RECEIVED
Jan 03 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Bentley Price, Circuit Court Judge
Appellate Case No. 2022-001075

THE STATE,

Respondent,

vs.

MAZAR NATHANIEL STURDIVANT,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit

Post Office Drawer 1276
Conway, SC 29526
(843) 915-5460

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

COUNTER-STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

STANDARD OF REVIEW 6

ARGUMENT 7

The trial judge correctly permitted Ward—one of Sturdivant's armed robbery victims—to make an in-court identification of Sturdivant and properly left it to the jurors to determine the reliability of that identification evidence because Ward's identification of Sturdivant occurred for the first time during trial, which meant it did not raise any due process concerns under the circumstances involved. Relatedly, since the identification evidence was properly admitted, the trial judge did not abuse his discretion or otherwise err by declining to grant the extreme remedy of a mistrial based on that evidence's admission. 7

CONCLUSION 22

TABLE OF AUTHORITIES

South Carolina Cases:

State v. Adams, 430 S.C. 420, 845 S.E.2d 217 (Ct. App. 2020). 20

State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006). 6

State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010). 6

State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (Ct. App. 2003). 14, 18

State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). 6

State v. Govan, 372 S.C. 552, 643 S.E.2d 92 (Ct. App. 2007). 13, 14, 19

State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000). 6, 21

State v. Heller, 399 S.C. 157, 731 S.E.2d 312 (Ct. App. 2012). 18

State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995). 6

State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). 6

State v. Lewis, 363 S.C. 37, 609 S.E.2d 515 (2005). 16, 17, 19

State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012). 13, 14, 15

State v. Moore, 308 S.C. 349, 417 S.E.2d 869 (1992). 17

State v. Patterson, 425 S.C. 500, 823 S.E.2d 217 (Ct. App. 2019). 6, 18

State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990). 21

State v. Scipio, 283 S.C. 124, 322 S.E.2d 15 (1984). 14

State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980). 19, 21

State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010). 6

State v. Turner, 373 S.C. 121, 644 S.E.2d 693 (2007). 19

State v. Washington, 323 S.C. 106, 473 S.E.2d 479 (1996). 21

State v. Wiley, 387 S.C. 490, 692 S.E.2d 560 (Ct. App. 2010). 21

United States Supreme Court Cases:

Coy v. Iowa, 487 U.S. 1012 (1988). 18

Davis v. United States, 564 U.S. 229 (2011). 16

Manson v. Brathwaite, 432 U.S. 98 (1977). 13, 21

Neil v. Biggers, 409 U.S. 188 (1972). 12, 13

Perry v. New Hampshire, 565 U.S. 228 (2012). 12, 14, 15, 20

Stovall v. Denno, 388 U.S. 293 (1967). 13

Other State and Federal Cases:

Harker v. Maryland, 800 F.2d 437 (4th Cir. 1983). 14

People v. Morales, 109 N.Y.S.3d 650 (N.Y. App. Div. 2019). 19

State v. Brown, 528 N.E.2d 523 (Ohio 1988). 15

United States v. Stevens, 935 F.2d 1380 (3rd Cir. 1991). 13

Other Authorities:

S.C. Const. art. I, § 24. 20

STATEMENT OF ISSUES ON APPEAL

I.

"Whether the trial court erred in permitting Ward to make an in-court identification of Appellant where Ward had never made an out-of-court identification, and where Ward was in the courtroom when the court ruled Appellant would be foreclosed from arguing identity if he waived his presence, since the unduly suggestive in camera confrontation resulted in an unreliable identification?"

II.

"Whether the court erred in denying Appellant's mistrial motion based on the unnecessarily suggestive confrontation and unreliable identification?"

COUNTER-STATEMENT OF ISSUE ON APPEAL

Did the trial judge correctly permit Ward—one of Sturdivant's armed robbery victims—to make an in-court identification of Sturdivant and properly leave it to the jurors to determine the reliability of that identification evidence when Ward's identification of Sturdivant occurred for the first time during trial, which meant it did not raise any due process concerns under the circumstances involved? Relatedly, since the identification evidence was properly admitted, did the trial judge somehow abuse his discretion or otherwise err by declining to grant the extreme remedy of a mistrial based on that evidence's admission?

