

No. 19-8208

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

JERALD HARRIS — PETITIONER
(Your Name)

vs.

RICHARD JENNINGS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JERALD HARRIS #521524
(Your Name)

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ORIGINAI

QUESTION(S) PRESENTED

When a witness in a criminal case identifies a suspect out-of-court, under suggestive circumstances which give rise to a substantial likelihood of later misidentification, due process requires the trial judge to determine whether the out-of-court identification and any subsequent in-court identification are reliable before either may be admitted into evidence.

Question: Do the due process protections against unreliable identification evidence apply to all identifications made under suggestive circumstances, as held by the First Circuit Court of Appeals and other federal court of appeals, or only when the suggestive circumstances were orchestrated by the police, as held by the Missouri Court of Appeals and other courts?

LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at Case No. 19-2870; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at Case No. 4:19-CV-00153-SRC; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is _____.

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 22, 2019.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including February 28, 2020 (date) on February 5, 2020 (date) in Application No. 19 A 877.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "No State shall ... deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

GROUND ONE

The trial court erred in denying Mr. Harris' Motion to Suppress the evidence and testimony of the out of court identification made by Julie Spychala, and admitting State's Exhibits 35A-F, in violation of his rights to due process and a fair trial because the identification procedures employed by the police were impermissibly suggestive in that Mr. Harris was the only individual wearing dark clothing and he was taller than two of the three people in the line-up. The in-court identification is unreliable and flawed because the face of the robber was covered throughout the encounter, Ms. Spychala gave only a very general description at the time of the crime, she was not certain of her identification until she saw physical evidence connected to the crime, and there was a lengthy delay between the crime and the identification.

Preservation of Error and Standard of Review

Mr. Harris challenged the identification in a pre-trial motion to suppress and a hearing was held on this matter (LF 34-36; Tr. 191-232). Mr. Harris made timely objections to Julie Spychala's out of court identification from the photo line-up as well as her in court identification (Tr. 277; 286). A timely objection was also made during Det. Griffin's testimony (Tr. 612; 619). The objection was renewed in a timely filed Motion for New Trial (LF 128-33). This claim of error is properly preserved for review.

"This Court will reverse a ruling on a motion to suppress only if the ruling is clearly erroneous" *State v. Ivy*, 455 S.W.3d 13, 17 (Mo. App. E.D. 2014); citing *Foster v. State*, 348 S.W.3d 158, 161 (Mo. App. E.D. 2011). "If the ruling is plausible, in light of

the record viewed in its entirety, we will not reverse" *Id*; citing *State v. Ashby*, 339 S.W.3d 600, 603 (Mo. App. E.D. 2011). "[Courts] view the facts in the light most favorable to the judgment and disregard all contrary evidence and inferences" *Id.* at 18. "[The appellate court] will reverse the trial court's admission of identification testimony only if the trial court abused its discretion" *Id*; citing *Foster*, 348 S.W.3d at 161.

Analysis

"Courts apply a two-prong test to determine whether identification testimony is admissible" *Ivy, supra* at 19; *Foster, supra* at 161. "First, the court must determine whether the pre-trial identification procedure was unduly suggestive" *Foster*, at 162. "A pre-trial identification procedure is unduly suggestive only if the identification is the result of the procedures used by the police rather than a result of the witness's recollection" *Id*. "The key issue in determining whether unduly suggestive pre-trial procedures tainted the identification is whether the witness has an adequate basis for the identification independent of the suggestive procedure" *Ivy*, at 19; quoting *State v. Floyd*, 347 S.W.3d 115, 125 (Mo. App. E.D. 2011), and *State v. Chambers*, 234 S.W.3d 501, 513 (Mo. App. E.D. 2007). "If the procedure is not unduly suggestive, any pre-trial and in-court identification is admissible" *Foster*, at 162.

"If the procedure is unduly suggestive, the court must proceed to the second prong and determine whether the suggestive procedures have so tainted the identification as to lead to a substantial likelihood that the pre-trial identification was not reliable" *Id.* at 19-20; quoting *Chambers, supra* at 513. "If the procedure is unduly suggestive, the pre-trial identification will be excluded" *Chambers, supra* at 513. "Similarly, if the court finds

that the suggestive procedures have so affected the witness as to lead to a substantial likelihood that an in-court identification would not be reliable, then no in-court identification will be permitted" *Id.*

"In determining the reliability of a witness's identification, we consider: (1) the opportunity of the witness to view the subject; (2) the witness's degree of attention; (3) the accuracy of any prior description given by the witness; (4) the level of certainty demonstrated by the witness in making the identification; and (5) the interval between the event and the identification procedure" *Floyd, supra* at 125; *State v. Middleton*, 995 S.W.2d 443, 453 (Mo. banc 1999)."However, the defendant must establish that the police procedures were impermissibly suggestive before review of the reliability of the identification is necessary or appropriate" *State v. Vinson*, 800 S.W.2d 444, 446 (Mo. banc 1990); *State v. Allen*, 274 S.W.3d 514, 526 (Mo. App. W.D. 2008); *Chambers, supra* at 513.

