STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable R. Keith Kelly, Circuit Court Judge
Appellate Case No. 2016-001536

THE STATE,

Respondent,

vs.

COREY ANDREW BROWN,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

In August of 2015, Appellant Corey Andrew Brown was arrested following an investigation into a violent armed robbery committed at a toy store. In October of 2015, the Spartanburg County Grand Jury indicted Appellant for kidnapping, assault and battery of a high and aggravated nature, armed robbery, and possession of a weapon during the commission of a violent crime. On July 11, 2016, a jury trial was commenced in the Spartanburg County Court of General Sessions with the Honorable R. Keith Kelly, circuit court judge, presiding. At the conclusion of the multi-day trial, the jury convicted Appellant of kidnapping, armed robbery, possession of a weapon during the commission of a violent crime, and the lesser-included offense of first-degree assault and battery. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of thirty years for kidnapping, thirty years for armed robbery, and ten years for first-degree assault and battery along with a consecutive term of imprisonment of five years for possession of a weapon during the commission of a violent crime. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

Around noon on August 7, 2015, Mindy Slotin ("Victim") went to Imagination Station, a specialty toy store located on Main Street in Spartanburg, South Carolina, to provide temporary assistance to her husband, Mark Slotin, so he could briefly leave his store for a lunch break. (R. pp. 12-13; pp. 55-57). When she arrived, Victim observed Slotin attending to a male customer and a female customer, and Slotin indicated to her the pair had been in the store for an extended period of time. (R. p. 13; p. 57). Slotin then continued to assist the customers for a few more minutes, and they eventually picked out an item, brought it to the store's check-out counter, and asked for it to be wrapped. (R. p. 13; p. 16; p. 57). After doing so, the male customer stated they had more shopping to do, indicated they would come back later to pick up their gift, and exited the store along with the female customer. (R. p. 13; p. 57). Slotin then left the store to go get some lunch, and Victim remained behind to tend to the store while her husband was gone. (R. p. 14; p. 57).

Approximately fifteen minutes later, the male customer and female customer returned to the toy store. (R. p. 14; p. 57). Upon returning, the male customer approached Victim at the check-out counter and inquired if Slotin was gone, and Victim confirmed he was, in fact, no longer present. (R. p. 14; p. 58). The male customer then indicated he wanted to speak with her about one more thing, he escorted Victim to a location towards the back of the store, and the two proceeded to discuss a particular toy there. (R. p. 14; p. 58). At that point, the male customer suddenly pulled out a gun, struck Victim in the head with it, and knocked her to the floor. (R. p. 14; p. 58). He then pointed the gun at her face, struck her again with it, bound her hands with duct tape, stole her wedding and engagement rings, and directed her to the cash register at gunpoint. (R. pp. 14-15; p. 58). Once they reached the cash register, he asked his female

accomplice to lock the store's door and forced Victim to open the register. (R. p. 15; p. 59). After Victim did so, he directed her to a back storage room at gunpoint, bound her arms and ankles with duct tape, and placed a piece of duct tape over her mouth. (R. p. 15; p. 59). He then informed Victim he was going toy shopping, warned her he would kill her if she made a single sound, and left her in the storage room. (R. p. 15; p. 59).

Once Victim was alone, she broke free from the duct tape and quickly fled out of the store through a back door. (R. p. 22; p. 59). She then ran to a nearby store for help, and some people at that location alerted the police of the robbery. (R. pp. 22-24; pp. 59-60; p. 69; pp. 77-78; pp. 115-116). In response, officers from the Spartanburg Police Department rapidly proceeded to Victim's location, and Victim, who still had pieces of duct tape attached to her body, advised them of what had occurred while also providing them with descriptions of the two robbers.[1] (R. pp. 24-25; p. 78; p. 80; pp. 115-116; p. 118; p. 142; p. 179). The officers then quickly headed over to the toy store, but the robbers had absconded with roughly $100 in cash, an iPad, and Victim's rings by the time they arrived. (R. p. 62; pp. 89-90; p. 118; p. 142; p. 179).

