ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

Respondent,

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SC Court of Appeals

vs.

BRIAN WILLIE LEWIS,

Appellant.

Appellate Case No. 2017-000482

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court's instructions as a whole correctly conveyed to the jury the concept of reasonable doubt, and Appellant was not prejudiced by the alleged error in the reasonable doubt instruction.

II.

The trial court did not err in declining to charge the jury Appellant's suggested instructions on identification and credibility of witnesses and instead providing its own instructions. The trial court's instructions adequately apprised the jury of the law. Appellant failed to explain why the trial court's identification instruction was not sufficient, so the issue is not preserved for review. Further, any error was not prejudicial to Appellant.

III.

Because evidence supports the finding Appellant freely and voluntarily made his statements to law enforcement, the trial court did not err. Law enforcement did not threaten or coerce Appellant, who likewise maintained a calm demeanor during the interview at the police station. Because Appellant did not appear to be in significant distress or pain during either interrogation, and because law enforcement did not make medical attention for his injury contingent upon his cooperation, his statement was not rendered involuntary merely because he suffered a bite from the police dog who apprehended him when he was fleeing law enforcement.

STATEMENT OF THE CASE

Appellant Brian Lewis was found guilty by a jury of armed robbery, possession of a weapon during the commission of a violent crime, conspiracy, and resisting arrest following trial on February 7-9, 2017. The Honorable Brian M. Gibbons sentenced Lewis to twenty-seven years imprisonment for armed robbery and a consecutive five years imprisonment for the weapon possession conviction. Judge Gibbons sentence Lewis to concurrent sentences of five years imprisonment for conspiracy and resisting arrest.

STATEMENT OF FACTS

Steven Haefner is the franchisee for two Domino's Pizza restaurants. His duties include some of everything, making pizzas, delivering pizzas, answering phones, janitorial duties – as the owner, he is required to wear many hats. One of his restaurants received an order for multiple items at an address at Lakeside apartments. Haefner drove his own blue Toyota Highlander. He parked relatively near the breezeway and took the pizzas and two liter bottles of soda upstairs, and knocked on the apartment door. No one answered. He walked down the stairs, put the pizzas and soda on the hood of the car, and reached inside his Highlander to retrieve his phone. Haefner called the phone number on the order and did not get an answer. About that time, four young black men walked through the breezeway. One of them claimed the order was "for my people." R. pp. 111-14.

Haefner asked the man to knock on the door to verify it was their order. While the man went up the stairs to the door, another one of the men stuck a gun in Haefner's face and made him get on the ground after making Haefner throw his keys and wallet into the parking lot. R. pp. 114-15; p. 120. The robbers made Haefner lay face down. Two of the robbers kicked Haefner in the back of the head. He heard his car pull away and waited a bit before calling 911 and walking to the manager's office to wait for law enforcement. R. pp. 124-27.

None of the robbers wore masks and it was daylight. R. pp. 115-16; p. 138. Haefner estimated the gunman was standing two feet away from him, and his attention was focused on the gunman. R. p. 124, lines 1-5. Haefner was able to pick the gunman out of a photographic lineup. He testified he was able to make the identification "very quickly." He identified Lewis as the gunman. R. pp. 133-35. Haefner was further able to identify one of the accomplices, Robert Jackson, as the man who pretended to pay for the pizzas. R. pp. 136-37. Haefner also was able to

identify State's Exhibit 15 as the gun used in the robbery. R. p. 138.

The robbers stole the car, the pizzas, Haefner's laptop, and about $150 in single dollar bills. R. p. 139. Some tools were also stolen. R. p. 147. Later, when the car was recovered, a cell phone and purple gloves were found in the car that did not belong to Haefner. R. pp. 139-40. One of the robbers wore a Superman t-shirt. R. p. 146, lines 9-11.

At about 2:30 p.m., Monica Morân, the property manager at Grove Station Apartments, acting on a complaint, drove her golf cart to a breezeway where she found four young men talking and smoking cigarettes. She knew them: Robert Jackson, Brian Lewis and his brother Cordell Lewis, and another individual named Donny. She told them to stop loitering and return to their units. They agreed to and dispersed. R. p. 155-56.

Law enforcement contacted Moran at about 3:30 p.m., and they provided Haefner's description of four individuals which sounded like the men she approached at the breezeway. R. p. 161. She confirmed the apartment where Haefner attempted to deliver the pizza order was vacant for the last eight years. R. p. 163; p. 165.

Robert Jackson, seventeen years old at the time of the robbery, was one of the robbers. He provided a statement to law enforcement a day after the robbery and subsequently pled guilty to conspiracy. R. pp. 168-69. Jackson knew Lewis because he lived across the breezeway from his apartment, but he only knew him as "Rida." He had only known Lewis a couple of weeks. R. pp. 170-71. He confirmed Moran confronted them at the breezeway that day. R. p. 171. He testified that one of the other two accomplices, not Lewis, ordered the pizza. R. p. 172, lines 5-17. Jackson claimed he did not know there was going to be a robbery, but he was supposed to stall the pizza man and offered to pay the pizza man by credit card. Lewis then pointed a gun at the pizza man. Jackson

decided to leave at that point. R. p. 173; pp. 177-81. Both of the two other testifying co-defendants confirmed Jackson left when the robbery started. R. p. 248, lines 4-6; p. 327, lines 15-21. Later in the trial, Lewis' brother, Cordell Lewis, corroborated Jackson's claim he did not know the robbery was going to take place. R. p. 322, line 24-p. 323, line 7.

