

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2009-KA-0341**  
**VERSUS** \*  
**MISTER B. MACKEY** \* **COURT OF APPEAL**  
\* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
\* \* \* \* \*

APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 452-564, SECTION "A"  
Honorable Laurie A. White, Judge

\* \* \* \* \*

**Judge Terri F. Love**

\* \* \* \* \*

(Court composed of Judge Terri F. Love, Judge David S. Gorbaty, Judge Roland L. Belsome)

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**CONVICTION AND SENTENCE AFFIRMED**  
**DECEMBER 30, 2009**

The State filed a bill of information charging Mister B. Mackey with second degree murder. The defendant subsequently entered a plea of not guilty and filed a motion to suppress identification. Appellant maintains that his Sixth Amendment right to a fair trial was violated by the trial court's denial of the defendant's motion to retry his motion to suppress identification with conflict-free counsel. We further find no error in the trial court's refusal to allow Defendant Mackey the opportunity to retry his motion to suppress. We find the trial court's refusal was harmless error, as the record provides sufficient evidence to support Defendant Mackey's conviction for second degree murder even in the absence from evidence of the challenged photographic lineup identification. The Appellant's conviction and sentence are affirmed.

#### **FACTUAL AND PROCEDURAL HISTORY**

The State of Louisiana charged Mister B. Mackey by bill of indictment with one count of violating La. R.S. 14:30(1), second degree murder. Defendant Mackey, accompanied by Attorney John Fuller, appeared before the trial court for arraignment and pled not guilty to the charge. The trial court heard Defendant

Mackey's motion to suppress identification. At the outset of the hearing, defense counsel notified the trial court that he had a conflict of interest in that he had, at one point, represented the victim in an unrelated criminal matter. After questioning from the trial court, Defendant Mackey stated that he understood the issue and still wished for Mr. Fuller to represent him at the hearing. The trial court denied Defendant Mackey's motion at the close of the hearing.

Attorney John Fuller advised the trial court at the close of the hearing that Defendant Mackey was exhibiting animosity towards him and asked the trial court to appoint new counsel. Subsequently, the trial court appointed Shelly Vix, of O.I.D.P., to represent Defendant Mackey. On January 30, 2007, O.I.D.P. filed a motion to withdraw entirely from Defendant Mackey's representation. The trial court granted the motion and set a hearing in order to determine new counsel.

The trial court held a hearing to determine counsel. Defendant Mackey appeared with new counsel, Robert Pastor. Against his attorney's advice, Defendant Mackey filed a motion to quash the indictment. The trial court denied Defendant Mackey's motion. The record indicates that Robert Pastor withdrew as counsel of record in March 2007, and in May 2007, the trial court appointed Bruce Whitaker to represent Defendant Mackey.

In May 2007, the defense asked the trial court to hold a competency hearing. The trial court held a competency hearing, and at the close of the hearing, the trial court declared Defendant Mackey incompetent to stand trial. The trial court held an additional competency hearing, whereupon the trial court again declared Defendant Mackey incompetent to stand trial. Another competency hearing took place in 2008. At the close of the third competency hearing, the trial court declared Defendant Mackey fit to stand trial.

In July 2008, the trial court denied Defendant Mackey's motion to re-open the motion to suppress identification as well as a second motion to quash the indictment. In the same month, the trial judge again declared Defendant Mackey incompetent to proceed to trial. The trial judge declared Defendant Mackey competent to proceed to trial in November 2008.

The State proceeded to trial on a second degree murder charge case against Defendant Mackey, and Defendant Mackey waived the jury and elected to have his case tried before the trial judge. Prior to the commencement of trial, Defendant Mackey reurged his motion to reopen the motion to suppress identifications, which the trial court again denied. The State introduced eleven exhibits and presented testimony from ten individuals. The defendant introduced one exhibit and presented no testimony. After the close of evidence and oral argument, the trial court found Defendant Mackey guilty of second degree murder.

The trial court sentenced Defendant Mackey to life imprisonment at hard labor. Following the sentencing, Defendant Mackey lodged an oral objection to the excessiveness of the sentence and made an oral motion for appeal with the trial court.