The police procedure was unduly suggestive

"As a threshold consideration, [courts] weigh the totality of the circumstances to determine whether identification procedures were impermissibly suggestive" *State v. Grady*, 649 S.W. 2d 240, 244 (Mo. App. E.D. 1983); citing *Simmons v. U.S.*, 390 U.S. 377, 383 (1968), *Stovall v. Denno*, 388 U.S. 293, 302 (1967), and *Neil v. Biggers*, 409 U.S. 188, 198 (1972). The identification procedure used by the police in this case to create the photo line-up was impermissibly suggestive. It was suggestive because Mr. Harris was the only person wearing dark clothing and he was taller than two of the other individuals standing immediately next to him in the line-up.

At the scene, Ms. Spychala said the robber wore dark clothing (Tr. 299). Det. Griffin was aware of this description (Tr. 632). Det. Griffin agreed Mr. Harris was the only person wearing dark clothing in the line-up (Tr. 632). Ms. Spychala said the same thing (Tr. 299). Ms. Spychala denied her identification was based on clothing (Tr. 301). She "picked the man who looked like the man" who robbed her (Tr. 302). Despite her claim the clothing did not influence her decision, the fact that she chose a person who "looked like" the robber means she considered his clothing in making her choice.

The fact that a defendant is wearing the same or similar clothing to the clothing described by the witness does not necessarily make a line-up suggestive. *See State v. Arnold*, 528 S.W.2d 164, 166 (Mo. App. 1975). In *State v. Grady*, appellant argued that the clothing he was wearing during the line-up caused it to be suggestive because it was similar to the clothing described by the victim. 649 S.W.2d at 244-45. This Court upheld the circuit court's denial of Mr. Grady's motion to suppress because the "[i]dentification did not turn on the articles of clothing worn" *Id.* at 244. In *Grady*, however the witness saw the defendant's face because it was not covered during the assault. *Id.* at 242. The witness gave a description to a police sketch artist and viewed "five or four" line-ups before identifying Mr. Grady. *Id.* at 242; 245.

Ms. Spychala could not describe any of the robber's facial features because his face was covered. She testified that he was tall, heavy set and had a medium dark complexion (Tr. 280). Her physical description of the robber's body type suggests she took note of his clothing and build. Her memory of the clothing was likely a factor in her identification. Mr. Harris was also noticeably taller than two of the three people placed in

the line-up (Tr. 631). Ms. Spychala described the robber as "tall" (Tr. 280). Det. Griffin testified the individuals in positions two and three of the line-up were "a couple inches shorter than" Mr. Harris (Tr. 631-32). Mr. Harris therefore would have appeared "tall" relative to the individuals closest to him in the line-up photo.

The totality of the circumstances in this case support the conclusion that the police employed a suggestive procedure. Mr. Harris was the only person wearing dark clothing that matched Ms. Spychala's description of the robber's clothing and was taller than the individuals immediately next to him. Ms. Spychala's identification was not based on her independent memory of what the robber looked like when the crime was committed but rather was based upon the suggestiveness of the photo line-up.

The in-court identification was unreliable

A pre-trial identification deemed impermissibly suggestive can still be admissible. *State v. Nelson*, 334 S.W.3d 189, 194 (Mo. App. W.D. 2011). "Pretrial identifications that were found suggestive have been held to be admissible as long as they were reliable." *State v. Robinson*, 849 S.W.2d. 693, 696 (Mo. App. E.D. 1993). "The key issue ... is whether the witness has an adequate basis for the identification independent of the suggestive procedure." *Chambers, supra* at 513; citing *State v. Glover*, 951 S.W.2d 359, 362 (Mo. App. W.D. 1997). "Reliability involves a number of factors, including: the opportunity of the witness to view the actor at the time of the crime; the degree of attention exercised; the accuracy of a prior description; the level of certainty demonstrated by the witness; and, the length of time between the crime and the ...

identification." *Robinson, supra* at 696; citing *State v. Harding*, 734 S.W.2d 871 (Mo. App. E.D. 1987).

Opportunity to view and degree of attention

This factor weighs in Mr. Harris' favor. Ms. Spychala testified that she saw someone coming down the sidewalk before the robbery and briefly made eye contact with that person (Tr. 264). For the duration of the robbery, the robber's face was covered (Tr. 265). Ms. Spychala claimed the person walking down the sidewalk before the robbery was the same person who committed the robbery (Tr. 271). Assuming this is true Ms. Spychala had a few seconds at most to see that person's bare face. There was no street light or other light shining on this person's face (Tr. 297). She denied paying any special degree of attention to that person (Tr. 264). She said the incident took 2 to 3 minutes (Tr. 272). This is hardly a lengthy period of time in which to see and remember a stranger's face.

In addition to the robber's face being covered, Ms. Spychala also said she complied when he told her not to look at his face, so she focused on the gun instead (Tr. 265; 272; 290-91). Her testimony reveals just how focused she was on that gun. She said she got a "really good look" at it, couldn't take her eyes off of it, and "really remembered the gun" (Tr. 290-91; 265). She did not say the same thing about robber's appearance. This factor weighs against the reliability of the identification.

