ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2013-001690

THE STATE,

Respondent,

v.

KENNETH JOWAN CRAIG,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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APR 2 9 2014

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STATEMENT OF ISSUE ON APPEAL

The trial court was within its discretion when it denied Appellant's motion to suppress and admitted into evidence the out-of-court identification and the in-court identification by the witness because it was not tainted by suggestive governmental involvement.

STATEMENT OF THE CASE

A Spartanburg County Grand Jury indicted Appellant for two counts of armed robbery, one count of possession of a firearm during the commission of a violent crime, and eleven counts of attempted armed robbery. (R. p.200-215.) On July 22, 2013, Appellant proceeded to trial before a jury and the Honorable Roger L. Couch. Richard Whelchel, Esquire, represented Appellant, and Assistant Solicitors Jennifer Jordan and Susan Reese represented the State. The jury found Appellant guilty on all counts. (R. p.193-196.) Judge Couch sentenced him to twenty years' imprisonment for the armed robbery charges, ten years' imprisonment for each attempted armed robbery charge, and five years' imprisonment for the possession of a firearm charge. (R. p.197-198.)

On August 2, 2013, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

On January 21, 2012, two men entered a Waffle House and ordered everyone to get down or they would die. (R. p.25, lines 23-25.) The first person, Dante Williams, was carrying a pistol and the second person had a black trash bag. (R. p.26, lines 4-15.) Justin Harrison, a customer in the restaurant who was carrying a gun, shot and killed Williams when he came toward him. (R. p.29, lines 19-25; R. p.30, lines 6-8.) Harrison initially backed the second robber into a corner, but the robber was able to get away and run from the Waffle House. (R. p.30, line 2-R. p.31, line 6.) Officers obtained a warrant for Appellant, arrested him, and charged him with fourteen counts all stemming from the Waffle House incident. (R. p.51, line 15-R. p.52, line 16; R. p.200-215.)

At trial, the State called Brittany McSwain and Adisa Norman, who both testified they were at McSwain's home on the night of January 20, 2012. (R. p.11, lines 18-20; R. p.17, lines 12-22.) McSwain testified she heard Appellant and Dante Williams discuss going on a mission that night. (R. p.12, lines 4-12.) She recounted Williams leaving with Appellant around midnight. (R. p.13, lines 4-22.) She specifically recalled Appellant taking off a brown and white jacket, and saying, "I'm in all black. Let's go." (R. p.14, lines 8-16.) McSwain testified Appellant had gloves when he left and that Williams came back to retrieve his own gloves. (R. p.15, lines 5-9.) She testified Appellant returned alone at approximately 3:30 a.m. and was acting nervous and shaken up. (R. p.15, line 15-R. p.16, line 5.) Appellant told McSwain he dropped Williams off in Pineview Hills. (R. p.16, lines 9-12.) Norman also testified that Appellant returned alone, was acting nervous, and said he dropped off Williams in Pineview Hills. (R. p.20, lines 2-22.)

Next, the State called Justin Harrison, the Waffle House customer who shot and killed Williams. (R. p.21, line 15.) He testified that two men entered the Waffle House shouting for everyone to get down or they would die. (R. p.25, lines 23-25.) He was able to see both men from where he was sitting at the bar. (R. p.27, lines 1-14.) He testified both men were wearing all black, including black gloves. (R. p.29, lines 9-12.) Harrison recalled Williams had something shielding his face from view but Appellant did not at the time Harrison initiated contact. (R. p.29, lines 13-18.) He explained how he backed Appellant into a corner and held his gun on him but that Appellant started crawling toward Williams and eventually wrestled Harrison out the interior door. (R. p.30, line 2-R. p.31, line 2.) Harrison testified Appellant put his hands on Harrison's gun, at which time Harrison pulled the trigger. (R. p.31, lines 2-5.) Appellant ran out of the Waffle House. (R. p.31, line 6.)

