STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-001785

THE STATE,

Respondent,

v.

JAVARIUS G. TEAGUE,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SUSANNAH R. COLE
Assistant Attorney General

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

W. WALTER WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 E. North St.
Greenville, SC 29601
(864) 467-8647

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-001785

THE STATE,

Respondent,

v.

JAVARIUS G. TEAGUE,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SUSANNAH R. COLE
Assistant Attorney General

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

W. WALTER WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 E. North St.
Greenville, SC 29601
(864) 467-8647

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

STATEMENT OF ISSUES ON APPEAL

I.

The trial judge properly admitted the police lineup because the lineup was not suggestive, and the witnesses' identification was reliable under the totality of the circumstances.

II.

Because the witnesses' out of court identification was reliable and not unduly suggestive, the in court identification of Appellant was properly admissible.

III.

The trial judge's instruction to the jury on identification was proper because he charged the correct statement of law of South Carolina, focused the jury on the State's burden of proof that the testimony identified the offender beyond a reasonable doubt, and refrained from the appearance of commenting on the witnesses' credibility or the weight of the evidence presented at trial.

STATEMENT OF THE CASE

On May 21, 2013, a Greenville County grand jury indicted Appellant for three counts of armed robbery and three counts of possession of a weapon during the commission of a violent crime. (R. pp. 166-170). A jury convicted Appellant of all counts following a trial before the Honorable James R. Barber, III, held August 12-13, 2014. (R. p. 1.) Susannah Ross, Esquire represented Appellant and Mark Moyer, Esquire represented the State. (R. p. 1; p. 161, line 23 – p. 162, line 16.) Judge Barber sentenced Appellant to twenty years' imprisonment for each of the three counts of armed robbery and five years' imprisonment for each of the three counts of the possession of a weapon during a violent crime. The terms were concurrent. (R. p. 163, line 14 – p. 164, line 8.) This Appeal follows.

STATEMENT OF FACTS

On the night of July 23, 2012, five teenagers, Angelo, Fiorella, Jean, Edgar, and Devin, were hanging out outside Jean's home, listening to music and talking. (R. p. 65, line 6 – p. 66, line 25.) They noticed a car drive by and then return. (R. p. 64, line 25.) Jean directed everyone's attention to the car, and shortly thereafter two men jumped out and ran toward them, pointing guns. (R. p. 67, lines 1-14.) Fiorella and Devin were sitting on the sidewalk, and Jean and Angelo were standing nearby. (R. p. 86, lines 2-10.) One gunman approached Edgar, who was sitting in his car, and one gunman went to Angelo and started going through his pockets. (R. p. 68, lines 5-7; p. 85 line 16.) After the gunmen left, the teens went to Fiorella and Angelo's home and Fiorella called the police. (R. p. 69, lines 3-6.)

Before the State presented its case in chief, the trial court held a Neil v. Biggers[1] hearing to determine the admissibility of the witnesses' identification. (R. p. 7, line 25.) Timothy Conroy, a detective with the Greenville Police Department with eighteen years of experience as a law enforcement officer, took the stand. (R. p. 8, lines 10-19.) Conroy was the detective assigned to the case. (R. p. 9, lines 1-5.) He constructed a photo lineup to show three of the victims-- Angelo, Fiorella, and Jean. (R. p. 9, lines 6-11.) Appellant's picture was in the lineup, in addition to the pictures of five other men with similar characteristics, such as age, facial features, race, and hair. (R. p. 9, lines 15-22; p. 10, lines 5-6.)

Conroy testified he developed Appellant as a suspect while investigating a similar crime and after speaking to an informant who lived in the same neighborhood where the robbery occurred. (R. p. 10, lines 10-19.) The informant told Conroy the perpetrator was

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

nicknamed Peanut, which was Appellant's nickname. (R. p. 10, lines 20-21 and p. 11, lines 3-4.) Conroy went to the home of two of the victims on July 25, 2012, at approximately 11:00 am, to show them the photo lineup. (R. p. 11, lines 8-20.) At the victims' apartment, their mother answered the door. Angelo was upstairs sleeping, so she brought him downstairs to talk to the officer. (R. p. 12, lines 2-5.)

Conroy showed Angelo the lineup and advised him he was showing him six pictures of men with the similar characteristics. (R. p. 12, lines 6-8.) Conroy also told Angelo to pay more attention to the facial features than the hair because hairstyles can change. (R. p. 12, lines 8-9.) Conroy advised Angelo he could not tell him if the suspect was, in fact, in the lineup. (R. p. 12, lines 24-25.) While the lineup was face down, Conroy saw Angelo's eyes glance over the back of all six pictures. (R. p. 13, lines 4-5.) Angelo turned the lineup over himself and "really looked" at all six pictures. (R. p. 13, lines 18-19.) After examining the photos, he chose the picture of the Appellant and identified him as the man who robbed him. (R. p. 13, lines 18-20.) Angelo indicated he was "a hundred percent certain" he had chosen the right person. (R. p. 13, lines 20-25.) Conroy testified he made no suggestions nor attempted to influence Angelo's decision. (R. p. 13, lines 9-13.) Angelo signed the lineup form and indicated which photo he identified and how he knew the person. (R. p. 14, lines 1-6.)

