THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAR 12 2014
SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
R. Markley Dennis, Circuit Court Judge

Appellate Case No. 2012-212968

The STATE..Respondent,

vs.

Eugene THOMAS..Appellant.

FINAL BRIEF OF APPELLANT

TIMOTHY L. GEHRET
Timothy L. Gehret, Attorney at Law, LLC
P.O. Box 12494
Charleston, SC 29422
(843) 408-0626

ROBERT M. DUDEK,
Chief Appellate Defender
SC Commission on Indigent Defense
1330 Lady Street Suite 401
Columbia, South Carolina 29201
(803)734-1330

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

Table of Authorities iii

Statement of Issues on Appeal 1

Statement of the Case 1

Statement of the Facts 2

Standard of Review 4

Arguments 5

I. BECAUSE THE STATE'S CIRCUMSTANTIAL EVIDENCE WAS NOT SUBSTANTIAL, THE TRIAL COURT ERRED BY SUBMITTING THE CASE TO THE JURY 5

A. Third degree burglary 7

B. Attempted armed robbery 7

C. Possession of a firearm during the commission of a violent crime 8

II. THE TRIAL COURT ERRED BY ALLOWING AN UNDULY SUGGESTIVE OUT-OF-COURT IDENTIFICATION TO BE ADMITTED INTO EVIDENCE 12

A. Unduly suggestive 13

B. Substantial likelihood of misidentification 14

1. Opportunity to view 13

2. Degree of attention 14

3. Accuracy of description 14

4. Level of certainty 14

5. Time passage 15

III. BECAUSE NO EVIDENCE PROVED THE FIREARM PRESENTED AT TRIAL WAS USED IN THE ALLEGED ROBBERY THE TRIAL COURT ERRED BY REFUSING TO CHARGE A LESSER INCLUDED OFFENSE OF STRONG ARMED ROBBERY 15

Conclusion 17

TABLE OF AUTHORITIES

CASES

Hope v. State, 328 S.C. 78, 492 S.E.2d 76 (1997) 16

Manson v. Bathwaite, 432 U.S. 98, 97 S.Ct. 224 (1977) 15

Neil vs. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972) 10, 11, 12

Perry v. New Hampshire, U.S. 132 S.Ct. 716 (2012) 12

Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968) 13

State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004) 6, 10

State v.Baccus, 367 S.C. 41, 625 S.E.2d 216, (2006) 4

State v. Bland, 318 S.C. 315, 457 S.E.2d 611 (1995) 16

State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011) 5

State v. Bostick, 395 S.C. 582, 720 S.E.2d 48 (2011) 6, 10

State v. Brown, 360 S.C. 581, 602 S.E.2d 392 (2004) 6

State v. Brown, 333 S.C. 185, 508 S.E.2d 38 (Ct. App. 1998) 14, 15

State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001) 14, 15

State v. Evans, 376 S.C. 421, 424, 656 S.E.2d 782, 783 (Ct. App. 2008) 6

State v. Ford, 287 S.C. 384, 296 S.E.2d 866 (1982) 14, 15

State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996) 16

State v. Green, 397 S.C. 268,724 S.E.2d 664 (2012) 8

State v. Johnson, 318 S.C. 372, 458 S.E.2d 49 (Ct.App.1995) 14, 15

State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012) 10, 11, 12

State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001) 6

State v.Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) 10

State v. Mack, 255 Kan. 21, 21, 871 P.2d 1265 (1994) 11

State v. Odems, 395 S.C. 582, 720 S.E.2d 48(2011) 5, 6, 10

State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001) 10

State v. Rosemond, 356 S.C.426, 589 S.E.2d 757 (2003) 15

State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992) 4

State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000) 8

State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451(1984) 9

State v. Tasco, 292 S.C. 270, 356 S.E.2d 117 (1987) 16

State v. Traylor,360 S.C. 74, 600 S.E.2d 523 (2004) 11, 12

State v. Washington, 323 S.C. 106, 473 S.E.2d 479 (Ct. App. 1996) 14, 15

United States vs. Ash, 413 U.S. 300, 93 S.Ct. 2568 (1973) 13

United States v. Sanders, 708 F.3d 976 (7th Cir.2013) 12

In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970) 6

STATUTES

S.C. Code Ann. § 17-25-45 (2007) 1

S.C. Code Ann. § 16-11-313 (2007) 7

S.C. Code Ann. § 16-11-330 (2007) 7

S.C. Code Ann. § 16-23-490(A) (2007) 9

OTHER AUTHORITIES

Rule 19(a), SCRCrimP 6

Rule 104(c), SCRE 10

STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT BECAUSE THE STATE'S CIRCUMSTANTIAL EVIDENCE WAS NOT SUBSTANTIAL ENOUGH TO CREATE ANY MORE THAN A MERE SUSPICION OF GUILT?