Accuracy of prior description

Ms. Spychala gave no specific physical description of the robber to the police at the scene (Tr. 294). She told the police he was tall, heavy set, with a bigger build, and a

medium dark complexion (Tr. 280). She did not give a description of the robber's eyes, nose, or mouth because his face was covered (Tr. 294). None of the witnesses gave any details regarding facial hair, hair style, or facial features of the robber (Tr. 402). This factor also weighs against reliability because Ms. Spychala gave no specific physical description at the time of the crime, when the details would have been freshest.

Level of uncertainty demonstrated at the time of confrontation

Both Ms. Spychala and Detective Griffin confirmed that she did not indicate any level of certainty on the line-up viewing form she filled out after she looked at the photo line-up (Tr. 305; 641). When Ms. Spychala viewed the photo line-up, she was not 100% sure of her identification (Tr. 305). After seeing other physical evidence in the case, specifically a photo of the gun and the handkerchief, she became 100% certain (Tr. 305). Ms. Spychala's certainty at the time of the identification is unknown. This factor also weighs against reliability.

Length of time between crime and confrontation

"The shorter the time, the greater the reliability, because details are fresh in the witness's mind." *State v. Johnson*, 618 S.W.2d 443, 445 (Mo. App. W.D. 1981); citing *State v. Ralls*, 583 S.W.2d 289, 291 (Mo. App. 1979). The robbery occurred the evening of January 6, 2013 (LF 16). Ms. Spychala was not called to view the photo array and individual photos until about six months later, on June 5th or 6th (Tr. 275). The time between the crime and the identification was lengthy. This factor weighs in Mr. Harris' favor.

Even if this Court concludes that the identification procedures employed by the police were not impermissibly suggestive, the identification should have been excluded because it was unreliable. The trial court erred in admitting Ms. Spychala's testimony of her out of court identification, evidence of her identification in the form of State's Exhibits 35A-F, and permitting her to identify Mr. Harris in court.

GROUND TWO

The trial court erred in denying Mr. Harris' Motion to Suppress the evidence and testimony of the out of court identification made by Stephanie Durkacz, and admitting State's Exhibits 35A-F, in violation of his rights to due process and a fair trial because the identification procedures employed by the police were impermissibly suggestive in that Mr. Harris was the only individual wearing dark clothing and he was taller than two of the three other individuals in the line-up. The in-court identification is unreliable and flawed because Ms. Durkacz testified that she never saw the robber's face because it was obscured, she gave a very general description of the robber at the time of the crime, and she testified that she became certain of her identification after Det. Griffin told her she chose the same person as Ms. Spychala.

Preservation of Error and Standard of Review

Mr. Harris challenged the identification testimony in a pre-trial motion to suppress and a hearing was held on this matter (LF 34-36; Tr. 191-232). Mr. Harris made timely objections to Stephanie Durkacz's in court identification and objected to her testimony regarding her out of court identification of him in the photo line-up (Tr. 340; 333). A timely objection was also made during Det. Griffin's testimony (Tr. 612). Mr. Harris renewed his objection to the identification testimony and the state's exhibits in a timely filed Motion for New Trial (LF 128-33). This claim of error is properly preserved for review.

“This Court will reverse a ruling on a motion to suppress only if the ruling is clearly erroneous” *State v. Ivy*, 455 S.W.3d 13, 17 (Mo. App. E.D. 2014); citing *Foster v. State*, 348 S.W.3d 158, 161 (Mo. App. E.D. 2011). “If the ruling is plausible, in light of the record viewed in its entirety, we will not reverse” *Id*; citing *State v. Ashby*, 339 S.W.3d 600, 603 (Mo. App. E.D. 2011). “[Courts] view the facts in the light most favorable to the judgment and disregard all contrary evidence and inferences” *Id.* at 18. “[The appellate court] will reverse the trial court's admission of identification testimony only if the trial court abused its discretion” *Id*; citing *Foster*, 348 S.W.3d at 161.

Analysis

To avoid repetition, Mr. Harris incorporates the case law regarding suggestiveness and reliability from the Analysis section of Point I herein. Facts related to Ms. Durkacz's identification will be cited in support of Mr. Harris' argument that her out of court and in court identifications should have been excluded.

The police procedure was unduly suggestive

“As a threshold consideration, [courts] weigh the totality of the circumstances to determine whether identification procedures were impermissibly suggestive” *State v. Grady*, 649 S.W. 2d 240, 244 (Mo. App. E.D. 1983); citing *Simmons v. U.S.*, 390 U.S. 377, 383 (1968), *Stovall v. Denno*, 388 U.S. 293, 302 (1967), and *Neil v. Biggers*, 409 U.S. 188, 198 (1972). The identification procedure used by the police to create the photo line-up was impermissibly suggestive. It was suggestive because Mr. Harris was the only person wearing dark clothing and he was taller than two of the other individuals.