Investigator Michael Stanton interviewed Haefner at the hospital, who was visibly shaken. Haefner identified the robbers who presented the credit card as wearing a Superman t-shirt and Haefner described the gunman as dressed in all black. R. pp. 191-92.

While Investigator Stanton canvassed the neighborhood, a car pulled up and a Domino's Pizza employee said he saw his boss's stolen vehicle. R. pp. 198-99. Six patrol vehicles followed the employee's car and found the stolen Highlander at a dead end. Although it was nighttime, the vehicle drove by Investigator Stanton's patrol car without its lights on. It then collided twice with patrol vehicles and came to rest by a guard rail. By the time Investigator Stanton approached, the Highlander was empty. R. pp. 200-04. The officers apprehended Donny Campbell. Campbell told Investigator Stanton the driver was Isiah "Ike" Jefferson. He described the driver as wearing black shorts and no shirt, with purple and white Nike shoes. This was a false name and subsequently Campbell identified Lewis as the driver. R. pp. 205-08.

Based on the subsequent interview with Campbell, Investigator Stanton requested a K-9 unit go to Lewis' apartment. Law enforcement took Lewis in custody by a knoll in the apartments. R. pp. 208-09. Investigator Stanton asked Lewis about the robbery and Lewis told him "he was around the people." R. p. 211, line 16 – p. 212, line 5. Lewis explained he "was trying to make some easy money" and "it was a little job." R. p. 212, lines 5-6. Lewis wanted to get a car because he needed to drive. R. p. 212, lines 6-8. Investigator Stanton noted Lewis was shirtless and wore black

basketball shorts. R. p. 218.

Donny Campbell was the second co-defendant to testify against Lewis. He was seventeen at the time of the robbery. He pled guilty to armed robbery and conspiracy, and freely admitted he was guilty of those charges. R. pp. 235-37. He identified his fellow conspirators as Robert Jackson, Cordell Lewis, and Brian Lewis. R. p. 238. Campbell testified the plan was to rob a pizza delivery man and take his car. This was Lewis's idea, he wanted to raise money to take care of his child. R. pp. 239-40. Campbell testified Lewis placed the order on Campbell's phone while they were gathered in the breezeway. Lewis also used Campbell's gun. Campbell was apprehended in the woods, and he saw law enforcement retrieve the gun used in the robbery while he was sitting in the patrol car. He admitted he carried the gun into the woods. R. pp. 241-42. The order was to be delivered to the vacant apartment. Campbell remembered only three of the conspirators gathered at the breezeway, he testified Jackson was not gathered at the breezeway with the remaining robbers. R. p. 239; p. 243.

The four robbers gathered when the pizza man arrived. Jackson greeted Haefner. Lewis then walked up to Haefner and made him get on the ground at gunpoint. Lewis cranked up the Highlander while Cordell held the gun on Haefner. Campbell kicked Lewis in the head before they left. Campbell confirmed Jackson ran off and did not get in the Highlander. R. pp. 244-48. Apparently, Lewis was concerned about Jackson abandoning the venture and drove around the neighborhood looking for him. They ate the stolen pizza and for a time, Lewis left Cordell and Campbell behind at a relative's in Judon and drove somewhere with the stolen Highlander, but he returned and picked them up. They later parked the Highlander in "a cut," which he explained was a closed dirt road, to hide the vehicle. However, when they saw a patrol car, Campbell ran while

Lewis drove and hit a patrol car. Campbell was caught by an officer. R. pp. 248-52. He told them where the gun was and admitted it was his gun. R. p. 265.

Campbell admitted he lied when he told officers the driver was Isiah Jefferson. Campbell explained it was a made up name. At the police station, Campbell admitted Lewis was driving and provided Lewis' address. R. pp. 254-56.

Deputy Jeremy Jones drove one of the patrol cars to the stolen Highlander. As he approached the Highlander, he saw a suspect in a light-blue shirt run to the tree-line. An SUV with its lights off sped his way and he swerved, then heard a crash. Deputy Jones chased down the man he saw run into the tree line. The man told him the gun was left in the woods. The K-9 unit found it. R. pp. 268-70. The apprehended suspect, Campbell, told Deputy Jones that Isiah Jefferson was driving the vehicle, but no one with that name appeared in the computer system or in the Department of Motor Vehicle's online database. R. p. 276.

Investigator William Whitlock was called out to the scene and heard the loud crash. The Highlander was abandoned by the time he reached it, but he found a black Chicago Bulls tee-shirt on the passenger floorboard. R. pp. 289-91; p. 295.

Deputy Matthew Anderson was with the K-9 unit. Other officers approached Lewis' apartment while Deputy Anderson positioned himself by the breezeway and the back windows to the apartment. He saw a black male with no shirt, no pants, and purple shoes (he saw the purple shoes last) jump out the window and takeoff running. On his command, Deputy Anderson's dog, Striker, gave chase, clamped down on Lewis' arm, and pulled him down. R. pp. 300-02.