2. DID THE CIRCUIT COURT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS THE PRE-TRIAL PHOTO LINEUP IDENTIFICATION BECAUSE IT WAS UNDULY SUGGESTIVE AND UNRELIABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES?

3. DID THE CIRCUIT COURT ERR IN REFUSING TO CHARGE THE LESSER INCLUDED OFFENSE OF STRONG ARMED ROBBERY BECAUSE NO PROOF OF A WEAPON OR THREAT OF A WEAPON WAS EVER PRESENTED?

STATEMENT OF THE CASE

Appellant Eugene Thomas was indicted by the Greenville County Grand Jury on May 10, 2010 for Third Degree Burglary, Possession of a Firearm During the Commission of a Violent Crime, and Armed Robbery. His case proceeded to trial before the Honorable R. Markley Dennis in the Court of General Sessions for the Thirteenth Judicial Circuit in Greenville, South Carolina on September 10, 2012. Greenville attorney Scott Robinson represented Appellant, while Assistant Solicitor Jennifer Tessitore represented the State.

The jury returned a verdict of guilty on the charges of Third Degree Burglary, Possession of a Weapon During the commission of a Violent Crime and the lesser included offense of Attempted Armed Robbery. (R.299). Due to the fact that Mr. Thomas was convicted of Second Degree Murder in 1981 in Florida, South Carolina Code Ann. Section 17-25-45 (2007) also known as the "Two Strikes" law mandates a lifetime prison

sentence without the possibility of parole for a conviction of two most serious offenses. Under this law, Attempted Armed Robbery and Second Degree Murder are classified as most serious offenses. Judge Markley Dennis sentenced Mr. Thomas accordingly.

STATEMENT OF THE FACTS

On the afternoon of July 22, 2009, Michael Gordon claims that he was alone as he painted the inside of a unit of a small Greenville apartment complex located at 119 Forrest Street. (R. 82). Gordon says he went into another vacant apartment, Apartment D, to wash up when he finished for the day because Unit A, the apartment he was painting, had no running water. (R. 88 Line 6). Gordon claims that as he washed his hands at the kitchen sink he saw the front door open and, out of the corner of his eye, saw a black male with long dreadlocks, a mustache, and a goatee standing in the doorway of the apartment. (R. 95 Line 18)(R. 48 Line 20). Mr. Gordon alleged that the strange man, whom he later identified as the defendant, Eugene Thomas, ordered him, at gun-point, to lie face-down on the floor while the man, he alleged, rummaged through his wallet. (R.98 Line 6 -25). Although Gordon claims he had in his wallet, among other things, twenty-six dollars in cash, a debit card and a three-dollar Powerball ticket, he says neither the money nor the debit card was taken. (R. 100 - 102). The only thing he testified to being missing from his wallet was the Powerball ticket. (R. 102 Line 4). Police did not search for the missing lottery ticket and no lottery ticket ever surfaced. (R. 213).

At trial, on September 10, 2012, Gordon described the person whom he says robbed him as being a black male in his late 30's or early 40's with long dreadlocks, a mustache and a goatee. (R. 51 Lines 14-25)(R. 52 Lines 1-10). Also, three latent fingerprints were collected from the front door and submitted for analysis. (R. 165 Line

12) (State's Exhibits 20, 21, 22). Of those three prints, only one was a match. (R. 166 Line 23). No evidence was presented at trial that police collected any latent prints from inside the apartment or from Mr. Gordon's wallet.

Detective Collis Flavell, with the Greenville Police Department, testified that a latent fingerprint taken from the door of the apartment in question was "very similar" to that of Eugene Thomas. (R. 197 Line 21). Latent Print Examiner Chris Gray testified that print number one, which was found on the inside of the door above the handle, matched Mr. Thomas' left little finger. (R. 166 Line 23)

Six days after the alleged incident, based on the fingerprint, Detective Flavell created a computer-generated photo Lineup which contained a photo of Mr. Thomas and five other individuals based around Mr. Thomsas' photo. (R. 22 Line 19-25). On July 28, 2009, six days after the alleged incident, Mr. Gordon viewed the Lineup and, although he was not absolutely certain, he identified Eugene Thomas as the suspect. (R. 207 Line 18)(R.124 Line 6). After the identification was made, Detective Flavell obtained an arrest warrant for Mr. Thomas. (R. 208 Line 4).