Harrison testified that when he had Appellant backed into the corner, Appellant did not have anything obstructing his face and he was able to get a clear look at Appellant's face. (R. p.32, lines 7-18.) When the State asked how long he was able to get a clear look at Appellant's face, defense counsel objected and told the trial court he had a matter of law to take up, at which time the trial court excused the jury. (R. p.32, lines 19-25.) Appellant moved to suppress the identification, arguing all evidence obtained as a result of Appellant's arrest needed to be suppressed because the arrest was in violation of his constitutional rights. (R. p.36, lines 18-22.) He further argued the arrest was made without probable cause. (R. p.37, lines 1-11.) Ultimately, Appellant articulated his argument as two motions, the second one being to "suppress the warrant and the identification that leads from the warrant." (R. p.39, lines 13-18.) The State

objected, arguing the probable cause hearing was over and that they were now past the stage where Appellant could object to the indictments. (R. p.40, lines 4-18.)

Appellant further argued, "When my client is arrested without probable cause, Your Honor, everything that stems from his arrest is tainted and should be, should not be allowed to go to the jury, which includes the pictures that were used in his photograph." (R. p.42, lines 17-21.) He then asked for a hearing to determine the reliability of the identification. (R. p.44, lines 6-8.) The trial court confirmed with the State that no formal identification process was conducted. (R. p.46, line 19-R. p.47, line 19.) The trial court then allowed defense counsel to make a proffer on the probable cause issue, and the defense called Investigator Jason Bryant. (R. p.50, lines 8-24.) Bryant testified he had evidence that Appellant had planned a robbery or mission or "lick" with Williams and had changed his clothes into all black and was the only one who had left with Williams prior to the robbery. (R. p.56, lines 2-15; R. p.67, lines 6-13.) Bryant had secured the warrant based on that evidence. (R. p.89, lines 12-23; R. p.60, lines 13-24; R. p.65, lines 8-16.)

As part of his argument regarding the warrant and whether any photograph obtained was the result of an illegal arrest, Appellant argued the State should not be allowed to use the identification Harrison made based on the photograph he saw on the news. (R. p.74, lines 14-22.) The trial court pointed out there was no formal identification process conducted by the State, and told Appellant he would have the right to offer proof if the State participated in a formal identification process such as a show-up or lineup. (R. p.75, lines 10-25.) The following exchange took place:

> The Court: If people just identify people when they see them on the street, that's not - - a different identification from when the State sponsors an identification, and the

> question of suggestiveness for the State sponsored identification are not necessarily present if I happen to walk down the street and see a gentleman I observed committing a crime earlier in the week and saw that's the guy who did it, and I call a policeman and say that's the guy who did it. There's a difference in that identification - - - . . . that I have to analyze.
>
> [Appellant]: Yes, sir.
>
> The Court: So, I'm trying to determine if you're claiming that the State conducted any type of formal State identification process here.
>
> [Appellant]: Yes, sir.
>
> The Court: Okay. What did they do?
>
> [Appellant]: The State advocated their responsibility, in my opinion in this case, to do that lineup or to conduct that lineup in a method that should be done in accord with Ne[i]l v. Biggers.
>
> Here's what the State did, Your Honor. The State obtained the arrest warrant for my client. Then they contacted what's going to be their main witness for identification and in this case, Your Honor. Three days after they contacted him, they contacted him and asked him did you see the news - - . . . and then he told them what they're doing.

(R. p.76, line 2-R. p.77, line 7.)

Defense counsel then argued the State used the press as a way to establish identification by asking Harrison, the main witness, whether he had seen the news. (R. p.76, line 20-R. p.77, line 18.) The trial court asked Appellant to provide evidence of how the State controls the press's publication of that photograph. (R. p.79, lines 3-7.) Appellant admitted no evidence demonstrated the pictures were published in accordance with some prior arrangement and that those types of reports are done by the media in the general course of business. (R. p.79, line 21-p.80, line 6.) The State argued Investigator Bryant did his job by asking if Harrison had seen any media coverage before showing

him a lineup because the fact he had seen a picture of the suspect on the news would have invalidated the lineup. (R. p.81, lines 18-22.) After listening to arguments from both parties, the trial court found probable cause existed to justify the warrant but deferred ruling on the reliability of the identification because "we didn't get that far." (R. p.83, line 9-R. p.84, line 20.) However, the trial court did rule "based on Drayton and Tisdale, that the identification should not be excluded for the reasons that you asked me to exclude it. . . . So, I will allow the identification to go forward should it be determined that the identification was reliable." (R. p.84, line 23-R. p.85, line 4.) The State then objected based on State v. Lewis that there was no need for a Neil v. Biggers hearing because the police did not conduct a lineup or show-up. (R. p.85, lines 9-14.) The trial court allowed Harrison back on the stand, stating it would deal with any objections of defense counsel at the time they were made. (R. p.85, line 24-R. p.86, line 1.)

