IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35685

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

SALADINE QUINN RICHARDSON,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 1

II. SUMMARY OF ARGUMENT 2

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION 3

IV. STATEMENT OF FACTS 3

V. ARGUMENT 10

A. THE PRE-TRIAL IDENTIFICATION PROCEDURES USED BY THE STATE WERE RELIABLE AND DID NOT PRESENT A SUBSTANTIAL RISK OF MISIDENTIFICATION 10

1. The Standard of Review 10

2. The Appellant Was Reliably Identified by Both In- and Out-of-Court Identifications 11

VI. CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Jarrett v. Headly, 802 F.2d 34 (2d Cir. 1986) 15

Manson v. Brathwaite, 432 U.S. 98 (1977) . . . . . *passim*

Neil v. Biggers, 409 U.S. 188 (1972) 2, 3, 11, 12

Simmons v. United States, 390 U.S. 377 (1968) 11, 14

State v. Casdorph, 159 W. Va. 909, 230 S.E.2d 476 (1976),
vacated on other grounds, State v. Persinger, 169
W. Va. 121, 286 S.E.2d 261 (1982) 2, 12

State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995) 10

State v. Harless, 168 W. Va. 707, 285 S.E.2d 461 (1981) 12

State v. LaRock, 196 W. Va. 294, 470 S.E.2d 613 (1996) 14

State v. Lacy, 196 W. Va. 104, 468 S.E.2d 719 (1996) 11

State v. Lilly, 194 W. Va. 595, 461 S.E.2d 101 (1995) 11

United States v. Lawrence, 349 F.3d 109 (3d Cir. 2003) 12

United States v. Raddatz, 447 U.S. 667 (1980) 14

United States v. Rogers, 491 F. Supp. 2d 530 (M.D. Pa. 2007) 12

STATUTES:

W. Va. Code § 61-2-9(a) 2

OTHER:

W. Va. R. App. P. 18(a)(1) 3

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STATE OF WEST VIRGINIA,

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SALADINE QUINN RICHARDSON,

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

The June 2006 Term of the Marion County Grand Jury indicted Saladine Richardson (hereinafter "the Appellant" or "Appellant") for one count of the malicious wounding of Houston Lee (Count I), one count of the malicious wounding of Lakisha Washington[1] (Count II), one count of wanton endangerment (Count III), three counts of forgery of a public record (Count IV-VI), three

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[1]The facts supporting Count II occurred two months before the remaining counts. The Appellant was represented by different counsel on this single count, who moved to have the count severed from the balance of the other counts. In the end the Appellant pled guilty to lesser-included offense of unlawful wounding on December 6, 2006. The trial court sentenced him to an indeterminate term of one to five years. (R. at 117, 123.)

Counts IV-IX were also severed, and the Appellant was convicted of all of these counts after a jury trial which occurred on July 30, 2008. (R. at 203, 251.)

On January 6, 2009, the trial court granted Appellant's motion to dismiss Count III (Wanton Endangerment) as a lesser included offense of Count I. (R. at 218, 293.)

counts of uttering a forged public record (Counts VII-IX), and one count of being a felon in possession of a firearm (Count X). The Appellant was convicted of one count of Malicious Wounding (Count I) pursuant to West Virginia Code § 61-2-9(a), following a jury trial held between January 21-22, 2009, in the Circuit Court of Fairmont County, West Virginia, the Honorable David Janes presiding. Appellant's sentencing hearing occurred on September 17, 2009. During the hearing the trial court denied Appellant's motions for a post-verdict judgment of acquittal and a new trial. (R. at 296-97, 315.) By order entered October 29, 2009, the court sentenced the Appellant to an indeterminate sentence of two to ten years to run consecutive to his prior convictions for forgery and uttering of a public record and the unlawful wounding of Lakisha Washington. (Sent. Hr'g at 10-11; R. at 321.) This appeal is predicated upon that order.

The Appellant argued two Assignments of Error in his Petition for Appeal to this Court. This Court accepted Assignment of Error two only.[2]

II.

