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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County

Honorable Thomas William McGee, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TROY DOUGLAS JENKINS,

APPELLANT

APPELLATE CASE NO. 2025-002280

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to suppress eye-witness identifications because the procedures used were unnecessarily suggestive and created a substantial likelihood of misidentification?

STATEMENT OF THE CASE

In April of 2025, the Kershaw County Grand Jury indicted Appellant, Troy Douglas Jemkins, for burglary first degree, two counts of kidnapping, possession of a weapon during the commission of a violent crime, armed robbery, and assault and battery first degree, indictments #2025-GS-28- 284-289.[1] (R. pp. **). On November 5, 2025, Appellant proceeded to jury trial before the Honorable Thomas William McGee. John Tate and Jason Kirincich represented Appellant. Michael Bradbury and Paul Walton prosecuted the case. The jury found Appellant guilty as indicted. Judge McGee sentenced Appellant to forty (45) years for burglary first degree, thirty (30) years concurrent for each kidnapping charge, five (5) years concurrent for the weapon charge, thirty (30) years concurrent for armed robbery, and ten (10) years concurrent for assault and battery first degree. (R. pp. **). A timely notice of intent to appeal was served on November 12, 2025. This appeal follows.

[1] The stamped void over the incorrect date and the replaced corrected date are explained during a motion to quash the indictments. (Tr. pp. 20-44).

STANDARD OF REVIEW

"Whether 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). In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court. Id. Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion. Id." State v. Liverman, 398 S.C. 130, 137–38, 727 S.E.2d 422, 425 (2012)

ARGUMENT

The trial judge erred in refusing to suppress eye-witness identifications because the procedures used were unnecessarily suggestive and created a substantial likelihood of misidentification.

Facts

On the afternoon of February 19, 2023, someone broke into the home of John and Mary Durai, held Mr. Durai at knife point, and demanded money. (Tr. p. 182, lines 1-16). Mr. Durai was cut during a struggle with the robber who eventually left the house after getting - $240.00 from Mr. Durai and an additional unknown amount[2] from Mrs. Durai. (Tr. p. 225, line 18 – p. 226, lines 1-19; p. 230, lines 2-8; p. 331, lines 7-13). Mrs. Durai called 911. (Tr. p. 332, lines 19-23).

Corporal Jordan Sanner, who at the time was with the Camden Police Department, received a call to be on the lookout for a black male wearing dark clothing with a ballcap, possibly carrying a knife. (Tr. p. 182, lines 17-23). At trial Sanner testified he saw someone who fit the description, tried to stop the individual but he ran away. (Tr. p. 182, line 24 – p. 183, lines 1-23). Appellant was apprehended and arrested by Sergeant Anderson and Officer Peters. (Tr. p. 79, line 20 – p. 80, lines 1-5). Appellant was placed in the back of a patrol car where Sanner, using his phone, took a photo of Appellant. (Tr. p. 189, line 23 – p. 190, lines 1-14). Sanner sent the photo to Sergeant Anderson who had returned to the Durai's house. (Tr. p. 191, lines 21-25; p. 80, lines 9-11). Sergeant Anderson showed the photo he received on his phone to

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[2] When asked about the amount of additional money Mr. Durai testified, "I really don't know. I – I asked my wife and she said she didn't really know. We – we found out it was about $2,000 more – more or less." (Tr. p. 230, lines 2-8). Mrs. Durai testified, "I – I don't remember exactly how much it was, but it was a nice stack of money."(Tr. p. 331, lines 7-13). The State told the judge that the $2600 and change recovered was the exact amount reported missing. (Tr. p. 88, lines 10-22).

the Durais. (Tr. p. 76, lines 1-5). John Durai testified that law enforcement showed him a photo, and he thought he recognized the person in the photo as the robber although he was not wearing a black shirt. (Tr. p. 233, lines 5-9). Law enforcement showed Mary Durai the single photo and she was unable to identify the robber. (Tr. p. 101, lines 3-23).

