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**Mar 11 2022**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Sumter County

Honorable Kristi F. Curtis, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

COREY RASHAD BROWN,

APPELLANT

APPELLATE CASE NO. 2021-000521

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INITIAL BRIEF OF APPELLANT

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SARAH E. SHIPE  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

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## **STATEMENT OF ISSUE ON APPEAL**

Whether the trial court erred in allowing what was tantamount to an in-court identification because there was a substantial likelihood of irreparable misidentification where the complaining witness failed to identify appellant prior to his arrest and only identified him as the individual in the surveillance video after seeing him at the preliminary hearing shackled and in jail clothing?

## STATEMENT OF THE CASE

A Sumter County Grand Jury indicted appellant on March 12, 2020, for armed robbery, first degree burglary, assault and battery first degree, and possession of a weapon during the commission of a violent crime. R.\*. Appellant's case was called to trial on April 28, 2021, before the Honorable Kristi F. Curtis and a jury. Tr. 1. Assistant solicitor William Corbett represented the state. Tr. 1. Michael Routzong represented appellant. Tr. 1.

On April 30, 2021, the jury found appellant guilty of armed robbery, first degree burglary, and assault and battery first degree. However, he was acquitted of possession of a weapon during the commission of a violent crime. Tr. 293. Appellant was sentenced to concurrent terms of ten years for armed robbery, twenty years for first degree burglary, and ten years for assault and battery first degree. Tr. 298.

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 in allowing what was tantamount to an in-court identification because there was a substantial likelihood of irreparable misidentification where the complaining witness failed to identify appellant prior to his arrest and only identified him as the individual in the surveillance video after seeing him at the preliminary hearing shackled and in jail clothing.

### **Relevant Facts**

On July 22, 2019, someone entered the home of Anslemo Lopez Martinez robbed and injured him causing Martinez to sustain a facial fracture. Across the street from Martinez's home was an apartment complex that had a surveillance system. The Sumter County Police Department obtained footage from the surveillance system during its investigation of the incident. Tr. 100-02; 103, ll. 4-13. In video footage taken from the surveillance system there is an individual in an orange shirt and black pants that can be seen walking towards Martinez's home and then returning to his parked truck. State's exhibit 3, surveillance video.<sup>1</sup> Law enforcement released a portion of the video obtained from the apartment's surveillance system on its social media page asking the public to identify the individual in the orange shirt and black pants. Tr. 140, ll. 10-24; 142, l. 15-23. A crime stoppers tip indicated the individual in the video was appellant. he was interviewed by law enforcement during which appellant acknowledged he was the individual in the video but denied any involvement in the incident. Tr. 157, ll. 4-13; 168, ll. 7-20.

During pretrial motions defense counsel brought to the court's attention that there may be an issue regarding identity. Tr. 48. Shortly after the incident, around July 27, 2019, Martinez was shown a six-person photographic lineup that included appellant. Martinez was unable to make an

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<sup>1</sup> State's exhibit 3, surveillance video, is on file with the Court.

identification. Tr. 48-49; 51, ll. 20-51, l. 2. On August 29, 2019, Martinez attended appellant's preliminary hearing which was held at the jail. Tr. 48-49; 53, 52, l. 24-53, l. 4. Sometime after that Martinez was interviewed at the solicitor's office and shown the surveillance video captured by the nearby apartments. Martinez told the solicitor that the person seen in the video was the person that robbed him.<sup>2</sup> Tr. 48-49; 52. Defense counsel asserted that the identification of appellant in the video amounted to an out-of-court identification that triggered a *Neil v. Biggers*,<sup>3</sup> hearing arguing that during appellant's preliminary hearing Martinez had a "good long time to look at [appellant]." Tr. 55, ll. 5-14.

The court noted that if Martinez was unable to identify appellant from a six-person photographic lineup up and was only able to identify him as the intruder after he had the opportunity to look at appellant during the preliminary hearing then "we have a definite problem." Tr. 55, l. 15-56, l. 1. The court specified that it would need to see the six-person photographic lineup and the video during the hearing.

The solicitor contended that Martinez's identification of appellant was not crucial to its case. The solicitor alleged that in the surveillance video you can see appellant exiting Martinez's residence and within a few seconds Martinez exits the house. In their meeting, Martinez told the solicitor that the individual seen running away from his house was the individual who robbed him. Tr. 57, ll. 17-22.

The court declared it was not a *Biggers* issue if the state was not going to ask Martinez to point out appellant in the court room. Tr. 59, ll. 2-10. However, it was decided a hearing would

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<sup>2</sup> The record was unclear as to whether Martinez had been shown the video previously by law enforcement. Tr. 53, ll. 5-12.

<sup>3</sup> *Neil v. Biggers*, 409 U.S. 188 (1972).

be held and Martinez's testimony would be proffered.

