

STATE OF SOUTH CAROLINA

RECEIVED

IN THE COURT OF APPEALS

NOV 03 2015

SC Court of Appeals

Appeal from Greenville County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAVARIAS G. TEAGUE,

APPELLANT

APPELLATE CASE NO. 2014-001785

FINAL BRIEF OF APPELLANT

LAURA R. BAER
Appellate Defender

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

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES..... 2

STATEMENT OF ISSUES ON APPEAL..... 3

STATEMENT OF THE CASE 4

STATEMENT OF FACTS 5

Neil v. Biggers Hearing 5

 Trial Testimony 11

 Jury Instruction on Identification 16

ARGUMENT 18

 I. The trial court erred in admitting the out-of-court identifications of Appellant from a photo array where (1) the identification procedure was unduly suggestive because Appellant's eyes and weight made his photograph stand out from the others in the photo arrays and the witnesses had an opportunity to speak with each other between their purportedly separate identifications, and (2) the identifications were unreliable based on a totality of the circumstances 18

 II. The trial court erred in admitting the in-court identifications of Appellant where the unduly suggestive and otherwise unreliable photo array identification created a substantial likelihood of irreparable misidentification 27

 III. The trial court erred in refusing to give the defense's requested jury instruction on identification and instead only gave its standard identification charge where identification was the sole issue at the trial 30

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

<u>Brodes v. State</u> , 614 S.E.2d 766, (Ga. 2005)	31
<u>Caver v. Alabama</u> , 537 F.2d 1333, 1335 (5th Cir. 1976)	19
<u>Clyburn v. Sumter County Sch. Dist.</u> , 317 S.C. 50, 53, 451 S.E.2d 885, 887-88 (1994). 19	
<u>Commonwealth v. Bastaldo</u> , ___ N.E.3d ___, 2015 WL 3885652 at *1 (Mass. June 25, 2015)	34, 37
<u>Commonwealth v. Gomes</u> , 22 N.E.3d 897 (Mass. 2015).....	35, 36, 37
<u>Commonwealth v. Hyatt</u> , 647 N.E.2d 1168 (Mass. 1995)	34
<u>Commonwealth v. Walker</u> , 953 N.E.2d 195 (Mass. 2011)	35
<u>Curtis v. Commonwealth</u> , 396 S.E.2d 386, 388 (Va. Ct. App. 1990).....	19
<u>Foster v. California</u> , 394 U.S. 440, 89 S.Ct. 1127 (1969).....	19
<u>In re Winship</u> , 397 U.S. 358 (1970)	30
<u>Manson v. Brathwaite</u> , 432 U.S. 98, 97 S.Ct. 2243 (1977)	27
<u>Neil v. Biggers</u> , 409 U.S. 188, 93 S.Ct. 375 (1972)	18, 19, 27, 29
<u>Perry v. New Hampshire</u> , ___ U.S. ___, 132 S.Ct. 716, 728 (2012).....	31
<u>Simmons v. United States</u> , 390 U.S. 377, 88 S.Ct. 967 (1968)	27
<u>State v. Aleksey</u> , 343 S.C. 20, 538 S.E.2d 248 (2000).....	30
<u>State v. Blassingame</u> , 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999)	25
<u>State v. Bowman</u> , 366 S.C. 485, 623 S.E.2d 378 (2005).....	12
<u>State v. Cheeseboro</u> , 346 S.C. 526, 552 S.E.2d 300 (2001)	27
<u>State v. Day</u> , 341 S.C. 410, 535 S.E.2d 431 (2000).....	31
<u>State v. Dukes</u> , 404 S.C. 553, 745 S.E.2d 137 (Ct. App. 2013)	20
<u>State v. Fuller</u> , 297 S.C. 440, 377 S.E.2d 328 (1989).....	31
<u>State v. Henderson</u> , 27 A.3d 872 (N.J. 2011)	36
<u>State v. Knoten</u> , 347 S.C. 296, 555 S.E.2d 391, (2001).....	31
<u>State v. Lane</u> , 406 S.C. 118, 749 S.E.2d 165 (Ct. App. 2013).....	30
<u>State v. Long</u> , 721 P.2d 483 (Utah 1986)	31
<u>State v. Mansfield</u> , 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000)	25
<u>State v. Moore</u> , 343 S.C. 282, 540 S.E.2d 445 (2000).....	19, 25, 27
<u>State v. Patterson</u> , 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999).....	20
<u>State v. Santiago</u> , 370 S.C. 153, 634 S.E.2d 23, (Ct. App. 2006).....	31
<u>State v. Spears</u> , 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011).....	25
<u>State v. Traylor</u> , 360 S.C. 74, 600 S.E.2d 523 (2004)	25
<u>State v. Wiles</u> , 383 S.C. 151, 679 S.E.2d 172 (2009).....	12
<u>Stovall v. Denno</u> , 388 U.S. 293, 87 S.Ct. 1967 (1967).....	18
<u>Todd v. State</u> , 355 S.C. 396, 585 S.E.2d 305, (2003)	30
<u>United States v. Jones</u> , 38 F. App'x 901, 902 (4 th Cir. 2002).....	20
<u>United States v. Sanders</u> , 708 F.3d 976, 984 (7th Cir.2013)	20

STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court erred in admitting the out-of-court identifications of Appellant from a photo array where (1) the identification procedure was unduly suggestive because Appellant's eyes and weight made his photograph stand out from the others in the photo arrays and the witnesses had an opportunity to speak with each other between their purportedly separate identifications, and (2) the identifications were unreliable based on a totality of the circumstances?

- II. Whether the trial court erred in admitting the in-court identifications of Appellant where the unduly suggestive and otherwise unreliable photo array identification created a substantial likelihood of irreparable misidentification?

- III. Whether the trial court erred in refusing to give the defense's requested jury instruction on identification and instead only gave its standard identification charge where identification was the sole issue at the trial?

STATEMENT OF THE CASE

On May 21, 2013, the Greenville County grand jury indicted Appellant Javarias G. Teague for three counts of armed robbery and three counts of possession of a weapon during the commission of a violent crime. R. 166 (Indictments).

On August 12-13, 2014, Teague appeared before the Honorable James R. Barber, III and a jury for a trial on the above offenses. Teague was represented by Susannah Ross and the State was represented by assistant solicitors Mark Moyer and Stan Overby. R. 1.

The jury found Teague guilty on all counts of the indictments. R. 160, l. 11 – 161, l. 25. Judge Barber sentenced Teague to concurrent terms of twenty years incarceration for each of the three counts of armed robbery and five years incarceration for each of the three counts of possession of a weapon during the commission of a violent crime. R. 163, l. 14 – 164, l. 11.

This appeal follows.

