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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Bentley Price, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MAZAR STURDIVANT,

APPELLANT

APPELLATE CASE NO. 2022-001075

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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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?

STATEMENT OF THE CASE

On April 10, 2019, an Horry County Grand Jury indicted Mazar Sturdivant, Appellant, with two counts of armed robbery. Appellant was tried before the Honorable Bentley Price and a jury, on July 18, 2022, and July 20 – 21, 2022. Appellant was tried jointly with his codefendant, Dlanor Tilton. Appellant was represented by Johnny Gardner. Dlanor Tilton, who was tried in his absence, was represented by Eric Fox. Joshua Holford and Elizabeth Farmer prosecuted the case.[1]

Appellant was convicted as indicted. He was sentenced to serve concurrent terms of imprisonment of ten years. Tilton was also convicted as indicted.[2]

This appeal follows.

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[1] R. 1; R. 441.

[2] R. 417, ll. 10-23; R. 425, ll. 2-22; R. 460.

STATEMENT OF FACTS

On December 28, 2018, Matthew Beckoff came to Myrtle Beach and he used Grindr to find a young man for sex. Grindr is an all-male dating application (app) that uses geo-location to identify other males nearby. Matches are based on location and sexual preferences, such as preferred sexual position. Beckoff was directed to an address on Bryant Street. He was robbed at gunpoint by two suspects when he pulled up to the address at roughly 10:30 p.m. The suspects took his phone, wallet, and cash, and told him to leave.[3]

Beckoff called the police an hour and a half later. Beckoff initially told the police the suspects were a thirty-year-old and a forty-year-old black man. However, Beckoff later told the police the suspects looked like teenagers. Beckoff admitted he lied to the police about the suspects' ages. Beckoff "might" have told the police he did not see the suspects' faces well.[4]

The following night, December 29, 2018, Christopher Ward came to Myrtle Beach, and he also used Grindr to find a young man for sex. Ward drove a white sport utility vehicle (SUV). He was directed to the same address on Bryant Street shortly before 8:11 p.m. When Ward arrived, two suspects came out of the bushes with guns. Ward was ordered out of the car. The suspects wanted his keys. One of the suspects ran off. Ward ran off. The other suspect chased Ward and hit him in the head with a pistol. Ward ran to a nearby home, asked for help, and the police were called.[5]

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[3] R. 161, ll. 14-21; R. 181, l. 6 – 186, l. 17; R. 182, l. 9 – 183, l. 3; *see Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 584 (S.D.N.Y. 2018); *Saponaro v. Grindr, LLC*, 93 F. Supp. 3d 319, 321 (D.N.J. 2015).

[4] R. 112, l. 17 – 113, l. 20; R. 116, l. 3 – 117, l. 5; R. 119, l. 4 – 123, l. 4; R. 184, ll. 3-15; R. 187, l. 5 – 191, l. 12.

[5] R. 161, l. 23 – 162, l. 4; R. 213, l. 8 – 221, l. 7; R. 312, l. 8 – 318, l. 2; R. 213, l. 23 – 214, l. 5.

Law enforcement submitted the Grindr photograph to SLED's facial recognition program. The program matched that photograph to a photograph of nineteen-year-old Dlanor Tilton. Sergeant Gibson compared the Grindr photograph to additional photographs of Tilton from the Department of Motor Vehicles and from social media, and he agreed the Grindr photograph was Tilton.[6]

Law enforcement obtained video surveillance footage from a Circle K convenience store near the Bryant Street address. The video footage showed that at 10:13 p.m. on December 28, 2018, two young black men were inside the store buying drinks and snacks. Sergeant Gibson believed the two young men were Tilton and seventeen-year-old Appellant.[7]

Tilton lived next door to the Bryant Street address. Ward's white SUV was still in the driveway at the Bryant Street address when police arrived. Both Appellant and Tilton were found at Tilton's home by law enforcement in the following days. When police served a search warrant at Tilton's home, they found two realistic-looking black BB pistols. Ward's wallet was found inside the home. Appellant's wallet was also found inside the home.[8]

Tilton and Appellant were both interviewed by police. According to Investigator Amos, Appellant admitted being present at Tilton's home when Ward was robbed—he remembered seeing Ward's white SUV. However, Appellant denied participating in the robberies. Dlanor Tilton admitted matching with Beckoff and Ward on Grindr, directing them to Bryant Street, and

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[6] R. 146, l. 22 – 152 l. 22; R. 157, l. 8 – 161, l. 4.