Tiya Brumfield, the State's first witness, testified that she is the mother of the victim, Morgan Brumfield, and that he was living in the Curran Place Apartments in August 2004. Mrs. Brumfield explained that she last saw her son alive on the night of August 2, 2004, at a birthday party in the Curran Place Apartments for her younger twin sons. Moreover, Mrs. Brumfield stated that she knew Defendant Mackey, identified him in court, and testified that Defendant Mackey and her son were friends. Mrs. Brumfield also testified that she saw Defendant Mackey two times on the day of the shooting: 1) at a gas station near

the intersection of Bullard and Curran in New Orleans East; and 2) at the twins' birthday party. Mrs. Brumfield noted that Defendant Mackey had given her some money for the twins' birthday when she spoke to him at the gas station on August 2, 2004. Additionally, Mrs. Brumfield stated that subsequent to the incident she spoke about the facts of the shooting with Natasha Bridges, her sister Jeannine Johnson, her niece Janee Johnson, and investigating police officers. Lastly, Mrs. Brumfield identified a photograph of her son and testified that she was not in the Curran Place Apartments at the time of the shooting.

The State's next witness, Officer Michael Duzmal, testified that he was assigned to the Seventh District on August 3, 2004, and was involved in the investigation of Morgan Brumfield's murder. The record indicates that Officer Duzmal received a call around 1:15 A.M. from an N.O.P.D. dispatcher to respond to a call at the Curran Place Apartments. Officer Duzmal noted that upon arriving at the scene, he observed the victim lying face down on the ground of a common courtyard near apartment 149. Officer Duzmal further noted that upon closer inspection, Morgan Brumfield's body exhibited gunshot wounds, including several to the head. Accordingly, Officer Duzmal notified EMS and the Seventh District investigative unit, made a request for a crime lab unit, and asked the New Orleans Fire Department to send a light truck to the scene in order to illuminate the area under investigation. Officer Duzmal indicated that while the police investigation revealed two bullet casings and several bullet fragments, no weapon was located. Officer Duzmal indicated that several bullets had pierced the outer wall of apartment 149 and came to rest inside the apartment. The investigating officers located spent bullets inside the living room and children's bedroom of apartment 149. In connection with his testimony, Officer Duzmal identified several maps of

the area and numerous photographs taken of the crime scene and the subsequent investigation.

Officer Kenneth Leary testified that he is employed by the N.O.P.D. as a firearms examiner in the crime lab. Officer Leary further noted that he had occasion to conduct an analysis of several items of evidence gathered in connection with the underlying incident. Specifically, Officer Leary stated that he was asked to determine whether the casings and bullet fragments collected at the murder scene were fired from the same weapon. After testing, Officer Leary concluded that the two spent casings were fired from the same weapon. Further, Officer Leary was also able to determine that the two of the bullet fragments appeared to be 7.62 millimeter ammunition. However, Officer Leary also stated that he lacked sufficient evidence to conclude that the bullet fragments were fired from the same weapon. Officer Leary stated that the weapon that fired the bullets is a very high powered rifle, designed for long range shooting, and concluded that it was probably an AK-47 or an SKS.<sup>1</sup> On cross-examination, Officer Leary testified that in addition to the foregoing fragments and casings, he also examined several other fragments and casings found at the scene and that several of these items were unsuitable for identification. Thus, Officer Leary stated that he could not rule out the possibility that more than one weapon was fired at the time of the crime. Nevertheless, Officer Leary noted that all of the identifiable fragments originated from an AK-47 or SKS. Additionally, Officer Leary noted that the fragment retrieved from the victim's body was identifiable as a 7.62 mm copper bullet fragment.

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<sup>1</sup> Officer Leary noted that an SKS is another model of the AK-47.

