

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of General Sessions
Honorable B. Alex Hyman, Circuit Court Judge

Court of Appeals Case No. 2025-001503

The State,

Respondent,

v.

Chriwanta Cyntonio Bryant,

Appellant.

Final Brief of Respondent

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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?

COUNTER-STATEMENT OF ISSUE ON APPEAL

Did the trial court abuse its broad discretion in admitting the victim's out-of-court and in-court identifications of Appellant when (1) the photographic lineup was not unduly suggestive under the circumstances; (2) even if the lineup was unduly suggestive, the identifications were nevertheless reliable under the totality of the circumstances and therefore did not create a substantial likelihood of misidentification; and (3) even if the identifications were improperly admitted, any error was harmless beyond a reasonable doubt in light of the overwhelming evidence of Appellant's guilt?

STATEMENT OF THE CASE

Appellant was indicted for the offenses of armed robbery and possession of a weapon during the commission of a violent crime. (R. p. 207-210.) He pled not guilty. On June 13, 2025, Appellant was served with the State's notice to seek life without parole pursuant to S.C. Code Section 17-25-45. Appellant was tried before a jury in Horry County on July 14 and 15, 2025. At the conclusion of his trial, the jury found Appellant guilty as charged. The trial court thereafter sentenced Appellant to life imprisonment without parole on the armed robbery conviction and time served on the conviction of possession of a weapon during the commission of a violence crime.

Appellant appealed his convictions and sentences on July 21, 2025.

STATEMENT OF FACTS

In February 2023, Shaneikqa Smalls was in a relationship with Appellant and allowed him to use her black Dodge Avenger on the night of February 8. (R. p. 170, lines 10-21.)

Around 9:00 p.m. on February 8, 2023, Bre'Anna Hyde was sitting in her car in the parking lot of her apartment complex preparing to go to the gym when she noticed a black Dodge driven by Appellant enter the parking lot and back into the adjacent parking space so that its driver's side was next to her driver's side. Appellant, who she had not seen before, then knocked on her window with a long, skinny gun.¹ She could not drive forward because of the curb so she tried to back her car up. But, when she attempted to do so, he threatened to shoot her, leaving her unable to leave. (R. p. 134, line 4 – p. 137, line 4; p. 139, lines 10-20; p. 146, lines 4-6; p. 155, lines 5-21.)

Appellant demanded money. When Ms. Hyde said she had no cash, she offered to withdraw money or send it electronically. After viewing her bank balance, Appellant directed her to send \$200 through Cash App to "Smalls," stating the money was for his son. Because her hands were shaking, Ms. Hyde briefly handed him her phone, but he returned it after having difficulty typing while wearing gloves. (R. p. 137, lines 5-17; p. 138, lines 5-12; p. 141, lines 14-21.) Ms. Hyde then completed the \$200 transfer to Talisha Smalls while Appellant held the gun on her. (R. p. 138, lines 13-22; p. 146, lines 7-14.) After waiting about thirty seconds to a minute, Appellant returned to the Dodge and drove away. (R. 138, line 23 – p. 139, line 25.)

Appellant later asked Ms. Smalls whether she had received "the money." She had received a Cash App notification showing a \$200 payment from an unknown sender identified as "Bre." (R. p. 170, line 22 – p. 172, line 12.)

¹ Ms. Hyde identified State's Exhibit 6 as the gun that was pointed at her by Appellant. (R. p. 155, lines 16-21.)

Fearing Appellant might return and shoot her, Hyde moved her car to another location in the complex, called her boyfriend, her aunt, and then police. (R. p. 140, lines 3-15.) Officers responded within minutes. Hyde described the robber as a Black man wearing dark clothing and black gloves whose face was uncovered. (R. p. 140, line 21 – p. 141, line 21; p. 143, lines 16-18.) She also told police he had dreadlocks. (R. p. 154, line 24 – p. 155, line 2.) Although her written statement focused on the robbery itself and omitted a physical description, she later recalled additional facial features, like his nose and facial hair. (R. p. 148, line 22 – p. 153, line 19.)