On her 911 call, Ms. Durkacz described a black male, wearing black clothing, with something black covering his face (Tr. 342). She gave the same general description at the scene (Tr. 317). Det. Griffin was aware of this description (Tr. 632). Det. Griffin agreed Mr. Harris was the only person with dark clothes on in the photo line-up (Tr. 632). In June 2013, Ms. Durkacz lived in Texas so she reviewed the line-ups via email attachments from Det. Griffin (Tr. 331). She opened the photo attachments in order and viewed each of them for a few minutes (Tr. 332-33). Ms. Durkacz used a process of elimination to exclude the individuals in positions 2, 3, and 4 (Tr. 347).

She emailed Det. Griffin a little less than an hour after he emailed her to let him know she picked Mr. Harris (Tr. 333-34; 623). Ms. Durkacz said her identification was based on height and weight, as well as eyes, eyes brows, and facial structure (Tr. 333-34). Ms. Durkacz agreed that the robber wore black clothing at the time of the crime (Tr. 317; 330; 342). Given the fact that Mr. Harris was the only individual wearing dark clothing in the line-up photo, it is likely this influenced her identification of him and was therefore suggestive.

Mr. Harris was also noticeably taller than two of the three fillers placed in the line-up (Tr. 631). Ms. Durkacz described the robber as being "a little bit taller" and "a little bit heavier" (Tr. 330). She testified that she based her identification partially on height and weight (Tr. 333-34). Det. Griffin agreed the individuals in positions two and three of the line-up were "a couple inches shorter than" Mr. Harris (Tr. 631-32). Mr. Harris therefore would have appeared "tall" relative to the individuals closest to him in the line-up photo. Given Ms. Durkacz's description of the robber as "a little bit taller", it is likely that she

picked Mr. Harris not based on her memory of him specifically, but based on the fact that he appeared a little bit taller than those closest to him in the photo line-up.

The totality of the circumstances in this case support the conclusion that the police employed a suggestive procedure. Mr. Harris was taller than the individuals immediately next to him and was the only individual wearing dark clothing in the photo line-up. Ms. Durkacz cited height and weight as things on which she based her identification (Tr. 333-34). Based on the foregoing, it is likely Ms. Durkacz's identification was not based on her independent memory of the crime but rather, was made due to the suggestiveness of the photo line-up.

The in-court identification was unreliable

Even if a pre-trial identification is deemed impermissibly suggestive, it can still be admissible at trial. *State v. Nelson*, 334 S.W.3d 189, 194 (Mo. App. W.D. 2011). "Pretrial identifications that were found suggestive have been held to be admissible as long as they were reliable." *State v. Robinson*, 849 S.W.2d. 693, 696 (Mo. App. E.D. 1993). "The key issue ... is whether the witness has an adequate basis for the identification independent of the suggestive procedure." *Chambers, supra* at 513; citing *State v. Glover*, 951 S.W.2d 359, 362 (Mo. App. W.D. 1997). "Reliability involves a number of factors, including: the opportunity of the witness to view the actor at the time of the crime; the degree of attention exercised; the accuracy of a prior description; the level of certainty demonstrated by the witness; and, the length of time between the crime and the ... identification." *Robinson, supra* at 696; citing *State v. Harding*, 734 S.W.2d 871 (Mo. App. E.D. 1987).

Opportunity to view and degree of attention

This factor weighs in Mr. Harris' favor. Ms. Durkacz said the first unusual thing she noticed was a person behind her with a gun (Tr. 316). She never saw that person's face because it was covered (Tr. 317). She said the mask covered everything but his eyes (Tr. 317). She guessed that the entire incident lasted about ten minutes from beginning to end (Tr. 339). Even though she said she could not see the person's face, she based her identification on the person's eyes, eyebrows, and facial structure (Tr. 333-34). Ms. Durkacz had no opportunity to see the eyes, eyebrows, or facial structure of the robber. This factor weighs against the reliability of the identification.

Accuracy of prior description

Ms. Durkacz did not remember if she told the police anything about the robber's height, weight, facial hair, hair style or facial features at the scene (Tr. 343). She did not give a specific description of his eyes, the only part of the face she claimed she did see (Tr. 343-44). At the scene, she described the robber as a black male, in black clothing, a little bit heavier set, who wore a mask that covered everything but his eyes (Tr. 317). The police confirmed that none of the witnesses described any specific facial features of the robber (Tr. 402). This factor also weighs against reliability because Ms. Durkacz was not able to give a specific physical description at the time of the crime, when the details would have been freshest.

Level of uncertainty demonstrated at the time of confrontation

Ms. Durkacz testified that she was certain of her identification (Tr. 338). She also testified, however that her confidence increased when she learned Ms. Spychala had also

picked the same person (Tr. 349). Mr. Harris asserts that this factor is neutral and neither supports nor defeats his claim.

Length of time between crime and confrontation

“The shorter the time, the greater the reliability, because details are fresh in the witness's mind.” *State v. Johnson*, 618 S.W.2d 443, 445 (Mo. App. W.D. 1981); citing *State v. Ralls*, 583 S.W.2d 289, 291 (Mo. App. 1979). The robbery occurred the evening of January 6, 2013 (LF 16). Ms. Durkacz was not contacted by Det. Griffin about the line-up until June 6, 2013, approximately six months later (Tr. 330; 623). The time between the crime and viewing the photos was lengthy and supports a conclusion that her identification was unreliable.