STATEMENT OF FACTS

Sometime after midnight on June 23, 2012, five teenagers, Jean V., Edgar C., Angelo B.,¹ Fiorella B., and Devin T. were hanging out beside Jean's home. Edgar was sitting in the driver's seat of his vehicle with the door open, Jean and Angelo were standing on the sidewalk, and Fiorella and Devin were sitting on the sidewalk. R. 65, ll. 17-22; R. 85, l. 7 – 86, l. 17; R. 93, ll. 2-19. A tan Nissan Maxima passed by several times and eventually stopped. Two black males with guns got out of the vehicle and approached the group. R. 94, l. 2 – 95, l. 10; R. 132, ll. 24-25. They took Edgar's work pants and wallet that were sitting in the passenger seat of his car, Angelo's iPhone, and Jean's keys. R. 97, l. 2-3; R. 104, l. 14 – 105, l. 6; R. 115, ll. 20-24; R. 133, ll. 16-20. On the night of the incident, the assailants were described as two black males, one with dreadlocks and wearing a green polo shirt and the other bald and wearing a red shirt. 133, l. 23 – 134, l. 2. The **only** evidence connecting Teague with the crime is his alleged identification by two of the witnesses, Angelo and Fiorella, from photo arrays shown to them two days after the incident.

Neil v. Biggers Hearing

The trial court conducted a Neil v. Biggers² hearing at the beginning of the case. The State presented testimony from Sergeant Tim Conroy, who conducted the identifications, and testimony of siblings Angelo and Fiorella B. The defense presented expert testimony from Dawn McQuiston.

¹ Angelo B. is also referred to as Antonio B. several times in the transcript. For ease of reference, he is referred to only as "Angelo" in Appellant's brief.

² 409 U.S. 188, 93 S.Ct. 375 (1972).

Based on a tip from a confidential informant and their suspected involvement in another matter, Conroy initially prepared photo arrays containing photographs of Appellant Teague and Survaggio Jones. R. 22, l. 10 – 24, l. 20; See State's Ex. 1, photo array shown to Fiorella B., on file with this court; State's Ex. 2, photo array shown to Angelo B., on file with this court; State's Ex. 3, photo array of Jones, on file with this court. Conroy testified that on July 25, 2012, two days after the incident, he went to the home of Angelo and Fiorella at approximately 11:00 a.m. R. 11, ll. 7-24. Prior to arriving that day, Conroy spoke with Angelo and asked him if he would be willing to look at a line-up of suspects. R. 23, l. 19 – 24, l. 4. Conroy did not take any notes at the home and did not audio or video record the meetings. Though he claimed to provide instructions to the witnesses prior to showing them the photo arrays, he did not use a card or written instruction sheet. R. 11, l. 25 – 13, l. 5; R. 21, l. 14 – 22, l. 9. Not surprisingly, Conroy testified that he did not make any suggestion as to who Angelo or Fiorella should pick from the photo array or otherwise influence their decisions. R. 13, ll. 9-13; R. 19, ll. 4-11.

Angelo's mother woke him up and he went downstairs, where Conroy "explained to him [that he] just wanted to show him a photo lineup." Conroy purportedly advised Angelo that he "was going to show him six pictures who had the same characteristics in the pictures, and to look at the facial features because the hair may have changed." R. 12, ll. 6-9. Angelo selected Teague from the line-up. Conroy testified that Angelo said he was a hundred percent certain that the person he selected robbed him. R. 13, l. 15 – 15, l. 9. However, on cross-examination, Conroy admitted that his report written after the identification procedure did not include that Angelo was "a hundred percent certain."

Conroy clarified that Angelo was "positive" and said that he would not have signed the warrant otherwise. R. 26, l. 18 – 27, l. 3. He also admitted that Angelo indicated in his statement on that night of the incident that he was confronted by the assailant wearing a red shirt and braids. Angelo described the other individual as being bald and heavy set. R. 24, l. 21 – 25, l. 23.

According to Conroy, as Angelo was returning to the upstairs of the house, Conroy asked the mother if Fiorella would come talk to him downstairs. R. 16, l. 24 – 17, l. 7. Angelo was upstairs during Conroy's meeting with Fiorella. Conroy did not believe that Fiorella was aware that Angelo had picked someone out of the photo array when she came down. The line-up that he showed Fiorella had Teague's picture in the sixth position rather than the second position. R. 17, l. 8 – 18, l. 12; R. 27, ll. 18-21. Conroy testified that he "did the same thing as with [Angelo]." He told Fiorella that he "was going to show her six photos, all of the same race, same approximate age, same facial hair, same hairstyle, and [] told her not to feel obligated to pick somebody out; that he may or may not be there." R. 18, ll. 13-19. Fiorella said "number six is the person that robbed them." R. 18, ll. 21-23. Conroy testified that she "had confidence like she was a hundred percent certain." R. 18, l. 24 – 19, l. 3. However, he admitted on cross-examination that he was not aware of Fiorella giving any description of either of the assailants after the incident. R. 27, ll. 15-17.

Conroy also showed Angelo and Fiorella photo arrays with the co-defendant, Survaggio Jones, during his respective meetings with each of them. Neither of them recognized anyone in that photo array as the person who committed the robbery. R. 15, l. 16 – 16, l. 23; R. 19, ll. 16-25. He later showed two photo array line-ups to Jean V. Jean

was unable to pick anyone out of either line-up because it was dark and he did not get a good look at the robbers. R. 20, ll. 1-12. On the night of the incident, he described the assailant who pointed a gun at him as a bald person in a green shirt. R. 26, ll. 10-17.

On September 14, 2012,³ Conroy met with Angelo a second time and showed him a line-up with a third suspect, Ashley Roper. Angelo picked Roper out as someone “that looks like one of them” but did not display the same level of confidence according to Conroy. R. 20, l. 13 – 21, l. 10; See State’s Ex. 5, photo array of Roper, on file with this court.

Angelo testified that it was dark but that there was a street light that provided enough light for him to see the face of one of the assailants. R. 31, ll. 9-13; R. 32, l. 13 – 33, l. 4. At the hearing, he described one of them as thinner with dreadlocks and the other as bigger and with no hair. He then clarified that when he wrote “bald” in his prior statement, and apparently when he said “the one with no hair” just seconds before at the hearing, that he meant “just a little hair” or a “low-cut haircut.” R. 33, l. 5 – 34, l. 2. He said that he was very close to the “bald” man and got “a good enough look” to identify him later. R. 34, l. 3 – 35, l. 1. He claimed that he was “not quite sure” about the other person because he was not in contact with him, but admitted that was not what he indicated on the night of the incident. Defense counsel confronted Angelo with the statement that he signed, in which he described one of the assailants as a skinny black

³ The testimony during the Neil v. Biggers hearing was that the second meeting with Angelo took place on July 14, 2012; however, the testimony at trial and the notation on State’s Exhibit 5 indicate that the meeting actually took place on September 14, 2012. R. 20, ll. 13-19; R. 124, l. 9 – 125, l. 24; State’s Ex. 5, photo array of Roper, on file with this court. Additionally, the robbery took place after midnight on July 23, 2012, making it impossible for the line-up to have occurred on July 14, 2012. R. 138, ll. 17-21.

male wearing a red shirt, six foot, dark complexion, with dreads, and the other as a heavy-set black male wearing black shorts, bald, and wearing a greenish polo shirt. In his statement, Angelo said "they walked up to me and the skinny male pointed a gun at me and the heavysset male pointed a gun at Jean." Angelo contended that the officer must have written it down wrong, despite his own signature at the bottom of the statement. R. 37, l. 10 – 38, l. 7.

