THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Roger M. Young, Circuit Court Judge

Case Nos. 2014-GS-10-00763
2014-GS-10-00765 and 2014-GS-10-00767

Appellate Case No. 2015-000709
Opinion No. 5537, Filed February 14, 2018

The State, ... Respondent,

v.

Denzel Heyward . . . . . Appellant

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Appellant, Denzel M. Heyward, petitions the court for reconsideration and/or rehearing of the Court of Appeals Opinion No. 5537 (filed February 14, 2018), pursuant to Rule 221(a), SCACR, based on the following grounds:

I. Appellant respectfully submits that the Court overlooked Appellant's principal argument that the trial court failed to conduct any analysis of the reliability factors and evidence presented during the pre-trial Biggers hearing, which was an abuse of discretion under the Court's precedent in State v. Moore, 334 S.C. 411, 415, 513 S.E.2d 626, (Ct. App. 1999), (finding failure to conduct Biggers factor analysis to be an abuse of discretion) *reversed in part on other grounds*, 343 S.C. 282, 288, 540 S.E.2d 445 (2000). The Appellant, the Respondent and the Court (Opinion at Page 4-5) all concur that the trial court only passed on the credibility of the witness's statements at the time of trial rather than analyzing the reliability of the identification based on the objective factors specified in Neil v. Biggers, and its progeny. Instead of addressing whether the trial court exercised its discretion, this Court engaged in its own fact-finding. I doing so, this Court did not consider the totality of the circumstances, but rather applied a deferential standard that only considered the sufficiency of the record to support findings that were never made at the trial court below.

Appellant and his co-defendant, Dashaun Simmons, were tried jointly in Charleston County for murder, attempted murder, armed robbery and possession of a weapon during a violent crime, for incidents occurring on May 16, 2012. Hemingway had failed to make an identification of Appellant during a "six-pack" photo line-up conducted at his home one day after the incident. The next day, investigators took

Hemingway to police headquarters and gave him another line-up featuring Appellant. When shown the subsequent line-up at the police station. Hemingway testified that the investigators "had to know something [he] didn't know . . . They keep showing [him] the same picture." R. pp. 115-116. Hemingway testified that he feared he would be incarcerated for failing to identify Appellant. R. p. 94. Hemingway then identified Appellant during the second line-up. Hemingway never identified the other co-defendants, who were only presented in a single line-up, rather than multiple line-ups.

Prior to the trial of this case, the Appellant moved to suppress the out-of-court and in-court identification of Appellant by Jujuain Hemingway pursuant to Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). To ensure due process, Neil v. Blggers requires courts to assess, on a case-by-case basis, the following: (1) whether the identification resulted from unnecessary and unduly suggestive polilce procedures, and if so, (2) wheteher the out-of court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Opinion at 4, *citing* State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). "Under the totality of the circumstances, the factors to be considered is assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to review 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. Id. Any one factor weighing in favor of reliability is not dispositive. *See*, e.g. State v. Moore, 343 S.C. 282, 289 (noting closeness in time, did not outweigh other factors).

The trial court made the following finding after the Biggers hearing:[1]

> "Well, I find that the lineup was unduly suggestive because they showed up with a lineup with the Defendant in it, and then 24 hours later showed up with a different lineup but there was one picture that was the same and that was the Defendant. And as the one witness said, well, that suggested to me they knew something. And then I think it taints that lineup and makes it unduly suggestive; however, that's just the first prong of the analysis.
>
> The second prong is, even though it was unduly suggestive, it was nevertheless reliable. And considering Mr. Jujuain Hemingway's testimony that he, in fact, was able to identify Mr. Heyward on the first day, but just chose to just not verbalize that because he was angry suggests to me that he was not, in fact, influenced by the second lineup. He stated, yeah, that suggested to me that they knew something that I didn't know, but at the same time he states that he had already made the identification. So the second one didn't influence his first – it couldn't have influenced his first lineup, so – or his first identification.
>
> So even though the lineup procedure combined – combining the two was unduly suggestive, *I don't think it was unreliable because of the unique – very unique circumstances of Mr. Hemingway stating that he had, in fact, already identified it, but because of his anger and his youth had decided not to share that identification with police.*
>
> All right. So your motion to suppress that will be denied." (emphasis added)