SUMMARY OF ARGUMENT

The Appellant has failed to prove that the State's out-of-court, pre-trial identification procedures were unduly suggestive under the "totality of the circumstances" test first articulated in *Neil v. Biggers,* 409 U.S. 188 (1972), and *Manson v. Brathwaite*, 432 U.S. 98 (1977). *See also* Syl. pt. 3, *State v. Casdorph*, 159 W. Va. 909, 230 S.E.2d 476 (1976), *vacated on other grounds, State*

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[2]Although the Appellant repeatedly refers to search and seizure issues surrounding the investigating officer's preparation of the photo array as grounds for reversal; these issues were not accepted by this Court. Had this Court wished to hear argument on these issues, it would have accepted Appellant's first assignment of error.

Pursuant to this Court's order counsel for the Appellee will only address the supposed due process implications of the alleged suggestiveness of the State's photo array.

v. Persinger, 169 W. Va. 121, 137, 286 S.E.2d 261, 271 (1982). Even if this Court were to find that the State's procedures were unduly suggestive, the witnesses' in- and out-of-court identifications of the Appellant were reliable. *Brathwaite,* 432 U.S. at 106; *Biggers*, 409 U.S. at 199-200. Each witness had more than an adequate opportunity to observe the Appellant before viewing the photo array, each identified him with certainty, each witness was in a position to observe the Appellant as he shot the victim, and each identified the Appellant shortly after the incident in question.

Nor did the Appellant's photo stand out, in some suggestive manner, from the others in the array. There is no evidence that the other suspects formed a pool or control group from which the Appellant stood out.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case presents no issues of first impression. Nor does it require a complex analysis of already existing case law. Counsel for the Appellee agrees with counsel for the Appellant that oral argument is not necessary. *See* W. Va. R. App. P. 18(a)(1).

IV.

STATEMENT OF FACTS

During either the late evening hours of March 6 or the early morning hours of March 7, 2006, the Appellant shot the victim, sixty-four-year-old Houston Lee, in the face, at point blank range rendering the victim permanently unable to use his left eye. (Trial Tr., 22, 24, 84, 134-35, 217, July 30, 2008.) The shooting took place outside of Carol Davison's home on Spruce Street, in the

city of Fairmont, Marion County, West Virginia.[3] (Suppression Hr'g, 29, Nov. 22, 2006; Trial. Tr., 98, 139, 164.) Fairmont patrolman Samuel Murray took a brief statement from the victim while he was at the hospital. Mr. Lee told the patrolman that he was standing in the street in front of his girlfriend's home when his assailant struck the back of his head, knocking him to the ground. When he turned around he noticed this same individual pointing a handgun at him. The Appellant was standing an arm's length away from Mr. Lee. (Trial Tr., 24.) He proceeded to shoot Mr. Lee in the face. Mr. Lee described his assailant as a black male, in his early 20s with a medium build and wearing a red coat, with dreadlocks. (Trial Tr., 22.) After shooting Mr. Lee, the assailant drove away in a green jeep or SUV. (*Id.*)

At trial, Mr. Lee testified that he was standing in Ms. Davison's driveway when he saw the Appellant leaving her house. He had never met him before. (Trial Tr., 140.) He then felt a sharp pain to the back of his head causing him to fall to the ground. (*Id.* at 139.) As he turned around to get back up he heard a shot and felt fragments in his left eye. (*Id.*) The Appellant was standing approximately two feet away when he shot him. (*Id.* at 141.) Mr. Lee ran across the street and over an embankment. The Appellant shot in his direct three more times. (*Id.* at 139.) Mr. Lee testified that he got a good look at the Appellant when the shots were fired. (*Id.* at 142-43.) He was able to identify the Appellant, without hesitation, in court. (*Id.* at 145.)

The first detective to arrive on the scene was Detective Douglas Yost of the Fairmont Police Department. (Suppression Hr'g, 30, Nov. 22, 2006.) He took a short tape-recorded statement from Ms. Davison at 1:10 a.m. on March 8, 2006. (R at 136; Suppression Hr'g, 30, Nov. 22, 2006; Trial

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[3]Ms. Davison was Mr. Lee's girlfriend at the time. (Trial Tr., 83, 136.) She lived with her three daughters: Aston, Blair and Mara. Blair was not in town on the day of the shooting. (Trial Tr., 86.) Aston had left the State by the time of the trial.