Officer Robert Nicholl responded to Ms. Hyde's 911 call shortly after 9:11 p.m. (R. p. 94, line 19 – p. 96, line 6.) After learning that the Cash App account belonged to Talisha Smalls, he determined through DMV records that she owned a black 2010 Dodge Avenger and obtained its license plate number. (R. p. 97, line 5 – p. 103, line 12; p. 104, lines 3-5.) Using automated license plate reader cameras, officers traced the vehicle's travel from the robbery scene toward Conway. (R. p. 104, line 8 – p. 105, line 17; p. 106, line 21 – p. 107, line 9.) After arriving at the address of Ms. Smalls and seeing an unrelated Dodge Avenger, Appellant arrived driving Ms. Smalls's Avenger. Officers detained him, confirmed on Ms. Smalls's phone that she had received the \$200 Cash App payment from Ms. Hyde, recovered a handgun² from Ms. Small's Avenger that Appellant had been driving, and arrested Appellant. (R. p. 107, line 20 – p. 108, line 4; p. 109, line 4 – p. 111, line 5; p. 114, line 6 – p. 116, line 20; p. 117, lines 3-8.)

Two days after the robbery, Ms. Hyde met Detective Contino at the Conway Police Department to view a SLED-prepared photographic lineup that included Appellant.³ Both Ms.

² This gun was later identified by Ms. Hyde as the gun the defendant held on her. (R. p. 155, lines 16-21.)

³ Admitted at trial over the defense's objection as State's Exhibit 7. (R. p. 142, line 15 – p. 143, line 9; p. 158, line 21 – p. 159, line 6.)

Hyde and Detective Contino testified that no one suggested which photograph she should select or otherwise influenced her identification. Ms. Hyde also testified that she had not seen any news reports about the robbery and had not been shown any photographs or suspects before viewing the lineup. (R. p. 145, lines 4-19; p. 160, lines 11-19.) Upon seeing the lineup, she identified Appellant's photograph within approximately fifteen seconds, signed the photograph and the accompanying form⁴, and testified that her identification was based solely on her memory of the robbery. She explained that she recognized Appellant because “[h]e was in [her] face the other night” and that he had the same features she remembered. (R. p. 142, line 4 – p. 144, line 19; p. 145, lines 20-22; p. 159, line 7 – p. 160, line 10; p. 166, lines 16-21; p. 206; State’s Exhibit 7.) Ms. Hyde testified that she was 100 percent certain of her identification. (R. p. 144, lines 2-3).

During her testimony at Appellant’s trial, Ms. Hyde made an in-court identification of Appellant as the man who robbed her.⁵ (R. p. 156, lines 2-9.) After she did so, the defense renewed its objection, referring to its objection made during the *Biggers* hearing. (R. p. 156, lines 10-13.)

⁴ When asked on cross examination how she could distinguish between nose and facial hair of the men in photos 3 and 4 in the photo lineup, she responded, “[b]ecause they look completely different in the face.... They’re not the same.” (R. p. 154, lines 18-23.)

⁵ After she did so, the defense renewed its objection, referring to its objection made during the *Biggers* hearing. (R. p. 156, lines 10-13.)

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). When reviewing a trial judge’s evidentiary ruling on appeal, an appellate court will not reverse absent a clear abuse of discretion resulting in prejudice to the defendant. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); *see State v. Torres*, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) (“The appellate court reviews a trial judge’s ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court.”); *State v. Kelley*, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) (“A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.”); *see also State v. Bixby*, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) (“[D]eference is due to the trial court’s admission of the evidence.”).

ARGUMENT

The trial court did not abuse its broad discretion in admitting the victim's out-of-court and in-court identifications of Appellant because (1) the photographic lineup was not unduly suggestive under the circumstances; (2) even if the lineup was unduly suggestive, the identifications were nevertheless reliable under the totality of the circumstances and therefore did not create a substantial likelihood of misidentification; and (3) even if the identifications were improperly admitted, any error was harmless beyond a reasonable doubt in light of the overwhelming evidence of Appellant's guilt. (Issue I)