With respect to the photo array, Angelo said that he was very confident of his selection and that he "could tell by the eyes." R. 35, l. 6 – 36, l. 1. However, his initial description did not contain anything about the assailant's eyes. R. 40, ll. 4-6. Angelo stated that he did not know where Fiorella was while he looked at the photo array. He also said that he did not have any conversation with her after he looked at the photo array. R. 30, ll. 9-20. Angelo also claimed that between the time of the incident and Conroy's arrival on June 24, 2012, he and Fiorella did not talk about what the assailants looked like, though they did discuss the incident itself. R. 39, l. 17 – 40, l. 3.

Fiorella did not give a description of two assailants on the night of the incident other than that they were two black men. R. 48, l. 21 – 49, l. 6. When asked what she remembered about the assailants from the night of the incident at the hearing, Fiorella's testimony was awash with inconsistency. She initially described herself as being about a foot away from her brother and his assailant, but then changed that to approximately six feet. When asked what she remembered about what the two men looked like, she testified that she "just remember[ed] the dark skin and one had long dreads" and that the other had "[a] short haircut." When asked if she was "able to get a good look at either one of them to be able to identify them," Fiorella responded that she "only remember[ed]

the hair.” However, she later said that she “got a good look at his eyes” when he was going through her brother’s pants. She admitted that she was looking down for the majority of the incident but testified that the person’s face was illuminated “a little bit” by the street light. Despite all of this, Fiorella claimed that she got “a good enough look at him to identify him later.” R. 44, l. 16 – 46, l. 7.

Fiorella testified that she was sleeping up until just before she was shown the photo array, when her brother came and woke her. She claimed that her brother gave her no indication of why the officer was there and that she proceeded downstairs. R. 41, l. 17 – 42, l. 16. She said that she was “very confident” in who she selected from the photo array. R. 46, l. 8 – 48, l. 7. She initially claimed that she and her brother had not discussed the incident at all, but then clarified that they “didn’t discuss the men or nothing.” R. 49, ll. 7-14.

Defense counsel then presented an expert witness in the areas of memory and eye-witness identification, Dawn McQuiston. R. 50, l. 5 – 54, l. 5. Dr. McQuiston testified that the photo array containing Teague could have been less suggestive. As prepared, Teague’s picture stood out from the rest because he appears to have blinked or have heavy-set eyes and he appears to weigh more than the others in the array. This may have resulted in drawing the witnesses’ attention to his photograph. R. 54, l. 7 – 57, l. 11. The witnesses’ confidence level was questionable in this case and their perception may have been affected by the lighting, use of a weapon, and fear. It also raised concerns that they gave very little information at the time of the incident, but later presented a lot of certainty with respect to their identifications. R. 57, l. 12 – 59, l. 3. She further noted that the witnesses both stated that they recognized Teague in the photo array based on his

eyes, yet neither of them mentioned anything distinctive about his eyes on the night of the incident. R. 59, ll. 4-15.

Ultimately, the trial court determined that the defense failed to meet its burden of proving that the identification procedure was impermissibly suggestive. He found that both of the witnesses “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 noting that one of the witnesses did not give any prior description, he found that the other witness “gave some description, including close haircut” Further, he found that they both testified as to their certainty of the identification and that the identification was made within a very short period of time from the incident. R. 61, l. 15 – 62, l. 9.

Testimony at Trial

Defense counsel renewed her objection to the admissibility of the photo array identifications during the trial. She also objected to the in-court identifications of Teague by Angelo and Fiorella. Her objections were overruled. R. 74, l. 5 – 77, l. 15; R. 79, l. 12 – 80, l. 6; R. 126, ll. 6 – 127, l. 7. The judge made clear that his ruling on the admissibility of the testimony regarding the identifications was final by instructing the jury, prior to the resumption of testimony by the State’s first witness, that “the determination of whether the identification is a proper identification falls within your purview and it is in your responsibility. I will charge you that you are to determine whether there was a proper identification made by this witness.” R. 77, l. 18 – 78, l. 1; see State v. Bowman, 366 S.C. 485, 500–01, 623 S.E.2d 378, 386 (2005) (noting an exception to the rule requiring a contemporaneous objection when evidence is introduced exists where a judge makes an *in limine* ruling on the admission of evidence on the record

immediately prior to the introduction of the evidence in question); State v. Wiles, 383 S.C. 151, 156-57, 679 S.E.2d 172, 175 (2009) (finding that despite the fact that the evidence was not immediately introduced after the motion *in limine*, the trial judge indicated, by his actions, that his ruling was a final, rather than preliminary).

Devin, Jean, and Edgar all admitted that they did not get a good look at the assailants. Devin saw two black males approaching them with guns, but held her hands over her face for the remainder of the incident. R. 87, l. 7 – 88, l. 24; R. 89, l. 18 – 90, l. 7. Jean testified that he remembered that “one had short hair and the other one had dreadlocks” but did not see their faces because he was trying to hide his belongings in his pockets. R. 95, ll. 20-23. On direct, he said that the one with dreadlocks was wearing a red shirt, but on cross-examination he said that he could not remember whether the one with the red shirt was the one with the long braids. R. 97, ll. 8-17; R. 99, ll. 15-22. He was shown a photo array, but was unable to identify anyone with certainty. R. 98, ll. 6-17. Edgar testified that he did not look at the person who pointed a gun at him. He did not see the color of the assailants’ shirts or their height, weight, or hairstyles. R. 103, l. 17 – 104, l. 12; R. 105, l. 19 – 106, l. 3; R. 108, ll. 15-22.

In his testimony before the jury, Angelo again said that he and his friends were approached by two men, both of whom had guns. He described one as skinny with dreads, a red shirt, and a baseball cap, and the other as heavier and with a very short haircut. When asked what the second person was wearing, Angelo said “like a shirt but I was looking at the gun.” He again clarified that his earlier description of the assailant as bald meant “just a little hair.” Angelo said that the heavier guy took his cell phone from him when it rang and that he “just glanced” at the man when he came up to him. Even

so, he claimed that he got "a good look" at the man's face as he was approaching from across the street. R. 110, l. 24 – 115, l. 19. Angelo testified that he saw the other person's hair and clothes, but not his face. R. 116, l. 24 – 117, l. 3. But, he admitted that the incident occurred after midnight and "all happened pretty fast." R. 129, ll. 18-20. He also said that his prior written statement was incorrect in stating that it was the skinny male who was close to him, and that it was actually the heavy-set person. R. 118, ll. 11-18; R. 127, l. 23 – 129, l. 6. However, Officer Lane, who took Angelo's statement, wrote what was told to him by Angelo on the night of the incident. R. 135, l. 23 – 136, l. 9.

