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**IN THE COURT OF APPEALS**

**STATE OF GEORGIA[[2]](#footnote-2)**

**STATE OF GEORGIA**

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**COURT OF APPEALS**

**CASE NO. A12B3456**

**v.**

**JAKE BARNS**

**STATEMENT OF JURISDICTION**

The Court of Appeals of Georgia rather than the Supreme Court of Georgia has jurisdiction of this case because this is an appeal from the final judgment of a Superior Court in a noncapital felony case and does not come within any of the areas designated to be heard before the Supreme Court under Article VI, Section VI, Paragraph III, Georgia Constitution of 1983. Jurisdiction of this category of appeal is conferred upon this Court under the provisions of Article VI, Section V, Paragraph III, Georgia Constitution of 1983.

**STATEMENT OF THE CASE**

On October 10, 2006, Jake Barnes was indicted by the grand jury of Fulton County on three counts of aggravated assault, two counts of armed robbery, two counts of battery, one count of theft by receiving stolen property auto, and one count of possession of a firearm during the commission of a felony. (Record of the case, hereinafter “R.” pages 9-15). On March 28, 2008, Barnes moved to suppress a pre-trial showup identification conducted by the Atlanta Police Department on the date of the offense. (R. 48-51). During a pre-trial motion hearing on March 31, 2008, the court denied William’s motion in regards to witnesses Robert Cohn, Count Mippipopolous, Bill Gorton, Romero Montoya, and Lady Brett. (Transcript of motion hearing held on March 31, 2008, hereinafter ‘MT.’ page 168). On a pre-trial motion hearing on April 28, 2008, the court denied William’s motion in regards to Mike Campbell. (Transcript of trial hereinafter ‘T.’ page 304).

At trial, Barnes was convicted on all counts except count four, and sentenced to twenty years to serve ten. (R. 83-94). The trial court granted Mr. Barnes the right to file an out of time appeal on November 10, 2009 (R. 116-117). A motion for new trial was filed on November 10, 2009. (R. 114- 115). A hearing on the motion for new trial was held on June 21, 2013. The motion was denied in an order filed on June 21, 2013. (R. 134-136).

A notice of appeal was filed on July 19, 2013 and docketed in this court on March 24, 2014.(R.1).

**STATEMENT OF THE FACTS**

At or around two am on October 7, 2006, Robert Cohn left a neighborhood bar in Pamplona’s Beloso neighborhood. (MT. 54). Too drunk to drive, Cohn walked to a friend’s nearby home. (MT. 54). While en route, Cohn was approached by two men, told to lie down on the ground, and robbed at gunpoint. (MT. 54). Shortly after, Philip Montoya and Lady Brett, who had also been drinking, were leaving a bar in the nearby neighborhood of Little Five Points, when they were approached by three men, assaulted, and robbed at gunpoint. (MT. 116).

Later that night, Pamplona Police Department Officer Jim Bean observed four young, Black men leave a Beloso area Starbucks parking lot in a green Dodge minivan. (T.272). Though he witnessed no criminal activity, Officer Bean decided that the men looked suspicious and began to follow the van. (T. 272). After following the van for several blocks, Officer Bean reported his behavior to his supervisor and was told to end his pursuit as he did not have any reasonable suspicion that the young men had been involved in criminal activity. (T. 272). Shortly after being told to stop following the van, Officer Bean heard reports of an armed robbery over his dispatch radio. (T.272). Despite the Computer Aided Dispatch (CAD) system showing no record that the dispatcher ever gave a description of the vehicle suspected of being involved in the robberies, Officer Bean testified during the pre-trial motion hearings that he heard the radio dispatcher describe a minivan matching the description of the green Dodge van.(T.274-276).

After hearing the CAD report, Officer Bean resumed his pursuit of the van. He was soon joined by Atlanta Police Department Officer Paul Rocher, who was also in the neighborhood and had heard Officer Bean’s exchange with his supervisor. (T.380). After a low-speed pursuit, during which neither officer turned on their lights, the van pulled onto a side street and four young men jumped out of the car and fled. (T. 380). Officer Rocher and two other officers pursued the men on foot. (T.382). After chasing the suspects for several blocks, the officers apprehended Jake Barnes and his two cousins, Frances and Wilson Harris. (T. 384). The fourth suspect was never apprehended. (T. 384).

After apprehending the three boys, and with no evidence to suggest that they had been involved in an armed robbery, the officers took Frances Harris, Wilson Harris, and Jake Barnes to the scenes of the robberies, where they conducted a showup identification (T. 416). Handcuffed and disheveled, a flashlight blinding them so that they would not be able to see their accusers, the young men were paraded in front of the witnesses. (MT. 17). And each witness—exhausted and afraid—identified the young men as their attackers. (MT. 48; MT. 71; MT. 111; MT. 117; MT. 127; T. 292).