Even if this Court concludes that the identification procedures employed by the police were not unduly and impermissibly suggestive, it is clear that the identification should have been excluded because it was unreliable. The trial court erred in admitting her testimony of her out of court identification and permitting her to identify Mr. Harris in court.

GROUND THREE

The trial court erred in denying Mr. Harris' Motion to Suppress the evidence and testimony of the out of court identification made by Brendon Hutton, and admitting State's Exhibits 35A-F, in violation of his rights to due process and a fair trial because the identification procedures employed by the police were impermissibly suggestive in that Mr. Harris was the only individual wearing dark clothing and he was taller than two of the three other individuals in the line-up. The in-court identification is unreliable and flawed because the robber's face was obscured, Mr. Hutton avoided looking at the robber's face and, when he did get a glimpse of it, it was only for a few seconds.

Preservation of Error and Standard of Review

Mr. Harris challenged the identification testimony in a pre-trial motion to suppress and a hearing was held on this matter (LF 34-36; Tr. 191-232). Mr. Harris made timely objections to Brendon Hutton's in court identification and to his testimony regarding his out of court identification from the photo line-up (Tr. 379; 375; 390). A timely objection was also made during Det. Griffin's testimony (Tr. 612). Mr. Harris renewed his objection in a timely filed Motion for New Trial (LF 128-33). This claim of error is properly preserved for review.

"This Court will reverse a ruling on a motion to suppress only if the ruling is clearly erroneous" *State v. Ivy*, 455 S.W.3d 13, 17 (Mo. App. E.D. 2014); citing *Foster v. State*, 348 S.W.3d 158, 161 (Mo. App. E.D. 2011). "If the ruling is plausible, in light of the record viewed in its entirety, we will not reverse" *Id*; citing *State v. Ashby*, 339

S.W.3d 600, 603 (Mo. App. E.D. 2011). “[Courts] view the facts in the light most favorable to the judgment and disregard all contrary evidence and inferences” *Id.* at 18. “[The appellate court] will reverse the trial court's admission of identification testimony only if the trial court abused its discretion” *Id.*; citing *Foster*, 348 S.W.3d at 161.

Analysis

To avoid repetition, Mr. Harris incorporates the case law regarding suggestiveness and reliability from the Analysis section of Point I herein. Facts related to Mr. Hutton's identification will be cited in support of Mr. Harris' argument that his out of court and in court identifications should have been excluded.

The police procedure was unduly suggestive

“As a threshold consideration, [courts] weigh the totality of the circumstances to determine whether identification procedures were impermissibly suggestive” *State v. Grady*, 649 S.W. 2d 240, 244 (Mo. App. E.D. 1983); citing *Simmons v. U.S.*, 390 U.S. 377, 383 (1968), *Stovall v. Denno*, 388 U.S. 293, 302 (1967), and *Neil v. Biggers*, 409 U.S. 188, 198 (1972). The identification procedure used by the police in the creation of the photo line-up was impermissibly suggestive. It was suggestive because Mr. Harris was the only person wearing dark clothing and he was taller than two of the other individuals.

Mr. Hutton said the first thing he remembered was someone coming up behind him, with a gun, demanding money (Tr. 359). He did not see anyone walking down the sidewalk before the incident (Tr. 358). Mr. Hutton said that the robber told everyone not to look at his face so he focused his attention on the gun (Tr. 360; 385). After the three of

them handed over all of their money, the robber told Mr. Hutton to turn around and face away from him towards a park car (Tr. 367). He testified that he did as he was told and had his back turned for the remainder of the interaction (Tr. 367). At trial, he described the robber as having a bigger build, with a body type that was a "little more mature" and "filled out" (Tr. 372). He said the robber was wearing a black hoodie, with the hood up, and a mask or scarf over his face (Tr. 359). Mr. Hutton claimed that for a second during the robbery, the covering slipped and he was able to get a "glimpse" of the robber's face (Tr. 364). Other than this "glimpse", Mr. Hutton said he was only able to see "just barely [the] eyes" of the robber (Tr. 360). He recalled that the event lasted five to ten minutes at most (Tr. 365).

Mr. Hutton did not give a description of the robber to the police (Tr. 371). He testified that the police who responded to the scene interviewed them together and "the girls" took over the conversation (Tr. 383; 372). Mr. Hutton viewed the line-up photos in June 2013, around the same time as the other witnesses (Tr. 376; 623). He initially denied that his identification was based upon the clothing worn by Mr. Harris in the photo line-up (Tr. 377). During cross-examination, however, he said that it was a factor in his identification of Mr. Harris (Tr. 386-87). He agreed Mr. Harris was the only individual wearing dark clothing in the line-up (Tr. 387). Mr. Hutton also agreed Mr. Harris was taller than the two individuals standing directly next to him in the photo line-up (Tr. 387-88). It is clear that the difference between Mr. Harris and the fillers in the line-up with regard to their heights and body type played a key role in Mr. Hutton's identification. He testified that he based his identification partially on build and clothing (Tr. 333-34).