The State's next witness, Trooper Gus Bethea, testified that while he now works for the Louisiana State Police, he was employed by the N.O.P.D. and assigned to the homicide unit at the time of the murder. Trooper Bethea testified that he had occasion to investigate the murder of Morgan Brumfield. Specifically, Trooper Bethea testified that he was tasked with assisting the lead investigator in collecting evidence, directing the crime lab, canvassing the area for witnesses, crowd control, and obtaining statements from investigating officers. Trooper Bethea stated that the investigation recovered two spent 7.62 mm bullet casings, a lead fragment core that was recovered from outside the scene, two spent casings recovered from outside the scene, and a lead fragment and copper casing recovered from inside a nearby building. Trooper Bethea also noted that they were unable to locate any witnesses on the night of the shooting. However, Trooper Bethea stated that they were later contacted by the mother of a witness, who eventually gave a statement to the investigating officers at the Seventh District Station. Janee Johnson, accompanied by her mother, informed them that she knew Morgan Brumfield, was a witness to his murder, and identified Defendant Mackey as Brumfield's murderer.

Trooper Bethea indicated that the police also showed Ms. Johnson a photographic lineup containing Defendant Mackey's photograph. Trooper Bethea indicated that at the time of Ms. Johnson's statement the computer software that prepared the lineups was not functioning properly. Accordingly, the officers printed out six individual photographs, taped them to a folder and presented the photographs to Ms. Johnson. Ms. Johnson identified Defendant Mackey as Morgan Brumfield's shooter. Trooper Bethea testified that Ms. Johnson and her mother signed the back of the lineup. However, the original lineup was not

available for trial. Accordingly, Trooper Bethea identified a photocopy of the lineup as accurately depicting what was presented to Ms. Johnson at the time of her statement.

Following Trooper Bethea's testimony, the State elicited testimony from Jeanine Johnson. Mrs. Johnson testified that Morgan Brumfield had been her nephew. Further, Mrs. Johnson explained that she, her sister, and her brother had stopped at the Curran Place Apartments to go to the August 2, 2004 birthday party for Morgan Brumfield's two younger brothers. Mrs. Johnson noted that Defendant Mackey was at the party and that she and Defendant Mackey shared friends. Mrs. Johnson left two to three hours later. Mrs. Johnson explained that her three daughters stayed behind with a friend at the apartments. Later, in the early morning hours of August 3, 2004, she received a call from her daughter Jasmine, informing her that her nephew had been killed. Mrs. Johnson then went back to the Curran Place Apartments to get her daughters. Mrs. Johnson testified that, upon arriving at the apartments, she found her daughters shaken up and scared. Mrs. Johnson stated that she did not speak to her daughters about what they witnessed until after returning to her home later that morning. Two weeks later, Mrs. Johnson took Janee, her daughter, to the Seventh District police station so that Janee could tell the police what she witnessed on the night of the shooting. Mrs. Johnson explained that she waited for several weeks to take Janee to the police because her daughter was merely twelve at the time, and she did not want to push her but instead, wanted to wait until Janee was ready to talk to the police. Mrs. Johnson noted that the investigating officers interviewed Janee, taped her statement, and showed her a photo-lineup. Janee examined the lineup, identified Defendant Mackey as the individual who shot Morgan Brumfield, and signed and

dated the lineup. Mrs. Johnson also signed and dated the lineup. Lastly, Mrs. Johnson identified both a copy of the photo-lineup and Defendant Mackey in court during trial.

The State next called Dr. Samantha Huber, a forensic pathologist with the Orleans Parish Coroner's Office, to testify. The parties stipulated that Dr. Huber is an expert in forensic pathology. Dr. Huber testified that she performed the victim's autopsy. Further, Dr. Huber testified that the victim was struck by eight bullets and that six of these bullets entered the victim's body. Specifically, Dr. Huber identified the following bullet-related injuries: 1) a bullet entered the victim's left forehead and exited on the right side of the scalp near the eye; 2) a bullet entered the victim's right forehead and exited the right lateral forehead; 3) a bullet which impacted approximately two and one-half centimeters into the soft tissue, but did not cause any severe brain damage; 4) a bullet that entered the victim's left forehead above the eyebrow and exited the right cheek; 5) a bullet that entered the victim's back, exited through the left shoulder, and fractured the humerus; 6) a bullet which impacted one of the victim's wrists; and 7) two graze wounds. Dr. Huber was unable to determine the order in which the various wounds were inflicted. Dr. Huber concluded that based on the presence of soot near the entry wounds, bullets two and three were fired when the muzzle of the gun was within six inches of the victim. Additionally, Dr. Huber testified that bullets one, two, and four were sufficient to cause both brain injury and death. Dr. Huber opined that the victim died as a result of cranial cerebral injury secondary to gunshot wounds.

