

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2007-KA-1280**  
**VERSUS** \* **COURT OF APPEAL**  
**HAROLD HAYES** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
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APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 463-653, SECTION "L"  
Honorable Terry Alarcon, Judge

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**Charles R. Jones**  
**Judge**  
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(Court composed of Judge Charles R. Jones, Judge Michael E. Kirby, and Judge Roland L. Belsome)

*BELSOME, J., CONCURS IN THE RESULT*

Keva Landrum-Johnson, District Attorney  
Graham L. Bosworth, Assistant District Attorney  
1340 Poydras Street, Suite 700  
New Orleans, LA 70112-1221

COUNSEL FOR STATE OF LOUISIANA

Mary Constance Hanes  
LOUISIANA APPELLATE PROJECT  
P.O. Box 4015  
New Orleans, LA 70178-4015

COUNSEL FOR HAROLD HAYES

**AFFIRMED AND  
REMANDED**

The Defendant, Harold Hayes, appeals his conviction and sentence for the crime of armed robbery. We affirm.

Hayes was charged by bill of information in count one and count two with the crime of armed robbery, a violation of La. R.S. 14:64, and in count three of the bill of information with the crime of aggravated battery, a violation of La. R.S. 14:34. The district court denied his motion to suppress the identification, found probable cause as to counts one and two, but no probable cause as to count three. Trial before a twelve-person jury commenced, during which the State entered a *nolle prosequi* as to count three. The jury found Hayes guilty as charged as to count one, and not guilty as to count two. On July 13, 2007, the district court denied Hayes' motion for new trial. Hayes waived all legal delays and was sentenced to ten years at hard labor without benefit of parole, probation or suspension of sentence. He orally notified the court of his intention to seek an appeal.

New Orleans Police Department 911 operator Teri Clark testified at trial that on June 23, 2005, at 17:44 hours, complainant James Branch reported an armed robbery from 10321 Plainfield, the Bernmas Apartments. Operator Clark further

testified that on July 6, 2005, at 10:37 hours, an armed robbery call came in from 10301 I-10 Service Road, listed as from the “Palms.” The caller’s name was not reported. The recordings of both 911 calls were played for the jury.

New Orleans Police Detective Darrell Doucette<sup>1</sup> Jr., testified at trial that in the summer of 2005 he investigated two armed robberies in Eastern New Orleans that occurred in the same vicinity. The first occurred on June 23, 2005 at 10321 Plainfield Drive, the second on July 6, 2005 on the I-10 Service Road. The robberies occurred approximately one-half block from and across the street from each other. Based on information he received from another detective, Det. Doucette developed Hayes as a suspect. He compiled two photographic lineups composed of six photographs each. He displayed one to James Branch on August 7, 2005, Mr. Branch identified Hayes as the offender. Det. Doucette said he had earlier prepared a lineup of black and white photographs, because the machine was only printing in black and white. The detective indicated that Mr. Branch was prepared to make an identification of Hayes in that lineup, but the detective stopped him and returned on August 7, 2005 with the color photo lineup. Det. Doucette also testified that he showed a photo-lineup to the second victim. He testified that normally if he had a suspect for multiple armed robberies he used the same photos in the lineups but changed the positions of the photos. He testified that Hayes was in position number one in the lineup shown the second victim. The detective did not tell the second victim nor suggest to him which person to pick, nor force nor coerce him to select someone. The detective testified that the second victim identified someone as the person who pointed a gun at him and demanded

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<sup>1</sup> The court reporter incorrectly spelled Det. Doucette’s name as “Doucett.” The name is spelled “Doucette” in all of the police reports, as well as Det. Doucette’s application for an arrest warrant for Hayes.

his wallet. However, the detective did not state at that point in his testimony that the second victim picked out Hayes.

Det. Doucette testified on cross examination that in his report he included only a height and weight description of the suspect in the Plainfield Drive robbery—6'2" and 145 lbs. It came out during cross examination of Det. Doucette that the part of his report that stated which photo the second victim had chosen had been whited out, and the number “4” written in the whited-out spot. Det. Doucette confirmed that Hayes’ photo had been number one in the second photo lineup, as he had testified on direct examination. Det. Doucette characterized the designation of number “4” as a typo, but conceded on questioning that what he was saying was that someone had tampered with his report. Det. Doucette also admitted that he made a mistake when securing the arrest warrant for Hayes. While he listed Hayes’ name in the warrant itself, he listed on the application the name and date of birth of “Robert Roan.” Det. Doucette also testified on redirect examination that he put Hayes’ name in the arrest bulletin.

