

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

The Honorable Brooks P. Goldsmith

Appellate Case No. 2013-002537

The State,

Respondent,

v.

Marion Benjamin Powell,

Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court's admission of the eyewitnesses' identification of Appellant deprive him of due process where the photo array created by the State and shown to two eyewitnesses the day following the alleged crime contained a photo of Appellant that is different than the other array photos and that unduly accentuates Appellant's features consistent with one eyewitness's pre-lineup description of the assailant?

STATEMENT OF THE CASE

Appellant was indicted April 21, 2011 by the Beaufort County grand jury on five counts of kidnapping, one count of burglary in the first degree, one count of armed robbery, one count of possession of a weapon during a violent crime, and one count of unlawful possession of a firearm. R. at ___; Tr. p.14, ll.14-23; *see also* R. at ___; Indictments and sentence sheets at pp. 1-30. On November 18, 2013, Appellant proceeded to trial before a jury and the Honorable Brooks P. Goldsmith. The State was represented by Benjamin Shelton and Benjamin Coppage. R. at ___; Tr. p.2. Appellant was represented at trial by Scott W. Lee. R. at ___; Tr. p.2.

At the conclusion of the trial on November 22, 2013, the jury found Appellant guilty of first degree burglary, guilty of five counts of kidnapping, guilty of armed robbery, and guilty of possession of a weapon during a violent crime. R. at ___; Tr. p.724, l.25 to p.725, ll.1-23. Judge Goldsmith sentenced Appellant to twenty-seven years imprisonment on the kidnapping, armed robbery, and first degree burglary charges with those sentences to run concurrently and with credit for time served in jail prior to trial. R. at ___; Tr. p.738, ll.9-17. Appellant was sentenced to five years on the

possession count with that sentence to also run concurrently with the other sentences. R. at ____; Tr. p.738, ll.9-17.

Appellant filed his notice of appeal and this appeal follows.

STANDARD OF REVIEW

The decision to admit an eyewitness' identification is within the trial judge's discretion and will generally not be reversed absent an abuse of discretion or prejudicial legal error. State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000); see also State v. Brown, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App. 2003). "However, an eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law. Moore, 343 S.C. at 288, 540 S.E.2d at 448 (citing Caver v. Alabama, 537 F.2d 1333, 1335 (5th Cir. 1976)).

ARGUMENT

The trial court erred by admitting the eyewitness identification of Appellant where he was identified in a photo lineup, the day following the alleged crime, in which his photograph is distinct from the other photographs and unduly accentuates his features consistent with an eyewitness' pre-lineup description of the assailant such as to render it patently suggestive. The resulting suggestiveness of the lineup, under the totality of the circumstances, renders both the out-of-court identifications and the in-court identifications inadmissible due to the substantial likelihood of irreparable misidentification the lineup created. This was a violation of Appellant's due process rights and this matter should be remanded for a new trial.

STATEMENT OF FACTS

The home of Senora Jones was invaded by three armed assailants in the early evening of October 25, 2010. R. at ___; Tr. p.274, ll.7-24. At the time of the home invasion, Senora Jones was at home with her minor son, her 10 year old child A.H., and her two nieces. Id. The three assailants entered the property through Mrs. Jones' backyard where three of the children had been playing and, with the children, entered the home. R. at ___; Tr. p.274, ll.7-25, Tr. p.275, ll.1-21, Tr. p. 314, ll.9-23. The three armed assailants were identified by Mrs. Jones as African-American males. R. at ___; Tr. p.274, ll.7-18.

Upon entering the home the three men found Mrs. Jones in her bedroom and instructed Mrs. Jones to get off her bed and onto the floor with her face to the ground. R. at ___; Tr. p.314, ll.9-25 to p.315, ll.6. Mrs. Jones testified she stayed face down in her bedroom for most of the incident. R. at ___; Tr. p.314, ll.10-18. Mrs. Jones's child, A.H., and the other three children were instructed to sit against a wall outside Mrs. Jones's bedroom in the upstairs of the home. R. at ___; Tr. p.242, ll.9-25, Tr. p.243, ll.23-25, Tr. p.244, ll.1-19. During this time, the assailant that Mrs. Jones and A.H. identified as Appellant was alleged to have been walking back and forth from the hallway to Mrs. Jones's bedroom as well as up and down the stairs in the home. R. at ___; Tr. p.246, ll. 18-25, Tr. p.247, ll.1-12. The assailant that was moving back and forth between the hallway, the room, and the up and down stairs was also alleged to possess a handgun during this time. Id.

