STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of General Sessions

Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2013-002537

THE STATE,

Respondent,

v.

MARION BENJAMIN POWELL,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

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

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

Post Office Box 1880
Bluffton, SC 29526
(843) 255-5880

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court properly admitted the victims' out-of-court identifications from photo lineups because they were not unduly suggestive, did not create a substantial likelihood of irreparable misidentification, and did not deprive Appellant of due process.

STATEMENT OF THE CASE

A Beaufort County Grand Jury indicted Appellant for five counts of kidnapping, one count of first-degree burglary, one count of armed robbery, one count of possession of a firearm during the commission of a violent crime, and one count of unlawful possession of a firearm. (R.* Indictments.) On November 18-22, 2013, Appellant proceeded to trial before a jury and the Honorable Brooks P. Goldsmith. Scott W. Lee, Esquire, represented Appellant, and Assistant Solicitors Benjamin Shelton and Benjamin Coppage represented the State. The jury found Appellant guilty on all counts. (Tr. 725.) Judge Goldsmith sentenced him to twenty-seven years' imprisonment for the kidnapping charges, the first-degree burglary charge, and the armed robbery charge, and five years' imprisonment for the possession of a firearm charge, with all sentences to run concurrently. (Tr. 739.)

On November 25, 2013, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

On October 25, 2010, Senora Jones (Victim) was watching a movie in the upstairs area of her home while her children played outside in a fenced-in backyard. (Tr. 274, lines 7-15.) Suddenly, three black males came into her bedroom and she could hear the children right outside in the hall. (Tr. 274, lines 15-18.) The men held her at gunpoint on the floor while they took money and items in the amount of $51,540. (Tr. 274, lines 19-24; Tr. 378, line 18.) Victim called the police shortly after the men left, and she was able to identify one of the men in a photographic lineup the following day. (Tr. 285, line 21-25; Tr. 287, line 2-Tr. 290, line 6.) Victim and her daughter both identified Appellant in separate lineups. (Tr. 361, line 14-Tr. 362, line 18.) After confirming Appellant's identification on October 26, 2010, obtaining an arrest warrant, and attempting to locate him with the help of the media, the police finally apprehended him on March 27, 2011, when Appellant turned himself in. (Tr. 376, line 20-Tr. 377, 23; Tr. 401, line 16-Tr. 402, line 12.) He was charged with five counts of kidnapping, one count of first-degree burglary, one count of armed robbery, one count of possession of a firearm during the commission of a violent crime, one count of unlawful possession of a firearm, and one count of pointing and presenting a firearm and proceeded to trial.[1] (R.* Indictments.)

Pretrial, the trial court held a Neil v. Biggers[2] hearing to determine the admissibility of the out-of-court identifications made by Victim and her daughter. (Tr. 129-43.) Rather than present testimony, the State submitted a memorandum entitled "Memo in Support of Introduction of Identification Evidence (Neil v. Biggers Memo)"

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[1] The charges of unlawful possession of a firearm and pointing and presenting a firearm were nolle prossed on January 23, 2014. (R.* Nolle Prosequi sheets.)
[2] 409 U.S. 188 (1972).

("the State's memo"), to which Appellant made no objection.[3] (Tr. 137, lines 12-14; Tr. 183, line 8.) Along with the State's memo, the State submitted an email from the solicitor to defense counsel regarding the analyst who created the lineup. Both parties stipulated to the facts provided in the email to avoid calling the analyst as a witness. (Tr. 129, line 16-Tr. 130, line 7.) Appellant argued the lineup containing Appellant's photo that was shown to Victim and her daughter was overly suggestive. (Tr. 131, lines 10-12.) However, he conceded "[i]t happened at night so [the lineup] was done the next morning, so there was a short amount of time there." (Tr. 131, lines 23-25.) Appellant's main complaint in regard to the lineup was that the "flared nostrils," which were the distinguishing characteristic given in the victims' descriptions, were "greatly enhanced by the photo that they chose to put in the photo lineup." (Tr. 134, lines 10-17.) The solicitor then argued that all the individuals in the lineup had about the same width neck, almost the same skin tone (except the one in position 1 who is darker), and large nostrils that were apparent in the photos. (Tr. 139, lines 10-14.) He also pointed out the others in the lineup have their heads slightly cocked back or slightly turned to the right or to the left. (Tr. 139, lines 14-16.) He argued every person in the lineup had slight variations such as pursed lips, turning to the side, or not quite looking at the camera, in addition to Appellant having his mouth slightly open. (Tr. 139, lines 17-22.) The solicitor noted they all had similarly shaped and sized noses, wore the same orange shirt, and had a concrete background. (Tr. 140, lines 1-3.) He pointed out that although one could identify two things in each individual that were slightly different from the others, the

