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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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JUN 12 2019

SC Court of Appeals

Appeal from York County

Honorable John C. Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JARNELLE LADARIUS ERVIN,

APPELLANT

APPELLATE CASE NO. 2018-000973

ANDERS BRIEF OF APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Whether the trial court erred where it admitted Mrs. Parker's identification of appellant as the perpetrator, where she was unable to pick appellant out of a photographic lineup shortly after the robbery but claimed she could identify him after seeing him at a preliminary hearing several months later, since her identification was impermissibly tainted by seeing appellant on a prior occasion in the lineup?

## STATEMENT OF THE CASE

On December 8, 2016, a York County Grand Jury indicted appellant for the offenses of: first degree burglary; possession of a weapon during the commission of a violent crime; armed robbery; criminal conspiracy; and four counts of kidnapping. R. 615 – 628. Appellant was tried before the Honorable John C. Hayes, III and a jury from May 15 – 18, 2018. R. 1; R. 200; R. 417. Donovan Steltzner represented appellant. R. 1. Matthew Shelton and Daniel Porter represented the state. R. 1.

Appellant was convicted as indicted and was sentenced to a total of sixty-five years' imprisonment: concurrent terms of thirty years for first degree burglary; thirty years for armed robbery; five years for criminal conspiracy; thirty years on three counts of kidnapping; and consecutive terms of thirty years for the remaining count of kidnapping and five years for possession of a weapon during the commission of a violent crime. 612, l. 13 – 613, l. 1.

This appeal follows.

## **STANDARD OF REVIEW**

“[W]hether an eyewitness identification is sufficiently reliable is a mixed question of law and fact.” *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) (finding show-up identification unreliable as a matter of law); *see also State v. Traylor*, 360 S.C. 74, 81-82, 600 S.E.2d 523, 526-27 (2004) (*citing Moore* and holding that photographic line-up procedure was “patently suggestive”). “Generally, the decision to admit an eyewitness identification is at the trial judge’s discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error.” *Moore* at 288, 540 S.E.2d at 448. “In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court.” *Id.* Questions of law are reviewed de novo. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

## ARGUMENT

The trial court erred where it admitted Mrs. Parker's identification of appellant as the perpetrator, where she was unable to pick appellant out of a photographic lineup shortly after the robbery but claimed she could identify him after seeing him at a preliminary hearing several months later, since her identification was impermissibly tainted by seeing appellant on a prior occasion in the lineup.

The admission of Mrs. Parker's identification was error because after she had seen the photograph of appellant, she likely retained the image of his photograph in her memory rather than the image of the perpetrator, which resulted in a substantial likelihood of misidentification.

### *Relevant facts*

On July 11, 2016, Mrs. Parker and Timothy P. were at home in Clover when three men forced their way in "shoving guns in our faces and screaming [at] us, asking where's Tim, where's Tim." R. 9, l. 8 – 10, l. 10. One of the men, later identified as Jermaine Lowery, looked "tall" and "goofy." R. 162, l. 6; R. 361, ll. 2-5. A second man was of medium build and wore his dreadlocked hair in a ponytail. R. 164, ll. 16-18. A third man was never identified. R. 46, ll. 19-22. The robbery was lasted roughly an hour. R. 11, ll. 13-14; R. 32, ll. 22-25.

The men tied up Mrs. Parker with coaxial cable and put her in a closet, which is where she remained during the robbery, except when she briefly emerged to plead for Timothy P.'s life after the man with dreadlocks asked if "he'd ever seen anybody's head be blown off." R. 10, ll. 11-24; R. 170, ll. 15-18. The men told her to get back in the closet and she did. R. 10, ll. 22-24. The men repeatedly demanded "X pills" and cash. R. 168, l. 24 – 169, l. 3. They beat Timothy P. and he gave them marijuana. R. 216, ll. 15-19.

Mr. Parker and his coworker Will Mosteller arrived home during the chaos. R. 351, ll. 14-17; R. 360, ll. 10-12. Both Timothy P. and Mr. Parker got ahold of guns and tried to shoot the intruders without success. R. 352, l. 20 – 353, l. 10; R. 213, ll. 12-18. Mr. Parker was tied up and beaten in the living room before being shoved into the closet with his wife. R. 353, l. 20 – 354, l. 1; R. 355, ll. 18-20. Will Mosteller and Timothy P. were tied up and put in the bath tub. R. 223, l. 11 – 224, l. 6. The men made off with electronics, cash, shoes, drugs, and guns. R. 227, ll. 1-19; R. 354, ll. 19-25.

