STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2021-000570

THE STATE,

Respondent,

vs.

JEREMIAH DICAPUA,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

"Did the trial court err in allowing an in-court identification after ruling that the show-up identification of appellant after the State's witness failed to pick him out of a photo lineup was unnecessarily suggestive?"

COUNTER-STATEMENT OF ISSUE ON APPEAL

Did the trial judge somehow abuse his broad discretion by admitting evidence of the victim's out-of-court and in-court identifications of Appellant as the perpetrator of the charged offense when: (1) the show-up identification procedure employed in Appellant's case was not *unnecessarily* suggestive under the specific circumstances involved; and (2) even if the show-up was unnecessarily suggestive, the identification evidence was nonetheless sufficiently reliable under the totality of the circumstances such that no substantial likelihood of misidentification existed due to the strong indicia of reliability present?

STATEMENT OF THE CASE

In June of 2018, Appellant Jeremiah DiCapua was arrested following an investigation into an incident in which he grabbed a woman who was walking along a sidewalk while on vacation in Garden City, South Carolina. In August of 2018, the Georgetown County Grand Jury indicted Appellant for one count of kidnapping. Prior to trial, the solicitor served timely notice on Appellant indicating the State would seek a mandatory sentence of life without parole upon conviction based on Appellant's prior "most serious" conviction.[1] On May 11, 2021, a jury trial was commenced in the Georgetown County Court of General Sessions with the Honorable Steven H. John, circuit court judge, presiding. At the conclusion of the multi-day trial, the jury convicted Appellant of the lesser-included offense of attempted kidnapping while acquitting him of kidnapping. Following the verdict, the trial judge declined to impose the statutorily-mandated sentence of life without parole and improperly sentenced Appellant to a thirty-year term of imprisonment despite having no discretion to do so under the circumstances involved.[2] Appellant then timely filed a notice of appeal.

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[1] In 1980, Appellant was convicted of the "most serious" offense of murder. (R. p. 88; pp. 506-511; Supp. R. pp. 2-3).

[2] Earlier during trial, the trial judge—while discussing attempted kidnapping as a lesser-included offense with the parties—indicated he did not believe attempted kidnapping constituted a "most serious" offense and, based on that belief, ruled he would not impose the required mandatory sentence of life without parole in the event Appellant was ultimately convicted of that lesser-included offense. (R. pp. 446-447). Despite the trial judge's erroneous finding to the contrary, attempted kidnapping unquestionably was and is a "most serious" offense pursuant to unambiguous South Carolina law, and, thus, the trial judge had a statutory duty to sentence Appellant to life without parole upon Appellant's conviction for that "most serious" offense. See S.C. Code Ann. § 17-25-45 (mandating an offender "must be sentenced to a term of imprisonment for life without the possibility of parole" if convicted of a "most serious" offense after having previously been convicted of such an offense and including "[k]idnapping" and "[a]ttempt, for any offense enumerated in this item" in the plainly-worded list of "most serious" offenses).

STATEMENT OF FACTS

On the sunny morning of Sunday, June 10, 2018, Stacey Starnes ("Victim"), who was on a week-long annual vacation to a rented beach house situated on South Waccamaw Drive in Garden City, South Carolina, went out for a run along with her husband, Jason Starnes ("Husband"). (R. pp. 158-159; p. 161; pp. 207-209; pp. 245-246; p. 254). During the course of the run, Victim left Husband behind, turned around after a mile, and passed by him on her way back to the beach house. (R. p. 159; p. 209; p. 212). Then, after making it back to that location, Victim turned around once again and began walking in Husband's direction in order to meet back up with him once he was finished, too. (R. p. 159; p. 209).

As she did so, Victim spotted a black sports utility vehicle with an open door stopped at a stop sign in the direction she was walking, and, as she neared the vehicle, its driver tried to get her attention and speak with her. (R. pp. 159-160; p. 209; p. 215; pp. 242-243). However, not recognizing the man, Victim ignored him, walked around the front of the vehicle, and continued on down the street. (R. p. 209; p. 218; p. 233; pp. 242-243).

Around five minutes later, Victim saw the same black vehicle parked on the sidewalk in front of a beach house farther up South Waccamaw Drive in the same direction she was headed.[3] (R. pp. 161-162; p. 209; pp. 233-234). Not realizing anything was amiss, Victim continued on, and, as she neared the vehicle, she noticed there was a man standing next to it. (R. pp. 161-162; p. 210). The man then began walking towards her, suddenly reached for her without succeeding, and then attempted to grab her again. (R. p. 162; p. 210). Shocked, Victim tried to evade, but the man, who had a "mean" expression and widened eyes, lunged at her with both hands and

[3] Explaining how the vehicle came to be parked farther down the road, an individual performing maintenance work in the area confirmed he saw a black Jeep Cherokee that was stopped at a stop sign rapidly back up and speed away on the date of the incident. (R. pp. 258-261).

grabbed her by her arm against her will. (R. p. 162; p. 170; p. 210; pp. 216-217; p. 219). Immediately in response, Victim yelled "no" and jerked herself free. (R. p. 210; p. 23). She then rapidly sprinted away and found a place to hide. (R. p. 163; p. 210; p. 235).

Following that, Victim, who was terrified, called her Husband, and they quickly met back up and headed back to the beach house. (R. p. 163; p. 210). Once safely there, they then called 911 to report what had occurred. (R. p. 163; State's Ex. # 11 (911 Call Recording)). During the course of the call, Victim spoke with the dispatcher and recounted her frightening ordeal. (State's Ex. # 11). Additionally, Victim described her assailant as a "heavier" white male with dark hair who was very tan, "probably" in his fifties, approximately 5'8" tall, and driving a black Jeep. (R. pp. 163-164; State's Ex. # 11). She further reported her assailant was wearing black shorts at the time and she did not think he was wearing a shirt. (State's Ex. # 11).