**PRESERVATION OF ERRORS**

1. Appellant’s enumeration of error, that the trial court erred by denying the defendant’s motion to suppress the showup identification procedure, was preserved by raising the issue in a pre-trial hearing and obtaining a ruling from the trial court.

**PART II:**

**APPELLANT’S ENUMERATION OF ERRORS**

I.

The trial court erred in denying defendant’s motion to suppress an inherently suggestive showup identification which was improperly conducted so as to create a substantial likelihood of misidentification.

**PART III:**

**ARGUMENT AND CITATION OF AUTHORITY**

**I.**

**The trial court erred in denying defendant’s motion to suppress an inherently suggestive showup identification which was improperly conducted so as to create a substantial likelihood of misidentification.**

**Standard of Review:** When reviewing a trial court’s denial of a motion to suppress identification, the Court of Appeals “construe[s] the evidence most favorably to upholding the trial court’s finding and judgment, and accepts the court’s ruling unless clearly erroneous.” *Price v. State,* 289 Ga.App. 763, 765-766 (658 S.E.2d 382, 385) (2008). A trial court's findings of fact "are not clearly

erroneous if there is any evidence to support them." *Jones v. State*, 249 Ga. App. 64 (2001) (citing *Bettis v. State*, 228 Ga. App. 120, 121 (1997)). The trial court’s legal analysis is subject to de novo review*. Callahan v. Hall*, 302 Ga.App. 886, 887 (2010). When reviewing a trial court’s denial of a motion to suppress identification, the Court of Appeals “construe[s] the evidence most favorably to upholding the trial court’s finding and judgment, and accepts the court’s ruling unless clearly erroneous.” *Price v. State*, 289 Ga.App. 763, 765-766 (658 S.E.2d 382, 385) (2008). A trial court's findings of fact "are not clearly erroneous if there is any evidence to support them." *Jones v. State*, 249 Ga. App. 64 (2001) (citing *Bettis v. State*, 228 Ga. App. 120, 121 (1997)).

1. **Showup Identification**

 The Due Process Clause of the Fourteenth Amendment protects an accused against the admission of unreliable identification evidence. *Manson v. Braithwaite*, 432 U.S. 98 (1977). The Supreme Court has laid out a two-part test for determining the admissibility of testimony from a showup procedure. “The first inquiry [is] whether the police used an impermissibly suggestive procedure in obtaining the out of court identification. If so, the second inquiry is whether, under the totality of the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.” Idat107.

1. **Impermissible Suggestiveness**

 Impermissible suggestiveness speaks to both the necessity of the showup identification as well as the suggestiveness of the procedure. Courts have routinely held that showup identifications are inherently suggestive. *Butler v. State*, 290 Ga.412, 414(2012); *Scruggs v. State*, 309 Ga.App. 569, 575(2011); *Freeman v. State*, 306 Ga.App. 783, 785 (2010). The need to promptly resolve any “doubts as to identification” and expedite the release of innocent suspects are overriding considerations when determining the permissibility of a showup identification. *Butler v. State*, 623 S.E.2d 132, 164 (2005).

The showup identification at issue in the instant case was unnecessary. The facts of the case illustrate that the police had no fear of wrongfully detaining innocent suspects. During the pre-trial hearing, the arresting officer, Officer Bean, indicated that he had detained the suspects after they were caught fleeing from a stolen car and had reason to charge the defendants with obstruction (T.382). Obstruction is a misdemeanor punishable by up to twelve months of imprisonment and warrants *at leas*t temporary detention. O.C.G.A. §16-10-24 (a). Because the defendants could already legally be charged with obstruction, there was no reason for Officer Bean to fear that he had wrongfully detained innocent suspects. Officer Bean had the time and opportunity to take the defendants back to a police station and create a less suggestive photographic or live lineup identification that would have significantly decreased the possibility of a wrongful identification. The facts of the case do not illustrate a sufficient reason to take the suspects to the scene of the crime and conduct an inherently suggestive identification procedure.

“A pretrial identification procedure is impermissibly suggestive when it leads the witness to an all but inevitable identification of the defendant as the perpetrator...” *State v. Norton*, 280 Ga.App. 657, 659 (Ga.App.,2006). The facts of the showup procedure illustrate that the suspects were presented to the victims as criminals. The defendants were brought to a crime scene at three o’clock in the morning—an hour that suggests to the victims that the officers have detained the perpetrators and are trying to expedite the identification process as quickly as possible. (T.359).The defendants had just been involved in a police foot chase, and they were dirty and disheveled. (T. 359). They were held in the backs of police cars. (T. 346). A bright light was shone on their faces, blinding them so that they would not be able to identify their would-be accusers. (T.346). Contributing to the unfair environment was the state of the witnesses—tired, drunk, and afraid—a combination of physical and emotional conditions that were not conducive to a sober, reliable identification. All of these factors contributed to an impermissibly suggestive showup procedure which led to the inevitable identification of the defendants as the perpetrators.