Tr., 116, 164; Suppression Hr'g, 11, July 6, 2007.) A witness to the shooting, Ms. Davison gave Detective Yost a description of the perpetrator. (Suppression Hr'g, 31, Nov. 22, 2006.) She described him as a light-skinned black male with tightly braided hair and a silky red jacket. She did not notice anything distinct about his face. (Suppression Hr'g, 5, July 6, 2007.) She stated that she did not know the perpetrator, but from her vantage point in her front yard she saw him strike Mr. Lee, shoot him in the face, and drive off in a green jeep or SUV. (*Id.*) She never saw a gun.

The morning of March 9, after interviewing the victim, Detective Yost asked Ms. Davison to come to the Fairmont Police Station for another statement. (R at 139; Trial Tr., 121; Suppression Hr'g, 7, July 6, 2007.) She admitted that she had not been completely truthful the first time out of concern for her safety and the safety of her children. (Trial Tr., 171-72; Suppression Hr'g, 23-24, July 6, 2007.) She told Detective Yost that the shooter's street name was Woo and that he hung out with his friends in Carolina, Marion County. (Suppression Hr'g, 34, Nov. 22, 2006; Suppression Hr'g, 123, 172-73, July 6, 2007.) She described him as black, probably brown complected, with medium dreadlocks, and wearing a red jacket. (Suppression Hr'g, 12, July 6, 2007.)

The evening of the party, Ms. Davison told her daughter Aston to clear out the house. The Appellant was one of her guests. Shortly thereafter she stood in front of her house talking to the victim when the Appellant walked by. Ms. Davison saw the Appellant strike the victim causing him to fall to the ground. While he lie on the ground, she heard a shot. The victim scrambled to the other side of the street, and down an embankment. The Appellant fired four more shots over the embankment. Ms. Davison told Detective Yost that the Appellant hung out in Carolina.

That same morning Detective Yost interviewed Ms. Davison's eighteen-year-old daughter, Aston Davison. Ms. Davison described the shooter. (Trial Tr., 82; Suppression Hr'g, 35, July 6,

2007; Trial Tr., 87; Suppression Hr'g, 8, July 6, 2007.) She said that she knew the Appellant as James. (Suppression Hr'g, 35, Nov. 22, 2006; Suppression Hr'g, 24, July 6, 2007.)

At trial, Ms. Davison testified that the Appellant was at her house the evening of the shooting: He refused to leave when asked. At some point Mr. Lee arrived to assist. Ms. Davison, her daughter Aston Davison, Mr. Lee, and the Appellant were all standing in Ms. Davison's front yard when the Appellant moved behind Mr. Lee. At that point, Mr. Lee stumbled and fell, and Appellant fired two shots at him. (Trial Tr., 99.) Mr. Lee scrambled across the street and down an embankment on the other side of the street. The Appellant followed him and fired three or four more shots over the embankment. (*Id.* at 99-100.) She told the police that the Appellant left in a dark colored Jeep with tinted windows. (*Id.* at 113.) When the police arrived she described the shooter as a black guy, with light brown skin, about 5 feet 4 inches wearing a red jacket. (*Id.* at 114.)

The evening of March 8 Detective Yost interviewed the victim, Houston Lee, at Ruby Memorial Hospital. (*Id.* at 166.) Mr. Lee stated that his girlfriend had lost control of her house, and had asked him to help her get some people to leave. (*Id.* at 167.) He stated that, while at the house, someone struck him from behind and shot him. (*Id.* at 167.) He insisted that he could identify the person who had shot him from a photo array. (*Id.* at 168.) Detective Yost showed Mr. Lee a photo array containing a picture of one-time suspect Jason Jones. Mr. Lee knew Mr. Jones, but fervently denied that he was the person who had shot him. (Suppression Hr'g, 32, Nov. 22, 2006; Trial Tr., 72, 74, 168.) Mr. Lee was also able to eliminate another suspect named Johnny Woods. (Trial Tr., 170.) Detective Yost took a taped statement from Mr. Lee. (*Id.* at 171.) When asked to describe his assailant, his description was similar to the description of the shooter provided by Ms. Davison. (Suppression Hr'g, 32, Nov. 22, 2006.)

