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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

vs.

DAVID CROCKETT ROBINSON,

Appellant.

Appellate Case No. 2021-001039

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I.

Victim's identification of Appellant was not unnecessarily suggestive and occurred only an hour after the robbery. Appellant matched Victim's description, and the detective explained it was more prudent to conduct a show-up identification while the crime was fresh to determine if Appellant was the robber and ensure his quick release if he was not identified as the robber. There was not a substantial likelihood of misidentification – Appellant carried Victim's cell phone which is how law enforcement found him

II.

Victim's redirect testimony expressly refuted what the defendant sought to imply during cross-examination and did not constitute new matter that entitled Appellant to recross Victim during the pretrial hearing on her identification of Appellant. Further, the issue is not preserved for review.

STATEMENT OF THE CASE

Appellant Robinson was convicted by a jury of armed robbery and possession of a weapon during a violent crime following trial on September 7-9, 2021, before the Honorable R. Ferrell Cothran. Judge Cothran sentenced Appellant to twenty-seven years' imprisonment for armed robbery and a concurrent sentence of five years' imprisonment for the weapons charge.

STATEMENT OF FACTS

During an armed robbery, Appellant Robinson took everything he could from Victim, a young woman walking down the street with a shopping bag, her laptop, her Michael Kors bag, and her cellphone. The cellphone got him, because police were able to track his movements as he rode away in a vehicle. The officers found him hiding in the woods.

Victim lived in New York and designed lighting for theatre. She shopped during time off from some free-lance work that brought her to Charleston. She bought jeans and a shirt from Urban Outfitters; the receipt was in the pink, reusable bag. She also carried her laptop, hotel key card, and makeup bag. Tr. pp. 144-48. She walked on Queen Street, texting and not paying attention. She moved to the side to make way for the pedestrian that she was vaguely aware of behind her, then she heard a voice tell her not to scream. The robber wore a bandana that came up below his nose. She looked to see a gun pointed to her side, and the robber also carried a black bag that was sort of like a duffle bag and sort of like a backpack. Tr. pp. 149-52. Victim pleaded with the robber to let her keep her laptop. His response: "I'll fucking shoot you." The robber took the Urban Outfitters bag, her Michael Kors bag, and her laptop. She tried to hide her cell phone but the robber took that too and ran away. Tr. pp. 152-53.

Victim yelled for help and some people on a golf cart promised to call 911 when they arrived back home, but they did not wait with her because they had their children with them. Then a car came and remained with her until police arrived, which happened quickly. She described the robber to law enforcement:

> Q: Do you recall were you able to describe his hair?
>
> A: I was able to describe his hair.
>
> Q: How did you describe his hair?
>
> A: I said that it wasn't long in dreads but it wasn't very short to the head, it was just a little bit of hair.
>
> Q: Okay. Were you able to describe his height?
>
> A: Mhm. I told them, the cop that first found me, that he was the same height as that cop.
>
> Q: And did that officer share with you what height that was?
>
> A: Yeah, he said 5'10."

Tr. p. 155, line 13 – p. 156, line 2. The robber wore a white T-shirt and black pants. She told the officer about the athletic bag. Tr. p. 156, lines 3-14. She then told the officers about a mark on the robber's face:

> Q: Now, is there any other feature of this person that you were able to see during the robbery that would distinguish him from any other individual?
>
> A: Yeah, I told the police officers that he had like a scarring, dimple, pock marking on the cheek.
>
> Q: And now, you just sort of searched for words on [sort] of how to describe it, is that what you did that day as well?

A: Yeah, I used a of [sic] couple of different words because I couldn't quite place what it was.

Q: Was that part of assailant's face that was close in proximity to you during the robbery?

A: Yes, I can see the details very clearly.

Q: So, it's a detail that stood out to you at the time?

A: Very much so.

Tr. p. 156, line 14 – p. 157, line 7.

