

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
John C. Hayes, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

CLAYTON L. MASSEY,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court did not err in finding the informant's identification of Appellant was admissible where the photographic lineup was not unduly suggestive; where Appellant failed to argue it was suggestive to the trial court; and where the informant had purchased crack cocaine from Appellant at least ten other times, watched Appellant take a rock of crack cocaine from his mouth during the controlled buy, and was certain of his identification.

STATEMENT OF THE CASE

Appellant Massey was tried by jury before the Honorable John C. Hayes, III, on March 20, 2013 for distribution of crack cocaine. The jury found Massey guilty as charged. Judge Hayes sentenced Massey to fifteen years' imprisonment.

STATEMENT OF FACTS

Ron Birch was working as a confidential informant for the Rock Hill Police Department. He made a controlled purchase of crack cocaine from Appellant Massey.

In camera proceeding

Prior to trial, the State presented Birch and Detective Josh Welch as witnesses in a Neil v. Biggers¹ hearing.

Birch testified he did not know Massey's name at the time he set up a purchase from Massey, but Birch purchased crack cocaine from Massey at least ten other times. Each transaction lasted about five seconds. Birch testified he was able to take a good look at Massey's face each time. Tr. pp. 10-11.

A recording device was placed in Birch's car by Detective Welch. Birch drove to the transaction and purchased crack cocaine on September 16, 2011. Tr. p. 12. Birch testified that several days later, Detective Welch showed him a photographic lineup. Birch chose Massey's picture from the photographic lineup as the person from whom he purchased the crack cocaine. Tr. pp. 13-14. This was the only lineup Birch was shown. Tr. p. 14. Birch signed a form indicating the following:

I have freely and voluntarily without threats or promises viewed a photographic lineup as shown by the officer listed below. The officer in no way suggested any particular photograph. I am positive without a doubt that the person I picked is the responsible party. I have initialed the attached photograph.

Tr. p. 15, lines 4-9.

Birch testified that the prior transactions typically occurred during the daytime.

¹ 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

Tr. pp. 17-18. Defense counsel asked Birch how he contacted Massey, and Birch said by phone. Birch told defense counsel the phone number used to contact Massey. Tr. pp. 17-18. Birch testified on cross-examination that he picked Massey out fairly quickly because of Massey's distinguishable features. Tr. p. 19. He testified that the distinguishable features were: "His eyes, elongated longer face. I knew without a question it was very obvious. I mean somebody I had seen a number of times. It was very obvious." Tr. p. 19, lines 9-11.

Detective Welch was a police officer for seventeen years at the time of trial. He met with Birch to discuss Birch working for him as a confidential informant. Tr. p. 21. Detective Welch testified that Birch indicated he could purchase crack cocaine from a person he knew in the Boyd Hill area. All Birch knew was the person's phone number. Birch did not know his name or address and only identified him as a black male. Tr. p. 22. Birch met with Detective Welch to set up the deal on September 16, 2014. Birch made a phone call to set up the transaction and the phone call was recorded. Tr. pp. 22-23.

The transaction was recorded by audio device. Detective Welch was informed by an officer from the street crimes unit that Massey was the individual selling crack cocaine to Birch. Thereafter, Detective Welch put together a photographic lineup that included a photograph of Massey and five other individuals. Tr. pp. 24-25; Court's exhibits No. 1 and No. 2. Detective Welch showed Birch the photographic lineup on September 27, 2011. Tr. pp. 27-28. Detective Welch testified as to what he tells anyone when he presents them with a photographic lineup:

Every time I show a photo lineup, in every case, I always take the photographs in there and I tell the person the person may or may not be in the lineup that you bought

crack from or, you know, that or whatever I'm doing I always say the person may or may not be in the lineup, if you could look at the lineup and tell me if they're in there. Then I'll lay it in front of them and let them look at it. **And that's what I did on that day.**

Tr. p. 28, lines 15-22 (emphasis added). It was the only photographic lineup he showed Birch. Tr. p. 29, lines 18-20. Birch chose Massey's picture out of the lineup. Tr. pp. 29-30.