The totality of the circumstances in this case support the conclusion that the police employed a suggestive procedure. Mr. Harris was taller than the individuals immediately next to him and he was the only suspect wearing dark clothing, clothing that matched the description given by Mr. Hutton. Mr. Hutton cited height and clothing as things he considered in making his identification (Tr. 387-88). Based on the foregoing, it is likely Mr. Hutton's identification was not based on his independent memory of the crime but rather, was due to the suggestiveness of the photo line-up.

The in-court identification was unreliable

Even if a pre-trial identification is deemed impermissibly suggestive, it can still be admissible at trial. *State v. Nelson*, 334 S.W.3d 189, 194 (Mo. App. W.D. 2011). "Pretrial identifications that were found suggestive have been held to be admissible as long as they were reliable." *State v. Robinson*, 849 S.W.2d. 693, 696 (Mo. App. E.D. 1993). "The key issue ... is whether the witness has an adequate basis for the identification independent of the suggestive procedure." *Chambers, supra* at 513; citing *State v. Glover*, 951 S.W.2d 359, 362 (Mo. App. W.D. 1997). "Reliability involves a number of factors, including: the opportunity of the witness to view the actor at the time of the crime; the degree of attention exercised; the accuracy of a prior description; the level of certainty demonstrated by the witness; and, the length of time between the crime and the ... identification." *Robinson, supra* at 696; citing *State v. Harding*, 734 S.W.2d 871 (Mo. App. E.D. 1987).

Opportunity to view and degree of attention

This factor weighs in Mr. Harris' favor. Mr. Hutton first noticed the robber when he came up behind him, with a gun and demanded money (Tr. 359). He said that the robber had a hoodie on, with the hood up over his head, and a mask or scarf covering his face (Tr. 359-60). Mr. Hutton could see "barely just [the] eyes" of this person (Tr. 360). The only opportunity to see any facial features or anything distinguishing about this person was when the robber's face covering allegedly came down and Mr. Hutton was able to get a "glimpse" of his face (Tr. 364). For the latter part of the interaction, Mr. Hutton had his back to the robber and was only able to look over his shoulder at what was happening (Tr. 367). He admitted his mind was "racing", and reiterated he was only able to get a glimpse of what was going on behind him (Tr. 367).

He gave no description at the scene and did not tell police that he got a "two second" glimpse of the person's face when his mask fell down (Tr. 384; 382). He was focused on the gun when this was happening (Tr. 385). In fact, the gun made such a strong impression that he was able to immediately identify a photo of it and said it "struck him more than anything" (Tr. 377-78). There is scant evidence Mr. Hutton had a meaningful opportunity to view the robber's face and his testimony that his attention was drawn more towards the gun than the person holding it. He also testified that his mind was racing during this incident which interfered with his ability to commit any specific details of the person's appearance to memory (Tr. 367). This factor weighs against the reliability of the identification.

Accuracy of prior description

Mr. Hutton first said he gave no description to the police and said that the girls took over the conversation (Tr. 371-72). None of the witnesses described any specific facial features of the robber at the scene (Tr. 402). Mr. Hutton did testify that he said the person was older, because his body type was more mature, and filled out (Tr. 372). He said that he could not recall any distinguishing features of the robber because his attention was focused on the gun (Tr. 385). His description at trial was very general: bigger build, black hoodie, about 6 feet tall (Tr. 359). This description could match a large number of people and does not support the reliability of Mr. Hutton's identification. This factor also weights in favor of excluding the identification.

Level of uncertainty demonstrated at the time of confrontation

Mr. Hutton testified that he was immediately drawn to the person in position one, Mr. Harris (Tr. 377). He made an identification based on a memory of seeing the robber's face for two seconds six months earlier (Tr. 377; 382). Given his limited opportunity to view the robber, this factor is neutral and does not support or defeat his claim that the identification is reliable.

Length of time between crime and confrontation

"The shorter the time, the greater the reliability, because details are fresh in the witness's mind." *State v. Johnson*, 618 S.W.2d 443, 445 (Mo. App. W.D. 1981); citing *State v. Ralls*, 583 S.W.2d 289, 291 (Mo. App. 1979). The robbery occurred the evening of January 6, 2013 (LF 16). Mr. Hutton was not contacted by Det. Griffin about the line-

up until June 6, 2013, approximately six months later (Tr. 376; 623). The time between the crime and viewing the photos was lengthy and weighs in favor of unreliability.

Even if this Court concludes that the identification procedures employed by the police were not unduly and impermissibly suggestive, it is clear that the identification should have been excluded because it was unreliable. The trial court erred in admitting testimony of Mr. Hutton's out of court identification and permitting him to identify Mr. Harris in court.

GROUND FOUR

The trial court erred in denying Mr. Harris' Motion to Suppress the testimony and evidence of the identifications made based on the audio line-up, and admitting State's Exhibit 36, in violation of Mr. Harris' rights to due process and a fair trial because the identification procedure employed by the police with the audio line-up was impermissibly suggestive in that detective told the witnesses that the photos and voices were in the same order such that after each witness had already identified Mr. Harris, in position number one in the photo line-up, they knew his voice would be first on the audio recording. The identifications based on the audio line-up were also unreliable and flawed because the witnesses gave no description of the voice at the time of the crime and heard the audio recording nearly six months after the robbery occurred.

