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STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions
Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2015-001201

THE STATE, ...RESPONDENT

v.

QUARTIS HEMINGWAY,.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court properly admitted the victims' out-of-court identifications from photo lineups because they were not unduly suggestive or the result of police procedures, did not create a substantial likelihood of irreparable misidentification, and did not deprive Appellant of due process.

STATEMENT OF THE CASE

On October 16, 2014, Appellant was indicted by the Horry County Grand Jury for two counts of armed robbery (2014-GS-26-4212–4213) and two counts of kidnapping (2014-GS-26-4214–4215). On May 27-29, 2015, Appellant proceeded to a jury trial before the Honorable Michael Nettles. Buddy Long, Esquire, represented Appellant; and Assistant Solicitor Austin Thomas, Esquire, represented the State. The jury found Appellant guilty of all the charges as indicted, and the trial judge sentenced him to eighteen years' imprisonment on each count, with all sentences running concurrent. (R.p.152, line 1–R.p.153, line 9; R.p.162, lines 4–20).

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On January 17, 2014, Mario Aldan (Victim 1) received a phone call from an individual seeking to sell him two junk cars. Victim 1, who sold used cars and their parts as his profession, agreed to pay the person $500 for both cars. They agreed to meet in a rural area of Horry County, near Loris. (R.p.41, line 7–R.p.42, line 16; R.p.72, line 4–R.p.73, line 12).

Victim 1 brought his wife, Alejandrina Morales-Gonzales (Victim 2), with him to the meeting. When they arrived, Appellant was waiting for them near an abandoned trailer. He told Victim 1 to leave his car near the trailer, and to walk with him to the back area to inspect Appellant's cars. When they arrived at the designated location, Victim 1 was unable to locate the purported cars. Appellant then pulled out a revolver, grabbed Victim 1's neck, put the gun to his head, and threw him to the ground. Appellant was joined by two masked men, and together all three bound Victim 1's arms with tape and searched him for money and valuables. One of the masked men went back to Victim 1's car, grabbed Victim 2, and brought her to the same area they were holding Victim 1. They then bound her arms with tape and began asking both Victims all the money and valuables in their possession. Over the course of forty-five minutes, Appellant and the masked men repeatedly threatened Victims: they held guns up to their heads, shot at the ground near them, and promised to kill them. The robbers also threatened to kill Victims if they reported the crime to police. After the men left with two cellular phones, $1,600, and Victim 2's jewelry, Victims escaped and fled to the business of David Hatchell, a man to whom Victim 1 regularly sold scrap cars and parts. Hatchell urged Victim 1 to call the police but he refused, believing Appellant or the masked men would kill him and

his family. (R.p.42, line 16–R.p.45, line 15; R.p.51, lines 7–9; R.p.65, lines 21–24; R.p.94, line 3–R.p.96, line 9; R.p.97, lines 16–18).

Later that afternoon, Victim 1 and Hatchell went back to the scene of the robbery to try to locate evidence of the perpetrators' identities, but were unsuccessful. When Victims returned home that night, they called their cell phone company and, using the times that they received the calls from Appellant as well as Victim 1's memory of the last four digits, obtained his telephone number. They called the number and heard Appellant's voice. (R.p.50, lines 8–25; R.p.52, lines 4–8; R.p.53, lines 8–16; R.p.96, lines 10–14).

The following day, January 18, 2014, Victims returned to Hatchell's business. There, the three of them performed a Facebook search using Appellant's phone number. The search took them to Appellant's Facebook page, where they saw a picture of four people, including Appellant, whom they immediately recognized as the unmasked robber. Still fearing retaliation from the robbers, Victims decided against reporting the crime and their discovery to police. (R.p.53, line 18–R.p.56, line 20; R.p.96, lines 14–23; State's Exhibit 5).