The State continued its examination of Harrison, asking him for details about his view of the second robber. (R. p.87, lines 19-23.) Harrison testified he saw the second robber, Appellant, for thirty to forty-five seconds during which they were within a couple of feet of each other. (R. p.87, line 22-R. p.88, line 4.) Harrison testified he saw a picture of the second suspect on the news. (R. p.89, lines 13-25.) He confirmed that when he saw the picture on the news, he was 100% certain without a doubt that it was the man from the robbery. (R. p.90, lines 1-5.) Harrison then attended the bond hearing and recognized Appellant as the second robber, even though he noticed the man's hair was a little longer. (R. p.90, lines 6-17.) When the State seemed to begin to ask Harrison to point out to the trial court and jury the man he identified, defense counsel objected on the basis of lack of foundation because Harrison only saw the man for thirty to forty-five seconds. (R. p.90, lines 18-25.) The trial court asked the State to lay a better foundation,

and the State proceeded to elicit a more detailed description: short, small build, eyes like a sad puppy, dark complexion, very thick mustache. (R. p.91, 1-11.)

During cross-examination, Harrison testified, "The police called me and asked me if I could identify the second suspect from a police lineup and I said there was no use, that's the guy, y'all caught him." (R. p.98, lines 6-8.) After defense counsel finished his cross-examination, he objected again based on insufficient foundation because no testimony was given pertaining to height, weight, or lighting conditions. (R. p.101, lines 4-11.) The trial court overruled the objection and allowed Harrison to testify. (R. p.102, lines 4-10.) When the State continued its direct examination, Harrison identified Appellant in court as the second robber. (R. p.102, lines 17-24.) Upon further cross-examination, Harrison recounted wrestling through the inner door with Appellant side-by-side. (R. p.107, lines 11-25.) He testified that he tried to block Appellant's path and Appellant put both his hands on Harrison's pistol, kind of leaning over him, very close. (R. p.108, lines 4-10.)

SLED agent Michael Moskal testified as an expert in gunshot residue. (R. p.110, line 1-R. p.110, line 20.) He testified that he found gunshot residue on Appellant's clothing and the trial court admitted the gunshot residue kit without objection. (R. p.112, line 13-R. p.134, line 9.)

Ultimately, the jury found Appellant guilty on all counts, and Judge Couch sentenced him to twenty years' imprisonment for the armed robbery charges, ten years' imprisonment for each attempted armed robbery charge, and five years' imprisonment for the possession of a firearm charge. (R. p.193-198.)

ARGUMENT

The trial court was within its discretion when it denied Appellant's motion to suppress and admitted into evidence the out-of-court identification and the in-court identification by the witness because the identification was not tainted by suggestive governmental involvement.

Appellant argues the trial court erred by allowing an unnecessarily suggestive out-of-court identification based on publication of Appellant's photograph in the news media that led to an in-court identification of Appellant in the presence of the jury. He also claims the in-court identification was in error because the witness only viewed Appellant for less than forty-five seconds during a high-stress encounter after killing another perpetrator. To the contrary, the trial court properly overruled Appellant's objection to the out-of-court identification. Furthermore, Appellant did not object to witness Harrison's in-court identification of Appellant. Thus, that portion of the argument is not preserved for appellate review.

Standard of Review

In criminal cases, appellate courts only review errors of law. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. 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." State v. Liverman, 398 S.C. 130, 137-38, 727 S.E.2d 422, 425 (2012). "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).

Preservation

"Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review." In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009). If an error is not presented to and ruled upon by the trial court, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). The appellate court will not consider any issues that were not presented to or passed upon by the trial court. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000). 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). Appellant's issue on appeal regarding the trial court's admission of Harrison's in-court identification is not preserved for review.