1. **Substantial Likelihood of Misidentification**

 If a showup procedure is impermissibly suggestive, the court looks to the totality of the circumstances to determine if the procedure “gave rise to a substantial likelihood of misidentification.” *Neil v. Biggers*, 409 U.S. 188, 202(1972).The court addresses the following factors when making this determination: (1) the opportunity of the witness to view the perpetrator at the time of the crime, (2) the witness’s degree of attention, (3) the accuracy of the witness’s prior description. (4) the level of certainty expressed by the witness, and (5) the length of time between the crime and the confrontation. *Id.*

When the trial court denied Appellant’s motion to suppress the identification, the court emphasized the fifth Biggers facto—the trial court pointed to the short time between the robberies and the identification as evidence of the showup’s reliability. (T.168). Instead of addressing the other four *Biggers* factors, the trial court emphasized “the corroboration by witnesses from two separate and distinct events.” (T. 168).[[3]](#footnote-3) By relying almost exclusively on the time period between the incident and identification and witness corroboration, the trial court shirked its responsibility to consider the totality of the circumstances surrounding the showup procedure before denying the defendant’s motion to suppress.

The trial court’s unwillingness to address each of the *Biggers* factors and consider the circumstances surrounding the robberies and those surrounding the showup procedure resulted in a ruling that allowed the jury to hear evidence from a showup procedure which was unnecessary, improperly conducted, and created a significant probability of misidentification. Appellant will address the five *Biggers* factors, how they apply to each of the witnesses, and how, when considering the totality of the circumstances, the factors weigh in favor of the Appellant.

1. **Robert Cohn**

*“[I]t’s just obvious if a cop’s got guys…that they’ve been caught for something.”*

*-Robert Cohn* (TT. 57).

*The opportunity of the witness to view the perpetrator at the time of the crime.* Cohn testified that he was approached from behind by two assailants. (TT.45). Though Cohn testified that he briefly turned around and faced his assailants, he also stated that upon turning and seeing a gun he immediately dropped to the ground and remained there throughout the course of the altercation. (TT.45). Cohn testified that he was ordered not to look up, and continued to lie on the ground, face down, until his assailants ran away. (TT. 46). Cohn’s recount of the altercation does not illustrate that he had a good opportunity to view his attackers—Cohn was approached from behind and lied face down on the ground for the entire robbery. In addition to his brief opportunity to view the robbers, Cohn also testified that he was robbed at two am on a dimly lit street. Even if Cohn did briefly view his attackers head-on, his ability to observe his attackers was obstructed by darkness. At best, Cohn got a fleeting glance of his assailants on a dark street before he turned around and lied face down on the ground. Nothing in Cohn’s testimony illustrates that he had a good opportunity to observe his perpetrators at the time of the crime.

*The witness’s degree of attention*. In *United States v. Russell*, the Supreme Court acknowledged the “great potential for misidentification when a witness identifies a stranger based solely upon a single brief identification, [a risk that is increased] when the observation was made at a time of stress or excitement.” *U.S. v. Russell*, 532 F.2d 1063, 1066 (1976). During his testimony, Cohn stated that he was “very scared” at the time of the robbery. (TT.54). Cohn was approached on a dark street at two o’clock in the morning, by two strange men bearing a gun—factors that would cause the average person a great deal of stress. In addition to being “very scared,” Cohn was also very drunk—by his own admission, he had consumed a substantial amount of alcohol and was too drunk to drive. (TT.54). Cohn’s drunkenness likely amplified his stress level, making it even more difficult for him to closely observe his attackers. The robbery also occurred very late at night, so Cohn was likely tired after a long day. All of these factors—the anxiety, the drunkenness, the late time of day—suggest that Cohn was incapable of making a sober, thoughtful observation of his assailants. Cohn’s anxiety, exacerbated by his drunken state, suggests an unreliable degree of attention during the robbery.

*The accuracy of the witness’ prior description.* The record indicates that Cohn gave a very broad description of his assailants to the responding officers. When Investigator Jared Watkins asked Cohn to describe his assailants, Cohn stated only that they were “two young black males.” (TT. 13). In *Towns v. State*, the Georgia Court of Appeals overruled the admission of an impermissibly suggestive identification based on the witness’s broad prior description of his assailant. Addressing the third *Bigger* factor, the *Towns* Court noted that the witness’s prior description of the assailant as a black man, about the same size of the witness, wearing a toboggan, “was extremely general and could have described any number of black men in the community.” *W.F. Towns v. The State*, 136 Ga.App. 467, 468 (1975). *Towns* is applicable to the instant argument because the description given by the witness in *Towns*, though very general, is more detailed than the one offered by Cohn. In the instant case, Cohn said nothing about his attackers’ frame, build, or clothing. He stated only that the robbers were young and black—a description that is easily applicable to a large percentage of Atlanta’s population. Even though the defendant in *Towns* matched the witness’s broad description, and was even wearing a toboggan, the Court still found that the description was insufficient and ruled against the identification. *Id.*at 468. The same standard that the Court applied in *Towns* should be applied to this case—the youth and race of the suspects should not immediately target them as criminals. The Court should require a more detailed prior description to satisfy the *Bigger* factor.