Background: The Pre-Trial Hearing

After the jury was selected but before it was sworn, the trial court conducted a hearing on Appellant's motion to suppress the victim's out-of-court identification. The victim, Bre'Anna Hyde, testified that she had never before been the victim of a crime or testified in court. She also testified that she had prior contact with African Americans. (R. p. 3, lines 9 – 22.) On February 8, 2023 when the crime occurred, she was 20 years old and living in an apartment complex called The Arch. (R. p. 3, line 23– p. 6, line 12; p. 9, lines 19-23.) At approximately 9:00 p.m., she was sitting in her car in the parking lot of the complex getting ready to go to the gym.⁶ It was dark outside, but there was a streetlight in the grass next to Ms. Hyde's car. (R. p. 5, lines 15-17; p. 9, line 24 – p. 10, line 3; p. 11, lines 13-17; p. 26, line 25 – p. 27, line 1.) She first noticed Appellant drive into the parking lot from “yards” away. She then saw him back his car up so that his driver side was facing her driver side. Ms. Hyde heard a knock on her window, looked, and saw Appellant – a man she did not recall ever seeing before – knocking on her window with a gun. (R. p. 5, line 18 – p. 7, line 2; p. 10, lines 8-10; p. 11, lines 11-12; p. 15, lines 7-9.) She described the gun as a

⁶ During the hearing, Ms. Hyde identified State's Exhibit 3 as a fair and accurate reflection of the apartment complex, and a red dot on it as marking where she was parked in the parking lot. The exhibit was then admitted without objection. (R. p. 4, line 10 p. 5, line 10.)

“skinny, like handgun.” (R. p. 7, lines 3-4; p. 26, lines 12-16.) At this point he was about an arm’s length away. She was sitting in her car, and he was standing outside of it. (R. p. 10, line 17 – p. 11, line 5.) Unable to go forward because of a curb and grass, she went to back her car up, but he told her would shoot her if she moved. She stopped and parked the car. (R. p. 7, lines 15-21.)

Ms. Hyde rolled her window down, and Appellant told her “he wasn’t trying to hurt [her], but he just wanted to get money for his kid because he just got out of prison.” (R. p. 7, lines 23-25.) Ms. Hyde told him she did not have any cash or her card, but that her card was upstairs. She asked if she could go upstairs and get it or if she could use Venmo or Cash App to give him money. He agreed to a Cash App transaction. (R. p. 8, lines 4-10.) He then told her to send money via Cash App to Talisa Smalls. Because her hands were shaking too much for her to type, Ms. Hyde gave her phone to Appellant to type in the Cash App transaction. He was wearing gloves and unable to type so he gave the phone back to her. She then, using and looking at her phone, did so. (R. p. 8, lines 11-16; p. 25, lines 13-18; p. 30, lines 1-10.) When the transaction was completed, he backed away from her car, while pointing the gun at her, and got in his car and drove away. (R. p. 8, lines 17-20.) Ms. Hyde, using State’s exhibit 3, showed which way Appellant pulled out of the parking lot and “sped” away. He left approximately one to two minutes after the money was transmitted on Cash App. (R. p. 8, lines 21-25; p. 25, line 19 – p. 26, line 2.)

After Appellant drove away, Ms. Hyde, afraid that Appellant might change his mind, come back and shoot her so she would not call the police, moved her car. (R. p. 9, lines 5-8.) She then called her ex-boyfriend who lived in the complex (so he would come down and get her), her aunt, and then the police. (R. p. 9, lines 8-11; p. 11, lines 18-24.) She did not remember what she said to the 911 operator because she was hysterical. (R. p. 23, line 25 – p. 24, line 6.)

Ms. Hyde said that, while she did not look at the time during the interaction with Appellant,

it felt like it lasted 15 minutes. (R. p. 9, lines 1-4; p. 24, lines 7-9.) Nothing blocked her view of him. She said he was a skinny black man of average height (neither tall nor short), in his 30s or 40s; she noticed his nose and facial features, including “scruff” (facial hair). She also saw that he was wearing black gloves and he held the gun in his right hand. (R. p. 7, lines 5-12; p. 11, lines 6-12; p. 13, line 22 – p. 15, line 2; p. 20, lines 11-14.) Never having been in front of a gun before, she said she did focus on the gun Appellant was holding. (R. p. 10, lines 4-7; p. 26, lines 3-11.)

Ms. Hyde described her hearing and eyesight as very good. (R. p. 9, lines 14-18.) At the time of the incident, she had not been smoking, drinking, or taking any medications and was not under the influence of alcohol or drugs. (R. p. 9, line 24 – p. 10, line 3; p. 26, lines 20-24.)

When the police arrived, Ms. Hyde told them what she had just testified to and gave a written statement. (R. p. 11, line 25 – p. 12, line 2.) She described the man as wearing black gloves and track suit type clothing and having dreadlocks, but she admitted during the hearing that she wasn’t focused on his hair. (R. p. 12, line 9 – p. 13, line 15; p. 28, line 9; p. 29, lines 6-10.)