R. pp. 193-195. The trial court did not address any of evidentiary facts bearing on the Biggers factors, including: (1) the incident occurred at 11:30 p.m. on a stormy night; (2) Hemingway had smoked hallucinogenic drugs a short time before the initial contact; (R. p. 102); (3) the witness was face down on the ground for the majority of the interaction (R. pp. 86-87); (4) the witness claimed that he had an equally good look at *both* of the assailants (Opinion p. 4, R. p. 85), but was never able to identify the co-defendant. *See,* State v. Moore, 540 S.E.2d 445, 343 S.C. 282, 249 (2000) (noting concern that witness was unable to identify co-defendant at time of confrontation despite claim that

[1] "I find that the lineup was unduly suggestive because they showed up with a lineup with the Defendant in it, and then 24 hours later showed up with a different lineup but there was one picture that was the same and that was the Defendant. And as the one witness said, well, that suggested to me they knew something. And then I think it taints that lineup and makes it unduly suggestive." R. pp. 193-194.

witness had seen the co-defendant's face). Nor did the trial court consider the evidence discussed by the State on appeal and adopted by this Court to support reliability. *See*, Opinion p. 5.

In State v. Moore, this Court found that the trial court failed to exercise its discretion because the trial judge declined to examine the reliability of an eyewitness identification using the Biggers factors. In that case, the trial judge did not make a finding that the identification was reliable in light of the factors, stating:

> "The court's finding is that there is evidence—I won't say reliable, but I think that's a matter for the jury—that she can identify them. I don't find it unduly suggestive. I find the issues—the weight is a matter for the jury."

343 S.C. at 415, 513 S.E.2d at ___. In Moore, the Court of Appeals ruled that the trial court "did not evaluate the reliability of Davis's identification in light of the above factors and did not make a determination that her identification was reliable. This was error." Id.

The exact same error has occurred in this case. It is indisputable that the trial court never passed on the evidence bearing on the objective factors set forth in Biggers relating to the reliability of Hemingway's perception before making a final ruling. Instead, the trial court only made a determination based on the credibility of the witness's statement that he had lied during the first line-up – a fact that was not disclosed to law enforcement for years after the line-ups occurred.

This determination is in direct conflict with Biggers, which directs the court to assess the "level of certainty *demonstrated at the time of the confrontation*." It is clear, that the witness outwardly demonstrated *no certainty* at the time of the initial confrontation. Then, the next day, after being taken into a police station where he

feared for his liberty, the witness demonstrated absolute certainty and even identified the Appellant by name. To reject the objective evidence on this factor for an after the fact explanation subverts the purpose of entire Biggers analysis, because it replaces the objective review of the totality of the circumstances with a subjective credibility test.

B. In conducting it's own *de novo* review of the evidence this Court overlooked or neglected to consider the totality of the circumstances. Although ostensibly reviewing the lower court for an abuse of discretion, this Court actually passed on the credibility and import of a number of factual matters (Opinion at 5), about which the trial court made no findings whatsoever. In doing so, it either exceeded the scope of review, State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, __, (2001) (holding the Court of Appeals erred in taking a *de novo* approach to admissibility of evidence), or abused its discretion in failing to consider the totality of the circumstances.

In conducting this *de novo* analysis, the Court failed to discuss or consider the totality of the circumstances surrounding the identification, and instead searched the record only for evidence that would support findings that were *never made by the trial court.* In doing so, the Court overlooked many of the most important facts on this issue, including the highly suggestive and coercive actions of law enforcement in taking custody of the eyewitness Hemingway; the time of day; the intoxication of the witness, the position of the witness on the ground; and the witness's inconsistency in his ability to identify other participants.

Accordingly, Appellant asks that the court reconsider its decision to include analysis of all facts and evidence bearing on the question of reliability.

C. Appellant submits that this Court misapprehended or misstated the rule in State v. Liverman, 398 S.C. at 143-44, 727 S.E.2d at 428-429, to the extent the Opinion suggests that the ability to vet identification evidence at trial will always cure the erroneous admission of identification evidence that would otherwise violate a defendant's due process rights. In it's Opinion, the court suggests that Liverman holds that "any error in the admission of identification evidence to be harmless where the reliability of the identification evidence was fully vetted at trial, the weaknesses in the evidence were exposed on cross-examination, and defense counsel reminded the jury of those weaknesses during closing arguments." Opinion at 5. Of course, such a broad reading of Liverman would make pre-trial misidentification safeguards meaningless.

Liverman involved an identification where the witness was a prior acquaintance of the Defendant. In South Carolina, such cases did not even fall under the scope of Biggers, until the United States Supreme Court's decision in Perry v. New Hampshire, 565 U.S. 228, 132 S.Ct. 716 (2012). *See* State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973) (no pretrial hearing on reliability and admissibility of identification evidence was necessary where the eyewitness knows the accused).