Conroy then showed Angelo another photo lineup in an attempt to identify the other suspect in the crime. (R. p. 15, lines 16-20.) Conroy introduced the second lineup to Angelo in the same manner as the first. (R. p. 16, lines 11-15.) Angelo looked at each of the six pictures and stated he could not recognize the second suspect in the robbery. (R. p. 16, lines 18-19.)

When he completed the lineup with Angelo, Conroy asked the victims' mother if he could show the lineup to the second victim, Angelo's sister Fiorella. (R. p. 17, lines 1-3.) Angelo was going upstairs at the time. (R. p. 17, line 3.) Fiorella came downstairs and met with Conroy in the same area he met with Angelo, but Angelo was upstairs during Conroy's meeting with his sister. (R. p. 17, lines 5-9). Angelo was not within auditory or visual range of Conroy's conversation with his sister. (R. p. 17, lines 10-12.) Conroy showed Fiorella a different lineup than the one he showed Angelo; the photos were re-ordered. (R. p. 17, lines14-16.) Appellant was in position two in the lineup Conroy showed Angelo, but in position six in the lineup for Fiorella. Conroy presented the lineup in the same manner as he did with Angelo: he was showing six photos of men with similar traits (same age, same hair, same facial hair), he advised her she should not feel obligated to choose one, and the suspect may not even be in the lineup. (R. p. 18, lines 15-19.) Fiorella chose suspect number six with confidence, "like she was a hundred percent certain" he was the man who robbed her. (R. p. 18, line 23 – p. 19, line 3.) Conroy testified he did not influence or make any suggestions to Fiorella in any way, nor did he tell her Appellant was in the lineup. (R. p. 19, lines 4-11.) Conroy repeated the procedure for the next lineup for the second suspect. He presented it facedown, and when Fiorella turned over the lineup, she did not recognize anyone. (R. p. 19, lines 12-25.)

Conroy next met with victim Jean at his home. (R. p. 20, lines 5-8.) Jean was unable to identify anyone from the photo lineup because he claimed it was dark the night of the robbery, and he could not get a good look at anyone. (R. p. 20, lines 7-12.)

On July 14, 2012, about one month later, Conroy met with Angelo again to show him another lineup of another possible suspect in the case. (R. p. 20, lines 13-16.) Conroy followed procedure again with the presentation of the lineup. (R. p.20, lines 23-25.)

Angelo looked at the six pictures and indicated photo position three looked like one of the suspects. (R. p. 20, lines 3-4.) Conroy said Angelo was not "absolutely positively" certain number three was the suspect, but it looked like him. (R. p. 20, lines 5-8.)

Angelo testified at the Neil v. Biggers hearing. (R. p. 28, lines 2-3.) Angelo was fifteen on the night of the robbery. (R. p. 28, lines 14-15.) Angelo also testified he was upstairs sleeping the morning Conroy came to his home for the photo lineup. (R. p. 29, lines 1-3.) His mother woke him up, and he went downstairs to talk to the officer. Angelo testified he did not feel compelled to choose someone from the lineup, nor did Conroy influences his decision in any way. (R. p. 29, line 19 – p. 30, line 5.) Angelo remembers his sister was not in the room during the lineup, and he did not have any conversation with her following his selection of Appellant. (R. p. 30, lines 9-20.)

Angelo testified about the night of the robbery. (R. p. 30, lines 21-25.) Angelo and his friends Edgar, Devin, Jean, and Fiorella were talking and listening to some music outside Jean's house around eleven or twelve o'clock at night. (R. p. 31, lines 11-23.) Four people drove up in a car; two remained and two approached the victims. (R. p. 31, lines 1-8.) Angelo noticed both men who approached had guns. (R. p. 32, lines 9-12.) Angelo testified the light was bright enough for him to see the face of one of the suspects well. (R. p. 32, line 13 – p. 33, line 4.) He described the general appearance of both men; "one guy was bigger than the other and one had hair." (R. p. 33, line 6.) The thinner suspect had dreadlocks and the larger suspect was bald. (R. p. 33, lines 9-18.) Angelo clarified his meaning of "bald" to include little hair or a low cut hairstyle. (R. p. 33, line 25.) Angelo watched the larger suspect approach him and saw his face clearly when the suspect physically touched him to go through his pants. (R. p. 34, lines 3-21.) Angelo testified Appellant came within about six inches of his face, which is why he recognized

him from the photo lineup with "one hundred percent" certainty. (R. p. 34, line 22 – p. 35, line 24.)

Angelo explained he was unable to recognize the other suspect, however, during Conroy's first visit to his house when he showed Angelo the second lineup. (R. p. 36, lines 2-9.) He told Conroy he was unable to identify anyone in the second set of photos that day. (R. p. 36, lines 9-13.) Angelo remembered Conroy returning a month later to show him another lineup, (R. p. 36, lines 14-16.) Angelo recognized someone from the second lineup, as if he had seen him before, but he was not as confident as he was when he recognized Appellant previously. (R. p. 36, lines 17-25.)

Fiorella next took the stand to testify in the Neil v. Biggers hearing. Fiorella was thirteen on the night of the robbery. (R. p. 41, line 5.) Fiorella recalled meeting with Conroy for the photo lineup on July 25, 2012. (R. p. 41, lines 17-20.) She was asleep when he arrived at her house. (R. p. 41, lines 23-24.) She remembered her brother coming to wake her up and telling her the officer was there, but not telling her why or about the pictures. (R. p. 42, lines 1-12.) Conroy and Fiorella met at her kitchen table to look at the lineup, but Fiorella did not recall Conroy's instructions to her concerning the photos. (R. p. 42. lines 20-24.) Fiorella stated she felt no pressure from Conroy to identify a suspect, and she did not feel influenced in any way. (R. p. 43, lines 1-9.)