In response, law enforcement officers from Horry County initially responded to the scene, spoke with Victim about what occurred, and drove her around the area in an effort to locate the suspect's vehicle. (R. pp. 221-222; pp. 224-225; pp. 247-248; p. 315; p. 346). However, despite seeing many dark-colored vehicles, Victim did not spot the suspect's vehicle during that search. (R. pp. 224-225; pp. 243-244).

As the investigation progressed, the Horry County officers discovered the incident itself had actually occurred just across the county line in Georgetown County. (R. pp. 107-108; p. 225; p. 315; p. 317). As a result, Investigator Jonathan Griffith from the Georgetown County Sheriff's Office took over the investigation, and he quickly responded to Victim's beach house.[4] (R. pp. 107-108; p. 225; pp. 315-316). Upon arriving there, he spoke with Victim about what

[4] Although Investigator Griffith took over the investigation involving Victim, officers from Horry County remained in contact with the Georgetown County Sheriff's Office about the matter because a similar incident was reported to have occurred in Horry County within hours of the one involving Victim. (R. p. 109; p. 135).

occurred and obtained a description of the man who grabbed her. (R. pp. 108-109; p. 316; p. 341). Based on Victim's ability to describe her assailant, Investigator Griffith enlisted a composite sketch artist to assist, and, by working with Victim, the composite sketch artist prepared a sketch of the perpetrator. (R. pp. 109-110; pp. 166-167; pp. 281-286; pp. 316-317; Supp. R. p. 8).

Over the course of the next few days, officers were able to obtain some surveillance footage that depicted both Victim and the perpetrator's vehicle on the date of the incident near the location where the incident occurred. (R. p. 114; p. 322; p. 324; p. 353; pp. 363-364; p. 373; State's Ex. # 16 (Surveillance Footage)). Furthermore, the sketch of the perpetrator was released to the public, and the owner of a liquor store located near the incident scene identified Appellant, who was a frequent customer at the store, as potentially being the person depicted in that sketch. (R. p. 110; pp. 114-115; pp. 264-267; p. 271; p. 276; p. 278; p. 321; p. 326; p. 365). Beyond that, the liquor store owner provided officers with some photographs of Appellant and Appellant's vehicle, which was consistent with Victim's description of the perpetrator's vehicle and was a black Jeep Cherokee with an expired paper tag.[5] (R. p. 267; p. 271; p. 305; p. 367; p. 369; Supp. R. pp. 9-14).

Upon Appellant being identified as a possible suspect, Investigator Griffith obtained a six-person photographic lineup of questionable quality that contained a partially-cropped picture of Appellant from when he was younger, and the investigator showed that lineup to Victim two days after the incident. (R. p. 118; p. 120; p. 131; p. 228; p. 250; pp. 330-332; p. 350; Supp. R.

[5] On the day after the incident, an eyewitness who observed what occurred called 911 and reported the perpetrator's vehicle had a paper tag. (R. p. 412; pp. 414-416; State's Ex. # 38 (911 Call Recording)).

p. 15). However, due to a lack of certainty on her part, Victim did not end up identifying anyone at that time.[6] (R. p. 119; p. 132; p. 168; pp. 228-229; p. 331).

Following that, Investigator Griffith consulted with an assistant solicitor about his potential next steps in the investigation and decided to see if Victim would be able to recognize Appellant if she saw him in person. (R. p. 120; pp. 137-138; p. 332; p. 350). A day or two later, Investigator Griffith drove Victim to Appellant's residence, and, upon seeing Appellant's black Jeep Cherokee parked outside, Victim immediately identified it as the perpetrator's vehicle.[7] (R. pp. 120-122; pp. 135-136; p. 168; pp. 229-230; pp. 238-239; p. 251; pp. 331-334; pp. 513-514). Two other non-uniformed officers then went to Appellant's door and lured him outside by asking to speak with him about his vehicle's expired tag. (R. p. 121; pp. 148-149; p. 333; pp. 367-368). As soon as Victim saw Appellant when he exited his home, she became emotional, identified him as the man who had grabbed her, and expressed absolute certainty in that identification. (R. p. 122; p. 124; pp. 168-169; pp. 230-231; p. 251; pp. 333-334).

In light of Victim's identification, Investigator Griffith met with Appellant, who was sixty-seven years old at the time, on June 15, 2018, and spoke with him about the incident. (R. pp. 288-289; p. 296; p. 334; p. 341). During that conversation, Appellant—after being informed of and waiving his rights—denied trying to grab any women on the date of the incident while claiming they had the "wrong person." (R. p. 289; pp. 335-336; State's Ex. # 17 (First Interview Recording)). However, Appellant, who seemed nervous, did admit he had been in the South Waccamaw area on that date, and he further admitted he was driving a rented black Jeep with a

[6] Later on during trial, Victim indicated she thought the suspect was, in fact, in the photographic lineup but explained she did not want to make an identification from the lineup unless she was certain. (R. pp. 165-166; p. 229).

[7] Appellant's residence was located roughly ten minutes away from Victim's rented beach house. (R. p. 230).

"bad" cardboard tag at that time. (R. pp. 293-294; pp. 335-336; State's Ex. # 17). Ultimately, at the conclusion of the conversation, Appellant was taken into custody and arrested. (R. p. 298; p. 334; pp. 515-516).

A few days later, Investigator Griffith again met with Appellant and spoke with him at the detention center in connection to the incident. (R. p. 338; State's Ex. # 18 (Second Interview Recording)). During that interview, Appellant—after again being informed of and waiving his rights—offered a radically-different account of what occurred. (R. p. 338; State's Ex. # 18). In his latest version of events, Appellant claimed he almost hit a jogger with his vehicle on the date of the incident, he got out of the vehicle purely to help her in some fashion, he asked her if she was alright, and she took off running in response. (R. pp. 125-126; State's Ex. # 18). However, Appellant continued to deny he ever physically touched Victim, and he emphatically asserted "[his] DNA [was] not on her." (State's Ex. # 18).

Subsequent to that, Appellant was indicted for kidnapping, and he elected to proceed forward to trial. (R. p. 89; pp. 517-518). At the outset of that trial, the trial judge initiated an in camera hearing concerning the admissibility of the evidence related to Victim's identification of Appellant as her assailant. (R. p. 105).