Mike Aiken, a Greenville police officer assigned to the U.S. Marshall's task force in 2009, stated at trial that through ongoing surveillance he was able to locate Mr. Thomas at the InTown Suites located at 2540 Wade Hampton Boulevard in Greenville County. (R.217– 218). On September 28, 2009 he arrested Mr. Thomas in his hotel room where he also discovered a zipper bag containing a pistol, two men's watches and a dice game. (R. 220 Line 18). Again, no lottery ticket was ever located. (R. 231 Lines 15-17).

Witness Chris Gray, also testified that an inspection of the four items revealed only one latent fingerprint matching Appellant's fingerprint which was located on the

back of the dice game package. (R. 235 Line 15 - 17). There were no fingerprints on the gun.

Despite these facts, police charged Thomas with Third Degree Burglary, Possession of a Firearm During the Commission of a Violent Crime, and Armed Robbery.

At the close of the State's case, the Defense moved for a directed verdict on the ground that the State's evidence did not prove Mr. Thomas' guilt beyond a reasonable doubt. (R. 253Line 19-22). Judge Dennis denied Defendant's motion. (R. 253 Line 9). Due to the fact that no direct or circumstantial evidence linked the handgun entered into evidence at trial and the one found in Mr. Thomas' hotel room to the incident in question, the Defense requested that the judge charge the jury with strong armed robbery. (R. 294 Line 11). Judge Dennis also denied this request. (R. 255 Line 17). Because the single alleged victim was also the single alleged witness, Judge Dennis charged the jury pursuant to State v. Simmons, 308 S.C. 80, 83 417 S.E.2d 92, 94 (1992), stating that the burden of proving the defendant's identity rests with the state. (R. 288 Line 23-24). The jury returned a verdict of guilty on the charges of Third Degree Burglary, Possession of a Weapon During the commission of a Violent Crime and the lesser included offense of Attempted Armed Robbery. (R. 299). This appeal follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

On appeal from the denial of a directed verdict, the appellate court must view the evidence in the light most favorable to the State. State v. Odems, 395 S.C. 582, 586 720

S.E.2d 48, 50 (2011) (internal citations omitted). The Defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. However, if there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. Id. A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. Id.

In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011). A jury charge is correct if, when read as a whole, the charge adequately covers the law. Id. "A jury charge that is substantially correct and covers the law does not require reversal." Id.

ARGUMENTS

I. BECAUSE THE STATE'S CIRCUMSTANTIAL EVIDENCE WAS NOT SUBSTANTIAL, THE TRIAL COURT ERRED BY SUBMITTING THE CASE TO THE JURY.

At the close of the State's case, Appellant moved for a directed verdict of acquittal pursuant to Rule 19 of the South Carolina Rules of Criminal Procedure. (R. 294 Line 19-22). The trial judge denied the motion after stating that there was enough circumstantial evidence for the jury to conclude that Appellant committed the crimes for which he was charged. (R. 294-295). However, not only did the State fail to sufficiently connect Appellant to the crimes, it offered no proof that a crime actually occurred. Therefore, the trial judge's denial of directed verdict was improper.

A trial court must direct a verdict of acquittal when the record does not contain evidence to support every element of the charged offense. See, e.g., State v. Brown,

360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004); State v. Evans, 376 S.C. 421, 424, 656 S.E.2d 782, 783 (Ct. App. 2008) ("A defendant is entitled to a directed verdict when the state fails to produce evidence on a material element of the offense charged."); see also In re Winship, 397 U.S. 358, 364 90 S.Ct. 1068, 1073 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); Rule 19(a), SCRCrimP ("On motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged... if there is a failure of competent evidence tending to prove the charge in the indictment."). When considering a motion for directed verdict of acquittal, "the trial court is concerned with the existence or non-existence of evidence, not its weight." Brown, 360 S.C. at 586, 602 S.E.2d at 395.