Deputy Anderson explained how Striker is trained to apprehend suspects as follows:

> The way our dogs work is the bite command is really nothing

> more than a sit command. It is not aggression. It is not angry. It's just this is what they do. They can't grab with hands because they don't have thumbs. So they use their mouth.
>
> Once I tell my dog the command, whatever he sees he's going to go to and he's going to hold onto it. He's not going to bite in multiple spots. He's not going to tear. He's just going to grab with the very back of his mouth that he can get and hold on. It's simple pain compliance. Just . . . like putting your hand in a small vice grip, basically.
>
> He's going to hold that until I deem that it's safe for other officers and myself to tell him to let go.

R. p. 302, line 25 – p. 303, line 13.

Lewis rolled and resisted law enforcement's commands even as he was held by Striker. R. p. 304. Striker let go upon command. However, Lewis continued resisting even as Deputy Anderson put handcuffs on him. R. p. 306. Lewis had scratches on his leg. R. p. 310.

Cordell Lewis, the remaining conspirator and Lewis' younger brother, also testified against Lewis. Cordell was sixteen years old at the time. R. p. 315. Cordell pled guilty to attempted armed robbery, conspiracy, and assault and battery. R. p. 318. Cordell testified he did not know Jackson well and he only met Campbell a few minutes before the robbery. Cordell understood the plan was to get some money. According to Cordell, Campbell called and placed the pizza order. When Jackson was about to pay for the pizzas with a credit card, Lewis pulled out a gun on the pizza deliveryman. R. pp. 321-22. Cordell was not sure if Jackson knew a robbery was going to occur. R. p. 322, line 24-p. 323, line 7. Lewis made the deliveryman drop his keys and wallet and then lay on the ground. Cordell held the gun while Lewis cranked up the car. Cordell put the gun in the car and kicked the deliveryman. Jackson walked away from the robbery. Lewis drove Cordell and Campbell to Judson and later dropped off Cordell so he could play basketball. R. pp. 323-29.

Sergeant Darwin Shaw photographed the vehicle damage and the gun, and took fingerprints

off the SUV. R. p. 339; p. 341; p. 349. The prints on the front passenger side were Campbell's prints. Cordell left his fingerprints on the backside of the rear driver's side door. R. pp. 359-60.

Investigator Kicklighter provided Lewis Miranda warnings after he was apprehended. Lewis admitted he was the driver and said they were trying to "hit a jug." R. pp. 376-79. Investigator Kicklighter later interviewed Lewis at the police station after Lewis was treated for a dog bite. When asked what he knew about the robbery, Lewis initially responded that he wanted to make some easy money. State's Exhibit No. 53 (4:55-5:45). In response to Lewis complaining his explanation was not satisfying the officers, they responded they were not satisfied if he was not giving them the truth. (6:00-7:00). Lewis claimed he was merely driving the stolen vehicle. He would explain to the officers that if someone said he just needed to drive to make some easy money, he could care less what they do if he was not taking part. (circa 12:45). Law enforcement was skeptical that Lewis, twenty-one years old, was taking orders from two seventeen year-olds and a sixteen year old. 14:30-15:00.

ARGUMENT

I.

The trial court's instructions as a whole correctly conveyed to the jury the concept of reasonable doubt, and Appellant was not prejudiced by the alleged error in the reasonable doubt instruction.

Lewis argues he is entitled to a new trial because the trial court used the term "search for the truth" in defining reasonable doubt. The jury instructions, considered in totality, did not reduce or shift the State's burden to prove its case beyond a reasonable doubt.

Amazingly, Lewis claims, "It is simply not the jury's function to search for the truth." However, determining the truth, including an assessment of the witnesses' credibility, is precisely the function delegated solely to jurors. The constitution restricts the trial judges from instructing jurors on the facts of the case. S.C. Const. art. V, § 21. The purpose of this provision is to ensure the exclusive judgment of the facts of the case are made by the jury. Referencing a similar provision from the 1895 constitution, the Supreme Court explained, "The real object of this clause of the Constitution is to leave the decision of all questions of fact to the jury exclusively, . . ." State v. Pruitt, 187 S.C. 58, 196 S.E. 371, 373 (1938). A "fact" is defined by the American Heritage Dictionary as "4.a. Something having real, demonstrable existence. b. The quality of being real or actual." Houghton Mifflin, The American Heritage Dictionary (2d ed. 1982). "Fact-finding" is "[t]he discovery or determination of facts or accurate information." Id.

The **central function** of the trial process in both criminal and civil cases is to discover the truth. See Portuondo v. Agard, 529 U.S. 61, 73 (2000) (stating "the central function of [a] trial . . . is to discover the truth"); see also State v. Wren, 322 S.C. 103, 105, 470 S.E.2d 111, 112 (Ct. App.

1996) ("A trial is a search for the truth[.]"); see, e.g., Carella v. California, 491 U.S. 263, 265 (1989) (explaining that burden-relieving jury instructions "subvert the presumption of innocence accorded to accused persons and also invade **the truth-finding task assigned solely to juries** in criminal cases." (emphasis added)).