Detective Welch described how the other pictures in the photographic lineup were selected:

The program works when you log into our system. Anybody who's ever been booked into our jail at the Rock Hill Police Department they are put into this system. Whenever you select the name it puts the photograph of the person up there and it puts all their identifying features and then you select create a lineup using these same features, height, weight, hair color, eye color, things like that. And it brings up a line or it brings up pages and pages of people that you pick and put into the lineup. Then when you print it – When you print it out the order that you print, put them on there, when you print it out it puts it in its own order so it doesn't go by your order or anything like that. It does its own order as far as how they go in the lineup.

Tr. p. 30, line 12 - p. 31, line 1.

The in limine ruling

At the conclusion of the Biggers hearing, Judge Hayes ruled as follows:

Well I find by clear and convincing evidence that the lineup is not unduly suggestive; that the trial identification procedure utilized by the law enforcement does not create a very substantial likelihood or any substantial or any likelihood of irreparable misidentification. I find Mr. Birch's identification of Mr. Massey is reliable and may be introduced in front of a jury here in addition to the photo lineup identification being reliable I find that Mr. Birch had during day light hours though short opportunities to view the

defendant face to face and that his identification was to use his word to a degree of quote without question quote so I'll allow the identification in. And the photo lineup.

Tr. p. 37, line 16 – p. 38, line 3.

Jury trial testimony

Ronald Birch was arrested for possession of crack cocaine and subsequently agreed to assist law enforcement by purchasing crack cocaine. Tr. pp. 68-69. Birch explained: “No promises specifically been made to me; said that we would work to help me out as much as possible but I had no specific promises.” Tr. p. 69, lines 1-3. Birch explained that while he did not know Massey’s name or address, he met Massey a minimum of ten times and was able to get in touch with Massey by phone. An audio recording was made of Birch setting up a drug deal with Massey. Tr. p. 71.

Birch asked Massey if he had anything good today and asked for a “forty”, which Massey explained to the jury meant forty dollars’ worth of crack cocaine. Tr. p. 72. After a second phone call, Massey requested Birch meet him at the “Venero” store. Tr. pp. 76-77. Massey entered Birch’s car and took crack cocaine from his mouth and gave it to Birch in exchange for forty dollars. Tr. p. 78. Eleven days later, Birch picked Massey out of a photographic lineup. Tr. pp. 82-84.

Detective Welch explained the purpose of utilizing a confidential informant as follows:

The purpose of using a confidential informant me – I couldn’t go to a neighborhood and get somebody to sell me crack cocaine. They would pick up on it, they would know me. I don’t know the street lingo. They haven’t seen me before. So the purpose of using a confidential informant is you have a person at this level and you try to reach the next level and the way to do that is you have to use those people

who are already established in that area who already know these people who are dealing drugs to take down the dealers and to try to work your way up the chain. And that's the main goal.

Tr. p. 98, lines 9-19.

Detective Welch testified that after he returned, Birch handed him two rocks of crack cocaine. Tr. p. 106. Eleven days later, Detective Welch showed Birch the photographic lineup. Detective Welch testified he always advises the person presented with a photographic lineup that the perpetrator may or may not be in the lineup. Tr. p. 111.

The two rocks Massey sold Birch were .31 grams of crack cocaine. Tr. p. 129.

ARGUMENT

The trial court did not err in finding the informant's identification of Appellant was admissible where the photographic lineup was not unduly suggestive; where Appellant failed to argue it was suggestive to the trial court; and where the informant had purchased crack cocaine from Appellant at least ten other times, watched Appellant take a rock of crack cocaine from his mouth during the controlled buy, and was certain of his identification.

Massey complains that Birch's identification of Massey was unreliable and should have been suppressed. The identification, made from a photographic lineup of six people, was not unduly suggestive. Further, the identification was reliable because Birch had purchased crack cocaine from Massey ten other times and watched Massey take crack cocaine out of his mouth to complete the transaction, so his eyes were firmly set on Massey during the illegal drug transaction.

"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." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). A trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). In the instant case, the conclusions are supported by evidence.

A criminal defendant may be deprived of due process by an identification procedure that is so unnecessarily suggestive and conducive to irreparable mistaken identification. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) *overruled on other grounds by* Griffith v. Kentucky, 479 U.S. 314 (1987). The in-court

identification of the accused becomes inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); Moore, supra.

