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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Honorable H. Steven DeBerry IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SEAN DEVON JAMES,

APPELLANT

APPELLATE CASE NO. 2022-001279

INITIAL BRIEF OF APPELLANT

BREEN RICHARD STEVENS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 3

STATEMENT OF THE FACTS 4

ARGUMENT

The trial court reversibly erred by failing to suppress the identification of Appellant as unduly suggestive and unreliable where the initial description given by the eyewitness was limited to race and gender, and where over a month elapsed before police sent one photo of each suspect to the eyewitness via text and included a statement under Appellant's photograph regarding a tattoo on his face 9

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 15

Clyburn v. Sumter County Sch. Dist., 317 S.C. 50, 451 S.E.2d 885 (1994) 3

Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) 15

Manson v. Braithwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) 12

Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) 10, 14

State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999) 10

State v. Cash, 257 S.C. 249, 185 S.E.2d 525 (1971) 10

State v. Jones, 435 S.C. 138, 866 S.E.2d 558 (2021) 9

State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000) 3, 10

State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716 (1959) 16

State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000) .... passim

State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) 12

State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001) 10

State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990) 15

State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) 16

State v. Sims, 377 S.C. 598, 661 S.E.2d 122 (2008) 3

State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004) 9, 12

Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) 10

STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by failing to suppress the identification of Appellant as unduly suggestive and unreliable where the initial description given by the eyewitness was limited to race and gender, and where over a month elapsed before police sent one photo of each suspect to the eyewitness via text and included a statement under Appellant's photograph regarding a tattoo on his face?

STATEMENT OF THE CASE

On March 3, 2022, Appellant Sean Devon James was indicted by the Florence County Grand Jury for armed robbery, grand larceny (more than $10,000), and conspiracy, arising from an incident occurring on November 17, 2019. Tr. 8, ll. 10-16; Tr. * (Indictments). Appellant's case proceeded to trial from September 6th through 7th, 2022, before the Honorable H. Steven DeBerry, IV, and a jury. John M. Ervin, III, represented Appellant, while Jeremiah Freeman represented the State. Tr. 1.

The trial court directed a verdict of acquittal for the charge of conspiracy, but the jury found Appellant guilty of armed robbery and grand larceny. Tr. 251, ll. 23-24; Tr. 302, ll. 14-24. Appellant was sentenced as follows: twenty (20) years for armed robbery, and time served for grand larceny. Tr. 310, ll. 10-16; Tr. * (Sentence sheets).

STANDARD OF REVIEW

"[W]hether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." State v. Moore, 343 S.C. 282, 288, 540 S.E.2 445, 448 (2000). "In reviewing mixed questions of fact and law, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." Id. (citing Clyburn v. Sumter County Sch. Dist., 317 S.C. 50, 53, 451 S.E.2d 885, 887-88 (1994)). Further, the admissibility of evidence lies within the ambit of the trial court's discretion, and will not be reversed absent abuse of that discretion. State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by error of law." State v. Sims, 377 S.C. 598, 604, 661 S.E.2d 122, 125 (Ct App. 2008). "However, an eyewitness identification which is unreliable because of suggestive lineup procedures is constitutionally inadmissible as a matter of law." Moore, 343 S.C. at 288, 540 S.E.2 at 448.

STATEMENT OF THE FACTS

On the night of November 17, 2019, Ms. Carla Eaddy (Eaddy) was sitting in her car by the side of the home of her sister and brother-in-law, Aggie Graham (Mrs. Graham) and Clifton Graham (Mr. Graham), on Walnut Street in Florence, South Carolina, and about to leave. Tr. 39, ll. 2-19; Tr. 158, ll. 6-17; Tr. 160, ll. 13-19. While counting money in her car, a black SUV stopped in front of the house and Ms. Mo Woods (Woods) exited. Woods came up to Eaddy and asked to use the bathroom, and Eaddy referred her to the front door to ask Ms. Graham. Ms. Graham came to the door when Woods knocked, allowed her inside to use the bathroom, and Woods left back to the SUV. Tr. 39, ln. 24–Tr. 41, ln. 20; Tr. 43, ln, 4—Tr. 44, ln. 25; Tr. 140, ln. 22—Tr. 141, ln. 7; Tr. 159, ll. 2-19. The only illumination outside came from the floodlight in the yard of the house. Tr. 68, ll. 18-21; Tr. 70, ll. 16-23; Tr. 141, ll. 21-22; Tr. 143, ll. 22-24.

