STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to the Court of Appeals
Appeal from Spartanburg County
William A. McKinnon, Circuit Court Judge

Opinion No. 2024-UP-371 (S.C. Ct. App. filed July 09, 2024)

BRIAN FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000724

SUPPLEMENTAL APPENDIX

SARAH E. SHIPE
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Deputy Attorney General
1000 Assembly Street, Room 519
Columbia, SC 29201
(803) 734-4117

ATTORNEYS FOR RESPONDENT

INDEX

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable William A. McKinnon, Circuit Court Judge

BRIAN FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000724

BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

SARAH E. SHIPE
Appellate Defender

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

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred allowing multiple witnesses to make in-court identifications of petitioner as the shooter where the court ruled the photographic lineup used by law enforcement was suggestive but wrongly found the identifications were nonetheless reliable?

STATEMENT OF THE CASE

On May 14, 2018, a Spartanburg County grand jury indicted petitioner for murder, possession of a firearm or ammunition by a person convicted of a violent crime, three counts of attempted murder, and four counts of possession of a weapon during a violent crime. App. 13, l. 25-15, l. 12; 667-74. Petitioner's case was called to trial before the Honorable J. Derham Cole and a jury on April 8, 2019. App. 1. Petitioner was represented by Beverly Jones and the state was represented by assistant solicitors, Spenser Smith and Candace Clark. App. 1.

The jury convicted petitioner of murder, attempted murder, two counts of possession of a weapon during the commission of a violent crime, and possession of a firearm or ammunition by a person convicted of a violent crime. App. 550, l. 9-551, l. 1. The jury found petitioner was not guilty of two counts of attempted murder and two counts of possession of a weapon during a violent crime. App. 550, l. 9-551, l. 1. Judge Cole sentenced petitioner to life imprisonment for murder, thirty years' imprisonment for attempted murder, and five years' imprisonment for both weapon charges. App. 572-73.

Defense counsel filed an untimely notice of appeal on April 23, 2019, and the Court of Appeals dismissed the appeal. App. 575-77. On June 26, 2019, counsel filed a motion to reinstate the appeal, which was denied by written order. App. 578-79. The remittitur was issued October 3, 2019. App. 580.

Thereafter petitioner filed an application for PCR. App. 581-86. On June 7, 2022, an evidentiary hearing was held before the Honorable William A. McKinnon. App 594-649. Petitioner was represented by Rodney Richey and the state was represented by Chelsey Marto. App. 594.

On March 22, 2023, Judge McKinnon signed an order granting belated appellate review pursuant to *White v. State*, and denied PCR as to all other claims. App. 652-65. Judge McKinnon found petitioner was entitled to belated review of his conviction where counsel assumed responsibility for her failure to timely file and serve the notice of appeal. App. 664. Judge McKinnon found this failure denied petitioner an opportunity to seek appellate review of his convictions and that he had not knowingly, voluntarily, and intelligently waived that right. App. 664.

Petitioner now files this brief addressing the direct appeal issue, as required by Rule 243, SCACR, simultaneously with a petition.

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.2d 445, 448 (2000) (finding show-up identification unreliable as a matter of law); *see also State v. Traylor*, 360 S.C. 74, 81-82, 600 S.E.2d 523, 526-27 (2004) (*citing Moore* and holding that photographic line-up procedure was "patently suggestive"). "Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error." *Moore* at 288, 540 S.E.2d at 448. "In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." *Id*. Questions of law are reviewed *de novo*. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

ARGUMENT

The trial court erred allowing multiple witnesses to make in-court identifications of petitioner as the shooter where the court ruled the photographic lineup used by law enforcement was suggestive but wrongly found the identifications were nonetheless reliable.

Relevant facts

On February 18, 2018, Eric Morris was shot and killed in his home. His friend Joel Campbell and his house mates, Joe Lewis and Thomas Koepke, were outside the house when the shooting occurred. Koepke entered the home to check on Morris and was shot and injured.

Prior to trial a *Neil v. Biggers*[1] hearing was held to determine the admissibility of the identifications of petitioner by Joel Campbell and Joe Lewis. App. 52-112. Testimony from the hearing is summarized below.

Officer Mark Gaddy claimed that shortly after he arrived at the scene of the incident, he was given petitioner's name as the individual who was potentially responsible for the shooting. Gaddy said petitioner generally fit the description of the shooter that law enforcement had been given at that time. App. 52, l. 11-53, l. 6. Gaddy stated that Joel Campbell described the shooter as "5'6" to 5'8", skinny with no facial hair, close on the sides with a mop-top haircut, dark skin with a hoodie, possibly blue and white." App. 59, ll. 15-21. A neighbor, Jim Moore, described the suspect as, "5'7" to 5'8", skinny with hair close on the sides with a mop top . . . black t-shirt with a white hand on it . . . black sweatpants." App. 59, l. 22-60, l. 1

Gaddy testified he and Jon Guest generated the photographic lineup using "people with the same physical characteristics" as petitioner. App. 53, ll. 7-25; 684-94. Gaddy said he and Guest showed the same lineup to every witness. App. 54, ll. 15-21. He took a statement from a

1 409 U.S. 188 (1972).

neighbor Jim Moore and showed him the lineup to see if he could identify the person he saw shortly after the incident.[2] App. 54, l. 23-55, l. 6. Moore identified petitioner. App. 56, ll.

Joel Campbell was at Eric Morris's, home on the day of the incident. App. 82-87. Campbell testified at some point during the afternoon a man in a hoodie showed up and Morris told him he was a friend. App. 83, l. 15-84, l. 6. Campbell described the man as a young black man 5'6" to 5'8" skinny without facial hair and wearing a "possibly blue and white" hoodie. App. 84, ll. 9-12; 91, ll. 17-19. He claimed that prior the shooting the man was outside for forty-five minutes to an hour. App. 85, ll. 16-21. After the incident, Campbell was shown the photographic lineup. Campbell testified that he identified petitioner as the shooter, "as soon as [he] saw his eyes." App. 89, ll. 1-23.

Joe Lewis was also at Morris's home the day of the shooting. Lewis alleged he had seen petitioner before because petitioner lived with Morris for a short time. However, he also said he had never spoken to petitioner. App. 99, ll. 22-25. Lewis did not know petitioner's name he just recognized him as someone he had seen before. App. 100, ll. 1-5; 101, ll. 1-3. He testified he did not interact with the man on the day of the incident but said they were both outside at Morris's house for around twenty minutes. App. 100, ll. 11-25; 103, ll. 20-23. Lewis claimed when he saw the photographic lineup, he recognized petitioner and was certain he was the shooter. App. 102, ll. 11-25.

Defense counsel argued both Campbell's and Lewis's identifications of petitioner were inadmissible because the photographic lineup used by law enforcement was inherently suggestive based on the description Officer Gaddy said they used to generate the lineup. App. 108, ll. 9-13. Counsel asserted that law enforcement was told the shooter did not have facial hair

---

2 Moore's in-camera testimony is given later during trial and was not a basis for the pretrial determination that Campbell's and Lewis's in-court identifications of petitioner were admissible.

and every other individual used for the lineup had facial hair except petitioner. App. 108, ll. 11-1-13. The solicitor argued law enforcement did the best they could in this circumstance based on the photographs they had access to at the time. The solicitor contended each person who viewed the lineup was admonished not to pay attention to hair length or facial hair. App. 108, ll. 15-24. The solicitor averred that the witness, Thomas Koepke, who arguably had the closest look at the shooter was unable to identify anyone in the lineup which demonstrated that the lineup was not unduly suggestive. App. 108, ll. 18-21.