The tall perpetrator, Jermaine Lowery, pleaded guilty and was sentenced to thirty years in prison. R. 608, ll. 1-4. Lowery did not testify at appellant's trial. The state alleged appellant was the second perpetrator, the man with a medium build and dreadlocked hair.

The intruders wore "bandana masks" on their faces when they came in. R. 46, l. 25 – 47, l. 17; R. 11, l. 21 – 12, l. 12. However, "as the time progresse[d], the rags fell off their faces." R. 11, ll. 23-24. Although Mrs. Parker was in the closet almost the entire time, she said she was able to "peek the door open" and she could see the unmasked profile of the man with dreadlocks looking out of the window. R. 12, ll. 14-19; R. 164, l. 20 – 165, l. 10. She said when she briefly came out of the closet to plead with the man who had dreadlocks, she saw his face for about forty-five seconds to a minute and a half, from five to six feet away. R. 13, ll. 3-23.

Mrs. Parker, Timothy P., and Mr. Parker were all shown photographic lineups containing appellant's picture. Mr. Parker identified appellant's photograph with "a hundred percent" certainty—that lineup was admitted, and he made an in-court identification of appellant. R. 79, l. 9 – 80, l. 2. Timothy P. tentatively identified appellant's photograph, but the trial court excluded that lineup since he was unsure, and he did not make an in-court identification. R. 78, ll. 1-9.

Mrs. Parker tentatively chose appellant's photograph but declined to identify him because she was uncertain. R. 65, l. 12' – 66, l. 25. On November 22, 2016, more than three months after the robbery, she received notice of appellant's preliminary hearing and she attended it. R. 19, ll. 14-20. Mrs. Parker said when she saw and heard appellant at the preliminary hearing, her "hair stood up," and claimed she knew "beyond a shadow of a doubt" that he was the man she had heard "threatening to take [her] son's life." R. 21, l. 13 – 22, l. 7. However, she admitted it was "hard to say" whether it was seeing appellant or hearing his voice that caused her reaction. R. 22, ll. 8-18; R.

Defense counsel argued that the court should exclude Mrs. Parker's identification of appellant because of the likelihood of misidentification, given that she had already seen appellant's photograph in a lineup and been unable to identify him before she subsequently saw him again at the preliminary hearing, and only then identified him. R. 76, l. 6 – 77, 9.

The court excluded Mrs. Parker's lineup but allowed her in-court identification of appellant based upon seeing him at the preliminary hearing. R. 78, ll. 9-21. The court stated it found "that identification is reliable based on the totality of the circumstances" because "she recognized his voice, which she heard over a good period of time, she recognized his build, she saw him face-to-face in the encounter, it was a well-lit area, [and] she had a heightened observation because of the threatening remarks to her son . . ." R. 78, l. 23 – 79, l. 8.

### ***Discussion***

The Due Process Clause protects "against the admission of evidence deriving from suggestive identification procedures." *Neil v. Biggers*, 409 U.S. 188, 196 (1972). "[T]he primary evil to be avoided is a very substantial likelihood of irreparable misidentification." *Id.* at 198 (internal quotations omitted). "An identification infected by improper police influence" must be

excluded if there is a ““very substantial likelihood of irreparable misidentification.”” *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

Whether a suggestive confrontation or “identification procedure was so unduly prejudicial as fatally to taint the conviction . . . is a claim which must be evaluated in light of the totality of surrounding circumstances.” *Simmons v. United States*, 390 U.S. 377, 383 (1968). “[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.” *Neil v. Biggers*, 409 U.S. at 199-200; accord *Manson v. Brathwaite*, 432 U.S. 98, 114, (1977).

Taking the factors one by one, the first factor—the witness’ opportunity to view the perpetrator at the time of the crime—weighs against admission, as the opportunity was limited. Most of Mrs. Parker’s observations took place through a crack in the closet, although she did view him face to face for about a minute. The next factor—the witness’ degree of attention—also weighs against admission since she was focused on the potential harm to her son and husband rather than on the perpetrator. The third factor—the accuracy of the witness’ prior description of the perpetrator—is unknown, beyond the fact that she described the perpetrator as a black male, like appellant.

The fourth factor—the level of certainty demonstrated by the witness at the confrontation—is not as easy to ascertain at first blush. Initially, it appears this factor would weigh in favor of admission since Mrs. Parker said she recognized appellant beyond a doubt, but

it must be remembered that she had already been exposed to his likeness in the photographic lineup and at that time she was unsure if appellant was the perpetrator. Because she was unsure first, and she only made the identification after her memory had been tainted by that earlier exposure, this factor too weighs against admission.