After Corporal Sanner took the photo of Appellant in the back of the police car, he assisted the canine unit with recovery of some money from a tree. (Tr. p. 192, line 3 – p. 193, lines 1-21). Canine Coda also located a black KFC [Kentucky Fried Chicken] shirt. (Tr. p. 212, line 16 – p. 213, lines 1-1-24). No forensic analysis was done of the shirt. (Tr. p. 325, lines 15-21). A knife was not found that day.

Appellant was taken to the Camden Police Department and interviewed by Detective Carl Olson and Sergeant Carmen Oxandaboure. (Tr. p. 246, line 5 – p. 247, lines 1-5; p. 296, lines 2 – 21). Halfway into the interview Sergeant Oxandaboure received a phone call from officers at the Durai home letting her know that "the homeowners were able to confirm a picture." (Tr. p. 248, line 22 – p. 249, lines 1-4). The officers asked Appellant if he had any money and he told them he had about $280.00 dollars from working at KFC. (Tr. p. 301, lines 11-20). According to the detective the money was seized because it was similar to the amount Mr. Durai gave the robber. (Tr. p. 302, lines 3-15).

Detective Olson testified that several days after the robbery he presented a six-person photo line-up to Mr. and Mrs. Durai and both identified Appellant from the line-up. (Tr. pp. 312-316). On February 24, 2023, the detective received a call that a neighbor of the Durais found a knife in a brush pile by the side of the road. (Tr. p. 306, lines 3-10). The detective collected the knife, and it was admitted in evidence without objection. (Tr. p. 310, lines 1-11).

Motion to Suppress Identifications

Pre-trial Appellant moved to suppress the out of court single photo identification of Appellant by Mr. Durai, the subsequent out of court six pack lineup identifications by both Mr. and Mrs. Durai, and the in-court identifications. (Tr. pp. 45-133; pp. 149-154). Appellant cited State v. Hardin, 425 S.C.1, 819 S.E.2d 177 (Ct.App. 2018), and argued the single photo identification was an unreliable, suggestive identification procedure. (Tr. p. 51, lines 1-21). Appellant argued the six pack lineup identifications were suggestive as a result of the single photo of Appellant shown to both John and Mary Durai. (Tr. p. 52, lines 19-25). Additionally, Appellant argued the six pack lineup identifications were suggestive because Appellant is the only one in the lineup wearing a bright blue shirt. (Tr. p. 109, line 19 – p. 110, lines 1-8; p.124, line 19 – p. 125, 126, lines 1-8).

The trial judge found the single photo identification was unduly suggestive. (Tr. p. 128, line 21 – p. 129, lines 1-8). Addressing the six pack lineups the judge stated, "I – I think it comes down to whether this first photograph taints the second and the in-court or not. Because I don't see that there's anything, any evidence before me that the six pack was improperly conducted. That there was pressure given or that he's – you know, that – that he's in with people that don't look like him at all or that somebody told him want to do." (Tr. p. 121, lines 18-25). While the judge acknowledged Appellant's argument about "the shirt," he failed to address the fact that Appellant was the only one in the line-up wearing a bright blue shirt. (Tr. p. 111, lines 5-13).

The judge then considered the Biggers factors and found that, although the single photo identification was unduly suggestive, the identification was reliable and there was not a substantial likelihood of misidentification. (Tr. pp. 129-132). The judge then made an alternate

ruling stating, "And so even if the Biggers factors did not – were—were in favor of the defendant instead of the State in this case, I think that it would be either harmless or cumulative as the – the Court would call to hear. So for – for those reasons and for reasons that we discussed earlier, I would respectfully deny the motion to exclude the – the photographs and the in-court identification" (Tr. p. 133, lines 9-17).

Appellant later asked for clarification on the admission of the single photo identification the judge found unduly suggestive. (Tr. p. 148, line 24 – p. 149, lines 1-15). Appellant argued the single photo, later admitted as State's #28, was not a fair and accurate depiction of what the Durais were shown on the officer's phone. (Tr. p. 152, line 16 – p. 153, lines 1-4). The judge ruled that the single photo identification, the six pack lineup identifications, and the in-court identifications were admissible. (Tr. p. 153, line 5 -p. 154, lines 1-18).