Following the incident, Mrs. Jones gave a description to Sergeant Donald Chandler of the three assailants. R. at ___; Tr. p.237, ll.18-24; Tr. p.234, ll.2-25 to Tr.

p.235, ll.1-15. Mrs. Jones described the suspect she later identified as Appellant, suspect two, as “a black male; approximately six-foot, one inches tall; 180 pounds; black pants; black t-shirt” who had “a short Afro with flared nostrils.” Id. at p.235, ll.1-15; Tr. p.360, l.20 to p.361, l.10. No description appears to have been given by A.H. at the home following the incident.

A.H., who was ten years old at the time of the home invasion, went to the Bluffton Police Department the day following the home invasion in order to participate in a photo lineup. R. at _; Tr. p.248, ll.2-25 to p.252, ll.1-14. At the police department A.H. was shown four 6-person photo lineup cards. R. at __; Tr. p.248, ll.10-25 to p. 249, ll.1-8. Prior to viewing the photo lineup cards A.H. was read and shown the standard instructions on the back of the lineup cards and was asked if she understood them. R. at _; Tr. p.249, ll.13 to p.254, l.8. A.H. was then shown the photo lineup cards and identified Appellant and signed, initialed, and circled Appellant’s photograph on the card which was admitted at trial as Exhibit 46. Id.; R. at _; State’s Ex. 24 at Tr. p.252, ll.15-21. A.H. also identified Appellant at trial as one of the robbers and the person she identified from the lineup. R. at _; Tr. p.241, ll.15 to p.242, l.3; Tr. p.251, ll.7-18.

Senora Jones also participated in a separate photo lineup the same day as A.H. at around 2:09 p.m. prior to which the same instructions and warnings were given. R. at _; Tr. p.287, l.2 to p.293, l.8. She was shown four photo lineups as well. Id. The four lineups Mrs. Jones was shown were identical to the ones A.H. had been shown. R. at _; Tr. p.367, l.13 to p.371, l.10. Mrs. Jones also identified Appellant’s photograph, signed, initialed, and circled appellant’s photograph, and it was admitted at trial as Exhibit 48. Id.; State’s Ex. 48 at Tr. p.290, ll.7-14. Mrs. Jones also identified Appellant at trial as

one of the robbers and the person she identified from the lineup. R. at _; Tr. p.274, l.19 to p.278, l.15; Tr. p.283, l.6 to p.284, l.7.

When Mrs. Jones was shown the four photo lineup cards the day following the robbery she only identified Appellant. R. at _; Tr. p.287, l.9 to p.289, l.12. Of note, however, at trial three years after the robbery, Mrs. Jones identified a second assailant, based on his eyes alone as his face was covered during the robbery. R. at _; Tr. p.291, l.9 to p.292, l.23; Tr. p.300, l.12 to p.302, l.16; State's Ex. 49, Tr. p.367, l.8-12.

Bluffton Police Officer James Duke was the lead investigator of this incident and the officer responsible for showing A.H. and Mrs. Jones the photo lineup cards and reading them the photo advisory instructions. R. at _; Tr. p. 354, l.18 to p.355, l.5; Tr. p.371, ll.7-12; Tr. p.364, ll.1-24. Officer Duke testified at trial that he requested the photo lineups from the Beaufort County Sheriff's Office's Intelligence Unit, that a civilian analyst with that office sent him the photo lineups, that he reviewed them to make sure that they did not contained mixed gender and did contain six black males, and that he did not have any special training in conducting identifications other than reading the advisory instructions. R. at _; Tr. p. 384, l.5 to p.386, l.15.