STATEMENT OF THE CASE

In December of 2018, Appellant Mazar Nathaniel Sturdivant was arrested following an investigation into a series of highly-similar armed robberies that had been committed over the span of several consecutive nights in Mrytle Beach, South Carolina. In April of 2019, the Horry County Grand Jury indicted Sturdivant for three counts of armed robbery. That same month, the Horry County Grand Jury indicted Dlanor Phillip Tilton—one of Sturdivant's accomplices—for three counts of armed robbery and Shamoray Rockel Holmes—another of Sturdivant's accomplices—for one count of armed robbery. On July 18, 2022, a joint jury trial was commenced in the Horry County Court of General Sessions with the Honorable Michael S. Holt, circuit court judge, presiding. Ultimately, following in limine discussions, the trial proceeded forward solely on two of Sturdivant's and Tilton's armed robbery charges with the Honorable Bentley Price, circuit court judge, presiding.[1] At the conclusion of the three-day trial, the jury convicted Sturdivant and Tilton as indicted. Following the verdict, the trial judge sentenced Sturdivant to concurrent terms of imprisonment of ten years for his two convictions.[2] Sturdivant then timely filed a notice of appeal.

[1] Prior to the jury being sworn, the original trial judge was replaced due to an unexpected illness. (Tr. p. 80; p. 122).

[2] Because Tilton was not present at that time, the trial judge sealed Tilton's sentences. (Tr. p. 452).

STATEMENT OF FACTS

By his own candid admission, Tilton—Sturdivant's accomplice and co-defendant—used Grindr, a social media app designed for gay and bisexual individuals, to scam people. (Tr. p. 189; p. 193; pp. 202-203). At least initially, Tilton, who claimed not to truly be gay himself, used the app to trick his targets into providing him with food, money, or meals by making them believe he was going to have sex with them. (Tr. p. 189; p. 193; pp. 202-203). However, toward the end of December 2018, Tilton escalated his criminal scheme and began using the Grindr app to set up armed robberies. (Tr. pp. 192-194; pp. 208-211).

On the night of December 28, 2018, Tilton made contact with Matthew Beckhoff, a resident of New Jersey who was visiting the Myrtle Beach area at the time, via the Grindr app and arranged to meet him on Bryant Street. (Tr. pp. 207-209). In response, Beckhoff drove to the address provided but left because something felt amiss. (Tr. p. 209). However, as soon as he drove away, he received a communication from Tilton asking him to return, and he did so despite his reservations. (Tr. pp. 209-210). When he returned to Bryant Street, he observed Sturdivant standing on a nearby street corner. (Tr. p. 210). Nevertheless, Beckhoff pulled up next to a dark house located at the address provided and stopped. (Tr. p. 210; p. 213; p. 232). Upon doing so, Tilton approached Beckhoff's car from the passenger side, jumped inside, and put a gun to his head. (Tr. p. 210; p. 213; p. 222; p. 232). Almost immediately after that, Sturdivant pointed a gun at Beckhoff through his vehicle's driver side window. (Tr. p. 210; p. 213; p. 232). Tilton and Sturdivant then demanded Beckhoff's belongings, and Beckhoff quickly handed over his phone, cash, and wallet. (Tr. p. 150; p. 210; p. 213; p. 232). At that point, Tilton and Sturdivant ordered Beckhoff to leave, he complied with their directive, and, after initially waiting roughly

an hour or so due to his concerns about revealing his sexuality, he eventually alerted the police of what had occurred. (Tr. pp. 139-140; p. 143; pp. 145-146; p. 211; pp. 213-214; pp. 216-217).

On the following night, Tilton lured Christopher Ward, who—much like Beckhoff—was visiting Myrtle Beach at the time, to Bryant Street via the Grindr app, and Ward drove to the address Tilton provided, which was the address of an abandoned house. (Tr. pp. 193-194; p. 255; pp. 339-341). Once Ward had parked in the driveway there, two men suddenly sprang up from behind some bushes and ordered him out of his vehicle at gunpoint. (Tr. pp. 341-342). In response, Ward got out and tried to flee. (Tr. pp. 342-343). When he did, one of the robbers ran off, but the other—Sturdivant—chased after Ward, grabbed him, and struck him with his gun. (Tr. pp. 342-343; p. 345; p. 348; p. 352). Nevertheless, Ward continued to resist, was able to break free, and ran to a nearby house for help. (Tr. p. 343). Based on that, the police were rapidly alerted of what had transpired. (Tr. pp. 239-241; pp. 246-247; p. 343).

During the ensuing investigation into the incidents, Tilton was identified as a potential suspect after a photograph obtained from the Grindr account used to lure the victims to the robberies was processed through a facial recognition program. (Tr. pp. 174-179; p. 182; pp. 184-185). After verifying Tilton was indeed the person depicted in the Grindr photograph, officers attempted to locate and arrest him on the night of December 30, 2018. (Tr. pp. 185-187; p. 253; p. 258). When they did, Tilton responded by fleeing into a residence on Bryant Street, and, following a brief chase, he was taken into custody there. (Tr. p. 190; pp. 253-256; p. 291).