Mr. Branch testified that on June 23, 2005, he was residing at 10321 Plainfield Drive in New Orleans. At approximately 5:45 p.m. on that date, he was in between the open rear doors of his van, which was parked in his driveway, getting some things out of it, when he became aware of two young men inside of the doors with him. One of them said “give it up.” Mr. Branch testified that at first he did not understand what was going on, and then one of the men produced a gun. Mr. Branch described the gunman as a black male, tall—taller than he was—with a slender build, and wearing a T-shirt, jeans stopping at the bottom of the calves/top of the ankles, and a cap. Mr. Branch testified that the gunman was less than a foot-and-a-half away from him, and there was nothing covering the

gunman's face. He was able to see his face. It was, as Mr. Branch described it, "broad daylight." There was no carport covering the van. The robbers took his wallet and cell phone, and they walked across the street to an apartment complex. The robbery took a few minutes. Mr. Branch testified that he described both men to police as similarly dressed in jeans and T-shirts, wearing baseball caps, and both tall, dark and slender, weighing around 135 to 150 lbs. Mr. Branch identified a photo lineup Det. Doucette presented to him, testifying that he selected the top middle photograph. He said he was very certain of his selection, noting that it was a very serious offense and that he had to be certain. Mr. Branch confirmed that he was absolutely certain that the person he selected, the one who had the gun, robbed him; he had no doubt. Mr. Branch identified Hayes in court as the person who had robbed him.

Mr. Branch admitted in response to questions on cross examination that when he testified in June 2006, which would have been at the hearing on the motion to suppress the identification, he was unable at that time to pick the photograph of the robber from the photo lineup he had been presented by Det. Doucette back in August 2005. Mr. Branch also replied in the affirmative when asked on cross examination whether he had been unable to identify the robber in court when testifying in June 2006. He was asked about Det. Doucette having shown him the black and white photographic lineup, before the detective left and returned on another day with the color photographic lineup from which he selected Hayes' photo. Mr. Branch was also asked how many pages Det. Doucette brought with him that first time he came to see him. Mr. Branch testified that he thought there had been three or four pages. When asked how many persons he selected when the detective brought those pages to him, Mr. Branch said he thought he

selected three or four. He confirmed that when Det. Doucette came back he picked out an individual who “looked familiar.”

Mr. Branch said on redirect examination that he made the identification of Hayes in the photo lineup about two weeks—it was actually about six weeks—after the incident, meaning the robbery. He said it was very fresh in his mind, and so he had been sure.

Robert McLaughlin testified that on July 6, 2005, he was living in an apartment at 10301 I-10 Service Road. On that day he returned home from a grocery store at approximately 10:30 a.m. He noticed Hayes walking in the parking lot as he drove to his parking spot. Mr. McLaughlin exited his car and went to get a basket to take his groceries to his apartment. Hayes approached, put a gun to his face, and ordered him to “give it up.” Hayes reached into Mr. McLaughlin’s pocket and took a wad of twenty-one dollar bills, as well as a little case holding his identification and more money. Mr. McLaughlin described the robber as taller than he was, with a lot of hair, and wearing dark clothes. He could not remember whether the robber had anything on his head. Mr. McLaughlin said it was a clear sunny day, he was arm’s length from the robber, and he got a look at his face. When Det. Doucette showed him a photo lineup, Mr. McLaughlin looked at the photos and made an identification within twenty or thirty seconds. Det. Doucette did not suggest to him nor tell him which photo to select. He was certain he picked the robber.

New Orleans Police Officer Patrick Hartman testified that he responded to an “aggravated” robbery on June 23, 2005, at 10321 Plainfield Drive. The victim, Mr. Branch, gave a description of the robber as being a black male about 5' 10" and weighing 145 lbs. The officer also stated that the victim said the robber had a thin

build, was around 20 years old, and wore blue jean shorts, white T-shirt and a red baseball cap.