The State next called Natasha Bridges to testify. Ms. Bridges testified that in August 2004 she lived in the Curran Place Apartments. Ms. Bridges testified

that shortly after midnight on August 3, 2004, she went to visit a person she referred to as the “candy lady.” Ms. Bridges explained that the candy lady lived in the apartment complex and sold snacks and cold drinks out of her house.<sup>2</sup> After purchasing some snacks, Ms. Bridges walked back to her apartment. On her way back to her apartment, Ms. Bridges observed Defendant Mackey approach the victim and ask, “Where is Kirk?” Ms. Bridge noted that Defendant Mackey was holding a “long black gun” as he spoke to the victim and that she recognized him because she saw him frequently in the apartment complex. Likewise, Ms. Bridges was familiar with the victim because he lived in the apartment complex with his girlfriend. Ms. Bridges testified that the lighting was sufficient at the time for her to identify the two men. Ms. Bridges stated that Defendant Mackey and the victim then began to argue, and she then heard the victim state, “M, it wasn’t me.” Ms. Bridges testified that the victim backed away from Defendant Mackey and began to run away. Ms. Bridges then hid in nearby bushes as Defendant Mackey began to shoot at the victim. Ms. Bridges noted that Defendant Mackey ran after the victim while steadily shooting. After Defendant Mackey passed by the bush she was hiding in, Ms. Bridges ran into her apartment and called her parents.

Ms. Bridges did not speak with the responding officers later that night because she was scared. On cross-examination, Ms. Bridges explained that she crossed paths with Jeannine Johnson several days after the shooting. Ms. Bridges told Mrs. Johnson what she had witnessed at the time of the shooting, and Mrs. Johnson asked Ms. Bridges if she had a problem with going to the police with her story. Several weeks later, Ms. Bridges went to the police station to relate her

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<sup>2</sup> Ms. Bridges further noted that the candy lady would allow certain customers into her apartment after hours. Ms. Bridges was one of the candy lady’s trusted customers.

observations to the police. Ms. Bridges testified that she gave a statement to the police and identified Defendant Mackey in a photographic lineup prepared by the officers. Ms. Bridges testified that she identified a photograph of Defendant Mackey as Morgan Brumfield's killer. Ms. Bridges testified that the photographic lineup consisted of six photographs affixed to a folder. Additionally, Ms. Bridges identified Defendant Mackey in court as Morgan Brumfield's killer.

The State next elicited testimony from Jasmine Johnson, Jeannine Johnson's daughter. In August 2004, Ms. Johnson was fifteen years old. Ms. Johnson testified that on the night of the killing, she, her sister Janee, her two cousins – the victim's younger brothers – and several other friends were at Sierra Whitley's apartment in the Curran Place Apartments. Ms. Johnson testified that she had been inside the apartment when her sister and Ms. Whitley ran inside the apartment. Ms. Johnson stated that she then heard gunshots and, looking through a window, witnessed someone armed with an AK-47 chasing the victim through the apartment complex. Ms. Johnson, as well as the others, then ran and hid inside a closet in the back of Ms. Whitley's apartment. Shortly thereafter, Ms. Johnson heard the sound of someone knocking on a window. Ms. Whitley then opened a curtain. Ms. Johnson testified that she saw a man, Defendant Mackey on the outside pressing the AK-47 to the glass. According to Ms. Johnson, Defendant Mackey stated to Ms. Whitley that he would kill her if she went to the police. Ms. Johnson testified that the man was Defendant Mackey and that she knew him because he was a friend of her cousin, the victim. Further, Ms. Johnson noted that prior to the shooting she had seen Defendant Mackey twice on August 2, 2004. Ms. Johnson also identified Defendant Mackey in court as the man she saw at the window of Ms. Whitley's apartment on the night of the shooting.