As part of the truth-seeking process, the State carries the burden to prove a criminal defendant's guilt for every element of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970); see also Burr v. Florida, 474 U.S. 879, 880 (1985) ("[T]he **beacon of the truth-seeking process** in criminal cases is not absolute certainty, but the 'reasonable doubt' standard[.]" (emphasis added)). However, the jury must analyze the evidence presented by both parties to determine the facts – in other words, the truth.

In the instant case, as in other cases with isolated "search" language in the jury instructions, the charge as a whole is a correct statement of law and did not reduce or shift the State's burden. "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted). Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error. State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. State v. Lee Grigg, 374 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007).

Regarding a jury charge on reasonable doubt, "[t]he beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." Victor v. Nebraska, 511 U.S. 1, 5 (1994). In a criminal case, a trial judge is only required to instruct the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt, and no specific language or wording is required to be used to advise the jury of that burden of proof. Id. In order to meet the requirements of the Constitution, jury instructions as a whole must only correctly convey to the jury the concept of reasonable doubt. Id.

Significantly, our state supreme court has repeatedly recognized trial judges are not required to specifically define reasonable doubt when instructing the jury in criminal cases. See State v. Adams, 322 S.C. 114, 126, 470 S.E.2d 366, 373 (1996) (finding no error in the trial judge's refusal to define reasonable doubt during the jury instructions) *overruled on other grounds by* State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014). Nonetheless, our state supreme court held "[j]ury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'" State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (quoting State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998)). "The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." Id. (citing Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)).

In the instant case, the trial court provided the following instruction:

> So what is a reasonable doubt? I've said that word seventeen times. What does that mean? A reasonable doubt is that doubt which would make an honest, conscientious juror searching for the truth in a

> case to hesitate to act. Proof beyond a reasonable doubt must therefore be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.
>
> Proof beyond a reasonable doubt can also be described as proof that leaves you firmly convinced of the Defendant's guilt.

R. p. 456, line 20 – p. 457, line 7.

This Court previously addressed the reasonable doubt instruction provided in State v. Pradubsri, 420 S.C. 629, 803 S.E.2d 724 (Ct. App. 2017). This Court noted the Supreme Court's opinion from State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016, refiled April 25, 2018), which admonishes its circuit court judges to refrain from using "seek" or "search" in jury instructions, but nonetheless found the defendant was unable to show prejudice from the instruction. This Court compared Beaty to the Supreme Court's same admonishment to its circuit court judges in State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998). In that case, the Supreme Court found problematic the following instruction, which is nearly identical to the present case:

> [A] reasonable doubt is a doubt which makes an honest, sincere, conscientious juror in search of the truth in the case hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and to act upon it in the most important of his or her own affairs.

Needs, 333 S.C. at 152, 508 S.E.2d at 866. Notably, the circumstantial evidence instructions also used "search" language. Id. However, the Supreme Court, as it did in Beaty, found the language harmless because the reasonable doubt standard was referenced twenty-six times and other disfavored language – "moral certainty" and "real reason" language was not used in the jury instructions. Needs, 333 S.C. at 154-55, 508 S.E.2d at 867-68. Even while advising trial courts to abandon the "search for the truth" language in the reasonable doubt charge, the Supreme Court

noted, "trial judges have talked about jurors searching for the truth for more than a century." Id. at 154, 508 S.E.2d at 867 (citations omitted).

This Court concluded Pradubsri was not prejudiced by the identical instruction from Needs, noting the trial court referenced the reasonable doubt standard twenty times in its instructions and did not use the problematic "moral certainty" and "real reason" terms. Pradubsri, 420 S.C. at 640-41, 803 S.E.2d at 730. The trial court in the instant case referenced the reasonable doubt standard twenty-five other times and did not use the "moral certainty" or "real reason" terms. Accordingly, in line with Needs and Pradubsri, the trial court's decision to use the "search" language from Needs was harmless and did not prejudice Lewis.

II.

The trial court did not err in declining to charge the jury Appellant's suggested instructions on identification and credibility of witnesses and instead providing its own instructions. The trial court's instructions adequately apprised the jury of the law. Appellant failed to explain why the trial court's identification instruction was not sufficient, so the issue is not preserved for review. Further, any error was not prejudicial to Appellant.

Lewis combines two separate issues into one – arguing the trial court erred in declining Lewis' requested charges and relying on its own instructions for eyewitness identification and credibility of witnesses. The trial court did not abuse its discretion in either case, and the trial court's decision to decline the specific language requested by Lewis did not prejudice Lewis. Further, the sufficiency of the instruction for identification is not preserved for review.

A. Identification charge

First, Lewis argues the trial court erred in declining Lewis' requested instruction on eyewitness identification. The trial court did not err as the instruction was confusing and a comment on the facts. Lewis cites case law from other jurisdictions that this Court already rejected to support of his argument. Further, Lewis failed to preserve this issue for review because he failed to articulate any explanation to the trial court as to why the trial court's instruction was inadequate. Further, his requested instruction is an improper comment on the facts.