Victim realized the officers could track her phone because it was not turned off. Victim logged onto her Apple account using the officer's iPhone. The officer was able to relay the locations of the pings which tracked Victim's phone to other officers. Tr. p. 157; p. 160. Law enforcement then drove her to another location to see if the person they apprehended there was the robber. Victim did not want to get out of the car, she was understandably scared of the robber. But she was certain the person they showed her was the robber. She did want to get closer to the suspect, but she was scared. Victim testified she was "confident" about the identification. Tr. pp. 164-69. She pointed to Appellant as the person who robbed her. Tr. p. 173. During redirect examination, Victim confirmed she was confident in her out of court identification because she had a good look at the robber, and she did not feel any pressure to make a positive identification. Tr. pp. 181-82.

Lieutenant Brian Salkfeld testified he heard radio traffic that a robbery occurred. Then a suspect vehicle was identified and a passenger fled from the vehicle. He set up a perimeter by the Forge Ready Mix Concrete plant. He made his way past the piles of materials in the cement factory yard and saw someone in the woods. Ultimately other officers caught Appellant after a short foot

chase. Tr. pp. 190-93. Law enforcement found Victim's cell phone on Appellant's person and returned the phone to Victim. Tr. pp. 194-95.

Officer Eddie Henderson responded to the armed robbery on Queen and Logan. Victim gave a description of the robber and described the stolen items. Then, as testified by Victim, he was able to track Victim's phone as it passed through town and on to Interstate 26. The phone ended up stationary in the woods by the interstate. Tr. p. 201-207. Officer Henderson testified he arrived at the scene of the robbery at about 18:33. Tr. p. 210.

Tyler Karges, currently an investigator, was on patrol at the time of the robbery. He received the description of a vehicle believed to be involved in a robbery and followed the vehicle from around the intersection of Meeting and Wolfe, onto the westbound lanes of Interstate 26. He stopped the vehicle by the ramp for Harriett Street. Tr. pp. 214-17. The passenger, a black male, fled the vehicle, while the driver, a Hispanic male, stayed behind. Investigator Karges testified he located a black purse and a laptop in the vehicle. Tr. pp. 217-18.

Appellant's wallet, including a bank card with his name on it, was found by law enforcement in the grass by the exit ramp. Tr. pp. 231-34.

Ashley Wojslawowicz, a CSI tech, processed the vehicle where it was stopped on I-26. There was an open can of Coca-Cola in the cup-holder. She also processed a black athletic bag, a black purse – which sat on items that appeared to be dumped out of the purse, a hotel key card, a wallet with Victim's identification inside, a pink Urban Outfitters bag with clothing and a receipt inside, and a laptop that was locked with the screensaver with Victim's name appearing on the screen. Nine latent prints were taken from the vehicle. Tr. pp. 251-57.

Nova Grilli, the Latent Print Supervisor with the Charleston Police Department acted as the verifier of the prints analyzed by the examiner, Nadine Kirstein. Tr. pp. 274-75. A total of five lifts from four print cards matched Appellant's prints: (1) Lift 1 from the driver side hood; (2) Lift 3 from the exterior rear passenger side window; (3) Lift 6 from the exterior front passenger door panel; and (4) Lift 7, from the Coca-Cola can in the vehicle's cup-holder. Tr. p. 279.

The State also introduced Exhibit 1, a photograph that shows scabbing and acne on Appellant's cheek. State's Exhibit 1.

Sergeant Joseph Harvill drove Victim to the location where Appellant was apprehended. Victim made her identification at roughly 7:30 p.m., about an hour after the robbery. Tr. pp. 292-98. Another person that saw the incident was brought for a later identification but was unsure if Appellant was the robber. Tr. p. 313. Sergeant Harvill's testimony is discussed in more detail within the argument for the identification issue.

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). The conduct of a criminal trial is left largely to the sound discretion of the trial judge. State v. Barton, 325 S.C. 522, 529, 481 S.E.2d 439, 443 (Ct. App. 1997) (citing State v. Sinclair, 275 S.C. 608, 614, 274 S.E.2d 411, 414 (1981)). 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); 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.").

ARGUMENT

I.

Victim's identification of Appellant was not unnecessarily suggestive and occurred only an hour after the robbery. Appellant matched Victim's description, and the detective explained it was more prudent to conduct a show-up identification while the crime was fresh to determine if Appellant was the robber and ensure his quick release if he was not identified as the robber. There was not a substantial likelihood of misidentification – Appellant carried Victim's cell phone which is how law enforcement found him.

