IN THE SUPREME COURT OF THE STATE OF DELAWARE

ADAM PRESOCK,	§	
	§	No. 459, 2012
Defendant Below-Appellant	§	
	§	Court Below: Superior Court of the State of Delaware in and for Sussex County
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	Id No. 1112017173
Plaintiff Below-Appellee	§	
	§	

Submitted: January 18, 2013
Decided: March 13, 2013

Before **BERGER**, **JACOBS**, and **RIDGELY**, Justices.

O R D E R

On this 13th day of March 2013, it appears to the Court that:

(1) Defendant-below/Appellant Adam Presock appeals from a jury conviction of Burglary First Degree, three counts of Assault Third Degree, and Conspiracy Second Degree. Presock claims that the pre-trial identification of him should have been suppressed because the use of a digital picture of him, instead of a photographic array, was impermissibly suggestive. He claims that the in-court identifications of him were tainted by that pre-trial identification. Presock also claims that the Superior Court's reprimand of his counsel in the presence of the

jury deprived him of his right to counsel and a fair trial. We find no merit to Presock's appeal and affirm.

(2) In December, 2011, Freda and Kenneth Jess hosted a party celebrating Christmas and their son Aaron's birthday. The hosts and all guests consumed varying amounts of alcohol during the party. Shortly before midnight, several friends of friends of Aaron's—including a man later identified as Christopher Conway—arrived uninvited. After a minor scuffle, the uninvited guests left the house saying they would be back. After being ejected from the party, Conway returned to his home and called his friend Joseph Luffman. Conway told Luffman he wished to return to the Jess party and finish the fight. When he received the call, Luffman was at the home of Adam Presock, the appellant. Also at Luffman's home were Mark Cannon, Stephanie Perry and Bobby Allman. Luffman, Presock, Cannon, Perry and Allman got into a car and drove to Conway's house, where another car containing "four or five" people joined the group. The two cars then went to the Jess house.

(3) After ejecting the uninvited guests, Kenneth and Aaron Jess went to sleep in their bedrooms. Another guest, Cody Baynard, went to sleep on a couch in the living room while Justin Jess, Aaron's brother, watched television. Freda Jess and some other guests were sitting in the next room. Aaron's sister Sierra and her friend Allison Cordrey went out to the house's porch. Cordrey observed

several people running towards the house. She and Sierra ran inside. The two women managed to close and lock the door before the Conway group reached the house.

(4) Luffman kicked in the door. Part of the Conway group then entered the house and began a brawl with the party guests. Kenneth Jess came downstairs from his bedroom and struck on the head two members of the Conway group with a steel pipe. The Conway group fled the house. Kenneth pursued the group with his son Justin, striking Presock with the pipe. The Conway group got into their cars and drove the injured parties to the hospital.

(5) A couple of hours after the incident, Greenwood Police Chief Mark Anderson interviewed partygoers at the Jess home. He showed Freda and Kenneth Jess digital images in his camera that he had taken of Presock and another Conway group member, Jared Pentoney. The pictures showed Presock and Pentoney while they were at the hospital suffering from severe head wounds. Freda and Kenneth both identified the Presock and Pentoney as two of the men who entered the house during the invasion. Chief Anderson also showed the photographs to Cordrey and "the people that were still at the residence." Five days later, Baynard, while at the police station, was shown four DELJIS photographs of people who had been arrested. Baynard identified Presock as one of the persons who entered the house.

(6) Presock was charged with Burglary First Degree, Conspiracy Second

Degree, and several related assault charges. Presock's defense at trial was that though he was present during the incident, he never entered the Jess home. Prior to trial, Presock moved to suppress the "use as evidence…the identification of the Defendant by Cody Baynard or the Greenwood Police Department as the person who committed the offense set forth in the Indictment." Presock also argued that any in-court identifications would be tainted and unreliable due to Chief Anderson showing the witnesses the digital picture of Presock. The trial judge denied the motion. The jury convicted Presock as charged. The trial judge sentenced Presock to two years imprisonment at Level 5 and additional terms of suspended imprisonment. This appeal followed.