"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. Here, the charge was a current and correct statement of the law on identification

testimony in South Carolina.

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Commander, 396 S.C. 254, 270-71, 721 S.E.2d 413, 422 (2011). "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." State v. Dickey, 394 S.C. 491, 512, 716 S.E.2d 97, 108 (2011). "The substance of the law is what must be charged to the jury, not any particular verbiage." State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011).

Lewis puts forward arguments already rejected by this Court and the Supreme Court. In State v. Motes, 264 S.C. 317, 215 S.E.2d 190 (1975), the Supreme Court considered the model jury instruction from United States v. Telfaire, 469 F.2d 552 (D.C. Cir 1972). 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. However, the Supreme 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.

In State v. Green, 412 S.C. 65, 770 S.E.2d 424 (Ct. App. 2015), this Court likewise found a standard identification instruction sufficient for the jury. This Court specifically found Green's reliance on two out of state cases, Brodes v. State, 614 S.E.2d 766 (Ga. 2005) and State v. Long, 721 P.2d 483 (Utah 1986), misplaced. Lewis relies on these same two cases in his brief. This Court

noted that other courts found Brodes' instruction superfluous or an impermissible judicial comment on the evidence. Green, 412 S.C. at 77-78, 770 S.E.2d at 431. Long held cautionary instructions based on Telfaire's suggested instructions should be given, but the Utah court held the trial court has the discretion to craft appropriate instructions. Long, 721 P.2d at 492. This Court noted our state supreme court declined to require Telfaire instructions. Green, 412 S.C. at 78, 770 S.E.2d at 431.

Lewis claims the requested charge is not an instruction on the facts. However, Lewis fails to cite State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), which is controlling. In Stukes, our Supreme Court found the instruction that advised the jury a rape victim's testimony need not be corroborated – an accurate statement of law – to be an unconstitutional instruction on the facts. Likewise, the requested instruction, telling jurors how they were supposed to decide the facts of the instant case, is likewise an unconstitutional charge on the facts. S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.").

In the instant case, the trial court provided the following instruction:

> Now, 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 him.
>
> Identification testimony is an expression or 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 alleged offenses. This will be affected by things like how long or short a time was available; how far or close the witness may have been from the offender, alleged offender; the lighting conditions; whether or not the witness had the chance to see or know the person in the past. Once again I instruct that the burden on the State extends to every element of the crimes charged and this specifically includes the burden proving beyond a reasonable doubt the identity of the Defendant.

> 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. 461, line 5 – p. 462, line 13. The trial court, before rejecting Lewis' requested instruction, noted, "Mine is shorter, sweeter, [and] easier to understand . . . ." R. p. 407, lines 22-25. The prosecutor initially did not object to Lewis' proposed instruction, but when the trial court provided its superior instruction, the prosecution agreed it was better than Lewis' proposed language. R. p. 407, lines 18-21; p. 409, line 17 – p. 410, line 3.

This Court concluded the similar instruction provided to the jury in Green was sufficient. Green, 412 S.C. at 76-77, 770 S.E.2d at 430. Because the trial court's instruction provided the jury the proper test for determining the reliability of the identification and stressed the requirement that identity be proved beyond a reasonable doubt, the trial court did not err in declining Lewis' requested instruction.

Further, Lewis never explained to the trial court why his language was superior to the trial court instruction. While Lewis asked that his requested instruction be made a court's exhibit if the trial court used its own instruction, Lewis never argued why the trial court's instruction was not sufficient. R. p. 410, lines 6-8. "The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error." State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). Therefore, the issue is not preserved for review. Ex parte McMillan, 319 S.C. 331, 334, 461 S.E.2d 43, 45 (1995) (holding a party cannot acquiesce to an issue at trial, but then complain on appeal).

B. Credibility of witnesses

Lewis alleges the trial court erred in declining his requested instruction regarding the

credibility of witnesses. However, the trial court's instruction on credibility was sufficient.

The trial court provided the following instruction regarding the credibility of witnesses:

> You are the judges, the sole judges of credibility, also called the believability of the witnesses who have testified and of the evidence which has been presented during this trial.
>
> In determining credibility or passing upon that issue, you can take into consideration many things. Such as:
>
> The demeanor or the manner in which a witness testified.
>
> Whether or not a witness had reason to be biased or prejudiced.
>
> Whether or not a witness' testimony was contradicted on the one hand or supported or corroborated on the other hand.
>
> All of these things you consider bearing in mind that you should give the Defendant the benefit of any reasonable doubt.

R. p. 452, line 9 – p. 453, line 1.

In the requested instruction, the judge would tell the jury, "Let me suggest a few things to think about as you weigh each witness's testimony" before enumerating several factors. Three factors chiefly addressed the possible bias of witnesses (items 2-4), which the trial court instructed the jury on. The eighth item is similar to the trial court's instruction that the jury consider the demeanor or manner in which the witness testified. The fifth item, consistency of the witness's testimony over time, is simply confusing. Is that time simply the duration of the trial, or a reference to an out of court statement, which is not testimony at all?