During pre-trial motions the State and Appellant stipulated to certain facts regarding how the Intelligence Unit had selected Appellant's photograph for the photo lineup. R. at _; Tr. p.129, l.16 to p.130, l.25; Court's Ex. 2, Tr. p.130, ll.8-14. The stipulated facts are that Pam Brown created the photo lineups at issue, she typically pulls a suspect's most recent booking photograph, she tries to keep the photos consistent and similar, she was surprised that she created this lineup due to the fact that Appellant's photo stood out compared to the others in his 6 person lineup card, and she relies on law

enforcement to make suggestibility determinations and send them back if changes are needed. Id. During pre-trial argument on the State's Neil v. Biggers¹ motion, it was undisputed that Appellant's photograph was put into one of the photo lineups after Bluffton Police was contacted by Northern Beaufort County Sheriff's Office who suggested a number of potential suspects for the lineups. R. at _; Tr. p.132, l.23 to p.133, l.9.

During pre-trial motions the State submitted a memorandum of law to admit the out-of-court identification. R. at _; Tr. p.189, ll.20-25. No witness testimony was proffered for purposes of the Biggers hearing, but the trial court heard from both the State and Appellant on that issue. R. at _; Tr. p.129, l.7 to p.143, l.6. Following argument the trial court granted the State's motion to admit Mrs. Jones's and A.H.'s out-of-court identifications of Appellant. Id.

LEGAL AND FACTUAL ANALYSIS

- I. The photo array was unduly suggestive which created a substantial likelihood of irreparable misidentification in violation of Appellant's right to due process.

It is a violation of a criminal defendant's right to due process of law to admit an out-of-court identification which flows from "an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999) (citing Stovall v. Denno, 388 U.S. 293 (1967); State v. Patterson, 337 S.C. 215, 552 S.E.2d 845 (Ct. App. 1999)); see also State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). It follows that "[a]n in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable

¹ 409 U.S. 188 (1992).

misidentification.” Moore, 343 S.C. at 286, 540 S.E.2d at 447 (citing Manson v. Brathwaite, 432 U.S. 98 (1977); Simmons v. United States, 390 U.S. 377 (1968); State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980)). The reason for these legal safeguards is patent. Justice Brennan has noted that “despite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries [as they] seem most receptive, and not inclined to discredit, testimony of a witness who states that he saw the defendant commit the crime.” Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan J., dissenting) (citing Manson, 432 U.S. at 120); see also State v. Henderson, 27 A.3d 872 (N.J. 2011) (Supreme Court of New Jersey revising Manson framework in favor of more rigorous lineup procedures to overcome inherent unreliability of eyewitness identification because of juries receptiveness to such identifications).

Here the highly suggestive nature of the photo array containing Appellant’s photograph is clear. First, it accentuates one of the only physical characteristics reported by Mrs. Jones when describing the suspect later alleged to be Appellant, i.e., flared nostrils. Second, the photo of Appellant stands out from the other photographs in the array by its lack of similarity to of any of the fillers – a fact that jumped out at the very analyst who compiled the photo array at the request of law enforcement. Third, that Appellant’s head is tilted back and mouth is open further highlights his photo over the others in the array. This suggestiveness and the lack of other indicia of reliability under the totality of the circumstances created a substantial likelihood of irreparable misidentification. Thus, the subsequent in-court identifications should have been excluded as fruit of the poisonous tree.

- a. The photo array selected by law enforcement to identify Appellant was highly suggestive

“A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification.” State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012). Pursuant to Biggers, both the U.S. Supreme Court and South Carolina courts require trial courts to rigorously test the admissibility of out-of-court identifications. The two-prong inquiry used by our courts asks first whether the identification process was unduly suggestive. Moore, 343 S.C. at 287, 540 S.E.2d at 447. The fairness of a photographic array should be considered by looking at various factors including its size, the number of the photographs, the manner of presentation by the officers, and the array's contents. U.S. v. Concepcion, 983 F.2d 369, 377 (2d. Cir. 1992). If there is nothing inherently prejudicial about the identification procedure, such as “show-up” procedures,² the “principal question is whether the picture of the accused, matching descriptions given by the witness, so stood out from all of the other photographs as to ‘suggest to an identifying witness that [that person] was more likely to be the culprit,’ ” Jarrett v. Headley, 802 F.2d 34, 41 (2d Cir. 1986) (quoting United States v. Archibald, 734 F.2d 938, 940 (2d Cir.1984)).