Appellant objected when State's #28, the single photo of Appellant in the back of a police car, was admitted in evidence. (Tr. p. 191, lines 9-10). Appellant objected to the in-court identification by John Durai. (Tr. p. 227, lines 17-18). Appellant objected when the State asked John Durai about identifying the robber in State's #28. (Tr. p. 232, line 15 – p. 233, lines 1-9). Appellant renewed pretrial objections to the out of court single photo identification of Appellant by Mr. Durai, the subsequent out of court six pack lineup identifications by both Mr. and Mrs. Durai, and the in-court identifications. (Tr. p. 238, lines 1-21). Appellant objected when Sergeant Oxandaboure testified about the identification from State's #28. (Tr. p. 249, lines 2-24). Appellant objected when Detective Olson testified about the six pack lineup identification and objected when the lineups were admitted in evidence as State's #30, #31. (Tr. p. 312, lines 7-22; p. 314, lines 11-19). Appellant objected to the in-court identification by Mary Durai. (Tr. p. 330, lines 3-12). At the close of the State's case Appellant again renewed the objections to the

single photo identification, State's #28, referring to it as a "show up," the two six pack lineups, State's #30, #31, and the in-court identifications. (Tr. p. 340, lines 7-20).

Appellant presented testimony from Dr. Dawn McQuiston, an expert in eye-witness identification, particularly cross racial identification. (Tr. pp. 353-373; p. 379, lines 10-22). Dr. McQuiston testified that the cross-race effect shows that people are not as accurate in remembering the face of a person of a different race. (Tr. p. 366, line 14 – p. 367, lines 1-6). The doctor testified about witnesses contaminating one another's memory. (Tr. p. 367, line 7 – p. 368, lines 1-5). She discussed the problems with one-on-one identifications. (Tr. p. 368, line 22 – p. 369, lines 1-12).

Dr. McQuiston testified about accepted procedures to be used when showing a lineup for witness identification. (Tr. p. 369, line 13 – pp. 370-372). She testified that the witness should be told the perpetrator may or may not be in the lineup. (Tr. p. 370, lines 1-4). She testified that the people in the lineup should reasonably resemble one another. (Tr. p. 370, lines 4-6). She testified that the procedure should be recorded, and the witness should be asked to rate their confidence level in making an identification. (Tr. p. 370, lines 8-25).

Detective Olson, who showed the photo lineups to Mr. and Mrs. Durai, admitted he had no formal training in lineup presentation. (Tr. p. 321, lines 23-25). The detective admitted that at the time he had not been to basic detective school at the academy. (Tr. p. 322, lines 1-5). When asked if he was aware of the double-blind standard in presenting lineups he answered, "I am at this stage of my career, yes." (Tr. p. 322, lines 6-8). The detective agreed that the double-blind standard uses an officer unfamiliar with the suspect to show the lineup to the witness. (Tr. p. 322, lines 9-15).

Dr. McQuiston reviewed the circumstances surrounding the identifications in the present case and testified, "I think that when you – when you consider these factors that I've described – a very highly stressful incident event and the cross-race nature of the situation, that there was a threatening weapon involved and also that a – a photograph was also shown before a lineup, when you – when you consider all these things together, I do think that there's some – I think it's important to consider the possibility of those things affecting – negatively affecting the reliability of an identification." (Tr. p. 373, lines 3-12).

Discussion

The trial judge erred in refusing to suppress the eye-witness identifications in this case because the procedures used were unnecessarily suggestive and created a substantial likelihood of misidentification. A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification. Stovall v. Denno 388 U.S. 293, 87 .Ct. 1967, 18 L.Ed.2d 1199 (1967). 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. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 14 (1977) (citing Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)); State v. Stewart, 275 S.C. 477, 272 S.E.2d 628 (1980).

In State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000), the South Carolina Supreme Court wrote:

> The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); Manson v. Brathwaite, supra. 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." Curtis v. Commonwealth, 11 Va.App. 28, 396 S.E.2d 386, 388 (1990)

(citing Neil v. Biggers, 409 U.S. at 198, 93 S.Ct. 375).