Appellant argues Victim's identification in the show up was unnecessarily suggestive and created a substantial likelihood of misidentification. The close-in-time show up identification was proper because it was fresh on the heels of Victim's opportunity to view her robber. Appellant wore the same clothes and bore the scabbing on his cheek as described by Victim. He was found with Victim's cell phone, which is how law enforcement tracked him down. He ran from the car filled with the stolen items. Contrary to Appellant's claims on appeal, Victim expressed certainty in the identification.

Neal v Biggers hearing

Prior to trial, Victim and the detective conducting the show up identification testified at the hearing pursuant to Neil v. Biggers, 409 U.S. 188, 197-198 (1972). Victim testified she is from New York City and travelled to Charleston for work. She had the day off and did some sightseeing and shopping. She was walking down Queen Street and not paying attention when a man told her not to scream and pushed a gun to her side. The man wore a bandana, but Victim could see his face above it, from below the nose to the top of his head. Tr. pp. 46-51.

The robber told her he would "fucking shoot her" when she asked him not to take her laptop. Once Appellant left, she called for help. After a vehicle stopped for her, police responded quickly to the scene. Tr. pp. 52-54. She described the robber's hair style as follows:

> Q: How did you describe [the assailant's hair], do you recall?
>
> A: I said it wasn't long, it didn't have like dreads or anything, but it wasn't shaved close. It had, like, hair.
>
> Q: So, not long dreads, not shaved close, but just hair?
>
> A: No distinguishing hair style.

Tr. p. 55, lines 1-13.

Victim described the robber as a black male and told the officer the robber was about the same height as the officer. The officer was 5'10." The robber wore a white shirt with black pants. In addition to the bandanna he wore, the robber carried a black backpack or duffel bag. Tr. pp. 55-56. The robber had a mark on his face Victim described as "like [a] scar, dimple, pock on the cheek." Tr. p. 57, lines 3-8.

As later described at trial, at Victim's suggestion, law enforcement tracked Appellant down by tracking Victim's stolen cell phone. Victim explained an officer drover her to a second location. She was fearful and did not want to get out of the patrol car. She was provided the opportunity to view Appellant from the safety of the patrol car. Tr. pp. 59-61.

Victim testified as follows:

> Q: Ms. Cox, was it your intent in that exchange to convey to the officer that that was the person who had robbed you?
>
> A: That's correct.

Q: You and the officer use some language like, that's him, like very similar, right?

A: Mhm.

Q: And then he asked you, "similar stature and body?" And you said, "similar [stature], yes."

A: Yeah.

Q: Was it your intent to convey to him that that is the same?

A: Yes.

Q: You had already testified that you had already communicated prerecording to the cop that you did not want to get out of that car.

A: Yeah, I did not want to get out of the car.

Q: What distinctive feature had you already given the police about the assailant?

A: That there were like pock, like dimple and pock or scar.

Q: So, when you say, "I wish I could see his face closer to see if there is a pock mark or something on that cheek, but it looks very similar," were you asking to get out of the car and see him or was that more aspirational?

A: I wanted to but there was no way I was about to get out of the car and be anywhere closer than where we were, for my own safety, I didn't feel comfortable.

Q: When you described to the police the irregularities in the skin, pock mark, scarring, what have you[,] were you trying to describe what you already I.D. as in State's 1, for I.D.?

A: That's correct.

Q: But you weren't close enough at the I.D. to see that?

A: I saw texture but I didn't see the –

> Q: Okay. But nevertheless, it was your intent as it seems it was interpreted by the officer, to convey that this is the person?
>
> A: Yes, that that was the person.

Tr. p. 62, line 24 – p. 64, line 18.

Victim's cell phone was returned to her that day. Other items, including the pink Urban Outfitter bag and the lap top computer were also returned to her. Tr. pp. 64-65. On cross-examination, Victim admitted she heard chatter over the police radio as she sat on the sidewalk while the officer conveyed the pings on his phone to the other officers, but she did not know what they were saying. Tr. pp. 70-71.

The last cross-examination question follows:

> Q: And given the summary of what's happened that Sergeant Adams [gave] you, did you feel confident the police had **the suspect** caught?
>
> A: Based on them taking me to go I.D. somebody? I would feel confident that that would be **a suspect**.