During the course of the hearing, Investigator Griffith detailed the events surrounding Victim's identification of Appellant as the perpetrator. (R. pp. 106-139). In doing so, the investigator discussed the unsuccessful attempt to obtain an identification of Appellant using the photographic lineup, and he further explained he believed Victim's failure to make such an identification was due to the poor quality of Appellant's lineup picture, which he noted was the only one available at that time and which did *not* depict Appellant at his age at the time of incident. (R. pp. 117-120; pp. 131-132; pp. 137-138). Likewise, regarding the show-up

identification procedure employed, Investigator Griffith explained he believed it was necessary due to the urgent nature of the crime, which occurred in an area crowded with vacationers at that time of year. (R. p. 110; pp. 135-136). He further explained the show-up was only performed after the photographic lineup was unsuccessful, Victim's identification upon seeing Appellant in person was immediate and certain, and the use of the show-up could have eliminated Appellant as a suspect and allowed them to shift their investigation to the real perpetrator if he had not been identified. (R. pp. 118-122; pp. 124-125; pp. 137-139). Beyond that, Investigator Griffith noted Appellant subsequently admitted he had, in fact, had contact with Victim on the date of the incident. (R. pp. 125-126).

Likewise, Lieutenant Robert Sarvis, who was one of the officers from the Georgetown County Sheriff's Office that assisted with the investigation, recounted his involvement in the matter. (R. pp. 140-156). More specifically, he noted the investigation was an urgent one because the incident involving Victim—along with a similar incident that happened hours later in Horry County—occurred in a highly-populated tourist area with a constant influx and efflux of people. (R. pp. 141-142). Additionally, he noted he assisted with the show-up and was *not* in uniform when he approached the door of Appellant's residence. (R. p. 149). Furthermore, he explained he never considered attempting to conduct a physical lineup due to the fact one was not feasible since they did not believe they had a basis to arrest Appellant prior to the identification and they did not have the resources needed to quickly find five similar-looking individuals to use in that type of lineup. (R. pp. 149-150).

Finally, Victim recounted the details surrounding the incident, her viewing of the photographic lineup, and her identification of Appellant and Appellant's vehicle during the show-up. (R. pp. 157-182). In recounting those events, Victim explained the incident occurred

on the morning of a sunny day, she encountered Appellant and his vehicle more than once on that date, she looked into Appellant's eyes, and she was within arm's reach of him during the incident. (R. pp. 159-163; p. 178; p. 181). Similarly, regarding the show-up, she noted she was only advised she was going to view a "possible" suspect at that time, she was *not* advised of any of the details of the investigation prior to viewing Appellant, she instantly recognized Appellant and his vehicle upon seeing them in person, she was completely certain of her identification, and she had"[n]o doubt" Appellant was the perpetrator. (R. pp. 168-169; pp. 175-176; p. 179; pp. 181-182). Furthermore, Victim explained she would "never forget" what Appellant's eyes looked like during the incident, and she confirmed she would have known Appellant was the perpetrator upon seeing him in person even if she had not seen his vehicle. (R. p. 162; p. 177).

Following the presentation of that testimony, defense counsel argued the identification evidence should be suppressed as the product of an unreasonably and unnecessarily suggestive identification procedure. (R. pp. 185-186). As support for that contention, defense counsel maintained Appellant's picture in the photograph lineup was clear, the composite sketch purportedly looked nothing like Appellant and did not fit his description, and the presence of the vehicle at the location of the show-up was suggestive. (R. pp. 183-185).

Conversely, the solicitor asserted the identification should be found to be admissible based on the totality of the circumstances. (R. pp. 187-190). Regarding those circumstances, the solicitor noted Victim had two distinct opportunities to view the perpetrator on the date of the incident, the viewings occurred on a well-lit day, Victim looked directly at the perpetrator's face during the incident, Victim's description was largely accurate and only slightly off as to Appellant's age, the composite sketch prepared with Victim's input was sufficiently accurate to lead to Appellant being identified from it, Victim's actions during the photographic lineup

demonstrated her carefulness and desire to avoid picking the wrong person unless certain, and Victim expressed complete certainty as to the identification she ultimately made. (R. pp. 187-189). Furthermore, the solicitor noted Appellant himself personally confirmed the accuracy of Victim's identification through the statements he made after his arrest. (R. pp. 189-190).

Upon considering the arguments of counsel, the trial judge began the applicable two-part analysis and, pursuant to the first part of that analysis, found—without offering any explanation as to his reasoning—the identification procedure employed was "clearly" not "a proper procedure." (R. p. 191). The trial judge then shifted to the second part of the analysis, which involved consideration of whether the identification was nevertheless so reliable no substantial likelihood of misidentification existed under the circumstances involved. (R. p. 191). Looking to the relevant circumstances, the trial judge noted Victim had an opportunity to observe both the perpetrator and his vehicle twice on the date of the incident from close proximity on a clear day, Victim saw the perpetrator's face clearly, and Victim focused her attention on his eyes and face. (R. p. 192). Likewise, the trial judge noted Victim provided a description of sufficient accuracy for Appellant to be identified through a composite sketch prepared with her input. (R. p. 192). Furthermore, the judge noted the identification procedure occurred just three days after the incident, Victim was certain of her identification of Appellant as the perpetrator, and Victim made the identification immediately upon seeing the vehicle and Appellant. (R. pp. 192-193). Based on all those factors, the trial judge concluded no substantial likelihood of misidentification existed in Appellant's case and, therefore, denied the suppression motion. (R. p. 193).

Following the trial judge's ruling, the trial proceeded forward, and Victim testified before the jury about her frightening experiences on the date of the incident. (R. pp. 207-244). As part

of her testimony, Victim identified Appellant as the man who grabbed her in the courtroom, and she expressed absolute certainty of her identification. (R. p. 231).