The unduly suggestive identifications in the present case created a substantial likelihood of misidentification. Both the out of court identifications and the in court identification should have been suppressed. The error in admitting the identifications requires reversal.

First Prong: Unduly Suggestive

The trial judge correctly found the single photo identification was unduly suggestive. (Tr. p. 128, line 21 – p. 129, lines 1-8). The single photo identification, State's #28, is the equivalent of a "show up" identification. "Single person show-ups are particularly disfavored in the law. Stovall, 388 U.S. at 302, 87 S.Ct. 1967 (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned); see also State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct.App.1993) (single person show-ups are particularly disfavored in the law)." State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 448 (2000). The single photo identification was not necessary in this case because at the time the photo was shown to the Durais, Appellant was in custody and being questioned. (Tr. p. 248, line 22 – p. 249, lines 1-4). Like in Hardin the single photo identification is unnecessarily suggestive.

The trial judge erred in refusing to find that the six pack lineups, State's #30, #31, were tainted by the unduly suggestive prior single photo identification, shown to both John and Mary Durai. Additionally, the judge erred in refusing to find that the six pack lineups were unnecessarily suggestive because Appellant was the only one in a bright blue shirt.

In Simmons v. United States, 390 U.S. 377, 383–84, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247 (1968)(footnotes omitted), the Court described how suggestive identification procedures may lead to misidentifications writing:

> It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.

In Simmons, decided four years before Biggers, FBI agents showed five bank employees who witnessed a robbery at their place of work, group photographs of Simmons, co-defendants, and others. Each of the five employees identified Simmons from the photographs. Later some of these witnesses were again interviewed by the FBI and shown indeterminate numbers of pictures. Again, all identified Simmons. At trial, the prosecution did not introduce any of the photographs but relied upon in-court identification by the five eyewitnesses, each of whom swore that Simmons was one of the robbers. While recognizing the danger involved with the identification procedure, the Court noted, citing Stovall v. Denno, " . . .that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons, 390 U.S. at 384, 88 S. Ct. at 971, 19. The Court first found that the identification

procedure used was necessary because the perpetrators of a serious crime were still at large. The Court then found, using some factors that later evolved into the Biggers factors, ". . . there was in the circumstances of this case little chance that the procedure utilized led to misidentification of Simmons." Simmons, 390 U.S. at 385, 88 S. Ct. at 971.

Unlike Simmons, in the present case the single photo identification was not necessary because at the time the photo was shown to the Durais, Appellant was in custody and being questioned. (Tr. p. 248, line 22 – p. 249, lines 1-4). The out of court identifications in the present meet the unnecessarily suggestive prong of Biggers. In Foster v. California, 394 U.S. 440, 443, 89 S. Ct. 1127, 1129, 22 L. Ed. 2d 402 (1969), the Court held, "The suggestive elements in this identification procedure made it all but inevitable that David [the sole eyewitness] would identify petitioner whether or not he was in fact 'the man.' In effect, the police repeatedly said to the witness, 'This is the man.' See Biggers v. Tennessee, 390 U.S. 404, 407, 88 S.Ct. 979, 980, 19 L.Ed.2d 1267 (dissenting opinion)." In Foster the police first showed the witness a lineup of three men. Foster stood out in the lineup because of his height and because he was wearing a leather jacket similar to the one worn by the robber. The witness was unable to identify Foster. The police then allowed a one-on-one confrontation between Foster and the witness. The witness was still uncertain. Several days later a second lineup was shown to the witness. Foster was the only person in the second lineup who was included in the first lineup. Unsurprisingly, the witness identified Foster.

In the present case the police first showed the witnesses an unduly suggestive single photo, followed by a photo lineup where Appellant stood out because he was wearing a bright blue shirt. As in Foster, it was all but inevitable that the witnesses would identify Appellant

whether or not he was in fact the robber. The out of court identification procedures, both the single photo and the six pack lineups, meet the unnecessarily suggestive first prong of Biggers.