A review of the record reveals one error patent. The district court failed to sentence Hayes to a mandatory additional five years imprisonment pursuant to La. R.S. 64.3(A),<sup>2</sup> for using a firearm in the armed robbery for which he was convicted.<sup>3</sup> Thus, the sentence was illegally lenient. Although the State did not object to the illegally lenient sentence nor raise it on appeal, the case must be remanded for imposition of the mandatory additional five-year term of imprisonment. See State v. Williams, 2003-0302, pp. 3-4 (La. App. 4 Cir. 10/6/03), 859 So. 2d 751, 753 (Failure to impose mandatory fine under La. R.S. 40:967(F)(1)(b) requires remand for imposition of fine, even where State failed to object to the illegally lenient sentence or raise it on appeal).

Accordingly, this matter will be remanded to the district court for imposition of the mandatory five-year term of imprisonment provided for by La. R.S. 14:64.3, in addition to the minimum ten-year sentence already imposed pursuant to La. R.S. 14:64.<sup>4</sup>

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<sup>2</sup> La. R.S. 14:64.3(A) states:

When the dangerous weapon used in the commission of the crime of armed robbery is a firearm, the offender shall be imprisoned at hard labor for an additional period of five years without benefit of parole, probation, or suspension of sentence. The additional penalty imposed pursuant to this Subsection shall be served consecutively to the sentence imposed under the provisions of R.S. 14:64.

<sup>3</sup> For the firearm enhancement provisions of La. R.S. 14:64.3 to be applicable all the State has to do is allege in the bill of information charging the defendant with armed robbery that he committed the armed robbery while armed with a gun, as was done in the instant case—“WHILE ARMED WITH A DANGEROUS WEAPON, TO WIT: HANDGUN, ROBBED JAMES BRANCH ....” State v. Lewis, 2003-1234, p. 10, n. 3 (La. App. 4 Cir. 6/2/04), 876 So. 2d 912, 917, n. 3.

<sup>4</sup> The additional five-year sentence must properly be imposed by the trial court because, although it is mandatory, a trial court has the power and authority to find any sentence constitutionally excessive. See State v. Fobbs, 99-0073, p. 2 (La. App. 4 Cir. 11/24/99), 747 So. 2d 1232, 1233 (Reduction of mandatory minimum sentence as unconstitutionally excessive pursuant to State v. Dorthey, 623 So. 2d 1276 (La. 1993) is applicable to all sentences).

In his first assignment of error, Hayes argues that the evidence was insufficient to support his conviction, focusing primarily on the State's alleged failure to negate any reasonable probability of misidentification.

This court set out the well-settled standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, as follows:

In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La. 1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." State v. Smith, 600 So.2d 1319 (La.1992) at 1324.

In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La.1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198



(La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La.1987).

98-0011 at pp. 13-14, 744 So. 2d at 106-107, quoting State v. Egana, 97-0318, pp. 5-6 (La. App. 4 Cir. 12/3/97), 703 So. 2d 223, 227-228.

When identity is disputed, as in the instant case, the State must negate any reasonable probability of misidentification in order to satisfy its burden to establish every element of the crime charged beyond a reasonable doubt. State v. Edwards, 97-1797, pp. 12-13 (La. 7/2/99), 750 So. 2d 893, 902; State v. Woodfork, 99-0859, p. 4 (La. App. 4 Cir. 5/17/00), 764 So. 2d 132, 134.

Hayes was convicted of armed robbery, a violation of La. R.S. 14:64, which defines armed robbery as:

The taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.

Thus, to convict Hayes in the instant case, the State had to prove beyond a reasonable doubt that Hayes took something of value belonging to another from the person of James Branch, or that was in the immediate control of James Branch, by the use of force or intimidation, while armed with a dangerous weapon, in this case a handgun.

