

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING, AND IF FILED, DETERMINED

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION**

**HARIRAM JAYARAMAN,
Appellant,**

UCN: 512017AP000019APAXES

Appeal No.: 17-AP-19

Lower No.: 16-CT-829532

v.

**STATE OF FLORIDA,
Appellee.**

On appeal from Pasco County Court,
Honorable Candy Morris Vandercar

Rolando Santiago, Esq.,
for Appellant,

Danielle Rudisil, Esq.,
Assistant State Attorney,
for Appellee.

ORDER AND OPINION

Appellant raises three arguments on appeal. The trial court's rulings on Appellant's Motion to Dismiss and Appellee's Motion to Strike are affirmed without comment. We write only to address Appellant's argument that the trial court abused its discretion by not permitting the impeachment of the victim's in-court identification of Appellant.

STATEMENT OF THE CASE AND FACTS

On September 16, 2016, Appellant was issued a criminal traffic citation and notice to appear for leaving the scene of an accident involving more than \$50 in damage without giving information, a second-degree misdemeanor, in violation of section 316.061(1), Florida Statutes (2016). On December 20, 2016, Appellant filed a Motion to Dismiss. The motion asserted, in relevant part, that during her deposition, the victim was provided two photos of random people (neither of whom were Appellant) by Appellant's counsel and was asked whether she recognized Appellant, to which she responded yes and

affirmatively identified one of the photos as Appellant. Appellant argued that as a result of this, the victim would be unable to identify Appellant and would thus be unable to place him at the scene of the accident.

On February 24, 2017, the State filed a Traverse stating that there were disputed issues of material fact and specifically denying that the victim would be unable to identify Appellant. The State added the following additional facts: That the victim looked inside Appellant's vehicle and saw his face and that the victim can positively identify Appellant. The State also filed a Motion to Strike the motion to dismiss, arguing that a defendant cannot create a misidentification via his own photopack line-up during a deposition because a defendant is not permitted to create evidence during a deposition. Thus, the State continued, the Motion to Dismiss was legally insufficient because it was based upon trickery and should be stricken. In support of that motion, the State cited to *State v. Kuntsman*, 643 So. 2d 1172 (Fla. 3d DCA 1994)

A hearing was held on the competing motions that same day. The trial court granted the State's Motion to Strike pursuant to *Kuntsman* and denied Appellant's Motion to Dismiss based upon the State's Traverse. The trial court then certified that there would be no jail sentence and set the case for a bench trial.

During the trial on April 7, 2017, the victim testified that she was stopped in a loop in front of Sand Pines Elementary School when a vehicle attempted to go around the left side of her vehicle and struck it, causing it to shake. She looked at the other vehicle as it passed and saw Appellant driving the vehicle. She testified that there was no one in the passenger seat. She testified that she thought he was going to stop at a nearby parking lot, but that he continued driving away. She testified that the impact caused \$700 worth of damage to her bumper and her paint. She testified that Appellant called her later that night, asked her if he had scratched her vehicle, and said a cop had just left his house and that he had been cited for leaving the scene and reckless driving. She testified that he also apologized for hitting her vehicle.

On cross-examination, Appellant attempted to elicit testimony regarding the victim's misidentification of Appellant during her deposition. The State objected based upon the previously granted motion to strike, arguing that the State had sought and the court had granted, a motion to strike the photographs used in, and the testimony from,

the deposition. Appellant, however, argued that the State's motion to strike was a motion to strike Appellant's motion to dismiss and nothing else. The trial court sustained the State's objection and stated that preventing the use of the pictures and deposition testimony was included within the order granting the State's motion to strike. The victim then testified that the only description she gave to the officer after the accident was that the driver of the vehicle was not white, had dark hair, and was wearing glasses.

Florida Highway Patrol Trooper Kevin Hamilton testified that he observed an estimated \$200 worth of damage to left rear portion of the victim's vehicle. He testified that he observed \$500 worth of damage to the front right portion of Appellant's vehicle. He further testified that the damage to Appellant's vehicle was consistent with striking the victim's vehicle. He testified that Appellant was a nonwhite male, dark skin, dark hair, and glasses; consistent with the description provided by the victim.