A case should be submitted to the jury when the evidence is circumstantial if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. State v. Bostick, 395 S.C. 582, 589, 720 S.E.2d 48, 52(2011); and State v. Odems, 395 S.C. at 586, 720 S.E.2d at 50. While a defendant's actions may appear suspicious, mere suspicion is insufficient to support a guilty verdict. See Bostick Supra (Citing State v. Arnold, 361 S.C. 386, 389, 605 S.E.2d 529, 531 (2004)). Therefore, mere arousal of suspicion is an improper basis to deny a motion for directed verdict. State v. Lollis, 343 S.C. 580 at 585, 541 S.E.2d 254, 257 (2001).

The State's evidence against the Defendant in the present case was entirely

circumstantial. Aside from Mr. Gordon's allegation, there is no evidence that a crime even occurred.

A. Third degree Burglary

To be guilty of third degree burglary, a person must (1) enter a building (2) without consent (3) with the intent to commit a crime in that building. See SC Code Ann. Section 16-11-313(A)(2007). While Mr. Gordon testified that the defendant entered the apartment, no other witnesses testified to seeing the defendant come or go from the apartment on July 22, 2009. No latent fingerprints were found anywhere inside the apartment and no evidence was provided that proved detectives ever checked Gordon's wallet for prints. Only three latent fingerprints, the three which were collected from the front door, were submitted for analysis. (R. 165 Line 12-14) (State's Exhibits 20, 21, 22). Of those three prints, only one was a match. (R. 166 Line 23). Latent Print Examiner Chris Gray testified that print number one, which was found on the inside of the door above the handle, matched Mr. Thomas' left little finger. Id. However, Mr. Gray later stated that was no way of knowing how long the prints had been on the door. (R. 169 Lines 11-18).

B. Attempted Armed Robbery

Armed Robbery occurs when a person commits a common law robbery while armed with a deadly weapon. S.C. Code Ann. Section 16-11-330 (2007). To be guilty of Attempted Armed Robbery, a person must have committed an overt act that proves he or she consciously intended but failed to take another person's property. See State v. Green, 397 S.C. 268, 284 724 S.E.2d 664, 672 (2012). (Defining attempt as having the specific intent, or having consciously intended the completion of acts.)(Citing

State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000). (Attempt requires an overt act beyond mere preparation to show specific intent). In the present case, again, the State failed to show substantial evidence beyond a mere allegation by the lone victim and witness, that anyone, let alone the defendant, was actually at or inside the apartment on July 22, 2009 to even commit an overt act. Mr. Gordon testified that the suspect looked through his wallet. (R. 98 Line 25). He claims that the suspect told him "I ain't here to kill you, I just want your money." (R. 99 Line 2). When asked about the contents of his wallet, Mr. Gordon stated that he had a Lowe's Card, Home Depot Card, a debit card, some receipts, a Powerball lottery ticket for that night's drawing and twenty-six dollars that he had tucked away. (R. 100-101). However, the only thing he testified as missing from his wallet was the Powerball ticket. (R. 102 Line 4). Detective Mike Aiken testified that, at the time police arrested Mr. Thomas, they discovered, in his hotel room, a small blue zipper bag containing a pistol, two men's watches and a dice game. (R. 220 Lines 4 -19). On cross examination by the Defense, Detective Aiken testified that no lottery ticket was found. (R. 231 Line 15-17). Furthermore, there was no evidence that any ticket ever existed, was ever purchased, or ever in Mr. Gordon's possession. Officer Flavell testified that not only was no lottery ticket found, no effort was made to locate the ticket, the only property which is alleged to have been stolen. (R. 213).

C. Possessing a Weapon During the commission of a Violent Crime

To be guilty of Possessing a Weapon During the commission of a Violent Crime, a person must physically possess or display a weapon during the commission of a violent crime. See SC Code Ann. Section 16-23-490(A)(2007). This requires

substantial evidence of (1) a weapon and (2) a violent crime. Here, the only evidence that a weapon was present in the apartment on June 22, 2009 was testimony of the same lone witness, Mr. Gordon. When questioned on direct examination about the gun which he claims the perpetrator used to rob him, Michael Gordon testified that all he could see was the barrel. (R. 112 Line 18). He also stated he could tell it was black but could not identify anything distinctive about the gun. (R. 112 Line 18 -21). When shown State's Exhibit 14 on direct examination and asked if it was the gun that was used in the alleged robbery, Mr. Gordon replied "I'm not saying that is the gun but it's similar to it." (R. 113 Line 7). The State later had Detective Mike Aiken identify State's Exhibit 14 as the gun police found in the hotel room at the time they arrested Mr. Thomas. (R. 222 – 223). However no testimony or forensic evidence was offered to prove there was any connection, whatsoever, between State's Exhibit 14 and the alleged armed robbery that Mr. Gordon claims occurred on July 22, 2009.

