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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable B. Alex Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRIWANTA CYNTONIO BRYANT,

APPELLANT

APPELLATE CASE NO. 2025-001503

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court abuse its discretion by admitting an eyewitness's out of court identification and subsequent in court identification of Appellant as the individual who robbed her where the photographic lineup compiled by law enforcement was unnecessarily and unduly suggestive and the identification was so unreliable that a substantial likelihood of irreparable misidentification existed?

STATEMENT OF THE CASE

A Horry County grand jury indicted Appellant on April 19, 2023, for armed robbery and possession of a weapon during the commission of a violent crime. R. * (Indictments). His case was called to trial on July 14, 2025, before the Honorable B. Alex Hyman, and a jury. Tr. 1. Assistant Solicitors Seth Oskin and Anthony DiChiara represented the state. Jonathan Hiller and Lisa Deitle represented Appellant. Tr. 1.

On July 15, 2025, the jury found Appellant guilty as indicted. Tr. 253, ll. 9-16. He was sentenced to life without parole for armed robbery pursuant to S.C. Code Ann. § 17-25-45. No sentence was imposed for the weapons offense pursuant to S.C. Code Ann. § 16-23-490 because Appellant was sentenced to life without parole for armed robbery. Tr. 263, l. 1 – 264, l. 10.

This appeal follows.

STATEMENT OF FACTS

Shortly before nine o'clock on the night of February 8, 2023, BreAnna Hyde, then a student at Coastal Carolina University, was leaving her apartment to go to the gym. As she was sitting in her car outside her apartment, a car backed into the parking spot next to her. She paid little attention to this vehicle until the driver knocked on her window with a gun. Hyde immediately tried to back her car up and leave. However, the man told her that if she tried to leave, "he would shoot." The man asked Hyde for money. Hyde told him she did not have any cash, but that she could get her debit card from her apartment. The man refused this offer. Hyde then suggested that she could give him money through Cash App or Venmo. The man agreed to use Cash App. Hyde showed the man the balance in her bank account. The man told her that he did not want to take all of her money and would "accept $200." He directed Hyde to send the money to Talisha Smalls. "He said it was for his son." After the transaction was complete, the man "backed up into his car still holding the gun" and then "sped off pretty fast." Tr. 175, l. 2 – 178, l. 2.

Hyde immediately moved her car so that if the man returned, she would not be in the same parking spot. She then called her boyfriend, who lived in the same apartment complex, and asked him to come downstairs. After briefly speaking with her boyfriend, Hyde called her aunt, who told her to call the police right away. Hyde called 911 at 9:11 p.m. Tr. 178, l. 6 – 179, l. 15.

Robert Nicholl with the Conway Police Department was one of the first officers to arrive at the scene. He met with Hyde in the "breezeway" outside her apartment. Tr. 158, ll. 11-21. Hyde told Nicholl what happened. She described the robber as a skinny Black male with short dreads and said he was wearing all black. Tr. 159, l. 2 – 160, l. 12. Hyde described the car the robber drove as "an older model, black in color, Ram or Dodge" and the handgun as long and

black. Tr. 141, ll. 11-15. Hyde also showed Nicholl the Cash App transaction on her phone showing that Hyde sent two hundred dollars to Talisha Smalls. Tr. 138, ll. 1-23.

Officer Nicholl was able to "link" Talisha Smalls to an address at 1911 9th Avenue, Apartment A2, in Conway. Tr. 138, ll. 1-23. He also searched for Talisha Smalls in the South Carolina Department of Motor Vehicles (DMV) database and discovered that a 2010 Dodge Avenger was registered to her. Tr. 141, ll. 12-25. Nicholl obtained the license plate number for Smalls' 2010 Dodge Avenger from the DMV registration. He entered the license plate number into the automated license plate reader (ALPR) system "and was able to see the vehicle traveling from the incident location back into Conway" starting at 9:08 p.m. Tr. 143, ll. 23.

After discovering this information, Nicholl drove to 1911 9th Avenue to see if he could find the car registered to Smalls. He arrived around 10:15 p.m. Tr. 168, l. 13 – 169, l. 19. He saw a Dodge Avenger in the parking lot, but it had a different license plate. Before Nicholl could decide what to do next, Appellant arrived in the Dodge Avenger registered to Smalls. Tr. 146, l. 23 – 147, l. 4. When Appellant got out of the car, Nicholl immediately detained him. After Appellant was detained, Nicholl made contact with Talisha Smalls at her apartment. Smalls confirmed that she had a Cash App account and showed Nicholl her recent transactions, which included a transfer of two hundred dollars from Hyde's account at 9:03 p.m. Tr. 148, l. 12 – 149, l. 22; See State's Exhibit No. 5. Nicholl also searched Smalls' Dodge Avenger and located a handgun. Tr. 152, l. 23 – 155, l. 12.