Immediately after, three men—two black males, and one yellow or light-skinned male—armed with weapons jumped out of the SUV. One black male went to the driver's-side door of Eaddy's car, the light-skinned male went to the passenger side door, and the second black male went to the front porch door. Tr. 45, ln. 9—Tr. 46, ln. 25; Tr, 159, ln. 20—Tr. 160, ln. 2; Tr. 164, ll. 13-19.

Mrs. Graham opened the door again about five (5) to ten (10) minutes after Woods left to see why her dog was barking, only to see a man pointing a gun at her; he ordered outside, and took her cell phone. Tr. 78, ll. 1-2; Tr. 140, ln. 18—Tr. 141, ln. 20. Mr. Graham was in bed watching television, but likewise came to the front door due to their dog barking. When he opened the door, the gunman pointed his weapon at Mr. Graham and pulled him through the screen door. Mr. Graham moved to the side of the porch with his wife and placed himself

between the gunman and Mrs. Graham with his back to the gunman. Tr. 148, ll. 12-22; Tr. 150, ll. 1-19.

Meanwhile, the robber next to Eaddy had a handgun pointed at her. He took between $2000 to $2500 cash, her cell phone, and leaned in to take the keys from her ignition as well. Tr. 163, ll. 6-17; Tr. 164, ll. 6-10; Tr. 171, ln. 21—Tr. 172, ln. 3. The assailants retuned to the SUV and departed. The duration of the entire incident—from the moment Ms. Woods arrived till the moment the SUV left—lasted approximately ten (10) to twenty (20) minutes. Tr. 172, ln. 23—Tr. 173, ln. 11.

Three Florence City Police Department (FPD) officers arrived shortly after. Tr. 131, ll. 2-14; Tr. 133, ll. 6-22. According to police, the only description of the robbers that Eaddy, Mrs. Graham, or Mr. Graham[1] could muster at the time was that there were two black males, and one light-skinned[2] male; no other physical description was given. Tr. 58, ll. 23—Tr. 59, ln. 2; Tr. 70, ll. 16-23; Tr. 135, ln. 22—Tr. 137, ln. 11. Items taken included cell phones, cash, and keys to Ms. Eaddy's car. Tr. 132, ll. 18-19.

On December 20, 2019, Eaddy's daughter, Ashley Lynch (Lynch) noticed Eaddy's car was missing when she drove by. After calling her mother—who was in Baltimore, Maryland at the time—Lynch contacted both Pee Dee Auto Sales and police to report the vehicle stolen. Pee Dee Auto Sales was able to work with police to locate Eaddy's 2015 Chevrolet Impala within one hour due to a tracking device put in place until the vehicle was fully paid-off by the owner. Tr. 178, ln.4 –Tr. 181, ln. 24; Tr. 184, ll. 5-15. The Impala was ultimately found behind a

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1 While the incident report did not indicate the detail, Mr. Graham stated he told police that one of the black male assailants "had dreads in his head." Tr. 151, ln. 18—Tr. 152, ln. 6.