[7] *See* State's Exhibit #7 (State's Exhibit #7 is the video surveillance footage from the Circle K store and is on file with this Court); R. 127, l. 1 – 130, l. 13; R. 338, ll. 2-4.

[8] R. 226, l. 14 – 229, l. 8; R. 236, l. 11 – 250, l. 20; R. 263, l. 25 – 264, l. 16; R. 281, ll. 7-12.

meeting up with them, but Tilton denied that any robberies occurred. Tilton claimed he often used the Grindr app to get strangers to buy food for him.[9]

Tilton and Appellant were both charged with the December 28 armed robbery of Beckoff and the December 29 armed robbery of Ward. The State tried the defendants jointly, and it tried the two incidents together as well. During pretrial motions, the court granted a motion to sequester witnesses.[10]

Tilton did not appear for trial and the joint trial proceeded in his absence. Appellant was present for the first day of trial. Appellant was warned that he must be present for trial the next day. However, he missed the second day of trial, and a bench warrant was issued. During the second day of trial, Beckoff testified. Beckoff was shown still photographs from the Circle K surveillance footage and he claimed he was one hundred percent certain the young men in the footage were the suspects. Beckoff said he wished the suspects were in court so he could identify them in person. Beckoff claimed he positively identified their photographs to law enforcement. However, no police officers testified about showing the suspects' photographs to Beckoff and no *Neil v. Biggers* hearings were held.[11]

The third day of trial, Appellant reappeared of his own volition, and Appellant explained he had been in Socastee at his mother's house without transportation the day before. The defense asked to waive Appellant's presence. The court observed that Ward was about to testify, and the court stated it thought Appellant should be present in case Ward could identify him. The court:

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[9] R. 163, l. 15 – 167, l. 16; R. 283, l. 20 – 289, l. 14.

[10] R. 91, l. 16 – 92, l. 19.

[11] R. 21, ll. 16-22; R. 137, l. 24 – 138, l. 3; R. 185, ll. 13-17; R. 186, ll. 2-10; R. 203, ll. 14-25; R. 51, l. 22 – 52, l. 4.

"I'm worried about the fact that, if he is here at trial—and the 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." The court ruled that if Appellant wanted to argue identity to the jury, then he would not be permitted to waive his presence—only if Appellant was present for Ward's testimony so that Ward had the opportunity to identify him could Appellant raise identity as a defense.[12]

Defense counsel argued an in-court identification by Ward would be too suggestive to be admissible. Defense counsel noted that Ward had been in the courtroom when the court ruled Appellant's presence would be tied to his ability to present an identity defense. Defense counsel also argued an identification would be too suggestive since it was apparent Appellant was the defendant in the courtroom. Counsel argued the circumstances had amounted to a "showup" [sic]. Defense counsel cited *United States v. Greene*, 704 F.3d 298 (4th Cir. 2013), to support his argument. The court permitted Ward to make an in-court identification of Appellant before the jury. Defense counsel argued the identification should be stricken.[13]

The court noted Appellant could cross-examine Ward about the identification but agreed that it was problematic Ward was present when he ruled on Appellant's request to waive his presence. "He can bring that up and raise cane about it, but that does not cure the fact that the jury is never going to know that the victim was in here during the options that I gave out." The court stated a curative instruction would be insufficient to mitigate the harm. Defense counsel asked for a mistrial. The court denied the mistrial motion and ruled that it would instruct the jury

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[12] R. 296, l. 20 – 297, l. 17; R. 305, l. 5 – 309, l. 25; R. 306, ll. 15-19.