Notably, Appellant did not match the description of the robber given by Hyde to law enforcement. Hyde stated that the man had short dreads and was wearing all black. However, Appellant did not have dreads and was not wearing all black. Nicholl recalled being "concerned" that Hyde stated the robber had dreads, but Appellant did not. Tr. 160, l. 1 – 164, l.

13. Despite this, Appellant was arrested that night and charged with armed robbery. Tr. 156, ll. 3-8.

Two days later, on February 10, 2023, Hyde went to the Conway Police Department to view a photographic lineup. She identified Appellant in the lineup within about fifteen seconds. She maintained that she was one "hundred percent sure" that the individual she selected in the lineup was the person who robbed her. Hyde testified that she remembered the robber's nose and facial hair. Tr. 180, l. 7 – 183, l. 3. However, she was later impeached with footage from Officer Nicholl's body camera. Hyde admitted that when she was asked by law enforcement on the night of the robbery if the person who robbed her had facial hair, she responded, "I don't remember." Tr. 192, ll. 15-23. Hyde eventually identified Appellant in the courtroom as the person who robbed her. Tr. 195, ll. 2-9.

Nicholas Contino, a detective with the Conway Police Department, was tasked with obtaining the photographic lineup in this case and showing the lineup to Hyde. Contino testified that he was responsible for obtaining at least one photograph of Appellant, the suspect, and sending the photograph to the South Carolina Law Enforcement Division (SLED). SLED then generated the lineup shown to Hyde. SLED chose the five other photographs that appeared in the lineup in addition to Appellant's photograph. Contino explained that he generally obtains suspect photographs from the DMV or uses "jail photos." He said that if he sends multiple photographs of a suspect to SLED, SLED will used the "best one." However, Contino could not recall in this case whether he sent multiple photographs of Appellant to SLED or only the photograph SLED ultimately used in the lineup. Tr. 203, l. 13 – 204, l. 24.

Shaneikqa Smalls, Appellant's girlfriend and the mother of his child, testified that she allowed Appellant to drive her black Dodge Avenger on the night of February 8, 2023. That

night, she received two hundred dollars via Cash App. Smalls maintained that she was not expecting this money. After she received the money, Smalls testified that Appellant asked her "did it come." Later that evening, the police came to her apartment and "took" her phone. They took two photographs of the screen of her phone displaying the Cash App transaction. Smalls testified that she did not know of Hyde before she received the two hundred dollars. Tr. 209, l. 10 – 211, l. 12. Smalls acknowledged that she did not know what Appellant did that night and that she does not know whether Appellant had possession of her car the entire night. In addition to Appellant, Smalls also allowed other family members and trusted friends to drive her Dodge Avenger. Tr. 212, l. 3 – 213, l. 10.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Liverman, 398 S.C. 130, 137, 727 S.E.2d 422, 425 (2012) (citing State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). "Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." Id. at 137-38, 727 S.E.2d at 425 (citing State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000)). "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. at 138, 727 S.E.2d at 425 (citing Moore, 343 S.C. at 288, 540 S.E.2d at 448). "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 discretion." Id. at 138, 727 S.E.2d at 425 (citing Moore, 343 S.C. at 288, 540 S.E.2d at 448).

ARGUMENT

The trial court abused its discretion by admitting an eyewitness's out of court identification and subsequent in court identification of Appellant as the individual who robbed her where the photographic lineup compiled by law enforcement was unnecessarily and unduly suggestive and the identification was so unreliable that a substantial likelihood of irreparable misidentification existed.

Relevant Facts

Prior to trial, Appellant moved to suppress BreAnna Hyde's eyewitness identification and the trial court held a hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972). The state presented Hyde's testimony during the hearing.