Ultimately, the State succeeded in proving, at best, that Mr. Thomas had, at some point in his life, touched the front door of Apartment D and that he had a gun in his hotel room. There was no direct or circumstantial evidence presented as proof that he ever used a gun for any reason or that he took or intended to take property from anyone. The circumstantial evidence relied upon by the State was not substantial enough to reasonably to prove Appellant committed any of the acts of which he is accused. The evidence raised, at best, a mere suspicion of guilt. See Odem's, 395 S.C. at 586, 720 S.E.2d at 50 (citing State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451 (1984)); Bostick, 392 S.C. at 139, 708 S.E.2d at 776; State v.Martin, 340 S.C. 597, 602, 533 S.E.2d 572, 574(2000); see also Arnold, 361 S.C. at 390, 605 S.E.2d at

531. Mere suspicion is insufficient to support a guilty verdict. Odems Supra. Therefore, denying the Defendant's motion for directed verdict was made in error.

II. THE TRIAL COURT ERRED BY ALLOWING AN UNDULY SUGGESTIVE OUT-OF-COURT IDENTIFICATION TO BE ADMITTED INTO EVIDENCE.

Shortly after jury selection, a pre-trial suppression hearing was held pursuant to Neil vs. Biggers,409 U.S. 188, 199, 93 S.Ct. 375, 382 (1972) with regard to the out of court identification conducted on July 28, 2009 in which the alleged victim identified Appellant from a six-person photo array. (R. 20-69). Our courts have held that generally, a trial court must hold an in camera hearing outside the presence of the jury when the State offers a witness whose testimony identifies the Defendant as a person who committed the crime and the Defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation. State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012) (citing State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001)); The purpose of the in camera hearing is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification. Id; See also Rule 104(c), SCRE (providing that "hearings on the admissibility of ... pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury").

Appellant moved to suppress the identification based on the five factors to be considered under the totality of the circumstances which the United States Supreme Court outLined in Neil vs. Biggers,409 U.S. 188, 199, 93 S.Ct. 375, 382 (1972). (R. 68-69)(citing State v. Mack, 255 Kan. 21, 21, 871 P.2d 1265 (1994)). The trial judge

denied Appellant's motion stating that the photo array was not unusual or unreliable therefore not unduly suggestive. (R. 69 Line 10-12). However, based on his own testimony, Mr. Gordon had little time to view the man he says held him up (R. 39 Line 20-22; R. 49 Line 15-17). He was in fear of his life (R. 104 Lines 22-23). He incorrectly described the alleged perpetrator (R. 51 Lines 14-25)(R. 52 Lines 1-10). He expressed uncertainty at the time of the identification (R. 53 Line 17-24). Finally, six days had passed between the alleged hold-up and the identification. Therefore, under the totality of the circumstances, the trial judge violated Appellant's due process by failing to suppress the photo Lineup.

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 conducive to a substantial likelihood of misidentification. State v. Liverman, 398 S.C. at 138, 727 S.E.2d at 425. A witness' 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); see also Neil v. Biggers, 409 U.S. at 198, 93 S.Ct. at 381("While the phrase 'a very substantial likelihood of irreparable misidentification' was coined as a standard for determining whether an in-court identification would be admissible ..., with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself.").

Trial courts employ a two-pronged inquiry to determine whether due process requires suppression of an out-of-court eyewitness identification. Liverman Supra. First, the court must determine whether the identification resulted from

"unnecessarily suggestive" police procedures. Biggers, 409 U.S. at 199, 93 S.Ct. at 381; see also Perry v. New Hampshire, 132 S.Ct. 716, 721 181 (2012) (stating "what triggers due process concerns is police use of an unnecessarily suggestive identification procedure"); Liverman, 398 S.C. at 138, 727 S.E.2d at 426 (stating the standard for impermissible suggestiveness as whether the police procedures were "unnecessary and unduly suggestive"); Traylor, 360 S.C. at 81, 600 S.E.2d at 526 (stating the standard as whether the police procedures were "unduly suggestive"). 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. See United States v. Sanders, 708 F.3d 976, 984 (7th Cir.2013)(citing Perry for the proposition that "courts will only consider the second prong if a challenged procedure does not pass muster under the first"). 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." Liverman, 398 S.C. at 138, 727 S.E.2d at 426 (citing Biggers). The following factors should be considered in evaluating the totality of the circumstances to determine the likelihood of a misidentification: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' 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.

