

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

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SC Court of Appeals

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

v.

Kenneth Jowan CraigAppellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE ON APPEAL

- I. Did the trial court's admission of an out-of-court identification of Appellant deprive him of due process where the witness only identified Appellant after a highly suggestive identification procedure where Appellant's photograph was the only one shown by local news media, and did the trial court also err in admitting the in-court identification of Appellant where the witness only viewed Appellant for less than forty-five seconds during a high-stress encounter after the witness shot and killed another perpetrator?

STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg County grand jury on two counts of armed robbery, one count of possession of a firearm during the commission of a violent crime, eleven counts of attempted armed robbery, with all fourteen counts arising out of the same event or occurrence. (R. pp. 1-2.)

On July 23, 2013, Appellant proceeded to a two day trial before a jury and the Honorable Roger L. Couch. Richard Whelchel, Assistant Public Defender, represented Appellant and Jennifer Jordan and Susan Reese, Assistant Solicitors, represented the State of South Carolina. (R. pp. 3-4; R. p. 8.)

At the conclusion of the trial on July 25, 2013, the jury found Appellant guilty on all fourteen counts. (R. pp. 193-96.) Judge Couch sentenced Appellant as follows: 20 years imprisonment for the armed robbery charges, running concurrently; 10 years for each attempted armed robbery charged, running consecutively to the armed robbery sentence for one count and concurrently for the remaining ten counts; and, finally, 5 years for the possession of a firearm during the commission of a violent crime, running concurrently. (R. pp. 197-98.) Appellant was sentenced to a total of 30 years.

This appeal follows.

ARGUMENT

A. Summary of the Appeal

The trial court committed error in allowing the out-of-court identification of Appellant by a witness to be presented the jury. This identification resulted from unduly suggestive questioning, and created a very real risk of irreparable misidentification of Appellant at trial. For this reason, the subsequent in-court identification of Appellant by the same witness also constituted reversible error, requiring remand for a new trial.

B. Statement of Facts

In the early morning hours of January 21, 2012, two individuals committed an armed robbery of a Waffle House restaurant in Chesnee, South Carolina. Both the restaurant and the restaurant patrons were targeted in the armed robbery. (R. pp. 25-26.) It is undisputed that one perpetrator, the now-deceased Dante Williams (“Mr. Williams”), was armed with a handgun, and the other perpetrator carried a bag to transport the fruits of the crime. (R. p. 25.) Mr. Williams brandished a handgun as he entered the Waffle House, and one perpetrator demanded that the restaurant patrons stay on the floor and follow their orders. (R. pp. 25-26.)

Mr. Williams was shot during the commission of the crime, and died inside the Waffle House that morning. (R. pp. 29-30.) After Mr. Williams was shot, however, the second perpetrator fled the Waffle House, and the identity of that second perpetrator was the central issue at trial. (R. p. 7.) Over the course of a two day trial, the State presented its theory of the case that Kenneth Jowan Craig (“Appellant”) was the second individual with Mr. Williams that morning, and after the conclusion of the trial, the jury returned a verdict consistent with that theory. (R. pp. 7-8.) This conclusion was in part

based on an unduly suggestive out-of-court identification, which resulted in an improper in-court identification of Appellant. (R. pp. 101-02.)

Justin Harrison (“Mr. Harrison”) assumed a central role in the events as they unfolded at the Waffle House and then later as a witness at trial. Being the only witness present at the Waffle House to identify Appellant pretrial, he was integral in developing the State’s theory of the case. Mr. Harrison’s role as a witness began after he decided to dine at the Waffle House after leaving work around midnight on Friday, January 20, 2012. (R. p. 22.) Mr. Harrison possessed a valid concealed weapons permit, and once he arrived at the Waffle House, he carried his holstered handgun into the Waffle House. (R. p. 25.) The events of the robbery escalated quickly, with patrons being forced to floor as they were robbed. (*Id.*) Mr. Williams approached Mr. Harrison with his firearm drawn, which caused Mr. Harrison to believe that Mr. Williams intended to kill him. (R. p. 29.) He responded by fatally shooting Mr. Williams (R. p. 105), or as he put it, “met [Mr. Williams’] force with force.” (*Id.*)

