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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions

Maité D. Murphy, Circuit Court Judge

Opinion No. 5589 (S.C. Ct. App. filed August 15, 2018)
Court of Appeals Appellate Case No. 2015-000516

State of South Carolina, ... Petitioner,

v.

Archie More Hardin, ... Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err in failing to properly apply existing precedent and the appropriate standard of review in reaching its conclusion that the identification procedure utilized by the police was BOTH impermissibly suggestive AND conducive to substantial likelihood of misidentification where it failed to consider whether the admittedly "unduly suggestive" procedure used by police was also "unnecessarily suggestive" such as to render it impermissible under the circumstances of this case?

STATEMENT OF THE CASE

Archie More Hardin (Respondent) was indicted at the September 8, 2014 term of the grand jury for Orangeburg County for three (3) counts of kidnapping (2014-GS-38-888, -889, & -890), one count of armed robbery (2014-GS-38-891), one count of assault and battery of a high and aggravated nature (2014-GS-38-892), and one count of possession of a weapon during a violent crime (2014-GS-38-893). He was represented by Assistant Public Defenders Breen Stevens and Doug Mellard of the First Circuit Public Defender's Office. Petitioner (the State) was represented by Assistant Solicitors Ashley Cornwell and Sarah Ford of the First Circuit Solicitor's Office. On February 23-27, 2015, Respondent proceeded to trial by jury pursuant to which he was found guilty as charged. He was sentenced by the Honorable Maité D. Murphy to thirty (30) years' concurrent imprisonment for each count of kidnapping, thirty (30) years' concurrent imprisonment for armed robbery, twenty (20) years' concurrent imprisonment for assault and battery of a high and aggravated nature, and five (5) years' consecutive imprisonment for possession of a weapon during a violent crime, for an aggregate sentence of thirty-five (35) years' imprisonment. (App.p.719-735; p.716-p.717). He timely filed a notice of intent to appeal his convictions and sentences and the parties submitted briefs addressing the three issue raised by Respondent on appeal. On August 15, 2018, the Court of Appeals issued a published opinion that affirmed Respondent's convictions. *State v. Hardin*, Op. No. 5589 (S.C. Ct. App. filed August 15, 2018). (App.p.792-p.805). On August 30, 2018, the State petitioned the Court of Appeals for rehearing solely in regard to its conclusion that the circuit court erred in admitting the out-of-court identifications made by the three victims of Respondent's crimes. (App.p.806-p.821). Respondent did not file a return and by order filed October 19, 2018, the petition for

rehearing was denied. (App.p.822- p.823.). This Petition for a Writ of Certiorari to the Court of Appeals, submitted on behalf of the State, now follows.

STATEMENT OF FACTS

As described by the solicitor in her opening statement, what started as a normal morning at the T-Mobile store in Orangeburg on May 16, 2014, soon turned into a terrifying day for three employees when the store was robbed by two armed men. Shortly after 10 a.m., Respondent entered the store and talked with employee Jarron Weaver about getting an iPad for his daughter. He said he was going outside to call his wife and reentered a few minutes later to discuss getting his credit checked for the purchase. Respondent then left a second time; however, after the only other customer exited the store, he and another man came in waving guns while wearing masks and gloves. They pointed the guns at Weaver, forced him and the store manager, Thomas Sims, the back of the store, and then ordered them to the ground. The robbers used duct tape to bind Weaver's and Sims' hands behind their backs and their feet together. They then retrieved a third employee, Kirstie Berry, from behind the store where she had gone out to smoke a cigarette. Respondent punched Berry in the face, grabbed her by the hair, pulled her back into the store, and ordered her to the ground. He pistol whipped Berry in the back of the head and then duct taped her hands and feet.

Respondent and the other man ransacked the storage room and started filling two black bags with telephones, electronics, and other items. They exited the back of the store where two witnesses saw them jump a fence and drive off in a gray car. In addition to the items from the store, the robbers also stole Sims' book bag which contained a personal iPad which had the "Locate my iPad" app. By activating the app using Sims' father's phone, the police tracked the stolen iPad to an apartment in Columbia. When they arrived, they found a gray, four-door

Toyota parked in front of an apartment and saw Respondent coming out towards the car. He admitted it was his car. The iPad was subsequently located behind a dumpster at the apartment, and during a search of Respondent's apartment, the police found the items stolen from the T-Mobile store as well as two guns which matched the description of the guns used in the robbery. Before locating the iPad or searching the apartment, the police took a photograph of Respondent and texted it to police in Orangeburg who showed it to the three victims, each of whom identified Respondent as one of the robbers. (App.p.349-p.355).