Ms. Hyde met with a Conway Police detective on the morning of February 10 to look at a photo lineup. Before that time, she had not heard anyone had been arrested, had not seen any photos of Appellant, had not gone to the jail, had not gone to his bond hearing, and had not seen or read any news coverage. (R. p. 15, line 23; p. 15, lines 10-23; p. 18, lines 18-24; p. 22, line 5 – p. 23, line 24.) No one in the photo lineup had dreads, but that did not surprise Ms. Hyde, as she stated that “[she] also wasn’t very focused on his hair.” When asked why she would have picked someone out who did not have dreads, she said no one had dreads “[, b]ut I recognized his face immediately.” (R. p. 27, line 15 – p. 28, line 14.) Without the detective saying anything to her during the procedure other than asking if she could identify anyone in the lineup, she – within 10-15 seconds – identified one of the photos as being of the man who robbed her. Afterward, she

signed a form and signed the lineup.⁷ (R. p. 15, line 24 – p. 16, line 8; p. 17, line 20 – 19, line 13.) Although his hair was different, Ms. Hyde said she was 100% sure when she picked Appellant's photo during the lineup and was still 100% sure of her identification.⁸ She said she picked him because she had just seen him the night or two before during the incident. (R. p. 20, lines 11-18.) She also made an in-court identification of Appellant as the man who robbed her. (R. p. 49, line 14 – p. 20, line 9.)

Horry County Officer Nicholas Contino testified next. While working as a detective with the Conway Police Department back in February 2023, he was asked to prepare and administer a photo lineup for Ms. Hyde. He submitted a photo of Appellant to SLED,⁹ and the generated six-pack was sent to him; the paperwork from SLED indicated in which position Appellant was in the line-up. (R. p. 31, line 18 – p. 32, line 6; p. 33, lines 1-6; p. 38, line 13 – p. 39, line 19; p. 47, line 21 – p. 48, line 3.) The lineup consisted of six photos, three photos on top and three on the bottom. The photos in the lineup depicted six men who appeared to be of a similar age, race, build, and weight, with similar facial features. Four of the six photos in the lineup are of men wearing dark-

⁷ Ms. Hyde testified during the hearing that State's Exhibit 1 was the photo lineup she viewed, made an identification from, and initialed and signed. She said it had not been altered in any way. It was admitted without objection. (R. p. 16, line 9 – p. 17, line 6.)

⁸ On cross by the defense during the hearing, Ms. Hyde acknowledged that she did not verbalize the fact that she was 100% certain that the photo she picked was of the man who robbed her but relied on the language used in the form itself for that certainty. The form, once she picked a photo and the photo number was inserted, read that she was 100% positive that the person in the photo is the person who was involved in the crime. (R. p. 29, lines 11-17; p. 30, line 11 – p. 31, line 2.)

⁹ Upon question by the defense during the pretrial hearing, Officer Contino testified that he would have picked the photo or photos of Appellant to send to SLED, and, to do so, he would have looked at photos from the detention center and the DMV. He did not remember where the photo or photos he submitted to SLED came from. He identified a photo marked as Defendant's Exhibit 1 as a photo of Appellant but said it was not the exact photo he sent to SLED because the photo in the lineup had been cropped and the background altered to match the rest of the six-pack. (R. p. 40, line 1 – p. 42, line 3; p. 46, lines 9-20.)

colored shirts; in Appellant's photo, he is wearing an orange shirt,¹⁰ and the man in another photo is wearing a light-colored shirt. Officer Contino identified Court's Exhibit 1¹¹ as the photo lineup showed to Ms. Hyde. (R. p. 33, line 16 – p. 34, line 9; p. 36, lines 18-23; p. 39, lines 17-22; p. 46, line 21 – p. 47, line 7.) The photo lineup was conducted at 10:59 a.m. on February 10, 2023, with only Ms. Hyde and Officer Contino present. Officer Contino did not show Ms. Hyde any photos of Appellant before showing her the line up. He also did not tell her which photo to pick or say anything to influence her on who to pick from the lineup. (R. p. 32, lines 11-16; p. 34, line 10 – p. 35, line 2; p. 36, lines 13-15; p. 47, lines 8-10.) Ms. Hyde almost immediately picked photo number 3, Appellant's photo, as the person who committed the armed robbery of her. (R. p. 35, lines 3-21.)