During the defense case-in-chief, Appellant testified that he was, in fact, driving the vehicle that struck the victim's vehicle that day. He further testified that he did not know he had been in an accident until law enforcement showed up at his house. He further testified that he was at the school picking up his daughter. He testified that after law enforcement left he called the victim to confirm that there had indeed been an accident because he still was not convinced and was never aware that he had struck another vehicle. At the conclusion of trial, the trial court found that the State had proven beyond a reasonable doubt that Appellant had violated section 316.061(1) and withheld adjudication.

STANDARD OF REVIEW

"The purpose of a motion to dismiss is to allow a pretrial determination of the law of the case when the facts are not in dispute," and when "considering the motion, the State is entitled to the most favorable construction of the evidence, and all inferences should be resolved against the defendant." *Bell v. State*, 835 So. 2d 392, 393-94 (Fla. 2d DCA 2003). This court reviews the trial court's order on a motion to dismiss pursuant to a *de novo* standard. *Id.* Questions of law are also reviewed pursuant to a *de novo* standard. *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000).

The trial court's rulings on the admissibility of evidence will not be overturned absent an abuse of discretion. *Blanco v. State*, 452 So. 2d 520 (Fla. 1984); *Hinojosa v. State*, 857 So. 2d 308 (Fla. 2d DCA 2003).

LAW AND ANALYSIS

Appellant argues that because the State elicited from the victim an in-court identification of Appellant, he should have been permitted to impeach that testimony by cross-examining her regarding her misidentification of Appellant during her deposition. Appellant further argues that that *Kuntsman* is inapplicable to the instant case and that regardless of *Kuntsman*, once a witness makes an in-court identification, the trier of fact is entitled to consider an out-of-court identification to evaluate whether the in-court identification is credible.

The trial court did not abuse its discretion in sustaining the State's objection. While the trial court's order on the Motion to Strike struck only the Motion to Dismiss and did not address whether the deposition photos or the victim's deposition testimony would be admissible during trial, the trial court's reasoning in granting the Motion to Strike applies equally to their use during trial.

In *Kuntsman*, the Third District held that a trial court judge is not authorized to compel a prosecution witness to view a photopack created by the defendant because Florida Rule of Criminal Procedure 3.220 is not intended to allow a defendant to create evidence of misidentification during the discovery process. *Kuntsman*, 643 So. 2d at 1173-74. Appellant argues that *Kuntsman* is inapplicable to the instant case because the trial court below did not issue an order compelling the victim to participate in the deposition photopack line-up. However, any possible argument that the decision in *Kuntsman* turned on the trial court's order compelling and not on the creation of misidentification evidence is refuted by *State v. McWilliams*, 817 So. 2d 1036 (Fla. 3d DCA 2002). In that case, the Third District cited to *Kuntsman* and specifically noted that "although defense counsel is free to question witnesses about the photographic line-up they viewed, he is not free to present the witness with the photo-pack line-up and conduct a new identification proceeding." *McWilliams*, 817 So. 2d at 1037 n.1. Because Appellant violated the rules of discovery in attempting to create new evidence of misidentification, the trial court did

not err in sustaining the State's objection to Appellant's attempt to impeach the victim's testimony with that same evidence.

Appellant's argument that the deposition misidentification should still have been admissible to impeach the victim's in-court identification is similarly without merit. A possible analogy to Appellant's argument would be where a defendant's confession is obtained by law enforcement after he has invoked his right to remain silent or his right to an attorney. In such an instance, a confession may or may not be admissible as substantive evidence but if a defendant testifies in his own defense, the confession may be used for impeachment purposes in some instances.

However, there is nothing in Florida Rule of Criminal Procedure 3.220 that precludes law enforcement from obtaining a confession from a defendant. Rule 3.220 has no bearing on the admissibility of a confession. By contrast, a misidentification like the one in this case is new evidence created during a discovery deposition. It is not just evidence that should be suppressed. It is evidence that should not exist and there is no factual scenario that would allow for its creation. If the evidence should not have been created during the deposition under any circumstances whatsoever, then it is improper to permit its use during trial.

CONCLUSION

Because it was not error for the trial court to sustain the State's objection to Appellant's attempt to use the deposition photopack line-up to impeach the victim's testimony and Appellant's remaining claims are without merit, his conviction is affirmed.

It is therefore ORDERED and ADJUDGED that the order of the trial court is hereby AFFIRMED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida
this ____ day of _____, 2018.

Original Order entered on June 5, 2018, by Circuit Judges Linda Babb,
Kimberly Campbell, and Daniel D. Diskey.

Copies to:

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