Prior to the commencement of trial, the trial court held an extensive pretrial hearing on a number of motions, including Respondent's motion for a continuance (App.p.13-p.30), Respondent's motion to suppress evidence discovered during the warrantless search of his apartment (App.p.39-p.40; p.72), and Respondent's request for a *Neil v. Biggers* hearing to challenge the reliability of his out-of-court identification by the three victims and the admissibility of their identification testimony which the State intended to offer at trial. (App.p.36-p.39).

Testimony regarding identification was interspersed with testimony regarding the search of Respondent's apartment and the admissibility of his statements to the police. First, in regard to the identification, Corporal Cain testified that **prior to locating the iPad and prior to Respondent's arrest** he took a photo of Respondent with his county issued cell phone and sent it to Lieutenant Schumpert in Orangeburg. He was subsequently advised by Schumpert that Respondent had been identified by the victims of the armed robbery. Cain identified a printed copy of the photo he sent, which was marked and entered as State's Exhibit #2. (App.p.62-p.64).

Next, Sergeant Stokes testified he was the officer who instructed Cain to take the photo of Respondent to send to Lieutenant Schumpert. He explained the photo was shown to the three

victims and they positively identified Respondent as having robbed the T-Mobile store that morning. (App.p.86; p.92). On cross-examination, Stokes acknowledged an officer in uniform is also visible in the photo, standing behind Respondent. He likewise acknowledged the photo was shown to the victims on a cell phone, not as a print-out or as part of a "six-pack" photo lineup. Stokes also acknowledged that during the investigation he took a statement from a Mr. Walters, an eyewitness who was nearby at the time of the crime, in which Walters said Schumpert had shown him two photographs. Finally, Stokes acknowledged that several days after the robbery the police put together a six-card photo lineup which did not include Respondent's photograph and that victim Thomas Sims, Jr., identified somebody from that lineup as one of the robbers. (App.p.118-p.127; p.129-p.132). On redirect Stokes explained the six-card photo lineup was presented to Sims on May 21, 2014, in an effort to ascertain the identity of the co-defendant, and that he was not attempting to determine if Sims could further identify Respondent. (App.p.140-p.141).

Following jury qualification and selection, the State proceeded to call each of the three victims to describe the armed robbery as well as their out-of-court identification of Respondent. Store manager Thomas Sims, Jr., saw Respondent come into the T-Mobile store and watched him talk with his employee, Jarron Weaver, about getting an iPad for his daughter. Sims said he was able to view Respondent for five to ten minutes before he left the store first time, then saw Respondent briefly return, leave again, and then come in a third time with another guy. The two men had guns and told him and Weaver to get to the back of the store where they ordered them to the ground and duct taped their hands behind their backs and their feet together. Sims testified the police later showed him a photograph on a cell phone and asked if he could identify the person in the photo. He said he was immediately able to identify the person in the photograph as

the person that robbed the store. (App.p.172-p.178). On cross-examination, Sims was questioned about his opportunity to see the men who robbed the store, discrepancies in the details he gave when describing those men to the police, and being shown a single photograph on a cell phone which included an officer in the background. (App.p.178-p.197).

Store employee Jarron Weaver testified he talked with Respondent, face to face, for ten to fifteen minutes the first time he came into the T-Mobile store and then again for another five to ten minutes the second time he came in prior to the robbery. He testified the robbery itself lasted ten to fifteen minutes during which he was taken to the back at gunpoint, ordered to the floor, and duct taped. Weaver described being shown the cell phone photograph of Respondent by the police. He testified he was taken over to the side, by himself, and shown the picture and was able to immediately recognize Respondent as the person who robbed the store. Weaver said he was a hundred percent certain of the identification. (App.p.197-p.202).

Store employee Kirstie Berry testified about being outside on a smoke break when she was "snatched" into the back door of the T-Mobile store, ordered to the ground, hit in the back of the head before being duct taped on the floor. She said she got a good look at her assailant because she was turned directly face-to-face with him, less than a foot away, when she was pulled into the store. Berry testified about being shown the photo. She said she was immediately able to identify Respondent as the guy who robbed the store and who tied her up. Berry testified she was one hundred percent certain of the identification and then identified Respondent in the courtroom. (App.p.213-p.218).