[13] R. 306, ll. 15-21; R. 310, ll. 9-10; R. 311, ll. 2-12; R. 318, l. 5 – 326, l. 20.

it could give Ward's testimony whatever weight they chose. The court ruled the matter was one of credibility for the jury.[14]

Of note, although Appellant had a face tattoo under his eye, apparently neither Beckoff nor Ward included a face tattoo in their suspect descriptions to law enforcement. Appellant testified in his own defense. Appellant agreed he was one of the young men captured on the Circle K footage, and he admitted he spent time at Tilton's house. Appellant denied taking part in the robberies. Appellant also denied telling police he saw a white car outside Tilton's house but later said he did not remember. The jury deliberated for two hours but Appellant was convicted as indicted.[15]

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[14] R. 326, l. 21 – 329, l. 24.

[15] R. 345, ll. 8-19; R. 349, l. 11 – 363, l. 13; R. 356, l. 25; R. 417, ll. 10-20; R. 415, l. 1 – 417, l. 2.

ARGUMENT

I.

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.

A. Standard of review

"[W]hether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) (finding show-up identification unreliable as a matter of law). Trial courts must hold a preliminary hearing "once it is contended that an identification is obtained under unnecessarily suggestive circumstances arranged by state action, regardless of the witness's prior knowledge of the accused." *State v. Liverman*, 398 S.C. 130, 140, 727 S.E.2d 422, 427 (2012) (finding error in trial court holding the "functional equivalent" of a *Neil v. Biggers* hearing).

"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 such, or the commission of prejudicial legal error." *Id.* "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.* Questions of law are reviewed *de novo*. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

B. Discussion

i. Introduction

Ward was present in the courtroom when the judge ruled that Appellant would not be permitted to argue an identity defense unless he remained in the courtroom when Ward testified, so that Ward would have the opportunity to identify Appellant. Appellant was the only defendant in the courtroom at the time. These circumstances presented an unnecessarily suggestive confrontation which occurred outside the presence of the jury, and resulted in an unreliable in-court identification. The trial judge correctly recognized that neither he nor Appellant's counsel would be able to adequately explain these circumstances to the jury. On these unusual facts, the court should have held an *in camera* hearing or otherwise excluded the identification.

ii. Due process requires the exclusion of an identification resulting from an unnecessarily suggestive confrontation when there was a substantial likelihood of misidentification.

Due process protection against the admission of evidence deriving from suggestive identification procedures guards against a substantial likelihood of misidentification. *Neil v. Biggers*, 409 U.S. 188, 196 (1972). "It is the likelihood of misidentification which violates a defendant's right to due process . . . Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." *Id.*, 409 U.S. at 198.

The identification must be suppressed if the procedures used were "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law." *Id.*, 409 U.S. at 196 (quoting *Stovall v. Denno*, 388 U.S. 293, 302 (1967)). To determine whether an unnecessarily suggestive confrontation requires the exclusion of

evidence, the court must consider whether the totality of circumstances indicates the identification was nevertheless reliable. *Id.*, 409 U.S. at 199. The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.*, 409 U.S. at 199-200. "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977). Where there is a substantial likelihood of misidentification, the evidence must be excluded. *Biggers*, 409 U.S. at 201.

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. First, a court must first determine whether the identification process was unduly suggestive. It next must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *State v. Moore*, 343 S.C. at 287, 540 S.E.2d at 447 (citing *Neil v. Biggers*; *Manson v. Braithwaite*, *supra*). "The United States Supreme Court has not yet addressed the question of whether first time in-court identifications are in the category of unnecessarily suggestive procedures that trigger due process protections." *State v. Dickson*, 141 A.3d 810, 821 (Conn. 2016).