In addition to that, the officers and other individuals who responded in connection to the incident testified about what occurred along with what was uncovered during the ensuing investigation. (R. pp. 245-254; pp. 258-261; pp. 264-279; pp. 281-286; pp. 288-300; pp. 314-353; pp. 362-381). Additionally, testimony was presented regarding the circumstances surrounding Victim's out-of-court identification of Appellant, and the photographic lineup and composite sketch were introduced along with a candid photograph of Appellant taken around the time of the incident in order to assist the jury in assessing the reliability of the identification evidence. (R. pp. 284-286; pp. 330-334; pp. 367-368; pp. 379-380; Supp. R. p. 8; p. 15; p. 19). Likewise, recordings of Appellant's wildly-inconsistent statements to law enforcement were admitted into evidence and played for the jury. (R. pp. 290-291; pp. 340-341; State's Ex. # 17; State's Ex. # 18). Similarly, several recordings of calls Appellant placed to family members from the detention center were introduced and played for the jury. (R. pp. 403-408; State's Ex. # 31 (Jail Call Recording); State's Ex. # 33 (Jail Call Recording); State's Ex. # 35 (Jail Call Recording); State's Ex. # 37 (Jail Call Recording)). Significantly, during those candid calls, Appellant provided shifting accounts to his family members and—after initially denying ever touching anyone—ultimately admitted he physically grabbed a woman multiple times. (State's Ex. # 31; State's Ex. # 33; State's Ex. # 35; State's Ex. # 37). Furthermore, testimony was presented linking Appellant to a black Jeep Cherokee consistent with the one involved in the incident and establishing he altered his appearance shortly after the incident by getting rid of the hair on the sides of his head. (R. p. 267; pp. 270-271; pp. 274-276; p. 278; pp. 302-312). Finally, two eyewitnesses testified about their observations on the date of the incident, and they

described seeing events strikingly consistent with Victim's account of what happened to her. (R. pp. 411-429).

Ultimately, following the presentation of all that testimony and evidence, the parties presented their closing arguments to the jury, the trial judge instructed the jury on the applicable law, and the jurors began their deliberations.[8] (R. pp. 451-476; pp. 483-496). Roughly ninety minutes after that, the jury unanimously convicted Appellant of the lesser-included offense of attempted kidnapping. (R. p. 496; pp. 502-503).

[8] As part of his jury instructions, the trial judge specifically explained the State had the burden of proving identity beyond a reasonable doubt and the jurors had to consider the accuracy of the identification evidence when determining whether the State met its burden of proof. (R. pp. 486-487).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on an evidentiary matter absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); see also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

The trial judge did not abuse his broad discretion by admitting evidence of the victim's out-of-court and in-court identifications of Appellant as the perpetrator of the charged offense because: (1) the show-up identification procedure that was employed in Appellant's case was not *unnecessarily* suggestive under the specific circumstances involved; and (2) even if the show-up was unnecessarily suggestive, the identification evidence was nonetheless sufficiently reliable under the totality of the circumstances such that no substantial likelihood of misidentification existed due to the strong indicia of reliability present.

Appellant contends the trial judge reversibly erred by admitting evidence of Victim's identification of him as the perpetrator of the charged offense. In support of that contention, Appellant maintains the show-up employed by law enforcement was unnecessarily suggestive and—contrary to the conclusion reached by the trial judge—victim's identification was not reliable due to the taint that purportedly resulted from the identification procedure used. To the contrary, the trial judge properly declined to suppress the identification evidence because the show-up identification procedure employed in Appellant's case was not *unnecessarily* suggestive under the specific circumstances involved. Moreover, even if the show-up identification procedure was unnecessarily suggestive, the trial judge nevertheless properly admitted the identification evidence because Victim's identification of Appellant as the perpetrator of the charged offense was sufficiently reliable under the totality of the circumstances such that there was no very substantial likelihood of misidentification. For those reasons, the trial judge did not abuse his broad discretion by admitting the identification evidence, and there are no valid grounds upon which to disturb that sound evidentiary ruling on appeal. Appellant's conviction should be affirmed.

When evidence of an eyewitness identification is introduced during a criminal trial, a defendant may be deprived of due process of law if that identification was the product of unnecessarily suggestive circumstances arranged by government officials, such as law

enforcement officers, and a very substantial likelihood of irreparable mistaken identification exists as a result of those suggestive circumstances. Neil v. Biggers, 409 U.S. 188, 197-198 (1972); see Perry v. New Hampshire, 565 U.S. 228, 232 (2012) (recognizing "a due process check on the admission of eyewitness identification" is applicable "when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime"). In determining the admissibility of identification evidence, a court must conduct a two-prong inquiry into the matter. See Biggers, 409 U.S. at 199-200 (outlining the necessary inquiry regarding out-of-court identifications and the factors to be weighed when determining reliability).

Initially, pursuant to the first step of the applicable two-prong inquiry, it must be determined whether the identification procedure used was both suggestive *and* unnecessary under the circumstances. Biggers, 409 U.S. at 199-200; see United States v. Stevens, 935 F.2d 1380, 1389 (3rd Cir. 1991) (explaining the question of whether an identification procedure is unnecessarily suggestive depends on both its suggestiveness and necessity). In making such a determination, factors to be considered include what procedure was employed, whether the utilized procedure was warranted by an emergency or the existence of exigent circumstances, and whether an alternative procedure could have *practically* been used that would have been less suggestive. See, e.g., Manson v. Brathwaite, 432 U.S. 98, 109 (1977) (recognizing the use of a single-person photographic lineup in the absence of an emergency or the existence of exigent circumstances was unnecessarily suggestive); Stovall v. Denno, 388 U.S. 293, 302 (1967) (finding the use of a single-person show-up was not unnecessarily suggestive where Stovall's surviving victim was the only person who could exonerate or identify him, she was hospitalized at the time, and it was unclear whether she would ultimately survive her injuries). If the

identification procedure employed was not suggestive *or* was necessary under the circumstances involved, "the inquiry ends there and the court need not consider the second prong." State v. Wyatt, 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017).