The trial court found the lineup *was* suggestive where petitioner was the only person in the lineup that was clean shaven and where he appeared "right in the middle of the lineup." App. 110, ll. 3-11. However, the court ultimately found the identifications by the witnesses were admissible.

As to Lewis the court found the suggestiveness was "likely negligible" where Lewis knew petitioner. App. 110, l. 22-111, l. 15. As to Campbell the court noted he picked petitioner "immediately based upon his eyes." The court also noted Campbell's level of certainty was high that the shooter was petitioner. App. 111, l. 16-112, l. 8. The court found there was "no real corrupting influence" of the suggestive lineup based on the testimony and the other factors. The court stated:

> [w]hile the procedure might have been somewhat suggestive, I find that their testimony is, nevertheless, credible and that their identification of the [petitioner] was not based upon any suggestive lineup but based upon their own certainty and recollection as to the events, the circumstances relating to that event and their ability to identify the [petitioner] as the perpetrator of the offense; and therefore the in-court identification shall be permitted.

App. 112, l. 23-113, l. 7.

During trial Jim Moore, a resident that lived near Morris, testified in-camera. App. 207. Moore said that on the day of the incident a man entered his backyard saying someone had raped

and killed his mother. App. 208, ll. 8-18. Moore went to get his home phone to call 911 for help. App. 208, ll. 19-25. Moore testified that while he was on the phone with 911, the man grabbed the phone and walked away. App. 209, ll. 1-6. He said that he heard the man asking someone to come get him. App. 209, ll. 7-16. Moore claimed that before law enforcement arrived the man left. App. 209-210. Moore estimated that the interaction with the man was twenty minutes and that they were standing only a few feet from each other. App. 211, ll. 2-5. Moore described the man as a young black man wearing black sweatpants and a black hoodie with a large white hand on it. App. 210, ll. 17-24. When law enforcement showed him the photographic lineup he choose petitioner. App. 212, ll. 1-17. (207-217)

After Moore's in-camera testimony, the court ruled Moore's identification of petitioner was admissible. The court again found the lineup was "arguably suggestive," but found that the identification of petitioner was "nevertheless, reliable." App. 215, ll. 20-25

All three witnesses made in-court identifications of petitioner as the shooter. App. 153, l. 1-154, l. 17; 179, ll. 18-25; 223, ll. 11-16. Thomas Koepke who had not been able to identify petitioner from the lineup testified he was one hundred percent sure petitioner was the person who killed decedent and shot him. App. 201, ll. 18-21; 203, l. 9-204, l. 21; 245, l. 19-246, l. 1.

Discussion

The trial court erred in allowing Lewis, Campbell, and Moore to make in-court identifications of petitioner where the photographic lineup used by law enforcement was suggestive and created a substantial likelihood of irreparable misidentification.

An out-of-court identification of the defendant violates due process and must be suppressed when the identification procedure used by police was impermissibly suggestive and conducive to a substantial likelihood of misidentification. *State v. Liverman*, 398 S.C. 130, 138,

727 S.E.2d 422, 425 (2012). A witness's subsequent in-court identification is inadmissible "if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (emphasis added); *see also Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 381, 34 L.Ed.2d 401, 410 (1972).

Trial courts use a two-pronged inquiry to determine whether due process requires suppression of an out-of-court eyewitness identification. *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426. First, the court must determine whether the identification resulted from "unnecessarily suggestive" police procedures. *Biggers*, 409 U.S. at 198–99, 93. If the court finds, however, that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless "so reliable that no substantial likelihood of misidentification existed." *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426 (citing *Biggers*, 409 U.S. at 199, 93).

To determine whether an identification is reliable, it is necessary to consider the factors set forth in *Biggers*: (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 confrontation. *Biggers* at 199-200.

The trial court correctly found that lineup used by law enforcement was suggestive where the suspect had been described as not having facial hair and the petitioner was the only individual depicted in the lineup that did not have facial hair. The trial court's reasoning was sound where it discussed that when generating a lineup law enforcement should include persons with similar characteristics that are based on witness' descriptions. Here law enforcement was

informed the suspect did not have facial hair. Petitioner's photograph in the lineup showed him without facial hair. Notwithstanding those facts law enforcement selected five additional individuals for the lineup that had facial hair. Accordingly, the lineup was suggestive where, as the trial court noted, "an important part of the description was that the perpetrator was clean shaven," and all of the other photographs included were of individuals that had facial hair.

The trial court erred finding that despite the suggestive lineup the identifications were reliable under the *Biggers* factors. As to Lewis the court relied heavily on the fact that Lewis knew petitioner. However, his testimony was not that he knew petitioner it was that he had seen him before. In fact, Lewis did not know petitioner at all. Lewis did not even know petitioner's name as he had admittedly only seen petitioner one time before. This is not a situation where these two men were well acquainted and there would be no mistaking petitioner for someone else. According to Lewis's own testimony he had seen him once or twice before in passing and the two had never spoken to each other. The court stated that the other factors—witness opportunity to view individual, degree of attention, level of certainty—were all considered. However, the court failed to make specific findings as to the listed factors.

As to the first factor Lewis testified that he did not interact at all with petitioner on that day although they were both outside for about twenty minutes. Lewis did not testify at all about the second factor, his degree of attention. As to the third factor, Lewis previously described the individual as skinny, medium build, black guy with short hair. In the lineup you cannot see petitioner's build or weight. Petitioner is black as were all of the men shown in the lineup but his photograph in the lineup depicts longer hair. Lewis was certain that petitioner was the person he saw at the house and the lineup was shown to him the same day as the incident. However, when considering all of the factors together and weigh those factors against the corrupting effect of the

suggestive lineup Lewis's identification cannot be deemed reliable.

Regarding Campbell's identification of petitioner, the trial court appeared to rely solely on Campbell's level of certainty that petitioner was the shooter because of the way his eyes looked. However, Campbell admitted he did not give any description of the man's eyes to law enforcement on the day of the incident. App. 91-92. The court also noted the short time between the incident and the identification. Campbell testified that he and the man were outside Morris's home together for less than an hour. Campbell claimed at one point the man was staring at him but also testified that he was not really involved in the conversation because he was working on Morris's moped. App. 83, ll. 15-86, l. 12. However, the court did not make any specific findings as to the first three *Biggers* factors and when considering all of the factors together and weighing those factors against the corrupting effect of the suggestive lineup Campbell's identification cannot be deemed reliable.

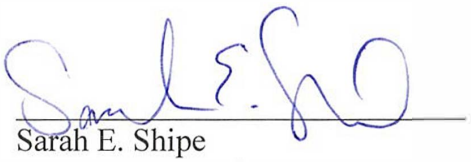
As to Moore's identification of petitioner the trial court did not make specific findings as to the *Biggers* factors although he summarily stated he considered them. Only two *Biggers* factors establish any degree of reliability in Moore's identification. Moore claimed he was around the man for twenty minutes and that they were standing very close. Moore's testimony was completely silent as to his "degree of attention." Moore's description was vague at best and did not match the clothing description of the other witnesses. Accordingly, when considering all of the factors together and weighing those factors against the corrupting effect of the suggestive lineup Moore's identification cannot be deemed reliable.

