IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KEVIN EUGENE OWEN — APPELLANT

VS. — NO. 2008-KA-1469-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The grand jury of Forrest County indicted defendant, Kevin Eugene Owen with Armed Robbery in violation of Miss. Code Ann. §§ 97-3-79. (Indictment, cp.10). After a trial by jury, Judge Robert B. Helfrich, presiding, the jury found defendant guilty. (C.p.86). Defendant was sentenced 25 years in the custody of the Mississippi Department of Corrections, a fine of $5,000 and court costs. (Sentence order, cp. 50-52).

After denial of post-trial motions this instant appeal was timely noticed.

STATEMENT OF FACTS

Defendant robbed a convenience store using a gun. He was caught on tape for the police and the jury to see. Further, the clerk was able to give a good, detailed

description, noticing down to the stripe on his shoes.

On the above mentioned video the robber wore short sleeves and showed a small tattoo on his forearm. Interestingly, defendant, when he came to trial had a MUCH LARGER tattoo than would appear on the video. There was considerable testimony regarding defendant's tattoo. The jury heard it all and found defendant guilty.

SUMMARY OF THE ARGUMENT

PROPOSITION I.

UNDER THE TOTALITY OF THE CIRCUMSTANCES THE ONE PERSON SHOW UP IDENTIFICATION WAS NOT IMPERMISSIBLY SUGGESTIVE.

The witness gave an exacting and detailed description and correlated facts he witnessed to the man in the back of the patrol car. Such a witness and details are admissible and not suggestive identification..

PROPOSITION II

THE TRIAL COURT DID NOT ERR IN ADMITTING THE TAPE OF AN UNAVAILABLE WITNESS.

The information contained on the tape was not hearsay as it was information

obtained in pursuit of an investigation. Alternatively, the admission of the tape was harmless error as it was duplicative of other trial testimony.

ARGUMENT

PROPOSITION I

UNDER THE TOTALITY OF THE CIRCUMSTANCES THE ONE PERSON SHOW UP IDENTIFICATION WAS NOT IMPERMISSIBLY SUGGESTIVE.

Within this initial allegation of error defendant asserts that when law enforcement took the victim to where the defendant was apprehended it was highly suggestive and constituted a one person show-up identification.

The reviewing courts of this State have heard this similar facts and legal assertion before, holding:

> ¶ 11. Garner now contends that this encounter in the police station constituted a single-person show-up under circumstances that made it likely that she would identify him based, not on an actual recognition, but on the suggestive nature of the circumstances. Formal, arranged single-person show-ups in which the police purposely cause a victim to be confronted with a single individual bearing some general resemblance to the description offered by the victim are not favored in the law. "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." Stovall v. Denno, 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), rev'd on other grounds, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). However, the case makes clear that the fact of an identification based on a single person show-up is not, of itself, a basis to exclude evidence of the identification. Rather, the issue is whether, based on a totality of the circumstances, the show-up "was so

unnecessarily suggestive and conducive to irreparable mistaken identification" that it amounted to a deprivation of due process. Id.

¶ 12. The considerations that go into making such a determination were set out in some detail in the later case of Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). That case outlined these five factors: (1) the opportunity of the witness to view the accused at the time of the crime; (2) the degree of attention exhibited by the witness; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty exhibited by the witness at the confrontation; and (5) the length of the time between the crime and the confrontation. Id. at 199-200, 93 S.Ct. 375.

Garner v. State, 856 So.2d 729, 732-33 (Miss.App. 2003).

From the record of the suppression hearing it is clear the judge had ample testimony to allow the show-up identification. Interestingly, it would appear defense counsel makes a major point that the shorts were a different color. The truth of the matter, which the judge heard, was that the shorts were reversible. Tr. 19. Also the detail the witness remembered were very exacting down to the stipe on the bottom of the robber's shoes. Tr.20.

¶ 10. The Mississippi Supreme Court held in Magee v. State, 542 So.2d 228, 231 (Miss.1989), that the standard of review for suppression hearing findings in pretrial identification cases is whether, considering the totality of the circumstances, substantial credible evidence supports the trial court's findings. Only in the absence of substantial credible evidence supporting the findings can those findings be disturbed. Id. This Court finds that there is substantial credible evidence supporting the trial court's findings. Grayer's contentions notwithstanding, all of the Biggers factors favor the reliability of the identification. It is clear from the record that the trial court considered those factors in making*909 its determination not to suppress the identification testimony, and that the

court's findings are backed by substantial credible evidence. This Court finds no reversible error on this issue.