Amongst the various identification procedures that may be employed, multi-person photographic lineups are generally considered to be the least suggestive of the possible procedures. See Simmons v. United States, 390 U.S. 377, 383 (1968) (characterizing an identification procedure through which a witness is shown pictures of a number of individuals without being informed which one is the suspect as "the most correct" photographic identification procedure); see also State v. Turner, 373 S.C. 121, 128, 644 S.E.2d 693, 697 (2007) (finding a photographic lineup not to be unduly suggestive where Turner did not stand out in comparison to the other individuals depicted in it); State v. Patterson, 337 S.C. 215, 230, 522 S.E.2d 845, 852 (Ct. App. 1999) (finding "no evidence whatsoever of suggestiveness" existed when no testimony or other evidence was presented suggesting the officer who showed the photographic lineup to the victim in Patterson's case expressly or implicitly suggested which photograph was of a suspect and when the photographs included in the lineup did not stand out from one another, were of comparable size and composition, and contained subjects that were similar to one another in regard to appearance, age, and physical characteristics). Meanwhile, single person show-ups are disfavored because they are inherently suggestive. State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999).

Importantly though, "[m]ost eyewitness identifications involve some element of suggestion[,]" and suggestiveness alone does *not* mandate the exclusion of identification evidence. Perry, 565 U.S. at 244; see State v. Stewart, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980) ("[S]uggestiveness alone does not require the exclusion of evidence."); State v. Brown,

356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct. App. 2003) ("Suggestiveness alone does not mandate the exclusion of evidence."). Accordingly, there are no bright line rules concerning identification procedures, and the admissibility of identification evidence following an identification made during such a procedure—including a show-up—will be controlled by the particular facts and circumstances of each individual case. Gibbs v. State, 403 S.C. 484, 494, 744 S.E.2d 170, 175 (2013); see Perry, 565 U.S. at 232 ("An identification infected by improper police influence . . . is not automatically excluded."); Biggers, 409 U.S. at 198 ("[T]he admission of evidence of a showup without more does not violate due process."); Dotch v. State, 67 So. 3d 936, 953 (Ala. Crim. App. 2010) ("[D]espite the danger in the reliability of an identification of a perpetrator from a one-man showup, it is permitted where conducted promptly after the commission of a crime or demanded by necessity, emergency or exigent circumstances." (citations and internal quotations omitted)).

When the identification procedure involved was a show-up, the following factors should be considered to determine its propriety: (1) how quickly the show-up was conducted after the alleged crime; (2) whether the show-up was conducted near the scene of the crime; (3) whether the witness's memory was still fresh at the time of the show-up; (4) whether the suspect has had time to alter his looks or dispose of evidence; and (5) whether the show-up may expedite the release of innocent suspects and enable the police to determine whether they need to continue searching for the true perpetrator. Brown, 356 S.C. at 503-504, 589 S.E.2d at 785; see also Willis v. Garrison, 624 F.2d 491, 493-494 (4th Cir. 1980) (acknowledging show-ups are inherently suggestive but recognizing prompt on-the-scene show-up identifications can promote fairness by enhancing the reliability of the identifications and permitting the expeditious release of innocent suspects). Significantly, the use of a show-up is less objectionable the closer the

show-up is in time and proximity to the scene of the crime. Brown, 356 S.C. at 504, 589 S.E.2d at 785. Furthermore, a show-up may even be proper where the police refer to the suspect as a suspect and the suspect is handcuffed and in the presence of law enforcement officers. Id.

In the event an identification procedure is found to have been unnecessarily and unduly suggestive, it must then—pursuant to the second step of the applicable two-prong inquiry—be determined whether the suggestiveness of the procedure resulted in a substantial likelihood of misidentification. State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). Critically, identification evidence may still be admissible if the State can prove by clear and convincing evidence the identification is reliable notwithstanding the suggestiveness of the identification procedure employed. State v. Govan, 372 S.C. 552, 559, 643 S.E.2d 92, 95-96 (Ct. App. 2007); see State v. Traylor, 360 S.C. 74, 82, 600 S.E.2d 523, 527 (2004) ("Even assuming an identification procedure is suggestive, it need not be excluded so long as, under all the circumstances, the identification was reliable notwithstanding the suggestiveness."). When determining whether the identification is reliable, a court must look to the totality of the circumstances, and the following factors are pertinent to the inquiry: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the identification. Govan, 372 S.C. at 559, 643 S.E.2d at 96; see also State v. Scipio, 283 S.C. 124, 127, 322 S.E.2d 15, 17 (1984) ("The reliability of an identification is determined by the facts."). Upon examining those factors, a court ordinarily should admit identification evidence and allow the jury to determine its worth "if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances[.]" Perry, 565 U.S. at 232; see

Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983) (instructing the exclusion is a "drastic sanction" and should be "limited to identification testimony which is manifestly suspect").

In the case sub judice, the show-up identification procedure employed—although unquestionably suggestive—was not *unnecessarily* suggestive under the specific circumstances involved.[9] See Wyatt, 421 S.C. at 312, 806 S.E.2d at 711 ("[T]he analysis under the first prong is not complete without considering the necessity of the procedures."). Looking to those circumstances, the crime involved in Appellant's case was committed during a prime vacation month at a tourist location where non-resident visitors to the area regularly come and go in large numbers, and, based on that, officers had an urgent need to quickly be able to confirm or dispel their suspicions regarding Appellant so they could rapidly shift their investigation in a different direction before the perpetrator—who potentially could have only been temporarily visiting Garden City *just like Victim*—left the area if he was not, in fact, actually Appellant as suspected. See id. at 313-314, 806 S.E.2d at 712 (finding a show-up to be necessary when its use enabled officers to determine whether they needed to continue searching "before other suspects could leave the area"); see also Baynes v. State, 463 S.E.2d 144, 146 (Ga. Ct. App. 1995) (recognizing factors than may render a show-up identification "permissible if not desirable" include "the necessity of a speedy police investigation and the necessity to resolve promptly any doubts as to identification so as to enhance the accuracy and reliability of the identification, thus expediting the release of innocent subjects"); cf. Brisco v. Ercole, 565 F.3d 80, 91 (2d Cir. 2009) (explaining it was not unreasonable to conclude a show-up was not *unnecessarily* suggestive