While it is true the state offered other evidence that pointed towards petitioner's guilt the in-court identifications made by Lewis, Campbell, and Moore, were incredibly damaging to petitioner. The out of court identifications of petitioner by all three witnesses violated

petitioner's due process and should have been suppressed where the photographic lineup used by law enforcement was impermissibly suggestive and conducive to a substantial likelihood of misidentification.

CONCLUSION

By reason of the foregoing argument, petitioner's convictions should be reversed, and this case remanded for a new trial.



Sarah E. Shipe
Appellate Defender

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

ATTORNEY FOR PETITIONER

This 3rd day of October, 2023.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable William A. McKinnon, Circuit Court Judge

BRIAN FOSTER,

PETITIONER

V.

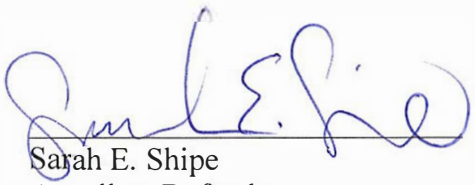
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000724

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellant pursuant to White v. State in the above referenced case has been served upon Suzanne Shaw, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Brief of Appellant pursuant to White v. State has been served on Brian Cornelius Foster, #371789, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 3rd day of October, 2023.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Spartanburg County
Honorable J. Derham Cole, Trial Judge
Honorable William A. McKinnon, Post-Conviction Relief Judge
Appellate Case No. 2023-000724

BRIAN FOSTER,

Petitioner,

vs.

THE STATE,

Respondent.

BRIEF OF RESPONDENT PURSUANT TO WHITE v. STATE

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases:

United States Supreme Court Cases:

Other State and Federal Cases:

STATEMENT OF ISSUE ON BELATED APPEAL

"Whether the trial court erred allowing multiple witnesses to make in-court identifications of petitioner as the shooter where the court ruled the photographic lineup used by law enforcement was suggestive but wrongly found the identifications were nonetheless reliable?"

COUNTER-STATEMENT OF ISSUE ON BELATED APPEAL

Did the trial judge somehow abuse his broad discretion or otherwise err by admitting evidence of several eyewitnesses' out-of-court and in-court identifications of Foster when: (1) the photographic lineup that was employed in Foster's case was not unduly suggestive under the specific circumstances involved; and (2) even if the photographic lineup was unduly or 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 February of 2018, Petitioner Brian Foster was arrested following an investigation into a fatal shooting that had occurred a few days earlier. In May of 2018, the Spartanburg County Grand Jury indicted Foster for one count of murder, three counts of attempted murder, four counts of possession of a weapon during the commission of a violent crime, and one count of possession of a firearm by a person convicted of a violent felony.[1] On April 8, 2019, a jury trial was commenced in the Spartanburg County Court of General Sessions with the Honorable J. Derham Cole, circuit court judge, presiding. At the conclusion of the four-day trial, the jury convicted Foster of murder, one of the attempted murder charges, the two related counts of possession of a weapon during the commission of a violent crime, and possession of a firearm by a person convicted of a violent felony. Following the verdict, the trial judge sentenced Foster to concurrent terms of imprisonment of life without parole for murder, thirty years for attempted murder, five years for possession of a weapon during the commission of a violent crime, and five years for possession of a firearm by a person convicted of a violent felony. Foster's defense counsel then attempted to initiate an appeal on Foster's behalf but failed to timely serve the notice of appeal.

Based on defense counsel's failure to timely serve the notice of appeal, the Court of Appeals issued an order dismissing Foster's appeal as untimely. A few days later, defense counsel moved to reinstate the appeal. However, the Court of Appeals denied the motion. On October 3, 2019, remittitur was issued.

Subsequent to the issuance of the remittitur, Foster timely filed an application for post-conviction relief ("PCR"), and, in response, the State filed a return requesting an evidentiary

[1] Prior to the incident, Foster had previously been convicted of grand larceny and the violent crime of second-degree burglary. (App'x p. 440; p. 570).

hearing. On June 7, 2022, an evidentiary hearing was commenced in the Spartanburg County Court of Common Pleas with the Honorable William A. McKinnon, circuit court judge, presiding. During the hearing, counsel for the State conceded Foster was entitled to belated appellate review pursuant to White v. State, 263 S.C 110, 208 S.E.2d 35 (1974). At the conclusion of the hearing, the PCR judge granted Foster belated appellate review pursuant to White and denied Foster's other allegations. That ruling was subsequently confirmed through a written order filed on April 4, 2023. Foster then timely filed a notice of appeal.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). 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."). "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. Patterson, 425 S.C. 500, 507, 823 S.E.2d 217, 221 (Ct. App. 2019) (citation and internal quotations omitted).

ARGUMENT

The trial judge properly admitted evidence of several eyewitnesses' out-of-court and in-court identifications of Foster because: (1) the photographic lineup that was employed in Foster's case was not unduly suggestive under the specific circumstances involved; and (2) even if the photographic lineup was unduly or 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.

Foster contends the trial judge reversibly erred by admitting identification evidence from several different eyewitnesses. In support of that contention, Foster maintains the photographic lineup employed in his case was unduly suggestive and—contrary to the conclusion reached by the trial judge—the eyewitnesses' identifications were not reliable due to the taint that purportedly resulted from the lineup used. To the contrary, the trial judge properly declined to suppress the identification evidence because the photographic lineup employed in Foster's case was not unduly suggestive under the specific circumstances involved. Moreover, even if the photographic lineup was unduly or unnecessarily suggestive, the trial judge nevertheless properly admitted the identification evidence because the eyewitnesses' identifications of Foster were sufficiently reliable under the totality of the circumstances such that there was no very substantial likelihood of misidentification as was necessary to warrant the drastic sanction of exclusion of the evidence. For those reasons, the trial judge did not abuse his broad discretion or otherwise err by admitting the identification evidence, and there are no valid grounds upon which to disturb that sound ruling on appeal. Foster's convictions should be affirmed.

Relevant Facts

On February 18, 2018, a gunman—for no clear reason—fatally shot Eric Morris in the head inside Morris's home with Morris's own gun after Morris invited him to enter. (App'x p. 134; p. 140; pp. 144-145; p. 175; pp. 350-351; pp. 355-356; p. 370; p. 377). Shortly after that,

the same gunman shot Thomas Koepke, who was one of Morris's roommates, in the hip outside the home and attempted unsuccessfully to shoot him several more times.[2] (App'x p. 190; p. 193; pp. 197-198). Foster was that gunman. (App'x p. 154; pp. 178-179; pp. 186-187).

On the afternoon of the shooting, Joel Campbell, who was best friends with Morris's brother, spent roughly forty-five minutes to one hour "together side by side" with Foster at Morris's residence. (App'x pp. 81-82; p. 141). During that time period, Campbell was able to observe Foster unobstructed during daylight hours and even looked directly into Foster's eyes at two separate points: (1) once when he realized Foster was oddly staring right at him while they were all hanging out together outside Morris's home; and (2) again when Foster came back outside after Campbell was startled by what sounded like—and was—a gunshot being fired inside the home. (App'x pp. 85-86; p. 92; p. 134; pp. 142-143; p. 145; p. 150; p. 169). Furthermore, when he spoke to deputies after the shooting, Campbell—despite being in a "panic" as a result of what had transpired—was able to provide a detailed and accurate description of the perpetrator, he *instantly* selected Foster as the gunman upon seeing his photograph in a six-person photographic lineup that was shown to him shortly after the incident, and he was certain of his identification of Foster.[3] (App'x p. 54; p. 59; p. 66; p. 69; p. 75; pp. 88-90; pp. 152-153; pp. 157-159; p. 169; pp. 386-387; p. 398).