*The level of certainty expressed by the witness.* During the showup identification, Cohn was shown three men, all at once, and told to pick out the two who robbed him. (TT.48). This method of conducting an identification procedure has been shown to increase the likelihood of misidentification.[[4]](#footnote-4) During trial, Cohn also stated that seeing the defendants in custody communicated to him that they had been involved in criminal activity. (TT.57). Despite Cohn being relatively certain of his description, the technique employed by the Atlanta Police Department in addition to Cohn’s assumption that because the young men were in custody that they were guilty of something, illustrates that his certainty was tainted by an inherently suggestive procedure.

*The length of time between the crime and the confrontation.* Cohn testified that approximately forty-five minutes elapsed between the robbery and the showup identification. (TT.53). Though the trial court did not address each factor of the *Bigger* test in turn, instead giving only a cursory run-through of the factors before issuing the verdict, the court did make note of the short time period between the altercation and the identification as support for allowing the identification. (TT.168). Though the short time span would usually weigh against the defense, in this case it should have weighed against the prosecution. Forty-five minutes wanton enough for Cohn, who was drunk at the time of the robbery, to recuperate enough to make a sober and deliberate identification at the time of the showup.

 *Error and Harm.* The trial court’s brief and perfunctory review of the *Biggers* factors did not sufficiently consider the particular circumstances of this identification and allowed the short time span between the altercation and the confrontation to weigh in favor of the prosecution when it should have weighed in favor of the defense. First, the trial court erred in relying completely on one *Biggers* factor—the short time lapse between the incident and the identification—when allowing testimony about the showup procedure. Cohn was the sole identification witness to the armed robbery in count one. The improper admission of this testimony was not harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 23 (1967). Without this testimony, the state would have been severely hampered in prosecuting count one of the indictment. *Id*. Moreover, Cohn’s testimony also had a corroborative effect on the weak identification testimony supporting the other counts of the indictment.

1. **Romero Montoya**

*“I never saw the face. It happened really fast.” –Romero Montoya*

(TT.117)

*The opportunity of the witness to view the perpetrator at the time of the crime.* Montoya testified that the robbers approached him from behind and pushed him against a car. (TT.116). He testified that he never got a chance to turn around and see the faces of his assailants. (TT.117). During the pre-trial motion to suppress hearing, Cohn emphasized repeatedly that he did not get a good look at the perpetrators:

*It was really late and dark […]. I don’t remember anything. I had my […] back turned the entire time this happened.*

(TT.120).

Montoya never had an opportunity to view his perpetrators. Montoya was facing the car during the entire altercation, a gun to his head, likely too afraid to turn around and confront his assailant. Montoya testified that he identified the suspects

*[…] [O]nly by a t-shirt. That’s all I could recognize was just a T-shirt because I never saw faces.”*

(TT. 117).

Despite basing his identification on the suspects’ t-shirts, Montoya never offers anything unique about the t-shirts, and at trial he states that he remembers nothing about the t-shirts on which he based his identification. (T. 478). Montoya also never explains how he could so accurately remember what the robbers were wearing when he was, by his own admission, pressed against the car the entire time, never having an opportunity to turn around. Montoya’s admission that he never actually saw the robbers should have been considered when the court considered his opportunity to view his perpetrator at the time of the crime.

*The witness’s degree of attention.* Like Cohn, Montoya was returning from a bar where he had been drinking. (TT.119). Montoya was also approached from behind and had a gun pointed to his head. (TT. 117). Montoya was then pressed against a car and struck in both the head and the mouth with the gun. (TT.122). At trial, when Montoya was asked if he could describe the people he saw, Montoya responded:

*No, No. It was very blurry, a very scary moment.*

(T. 474).

Montoya’s testimony illustrates an incredibly stressful situation in which Montoya’s degree of attention was impaired by the fact that he had been drinking, was returning from a bar where he had been working, was approached in a dark parking lot, was physically assaulted, and never got a chance to look at his aggressors. These facts suggest that Montoya’s degree of attention was very low and that this factor should have been decided in favor of the defense.

*The accuracy of the witness’ prior description.* Montoya never gave a description of the perpetrators prior to the showup identification.

*The level of certainty expressed by the witness.* Not only does Montoya not get a chance to see his attackers during the robbery, he also never gets a chance to see them at the time of the identification.

*And he had a flashlight in the guy’s face where he couldn’t see me and I really couldn’t see him.*

(T. 476).

Montoya’s testimony also suggests that he felt pressure from the police to make an identification.

*And they kept asking me is this the guy, is this the guy, and I said, yes, that’s them.*

(TT. 119).