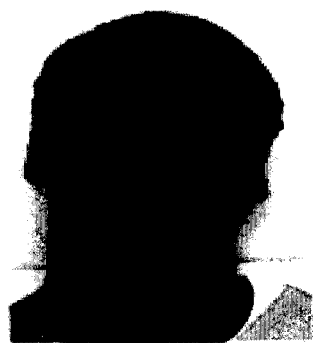
Here three distinct features of Appellant’s photographs set it apart from the five filler photographs in the six person photo array shown to A.H. and Senora Jones some twenty hours after the alleged robbery.

Following the robbery and prior to the identifications, Senora Jones gave Officer Scott Chandler a description of the suspect later identified as Appellant as: “a black male;

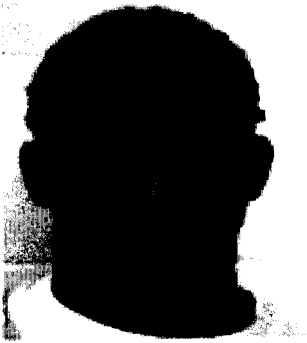
² Moore, 343 S.C. 287, 540 S.E.2d at 448.

approximately six-foot, one inches tall; 180 pounds; black pants; black t-shirt” who had “a short Afro with flared nostrils.” Id. at p.235, ll.1-15. The information that Officer James Duke received prior to the identifications was that the suspect alleged to be Appellant “black male, early 20s, 6-2, and skinny, dark skin, flared-out nose, face uncovered, wearing a black shirt, faded black pants, and black shoes. Tr. p.360, l.20 to p.361, l.10. Outside of the suspect’s skin color and approximate height the only physical characteristic recalled by Mrs. Jones was the suspect’s “flared nostrils” or “flared-out nose.” Id. The subject photo array with Appellant in the sixth position, combined with the leaning position, clearly accentuates the “flared nostrils.” Tr. p.252, State’s Ex. 46.

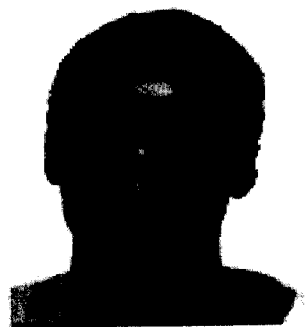
BLUFFTON POLICE DEPARTMENT



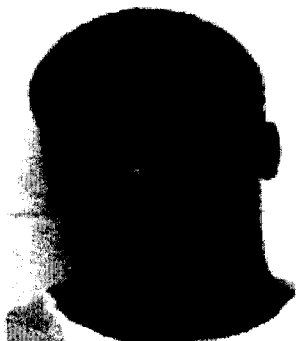
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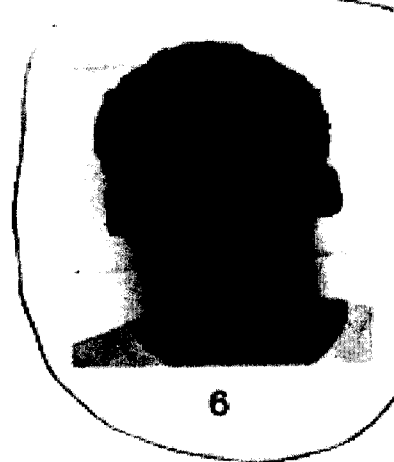
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4



5



6

EXHIBIT
W. Duke
3
11-2-13

One reason Appellant's nostrils are accentuated in this photograph is because Appellant appears to have his head cocked rearward, exaggerating the effect. This is particularly of concern when it is considered within the context of the description of the crime. Both A.H. and Mrs. Jones testified that they were made to get on the ground by the assailants with A.H. sitting down against a wall and Mrs. Jones lying face down on the floor. R. at __; Tr. p.242, ll.9-25, Tr. p.243, ll.23-25, Tr. p.244, ll.1-19; R. at __; Tr. p.314, ll.9-25 to p.315, ll.6. Mrs. Jones and A.H.'s view of assailant, who was described as over six feet tall, would have been looking up at him as he moved throughout the upstairs. This casts more concern on the photograph of Appellant as the cocked back position of his head with his nose raised exposing his nostrils gives the effect that one is looking up at him.