After shooting Mr. Williams, Mr. Harrison turned his attention to the second suspect, who was “backed up” in the corner of the restaurant away from him. (R. p. 30.) The second suspect unsuccessfully attempted to check on the deceased, an action Mr. Harrison took as a threat that the perpetrator wished to arm himself with Mr. Williams’ gun (*id.*), but instead the second perpetrator hurriedly attempted to flee. (R. pp. 30-31.) Mr. Harrison tried to detain the second perpetrator (R. pp. 30, 108), and the two wrestled as the second perpetrator attempted to exit the front door of the Waffle House. (R. p. 31.) That struggle at the lasted a quick thirty to forty-five seconds. (R. p. 87.) An additional shot was discharged from Mr. Harrison’s weapon into the ceiling during the

skirmish (R. pp. 31, 99), and the second perpetrator was able to escape the Waffle House property before law enforcement arrived. (R. p. 109.)

Ultimately, the Spartanburg County Sheriff's Department identified and apprehended Appellant on January 21, 2012, after Mr. Williams' family and friends indicated he was with Appellant during the hours leading up to the robbery on Friday, January 20th. (R. pp. 55-57.) The local news media published the booking photo of Appellant in the relevant news outlets (R. pp. 38, 96), and during the days following the Waffle House robbery, Appellant's likeness was "on the TV and in the newspapers almost constantly" as the story continued to gain interest and notoriety. (R. p. 78.)

As the State's key witness, Mr. Harrison, provided an out-of-court identification of the Appellant three days after the crime on January 24, 2012. (R. pp. 34, 89.) At that time, Investigator Jason Bryant of the Spartanburg County Sheriff's Office asked Mr. Harrison if he previously watched the local evening news. (R. pp. 34, 99.) Mr. Harrison was asked if he would be willing to identify the suspect in a police lineup, but responded to Investigator Bryant that the man he saw on the news—expressly identified as the second robber in the media accounts that also depicted Appellant *alone* as the only suspect in their published photographs (R. pp. 96-97)—was the second perpetrator in the Waffle House. (R. p. 98.) Over objections raised by defense counsel, Mr. Harrison was allowed to identify the Appellant at trial. (R. p. 102.)

After Appellant was identified over the phone on January 24, 2012 no further attempts were made to identify the Appellant until he reached trial in July of 2013, some eighteen months later. (R. p. 37.) Additionally, at the time Appellant was arrested, no other victim or witness identified the Appellant as the second actor in the crime. (*Id.*)

Instead, Investigator Bryant used only the photo published by the news media to conduct an identification of the Appellant. (R. p. 38.)

Defense counsel moved that Judge Couch suppress the out-of-court identification, as it was a violation of due process. (R. p. 36.) Specifically, the defense moved to suppress the warrant on two grounds: 1) the initial arrest was illegal because the magistrate lacked probable cause to issue the warrant for Appellant's arrest as the identification was so faulty; and 2) even if the arrest was based on a valid warrant, the court should suppress the out-of-court identification that lead to a subsequently improper in-court identification that occurred in trial—a full eighteen months after the robbery—because of the highly suggestive nature of the identification made the entire set of events unreliable and a violation of Appellant's due process rights. (R. pp. 39, 74, 83-84.) After allowing the defense to make a proffer on these points (R. pp. 32-86), Judge Couch concluded that probable cause was sufficient, and denied defense counsel's first motion to suppress. (R. pp. 83-84.) Likewise, Judge Couch ruled against defense counsel's second motion to suppress the out-of-court identification because of the Investigator Bryant's suggestive actions. (R. pp. 84-85.) Defense counsel renewed its objection of the reliability of the identification. (R. pp. 90, 101.) In the presence of the jury, Mr. Harrison was allowed to identify Appellant as the second perpetrator. (R. p. 102.) The following appeal focuses on the second ground stated *supra*, the highly suggestive identifications, which were improperly admitted at trial over the timely objections of the Appellant's trial counsel.