According to Angelo, when he was shown the photo array on July 25, 2012, his sister was sleeping. In contrast, at the pre-trial hearing he was unsure where she was. He said that he looked at all six photographs and was positive that the person he picked was the one who robbed him. R. 118, l. 19 – R. 123, l. 10. He agreed that the person he selected was the heaviest looking of all of the people who were in the line-up. R. 127, ll. 11-14. He said that he did not pick anyone out of the second line-up that he was shown because "[t]he hair wasn't long enough." R. 123, l. 11 – 124, l. 8. Over defense counsel's objection, Angelo made an in-court identification of Teague, "the defendant... in the white shirt at [the defense] table," as the person who robbed him. R. 126, l. 6 – 127, l. 7.

Fiorella testified that the entire incident lasted less than three minutes and that she was approximately six feet away from the assailants. She was looking down, but "glanced up" "real quick" and allegedly saw the face of the assailants. Even so, she claimed to see him clearly. R. 67, l. 12 – 69, l. 2. She also claimed to have seen that one

of the men had “real low hair and one had dreads.” R. 78, ll. 4-11. However, on cross-examination, Fiorella admitted that on the night of the incident the only description she gave was that “an African-American walking near a white car pulled out a gun; said give me your money.” R. 80, ll. 16-25. While Fiorella admitted that she and her brother discussed the incident after it occurred, she maintained that they did not discuss who did it. But, she later said that they talked about how it happened and if they saw anything. R. 81, l. 22 – 82, l. 24. She also admitted that if she had gotten a good look at the person who did it, she would have talked to her brother about it. R. 83, ll. 8-11.

Regarding the photo array shown to her two days after the incident, Fiorella testified that Conroy told her that he had already met with Angelo, but that she did not have any conversation with Angelo about his meeting with Conroy. She said that Conroy did not give her any instructions on how to use the photo lineup. She claimed that she saw “the person from that night in the line-up” and that she was very confident. R. 69, l. 14 – 74, l. 4. Over defense counsel’s objection, Fiorella made an in-court identification of Teague, “the Defendant” “in the white shirt” “sitting by counsel.” R. 79, l. 7 – 80, l. 6.

Officer Charles Lane and Sergeant Tim Conroy also testified during the trial. They confirmed that the Nissan Maxima was never connected to Teague, that the iPhone was unable to be tracked, and that none of the stolen property was recovered. R. 135, ll. 11-14; R. 139, l. 15 – 140, l. 3; R. 153, ll. 1-5. Thus, the only evidence connecting Teague to the armed robberies was the alleged identifications by Angelo and Fiorella.

Sergeant Conroy testified at trial that he contacted Angelo and asked him if he would be able to identify the individual who robbed him if he were to develop a person of interest. Angelo said that “he thought he would be able to more than likely if the person

was in the lineup.” Angelo expressed that he may only be able to recognize one of the suspects, but did not indicate to Conroy which one. R. 138, l. 22 – 139, l. 14. Conroy testified that he included Teague and Survaggio Jones in the photo arrays that he showed to Jean, Angelo, and Fiorella because he came up with those names through his investigation after talking to several people. R. 140, l. 4 – 141, l. 7. Conroy said that in creating the photo arrays, he used pictures of six individuals, including the suspect, who have the same facial hair, hairstyle, facial features, sex, and race. He claimed that when he shows an array, he instructs the witness to look at the facial characteristics rather than facial hair or head hair because it may have changed. R. 141, l. 8 – 142, l. 13. However, his description of his instructions to Angelo was:

I explained to Angelo that I was going to show him photos of six persons and they would all have similar head hair or facial hair, facial characteristics, the same race and approximately the same age.

I told him do not feel obligated to pick someone out; just look at the pictures, all six pictures, and let me know if he recognized anyone on there.

At that point, I handed it to him face down. He turned it over and I could see his eyes glance at each photo. He then stated that picture number two was the person that robbed him.

R. 143, l. 20 – 144, l. 9.

Though he did not mention it during the Neil v. Biggers hearing, Conroy testified at trial that after Angelo completed the identification, he “told Angelo I’m calling your sister now; don’t talk to her or tell her what picture you’ve picked out because I changed the order of the photographs, and he went upstairs as she was coming down.” Then he asked Angelo’s mother to go upstairs and get Fiorella, who was sleeping. R. 146, ll. 7-

15. This is contrary to Fiorella's pre-trial testimony that her brother, Angelo, is the one who woke her and told her that Conroy was downstairs. R. 41, l. 17 – 42, l. 7.

Jury Instruction on Identification

Defense counsel requested that the Court give an instruction on identification. The trial judge indicated that he had an identification charge and would further consider any charge requests in the morning. R. 119, l. 15 – 120, l. 1. When the trial resumed the next morning, defense counsel requested that the identification instruction she requested by marked as a Court's exhibit. R. 155, ll. 2-7; see R.165 (Court's Ex. 3, proposed identification charge).

The trial court's identification instruction consisted of 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 the 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 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. 158, l. 25 – 159, l. 25.

Following the jury instructions, defense counsel took exception to the trial court's failure to charge the identification instruction that she submitted. R. 160, ll. 2-7. The Court responded "All right. Well, it was submitted and I believe it was covered." R. 160, ll. 8-9.

ARGUMENT

- I. **The trial court erred in admitting the out-of-court identifications of Appellant from a photo array where (1) the identification procedure was unduly suggestive because Appellant's eyes and weight made his photograph stand out from the others in the photo arrays and the witnesses had an opportunity to speak with each other between their purportedly separate identifications, and (2) the identifications were unreliable based on a totality of the circumstances.**

The trial court erred in admitting the testimony regarding the out of court identifications of Teague through photo arrays shown to Angelo and Fiorella B., which were the sole evidence presented by the State to connect Teague to these offenses. Though they claimed confidence in their identifications made two days after the incident, neither of them had a sufficient opportunity to observe the assailants, whose faces were illuminated only "a little bit" by the street light. They were also both fearful, and Angelo admitted that he was focused on the gun. While they pointed to the suspects eyes as being distinctive in the photo array, neither of them mentioned that in their descriptions on the night of the incident. The only logical explanation for Angelo and Fiorella both having selected Teague from the photo arrays is that they made their selection based on his weight and that they spoke after the incident, influencing each other's memories. Notably, none of the other three victims and witnesses was able to make a positive identification.

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. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967). The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972). First, "[a]

court must first determine whether the identification process was unduly suggestive.... [It] next must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.” Curtis v. Commonwealth, 396 S.E.2d 386, 388 (Va. Ct. App. 1990) (citing Biggers, 409 U.S. at 198, 93 S.Ct. at 381-82). In Foster v. California, 394 U.S. 440, 89 S.Ct. 1127 (1969), the Court held that a line-up is unduly suggestive when it is virtually inevitable that the witness will select the individual whom the police have singled out.

Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). 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. Clyburn v. Sumter County Sch. Dist., 317 S.C. 50, 53, 451 S.E.2d 885, 887-88 (1994). An eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law. Caver v. Alabama, 537 F.2d 1333, 1335 (5th Cir. 1976), *cert. denied*, 430 U.S. 910, 97 S.Ct. 1183 (1977) (citing Foster v. California, 394 U.S. at 442 n. 2, 89 S.Ct. at 1128 n. 2).

The following factors are to be considered in evaluating the totality of the circumstances as to whether an identification is admissible:

[T]he opportunity of the witness to view the criminal at the time of the crime, the witness’s degree of attention, the accuracy of the witness’s prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Biggers, 409 U.S. at 199, 93 S.Ct. at 382; Stewart, 275 S.C. at 450, 272 S.E.2d at 629. Only after a determination as to the reliability of a witness’ identification has been

made by the trial court may the witness testify before the jury. State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999).

The case law is clear that if the trial court finds that the identification did not result from impermissibly suggestive police procedures, the court need not consider the second prong. State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013) (citing United States v. Sanders, 708 F.3d 976, 984 (7th Cir.2013)); United States v. Jones, 38 F. App'x 901, 902 (4th Cir. 2002). However, in the present case, the trial judge addressed both impermissible suggestiveness and reliability, despite finding that Teague failed to meet his burden in proving the former. The judge found, without explanation, that the photo array line-ups were not impermissibly suggestive and then made brief findings as to reliability. Specifically, he said:

I think it's the Court's responsibility to determine if the lineup -- if the Defendant has proven that the identification procedure was impermissibly suggestive. I find that the Defendant has not proven that.

The testimony that has been offered on the photo lineup shall be admitted. 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 that the lineups were not impermissibly suggestive, but, of course, the jury is ultimately going to make that determination.

R. 61, l. 15 – 62, l. 7.

The identification process surrounding the photo arrays was unduly suggestive. Conroy spoke with Angelo later on the day of the incident about his ability to pick either of the suspects out of a line-up. Significantly, Conroy indicated that he would develop

such a line up "if he were to come up with a person of interest." R. 137, l. 22 – 138, l. 10. The photo array shown to Angelo and Fiorella contained Teague's picture and those of five other men. The photographs used in both arrays were identical except that they were placed in a different order. Teague's photograph was in position two in the photo array shown to Angelo and in position six in the photo array shown to Fiorella. A review of the photo array themselves reveals that Teague's eyes are distinctive, appearing sunken in comparison to the others, and Teague's face and neck make him appear the heaviest in comparison to the others. See State's Ex. 1, photo array shown to Fiorella B., on file with this court; State's Ex. 2, photo array shown to Angelo B., on file with this court. Despite Sergeant Conroy's averment that you could not tell the weight of the individuals in the line-up by their faces, Angelo agreed at trial that the person he selected is the one who appeared the heaviest of the people in the line-up. R. 25, l. 24 – 26, l. 5; R. 127, ll. 11-14. Additionally, neither Angelo nor Fiorella were able to confirm what instructions, if any, they were given by Conroy prior to being shown the photo arrays. R. 42, ll. 22-24; R. 29, ll. 14-18; R. 70, l. 24 – 71, l. 1.

Even more damaging was the inconsistent testimony between the pre-trial hearing and the trial testimony regarding who went to get Fiorella from upstairs after Angelo finished looking at the line-ups. At the hearing Fiorella testified that her brother, Angelo, came and woke her, yet Conroy testified at trial that it was her mother who went to get her. R. 41, l. 17 – 42, l. 7; R. 146, ll. 9-10. Conroy also added to his testimony at trial that he told Angelo that he was going to call his sister now and instructed him not to talk to her or tell her what picture you've picked out. R. 146, ll. 11-13. This was an obvious attempt to curtail the defense's argument that Angelo and Fiorella discussed the photo

array and he told her who to select. However, Conroy also testified that he told Angelo that he changed the order of the photographs. R. 146, ll. 13-14. This undermined any potential benefit from the reordering. Conroy essentially put 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. Notably, Conroy chose to go to the home of the teenagers and allow them to cross paths upstairs and in the stairwell rather than asking them to come to the police station where other officers could have assisted in ensuring that Angelo did not influence Fiorella. Interestingly, Angelo also testified that his inability to select anyone from the second line-up was due to the hair not being long enough. R. 123, l. 11 – 124, l. 8. This means that Angelo either ignored Conroy's instructions that the hair may have changed and a selection should be made based on facial characteristics, or that no such instructions were given.

Dr. McQuiston, the defense expert who testified at the Neil v. Biggers hearing, pointed out Teague's distinctive eyes and weight in the photo array, which would have drawn attention to his photograph. R. 54, l. 7 – 57, l. 11. Both Angelo and Fiorella testified that it was the eyes that remembered and drew them to Teague's photograph. Dr. McQuiston found that strange since neither of them mentioned distinctive eyes in their statements on the night of the robbery. R. 59, ll. 4-15. Based on the evidence presented, the trial court erred in finding that the photo array was not impermissibly suggestive.

Regarding reliability, the trial court only briefly mentioned each of the five factors and overlooked much of the evidence presented during the hearing. The trial court found that the witnesses both had the opportunity to view the assailants at the scene

and they were paying close attention because they were very close to them. R. 61, ll. 20-24. However, the testimony actually reflected that Angelo thought he got "a good enough look" at one of the assailants as they were crossing the street and during the robbery itself to identify him later. R. 34, l. 22 - 35, l. 1; R. 138, l. 22 - 139, l. 14. Fiorella had even less opportunity to view the assailants because she was looking down for the majority of the incident. She testified that the only thing that she got a good look at was the hair, though later she also claimed to get a good look at his eyes. R. 44, l. 16 - 45, l. 25. Both witnesses also admitted that it was dark and that the assailants were only illuminated by street lights. R. 31, ll. 9-13; R. 32, ll. 13-16; R. 46, ll. 1-4.

Further, during their trial testimony Angelo testified that he "just glanced" at the man when he came up to him and admitted that the incident occurred after midnight and "all happened pretty fast." R. 129, ll. 18-20. He also testified that he was looking at the gun. R. 112, l. 10. Fiorella likewise testified that she saw one of the assailant's faces when she glanced up "real quick" and that the entire incident lasted less three minutes. R. 67, ll. 18-22; R. 68, ll. 17-25. Fiorella also denied having discussed what the assailant looked like with her brother. Yet, she stated that had she gotten a good look at the person who did it, she would have talked to her brother about it. R. 83, ll. 8-11. The only logical inferences were that either Fiorella did not get a good look at the assailant, or that she lied about not having discussed the matter with her brother. Dr. McQuiston pointed to the lighting, use of a weapon, and fear as factors that affect witness perception. R. 57, l. 20 - 58, l. 4. Thus, both the opportunity to view the assailants and the witnesses' degree of attention weighed against the reliability of the identifications.