Merits

"The admission of evidence is within the sound discretion of the trial court." State v. Tisdale, 338 S.C. 607, 611, 527 S.E.2d 389, 391 (Ct. App. 2000); see also State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 (1995); State v. Brown, 333 S.C. 185, 508 S.E.2d 38 (Ct. App. 1998). "Accordingly, a trial court's decision to allow the in-court identification of an accused will not be reversed absent an abuse of discretion or prejudicial legal error." Id. at 611, 527 S.E.2d at 392. "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." Id. (citations and quotation marks omitted).

"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." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). In Neil v. Biggers, the United States Supreme Court set forth a two-part test for courts to use in determining whether due process requires suppression of an eyewitness identification. 409 U.S. 188, 198 (1972). First, the court must determine whether the identification resulted from unnecessary and unduly suggestive **police procedures**. Id. (emphasis added). If so, the court must then determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id.

"Generally, the decision to admit an eyewitness identification is in the trial [court]'s discretion and will not be disturbed on appeal absent an abuse of discretion, or the commission of prejudicial legal error." State v. Brown, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App. 2003); see also State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000). A trial judge should only exclude the identification evidence if there is "'a **very substantial** likelihood of irreparable misidentification.'" Perry v. New Hampshire, 132 S. Ct. 716, 720 (2012) (emphasis added and citation omitted).

In Perry v. New Hampshire, 132 S. Ct. 716, 730 (2012), the United States Supreme Court held the 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.

> When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness

> identification and the requirement that guilt be proved beyond a reasonable doubt.

Id. at 721.

In the case sub judice, a Neil v. Biggers hearing was not necessary because there was no government-sponsored identification procedure. Nevertheless, Harrison's testimony at the hearing provided details about his identification of Appellant and his opportunity to view him. He testified he saw the second robber, Appellant, for thirty to forty-five seconds during which they were within a couple of feet of each other. (R. p.87, line 22-R. p.88, line 4.) Harrison testified that when he had Appellant backed into the corner, Appellant did not have anything obstructing his face and he was able to get a clear look at Appellant's face. (R. p.32, lines 7-18.) He explained how Appellant started crawling toward Williams and eventually wrestled Harrison out the interior door. (R. p.30, line 2-R. p.31, line 2.) Harrison testified Appellant put his hands on Harrison's gun, at which time Harrison pulled the trigger. (R. p.31, lines 2-5.) He confirmed that when he saw the picture on the news, he was 100% certain without a doubt that it was the man from the robbery. (R. p.90, lines 1-5.) Appellant attempts to argue Harrison's fear would "reasonably limit his ability to reliably identify Appellant." (App. Br. 14.) To the contrary, this Court has recognized in that under circumstances such as an armed robbery, specifically where a gun is being held to a victim's head, the victim's attention would have been heightened. State v. Govan, 372 S.C. 552, 560, 643 S.E.2d 92, 96 (Ct. App. 2007). See also State v. Blassingame, 338 S.C. 240, 252, 525 S.E.2d 535, 541-42 (Ct. App. 1999) ("A person in fear of his life presumably has a more acute degree of attention to his surroundings than a mere passerby.").

In State v. Tisdale, 338 S.C. 607, 611-15, 527 S.E.2d 389, 391-94 (Ct. App. 2000), this Court considered the effect of nongovernmental media photographs on the witnesses' identifications. Three bank tellers witnessed an armed robbery. Prior to law enforcement having an opportunity to show them a photo lineup, each teller notified police she had seen Tisdale either on the television news or in a newspaper photograph and identified him as the robber. Id. at 610, 527 S.E.2d at 391. Accordingly, the police found it unnecessary to conduct a photo lineup. Id.

This Court found the pretrial identification of Tisdale by the three tellers was properly admitted because the television and newspaper were nongovernmental sources of the suggestiveness. Id. at 611-15, 527 S.E.2d at 391-94. "The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available . . . ." Id. at 612, 527 S.E.2d at 392 (quoting Neil, 409 U.S. at 199). This Court pointed out "the impetus behind the harsh remedy of exclusion is police deterrence, concluding that while "the reliability of an identification may be affected by media identification, no police deterrence would be achieved by excluding evidence where there has been no governmental involvement." Id. Consequently, this Court held "that the Neil analysis is inapplicable where there is a nongovernmental identification source[,]" and determined the trial judge did not err in allowing the tellers' identification testimony. Id. at 612-13, 527 S.E.2d at 392.