At that same residence, officers found Sturdivant and several other individuals inside. (Tr. p. 308). Furthermore, during an ensuing warrant-based search of the residence, officers also located Ward's wallet, which had been in his car when he was accosted by the robbers, hidden

underneath a bed in one of the residence's bedrooms along with several BB guns that had been modified to look like real guns in other spots. (Tr. pp. 269-276; pp. 348-349).

Early the next morning, officers spoke separately with both Tilton and Sturdivant. (Tr. p. 190). During their interviews, both admitted they were either present or in the vicinity at the time of the robberies, and Tilton acknowledged he had arranged meetings with the victims via the Grindr app. (Tr. pp. 192-194; pp. 315-316). However, the two denied personally committing the robberies, and each apparently implicated the other as the true perpetrator of the crimes. (Tr. pp. 70-72; p. 203; pp. 448-449).

Ultimately, based on what was uncovered in the investigation, Tilton and Sturdivant were both indicted for multiple counts of armed robbery, and their cases proceeded forward to a joint trial. (Tr. p. 48; pp. 68-69; p. 121; Indictments). At the conclusion of that trial, the jury convicted both Tilton and Sturdivant of two counts of armed robberies in connection to the incidents involving Beckhoff and Ward. (Tr. p. 444).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). When reviewing a trial judge's evidentiary ruling on appeal, an appellate court will not reverse absent a clear abuse of discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); see also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). Meanwhile, when reviewing a decision regarding a mistrial, an appellate court will not disturb a trial judge's discretionary ruling on such a matter absent a prejudicial abuse of discretion. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000); see State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ("In order to receive a mistrial, the defendant must show error and resulting prejudice."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Patterson, 425 S.C. 500, 507, 823 S.E.2d 217, 221 (Ct. App. 2019) (citation and internal quotations omitted).

ARGUMENT

The trial judge correctly permitted Ward—one of Sturdivant's armed robbery victims—to make an in-court identification of Sturdivant and properly left it to the jurors to determine the reliability of that identification evidence because Ward's identification of Sturdivant occurred for the first time during trial, which meant it did not raise any due process concerns under the circumstances involved. Relatedly, since the identification evidence was properly admitted, the trial judge did not abuse his discretion or otherwise err by declining to grant the extreme remedy of a mistrial based on that evidence's admission.

Relevant Facts

At the outset of the joint trial conducted in Sturdivant's case, Sturdivant was initially present in the courtroom, but Tilton—his co-defendant—was not. (Tr. p. 48). However, before the jury was sworn and the evidentiary phase of trial got underway, Sturdivant—despite assuring the trial judge he would continue to appear—absented himself from the proceedings, too. (Tr. pp. 80-81; p. 122). As a result, bench warrants were issued for both Tilton and Sturdivant. (Tr. p. 79; pp. 164-165; p. 301).

On the trial's third day, Sturdivant finally returned to the courthouse and was quickly apprehended. (Tr. p. 332). At that point, the trial judge briefly excused the jury from the courtroom to discuss the matter, and, once the jury was gone, he noted Sturdivant may need to be brought into the courtroom because one of Sturdivant's victims—Ward—"may" want to identify him during his testimony. (Tr. p. 332). In response to that, Sturdivant's defense counsel indicated that put him "in a pickle" and inquired of the trial judge whether Sturdivant could simply waive his right to be present. (Tr. p. 332). Following that suggestion, defense counsel, the solicitor, and the trial judge all questioned whether a criminal defendant "technically" had a right to wait outside of a courtroom during trial. (Tr. pp. 332-333). After considering the matter, the trial judge noted he was "worried" about such a course of action when the defendant was, in fact, present. (Tr. p. 333). As to why he was worried, the trial judge explained Sturdivant's "last

victim indicated that he wanted to positively identify him and now you have another victim that may *potentially* be able to do the same." (Tr. p. 333) (emphasis added).

At that point, Sturdivant's defense counsel interjected and suggested that would "open up a whole new can of worms about in-court identification." (Tr. p. 333). In response, the trial judge indicated he agreed and directed Sturdivant to be brought into the courtroom to discuss the matter. (Tr. pp. 333-334). During the ensuing colloquy, Sturdivant claimed he was at his mother's house on the preceding day and could not come to trial because there was "some family stuff going on." (Tr. pp. 334-335). The trial judge then afforded Sturdivant several minutes to speak with his defense counsel about how he wished to proceed. (Tr. p. 335).