The last paragraph is likewise clumsily worded. Lewis would have the judge tell the jurors:

> You do not have to believe everything that a witness said. You may believe part and disbelieve the rest. On the other hand, if you are convinced that a witness lied, you may disbelieve anything the

> witness said. In other words, you may believe all, part, or none of a witness's testimony. You may believe many witnesses against one or one against many.

The requested instruction is haphazard and unartful. The language even suggests to the jury that it has to believe the witness lied to disbelieve the testimony – a stiffer requirement than merely disbelieving the quality of the witness' perception or memory.

Understandably, the trial court rejected Lewis' suggested instruction, finding its own charge easier to understand and not as long. R. p. 411, lines 15-17. The trial court has the discretion to fashion instructions it determines sufficient to apprise the jury of its role in determining credibility of the witnesses. See generally Victor v. Nebraska, 511 U.S. 1, 5 (1994) (noting the trial court is required to convey the concept of reasonable doubt to the jury, but is not required to define reasonable doubt or prohibited from doing so); State v. Adams, 322 S.C. 114, 126, 470 S.E.2d 366, 373 (1996) (finding no error in the trial judge's refusal to define reasonable doubt during the jury instructions) *overruled on other grounds by* State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014).

In State v. Bamberg, 270 S.C. 77, 82, 240 S.E.2d 639, 641 (1977), the Supreme Court rejected Bamberg's claim the trial court erred in refusing the instruction that the jury should take into consideration the interest or bias of the witness and observe the witness' demeanor. The trial judge charged the jury it was tasked with judging the witnesses' credibility, and they could believe one witness against many or only portions of a witness' credibility. The Supreme Court held it was within the trial judge's discretion to refuse the additional credibility charge and further, the defendant failed to show prejudice.

In the instant case, the trial court instructed the jury on their duty to determine credibility, and advised the jurors they could assess the demeanor and potential bias of the witnesses in determining

credibility. Additionally, the trial court advised the jury that it could consider the other evidence corroborating or contradicting the witness' testimony. Most importantly, the trial court advised the jury that in judging the credibility of the witnesses, it should give the defendant the benefit of any reasonable doubt. Therefore, as in Bamberg, the trial court acted in its discretion in fashioning an appropriate credibility instruction.

Further, Lewis' claim the jury would not know it could disbelieve part of a witness's testimony or could believe one over many witnesses strains credulity. It is the common sense of lay jurors that makes the jury system so successful. The jury did not check its common sense at the door and fail to critically analyze the testimony and evidence with the requisite scrutiny. The trial court did not err in declining the instruction and adequately covered the law with its own instruction.

Finally, Lewis purports he was prejudiced by the trial court's decision to decline the instruction because the State "paraded" Lewis' three accomplices. However, the trial court's instructions to the jury advised the jury that it could consider any reason a witness might be biased. The jury therefore knew it could discount, to the point they thought necessary, the testimony of the three young accomplices Lewis picked to assist him in the foolhardy robbery he committed. Further, Lewis was easily identified by his victim from a non-suggestive lineup and admitted to being involved in the robbery and driving the stolen vehicle. Contrary to Lewis' claim in his brief, the three accomplices testified consistently with each other with the exception that Campbell claimed Lewis, not himself, called the pizza deliveryman. Therefore, Lewis was not prejudiced by the trial court's decision to decline the requested instruction. Bamberg.

III.

Because evidence supports the finding Appellant freely and voluntarily made his statements to law enforcement, the trial court did not err. Law enforcement did not threaten or coerce Appellant, who likewise maintained a calm demeanor during the interview at the police station. Because Appellant did not appear to be in significant distress or pain during either interrogation, and because law enforcement did not make medical attention for his injury contingent upon his cooperation, his statement was not rendered involuntary merely because he suffered a bite from the police dog who apprehended him when he was fleeing law enforcement.

Lewis complains his statements to law enforcement were involuntary because he received a dog bite when he fled law enforcement and because police officers sought truthful information concerning the robbery he admitted to them he was a part of. The trial court's ruling that his statements were voluntary is supported by evidence. While Appellant attempts to characterize law enforcement's interrogation as coercive, the officers did not raise their voices, and Appellant likewise remained calm during the interview and showed his will was not overborne by the fact he was willing to answer some questions and not others, especially those concerning the identity of his accomplices. Although Lewis suffered a dog bite during his flight from law enforcement, the record demonstrates that this did not affect his ability to comprehend law enforcement's advisement of rights and he did not complain that he was in significant distress or pain.

During the Denno[1] hearing, Investigator Stanton testified when he first approached and spoke to Lewis, Lewis was handcuffed, sitting on the grass by the apartments. R. p. 55, lines 17-20. Investigator Stanton told Lewis the severity of the situation and then advised him of his Miranda rights by reading from a card. R. p. 56, lines 2-5. Investigator Stanton did not remember which of

the cards he used. R. pp. 56-57. During the trial, he explained to the jury that he did not have a card with him, so he borrowed a deputy's card. R. p. 211.

Investigator Stanton noted the different cards used different syntax. R. p. 66, lines 12-14. However, Investigator Stanton testified he would have advised Lewis of his right to remain silent, that any statements could be used against him in court, he had a right to have an attorney present during questioning, if he could not afford an attorney, one would be appointed for him, that he could exercise those rights at any point, and he was asked if he was willing to give a statement. R. p. 57, lines 12-22.