On the night of the robbery, Fiorella said she was "hanging out where Angelo was." (R. p. 43, lines 10-13.) At that time of night, there was little traffic on the street, and Fiorella was sitting on the sidewalk. (R. p. 43, lines 16-29.) Fiorella first noticed the car when Jean pointed out the car was driving by. (R. p. 44, lines 2-3.) She realized she was about to be robbed when the car stopped. (R. p. 44, lines 4-6.) She noticed two men get out of the car, holding guns. (R. p. 44, lines 8-15.) Fiorella remembered one man had

dreadlocks and the other had a short haircut. (R. p. 44, lines 16-20.) Fiorella testified she remembered the hair, and the men were about a foot away from her. (R. 44, line 23 – p. 45, line 5.) Fiorella said she was looking down during much of the robbery because she was scared, but she was able to get a "good look at [the] eyes" of Appellant when he was going through her brother's pants. (R. p. 45, lines 7-9.) She testified Appellant came within five or six feet of her. (R. p. 45, lines 18-25.) The street light illuminated the Appellant's face sufficiently for Fiorella to be able to identify him later. (R. p. 46, lines 1-7.) Fiorella said when she chose Appellant's photo she was very confident he was the man who robbed them; she had no doubt. (R. p. 47, lines 1-7.) Fiorella then testified she was unable to identify the suspect with dreadlocks from Conroy's second lineup. (R. p. 47, lines 8-18.) Fiorella gave a statement at the scene, but she did not offer any description of the suspects in her statement. (R. p. 49, lines 1-6.)

Appellant called Dawn McQuisten to the stand to testify as an expert in memory and eyewitness identification. (R. p. 50, lines 10-19.) Dr. McQuisten has a bachelor's degree in psychology, a master's degree in experimental psychology, and a PHD in experimental psychology from University of Texas at El Paso. (R. p. 50, line 24 – p. 51, line 1.) McQuisten testified she thought the lineup was improper because Appellant appears to "have blinked for the camera ... he looks to have either heavy set eyes or blinked for the camera compared to all of the others." (R. p. 54, lines 19-25.) McQuisten said because his eyes were distinctive, a witness might be more inclined to choose this photo. (R. p. 55, lines 6-12.) She also testified, in her opinion, the suspect in position six in State's Exhibit 1 looked heavier than the others. (R. p. 55, lines 17-21.) McQuisten testified lighting and fear can be factors affecting a person's processing of the events at

the scene. (R. p. 57, line 23 – p. 58, line 4.) McQuisten also noted, "people can be off in their descriptions and still be accurate in their recognition." (R. p. 58, lines 14-15.)

Following McQuisten's testimony, and without argument, the court ruled the lineup was admissible because Appellant did not prove the photos were impermissibly suggestive. (R. p. 61, lines 15-18.) He further found the witnesses had ample opportunity to view the Appellant's face because they were in close physical proximity to him. (R. p. 61, lines 19-24.) The judge also ruled although one witness provided no physical description in her statement to the police, the other witness did provide some basic information consistent with his later identification of the suspect. (R. p. 61, line 25 – p. 62, line 2.) Moreover, the judge noted the certainty with which the teenagers recognized Appellant as the suspect in support of his ruling. (R. p. 62, lines 2-4.) During discussion of the publishing of the photo lineup to the jury, both the State and Appellant's counsel agreed the photos should be shown. (R. p. 63, lines 1-5.)

During the case in chief, Angelo testified Appellant took his phone out of Angelo's pocket when it rang during the robbery. (R. p. 113, lines 12-17.) Angelo was able to see Appellant's face clearly because he was so close to Appellant while he was being robbed and the street lights provided enough light. (R. p.114, line 3 – p. 115, line 19.) Angelo also said he was unable to see the other man who robbed them; he could only see his hair and his clothing, but not his face. (R. p. 116, line 24 – p. 117, line 3.) Angelo said the statement taken the night of the robbery was incorrect because it said the "the skinny male was close to me" but, in fact, the larger of the two suspects actually approached Angelo. (R. p. 118, lines 12-18.) Angelo did not write out the statement himself, however, because his hand was previously injured and he could not write at the time. (R. p 117, line 19 – p. 118, line 18.) The officer wrote the statement for him. (R. p.

117, line 25 – p. 118, line 1.) Angelo testified his sister was sleeping while he met with Conroy to look at the lineup, and only his mother was in the room. (R. p. 120, lines 17-14.) Angelo felt no pressure to choose anyone from the lineup and Conroy made no suggestions or inferences as to the identity of the suspect. (R. p. 121, line 13 – p. 122, line 3.) Angelo was positive in his identification of Appellant as the man who robbed him. (R. p. 122, lines 11-15.) Angelo did not recognize the second suspect from the second photo lineup. (R. p. 123, line 11 – p. 124, line 8.) When Conroy returned a few weeks later with another photo lineup, in an attempt to identify the second suspect in the robbery, Angelo thought one man looked familiar, but he could not be certain he had chosen the right man. (R. p. 124, line 9 – p.125, line 17.) Angelo identified Appellant in court as the man who robbed him. (R. p, 126, line 6 – p. 127, line7.)