Preservation of Error and Standard of Review

Mr. Harris challenged the testimony and evidence of the identifications based on the audio line-up at every stage of the case with the exception of failing to make a timely objection to Ms. Durkacz's testimony about the audio line-up (LF 34-36). When Ms. Durkacz was first questioned by the state regarding her out of court identification, Mr. Harris objected to the "line of questioning" and made reference to his pre-trial motion to suppress (Tr. 333). Mr. Harris did not object again when Ms. Durkacz testified about listening to the audio line-up (Tr. 334-35). Despite this, Mr. Harris asserts that this claim of error is preserved for review.

“[A]ny objection to evidence must be sufficiently clear and definite so that the court will understand the reason for the objection.” *State v. Brethold*, 149 S.W.3d 906, 909 (Mo. App. E.D. 2004); quoting *State v. Schuster*, 92 S.W.3d 816, 821 (Mo. App. S.D. 2003)(internal quotation marks omitted). “Error is not preserved where the basis for the specific objection is not readily apparent.” *Schuster, supra*. “The error must also be included in a motion for new trial.” *Brethold, supra*; citing *State v. Jones*, 128 S.W.3d 110, 113 (Mo. App. E.D. 2003). “An ... objection must be made at the earliest possible opportunity in the progress of the trial.” *State v. Cannady*, 660 S.W.2d 33, 37 (Mo. App. E.D. 1983); citing *State v. Simmons*, 500 S.W.2d 325, 328 (Mo. App. 1973).

Mr. Harris’ repeated and constant prior objections to each and every witnesses’ testimony regarding their out of court identifications based on both the photo line-up and the audio line-up and objections to the related state’s exhibits, gave the court ample notice of his opposition to the admission of this evidence and the basis for that opposition. Mr. Harris complied with the requirement that he renew his objections in his Motion for New Trial (LF 128-33). He asserts that this claim of error is therefore properly preserved for review. If this Court determines it is not preserved, Mr. Harris requests that the court review for plain error pursuant to Rule 30.20.

“This Court will reverse a ruling on a motion to suppress only if the ruling is clearly erroneous” *State v. Ivy*, 455 S.W.3d 13, 17 (Mo. App. E.D. 2014); citing *Foster v. State*, 348 S.W.3d 158, 161 (Mo. App. E.D. 2011). “If the ruling is plausible, in light of the record viewed in its entirety, we will not reverse” *Id*; citing *State v. Ashby*, 339 S.W.3d 600, 603 (Mo. App. E.D. 2011). “[Courts] view the facts in the light most

favorable to the judgment and disregard all contrary evidence and inferences" *Id.* at 18. "[The appellate court] will reverse the trial court's admission of identification testimony only if the trial court abused its discretion" *Id.*; citing *Foster*, 348 S.W.3d at 161.

Analysis

Though not as common as a visual identification, "[i]dentification by means of a defendant's voice is a permissible method" through which the state can prove an element of an offense. *State v. Mitchell*, 755 S.W.2d 603, 608 (Mo. App. E.D. 1988); citing *Eichelberger v. State*, 524 S.W.2d 890, 894 (Mo. App. E.D. 1975). The admissibility of an out of court identification based upon recognition of a suspect's voice is evaluated in the same manner that an out of court, visual identification is evaluated. "As a threshold consideration, [courts] weigh the totality of the circumstances to determine whether identification procedures were impermissibly suggestive" *State v. Grady*, 649 S.W. 2d 240, 244 (Mo. App. E.D. 1983); citing *Simmons v. U.S.*, 390 U.S. 377, 383 (1968), *Stovall v. Denno*, 388 U.S. 293, 302 (1967), and *Neil v. Biggers*, 409 U.S. 188, 198 (1972). "The factors ... for determining [the] reliability of voice identification are comparable to those listed in *Neil v. Biggers*, *supra*" *State v. Bolanos*, 743 S.W.2d 442, 446 (Mo. App. W.D. 1987).

Analysis

To avoid repetition, Mr. Harris incorporates previously cited case law regarding suggestiveness and reliability from the Analysis section of Point I herein. Additional facts related to the identifications made based on the audio line-up will be cited in support of

Mr. Harris' argument that the out of court and in court identifications should have been excluded.

The police procedure was unduly suggestive

Det. Griffin had Ms. Spychala and Mr. Hutton view the photo line-up first, then had them listen to the audio line-up (Tr. 617; 623). Ms. Durkacz testified that she looked at the photos Det. Griffin emailed to her before she listened to the audio line-up (Tr. 334-35). Det. Griffin told the witnesses after viewing the photo line-up, but before listening to the audio line-up, that the persons were in the same order in both (Tr. 639). In other words, after each witness had already identified Mr. Harris in the photo line-up, they knew that Mr. Harris' voice was the first voice they would hear on the audio recording. To conclude that this had no suggestive effect on their choice defies logic. The trial court abused its discretion when it denied Mr. Harris' motion and admitted evidence and testimony regarding the audio identification.