### *Hearing*

The following day a *Neil v. Biggers*, hearing was held outside the presence of the jury. Tr. 109. The state proffered Martinez's testimony regarding identification.<sup>4</sup> Martinez testified that he did see the individual that robbed him during the incident, but he said nothing stood out to him about the individual because the encounter was "just seconds." Tr. 110, l. 25-111, l. 2; 116, ll. 20-24. Martinez said that he spoke to police through an interpreter and told them that the person that robbed him was "a black man dressed all in black." Tr. 119, ll. 17-19. He testified that he remembered Detective McFadden showing him the six-person photographic lineup but could not recall when he was shown the lineup. Tr. 111, l. 20-112, l. 5.

The first time he was asked Martinez said that he was able to pick a person from the six-person photographic lineup, but later agreed that he did not. Tr. 113, ll. 1-2; 117, ll. 5-7. On cross-examination when asked again he insisted that he did pick appellant out of the lineup. 118, l.10-119, l. 10. Martinez initially stated that he had not been to any other court hearings in this case before admitting that he attended appellant's preliminary hearing. Martinez stated, "I saw him [] at the court where they take him out of the jail." Tr. 112, ll. 6-12; 117, ll. 11-17. When asked if he remembered going to the solicitor's office Martinez answered, "[n]o, right now in three days I [won't] remember what I'm doing." Tr. 120, ll. 8-13.

Detective Willie McFadden testified that he was responsible for requesting the six-person photographic lineup containing appellant's picture along with five other pictures. Tr. 122, ll. 13-22. McFadden testified that when he showed it to Martinez he was unable to pick anyone out of

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<sup>4</sup> Martinez does not speak English and his testimony was translated through interpreter, Carol Morgan. Tr. 110, ll. 2-4. Candidly, Martinez's testimony, as given through the interpreter, is difficult to follow.

the lineup. Tr. 122, l. 24-123, l. 3.

The state conceded that Martinez was unable to identify appellant from the lineup but argued Martinez made an in-court identification of appellant during the preliminary hearing. Tr. 123, l. 24-124, ll. 3. The state argued there was nothing suggestive about the course of events contending that Martinez had the right to be present at the preliminary hearing and that due process concerns only arise when the procedure is suggestive and unnecessary. Tr. 124, ll. 1-13.

Defense counsel argued that an in-court identification of appellant was inadmissible because of a suggestive out-of-court identification procedure. Defense counsel pointed to the fact that Martinez testified that his opportunity to view the individual during the incident was “only seconds.” Counsel also pointed out the inaccuracy of Martinez’s prior description of the intruder versus the person seen in the surveillance video. Martinez said the intruder was wearing all black, in the video appellant is wearing a bright orange shirt. Counsel argued that Martinez’s level of certainty was low because he could not pick appellant out of a lineup. Counsel averred that it is inherently suggestive when you see a person in a jail uniform and handcuffs at the jail and argued that the state should not be allowed to elicit testimony from Martinez amounting to an in-court identification. Tr. 124, l. 16-126, l. 11.

The court ruled that an in-court identification was not admissible. Tr. 126, ll. 12-13. The court found that that Martinez viewed the intruder for “a very short period of time.” Martinez was not able to identify appellant in a six-person photographic lineup that he was shown very close in time to the incident. The court found that there was no testimony that anyone asked Martinez whether he recognized appellant as the intruder at the preliminary hearing and so the danger was that Martinez saw him at the hearing, which “was basically a show up,” where appellant was “in an orange jump suit” and had been arrested. The court continued that it would be unduly

suggestive for Martinez to testify that appellant was the intruder. The court reasoned that “the state believes [appellant is] the person . . . it’s just human nature that the only person presented to you at the preliminary as [] being the perpetrator would be the person that he’s identifying today.” However, the court found that it was different to have Martinez identify the person in the video as the person that robbed him. Tr. 129, l. 12-127, l. 17.

#### *Surveillance video*

Surveillance video from the nearby apartment complex, State’s exhibit 3, was admitted during Detective Willie McFadden’s testimony. Tr. 144, l. 9-145, l. 16. McFadden testified that you could see the “vehicle that [appellant] got out of, driving back and forth numerous times past [Martinez’s] residence.” Tr. 146, ll. 10-14. He testified that in the video you could see appellant walking towards Martinez’s residence and then shortly after running back towards a vehicle. Tr. 149-55.

McFadden testified that appellant voluntarily came to his office and spoke with him after he was identified as the individual in the orange shirt by a crime stoppers tip. During their conversation McFadden showed appellant a still shot from the video and appellant admitted it was him. Tr. 164, l. 23-165, l. 3. McFadden showed appellant the portion of the video that shows him walking towards Martinez’s home and then not long after coming back towards where his vehicle was parked. Appellant denied having anything to do with the incident. Tr. 165, l.19-166, l. 14.