After that brief recess concluded, the trial judge indicated he was going to afford two options to Sturdivant. (Tr. pp. 335-336). Specifically, he indicated Sturdivant would—pursuant to one option—be required to stay in the courtroom if he wished to pursue a defense of "he wasn't there and he cannot be identified" or—pursuant to the other option—could waive his right to be present and pursue a different defense. (Tr. pp. 335-336). Following that discussion, Sturdivant elected to remain in the courtroom. (Tr. pp. 336-338).

Thereafter, the solicitor called Ward—one of Sturdivant's victims—to the witness stand. (Tr. p. 337). When he did, Sturdivant's defense counsel quickly requested a bench conference and noted it was purportedly "going to be a true showup because [Ward] ha[d] never identified [Sturdivant]" and had been present in the courtroom during their discussion "about the law and options and A and B of the defense." (Tr. p. 338). Nevertheless, the trial judge directed Ward to be sworn as a witness and allowed him testify. (Tr. p. 338).

During Ward's testimony, he recounted the details of the armed robbery and confirmed two men sprang "out of the bushes" and robbed him at a location he arranged to meet someone at

via the Grindr app. (Tr. pp. 338-342; p. 344). He further confirmed he did not know if either of the men was the individual he was communicating with via the Grindr app because he was "not sure who [he] was communicating with" through that app. (Tr. p. 342).

As Ward's testimony continued, the solicitor asked him if he knew who struck him during the robbery, and Ward responded he did before indicating it was "[t]he gentleman that's sitting right there." (Tr. p. 345). In response, Sturdivant's defense counsel objected and—in the presence of the jury—stated:

> Your Honor, I have an objection under Biggers and some other cases, and also object to this question because the testimony earlier, if I understood it right, is he didn't know -- two guys came out of the bushes, and he didn't know who they were. Now, we're in court. He's not going to point to me because he knows I wasn't there, so it only leaves him to point to this one.

(Tr. p. 345). For reasons unclear, the trial judge sustained that objection. (Tr. p. 345). However, the trial judge further indicated he would permit the question to stand while stating Sturdivant's defense counsel could "clean it up on cross-examination." (Tr. pp. 345-346).

At that point, the solicitor's direct examination of Ward continued, and Ward explained he recognized Sturdivant's face because Sturdivant "was in [his] face with a gun" during the robbery. (Tr. p. 346). Ward further confirmed the trial was his first opportunity to view Sturdivant since the incident and he was certain of his identification of him as one of the robbers. (Tr. p. 346). Beyond that, he noted the only photograph shown to him by law enforcement during the investigation was a photograph taken from a Grindr account. (Tr. pp. 347-348). He then again reiterated "[t]hat gentleman there"—Sturdivant—was the one who struck him with a gun and chased him during the robbery. (Tr. p. 348).

Subsequently, on cross-examination, Sturdivant's defense counsel questioned Ward about his identification, and Ward confirmed the police did not make any suggestions to him about

who perpetrated the robbery or show him any photographs or artist renderings of the suspect prior to him identifying Sturdivant. (Tr. p. 351). Sturdivant's defense counsel then opined Ward may know what his next question was going to be because he "kind of was incorporating it in [his] objection to [Ward's] testimony," suggested "they" always pick out the guy sitting next to "the guy with the tie" when asked in court if they can identify who did it, and queried Ward if that was what he had done during the trial. (Tr. pp. 351-352). In response, Ward refuted defense counsel's suggestion and explained he identified Sturdivant because he had been "right in [his] face" during the incident, which enabled him to see him "clear as day[.]" (Tr. p. 352).

Following that, Ward's testimony concluded, the jury was excused, and Sturdivant's defense counsel indicated he wanted to further discuss his objection to Ward's testimony. (Tr. pp. 352-353). During the ensuing in camera discussion, Sturdivant's defense counsel noted he had earlier moved to preclude Ward from making an in-court identification. (Tr. p. 353). As support for such relief, Sturdivant's defense counsel asserted the incident occurred three and a half years earlier, pointed out no prior identification was made during that period of time, and maintained Ward must have identified Sturdivant because he was the only defendant in the courtroom. (Tr. p. 353). Furthermore, Sturdivant's defense counsel noted Ward had been present in the courtroom during the discussion of the options the trial judge elected to afford to the defense. (Tr. p. 353). As a result, Sturdivant's defense counsel asked the trial judge to strike Ward's identification and to preclude the jury from giving it any consideration. (Tr. p. 353).

