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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Georgetown County

Honorable Steven H. John, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JEREMIAH DICAPUA,

APPELLANT.

APPELLATE CASE NO. 2021-000570

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INITIAL BRIEF OF APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

1.

Did the trial court err in allowing an in-court identification after ruling that the show-up identification of appellant after the State's witness failed to pick him out of a photo lineup was unnecessarily suggestive?

## **STATEMENT OF THE CASE**

Appellant Jeremiah DiCapua was indicted by a Georgetown County grand jury for kidnapping. R. \_\_\_\_\_. On November 30, 2020, a Neil v. Biggers, 409 U.S. 188 (1972) hearing was held before the Honorable Steven John. Hearing Tr. 1. Alicia Richardson represented the State. Hearing Tr. 1. Ricky Todd and Madison Harte represented appellant. Hearing Tr. 1. Judge John relieved Mr. Todd at the end of the hearing and continued the matter. Hearing Tr. 78, l. 6 – 24.

On May 11, 2021, appellant was tried before Judge John and a jury. Tr. 1. Alicia Richardson and Elizabeth Smith represented the State. Tr. 1. William Edgeworth represented appellant. Tr. 1. The jury acquitted appellant of kidnapping, but convicted him of the lesser included offense of attempted kidnapping. Tr. 461, l. 7 – 13. Judge John sentenced appellant to thirty years' imprisonment for attempted kidnapping and placement on the sex offender registry. Tr. 473, l. 4 – 7. This appeal follows.

## **STANDARD OF REVIEW**

Legal issues related to improper identifications are mixed questions of law and fact reviewed for abuse of discretion or prejudicial legal error. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000).

## ARGUMENT

The trial court erred in allowing an in-court identification after ruling that the show-up identification of appellant after the State’s witness failed to pick him out of a photo lineup was unnecessarily suggestive.

But for the improperly obtained identification of appellant Jeremiah DiCapua (“DiCapua”), the police admitted they would have had no probable cause to arrest him for attempting to kidnap Stacey Starnes (“Starnes”). Tr. 83, l. 22 – 84, l. 20. After two Neil v. Biggers, 409 U.S. 188 (1972), hearings—the first which was continued under unusual circumstances—the trial court ruled that the show-up identification in this case was unnecessarily suggestive. Tr. 137, l. 14 – 140, l. 14. Nevertheless, the court permitted Starnes to identify DiCapua by ruling that her identification was reliable. Tr. 137, l. 14 – 140, l. 14.

In June 2018, Starnes and her husband were vacationing in a Garden City beach house rental with friends. Tr. 105, l. 11 – 23. On Sunday morning, Starnes went for a run on the road nearest the beach, South Waccamaw. Tr. 106, l. 2 – 12. Tr. 56, l. 1 – 6. Her husband joined her. Tr. 106, l. 2 – 12. She ran one mile and turned back while her husband continued straight. Tr. 106, l. 2 – 12. Starnes finished her two miles and turned around to meet her husband. Tr. 106, l. 2 – 12.

Starnes saw a black SUV at a stop sign. Tr. 106, l. 13 – 25. The door opened and a man got out. Tr. 106, l. 20 – 107, l. 12. The man tried to talk to Starnes, but she could not remember what he said. Tr. 107, l. 8 – 12. Starnes kept walking. Tr. 106, l. 13 – 19.

She walked another five minutes and saw the same black SUV parked with its “back end on the sidewalk.” Tr. 108, l. 22 – 109, l. 10. The man was outside of the car and as Starnes approached, he began walking towards her. Tr. 108, l. 22 – 109, l. 10. The man reached for her

twice without making contact. Tr. 108, l. 22 – 109, l. 10. On the third try, the man grabbed her arm. Tr. 109, l. 11 – 23. She yelled, “No,” jerked away, and sprinted to a house and hid behind cars. Tr. 109, l. 15 – 110, l. 10. She called her husband and they called the police. Tr. 110, l. 8 – 25. The police drove Starnes around the area to see if she could recognize any cars to no avail. Tr. 111, l. 3 – 18.

Starnes’ initial description to the police was of a “male 45-50 years old, tan, slightly heavy set, dark hair, no shirt, with shorts.” Tr. 56, l. 17 – 22. A sketch artist produced a drawing of the man and the police released it to the media. Tr. 57, l. 4 – 18. The sketch was entered into evidence as State’s Ex. 4 at the Biggers hearing. One of the officers who used the sketch agreed that while it has “similarities” to DiCapua, he could not be identified with certainty from the sketch. Tr. 100, l. 1 – 10.