In *State v. Simmons*, 308 S.C. 80, 81-82, 417 S.E.2d 92, 93 (1992), the defendant moved to suppress an in-court identification by an undercover officer who bought drugs at the defendant's home. After the defendant was arrested, the officer was told the defendant was having a bond hearing, and the officer witnessed the defendant when her bond was set. The

defense contended the in-court identification was the result of the bond hearing, not observation at the time of the crime. The South Carolina Supreme Court found the denial of the motion to suppress was error—the question was whether the identification arose solely from the witness's observation the night of the drug sale. "The identification must be free of and independent of any later suggestion that Simmons was the person who sold him the crack. The identification may be so tainted by the circumstances surrounding the bond hearing as to require that it be suppressed." *Id.*, 308 S.C. at 82, 417 S.E.2d at 93.

The Supreme Court remanded the matter for an *in camera* hearing on whether the in-court identification was "of independent origin [or] was the tainted product of circumstances surrounding the bond hearing . . ." *Id.*, 308 S.C. at 82, 417 S.E.2d at 94. The Supreme Court explained,

> **In *State v. Cash*, 257 S.C. 249, 185 S.E.2d 525 (1971), this Court adopted a *per se* rule requiring the court to hold an *in camera* hearing when the state offers witnesses whose testimony identifies the defendant as the person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous illegal identification.** *Contra Watkins v. Souder,* 449 U.S. 341, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981). The lower court refused to hold a hearing. This error warrants reversal.

Simmons, 308 S.C. at 82–83, 417 S.E.2d at 93. *See also State v. Ramsey*, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (discussing necessity for *in camera* hearing in situations where an in-court identification is the product of an unlawful confrontation or lineup); *Coleman v. Alabama*, 399 U.S. 1, 5-6 (1970) (evidence supported finding identifications were entirely based on observations at the time of the assault and not at all induced by the conduct of the lineup).

iii. The holding in *State v. Lewis*, that *Neil v. Biggers* does not apply to first time, in-court identifications, should be distinguished.

Lewis held that "the *Neil v. Biggers* analysis should not be extended to protect criminal defendants against identifications that occur for the first time in court without a pre-trial identification." *State v. Lewis*, 363 S.C. 37, 42, 609 S.E.2d 515, 517 (2005). In *Lewis*, the witness had never identified the defendants prior to trial. Lewis objected to the witness' in-court identification and asked for an *in camera* hearing to determine the reliability of the identification. The trial judge denied the request and the Supreme Court affirmed. *Id.*, 363 S.C. at 41, 609 S.E.2d at 517. "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." *Id.*, 363 S.C. at 42, 609 S.E.2d at 518.

State v. Lewis should be distinguished. In *Lewis*, unlike in this case, there was no indication the witness was confronted with the defendant in the courtroom prior to his testimony. *See United States v. Archibald*, 734 F.2d 938, 941 (2nd Cir. 1984) (any witness can determine which of the individuals in the courtroom is the defendant, which is the defense lawyer, and which is the prosecutor); *United States v. Greene*, 704 F.3d 298 (4th Cir. 2013) (in-court identification by witness who never made out-of-court identification was unnecessarily suggestive where it was clear who in the courtroom was the defendant).

More importantly, in *Lewis*, there was not the corrupting effect there was in this case of the witness hearing the trial judge's ruling that the defendant should be present in the courtroom so that the witness could try to identify him. *See Simmons v. United States*, 390 U.S. 377, 383 (1968) (chance of misidentification is heightened if police indicate to witness they have evidence one of the persons pictured committed the crime); *United States v. Rogers*, 126 F.2d 655, 658 (5th Cir. 1997) ("Even the best intentioned among us cannot be sure that our recollection is not

influenced by the fact that we are looking at a person we know the Government has charged with a crime."); *United States v. Wade*, 388 U.S. 218 (1967) (major factor contributing to "mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification."). The effect of the witness overhearing the judge's ruling on identity cannot be overstated—it is hard to imagine a circumstance more unnecessarily suggestive and conducive to misidentification.