Shortly thereafter, forensic investigators from the police department travelled to the toy store and processed it for evidence. (R. pp. 75-76; pp. 118-119; p. 142). In doing so, the investigators located and collected a number of fingerprints, including from the front door, the cash register drawer, some toys, and a toy box. (R. pp. 118-119; pp. 129-131; p. 136; pp. 142-144). They then promptly submitted those fingerprints to a latent fingerprint examiner for analysis. (R. p. 133; pp. 142-143; pp. 146-148). Upon analysis, the latent fingerprint examiner

[1] Regarding the descriptions, Victim indicated she described the robbers' clothing and ethnicity, and she stated she indicated the male robber was taller than herself. (R. pp. 24-25; pp. 78-80). Additionally, based on the information allegedly contained in the police report, defense counsel questioned Victim as to whether she described the male robber as "a black male with dark skin" who was approximately 5'10", weighed 160 pounds, and was wearing blue jeans and a dark t-shirt. (R. p 79). However, Victim stated she did not specifically remember providing all that information. (R. p. 79).

determined two of the fingerprints collected from the cash register drawer were left by Appellant Corey Andrew Brown while the fingerprints collected from the toys and toy box were left by an individual named Sandra Pearson.[2] (R. pp. 160-162; pp. 174-176; p. 180). Based on that determination, Appellant and Pearson were identified as the suspects in the armed robbery. (R. pp. 180-181).

On the following day, officers from the Spartanburg Police Department travelled to Appellant and Pearson's apartment, which was located just over a mile away from the toy store. (R. pp. 180-181). When they arrived, Pearson immediately surrendered to them, but Appellant ran up the apartment's stairs and barricaded himself inside the home. (R. p. 91; p. 96). He then remained there for approximately an hour before finally surrendering to the authorities. (R. p. 96). Following Appellant's surrender, officers conducted a search of the home, and they located a loaded gun, a box of ammunition, a roll of duct tape, various coins, and a wallet containing $50 in cash. (R. p. 92; p. 182; pp. 184-186; pp. 191-192; p. 197).

A few days after that, Victim observed Appellant's mug shot either in a newspaper article or a news broadcast and on the sheriff department's website, and she immediately recognized him as the perpetrator of the armed robbery. (R. pp. 16-17; p. 19; pp. 25-27). Victim then quickly contacted the police and alerted them of her positive identification of Appellant as the armed robber. (R. p. 19; p. 27).

Subsequently, Appellant was indicted for armed robbery, kidnapping, assault and battery of a high and aggravated nature, and possession of a weapon during the commission of a violent crime, and he proceeded forward to trial. (R. p. 2; pp. 280-281; pp. 283-284; pp. 286-287). At the outset of trial, defense counsel asked the trial judge to prevent Victim from identifying

[2] Through her analysis, the latent fingerprint examiner also determined some of the fingerprints collected from the toy store were unsurprisingly left by Slotin, who was the store's owner. (R. pp. 55-56; p. 161).

Appellant in the courtroom as her assailant. (R. p. 3). In support of that request, defense counsel asserted Victim's out-of-court identification was tainted and rendered unreliable because Victim observed Appellant's mugshot on a news broadcast, which he contended would result in Victim simply identifying the person she saw on the news broadcast as the robber. (R. p. 4). Defense counsel further contended the out-of-court identification resulted from police action in light of the fact the media must have obtained Appellant's mugshot from the police, and he argued permitting Victim to make an in-court identification under those circumstances would violate Appellant's due process rights. (R. pp. 3-4; p. 7; p. 9). In rebuttal, the solicitor asserted there was no intentional police involvement with the media displaying Appellant's photograph, and, even if there had been, Victim's identification was reliable under the totality of the circumstances. (R. pp. 5-7; pp. 9-11).