2 During testimony, witnesses utilized the terms "high yellow" and "light bright" at times to describe the "light skinned" robber. Tr. 58, ll. 23—Tr. 59, ln. 2; Tr. 70, ll. 16-23; Tr. 159, ln. 23; Tr. 164, ll. 13-16; Tr. 170, ln. 17-22.

singlewide trailer off of Kelly Bridge Road West in Bishopville, South Carolina. Lee County Deputy Sheriff Jack Corbett (Dep. Corbett) and his trainee were sent to investigate, and discovered three men by Eaddy's blue Impala: Justin Shope (Shope), Trevon Jarkyese Cooley (Cooley), and Appellant. Shope, who was white, lived at the trailer. Cooley and Appellant were under the hood of the vehicle with tools. Tr. 203, ln. 2—Tr. 204, ln. 8. Dep. Corbett detained all three men, mirandized them, and arrested them for possession of a stolen vehicle. Tr. 218, ll. 2-17. Although Dep. Corbett looked through the vehicle, including the floorboard area and the trunk, he did not process it for evidence. Rather, it was towed to a junkyard, and Lynch took possession of it the following day. Tr. 183, ll. 1-20; Tr. 219, ll. 15-25. Upon seeing a handgun on the floorboard, Ashley contacted police and the firearm was ultimately recovered by FPD. Tr. 184, ll. 5-25; Tr. 192, ll. 8-9.

When Lee County notified FPD on December 20, 2019, Officer Minors (Ofc. Minors) relayed the information to Investigator John Davis. At that time, Ofc. Minors also informed Inv. Davis of the armed previous robbery case from the same address on Walnut Street as the stolen vehicle. Tr. 86, ll. 8-15; Tr. 226, ll. 2-4; Tr. 233, ll. 13-15; Tr. 238, 10-25. Inv. Davis obtained the names and dates of birth for each of the three suspects; rather than obtaining a photographic lineup—which he later acknowledged was not a very difficult thing to do—he simply printed their DMV photographs and left for Walnut Street. Tr. 81, ll. 3-9; Tr. 82, ll. 5-7; Tr. 230, ll. 5-10; Tr. 238, ll. 23—Tr. 239, ln. 17. After reaching Lynch, Mr. Graham, and Mrs. Graham, he showed them the three photographs, ostensibly to determine if they should or should not be driving the vehicle.[3] Tr. Tr. 82, ll. 6-11; Tr. 146, ll. 1-19; Tr. 152, ll. 13-22. In Inv. Davis'

[3] According to Inv. Davis, it is "very standard" for FPD officers to show individual photographs of people found in possession of a vehicle reported stolen to the victim "to eliminate them as being persons who should *or shouldn't* be in possession of that vehicle." Tr. 87, ll. 3-5 (emphasis

words, "oftentimes the best form of identifying someone who should *or shouldn't* be in possession of your car is through photographs." Tr. 231, ll. 23-25 (emphasis added). Inv. Davis indicated that Mr. and Mrs. Graham purportedly told him the three men in the pictures had robbed them the previous month. Tr. 83, ll. 2-15; Tr. 234, ll. 4-7. Inv. Davis then sent the same pictures to Eaddy in a text, along with a message beneath Appellant's photograph stating, "This one has a cross tattoo between his eyes." According to Inv. Davis, he included the text regarding the tattoo because it was not visible in the photograph, and "it's important for proper identification." Tr. 52, ll. 10—Tr. 53, ln. 24; Tr. 83, ll. 16-23; Tr. 170, ll. 1-11; Tr. 240, ll. 12-17; Tr. * (Defendant's Ex. #1). Eaddy called, and indicated that the three men in the photographs were not allowed to drive her car, and had robbed her the previous month. Tr. 170, ll. 20-24. In Eaddy's words, she recognized all three of them "because all three of them was together." Tr. 173, ll. 13-17. Moreover, although she acknowledged the cross tattoo could not be seen in the picture sent, Eaddy stated she recognized Appellant's face "because he tattoos all over his face."[4] Tr. 47, ll. 13-20; Tr. 174, ll. 1-8.