Similarly, Darryl Lewis, who was Morris's cousin and—like Koepke—lived with Morris, was also present at Morris's residence on the date of the incident and spent roughly thirty to forty minutes in Foster's presence that afternoon. (App'x pp. 171-174). Prior to that date, Lewis was

---

[2] Fortunately for Koepke, the gunman's gun repeatedly jammed after Koepke was shot for the first time, and the gunman eventually abandoned his seemingly sincere efforts to kill Koepke due to that firearm malfunction. (App'x p. 198).

[3] Foster was first identified as a potential suspect after an individual in the area provided his name to one of the responding deputies. (App'x pp. 264-265).

also already familiar with Foster because Foster had previously stayed at Morris's residence for a week or so, but Lewis did not yet know Foster's name. (App'x p. 173). Furthermore, like Campbell, Lewis spoke with deputies shortly after the incident and he "very quickly" selected Foster as the shooter when shown a six-person photographic lineup because he "recognized him as soon as [he] s[aw] it." (App'x pp. 64-65; pp. 69-70; p. 75; pp. 178-179; pp. 186-187).

Like Campbell and Lewis, Koepke was at the home he shared with Morris and Lewis on the date of the incident, and he hung out with Morris, Campbell, Lewis, and Foster for an extended period of time that afternoon prior to the horrific events that unfolded. (App'x pp. 187-190). However, unlike the other surviving eyewitnesses, Koepke, who was shown the same photographic lineup as the others shortly after the crime, was unable to identify anyone from it. (App'x pp. 70-71; pp. 200-201; p. 256). The likely reason for his inability to make an identification at that time was Koepke was in the hospital due to having been shot, and he was either medicated or in shock and had lost a lot of blood when the lineup was shown to him. (App'x pp. 201-203; pp. 245-246).

In addition to the eyewitnesses at the scene, Jim Moore, who lived near Morris's home, encountered Foster on the date of the incident after Foster noisily scurried through Moore's neighbor's yard and into Moore's own backyard. (App'x pp. 207-208; pp. 217-219; p. 382). Moore spent the next twenty minutes in close proximity to Foster, spoke with him, and remained with him—outside of one brief instance when Foster tried to run off with his phone—until Foster fled upon a deputy's arrival at Moore's home. (App'x pp. 208-211; pp. 219-222). Furthermore, following Foster's rapid flight, Moore provided an accurate description of him to law enforcement, was shown a photographic lineup a short time after his encounter with Foster, and

selected Foster from that lineup within seconds of viewing it. (App'x pp. 54-56; pp. 59-60; pp. 70-71; pp. 211-212; p. 223; pp. 382-384; pp. 686-688).

Based on what was uncovered in the investigation into the incident, Foster was arrested for numerous crimes just two days later.[4] (App'x pp. 390-391). Subsequent to that, Foster was indicted for murder, multiple counts of attempted murder, and other charges, and he elected to proceed forward to trial. (App'x pp. 13-15; pp. 667-674).

Toward the outset of Foster's trial, the trial judge conducted an in limine hearing to address the admissibility of the identification evidence related to Campbell's and Lewis's out-of-court identifications of Foster as the perpetrator of the incident. (App'x pp. 47-49). During the course of that hearing, evidence and testimony was presented detailing the manner in which the photographic lineup procedure was conducted and the out-of-court identifications were made in Foster's case. (App'x pp. 52-79; pp. 81-107). More specifically, that evidence and testimony established: (1) a photographic lineup was created at the scene of the incident approximately an hour after it occurred through the use of a computer system that assisted in generating a lineup of photographs of individuals with "the same physical characteristics;" (2) Foster's photograph was included in that lineup; (3) Foster did not appear to have any facial hair in his lineup photograph while the other individuals depicted did appear to have some degree of facial hair; (4) the lineup was separately shown to Campbell and Lewis, who both spent an extended period of time with the gunman during daylight hours, at the scene of the incident shortly after it occurred; (5) the lineup was shown to Moore, who also spent an extended period of time with the suspect, a short distance away around the same time; (6) the lineup was shown to Koepke, who—like the others—was in the gunman's presence for an extended period, on the same date while he was at

[4] Significantly, by the time he was apprehended and arrested, Foster had altered his appearance by completely shaving off all his head hair. (App'x p. 394).

the hospital; (7) each of the witnesses was advised the suspect may or may not be in the lineup; (8) each of the witnesses was advised to focus on features that do *not* change instead of changeable features like hairstyle; and (9) upon viewing the lineup, Campbell identified Foster as the shooter instantly while Lewis identified Foster as the shooter "very quickly" and within a matter of just seconds.[5] (App'x pp. 52-79; pp. 81-107; pp. 684-685; pp. 689-694).

At the conclusion of the in limine hearing, defense counsel argued the photographic lineup was "inherently suggestive" because the perpetrator had been described as having no facial hair while Foster was the only person in the lineup without facial hair. (App'x p. 108). Conversely, the solicitor argued the lineup was not unduly suggestive because: (1) one of the eyewitnesses was not able to identify anyone from it; (2) the witnesses were advised prior to viewing the lineup not to focus on things like facial hair due to their changing nature; and (3) Campbell—demonstrating his ability to recognize someone even when their hairstyle had changed—noted Foster's hairstyle was not the same in his lineup photograph as it had been at the time of the incident. (App'x pp. 108-109). Beyond that, the solicitor contended there was no substantial likelihood of misidentification under the circumstances involved. (App'x p. 109).

After considering the matter, the trial judge found the lineup was—or at least might have been—"somewhat" suggestive due to fact Foster's photograph was the only one depicting a clean-shaven individual. (App'x pp. 109-110; p. 112). Nevertheless, the trial judge concluded there was no substantial likelihood of misidentification when considering the totality of the circumstances. (App'x pp. 110-113). Specifically, in reaching such a conclusion, the trial judge noted: (1) Lewis had preexisting knowledge of Foster, which minimized the potential for him to have been influenced by any suggestiveness with the lineup; (2) the suggestive feature of the

[5] Notably, Campbell personally confirmed he made his out-of-court identification of Foster from the lineup because he recognized Foster's eyes. (App'x pp. 89-92).

lineup was not immediately apparent due to the faintness of the others' facial hair; (3) Campbell made his identification immediately based on Foster's eyes, which he recognized "right off the bat;" (4) Campbell confirmed he was "quite certain" of his identification and, thus, displayed a high degree of certainty; (5) only a short period of time elapsed between the incident and the showing of the lineup; and (6) the lineup was conducted at the scene of the incident for Campbell and Lewis. (App'x pp. 110-113).

Following that ruling, the trial proceeded forward, and both Campbell and Lewis recounted the details of the incident along with the details surrounding their subsequent identifications of Foster as the perpetrator from the photographic lineup. (App'x pp. 133-169; pp. 171-187). Furthermore, each of the two identified Foster in the courtroom as the perpetrator of the charged crimes. (App'x p. 153; p. 179).

Likewise, Koepke recounted the details of the incident, and he confirmed he had been unable—unlike the others—to identify anyone from the same photographic lineup, which was shown to him while he was at the hospital. (App'x pp. 187-204). However, Koepke further confirmed he could now "a hundred percent" make an identification of the perpetrator during the trial itself. (App'x p. 204).