Tr. p. 90, lines 14-21. On redirect examination, Victim confirmed any police chatter did not influence her identification. She did not feel pressure to identify Appellant as the robber, and she would have said if she felt like the person presented did not look like the robber. Tr. pp. 92-93.

Detective Harvill was the other witness testifying during the Neil v Biggers hearing. He arrived at the scene of the robbery after receiving a call at around 6:30 p.m. An officer was already on the scene. Tr. pp. 95-96. Detective Harvill interviewed Victim who provided essentially the same description she testified to at the hearing. Tr. p. 97, lines 14-22. When presented with a photograph of Appellant from a time close to the arrest, Detective Harvill noted Appellant's left side

cheek had "a prominence of some kind of scarring." Tr. p. 98, lines 19-21.

Detective Harvill testified Victim's description of the robber matched Appellant. He noted Victim relayed information that indicated she had a good opportunity to view the robber. Her account was "very detailed" and "very clear and concise." Detective Harvill did not entertain any doubts about Victim's confidence in her identification of Appellant. Tr. p. 99, lines 2-16.

Detective Harvill testified as follows: "So, a show-up is more advantageous, particularly when you have a fairly confident victim or witness who got a fresh look at a subject with it fresh on their mind, and we think here how freshly committed is the crime." Tr. p. 100, lines 10-14. The freshness of the event presented what Detective Harvill termed a "window of opportunity" that he ideally would not want to miss. Tr. p. 100, lines 15-19.

Testifying before the jury, Detective Harvill expanded on this concept some more:

> Q: You performed with [Victim] what we call a show up I.D.?
>
> A: Yes, sir.
>
> Q: Is that the only way to identify or show a witness or have a witness identify a suspect?
>
> A: No, sir, it's not. There are two other types that can be utilized. There is a single photograph, which typically is going to be utilized for identification of people who have a known familiarity with a family member or somebody close to them. And then also what's called a photo array or sometimes you hear the terminology known as a six pack line up. It's a photo array of multiple subjects on there, one of which is the subject individual, others matching similar descriptions placed in front of the victim or witness at that time to identify.

Tr. p. 292, lines 4-19. Then Detective Harvill explained why an officer might choose to do a show-up identification:

> So, one of the complications with the photo array is the length of time sometimes it takes to obtain it. Specifically circa 2017, we sent it often times up to the SLED center to be produced. So, there is a time lapse involved with that. In this case on May 7th, we had the defendant detained there on the scene.

Tr. p. 293, lines 9-15. Detective Harvill confirmed that to arrange a six pack, all six people need to look "very similar" and that somehow, "other individuals need to be found that match basic characteristics of the suspect." Tr. p. 293, lines 21-24. Therefore, Detective Harvill explained, "[I]t takes a good amount of time for the process, ..." Tr. p. 293, line 25 – p. 294, line 5.

Therefore, Detective Harvill explained:

> In this case we had the defendant detained and this is an approximation from what I really, but within an hour of the actual time the crime occurred to the time where we could actually show up with Ms. Cox there on the scene, time is of essence, particularly the fact that Ms. Cox was very detailed in her description, she had a fresh recollection and this is a freshly committed crime. Also, to ensure that we have an obligation for due process there on the scene to ensure we have the right person, not knowing until she showed up whether or not that I.D. would be affirmed or not on the defendant. We want to make sure we had the right person and we were not detaining somebody longer than the process should have taken.

Tr. p. 294, lines 10-24.

During the hearing, Appellant's counsel attempted to establish that Victim overheard police chatter tracking Appellant down. She is likely present when she learns that the vehicle proceeding down Meeting Street and on to the interstate was stopped, Officer Henderson said, prematurely, "We got him." State's Exhibit 37 (9:55-10:20). Listening to the recording of Officer Henderson (State's Exhibit 37), by the time of the short foot chase, at 19:30-19:45, Officer Henderson seems to be talking with a different eyewitness. At approximately 22:00, Officer Henderson advises Victim is

