THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2013-001690

The State of South Carolina,.....Respondent,

v.

Kenneth Jowan Craig .....Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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I. APPELLANT'S ARGUMENT REGARDING THE IN-COURT IDENTIFICATION IS PRESERVED FOR REVIEW.

The State argues that Appellant has not properly preserved his argument regarding Justin Harrison's in-court identification. However, the State relies on an over-technical reading of the preservation rules.

Prior to Harrison taking the stand, Appellant argued at length about the improper suggestiveness of Harrison's out-of-court identification. (Tr. 204-207). After the trial court ruled that the out-of-court identification was not unduly suggestive, Harrison took the stand. As the State began to ask Harrison to identify the perpetrator in court, Appellant objected. (Tr. 220). Then, at the end of Harrison's testimony, Appellant raised the issue again, arguing that the in-court identification should not be allowed. (Tr. 231). While Appellant focused his later arguments on the State's failure to lay a foundation for how Harrison could recognize the perpetrator, the objections also logically related back to Appellant's earlier arguments regarding the improper suggestiveness of the out-of-court identification and how that tainted the in-court identification. Thus, a fair reading of the record demonstrates that the trial court was sufficiently apprised of the nature of the objection, and therefore, this issue is properly preserved for review. *See State v. Kromah*, 401 S.C. 340, 353-354, 737 S.E.2d 490, 497 (2013) (finding issue preserved for appeal even though "the full grounds for the exception were not articulated on the record at the time of the objection" because "it nevertheless appears from the transcript and the context of the proceedings that [the appellant's] reference to the parties' earlier discussion sufficiently apprised the trial

court of the nature of the objection"); *State v. McDonald*, 343 S.C. 319, 322-323, 540 S.E.2d 464, 465 (2000) (rejecting the State's argument that issue regarding proffered testimony was not preserved for review because the grounds for offering and admitting the testimony were apparent from the context of the proffer).

Furthermore, considering the number of objections Appellant raised with regard to the identifications, it would be unfair to require him to continue to harass the trial court, who made it clear that he was going to allow the out-of-court identification despite its highly suggestive nature. Considering the trial court's previous finding that the out-of-court identification was admissible, it would have been futile for the Appellant to re-argue this same issue again when the in-court identification was made. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 415-16, 529 S.E.2d 543, 547-48 (2000) ("This Court does not require parties to engage in futile actions in order to preserve issues for appellate review."); *see also State v. Bryant*, 316 S.C. 216, 220, 447 S.E.2d 852, 855 (1994) (finding issue preserved despite the appellant's failure to move to strike testimony because such a motion would have been futile in light of the trial court's previous ruling that testimony was proper); *State v. Ross*, 272 S.C. 56, 60–61, 249 S.E.2d 159, 162 (1978) (explaining that once the court rules on an objection, counsel is not obligated to repeat the objection after each question).

II. THE TRIAL COURT'S ADMISSION OF THE OUT-OF-COURT IDENTIFICATION ALONE JUSTIFIES THE REVERSAL OF APPELLANT'S CONVICTION.

Appellant's appeal does not hinge on this Court finding that the trial court erred in allowing into evidence Harrison's in-court identification of Appellant. Rather, the

erroneous admission of the out-of-court identification, standing alone, justifies a reversal of Appellant's conviction.

Whether an error is prejudicial enough to justify the reversal of a conviction depends upon the circumstances of each particular case. *State v. Thompson*, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). Errors are assumed to be prejudicial unless guilt can be conclusively proven beyond a reasonable doubt by the other competent evidence in the record. *State v. Miller*, 359 S.C. 589, 599-600, 598 S.E.2d 297, 303 (Ct. App. 2004).

Here, if there were no out-of-court identification, jurors could have had reasonable doubt as to the Appellant's guilt. Despite there being over a dozen witnesses to the armed robbery, Harrison was the only witness presented at trial who identified the Appellant as the perpetrator *before* trial and out-of-court. Had his in-court identification not have been bolstered by his prior out-of-court identification, the jury may have discounted it based on the significant amount of time that had passed. The only other evidence presented by the State was underwhelming: a surveillance video merely showing that two, black males robbed the Waffle House and dark clothing that contained gun residue. Appellant denied owning the black coat put into evidence, and he provided an explanation for how gun residue could have been found on his pants. (Tr. 508-09). Because the admission of the out-of court identification had "some probative value upon a material issue of fact [it] is presumed to be prejudicial" because evidence existed both ways upon a disputed issue. *S.C. State Highway Dep't v. Graydon*, 246 S.C. 509, 511, 144 S.E.2d 484, 485 (1965). Moreover, the State obviously considered the out-of-court identification to be critical or it would not have argued so strenuously against the Appellant's objection to it during trial.