On March 6, 2006, Eva Gowers called the Appellant's cousin, Darrell Claybrook. (Trial Tr., 36.) The Appellant answered, and asked Ms. Gowers for a ride to Aston Davison's house. (Trial Tr., 36.) Ms. Gowers testified that she had met the Appellant in January 2006, that she saw him every once in a while, that he lived in Carolina, and went by the street name Woo.[4] (*Id.* at 33-34.) She had met the Appellant through Mr. Claybrook. Ms. Gowers testified that the Appellant wore his hair in dreadlocks which he tied into a ponytail. (*Id.* at 35-36.) That evening she picked him up in her hunter green SUV,[5] and dropped him off at the Davison home. (*Id.* at 37.) After driving a friend to another part of town, she returned and parked her car up the street. (*Id.* at 51.) Later she heard a gunshot and a woman screaming. When she looked in her rearview mirror, she saw an older black man scrambling across the street over an embankment. (*Id.* at 40, 53.) Shortly after that she saw the Appellant standing behind her car kissing Aston Davison. (*Id.* at 53.) He was wearing a red jacket and a red hoodie. (*Id.* at 45-47.) Woo got into her car and ordered Ms. Gowers to "Go." (*Id.* at 41.) The Appellant then asked her if she thought he was crazy and said, "I don't know if I got him."[6] (*Id.* at 41-42, 63.)

Fairmont city Detective John Bennington recognized the Appellant's street name from prior cases he had worked,[7] and believed that Woo lived with Darrell Claybrook in Carolina. (*Id.* at 174.) The detectives, along with Fairmont Detective Sergeant Moran and West Virginia State Trooper

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[4]Ms. Gowers identified the Appellant as Woo, the person she had driven to the Davison home, during the trial. (Trial Tr., 34.)

[5]Her car had tinted windows.

[6]Ms. Gowers gave Detective Yost a statement on March 10, 2006, in which she repeated this phrase. (Trial Tr., 61.)

[7]Including the Lakisha Washington case reflected in Count II of the Indictment. (Suppression Hr'g, 36, Nov. 22, 2006.)

Mike Camden decided to drive to Mr. Claybrook's house in Carolina to investigate further. Upon their arrival Mr. Claybrook's grandmother pointed out Darrell Claybrook's house. (Suppression Hr'g, 38-39, Nov. 22, 2006; Suppression Hr'g, 26, July 6, 2007.) The detectives announced themselves and repeatedly knocked on both the front and back doors. Detective Yost testified that he heard voices inside the home but that both doors were locked from the inside.[8] (Trial Tr., 175.) While they were outside, Mr. Claybrook's mother came to the house and knocked. When the detectives told her who they were looking for, she stated that Mr. Claybrook had a cousin who went by the name Woo or Sallie Woo with braids or dreads. (Trial Tr., 176.)

After several minutes of knocking, Detective Yost returned to the Fairmont Police Station and prepared a search warrant, along with an affidavit.[9] (*Id.* at 177.) The affidavit stated, in part, that Carol Davison, her daughter Aston, and Mr. Lee identified the person who shot Mr. Lee as Woo. *See* Search Warrant Affidavit, ¶ 5. Woo was described as a black male with light to medium complexion and braided hair. While they were standing outside Mr. Claybrook's house, Mr. Claybrook's mother told the detectives that a man named Woo or Sallie Woo lived with Mr. Claybrook. Although the officers could hear voices inside, no one came to the door.

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[8]The doors could not be locked from the outside. (Suppression Hr'g, 25, July 6, 1007.)

[9]It is the Appellant's position that the first search warrant sworn out by Detective Yost did not contain an affidavit. (Suppression Hr'g, 17, 19-21, Nov. 22, 2006.) The State disputed Appellant's position, arguing that both search warrants contained similar affidavits. (Suppression Hr'g, 17, 19-21, Nov. 22, 2006; Suppression Hr'g, 31, 33-35, July 6, 2007.) The trial court characterized the issue as a question of fact. (Suppression Hr'g, 21, Nov. 22, 2006.) During the suppression hearing Detective Yost testified that he typed up a 15-paragraph affidavit for the first search warrant. (Suppression Hr'g, 41, 42-43, Nov. 22, 2006; Suppression Hr'g, 34-35, July 6, 2007.) The affidavit for the first search warrant was identical to the affidavit for the second, but left out the last three paragraphs. (*Id.*)