However, Ms. Johnson did not speak to the police about the incident or make any type of photographic identification of Defendant Mackey. Rather, Ms. Johnson stated that she spoke to her mother about the events she witnessed after returning to her home later that day.

Sergeant Arthur Kaufman testified that on August 3, 2004, he was the supervisor of the Seventh District Homicide Squad and that he was at the scene during the police investigation. Sergeant Kaufman further noted that, with respect to the present investigation, he supervised five detectives as well as support personnel and crime lab technicians. Further, Sergeant Kaufman testified that he observed personnel from the coroner's office move Morgan Brumfield's body from the scene. Sergeant Kaufman noted that after the body was removed, he observed four to five strike marks on the ground at the spot where the body had been lying. Additionally, Sergeant Kaufman testified that he was unable to locate this matter's case file or copies of the photographic lineups. Sergeant Kaufman explained that the Seventh District police station received six to eight feet of floodwater as a result of Hurricane Katrina and that the building was gutted before anyone could ascertain the state of the various files. Following Sergeant Kaufman's testimony, the State and the defense stipulated that the evidence recovered from the scene of the underlying crime has not been located after the events surrounding Hurricane Katrina.

The State 's final witness, Janee Johnson, testified that on August 2, 2004, she was thirteen years old, and on the day of the incident, she went to the Curran Place Apartments to attend a gathering in honor of her younger cousins' birthdays. After the party, she, her sister, the victim and her cousins, went to Sierra Whitley's apartment. Ms. Johnson further testified that she, the victim, and several others,

were sitting outside after midnight when Defendant Mackey walked up to them, carrying a long black gun and inquiring as to the whereabouts of the victim's uncle. Ms. Johnson testified that at that time, Defendant Mackey was wearing a white shirt, some shorts, and white shoes. Further, Ms. Johnson noted that Defendant Mackey had some gold teeth. Ms. Johnson also testified that she knew Defendant Mackey as a friend of her cousin. Ms. Johnson noted that she saw Defendant Mackey earlier at her cousin's birthday party. Ms. Johnson denied observing any problems between Defendant Mackey and the victim at her cousins' birthday party.

Ms. Johnson stated that Defendant Mackey was of the opinion that the victim had broken into Defendant Mackey's home. Ms. Johnson stated that the victim then stated, "M Baby, it wasn't me", and began to run away from Defendant Mackey. Ms. Johnson stated that Defendant Mackey then began to chase, and shoot at the victim. Ms. Johnson then ran into Ms. Whitley's apartment. She was unable to see where her cousin finally collapsed. Ms. Johnson, her sister, her two younger cousins, and Ms. Whitley then ran to the back of the apartment and hid in a closet. Ms. Johnson testified that while hiding in the closet she heard a knock on a window near the closet. Ms. Whitley opened a curtain wide enough for Ms. Johnson to see who was knocking. Ms. Johnson stated that she witnessed Defendant Mackey, holding a gun, knocking on the window. Further, Ms. Johnson stated that she heard Defendant Mackey threaten Ms. Whitley in the event she spoke to anyone about what they had just witnessed. She and the others then went back to hiding in the closet until she was picked up by her mother later that morning. Subsequently, Ms. Johnson told her mother about what she had

witnessed. Ms. Johnson explained that she did not initially speak with the police because she was scared.

Ms. Johnson later went with her mother to the police station to speak with the police. At the police station, Ms. Johnson gave a statement, informed the police that Defendant Mackey murdered her cousin, and identified Defendant Mackey in a photographic lineup. Ms. Johnson described the photographic lineup as comprising six photographs affixed to a folder. After picking Defendant Mackey out of the photographic lineup, Ms. Johnson signed and dated the lineup. Additionally, Ms. Johnson identified Defendant Mackey in court as being the same person she saw at the window in Ms. Whitley's apartment.

Following, Ms. Johnson's testimony, the State rested. After the conclusion of oral arguments, the trial court found Defendant Mackey guilty of second degree murder. The trial court sentenced Defendant Mackey to life in prison at hard labor.

### **ERRORS PATENT**

A review of the record reveals no errors patent.