Hyde explained that she was sitting in her car outside her apartment when she first noticed the robber. She testified that when she first saw him, he was driving. The man backed his car into the parking spot next to where she was parked so that the driver sides of their cars were adjacent to each other. Hyde did not pay any attention to the man until he knocked on her window with a gun. It was a "skinny" handgun. She testified that the man was Black. She noticed his nose and facial features. He was wearing gloves. Hyde immediately tried to back her car up when the man knocked, but he threatened to shoot her so she stopped and rolled down her window. Hyde testified that the man said he was not trying to hurt her, but that he needed "money for his kid because he just got out of prison." Hyde told the man that she did not have any money, but that she could go to her apartment and get her debit card. She then offered to send the man money through Venmo or Cash App. The man agreed to use Cash App and directed Hyde to send money to Talisha Smalls. After the transaction was complete, the man backed up into his car with the gun pointed at Hyde and drove away. Tr. 33, l. 23 – 38, l. 20.

Hyde testified that the encounter "felt like [it lasted] 15 minutes." She admitted that she was focused on the gun and not the man during the robbery because she had "never been in front of a gun before." While it was dark outside, Hyde explained that there was a streetlight in the grass by her car. The man was about an "arm's length" away from her during the robbery and nothing obstructed her view of him. Tr. 39, l. 1 – 41, l. 17. When the police arrived that night, Hyde told them the robber was Black, was wearing black gloves and a "track suit type thing," and had dreads. Tr. 43, ll. 11-15. She also described him as skinny and thought he was in his thirties or forties. While she did not recall his eye color, she specifically noticed his nose and facial hair ("the scruff on his face"). Tr. 43, l. 22 – 44, l. 16. Hyde had never seen the man before. Tr. 45, ll. 7-9.

At some point, Hyde met with an officer at the Conway Police Department. She was told she "was gonna do a photo lineup and . . . try to identify the guy who robbed me." Hyde testified that she was shown multiple photographs, "like a collage." She identified the person who she thought robbed her in the lineup and signed a form. Hyde maintained that law enforcement did not tell her who she should pick in the lineup. She identified Appellant in the lineup in about ten to fifteen seconds. Hyde testified that she had not seen any photographs of Appellant before she viewed the lineup and she did not go to his bond hearing. She maintained that she was one "hundred percent sure" that the person she identified in the lineup was the person who robbed her at the time she made the identification and that she was still one hundred percent sure at the time of the hearing. The only difference in the description she gave to law enforcement of the robber and the person she selected in the lineup was "his hair." Tr. 45, l. 11 – 49, l. 21. Hyde eventually identified Appellant in the courtroom as the person who robbed her. Tr. 50, ll. 3-9.

During cross-examination, Hyde admitted again that she was distracted by the gun during the encounter. Tr. 56, ll. 3-11. She further admitted that she was looking down at her phone while she was completing the Cash App transaction. Tr. 55, ll. 5-18. Hyde testified that she was never asked verbally how confident she was in her identification. However, prewritten on the form she signed after viewing the lineup is a statement indicating that she was "100% positive that the person [she identified] is the person [she] observed involved in a crime . . ." Tr. 59, ll. 11-17; See State's Exhibit No. 8.

Nicholas Contino, then a detective with the Conway Police Department, also testified *in camera*. He explained that he was tasked with showing Hyde a photographic lineup on February 10, 2023. Hyde viewed the lineup at 10:59 a.m., which was roughly thirty-six hours after the robbery on the night of February 8, 2023. Tr. 62, l. 1 – 63, l. 4. Contino explained that the lineup, which was generated by SLED, included six photographs displayed at the same time. Only Contino and Hyde were in the interview room when Hyde was shown the lineup. Contino maintained that he did not "do or say anything to influence her on who to pick." According to Contino, Hyde identified Appellant in the lineup "almost immediately." After selecting Appellant, Hyde signed a form indicating she was one hundred percent sure of her identification. Tr. 63, l. 9 – 66, l. 12.

Contino testified that all of the individuals in the lineup were "of a similar age range, race, facial features, build, weight, height, and hairstyle," which is "typical when lineups are generated for witness identification." Tr. 66, ll. 18-24.

During his direct testimony, Contino claimed that he did not know who the suspect was because he was "an outside detective." Tr. 64, ll. 16-18. However, during cross-examination, Contino contradicted himself by admitting that he was the individual who found the photograph

of Appellant and sent the photograph to SLED to include in the lineup. Tr. 68, ll. 13-19. Contino acknowledged that he was aware who was the "person of interest" before he presented the lineup to Hyde and that SLED would have told him "in the paperwork" the position of Appellant in the lineup. Tr. 69, ll. 5-16.