Upon opening the front door of Mr. Claybrook's house the officers flooded the apartment.[10] (Suppression Hr'g, 28, July 6, 2007.) They found the Appellant in the bedroom: He did not resist. (Suppression Hr'g, 45, Nov. 22, 2006.) The Appellant was cuffed. (Suppression Hr'g, 29, July 6, 2007.) Detective Yost informed the Appellant that he matched the witnesses' description, and that he was detaining him, and transporting him to the Fairmont Police Station where he would have his picture taken for inclusion in a photo array. He repeatedly told the Appellant that he was not under arrest. The State later conceded that Detective Yost did not have probable cause to arrest the Appellant at that time. (Suppression Hr'g, 28-29, June 7, 2007.) When asked his name, the Appellant told the officers he was Lawrence Flanagan from El Paso, Mexico. (Suppression Hr'g, 47, Nov. 22, 2006.)

The Appellant was taken to the Fairmont Police Station and placed in the processing room. (Suppression Hr'g, 46, Nov. 22, 2006.) Detective Yost told him that his picture would be taken and included in a photo array. If the witnesses did not pick him out, he was free to go. If they did, the case would proceed from there. (Suppression Hr'g, 46, Nov. 22, 2006; Suppression Hr'g, 12, Dec. 1, 2006.) Over the Appellant's objections, his photo was taken and included in the photo array shown to Mr. Lee, Ms. Davison, and her daughter Aston. Ms. Davison was the first witness to identify the Appellant from a photo array prepared by Detective Yost. (Suppression Hr'g, 14-15, Dec. 1, 2006; Trial Tr., 107-08; R. at 80.) Ms. Davison also identified the Appellant in court. (Trial Tr., 108, 132-33.) Mr. Lee was shown a second photo array containing a photograph of the Appellant.[11] He

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[10]"Flooding the Apartment" means rushing as many police officers as possible into the dwelling as quickly as possible. It is done for officer safety. (Suppression Hr'g, 28, July 6, 2007.)

[11]This photo array was the same one earlier shown to Ms. Davison. (Suppression Hr'g, 18, Dec. 1, 2006.)

immediately identified the Appellant as the person who had shot him. (Suppression Hr'g, 23, Dec. 1, 2006; Trial Tr., 73, 144-45; R. at 81.) Aston Davison also picked the Appellant out of the same photo array. (Trial Tr., 75; R. at 83.) On March 10, Ms. Gowers voluntarily came to the Fairmont Police Station by her own volition. She was able to identify the Appellant from the same photo array shown to Ms. Davison, her daughter, and the victim. (Suppression Hr'g, 26-29, Dec. 1, 2006.)

After Ms. Davison and her daughter Aston identified the Appellant, he was placed under arrest. (Suppression Hr'g, 33, Dec. 1, 2006.) While he was being fingerprinted, the Appellant again stated that he was Lawrence Flanagan of El Paso, Mexico.[12] (*Id.* at 33.) Detective Yost faxed a copy of the Appellant's fingerprints to the FBI, who identified him as Saladine Quinn Richardson. (*Id.* at 36.)

V.

ARGUMENT

A. THE PRE-TRIAL IDENTIFICATION PROCEDURES USED BY THE STATE WERE RELIABLE AND DID NOT PRESENT A SUBSTANTIAL RISK OF MISIDENTIFICATION.

1. The Standard of Review.

"Although most rulings of a trial court regarding the admission of evidence are reviewed under an abuse of discretion standard, an appellate court reviews *de novo* the legal analysis underlying a trial court's decision." *State v. Guthrie*, 194 W. Va. 657, 680, 461 S.E.2d 163, 186 (1995).

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[12]Mr. Richardson signed the fingerprint cards with the name Lawrence Flanagan. This gave rise to Counts IV through IX of the Indictment. These counts were later severed.

> When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in a light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.

Syl. pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

This Court has also ruled, "we review *de novo* questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action." *State v. Lilly*, 194 W. Va. 595, 600, 461 S.E.2d 101, 106 (1995).

2. <u>The Appellant Was Reliably Identified by Both In- and Out-of-Court Identifications</u>.