Officer Contino also identified State's Exhibit 2 as the form completed by Ms. Hyde after she selected Appellant's photo from the photo lineup. (R. p. 35, line 25 – p. 36, line 12.) He testified that, to the best of his knowledge, he read the form to her verbatim and had no other conversation with her before showing her the lineup. (R. p. 42, line 10 - 43, line 1.) He explained that the phrase "100 percent positive" was already typed on the form because people making an identification need to be a hundred percent positive. (R. p. 43, line 20 – p. 44, line 7.) He also testified that he had conducted plenty of lineups in which someone was not picked. (R. p. 47, lines 11-13.)

During the hearing, the trial court found defense witness, Dr. Dawn McQuiston, qualified as an expert in the field of police procedural identification issues and eyewitness identification.

¹⁰ The defense attempted to have Officer Contino say that the orange clothing worn by Appellant in his photo in the lineup was a jail jumpsuit. Officer Contino said he did not know if it was, but that it appeared to be an orange shirt. (R. p. 39, lines 17-22; p. 41, line 2 – p. 42, line 9.)

¹¹ The reference to the photo lineup as a Court's exhibit appears to be a slip of the tongue, as there were no Court's exhibits entered and the photo lineup was entered into evidence for purposes of the hearing as State's Exhibit 1 during Ms. Hyde's testimony. (R. p. 17, lines 1-18.)

(R. p. 54, lines 4-12.) She testified that the creation and presentation portion of the identification procedure did not conform with best practices because, as to creation, Appellant stands out relative to the other lineup members and, as to presentation, while written unbiased instructions were given, unbiased spoken instructions were not given and the victim was not allowed to provide her own level of confidence. (R. p. 61, line 19 – p. 64, line 5.) She concluded the identification procedure was unduly suggestive and the identification unreliable. (R. p. 65, line 12 – p. 68, line 25.)

At the conclusion of the hearing, the defense argued the out-of-court identification was unduly and unnecessarily suggestive because, in the lineup, Appellant was the only one dressed in a brightly-colored shirt and SLED possibly could have changed that since Officer Contino said they “doctored” the photos to some extent. (R. p. 75, line 2 – 76, line 8.) The defense then argued that the identification was not so reliable that there was no substantial likelihood of misidentification. While not challenging the length of time between the crime and the identification, the defense argued the victim’s description to police was not accurate because she said he had dreads and he did not, the witness did not have a good degree of attention or a good opportunity to view the robber because she was scared and looking at her phone, and they only had the officer’s word on the victim’s level of certainty during the photo lineup, and the officer was not able to recall a lot of things. (R. p. 76, line 10 – p. 79, line 4.) The defense also requested the court disallow any in-court identification of Appellant by the victim in front of the jury. (R. p. 79, lines 5-8.)

The State countered the defense’s argument and, reviewing the evidence presented, asserted that, even if the lineup was unduly suggestive, Ms. Hyde’s out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. (R. p. 79, line 11 – p. 82, line 15.)

The trial court denied the defense's motion as follows.

THE COURT: ...I don't find that it's overly suggestive. I find that whatever suggestiveness it is is [sic] harmless in nature. I do think that you may be able to use some of the arguments that you've made to challenge the reliability in cross-examination when Ms. Hyde testifies, but I don't find enough to suggest that it was overly suggestive. And I say that because I think it was the statements made by everyone, that I've excluded, that he had just gotten out of prison. Well, they don't wear orange in prison in South Carolina. They wear blue or tan or black. Quite a few of these are wearing black, and including Number 4, you can actually tell that it's a uniform. I mean it's a -- Number 4 would be suggestive in that manner. While J. Reuben uses orange, blue, tan, red, and green.

[PROSECUTOR]: I saw a striped one the other day, as well, Your Honor.

THE COURT: At J. Reuben? Again, it changes quite frequently. I understand that orange does stand out; I completely agree with that. That's why they probably make jokes all the time about Clemson players and cleaning up trash on the side of the road. I'm a Carolina fan, so I guess I can make that. Again, I think that -- I think you can argue certain things as far as how long she witnessed it, as to her credibility and reliability of her identification. But for the purpose of the Neil v. Biggers hearing, I do not find that it is overly suggestive. So, I will allow the in-court identification.

(R. p. 82, line 22 – p. 83, line 23.)