When shown the lineup, Contino agreed that Appellant was the only individual with an orange shirt on. However, he would not admit that Appellant was wearing "jail attire" or a "jail jumpsuit." Tr. 69, ll. 17-22. Despite his refusal to agree that Appellant was wearing "jail attire" in the photograph, Contino testified that he would have sent either "DMV photos or jail photos [of Appellant] to SLED" to include in the lineup. He explained that SLED may alter whatever photograph is sent when creating a lineup. For example, in this case, Contino said SLED altered the background of the photograph of Appellant he sent to "match the rest of the six-pack."[1] Tr. 70, ll. 1-17; See Defendant's Exhibit No. 1 Pretrial (Photograph).

Contino denied that the photograph of Appellant in the orange jail jumpsuit was suggestive. He maintained that he obtained the best photograph of Appellant as possible. He admitted that he had access to DMV records as a law enforcement officer. However, he could not recall whether he looked at Appellant's DMV records and he did not know the date Appellant last renewed his license. Because he did not recall what Appellant's DMV photograph looked like, he could not say whether that photograph would have been less suggestive than the photograph of Appellant he obtained from the jail. Tr. 71, l. 2 – 72, l. 9.

[1] The photograph of Appellant that Contino sent to SLED was marked as Defendant's Exhibit No. 1 Pretrial during the Biggers hearing. Despite Contino's testimony that SLED altered the background of this photograph, the background of this photograph and the background of the photograph of Appellant in the lineup appear to be identical. See State's Exhibit No. 1 Pretrial and Defendant's Exhibit No. 1 Pretrial. Perhaps Contino meant that the photograph was cropped.

To the best of his knowledge, Contino read the instructional form to Hyde verbatim. See R. * (State's Exhibit No. 2 Pretrial – Lineup Form). Contino agreed that this form contains a prewritten statement indicating that the witness is one hundred percent sure that the person she identified is the person who committed the crime. He admitted that the form does not allow the witness to supply her own level of certainty. Contino further maintained that a witness would not have selected an individual in the lineup if she were not one hundred precent certain. "The form is for a hundred percent certainty, and not for anything minimal." Tr. 72, l. 10 – 74, l. 10.

Contino also explained that his interaction with Hyde should have been audio and video recorded. He testified that he showed Hyde the photographic lineup in an interview room at the police department, which had cameras that automatically begin recording "the moment you walk" into the room. Contino was also wearing a body camera, which to his knowledge, recorded his interaction with Hyde.[2] Tr. 67, l. 12 – 68, l. 12.

Appellant presented the testimony of Dr. Dawn McQuiston during the Biggers hearing. Dr. McQuiston was qualified as an expert in eyewitness identification and police procedure involving identification issues. Tr, 81, l. 21 – 84, l. 12. Dr. McQuiston testified that "there are certain procedures if when followed promote eyewitness accuracy." Such procedures "can help eyewitnesses be more reliable in their identifications" and "avoid eyewitness mistakes." Tr. 86, ll. 9-16. She explained that "all of the recommendations say that all of the persons in a lineup should be reasonably similar when it comes to facial characteristics, background, lighting, so the fillers should be selected to reasonably match the suspect. And the point is so that no one stands out in the lineup." Tr. 87, ll. 2-11. She maintained that suspects in unfair lineups are identified more often than suspects in fair lineups. Tr. 87, ll. 16-18.

[2] Despite Contino's testimony that his interaction with Hyde should have been audio and video recorded, the state had no such recordings. Tr. 103, l. 24 – 104, l. 8.

Dr. McQuiston opined that the lineup in this case was "very unfair" because it was "suggestive." She testified that there is "one person who stands out relative to the other lineup members." Tr. 87, ll. 20-25. This individual, Appellant, is wearing orange clothing. In the uncropped version of the photograph of Appellant, which was marked as Defendant's Exhibit No. 1 Pretrial, it is "obvious" that Appellant is wearing "a prison jumpsuit or clothing." Tr. 88, ll. 4-20. While it is less obvious that Appellant is wearing prison attire in the cropped photograph used in the lineup, the orange color of Appellant's shirt "gives the witness a cue to prison clothing." Tr. 88, l. 21 – 89, l. 3.

The individuals labeled as 1, 2, 4, and 5 are wearing black in the lineup while the individual labeled 6 is wearing white. However, Dr. McQuiston testified that the photograph of the individual labeled 6 is "pretty cropped" making it difficult to see his clothing. Again, Appellant is the only individual in the lineup wearing orange. Dr. McQuiston testified that "suspects who stand out are more likely to be identified than suspects who do not." Tr. 89, ll. 4-18.