The reasoning in *Lewis* does not work when applied to these facts. "[W]e conclude *Neil v. Biggers* does not apply to a first-time in-court identification **because the judge is present and can adequately address relevant problems; the jury is physically present to witness the identification**, rather than merely hearing testimony about it; **and cross-examination offers defendants an adequate safeguard** or remedy against suggestive examinations." *Lewis*, 363 S.C. at 43, 609 S.E.2d at 518 (emphasis added). Importantly, although the judge was there to address problems, the judge did not adequately address this problem. Nor was the jury present during the *in camera* ruling when Ward was confronted with Appellant. The trial judge recognized that cross-examination was not an adequate safeguard under these unusual circumstances because neither the court nor counsel could explain that Ward was confronted with Appellant during the court's ruling about identity. *Lewis* should be distinguished.

Finally, *Perry v. New Hampshire* does not bar relief in this case and should be distinguished. "[T]he Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." *Perry v. New Hampshire*, 565 U.S. 228, 248 (2012). Therefore, whether a *Biggers* hearing is required "turn[s] on the

presence of state action and aim[s] to deter police from rigging identification procedures." *Id.*, 565 U.S. 232-33.

Unlike this case, the question of whether a prosecution-orchestrated first time in-court identification triggered due process protections was not before the Court in *Perry*. Moreover, this was state action—prosecution conduct—of asking the witness for a first-time in-court identification after the corrupting circumstances of Ward hearing the court's ruling on identity. *See Dickson*, 141 A.3d at 824 (concluding that prosecutor's elicitation of in-court identification was state conduct). *Perry* does not preclude relief in this case. Regardless, an identical hearing should have been held pursuant to *Cash*, 257 S.C. at 253, 185 S.E.2d 526-27, *Simmons*, 308 S.C. at 82–83, 417 S.E.2d at 93, and *Ramsey*, 345 S.C. at 613, 550 S.E.2d at 297, as discussed above.[16]

iv. Due process required excluding Ward's identification—the unnecessarily suggestive confrontation caused a substantial likelihood of misidentification.

The in-court identification was impermissibly suggestive and unreliable. *Biggers*, 409 U.S. at 199-200, considers: (1) the opportunity of the witness to view the criminal at the time of the crime. It was dark; nighttime. Ward stated his assailant was "in my face with a gun." "One of them grabbed me with a gun . . . chased me down the road." He "grabbed ahold of me and stopped me, and then, finally, I got away from him again. He wanted my keys to my car, and I wouldn't give them to him."[17]

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16 Interestingly, "[s]ince *Perry*, other circuits have debated whether or not the Court's decision overruled circuit-level precedent requiring inquiries into the suggestiveness and reliability of in-court identifications." *United States v. Thomas*, 849 F.3d 906, 910 (10th Cir. 2017).

17 R. 325, ll. 5-8; R. 321, ll. 15-18; R 319, ll. 5-6; R. 315, l. 10 – 316, l. 2.

(2) the witness' degree of attention. Ward stated, "I do know him by his face because he was in my face with a gun." *See United States v. Greene*, 704 F.3d at 308 (when a weapon is visible during a crime, "weapon focus" can impair ability to make a reliable identification). (3) the accuracy of the witness' prior description of the criminal. Ward only described his assailant to the police as a "black gentleman." As seen, however, Appellant was light-skinned, seventeen years old, and had a tattoo of a dollar sign under his eye—none of which were described by Ward. Nor did Ward provide any height, weight, build, hair, or clothing descriptions. (4) the level of certainty demonstrated by the witness at the confrontation. It is not known how certain Ward was when he confronted Appellant in the courtroom during the court's *in camera* ruling. Finally, (5) the length of time between the crime and the confrontation. Over three years had passed since the night Ward was robbed and the day that he saw Appellant in court. *See Neil v. Biggers*, 409 U.S. at 201 (lapse of seven months between crime and confrontation would be a seriously negative factor in most cases).[18]

Ward had limited opportunity to view his assailants, his attention was on the assailants' guns, he was unable to provide a description beyond "black gentleman," his level of certainty at the confrontation (during the court's *in camera* ruling) is not in the record, and years had passed since the robbery. Ward had just heard the judge say the judge wanted to see if Ward could identify Appellant as his assailant, which would have had an incredibly corrupting effect on any witness. Appellant was the only defendant in the courtroom. *See State v. Moore*, 343 S.C. at 287, 540 S.E.2d at 448 (single person show-ups are particularly disfavored in the law). Under the totality of these circumstances, there was a substantial likelihood of misidentification. *Manson v. Braithwaite*, 432 U.S. at 114; *Biggers*, 409 U.S. at 201.