Officer Charles Lane was the responding officer on the night of the robbery. (R. p. 130, line 7 – p. 131, line 4.) Lane described the teenagers as "shaken up or excitable" and he had trouble understanding some of the things they said. (R. p. 133, lines 11-15.)

Detective Conroy testified at the case in chief he told Angelo not to discuss the lineup with his sister following Angelo's identification of Appellant. (R. p. 146, lines 9-15.) Neither Angelo nor Fiorella was able to recognize the second suspect. (R. p. 145, lines 18-19; p. 148, lines 15-20.) Edgar and Jean were unable to identify either of the suspects. (R. p. 148, line 21 – p. 149, line 10.) At the second photo lineup a few weeks later, Angelo indicated one of the men as looking similar to the man who robbed them, but he was uncertain of his identification of the suspect. (R. p. 150, lines 2-18.) Because of Angelo's uncertainty, Conroy did not get a warrant for the second suspect. (R. p. 151, line 1.) Conroy detailed his recollections in a report two days later, and in that report he did not indicate Angelo was one hundred percent certain of his identification of

Appellant. (R. p. 151, lines 15-21.) However, Conroy testified he would not have sought the arrest warrant for Appellant if Angelo not been one hundred percent certain. (R. p. 151, lines 24-25.)

Appellant's trial counsel requested a detailed charge on identification, which included a provision on cross-racial identification. (R. p. 154, lines 15-9, Court's Exhibit 3.) The judge charged his standard identification instruction instead. (R. p. 158, line 25 – p. 159, line 25.) At the conclusion of the jury charge Appellant's trial counsel objected, stating, "I would take exception to the failure to charge the request that I submitted." (R. p. 160, lines 6-7.) The judge responded, "All right. Well, it was submitted and I believe it was covered." (R. p. 160, lines 8-9.)

ARGUMENT

I

The trial judge properly admitted the police lineup because the lineup was not suggestive, and the witnesses' identification was reliable under the totality of the circumstances.

Appellant argues the teenagers' out of court identification of him was unreliable and should have been suppressed. The identification, made from a photographic lineup of six people, was not unduly suggestive because the six men in the photos have similar characteristics of Appellant, even though each man has minor facial distinctions. Further, the investigating officer used his standard protocol for conducting the lineup to prevent any undue influence. Under the totality of the circumstances, the identification was proper, and the trial court committed no error in its admission.

"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). A trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). In the instant case, the conclusions are supported by evidence.

A criminal defendant may be deprived of due process by an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification. Stovall v. Denno, 388 U.S. 293, 302 (1967) *overruled on other grounds by* Griffith v. Kentucky, 479 U.S. 314 (1987). The in-court identification of the accused becomes inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. Neil v. Biggers, 409 U.S. 188

(1972); Moore, 343 S.C. at 290, 540 S.E. 2d at 449.

The courts use a two prong analysis to determine the admissibility of the out-of-court identification. The test is: 1) whether the identification process was unduly suggestive; and 2) whether the identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers 409 U.S. at 198; Moore, 343 S.C. at 287, 540 S.E.2d at 447. Courts employing the test should consider the totality of circumstances. Biggers, 409 U.S. at 199.

Appellant complains the photographic lineup was suggestive because, he contends, he appears larger than the other individuals in the lineup and his eyes appear slightly closed, indicating the different facial characteristics made his photo stand out from the five others. Viewing the exhibit, the individuals have the appearance of being roughly similar in size. The lineup shows the photos of six men, with each image cropped at the area just below the men's chins. Only a small portion of their necks, just on either side of their chins is visible. Appellant's height and weight are not indicated on the form, and his size is not clear from the photograph. Indeed, the facial shapes of most of the other individuals are similar, but not exact. Appellant's size does not stand out from the others in such a way as to render the lineup unduly suggestive.

Appellant's eyes, though distinctive, are not so unusual as to draw attention to his photo, to the exclusion of the others. All six men have differently shaped eyes. In State's Exhibit 2, the man in the fourth position appears to have deep set eyes, and his chin is tilted downward slightly. The man is position five has lighter colored eyes, which gives him a distinctive look from the others. Moreover, the man in position six has his head tilted slightly to one side, and the man in position one has a narrower face than the others. Small differences exist between Appellant and the other men, but the men remain similar

in their overall appearance. The exhibit does not support Appellant's argument the lineup was unduly suggestive. See State v. Simmons, 384 S.C. 145, 168, 682 S.E.2d 19, 31 (Ct. App. 2009) (finding "[d]espite Simmons's contention that his ears were smaller than those of the other individuals in the line-up, his photograph does not stand out in such a way as to render the line-up unduly suggestive").

The North Carolina Supreme Court rendered a holding which readily applies to the instant case:

> Although there is some disparity in age, height and weight of the lineup participants, these differences do not render the identification procedures so 'unnecessarily suggestive and conducive to irreparable mistaken identification' as to constitute a denial of due process. The State is not required to produce lineup subjects who are in all respects identical to the suspect. If such were the rule, no lineup would be valid because no two men are alike. Here, the lineup subjects approximated the general physical description given by the victim; and defendant was not rendered conspicuous by police procedures. The mere fact that defendant had specific identifying characteristics not shared by the other participants does not invalidate the lineup.