In Liverman, the court concluded that the error of not having a full in camera hearing was harmless, because the identification was nevertheless reliable, largely based on the witness's prior knowledge of the defendant. 398 S.C. 141, 727 S.E.2d 427. Only in "reinforcing" this primary conclusion, did the court state that the vetting of evidence at trial provided *additional* support for their conclusion. 398 S.C. 142-144, 398 S.E.2d at 143-144.

In short, cross-examination and trial rights are *not* a standalone cure for improperly admitted identification evidence under Liverman. The court's statement of the law on this point is a dangerous erosion of defendants' due process rights, and may undermine fair proceedings in the future.

II. Appellant respectfully submits that the court overlooked portions of the record and briefs in concluding the Appellant's arguments to exclude evidence relating to domestic abuse by the appellant against Qusantrina Rivers were not preserved. Appellant's arguments were clearly articulated and presented to the court in a pre-trial motion and the basis of Appellant's contemporaneous, renewed objection was clear from the context.

Before trial, the Appellant moved to exclude any testimony about allegations of domestic abuse by the Appellant against Quasantrina Rivers ("Rivers"), an alleged co-conspirator and prosecution witness. The state sought to introduce numerous incidents of domestic violence, including video of the Appellant hitting Rivers months before May 16, 2012. The state argued the violent incidents during the course of the relationship showed the violent nature of the relationship, and specifically the Appellant's violent temperament toward Rivers. Tr. Vol 1, pp. 200-213; R. pp. 138-151. They further argued that the incidents showed that Rivers was under the control of the Appellant. The court properly rejected these arguments, noting the state's efforts to depict Appellant as a violent abuser, directly contravened the purpose of Rule 404(b), which is to exclude character evidence offered to prove a character trait of the defendant

consistent with the crime charged.[2] The court did not totally foreclose the possibility that the state *might* be able to introduce the domestic violence incidents if it was necessary to rehabilitate Rivers following her cross-examination. Tr. Vol 1, pp. 212-213; R. pp. 150-151.

Before Rivers testified, her mother, Sidearis Singleton took the stand. During the cross-examination of Rivers' mother, Defense Counsel inquired whether Singleton knew if Rivers had accused Singleton's husband of sexual abuse:

> Q. Do you know if [Rivers has] had some mental health issues?
> A. I am unsure about that.
> Q. Do you know whether she's accused anyone in your family of sexually assaulting her?
> A. I'm not sure about that, sir.
> . . .
> Q. Do you have a husband at the present time?
> A. Yes, sir.
> Q. And what is his name?
> A. His name is Phillip.
> Q. Do you know whether [Rivers] has ever accused Phillip of sexually assaulting her?
> A. No sir.
> Q. You do not know whether that's true or not?
> A. No sir.
> Q. You're still presently married to Phillip?
> A. Yes, sir.
> Q. All right. And if [Rivers] had accused him of sexually molesting her, then you would not be married to him if you believed those were correct; is that true?
> A. Correct.
> Q. You're uncertain whether [Rivers] has ever accused Phillip of sexually assaulting her?

[2] "[Y]our trying to say he's a really bad guy and, therefore, he's convicted -- he should be convicted of this, look at all these other things that he did. And that's exactly what character evidence is usually not allowed to do." Tr. Vol 1, p. 206; R. p. 144.

Tr. Vol. 2, pp. 224-225; R. pp. 239-240. The obvious intent of defense counsel, was to elicit testimony regarding a specific instance of fabrication by Rivers. The only suggestion made was that Rivers' mother did not believe the specific allegation of sexual abuse made against her husband.

On redirect, the State then proceeded to ask Ms. Singleton "Who do you know that abused [Rivers]." Tr. Vol. 2, p. 232; R. p. 247. Defense counsel immediately objected. The court immediately stated that defense counsel had opened the door. Id.

Despite its prior ruling to exclude this testimony on this subject, the court permitted Mrs. Singleton to testify extensively regarding the abusive relationship between Appellant and Rivers. Tr. Vol. 2, pp. 233-235; R. pp. 248-250. Singleton testified that the Appellant abused Rivers on multiple occasions, in multiple localities and that she personally disapproved of him having a relationship with her daughter.