Following that discussion, the trial judge conducted an in limine hearing on the matter, and Victim testified during the hearing about the incident and her subsequent identification of Appellant as the armed robber. (R. pp. 12-28). During her testimony, Victim noted she was "[v]ery close" to the robber during the incident, which occurred around noon, and she indicated she was able to observe him for at least ten minutes while he was inside the toy store. (R. p. 12; pp. 15-16; p. 18). Additionally, Victim testified she stared at the robber's face throughout the incident, stated she would never forget his face, and asserted there was "not a doubt in [her] mind" Appellant was the perpetrator of the armed robbery. (R. pp. 16-18). Furthermore, Victim noted she was never asked by the police to make an identification of Appellant and only identified Appellant after seeing his mugshot either on a news broadcast or in a newspaper and while looking at the sheriff's department's website. (R. p. 19; pp. 26-28).

At the conclusion of Victim's testimony, defense counsel renewed his opposition to the admission of the identification evidence on the same grounds he had previously raised. (R. p. 29). However, the trial judge declined to exclude the identification evidence. (R. pp. 29-31). In declining to do so, the trial judge concluded there was no governmental involvement in Victim's out-of-court identification of Appellant as the robber, and, as a result, he ruled Victim would be permitted to identify Appellant during trial. (R. pp. 30-31; p. 36).

Thereafter, the trial proceeded forward, and Victim recounted the harrowing details of the armed robbery to the jury, identified Appellant in the courtroom as the robber over defense counsel's objection, and indicated she was "[a]bsolutely without a doubt positive" of her identification. (R. pp. 55-80). In addition to that testimony, Pearson testified about her role in the armed robbery, acknowledged she had pled guilty to an armed robbery charge based on the incident, indicated Appellant was the perpetrator of the robbery, and identified him in the courtroom as the robber. (R. pp. 85-111). Furthermore, the law enforcement personnel involved in the investigation into the armed robbery testified about the discovery of Appellant's fingerprints on the cash register drawer from the toy store and the subsequent search of Appellant's nearby home, which led to the recovery of a loaded gun, duct tape, and cash. (R. pp. 118-138; pp. 142-144; pp. 146-164; pp. 172-176; pp. 179-197).

Subsequently, at the conclusion of trial, the jury convicted Appellant of armed robbery, kidnapping, first-degree assault and battery, and possession of a weapon during the commission of a violent crime.[3] (R. pp. 252-253). The trial judge then sentenced Appellant to an aggregate term of imprisonment of thirty-five years. (R. pp. 261-262).

[3] Although Appellant was indicted for assault and battery of a high and aggravated nature, the parties appear to have agreed during an off-the-record charge conference only the lesser-included offense of first-degree assault and battery should be submitted to the jury, and the trial judge instructed the jury on that offense during his jury instructions without objection. (R. p. 213; pp. 240-245; p. 150).

ARGUMENT

The trial judge properly admitted the identification evidence during trial because no out-of-court governmental identification procedure was employed in Appellant's case and because the victim's independent identification of Appellant as the armed robber was reliable under the totality of the circumstances such that there was no substantial likelihood of irreparable misidentification.

Appellant contends the trial judge erred by allowing identification evidence to be introduced during trial. In support of that contention, Appellant maintains the identification evidence was unreliable, inadmissible, and violative of his due process rights because it allegedly resulted from a suggestive out-of-court identification that occurred when Victim saw Appellant through media coverage of the armed robbery. To the contrary, the identification evidence was admissible and properly introduced during trial because Victim's out-of-court identification of Appellant was not the product of a governmental identification procedure, which meant Appellant's due process right were not implicated by the evidence's admission. Furthermore, even if Appellant's due process rights had somehow been implicated, the identification evidence was nonetheless properly admitted because it was reliable under the totality of the circumstances in light of the fact Victim had an excellent opportunity to view the perpetrators of the armed robbery, she had a heightened degree of attention due to the startling nature of the events that transpired, nothing established her description of the robbers was inaccurate, she was entirely certain of her identification of Appellant, and she identified Appellant within just a few days of the incident. For those reasons, the trial judge committed no error in admitting the identification evidence during Appellant's trial. Accordingly, Appellant's convictions should be affirmed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial judges have considerable discretion in ruling on

the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on an evidentiary matter absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); see also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ANALYSIS