State v. Gaines, 194 S.E.2d 839, 844 (N.C. 1973). Courts must consider the totality of circumstances and consider the following factors in deciding the likelihood of misidentification:

> 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of the witness's prior description of the criminal; 4) the level of certainty demonstrated at the confrontation; and 5) the time between the crime and the confrontation.

State v. Washington, 323 S.C. 106, 473 S.E.2d 479, 481 (Ct. App. 1996).

A trial judge should only exclude identification evidence if there is "'a very substantial likelihood of irreparable misidentification.'" Perry v. New Hampshire, __

U.S. __, 132 S. Ct. 716, 720 (2012) (citation omitted). Indeed, the exclusion of evidence is a "drastic sanction" and should be "limited to identification testimony which is manifestly suspect." Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983). The decision to admit an eyewitness identification is within the trial judge's discretion and will not be disturbed on appeal absent an abuse of that discretion or the commission of prejudicial legal error. State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000).

Following the Neil v. Biggers hearing, the trial court judge made these findings:

> I find the witnesses' opportunity—both of them said that they had an opportunity to observe the people in that regard at the scene and they were paying close attention because the witnesses were very close to them.
>
> While there was no prior description as to one, the other one gave some description, including close haircut, and both testified as to the certainty of the identification and within a very short period of time from the time of the incident.
>
> I find the lineups were not impermissibly suggestive, but, of course, the jury is ultimately going to make that determination.

(R. p. 61, line 20 – p. 62, line 7.)

The court properly found the teenagers' identification of Appellant reliable in light of the totality of the circumstances surrounding the confrontation. First, the record reflected Angelo and Fiorella had ample opportunity to view Appellant when he approached Angelo to take his phone and go through his pockets. During this time, at least two streetlights illuminated Appellant's face. Angelo was able to pay particularly close attention to Appellant because he was rummaging through his pants and holding a gun directly on him. A person in fear of his life presumably has a more acute degree of attention to his surroundings than a mere passerby. See State v. Ford, 278 S.C. 384, 296 S.E.2d 866 (1982); State v. Brown, 333 S.C. 185, 508 S.E.2d 38 (Ct.App.1998); State v.

Johnson, 318 S.C. 372, 458 S.E.2d 49 (Ct.App.1995).

Although Angelo's description of the two men was not very detailed, it was consistent with their appearance. Later, when they were shown the photographic lineup, Angelo and Fiorella chose Appellant's photograph without hesitation. Appellant's own expert testified, "people can be off in their descriptions and still be accurate in their recognition." (R. p. 58, lines 14-15.) To borrow a phrase from Justice Stewart, the witness may not be able to define accurately the specific characteristics of the perpetrator's appearance, but he may know it when he sees it. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) ("I shall not attempt today to further define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligently doing so. But I know it when I see it, and the motion picture involved in this case is not that.") Both Angelo and Fiorella were absolutely certain of their identification of Appellant when they saw his photo in the lineup.

Finally, the identification took place only two days after the burglary. Our Supreme Court has on at least three occasions found reliable out-of-court identifications made after greater lapses of time. See State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980) (photo identification fifteen days later); State v. Gambrell, 274 S.C. 587, 266 S.E.2d 78 (1980) (photo identification less than two weeks later); State v. Patterson, 337 S.C. 215, 230-31, 522 S.E.2d 845, 853 (Ct. App. 1999) (photo identification two weeks later).

Appellant argues Detective Conroy improperly constructed the photo lineup and undermined the objectivity of the witnesses, but offers no evidence to support this claim, other than Conroy's providing more detail of his instructions to Angelo during the case in chief than in the Neil v. Biggers hearing. Appellant broadly claims Angelo and Fiorella

did not have sufficient opportunity to view the culprit because the lighting was not bright enough, despite their testimony otherwise. Appellant also argues because they were scared, they could not have focused on the robber's face. "The only logical explanation ... is that they made their selection based on his weight and that they spoke after the incident, influencing each other's memories." (Appellant's Brief, p. 17.) No evidence supports this assertion. Perhaps a more logical explanation for their selection of Appellant is because they recognized him as the man who robbed them.

Further supporting their identification as honest and reliable is their failure to identify a second suspect, despite two lineups presented by Detective Conroy. Because the teenagers were not inclined to choose a man without confidence, no other suspect was identified. Logic implies if Angelo and Fiorella were deluding themselves into selecting an innocent man from a lineup, they would delude themselves a second time. Similarly, if Conroy were suggestive of Appellant in his lineup, he would have been suggestive in his second. Because the teenagers did not choose a second suspect, their choice of Appellant has a greater indication of reliability.

In sum, Appellant's photograph was chosen with ease from a set of six photographs by Angelo and Fiorella because Appellant came closest to them in a well-lit area, and they were able to see his face. To suggest improper police procedure without any evidence to support it is disingenuous on Appellant's part. The police lineup was not suggestive, the identification was reliable, and the trial court did not abuse its discretion in allowing the in court identification. Appellant is not entitled to a new trial on this ground.

II.

Because the witnesses' out of court identification was reliable and not unduly suggestive, the in court identification of Appellant was properly admissible.

To determine the admissibility of an identification, the court must determine (1) whether the identification process was unduly suggestive and (2) if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. State v. Cheeseboro, 346 S.C. 526, 540, 552 S.E.2d 300, 307-08 (2001); Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). As thoroughly discussed in Section I, the photo lineup was neither unduly suggestive nor unreliable. Thus, Appellant has no basis for the claim the in court identification was inadmissible.