As the trial continued on, the solicitor called Moore to the witness stand, and the trial judge conducted a brief in camera hearing to determine the admissibility of his identification testimony. (App'x pp. 207-212). During that hearing, Moore confirmed he was with the man that entered his backyard on the date of the incident for roughly twenty minutes and allowed the man to use his phone during that time period. (App'x pp. 207-211). Furthermore, Moore confirmed he was shown a photographic lineup after the man fled and selected Foster from it within mere seconds of viewing it. (App'x pp. 211-212).

Following the presentation of that testimony, the trial judge concluded the photographic lineup used was "arguably suggestive" but Moore's identification was nevertheless reliable under the totality of the circumstances. (App'x pp. 215-216). As a result, the trial judge once again ruled the identification evidence was admissible. (App'x pp. 215-216).

Thereafter, Moore testified before the jury. (App'x pp. 217-227). During his testimony, Moore explained he was shown a photographic lineup following a strange encounter with a man that entered his yard on the date of the incident, and he identified Foster in the courtroom as the person he selected from that lineup. (App'x pp. 222-223).

Subsequent to that, the trial continued on, and, at its conclusion, the jury—after just over two hours of deliberations—convicted Foster of the murder of Morris and the attempted murder of Koepke along with several firearm-related offenses. (App'x p. 547; pp. 549-551). Meanwhile, the jury acquitted Foster of the charges related to Campbell and Lewis.[6] (App'x pp. 550-551).

Analysis

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

[6] As to why the jury may have acquitted Foster of the charges related to Campbell and Lewis, neither of the men was certain whether Foster actually attempted to shoot them personally. (App'x p. 168; p. 185).

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. Id.; see United States v. Stevens, 935 F.2d 1380, 1389 (3d 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, 127-128, 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). When evaluating whether a photographic lineup was unduly suggestive, several factors must be considered, including the size of the lineup, the manner of presentation by the officers, and the contents of the array. United States v. Thai, 29 F.3d 785, 808 (2d Cir. 1994). "If there is nothing inherently prejudicial about the presentation, such as use of a very small number of photographs . . . or the utterance of suggestive comments before an identification is made, the principal question is whether the picture of the accused, matching descriptions given by the witness, so stood out from all of the other photographs as to suggest to an identifying witness that that person was more likely to be the culprit[.]" Id. (citations, brackets, and internal quotations omitted). Significantly, "[a]n unduly suggestive procedure is one which leads the witness to the

virtually inevitable identification of the defendant as the perpetrator, and is equivalent to the authorities telling the witness, 'This is our suspect.' " Williams v. State, 692 S.E.2d 374, 378 (Ga. 2010) (citation and internal quotations omitted).

Importantly though, "[m]ost eyewitness identifications involve some element of suggestion[,]" and, even when suggestiveness is present, it 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 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.").

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 *very* 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, Foster contends the specific photographic lineup employed in his case was unduly suggestive and created a substantial likelihood of misidentification such that the in-court and out-of-court identification evidence should have been excluded during trial. As support for such a contention, Foster points to the fact he was the only one of the six individuals depicted in the photographic lineup who had no facial hair at all.

Notably, in State v. Collier, 421 S.C. 426, 440, 807 S.E.2d 206, 214 (Ct. App. 2017), a somewhat similar challenge to the purported suggestiveness of a photograph lineup was raised. In that case, a subcontractor named Justin Kirkman had a ten-to-fifteen-second-long face-to-face encounter with a burglar wearing a hooded sweatshirt at a motel that was undergoing renovations at the time. Id. at 430, 807 S.E.2d at 208. Roughly a week later, Kirkman was shown a

photographic lineup by law enforcement. Id. at 430, 807 S.E.2d at 209. Significantly, Collier was the only person depicted in the lineup who—like the suspect—was wearing a hooded sweatshirt. Id. at 439, 807 S.E.2d at 213. Ultimately, Kirkman was only able eliminate four of the suspects depicted in the lineup. Id. However, during trial, Kirkman recognized Collier as the perpetrator, and, following an in camera hearing on the matter, the trial judge ruled Kirkman's identification was admissible. Id. at 432-433, 807 S.E.2d at 210. Collier was subsequently convicted of second-degree burglary, and he appealed, arguing—in part—the identification evidence should have been excluded as the product of a unduly suggestive lineup since he was the only person depicted in the lineup wearing a hooded sweatshirt like the perpetrator. Id. at 440, 807 S.E.2d at 214. On appeal, the Court of Appeals affirmed. Id. at 442, 807 S.E.2d at 215. In affirming, the Court of Appeals concluded the manner in which the photographic lineup was constructed in Collier's case did *not* necessarily support a conclusion the lineup was "tainted by suggestive police tactics." Id. at 440-441, 807 S.E.2d at 214. And, the Court of Appeals reached that conclusion even though Kirkman himself expressed concern about whether Collier being depicted in a hooded sweatshirt had influenced him. Id. Beyond that, the Court of Appeals found the circumstances involved supported a conclusion Kirkman's in-court identification was reliable even if the out-of-court identification procedure had been suggestive. Id. at 441, 807 S.E.2d at 214.

Much like the lineup procedure employed in Collier, the photographic lineup identification procedure employed in Foster's case was not *unduly* suggestive under the specific circumstances involved. Demonstrating that fact, Foster and the five individuals depicted in the photographic lineup all had similar physical features and characteristics, including similar hairstyles. (App'x p. 685; p. 687; p. 690; p. 693). Meanwhile, Foster appeared to be clean

shaven in his lineup photograph while the other five men did appear to have at least *some* small amount of facial hair. (App'x p. 685; p. 687; p. 690; p. 693). Importantly though, the amount of facial hair an individual has can change throughout *a single day*, and the slight difference in facial hair of the six individuals depicted in the lineup did *not* make Foster's photograph stand out from the others in any meaningful way. Cf. State v. Simmons, 384 S.C. 145, 168, 682 S.E.2d 19, 31 (Ct. App. 2009) ("Despite Simmons's contention that his ears were smaller than those of the other individuals in the line-up, his photograph does not stand out in such a way as to render the line-up unduly suggestive."). In fact, Koepke was not even able to identify anyone from the lineup despite the fact Foster was the only one who was clean shaven in it. Cf. State v. Gambrell, 274 S.C. 587, 590, 266 S.E.2d 78, 80 (1980) ("The fact [the witness] could not differentiate between two of the photographs because, in her words, they 'looked so much alike,' belies any assertion they were selected or arranged in a manner likely to suggest her to identify [Gambrell]."). Thus, the mere fact Foster was depicted with less facial hair than the other men was not something that rendered the photographic lineup impermissibly suggestive under the circumstances involved. See United States v. House, 823 F.3d 482, 486 (8th Cir. 2016) ("In a photographic lineup, reasonable variations in hair length or style are not impermissibly suggestive, especially as they can vary on any given person at different times." (citation and internal quotations omitted)). And, that was particularly true given the fact all the witnesses were expressly instructed not to focus on changeable features like hairstyle before being shown the lineup, which helped to further eliminate any possibility they would have been improperly influenced by the depicted facial hair. Cf. Valentine v. State, 307 So. 3d 726, 733 (Fla. Dist. Ct. App. 2020) (instructing a lineup of clones is not required and rejecting the suggestion the photographic lineup used in Valentine's case was unnecessarily suggestive even though some of

those depicted in it had more facial hair than others because the eyewitness was specifically instructed not to focus on facial hair). Accordingly, even though everyone in the photographic lineup employed did not look exactly the same as each other in all respects, the lineup itself was *not* unduly or impermissibly suggestive under the circumstances involved. Cf. House, 823 F.3d at 486 (concluding—in a case in which the perpetrator was described as having a ponytail—"the mere fact that House is the only individual pictured with a ponytail does not render the photographic lineup unduly suggestive"); Collier, 421 S.C. at 440, 807 S.E.2d at 214 (explaining "it does not necessarily follow that the lineup was tainted by suggestive police tactics" even though Collier was the only person who—like the suspect—was wearing a hooded sweatshirt in a six-person photographic lineup).