[9] Significantly, when ruling on the admissibility of the identification evidence, the trial judge did not make any specific findings as to why the procedure employed in Appellant's case was not necessary under the circumstances involved. (R. p. 191). Instead, the trial judge simply—and without further explanation or analysis—stated: "Clearly, this was not a *proper* procedure. I don't think anybody can argue with that." (R. p. 191) (emphasis added).

because "the procedure enabled the officers to determine whether they 'had their man' while the witness's memory was still fresh and while the maroon shorts were still available as evidence" and noting "the officers could resume their search for the offender" if no identification was made during the show-up). Relatedly, prior to the show-up, the officers had attempted *unsuccessfully* to employ a less-suggestive identification procedure in the form of a photographic lineup, but that particular procedure was not effective due to the unavailability of any recent photographs of Appellant that accurately reflected what he looked like at that time.[10] See Wyatt, 421 S.C. at 315, 806 S.E.2d at 712 (finding a show-up to be necessary when another type of identification procedure would have been "unworkable" under the circumstances involved); cf. State v. Bell, 537 A.2d 496, 499 (Conn. App. Ct. 1988) (concluding a show-up was "reasonably necessary" such that no further analysis was necessary when "[t]he victim, who had given a complete description of her assailant to the police, was unable before then to identify her attacker from photo arrays within the short interval before his apprehension, finding the process 'overwhelming' "). Furthermore, as explained during trial, it was not practical or feasible for the officers to attempt to conduct a physical in-person lineup due to the officers' inability to timely find individuals with similar physical characteristics to Appellant, and—as Appellant now seems to be suggesting on appeal—the officers may have lacked a probable cause basis to arrest Appellant until he was positively identified by Victim such that they had no basis to take him into custody for purposes of conducting a physical in-person lineup or obtaining a new photograph that could be used in a more-accurate photographic lineup. See Wyatt, 421 S.C. at 314, 806 S.E.2d at 712 (finding a show-up to be necessary when "serious questions" existed as to

[10] Notably, in the candid photograph of Appellant's face taken around the time of the incident, Appellant looked quite a bit different than he did in the cropped image of him used in the photographic lineup shown to Victim, which helped to explain why Victim was unable to conclusively identify him from that lineup. (Supp. R. p. 15; p. 19).

whether an officer had probable cause to arrest Wyatt at the time of the show-up); see also United States v. Maguire, 918 F.2d 254, 263 (1st Cir. 1990) ("A suspect's inclusion in two photospreads, even with the same photo, is not constitutionally impermissible."). Considering the officers' pressing need to identify the perpetrator of a brazen attempt to unlawfully snatch at least one complete stranger—and possibly more—off the street in a high-traffic tourist area coupled with the fact the officers had no other workable means by which they could confirm or dispel their suspicions concerning Appellant, the show-up identification employed—while certainly suggestive—was not *unnecessary* under the specific circumstances involved. See Perry, 565 U.S. at 238-239 ("[D]ue process concerns arise only when law enforcement officers use an identification procedure that is both suggestive *and unnecessary*." (emphasis added)); cf. State v. Gambrell, 274 S.C. 587, 590, 266 S.E.2d 78, 81 (1980) (concluding the use of a photographic lineup that did not result in a conclusive identification followed by an in-person lineup in which Gambrell was the only suspect involved who had appeared in the earlier lineup was not "impermissibly suggestive" under the circumstances involved).

Meanwhile, looking to the characteristics of the show-up itself, it was conducted just a few days after the incident while Victim's memory was still at its freshest, Appellant was neither handcuffed nor surrounded by uniformed officers at that time, no spotlights or anything similar were directed at Appellant to unduly highlight him, and Appellant had not yet even gotten rid of the vehicle used in the incident by that point.[11] See State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000) (indicating a show-up may be proper when—amongst other things—it occurs when the witness's memory is still fresh and the suspect has not had time to

[11] Interestingly, Appellant did, in fact, get rid of the vehicle a short time after the officers made contact with him for the purpose of conducting the show-up identification procedure. (R. p. 229; pp. 306-308).

alter his looks *or dispose of evidence*); cf. Brisco, 565 F.3d at 93 (concluding the presence of maroon shorts at a show-up conducted after the victim described the burglar as wearing such shorts "add[ed] to, rather than detract[ed] from, the reliability" of the victim's identification since "Brisco's holding of the maroon shorts singled him out as the suspected burglar only if [the victim] was also able to identify the shorts as the ones seen on the burglar"). Similarly, helping to minimize the suggestiveness inherent in any show-up, Victim was only advised she was going to view a possible suspect, no information was provided to her about why Appellant in particular was suspected, and no pressure of any kind was placed on Victim to influence her or lead her to believe she was invariably required to make an identification during the show-up. See State v. Hilliard, 535 S.W.3d 341, 344 (Mo. Ct. App. 2016) ("A show-up is not impermissibly suggestive as long as the police do not unduly pressure the witness to make a positive identification."); Brown, 356 S.C. at 504, 589 S.E.2d at 785 ("A show-up may be proper even though the police refer to the suspect as a suspect, and even though the suspect is handcuffed or is in the presence of the police."). As a result, the officers' use of that suggestive-but-nevertheless-necessary-under-the-circumstances identification procedure was not constitutionally improper, and the identification evidence was properly admitted during Appellant's trial. See State v. Roberson, 935 N.W.2d 813, 819 (Wis. 2019) ("[I]f a suggestive law enforcement procedure was necessary, the state action that resulted in an identification will not implicate due process concerns."); cf. Wyatt, 421 S.C. at 316, 806 S.E.2d at 713 ("The trial court was correct not to suppress [the witness]'s identification. However, the court should have considered the necessity of the police procedures under the first prong of Biggers instead of going straight to the second prong.").