C. Discussion

I. Did the trial court's admission of an out-of-court identification of Appellant deprive him of due process where the witness only identified Appellant after a highly suggestive identification procedure where

Appellant's photograph was the only one shown by local news media, and did the trial court also err in admitting the in-court identification of Appellant where the witness only viewed Appellant for less than forty-five seconds during a high-stress encounter after the witness shot and killed another perpetrator?

Publication of Appellant's photograph in the news media resulted in an unnecessarily suggestive out-of-court identification, which was allowed at trial, and following that unduly suggestive out-of-court identification, the witness also identified Appellant in the presence of the jury. This constituted reversible error.

Investigator Jason Bryant of the Spartanburg County Sheriff's Department contacted Justin Harrison, a witness to the Waffle House robbery, over the telephone three days after the crime. During this phone call, Investigator Bryant elicited a faulty identification, which was highly conducive to irreparable mistaken identification. This phone call gave rise to the following issues that underscore the strongly suggestive nature of the call and subsequent identification: a) Mr. Harrison was never provided any alternative person to identify, whether in photographs or in person, by either law enforcement or the news media—Appellant's image was the only one Mr. Harrison ever viewed; b) Investigator Bryant failed to query Mr. Harrison about how long and how clearly Mr. Harrison observed the second perpetrator at Waffle House; c) during the phone call, inquiry was made into how recently and how clearly Mr. Harrison observed the media's photograph of Appellant; and, d) the intense local news coverage and clouded the ability of Mr. Harrison to make a proper identification of any suspect, including Appellant, especially combined with the other factors.

Because it is likely that the out-of-court and subsequent in-court identifications of Appellant played a significant role in the jury's determination of Appellant's guilt, the presentation of that evidence constitutes a reversible error as a violation of due process

of law. Appellant therefore requests reversal of the trial court's admission of these identifications and further requests remand for a new trial.

An identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification violates an individual's right to due process of law. *Stovall v. Denno*, 388 U.S. 293 (1967); *State v. Moore*, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000). *Neil v. Biggers*, 409 U.S. 188 (1992) created a two-prong inquiry to determine the admissibility of out-of-court identifications. First, a court must ascertain whether the identification process was unduly suggestive. *Id.* at 198. Then the court must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.*¹

When an out-of-court identification is both highly suggestive and likely to result in an irreparable misrepresentation, then the subsequent in-court identification may be excluded as well. *See State v. Moore*, 343 S.C. at 287, 540 S.E.2d at 448 ("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.").

While considering problematic identifications, this Court held that the underlying rationale in excluding identifications resulting from situations where the police have engaged in unnecessarily suggestive confrontations is to deter the police from using these less reliable procedures. *State v. Tisdale*, 338 S.C. 607, 612, 527 S.E.2d 389, 392

¹ To determine the degree of reliability of the identification, the following factors should be considered: (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; and (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. at 199, 93 S.Ct. at 382; *State v. Stewart*, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980). The "central question" for a reviewing court is to determine "whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive." *State v. Stewart*, 275 S.C. at 450, 272 S.E.2d at 629.

(Ct. App. 2000). Because of this focus on police conduct, this Court also held that the *Biggers, supra* analysis is inapplicable when the identification source is non-governmental as the goal of police deterrence would not be achieved. *Id.* Nevertheless, this Court recognized that a defendant's due process rights may be violated "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, 527 S.E.2d at 392 (quoting *United States v. Peele*, 574 F.2d 489, 491 (9th Cir. 1978)). In determining whether the defendant's due process rights were violated in *Tisdale*, this Court examined the time between the crime and the media identification, the opportunity the witnesses had to observe the perpetrator during the crime, the cross-examination of the witnesses during the trial, and the other evidence presented against the defendant. *Id.* at 614-615, 527 S.E.2d at 393.²