Argument

An out-of-court identification procedure arranged by law enforcement that is unduly suggestive and conducive to irreparable mistaken identification deprives a defendant of due process of law. *State v. Liverman*, 398 S.C. 130, 79, 727 S.E.2d 422, 425 (2012); *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). “An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of reparable misidentification.” *Id.*

In *Neil v. Biggers*, 409 U.S. 188 (1972), the Supreme Court of the United States reviewed its prior opinions addressing the admissibility of eyewitness identification and created a two-step analysis for determining whether due process requires the suppression of an eyewitness identification. First, the court must determine whether the identification resulted from unnecessary and unduly suggestive police procedures. *Id.*, 409 U.S. at 198. See also *Manson v. Brathwaite*, 432 U.S. 98 (1977); *State v. Liverman*, 398 S.C. at 79, 727 S.E.2d at 425-426 (2012).

If the answer to that question is “no” because the court finds the police procedures were not suggestive or that suggestive procedures were necessary under the circumstances, the inquiry ends there. The court need not go any further, and the out-of-court identification is admissible. See *State v. Wyatt*, 421 S.C. 306, 310-311, 806 S.E.2d 708, 710 (2017); *State v. Dukes*, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013).

If, on the other hand, the answer to that question is “yes,” then the court must proceed to the second step in the analysis to determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Manson v. Brathwaite*, *supra*; *Neil v. Biggers*, *supra*; *State v. Liverman*, *supra*.

Short of [there being a very substantial likelihood of irreparable misidentification], 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.

Manson v. Brathwaite, 432 U.S. at 116. In this step, the court is to, under the totality of the circumstances, consider the following five factors to assess the reliability of an otherwise unduly suggestive identification procedure:

(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.

State v. Liverman, 398 S.C. at 79, 727 S.E.2d at 426, citing *Manson v. Brathwaite*, 432 U.S. at 114. See also *Neil v. Biggers*, 409 U.S. at 199.

A. The Identification Procedure was not Unduly Suggestive

Following the mandate of *Neil v. Biggers*, *supra*, and its progeny, any challenge to Ms. Hyde's identification of Appellant must begin with the out-of-court identification procedure utilized by law enforcement in this case. To resolve the first step of the analysis, the court is to decide whether something in the photographic line-up or the manner in which it was conducted would have directed the witness's attention to a particular photo included in the array.

Appellant argues first that something in the photo lineup itself is unduly suggestive because his shirt in the photo is orange and obviously jail clothing. The State disagrees. Despite the difference between the color of the shirt worn by Appellant, his photograph does not stand out. A review of the photographic line-up reveals that all six men are similar in appearance: they are men of the same race, complexion, age group, with similar head and facial hair styles, facial features, and build/size. (State's Exhibit 7.) Appellant in photograph 3 and the individual in photograph 6 are not wearing black tops as the other four are. Appellant's top is orange, while the individual in photograph 6 wears a white top. Nothing in Appellant's photograph indicates that his shirt is jail attire. The photograph therefore contains no distinctive feature that would single out Appellant or direct a witness's attention to his photograph over the others. See *State v. Simmons*, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009) (photo lineup admissible despite defendant's contention that his ears were smaller than the other persons in the lineup); *State v. Turner*, 373 S.C. 121, 127-128,

644 S.E.2d 693, 697 (2007) (photo lineup with variation in background colors not unduly suggestive because defendant did not stand out in comparison to others in the lineup); *United States v. Lincoln*, 494 F.2d 833 (9th Cir.1974) (fact that Lincoln's photo was in color and photos of the other individuals in the line-up were in black and white is not impermissibly suggestive). Accordingly, the photo lineup as prepared is not unduly suggestive.

Moreover, the testimony of both Ms. Hyde and Officer Contino establishes that the identification procedure was entirely free from police suggestion. Both witnesses testified that Officer Contino did not tell, encourage, or otherwise suggest which photograph Ms. Hyde should select, either directly or indirectly. Nothing in the record indicates that law enforcement steered her toward Appellant's photograph in any manner.

The record and law supports the trial court's determination that neither the photographic line-up itself nor the manner in which it was conducted were suggestive, much less unduly suggestive. Therefore, the trial court properly admitted the evidence of the out-of-court identification.

B.