The trial court recognized that Fiorella failed to give any prior description of the assailants, yet that apparently did not affect his decision as to the admissibility of the identification. With respect to Angelo, the court found that he “gave some description, including close haircut.” R. 61, l. 25 – 62, l. 1. In fact, Angelo’s prior description of the assailant was that he was bald. Even during the Biggers hearing, he initially said that the person had “no hair.” R. 33, l. 13 – 34, l. 2. His correction to say that person had a close haircut was an apparent effort to conform his prior statement to the photograph that he selected from the photo array. Further, the “close haircut” described and reflected in the photo array is hardly distinctive. Moreover, the reliability factor relates to the **accuracy** of the witness’s prior description of the criminal. The witness statement signed by Angelo indicated that the assailant whom he was in contact with was the one wearing a green shirt, with dreads. Additionally, neither Angelo nor Fiorella said anything about the assailant’s eyes, yet both claimed that was the distinctive feature that they recognized in the photo array. R. 35, ll. 18-21; R. 40, ll. 4-6; R. 45, ll. 6-9; R. 49, ll. 4-6; R. 59, ll. 4-15. Thus, the accuracy of the prior descriptions weighed against the reliability of the identifications.

The trial court also found that both witnesses testified regarding their level of certainty demonstrated by the witness at the confrontation. R. 62, l. 2. Admittedly, the witnesses both claimed to be confident that the person they identified in the photo array was the robber. R. 35, ll. 9-19; R. 46, l. 8 – 48, l. 7. However, such testimony is not surprising given the social and courtroom pressure to maintain such certainty regarding an out-of-court identification. Dr. McQuiston testified that despite a common belief otherwise, studies and research show that confidence is not a perfect predictor of

accuracy. R. 58, l. – 59, l. 3. She further testified that the witnesses' confidence level was questionable in this case and said that it raises concerns when, as here, the witnesses gave little information at the time of the incident but later presented a lot of certainty with respect to their identifications. R. 57, ll. 12-19; R. 58, ll. 1-22.

Lastly, the trial court found the identifications were made "within a very short period of time from the time of the incident." R. 62, ll. 3-4. The incident occurred after midnight on July 23, 2015 and the photo arrays were shown to the witnesses at approximately 11:00 a.m. on July 25, 2013. That is distinguishable from the one to four hour intervals cited in other cases. See State v. Spears, 393 S.C. 466, 481, 713 S.E.2d 324, 332 (Ct. App. 2011) (finding that the witness saw the first photo line-up only four hours after the robbery); State v. Moore, 343 S.C. 282, 289, 540 S.E.2d 445, 449 (S.C. 2000) (finding that the amount of time between the crime and the confrontation was between 1 1/2-2 hours); State v. Mansfield, 343 S.C. 66, 80, 538 S.E.2d 257, 264 (Ct. App. 2000) (finding that the witness identified the defendant less than an hour after first seeing him); State v. Blassingame, 338 S.C. 240, 252-53, 525 S.E.2d 535, 542 (Ct. App. 1999) (finding that the identification took place approximately one and one-half hours after the incident); contra State v. Traylor, 360 S.C. 74, 83, 600 S.E.2d 523, 527 (2004). This delay and their sibling relationship gave the witnesses ample opportunity to discuss the assailant, influencing the other's memory. Thus, the length of time between the crime and the confrontation weighed against the reliability of the identifications.

Further, it does not appear that the trial court considered individually the identifications made by Angelo and Fiorella. While Teague maintains that both identifications should have been excluded, the evidence regarding the suggestiveness and

lack of reliability in Fiorella's identification was even stronger. The solicitor capitalized upon the fact that there were two separate identifications in his closing, stating:

They could theoretically argue that one person may have been mistaken -- maybe one person, but two -- two independent lineups shown to two different people at different times. No possibility the other was around when the other was shown.

R. 157, ll. 13-17. Thus, even if this Court finds that only Fiorella's identification should have been excluded, the error in its admission was not harmless, especially in light of the fact the State's sole evidence in this case was the identifications.

Therefore, the trial court erred in finding that the photo array identifications conducted in this case were not impermissibly suggestive and that there was not a substantial likelihood of irreparable misidentification. Teague is accordingly entitled to a new trial.

II. The trial court erred in admitting the in-court identifications of Appellant where the unduly suggestive and otherwise unreliable photo array identification created a substantial likelihood of irreparable misidentification.

Appellant incorporates the discussion in Issue I regarding the unduly suggestive identification procedures in this case and the lack of reliability under the totality of the circumstances. See Biggers, 409 U.S. at 198, 93 S.Ct. at 381-82. Defense counsel's objections to the in-court identification of Teague by Angelo and Fiorella were both overruled. R. 79, l. 7 – 80, l. 6; R. 126, l. 6 – 127, l. 7.

An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243 (1977) (citing Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968)); State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). 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. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972); State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000).

As discussed more fully supra, the identification procedure in this case was unduly suggestive. From his conversation with Conroy on the date of the incident, Angelo understood that he would be shown a line-up "if [Conroy] were to come up with a person of interest." R. 137, l. 22 – 138, l. 10. Conroy was unable to provide any consistent testimony regarding what instructions, if any, he gave to Angelo and Fiorella prior to showing them the photo arrays. R. 12, l. 6-5; R. 18, ll. 13-20; R. 21, l. 23 – 22, l. 8; R. 143, l. 20 – 144, l. 8; R. 146, l. 22 – 147, l. 20. Angelo could not recall what Conroy

told him when he showed him the photo arrays, and Fiorella was unable to recall being given any instructions at all. R. 29, ll. 14-18; R. 42, ll. 22-24; R. 70, l. 24 – 71, l. 1.

Angelo agreed that Teague's photograph was distinct in that he appeared to weigh the most of the six men pictured in the array. R. 127, ll. 11-14. Further, Teague's eyes appeared distinctive in comparison to the other individuals. R. 54, l. 7 – 57, l. 11; See State's Ex. 1, photo array shown to Fiorella B., on file with this court; State's Ex. 2, photo array shown to Angelo B., on file with this court.

Beyond this, there was evidence that Fiorella and Angelo were given an opportunity to interact unattended between meeting their meetings with Conroy to conduct the identifications. R. 41, l. 17 – 42, l. 7. Conroy provided no explanation for why he conducted the identifications at Angelo and Fiorella's home rather than at the police station where other officers could have assisted him and the process could have been recorded. Though Conroy claimed at trial that he told Angelo not to talk to Fiorella or tell her what picture you've picked out, he failed to mention that important detail during the pre-trial hearing. R. 146, ll. 11-13. Conroy also testified that he told Angelo that he changed the order of the photographs. R. 146, ll. 13-14. 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.