Appellant's case proceeded to trial from September 6th through 7th, 2022. Tr. 1. Appellant's trial counsel (Counsel) moved to suppress out-of-court and in-court identifications of Appellant due to the unduly suggestive nature of the identification, and its unreliability. Tr. 35, ln. 1–Tr. 36, ln. 21; Tr. * (Motion to Suppress). Specifically, Counsel argued that no eyewitness

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added). His rationale for this procedure was as follows: "So in a way *to unburden law enforcement with going through all the photo lineups and things like that for a [sic] automobile reported stolen,* more often than not, the people are said to, 'Oh yeah, it was john smith with the vehicle? Okay, yeah, they drive it to the grocery store sometimes, they're a friend of a friend.'" Tr. 87, ll. 9-16 (emphasis added).

[4] Although Eaddy claimed at the suppression hearing that her assailant had facial tattoos, this detail was never reported to police on the night of the incident, or over the following month. Rather, she claimed that the included text message regarding a facial tattoo "kind of refreshed my memories." Tr. 47, ll. 13-20; Tr. 58, ln. 20—Tr. 59, ln. 15.

could provide any details or identification of the robbers beyond gender and race; yet, over a month later Inv. Davis showed them three photographs of three suspects—two black males, and one white male, one of which (Appellant's) including a message regarding a facial tattoo. As such, the entire identification was tainted from its inception. Tr. 92, ln. 4—Tr. 94, ln. 9; Tr. 103, ln. 14–Tr. 105, ln. 19; Tr. 106, ln.1—Tr. 108, ln. 11.

After taking testimony from Eaddy, Mr. and Mrs. Graham, and Inv. Davis, and hearing arguments from both Counsel and the State, the trial court took note that the detective was aware of the armed robbery, and suppressed identification by Mr. and Mrs. Graham as unreliable. Tr. 112, ll. 12-14. However, the court reasoned that Eaddy had ample time to view Appellant from approximately two feet away, and determined the accuracy of Eaddy's prior description of "two black males and one that was light skinned male, certainly is consistent, at least." Tr. 112, ll. 15-22; Tr. 113, ll. 4-7. It further determined that her level of certainty "seem[ed] credible to me." Tr. 113, ll. 7-10. Finally, regarding the time period of over one month between the initial incident and confrontation, the trial court determined it was "reliable and certainly credible to believe that you wouldn't forget such an event within just 32 days, or the details of that event during that time period." Tr. 113, ll. 11-18. Accordingly, the court allowed the identification of Appellant by Eaddy. Tr. 113, ll. 20-22; Tr. 163, ll. 20-23; Tr. 167, ll. 5-11.

At the end of his trial, Appellant was convicted. The trial court imposed concurrent sentences of 20 years for armed robbery, and time served for grand larceny. Tr. 251, ll. 23-24; Tr. 302, ll. 14-24; Tr. 310, ll. 10-16; Tr. * (Sentence sheets).

This appeal follows.

ARGUMENT

The trial court reversibly erred by failing to suppress the identification of Appellant as unduly suggestive and unreliable where the initial description given by the eyewitness was limited to race and gender, and where over a month elapsed before police sent one photo of each suspect to the eyewitness via text and included a statement under Appellant's photograph regarding a tattoo on his face.

Eaddy's eyewitness identifications of Appellant should have been suppressed because police utilized a highly suggestive procedure of texting the witness individual pictures of three suspects linked not only to taking her car the day the photographs were sent, but also to robbing her of *inter alia* the key to her car at gunpoint over a month beforehand. Over objection,[5] the State was erroneously permitted to elicit testimony from Eaddy identifying Appellant as one of the three men who robbed her on the night of November 17, 2019. Tr. 41, l. 15 – Tr. 43, l. 1; Tr. 108, l. 2-13; Tr. 110, l. 25—Tr. 112, l. 7; Tr. 143, ll. 15-20; Tr. 236, l. 1—Tr. 237, l. 15. Moreover, Eaddy was the sole eyewitness placing Appellant at the scene on the night of the incident. As such, Appellant was prejudiced by the trial court's error.