A two prong analysis is used to determine the admissibility of the out-of-court identification. The test is: 1) whether the identification process was unduly suggestive; and 2) whether the identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, supra; Moore, supra. Courts employing the test should consider the totality of circumstances. Biggers.

Massey complains that the photographic lineup was suggestive because, he contends, he appears larger than the other individuals in the lineup and the others had different facial shapes. Massey never raised this argument to the trial court, nor did he argue that law enforcement employed a suggestive identification procedure. Accordingly, this argument is not preserved for review.

“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373 628 S.E.2d 902, 919 (Ct. App. 2006). An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error. State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011). The objecting party may not argue one ground at trial and another on appeal. State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001).

Because Massey failed to present his argument about the composition of the photographic array to the trial court, both the State and the trial court were deprived of the opportunity to consider or respond to Massey's argument. It would be patently unfair to the State for this Court to consider this argument on appeal.

However, Massey's argument concerning the suggestiveness of the photographic array simply does not ring true. Viewing the exhibit, the individuals have the appearance of being roughly similar in size. Perhaps Massey considers the middle right photograph to depict a smaller individual. However, it is obvious that this person is merely set back further from the camera in the photograph. The identifying features of each individual are provided in Court's exhibit #3. ROA p. _____. The individual in the middle right photograph is only three inches shorter and five pounds lighter than Massey. Only one individual is substantially smaller than Massey. ROA p. _____. The individual in the top right photograph is five inches shorter and twenty-five pounds lighter. But due to the camera angle, he appears roughly of the same size as Massey. The facial shapes of most of the other individuals are similar, just not exact. Massey does not stick out from the others in such a way as to render the lineup unduly suggestive. The exhibits do not support Massey's arguments. See State v. Simmons, 384 S.C. 145, 168, 682 S.E.2d 19, 31 (Ct. App. 2009) (finding "[d]espite Simmons's contention that his ears were smaller than those of the other individuals in the line-up, his photograph does not stand out in such a way as to render the line-up unduly suggestive").

The North Carolina Supreme Court rendered a holding which readily applies to the instant case:

Although there is some disparity in age, height and weight of the lineup participants, these differences do not render the identification procedures so ‘unnecessarily suggestive and conducive to irreparable mistaken identification’ as to constitute a denial of due process. The State is not required to produce lineup subjects who are in all respects identical to the suspect. If such were the rule, no lineup would be valid because no two men are alike. Here, the lineup subjects approximated the general physical description given by the victim; and defendant was not rendered conspicuous by police procedures. The mere fact that defendant had specific identifying characteristics not shared by the other participants does not invalidate the lineup.

State v. Gaines, 194 S.E.2d 839, 844 (N.C. 1973).

Further, independent of the quality of the photographic lineup procedure, the identification is highly reliable, since Birch was a regular customer for Massey. “Suggestiveness alone does not require the exclusion of evidence.” State v. Washington, 323 S.C. 106, 473 S.E.2d 479, 481 (Ct. App. 1996). Courts must consider the totality of circumstances and consider the following factors in deciding the likelihood of misidentification:

- 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 at the confrontation;
- and 5) the time between the crime and the confrontation.

Washington, 473 S.E.2d at 481.

A trial judge should only exclude identification evidence if there is “‘a very substantial likelihood of irreparable misidentification.’” Perry v. New Hampshire, ___ U.S. ___, 132 S. Ct. 716, 720 (2012) (emphasis added and citation omitted). Indeed, the exclusion of evidence is a “drastic sanction” and should be “limited to identification testimony which is manifestly suspect.” Harker v. Maryland, 800 F.2d 437, 443 (4th Cir.

1983). The decision to admit an eyewitness identification is within the trial judge's discretion and will not be disturbed on appeal absent an abuse of that discretion or the commission of prejudicial legal error. State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000).

In the instant case, Massey challenges the admission of the identification based on the fact that the identification was made eleven days after the sale² and that Birch provided a vague description of Massey before the sale.