The identifications also lacked reliability under the totality of the circumstances. Despite their averments that they got a "good enough" look at one of the assailant's faces, the remainder of Angelo and Fiorella's testimony revealed that they only glanced at the assailant's face on the dimly lit sidewalk. Thus, they had little opportunity to observe the

criminal at the time of the incident, which only lasted a few minutes. R. 67, ll. 18-22; R. 68, ll. 17-25; R. 129, ll. 18-20. During that short span, Angelo was focused on the gun and Fiorella spent the majority of the time looking down. R. 112, l. 10; R. 68, ll. 17-20. Thus, their degree attention was also lacking. Fiorella failed to give any prior description of the assailants and Angelo's statement indicated that he interacted with the man with dreadlocks. However, even if that was a mistake in the report, Angelo's prior description of the other assailant was only that he was a bald, African-American man and lacked any mention of distinctive eyes that Angelo referenced during the Biggers hearing. R. 33, l. 13 - 34, l. 2. The length of time between the confrontations also weighs against reliability, as the photo array was presented two days after the robbery, which gave the witnesses ample opportunity to discuss the assailant and influence the other's memory. Lastly, though both Angelo and Fiorella expressed a high level of certainty in their selections of Teague from the photo array, such is far from dispositive. R. 35, ll. 9-19; R. 46, l. 8 - 48, l. 7. In fact, when considered in contrast with the other factors, their high degree of certainty casted greater doubt on the reliability of their identifications. R. 57, l. 12 - 59, l. 3.

It was patent that Angelo and Fiorella's in-court identifications of Teague as their assailant were based on being shown his photograph in the photo array and his being seated next to defense counsel at the trial table. Therefore, the trial court erred in allowing the in-court identifications of Teague. Teague is accordingly entitled to a new trial.

III. The trial court erred in refusing to give the defense's requested jury instruction on identification and instead only gave its standard identification charge where identification was the sole issue at the trial.

The state's entire case rested upon identifications of Appellant as the robber by two of the five victims and witnesses to the robbery. Defense counsel requested that the Court give an instruction on identification. The proposed instruction advised the jury to consider certain factors relevant to the witness' opportunity and capacity to observe the person who committed the crime. Additionally, the instruction allowed the jury to consider issues implicated by cross-racial identifications. The proposed instructions also provided the jury with guidance concerning how to determine whether the identification was indeed a product of the witnesses' own memories. R. 154, l. 15 – R. 155, l. 7; R.165 (Court's Ex. 3, proposed identification charge). The judge instead issued his standard identification charge. R. 158, l. 25 – 159, l. 25. Following the jury instructions, defense counsel took exception to the trial court's failure to charge the identification instruction that she submitted. R. 160, ll. 2-7. The trial judge said that he believed that the requested charge "was covered." R. 160, ll. 8-9.

Due Process requires the prosecution prove every element of the charged offense beyond a reasonable doubt – including the element that the defendant is the actual perpetrator. In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970); Todd v. State, 355 S.C. 396, 400, 585 S.E.2d 305, 307 (2003); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Lane, 406 S.C. 118, 749 S.E.2d 165 (Ct. App. 2013). Therefore, a trial court must instruct the jury to ensure the jury's verdict is based upon the evidence presented. Jury instructions are important particularly in matters of witness identifications due to the

high number of wrongful convictions based upon erroneous identifications. See Perry v. New Hampshire, ___ U.S. ___, 132 S.Ct. 716, 728 (2012).

“The law to be charged must be determined from the evidence presented at trial.” State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). “If there is any evidence to support a jury charge, the trial judge should grant the requested charge. The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law.” State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006). Having standard charges benefits judges, but trial judges should not abdicate their duties of charging the jury on the law as presented by the facts to a book of general charges. Rather, trial judges must mold standard charges to fit the particular circumstances of each case. See State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989) (holding that “standard charges” or “approved charges” do not excuse a trial judge from crafting charges designed to address the specific case); State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) (“A trial judge should specifically tailor the self-defense instruction to adequately reflect the facts and theories presented by the defendant.”); see also Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005); State v. Long, 721 P.2d 483 (Utah 1986) (discussing the importance and need for tailoring jury instructions on eyewitness identifications to the facts and circumstances of each individual case).

In State v. Motes, 264 S.C. 317, 215 S.E.2d 190 (1975), our Supreme Court found no prejudice where the trial court refused to give a Telfaire⁴ instruction, which was designed to “focus the attention of the jury on the identification issue and minimize the

⁴ United States v. Telfaire, 469 F.2d 552 (1972).

risk of conviction through false or mistaken identification.” 264 S.C. at 326, 215 S.E.2d at 194. The court found that the trial court instructed the jury that it must find the testimony identified the defendant as the offender beyond a reasonable doubt and noted that identification presented no “peculiar problem” because two witnesses, one of whom was the defendant’s wife and another who “had ample opportunity” to observe the defendant, both identified him as the perpetrator. *Id.* at 326–27, 215 S.E.2d at 194.

In the recent decision in State v. Green, 412 S.C. 65, 770 S.E.2d 424 (Ct. App. 2015), *rehearing denied* (Apr. 21, 2015), *petition for cert. filed* (May 21, 2015), this Court found the “standard identification charge” sufficient, citing the fact that much of the substance of the requested charge was included in the charge given and that the trial court informed the jury that the State had the burden of proving beyond a reasonable doubt that Green committed the crime. 412 S.C. at 77, 770 S.E.2d at 430. The Green court also found that the 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; *but see State v. Whaley*, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991) (recognizing cross-racial nature of identification as factor in identification reliability).

The present case is distinguishable from both Motes and Green because the identification testimony in the present case was essential, as it was the only evidence linking Teague to the crimes. *See Brodes v. State*, 614 S.E.2d 766, 771 (Ga. 2005) (“When identification is an essential issue at trial, appropriate guidelines focusing the jury’s attention on how to analyze and consider the factual issues with regard to the

reliability of a witness's identification of a defendant as the perpetrator are critical.”). Further, Teague challenged both the suggestiveness of the identification procedure and the reliability of the identifications. In addition to the standard Biggers factors, there was evidence presented on the different races involved – the witnesses are Hispanic and Teague is African-American; the witnesses' level of fear and focus on the gun; the opportunity for Angelo and Fiorella to influence each other's memories; and the use of a photo array.

The proposed instruction encompassed the evidence presented to the jurors and allowed them to synthesize the matter in evaluating the evidence. Not only did the judge refuse to give the proposed charge, but he used his “standard charge,” which omitted certain items and failed to include any type of provision that would have allowed the jury to consider all of the evidence presented. In fact, the instruction given did not even include all of the Neil v. Biggers factors related to reliability. 409 U.S. at 199-200, 93 S.Ct. at 382 (“[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.”). Rather, the jury was advised only that it must determine the accuracy of the identifications, consider the believability of the witnesses just as any other witness, and that they:

[M]ay 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.

