IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee,

vs.

GEORGE L. DEWBERRY SR.

Defendant-Appellant.

Case No. 2020-0444

On Appeal From The Montgomery County Court Of Appeals, Second Appellate District

Court of Appeals Case No. 27434

MEMORANDUM IN RESPONSE OF APPELLEE, THE STATE OF OHIO

MATHIAS H. HECK, JR.
Prosecuting Attorney
By: SARAH E. HUTNIK
Reg. No. 0095900
(Counsel of Record)
Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
P.O. Box 972
301 W. Third Street, 5th Floor
Dayton, Ohio 45422
(937) 225-4117
(937) 496-6555 (facsimile)
hutniks@mcohio.org

COUNSEL FOR APPELLEE, THE STATE OF OHIO

MATTHEW J. BARBATO
Reg. No. 0076058
(Counsel of Record)
2625 Commons Boulevard
Beavercreek, Ohio 45431
(937) 427-9650
(937) 427-9659 (facsimile)
mjbarbato@mcnameelawoffice.com

COUNSEL FOR APPELLANT, GEORGE L. DEWBERRY SR.

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WHY LEAVE TO APPEAL SHOULD NOT BE GRANTED

In affirming George Dewberry Sr.'s conviction the Second District Court of Appeals applied well-established principles regarding a defendant's rights to due process at a motion to suppress hearing. The court of appeals held that there was no reasonable basis for the exclusion of an eyewitness at the motion to suppress, but in this case, the exclusion was harmless error. *State v. Dewberry*, 2nd Dist. Montgomery No. 27434, 2020-Ohio-691, ¶ 83.

The Second District's holding was both limited and reasonable. Dewberry fails to establish in his Memorandum in Support of Jurisdiction any meritorious propositions of law. Moreover, the Second District did not misapply or misinterpret the law, it did not create new law, nor did it change existing law. Dewberry argues that the court of appeals effectively eliminated a defendant's right to call witnesses on his own behalf at a suppression hearing. Instead, the court of appeals correctly applied existing law in finding that the trial court did not violate Dewberry's due process rights. This Court, therefore, should decline jurisdiction over Dewberry's proposition of law and dismiss this appeal.

STATEMENT OF THE CASE AND FACTS

On August 14, 2015, George Dewberry, Jr. was murdered. Jesse Pierce was looking to get a gun and some money from "Bustdown." Around midnight on August 20, 2015, Pierce and Laura Castro drove to Vina Villa Avenue in Dayton, Ohio to meet with Bustdown. Castro testified that she knew who it was because Pierce told her who they were meeting that night. Pierce introduced Castro to Bustdown, later identified as Dewberry, and then Dewberry asked if Pierce still needed a gun. At that point, Castro testified that she felt herself get shot and after blacking out momentarily, she saw Pierce get shot in the head. Castro tried to play dead, and once the shooter had left, she attempted CPR on Pierce and called 911. Castro attempted to communicate with the

911 dispatcher and eventually police and EMTs were dispatched to the area. Pierce was shot eight times, and Castro was shot four times.

On October 1, 2015, the Montgomery County Grand Jury indicted Defendant-Appellant Dewberry on one count aggravated murder (prior calculation/ design), pursuant to R.C. 2903.01(A), an unclassified felony with a firearm specification; one count murder (proximate result), pursuant to R.C. 2903.02(B), an unclassified felony with a firearm specification; one count felonious assault (deadly weapon), pursuant to R.C. 2903.11(A)(2), a second degree felony with a firearm specification; one count felonious assault (serious harm), pursuant to R.C. 2903.11(A)(1), a second degree felony with a firearm specification; one count attempted murder, pursuant to R.C. 2903.02(A) and R.C. 2923.02, a first degree felony with a firearm specification; and one count having weapons under disability (prior drug conviction), pursuant to R.C. 2923.13(A)(3), a third degree felony.

Dewberry filed motions to suppress on November 18, 2015, which the trial court overruled in a decision filed on April 18, 2016. The case proceeded to a jury trial on January 9, 2017, and on January 17, 2017, the jury found Dewberry guilty as charged on all counts. On February 1, 2017, the trial court sentenced Dewberry to a total term of life without parole plus 20 years imprisonment.

Dewberry appealed to the Second District Court of Appeals, raising seven assignments of error. He argued that the trial court erred in overruling his motion to suppress, manifest weight and sufficiency of the evidence, ineffective assistance of counsel, evidentiary rules violations, and cumulative error. On February 28, 2020, the court of appeals affirmed Dewberry's conviction. *State v. Dewberry*, 2d Dist. Montgomery No. 27434, 2020-Ohio-691. Dewberry filed a notice of appeal with this Court.

ARGUMENT

Appellee's Proposition of Law I:

A trial court commits harmless error in limiting a defendant's ability to call an eyewitness identifier at a motion to suppress when that testimony would have established a credible identification.