Second Prong: Reliability

The trial judge erred in finding that the identifications were reliable and there was no substantial likelihood of misidentification. (Tr. p. 132, lines 6-12). In State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012), the South Carolina Supreme Court wrote:

> In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. 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. Biggers, 409 U.S. at 198, 93 S.Ct. 375. 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. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S.Ct. 375).

In addressing the Biggers factors the trial judge found that the witnesses had an opportunity to view the perpetrator, noting there was a confrontation in then middle of the day, and the perpetrator was not wearing a mask. (Tr. p. 129, line 17 – p. 130, lines 1-7). The judge found the witness's degree of attention was heightened by the fact that they were "scared, apprehensive, frightened." (Tr. p. 130, lines 7-14). The judge found the accuracy of the witness's description sufficient writing:

> Next is the accuracy of the witness' prior description of the perpetrator. And of course, we have the 911 call which – in which at the time that she is speaking with the 911 operator, Mrs Durai is – is watching the perpetrator walk away. She says he is a medium build. He's an African American male. He's got dark

> clothes, dark grey sweater, that he – it's discrepancy about whether he needs a shave or a beard and that he did not have a hat on. I find that – that is at least based on the picture that I see here; I see an African American male with grey hair. Whether or not he has a beard or needs a shave is – certainly subjective. He's got dark – dark clothing on, dark grey. I don't know if it's a sweater or if it's a sweatshirt, but I find that the accuracy is -- is sufficient in this case. That it is on par with what he looks like.

(Tr. p. 130, line 15 – p. 131, lines 1-7).

The judge found that although there was no direct testimony about the level of certainty demonstrated by the witness at the confrontation, Mrs. Durai did not seem confused on the 911 call. (Tr. p. 131, lines 8-17). The judge found the length of time between the crime and the confrontation was an hour and twenty-one minutes. (Tr. p. 131, lines 18-23). The judge then ruled, "So I'm – I find that under – that under Biggers, I find that those factors support the finding that the -- the identification nevertheless was so reliable that substantial likelihood of misidentification that no – I find that – that there is not a substantial likelihood of misidentification in this case." (Tr. p. 132, lines 6-12). The judge erred.

Considering the five Neil v. Biggers factors in the present case, the out-of-court identification procedures created a substantial likelihood of irreparable misidentification. Counsel argued that while the witnesses may have had some opportunity to view the perpetrator, the incident happened so fast. (Tr. p. 64, lines 12-16). Some opportunity to view the perpetrator does not render the identifications reliable. Contrary to the judge's finding of a heightened degree of attention, the expert testified that stress negatively impacts reliability. The physical description of a medium build African American male in dark clothes was vague. The judge found the physical description "sufficient." (Tr. p. 130, line 15 – p. 131, lines 1-7). As noted by the trial judge, there were discrepancies in the descriptions about facial hair and whether he was wearing a hat. A "sufficient" description does not make the identification reliable.

As additionally noted by the trial judge, during the pre-trial hearing there was no direct testimony about the level of certainty demonstrated by the witnesses at the confrontation. The prosecutor told the judge that Mary Durai was unable to identify Appellant as the robber from the single photo she viewed on the officer's phone. (Tr. p. 101, lines 3-23). The judge's observation that Mrs. Durai did not seem confused on the 911 call has no bearing on level of certainty factor, especially since she was unable to identify Appellant in the single photo. The prosecutor told the judge that John Durai was sure when he identified Appellant in the single photo from the officer's phone. (Tr. p. 114, lines 17-18; p. 116, lines 12-14). At trial, however, John Durai testified that he thought he recognized the person in the single photo as the robber although he was not wearing a black shirt. (Tr. p. 233, lines 5-9).

At trial Detective Olson testified Mary Durai was very confident when she selected Appellant's photo from the six pack lineup. (Tr. p. 316, lines 20-22). Her confidence is not surprising because she had previously been shown a single photo of Appellant in the back of a police car. The one hour and twenty-one-minute time period between the robbery and when Mr. Durai identified Appellant in the single photo alone does not establish reliability. The several days between the February 19, 2023, robbery and the February 22nd and 24th six pack photo lineups do not establish reliability. Under the totality of the circumstances the out of court identifications are unreliable as a matter of law. The in-court identifications of Appellant are inadmissible because the suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification.