At the conclusion of the testimony, the parties argued their respective positions in regard to the admissibility of Respondent's identification by the victims. Respondent referenced the two-pronged *Biggers* inquiry and argued the identification procedure used by the police was both

unduly suggestive and so unreliable that it created a substantial likelihood of misidentification. He argued the act of showing the victims a single photo of him, with an officer standing directly behind, rather than a six-pack photo lineup or a traditional standup lineup with actual people was unduly suggestive. Respondent then argued that given the limited opportunity to view the robbers at the time of the offense, the degree of attention, the accuracy of the prior descriptions, and the length of time between the armed robbery and the identification of the photograph, there was a substantial likelihood of misidentification. He asked that the out-of-court identifications and any in-court identifications be suppressed. (App.p.321-p.327).

The solicitor acknowledged show-up identification procedures that involve a single suspect are generally disfavored; however, she argued they nevertheless may be proper when they occur shortly after the crime while the witnesses' memories are still fresh and the suspect has not had time to alter his looks or dispose of evidence. She also noted how a show-up procedure might expedite a release of innocent subjects and enable the police to determine whether to continue searching. **Although the solicitor did not specifically use the phrase: "the procedure used for Hardin's identification was necessary under the circumstances," this is precisely the substance of the argument she made to the trial judge.** The solicitor then moved on to the second part of the analysis and went through the factors supporting admission of the identification under the totality of the circumstances including the substantial opportunity the victims had to look at Respondent, the fact that they continued to have a conversation in close proximity with the robber when guns were pointed at them, the relative accuracy of their descriptions of the robbers, and the fact that the identifications were made only three hours after the robbery while their memory was still fresh. The solicitor reemphasized the **necessity** of the identification procedure used by the police under the circumstances in this case, because it

"might have expedited the release of innocent suspects." In conclusion, the solicitor argued that even if the trial court determined the procedure was impermissibly suggestive, it still did not create a substantial likelihood of irreparable misidentification and therefore the motion to suppress should be denied. (App.p.327-p.331).

The following morning the trial court ruled on the identification issue. Although it found the procedure used by the police in showing the individual photograph to the victims was "unduly suggestive," it never addressed whether it was also "unnecessarily suggestive." The trial court instead moved directly into the second stage of the analysis and found the identification of Respondent was sufficiently reliable to allow admission of the testimony. The trial court examined the likelihood of misidentification by considering the totality of the circumstances. It specifically noted: (1) the victims had ample opportunity during daylight hours to view the robbers at the time of the crime, (2) the victims were able to pay close attention to what the person looked like, (3) the victims gave accurate descriptions of the perpetrator, (4) the victims testified their level of certainty was one hundred percent, and (5) the length of time between the armed robbery and the confrontation when they identified the photograph was short in nature. Ultimately, the trial court found the identification of Respondent by the three victims was proper and denied Respondent's motion to suppress. (App.p.341-p.342).

ARGUMENT

The Court of Appeals erred in failing to properly apply existing precedent and the appropriate standard of review in reaching its conclusion that the identification procedure utilized by the police was BOTH impermissibly suggestive AND conducive to substantial likelihood of misidentification, because it failed to consider whether the admittedly "unduly suggestive" procedure used by police was also "unnecessarily suggestive" such as to render it impermissible under the circumstances of this case.

The State submits there are special and important reasons for this Court to exercise its discretion to grant certiorari and to review the decision of the Court of Appeals in this matter pursuant to Rule 242(b), SCACR. In its published opinion, the Court of Appeals affirmed Respondent's convictions and sentence in regard to the identification issue upon finding "the erroneous admission of the out-of-court identifications was harmless beyond a reasonable doubt." In regard to Respondent's argument that "the circuit court erred in concluding that despite the unduly suggestive identification procedure, the victim's out-of-court identifications were nevertheless so reliable that no substantial likelihood of misidentification existed," this Court concluded: "We agree the procedure was **unduly suggestive**, but find any error in admitting the photo identifications was harmless." (emphasis added). Specifically the Court of Appeals held: "Considering all these facts, we have no doubt the single photograph of Hardin with a uniformed officer, shown to the victims on a cell phone screen by another uniformed officer in the hours after the robbery was **unduly suggestive**." (emphasis added). Yet, the Court of Appeals neither addressed nor found the procedure was **unnecessarily suggestive**, even though this issue was raised to the trial court and could serve as an additional sustaining ground to the trial court's decision to admit the identification evidence.