with the detective. At 23:15-23:45, there is mention that the detective and Victim are doing an interview "right now." At 25:37-25:45, a detective is heard, in the middle of his conversation with Victim, telling Detective Harvill, "Steven said they have the second individual detained whenever you'll are ready; I said you were all talking . . . ." This last conversation is also recorded verbatim in the recording of Detective Harvill's interview, (State's Exhibit 36A) at around 5:15-5:30. This last conversation between detectives is heard clearer on State's 36A than on State's 37. The detective is heard asking if he heard anything over the radio and Detective Harvill said no, he had it turned off. (State's Exhibit36A, 5:20:5:30). No police chatter is heard in this recording. Therefore, it appears more likely Victim did not hear the chatter of when they caught Robinson. After Appellant was captured, Victim was told the person was detained rather than "we got him."

Victim's identification of Robinson was audio recorded. When Robinson was brought into view, while Victim remained safely in the patrol car, her immediate response was "Yeah," quickly followed by the detective's question, "That's him?" She says "very similar" and then "yes" while the detective interjects the question once more – they are really speaking over each other. It seems likely her initial "yeah" was an unsolicited statement that Robinson was the robber and second affirmation, "yes" is the answer to the detective's question. Victim states she wishes she could see his face closer to see the pock mark. She then said "it" is very similar, perhaps reference to the pock mark. She describes him wearing a "white beater" and black jeans. She further confirms he is of similar stature and the hair looks about the same. State's Exhibit 36B (1:27-1:50).

After hearing arguments, the trial court ruled as follows:

> Based on what's before me and, you know, the witness had an opportunity, even though he had a face mask on, he was very close to

> her, she had a good look at him and she described not only basically his height and the fact that his race, clothes, the fact that she did see pock marks and scarring on his right cheek and she was paying close attention to that, even though I'm sure based on her testimony it was a scary situation for her. She gave an accurate description at the time, she had a sufficient amount of time to observe him at the time of the armed robbery. And from the time the robbery occurred, till they apprehended the defendant in this case, was 45 minutes to an hour I think was basically the testimony.
>
> And, you know, show-ups, which is correct are suggestive. The question is whether they were so unduly suggestive. And I can take into consideration based on Govan and other case law, that [the totality] of the circumstances in this case. Because the real thing for me, was the identification. Even though it was somewhat suggestive, relied on, and there was no substantial likelihood of a misidentification. And the fact that she's informed the police to start pinging her phone and they did that, and they tracked the phone while the suspect was in the automobile, tracked the phone till they caught the suspect. So, that adds another layer that makes this misidentification very unlikely in this case. And I think it satisfies the issues of State v. Brown and Govan, as well as Biggers and Jones, and other cases. I find that the identification is admissible.

Tr. p. 120, line 22- p. 122, line 11.

Show-up identifications occurring shortly after the crime are generally not unnecessarily suggestive.

A significant hurdle not addressed by Appellant's trial counsel and minimized by Appellant now on appeal is that the show-up identification was close in time to the robbery and was not unnecessarily suggestive due to the fresh opportunity to conduct the showup quickly after the robbery occurred.

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").

Biggers provides a two-step test to determine the admissibility of an eyewitness identification. First the trial judge must determine if the identification procedure employed 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 *practically* have been used that would be 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). 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). "[T]he analysis under the first prong is not complete without considering the necessity of the procedures." Id. at 312, 806 S.E.2d at 711.

Appellant's counsel tried an end run around this first prong, claiming, "I'm not going to

spend too much time on the first prong, which Courts have held here that the show-up I.D. has been highly suggestive and conducive to misrepresentation or excuse me, misidentification." Tr. p. 114, lines 19-25. Later, counsel admitted, "I guess this was the best way to do it under the circumstances." Tr. p. 117, lines 17-18.

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). 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). However, "[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; 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.").

"Police officers need not limit themselves to station house line-ups when an opportunity for a quick, on-the-scene identification arises. Such identifications are essential to free innocent suspects and to inform the police if further investigation is necessary." United States v King, 148 F.3d 968, 970 (8th Cir. 1998); see 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 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). "Necessary incidents of on-the-scene identifications, such as the suspects being handcuffed and in police custody, do not render the identification procedure impermissibly suggestive." King, 148 F.3d at 970. "Whether such factors cast doubt on the accuracy of a positive identification is an issue for the jury." Id.