[3] The record indicates the trial judge considered the facts recited in the memorandum and they were not opposed. (Tr. 183, lines 1-7.)

similarities far exceeded the two differences Appellant argued were significant: a slightly cocked-back head and slightly open mouth. (Tr. 140, lines 3-10.)

The trial court found the lineup was not unduly suggestive and stated, "[I]f somebody were to – if I were taking a test and somebody told me to pick out, mark the number of individuals on this photo lineup that had flared nostrils, I probably would mark four out of the six. So I don't find that to be unduly suggestive." (Tr. 142, lines 12-17.) Based on the State's memo, the trial court determined the witnesses had a good opportunity to observe the person they described, noting he was not wearing a disguise or covered in any way. (Tr. 142, lines 18-21.) The trial court also pointed out the perpetrator was there for an extended period of time and that the lineup was done within 24 hours—the next day. (Tr. 142, lines 21-25.) Furthermore, the trial court emphasized Victim's confidence in her decision and both victims' ability to pick him out almost immediately and separately. (Tr. 142, line 25-Tr. 143, line 4.) The trial court denied the defense motion relating to identification. (Tr. 143, lines 5-6.)

Sergeant Tricia Nicole Brubaker of the Bluffton Police Department testified that she responded to a home invasion, armed robbery, and kidnapping on October 25, 2010. (Tr. 226, line 16-Tr. 227, line 12.) She testified that the victims were able to give descriptions of the perpetrators: two or three black males brandishing weapons. (Tr. 228, lines 12-17.)

Sergeant Scott Chandler testified he responded to the robbery call and observed that everything had been gone through, such as mattresses turned over and drawers pulled out. (Tr. 232, lines 3-12; Tr. 233, lines 16-21.) Sgt. Chandler referred to his report to refresh his memory of the description Victim gave him of the suspects. (Tr. 234, lines 2-8.) Based on his report, he recalled being told the second suspect was a black male,

approximately six feet, one inch tall, 180 pounds, wearing black pants and a black t-shirt, with no facial hair, a short Afro, and flared nostrils, and that he was carrying a silver handgun in his right hand. (Tr. 235, lines 5-10.)

Abriya Hart, Victim's daughter and one of the victims, described being outside and walking into her house to get a jacket. (Tr. 239, lines 16-25; Tr. 242, lines 9-11.) On her way down the stairs, she saw three men coming up the stairs. One told her and the other children to sit against the wall and be quiet. (Tr. 242, lines 11-15.) The man who told her to be quiet went into her mother's room where she heard them yelling at her mother that she was going to die, to show them where everything was, and to be quiet. (Tr. 242, lines 14-25.) When asked which man she had the most contact with during the incident, Hart pointed out Appellant and gave a description of what he was wearing the day the crimes occurred. (Tr. 243, lines 5-15.) Defense counsel objected to Hart's in-court identification based on previous arguments. (Tr. 243, lines 17-22.) Hart testified Appellant walked back and forth from where the children sat to her mother's bedroom and gave her cousin a tissue because she was crying. (Tr. 243, line 23-Tr. 244, line 3.) Between walking back and forth and going up and down the steps, he stood with the children and held them at gunpoint. (Tr. 244, lines 3-5; Tr. 246, lines 18-25.)

Hart testified the men had luggage when they left, and she saw her computer and some clothes, shoes, and purses that were her mother's. (Tr. 245, line 22-Tr. 246, line 12.) She testified that she went to the Bluffton Police Department and looked at lineups. (Tr. 248, lines 2-17.) She identified Appellant in one of the lineups. (Tr. 249, lines 2-10.) She recognized her signature on the back of the lineup and acknowledged the date of her signature was October 26, 2010, the day after the incident. (Tr. 249, line 13-Tr. 250, line 5.) Hart confirmed that she identified number 6 in the lineup and that it was