Dewberry argues that the trial court violated his due process rights when it prohibited him from calling a witness at the motion to suppress hearing. Dewberry argues that the exclusion alone, regardless of the content of that testimony, violated his due process rights. The Second District Court of Appeals held that trial court's exclusion of the eyewitness at the motion to suppress hearing was harmless error in light of her testimony at trial. Therefore, Dewberry's proposition of law is without merit.

To warrant suppression of identification testimony, the defendant bears the burden of showing that the identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" and that the identification itself was unreliable under the totality of the circumstances. *Manson v. Brathwaite*, 432 U.S. 98, 106, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). If, however, the reviewing court finds that the identification procedures were not unduly suggestive, the inquiry ends and "any remaining questions as to reliability go to the weight of the identification, not its admissibility * * *." *State v. Frazier*, 2nd Dist. Montgomery Nos. 26495, 26496, 2016-Ohio-727, ¶ 14, citing *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.2d 127, ¶ 209.

Specific to photographic confrontations, the court has found that a photo spread is impermissibly suggestive when the manner or mode of its presentation "'suggests that one individual is more likely than others to be the perpetrator - such as when the photograph of one

individual is in some way emphasized * * *.'" *State v. Lewis*, 2nd Dist. Montgomery No. 24271, 2011-Ohio-5967, ¶ 16, quoting *State v. Robinson*, 2nd Dist. Montgomery No. 17393, 2001 WL 62569, *6 (Jan. 26, 2001). Accordingly, the test to be employed to photo spread identifications "is whether the picture of the accused, matching descriptions given by the witness, so stood out from all of the photographs as to suggest to an identifying witness that [the accused] was more likely to be the culprit." *State v. Wills*, 120 Ohio App.3d 320, 325, 697 N.E.2d 1072 (8th Dist.1997).

Contrary to Dewberry's assertions, the Second District's decision did not eliminate or limit his due process rights at a motion to suppress hearing. Here, officers' testimony about the procedures employed in the photo identification shown to the eyewitness indicated that the procedures were not unduly suggestive. The Second District Court of Appeals appropriately applied *State v. Riveria*, 2nd Dist. Montgomery No. 18845, 2002 WL 91296 (Jan. 25, 2002), in which it held that an eye witness's testimony is relevant not just to the issue of reliability of the identification, but also to whether the procedures employed by police were unduly suggestive. In doing so, it further held that in this case, there was no reasonable basis to exclude the eyewitness from testifying. This decision did not eliminate or even limit Dewberry's due process rights, in actuality, the Second District's holding re-enforced Dewberry's right to call witnesses on his behalf.

Dewberry's interpretation of the Second District's holding, is simply not supported by the decision. Dewberry, simply disagrees with the outcome. In following *Riveria*, the Second District also held that any error made in prohibiting Dewberry from calling the eyewitness was harmless given that witnesses' testimony at trial. The Second District accurately applied exiting law when it held that the trial court committed harmless error because even if the eyewitness had testified at the motion to suppress that the officers' used unduly suggestive procedures, her identification was

still reliable. The Second District concluded that the eyewitness' identification was credible. The eyewitness was familiar with Dewberry, and knew his nickname as Bustdown. The eyewitness testified that she knew his relationship with the murder victim and that she knew they were meeting with Bustdown on the day of the murder. The eyewitness then saw Bustdown get into the vehicle and shoot her four times. The eyewitness explained that she did not immediately identify Dewberry, despite recognizing him in the initial photo spread, because she was scared for herself and her family. Given these facts, the Second District appropriately held that had the eyewitness had testified at the motion to suppress hearing, her identification was credible. Therefore, in holding that the trial court did not commit reversible error, the Second District properly applied existing precedent to the present case.

The trial court's exclusion of the eyewitness at the motion to suppress hearing did not violate the U.S. Constitution, the Ohio Constitution, or any other case law. The Second District's decision was limited to the present situation and in no way indicated that they intended to eliminate a defendant's due process rights by universally limiting his ability to call witnesses on his own behalf. Dewberry simply disagrees with the outcome. As such, this proposition law is without merit.

CONCLUSION

The Second District Court of Appeals did not err, in law or fact, in upholding Dewberry's conviction. The court of appeals did not misapply or misinterpret the law, it did not create new law, nor did it change existing law in reaching its decision. As a result, there is nothing for this Court to decide or review. For this reason, Appellee the State of Ohio respectfully requests that this Court find George Dewberry Sr.'s propositions of law without merit and deny him jurisdiction to appeal.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By: */s/ Sarah E. Hutnik*
SARAH E. HUTNIK, Reg. No. 0095900
Assistant Prosecuting Attorney

Attorney for the State of Ohio,
Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum in Response to Jurisdiction* was sent by first class mail, postage pre-paid, to Counsel for Defendant-Appellant: Matthew J. Barbato, 2625 Commons Boulevard, Beavercreek, Ohio 45431, on April 27, 2020.

/s/ Sarah E. Hutnik
SARAH E. HUTNIK
Reg. No. 0095900