In response to that, the trial judge indicated he "wholeheartedly" agreed Ward should not have been present in the courtroom and asserted he had not personally known who Ward was at that time. (Tr. p. 353). However, the solicitor quickly pointed out Ward was a victim and, thus, had a right to be present during the proceedings. (Tr. p. 354). At that point, the trial judge

indicated he "probably" should have excluded Ward because their discussion was—for reasons not obvious—"not the portion of the trial" while maintaining Ward purportedly "doesn't get to hear the defense's game plan[.]" (Tr. p. 354). Furthermore, the trial judge noted Sturdivant's defense counsel would be able to challenge the identification in his arguments to the jury but the jury would not know Ward was present "during the options that [he] gave out." (Tr. p. 354). Beyond that, the trial judge asserted "the cat [would] still [be] out of the bag" if he instructed the jury not to consider the in-court identification from Ward. (Tr. p. 353).

Following the trial judge's remarks, Sturdivant's defense counsel moved for a mistrial, and the solicitor quickly noted Sturdivant did not have a right to absent himself from trial in order to prevent an in-court identification from being made. (Tr. p. 353). At that point, the trial judge agreed and indicated a defendant should not receive a benefit from missing his trial. (Tr. p. 355). The trial judge then denied the mistrial motion, stating:

> I'm going to deny the motion for a mistrial, and I'm going to instruct the jury they can give his testimony whatever weight they want to give it. I mean, and I'm going to let [Sturdivant's defense counsel] have free reign as much as [he] want[s] to argue that to the jury. Obviously, he is here today and pointed at the guy, like [Sturdivant's defense counsel] said, sitting next to the person that doesn't have a tie on. So I think that's an issue of credibility for the witness -- I mean, for the jury to consider, so I'll allow it.

(Tr. p. 356).

After that ruling, the trial continued forward, and Sturdivant elected to testify in his own defense. (Tr. p. 365). As part of his testimony, Sturdivant specifically denied having ever met Ward. (Tr. p. 381). However, he did confirm he was, in fact, depicted in surveillance footage captured at a nearby convenience store on the date of one of the robberies.[3] (Tr. p. 382).

[3] Earlier during trial, Beckhoff identified the individuals depicted in the surveillance footage as the people who robbed him. (Tr. p. 213).

Subsequent to that testimony, the parties presented their closing arguments to the jury. (Tr. p. 390; pp. 393-426). As part of his closing argument, Sturdivant's defense counsel thoroughly attacked Ward's identification of Sturdivant. (Tr. pp. 412-425). In doing so, he suggested Ward had only identified Sturdivant because he was the only defendant in the courtroom, argued Ward's testimony should not be credited, contended eyewitness identification testimony was inherently unreliable, and asserted Ward's identification was particularly unreliable because it was a cross-racial one made three and a half years after the incident. (Tr. pp. 414-419).

After the closing arguments were presented, the trial judge instructed the jury on the applicable law. (Tr. pp. 426-439). As part of those instructions, the trial judge explained the State had the burden of proving the defendants' guilt beyond a reasonable doubt, indicated the defendants were presumed innocent, thoroughly discussed witness credibility and identification evidence, and expressly confirmed the jury should acquit if they had a reasonable doubt as to identity. (Tr. pp. 429-434).

Following that, the case was submitted to the jury. (Tr. p. 441). Upon deliberating for a little over two hours, the jury convicted Sturdivant and Tilton as indicted. (Tr. p. 441; p. 444).

Analysis

When evidence of an eyewitness identification is introduced during a criminal trial, a defendant may be deprived of due process of law if that identification was the product of unnecessarily suggestive circumstances arranged by government officials, such as law enforcement officers, and a very substantial likelihood of irreparable mistaken identification exists as a result of those suggestive circumstances. Neil v. Biggers, 409 U.S. 188, 197-198 (1972); see Perry v. New Hampshire, 565 U.S. 228, 232 (2012) (recognizing "a due process

check on the admission of eyewitness identification" is applicable "when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime"). In determining the admissibility of identification evidence, a court must conduct a two-prong inquiry into the matter. See Biggers, 409 U.S. at 199-200 (outlining the necessary inquiry regarding out-of-court identifications and the factors to be weighed when determining reliability). That inquiry involves first ascertaining whether the identification process was unnecessarily and unduly suggestive and then determining whether the out-of-court identification was nevertheless so reliable no substantial likelihood of misidentification existed. State v. Govan, 372 S.C. 552, 558, 643 S.E.2d 92, 95 (Ct. App. 2007); see State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) ("Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.").

