.

[11] To briefly address Appellant's alternative argument that the trial court improperly factored in the fact that Appellant admitted he was the driver in his *Neil v. Biggers* analysis, it simply does not hold weight. The court went through the factors and made his ruling and only then made the commonsense argument that the identity was corroborated by the fact that Appellant himself admitted he was the driver just like Keyshawn Davis said he was. Respondent asks this Court to affirm.

It bears mentioning that medial identification including photographs of a defendant on television or in a newspaper, or even on social media have not been generally held to impact the reliability of an identification. *See, e.g., State v. Tisdale*, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000) (holding that an identification coming from nongovernmental media sources was admissible even though it was made by suggestive means because it was not made by state actors, and the witnesses were fully cross-examined regarding their descriptions and suggestiveness of media representations).

State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980) has a very similar factual background to this case. Our Supreme Court found the identification of the Petitioner was reliable under the totality of the circumstances even though there was a degree of suggestiveness in procedures by police. There was a photo line-up, a physical line-up and degrees of certainty that line up with this case that are worth consideration.

Even if reliability is in question, however, safeguards like the right to counsel and especially the right to cross-examine one's accusers mitigate and render impotent most risk of an irreparable mistaken identity. *See State v. Washington*, 323 S.C. at 111-112, 473 S.E.2d at 481-482 (Ct. App. 1996) (holding that certainty is not always required in the identification of witnesses "because the jury has the opportunity to observe and attach credibility it deems proper to the witness's testimony, including the certainty or uncertainty of the identification.") Again, the focus is on fairness and whether the identification procedure by law enforcement so violated "those fundamental conceptions of justice which lie at the base of our civil and political institutions" as to make the trial inherently unfair to the defendant. *Dowling v. United States*, 493 U.S. 342 (1999).

Here, the trial court rightly found there was no substantial likelihood of irreparable misidentification of the Appellant by Keyshawn Davis because first, there was no state action. Davis did his own independent research and the detective's action of showing him a single photo of the Appellant was merely confirmatory or for confirmation purposes only. However, even if this Court disagrees, the trial court correctly found that the Appellant's due process rights were not violated and correctly denied the motion to suppress because Davis' identification was inherently reliable as he had prior, personal knowledge of who the Appellant was. This Court should affirm.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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