"A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (citing State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000)). Thus, the general rule concerning identification "is that a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being

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5 Once the trial court made it's pretrial ruling on this constitutional matter, the ruling was final,. See, e.g., State v. Jones, 435 S.C. 138, 866 S.E.2d 558 (2021) (holding that when a trial court rules after a hearing on a constitutional issue, "the ruling is final and, unless something changes during trial that may reasonably cause the trial judge to alter the pretrial ruling, no further objection is required to preserve the issue for appellate review.").

tainted by a previous identification or confrontation." State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (citing State v. Cash, 257 S.C. 249 185 S.E.2d 525 (1971)).

A two-prong inquiry is used to determine the admissibility of an out-of-court identification: (1) whether the identification process was unduly suggestive; and if so, (2) whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. See Moore, 343 S.C. at 287, 540 S.E.2d at 447; see also Neil v. Biggers, 409 U.S. 188, 198-200, 93 S.Ct. 375, 382 (1972).

In the case at bar, the first prong of inquiry is readily met. The State utilized an identification method akin to a single person "show-up" for each suspect by a police officer texting photographs of the three suspects—and only the three suspects—directly to Eaddy. Show-up identifications are "particularly disfavored in the law." Moore, 343 S.C. at 287, 540 S.E.2d at 448 (citing Stovall v. Denno, 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)). This is so "because they are suggestive by their very nature." State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000) (citing State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999)). Here, Inv. Davis not only sent individual photographs of the suspects to Eaddy, but also included the text message, "This one has a cross tattoo between his eyes" beneath Appellant's photograph when he sent it. According to Inv. Davis, he included the text regarding the tattoo because it was not visible in the photograph, and "it's important for proper identification." Tr. 52, ll. 10—Tr. 53, ln. 24; Tr. 83, ll. 16-23; Tr. 170, ll. 1-11; Tr. 240, ll. 12-17; Tr. * (Defendant's Ex. #1). As in Moore, "it is patent the show-up procedure used was unduly suggestive." Moore, 343 S.C. at 287, 540 S.E.2d at 448. Not only did he send the individual pictures, but he also specifically called attention to an identifiable feature of one suspect—Appellant—that was not even visible in the photograph. Accordingly, the procedure used here was unquestionably suggestive.

Moreover, Inv. Davis' explanation of why he chose to show three photographs of the three suspects offers no safe harbor to the overtly suggestive identification procedure. According to Inv. Davis, it is "very standard" for FPD officers to show individual photographs of a person found in possession of a vehicle reported stolen to the victim "to eliminate them as being persons who should *or shouldn't* be in possession of that vehicle." Tr. 87, ll. 3-5 (emphasis added). His rationale for this procedure was as follows: "So in a way *to unburden law enforcement with going through all the photo lineups and things like that for a [sic] automobile reported stolen,* more often than not, the people are said to, "Oh yeah, it was john smith with the vehicle? Okay, yeah, they drive it to the grocery store sometimes, they're a friend of a friend." Tr. 87, ll. 9-16 (emphasis added). In other words, Inv. Davis'—and by his own implication that of the FPD—intentionally utilizes a highly suggestive single-suspect photo identification procedure to determine whether a person *should or should not* be eliminated as a suspect because it is more convenient than using a non-suggestive means of a photographic lineup. Moreover, he does so even though he is familiar with photographic lineups, and acknowledged they are not difficult. Tr. 238, ln. 17—Tr. 239, ln. 2.

Additionally, Inv. Davis acknowledged that he knew of the armed robbery from November 17th prior to going to the home of Mr. and Mrs. Graham with the photographs—he was told by Ofc. Minor. Nonetheless, the investigator chose not to even read the three-page report linked to the same victims and continued to the Walnut Street address. If this was insufficient notice that a photographic lineup was needed because the three suspects for the December 20th stolen vehicle case could also be implicated in the November 17th robbery, the connection was made amply clear when, according to Inv. Davis himself, both Mr. and Mrs. Graham indicated the three suspects were involved in the robbery. Despite this knowledge, the

investigator still did not obtain a photographic line-up; rather, he conveniently sent the three suggestive photographs to Eaddy—along with highly suggestive message beneath Appellant's photograph, which he specifically included as "important for proper identification": "This one has a cross tattoo between his eyes." Tr. 83, ll. 16-23; Tr. 240, ln. 17; Tr. * (Defendant's Ex. #1). As such, the identification procedure used here was unquestionably suggestive, and cannot be salvaged on the basis of convenience.