Grayer v. State, 928 So.2d 905 (Miss.App. 2006).

The trial court heard the evidence and allowed the show-up identification to go before the jury. Based upon the rationale of Garner as applied to the standard of review enunciated in Grayer it is the position of the State there is no error and no relief should be granted.

PROPOSITION II

THE TRIAL COURT DID NOT ERR IN ADMITTING THE TAPE OF AN UNAVAILABLE WITNESS.

In this allegation of error defendant avers the trial court erred in admitting the tape of a witness.

First the trial court made a determination that the witness was unavailable for medical reasons, citing M.R.E. 804(a)(4). The court then allowed a taped interview of the witness to be played for the jury. Further, defendant requested and a specific instruction was given to the jury regarding the tape. (Instruction D-12, c.p.80).

First, the State would argue that such information was not hearsay but offered to show the officers developed their investigation about defendant's tattoo.

¶ 8. Rule 801© states: " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in

> evidence to prove the truth of the matter asserted." Statements are not hearsay when they are admitted to explain the officer's course of investigation. Rubenstein v. State, 941 So.2d 735, 764 (¶ 111) (Miss.2006). "[O]ut-of-court statements made to the police during the course of their investigations [are admissible]." Gray v. State, 931 So.2d 627, 631(¶ 14) (Miss.Ct.App.2006) (citing Swindle v. State, 502 So.2d 652, 658 (Miss.1987)).
>
> Smith v. State, 984 So.2d 295, 300 (Miss.App. 2007).

Secondly, the State would argue in the alternative that should this reviewing Court find the taped statement was hearsay and testimonial in nature then any error in admitting the tape was harmless.

> ¶ 22. Notwithstanding the Crawford analysis, we find that any error made by the trial court would be considered harmless error because the statement made by the declarant that Rudy shot Heard is merely cumulative of Officer Bryant's testimony that Heard stated the name Rudy several times before the ambulance took Heard to the hospital. See Hobgood v. State, 926 So.2d 847, 852(¶ 14) (Miss.2006) (holding that statements admitted in violation of Crawford that are duplicative of other testimony are harmless error).
>
> Moore v. State, 1 So.3d 871, 876 -877 (Miss.App. 2008).

There was much testimony about the tattoo – even defendant's Mother testified when he got it as did other witnesses. In fact defendant stood in full view of the jury and displayed his tattoo for his Mother to clearly see. Tr. 378.

In summary, the trial court made a judicial determination that for medical reasons the witness was unavailable. Second, the information obtained by law

enforcement was instrumental in decisions they made for investigating the identity of the perpetrator. And, lastly, if error it would be harmless as there was much testimony about the tattoo, the size, when obtained, where, etc. and under the rationale of Moore would be duplicative and harmless.

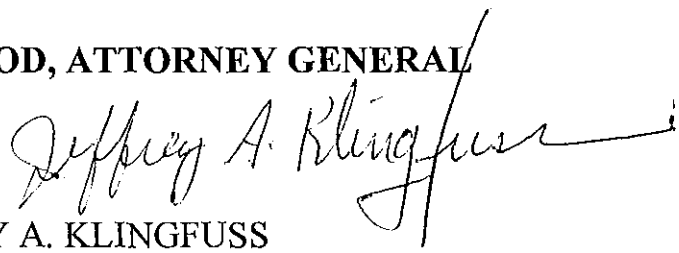
Consequently, it is the position of the State no relief should be granted on this allegation of error.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the jury verdict and sentence of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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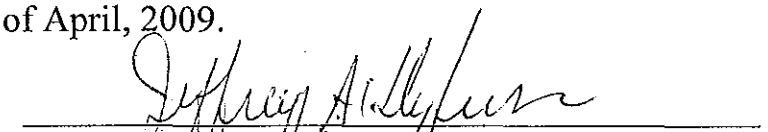
This the 20th day of April, 2009.



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