Pursuant to the proper analysis, it must first be determined whether the identification procedure used was both suggestive *and* unnecessary under the circumstances. Biggers, 409 U.S. at 199-200; see United States v. Stevens, 935 F.2d 1380, 1389 (3rd Cir. 1991) (explaining the question of whether an identification procedure is unnecessarily suggestive depends on both its suggestiveness and necessity). In making such a determination, factors to consider include what procedure was employed, whether the utilized procedure was warranted by an emergency or the existence of exigent circumstances, and whether an alternative procedure could have practically been used that would have been less suggestive. See, e.g., Manson v. Brathwaite, 432 U.S. 98, 109 (1977) (recognizing the use of a single-person photographic lineup in the absence of an emergency or the existence of exigent circumstances was unnecessarily suggestive); Stovall v.

Denno, 388 U.S. 293, 302 (1967) (finding the use of a single-person show-up was not unnecessarily suggestive where Stovall's surviving victim was the only person who could exonerate or identify him, she was hospitalized at the time, and it was unclear whether she would ultimately survive her injuries).

In the event—and only in the event—an identification procedure is found to have been unnecessarily and unduly suggestive, it must then be determined whether the suggestiveness of the procedure resulted in a substantial likelihood of misidentification. Liverman, 398 S.C. at 138, 727 S.E.2d at 426. Significantly, identification evidence may still be admissible if the State can prove by clear and convincing evidence the identification is reliable notwithstanding the suggestiveness of the identification procedure employed. Govan, 372 S.C. at 559, 643 S.E.2d at 95-96; see State v. Brown, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct. App. 2003) ("Reliability is the linchpin in determining the admissibility of identification testimony."). In determining whether the identification is reliable, a court must look to: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the identification. Govan, 372 S.C. at 559, 643 S.E.2d at 96; see also State v. Scipio, 283 S.C. 124, 127, 322 S.E.2d 15, 17 (1984) ("The reliability of an identification is determined by the facts."). Upon examining those factors, a court ordinarily should admit identification evidence and allow the jury to determine its worth "if the indicia of reliability are strong enough to outweigh the corrupting effect of the *police-arranged* suggestive circumstances[.]" Perry, 565 U.S. at 232 (emphasis added); see Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983) (instructing the exclusion of

evidence is a "drastic sanction" and should be "limited to identification testimony which is manifestly suspect").

Importantly though, due process concerns are *only* raised in cases in which government officials used an unnecessarily suggestive identification procedure. See Perry, 565 U.S. at 232 n. 1 ("[W]hat triggers due process concerns is police use of an unnecessarily suggestive identification procedure[.]"); see also Liverman, 398 S.C. at 140, 727 S.E.2d at 427 (recognizing preliminary judicial inquiry regarding the reliability of identification evidence is only required when "it is contended that an identification is obtained under unnecessarily suggestive circumstances arranged by state action"). If no improper law enforcement activity is involved, there is no proper basis upon which to exclude identification evidence as there is nothing to deter, and the reliability of the identification evidence will be up to the jury to determine after the evidence is tested through the ordinary mechanisms of trial, including vigorous cross-examination. See Perry, 565 U.S. at 232-233 ("Our decisions . . . turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photographic array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." (footnote omitted)); see also State v. Brown, 528 N.E.2d 523, 533 (Ohio 1988) ("The rationale for excluding a tainted pretrial identification is to protect the defendant from misconduct by the state. In the facts before us, there was no state action. . . . The alleged suggestiveness of the identification, therefore, goes to weight and reliability of the testimony rather than

admissibility."); see generally Davis v. United States, 564 U.S. 229, 236-237 (2011) (recognizing the exclusionary rule solely exists to deter future constitutional violations).

Notably, in State v. Lewis, 363 S.C. 37, 43-44, 609 S.E.2d 515, 518-519 (2005), our Supreme Court addressed an appellate challenge to the propriety of a trial judge's decision to admit a first-time in-court identification without first conducting an in camera hearing to determine the reliability of the identification. In that case, Lewis and several co-defendants were charged with armed robbery, first-degree criminal sexual conduct, and other charges after they committed heinous acts against a family travelling through the state. Id. at 39-40, 609 S.E.2d at 516-517. After the incident, Armstrong, one of the victims, spoke with police, identified the race of the assailants, and provided a general description of their height, facial hair, and clothing. Id. at 40, 363 S.E.2d at 517. Subsequent to that, Lewis and his co-defendants were arrested and brought to trial, and, during trial, the trial judge permitted Armstrong—who had never previously identified any of the perpetrators—to identify Lewis and Armstrong for the first time in the courtroom over objection and without conducting any in camera hearings on the matter. Id. After he was convicted, Lewis appealed, challenging the admission of the identification evidence in his case. Id. The Court of Appeals affirmed the trial judge's ruling in that regard, and the Supreme Court subsequently granted a writ of certiorari to review the matter. Id. at 41-42, 363 S.E.2d at 517. On certiorari, our Supreme Court recognized there was suggestiveness inherent in any in-court identification. Id. at 43 n. 11, 609 S.E.2d at 518 n. 11. Nevertheless, consistent with the majority view in the United States, our Supreme Court concluded "that Neil v. Biggers does not apply to in-court identifications and that the remedy for any alleged suggestiveness of an in-court identification is *cross-examination and argument*." Id. at 42, 609 S.E.2d at 518 (emphasis added). In reaching that conclusion, our Supreme Court explained the extra