Thus, the matter turns on the second prong of reliability. Several factors should be considered when evaluating the totality of the circumstances to determine the likelihood of misidentification, including the following: (1) the witness' opportunity to view the perpetrator at the time of the offense; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the offense and confrontation. See Manson v. Braithwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199-200, 93 S.Ct. at 382); Traylor, 360 S.C. at 82, 600 S.E.2d at 527. "Only after a determination as to the reliability of a witness' identification has been made by the trial court may the witness testify before the jury." Moore, 343 S.C. at 289, 540 S.E.2d at 449 (citing State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999)). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." Traylor, 360 S.C. at 81, 600 S.E.2d at 526.

Here, the circumstances taken as a whole militate toward suppression. First, even though Eaddy was close to the assailant for approximately ten to twenty minutes, she did so under circumstances of emotional and mental stress; yet instead of sharpening her focus, Eaddy's focus and recollection was frantic and impaired. According to her own testimony, "[w]hen you go

through something that traumatic, sometimes your mind is, you know, not there." Tr. 168, ll. 12-13. Under such highly stressful and traumatic circumstances, Eaddy's attention to detail and mind was admittedly "all over the place." Tr. 168, ln. 10.

Next, the accuracy of Eaddy's prior description of the perpetrator was at best generic. The only description Eaddy mustered on November 17, 2019, of the person standing next to her with a gun was that he was a black male. Further, although Eaddy later claimed during the suppression hearing that her assailant had facial tattoos, this detail was never reported to police on the night of the incident, or over the following month. Rather, she claimed that the included text message regarding a facial tattoo "*kind of refreshed my memories*." Tr. 47, ll. 13-20; Tr. 58, ln. 20—Tr. 59, ln. 15. In other words, Eaddy's ardent belief that she remembered and identified Appellant was likely the product of the extremely suggestive photograph sent to her with the concomitant text message beneath it.

This also goes to the next factor: certainty. Eaddy readily indicated a high level of certainty. However, as indicated above, this certainty was likely born of the circumstances under which Appellant's likeness was presented. Eaddy was sent the photographs of three suspects—two black males, and one white male—directly to her to identify them and determine whether or not they had permission to drive her stolen vehicle after the key to that vehicle was stolen one month prior by three robbers—two black males, and one light skinned male. Under such circumstances, it was both highly suggestive and highly predictable that Eaddy would identify them—especially Appellant—as one of the robbers. In fact, Eaddy acknowledged them because "all three of them was together." As such, Eaddy's certainty is both unsurprising, and an example of why the identification procedure used by Inv. Davis—what was effectively a show-up coupled with overtly suggestive language beneath Appellant's photograph—is disfavored in the law.

Finally, the length of time between the offense and show-up confrontation strongly militates against reliability. Unlike a typical "show-up" occurring withing minutes or hours of an incident, the highly suggestive photographs here were shown to Eaddy over a full month after the incident. Eaddy had time to finish talking with police at the incident location on November 17, 2019, leave, go to her own home in Florence, and then leave again to Baltimore for a funeral. Then, after over a full month passes, she received a text message from FPD—the same department investigating the robbery—on December 20, 2019, asking her to identify the three photographs sent to her. As she told the court, nothing occurred during that time period that would improve her memory or ability to recall the three robbers. Tr. 55, ll. 9-12. To the contrary, she was subjected to more stress, including the unrelated death of her family member, traveling to Baltimore for a funeral, and learning that her car was stolen the same morning that she was sent three pictures of suspects. In other words, the incident was far from "fresh" in her memory when asked to identify three individual photographs of the three individual suspects sent to her on December 20, 2019, as was any description beyond the generic statement of two black males and one light skinned male.