Improperly admitted evidence, like an improper identification, is prejudicial when the identification is in dispute, and conflicting testimony is put before the jury concerning the identity of the accused. See *S.C. State Highway Dep't v. Graydon*, 246 S.C. 509, 511, 144 S.E.2d 484, 485 (1965) ("Ordinarily, the admission of incompetent evidence having some probative value upon a material issue of fact in the case is presumed to be prejudicial . . . assum[ing] the existence of testimony both ways upon a disputed issue, and is based upon the possibility that the verdict of the jury may have

² In *Tisdale*, 338 S.C. at 614, 527 S.E.2d at 393, the amount of time between the crime and the media identifications was less than twenty-four hours and the witnesses testified they had ample time to observe the perpetrator. One witness testified to being three feet away from the robber, while a second witness testified to being only inches away, and a third witness testified she was only a few feet from the robber. *Id.* One witness testified that she had a clear view of the robber and that the bank was well-lit. *Id.* Finally, and perhaps most importantly, all three witnesses testified they were certain of their identifications due to the robber's distinctive chin structure. *Id.* Concerning the other direct evidence of the crime, the prosecution introduced a videotape of the robbery. *Id.* at 615, 527 S.E.2d at 393.

been influenced, to the prejudice of the complaining party, by the improperly admitted evidence”); *see also Chapman v. California*, 386 U.S. 18, 24 (1967) (“[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”). The materiality and prejudicial character of the error arise out of the circumstances of the entire case, and the South Carolina Supreme Court has held that no definite rule of governs the finding than error was harmless, as such a consideration of the underlying facts is necessary. *See State v. Reeves*, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990).

At trial, Judge Couch allowed an unnecessarily suggestive out-of-court identification of the Appellant, which led to a flawed in court identification. When Investigator Bryant called Mr. Harrison, his intent was to confirm the identity of the second perpetrator, who had previously been identified on the local television news. (R. p. 37.) Mr. Harrison stated he previously saw the news, and agreed that was the same individual. (R. p. 98.) However, no other attempts to perform any other identification occurred. (R. p. 37.) No lineups were conducted, and no other photographs were shown to Mr. Harrison or any other witness. (*Id.*) The Spartanburg County Sheriff’s Department relied only on the over-the-phone and out-of-court identification conducted by Investigator Bryant. Such identification was unnecessarily suggestive as the only purpose of the phone call to Mr. Harrison was to seek confirmation that the only suspect reported in connection with the crime was in fact the other individual in the Waffle House on January 21, 2012 with Mr. Williams.

The identification provided by Mr. Harrison, both out-of-court, should have been found unreliable by the trial court under the *Biggers* factors. Mr. Harrison testified that he “probably” viewed the second robber for thirty to forty-five seconds, while standing

within a “couple of feet” away from him. (R. pp. 87-88.) Mr. Harrison was also engaged in an admittedly scary altercation with the second perpetrator that would certainly affect his ability to reliably identify the Appellant or any other potential suspect. (R. p. 105.) Further affecting the reliability of the identification, Mr. Harrison “wrestled [the second perpetrator] through the door,” and while wrestling, the two were facing “the same way” (and apparently not face-to-face), potentially preventing a clear view of the second perpetrator’s unmasked face. (R. p.107, lines 20-22.)

At trial, Mr. Harrison described the second robber as “short, small build, and the only way to describe his eyes was like a sad puppy,” with a “very dark” complexion and a thick mustache. (R. p. 91, lines 6-9.) During cross-examination, however, Mr. Harrison testified further that he provided a statement to police immediately after the robbery on the morning of January 21st, but did not include any information about the amount of time he viewed the second robber, nor did he provide any details related to the individual’s height, weight, or appearance of his eyes. (R. pp. 92-93.) Mr. Harrison could not recall for how long, if at all, whether the second robber wore a mask over his face, likewise affecting his ability to reliably identify Appellant. (R. pp. 93-94.) During the events at the Waffle House, Mr. Harrison admitted to being scared, which would reasonably limit his ability to reliably identify Appellant. (R. p. 105.) As such, the totality of the circumstances indicates that the identification was not reliable under the guidelines created in *Biggers*.