On January 21, 2014, Victims overcame their fear and contacted the police. They met with Officer Larry Williams and provided him with Appellant's name, cell phone number, and his Facebook picture. After the meeting, Officer Williams performed his own Facebook search, using Appellant's phone number. The search returned multiple results: specifically, two posts by Appellant on his own Facebook page from December 31, 2013, and January 11, 2014, requesting people to contact him at the same number from which Victim 1 was called the day of the robbery. He also had the DMV search for

Appellant's home address, and found the robbery occurred "at [the] intersection" near the listed address.[1] Officer Williams used these discoveries as probable cause and obtained a search warrant for Appellant's phone number. Officer Williams also requested SLED generate a photographic lineup using Appellant's DMV picture. (R.p.57, line 6–R.p.58, line 14; R.p.75, line 15–R.p.80, line 13; State's Exhibits 6–7). Accordingly, SLED generated a six-photograph lineup, including Appellant's DMV picture and five other photos of individuals possessing similar hair and facial features. (R.p.26, line 8–R.p.27, line 9; R.p.81, lines 12–24).

Approximately one month after their initial meeting, Officer Williams again met with Victims. During the meeting, Officer Williams separated the Victims and had Victim 1 look at the lineup while Victim 2 waited in their car about 5 yards away. Then, Officer Williams had Victim 2 look at the photographic lineup. Victims both immediately identified Appellant as the unmasked robber. (R.p.58, line 24–R.p.61, line 16; R.p.82, line 12–R.p.85, line 13; R.p.99, line 15–R.p.101, line 10).

Moreover, Officer Jonathan Martin, another officer with Horry County, analyzed Appellant's phone records. Using the records received pursuant to the search warrant, and using Cell Hawk, a cell phone analysis program, Officer Martin confirmed that Appellant's phone was used to call Victim 1 several times on January 17, 2014, and utilized the cell phone tower closest to the crime scene for all three calls. (R.p.87, line 13–R.p.88, line 11; R.p.102, line 16–R.p.106, line 2; R.p.108, line 12–R.p.111, lines 24; State's Exhibit 8).

[1] Officer Williams testified Appellant's listed address was 2221 Blue Moon Court. He also noted the crime occurred on property located near the intersection of Blue Moon Drive and Blue Moon Court. (R.p.72, lines 4–15; R.p.79, lines 17–21).

During pretrial motions, defense counsel moved to suppress the out-of-court identifications using the photographic lineups pursuant to Neil v. Biggers, 409 U.S. 188 (1972), claiming the identifications were tainted by Victims' discovery of Appellant's Facebook page and his pictures therein; according to counsel, the use of this tainted information to obtain the photographic lineup was prejudicial and unconstitutional. He argued that Victims failed to provide a specific description of the unmasked robber to Officer Williams, other than his race and gender, and that the police generated the description of the robber based solely on the Facebook photos discovered by Victims. He also alleged that because Victims had some difficulty in understanding English, they believed they were required to select one person out of the photo lineup, and thus gravitated towards Appellant, the person of whom they had already seen a picture. Finally, defense counsel argued Victims were prejudiced towards picking Appellant's picture out of the photo lineup because they had seen a picture of Appellant holding three guns in one of his Facebook photographs.[2] (R.p.11, line 18–R.p.12, line 2; R.p.28, line 25–R.p.30, line 8).

The State argued against excluding the photographic lineup identifications, noting law enforcement was not present during Victims' initial Facebook search for Appellant, and thus Neil v. Biggers was not applicable to the instant case: if law enforcement neither

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[2] During the pretrial hearing, defense counsel argued against the admission of certain photographs from Appellant's Facebook profile, at least one of which was a photograph of Appellant in possession of a gun.

On Facebook, individuals can set photos to their main page, so that anyone visiting the page will automatically see those "profile pictures." During the pretrial hearing, the parties noted that State's Exhibit 5, a picture of Appellant and three other men, was the profile picture set to Appellant's main Facebook page at the time Victims found his page on January 18, 2014. However, sometime prior to trial, Appellant changed his profile picture to one in which he is holding several guns. It appears that profile picture was the one on Appellant's page when Officer Williams copied Appellant's Facebook posts containing his cell phone number. The solicitor agreed to not use the gun photos, and they were redacted from State's Exhibits 6–7 prior to trial. (R.p.5, line 15–R.p.11, line 17).

instigated nor ordered Victims to search for Appellant on Face, no undue influence or other suggestive behavior from police affect their Facebook identification. The State also noted that SLED generated the photo lineup used by Officer Williams, and that it contained five other individuals with similar hair and facial features to those of Appellant, which minimized any influence Victims' prior identifications may have had on their photo lineup selections. (R.p.12, lines 3–21; R.p.30, line 10–R.p.31, line 5).