When evidence of an eyewitness identification is introduced during a criminal trial, a defendant may be deprived of due process of law if that identification was the product of unnecessarily suggestive circumstances arranged by government officials, such as law enforcement officers, and a very substantial likelihood of irreparable mistaken identification exists as a result of those suggestive circumstances. Neil v. Biggers, 409 U.S. 188, 197-198 (1972); see Perry v. New Hampshire, 565 U.S. 228, 232 (2012) (recognizing "a due process check on the admission of eyewitness identification" is applicable "when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime"). In determining the admissibility of identification evidence, a court must conduct a two-prong inquiry into the matter. See Biggers, 409 U.S. at 199-200 (outlining the

necessary inquiry regarding out-of-court identifications and the factors to be weighed when determining reliability). That inquiry involves first ascertaining whether the identification process was unnecessarily and unduly suggestive and then determining whether the out-of-court identification was nevertheless so reliable no substantial likelihood of misidentification existed. State v. Govan, 372 S.C. 552, 558, 643 S.E.2d 92, 95 (Ct. App. 2007); see State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) ("Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.").

Pursuant to the proper analysis, it must first be determined whether the identification procedure used was both suggestive **and** unnecessary under the circumstances. Biggers, 409 U.S. at 199-200; see United States v. Stevens, 935 F.2d 1380, 1389 (3rd Cir. 1991) (explaining the question of whether an identification procedure is unnecessarily suggestive depends on both its suggestiveness and necessity). In making such a determination, factors to consider include what procedure was employed, whether the utilized procedure was warranted by an emergency or the existence of exigent circumstances, and whether an alternative procedure could have practically been used that would have been less suggestive. See, e.g., Manson v. Brathwaite, 432 U.S. 98, 109 (1977) (recognizing the use of a single-person photographic lineup in the absence of an emergency or the existence of exigent circumstances was unnecessarily suggestive); Stovall v. Denno, 388 U.S. 293, 302 (1967) (finding the use of a single-person show-up was not unnecessarily suggestive where Stovall's surviving victim was the only person who could exonerate or identify him, she was hospitalized at the time, and it was unclear whether she would ultimately survive her injuries).

In the event – and only in the event – an identification procedure is found to have been unnecessarily and unduly suggestive, it must then be determined whether the suggestiveness of the procedure resulted in a substantial likelihood of misidentification. Liverman, 398 S.C. at 138, 727 S.E.2d at 426. Significantly, identification evidence may still be admissible if the State can prove by clear and convincing evidence the identification is reliable notwithstanding the suggestiveness of the identification procedure employed. Govan, 372 S.C. at 559, 643 S.E.2d at 95-96; see State v. Brown, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct. App. 2003) ("Reliability is the linchpin in determining the admissibility of identification testimony."). In determining whether the identification is reliable, a court must look to: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the identification. Govan, 372 S.C. at 559, 643 S.E.2d at 96; see also State v. Scipio, 283 S.C. 124, 127, 322 S.E.2d 15, 17 (1984) ("The reliability of an identification is determined by the facts."). Upon examining those factors, a court ordinarily should admit identification evidence and allow the jury to determine its worth "if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances[.]" Perry, 565 U.S. at 232; see Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983) (instructing the exclusion of evidence is a "drastic sanction" and should be "limited to identification testimony which is manifestly suspect").

Importantly though, due process concerns are **only** raised in cases in which government officials used an unnecessarily suggestive identification procedure. See Perry, 565 U.S. at 232, n. 1 ("[W]hat triggers due process concerns is police use of an unnecessarily suggestive identification procedure[.]"); see also Liverman, 398 S.C. at 140, 727 S.E.2d at 427 (recognizing