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[18] R. 319, ll. 5-20; State's Exhibit #7; R. 356, l. 25.

The court should have excluded the identification on these unusual facts. The trial court was correct that Appellant was not permitted to absent himself from court to avoid an identification. *See State v. Moore*, 308 S.C. 349, 351, 417 S.E.2d 869, 870 (1992) (defendant had no constitutional right to be absent from trial in order to preclude in-court identification of him by the State's witnesses). However, it does not follow that the State could permissibly conduct an unnecessarily suggestive in-court identification procedure. *See United States v. Archibald*, 734 F.2d at 941 (trial court had obligation to ensure that in-court identification procedure did not simply amount to a show-up); *State v. Simmons*, 308 S.C. at 83, 417 S.E.2d at 94 (defendant entitled to new trial where in-court identification of was not of independent origin but was the tainted product of the circumstances surrounding the bond hearing). The in-court identification was so tainted by the circumstances as to require suppression. *Simmons*, 308 S.C. at 83, 417 S.E.2d at 94; *Biggers*, 409 U.S. at 201.

v. The error was not harmless.

Without Ward's identification, there was no direct evidence that Appellant participated in the December 29th armed robbery. Ward's identification of Appellant also significantly strengthened the State's case as to the December 28th robbery.

"Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *State v. Byers*, 392 S.C. 438, 447–48, 710 S.E.2d 55, 60 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). Where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, an insubstantial error that does not affect the result of the trial is considered harmless. *Id.* A harmless error analysis is contextual and specific to the circumstances of the case. No definite rule of law governs a finding of harmless error; rather the materiality and prejudicial

character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial. *Id.* (citing *State v. Reeves*, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990)). "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. Pagan*, 369 S.C. at 212, 631 S.E.2d at 267.

As to the December 29th robbery, the State had a weak case against Appellant without the identification by Ward. The evidence was circumstantial. Appellant's wallet was located in the home next door and Appellant was located in the home next door in the days after the robberies. Appellant admitted to being at the home when a white SUV was present, according to Investigator Amos. Beckoff identified Appellant as participating in a similar robbery the night before.

The State's case against Appellant on the December 28th robbery was largely dependent on Beckoff's identification, although Appellant admitted to being at a nearby convenience store that night. However, Beckoff had serious credibility problems—he admitted lying to the police about the suspects' descriptions; initially he said the suspects were in their thirties and forties. He admitted he may have told the police he could not see the suspects' faces well.

Also, the jury could have concluded that Appellant had a propensity to commit robberies based on Ward's identification and the fact the crimes on consecutive nights were joined at trial, thereby affecting the outcome of trial as to both offenses. The erroneous admission of Ward's identification was not harmless on these facts. *Pagan*, 369 S.C. at 212, 631 S.E.2d at 267.

II.

The trial court erred in denying Appellant's mistrial motion based on the unnecessarily suggestive confrontation and unreliable identification.

A. Standard of review

A trial judge's decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. *State v. Rowlands*, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). "Whether a mistrial is manifestly necessary is a fact specific inquiry. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." *Id.* at 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted). Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. *State v. Dial*, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing *State v. Wiley*, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010).

B. Discussion[19]

Ward was present in the courtroom when the judge ruled that Appellant would not be permitted to argue an identity defense unless Appellant was present during Ward's testimony so that Ward had the opportunity to identify him. When counsel realized Ward was in the courtroom, counsel brought that fact to the judge's attention. Counsel noted that Ward was in the courtroom during the judge's ruling, and that Appellant was the only defendant in the courtroom, and he argued the circumstances were suggestive. The court permitted the identification. Counsel asked for a mistrial. The trial court correctly recognized that Appellant would be unable to

[19] Appellant hereby incorporates the discussion from Issue I into Issue II.

explain these circumstances to the jury, and it correctly recognized that a curative instruction would be insufficient to mitigate the harm. However, the court then stated that victims were typically present during trial, including pretrial motions.[20]

Under these unusual circumstances, the court was constrained to declare a mistrial. Cross-examining Ward about the ruling or issuing a curative instruction would have confused the jury, invited speculation, required the court to comment on the facts, or suggested Appellant had an obligation to present a defense.