Critically though, even assuming the identification procedure employed actually was *unnecessarily* suggestive, the identification evidence was nonetheless still admissible during trial

because—just as the trial judge correctly found—no substantial likelihood of irreparable misidentification existed under the specific circumstances of Appellant's case. Looking to the relevant circumstances, Victim had an excellent opportunity to view Appellant during the incident because: (1) the incident occurred outdoors on a sunny day during daylight hours; (2) Victim encountered the perpetrator not once but twice over the course of a short period of time; (3) nothing was presented suggesting the perpetrator wore a mask or anything else that would have hidden any of his features from view; (4) Victim was able to and did look directly at the perpetrator's face and eyes; and (5) Victim was in very close proximity to the perpetrator since he was within range to physically grab her. Cf. Turner, 373 S.C. at 128, 644 S.E.2d at 697 (finding identification evidence to be reliable where the victim had an ample opportunity to view her assailant at the time of the crime and had a "full facial view of him while he asked her questions"); Stewart, 275 S.C. at 449-450, 272 S.E.2d at 629 (finding identification evidence to be reliable even though the victim was only able to view the perpetrator's face for *five to seven seconds* during the incident). Additionally, Victim's attention was heightened due to the fact she was physically grabbed by a stranger, which would undeniably be a terrifying and startling event to any normal person, and the event was so personally startling to Victim she affirmed she would *never* forget how the perpetrator's eyes looked at that time. See Howard v. Bouchard, 405 F.3d 459, 473 (6th Cir. 2005) ("Generally, we place greater trust in witness identifications made during the commission of a crime because the witness has a reason to pay attention to the perpetrator."); Govan, 372 at 560, 643 S.E.2d at 96 (recognizing a victim's attention would have been heightened during an armed robbery); Blassingame, 338 S.C. at 252, 525 S.E.2d at 541-542 ("A person in fear of his life presumably has a more acute degree of attention to his surroundings than a mere passerby."). Likewise, Victim provided a description of both the perpetrator and the

perpetrator's vehicle after the crime, and her descriptions were both largely accurate and of good enough quality to lead to the creation of a composite sketch from which Appellant was able to be identified by someone familiar with him. Cf. Brisco, 565 F.3d at 92 (rejecting the suggestion an identification was unreliable due to the fact Brisco was thirty-eight years old while the perpetrator was initially described as being eighteen to twenty years old and noting "age can be a particularly difficult characteristic to describe accurately"); Govan, 372 S.C. at 555, 643 S.E.2d at 93-94 (finding an out-of-court identification to be sufficiently reliable based on the consistency of the prior description even though the description of the suspect was simply "a black guy in a long black jacket and black hat (or rag)"); State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct. App. 1993) (finding identification evidence to be reliable even though the victim described the robber as wearing a ski jacket and cap and Johnson was not wearing a jacket or hat when he was apprehended). Furthermore, Victim immediately recognized both Appellant and his vehicle upon seeing them in person, she expressed absolute certainty in her identification of Appellant as the perpetrator, she was still completely certain of her identification by the time of trial, and the reliability of her expressed certainty was enhanced by the fact she had previously declined to identify anyone from the earlier photographic lineup due to a lack of total certainty on her part, which showed she was both conscious of the need to avoid wrongfully misidentifying anyone and only willing to make an identification if and when she was sure of it. Cf. United States v. Leonardi, 623 F.2d 746, 756 (2d Cir. 1980) (concluding the reliability of an identification was enhanced by the fact the witness had previously refused to identify anyone from earlier lineups, which demonstrated he was not readily susceptible to suggestive influences); State v. Frazier, 394 S.C. 213, 222, 715 S.E.2d 650, 654 (Ct. App. 2011) ("Although Sanders's description of Frazier's jacket was incorrect, she demonstrated a high

degree of certainty in her identification during the show-up."). Finally, Victim identified Appellant as the perpetrator within just days of the incident, which meant only a brief period of time elapsed between the incident and her identification. See United States v. Jones, 454 F.3d 642, 650 (7th Cir. 2006) (concluding "nine days is a relatively short delay" when determining the reliability of identification evidence); United States v. Gatewood, 230 F.3d 186, 193 (6th Cir. 2000) (finding identifications to be reliable when they occurred "only four days later"); United States v. Downs, 230 F.3d 272, 275 (7th Cir. 2000) ("[F]ive days between the incident and the line-up is not such a long span of time that memory lapses would be a problem.").

When considering the totality of those circumstances, strong-enough indicia of reliability were present such that the identification evidence in Appellant's case was sufficiently reliable to be admissible and no substantial likelihood of misidentification existed. See State v. Tisdale, 338 S.C. 607, 614-615, 527 S.E.2d 389, 393 (Ct. App. 2000) (finding the identification evidence was properly admitted where the circumstances surrounding the out-of-court identifications supported a finding the evidence was reliable); see also Perry, 565 U.S. at 245 ("[I]f the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth."). And, significantly, the reliability of that identification was further enhanced by the fact *Appellant himself* eliminated any conceivable doubts as to its accuracy by subsequently confirming he did, in fact, grab Victim on the date of the incident through both his statements to law enforcement and to his own family members.[12] See Brisco,

[12] Beyond that, even assuming the admission of the identification evidence was somehow improper, the admission of that evidence was entirely harmless because the other evidence presented during trial, which included Appellant's multiple incriminating admissions confirming his involvement in the incident, the identification of Appellant from the composite sketch, and Appellant's possession of a vehicle matching the one involved in the incident, overwhelmingly

565 F.3d at 94 (explaining the factors identified in Biggers "do not necessarily exhaust the possible ways in which identification evidence may prove to be reliable or unreliable" and noting "the Supreme Court was careful to say that the factors to be considered 'include' the five named ones"); cf. Gambrell, 274 S.C. at 591, 266 S.E.2d at 81 (concluding no substantial likelihood of misidentification existed such that identification evidence was properly admitted during trial based in part on the fact "the victim's identification of [Gambrell] was corroborated by the jewelry store employee's positive identification of [Gambrell] as the one who sold the ring").