Dr. McQuiston explained that a "blind administration of a lineup" is "when the person administrating the lineup does not know the identity of the suspect in the lineup." She testified that it is important to have blind administrators to avoid giving witnesses "nonverbal cues." Dr. McQuiston also stated that "fewer false identifications are made . . . when the lineup is conducted in a manner that is blind" and, consequently, "one of the major recommendations" based on research is to use blind procedures. Tr. 89, l. 19 – 90, l. 11.

Dr. McQuiston also testified that national guidelines recommend that the administrator ask the witness how confident she is after making an identification. Research shows an eyewitness's confidence is "a good predictor of their accuracy." Therefore, it is very important

for a witness to provide her own level of confidence. Moreover, witness confidence can change over time based on lots of different factors, such as hearing feedback from others, seeing it on the news, or reading about it on social media. Because of this, Dr. McQuiston testified that it is really important "to get a good solid documentation of a witness' confidence from their own mouth when the lineup procedure is done." Tr. 90, l. 12 – 91, l. 10.

Dr. McQuiston opined that best practices were not used in the administration of the photographic lineup in this case. First, Appellant, the suspect, stands out relative to the other lineup members. Second, the lineup was not conducted by a blind administrator. Moreover, proper instructions were not given to the witness by the officer. "Instructions are really important when it comes to presenting [a lineup] in a fair and unbiased way." Also, the witness was not able to provide her own confidence level. The preprinted form stating the witness was one hundred percent sure was suggestive. Thus, Dr. McQuistion opined that the lineup and the form were both suggestive. Tr. 91, l. 11 – 92, l. 18.

Dr. McQuiston testified that "the problem with a suggestive lineup is that you can never know what the source of the identification was. When someone who stands out is identified, it's impossible to determine whether that person was identified because . . . the victim actually remembers this is the person who committed the crime or simply because that person stands out in the lineup. It's impossible to know which one of those is true." Tr. 95, ll. 12-21.

Lastly, Dr. McQuiston testified that there is reason to question the reliability of the identification in this case. One reason being that the witness's description of the robber did not match Appellant. Specifically, the witness stated that the robber had dreadlocks and Appellant did not have dreads. Additionally, the witness admitted that she was focused on the firearm during the encounter and that it was dark outside. Tr. 97, l. 11 – 98, l. 25.

At the conclusion of Dr. McQuiston's testimony, defense counsel argued that Hyde's identification should be suppressed. He asserted that the lineup used in this case was suggestive because Appellant is the only individual in the lineup wearing orange or a brightly colored shirt. Consequently, Appellant "stands out a lot" in the lineup. Tr. 105, l. 2 – 106, l. 11.

Counsel also argued that there was a substantial likelihood of misidentification given the suggestive lineup and the procedures utilized. Counsel listed the five factors the court should consider when determining whether an out of court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Counsel stated that the length of time between the crime and the confrontation was reasonable, thirty six hours. However, he argued that the remaining four factors were problematic. He contended that Hyde's opportunity to view the perpetrator and her degree of attention were diminished because Hyde was scared, distracted by the gun, and was looking down at her phone to complete the Cash App transaction. As to the accuracy of Hyde's prior description, counsel asserted that Hyde was clear that the perpetrator had dreads, but Appellant did not. He argued law enforcement "made other discoveries and kind of just, oh well, dreads or no dreads, whatever." He further emphasized that all of the individuals in the lineup had close cropped hair. No one had dreads, braids, or twists. Counsel also asserted that the form Hyde signed was suggestive because it did not allow her to provide her own level of confidence. Rather, the form supplied the answer for Hyde. So there is no evidence of her independent level of confidence. Tr. 106, l. 10 – 108, l. 9.

Lastly, defense counsel emphasized the importance of an eyewitness identification. He asserted that there is case law that states an in court identification is a very strong piece of evidence. If Hyde is permitted to identify Appellant in the courtroom, counsel contended there

would an "irreparable likelihood of harm" to Appellant of being misidentified. Tr. 108, l. 18 – 109, l. 4. He concluded that the identification should be suppressed. Tr. 109, ll. 5-8.

The trial court found that the lineup was not "overly suggestive" and any suggestiveness was harmless. Consequently, it ruled the in court identification was admissible. However, it told defense counsel that he could challenge the reliability of Hyde's identification during cross-examination. Tr. 112, l. 6 – 113, l. 23.