Looking for video footage of the incident led police to a liquor store on Atlantic Avenue near the intersection with Highway 17. Tr. 90, l. 19 – 91, l. 10. The owner of the liquor store said the sketch looked like one of his customers and the owner and the police were able to determine the customer was DiCapua. Tr. 92, l. 9 – 93, l. 24. The police obtained photos of DiCapua and his black Jeep from the store. Tr. 93, l. 3 – 94, l. 23. State’s Ex. 6. Except for having a paper tag, nothing about DiCapua’s Jeep in State’s Ex. 6 is remarkable.

SLED sent the police a photo lineup containing a picture of DiCapua. Tr. 65, l. 1 – 13. The lineup is State’s Exhibit 8 and is on file with this Court. State’s Ex. 8. DiCapua is in the fourth position in the lineup. Tr. 65, l. 12 – 13.

On June 12, two days after the incident, the police showed Starnes the lineup at the vacation house. Tr. 66, l. 10 – 21. Starnes did not pick out anyone in the lineup. Tr. 66, l. 22 – 67, l. 8. The investigator said, “Upon viewing the photo lineup she appeared to be very undetermined.” Tr.

67, l. 2 – 4. When describing the attack, Starnes said, “I’ll never forget the eyes, they were that big as he was doing it.” Tr. 109, l. 20 – 23. She guessed she had approximately twenty seconds to view her attacker. Tr. 117, l. 14 – 118, l. 8.

The investigator called the solicitor’s office for guidance. Tr. 67, l. 7 – 12. After conferring with “Solicitor Todd,” the police “came to the conclusion that a driveby identification would be performed with the victim.”<sup>1</sup> Tr. 67, l. 7 – 12. The investigator testified that he thought the show-up identification would be “appropriate due to the fact of the poor quality of the photo lineup.” Tr. 67, l. 18 – 23. The investigator said the lineup was poor because DiCapua’s head had been cropped at the top and that it did not show DiCapua at his current age (approximately 70 years old at the time of the incident). Tr. 67, l. 18 – 23. Tr. 196, l. 1 – 5.

On cross-examination, defense counsel asked the investigator if he showed the photo lineup to Starnes despite his concerns over its quality and the investigator replied, “Correct.” Tr. 78, l. 3 – 8. He confirmed he had never shown a lineup to a witness that did not have the suspect in it. Tr. 78, l. 13 – 23. He did not ask SLED for a new array, claiming first that no other photo was available. Tr. 85, l. 4 – 6. He then admitted he did not know at the time whether another photo was available. Tr. 85, l. 7 – 12. The police did not contemplate showing the still shots of DiCapua from the liquor store to Starnes. Tr. 76, l. 21 – 77, l. 5. The investigator said, “We don’t do that.” Tr. 76, l. 21 – 23.

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<sup>1</sup> Judge John originally heard the Biggers motion on November 30, 2020, approximately five months before DiCapua was ultimately tried. Hearing Tr. 1. At the beginning of the hearing, DiCapua waived any conflict concerning the prior employment of his lawyer, Ricky Todd, by the solicitor’s office. Hearing Tr. 4, l. 18 – 6, l. 20. Todd said he had disclosed his involvement in the case to DiCapua. Hearing Tr. 4, l. 18 – 6, l. 20. When it came to light at the hearing that Todd was the lawyer at the solicitor’s office who authorized the show-up identification, Judge John disqualified Todd because he was a fact witness in the case and continued the case without ruling on the Biggers motion.

The next day the police put Starnes and her husband in an unmarked black Tahoe with tinted windows and drove her to DiCapua's house. Tr. 68, l. 1 – 69, l. 22. The officers planned to draw DiCapua out of the house with a “knock and talk” about the tag on his car. Tr. 68, l. 1 – 69, l. 22. Starnes said the officer told her that they were going to “get the possible suspect out . . . to see if I recognized him or didn't recognize him.” Tr. 115, l. 6 – 14. DiCapua's black Jeep was at his house. Tr. 68, l. 1 – 69, l. 22.