protections afforded when a *pre-trial* identification procedure that occurs *beyond the immediate supervision of the court* has been employed "are not applicable to an in-court identification because the witness' testimony is subject to the same rules of evidence, witness credibility, and cross-examination as all testimony in a criminal trial." Id. at 43, 609 S.E.2d at 518. As a result, the Supreme Court concluded Lewis's request for an in camera hearing was properly rejected and the first-time in-court identification evidence was properly admitted in Lewis's case. Id. at 43, 363 S.E.2d at 518.

In the case sub judice, Sturdivant readily conceded at trial and continues to concede on appeal no out-of-court identification procedure was employed in his case and, thus, Ward was never presented with a prior opportunity to make an identification of him outside of the immediate supervision of the trial court. Nevertheless, Sturdivant—while ignoring the fact Ward had a constitutional right to be present during the trial by virtue of being a victim of crime—maintains Ward was "confronted with" him prior to testifying solely by virtue of the fact Ward was present *in the courtroom* when the trial judge conducted an in camera discussion with the parties in response to defense counsel's improper request for Sturdivant to be permitted to voluntarily absent himself from his trial.[4] Based on that purported "confrontation," Sturdivant maintains due process somehow required the exclusion of Ward's identification of him as one of the robbers because the "unnecessarily suggestive confrontation caused a substantial likelihood of misidentification." Beyond that, Sturdivant maintains the trial judge should have granted a

[4] Obviously, defense counsel's request in that regard was improper and should have been immediately rejected by the trial judge. See State v. Moore, 308 S.C. 349, 351, 417 S.E.2d 869, 870 (1992) (instructing a criminal defendant has "no constitutional right not to be present at trial" in order to avoid being identified in the courtroom by a prosecution witness).

mistrial based on the admission of that identification evidence, which he characterizes as "tainted" and "unreliable."[5]

However, just like the victim in Lewis, Ward never previously made an identification of Sturdivant until he was on the witness stand during trial, *including* during the brief in camera discussion that occurred in which the trial judge noted Ward "may" potentially be able to make an identification if Sturdivant was present in the courtroom during Ward's testimony. See State v. Heller, 399 S.C. 157, 177, 731 S.E.2d 312, 323 (Ct. App. 2012) ("Our courts have refused . . . to extend the requirements of a Biggers hearing to protect criminal defendants against identifications that occur for the first time *in court*, without a pretrial identification."); cf. Brown, 356 S.C. at 504, 589 S.E.2d at 785 (explaining an out-of-court show-up identification procedure may be proper even when the police refer to the suspect as a suspect, the suspect is handcuffed, and the suspect in the presence of law enforcement officers). Thus, the only confrontation that occurred between Ward and Sturdivant—outside of the one that occurred during the crime itself, which had afforded Ward an opportunity to see his assailant's face—was one that was necessary and guaranteed by the constitutional right to confrontation at trial between an accuser and accused, and Ward's first-time identification of Sturdivant was made during their face-to-face meeting *in the courtroom* that took place as a result of that core constitutional right. See Coy v.

[5] As support for his current claim regarding the supposed lack of reliability of the identification evidence, Sturdivant notes he has a dollar sign tattoo under his eye that was "apparently" never referenced by Ward and Beckhoff. (App. Br. p. 7; p. 15). Notably though, defense counsel did not make a similar claim at any point during trial when attacking the reliability of the identification evidence. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). And, significantly, the likely reason he did not do so was Sturdivant's own testimony seemed to suggest he got his facial tattoo—which does not appear to be visible on the surveillance footage captured around the time of the robberies—at some unspecified point *after* the December 2018 incidents. (Tr. pp. 383-384; State's Ex. # 7 (Surveillance Footage)).

Iowa, 487 U.S. 1012, 1016 (1988) ("[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."); see also State v. Turner, 373 S.C. 121, 128, 644 S.E.2d 693, 697 (2007) (finding identification evidence to be reliable where the victim had an ample opportunity to view her assailant at the time of the crime and had a "full facial view of him while he asked her questions"); State v. Stewart, 275 S.C. 447, 449-450, 272 S.E.2d 628, 629 (1980) (finding identification evidence to be reliable even though the victim was only able to view the perpetrator's face for *five to seven seconds* during the incident); Govan, 372 S.C. at 560, 643 S.E.2d at 96 (recognizing a victim's attention would have been heightened during an armed robbery).