Montoya’s testimony indicates a very low level of certainty at the time of the identification. He states repeatedly throughout his testimony that he did not get a good look at his assailants and that he did not face them at any time during the altercation. He then goes on to state that he never gets a good look at the suspects during the showup. The facts do not illustrate a situation in which a reasonable person should have identified anyone with any level of certainty. Montoya’s testimony suggests that the showup identification created pressure for him to positively identify the defendants simply because they were in police custody. Montoya appears to have succumbed to police pressure to make an identification, despite having significant doubts about the identities of the perpetrators. Montoya did not identify the defendants at trial.

*The length of time between the crime and the confrontation.* The amount of time between the crime and the confrontation was short, but the court should have considered the fact that Montoya was returning from a bar and had been drinking when it considered the amount of weight to attribute to this factor. Like Cohn, the short time between the robbery and the identification did not allow Montoya significant time to sober up and make a clear-headed identification.

1. **Lady Brett**

 *The opportunity of the witness to view the perpetrator at the time of the crime.* Like Montoya, Brett was also approached from behind and never came face to face with her assailant. (MT.126). In her pre-trial testimony, Brett stated that she never got the opportunity to observe “definite features” of the perpetrators. (MT.125). Brett also stated that, as soon as the assailants approached her, she ran in the opposite direction towards Pamplona Pizza Bar. (MT.128). Based on Brett’s testimony, the perpetrators were behind her the entire time, and, as soon as she was approached, she immediately ran in the opposite direction to get help. Because she was approached from behind and then ran away, Brett never had the opportunity to look at the perpetrators at the time of the crime. At most, Brett

got a fleeting glance at the side of a moving face in a dimly lit parking lot in the middle of the night.

*The witness’s degree of attention.* As noted in the foregoing paragraph, Brett began to run away from the perpetrators almost immediately after she and Montoya were approached. During the pre-trial hearing, when questioned about Romero Montoya being assaulted with the gun, Brett responded that she “saw the action, but […] didn’t see what happened.” (MT.128). When upholding a showup identification in *Devlin v. State*, the Court of Appeals noted that at the time of the altercation the witness’s attention was focused on her perpetrator. *Devlin v. State*, 147 Ga.App.703, 703, 250 S.E.2d 6 (Ga.App., 1978). The opposite is true in this case. At trial, Brett repeatedly admitted that she never got a good look at the perpetrators. Also, like Montoya and Cohn, Brett had been drinking that night and was assaulted after leaving a bar at two o’clock in the morning. (MT.131). The stress of the situation, compounded with Brett’s late night of drinking and her attempt to run away from the

*The accuracy of the witness’s prior description. Like* Cohn, Brett offered a very broad description of her attackers.

*They were all black... And they were all kind of skinny…. And they were all taller than me.*

(TT. 126).

When evaluating a showup procedure in *Taylor v. State*, the Court of Appeals noted that, despite not giving a totally accurate description of the perpetrator, the witness correctly described the perpetrator’s missing front teeth—a feature the court called a “distinguishing characteristic.” *Taylor v. State*, 267 Ga.App. 194, 195 (Ga.App.2004). In the instant case, Brett’s description is very general and she points to no distinguishing characteristics.

During her testimony, Brett stated that she didn’t “remember definite features,” and instead identified the perpetrators by their clothing. (TT.125).

*Striped shirts. One of them had a solid colored t-shirt on.*

(TT. 126).

In *Carter v. The State,* the Court of Appeals ruled on another case in which a distinctive item of clothing played a substantial role in a showup procedure. In *Carter*, the Court of Appeals noted that, despite the fact that the appellant was wearing a jacket that was familiar to the victims, that “[b]oth victims testified that appellant was recognized by his facial features, not the fact that he was wearing [the] jacket at the time of the showup.” *Carter v. The State*, 228 Ga.App. 335, 336 (1997). The *Carter* court emphasized that, despite the distinctive clothing, the victims got a good look at the appellant’s face, and identified him based on an unobstructed observation of his specific facial features. In the instant case, Brett testified that she didn’t remember her perpetrators’ specific features, and instead identified them based solely on clothing.

Not only was Brett’s description of the young men, who she had barely seen, unremarkable, her description of their clothing, a combination of solid colors and stripes, was very general. Had Brett remembered a notable t-shirt graphic, an abnormally tall young man, or an unusual haircut, her description would have been more helpful. The description that Brett offered was completely general and could have been applied to almost any group of young, Black men who were presented to her. Like the description offered by the witness in *Towns*, Brett’s description of her attackers—thin black males, wearing a combination of striped and solid t-shirts— “was extremely general and could have described any number of black men in the community.” *W.F. Towns v. The State*, 136 Ga.App. 467, 468 (1975).