A. Unduly Suggestive

"It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals." United States vs.

Ash, 413 U.S. 300,332, 93 S.Ct. 2568, 2585 (1973) (quoting Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 971 (1968)). This danger will be increased if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. Id.

Detective Flavell testified at trial that the single victim witness, Mr. Gordon, described the alleged perpetrator as being approximately five foot ten inches tall and having a neatly-trimmed mustache and goatee. (R. 198 Line 11-12). Six days after the incident, Detective Flavell showed Mr. Gordon a photo array of six black males with dread locks, goatees and mustaches. (State's exhibit 1). None of the photos indicate the height of the individual shown. Id. The individual in photo number five is the only one having a substantial amount of gray along his hair Line and in his mustache. Id. Mr. Gordon never mentioned gray hair in his description to detective Flavell. Furthermore, in the pre-trial suppression hearing, Detective Flavell testified that he based the photo Lineup off of a fingerprint and stated that the others were added based around Appellant's photo. (R. 22 Line 19-25). The fact that (1.) police compiled the photo array around on a person of interest and not the actual description given by the only witness; (2) Appellant was the only one with a significant amount of gray hair (3) the single victim witness was unable to see the height of all six individuals, made the identification procedure used in Appellant's case so unnecessarily suggestive and conducive to irreparable mistaken identification that Appellant was denied due process of law.

B. Substantial Likelihood of Misidentification

1. Opportunity to view: The single victim witness in this case, Mr. Gordon, testified that he saw somebody out of the corner of his eye (R. 48 Line 20) and states

that the stranger ordered him to the ground almost immediately. (R. 57 Line 16). But see State v. Cheeseboro, 346 S.C. 526, 541, 552 S.E.2d 300, 308 (2001), the victim saw the perpetrator face-to-face in a well-lit place for several minutes. The victim had a gun pointed at him at the time and was paying very close attention. Id.

2. Degree of Attention: Mr. Gordon also testified that felt like he was about to get shot. (R. 57 Line 19). This is indicative of a person who is in fear of his life. It is an accepted theory in this state, that a person in fear of his life is more acute. State v. Ford, 287 S.C. 384,386, 296 S.E.2d 866,867 (1982); State v. Brown, 333 S.C. 185, 190, 508 S.E.2d 38, 41(Ct. App. 1998); State v. Washington, 323 S.C. 106, 111, 473 S.E.2d 479, 481(Ct. App. 1996); State v. Johnson,318 S.C. 372, 375 458 S.E.2d 49, 51 (Ct.App.1995). However, unlike the witnesses in the above cases, the length of time Mr. Gordon had to observe his alleged perpetrator and the accuracy of his description call his presumed acuteness into question.

3. Accuracy of Description: The description of the alleged gunman given by Mr. Gordon to the investigating officers was that of a dark black male about five feet ten inches tall with dreadlocks in his late 30's to early 40's with a mustache and a goatee. (R. 51 Lines 14-25; R. 83 Lines 1-10). Mr. Thomas is actually five feet seven inches tall and was, at the time of the alleged incident, 48 years old. (Court's Exhibit 2). But see Cheeseboro, 346 S.C. at 541, 552 S.E.2d at 308. (witness' description consistently matched appellant).

4. Level of Certainty: Mr. Gordon testified that his statement to police was that he was almost positive that the person he identified was the person he encountered in the apartment. (R. 55 Line 14-18). But see Cheeseboro, 346 S.C. at 541, 552 S.E.2d at 308.(he expressed absolutely no doubt about his identification of appellant at the

photographic Line-up).

5. Time Passage: Finally, Mr. Gordon identified Appellant six days after the incident. (R. 30 Line 13-14). The passage of time, almost a week after the alleged confrontation, reduced the reliability of his identification. See generally Manson v. Bathwaite, 432 U.S. 98, 97 S.Ct. 224 (1977) (victim gave description of perpetrator within minutes of the crime and photo identification was made two days later); Cheeseboro, 346 S.C. at 541, 552 S.E.2d at 308. (photo identification that took seven months); State v. Ford, 287 S.C. 384, 386, 296 S.E.2d 866,867 (1982) (identification was made within a week); State v. Brown, 333 S.C. 185, 190, 508 S.E.2d 38, 41(Ct. App. 1998) (identification was made within six days); State v. Washington, 323 S.C. 106, 111 473 S.E.2d 479, 481(Ct. App. 1996) (identification made in two days); State v. Johnson, 318 S.C. at 375, 458 S.E.2d at 51(within a few hours).

