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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 45100
)	
v.)	BONNER COUNTY NO. CR 2016-2854
)	
STEVEN MICHAEL MOORE,)	REPLY BRIEF
)	
Defendant-Appellant.)	
_____)	

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNER**

HONORABLE BARBARA A. BUCHANAN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Steven Michael Moore was identified by an eye-witness – twelve-year-old B.K. – as the man in the truck who had followed him home and rammed into the back of the 4-wheel ATV on which he was seated. B.K. had assured police he would be able to identify the man if he saw him again. The next day, the police drove back to B.K.’s house and held up a single photo – Mr. Moore’s driver’s license photo – for B.K. to look at, and asked if that was “the person.”

In this appeal, Mr. Moore challenges the district court’s order denying Mr. Moore’s motion to suppress B.K.’s identification. Mr. Moore argued in his Appellant’s Brief that the district court’s conclusion – that B.K.’s identification was reliable despite the impermissible overly-suggestive identification procedures – was erroneous because it was based on erroneous findings of fact as well as a misunderstanding and misapplication of the five-factor “reliability test” elaborated on in *State v. Almaraz*, 154 Idaho 584, 581 (2013). (*See generally* Appellant’s Brief.)

Mr. Moore refers this Court to the arguments set forth in that brief as his response to the State’s arguments. However, this Reply Brief is necessary to respond to the State’s arguments regarding the district court’s factual findings, and improper consideration of extrinsic evidence, under one of those factors – the “accuracy of the description” factor.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Ms. Moore’s Appellant’s Brief.

ISSUE

Did the district court err when it denied the motion to suppress B.K.'s eye-witness identification of Mr. Moore?

ARGUMENT

The District Court Erred When It Denied The Motion To Suppress B.K.’s Identification Of Mr. Moore

As argued in the Appellant’s Brief, the district court’s conclusion – that B.K.’s identification was reliable despite the impermissible overly-suggestive identification procedures – is erroneous and should be reversed because it is based upon clearly erroneous factual findings, and upon its misunderstanding and misapplication of the five-factor “reliability test” elaborated on in *State v. Almaraz*, 154 Idaho 584, 581 (2013). (*See generally* Appellant’s Brief.)

In this Reply Brief, Mr. Moore responds to the State’s argument regarding the “accuracy of the witness’s description” factor of the reliability test.

A. The Accuracy Of B.K.’s Prior Description Of The Driver Weighs Against Reliability

The district court erred in assessing the reliability of B.K.’s identification under the reliability test’s third factor – “accuracy of the witness’s prior description.” For the multiple reasons demonstrated in Appellant’s Brief, the district court clearly erred when it found that B.K.’s description “bears a striking resemblance *to the driver’s license photograph* of Stephen Moore.” (App. Br., pp.14-16, *citing* R., pp.132-33 (emphasis added).)

The State argues that this Court should uphold the district court’s factual finding based on alternative evidence – Mr. Moore’s *booking photo*. (Resp. Br., pp.11-12.) This argument should be rejected. The booking photo is *not* the photo used to obtain B.K.’s identification of Mr. Moore as the driver; B.K. identified Mr. Moore’s driver’s license photo. Moreover, there is no evidence that B.K. ever identified the actual, “live” Mr. Moore at any time, in court or out of court. (*See generally* Tr.) Rather, the only identification being challenged in this proceeding is B.K.’s

identification of Mr. Moore's driver's license photo as presented to him by Officer Cotter.¹ Whether that photo in turn is an accurate representation of the live Mr. Moore is not the subject of this inquiry. Additionally, the booking photo was *not* the photo that the district court considered when it made its factual findings; the district court's explicit finding B.K.'s description bore "a striking resemblance *to the driver's license photograph ...*" (R, p.132.)

The State also claims that the booking photo is "more contemporaneous, and therefore more accurate" than the Mr. Moore's driver's license photo. (Resp. Br., p.11.) Again, the record contains no evidence that would support the State's assumption. (*See generally* Tr.) The State asserts that substituting the booking photo for the driver's license presents "alternative grounds" for upholding the district court's finding. (Resp. Br., p.12.) But what the State is actually arguing is that this Court uphold the district court's factual finding by substituting "alternative evidence" that was neither considered by, nor relevant to, the district court's factual finding on this issue. The State's argument should be rejected.

B. The District Court Improperly Relied Upon Evidence Outside Of The Reliability Test To Bolster B.K.'s Identification

As argued in Appellant's Brief, at page 17, the district court additionally erred when it considered extrinsic evidence – a Pathfinder parked at Mr. Moore's house – to bolster the reliability of B.K.'s identification of Mr. Moore. Contrary to the State's argument (Resp. Br., p.13), the fact the police located other evidence that suggests Mr. Moore could be the culprit, and which might "link" him to the crime, does not factor into the "accuracy" factor for determining the reliability of the identification of Mr. Moore's driver's license photo. B.K.

¹ The district court made no ruling regarding the admissibility of B.K.'s subsequent identification of Mr. Moore's booking photo in the "six-pack" line up, months later. (*See generally* R., pp.112-35.)

identified a photo of Mr. Moore, but not the photo of the Pathfinder; thus, his description of the truck is irrelevant to the court's evaluation under this accuracy factor. In short, whether B.K. gave a description of a truck that resembles one found parked at Mr. Moore's house does not make his description *of Mr. Moore* more accurate.

CONCLUSION

For these reasons, and those set forth in Appellant's Brief, Mr. Moore respectfully asks that this Court reverse the district court's denial of his motion to suppress, vacate his conviction, and remand his case to the district court for further proceedings.

DATED this 19th day of April, 2018.

_____/s/_____
KIMBERLY A. COSTER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of April, 2018, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

STEVEN MICHAEL MOORE
420 LARCH LANE
OLDTOWN ID 83822

BARBARA A BUCHANAN
DISTRICT COURT JUDGE
E-MAILED BRIEF

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BONNER COUNTY PUBLIC DEFENDER
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_____/s/_____
EVAN A. SMITH
Administrative Assistant

KAC/eas