Critically though, even assuming the identification procedure employed actually was unduly or unnecessarily suggestive, the identification evidence was nonetheless still admissible during trial because—just as the trial judge correctly recognized—no very substantial likelihood of irreparable misidentification existed under the specific circumstances of Foster's case. Looking to the relevant circumstances, each and every one of the witnesses had an excellent opportunity to view Foster on the date of the incident because: (1) their encounters with the perpetrator occurred outdoors during daylight hours; (2) they were in the perpetrator's presence for extended periods of time ranging from no less than twenty minutes to as much as an hour; (3) nothing was covering the perpetrator's face or hiding any of his features from view; (4) the witnesses were able to directly view the perpetrator's face, and Campbell even locked eyes with him on more than one occasion; and (5) the witnesses were in close proximity to the perpetrator, and Moore was close enough to him for him to be able physically grab a phone from Moore's hand. 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, the attention of all the witnesses was heightened due to the startling and bizarre natures of their encounters with the perpetrator, and Campbell and Lewis's shared encounter was even more harrowing and attention-grabbing due to the life-threatening circumstances involved. 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). Likewise, the witnesses provided detailed and accurate descriptions of the perpetrator, and their largely-consistent descriptions matched Foster's physical appearance. Cf. 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, Campbell, Lewis, and Moore all recognized Foster either instantly or within seconds upon seeing his photograph in the lineup, they all appeared confident in their identifications, and they were all still certain of their identifications by the time of trial. Cf. 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."). Moreover, Lewis was already familiar with and had preexisting knowledge of Foster based on the fact they previously lived in the same residence for a week or so, which helped to minimize the possibility his identification was improperly influenced by any suggestiveness in the photographic lineup. See Liverman, 398 S.C. at 141, 727 S.E.2d at 427 (instructing "the fact that an identification witness knows the accused remains a significant factor in determining reliability" and any suggestiveness in the identification procedure is mitigated by the witness's prior knowledge of the accused). Finally, the witnesses all identified Foster as the perpetrator while still at the same locations where they encountered him on the same date of the incident not long after it occurred, which meant only a brief period of time elapsed between the encounters and the identifications. Cf. Turner, 373 S.C. at 128, 644 S.E.2d at 697 (concluding identification evidence was reliable and properly admitted regardless of any suggestive when "the time between the crime and the confrontation was very short as the line-up occurred on the same day as the crime"); State v. Mansfield, 343 S.C. 66, 80, 538 S.E.2d 257, 264 (Ct. App. 2000) (concluding an identification was reliable under the totality of the circumstances when "*[c]ritically, there was only a brief time between the crime and the identification*").

When considering the totality of those circumstances, strong-enough indicia of reliability were present such that the identification evidence in Foster'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."); cf. State v. Ford, 278 S.C. 384, 386, 296 S.E.2d 866, 867 (1982) ("The reliability of the identifications is established by the circumstances. The night clerk observed his assailant at close range for seven to eight minutes in a well-lit room. Because he was a victim as opposed to a mere passerby, his degree of attention was presumably acute. He was positive of his identification, and the lineups were conducted soon after the crime. One identification witness testified he observed [Ford] for approximately fifteen minutes in a well-lit service station, that he was attentive because of [Ford]'s unusual behavior, and that he was positive of his identification. *Clearly*, these identifications were sufficiently reliable to submit to the jury." (emphasis added)). And, significantly, the reliability of that identification was further enhanced by the fact Foster's DNA profile *compellingly* matched DNA profiles developed from clothing items that had been found hidden along with the murder weapon shortly after the killing.[7] See Brisco v. Ercole, 565 F.3d 80, 94 (2d Cir. 2009) (explaining the factors identified

[7] Beyond the identification evidence, the following evidence and testimony linking Foster to the charged offenses was presented during his trial: (1) surveillance footage captured both inside and outside Moore's home, which appeared to depict Foster; (2) testimony establishing a tracking dog tracked the scent of the individual Moore interacted with to Moore's neighbor's shed, which led to the discovery a hidden bookbag containing clothing with Foster's DNA on it along with several guns—including the murder weapon and a jammed pistol; (3) testimony establishing Foster called the exact same phone numbers after being booked into jail that the individual who interacted with Moore called when trying to obtain assistance in rapidly escaping from the area where the incident occurred; (4) a recording of incriminating statements Foster made during calls he placed from jail; and (5) testimony establishing Foster attempted to alter his appearance in the immediate aftermath of the incident by shaving his head. (App'x p. 220; p. 224; pp. 232-233; p. 240; p. 249; pp. 281-283; pp. 290-297; pp. 299-300; pp. 309-312; pp. 319-324; pp. 349-356; pp. 389-390; p. 394; pp. 421-424; pp. 429-437; p. 441; pp. 453-455; pp. 474-475). In light of all that, the admission of the identification evidence—even assuming it was somehow improper—was entirely harmless because the other evidence presented during trial overwhelmingly established Foster was, in fact, the perpetrator in an entirely independent fashion from the witnesses' 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."); cf. State v. Thompson, 276 S.C. 616, 621, 281

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 Foster's case was not unnecessarily or unduly suggestive and because—even if it was—no very substantial likelihood of misidentification existed under the totality of the circumstances, the trial judge did not err by declining to employ the drastic remedy of suppressing the identification evidence and prohibiting multiple witnesses—including several Foster terrorized at gunpoint—from identifying Foster during trial. See Harker, 800 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. . . . [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. State v. Washington, 323 S.C. 106, 112, 473 S.E.2d 479, 482 (1996) (affirming the trial judge's admission of identification evidence even though Washington was the only one depicted in a

---

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.").

photographic lineup with hair that matched the description of the suspect's hair); Collier, 421 S.C. at 441, 807 S.E.2d at 214 (finding identification evidence was properly admitted even though Collier was the only person in the six-person photographic lineup dressed in the same manner as the suspect). 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 Foster from pointing out to the jury all the reasons he believed the various witnesses' identifications should not have been credited.[8] 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)). Foster's convictions should be affirmed.

[8] During her closing argument, defense counsel did, in fact, attempt to convince the jury the identification evidence was unreliable due to the purportedly suggestive and problematic nature of the photographic lineup. (App'x pp. 484-499).

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Deputy Attorney General

BY:_____
Mark R. Farthing
S.C. Bar Number 76901

ATTORNEYS FOR RESPONDENT

March 11, 2024

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Spartanburg County
Honorable J. Derham Cole, Trial Judge
Honorable William A. McKinnon, Post-Conviction Relief Judge
Appellate Case No. 2023-000724

BRIAN FOSTER,

Petitioner,

vs.