Last, the person who put the photo array together was "very surprised that she was the individual who created the line-up." Tr. p.130, Court's Ex.2. In explaining why she pointed out that "[Appellant's] mouth was slightly open, and that she normally would not have created a line-up with only his mouth open." Id. The person who compiled the photo also stated that she "relies heavily on investigators expertise" to let her know if the lineup should be amended out of concerns regarding suggestiveness. Id. Nonetheless, she was surprised that she would have put one together in that manner because it singled out Appellant's photograph. See id.

This is quite different than a photo array where two photos had different color backgrounds than the others, State v. Turner, 373 S.C. 121, 122, 644 S.E.2d 693, 696 (2007) (not unduly suggestive), or where the photograph of the defendant was four to five times larger than the other photos shown the witness, State v. Carlson, 363 S.C. 586, 594,

611 S.E.2d 283, 287 (Ct. App. 2005) (unduly suggestive). Here the head position and the open mouth both distinguished Appellant's photograph from any of the other filler photos in the array. Combined with the accentuation of the one physical characteristic Mrs. Jones reported that can be seen in a photo, the flared nostrils, Appellant's photo so stood out compared to the others in the array that it is unduly suggestive. It is not one or two characteristics that Appellant shared with the other fillers. It is three characteristics singular to Appellant, one of which matched perfectly a description of the suspect by Mrs. Jones, that made this photo stand out so as to suggest Appellant's identification. This was clear even to the person who put the photo array together. The trial court erred by not finding the photo array unnecessarily suggestive.

- b. Under the totality of the circumstances the identification based on the unnecessarily suggestive identification process was unreliable and should be excluded

Once an out-of-court identification is ruled unnecessarily suggestive, the trial court must move to the second Biggers prong and assess the identification's reliability. State v. Dukes, 404 S.C. 553, 558, 745 S.E.2d 137, 139 (Ct. App. 2013). The question is whether "under the totality of the circumstances the identification was reliable." Patterson, 337 S.C. at 229, 522 S.E.2d at 852. Five factors should be considered when evaluating the reliability of an identification pursuant to Biggers: (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. Stewart, 275 S.C. at 450, 272 S.E.2d at 629.

Here, there are two identifications. The first was by a ten year old child, A.H., who testified that the suspect she identified as Appellant was one of three assailants who ordered her, her brother, and nieces to sit in a hallway upstairs while they moved about the house. R. at __; Tr. p.242, ll.9-25, Tr. p.243, ll.23-25, Tr. p.244, ll.1-19. A.H. testified that the suspect would leave and come back, go into her mother's bedroom, and would go up and down the stairs during the robbery. R. at __; Tr. p.246, ll. 18-25, Tr. p.247, ll.1-12. It is unclear from the record how long or how closely A.H. was able to view suspect two. Understandably A.H. testified that she was scared during the ordeal. R. at __; Tr. p.263, ll.14-18. Mrs. Jones's testimony confirmed that fact. R. at __; Tr. p.312, l.23 to p.313, l.6. A.H. never reported any identifying physical characteristics of the suspect save for that he had a silver gun and was wearing black clothes. Officer Duke did testify that A.H. identified Appellant quickly, R. at __; Tr. p.365, ll.24-25, and A.H. testified she was certain the Appellant was one of the assailants that day, R. at __; Tr. p.269, ll.18-22. However, almost twenty hours had passed since the time of the robbery and A.H. had time to discuss the incident with Mrs. Jones who described A.H.'s recollection was crucial in helping her identify the suspects since Mrs. Jones was face down during much of the robbery. R. at __; Tr. p.314, ll.2-23.

A.H.'s testimony arguably only meets one Biggers reliability factor: certainty. See Moore, 343 S.C. at 289, 540 S.E.2d at 449 (identification excluded as unreliable where only factor supporting finding of reliability was short time between crime's occurrence and witness' identification and consequently the identification was excluded). However, Appellant's expert testified regarding research studies that suggested children from nine to ten have a higher error rate in identifying persons in a lineup. R. at __; Tr. p.