Mr. Branch, the victim of the armed robbery for which Hayes was convicted, testified that he was robbed at approximately 5:45 p.m., on June 23rd, when it was still “broad daylight,” as he described it. He was less than a foot and a half away from the robber with the gun, whom he identified as Hayes. Mr. Branch made a positive identification of Hayes in a photo lineup on August 7, 2005, six weeks later. He testified that he realized the seriousness of the offense, noting that he had

to be certain, and was in fact certain. The responding officer testified that Mr. Branch reported that the gunman was 5'10" tall and weighed around 145 lbs. Mr. Branch also testified that both robbers were dark, tall and slender, and he recalled that he gave an average weight of 135 to 150 lbs. Det. Doucette's report reflected that Mr. Branch told him the suspects were 6'2" tall and weighed 145 lbs. Hayes' height and weight were listed on an August 10, 2005, arrest register as 6'2" and 140 lbs. Hayes argues in his brief that he was 6'3" tall and weighed 140 lbs. He was tall and slender, just as Mr. Branch generally described him. The fact that he may have told the responding officer that the gunman was 5'10" is not a fatal descriptive flaw. The responding officer testified that Mr. Branch reported that the robber wore blue jean shorts, a white T-shirt and a red cap, the same as Mr. Branch's trial testimony, except that Mr. Branch testified at trial that the robber wore jeans to below his calf/above his ankle. Mr. Branch did not mention a red cap, but said both men wore caps.

While Mr. Branch admitted that he was unable to identify Hayes' photo in the photo lineup when he testified at the motion to suppress hearing, or identify him in court on that date, he identified Hayes in the photo lineup six weeks after the robbery and identified him in court at trial. Hayes correctly points out that Det. Doucette had already shown Mr. Branch a black and white photo lineup containing Hayes' photo, and Mr. Branch had been unable at that time to positively identify Hayes. While Det. Doucette testified that Mr. Branch was prepared to identify Hayes in the black and white photo lineup, Mr. Branch testified on cross examination that he thought he selected three or four photographs. Mr. Branch also responded in the affirmative when asked on cross examination whether, when Det. Doucette returned with the color photo lineup, he selected an individual "who

looked familiar.” However, Mr. Branch also emphasized that he was aware of the seriousness of the offense when making his identification, obviously implying that he would not have identified Hayes if he had not been absolutely certain. Mr. Branch testified that he was certain, and that he was sure.

Viewing all the evidence in a light most favorable to the prosecution, any rational trier of fact could have found all the elements of the crime of armed robbery, committed with a handgun, present beyond a reasonable doubt, including that the State proved that Hayes was the perpetrator.

There is no merit to this assignment of error.

In his second assignment of error, Hayes argues that the district court erred in denying his motion to suppress the identification.

The defendant bears the burden of proving that an out-of-court identification was suggestive and that there was a substantial likelihood of misidentification as a result of the identification procedure. State v. Ballett, 98-2568, p. 17 (La. App. 4 Cir. 3/15/00), 756 So. 2d 587, 597; State v. Martello, 98-2066, p. 8 (La. App. 4 Cir. 11/17/99), 748 So.2d 1192, 1198. A defendant must first prove that the identification was suggestive. State v. Thibodeaux, 98-1673, pp. 20-21 (La. 9/8/99), 750 So. 2d 916, 932. An identification procedure is suggestive if it focuses attention on the defendant. State v. Laymon, 97-1520, p. 16 (La. App. 4 Cir. 3/15/00), 756 So. 2d 1160, 1172. However, even a suggestive identification will be admissible if it is found reliable under the totality of circumstances. Id. In Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), the United States Supreme Court set forth a five-factor test to determine whether an identification is reliable: (1) the opportunity of the witness to view the assailant at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the

witness's prior description of the assailant; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the crime and the confrontation. State v. Green, 98-1021, p. 12 (La. App. 4 Cir. 12/22/99), 750 So. 2d 343, 350. In reviewing a trial court's ruling on a motion to suppress, an appellate court is not limited to evidence adduced at the hearing on the motion to suppress; it may also consider any pertinent evidence given at trial of the case. State v. Nogess, 98-0670, p. 11 (La. App. 4 Cir. 3/3/99), 729 So. 2d 132, 137.

At the motion to suppress hearing, insofar as the identification of Hayes by Mr. Branch, the victim for whose armed robbery Hayes was convicted in instant case, Mr. Branch testified consistently with his testimony at trial. He also testified that he had seen the two robbers walking past his residence a few minutes before the robbery, as he was talking to his next door neighbor. Mr. Branch testified that during the identification procedure, Det. Doucette had not directed him in any way to identify the photograph he ultimately selected. Mr. Branch testified that he was not threatened, coerced nor given anything of value to select Hayes' photo. He was asked on cross examination at the motion to suppress hearing whether he reported to police that the robber with the gun, who Mr. Branch said was Hayes, had any special marks on his face or hands. Mr. Branch replied that he had not noticed any special marks, noting that when someone sticks a gun in your face you don't notice "other things."