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 present case, Robinson was apprehended close in time to the robbery and had limited opportunity to dispose of evidence or change his appearance. Victim made her identification while

the robbery was still fresh in her mind. The stolen items were found in the vehicle he fled and he wore clothes matching the description of the robber. Detective Harvill testified that by employing the procedure, the officers would not detain Robinson longer than necessary if it turned out he was not the person who robbed Victim. Detective Harvill emphasized the importance of seizing on the opportunity for an identification while Victim's observations of the robber were still fresh in Victim's mind. On the other hand, Detective Harvill noted that the process of assembling a usable six-person array would delay the identification process. Therefore, the alternative procedure Robinson proposes was not practical. Accordingly, evidence shows that the procedure employed was necessary under the circumstances.

No substantial likelihood of misidentification

At trial, Appellant argued the identification was unreliable because: "All she was able to say was similar. Similar stature, similar appearance, about the same hair. But if she knew for certain that was the guy then she would have said, that's the guy." Tr. p. 117, lines 2-5. See State v. Brown, 333 S.C. 185, 190, 508 S.E.2d 38, 41 (Ct. App. 1998) (noting "a witness identification need not be one hundred percent certain in order to meet due process requirements").

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 Neal v. Biggers 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.").

In the instant case: (1) the robbery occurred in the day time, and Victim saw the robber at close range. She noted she saw him clearly from the nose up, and observed his mark on his cheek; (2) she was focused on the robber; (see State v. Blassingame, 338 S.C. 240, 252, 525 S.E.2d 535, 541-542 (Ct. App. 1999) ("A person in fear of his life presumably has a more acute degree of attention to his surroundings than a mere passerby")); (3) Appellant was dressed as described by Victim, and on his cheek is the mark she described; (4) although Victim expressed a desire to see Appellant closer to better view the scabbing and acne on his cheek, and used the phrase "similar," she testified at the hearing that she was certain of her identification;[1] and (5) the identification was

[1] Appellant argues without citation to authority, "Reviewing the reliability factors, the fourth factor – level of certainty demonstrated at confrontation – prevents a finding of reliability on its own." App. Br. p. 9. However, "an identification is not unreliable because it is phrased in uncertain terms."

made roughly an hour from the time of the robbery.

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 instant case, the trial court's ruling is supported by evidence. First, the identification was not unduly or unnecessarily suggestive. Second, evidence supports the trial court's observations that the procedure employed did not create a likelihood of irreparable misidentification.

Finally, any error was harmless. The harmless error doctrine preserves the central purpose of a criminal trial, which is to decide the factual question of a defendant's guilt or innocence. State v. Rivera, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013) (citing Arizona v. Fulminante, 499 U.S. 279, 306-08 (1991)). The "materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). Appellant's flight from the car upon being stopped is evidence of his guilty conscience. He was found hiding in the woods with Victim's cell phone. Latent prints, especially the prints on the soda can, tie him to the vehicle in which all the stolen items were found. He dropped his wallet in his hasty flight. Appellant's cheek bore the marks and scabbing Victim described, and he was dressed as Victim described. Even without evidence of Victim's identification, evidence was overwhelming.

United States v. Peoples, 748 F.2d 934, 936 (4th Cir. 1984).

II.

The victim's redirect testimony expressly refuted what the defendant sought to imply during cross-examination and did not constitute new matter that entitled Appellant to recross the victim during the pretrial hearing on her identification of Appellant. Further, the issue is not preserved for review.

Appellant complains he should have been allowed to recross-examine Victim during the Neal v. Biggers hearing because during redirect examination, she testified she was not influenced by anything the officers told her before she identified Appellant as the robber. During cross-examination, Appellant attempted to create the implication that Victim was influenced by police chatter on the radio and Officer Henderson's statement that "we got him." Victim's redirect testimony therefore merely expressly refuted what Appellant sought to imply during cross-examination and did not introduce new matter that would entitle Appellant to recross-examination. Further, Appellant's claim on appeal that his confrontation rights were violated was not raised to the trial court.