The Tisdale court pointed out that all the tellers were fully cross-examined and determined "[t]he extent to which a suggestion from nongovernment sources has influenced the memory or perception of the witness, or the ability of the witness to articulate or relate the identifying characteristics of the accused, is a proper issue for the

trier of fact to determine." Id. at 613, 527 S.E.2d at 393 (citations and quotation marks omitted). This Court addressed factors such as the time between the crime and the media identification, the time the witnesses had to observe the robber, whether the view was obstructed, and the certainty of the witnesses' identifications. Additionally, this Court discussed the other evidence in the case, including a videotape of the robbery, Tisdale's car being seen near the scene of the robbery, another eyewitness's testimony he saw a black male driving the car, testimony the robber used a beige grocery bag in the robbery that matched one found in Tisdale's trunk, and evidence of a scar. For all these reasons, this Court affirmed the trial court's allowance of the identification testimony.

This case is almost identical to the facts of Tisdale. Harrison saw Appellant's photograph on the news and, before police could conduct a lineup, identified Appellant as the second robber 100% without a doubt. Additionally, the trial court addressed some of the same factors the trial court did in Tisdale: time to observe perpetrator, distance from perpetrator, whether view was obstructed, and certainty of identification. Just as in Tisdale, the police used the identification the witness made through the news source to identify the appellant. Furthermore, this was not 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." Tisdale, 338 S.C. at 613, 527 S.E.2d at 392. Appellant was allowed to cross-examine Harrison about his opportunity to view Appellant and his viewing Appellant's photograph on the news. Appellant questioned Harrison extensively before the jury about his view of Appellant, including how long he saw him, whether his face was obstructed by a mask, and how close to each other they were. (R. p.93, line 25-R. p.100, line 18.) Harrison saw Appellant for thirty to forty-five seconds; the witnesses in Tisdale saw the appellant

between thirty and forty-five seconds. Harrison testified he was a couple of feet away from the second robber at one point and was within an arm's length when Appellant put both his hands on Harrison's pistol; the witnesses in Tisdale testified to anywhere from a few inches away to three feet away from the appellant. The other evidence in this case is also similar to Tisdale. Other evidence included a videotape of the robbery; witnesses who heard Appellant planning a mission with Williams, dressing in all black, and leaving the house with Williams; and gunshot residue on Appellant's clothing.

In sum, in a case such as this where no law enforcement arrangement led to the identification, no hearing was required. As Perry v. New Hampshire held:

> When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

Perry at 721. The trial court correctly allowed Appellant to explore through cross-examination the influence the nongovernmental source of the media photograph may have had on Harrison's identification of Appellant. Then, the extent to which any possible suggestion influenced Harrison's memory or perception of Appellant, or his ability to articulate or relate Appellant's identifying characteristics, was reserved as a proper issue for the jury as the trier of fact. See Tisdale, 338 S.C. at 613, 527 S.E.2d at 393. Moreover, the trial court instructed the jury extensively on eyewitness identification and reasonable doubt. (R. p.184, line 19-R. p.186, line 9; R. p.191, line 8-R. p.192, line 13.) Therefore, the trial court correctly denied Appellant's motion to suppress Harrison's out-of-court identification.

CONCLUSION

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

Respectfully submitted,

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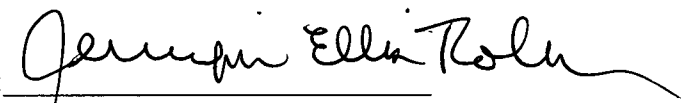
BY: 
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Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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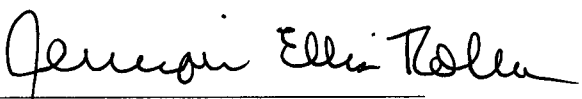
BY: 
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Appellant.

PROOF OF SERVICE

I, Angela Bennett, 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:

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I further certify that all parties required by Rule to be served have been served.
This 29th day of April, 2014.

Angela Bennett

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