

Trial Preparation Taints Eyewitnesses' In-Court Identification, Leads to Reversal of Murder Conviction

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Last week, the court of appeals reversed a defendant's conviction for first-degree murder. That doesn't happen every day, so let's unpack the case. The central issue concerns two eyewitnesses' in-court identifications of the defendant.

The crime. The case is [State v. Malone](#). It began when two men approached Kevette Jones on Jones's front porch. They asked where his friend Jared Alston was, apparently because Alston had cheated them in a drug deal. Jones said he didn't know. Dissatisfied with that response, one of the men fatally shot him.

The witnesses. Claudia Lopez and Cindy Alvarez were on Jones's porch at the time and were eyewitnesses to the murder. Lopez provided police with a general description of the perpetrators after the shooting. She was unable to identify the defendant in a photo lineup, though she said that the picture of the defendant "looked like" one of the perpetrators. She identified a man named Marquis Spence as the other perpetrator in a separate lineup. Spence was subsequently convicted and there seems to be no doubt that he was, indeed, involved in the crime.

Alvarez likewise provided a general description of the perpetrators to the police. She, too, identified Spence in a photo lineup but was unable to identify the defendant – in fact, she indicated interest in one of the fillers. However, a week or two later, she saw a photograph of the defendant online and recognized the photo as one of the perpetrators. The defendant was eventually charged with the murder.

The trip to the DA's office. The case against the defendant was delayed. Over three years after the shooting, a legal assistant contacted Lopez and asked her and Alvarez to visit the DA's office to "talk about coming in to testify" against the defendant. The witnesses went to the DA's office. During their time there, the legal assistant showed them photographs of the defendant and of Spence; showed them a surveillance video that depicted events shortly before and after the shooting; and played for them part of the defendant's recorded interview with police.

Coincidentally, at that moment, the defendant was exiting a police car outside the window of the DA's office. He was handcuffed and wearing an orange jumpsuit, apparently headed for court. Alvarez seems to have looked out the window and recognized the defendant as one of the perpetrators. She called Lopez over to look at the defendant.

The motion to suppress. Before trial began, the defendant moved to suppress any identification of him by Lopez and Alvarez, contending that he was the subject of suggestive identification procedures that created a substantial risk of irreparable misidentification and therefore violated due process.

The trial judge held a hearing on the motion. Lopez and Alvarez testified as described above. Both identified the defendant in court and testified that their identifications were based on their observations at the time of the crime rather than on anything that took place at the DA's office. The judge ruled (1) that the events at the DA's office were not impermissibly suggestive, and (2) that, in any event, the in-court identifications were of "independent origin." Therefore, the judge denied the motion.

The appeal. The defendant was convicted and appealed. He repeated his claim that the events at the DA's office

were unduly suggestive and that they violated due process, and added an argument that the proceedings violated the Eyewitness Identification Reform Act, [G.S. 15A-284.50 et seq.](#)

The majority opinion. Judge Hunter, writing for the majority, found a due process violation and therefore did not reach the EIRA claim.

First, the majority determined that the incident at the DA's office was impermissibly suggestive. Showing the witnesses "a video of Defendant's interview, surveillance footage of the incident, and more recent photographs of Defendant" would convey the impression that the defendant was involved in the murder and would encourage the witnesses to identify the defendant.

Second, the majority ruled that the suggestiveness created an irreparable risk of misidentification, given the witnesses' inability to describe or to identify the defendant at the time of the shooting. In other words, the facts "do not support the trial court's conclusion the witnesses' in-court identifications of Defendant were of independent origin. The short amount of time the witnesses had to view Defendant, their inability to positively identify Defendant two days after the incident, and their inconsistent descriptions demonstrate it is improbable that three and a half years later they could positively identify Defendant with accuracy absent the intervention by the District Attorney's office."

Therefore, the majority determined that a due process violation had taken place. It was prejudicial because Lopez and Alvarez were two of the four eyewitnesses who testified at trial, and the other witnesses' identifications were problematic or biased.

The dissent. Judge Dillon dissented. In his view, Alvarez's in-court identification was independent of any suggestiveness from the meeting with the legal assistant, because "she was sure that the shooter was Defendant – long before her meeting with the prosecutor – after seeing a picture of Defendant on the news shortly after the shooting." Therefore, Alvarez's identification was admissible, and any error in admitting Lopez's testimony was harmless in light of the substantial admissible evidence against the defendant.

Comments. A few things occurred to me in reading the case.

- Further review is likely given the dissent.
- There is no suggestion in the opinion that the legal assistant was *trying* to enable the witnesses to identify the defendant. To the contrary, it sounds as though the legal assistant was doing standard trial preparation work by reviewing the facts of the case with the witnesses and showing the witnesses exhibits that might be used to cross examine them. My guess is that the legal assistant *assumed* that the witnesses had already made whatever identifications they were going to make. To prevent a similar incident from occurring in the future, prosecutors and their assistants may wish to note on their case files when eyewitnesses have not made positive identifications. That way, they can be careful not to taint inadvertently any subsequent in-court identifications.
- The majority wrote that "[a]lthough neither the video interview [of the defendant] nor the surveillance footage [showing just before and after the shooting] were admitted during the suppression hearing, we reviewed this evidence in order to determine the suggestive nature of the identification procedures." Perhaps someone more familiar than I am with appellate procedure can shed some light on that. If the appellate court's "review of a trial court's denial of a motion to suppress is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence . . . and . . . support the judge's ultimate conclusions of law," *State v. Gentile*, 237 N.C. App. 304 (2014) (internal quotation marks and citations omitted), how can evidence that was not admitted play any role in appellate review?

As always, stay tuned for further developments.