631, l.12 to p.632, l.13. Combining that consideration with the conclusion that A.H. did not meet any of the other reliability criteria under Biggers her out-of-court identification of Appellant which was influenced by the suggestive identification process was so unreliable that a substantial likelihood of irreparable misidentification existed. Cf. State v. Govan, 372 S.C. 552, 559, 643 S.E.2d 92, 95-96 (Ct. App. 2007) (identification reliable where witness viewed robber in well-lit building while in direct contact with him for duration of robbery, robber's appearance was consistent with witness's prior description, and identification occurred 45 minutes after the robbery); State v. Jones, 273 S.C. 723, 730, 259 S.E.2d 120, 124 (1979) (identification reliable where witness observed assailants for an hour and a half, correct description of suspect given immediately after crime).

The same is true of Senora Jones's out-of-court identification. While Mrs. Jones testified she was at one point able to look at the suspect's eyes in order to look into his soul, she also testified at trial that she stayed face down in her bedroom for most of the incident. R. at _; Tr. p.314, ll.10-18. No testimony was elicited about the lighting within the house at the time of the robbery. A.H. testified that the suspect was in and out of her mother's room during the robbery. Mrs. Jones testified that she felt threatened by one of the other suspects and that she feared for her life during the robbery. R. at _; Tr. p. 278. l.16 to p.280, l.7. As discussed previously, Mrs. Jones told police the suspect was close to six feet tall, had a short afro, and had flared nostrils. R. at _; Tr. p.235, ll.1-15; Tr. p.360, l.20 to p.361, l.10. It was undisputed at trial that Mrs. Jones was certain her identification of Appellant was correct. And, again, 20 hours had elapsed between the time of the robbery and Mrs. Jones testified discussing the incident with A.H. was crucial

in helping her identify the suspects since Mrs. Jones was face down. R. at _; Tr. p.314, 11.2-23.

Taken as a whole, Mrs. Jones's out-of-court statement is also unreliable under Biggers. While the State pointed out that Mrs. Jones was certain of her identification of Appellant, it is worth noting that at trial three years after the incident and after having failed to identify anyone else, Mrs. Jones confidently identified a second assailant based on his eyes alone as his face was covered during the robbery. R. at _; Tr. p.291, 1.9 to p.292, 1.23; Tr. p.300, 1.12 to p.302, 1.16; State's Ex. 49, Tr. p.367, 1.8-12. Mrs. Jones's admitted she relied on A.H. to help with identifying suspects, admits she was face down for most of the encounter, and that she was fearful for her life and the lives of her children.

One or two factors do not tilt the scales in favor of reliability. In State v. Spears, 393 S.C. 466, 481, 713 S.E.2d 324, 332 (Ct. App. 2011), the identification was found reliable where the witness provided a detailed description of two suspects to law enforcement, she saw the photo four hours after the robbery, and she previously knew the suspect from her neighborhood. In State v. Jones, 273 S.C. 723, 730, 259 S.E.2d 120, 124 (1979) The witness's opportunity to observe the suspects during the period of approximately an hour and a half and the correctness of the physical descriptions given police immediately after the commission of the crimes supported a finding of reliability. Finally, in State v. Govan, 372 S.C. 552, 559, 643 S.E.2d 92, 95-96 (Ct. App. 2007), the witness identification reliable where witness closely viewed robber in well-lit building, was in direct contact with the robber for the entire as he held her by the arm, and identification occurred 45 minutes after the robbery. Here, under the totality of the

circumstances, Mrs. Jones does not sufficiently meet the Biggers criteria and her out-of-court statement was unreliable as a matter of law.

Appellant's identification by A.H. and Mrs. Jones should have been excluded as a matter of law and, as a matter of due process, the witnesses' in-court statements should also have been excluded as fruit of the poisonous tree. This should be the basis for a remand of this matter to the trial court

CONCLUSION

Appellant respectfully requests that this Honorable Court find the out-of-court identification procedure unduly suggestive and the two ensuing identifications were unreliable as a matter of law and remand this case for a new trial.

Respectfully submitted,



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