The accused has the right to cross-examine a witness concerning bias under the Confrontation Clause. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The right to cross examine a witness concerning current and prior testimony satisfies the requirements of the Confrontation Clause. California v. Green, 399 U.S. 149, 153 (1970). "The appropriate question under a Confrontation Clause analysis is whether there has been any interference with the defendant's opportunity for effective cross-examination at trial." State v. Gillian, 360 S.C. 433, 450, 602 S.E.2d 62, 71 (Ct. App. 2004) *aff'd as modified* 373 S.C. 601, 646 S.E.2d 872, 876 (2007).

Importantly, a defendant's right to confront the witnesses against him does not deprive the trial judge of his usual discretion in limiting the scope of cross-examination. State v. Turner, 373 S.C. 121, 130, 644 S.E.2d 693, 698 (2007). Trial judges may impose reasonable limitations on cross-examination designed to show bias "based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness's safety, or interrogation that is repetitive or only marginally relevant." State v. Jenkins, 322 S.C. 360, 364, 474 S.E.2d 812, 814 (Ct. App. 1996).

Standard of Review is abuse of discretion and a defendant is not entitled to recross-examination as a matter of right unless new matter is introduced on redirect examination.

"The right to, and scope of, recross-examination is within the sound discretion of the trial court." Liberty Mut. Ins. Co. v. Gould, 266 S.C. 521, 533, 224 S.E.2d 715, 720 (1976). "Absent the introduction of any new matter on re-direct examination, the rule is that recross-examination is not required. Without something new, a party has the last word with his own witness." United States v. Fleschner, 98 F.3d 155, 157 (4th Cir. 1996).

The trial court's discretion derives, in part, from Rule 611 of the South Carolina Rules of Evidence. The rule generally provides that the court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence." Rule 611(a), SCRE. As to the re-examination of witnesses, the rule provides, "A witness may be re-examined as to the same matters to which he testified only in the discretion of the court, but without exception he may be re-examined as to any new matter brought out during cross-examination." Rule 611(d), SCRE.

Error preservation/how the issue arose

During the pretrial hearing, Robinson's counsel conducted an extensive cross examination of Victim. Tr. pp. 66-90. The prosecution followed with eighteen redirect examination questions. Tr.

pp. 93-93.

Robinson's counsel then attempted another question: "[Victim], you went –," before the trial court intervened and advised that counsel did not "get a second crack at it." Robinson's counsel then claimed he should get to recross the redirect testimony, but the trial court noted under the rules, Robinson did not get a second crack. Tr. p. 93, line 24 - p. 94, line 9. Importantly, counsel did not allege new matter was brought up on redirect examination nor that his being denied further examination would violate Appellant's confrontation rights.

"[I]t is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750, 759 (1997). Robinson failed to argue to the trial court he was entitled to recross-examination because, as Robinson now contends on appeal, new matter was brought up on redirect examination. Perhaps if Robinson's trial counsel identified what trial counsel thought constituted new matter, the trial court would have agreed. But there is no indication in the record that trial counsel himself even believed new matter was raised during redirect examination. State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

The prosecution did not delve into any new areas during redirect examination

During cross-examination, Robinson's counsel asked Victim if she heard what Officer Henderson told police "about where the phone was hitting." Tr. p. 69, lines 21-23. Then counsel asked Victim if she heard the radio traffic back through the radio, to which Victim replied, "I remember hearing chatter but I don't know what they said." Tr. p. 70, lines 4-8. Counsel essentially asked the same two questions again and then played bodycam audio for Victim in an attempt to

refresh her memory. Tr. pp. 71-72. Although the replaying of the bodycam audio seemingly failed to refresh Victim's memory, counsel persisted and played the audio of when Officer Henderson said, "We got him." But Victim was uncertain that she remembered hearing that statement. Tr. pp. 74-75. Cross-examination ended with counsel asking if she knew police were bringing her to "the" suspect and she responded she was aware she would be viewing "a" suspect. Tr. p. 90, lines 14-21.

