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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
The Honorable Daniel D. Hall, Circuit Court Judge
Appellate Case No. 2016-000324

THE STATE,

Respondent,

vs.

JONATHON ALEXANDER PHILLIPS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

The circuit court did not abuse its discretion in admitting the store clerk's out-of-court and in-court identification of Appellant; however, any error in admitting the clerk's identification testimony was harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

The State concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In November 2015, the York County Grand Jury indicted Appellant Jonathan Alexander Phillips of one count of armed robbery in connection with an August 2015 robbery of a convenience store. The case was called for a jury trial on February 10, 2016, before the Honorable Daniel D. Hall, Circuit Court Judge.

Appellant moved pre-trial to suppress the store clerk's out-of-court and in-court identification of Appellant, arguing the out-of-court identification procedure was unduly suggestive such that it tainted any subsequent in-court identification. The circuit court conducted a hearing on the issue under Neil v. Biggers, 409 U.S. 188 (1972). (Trial Transcript [TT], pp. 26-27; Record on Appeal [R.], pp. 2-3).

At the hearing, Appellant's mother testified she heard Appellant was involved in a robbery, and she contacted a relative who worked with law enforcement. Officers came to her home and showed her a photograph taken from the store surveillance video, and she identified Appellant as the person in the photograph. (TT, pp. 28-35; R., pp. 4-11).

The store clerk testified he was working at the Murphy Express in Lake Wylie, South Carolina, on the evening of August 13, 2015. A man came up to the counter purportedly to buy a beer, but when the clerk opened the cash register to get the man's change, the man slid a note to him demanding all the money. The man showed the clerk a pistol under his shirt, and the clerk gave him all the money from the cash register. After the man left, the clerk called 911, and when police arrived, he showed them the store's surveillance video with images of the robber. (TT, pp. 36-39; R., pp. 12-15).

The clerk testified he interacted with the robber for thirty to forty-five seconds and he saw the man's face. He told the police the man was a black male in his mid-twenties, weighed about 145 pounds, wore a brown shirt and camo shorts, had short shaved hair, and one of his

eyes was bloodshot. Several days after the robbery, a police officer showed him a picture of Appellant's face, and he identified Appellant as the man who robbed the store. (TT, pp. 36-45; R., pp. 12-21).

Lieutenant Rick Thomasson of the York City Police Department testified Appellant's mother, who was married to his cousin, contacted him about the robbery. After speaking with her, Thomasson viewed the store surveillance video and recognized Appellant as the person who robbed the store. He and other officers took a still photograph from the video to Appellant's mother, and she identified Appellant as the person in the photograph. (State's Exhibit 2).¹ Several days later, Appellant turned himself in to Thomasson, who immediately noticed one of Appellant's eyes was very bloodshot. (TT, pp. 46-56; R., pp. 22-32).

After hearing arguments, the circuit court found the out-of-court identifications by Appellant's mother and Thomasson was based on their personal familiarity with Appellant, the video and photograph at issue were not unduly suggestive, and thus, their identification testimony was admissible. The court then heard additional testimony regarding the photograph shown to the store clerk, and found the clerk's out-of-court identification was reliable based on the amount of time he interacted with the robber, and the photograph at issue was not unduly suggestive, so the clerk's identification testimony also admissible. (TT, pp. 56-69; R., pp. 32-45).

The State's witnesses testified before the jury consistent with their pre-trial testimony. (TT, pp. 102-136, 145-186; R., pp. 51-85, 86-127). The jury convicted Appellant as indicted, and the circuit court sentenced him to fifteen years incarceration. (TT, pp. 231-237; R., pp. 165-171). This appeal followed.

¹State's Exhibits 2-11 (Still Shot Photos), State's Exhibit 12 (In-store Video), and State's Exhibit 13 (Defendant's Mug Shot) will be transported to the Court for consideration.

ARGUMENT

The circuit court did not abuse its discretion in admitting the store clerk's out-of-court and in-court identification of Appellant; however, any error in admitting the clerk's identification testimony was harmless beyond a reasonable doubt.

