THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court Of General Sessions
The Honorable H. Steven DeBerry, IV, Circuit Court Judge

Appellate Case No. 2022-001279

The State ..... Respondent,

v.

Sean Devon James, ...Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES

1. Whether the circuit court did not abuse its discretion in allowing testimony of the identification of Appellant in a show-up and allowing identification of him in trial?

2. Whether, as an additional sustaining ground, the out of court identification of Appellant in a show-up was neither prejudicial nor unnecessary, and the circuit court should have made such a finding.

STATEMENT OF THE CASE

The State concurs in the Statement of the Case.

STANDARD OF REVIEW

As stated in *State v. Davis*, 420 S.C. 50, 59–60, 800 S.E.2d 138, 143 (Ct. App. 2017):

> "In criminal cases, the appellate court sits to review errors of law only." *State v. Jenkins,* 412 S.C. 643, 650, 773 S.E.2d 906, 909 (2015). The decision of whether to admit or exclude evidence is within the sound discretion of the circuit court. *State v. Jackson*, 384 S.C. 29, 34, 681 S.E.2d 17, 19 (Ct. App. 2009). Likewise, the determination of whether to admit an eyewitness's identification is at the discretion of the circuit court. *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). This court will not disturb the circuit court's admissibility determinations absent a prejudicial abuse of discretion. *State v. Adkins*, 353 S.C. 312, 326, 577 S.E.2d 460, 468 (Ct. App. 2003). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *State v. Irick,* 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001).

ARGUMENT

I

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE IDENTIFICATION OF APPELLANT IN COURT AND THE TESTIMONY ABOUT HIS IDENTIFICATION IN A SHOW-UP

The following standards apply to the identification of Appellant:

> "A criminal defendant may be deprived of due process of law by an identification procedure [that] is unnecessarily suggestive and conducive to irreparable mistaken identification." *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." *Id.* "Single person show-ups are particularly disfavored in the law." *Moore*, 343 S.C. at 287, 540 S.E.2d at 448.
>
> In *Neil v. Biggers* [409 U.S. 188], the United States Supreme Court set forth a two-pronged test to determine whether due process requires the suppression of an eyewitness identification. 409 U.S. at 198–200, 93 S.Ct. 375. To ensure due process, *Neil v. Biggers* requires courts to assess, on a case-by-case basis, the following: (1) whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, (2) whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012).
>
> Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure 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.

State v. Davis, 420 S.C. 50, 63–64, 800 S.E.2d 138, 144–45 (Ct. App. 2017).

In this case, the Circuit Court judge found that the show-up was suggestive and unnecessary but that the identifications were reliable under the *Biggers* factors. Although, the conviction should be affirmed based upon his finding of reliability, it should also be affirmed under the additional sustaining grounds that the identification was neither suggestive nor unnecessary.

A

The Identification Was Reliable

In the *in camera* proceeding, Ms. Eaddy testified that one of the three robbers had tattoos on his face, was right beside the driver door in which she was in the driver's seat, had a pistol in his hand pointed at her and was there about 10 minutes which "seemed like eternity." R. p. * (Tr. p. 45, l. 23- p. 49, l. 1; p. 62, l. 7 – p. 63, l. 6). At trial, Ms. Eaddy testified that Appellant was in her face without a mask, and that he reached through her open car window to grab her car keys from the ignition, the money she was counting and her cell phone. Tr. p. 162, l. 1 – p. 164, l. 10. She said that "it seem like it was between 10 to 20 minutes, but it seem like eternity when somebody got a gun to your head." R. p. * 173, ll.9-11.

Most certainly, her testimony satisfies the *Biggers* factors of opportunity to view Appellant and her degree of attention. As found by the trial judge:

> her opportunity to view the Defendant in this matter, during this identification at the time of the incident, by all accounts, was -- was lengthy. Her degree of attention, certainly, she testified that this Defendant was within less than two feet of her for an extended period of time. Certainly also believe, out of the totality of the circumstances, that she was in the best position to see everything. And she was in this situation for the entire duration of the time that it took place . . .

R. p. * (Tr. p. 112, l. 17 – p. 113, l. 1).

Although not detailed, as found by the trial judge, "[t]he accuracy of any prior description, certainly, two black males and one that was light skinned male, certainly is consistent, at least." R. p. * (Tr. p. 113, ll. 4-6); see also R. p. * (Tr. p. 58, l. 20 -p. 59, l. 2) (Two black males and a "high yellow" or white man.). She said she was "terrified" and "shocked" at the time she talked to officers. R. p. * (Tr. p. 55, ll. 6-8, p. 56, ll. 1 & 2).