Appellant, again identifying him in court. (Tr. 251, lines 3-18.) She testified she did not recognize anyone else in the lineups, and she affirmed she circled Appellant's picture and put her initials next to it because she was positive she recognized him as the man who came into her house that day and robbed them. (Tr. 251, line 19-Tr. 252, line 14.) She further testified that the instructions on the back of the lineup were read to her, telling her not to conclude or guess that the photographs contain a picture of the person who committed the crime and that she was not obligated to identify anyone and stressing the importance of not identifying innocent persons, and that she understood the instructions. (Tr. 253, lines 7-25.) She explained this meant she did not have to identify someone if she did not see him but that if she recognized someone, she needed to point him out. (Tr. 254, lines 1-4.) Again, she stated she was positive about her identification. (Tr. 254, lines 5-8.)

Next, Victim testified regarding what happened on the day of the incident, saying she was watching a movie in her room when three black males came in. (Tr. 274, lines 1-18.) One of the men instructed her to lie on the floor and not move while pointing a gun at her and asking her where the money was, while the other two men ransacked the house. (Tr. 274, lines 19-24.) The man whom she called the "main one" told her to stay on the floor and would peek out to check on the children from time to time. (Tr. 275, lines 10-21.) The man continued to point the gun at her, and she told him where some money was. (Tr. 276, lines 5-20.) She could hear the men dumping things out in other rooms and even heard them go into the attic. (Tr. 277, lines 1-5.) She described the one who stayed with her while the others ransacked the house as wearing a black shirt and black pants, and she explained it was so "clear to see him" because he had nothing covering his face. (Tr. 277, lines 6-19; Tr. 278, lines 13-15.)

Victim related how at one point she looked directly at him and pleaded with him to look in her eyes just before he pointed the gun at her and told her to keep her head down. (Tr. 277, line 19-Tr. 278, line 12.) When the men left, Appellant told her not to call the police or he would come back and kill them. (Tr. 284, lines 20-22.) She waited five minutes before calling the police, who came and took pictures of the scene and statements from the victims. (Tr. 286, lines 2-24.) The next day, Victim met with officers to attempt to identify the intruders from lineups. (Tr. 287, lines 2-13.) She testified she was able to pick the person out of the lineup "immediately" because right when she saw it, she knew it was him—the person she had pleaded with and was there with her the whole time during the robbery. (Tr. 289, line 11-Tr. 290, line 6.) Victim testified she had not spoken to Hart about whether Hart had made an identification before she made her own and that they were in different rooms at different times. (Tr. 290, lines 15-19.) She testified that when shown the lineup, she read the instructions about how she should not guess, and that when she saw Appellant she did not have to second guess because she knew it was him as soon as she saw the picture. (Tr. 330, lines 9-22.)

Officer James Duke testified he showed Victim and Hart four lineups.[4] (Tr. 361, lines 14-21.) Appellant was in position 6 of one of the lineups. (Tr. 362, lines 6-9.) Duke testified Appellant was referred to as the second suspect in the description he was given. (Tr. 362, lines 10-18.) He showed the lineups to the two victims separately, in separate rooms. (Tr. 362, line 22-Tr. 363, line 11.) Duke explained what the photo lineup advisory stated—not to conclude or guess about whether she recognized anyone—and testified he read it to Hart before showing her the lineup. (Tr. 364, lines 1-24.) Hart

[4] According to the State's memo, police showed both victims four more lineups in subsequent days. (Court's Exhibit 4, 4.)

took only a matter of seconds to identify Appellant in the lineup and was certain about the identity. (Tr. 365, line 15-Tr. 366, line 2.) The State moved Exhibit Number 47, the photo lineup in which Hart identified Appellant, into evidence. (Tr. 365, lines 7-14.) Duke then testified regarding Victim's identification of Appellant in the lineup, noting she too identified him immediately and was positive it was him. (Tr. 371, line 23-Tr. 372, line 22.)

After the State rested, the defense called Dr. Lori Vanwallendael, an associate professor of psychology, and offered her as an expert in eyewitness memory. (Tr. 607, line 10-Tr. 608, line 17.) The State did not object, and the trial court qualified her as an expert. (Tr. 612, lines 18-22.) She testified that 75% of Innocence Project cases involve an eyewitness who identified the wrong person. (Tr. 619, lines 16-19.) She also testified regarding how stress can affect a person's mental resources, focusing on survival rather than paying attention to details about people's appearances. (Tr. 625, lines 10-22.) In addition, Dr. Vanwallendael testified that people who are focusing on a weapon are less likely to be able to identify the perpetrator. (Tr. 630, lines 3-19.) She testified that a lineup with one person exhibiting certain features while the others did not would be suggestive and opined the lineup at issue was suggestive because the photograph of Appellant exaggerated the characteristic of the flared nostrils due to his leaning back. (Tr. 640, line 1-Tr. 641, line 22.)