### **RIGHT TO A FAIR TRIAL**

Defendant Mackey raises one assignment of error on appeal. Defendant Mackey asserts that his Sixth Amendment right to a fair trial was violated by the trial court's denial of the defendant's motion to re-try his motion to suppress identification with conflict-free counsel. Defendant Mackey alleges that his original counsel was laboring under a conflict of interest because, prior to representing him, he also represented the victim on an unrelated charge. Further, Defendant Mackey asserts that his conviction and sentence should be reversed because the record would not contain sufficient evidence to support his conviction

if the trial court were to allow him to re-try his motion to suppress identification and subsequently suppress the photographic lineup identifications. However, Defendant Mackey merely asserts, without citation to evidence or jurisprudence, that his original counsel was actually conflicted. Moreover, Defendant Mackey cites to no jurisprudence in support of his assertion that the trial court in this case should have allowed him to re-try his motion to suppress identification. However, Defendant Mackey waived any objection to proceeding with his original counsel at the suppression hearing. Additionally, the trial court, at the close of evidence but prior to ruling, allowed Defendant Mackey's trial counsel to reargue the motion to suppress and, in fact, suppressed Natasha Bridge's alleged photographic lineup.

The State raises several detailed arguments in opposition to the Defendant Mackey's assertions. The State first argues that the Defendant Mackey's original counsel was not laboring under an actual conflict of interest at the time of the motion hearing. The State makes several sub-arguments in support of the foregoing assertion. Specifically, the State asserts: 1) original counsel's successive representation of Brumfield and Defendant Mackey did not create an actual conflict such that Defendant Mackey is relieved from establishing that the conflict actually affected counsel's performance; 2) there is no indication that the motion hearing implicated any privileged information that Defendant Mackey's counsel may have had concerning the victim; 3) the trial court questioned Defendant Mackey about the conflict, and Defendant Mackey waived any objection to the conflict; and 4) the witnesses' identifications were confirmatory and thus not suspect to suppression *ab initio*. In its second argument in opposition, the State asserts that, assuming *arguendo* that original counsel was laboring under

an actual conflict, the trial court cured any procedural defect when it reconsidered the motion after the close of evidence at trial.

We find no error in the trial court's refusal to allow Defendant Mackey to retry his motion. Secondly, even if the trial court erred in refusing to allow Defendant Mackey to reargue his motion to suppress, such error was, at best, harmless error. We base our conclusion on two observations. First, the record indicates that the trial court questioned Defendant Mackey at the suppression hearing about the alleged conflict, and he waived any objection to the conflict. The record before us contains the following colloquy:

**The Court:**

Mr. Mackey, are you aware of the question Mr. Fuller has raised?

**The Defendant:**

Yes, sir.

**The Court:**

Would you like another attorney?

**The Defendant:**

No, sir.

**The Court:**

I want it on the record that you understand there's a conflict. At one point Mr. Fuller represented the victim in this particular matter. Do you understand that?

**The Defendant:**

Yes, sir.

**The Court:**

Knowing that, do you still want Mr. Fuller to continue to represent you?

**The Defendant:**

Yes, sir.

Accordingly, Defendant Mackey waived any objection that he may have had to proceeding with original counsel at the suppression hearing.

The second observation in support of our conclusion is found in the transcript after the close of evidence, but prior to closing arguments. Specifically, the record indicates that the trial court allowed Defendant Mackey to reargue his motion at the close of evidence. The record also indicates that the trial court excluded any consideration of Natasha Bridge's photographic lineup identification when finding Defendant Mackey guilty of second degree murder. Specifically, the record reveals the following colloquy between the trial court and Defendant Mackey's trial counsel:

**The Court:**

. . . And now, I'd like to take up the separate objection that you're making regarding identification by Natasha Bridges.

**Mr. Whittaker:**

Re-urging my motion to suppress the identifications in both instances, in particular, as it relates to Natasha Bridges but it applies to both. As the Court is aware, Natasha Bridges allegedly made an identification but there is no police report reference whatsoever to any such procedure having taken place.

**The Court:**

With Natasha Bridges.