III. THE TRIAL COURT AND THE STATE FAIL TO RECOGNIZE THAT THE DANGERS OF HIGHLY SUGGESTIVE MEDIA LINEUPS WARNED ABOUT IN *TISDALE* ARE PRESENT IN THIS CASE.

In *State v. Tisdale*, 338 S.C. 607, 612, 527 S.E.2d 389, 392 (Ct. App. 2000), this Court addressed the admissibility of three witness's pre-trial identifications of the defendant that were obtained after the witnesses saw a photograph of the defendant in television and newspaper coverage of the crime. Although the *Tisdale* court ultimately allowed the identifications, it "recognized the possibility of a case 'where the mind of a witness is so clouded by suggestions from nongovernment sources that a conviction based principally on the testimony of that witness violates due process.'" *Id.* at 613-14, 527 S.E.2d at 392-93 (quoting *U.S. v. Peele*, 574 F.2d 489, 491 (9th Cir. 1978)).

Unlike the police in *Tisdale* who attempted to obtain witness identifications within twenty-four hours of the crime, the police in this case waited a solid three days before contacting Harrison about identifying the perpetrator. By that time, the police were well aware that the Appellant's photo had been broadcast by local media outlets, and indeed, asked Harrison if he had seen the local news. Based on the technology and access to information available in today's society, if courts were to allow the police to delay this long before contacting witnesses to identify a suspect, the government could effectively skirt around the protections afforded in *Neil v. Biggers*, 409 U.S. 188, 198 (1972). Although in some cases, it may be difficult to determine whether the length of delay was unreasonable, in this case it is undeniable that waiting three days before contacting Harrison made it almost impossible for Harrison not to have seen the Appellant's photograph on the news as the lone suspect in the Waffle House robbery.

It has long been acknowledged by our Courts that the use of a photographic lineup carries with it the danger that a witness might make an incorrect identification,

and "[r]egardless 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." *Simmons v. U.S.*, 390 U.S. 377, 383-84 (U.S. 1968). To counter that inherent danger, the Courts have employed safeguards to protect the due process rights of defendants, requiring that lineups not be unduly suggestive, and if they are, that the identification be reliable enough that there is no substantial likelihood of misidentification. *Biggers*, 409 U.S. at 198.

Tellingly, it was only at trial (and after Harrison had viewed the Appellant's photograph in a single person lineup on the local news station) that he was able to articulate particular features of the Appellant's face. Immediately after the robbery, Harrison did not provide any details about the suspect, which is understandable considering he only saw the suspect for a matter of seconds after having experienced the shock of shooting and killing the other perpetrator. (Tr. 222-23). Despite Harrison's total inability to recall details immediately after the incident, Harrison was remarkably detailed in his description of Appellant's eyes, his complexion, and his facial hair many months later at the time of trial. (Tr. 221). The stark contrast of Harrison's lack of recall prior to the lineup as compared to his incredible recall after the lineup demonstrates exactly what *Tisdale* and *Simmons* warned: Harrison became "so clouded by suggestions from nongovernment sources" and as a result, Appellant's conviction, which was "based principally on [Harrison's] testimony" violated Appellant's due process rights. *Tisdale*, at 613-14, 527 S.E.2d at 392-93. Accordingly, the in-court and out-of court identifications should have been excluded.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that his conviction be reversed.

Respectfully submitted,

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March 20, 2014
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2013-001690

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing ***Initial Reply Brief of Appellant*** has been served upon counsel of record via hand delivery on the 20th day of March, 2014, to address shown below.

Salley Elliott, Assistant Attorney General
Rembert Dennis Building
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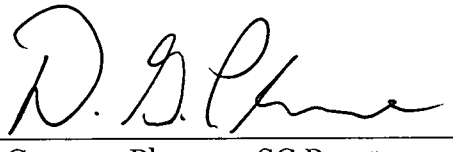

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March 20, 2014

VIA HAND DELIVERY

The Hon. Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
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Re: *The State v. Kenneth Jowan Craig*
Appellate Case No. 2013-001690

Dear Ms. Kitchings:

On behalf of Appellant Kenneth Jowan Craig, please find enclosed an original and eight (8) copies of the ***Initial Reply Brief of Appellant,*** along with the ***Proof of Service***. Please return a clocked-in copy to our courier.

By copy of this letter and as evidenced by the attached Proof of Service, we are serving counsel of record with a copy of the same.

Thank you for your assistance in this matter.

Very truly yours,

D. Gregory Placone

DGP/bn
Enclosure

cc: Robert Michael Dudek (via email, w/encl.)
Salley W. Elliott, Assistant Attorney General (via hand delivery, w/encl.)

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