preliminary judicial inquiry regarding the reliability of identification evidence is only required when "it is contended that an identification is obtained under unnecessarily suggestive circumstances arranged by state action"). If no improper law enforcement activity is involved, there is no proper basis upon which to exclude identification evidence as there is nothing to deter, and the reliability of the identification evidence will be up to the jury to determine after the evidence is tested through the ordinary mechanisms of trial, including vigorous cross-examination. See Perry, 565 U.S. at 232-233 ("Our decisions . . . turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photographic array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." (footnote omitted)); see also State v. Brown, 38 Ohio St. 3d 305, 310-311, 528 N.E.2d 523, 533 (Ohio 1988) ("The rationale for excluding a tainted pretrial identification is to protect the defendant from misconduct by the state. In the facts before us, there was no state action. . . . The alleged suggestiveness of the identification, therefore, goes to weight and reliability of the testimony rather than admissibility."); see generally Davis v. United States, 564 U.S. 229, 236-237 (2011) (recognizing the exclusionary rule solely exists to deter future constitutional violations).

Notably, in State v. Tisdale, 338 S.C. 607, 610-611, 527 S.E.2d 389, 391 (2000), this Court addressed a challenge to the admissibility of evidence of eyewitness identifications made after the witnesses saw Tisdale through a television broadcast and a newspaper article. In that case, Tisdale committed an armed robbery of a bank and was arrested later the same day after

officers tracked him down through their investigation into the incident. Id. at 610, 527 S.E.2d at 391. Following Tisdale's arrest, an officer assembled a photographic lineup to show to several bank employees present during the armed robbery. Id. However, before he could show the lineup to the witnesses, one of the employees notified him she believed Tisdale was the robber after seeing him on a television broadcast about his arrest while two other employees identified Tisdale as the robber after seeing his photograph in a newspaper article. Id. Tisdale was subsequently charged with several crimes, including armed robbery, and he proceeded forward to trial. Id. at 610-611, 527 S.E.2d at 391. During trial, Tisdale moved to suppress the identifications made by the bank employees, but the trial judge denied the motion and Tisdale was ultimately convicted of the charged crimes. Id. Tisdale then appealed his convictions, arguing the trial judge reversibly erred by denying his motion to suppress the identification evidence. Id. On appeal, this Court affirmed. Id. In affirming, this Court concluded the typical reliability analysis to be conducted when determining the admissibility of identification evidence was not applicable to Tisdale's case in light of the fact the identifications were made through the media without any law enforcement involvement. Id. at 612-613, 527 S.E.2d at 392. As a result, this Court held the trial judge committed no error by admitting the identification evidence during trial. Id. at 613, 527 S.E.2d at 392. Moreover, even assuming the typical reliability analysis was applicable to Tisdale's case, this Court concluded the identification evidence was nonetheless admissible under the totality of the circumstances in light of the fact the identifications were made less than twenty-four hours after the robbery, the witnesses had a good opportunity to observe the robber, and the witnesses were all certain of their identifications. Id. at 613-614, 527 S.E.2d at 393.

In the case sub judice, the trial judge committed no error by admitting the identification evidence during Appellant's trial because that evidence was not the product of any government action. That is true because, much like the eyewitnesses in Tisdale, the victim in Appellant's case identified Appellant not by taking part in a suggestive identification procedure arranged by law enforcement officers but, instead, by viewing Appellant's mugshot through the media and the internet. Importantly, nothing suggested the police officers investigating the armed robbery encouraged Victim to watch a news broadcast, read a newspaper, or search the internet in order to identify the robber, and nothing was presented indicating any of the officers attempted to influence or manipulate the media coverage of the brazen toy store robbery committed by Appellant. Instead, Victim specifically testified the police did not seek to have her participate in an identification procedure, and she personally decided to notify them when she identified Appellant as the robber through her own independent actions. Under those circumstances, no out-of-court identification procedure was employed or involved in Appellant's case, and, therefore, Victim's identification of Appellant as the robber simply was not the product of an identification procedure, including one that was unnecessarily and unduly suggestive. Cf. State v. Smith, 681 So. 2d 980, 986 (La. Ct. App. 1996) ("The viewing of television news coverage of a defendant's arrest is not an 'identification procedure.' " (citation omitted)). As a result, Appellant's due process rights were not implicated or violated by Victim's out-of-court or in-court identifications of Appellant, and the trial judge properly allowed the identification evidence to be admitted during trial. See Tisdale, 338 S.C. at 613, 527 S.E.2d at 392 ("[B]ecause the police were not involved in the media identifications in this case, the trial judge did not err in allowing the tellers' identification testimony."); see also United States v. Sharpe, 193 F.3d 852, 868 (5th Cir. 1999) (rejecting a due process challenge to the admission of identification evidence