THE STATE,

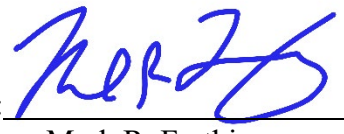
Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies this Brief of Respondent Pursuant to White v. State 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."

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Deputy Attorney General

BY: 

Mark R. Farthing
S.C. Bar Number 76901

ATTORNEYS FOR RESPONDENT

March 11, 2024

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Spartanburg County
Honorable J. Derham Cole, Trial Judge
Honorable William A. McKinnon, Post-Conviction Relief Judge
Appellate Case No. 2023-000724

BRIAN FOSTER,

Petitioner,

vs.

THE STATE,

Respondent.

PROOF OF SERVICE

I, Caroline Collins, certify I have served the within Brief of Respondent Pursuant to White v. State on Petitioner by sending an electronic copy via email to the address listed in AIS for the following individual:

Sarah E. Shipe, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 11th day of March, 2024.

CAROLINE COLLINS
Administrative Coordinator
Office of the Attorney General

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Brian Foster, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2023-000724

Appeal From Spartanburg County
J. Derham Cole, Trial Judge
William A. McKinnon, Post-Conviction Relief Judge

Unpublished Opinion No. 2024-UP-371
Submitted October 9, 2024 – Filed October 30, 2024

AFFIRMED

Appellate Defender Sarah Elizabeth Shipe, of Columbia, for Petitioner.

Senior Assistant Deputy Attorney General Mark Reynolds Farthing, of Columbia, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari from an order of the circuit court denying his application for post-conviction relief (PCR) but finding he was entitled to a belated review of his direct appeal issue pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

Because there is sufficient evidence to support the PCR judge's finding that Petitioner did not knowingly and intelligently waive his right to a direct appeal, we grant certiorari on Petitioner's question and proceed with a review of the direct appeal issue pursuant to *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986).

On appeal, Petitioner argues the trial court erred in allowing multiple witnesses make in-court identifications of Petitioner because the photographic line-up used by law enforcement was unduly suggestive and impermissible pursuant to *Neil v. Biggers*.[1] We affirm pursuant to Rule 220(b), SCACR.

We hold the trial court did not abuse its discretion in refusing to suppress the in-court identifications. *See State v. Liverman*, 398 S.C. 130, 137-38, 727 S.E.2d 422, 425 (2012) ("Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact."); *id.* at 138, 727 S.E.2d. at 425 ("In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court."); *id.* ("Generally, the decision to admit an eyewitness identification is at the trial [court]'s discretion and will not be disturbed on appeal absent an abuse of discretion."). Although the trial court found the use of the photographic line-up was "somewhat suggestive" because Petitioner did not possess any facial hair in his photograph while the other five individuals did, its findings that the witnesses' identifications were reliable, under the totality of the circumstances, were supported by the evidence and therefore not an abuse of discretion. *See State v. Moore*, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000) ("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."); *id.* at 287, 540 S.E.2d. at 447 (explaining courts utilize a two-prong inquiry to determine the admissibility of eyewitness identification testimony, asking first "whether the identification process was unduly suggestive," and if so, "whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed" (quoting *Curtis v. Commonwealth*, 396 S.E.2d 386, 388 (Va. Ct. App. 1990))); *State v. Wyatt*, 421 S.C. 306, 313, 806 S.E.2d 708, 711 (2017) (holding circumstances that "may make suggestive police identification procedures necessary [include]: 'where it occurs shortly after the alleged crime, near the scene of the crime, as the witness' memory is still fresh, and the suspect has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue

[1] 409 U.S. 188 (1972).

searching.'" (quoting *Gibbs v. State*, 403 S.C. 484, 494, 744 S.E.2d 170, 175 (2013))); *Moore*, 343 S.C. at 289, 540 S.E.2d at 448-49 (explaining the factors to be considered in evaluating whether the identification was sufficiently reliable, such that no substantial likelihood of misidentification existed include: "[t]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." (quoting *Biggers*, 409 U.S. at 199-200)); *State v. Patterson*, 337 S.C. 215, 229, 522 S.E.2d 845, 852 (Ct. App. 1999) ("Reliability is the linchpin in determining the admissibility of identification testimony."); *State v. Collier*, 421 S.C. 426, 440-41, 807 S.E.2d 206, 214 (Ct. App. 2017) (finding the trial court did not abuse its discretion in allowing the in-court identification by an eyewitness who was previously shown a photographic line-up in which the defendant was the only person who—like the suspect—wore a hooded sweatshirt, because there was no substantial likelihood of misidentification); *State v. Turner*, 373 S.C. 121, 128, 644 S.E.2d 693, 697 (2007) (finding identification evidence 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").

AFFIRMED.[2]

THOMAS, HEWITT, and VINSON, JJ., concur.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

RECEIVED
Nov 14 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable William A. McKinnon, Circuit Court Judge

Opinion No. 2024-UP-371

BRIAN FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000724

PETITION FOR REHEARING

On October 30, 2024, this Court affirmed petitioner's convictions and sentences where petitioner argued the trial court erred in allowing multiple witnesses to make in-court identifications of petitioner because the photographic line-up used by law enforcement was unduly suggestive and impermissible pursuant to *Neil v. Biggers*.[1] *Foster v. State*, Op. No. 2024-UP-371 (S.C. Ct. App. Filed Oct. 30, 2024). Pursuant to Rule 221(a), SCACR, Brian Cornelius Foster requests this Court grant rehearing considering the significant points overlooked and/or misapprehended by this Court discussed below.

---

[1] 409 U.S. 188 (1972).

In affirming petitioner's convictions and sentences, this Court upheld the trial court's decision that the witnesses' identifications were reliable under the totality of the circumstances and were supported by the evidence and therefore not an abuse of discretion. *Foster v. State*, Op. No. 2024-UP-371 (S.C. Ct. App. Filed October 30, 2024). In its opinion this Court correctly relied on South Carolina's significant identification cases. Below petitioner will show why the South Carolina law cited in this Court's opinion, when applied to these facts, does not support the Court's decision to affirm.

In the opinion the Court cited *State v. Moore*. 343 S.C. 282, 540 S.E.2d 445 (2000). In that case the Supreme Court of South Carolina held (1) the show-up procedure was unduly suggestive and (2) eyewitness identifications were unreliable as a matter of law. *Id.* The Court first found the trial court ruling the show-up procedure was not suggestive—where the two suspects were the only persons around not in a police uniform when the witness positively identified them—was error. *Id.* At 287, 540 S.E.2d at 448.

In that case, the Court also found the identification was unreliable as a matter of law. In coming to that decision, the Court cited *Caver v. Alabama*, 537 F.2d 1333, 1335 (5th Cir.1976), cert. denied, 430 U.S. 910, 97 S.Ct. 1183, 51 L.Ed.2d 587 (1977), for the proposition "an eyewitness identification which is unreliable because of suggestive line-up procedure is constitutionally inadmissible as a matter of law." *Id.* Next the Court analyzed the *Neil v. Biggers* factors application to the facts of the case and ultimately found under the totality of the circumstances there was a substantial likelihood of irreparable misidentification such that the identifications were unreliable as a matter of law. *Id.* at 289-90 540 S.E.2d at 449.

The Court also cited *State v. Wyatt*. 421 S.C. 306, 806 S.E.2d 708 (2017). In that case our Supreme Court held an identification by correctional officer at his post in a watch tower

during single person show up procedure was suggestive but that the use of suggestive procedure was necessary. *Id.* In that case, the Court focused on necessity of this procedure in these circumstances.