Investigator Stanton testified Lewis did not appear to have any difficulty understanding his rights and he did not appear to be under the influence of drugs or alcohol. R. p. 58, lines 17-25. Investigator Stanton noted Lewis was apprehended by a K-9 unit and the police dog bit Lewis' left arm. However, Lewis did not indicate he suffered any serious distress or pain. Medical care was provided on the scene, and he was transported to a hospital. His treatment was not contingent on him answering law enforcement's questions. R. pp. 59-60.

When asked about the robbery, Lewis said he "was around the people" and was trying to make some easy money from a "little job." He needed a car because he needed to drive. R. p. 58, lines 12-16

Investigator Kicklighter also arrived at the apartments to find Lewis sitting on the grass in handcuffs. He heard Investigator Stanton read Lewis his rights and testified he did not hear anything about Investigator Stanton's advisement of rights that needed to be corrected. He confirmed Lewis was fully advised of his rights. R. p. 76, lines 14-19. Before the jury, Investigator Kicklighter again

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[1] See Jackson v. Denno, 378 U.S. 368, 376 (1964).

confirmed he heard Investigator Stanton fully read Lewis his rights and added that if Investigator Stanton missed any part of his rights, Investigator Kicklighter would have "re-Mirandized" Lewis. R. p. 377, lines 1-5

Investigator Kicklighter and other officers subsequently interrogated Lewis at the police station after Lewis received medical treatment for the dog bite. He testified Lewis advised him he completed tenth grade and could read and write. Investigator Kicklighter asked Lewis to read each line of the advisement of rights form and initial each line. R. p. 79. Investigator Stanton was also present for the interview at the police station. He testified Lewis never indicated during the interview he was in any kind of physical distress. R. p. 65, lines 14-16. Before the jury, Investigator Kicklighter testified that Lewis never asked to stop the interview. R. p. 391, lines 2-3.

At the conclusion of the Denno hearing, the trial court found Lewis was advised of his rights and he freely and voluntarily made the statements. The trial court ruled the portion of the video where Lewis admitted he was intending to use the stolen car in another unspecified crime would be redacted. R. p. 94, lines 6-16 (Denno ruling); pp. 91-92 (arguments over redacting reference to future crime).

Due process requires the suppression of an involuntary confession, regardless of the truth or falsity of the confession. Jackson v. Denno, 378 U.S. 368, 376 (1964). Based on the Fifth Amendment's protection against self-incrimination, the United States Supreme Court announced, "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards. . . ." Miranda v. Arizona, 384 U.S. 436, 444 (1966). Before the accused is subjected to custodial interrogation, he or she must be informed of the right to remain silent; any statement made may be

used as evidence against him or her; the right to the presence of an attorney; and if he or she cannot afford an attorney one will be appointed prior to questioning. State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App.1996) *aff'd as modified* 333 S.C. 426, 510 S.E.2d 714 (1998).

The "ultimate test" of voluntariness involves determining whether the confession was "the product of an essentially free and unconstrained choice by its maker" or was the product of an overborne will and critically-impaired capacity for self-determination. Schneckloth v. Bustamonte, 412 U.S. 218, 225-226 (1973). "The process for ascertaining whether a statement is voluntary is bifurcated because the process involves determinations by both the trial judge and the jury." State v. Breeze, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008). Pursuant to the bifurcated process, the trial judge must first determine in an evidentiary hearing whether the State proved the statement was voluntarily made by a preponderance of the evidence, and then, if the trial judge finds the State met its burden, the statement is submitted to the jury where its voluntariness must be proven beyond a reasonable doubt. Id.

The voluntariness of a statement "is a question of fact to be determined from all the circumstances[.]" Schneckloth, 412 U.S. at 248-249. When considering the voluntariness and admissibility of a defendant's statements, the trial judge should examine the totality of the circumstances under which the statements were made, including the characteristics of the accused and the details of any interrogation that took place, to determine whether the State has met its burden of proof. State v. Rabon, 275 S.C. 459, 461, 272 S.E.2d 634, 635 (1980). Factors to be considered in the totality of the circumstances analysis include: (1) the age of the accused; (2) the educational level and intelligence of the accused; (3) the accused's knowledge of his constitutional rights; (4) the length of the accused's detention; (5) the nature of the questioning and whether it was repeated and

prolonged; and (6) the presence or absence of the use of punishment, including deprivation of food or sleep. Schneckloth, 412 U.S. at 226. Critically, the most important factor in evaluating the voluntariness of a defendant's statements is whether the defendant's will was overborne when he provided the statement. State v. Von Dohlen, 322 S.C. 234, 244, 471 S.E.2d 689, 695 (1996).

A trial court's determination of voluntariness of a statement will not be reversed absent an abuse of discretion amounting to error of law. State v. McLeod, 303 S.C. 420, 423, 401 S.E.2d 175, 177 (1991) *overruled on other grounds by* State v. Evans, 307 S.C. 477, 415 S.E.2d 816 (1992). "When reviewing a trial [court's] ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of evidence, but simply determines whether the trial [court's] ruling is supported by any evidence." State v. Miller, 375 S.C. 370, 378-79, 652 S.E.2d 444, 448 (Ct. App. 2007).