**Mr. Whittaker:**

With Natasha Bridges. There is no lineup that's ever been examined by anyone in this case, anybody with the DA's office, as far as we know throughout the history of this case and Bridges testified that the lineup that was done with her was in a manilla folder just as it was done with these two ladies [Jeannine and Janee Johnson]. Interestingly that they said that that was an unusual procedure, that the machine wasn't working. Well, it wasn't working with Natasha Bridges too or it was all done at the same time on the same day. Again, we're hampered –

**The Court:**

I understand.

**Mr. Whittaker:**

- this man's life is on the line by the absence of David Walker and by the absence of that lineup. I think that identification should be suppressed.

**The Court:**

I find that there is no out of court identification by Natasha Bridges.

**Ms. Patel:**

Judge, can I respond?

**The Court:**

There was no evidence presented and there is no out of court identification by Natasha Bridges. The state has not presented evidence. They presented testimony that she says she did. This Court will not consider that because that is not evidence.

**Ms. Patel:**

Judge, can I respond?

Her testimony indicates clearly she is the one who gave the name of the defendant.

**The Court:**

I understand. This is all about an identification procedure.

**Ms. Patel:**

And when we're talking about identification, it relies on suggestibility. There is no suggestibility in this case. Natasha Bridges testified that she –

**The Court:**

How do we know, we don't have any photographs.

**Ms. Patel:**

Well, she's the one that testified that she provided the name.

**The Court:**

I understand.

**Ms. Patel:**

And that the officer –

**The Court:**

We're not talking about a name that she provided. She clearly provided a name but as far as a photographic identification, I am not considering that. As far as I'm concerned, you did not present evidence of a photographic identification of Mister Mackey by Natasha Bridges. She did an in court identification and she identified him by name to the police.

**Ms. Patel:**

Yes, your honor.

**Mr. Whittaker:**

Thank you, Judge.

**The Court:**

I'll note both of your objections.

Do you have anything else?

**Mr. Whittaker:**

I don't, Judge.

**Ms. Patel:**

Your Honor, if I may be clear, are you disregarding that lineup procedure at the district, not providing the name or her in court identification?

**The Court:**

I've not seen a lineup that Natasha – and I want to be clear on the record. Pertaining to Natasha Bridges, you have not presented, this Court's not seen any photographic identification. We have not heard from an officer regarding a procedure. As far as I'm concerned, this Court is not considering evidence that she has not heard. So, there was no photographic lineup identification. So, therefore, I'm not considering it. She made an in court identification and she identified the perpetrator by name.

Accordingly, the record shows that: 1) the trial court allowed Defendant Mackey to reurge his motion to suppress identification; 2) Defendant Mackey argued the motion with respect to Natasha Bridges' alleged photographic identification; 3) the trial court ruled that the State failed to prove that Natasha Bridges made a photographic identification; and 4) the trial court refused to consider any evidence of Natasha Bridges' alleged photographic lineup identification of Defendant Mackey. Therefore, the trial court did not error when it denied Defendant Mackey's request to retry his motion to suppress identification.

However, the trial court's actions amounted to no more than harmless error that would not have changed the outcome of the trial. The jurisprudence provides that a trial error does not provide grounds for reversal of a defendant's conviction and sentence unless it affects substantial rights of the accused. La C.Cr.P. art. 921; *State v. Johnson*, 94-1379, pp. 16-17 (La. 11/27/95), 664 So.2d 94, 101-102. The test is whether there is a reasonable possibility the error might have contributed to the conviction and whether the court can declare a belief that the error is harmless beyond a reasonable doubt. *State v. Juniors*, 2003-2425, p. 54 (La. 6/29/05), 915 So.2d 291, 331. The reviewing court must find that the verdict actually rendered was surely unattributable to the error. *Johnson*, 94-1379, pp. 16-17, 664 So.2d at 101-102. In this matter, the only outcome favorable to Defendant Mackey of any future suppression hearing, given that the trial court has already refused to consider any evidence of Natasha Bridges' photographic lineup identification, could be the suppression of Janee Johnson's photographic lineup identification of Defendant Mackey. A review of the record indicates that Defendant Mackey's conviction rests on sufficient evidence even in the absence of Janee Johnson's photographic

lineup identification. Similarly, the inclusion of Janee Johnson's photographic lineup identification did not affect the trial court's verdict.