Under such circumstances, no due process concerns were raised in Sturdivant's case by virtue of Ward's in-court identification since it was made for the first time during trial, and the procedural safeguards applicable when a *pre-trial* identification procedure has been employed were simply not applicable in Sturdivant's case. See Lewis, 363 S.C. at 42, 609 S.E.2d at 518 ("We conclude, as the majority of courts have, that Neil v. Biggers does not apply to in-court identifications and that the remedy for any alleged suggestiveness of an in-court identification is cross-examination and argument. The United States Supreme Court has not extended its exclusionary rule to in-court identification procedures that are suggestive because of the trial setting."); cf. People v. Morales, 109 N.Y.S.3d 650, 651 (N.Y. App. Div. 2019) ("The defendant's due process rights were not violated when the Supreme Court permitted a witness to make a first-time, in-court identification during trial. In cases where there has been no pretrial identification procedure or the witness is unable to render a positive identification of the defendant, and the defendant is identified in court for the first time, the defendant is not deprived of a fair trial because the defense counsel is able to explore weaknesses and suggestiveness of the

identification in front of the jury" . . . . Here, defense counsel challenged the witness's testimony during cross-examination by eliciting that the witness saw the perpetrator for only two or three seconds, and that the in-court identification was being made four years after the incident. Further, defense counsel discussed those weaknesses during summation. Moreover, the defendant's challenge to the reliability of this evidence related to the weight to be afforded such evidence by the jury and not to its admissibility. . . ." (citations and internal quotations omitted)). Moreover, the fact Ward chose to exercise his absolute constitutional right to be present in the courtroom during Sturdivant's trial in no way necessitated a different result since Ward's presence *during trial* did not and could not result in any pre-trial identification being made outside the immediate supervision of the trial court as was necessary to trigger the need for any additional procedural safeguards beyond those that are a part of the trial process itself. See S.C. Const. art. I, § 24(A) (mandating a crime victim in South Carolina has a constitutional right to "be informed of and *present at* any criminal proceedings which are dispositive of the charges where the defendant has the right to be present" (emphasis added)); cf. State v. Adams, 430 S.C. 420, 438, 845 S.E.2d 217, 226 (Ct. App. 2020) ("As [the juvenile] victim's mother, she had a constitutional right to be present at Adams' trial.").

Accordingly, even though the circumstances surrounding any first-time in-court identification are—by necessity—at least somewhat suggestive, the trial judge properly permitted Ward to identify his assailant during trial and correctly left it to the jurors to determine the reliability of that identification evidence just as they were tasked with doing with all the other evidence admitted during trial.[6] See Perry, 565 U.S. at 245 ("[T]he jury, not the judge,

[6] Moreover, since Ward's identification only related to one of Sturdivant's armed robbery charges, any conceivable error in the admission of that evidence would have been entirely harmless as to Sturdivant's *other* armed robbery charge, which involved a different date and an

traditionally determines the reliability of evidence."); Brathwaite, 432 U.S. at 116 ("We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is *customary grist for the jury mill*. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." (citation omitted and emphasis added)); see also Stewart, 275 S.C. at 450, 272 S.E.2d at 629 ("[S]uggestiveness alone does not require the exclusion of evidence."); cf. State v. Washington, 323 S.C. 106, 112, 473 S.E.2d 479, 482 (1996) ("Because the jury had the opportunity to observe the witness and attach the credibility it deemed proper to his testimony, including the certainty or uncertainty of his identification, the identification is not unreliable."). Relatedly, since the trial judge committed no error by permitting Ward to make a first-time in-court identification during trial under the circumstances involved, the trial judge obviously did not err by declining to grant the extreme remedy of a mistrial based on that evidence's proper admission. See Harris, 340 S.C. at 63, 530 S.E.2d at 628 (instructing a trial judge's ruling on a mistrial motion "will not be disturbed on appeal absent an abuse of discretion amounting to an error of law"); see also State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010) ("The power of the trial court to declare a mistrial should be used *with the greatest caution* under *urgent circumstances* and for very plain and obvious reasons stated on the record by the trial court." (emphasis added)). Appellant's convictions should be affirmed.

---

entirely different victim who separately identified him as the perpetrator. See State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) ("Error is harmless when it could not reasonably have affected the result of the trial").

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Deputy Attorney General

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit

BY:_____
Mark R. Farthing
S.C. Bar Number 76901

ATTORNEYS FOR RESPONDENT

January 3, 2024