After listening to testimony from Victims and Officer Williams and reviewing the parties' arguments, the trial judge reviewed the photo lineup. He noted all six photos were of young, African-American men with dreadlocks of a similar length, similar degrees of facial hair, very similar facial features such as strong chin lines and "virtually the same mouth and nose structure." He noted that the men had some slight variance in skin tone, but that he could not imagine that "anyone could comprise a [photo lineup] that would be less suggestive than this," and found the lineup was not unduly suggestive, and was thus admissible. He noted it was a "legitimate point" for the defense to argue the Facebook identification may have impacted their selections in the photo lineup, but such issue was a question of fact for the jury. (R.p.31, line 6–R.p.32, line 15).

ARGUMENT

The trial court properly admitted the victims' out-of-court identifications from photo lineups because they were not unduly suggestive or the result of police procedures, did not create a substantial likelihood of irreparable misidentification, and did not deprive Appellant of due process.

Appellant argues the trial judge erred in failing to suppress the photo lineup identifications by Victims, and contends the identifications were tainted by Victims viewing Appellant's Facebook page the month prior. He also argues the identification process was suggestive, prejudicial, and unconstitutional due to the police investigation of Appellant's Facebook page, which resulted in Officer Williams including Appellant's picture in the photo lineup. However, the trial court properly admitted Victims' identification testimonies, as there was ample evidence supporting the trial judge's finding that the out-of-court photographic lineup identifications did not result from unduly suggestive police procedures. Thus, Appellant's challenge to the identification testimony should be denied and his convictions should be affirmed.

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).

An out-of-court identification of a defendant violates due process and must be suppressed when the identification procedure used by law enforcement was impermissibly suggestive and conducive to a substantial likelihood of misidentification. Liverman, 398 S.C. at 138, 727 S.E.2d at 425; State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013). A witness's subsequent in-court identification is inadmissible "if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (emphasis added). "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." Id.

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 'unnecessarily suggestive' police procedures." Dukes, 404 S.C. at 557, 745 S.E.2d at 139 (emphasis added). "If the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there and the court does not need to consider the second prong." Id. at 557-58, 745 S.E.2d at 139. "If the court finds, however, that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless 'so reliable that no substantial likelihood of misidentification existed.'" Id. at 558, 745 S.E.2d at 139. The defendant bears the burden of proving the identification

procedure was impermissibly suggestive. Id. at 561, 745 S.E.2d at 141 ("Our supreme court has never placed the burden of disproving suggestiveness on the State. The Fourth Circuit, whose decisions regarding federal constitutional law are binding on us, has held the defendant bears the burden of proving the identification procedure was impermissibly suggestive.").

Suggestiveness

Appellant places great weight on the fact that Victims had only brief interactions with Appellant prior to the robbery itself: Victim 1 viewed Appellant during their walk between his own car and the spot where he was robbed, and Victim 2 saw Appellant only briefly when Victims arrived at address and for a few moments before she was thrown on the ground beside Victim 1. Appellate counsel notes Victims were on their stomach and bound for the majority of the robbery, and that the chaos of the situation impacted their ability to accurately recall the appearance of the unmasked robber. According to appellate counsel, these high emotions led to an unreliable Facebook identification, which in turn led to the improper photo lineup identifications.

Initially, the State notes that the main identification in dispute, Victims' identification of Appellant on Facebook the day after the robbery, is a situation which falls outside of a Neil analysis. In State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000), this Court found that pre-trial witness identifications of a defendant based on media coverage were suggestive, but because they police were not involved in the media identifications and they originated from a nongovernmental source, they were admissible. The Court of Appeals noted that the purpose of Neil and its progeny is to deter the police from using a less reliable identification procedure where a more reliable one may be

available, and because no police deterrence would be achieved by excluding identifications in which government agencies were not involved, the circuit court did not err in allowing the witnesses' identification testimony. Id. at 392, 612. Accordingly, this Court found that questions regarding "[t]he extent to which a suggestion from nongovernment sources has influence the memory or perception of the witness . . . is a proper issue for the trier of fact to determine." Id. at 612–614, 392–393 (citing United States v. Peele, 574 F.2d 489, 491 (9th Cir. 1978)).