With this argument, Appellant's claim that the in-court identification was inadmissible necessarily turns on the admissibility of the out-of-court identification. Appellant continues to offer speculation, not evidence, on how the lineup might have been impermissible by pointing to differences in witness testimonies and opportunities for witness collaboration. Appellant cannot show inclination to influence each other's choices from the evidence at trial, nor can Appellant explain why the witnesses would misidentify one suspect but not another.

Nevertheless, Appellant cites several areas of testimony in support of his claim. First, the identification procedure used by Conroy was not improper or unduly suggestive. Conroy may have informed Angelo he would see a lineup if Conroy were to develop a person of interest, but Conroy did not tell Angelo the person of interest was definitely in the photo lineup presented. (R. p. 12, lines 24-25.) Even if Angelo assumed the suspect was in the lineup, nothing about Conroy's presentation of the lineup

suggested Angelo look more carefully at Appellant's photo in particular. (R. p. 12, line 6 – p. 14, line 6.)

Next, Conroy's testimony concerning his instructions to Angelo and Fiorella was not inconsistent. During the case-in-chief, Conroy provided more details about his instructions to Angelo, but he did not contradict his testimony in the Neil v. Biggers hearing. (R. p. 146, lines 9-15.) Angelo and Fiorella may not have been able to recall Conroy's instructions, but that failure to remember does not imply misconduct on Conroy's part. The teenagers simply did not remember Conroy's instructions "word for word," but they felt no pressure to choose one individual in particular, or at all. (R. p. 29, line 16-25.)

Although the teenagers may have had an opportunity to talk in passing between their viewings of the photo lineup, Appellant presented no evidence they discussed the lineup. In fact, when questioned about their exchange, Angelo testified he did not talk to his sister about his identification. (R. p. 30, lines 13-20.) Fiorella similarly testified Angelo did not tell her why the officer was at their house, nor did he tell her she would be shown pictures, or he had already chosen someone. (R. p. 42, lines 7-14.) Moreover, though trial counsel did not ask Conroy why he went to the witness's home to conduct the lineup, presumably he preferred the teenagers to be comfortable and not intimidated by police questioning.

Appellant states, "Conroy also testified that he told Angelo that he changed the order of the photographs. ... This undermined any potential benefit from the reordering by putting Angelo on notice that if he were to give his sister any tip on who to select, it should be based on something other than the placement of the photograph." (Appellant's Brief, p. 27.) This statement presupposes a scheme on the witnesses' part to convict an

innocent man, when there is simply no evidence this was the case. Clearly the siblings were not determined to choose the identity of their robber, regardless of the truth, because both Angelo and Fiorella refused to identify the second suspect. (R. p. 36, lines 1-24 and p. 47, lines 8-18.) It defies logic to suggest the two schemed for one suspect, but not the other.

The testimonies of Angelo and Fiorella were credible because they could see Appellant's face from the light of the streetlamp. In addition, Appellant came so physically close as to touch Angelo and go through his pockets. The teenagers were outside talking and listening to music within the same environment. When the Appellant entered the area in which they were standing and sitting on the ground, they could see him as well as they could see each other. Though the teenagers noticed the weapon Appellant carried with him, Fiorella and Angelo both testified they had the opportunity to see his face. (R. p. 32, line 10 and p. 35, line 1; p. 4, lines 10-15 and p. 45, lines 8-9.) Their attention to the gun was not exclusive of their ability to see Appellant.

Contrary to Appellant's argument the timing of the lineup negatively affects the credibility of the identification, the State submits the two day delay between the incident and the lineup was well within accepted period in which South Carolina courts have lineup identification properly admissible. See See State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980) (photo identification fifteen days later); State v. Gambrell, 274 S.C. 587, 266 S.E.2d 78 (1980) (photo identification less than two weeks later); State v. Patterson, 337 S.C. 215, 230-31, 522 S.E.2d 845, 853 (Ct. App. 1999) (photo identification two weeks later). Moreover, the failure of Angelo and Fiorella to give detailed descriptions of the robbers does not preclude them from recognizing Appellant

later, as the defense expert noted, "people can be off in their descriptions and still be accurate in their recognition." (R. p. 58, lines 14-15.)

Lastly, Appellant's argument the teens' certainty of their identification actually makes the identification unreliable lacks credibility. Courts consider confidence, or certainty, to be important one factor of several in determining, under the totality of the circumstances, whether the identification is reliable. State v. Washington, 323 S.C. 106, 473 S.E.2d 479, 481 (Ct. App. 1996). Certainty is a factor in favor of admission.

Because the out of court identification was not unduly suggestion and was reliable under the totality of the circumstances, the trial court judge properly admitted the in court identification of Appellant by the witnesses. Appellant is not entitled to a new trial on this ground.

III.

The trial judge's instruction to the jury on identification was proper because he charged the correct statement of law of South Carolina, focused the jury on the State's burden of proof that the testimony identified the offender beyond a reasonable doubt, and refrained from the appearance of commenting on the witnesses' credibility or the weight of the evidence presented at trial.