In *Neil v. Biggers*, 409 U.S. 188 (1972), and again in *Manson v. Brathwaite*, 432 U.S. 98 (1977), the Supreme Court considered when due process requires the exclusion of identification evidence following an out-of-court identification. *See also Simmons v. United States,* 390 U.S. 377, 384 (1968). Under those decisions, if the identification procedure was not unduly suggestive, the identification is admissible without further inquiry, and if the procedure was unduly suggestive, the identification is still admissible as long as the identification is independently reliable. *Manson v. Brathwaite*, 432 U.S. at 107-117; *Biggers*, 409 U.S. at 196-201. The Court fashioned a five-factor "totality of the circumstances" test for determining eyewitness reliability that evaluates (1) the witness's opportunity to view the criminal at the time of the crime; (2) his or her degree of attention; (3) the accuracy of the prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the length of time between the crime and the identification. *Biggers*, 432 U.S. at 199-200.

The Supreme Court has applied the "totality of the circumstances" test to in-court identifications. *Brathwaite*, 432 U.S. at 106-07. This Court has done the same,

> In determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness degree of attention, the accuracy of the witnesses' 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.

Syl. pt. 3, *State v. Casdorph*, 159 W. Va. 909, 230 S.E.2d 476 (1976), *vacated on other grounds, State v. Persinger*, 169 W. Va. 121, 286 S.E.2d 261 (1982).

In weighing the suggestiveness of a photo array, a court looks to the totality of the circumstances. *Biggers*, 409 U.S. at 199. Showing a witness a photo array may violate due process "when police attempt to emphasize the photograph of a given suspect, or when circumstances surrounding the array unduly suggest who[m] an identifying witness should select." *United States v. Lawrence,* 349 F.3d 109, 115 (3d Cir. 2003). To determine if a photo array is unnecessarily suggestive, a court considers factors including the size of the array, the manner of the presentation by the officials conducting the array, and the details of the photographs themselves. *See United States v. Rogers*, 491 F. Supp. 2d 530, 535 (M.D. Pa. 2007). *See* Syl. pt. 6, *State v. Harless*, 168 W. Va. 707, 285 S.E.2d 461 (1981) ("Most courts have concluded that a photographic array will not be deemed excessively suggestive as long as it contains some photographs that are fairly representative of the defendant's physical features. The fact that some of the photographs are dissimilar to the defendant's appearance will not taint the entire array.").

In the case at bar, a day and a half to two days after the shooting, the Appellant was picked from identical photo arrays by Carol Davison (Suppression Hr'g, 17, Dec. 6, 2006; Trial Tr., 69-70;

R. at 80), the victim, Houston Lee (Suppression Hr'g, 19, Dec. 6, 2006; Trial Tr., 73-74; R. at 81), Aston Davison (Suppression Hr'g, 61-62, Dec. 6, 2006; Trial Tr., 75-76; R. at 83), and Eva Gowers[13] (Suppression Hr'g, 29-30, Dec. 6, 2006; R. at 84). Every witness identified the Appellant without hesitation.[14] (Trial Tr., 71, 73, 75.) Indeed, before presenting the victim with the photo array containing a picture of the Appellant, the officers presented Mr. Lee with a photo array with photos of six other individuals. Mr. Lee adamantly denied that the person who shot him was in this first array. (Suppression Hr'g, 23, Dec. 6, 2006; Trial Tr., 74; R. at 82.)

Nor is there any evidence of cross-contamination. Detective Bennington testified that after Ms. Davison picked the Appellant's picture out of the array, he drove her to her home and told her to stay in the car. (Trial Tr., 76; Suppression Hr'g, 60-61, Dec. 6, 2006.) While she waited, he showed the same array to her daughter Aston. (Trial Tr., 77; Suppression Hr'g, 61, Dec. 6, 2006.) Both Detective Bennington and Detective Yost arrived at Ruby Memorial before Mr. Lee had an opportunity to watch the news. (Trial Tr., 77.)

The trial court credited the officers when they testified that there was no prompting the witnesses, and that each witness was given adequate time to examine the array. (Suppression Hr'g, 20-21, 29, Dec. 6, 2006.) The detectives told each witness that the suspect may or may not be in the array. (*Id.* at 16.)

At the time of the shooting Ms. Davison was approximately an arm's length away from the Appellant two minutes before the Appellant shot Mr. Lee. (Suppression Hr'g, 15-16, Dec. 6, 2006.)