Wyatt is readily distinguishable from the case at hand where the witnesses making the in-court identifications were not law enforcement. Neither was the suggestive procedure a single person show up. Here, it was a photographic line-up used by law enforcement. Moreover, there was absolutely no necessity for law enforcement to use the suggestive photographic line-up used in this case.

Also cited by this Court was *State v. Collier*. 421 S.C. 426, 807 S.E.2d 206 (Ct. App. 2017). In that case this Court held a witness's in-court identification was not so tainted by allegedly suggestive pretrial photographic line-up as to require its suppression. *Id.* In that case this Court noted "the trial court gave adequate consideration to the requisite facts in deciding to admit [the witness's] in-court identification of Collier." *Id.* at 441, 807 S.E.2d at 214

In *State v. Turner*, our Supreme Court held the photographic lineup from which the victim identified defendant as her assailant was not unduly suggestive and regardless, the identification was reliable. 373 S.C. 121, 644 S.E.2d 693 (2007). In that case the suggestive procedure used was a variation in the background colors on the photographic line-up. However, all the men in the line-up had facial hair and were muscular as the victim described. *Id.* at 127-28, 688 S.E.2d at 297. Unlike *Turner*, the photographic line-up in this case was suggestive where petitioner was the only face in the line-up without facial hair.

Here, the photographic line-up used by law enforcement was suggestive and created a substantial likelihood of irreparable misidentification. The trial court correctly found that line-up used by law enforcement was suggestive where the suspect had been described as not having

facial hair and the petitioner was the only individual depicted in the line-up that did not have facial hair. Additionally, the trial court's reasoning was sound where it discussed that when generating a line-up law enforcement should include persons with similar characteristics that are based on witness' descriptions. Here law enforcement was informed the suspect did *not* have facial hair. Petitioner's photograph in the line-up showed him without facial hair. Notwithstanding those facts law enforcement selected five additional individuals for the line-up that had facial hair. Accordingly, the line-up was suggestive where, as the trial court noted, "an important part of the description was that the perpetrator was clean shaven," and all the other photographs included were of individuals that had facial hair.

The trial court erred finding that despite the suggestive line-up the identifications were reliable under the *Biggers* factors. As to Lewis the court relied heavily on the fact that Lewis knew petitioner. However, Lewis's testimony was not that he knew petitioner it was that he had seen him before. In fact, Lewis did not know petitioner at all. Lewis did not even know petitioner's name as he had admittedly only seen petitioner one time before. This is not a situation where these two men were well acquainted and there would be no mistaking petitioner for someone else. According to Lewis's own testimony he had seen him once or twice before in passing and the two had never spoken to each other. The court stated that the other factors—witness opportunity to view individual, degree of attention, level of certainty—were all considered. However, the court failed to make specific findings as to the listed factors.

As to the first factor Lewis testified that he did not interact at all with petitioner on that day although they were both outside for about twenty minutes. Lewis did not testify at all about the second factor, his degree of attention. As to the third factor, Lewis previously described the individual as skinny, medium build, black guy with short hair. In the line-up you cannot see

petitioner's build or weight. Petitioner is black as were all of the men shown in the line-up but his photograph in the line-up depicts longer hair. Lewis was certain that petitioner was the person he saw at the house and the line-up was shown to him the same day as the incident. However, when considering all of the factors together and weigh those factors against the corrupting effect of the suggestive line-up Lewis's identification cannot be deemed reliable.

Regarding Campbell's identification of petitioner, the trial court apparently relied solely on Campbell's level of certainty that petitioner was the shooter because of the way his eyes looked. However, Campbell admitted he did not give any description of the man's eyes to law enforcement on the day of the incident. App. 91-92. The court also noted the short time between the incident and the identification. Campbell testified that he and the man were outside Morris's home together for less than an hour. Campbell claimed at one point the man was staring at him but also testified that he was not really involved in the conversation because he was working on Morris's moped. App. 83, ll. 15-86, l. 12. However, the court did not make any specific findings as to the first three *Biggers* factors and when considering all the factors together and weighing those factors against the corrupting effect of the suggestive line-up Campbell's identification cannot be deemed reliable.

As to Moore's identification of petitioner the trial court did not make specific findings as to the *Biggers* factors although he summarily stated he considered them. Only two *Biggers* factors establish any degree of reliability in Moore's identification. Moore claimed he was around the man for twenty minutes and that they were standing very close. Moore's testimony was completely silent as to his "degree of attention." Moore's description was vague at best and did not match the clothing description of the other witnesses. Accordingly, when considering all of the factors together and weighing those factors against the corrupting effect of the suggestive

line-up Moore's identification cannot be deemed reliable.

The in-court identifications made by Lewis, Campbell, and Moore, were incredibly damaging to petitioner. The out of court identifications of petitioner by all three witnesses violated petitioner's due process rights and should have been suppressed where the photographic line-up used by law enforcement was impermissibly suggestive and conducive to a substantial likelihood of misidentification.

The trial court's failure to make specific findings of fact in this case was an abuse of discretion. Accordingly, petitioner respectfully requests this Court reverse petitioner's convictions based on the trial court's erroneous admission of in-court identifications made by Lewis, Campbell, and Moore.

Sarah E. Shipe
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

This 14th day of November, 2024.

RECEIVED
Nov 14 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable William A. McKinnon, Circuit Court Judge

BRIAN FOSTER,

PETITIONER

V.

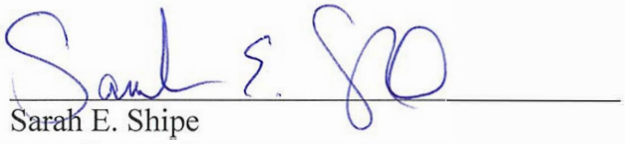
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000724

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Brian Cornelius Foster, #371789, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 14th day of November, 2024.



Sarah E. Shipe
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

The South Carolina Court of Appeals

Brian Foster, Petitioner,

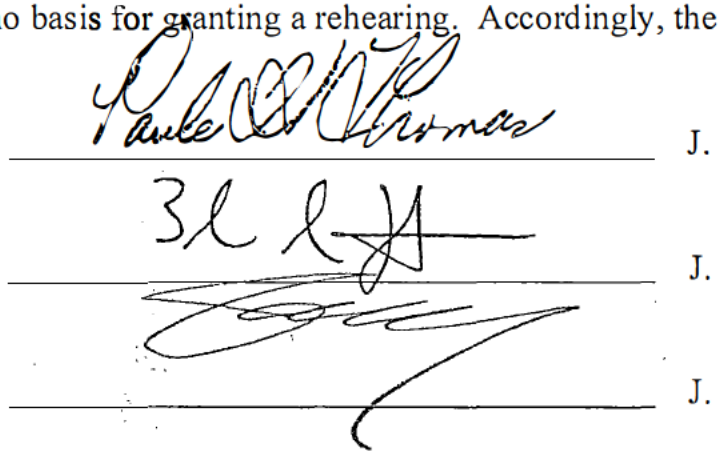
v.

State of South Carolina, Respondent.

Appellate Case No. 2023-000724

ORDER

After careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Sarah Elizabeth Shipe, Esquire
Mark Reynolds Farthing, Esquire
The Honorable William A. McKinnon

FILED
Dec 02 2024