The trial judge charged the jurors on identification, telling them they must be satisfied beyond a reasonable doubt of the accuracy of the identification before they could convict and listing things they could consider such as the length of time, how close the witnesses were, and the lighting conditions. (Tr. 717, lines 12-18; Tr. 718, lines 2-6.) The jury found Appellant guilty of all charges, and the trial court sentenced him to

twenty-seven years' imprisonment for the kidnapping charges, the first-degree burglary charge, and the armed robbery charge, and five years' imprisonment for the possession of a firearm charge, with all sentences to run concurrently. (Tr. 739.)

ARGUMENT

The trial court properly admitted the victims' out-of-court identifications from photo lineups because they were not unduly suggestive, did not create a substantial likelihood of irreparable misidentification, and did not deprive Appellant of due process.

Appellant contends the trial court erred in admitting the eyewitness identification of Appellant where he was first identified in a photo lineup, arguing his photograph is distinct from the others and unduly accentuates his features, rendering it patently suggestive. Further, he argues the resulting suggestiveness makes both the out-of-court and in-court identifications inadmissible due to the substantial likelihood of irreparable misidentification. However, the trial court properly admitted the victims' identification testimony, as there was ample evidence supporting the circuit court's finding that the out-of-court photographic lineup identifications did not result from unduly suggestive police procedures. Thus, Appellant's challenge to the identification testimony should be denied and his convictions should be affirmed.

Standard of Review

In criminal cases, appellate courts only review errors of law. 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. 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." State v. Liverman, 398 S.C. 130, 137-38, 727 S.E.2d 422, 425 (2012). "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." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000).

An out-of-court identification of a defendant violates due process and must be suppressed when the identification procedure used by law enforcement was impermissibly suggestive and conducive to a substantial likelihood of misidentification. Liverman, 398 S.C. at 138, 727 S.E.2d at 425; State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013). 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). "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.

In Neil v. Biggers, the United States Supreme Court set forth a two-part test for courts to use in determining whether due process requires suppression of an eyewitness identification. 409 U.S. 188, 198 (1972). "First, the court must determine whether the identification resulted from 'unnecessarily suggestive' police procedures." Dukes, 404 S.C. at 557, 745 S.E.2d at 139. "If the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there and the court does not need to consider the second prong." Id. at 557-58, 745 S.E.2d at 139. "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.'" Id. at 558, 745 S.E.2d at 139. The defendant bears the burden of proving the identification procedure was impermissibly suggestive. Id. at 561, 745 S.E.2d at 141 ("Our supreme court has never placed the

burden of disproving suggestiveness on the State. The Fourth Circuit, whose decisions regarding federal constitutional law are binding on us, has held the defendant bears the burden of proving the identification procedure was impermissibly suggestive.").

Suggestiveness

In the case at bar, the Intelligence Unit at the Beaufort County Sheriff's Department created a six-person photo array that included Appellant's photo. The analyst who put together the lineup, Pam Brown, had no law enforcement training and no other involvement in the case. The Northern Beaufort County Sherriff's Office told the Bluffton Police Department about four men—including Appellant—who were suspected of similar crimes; they were subsequently put into four photo arrays. (Tr. 132, line 25-Tr. 133, line 4.)

Appellant focuses on the comment that Brown herself was "very surprised that she was the individual who created the line-up" and that "she normally would not have created a line-up with only his mouth open." (App.Br.10 citing Court's Exhibit 2.)[5] Although Appellant seems to place great weight on Brown's opinion that Appellant's photo stood out, Brown simply did not make such a statement in Court's Exhibit 2. All the email said was that "[s]he first was very surprised that she was the individual who created the line-up and pointed out that [Appellant's] mouth was slightly open, and that she normally would not have created a line-up with only his mouth open." (Court's Exhibit 2.) The email also explained how she creates lineups and that she relies heavily