A. First, this Court ruled that the objection of counsel was "not specific." Opinion at 6. However, specific grounds for an objection are only necessary where the grounds are not clear from the context. Rule 103(a)(1), SCRE. Prior to trial, defense counsel moved to exclude any testimony regarding alleged domestic violence between Appellant and his co-defendant Quasantrina Rivers. An extensive pre-trial Lyle hearing took place based on counsel's Rule 404(b) arguments. At the conclusion of the pre-trial hearing, the trial court expressly ruled that the evidence the solicitor sought to introduce was directly excluded under Rule 404(b). The trial judge summarized the hearing as follows:

> "[Y]our trying to say he's a really bad guy and, therefore, he's convicted – he should be convicted of this, look at all these other things that he did. And that's exactly what character evidence is usually not allowed to do."

When the solicitor sought to introduce the exact same evidence through Sidearis Singleton at trial, the basis for defense counsel's objection was immediately apparent from the context.

B. Appellant submits that the court overlooked the Appellant's primary argument related to the impermissible character evidence, in that this Court did not provide any basis or supporting for its conclusion that defense counsel opened the door to the testimony of Sidearis Singleton. Without any explanation or analysis, the court states "we find defense counsel opened the door to the issue of abuse during the cross-examination of Singleton." Opinion at 7. This Court did not provide any explanation for this conclusion.

Rule 220(b), SCACR, requires that the reasons for the court's decision must be stated in writing. In reviewing the Opinion, no explanation for the court's conclusion is offered. In fact, the Opinion is starkly contrasted with the authorities cited by the Court, each of which provides an explanation for *why* the "door was opened" in each case.

In State v. Robertson, 305 S.C. 469, 409 S.E.2d 404, the South Carolina Supreme Court explained that a defendant could not complain of evidence linking a group to drug dealing, when the defendant's own attorney has previously solicited evidence of the same group's involvement in drug dealing.

In State v. Beam, 336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999), defense counsel questioned a state's expert about a certain type of test that had not been performed on some evidence, then complained of prejudice when the test was performed during the trial and the results were admitted as evidence against the defendant.

In State v. Page, 378 S.C. 476, 378 S.E.2d 357 (Ct. App. 2008), this Court went to extensive lengths to explain how the cross-examination by defense counsel created specific inferences about the state's investigation, but ultimately ruled that the line of questioning did not justify the admission of excluded evidence to rehabilitate an investigator.

In each case, the court articulated the specific transaction or subject matter nexus between the evidence or questions which opened a "door," or in the case of Page, the lack thereof. The Appellant's main argument on this issue was that there was no logical basis or subject matter relationship between defense counsel's questions and the evidence introduced by Sidearis Singleton. Testimony related to domestic abuse by a spouse or boyfriend does not in any way, explain, rebut or illuminate any suggestion or inference about Quasantrina River's totally unrelated allegations of sexual abuse against her step-father. The Appellant incorporates his arguments set forth in pages 16-19 of the Appellant's Final Brief, and requests that the court address this issue in accordance with Rule 220, SCACR.

C. Finally, the court overlooked Appellant's argument about the failure of the trial court to conduct a Rule 403 analysis as described in State v. Smith, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011). Brief of Appellant, pp. 19-22. By not addressing Appellant's argument on this issue it has issued an opinion in conflict with this Court's recent decision in State v. King, 416 S.C. 92, 784 S.E.2d 252, (2016), *cert. granted, decision pending*, which held that a circuit court's failure to conduct a Rule 404(b) analysis, including an analysis under Rule 403, is an error requiring remand for a determination on the record.

III. The Court overlooked the objections raised to the late sentencing and the consideration of victim impact evidence related only to Kadeem Chambers. As noted in Appellant's brief, trial counsel objected to proceeding with the sentencing at 1:30 in the morning. Additionally, trial counsel joined in his co-defendants arguments on the consideration of improper victim impact testimony, Tr. Vol., 3, p. 477; R. p. 646, and submitted a post-trial motion to reconsider sentencing which raised both issues again. R. pp. 654-655. The court ruled on the motion as well. R. pp. 5-8. To the extent precise language or strict issue preservation protocols were not followed, it is to be expected when court's conduct hearings at 1:30 a.m. Additionally, "[a] party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). "The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it [could] be reasonably understood by the trial [court]." McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct.App.1996). The trial court ruled, indicating an understanding of the objection. Accordingly, these arguments are preserved for review.

Respectfully Submitted,

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PROOF OF SERVICE

I certify that, on March 16, 2018, I served the Petition for Rehearing on the attorneys for the Respondent, by delivering a copy of same to the offices of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Room 519, and leaving a copy with a person of suitable age and discretion, addressed as follows:

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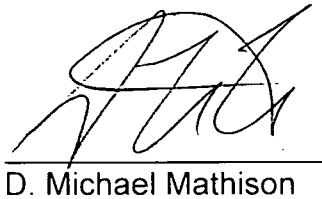

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