On redirect examination, the prosecution asked the following, which constitutes what Robinson contends is the new matter raised:

> Q: Did the chatter on the radio or any other detail that was, you know, going on in the background, do you feel like that influenced your confident I.D.?
>
> A: I don't.
>
> Q: Did you base your I.D. on your view of the person that robbed you?
>
> A: That is correct.
>
> Q: Again, whose idea was it to track your phone?
>
> A: It was mine.
>
> Q: And in conveying that idea to the police was it your hope that they would use that tool to [locate] a person?
>
> A: Absolutely.
>
> Q: So, did anything stated later by the police, in your mind, unduly impact your identification of this defendant?
>
> A: No.

Tr. p. 92, line 8 – p. 93, line 1.

The prosecution does not go into "new areas" merely by seeking elaboration on areas raised

by defense counsel's cross-examination. See State v. Faulkner, 381 N.E.2d 934 (Oh. 1978) ("Upon careful review of the record, we cannot find that the prosecution in the instant cause inquired into any new area, but rather inquired into the areas of skin tone and automobiles which were raised by defense counsel upon cross-examination.").

In Hopson v. State, 636 S.E.2d 702, 703 (Ga. Ct. App. 2006), the rape victim testified she was not interested in Hopson and experienced rectal pain after her encounter with Hopson. On cross-examination, Hopson tried to show the victim might have been interested in Hopson and her rectal pain arose well after the encounter. On redirect examination, the victim emphasized she gave signs to Hopson she was not interested in him and confirmed she did not know if Hopson penetrated her anus. The Georgia Court of Appeals found the trial court did not err in denying Hopson's request for further examination on recross because "[T]he requested recross-examination would merely have covered the same issues that had already been explored in the victim's earlier testimony." Id.

Likewise, the Kentucky Supreme Court found no error in the trial judge's denial for a defendant to recross a detective concerning two topics, including the detective's use of a single still photograph of the defendant to a witness who identified the defendant for the detective. McRae v. Commonwealth, 635 S.W.3d 60, 71-72 (Ky. 2021). On cross-examination, the defendant questioned why the detective did not use a photo pack array for witness's identification. The detective explained he did not use the photo pack because the witness knew the defendant and the detective was merely confirming it was the same person being investigated. On redirect, the Commonwealth elicited testimony from the detective explaining how a photo pack array works, the different means of presenting photographs to potentially identify a suspect, and that the detective does not typically use

a photo array when a witness already knows the suspect. Id. at 72. The Kentucky Supreme Court held, "Here, [the detective] had been examined and cross-examined, and subsequently recalled by the Commonwealth, testifying to matters which he had already addressed during his cross-examination. A trial court does not abuse its discretion in denying a request for recross-examination when the redirect testimony does not involve a new matter and is only an amplification of the previous testimony elicited during cross-examination." Id.

In the present case, counsel's questions sought to create an inference that Victim's identification was suggested by police chatter and Officer Henderson's statement that "we got him." The prosecution's question merely cut to the quick and established Victim's identification was not influenced by any conversation by police, including from the radio chatter and Officer Henderson's statements. It was not new matter.

Further, Appellant failed to make any showing of prejudice. The limitation of cross-examination constitutes reversible error only if the defendant establishes unfair prejudice resulted from the limitation. State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). The record is silent as to whether counsel thought new matter was brought up and what subjects counsel sought to explore.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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November 14, 2022

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

vs.

DAVID CROCKETT ROBINSON,

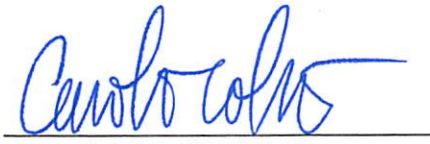
Appellant.

Appellate Case No. 2021-001039

PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by emailing his counsel of record, Taylor D. Gilliam, at his primary email address as provided by the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.
This 14th day of November, 2022.



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Caroline Collins

From: Caroline Collins
Sent: Monday, November 14, 2022 10:03 AM
To: 'Gilliam, Taylor'
Cc: 'Warren, Kaylynn'; David Spencer; William Blitch
Subject: The State v. David Crockett Robinson (2021-001039)
Attachments: ROBINSON David - Initial Brief of Respondent and Designation of Matter - 2021-001039 (03153309xD2C78).PDF

Good Morning Mr. Gilliam,

Attached please find the Initial Brief of Respondent and Designation of Matter in The State v. David Crockett Robinson (2021-001039). These documents will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to confirm receipt of this email.

Thank you!

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