R. 159, ll. 7-17.

Further, despite the Green court's apprehension over an instruction on cross-racial identification, such was paramount in this case, where the witnesses are Hispanic and Teague is African-American. This issue bore significantly on the accuracy of the jury's verdict in light of the jury's instruction that it "may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense," which "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." R. 159, ll. 7-17. There is no mention of the important factor of cross-racial identification. Further, there was no "catch all" phrase to inform the jury that it could consider the totality of the circumstances, leading the jurors to believe that the short list of factors related to "opportunity to observe" were all that was proper for their consideration.

Recently, the Massachusetts Supreme Court held that a "cross-racial instruction **should always** be included when giving the model eyewitness identification instruction, unless the parties agree that there was no cross-racial identification." Commonwealth v. Bastaldo, ___ N.E.3d ___, 2015 WL 3885652 at *1 (Mass. June 25, 2015) (emphasis added). Previously, the giving of such an instruction was discretionary. Id. at *4 (quoting Commonwealth v. Hyatt, 647 N.E.2d 1168 (Mass. 1995)). In requiring judges to give a cross-racial identification instruction, the Court explained "[t]he existence of the 'cross-race effect' (CRE) – that people are generally less accurate at identifying members of other races than they are at identifying members of their own race – has reached a near consensus in the relevant scientific community and has been recognized by courts and scholars alike." Id.

Thus, the Court concluded that jurors asked to evaluate the accuracy of an identification should be informed of the CRE. Id. Thereafter, the Court reaffirmed its model eyewitness identification instruction: “If the witness and the person identified appear to be of different races, you should consider that people may have greater difficulty in accurately identifying someone of a different race than someone of their own race.” Id.

The Bastaldo opinion was a clarification and extension of the Massachusetts Supreme Court’s opinion in Commonwealth v. Gomes, 22 N.E.3d 897 (Mass. 2015) decided on January 12, 2015. Using the Report and Recommendations of the Supreme Judicial Court Study Group on Eyewitness Evidence, the court concluded “that there are scientific principles regarding eyewitness identification that are ‘so generally accepted’ that it is appropriate in the future to instruct juries regarding these principles so that they may apply the principles in their evaluation of eyewitness identification evidence.” Id. at 900. Thus, the Court provided a provisional jury instruction for future cases involving eyewitness identifications. Id. at 901. The Massachusetts Supreme Court had “long recognized that a principle concerning eyewitness identifications may become so generally accepted that, rather than have expert testimony on the point, a standard jury instruction stating that principle would be appropriate.” Id. at 904 (internal quotation omitted).

The court took the “opportunity to revisit [its] jurisprudence regarding eyewitness identification jury instructions.” Id. at 905. In 2011, the Court “recognized that ‘eyewitness identification is the greatest source of wrongful convictions but also an invaluable law enforcement tool in obtaining accurate convictions.’” Id. at 905 (quoting Commonwealth v. Walker, 953 N.E.2d 195 (Mass. 2011)). Thus, the Court convened a study group to consider whether existing model jury instructions provided adequate guidance to juries. Id. At the

time of the Gomes decision, the report was completed and the court implemented the findings of the report. Id.

Previous to the Gomes decision, the model instruction for trial judges greatly resembled the instruction often used in South Carolina, and the instruction used by the trial judge in Teague's case. Id. at 906-907. As explained by the Massachusetts Supreme Court, "[i]t focuses the jury on factors they 'should consider' that may affect the accuracy of an eyewitness's positive identification of the defendant and poses questions the jury should ask themselves. It generally does not instruct the jury as to *how* those factors may affect the accuracy of the identification." Id. (emphasis in original). The Court was compelled to alter the instruction because "research makes clear that common sense is not enough to accurately discern the reliable eyewitness identification from the unreliable because many of the results of the research are not commonly known and some are counterintuitive." Id. at 909. The Court concluded that jury instructions would be comprised of only those principles where there is a near consensus in the relevant scientific community adopting that principle. Id.

Relying upon the comprehensive jury instructions adopted by the New Jersey Supreme Court in State v. Henderson, 27 A.3d 872 (N.J. 2011) and the report from its study group, the Massachusetts Supreme Court undertook the task of developing model jury instructions as well. Id. at 909. The Court adopted five principles at issue in Gomes that had achieved near consensus in the relevant scientific community and were to be included in model jury instructions regarding eyewitness identification. Id. at 912. Those five included:

1. Human memory does not function like a video recording but is a complex process that consists of three stages: acquisition, retention, and retrieval.

2. An eyewitness's expressed certainty in an identification, standing alone, may not indicate the accuracy of the identification, especially where the witness did not describe the level of certainty when the witness first made the identification.
3. High levels of stress can reduce an eyewitness's ability to make an accurate identification.
4. Information that is unrelated to the initial viewing of the event, which an eyewitness receives before or after making an identification, can influence the witness's later recollection of the memory or of the identification.
5. A prior viewing of a suspect at an identification procedure may reduce the reliability of a subsequent identification procedure in which the same suspect is shown.

Id. at 911-916. Thereafter, the Court proposed model jury instructions incorporating the five principles. Id. at 916-917. The Court explained the model jury instructions would "provide juries with more comprehensive guidance to evaluate and weigh eyewitness identifications." Id. at 917.

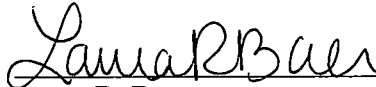
The model instructions adopted in Gomes and the cross-racial identification instruction made mandatory in Bastaldo offer guidance to our state regarding the need to update the "standard" jury instructions used by South Carolina's trial judges where eyewitness identification evidence is used by the state. Such an instruction more accurately reflects the status of the social science research in the area of eyewitness identifications and provides the jury with needed guidance to analyze the evidence provided during the trial.

In the present case, the general identification instruction given by the trial judge failed to point the jury to the Neil v. Biggers factors, much less the other factors relevant to the identifications in Teague's case based on the evidence presented at trial. Teague is accordingly entitled to a new trial.

CONCLUSION

For the foregoing reasons, Appellant Javarias G. Teague respectfully requests that this Court reverse his convictions and grant him a new trial.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of November, 2015.

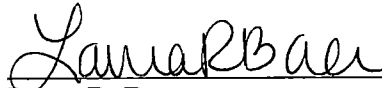
RECEIVED

NOV 03 2015

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

November 3rd, 2015



Laura R. Baer
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

NOV 03 2015

SC Court of Appeals

Appeal from Greenville County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAVARIAS G. TEAGUE,

APPELLANT

APPELLATE CASE NO. 2014-001785

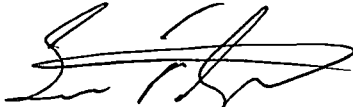
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon Susannah Cole, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 3rd day of November, 2015.

Laura R. Baer

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of November, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.