*The level of certainty expressed by the witness.* Because Brett testified that she never got a good look at the perpetrators, and instead relied on observations that she made about their clothing, the level of certainty that she expressed at the time of the showup identification should be given very little weight. During cross-examination, Brett also confirmed that, like Montoya, the fact that the defendants were in custody and were brought to the crime scene in handcuffs and in the back of police cars communicated to her that the police believed that the defendants were the perpetrators. (T. 563). Like Montoya, Brett likely felt pressure to finger the defendants as the perpetrators because the officers’ presented the defendants as criminals.

*The length of time between the crime and the confrontation.* The length of time between the altercation and the confrontation was short, but again, the court should have taken into account that Brett, like Cohn and Montoya, was returning from a bar where she had been drinking, and the short time between the crime and confrontation would not have allowed Brett significant time to sober up and make a reliable identification. (T. 561).

1. **Pamplona Pizza Bar Staff: Mike Campbell, Count Mippipopolous, Bill Gorton**

 *The opportunity of the witness to view the perpetrator at the time of the crime.* None of the testimony offered by the Pamplona Pizza Bar staff indicates that any of them had a good opportunity to view the perpetrator sat the time of the robbery. During the pre-trial motion to suppress, Mike Campbell testified that he and his co-workers initially noticed the robbery while they were inside of Pamplona Pizza Bar, approximately fifty to sixty feet away from where Brett and Montoya were being attacked. (TT. 294). Campbell also testified that the amount of time in which he had the opportunity to observe the perpetrators was roughly ten to fifteen seconds. (TT.295). All three employees stated that when they went outside to confront the attackers, they immediately fled. (TT. 294).

Like Brett, Montoya, and Cohn, the Pamplona Pizza Bar staff also testified that they didn’t get a good look at the assailants, and only caught a fleeting glance of their clothing. During the pre-trial hearing, Bill Gorton described what he saw as:

*[T]wo dark shirts and a white shirt with a big blue stripe and a muzzle and a flash.*

(TT. 110).

Neither Gorton nor anyone else on the staff noted any specific physical characteristics when describing the assailants.

The witnesses’ ability to identify clothing, alone, is not enough to uphold a showup identification. In other cases in which clothing has been relied upon to uphold a showup identification, courts have pointed to additional, more detailed observations to bolster the testimony. When relying on testimony about clothing in *Bean v. State*, the Court of Appeals noted that the victim spent approximately fifteen minutes with the assailant at the time of the confrontation, that “the lighting [at the incident location] was good,” and that the witness “testified that she focused on [the defendant’s] face” in order to give the most accurate description later. *Bean v. State*, 304 Ga. App 755, 758 (2010). In *Collins v. State*, the court noted that the encounter happened in a very well-lit convenience store, that the witness was very close to the robbers during the altercation, and that the witness accurately described both the shirts and pants the robbers wore. *Collins v. State*, 232 Ga.App. 651, 652 (1998). In *Massaline v. State*, the court pointed to the very detailed prior description the witness gave to the police prior to the showup. *Massaline v. State,* 234 Ga.App. 35, 35 (1998). None of the aforementioned mitigating factors exist in this case. In the instant case, the altercation lasted roughly fifteen seconds, from a distance, in a dimly lit parking lot. The perpetrators ran away from the crime scene as soon as the men came out of the restaurant, and the Pamplona Pizza Bar employees never came face to face with the assailants. (TT. 69). The pizza staff never got a chance to closely observe the perpetrators, and they relied on nothing more than very broad description of the assailants clothing. Based on the testimonies of the Pamplona Pizza Bar staff, none of the employees had a good opportunity to view the perpetrators.

*The witness’ degree of attention.* None of the testimonies given by the three men from Pamplona Pizza Bar in dictate that they got a good look at the assailants. Mike Campbell testified that as soon as the staff saw Brett and Montoya being assaulted, they ran outside to chase the perpetrators. (T. 290). Bill Gorton stated that as soon as the men walked outside of the restaurant they began yelling at the perpetrators. (TT. 110). Count Mippipopolous claimed to get a fairly decent look at the perpetrators, but Mippipopolous was the one who fired the shots at the suspects’ backs as they ran away. (MT. 70). It is unlikely that, while removing, aiming and firing his gun, Mippipopolous had the opportunity or presence of mind to make a decent observation of the assailants. The witnesses’ testimonies suggest that they were more concerned with scaring the perpetrators away than making a sober observation. The fact that these men had just finished a long work-shift at three am should also be considered when determining their degree of attention: these three men were presented with a random, extremely stressful, potentially life-threatening situation during the dead of night, after a long work-shift. None of these factors indicate that any of these witnesses had a high degree of attention at the time of the incident.