Discussion

The trial court abused its discretion by admitting BreAnna Hyde's out of court identification and subsequent in court identification of Appellant as the individual who robbed her since the photographic lineup compiled by law enforcement was unnecessarily and unduly suggestive and Hyde's identification was so unreliable that a substantial likelihood of irreparable misidentification existed.

"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)).

"When a defendant challenges the admissibility of a witness's identification, trial courts employ a two pronged inquiry to determine whether due process requires suppression." State v. Crummey, 443 S.C. 94, 102, 902 S.E.2d 391, 395 (Ct. App. 2024) (quoting State v. Wyatt, 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017)). "First, the court must determine whether the identification resulted from 'unnecessarily suggestive' police identification procedures." Id. (quoting Wyatt, 421 S.C. at 310, 806 S.E.2d at 710) (internal quotation marks omitted). "If . . . the court determines the procedures were both suggestive and unnecessary, the court must then

determine 'whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.'" Id. (quoting Wyatt, 421 S.C. at 310, 806 S.E.2d at 710) (internal quotation marks omitted); See State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012)). "If the court finds the police procedures were not suggestive, or that suggestive procedures were necessary under the circumstances, the inquiry ends there and the court need not consider the second prong." Id. at 102, 902 S.E.2d at 395-96 (quoting Wyatt, 421 S.C. at 310, 806 S.E.2d at 710) (internal quotation marks omitted).

"The inquiry must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification." State v. Spears, 393 S.C. 466, 480, 713 S.E.2d 324, 331 (Ct. App. 2011) (quoting State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007)) (internal quotation marks omitted). "The following factors are to be considered in evaluating the totality of the circumstances when determining the likelihood of misidentification: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's 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 crime and the confrontation." Id. (citing Turner, 373 S.C. at 127, 644 S.E.2d at 696-97).

The six person photographic lineup compiled by law enforcement and presented to Hyde was unduly suggestive because Appellant was the only individual in the lineup who was wearing a bright orange shirt. This easily singled out Appellant from the other members of the photographic lineup and resulted in the lineup being highly suggestive. The color of Appellant's shirt also strongly suggested to Hyde that Appellant was wearing "jail attire." Moreover, law enforcement's procedure in this case was not necessary. More specifically, SLED could have

changed the color of Appellant's shirt to match the color of the shirts of the other individuals in the lineup. If Appellant's shirt had been black and not orange, he would not have stood out. Additionally, a black shirt would not have suggested as strongly that Appellant was wearing "jail attire" or that the photograph was a mugshot. If SLED was unable to change the color of Appellant's shirt in the photograph from the jail, it could have obtained a different photograph of Appellant from the DMV or another source.

Not only was the identification process unduly suggestive, but Hyde's identification of Appellant was also highly unreliable. Hyde's encounter with the perpetrator was brief and she admitted that she was distracted by the gun. Additionally, Hyde was looking down at her phone for a large part of the encounter so she could complete the Cash App transaction. Therefore, she was not focused on the perpetrator. Hyde's description of the perpetrator minutes after the robbery did not match Appellant. Hyde stated the robber had dreads, but Appellant did not have dreads. Moreover, Hyde claimed that the robber's nose and facial hair stood out to her. However, on the night of the robbery, she told Officer Nicholl that she could not recall if the man had facial hair. Based on the record, it is unclear what Hyde's level of certainty was since the form she signed did not allow Hyde to provide her own level of certainty. Rather, preprinted on the form was a statement that she was "100% positive" that the individual she identified in the lineup was the person who committed the crime. See R. * (State's Exhibit No. 2 Pretrial – Lineup Form).

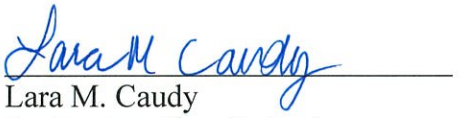
Based on the totality of the circumstances and the above factors, Hyde's identification was so unreliable that a substantial likelihood of misidentification existed. Appellant was prejudiced by the admission of the unnecessarily and unduly suggestive lineup and Hyde's unreliable out of court and subsequent in court identifications because Hyde was the state's key witness and her identification of Appellant as the man who robbed her was fundamental to the state's case.

Respectfully, this Court should hold the trial court abused its discretion by admitting Hyde's out of court and subsequent in court identifications of Appellant, reverse Appellant's convictions, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of March, 2026.