In addition to not meeting the Biggers reliability factors, the identifications are further suspect because the witnesses and the perpetrator were different races. The expert testified at trial that the cross-racial nature of the identifications negatively affected reliability. (Tr. p. 373,

lines 3-12). Also, the detective who showed the six pack line ups had no formal training in lineup presentation, (Tr. p. 321, lines 23-25), and. at the time he had not been to basic detective school at the academy. (Tr. p. 322, lines 1-5). There was no supplemental documentation supporting the six pack photo lineup identifications. (Tr. p. 122, lines 3-6). The lineups were not shown to the witnesses by an officer who was unaware of the identity of the suspect. (Tr. p. 122, lines 6-10). The detective did not believe the witnesses were in the room together when the six pack lineups were shown, but he was not certain. (Tr. p. 316, lines 5-13).

The error in admitting both the out of court identifications as well as the in court identifications is not harmless. The trial judge interestingly found any error in the admission of the identifications harmless ruling, "And so even if the Biggers factors did not – were—were in favor of the defendant instead of the State in this case, I think that it would be either harmless or cumulative as the – the Court would call to hear. So for – for those reasons and for reasons that we discussed earlier, I would respectfully deny the motion to exclude the – the photographs and the in-court identification" (Tr. p. 133, lines 9-17). The trial judge additionally stated:

> And so each of those, according to my reading of Hardin, would allow the introduction of the out-of-court identification and photograph despite the initial issues because of the Biggers factors that I've made the ruling on and the alternative ruling, which is the other collateral supporting evidence. That's – that's the way I read it. If I'm reading Hardin wrong, and you can point me to it, please do, or another—another one. But that –that seems to be all focused on the out-of-court identification at Hardin and they lit [sic] it in and the Court said it was okay under the analysis that we've done here.

(Tr. p. 153, line 20 – p. 154, lines 1-7).

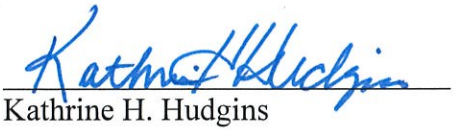
The Hardin case involved single photo from an officer's cellphone shown to witnesses, like in the present case. In Hardin the trial court found that despite the unduly suggestive identification procedure, the victims' out-of-court- identifications were nevertheless so reliable that no substantial likelihood of misidentification existed. The Court of Appeals. In Hardin,

found the trial court erred writing, "Under the totality of the circumstances, we find the circuit court erred in assessing the reliability of an otherwise unnecessarily suggestive identification procedure." Hardin, 425 S.C. at 14, 819 S.E.2d at 184. The Court of Appeals, however, found the error harmless because the State presented substantial evidence independently establishing Hardin's participation in the robbery, including the get away car matching a car Hardin admitted renting, guns found in Hardin's apartment matching guns used in the robbery, and merchandise from the robbery found in or near Hardin's apartment.

In the present case the State failed to present substantial evidence independently establishing Appellant's participation in the robbery. The Kentucky Fried Chicken [KFC] shirt and money found in the robber's purported route of escape and the $280.00 dollars Appellant told the officers he had from working at KFC, (Tr. p. 301, lines 11-20), is not substantial evidence independently establishing Appellant's participation in the robbery. (Tr. p. 132, line 13 – p. 133, lines 1-8). The amount of money Appellant had when arrested is close but not exactly the $240 Mr. Durai reported giving the robber. While Appellant said he got the $280 from working at KFC, there is nothing further to connect Appellant to the KFC shirt. Additionally, the robber was not described as wearing a KFC shirt. While the prosecutor told the judge that the $2600 and change recovered was the exact amount reported missing, (Tr. p. 88, lines 10-22), Mr. and Mrs. Durai seemed uncertain about the amount of money missing. (Tr. p. 230, lines 2-8; p. 331, lines 7-13). The evidence in the present case is far less than the substantial evidence discussed in Hardin.

CONCLUSION

Based on the above argument, this Court should reverse the convictions and remand for a new trial.



Kathrine H. Hudgins
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of September, 2026.