[5] In the record, there is some confusion about which exhibit is Court's 2. Court's Exhibit 2 is identified as a photo lineup. (Tr. 12, line 19; Tr. 130, lines 13-14.) However, it was marked immediately following a discussion of the email between the solicitor and the defense attorney concerning Pam Brown. That email is stamped Court's Exhibit 2, while the photo lineup is stamped Court's Exhibit 3, even though the list of exhibits provides that there is no Exhibit 3. (Tr. 12, line 21.) Regardless of the confusion, it appears both the photo array and the email were before the trial court.

on investigators to let her know if one is too suggestive. Nowhere in the email is there any indication that Brown actually said she thought Appellant's photo stood out. In any event, the trial judge was provided with the email—which both parties agreed would be admitted as a Court's exhibit in lieu of having Brown testify—and he was able to consider the information in the email as part of his determination of whether the lineup was suggestive. He still found it not unduly suggestive.

Appellant argues the lineup was unduly suggestive because his photograph accentuated one of the only physical characteristics Victim used in her description: flared nostrils. He also argues the photo stands out in its lack of similarity to any of the fillers, though he does not explain how, and notes that his head is tilted back and his mouth is open. Further, he argues the placement of Appellant in the sixth position clearly accentuates the flared nostrils. The trial court disagreed and found the lineup was not unduly suggestive. (Tr. 142, lines 12-13). Regarding Appellant's claim that he was the only one who looks like he had flared nostrils, the trial court noted: "[I]f somebody were to—if I were taking a test and somebody told me to pick out, mark the number of individuals on this photo lineup that had flared nostrils, I probably would mark four out of the six." (Tr. 142, lines 13-17). The photographic lineup itself supports the trial court's observations, as each suspect in each of the photographs has a very similar nose with wide nostrils and each has his head at a slightly different angle. Only one is looking straight ahead. All subjects have similar haircuts, clothing, skin tones (with the exception of number 1 who has a darker complexion), and backgrounds, and all have wide necks. Additionally, Appellant's argument that the lineup was unduly suggestive because he is positioned last is preposterous, as the same could be said if Appellant's photograph were listed first, or in the middle, or in any other position he wished to characterize as

suggestive without merit. Nothing about being in the sixth position accentuates his nostrils. Appellant failed to carry his burden of proving the identification procedure was impermissibly suggestive. See State v. Dukes, S.C. 553, 561, 745 S.E.2d 137, 141 (Ct. App. 2013) (finding the defendant bears the burden of proving the identification procedure was impermissibly suggestive).

It is important to note that Victim and Hart picked Appellant not just out of a six-person lineup. Rather, they each picked Appellant out of eight six-person lineups, or a total of forty-eight people. When reviewing the other lineups, number 4 has his mouth open and teeth showing in State's Exhibit 47, number 1 has his head slightly cocked back in State's Exhibit 54, and numbers 3 and 6 have their heads slightly cocked back in State's Exhibit 55. Yet both Victim and Hart chose Appellant as the only person they recognized as one of the intruders. Appellant argues that at trial, Victim "confidently identified a second assailant based on his eyes alone as his face was covered during the robbery." (App.Br.14.) However, Victim indicated she recognized number 4 in State's Exhibit 49 as one of the men who had his face covered, but she was not sure because she could only see his eyes. (Tr. 291, lines 10-25: Tr. 292, lines 1-6; 14-20.) She emphasized she did not identify the man based only on his eyes because "you can't, you know, identify somebody a hundred percent by eyes, so I didn't." (Tr. 300, lines 12-23.) While she did testify she was sure it was him based on his eyes, she also stated that she knew, because of the warnings she read before viewing the lineups, that she could not base an identification on just one part. (Tr. 301, line 1-Tr. 302, line 11.)

As evidence existed to support the trial court's decision, it did not abuse its discretion in ruling the procedure was not impermissibly suggestive. Dukes, 404 S.C. at 563, 745 S.E.2d at 142. Indeed, because the evidence supports more than one reasonable

inference, the question was a matter of law for the trial court to determine. See Liverman, 398 S.C. 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."). Consequently, this Court should affirm the trial court's ruling and need not consider the second prong of Biggers. Id. To the extent this Court disagrees, the State submits there was also sufficient evidence that the out-of-court identification was reliable under the totality of the circumstances.