The investigator guessed they had told Starnes “three or four times” that she was getting ready to see the person the police believed was the suspect. Tr. 81, l. 14 – 25. Starnes claimed that she immediately recognized DiCapua's black Jeep and “knew without a doubt that was the car, because I had seen a million that week trying to point out which one it was, and I knew that was it.” Tr. 115, l. 15 – 22. She also said she recognized DiCapua immediately after he walked out of the door. Tr. 115, l. 15 – 24. The police arrested DiCapua two days after Starnes saw DiCapua at the show-up identification. Tr. 292, l. 16 – 25.

After hearing argument, Judge John ruled that Starnes' show-up identification resulted from unnecessarily suggestive police procedures. Tr. 138, l. 4 – 11. The trial judge said, “Clearly, this was not a proper procedure. I don't think anybody can argue that.” Tr. 138, l. 7 – 11. Judge John then ruled he would allow Starnes to make an in-court identification because it “was so reliable that no substantial likelihood of misidentification exists.” Tr. 138, l. 12 – 140, l. 14. Starnes was the first witness in the trial and identified DiCapua as her attacker.<sup>2</sup> Tr. 188, l. 14 – 189, l. 8.

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<sup>2</sup> Appellant anticipates the State may attempt to assert a procedural bar because of the lack of any contemporaneous objection when Starnes identified DiCapua in the courtroom, but such an objection is no longer necessary after the Supreme Court's recent Opinion in State v. Jones, 435 S.C. 138, 866 S.E.2d 138 (2021). Jones holds that if a full pretrial hearing is held on a constitutional issue, “no further objection is required to preserve the issue for appellate review.” Jones at 144, 866 S.E.2d at 562.

The trial judge erred in allowing Starnes to make an identification after the police tainted her ability to do so with the highly suggestive and improper show-up identification. Single person show-ups are particularly disfavored in the law. Stovall v. Denno, 388 U.S. 293 (1967) (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned); State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000).

A criminal defendant may be deprived of due process of law by an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification. State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000). 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. Manson v. Brathwaite, 432 U.S. 98 (1977).

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Biggers, 409 U.S. 188. First, “[a] court must first determine whether the identification process was unduly suggestive.” Id., 409 U.S. at 198; Moore 343 S.C. at 286-287, 540 S.E.2d at 447. The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed ... only if [the procedure] was suggestive need the court consider the second question—whether there was a substantial likelihood of irreparable misidentification. Id.

Judge John correctly ruled that show-up identification was unnecessarily suggestive. See State v. Wyatt, 421 S.C. 306, 310-11, 806 S.E.2d 708, 710 (2017). The court also correctly stated the five-factor test to be used in the second prong of the Biggers analysis, but erred in its legal conclusion. Identification issues are mixed questions of law and fact reviewed under for abuse of discretion or prejudicial legal error. Moore at 288, 540 S.E.2d at 448. Even with the benefit of

the standard of review, the trial judge erred in finding Starnes' identification reliable after it was tainted by the police in a procedure ratified by the solicitor's office.

In considering whether an identification is reliable, based on the totality of the circumstances and despite the use of an unduly suggestive process, the court should consider the following factors: (1) the opportunity of the witness to view the offender at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. Moore, 343 S.C. at 289, 540 S.E.2d at 448-449.

Starnes had little opportunity to view her attacker. She said she had only twenty seconds and that the encounter was quick. Her degree of attention focused on the assailant's eyes, but she did not pick DiCapua out of the lineup even though his eyes were unchanged in the photo and clearly visible.

Her prior description was not accurate as to DiCapua. Starnes described a man 45-50 years old and DiCapua was close to seventy years old. The sketch does not look like DiCapua. The eyes and nose differ substantially. The nose in the sketch is flat and DiCapua's nose has a noticeable point. The lips are much thicker than DiCapua's.

While Starnes claimed she was 100% certain and not much time passed between the attack and the show-up at DiCapua's house, ultimately this case boils down to her failure to identify DiCapua in the lineup. She was told she would see a suspect at DiCapua's house and had already seen his photograph in the lineup. Combined with the highly suggestive and improper show-up procedure—which the solicitor approved—the court erred in allowing the in-court identification. The identification, and DiCapua's subsequent statements and jail calls, should all have been

suppressed. State v. Adams, 409 S.C. 641, 648, 763 S.E.2d 341, 345 (2014) (stating that evidence derived from an illegal arrest must be suppressed as fruit of the poisonous tree). This Court should reverse.

**CONCLUSION**

For the foregoing reasons, appellant's conviction should be reversed and this case remanded for a new trial.

s/David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of March, 2022.

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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 has been served upon William M. Blich, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 16th day of March, 2022.