In the instant case, Victims and Hatchell performed the Facebook search for Appellant on their own, without the involvement of police or any other government agency. (R.p.53, lines 8–21). Accordingly, the trial judge properly ruled that questions regarding whether the Facebook identifications influenced the memories of perceptions of Victims and their later identifications of Appellant were issues reserved for the jury's determination. See Peel, 574 F.2d at 491; Dukes, 404 S.C. at 557–558, 745 S.E.2d at 139 (stating that if an out-of-court identification was not the result of "impermissibly suggestive police procedures, due process does not require the identification to be suppressed); Tisdale, 338 at 612–614; 527 S.E.2d at 392–393.

Moreover, the photo lineup generated by SLED was not suggestive even under a Neal analysis. Victims' identified Appellant in a Facebook picture which included him and three other men. SLED generated a six-man photo lineup using a completely separate picture which had not been seen by Victims, Appellant's DMV photo, and used computer software to select five pictures of individuals possessing similar features to Appellant, including hair style and length, facial hair, and facial features including mouth and nose structure." (R.p.15, lines 4–17; R.p.31, lines 6–18; R.p.81, lines 12–24).

Officer Williams separated Victims during the photo lineup process, and Victims both identified quickly identified Appellant without any outside influence from each other or Officer Williams. (R.p.16, line 13–R.p.18, line 22; R.p.59, lines 4–11; R.p.82, line 12–R.p.83, line 12; R.p.84, line 14–R.p.85, line 10; R.p.99, line 15–R.p.100, line 6; State's Exhibits 1–2).

Finally, Appellant's argument that the photo lineup procedure was suggestive simply because the Victims found Appellant's Facebook page the day after the robbery is completely without merit. Victims did not perform a random search of Facebook to locate Appellant: instead, they performed a search for Appellant's phone number, which yielded two Facebook posts, by Appellant, in which he extended a general invitation for people viewing his profile to contact him. Both of those posts were made within weeks, and in one case, days prior to the robbery. (R.p.53, lines 11–21; R.p.76, line 17–R.p.79, line 8; State's Exhibits 6–7). Additionally, both Victims testified they immediately recognized Appellant as the unmasked robber, despite the presence of three additional men in the Facebook picture. (R.p.53, line 11–R.p.54, line 3; R.p.56, line 9–R.p.57, line 11; R.p.96, lines 10–23; R.p.97, line 19–R.p.98, line 5; State's Exhibit 5). Accordingly, Victims' later identifications of Appellant in the photo lineups and at trial were not due to any suggestive procedure from the state; rather, they were the result of their own investigation, which was based on their own memories of the crime. Appellant has failed to provide any evidence contradicting Victims' testimony, or that anything other than their own search using Appellant's phone number led them to his Facebook page. Thus, Appellant has failed to carry his burden of proving the identification procedure was impermissibly suggestive. See Dukes, 404 S.C.at 561, 745 S.E.2d at 141 (finding a

defendant bears the burden of proving the identification procedure was impermissibly suggestive).

Reliability

When determining the likelihood of misidentification, courts must evaluate the totality of the circumstances using the following factors: (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 at the confrontation, and (5) the length of time between the crime and the confrontation. Neil, 409 U.S. at 199-200; State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 697 (2007); State v. Singleton, 395 S.C. 6, 13-14, 716 S.E.2d 332, 335-36 (Ct. App. 2011).

Appellant argues that Victims' photo lineup identifications were not reliable under the totality of the circumstances and that Victims did not satisfy the first four Neil factors. Specifically, he contends: (1) Victims had only a limited opportunity to view the unmasked robber's face during the crime, because the they spent the majority of the crime face-down on the ground, and each witness viewed the unmasked robber for only a few moments during the robbery; (2) Victims did not pay much attention to the unmasked robber's features, because they were consumed with serious concern that they would be killed; (3) Victims did not provide Officer Williams with a detailed description of the unmasked robber, and instead relied upon the name and photo they found on Facebook; and (4) the Victims' level of certainty in their identification of Appellant was skewed because they located his Facebook page a month before Officer Williams presented them

with the photo lineups, so they could not be sure if they were identifying the person from the Facebook page or the robber.