The final factor—the length of time between the crime and the confrontation—also weighs against admission. Mrs. Parker was unable to identify appellant in a photographic lineup a week or ten days after the robbery but a very long time after that—three months—she claimed she was able to identify him.

The danger of misidentification is increased if the police show the witness “pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized.” *Simmons v. United States*, 390 U.S. 377, 383 (1968). “[T]he witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.” *Id.* at 383-84 (emphasis added).

In *Foster v. California*, 394 U.S. 440, 441 (1969), police officers placed Foster in a lineup, but the witness was unable to identify the perpetrator. Police then permitted a “one-on-one” confrontation between Foster and the witness but still the witness did not identify Foster as the perpetrator. *Id.* Nevertheless, a week or ten days later, police placed Foster in a second lineup, although he was the only person in the second lineup who had appeared in the first—this time the witness was convinced Foster was the perpetrator. *Id.* at 441-42.

The United States Supreme Court explained that “in some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law.” *Id.* at 443. The Court concluded, “In effect, the police

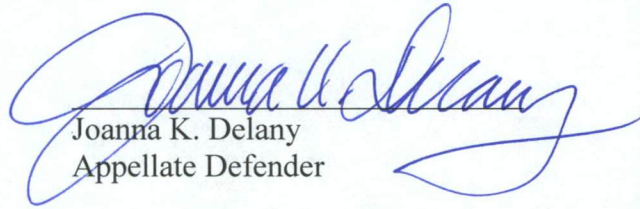
repeatedly said to the witness, 'This is the man.' This procedure so undermined the reliability of the eyewitness identification as to violate due process." *Id.* (citation omitted). Here, although the police did not organize a one-on-one confrontation, they did provide a photograph of appellant to Mrs. Parker (in the lineup). Mrs. Parker was then again shown appellant when she appeared for his preliminary hearing, at which time she had already been exposed to his photograph, and he was likely handcuffed and in jail garb.

Mrs. Parker testified that she identified appellant at the preliminary hearing, and she identified him to the jury during the trial. "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." *State v. Moore*, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000).

Because her identification of appellant at the preliminary hearing was impermissibly tainted by her prior exposure to his photograph, as discussed above, in addition to suppression of her preliminary hearing identification, her subsequent in-court identification should have been suppressed as well. Here, the in-court identification was not of independent origin, but instead was the tainted product of the prior out-of-court identification.

**CONCLUSION**

Based on the foregoing argument, appellant respectfully requests this court reverse his convictions and sentences and remand for a new trial.



Joanna K. Delany  
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of June, 2019.

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Appeal from York County

Honorable John C. Hayes, Circuit Court Judge  
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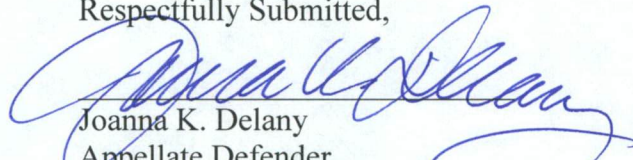
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PETITION TO BE RELIEVED AS COUNSEL  
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Counsel for Jarnelle Ladarius Ervin states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge John C. Hayes, which was held on May 15-17, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, She asks the Court to relieve her as counsel for Jarnelle Ladarius Ervin.

Respectfully Submitted,

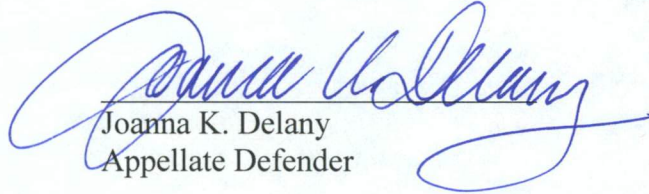
  
Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 12th day of June, 2019.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

June 12, 2019.

  
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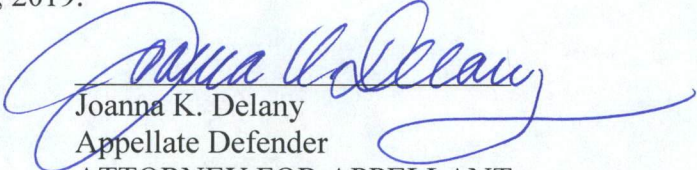
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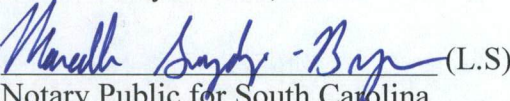
APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blich, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Jarnelle Ladarius Ervin, 376322, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 12th day of June, 2019.

  
Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 12th day of June, 2019.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 26, 2028