Appellant contends the trial court erred in admitting the store clerk's identification testimony because it was based on a single photograph of Appellant, which was unduly suggestive and so tainted the clerk's identification there was a substantial likelihood of irreparable misidentification. To the contrary, the circuit court acted well within its discretion in admitting the clerk's testimony. Further, any possible error in admitting the testimony was harmless beyond a reasonable doubt.

A. Standard of Review

In criminal cases, the appellate court sits to review errors of law only, and whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. State v. Moore, 343 S.C. 282, 540 S.E.2d 445, 448 (2000). Generally, the decision to admit an eyewitness identification is within the trial judge's discretion, which will not be disturbed on appeal absent an abuse of discretion. *Id.*

B. Identification Evidence

"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. T aylor, 360 S.C. 74, 600 S.E.2d 523, 526–27 (2004) (citing Moore). Biggers established a two-prong inquiry to determine the admissibility of an out-of-court identification: 1: the court must ascertain whether the identification process was unduly

suggestive; and 2) then determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.* If the court determines the confrontation procedure was suggestive, the central question becomes whether under the totality of the circumstances the identification was reliable. *Id.* Those rules do not apply, however, when the identification is based on the witness' personal knowledge of the defendant. State v. Liverman, 398 S.C. 130, 727 S.E.2d 422, 426 (2012).

In this case, immediately after the robbery the clerk gave a fairly detailed and accurate description of the robber, including the robber's very bloodshot eye.² The clerk had ample time to view the robber's face, his attention was acute in part because of the robber's gun, and he showed no hesitation in identifying Appellant as the man who robbed the store. While several days passed between the robbery and the clerk's viewing of Appellant's photograph, the photograph showed only Appellant's face, and as the circuit court found, nothing about the photograph suggested it was connected to any criminal activity by Appellant. (TT, pp. 68-69, State's Exhibit 13; R., pp. 44-45, 174). Therefore, the clerk's identification satisfied the Bigger factors, and the circuit court acted within its discretion in admitting the clerk's identification testimony.

C. Harmless Error

Even assuming error in admitting the clerk's testimony, however, the error was clearly harmless beyond any reasonable doubt. "A harmless error analysis is contextual and specific to the circumstances of the case." No definite rule of law governs the finding that an error was

²There was some confusion regarding when the clerk told police about the bloodshot eye because it was not included in his original written statement. The clerk definitively testified he told police about the eye the night of the robbery, and wrote the additional statement days later just to add that fact. He also testified he wrote the second statement before police showed him Appellant's photograph. (TT, pp. 41-42, 45, 107, 128-130, 134; R., pp. 17-18, 69, 21, 56, 77-79, 83).

harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. In considering whether error is harmless, a case's particular facts must be considered along with various factors including: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Liverman, 727 S.E.2d at 427 (internal citations omitted). The harmless error analysis centers on whether beyond a reasonable doubt the error did not contribute to the guilty verdict. State v. Tapp, 398 S.C. 376, 728 S.E.2d 468, 475 (2012).

Appellant blatantly ignores the identification testimony of Appellant's mother and Thomasson, which was based on their personal knowledge of, and familial relationship with, Appellant. Their testimony, standing alone, was more than sufficient to support the jury's finding of guilt. Therefore, even if the circuit court erred in admitting the clerk's identification testimony, it was harmless beyond any reasonable doubt.

CONCLUSION

Based on the foregoing reasons, the State submits the judgment and conviction of the lower court should be affirmed.

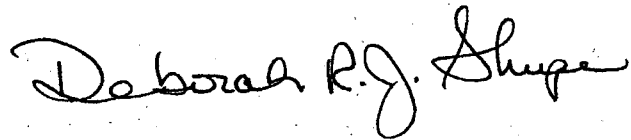
Respectfully submitted,

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March 3, 2017

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CERTIFICATE OF COUNSEL

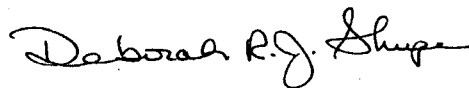
The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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