Appellant argues the trial judge's failure to instruct the jury with a modified Telfaire[2] instruction, which included a provision on cross racial identification, was improper. Appellant's proposed instruction was improper, however, because the jury could misinterpret the instruction as the trial judge's opinion on the credibility of the witness testimony. The judge charged the correct statement of law and committed no reversible error by failing to give Appellant's proposed charge.

Following closing arguments, defense counsel requested a special jury instruction on identification, which may be best described as a modified Telfaire charge, with an added cross-racial identification provision. (Court's Exhibit 3.) The cross-racial identification portion provides:

> You should also consider whether the witness is of a different race than the person identified. Identification by a person of a different race may be less reliable than identification by a person of the same race.

(Court's Exhibit 3, p. 2.) The instruction also expounded on the factors affecting the witness's "adequate opportunity to observe," "capacity to observe," and whether the identification was a product of his own memory. (Court's Exhibit 3, p. 1-2.)

The judge charged the following:

> Now ladies and gentlemen, an issue in this case is the identification of the Defendant as the person who committed the crimes charged. The State has the burden of proving identity beyond a reasonable doubt. You must be

[2] U.S. v. Telfaire, 469 F.2d 552 (1972).

> satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict the Defendant.
>
> Identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification of the defendant. You must consider the believability of each identification witness in the same way as any other witness.
>
> You may consider whether the witness had an adequate opportunity to observe the Defendant at the time of the offense. This will be affected by things like how long or short a time was available, how far or close the witness was, the lighting conditions, whether the witness had the chance to see or know the person.
>
> Once again, I instruct you that the burden of proof on the State extends to every element of the crime charged and specifically includes the burden of proving beyond a reasonable doubt the identity of the Defendant as the person who committed the crime.
>
> If, after examining the testimony you have a reasonable doubt as to the accuracy of the identification, you must find the Defendant not guilty.

(R. p. 158, line 25 – p. 159, line 25.) Defense counsel took exception to the judge's failure to instruct the jury exactly as requested. (R. p. 160, lines 6-7.)

"Generally, the trial judge is required to charge only the current and correct law of South Carolina." State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. This Court has held a jury charge on identification must adequately focus the jury's attention on the requirement of finding the testimony identified the defendant as the offender beyond a reasonable doubt. State v. Patterson, 337 S.C. 215, 234-35, 522 S.E.2d 845, 854-55 (Ct. App. 1999).

Recently this Court rejected (again) the notion the trial court is required to give the Telfaire instruction upon request of the defense. State v. Green 412 S. C. 65, 770 S.E. 2d 424 (2015). As in the present case, Green was convicted of possession of a weapon

during the commission of a violent crime and armed robbery. Green, 412 S.C. at 69, 770 S.E.2d at 426. Green requested the trial court instruct the jury "to consider issues implicated by cross-racial identifications; specifically, that '[i]dentification by a person of a different race may be less reliable than identification by a person of the same race.' This instruction also provided the jury with guidance concerning how to determine whether the identification was a product of the witness's own memory." Id. at 73, 770 S.E.2d at 428-29. The judge refused, giving his standard identification charge instead:

> An issue in this case is the identification of the defendant as the person who committed the crime charged. The State has the burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict the defendant.
>
> Identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification of the defendant. You must consider the believability of each identification witness in the same way as any other witness.
>
> You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. This will be affected by things like how long or short a time was available, how far or close the witness was, the lighting conditions, and whether the witness had a chance to see or know the person in the past.
>
> Once again, I instruct you, the burden of proof on the State extends to every element of the crime charged and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the crime.
>
> If after examining the testimony you have a reasonable doubt as to the accuracy of the identification you must find the defendant not guilty.

Id. at 74, 770 S.E.2d at 429.

The court found the trial court's standard identification charge was a correct statement of the law of South Carolina. More specifically, because the charge told the jury to "consider whether the witness had an adequate opportunity to observe the offender at the time of the offense," and that "[t]his will be affected by things like how long or short a time was available, how far or close the witness was, the lighting conditions, and whether the witness had a chance to see or know the person in the past," these were proper instructions under the circumstances. Id. at 76, 770 S.E.2d at 430. The court noted the instruction informed the jury the State had the burden of proving identification beyond a reasonable doubt, and therefore focused the attention of the jury to the proper standard by which to consider the testimony. Id. at 77, 770 S.E. 2d at 430; see also State v. Motes, 264 S.C. 317, 326, 215 S.E.2d 190, 194 (1975).

Significantly, the court also said, "Green's request to charge the jury that '[i]dentification by a person of a different race may be less reliable than identification by a person of the same race' would have been improper because it would have asked the jury to place less weight on Victim's testimony because he was of a different race than Green." Id.at 77, 770 S.E.2d at 431. Moreover, South Carolina considers instruction on a witness's certainty of identification as "superfluous" when the standard instruction on witness credibility and burden of proof are given. Id. at 78, 770 S.E.2d at 431.

In the present case, Appellant vehemently argues the witnesses' identification lacks credibility because of the cross-racial identification, but no evidence on the record developed the racial makeup of the witnesses themselves. In our state, as across the nation, racial composites are not always simply one race or another. The requested cross racial identification jury charge requires some investigation into the racial makeup of witnesses testifying at trial, as well as the Appellant, in order to substantiate the jury

instruction. Despite Appellant's argument the cross racial identification provision "encompassed evidence presented to the jurors and allowed them to synthesize the matter," the charge is not supported by the record.