Accordingly, because the identification procedure employed in Appellant's case was not *unnecessarily* suggestive and because—even if it was—no substantial likelihood of misidentification existed under the totality of the circumstances, the trial judge did not abuse his broad discretion by declining to employ the drastic remedy of suppressing the identification evidence and prohibiting Victim from identifying her victimizer during trial.[13] See Harker, 800

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established Appellant was, in fact, the perpetrator in an entirely independent fashion from Victim's out-of-court and in-court identifications of him. See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result."); see also Arizona v. Fulminante, 499 U.S. 279, 296 (1991) ("A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." (citations, internal quotations, brackets, and ellipsis omitted)); cf. State v. Thompson, 276 S.C. 616, 621, 281 S.E.2d 216, 219 (1981) ("[Thompson]'s accomplice testified, subject to cross examination, against [Thompson] at trial and identified him in court. In light of the accomplice's damaging testimony and other corroborative evidence linking [Thompson] to the crime, the improper in-court identification by the clerk was merely cumulative to independent and overwhelming evidence of guilt.").

[13] On appeal, Appellant contends both the identification *and* his "subsequent statements and jail calls" should have been suppressed due to the purportedly unnecessarily suggestive identification procedure employed in his case, and, in doing so, he appears to be alleging—in a wholly conclusory fashion—the identification procedure somehow rendered his arrest illegal. (App. Br. pp. 9-10). First, notwithstanding the conclusory nature of Appellant's freshly-conceived

F.2d at 443 ("The exclusion of evidence from the jury is . . . a drastic sanction, one that is limited to identification testimony which is manifestly suspect."); see also Perry, 565 U.S. at 232 ("[T]he reliability of relevant testimony typically falls within the province of the jury to determine. . . .

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appellate allegation concerning the lawfulness of his arrest, neither that allegation nor Appellant's expanded appellate challenge to the admission of the evidence of his various incriminating statements was properly preserved for appellate review because those particular matters were never raised to or ruled upon by the trial judge. See State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) (instructing an issue cannot ordinarily be raised or considered on appeal unless it was first presented to and ruled upon by the trial judge); State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (finding an argument to be abandoned where it was raised in a conclusory manner). Instead, during trial, defense counsel *solely* challenged the admission of the identification evidence when objecting based on the purported suggestiveness of the identification procedure involved and never asserted that challenge extended to the evidence of the statements Appellant made after his arrest. (R. pp. 182-186). More specifically, defense counsel expressly—and only—"ask[ed] the [trial judge] to exclude the lineup[and] exclude the identification as it's unreasonable and unnecessarily suggestive." (R. pp. 185-186). As a result, Appellant's apparent attempt to challenge the lawfulness of his arrest on appeal along with the evidence uncovered as a result of that arrest cannot now properly be considered or addressed for the first time by this Court under South Carolina's well-established issue preservation rules. See State v. Jones, 435 S.C. 138, 145, 866 S.E.2d 558, 561 (2021) ("Preservation rules are intended to ensure that appellate courts review considered decisions of our trial courts and that issues are not being raised for the first time on appeal."). Second, even if that glaring issue preservation problem could somehow simply be ignored, Appellant's new appellate contention is likewise wrong on the merits because the issue of whether the identification evidence was admissible at trial was entirely separate and distinct from the issue of whether there was probable cause for an arrest, which can be—and frequently is—based on evidence that would not be admissible at trial. See Stansbury v. Wertman, 721 F.3d 84, 91 n. 7 (2d Cir. 2013) ("Bigger concerns the admissibility of identifications at criminal trials, not whether an identification can support probable cause to arrest a suspect. Application of the Biggers framework requires the kind of hindsight that, while useful in determining whether evidence should be admitted at trial, is inappropriate when deciding whether a police officer has probable cause to arrest."). Thus, even if Appellant was somehow correct regarding the admissibility of the identification evidence at trial, the State's inability to properly admit the identification evidence *during trial* would nevertheless have in no way rendered Appellant's arrest unlawful or lacking in probable cause. See Michigan v. DeFillippo, 443 U.S. 31, 36 (1979) ("We have made clear that the kinds and degree of proof and the procedural requirements necessary for a conviction are not prerequisites to a valid arrest."); Phillips v. Allen, 668 F.3d 912, 915 (7th Cir. 2012) ("Identification by a single eyewitness who lacks an apparent grudge against the accused person supplies probable cause for arrest."); cf. People v. Nelson, 436 N.Y.S.2d 505, 507 (N.Y. App. Div. 1981) ("[A]lthough not able to be used at his trial, Perez' identification of Usher may properly provide a basis for probable cause to arrest him."), abrogated on other grounds by People v. Cintron, 606 N.Y.S.2d 52 (N.Y. App. Div. 1993).

[I]f the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth."); cf. Wyatt, 421 S.C. at 314, 806 S.E.2d at 712 ("The procedure used for [the witness]'s identification was suggestive, but the suggestive procedure was necessary under the circumstances of this case. Under the first prong of Biggers, therefore, the trial court correctly denied the motion to suppress."); State v. Washington, 323 S.C. 106, 112, 473 S.E.2d 479, 482 (1996) ("Because the jury had the opportunity to observe the witness and attach the credibility it deemed proper to his testimony, including the certainty or uncertainty of his identification, the identification is not unreliable."). And, by declining to impose that drastic sanction, the trial judge correctly left the question of the reliability of the identification evidence for the capable jurors to decide, which in no way prevented Appellant from pointing out to the jury all the reasons he believed Victim's identification should not be credited. See Govan, 372 S.C. at 556, 643 S.E.2d at 94 ("The decision to admit an eyewitness identification is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of that discretion, or the commission of prejudicial legal error."); see also Perry, 565 U.S. at 245 ("[T]he jury, not the judge, traditionally determines the reliability of evidence."); Brathwaite, 432 U.S. at 116 ("[W]e cannot say that under all of the circumstances of this case there is a 'very substantial likelihood of irreparable misidentification.' Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is *customary grist for the jury mill*. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." (citation omitted and emphasis added)). Appellant's conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

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October 5, 2022

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2021-000570

THE STATE,

Respondent,

vs.

JEREMIAH DICAPUA,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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