where the witness saw the defendant in a newspaper photograph prior to alerting the authorities and identifying the defendant in the courtroom because the witness's encounter with the photograph was unexpected, unplanned, and not arranged by the police); State v. Goudeau, 239 Ariz. 421, 456, 372 P.3d 945, 980 (Ariz. 2016) ("[A]lthough police disseminated Goudeau's composite sketch and photo to the media, there is no evidence that police attempted to influence any of these witnesses' pretrial identifications, for example, by arranging for or encouraging victims to view the media coverage. Consequently, even if the media coverage played a role in the victims' identifications of Goudeau – an issue disputed by the State and the victims – the State was not sufficiently responsible for the coverage to require a reliability determination." (citations omitted)); Williams v. State, 253 Ga. App. 458, 465, 559 S.E.2d 516, 523 (Ga. Ct. App. 2002) ("In this case, there is no evidence that the police or any other state actors were involved with either televising Williams's arrest or otherwise suggesting an identification to the witnesses. Beyond that, issues of witness credibility are for the trier of fact, and matters such as the basis for a witness's identification of Williams and the witness's ability to observe him at the crime scene were subjects for cross-examination and did not require that the identification testimony be excluded." (citations omitted)); Norris v. State, 265 Ind. 508, 512-513, 356 N.E.2d 204, 206 (Ind. 1976) ("[S]ince newspapers are free to print what they feel is appropriate, it is difficult to imagine how this type of witness-accused contact can be avoided, and no legitimate purpose would be served by subjecting the witness' subsequent in-court identification testimony to possible exclusion. . . . Any suggestion implanted in the witness' mind by seeing a suspect's photograph in the newspaper should go to the weight, and not the admissibility of the in-court identification."); Commonwealth v. Colon-Cruz, 408 Mass. 533, 542, 562 N.E.2d 797, 805 (Mass. 1990) ("If police have not in any way manipulated press reports, then simple exposure to

the media is not sufficient ground to suppress an identification."); State v. Webster, 166 N.H. 783, 789, 104 A.3d 203, 208 (N.H. 2014) ("Although law enforcement may have disseminated the photograph to the media, absent evidence that law enforcement also orchestrated the viewing of that photograph by a witness, there is no state action within the meaning of Biggers.").

Critically though, even assuming an unnecessarily suggestive identification procedure had somehow been employed, the identification evidence would nonetheless have been admissible during trial as no substantial likelihood of irreparable misidentification existed under the circumstances of Appellant's case. Looking to the relevant circumstances, Victim had an excellent opportunity to view Appellant during the course of the robbery because nothing was presented suggesting the robber ever wore a mask, the incident occurred during the middle of the day, and Victim had a long period of time in which to observe the robber's face both before and during the robbery from just a few feet away. Cf. State v. Turner, 373 S.C. 121, 128, 644 S.E.2d 693, 697 (2007) (finding identification evidence to be reliable where the victim had an ample opportunity to view her assailant at the time of the crime and had a "full facial view of him while he asked her questions"). Additionally, Victim's attention was heightened due to the fact she was a victim of an armed robbery, was threatened with a gun, and was physically assaulted by the robber. See Govan, 372 at 560, 643 S.E.2d at 96 (recognizing a victim's attention would have been heightened during an armed robbery); State v. Blassingame, 338 S.C. 240, 252, 525 S.E.2d 535, 541-542 (Ct. App. 1999) ("A person in fear of his life presumably has a more acute degree of attention to his surroundings than a mere passerby."). Likewise, Victim provided descriptions of the robbers after the crime, and nothing was presented suggesting her descriptions were inaccurate. Cf. State v. Frazier, 394 S.C. 213, 222, 715 S.E.2d 650, 654 (Ct. App. 2011) (finding an out-of-court identification to be sufficiently reliable even though the witness did not