The in-court identification was unreliable

Even if a pre-trial identification is deemed impermissibly suggestive, it can still be admissible at trial. *State v. Nelson*, 334 S.W.3d 189, 194 (Mo. App. W.D. 2011). "Pretrial identifications that were found suggestive have been held to be admissible as long as they were reliable." *State v. Robinson*, 849 S.W.2d. 693, 696 (Mo. App. E.D. 1993). "The key issue ... is whether the witness has an adequate basis for the identification independent of the suggestive procedure." *Chambers, supra* at 513; citing *State v. Glover*, 951 S.W.2d 359, 362 (Mo. App. W.D. 1997). "Reliability involves a number of factors, including: the opportunity of the witness to view the actor at the time of the crime; the degree of

attention exercised; the accuracy of a prior description; the level of certainty demonstrated by the witness; and, the length of time between the crime and the confrontation when identification occurs." *Robinson, supra* at 696; citing *State v. Harding*, 734 S.W.2d 871 (Mo. App. E.D. 1987). "The factors ... for determining [the] reliability of voice identification are comparable to those listed in *Neil v. Biggers*, [supra] at 199]" and reiterated by *Robinson, supra. State v. Bolanos*, 743 S.W.2d 442, 446 (Mo. App. W.D. 1987).

Opportunity to hear and degree of attention

Ms. Spychala, Ms. Durkacz, and Mr. Hutton all testified that the person who robbed them made verbal demands for money and also made sexually explicit comments (Tr. 267; 270; 319; 324; 360; 367). The witnesses testified that the robber spoke throughout the encounter; however, they also testified that the encounter was relatively brief. Ms. Spychala remembered that it took about two to three minutes (Tr. 272). Ms. Durkacz guessed that it lasted a bit longer, around ten minutes (Tr. 339). Mr. Hutton said the incident lasted about five to ten minutes "at most" (Tr. 365). Whether the encounter lasted three minutes or ten minutes, the witnesses had a limited opportunity to hear the robber's voice.

Not only was the encounter relatively brief, the witnesses were threatened with a gun and testified to being preoccupied by that. Ms. Spychala said she focused on the gun (Tr. 272; 290-91). Mr. Hutton also said that he was focused on the gun while the robbery was happening and for half of it, he had his back turned and admitted that his mind was "racing" (Tr. 385; 367). Clearly, he and Ms. Spychala were distracted by either the gun or

the circumstances and their attention was likely diverted. Mr. Harris asserts that this factor weighs in his favor.

Accuracy of prior description

There was no description of the voice in the police report (Tr. 403). Ms. Spychala gave no description of the voice at the scene (Tr. 295). However, she did say that she discussed the voice with Ms. Durkacz and Mr. Hutton so by the time each of them listened to the audio, they were aware of the impressions of the others (Tr. 295). At trial, Ms. Spychala described the voice as "old" and agreed that the voice she chose on the audio line-up, the first voice, was the only voice on the recording that sounded "old" (Tr. 280; 296).

Ms. Durkacz did not recall what she told the police about the voice at the scene (Tr. 330). Mr. Hutton also said he did not remember giving the police any description of the voice at the scene (Tr. 384). This factor weighs in favor of Mr. Harris. The witnesses gave no description of the voice at the scene so it cannot be said that their prior description was accurate or in any way supports the identification made based on the audio line-up.

Level of uncertainty demonstrated at the time of confrontation

With the exception of Mr. Hutton, who claimed he did not listen to the audio line-up until a few days prior to trial, the other two witnesses stated they were positive that the voice they had chosen belonged to the man who robbed them (Tr. 282; 334-35). Mr. Hutton said he recognized the first voice; that it was "pretty distinct" and none of the

others "rang a bell" for him (Tr. 390). He did not testify that the voice he chose belonged to the person who committed the robbery (Tr. *passim*).

Length of time between crime and confrontation

Mr. Hutton also testified that Det. Griffin did not play him the audio portion of the line-up when he viewed the photos (Tr. 377). Det. Griffin, on the other hand, said he gave all of the line-up information to each witness, the photos and the audio recording (Tr. 623). Mr. Hutton testified that he listened to the audio recording, a few days before trial, when the prosecutor played it for him (Tr. 391). Ms. Spychala and Ms. Durkacz each listened to the audio line-up at the beginning of June, approximately six months after the robbery (Tr. 279; 331). This factor weighs in favor of Mr. Harris.

REASONS FOR GRANTING THE PETITION

The writ of certiorari should issue because the trial court erred and abused its discretion in denying Petitioner's Motion to Suppress the Evidence and Testimony of the out-of-court Identifications made by Julie Spychala, Stephanie Durkacz, Brendon Hutton, and the identifications made based on the audio line-up, and admitting State's Exhibits 35 A-F and Exhibit 36, in violation of Petitioner's rights to due process of law, and to a fair trial. A manifest injustice would result in the absence of certiorari relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jerald Harris

Date: February 24, 2020