"Coercive police activity is a necessary predicate to finding a statement is not voluntary." Id. at 386, 652 S.E.2d at 452; see also State v. McClure, 312 S.C. 369, 371-72, 440 S.E.2d 404, 405-06 (Ct. App. 1994) (noting the question of the voluntariness of a confession can come down to a question of credibility, which the trial court may resolve in favor of the officers).

During the interview, the interviewing officers never raised their voice and used a respectful tone with Lewis, who likewise maintained a calm demeanor throughout the brief half-hour interview. Only one officer asked Lewis any questions until approximately thirteen minutes into the interview. Court's Exhibit No. 1 (circa 13:45). Shortly afterwards, Lewis asked what he was charged with and the officers told him the number of charges related to the robbery and the subsequent attack on a patrol vehicle when Lewis crashed the stolen vehicle into the patrol vehicle. (15:00-17:00).

Lewis was clearly frustrated with the predicament he put himself, refuting law enforcement's

recitation of the well-known phrase "the truth will set you free." Lewis observed it would not. The officers confirmed the truth would not set Lewis free, but advised him it would help. (17:00-18:00). He skeptically retorted it would only help him shave two or three years from whatever time he received. Lewis did not deny driving the stolen vehicle and fleeing the scene of the collision: he explained he was not trying to kill officers when he was told he could be charged with attempted murder. He also explained he did not know the cars were patrol vehicles because they did not have their blue lights on when he attempted to flee. (18:00-18:30).

Of course the law enforcement officers sought information about the other participants' roles in the robbery, which Lewis declined to offer. One of the officers calmly told Lewis the officer was not going to beg Lewis to tell about the others' roles, if Lewis asked him to shut up about it, the officer would not ask Lewis anymore about the accomplices. (21:00-22:00). Lewis claimed he was told he would make easy money, he only had to drive. (22:00-23:00). Indicative of the relaxed atmosphere, the main interviewer put his feet up on the office chair the officer was sitting in. (23:00-24:00). The interview wound down when it was clear Lewis was unwilling to implicate the other accomplices, one of the officers wished Lewis the best of luck. (28:30-29:00).

Merely because some force was necessarily used to apprehend Lewis does not render the subsequent statements involuntary. See Stokes v. State, 828 N.E.2d 937, 940 (Ind. Ct. App. 2005) (rejecting the contention that the use of a Taser to subdue Stokes rendered Stokes' subsequent statement to his sister involuntary; "[b]ecause [appellant] offers no authority for the proposition that the force necessary to control an intractable suspect should render any subsequent statement involuntary, we cannot say that the trial court abused its discretion by admitting his statement."). Neither is it relevant in determining voluntariness that law enforcement suggested to Lewis he should

be truthful. State v. Rochester, 301 S.C. 196, 201, 391 S.E.2d 244, 247 (1990) (finding polygraph examiner's statement to defendant that it would be in his best interest to tell the truth was not improper).

Finally, the dog bite did not render Lewis' statements involuntary. In Rogers v. State, 717 S.E.2d 629 (Ga. 2011), Rogers sought medical attention at a hospital for a gunshot wound and law enforcement interviewed him under the belief that he was a victim. The officer testified Rogers was lucid and awake, although initially disoriented and in a lot of pain. The officer testified Rogers appeared to know what he was doing and what was going on. The Georgia Supreme Court affirmed, finding the trial court's finding that Rogers made the statements freely and voluntarily was not clearly erroneous. Id. at 631.

In United States v. Choice, 392 F.Supp. 460, 469 (E.D. Pa. 1975), the district court noted Choice's gunshot wound did not mean Choice was presumed incapable of exercising free volition and making rational choices. Treatment for Choice's injuries from a gunshot were completed around midnight, and Choice was interviewed by law enforcement the next day. The officers did not testify to any lack of alertness, confusion, or great physical discomfort or pain on Choice's part. The district court found, "Choice's rationality and comprehension are demonstrated . . . by his willingness to answer some questions and his refusal to respond to others, particularly those concerning the identity of the third man at the scene of the robbery." Id. at 470. In concluding the statement was not involuntarily given, the district court concluded "his actions demonstrate complete awareness of what was transpiring and the exercise of his own independent judgment throughout the proceedings." Id.

In the instant case, as in Choice, Lewis never indicated he was in great pain or discomfort,

and nothing in the record indicates an inability to comprehend any aspect of either interrogation. Lewis demonstrated his free will by refusing to answer questions about his accomplices and by admitting to some conduct and minimizing other conduct. Because evidence in the record supports the trial court's determination that Lewis made his statements freely and voluntarily, the trial court did not err and the convictions and sentences should be affirmed.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

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May 15, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Brian M. Gibbons, Circuit Court Judge

RECEIVED
MAY 15 2018
SC Court of Appeals

THE STATE,

Respondent,

vs.

BRIAN WILLIE LEWIS,

Appellant.

Appellate Case No. 2017-000482

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."

Respectfully submitted,

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May 15, 2018