"[W]hether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." *State v. Herring*, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009). "The grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way." *Id.* "Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error." *Id.* "[A]n instruction to disregard objectionable evidence usually is deemed to have cured the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instruction the accused was prejudiced." *State v. Hale*, 284 S.C. 348, 354, 326 S.E.2d 418, 422 (Ct. App. 1985). "Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient *or* move for a mistrial to preserve an issue for review." *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005) (emphasis in original).

Remedial measures such as cross-examination or a curative instruction could not explain the circumstances under which Ward saw Appellant in the courtroom outside of the jury's

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[20] R. 305, l. 5 – 311, l. 11; R. 318, l. 11 – 319, l. 2; R. 326, l. 1 – 329, l. 24.

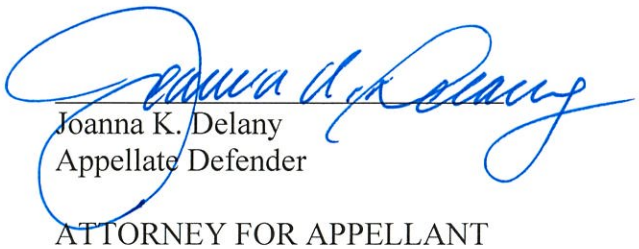
presence without confusing the jury, inviting speculation, commenting on the facts, or burden-shifting on whether Appellant should or should not have presented an identity defense. *See* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); *State v. Stukes*, 416 S.C. 493, 499, 787 S.E.2d 480, 483 (2016) (concluding "charge is confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case."); *Pantovich v. State*, 427 S.C. 555, 563, 832 S.E.2d 596, 600 (2019) ("there has been a trend to prohibit jury charges instructing juries on how to interpret and use evidence."); *State v. Burdette*, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019) (trial court may not directly comment upon facts in evidence, elevate those facts, and emphasize them to the jury).

See State v. Posey, 269 S.C. 500, 503, 238 S.E.2d 176, 177 (1977) (an accused is not required to present a defense and "has the right to rely entirely upon this presumption of innocence and the weakness in the State's case against him."); *State v. Sloan*, 278 S.C. 435, 438, 298 S.E.2d 92, 93 (1982) (solicitor's improper comment impermissibly invited jury to speculate about a matter irrelevant to defendant's guilt and diverted jury from its duty to decide guilt or innocence solely on evidence presented); *State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002) ("It is error to give instructions which are calculated to confuse or mislead the jury.").

On these highly unusual facts, the trial court should have granted a mistrial. *Herring*, 387 S.C. at 216, 692 S.E.2d at 498.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of February, 2024.

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Feb 22 2024
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Joanna K. Delany
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR APPELLANT

This 22nd day of February, 2024

RECEIVED
Feb 22 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Bentley Price, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MAZAR STURDIVANT,

APPELLANT

APPELLATE CASE NO. 2022-001075

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 22nd day of February, 2024.

Joanna K. Delany
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR APPELLANT

From: Warren, Kaylynn
To: Mark Farthing
Cc: Delany, Joanna; Caroline Collins
Subject: 2022-001075 The State v. Mazar Sturdivant
Date: Thursday, February 22, 2024 9:21:00 AM
Attachments: 2022-001075 The State v. Mazar Sturdivant Final Brief of Appellant.pdf

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Good Morning,

Attached for service in the above-referenced case is the Final Brief of Appellant which will be filed today, February 22, 2024, with the Court of Appeals.

Respectfully,
Kaylynn

Kaylynn Warren
Administrative Assistant
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