In a similar case, our Supreme Court determined in State v. Liverman, 398 S.C. 130, 144, 727 S.E.2d 422, 429 (2012), that "the trial court instructed the jury **thoroughly** on identification testimony and the factors that should be considered when evaluating it." (emphasis added). The trial courts in Green and Liverman gave nearly identical charges to the ones given here, and the Supreme Court considered them thorough. Therefore, the jury charges given here were certainly adequate. The charges "adequately focused the attention of the jury on the necessity for a finding that the testimony identified defendant as the offender beyond a reasonable doubt; therefore, no prejudice resulted to defendant from the failure to give the requested instruction." Motes, 264 S.C. at 326, 215 S.E.2d at 194. To warrant reversal, a trial judge's refusal to give a requested charge must be both erroneous and prejudicial. Ellison v. Parts Distributors, Inc., 302 S.C. 299, 395 S.E.2d 740 (Ct.App.1990); State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002).

In State v. Patterson, a woman was assaulted and robbed in her home by three men. 337 S.C. 215, 221, 522 S.E.2d 845, 848 (1999). The witness recognized one of her assailants as an associate of her husband, but did not recognize the other two men. Approximately two weeks later, she identified one of her attackers, who had spent about five minutes threatening her in a closet in her bedroom, from a photo lineup. Id. at 222, 522 S.E. 2d. at 849. At trial the defendant asked for the Telfaire instruction, and the trial court refused, issuing the standard identification instruction instead. Id. at 231, 522 S.E.2d at 854-855. The Court of Appeals affirmed, finding the requested instruction impermissible under Article V of the South Carolina Constitution, which prohibits judges

from charging juries on matters of fact. Id. (quoting State v. Robinson, 274 S.C. 198, 203, 262 S.E.2d 729, 731 (1980)). "The trial judge must refrain from intimating 'to the jury his opinion of the case, what weight or credence should be given to the evidence and participating in any manner with the jury's finding of fact.'" Id. at 234, 522 S.E.2d at 855. The court points out our Supreme Court rejected the Telfaire instruction in Robinson, holding under the circumstances of the case the trial court was correct to decline the Telfaire charge. Id.

Appellant also cites State v. Motes, 264 S.C. 317, 215 S.E.2d 190 (1975), and its discussion of the model jury instruction from United States v. Telfaire, 469 F.2d 525 (D.C. Cir 1972). In Motes, the Supreme Court held there was no error in the trial court's refusal to charge the Telfaire model instruction, noting the model instruction was "designed to focus the attention of the jury on the identification issue and minimize the risk of conviction through false or mistaken identification." Motes, 264 S.C. at 326, 215 S.E.2d at 194. The Court found, "The trial, and the instructions given, adequately focused the attention of the jury on the necessity for a finding that the testimony identified defendant as the offender beyond a reasonable doubt; therefore, no prejudice resulted to defendant from the failure to give the requested instruction." Id.

Appellant attempts to distinguish his case from those above by arguing the identification testimony in the present case was the only evidence tying Appellant to the crime. (Appellant's Brief, p. 31.) In Patterson, Motes, and Green, however, identification was also critical to the State's case. Moreover, the significance of the identification testimony makes the proposed instruction no less improper. In the course of criminal trials in South Carolina, the judge must refrain from all comment which tends to indicate his opinion on the weight or sufficiency of evidence, the credibility of witnesses, the guilt

of the accused, or the facts in controversy. State v. Ates, 297 S.C. 316, 317-18, 377 S.E.2d 98, 99 (1989); Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22 (1987). Indeed, when identification testimony is the only evidence linking a suspect to the crime, the trial court judge must be even more cautious in avoiding the appearance of impropriety by commenting on the witnesses' credibility.

South Carolina courts have been reluctant to require the expansive jury charge on identification because the jury may misinterpret the instruction as the trial judge's opinion concerning the credibility of the witness testimony. When considered as a whole, the charge given by the trial judge contains the correct definitions and adequately covers the law of identification testimony. The judge's failure to give the requested jury charge was not reversible error, and Appellant's convictions should be affirmed. Appellant is not entitled to a new trial on this ground.

CONCLUSION

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

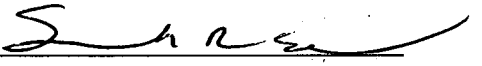
Respectfully submitted,

ALAN WILSON
Attorney General

SUSANNAH R. COLE
Assistant Attorney General

W. WALTER WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 E. North St.
Greenville, SC 29601
(864) 467-8647

BY: 
Susannah R. Cole
Bar # 68383

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

ATTORNEYS FOR RESPONDENT

October 20, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-001785

THE STATE,

Respondent,

v.

JAVARIUS G. TEAGUE,

Appellant.

CERTIFICATE OF COUNSEL

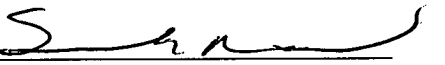
The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

SUSANNAH R. COLE
Assistant Attorney General

W. WALTER WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 E. North St.
Greenville, SC 29601
(864) 467-8647

BY: 

Susannah R. Cole
Bar # 68383

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

ATTORNEYS FOR RESPONDENT

October 20, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-001785

THE STATE,

Respondent,

v.

JAVARIAS G. TEAGUE,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Laura R. Baer, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 20th day of October, 2015.

Anne Mueller

ANNE MUELLER
Legal Assistant

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