III. BECAUSE NO EVIDENCE PROVED THE FIREARM PRESENTED AT TRIAL WAS USED IN THE ALLEGED ROBBERY THE TRIAL COURT ERRED BY REFUSING TO CHARGE A LESSER INCLUDED OFFENSE OF STRONG ARMED ROBBERY.

After the denial of the directed verdict, Appellant requested a jury charge of the lesser offense of Strong Armed Robbery. (R. 253 Line 12). Strong armed robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear. State v. Rosemond, 356 S.C.426, 430 589 S.E.2d 757, 758 (2003) (Citing State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996)).

The law to be charged is determined by the evidence presented at trial. State v.Gourdine, 322 S.C. 396, 397 472 S.E.2d 241 (1996). The trial judge is to charge the

jury on a lesser included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed Id. The test for determining whether one offense is a lesser included offense of another "is whether the greater of the two offenses includes all the elements of the lesser offense. If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater." Hope v. State, 328 S.C. 78, 81, 492 S.E.2d 76, 78 (1997) (quoting State v. Bland, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995)). "When a person perpetrates a robbery by brandishing an instrument which appears to be a firearm, in the absence of any evidence to the contrary, the law will presume the instrument to be what his conduct represented it to be, a firearm." State v. Tasco, 292 S.C. 270, 272, 356 S.E.2d 117, 118 (1987).

In this case, the State presented a black handgun that was found in Mr. Thomas' hotel room at the time of his arrest. (R. 223 – 224). What the state did not present however, is proof that the gun shown to the jury was, in fact, the handgun that Mr. Gordon claims the perpetrator used. In fact, Mr. Gordon testified on the stand that he was unable to determine if the gun presented to him by the State was the gun that he alleges was used. (R. 112 Lines 18-19)(R. 113 Line 7). In light of this fact, the Trial Judge's refusal to charge the jury with the lesser included offense of Strong Armed Robbery was erroneous.

CONCLUSION

For the foregoing reasons, Appellant Eugene Thomas respectfully requests that this Court reverse his conviction, and remand his case for a new trial pursuant to Issues II and III, and enter a directed verdict of acquittal pursuant to Issue I.

Respectfully submitted,

BY:

/s/ Timothy L. Gehret

TIMOTHY L. GEHRET
SC Bar Number 100932
P.O. BOX 12494
Charleston, South Carolina 29422
(843) 408-0626

ROBERT M. DUDEK,
Chief Appellate Defender
SC Commission on Indigent Defense
1330 Lady Street Suite 401
Columbia, South Carolina 29201
(803)734-1330
Attorneys for Appellant

This 12th Day of March 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
R. Markley Dennis, Circuit Court Judge

Appellate Case No. 2012-212968

The STATE...Respondent,

vs.

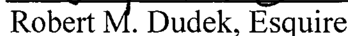
Eugene THOMAS...Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR and the August 13, 2007 order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Findings."

TIMOTHY L. GEHRET
Timothy L. Gehret, Attorney at Law, LLC
P.O. Box 12494
Charleston, SC 29422
(843)408-0626

ROBERT M. DUDEK,
Chief Appellate Defender
SC Commission on Indigent Defense
1330 Lady Street Suite 401
Columbia, South Carolina 29201
(803)734-1330

BY: 
Robert M. Dudek, Esquire

RECEIVED
MAR 1 2 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
R. Markley Dennis, Circuit Court Judge

Appellate Case No. 2012-212968

The STATE...Respondent,

vs.

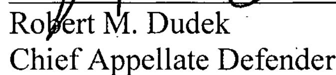
Eugene THOMAS...Appellant.

PROOF OF SERVICE

I, Robert M. Dudek, certify that I have served the Final Brief of Appellant on Respondent by depositing two copies of the same in the Unites States Mail, postage prepaid, addressed to:

NORMAN MARK RAPOPORT, ESQ.
Special Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

This 12th day of March, 2014



Robert M. Dudek
Chief Appellate Defender