This out-of-court identification was patently unreliable, as it created a strong possibility of misidentification because the media previously reported that the Appellant was a suspect and there was no other person but Appellant for Mr. Harrison (or any other witness) to identify. Therefore, while not a traditional lineup, the entire

confrontation procedure was unduly suggestive. The identification was aided by media, and the nongovernment sources here clouded the ability of Mr. Harrison to properly identify a suspect, which was bolstered by the suggestive procedures employed by Investigator Bryant. Unlike in *Tisdale* where the witnesses provided the identification less than twenty-four hours after the crime, the identification here occurred a full three days after the witness observed the potential suspect at the Waffle House, increasing the likelihood of misidentification.

The suggestive influence of the news media, the nongovernment source in this instance, was obviously strong as this case drew high levels of coverage. Without any safeguards from law enforcement, this identification is prone to the ‘clouding’ that *Tisdale* warned. Again unlike *Tisdale* where the witnesses described the distinctive chin of the suspect, Mr. Harrison did not provide any details about distinctive characteristics of the second perpetrator’s face, like his “sad puppy” eyes or thick mustache, until trial. Mr. Harrison also stated during cross-examination that he never provided any indication of the lighting in the Waffle House at the time of the robbery, whereas in *Tisdale* all three witnesses testified to the bank being well-lit. (R. pp. 92-93.) Furthermore, Mr. Harrison was placed in an undoubtedly stressful situation, after taking the life of another person, and within seconds was involved in a difficult struggle with the second perpetrator. These factors, compared to *Tisdale* where the witnesses were able to passively view the suspect in a well-lit environment, do not indicate that Mr. Harrison was able to obtain a clear observation of the second perpetrator.

In *Tisdale*, this Court also considered the direct evidence presented. In this case, the surveillance video only established that two black males robbed the Waffle House. In addition, the State was also able to offer black clothing that allegedly was worn during

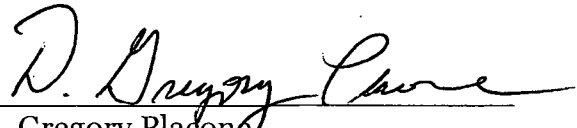
the robbery, which contained some levels of gunshot residue. Appellant denied owning coat put into evidence (R. p. 135) and Appellant further testified that the actual second perpetrator (as Appellant freely admits he drove both Mr. Williams and the second perpetrator to the Waffle House that morning) touched his pant leg in the area where the gun residue was found. (R. pp. 136-37.) The identification of Mr. Harrison played a significant role, both pretrial and at trial, in convicting Appellant as the direct evidence was not perfectly sound without the identification.

Introducing this evidence to the jury was an error at trial, because of the likelihood that the identification played a role in the jury's determination of Appellant's guilt. The initial out-of-court identification was both highly suggestive and likely to result in an irreparable misrepresentation; therefore, the subsequent in-court identification made by Mr. Harrison should also be excluded. The probative values of both of Mr. Harrison's identifications are clear, as he was the only individual to both identify Appellant pretrial and later in court. These identifications had a probative value on the most central material fact at issue in the trial—the identity of the second perpetrator. As such, this testimony can properly be presumed prejudicial because this identification was undeniably a disputed issue at trial and Mr. Harrison's identifications contributed to the jury's finding of guilt. Presentation of this evidence rose above the level of depriving Appellant of due process of the law, and Appellant presumptively suffered prejudice from that testimony.

CONCLUSION

For the reasons stated above, Appellant respectfully requests that this Court reverse the aforementioned decisions of the trial court, and remand for a new trial.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

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



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I hereby certify that a true copy of the *Final Brief of Appellant* in the above-referenced case has been served upon counsel of record via hand delivery on the 12th day of May, 2014, to address shown below.

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