However, Birch testified he purchased crack cocaine from Massey on at least ten prior occasions during daylight hours. This is significant in establishing the reliability of the identification. See State v. Frazier, 394 S.C. 213, 222, 715 S.E.2d 650, 654 (Ct. App. 2011) (upholding an identification as reliable under the totality of the circumstances, “[p]lacing particular weight on [the witness’s] acquaintance with [the defendant]”); State v. Roach, 364 S.C. 422, 429-30, 613 S.E.2d 791, 794-95 (Ct. App. 2005) (upholding an identification as reliable where the witness had many previous encounters with the defendant and was familiar with him), *vacated in part on other grounds by State v. Roach*, 377 S.C. 2, 659 S.E.2d 107 (2008).

Birch’s opportunity to view Massey was enhanced by the fact he was conducting a business transaction up close with Massey by purchasing crack cocaine from Massey. Birch testified Massey took crack cocaine from his mouth to complete the sale. Obviously Birch’s attention was drawn to Massey during the transaction if he is watching Massey’s mouth. Birch was able to choose Massey’s photograph out of the photographic

² See State v. Patterson, 337 S.C. 215, 230-31, 522 S.E.2d 845, 853 (Ct. App. 1999) (noting that the identification took place “only two weeks” after the crime).

lineup with no difficulty. In Birch's words, "[i]t was very obvious." Tr. p. 19, line 11.

While Birch arguably did not provide a detailed description of Massey in advance of the illicit transaction, one has to consider the context of the description. This was not a situation where police were relying on a crime victim's description to search the immediate vicinity for a perpetrator. They were using Birch to bring the perpetrator to them. Instead, this was the foundation of a sting operation to catch Birch's supplier, someone Birch obviously knew, even if Birch did not know his dealer by name.

Which leaves Massey's last argument that too much time passed from the time of the transaction to when Birch picked Massey's photograph out of the lineup. Eleven days is hardly much time and under the totality of circumstances, hardly renders the trial court's well-reasoned determination unsupported by evidence or establishes an error of law. State v. Patterson, 337 S.C. 215, 230-31, 522 S.E.2d 845, 853 (Ct. App. 1999) (noting that the identification took place "only two weeks" after the crime).

"[R]eliability is the linchpin in determining the admissibility of identification testimony" Manson v. Brathwaite, 432 U.S. 98, 114 (1977). However, the United States Supreme Court has made clear:

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.

Manson, at 116. All of Massey's arguments concerning Birch's ability to correctly identify Massey go to the weight, not admissibility of Birch's identification. The trial court did not abuse its discretion in admitting evidence of the identification.

Finally, any conceivable error in admission is harmless beyond a reasonable doubt. Massey sat next to his counsel throughout the trial. The jury had the opportunity to view State's Exhibit #2, the video of the transaction. An individual who looks exactly like the photograph of Massey in Court's Exhibit #1 is clearly visible in the video during the course of the transaction, which occurs between the fourteenth and fifteenth minute of the video. State's Exhibit #2. The jury did not have to trust Birch's testimony, they could decide for their own eyes if the State met its burden of proving identity beyond a reasonable doubt. State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 554-555 (2001) (When other properly admitted testimony reveals essentially the same information, the jury's exposure to improper evidence is harmless). Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990).

In the instant case, Massey's photograph was chosen from a set of six photographs by Birch with ease because Birch was his regular customer and not because of any police procedure. Accordingly, the police lineup was not suggestive, the identification was reliable, and the trial court did not abuse its discretion in allowing the in-court identification.

CONCLUSION

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

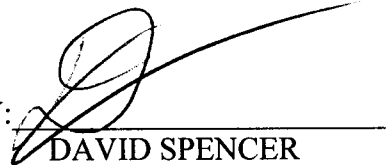
Respectfully submitted,

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**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Respondent proposes the following to be included in the Record on Appeal:

- (1) Court's Exhibits 1, 2, and 3 (photographic lineup, lineup form, and lineup image details);
- (2) State's Exhibits 1, 2, and 3 (audio (1 & 3) and video (2) recordings);
- (3) State's Exhibits 6 & 7 (photographs of defendant);
- (4) Tr. pp. 1-3; p. 159; p. 165.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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Respectfully submitted,

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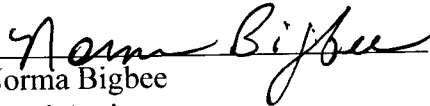
PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within **Initial Brief of Respondent and Designation of Matter** on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

**Lara M. Caudy, Esquire
Appellate Defender
SC Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.

This 24th day of March, 2014.


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