Assuming *Arguendo* the Identification Procedure was Unduly Suggestive, the Identifications were Nevertheless Reliable under the Totality of the Circumstances and did not Create a Substantial Likelihood of Misidentification

If this Court were to find Ms. Hyde's identification of Appellant did result from unnecessary and unduly suggestive police procedures such that it must proceed to the second step in the *Neil v. Biggers, supra*, analysis, the State maintains the identification was nevertheless so reliable that no substantial likelihood of misidentification existed.

As stated earlier, in assessing the reliability of the identifications, there are five *Neil v. Biggers, supra*, factors that must be considered under the totality of the circumstances. South

Carolina has never held that each of the factors must favor reliability before an identification may be admitted. Rather, the Supreme Court has consistently described the factors as considerations in evaluating the “totality of the circumstances” to determine the likelihood of misidentification. *See State v. Traylor*, 360 S.C. at 82, 600 S.E.2d at 527 (2004). Accordingly, the absence of one factor does not render an identification unreliable if, considering all the circumstances, there is no substantial likelihood of irreparable misidentification.

The first and the second *Biggers* factors are closely related: the witness’s opportunity to view the perpetrator at the time of the crime and her degree of attention. As set out in the summary of the pretrial hearing testimony, Ms. Hyde testified during the hearing that the crime lasted approximately 15 minutes. Appellant stood right by the door of Ms. Hyde’s car where she was seated for most of that time, and her window was down. Although it was nighttime, she was parked one space over from a light pole. While frightened and, perhaps, focusing on the gun pointing at her face, she was alert and had ample opportunity to see him as he talked to her, as she responded, as they passed her phone back and forth, and, at the end of the encounter, as he backed away from her and got in his car. The fact that she, despite her fear, was able to get him to give her incriminating evidence – a Cash App account that could be used by the police to find him – and observant enough to give the police a good description of the car he was driving supports findings that she had plenty of opportunity to view her robber and was paying close attention.

The third factor is the accuracy of the witness’s prior description of the perpetrator. In this case, the initial description given by Ms. Hyde was brief. A Black man with dreadlocks. The dreadlocks proved to be wrong, and only later was she able to recall Appellant’s facial features.

The fourth factor is the level of certainty demonstrated by the witness at the confrontation. In this case, both Ms. Hyde and the police officer who showed her the photo lineup said her

selection of Appellant's photo was immediate, within 15 seconds. She testified that she was 100% sure that he was the man who robbed her.

The fifth and last factor is the length of time between the crime and the confrontation. In this case, the length was about 36 hours. In fact, defense counsel conceded that that was not an unreasonable amount of time. (R. p. 76, line 25 – p. 77, line 3.)

The evidence clearly supports a determination that, if the identification procedure was unduly suggestive, the identifications were nevertheless reliable under the totality of the circumstances and did not create a substantial likelihood of misidentification. *Neil v. Biggers, supra*.

C.

Further Assuming *Arguendo* the Identifications were Improperly Admitted,
Any Error Was Harmless Beyond a Reasonable Doubt in Light of
The Overwhelming Evidence of Appellant's Guilt

An error in the admission of evidence will be harmless if there is overwhelming evidence of a defendant's guilt. *See, e.g., State v. Darby*, 297 S.C. 459, 377 S.E.2d 340 (1989). In this case, there was overwhelming evidence of Appellant's guilt. Even without the identification evidence from Ms. Hyde, there was evidence of the Cash App transmission of funds to Ms. Smalls, Appellant checking with Ms. Smalls to see if she had received the money from Ms. Hyde, the tracking of Ms. Smalls's car used that night by Appellant by the license plate readers from the area of Ms. Hyde's apartment complex back toward Ms. Smalls' home, and the discovery of the gun identified by Ms. Hyde as the weapon used by her robber in the Ms. Smalls' car upon his return to Ms. Smalls' home after the armed robbery.

CONCLUSION

For the foregoing reasons and any other appearing in the Record on Appeal (as provided for in Rule 220, SCACR), the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

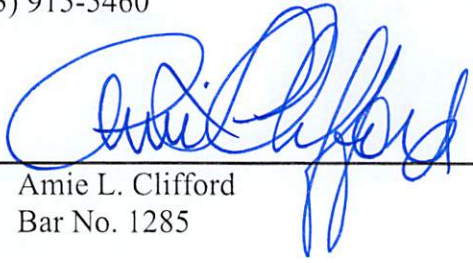
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