As stated previously, Victims' Facebook search for Appellant was an identification involving a nongovernmental source, and as such this Court need not reach the question of the reliability of the photo identifications. See Dukes, 404 S.C. at 557–558, 745 S.E.2d at 139; Tisdale, 338 at 612–614; 527 S.E.2d at 392–393.

As to the first factor, Victims' opportunity to view Appellant's face, Victims testified they met Appellant outside at 3:00 that afternoon, in clear weather. Victim 1 testified he had a conversation with Appellant on the way to the ambush spot, which was approximately 300 yards away, which took the pair roughly three minutes to walk. He stated that during this time, he was able to view Appellant "perfectly well," and had seen his face since the moment he arrived. Victim 2 testified she saw Appellant when they arrived for the sale, and heard the conversation between him and Victim 1 until the two men walked away. Notably, South Carolina courts have repeatedly found that encounters as short as minute were adequate opportunities for identification purposes under Neal. See, e.g., Traylor, 360 S.C. at 83, 600 S.E.2d at 527 (finding three witnesses, who had observed a defendant during a burglary and robbery for respective periods of one minute, five minutes, and ten minutes in a lit area were adequate time periods which did not undermine the reliability of the witnesses' identification of the defendant); Tisdale, 338 S.C. at 614, 527 S.E.2d at 393 (finding bank tellers' identifications of defendant, which ranged from thirty to forty-five seconds during the robbery, were reliable, when witnesses saw defendant clearly, in a well-lit area, without anything obstructing his face).

Appellant also challenges the second factor, Victims' degree of attention to Appellant's appearance, Appellant's argument is without merit. His sole argument regarding this factor is that Victims' apprehension undermined their abilities to accurately recall the unmasked robber's appearance. However, case law disputes that assertion. See State v. Govan, 372 S.C. 552, 560, 643 S.E.2d 92, 96 (Ct. App. 2007) (finding 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) ; 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.").

As to the third factor, the accuracy of Victims' description of Appellant, Appellant argues the description was too vague to be reliable, as it primarily consisted of statements from Victim 1 that the unmasked robber was a black male with a similar build to his. (R.p.62, line 15–R.p.63, line 20; R.p.89, line 6–R.p.90, line 3). However, Victim 1 testified he provided Officer Williams with Appellant's name, phone number, and Facebook picture. (R.p.57, line 19–R.p.58, line 14). Accordingly, it was unnecessary for Victim 1 to provide Officer Williams with any significant verbal description of Appellant, as the name, phone number, and photo were far more accurate and useful than a vague, verbal description of Appellant's appearance.

Regarding the fourth factor, the level of certainty demonstrated by Victims during the photo lineup, Appellant argues that Victims' certainty was skewed because they based their identification on Appellant's Facebook photo, and not on their actual memories of the robbery. According to Appellant, this affected the reliability of their identifications

because they were unsure whether they were identifying the unmasked robber or the person whom they identified using Facebook. However, this argument is without merit, because Victims positively identified Appellant as the unmasked robber, and were completely certain of that identification, from the very moment they saw his Facebook picture. Notably, Victims did not base their Facebook identification solely on the results of their phone number search: Appellant's Facebook picture included three other black men, yet they quickly identified Appellant as the man who robbed them. (R.p.53, line 18–R.p.56, line 20; R.p.66, lines 7–13, R.p.67, line 24–R.p.68, line 2; R.p.96, lines 10–23; State's Exhibit 5).

Accordingly, the trial judge did not did not abuse its discretion in denying Appellant's motion to suppress the identification testimony. Appellant's conviction and sentences should be affirmed.

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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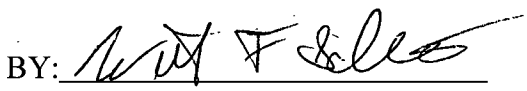
BY: 

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. Durant, Esquire
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I further certify that all parties required by Rule to be served have been served. This 4th day of April, 2016.

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