Certiorari

The State now seeks a writ of certiorari on the grounds that the Court of Appeals misapprehended, overlooked, or failed to properly apply existing precedent and the appropriate standard of review in reaching its conclusion that the identification procedure utilized by the police was BOTH impermissibly suggestive AND conducive to substantial likelihood of misidentification. *See State v. Liverman,* 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012) (noting an out-of-court identification of the defendant violates due process and must be suppressed when the identification procedure used by police was impermissibly suggestive and creates a very substantial likelihood of irreparable misidentification). Specifically, the Court of Appeals appears to have failed to consider whether the admittedly "unduly suggestive" procedure used by police was also "**unnecessarily suggestive**" such as to render it impermissible under the circumstances of this case. *See State v. Wyatt*, 421 S.C. 306, 308, 806 S.E.2d 708, 709 (2017) (finding the police identification procedure was not *unnecessarily suggestive*, and thus the trial court should have addressed the suppression question only under the first prong of *Neil v. Biggers*).

The Court of Appeals also misapplied the "abuse of discretion" standard when reviewing the trial court's analysis under the second prong of *Neil v. Biggers* by failing to give appropriate deference to the trial court's conclusion that the identification was sufficiently reliable to allow it to go to the jury. That conclusion was reached after a thorough and proper examination of whether, under the totality of the circumstances, the identification procedure created a very substantial likelihood of misidentification. Where there was ample evidence in the record to support the conclusion that no substantial likelihood of misidentification existed, it should have

been affirmed by the Court of Appeals on its merits rather than as a result of concluding it was harmless error.

Finally, the Court of Appeals gave insufficient consideration to the gravity of its ruling which, if made by the trial court, would have excluded relevant evidence from the jury. *See Harker v. Maryland*, 432 F.2d 437, 443 ("The exclusion of evidence from the jury is, however, a drastic sanction, one that is limited to identification testimony which is manifestly suspect. 'Short of that point, such evidence is for the jury to weigh ... for evidence with some element of untrustworthiness is customary grist for the jury mill.'") (quoting *Manson v. Brathwaite,* 432 U.S. 98 (1977). Although the Court of Appeals ultimately affirmed the identification issue on harmless error grounds, the significance of a published decision which would otherwise supplant the trial court's discretionary decision to admit relevant evidence while preventing victims of violent crimes from being able to identify their attackers to the jury cannot be overstated. *See Manson v. Braithwaite*, 432 U.S. 98, 110 (1977) (noting "the societal costs imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact"). As explained by the United States Supreme Court: ". . . such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." *Manson*, 432 U.S. at 116. The propriety of suppression, as found by the Court of Appeals, would be a drastic sanction almost never imposed by the appellate courts of South Carolina, the notable and nearly exclusive example being *State v. Moore*, 343 S.C. 282, 540 S.E.2d 445 (2000), which is discussed in more detail below.

Thus, the State respectfully submits the Court of Appeals should have affirmed the trial court's refusal to suppress the identification evidence under the first prong of *Neil v. Biggers* without considering the second prong. To the extent it nevertheless considered the second prong, it should have also have affirmed the trial court's refusal to suppress the identification evidence under that prong. As a result of affirming under either prong, the Court of Appeals could have done so without considering whether admission of the identification evidence was harmless beyond a reasonable doubt.

For these reasons, which are discussed in more detail below, the State respectfully requests that this Court grant this petition for a writ of certiorari and issue an opinion affirming the Court of Appeals affirmance of Respondent's convictions and sentence as modified, by finding the trial court did NOT err in refusing to suppress the identifications made by the three victims, and striking the harmless error analysis of this issue.

Analysis / Discussion

In *Wyatt*, this Court emphasized the focus of the first prong of the *Neil v. Biggers* inquiry is whether the identification resulted from an **unnecessarily suggestive** police identification procedure. *Wyatt*, 421 S.C. at 310, 806 S.E.2d at 710. In other words, due process concerns only arise when the procedure is both suggestive AND **unnecessary**. It went on to examine other cases which explained situations in which circumstances may make suggestive police identification procedures necessary. *Wyatt*, 421 S.C. at 312-13, 806 S.E.2d at 711-12. Most of those circumstances were present here, including: "where [the identification procedure] occurred shortly after the alleged crime . . . as the witness' memory is still fresh, and the suspect has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching." *Id.*

(quoting *Gibbs v. State*, 403 S.C. 484, 744 S.E.2d 170 (2013)). As in *Wyatt*, the procedure used for Respondent's identification was clearly suggestive, but the suggestive procedure was necessary under the circumstances of the case. Under the first prong of *Biggers*, therefore, the trial court correctly denied the motion to suppress, and the Court of Appeals should have affirmed for this alternative sustaining ground.