As for the black and white photo lineup shown to Mr. Branch by Det. Doucette, prior to the August 7, 2005 showing of the color photo lineup, Mr. Branch replied in the affirmative when asked whether there were half a dozen people in that lineup that looked like the robbers. He said he did not initial any of them, though, because he was not sure. Mr. Branch confirmed on cross

examination that he later picked out Hayes' photograph from the color photo lineup because it looked "familiar." However, he testified that on redirect examination that he signed the color photograph of Hayes, so he was sure.

Det. Doucette testified on direct examination at the motion to suppress hearing that he only recalled showing Mr. Branch one photo lineup. He did not force Mr. Branch to identify a certain person or give him any incentive for identifying him. The detective stated that when he showed lineups he instructed victims to take their time and look at each photograph carefully, and that if they see the person who committed the crime to point the person out immediately and let him know.

In the instant case, Hayes argues that the identification procedure in which Mr. Branch identified Hayes' photograph in the color-photo lineup was suggestive because Det. Doucette previously had shown Mr. Branch the black and white lineup.

In State v. Neslo, 433 So. 2d 73 (La. 1983), eleven days after the murder of their companion, two witnesses, one of whom had been shot and wounded by the perpetrator and the other of whom had been manhandled by the perpetrator, were shown photo lineups containing a photo of the defendant. Each witness identified two photographs, the defendant's and another individual's. Each witness said both individuals resembled the person who had shot the victim, but neither witness could make a positive identification. The defendant was arrested the next day and put in a physical lineup viewed by the two witnesses. The female witness stated that the defendant and another individual looked familiar, but she was not sure. The male witness made a tentative identification of the same two individuals as had the female witness. At the female witness's request, the lineup was

reassembled and the two witnesses went up onto the lineup stage, with the suspects behind the glass wall. When interviewed following this close-up viewing, both witnesses identified defendant as looking like the man who shot the victim to death. The defendant was subsequently tried and convicted of first degree murder.

On appeal, the defendant in Neslo argued that the trial court had erred in denying his motion to suppress the physical identification, submitting that the procedure had been suggestive because the witnesses had viewed his photograph in the earlier photo lineup. The Louisiana Supreme Court posited that because only the defendant appeared in both the photo and physical lineups, there was the possibility of suggestion—that the witnesses might have remembered the defendant from the photo lineup and not from the night of the crime. However, the female witness testified at the motion to suppress hearing that, while she had identified the defendant in both the photo and physical lineups, at the time of the physical lineup she had not remembered the defendant from the photo lineup. The male witness testified that he was not sure whether anyone in the physical lineup had also been in the photo lineup. The Louisiana Supreme Court found that the evidence did not indicate that either identification procedure was suggestive *per se*. The court went on to consider the circumstances of the crime incident. Each witness had consumed four or five drinks over a four hour period before the crime and both were intoxicated but not drunk. They felt their senses were sharp. Although the scene of the 4:00 a.m. crime, the 300 block of Burgundy Street in the French Quarter, had not been well-lit, and the crime occurred in less than one minute, both witnesses testified they got a good look at the perpetrator and gave similar descriptions to police. The court, applying the factors enunciated in Manson v. Brathwaite, *supra*, ultimately concluded that there was an adequate

independent basis for the identification which outweighed any suggestiveness in the use of the photos in the lineup procedure.

In State v. Tate, 454 So. 2d 391 (La. App. 4 Cir. 1984), a witness who had been a front seat passenger in a parked motor vehicle when the driver was murdered was shown a photo lineup seven days after the murder that contained the defendant's photograph. The witness positively identified the defendant as the murderer. The defendant's mug shot photo was dated just two days before the photo lineup, but the witness testified he had not noticed the date when he made his identification. The other photos apparently also had dates on them. A week after the photo lineup, the witness identified the defendant in a physical lineup. The defendant was the only person who appeared in both the photo lineup and the physical lineup. The defendant subsequently pleaded guilty to the murder, reserving his right to appeal the trial court's denial of his motion to suppress the identification. The defendant argued on appeal that the identification "procedures" were suggestive because only he appeared in both the physical and photo lineups. This court found no suggestiveness in the identification procedures and stated that even assuming there had been, there had been an adequate independent basis for the identification which outweighed any such suggestiveness.