*The accuracy of the witness’s prior description.* None of the Pamplona Pizza Bar employees gave a description to the police officers prior to the showup identification. In *U.S. v. Singleton*, the Court of Appeals for the District of Columbia noted the importance of obtaining an independent description of a perpetrator “from each witness individually” prior to a showup identification procedure. *U.S. v. Singleton*, 702 F.2d 1159, 1177 (1983). The court noted that the procedure allows police officers to compare the witnesses’ verbal descriptions “with the actual characteristics of the suspects.” *Id*. “Significant discrepancies between the suspect as described by the witnesses and the suspect identified in a showup would substantially undercut the showup evidence.” *Id*. This procedure is even more important when applied to a situation in which a group of people had only a fleeting glimpse at a group of perpetrators. Separating the staff and speaking with each person individually would have allowed the police officers to get a better understanding of what each individual observed, and what they could articulate. The lack of prior individual descriptions taints the showup identification.

*The level of certainty expressed by the witness.* In *United States v. Russell,* the Sixth Circuit Court of Appeals stated that “[i]n view of danger of misidentification when witness identifies stranger solely upon basis of brief observation at time of stress or excitement, court should be especially vigilant to make certain that there is no further distortion of possibly incomplete or mistaken perception of well-meaning witness by suggestive or other unfair investigatory techniques.” *U.S. v. Russell*, 532 F.2d 1063, 1066 (1976). One of these investigatory techniques involves separating the witnesses from each other prior to the identification. The *Russell* Court acknowledged that “construction of memory is greatly influenced by post-experience suggestion.” *Id* at 1064. Separating witnesses from one another ensures that their memories of the events won’t be improperly corrupted by corroborating suggestions based on a “preconceived stereotype.” *Id*. In the instant case, the police did not bother to separate the witnesses before performing the showup identification. During the pre-trial hearing, Bill Gorton confirmed that immediately after the incident, all the witnesses stood around and discussed the events. (TT.113). Allowing the witnesses to stand together and discuss the details of the robberies allowed them the opportunity to compare notes and influence each other’s memory of the events. It is possible that, because the witnesses weren’t separated, their memories were tainted by the statements of other members of the group. Even though Gorton testified that they performed the identifications separately, standing around and discussing the details likely bolstered the witnesses’ confidence regarding their identifications. Due to the unfair investigatory technique employed by the Atlanta Police Department, this factor should not be given significant weight.

*The length of time between the crime and the confrontation.* Though less than one hour lapsed between the crime and the confrontation, considering the rest of the *Biggers* factors, this factor should not be allowed to overrule the other factors.

**The trial court’s ruling was erroneous:**

The trial court’s ruling was erroneous for two reasons. First, the trial court erred in relying completely on one Biggers factor—the short time lapse between the incident and the identification—when allowing testimony about the showup procedure. Second, the trial court placed too much emphasis on the corroborating testimony from the witnesses—an element that is not even addressed in Biggers, the case that sets the standard for determining the admissibility of pre-trial identifications. (T.168). *Neil v. Biggers* sets the legal precedent for determining the admissibility of pre-trial identification. *Biggers* lays out five factors, detailed in the discussion above, for a trial court to consider when determining whether a pre-trial identification procedure was inadmissibly suggestive. *Neil v. Biggers*, 409 U.S. 188, 199 (1972). None of the five *Biggers* factors addresses witness corroboration—an element relied on heavily by the trial court in the instant case. In *Carter v. State*, the Court of Appeals relied on corroborative testimony to affirm the admissibility of a pre-trial identification, but the facts of Carter stand in stark contrast to the instant case. In *Carter*, the Court of Appeals noted that the showup identification was corroborated by another witness who was not present at the time of showup. *Carter v. The State*, 228 Ga.App. 335, 336 (1997). Even though the Carter court did factor in the corroborative identification, it did so because the witness did not participate in the initial, potentially suggestive, showup procedure. The *Carter* court also goes through an exhaustive examination of the five *Biggers* factors before tacking on the corroborative testimony at the end of their recitation, seemingly only for emphasis.3 In the instant case, the appellant was only identified during the showup identifications and the court did not address four of the *Biggers* factors. In *Carter v. State,* the Court of Appeals relied on corroborative testimony to affirm the admissibility of a pre-trial identification, but the facts of *Carter* stand in stark contrast to the instant case. In *Carter,* the Court of Appeals noted that the showup identification was corroborated by another witness who was not present at the time of showup. *Carter v. The State*, 228 Ga.App. 335, 336 (1997). Even though the *Carter* court did factor in the corroborative identification, it did so because the witness did not participate in the initial, potentially suggestive, showup procedure. The *Carter* court also goes through an exhaustive examination of the five *Biggers* factors before tacking on the corroborative testimony at the end of their recitation, seemingly only for emphasis.[[5]](#footnote-5) In the instant case, the appellant was only identified during showup identifications and the court did not address four of the *Biggers* factors.