Second, even if the trial court's decision to address the second prong of *Neil v. Biggers* was appropriate, the Court of Appeals appears to have misapplied the "abuse of discretion" standard when reviewing the trial court's analysis under the second prong of *Neil v. Biggers* by failing to give appropriate deference to the trial court's conclusion that the identification was sufficiently reliable to allow it to go to the jury. That conclusion was reached after a thorough and proper examination of whether, under the totality of the circumstances, the identification procedure created a very substantial likelihood of misidentification. Where there was ample evidence in the record to support the conclusion that no substantial likelihood of misidentification existed, it should have been affirmed.

In its published opinion, the Court of Appeals dispatched with the trial court's analysis of the factors to consider in assessing the reliability of the suggestive identification procedure. Instead, it conducted its own review of the record and assigned its own weight to those factors before concluding: "While the victims testified they were one hundred percent certain that Hardin was one of the assailants, and the length of time between the robbery and the identifications was only a little over three hours, we do not believe these two factors alone suffice to support a finding that the out-of-court identifications were proper and admissible." Relying on this Court's opinion in *State v. Moore*, 343 S.C. 282, 540 S.E.2d 445 (2000), the Court of Appeals concluded that: "Under the totality of the circumstances, we find the circuit

court erred in assessing the reliability of an otherwise unnecessarily suggestive identification procedure." However, the reliance on *Moore* is misplaced. In *Moore*, this Court found that under the facts of that case, the identification was unreliable as a matter of law. *Moore*, 343 S.C. at 288, 540 S.E.2d at 447. However, the facts in *Moore* are easily distinguished from the facts in this case. *Moore* was "not a case in which the witness had an opportunity to observe defendant in close proximity for some considerable period of time." *Id.* at 289, 540 S.E.2d at 449. Instead, "the witness saw the two defendants for only a brief period of time, at some distance." *Id.* Here, the victims all saw Respondent either for a long period of time, in very close proximity, or both. As to the second factor, the witness' attention in *Moore* "was likely not as acute as it might have been had she been the victim of a crime." *Id.* Here, there were three witnesses and they were all victims of the crimes. In *Moore*, "the degree of accuracy of [the witness'] description [was] tenuous, at best." *Id.* Here, the three victims gave incredibly consistent descriptions of Respondent's attire during the crimes and, as noted by the trial court, their level of certainty was one hundred percent. Thus, unlike the facts in *Moore*, the facts in Respondent's case support the trial court's finding there was no substantial likelihood of these being irreparable misidentifications. Consequently, the trial court did not abuse its discretion in denying Respondent's motion to suppress the identification testimony under the second *Biggers* prong. For all of the reasons argued here and in the Final Brief of Respondent, which is incorporated herein by reference, that determination should have been affirmed. Certiorari should be granted.

For these reasons, the State respectfully submits the Court of Appeals should have affirmed the trial court's refusal to suppress the identification evidence under the first prong of *Neil v. Biggers* without considering the second prong. Similarly, it should have affirmed the trial court's refusal to suppress the identification evidence under the second prong of *Neil v. Biggers*.

As a result, the Court of Appeals should have affirmed without considering whether admission of the identification evidence was harmless beyond a reasonable doubt. This Court should grant certiorari and affirm the Court of Appeals decision to affirm as modified, to include a finding that the trial court did not err in refusing to suppress identifications made by the three victims.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari and issue an order affirming the decision of the Court of Appeals as modified, by affirming Respondent's convictions and sentences in an opinion which includes a finding the trial court did not err in refusing to suppress identifications made by the three victims. If the Court grants the petition for a writ of certiorari without issuing a corrective opinion, Petitioner would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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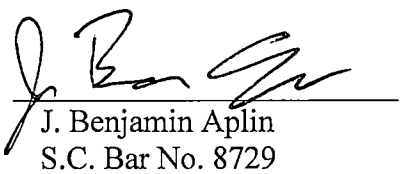
BY: 
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Columbia, South Carolina
November 15, 2018

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PROOF OF SERVICE

I, Troyeshi Brailey, Legal Coordinator, hereby certify that I have served the within *Petition for a Writ of Certiorari*, and the *Appendix*, both dated November 15, 2018, on Respondent by depositing two copies of the Petition and one copy of the Appendix in the United States mail, postage prepaid, addressed to his attorneys of record:

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I further certified that all parties required by Rule to be served have been served. This 15th day of November, 2018.

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