#### *Martinez’s trial testimony*

Martinez testified that on July 22, 2019, not long after he arrived home from work an individual tried to enter his house through his open backdoor. Martinez tried to push the door closed but the intruder pushed in. Martinez said that the individual had a knife and demanded money multiple times. Tr. 220, ll. 4-17. Martinez testified that during the incident that the

individual hit him in the face causing a fracture. Tr. 222, ll. 3-25. Martinez testified that around twenty-nine hundred dollars was stolen from him that day. Tr. 223, ll. 9-11. The solicitor played a portion of the surveillance video during Martinez's testimony.<sup>5</sup> Martinez claimed that the person in the video was the person that robbed him that day. Tr. 224, l. 17-225, l. 23. Throughout his testimony Martinez maintained that the intruder was wearing a dark pair of pants and a dark shirt. Tr. 224, ll. 20-22; 228, ll. 1-7; 232, ll. 13-15.

### **Discussion**

The trial court correctly ruled that Martinez could not make an in-court identification of appellant at trial because of the suggestiveness of Martinez having seen appellant, in jail clothing and handcuffed, at his preliminary hearing. However, the court abused its discretion in allowing Martinez to identify the person in the video as the intruder because Martinez had failed to pick appellant out of the lineup. Testimony had already been presented that appellant admitted that he was the individual in the video. Therefore, Martinez's identification of the man in the video as the intruder was tantamount to an in-court identification.

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. 130, 138, 727 S.E.2d 422, 425 (2012). A witness's 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

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<sup>5</sup> Another version of the surveillance video was admitted at trial State's 23, enhanced version of surveillance video. Tr. 188, ll. 18-22. The record does not explicitly state what version of the surveillance video was played during Martinez's testimony. State's exhibit 23, enhanced version of surveillance video is on file with the Court.

added).

In *Neil v. Biggers*, the United States Supreme Court found that a court must review the totality of the circumstances to determine whether an identification is reliable. The factors to be considered in evaluating the likelihood of misidentification include: (1) the opportunity of the witness to view the accused; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199 (1972).

The court abused its discretion when it made a distinction between Martinez identifying appellant in the video as the intruder and Martinez making an in-court identification of appellant. Appellant voluntarily gave a statement to law enforcement where he admitted that he was the individual in the orange shirt in the surveillance video and the defense did not contest that fact at trial. Evidence that appellant was the man in the orange shirt in the surveillance video was presented to the jury. Immediately following that evidence was Martinez's testimony that the person that robbed him was the person seen in the surveillance video. Martinez's testimony regarding the identity of appellant in the video was essentially the same as Martinez pointing at appellant in the court room and declaring that appellant was the intruder.

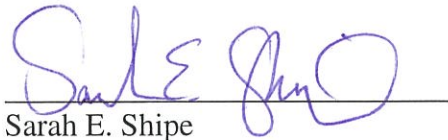
Martinez's identification of appellant was not reliable and should not have been admitted at trial. *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) ("A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification). Martinez consistently testified that his interaction with the intruder was only seconds. On multiple occasions, during his proffered testimony and during his testimony before the jury, Martinez

described the intruder as wearing dark pants and a dark shirt. In the video appellant is wearing a bright orange shirt. It is not as if Martinez said the intruder was wearing yellow and the shirt was orange, this is a drastic difference in color. Additionally, Martinez was unable to identify appellant from the six-person photographic lineup that he was shown days after the incident when his memory would have been the freshest. Martinez even admitted during trial that in three days he would not be able to recall what happened today. Notably, there was no testimony presented that Martinez recognized appellant at the preliminary hearing. It is more likely that after the suggestive preliminary hearing Martinez determined that the man he saw in jail was the intruder.

Martinez only identified appellant in the surveillance video after attending appellant's unduly suggestive preliminary hearing. *See Traylor*, 360 at 138, 727 S.E.2d at 425-26 ("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."). The trial court equated appellant's preliminary hearing to a "show up," and found that it was "unduly suggestive." Tr. 127, ll. 2-11. According to the record the preliminary hearing was held in jail and appellant was dressed in an orange jumpsuit and handcuffed. This was extremely suggestive because appellant was the only individual Martinez saw. As the court stated, "it's just human nature that the only person presented to you at the preliminary hearing . . . as being the perpetrator . . . would be the person that he's identifying today." Tr. 127, ll. 6-9. Martinez identified appellant, not from his recollection of the incident, but from the suggestive preliminary hearing.

**CONCLUSION**

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



Sarah E. Shipe  
Appellate Defender

ATTORNEY FOR APPELLANT

This 11<sup>th</sup> day of March, 2022.

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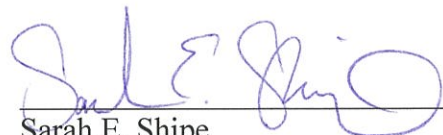
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CERTIFICATE OF SERVICE

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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case have been served upon William M. Blich, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Corey Rashad Brown, #385335, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 11<sup>th</sup> day of March, 2022.



Sarah E. Shipe  
Appellate Defender

ATTORNEY FOR APPELLANT