Reliability

When determining the likelihood of misidentification, courts must evaluate the totality of the circumstances using the following factors: (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. Biggers, 409 U.S. at 199-200; State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 697 (2007); State v. Singleton, 395 S.C. 6, 13-14, 716 S.E.2d 332, 335-36 (Ct. App. 2011).

Appellant argues Hart only met one of the Biggers factors: certainty. On the contrary, she met each one of the five factors. The State's memo provided all the information the trial judge based his ruling on and was not objected to by Appellant. As to the first factor, the State's memo indicated both Hart and Victim had ample opportunity to view Appellant at the time of the crime and had conversations with him while his face was not covered. Appellant argues the record is unclear as to how long or closely Hart viewed him. However, the trial court found, based on the State's memo, that the witnesses had a good opportunity to observe Appellant without a disguise or anything

covering his face and that he was there with them for an extended period of time. Appellant even concedes Victim was able to look at the suspect's eyes despite being face down for most of the incident. (App.Br. 13.) While Appellant argues no testimony was elicited about lighting, the State's memo provided "they were inside their lighted house." (Court's Exhibit 4, 7.) As to the second factor, they had opportunities to see Appellant both at gunpoint and when a gun was not in their faces. He was the one assailant who was in contact with either Hart or Victim the entire time while his co-conspirators searched the house. Both witnesses demonstrated a high degree of attention in their descriptions of Appellant and the entire incident, and their accounts are corroborative. While Appellant presented expert testimony that guns distract witnesses from remembering facts, case law disputes that assertion. See State v. Govan, 372 S.C. 552, 560, 643 S.E.2d 92, 96 (Ct. App. 2007) (finding that under circumstances such as an armed robbery, specifically where a gun is being held to a victim's head, the victim's attention would have been heightened) ; see also State v. Blassingame, 338 S.C. 240, 252, 525 S.E.2d 535, 541-42 (Ct. App. 1999) ("A person in fear of his life presumably has a more acute degree of attention to his surroundings than a mere passerby."). As to the third factor, Hart's and Victim's prior descriptions fit Appellant. Appellant was described as six feet, one inch tall and he was in fact six feet tall; he was described as 180 pounds and he was 160. He had the large nostrils and eyes Victim described to the forensic artist and was strikingly similar to the sketch. While Appellant characterizes as unreliable Victim's depending on Hart to assist her in describing the suspect when she called 911, Victim pointed out Hart was able to see all the suspects when they first came in from the backyard and walked the children into the house, while Victim did not see them until they were in her bedroom and made her put her face down. (Tr. 314, line 10-

Tr. 315, line 19.) As to the fourth factor, Hart and Victim were certain when they independently picked Appellant out of eight six-person lineups as the only person they recognized as one of the intruders. The State's memo indicated Hart and Victim took their time studying each lineup before selecting Appellant in the second lineup, and they did not have any difficulty or hesitation identifying him. As to the fifth and final factor, mere hours passed between the crime and the lineup procedures. They selected Appellant from the lineup the day after the incident. As noted in the above discussion on suggestiveness, the fact that Victim was so adamant about following the instructions when choosing someone from the lineups that she would not identify a person unless she was 100% certain demonstrates her reliability.

Appellant's expert cast doubt on the reliability of the victims' description and identification based on factors such as Hart's age, the fact that a gun was involved, the impact of stress on identification, and common problems with lineups, even going so far as to opine that this particular lineup was suggestive. All of these things were presented to the jury, to be considered when weighing the reliability of the identifications. However, none of this was presented to the trial court before it made its ruling regarding the admissibility of the identifications and has no bearing on the trial court's admissibility ruling.

Therefore, the trial court did not abuse its discretion in denying Appellant's motion to suppress the identification testimony, and Appellant's convictions should be affirmed.

CONCLUSION

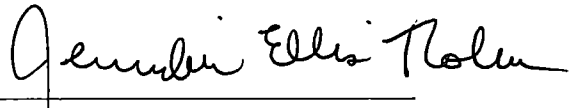
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

BY: 

Jennifer Ellis Roberts
Bar # 79818

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

May 22, 2015

STATE OF SOUTH CAROLINA
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THE STATE,

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MARION BENJAMIN POWELL,

Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Chris Moore, Esquire
Richardson, Patrick, Westbrook & Brickman, LLC
1730 Jackson Street
Barnwell, SC 29812

Robert M. Dudek, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served.
This 22nd day of May, 2015.

Angela Bennett

ANGELA BENNETT
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727