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[13]Ms. Gowers appeared at the Fairmont Police Station on the 10th. (Suppression Hr'g, 27, Dec. 6, 2006.)

[14]According to Detective Yost it took Ms. Davison two to three seconds to pick out the Appellant. (Suppression Hr'g, 15, Dec. 6, 2006.)

She had also seen him at her home prior to the shooting. (Suppression Hr'g, 16, Dec. 6, 2006.) The Appellant and the victim were so close to each other that the Appellant was able to hit Mr. Lee on the back of the head before shooting him. (*Id.* at 20.) Ms. Gowers' drove the Appellant to Ms. Davison's house, and then drove him away. (*Id.* at 28.) She was also present when the Appellant assaulted Lakisha Washington. (*Id.* at 28-29, 56-57.) Aston Davison was dating the Appellant at the time of the shooting. (*Id.* at 61.)

Although the Appellant now argues that the State failed to produce certain allegedly necessary witnesses for the suppression hearing, he did not raise this objection during the hearing; therefore, it is waived. *See State v. LaRock,* 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996) (discussing the raise or waive rule). Moreover, pursuant to West Virginia rule of Evidence104(a), a trial court may make preliminary determinations concerning the admissibility of evidence and is not bound by the rules of evidence except for those with respect to privilege. *See also United States v. Raddatz,* 447 U.S. 667, 679 (1980) (a trial court may rely on hearsay and other evidence at a suppression hearing, even though the evidence may not be admissible at trial).

The Appellant also objects to the content of the photo array. The Appellant's generic laundry list of differences does not satisfy the demanding burden of proof necessary to establish suggestiveness. Absent a finding of a "photographic identification procedure [that] was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States,* 390 U.S. at 384, the evidence set forth during the lineup is a question for the jury. *Manson v. Brathwaite*, 432 U.S. at 116.

Each witness immediately identified the Appellant as the man who shot Houston Lee: They were not tentative. Each was in Ms. Davison's front yard when the Appellant shot Mr. Lee, and had

an opportunity to view him the evening of the shooting. There is no evidence that the investigating officers offered suggestive comments before showing each witness the array. The men displayed were the same race, and appear to be roughly the same age possessing the same hair color. The individual depicted in photograph four has braided hair, and the individual in photograph one has bushy hair. Even if this Court were to find that each photo depicted someone with a different hairstyle, the Appellant's appearance was not so distinctive from the others in the array as to unfairly suggest that he was most likely the perpetrator.[15] *See Jarrett v. Headly*, 802 F.2d 34, 41 (2d Cir. 1986) ("[T]he principle question is whether the picture of the accused so stood from all the other photographs as to suggest to an identifying witness that [the person] was more likely to be the culprit.").

In his Petition for Appeal the Appellant argued that the mug shot placard visible in his photograph rendered the array impermissibly suggestive. This placard was not visible in all of the arrays. Carol Davison was able to identify the Appellant from a photo which did not depict the placard. Therefore, it had no effect on the witnesses' ability to identify the Appellant. Additionally, The individual posing in photograph 5 also has a placard, which is all the more visible because of the support wire around the back of his neck.

Appellant's arguments go to the weight of the identification testimony, not its admissibility.

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[15]Had the rest of the individuals depicted in the photo array had the same hairstyle, the Appellant might have had a stronger argument. But each individual has different features, hairstyles, and facial hair. There is no subtle pointer pointing at the Appellant's picture. The witnesses were expected to sift through six photos depicting men with individual features.

VI.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Marion County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel

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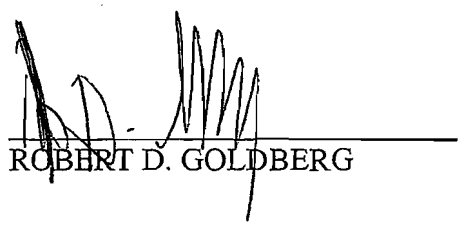
CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Appellee, do hereby verify that I have served a true copy of the Brief of Appellee upon counsel for the Appellant by depositing said copy in the United States mail, with first-class postage prepaid, on this 19th day of January, 2011, addressed as follows:

To: J.T. Hodges, Esq.
221 Washington Street
Fairmont, West Virginia 26554



ROBERT D. GOLDBERG