In light of all circumstances involved, Eaddy's identification of Appellant was unreliable. She was unable to provide anything more than a generic description of the three robbers on the night of the incident, as both her mind and focus were "all over the place." Tr. 168, ln. 10. Over a full month later, she was sent three photographs of three suspects—two black makes, and one white male—with one including a message describing details not seen in Appellant's photograph. Eaddy indicated she did not previously recall tattoos, but the included text message regarding a facial tattoo "*kind of refreshed my memories*." Under such circumstances, it cannot be said that the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. See Moore, 343 S.C. at 287, 540 S.E.2d at 447; see also Neil v. Biggers, 409 U.S. at 198-

200, 93 S.Ct. at 382 (1972). To the contrary, the totality of the circumstances show that Eaddy's recollection and identification of Appellant was likely the product of the highly suggestive identification procedure used in this case. Accordingly, Eaddy's identification of Appellant as one of the robbers was inadmissible, as it violated Appellant's fundamental due process rights. See, e.g., Moore, 343 S.C. at 288, 540 S.E.2d at 448 (citing Caver v. Alabama, 537 F.2d 1333, 1335 (5th Cir.1976) ("[A]n eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law.").

Further, Appellant was prejudiced by admission of testimony regarding Eaddy's identification. A constitutional error may be harmless only where the reviewing court is able to declare a belief "*beyond a reasonable doubt* that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967) (emphasis added); see also Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986).[6] "No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Reeves, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990).

In the case at bar, the State extensively relied upon Eaddy's identification of Appellant as the perpetrator in order to obtain convictions against him. Without such identification, the State had no other direct or substantial circumstantial evidence to place Appellant with a gun in his hands at Walnut Street in Florence on the night of November 17, 2019. The State provided no fingerprints or DNA from the driver's door or ignition area of Eaddy's Impala where the assailant stood and leaned when he reached into Eaddy's car to take the keys out of the ignition, nor did the State

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6 Additionally, it is the burden of the party benefitting from the trial error to prove it was harmless beyond a reasonable doubt. See, e.g., Chapman, 386 U.S. at 24, 87 S.Ct. at 828.

submit fingerprints or DNA from the key recovered out of the Impala in Shope's backyard. The only fingerprint of Appellant was on the outside of the rear door when he, Cooley, and Shope were with the vehicle in the back of Shope's residence. In fact, the State even failed to produce fingerprints or DNA evidence from the handgun later found inside Eaddy's Impala. Further, no other witnesses place Appellant at the scene of the crime either: neither Mr. or Mrs. Graham even saw the face of the third robber by the driver's door of Eaddy's car.

Additionally, the State repeatedly relied upon Eaddy's identification of Appellant in its closing argument to answer the critical question in the case: "It seems to me, and I submit to you that the only issue that we have in this matter is who did it." Tr. 266, ll. 24-25. Tr. 263, ln. 20–Tr. 264, ln. 18; Tr. 265, ln. 1—Tr. 270, ln. 21. The State made this abundantly clear when it answered its own question shortly after, asking: "What evidence do we have to prove the who? Carla Eaddy. That's who." Tr. 268, ll. 9-10. Thus, Eaddy's testimony placing Appellant as the man robbing her at the side of her car was the only direct evidence the State had to meet a material element of identity. See, e.g., State v. Schrock, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984) ("By bringing the case, the State assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the criminal act.") (citing State v. Mayfield, 235 S.C. 11, 25, 109 S.E.2d 716, 724 (1959)). Simply stated, Eaddy's identification of Appellant was critical to the State's case against Appellant. Accordingly, Appellant was prejudiced as the error was not harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, Sean Devon James respectfully requests this Court to reverse his convictions and sentences, and grant a new trial.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of March, 2023.