In State v. Calloway, 97-796 (La. App. 5 Cir. 8/25/98), 718 So.2d 559, two witnesses in a double homicide case who viewed the sixteen-year shooter at the time of the offense were shown a thirty-two-photograph lineup that included a photo of the defendant at age fourteen. Neither of the two witnesses could identify anyone in that lineup. Both witnesses were subsequently shown a photo lineup composed of eight photos, including a more recent one of the defendant, but neither witness could identify anyone in this second photo lineup. One week later,

these two witnesses and a third one viewed a physical lineup in which the defendant participated. One of the first two witnesses, whom the defendant had robbed before committing the homicides and who had the best opportunity to view him, identified the defendant, while the second witness could not identify anyone. The third witness, who had not viewed either of the two earlier photo lineups, also identified the defendant at the physical lineup. The defendant was tried and convicted of two counts of first degree murder and sentenced to two terms of life imprisonment. He argued on appeal that the trial court had erred in denying his motion to suppress the identification. He submitted that his identification at the physical lineup by one of the witnesses who had earlier viewed the photo lineups had been suggestive because that witness had seen photos of the defendant in those lineups. The appellate court rejected that argument, finding that the identification “procedures” had not been suggestive. The court also noted that there had not been a substantial likelihood of misidentification because, while that particular witness’s initial description of the shooter’s height, weight and age were somewhat inaccurate, that witness got a long view of the shooter’s face and assisted the sheriff’s office in making the composite sketch that led to defendant being identified as a suspect.

In the instant case, the Hayes’ photograph was included in the black and white photo lineup Det. Doucette initially presented to armed robbery victim Mr. Branch. Mr. Branch could not make a positive identification of one person, and the evidence indicates that he picked from three to six photos he said looked like the robber. Mr. Branch made a positive identification of Hayes’ photo in the color photo lineup presented to him some weeks later by Det. Doucette. The fact that Mr. Branch viewed a black and white photo of Hayes in the earlier photo lineup



did not render his subsequent identification of Hayes' color photo in the second lineup suggestive. The fact that Mr. Branch identified Hayes in the second photo lineup, the color one, does not establish that he remembered Hayes' photo from the first lineup, the black and white one. Rather, the evidence suggests that the lineups contained photos of the same persons, only the photos composing the first lineup were in black and white while the ones in the second lineup were in color. Det. Doucette testified that the reason he showed Mr. Branch the black and white photo lineup was that the machine that printed out the color photo lineups was broken. There is no indication that the photos in the lineups were different except for Hayes,' and Hayes does not make any such argument. Thus, the instant case is distinguished from the previously discussed cases, Neslo, Tate, and Calloway, where the respective defendants were the only ones whose photos were in both the photo lineups and the subsequent physical lineups at which the defendants were positively identified by witnesses who had previously viewed the photo lineups. Yet, even in those cases the reviewing courts did not find the subsequent physical lineups suggestive *per se*.

Moreover, in the instant case, even assuming *arguendo* that there was some minimal suggestiveness as a result of the earlier photo lineup, Mr. Branch testified that he had an excellent opportunity to view the robber armed with the handgun. The general physical description of the gunman given by Mr. Branch to the responding officer was accurate—a tall, slender black male. Mr. Branch's testimony exhibited the certainty of his identification and a definite conscientiousness in making that identification, acknowledging the grave implications of accusing an individual of the serious offense of armed robbery. The positive identification in the instant case was six weeks after the crime, and

Mr. Branch had been unable to identify Hayes in court at the motion to suppress hearing which had been nine months earlier than trial. Nevertheless, considering the five factors set forth in Manson v. Braithwaite, Mr. Branch's identification of Hayes was reliable. Thus, there was an adequate independent basis for the identification which outweighed any suggestiveness in the use of the earlier black and white photo lineup.

The district court in the instant case properly denied Hayes' motion to suppress the identification.

There is no merit to this assignment of error.

### **DECREE**

For the foregoing reasons, the conviction and sentence of Harold Hayes is affirmed. However, the case is ordered remanded to the district court for imposition of an additional five-year term of imprisonment pursuant to La. R.S. 14:64.3.

**AFFIRMED AND  
REMANDED**