The record indicates that several non-police fact witnesses testified at trial. The State first elicited testimony from Tiya Brumfield, which placed Defendant Mackey in the Curran Place Apartments on the evening of August 2, 2004. Additionally, Jasmine Johnson testified that: 1) she, along with several others, had been in the Curran Place Apartments on the night of the shooting; 2) she had already seen Defendant Mackey twice on the date of the shooting; 3) she was inside Sierra Whitley's apartment when she heard several gunshots from outside; 4) looking through a window, she saw someone, armed with an AK-47, chase Morgan Brumfield through the complex; 5) she then hid inside a closet with her sister and several others; and 6) looking through a window, she saw Defendant Mackey press the rifle to the glass and threaten Ms. Whitley with death in the event she reported him to the police. Jasmine Johnson testified unequivocally in open court that Defendant Mackey was the same man she saw at the window on the night of Brumfield's murder.

Further, Janee Johnson testified that: 1) she was thirteen years old on August 2, 2004; 2) she was at the Curran Place Apartments on the day of the shooting; 3) she, as well as several others, were at Sierra Whitley's apartment at the time of the shooting; 4) she, along with several others, were sitting outside Ms. Whitley's apartment when Defendant Mackey, carrying a long black gun, approached them and inquired about Morgan Brumfield; 5) she had already seen Defendant Mackey twice on the date of the shooting; 6) she witnessed Morgan Brumfield run from Defendant Mackey, and she heard Brumfield say, "M Baby, it wasn't me"; and 7) she witnessed Defendant Mackey chase after and shoot at

Morgan Brumfield. Janee Johnson then ran into Sierra Whitley's apartment and hid in a closet with her sister and several others. Like her sister, she testified that: 1) she heard a knock on a window; 2) she witnessed Ms. Whitley open the curtain; 3) she saw Defendant Mackey press the gun against the glass and threaten Ms. Whitley with death in the event she reported him to the police. Several weeks later, Ms. Johnson went with her mother to the Seventh District Police Station where she related her first hand observations to the police. Additionally, Ms. Johnson identified Defendant Mackey in open court as the man she saw at Ms. Whitley's window on the night of the incident.

Additionally, the State elicited testimony from Natasha Bridges. Ms. Bridges testified that: 1) she lived in the Curran Place Apartments at the time of the shooting; 2) shortly after midnight on August 3, 2004, she walked to a neighboring apartment to purchase some candy from a resident who sold snacks and drinks from out of her apartment; 3) while walking back to her apartment, she saw Defendant Mackey approach the victim and inquire about the someone subsequently shown to be the victim's uncle; 4) at the time, Defendant Mackey was carrying a long black gun; 5) Defendant Mackey and the victim began to argue; 6) she heard the victim state, "M, it wasn't me", as he backed up and began to run away; 7) she then hid in some bushes but nevertheless observed Defendant Mackey chase after and shoot at the victim; and 8) after Defendant Mackey passed her by, she ran into her apartment. Significantly, Ms. Bridges testified that she recognized both the victim and Defendant Mackey because she saw them both frequently in the apartment complex. Moreover, Ms. Bridges testified that the lighting was sufficient at the time of the shooting for her to recognize both men. Subsequently, Ms. Bridges gave a statement to the police wherein she related her

observations. Further, Ms. Bridges identified Defendant Mackey in court as being Morgan Brumfield's killer. Additionally, the State produced forensic evidence linking bullet fragments, associated with AK-47 type weapons, which were retrieved from the victim's body to similar fragments and casings collected at the crime scene.

We find sufficient evidence in the record to support the Defendant Mackey's conviction for second degree murder even with the absence from evidence of Janee Johnson's photographic lineup identification of Defendant Mackey. Therefore, the inclusion of Janee Johnson's photographic lineup identification did not affect the trial court's verdict. Accordingly, any failure on the part of the trial court in refusing to allow Defendant Mackey the opportunity to retry his motion to suppress was, at best, harmless error.

### **DECREE**

Defendant Mackey's conviction and sentence for second degree murder are affirmed.

### **CONVICTION AND SENTENCE AFFIRMED**