Ms. Eaddy's testimony certainly demonstrates a high level of certainty at the

confrontation. Her car was stolen and spotted a month after the November robbery. R. p. * (Tr. p. 222, l. 22 – p. 224, l. 7; 165, ll. 7 – 20.) On December 20, shortly after it was stolen, Ms. Eaddy's vehicle was located via a tracking device in the car at a home along with three individuals including Appellant. R. p. (Tr. P. 80, l. 2 – p 81, l. 4.; p. 202, l. 15 – p. 204, 4). The individuals were charged with possession of a stolen vehicle. R. p. *(Tr. p. 81, ll. 3-5). To verify that the men did not have permission to use the vehicle, the investigator followed a usual procedure. He texted photos of them to Ms. Eaddy along with the notation that one of them had a tattoo, information that she had not provided. R. p. * (Tr. p. 81, l. 3 – p. 82, l. 2; p. 84, ll. 8-20; 87, ll. 2 – 22). The investigator testified that, after he texted Ms. Eaddy the photos of the men found with her car, she called back to say spontaneously that "those are the same three guys that robbed [her] a month ago." R. p. * (Tr. p. 232, ll. 7 – 25). Ms. Eaddy identified Appellant as being in one of the photos. R. p. * (Tr. p. 59, l. 24 – p. 60, l. 4). The investigator had not said anything about the individuals being associated with the armed robbery. *Id.* At trial, she identified her car and and an image of the key from the scene in December as being consistent with the key taken from her. R. p. * (Tr. p. 221, ll. 12-23). She identified Appellant in the courtroom, recognized him immediately and had no doubt it was he. R. p. * (Tr. p. p. 60, ll. 5- 19; p. 163, l. 20 – p. 164, l. 3; p. 167, ll. 5- 8).

The Court found the above identification to be reliable and credible as to the confrontation and as to the lapse of time as set forth below:

> Ms. Eaddy's level of certainty, how she testified yesterday to the events and to the identity of Mr. Sean James in the courtroom, seem credible to me. And then finally, the time between the crime and the confrontation, being in this matter about 32 days, she testified that she was being held at gunpoint for what seemed like an eternity, that her assailant was close in proximity to her, and I think it's -- it's reliable and certainly credible to believe that you wouldn't forget such an event within just 32 days, or the details of that event during that time period.

R. p. * (Tr. p. 113, ll. 7-18).

The record shows that the circuit court did not abuse its discretion in allowing identification. Under the totality of the circumstances (*Davis, supra*), the identification was clearly reliable.

B

As And Additional Sustaining Ground, The Show-Up Was Neither Unnecessary Nor Unusually Suggestive

The circuit court judge found that the show-up was suggestive and unnecessary. Respectfully, it was neither. As noted above, the individuals were charged with possession of a stolen vehicle. R. p. *(Tr. p. 81, ll. 3-5). To verify that the men did not have permission to use the vehicle, a usual procedure, Investigator Davis texted photos of them to Ms. Eaddy along with the notation that one of them had a tattoo. R. p. * (Tr. p. 81, l. 3 – p. 82, l. 2; p. 84, ll. 8-20; 87, ll. 2 – 22. A photo lineup can take up to a week, and a show-up saves law enforcement time and the accused their freedom if they had permission to use the vehicle. (Tr. p. 84, ll. 8 – 20; p. 88, ll. 1-10). The investigator added the notation that Appellant had a tattoo, but he was not informed then of any description of the suspects in the earlier armed robbery. R. p. * (Tr. p. 239, l. 18 – p. 240, l. 1). Ms. Eaddy texted back immediately that the men did not have permission to use the car and had, in fact, had robbed her the month before. R. p. *, Tr. p. 232, ll, 7 – 25). The investigator had not said anything about the individuals being associated with the armed robbery. *Id.* Ms. Eaddy's identification of them as being the robbers was spontaneous. The show-up did not suggest that response from her.

What is important to note here is that the show-up was not for the purpose of identifying

Appellant as a suspect in the November robbery of Ms. Eaddy. It was to determine if Appellant and the other suspects had permission to use her car stolen thirty days later in December. This show-up in December, therefore, was not suggestive of Appellant as being a suspect in the November robbery. Moreover, this show-up was necessary, to determine whether the three men had permission to use the vehicle found in December. If so, they could be released. *See, State v. Wyatt*, 421 S.C. 306, 313, 806 S.E.2d 708, 712 (2017)("By conducting the showup procedure immediately, Kirkley was able to quickly determine whether Wyatt was the person who threw the contraband into the prison, or whether Wyatt should be released because he was innocent . . . ."). Accordingly, as additional sustaining ground the show-up satisfies the two-part first prong of *Biggers,* as being neither suggestive nor unnecessary.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm Appellant's conviction and sentences.

Respectfully submitted,

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May 18, 2023

ATTORNEYS FOR RESPONDENT

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RESPONDENT'S DESIGNATION OF MATTER FOR RECORD

I certify that I served the Initial Brief and Designation of Matter for Respondent in this case on counsel for Appellant, this May 18, 2023, via email under Paragraph (d)(1) of Order Re: Methods of Electronic Filing and Service Under Rule 262, SCACR, Appellate Case No. 2020-000447. A copy of the email is attached.

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