The trial court never considers that all the witnesses and victims report a very low degree of attention at the time of the incident—all of the witnesses were either intoxicated, being physically assaulted, or dodging gunfire at the time of the incidents. The trial court never considers that each victim was approached at night from behind and never got a chance to get an unobstructed view of their attackers. The trial court never considers that, aside from Cohn who gave a very general description of his attackers, none of the witnesses gave a prior description of their attackers. The trial court never considers that the victims from the Little Five Points area robbery expressed a low level of certainty about their identification: each witness and victim reported having identified the appellant based almost completely on a t-shirt—clothing that was so nondescript that each of the victims and witnesses gave different descriptions of the t-shirt at trial. If the court had given thoughtful consideration to each of the *Biggers* factors instead of going through only a brief, obligatory recitation, the court would have decided that the totality of the circumstances surrounding the showup illustrated that the identification was impermissibly suggestive and should be suppressed.

The trial court relied almost exclusively on the short time lapse between the incident and the identification, but never gives any weight to the fact that all of the victims were intoxicated at the time of the altercation. The short time lapse between the incident and the identification should have weighed against the prosecution because it did not allow the victims time to become sober enough to make a reliable identification. Considering the intoxicated state of the victims, this factor should have weighed in favor of the defense.

**The trial court’s errors were harmful:**

These errors were also harmful. The above analysis of the Biggers factors illustrates that the showup identification procedure created a substantial likelihood of misidentification. This inequitable identification was relied upon exclusively at trial—none of the witnesses identified the defendants at trial. The inclusion of testimony from the showup procedure was even more harmful because the witnesses never identified the defendants at trial—making the showup procedure the sole basis of identification. During the motion to suppress the showup, each witness gave testimony that called into question their ability to identify the perpetrators at the showup. An identification during trial would have cured any harm from the showup procedure. The state’s reluctance to ask the witnesses to identify their assailants at trial shows that the state was not confident that the witnesses could have identified the defendants with certainty in front of the judge and jury. Aside from the showup, there was very little linking the defendants to the crimes. None of the property stolen during the robberies was found in the defendants’ possession or in the van from which they fled. (T. 615). None of the defendants’ fingerprints were found on the gun inside of the van (T. 32 437). Further, none of the witnesses testified that they had seen a green van—the main link that the Atlanta Police Department used to tie the defendants to the robberies. (T. 614). The evidence used to convict the defendants was not overwhelming. The trial court relied almost completely on the impermissibly suggestive showup identification. Since the trial court’s errors could not be considered harmless under *Chapman v. California*, this Court should grant Mr. Barnes a new trial.

**CONCLUSION**

Wherefore, Jake Barnes respectfully requests that this Court reverse his convictions and remand his case to the Superior Court of Fulton County.

1. All of the names in this brief have been changed to protect client privacy. [↑](#footnote-ref-1)
2. *Williams v. State*, 329 Ga.App. 666, 765 S.E.2d 801 (Ga. App., 2014). [↑](#footnote-ref-2)
3. In *Carter v. State,* the Georgia Court of Appeals addressed a case of corroborated witness testimony when examining a showup identification procedure. *Carter v. State,* 288 Ga.App. 335(1997). The armed robbery at issue in Carter occurred in “sunny, daylight conditions “and both victims had an “unobstructed view” of the suspect “for approximately five minutes.” *Id*.at 336.A showup procedure was conducted and the victims identified the suspect. The victims’ identification was later corroborated by a witness who was present at the time of the robbery but did not participate in the showup identification. Several factors distinguish Carter from the instant case. First, the Carter court emphasized that the victims had a clear look at the perpetrators on a sunny day. In the instant case, the victims were robbed in the dark, early hours of the morning, in dimly lit areas. The Carter court also notes that the victims had an unobstructed view of the perpetrators for nearly five minutes. In the instant case, none of the victims had an unobstructed view of the perpetrators—they were all approached from behind and physically assaulted, a situation that allowed for neither the time nor opportunity to make a close observation of the perpetrators. All of the victims in the current case had also been drinking right before the time of the robbery—Cohn, in particular had drank so much that he decided to abandon his car at the bar and walk to a friend’s nearby house. The Carter court also pointed out that the additional witness was not present during the showup identification—his corroboration occurred after the victims had already identified the defendant during the showup. In the instant case, all of the witnesses were present during the time of the showup. Carter serves as a good example in which the Court of Appeals relied heavily on corroborating witness statements, but none of the Carter factors are present in the instant case. [↑](#footnote-ref-3)
4. Research indicates that simultaneous identification procedures—identifications in which the victims are shown several possible assailants at the same time—increases the likelihood of incorrect identifications. Sequential identification procedures—identifications in which suspects are shown one at a time—are a better practice and decrease the likelihood of misidentification. The Innocence Project, *Sequential Presentation of Lineups* <http://www.innocenceproject.org/Content/Sequential_Presentation_of_Lineups.php> (last visited Sept 29, 2012). [↑](#footnote-ref-4)
5. The *Carter* court writes that “[b]oth victims testified as to the sunny, daylight conditions that marked their unobstructed view of the appellant for the approximately five minutes in which the armed robbery occurred. Appellant did not wear a mask or otherwise attempt to conceal his appearance.” [↑](#footnote-ref-5)