(7) We review a trial judge's evidentiary rulings for abuse of discretion.[1] "An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice to produce injustice."[2]

(8) Presock first claims that the in-court identifications should have been suppressed because they were impermissibly tainted by Chief Anderson's showing witnesses the picture of Presock. A pre-trial identification violates the Due Process clause of the Fourteenth Amendment of the United States Constitution when the

[1] *Manna v. State*, 945 A.2d 1149, 1153 (Del. 2008) (*citing Pope v. State*, 632 A.2d 73, 78–79 (Del. 1993)).
[2] *Culp v. State*, 766 A.2d 486, 1153 (Del. 2008) (*citing Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994)).

procedure used is ""so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification"[3] "[T]he fact that a pretrial identification procedure is impermissibly suggestive, however, does not *ipso facto* constitute a due process violation. An impermissibly suggestive identification procedure must also create the danger of an irreparable misidentification."[4] An otherwise impermissibly suggestive identification may be admitted at trial if the trial court determines it is "nevertheless reliable."[5]

(9) At trial, eight witnesses testified that Presock was inside of the Jess residence during the brawl.[6] Four of the eight witnesses who placed Presock in the house did not view the digital photos. The witnesses were subject to cross examination by Presock's counsel, who questioned them as to how much alcohol each witness consumed during the party, the chaos of the brawl, and whether or not they were shown the digital pictures by Chief Anderson.

(10) Presock argues that because the party was so chaotic and the witnesses were intoxicated, the witnesses could not have accurately identified specific attackers. Presock further argues that the witnesses did not know the attackers and no witness provided a description to Chief Anderson before being shown the

[3] *Younger v. State*, 496 A.2d 546, 550 (Del.1985).
[4] *Monroe v. State*, 28 A.3d 418, 431 (Del. 2011) (*citing Mason v. Brathwaite*, 432 U.S. 98 (1977)).
[5] *Id.*
[6] Appendix to Appellee's Answering Brief at B2, B7, B14, B23, B28, B36, B46, B51.

digital pictures. We find these arguments unpersuasive. As the trial judge found, the display of the digital image of Presock was tantamount to a show up identification. Show up identifications are not *per se* unnecessarily suggestive.[7] Whether Presock was part of the Conway group was not an issue in this case. We find no abuse of discretion by the trial judge in finding that the witness testimony was not so suggestive as to create a substantial likelihood of an irreparable misidentification.

(11) Presock next claims that the court's admonishment of defense counsel during trial prejudiced the jury against him. As Presock did not challenge the remarks of the trial judge during the trial or seek a curative jury instruction. This claim can only be reviewed for plain error.[8]

(12) While defense counsel was cross-examining Freda Jess, the trial judge interrupted the line of questioning.

> THE COURT: [Counsel], I have no idea—wait a minute, when I speak you do not.
>
> COUNSEL: I'm sorry.
>
> THE COURT: I have no idea from what you got any of that because you have now mixed when she may have said something. I have no idea where you are getting the information that you are not questioning her about in that question.

[7] *Harris v. State*, 350 A.2d 768, 770 (Del. 1975).
[8] Supr. Ct. R. 8; *Damiani-Melendez v. State*, 55 A.3d 357, 359-60 (Del. 2012); Appellant's Opening Brief at 20.

> COUNSEL: Well, Your Honor—I'm sorry, I thought you were finished.
>
> THE COURT: Go ahead. If you were asking her something about what she said—please do not smile.
>
> COUNSEL: I'm sorry. I'm not trying to talk over you.

(13) This Court has recognized the dangers of a trial judge admonishing counsel in front of the jury. "Juries may get the wrong impression when they witness the court reprimanding an attorney. They may not understand what the attorney did wrong, and they may lose confidence in the attorney's case because of the court's criticism."[9] "Admonishing or reprimanding trial counsel plants a seed of doubt in the mind of a juror regarding the competence of the lawyer which may subconsciously affect the client's case."[10] We have also held that such admonishments may constitute harmless error, where "overwhelming evidence of [the defendant's] guilt at trial negates any inference that the trial court's remarks affected the outcome."[11]

(14) Here, the trial judge admonished counsel for referring to a statement of another witness without identifying the statement. The trial judge then admonished counsel for speaking over the court and counsel apologized. Presock admitted to being part of the Conway group and eight witnesses placed Presock in the house during the attack. The overwhelming evidence of Presock's guilt

[9] *Muhammad v. State*, 829 A.2d 137, 140 (Del. 2003).
[10] *Brown v. State*, 49 A.3d 1158, 1161 (Del. 2012).
[11] *Keyser v. State*, 893 A.2d 956, 963 (Del. 2006).

negates any possibility the trial judge's comments affected the outcome of the proceeding. Though "prudence would suggest that any reprimand that runs the risk of chastising counsel should be made outside the jury's presence,"[12] the failure to do so in this case was harmless error.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

[12] *Brown*, 49 A.3d at 1162.