provide a description of Frazier's physical appearance); Govan, 372 S.C. at 555, 643 S.E.2d at 93-94 (finding an out-of-court identification to be sufficiently reliable based on the consistency of the prior description even though the description of the suspect was simply "a black guy in a long black jacket and black hat (or rag)"); State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct. App. 1993) (finding identification evidence to be reliable even though the victim described the robber as wearing a ski jacket and cap and Johnson was not wearing a jacket or hat when he was apprehended). Furthermore, Victim immediately recognized Appellant as the robber upon seeing him through the media and internet, she expressed absolute certainty in her identification, and she was still certain of her identification by the time of trial. Cf. Frazier, 394 S.C. at 222, 715 S.E.2d at 654 ("Although Sanders's description of Frazier's jacket was incorrect, she demonstrated a high degree of certainty in her identification during the show-up."). Finally, Victim identified Appellant as the robber within just a few days of the incident, which meant only a brief period of time elapsed between the robbery and her identification. See United States v. Jones, 454 F.3d 642, 650 (7th Cir. 2006) (concluding "nine days is a relatively short delay" when determining the reliability of identification evidence); United States v. Downs, 230 F.3d 272, 275 (7th Cir. 2000) ("[F]ive days between the incident and the line-up is not such a long span of time that memory lapses would be a problem."). When considering the totality of those circumstances, the identification evidence in Appellant's case was sufficiently reliable such that there was no substantial likelihood of misidentification, and, thus, the trial judge committed no error by admitting that evidence even assuming its reliability needed to be analyzed prior to its admission. See Tisdale, 338 S.C. at 614-615, 527 S.E.2d at 393 (finding the identification evidence was properly admitted where the circumstances surrounding the out-of-court identifications supported a finding the evidence was reliable); see also Perry, 565 U.S. at 245

("[T]he jury, not the judge, traditionally determines the reliability of evidence."); Brown, 356 S.C. at 504, 589 S.E.2d at 785 ("Reliability is the linchpin in determining the admissibility of identification testimony.").

In conclusion, because no identification procedure was employed in Appellant's case and because no substantial likelihood of misidentification existed under the totality of the circumstances, the trial judge did not abuse his broad discretion by declining to employ the drastic remedy of suppressing the identification evidence, and the question of the reliability of the identification evidence was properly left for the jury to decide. See Harker, 800 F.2d at 443 ("The exclusion of evidence from the jury is . . . a drastic sanction, one that is limited to identification testimony which is manifestly suspect."); see also Perry, 565 U.S. at 232 ("[T]he reliability of relevant testimony typically falls within the province of the jury to determine. . . . [I]f the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth."); cf. State v. Washington, 323 S.C. 106, 112, 473 S.E.2d 479, 482 (1996) ("Because the jury had the opportunity to observe the witness and attach the credibility it deemed proper to his testimony, including the certainty or uncertainty of his identification, the identification is not unreliable."). Accordingly, the trial judge committed no error by admitting the identification evidence during trial, and Appellant's due process rights were in no way violated by that evidentiary decision.[4] See Govan, 372 S.C. at 556, 643 S.E.2d at

[4] Moreover, even assuming the admission of the identification evidence was somehow improper, its admission was entirely harmless because the other evidence presented during trial, which included Appellant's accomplice's testimony identifying Appellant as the armed robber, testimony establishing Appellant refused to surrender to the police after the robbery, and testimony establishing Appellant's fingerprints were recovered from the toy store's cash register drawer, overwhelmingly established Appellant was, in fact, the armed robber. See State v. Thompson, 276 S.C. 616, 621, 281 S.E.2d 216, 219 (1981) ("[Thompson]'s accomplice testified, subject to cross examination, against [Thompson] at trial and identified him in court. In light of the accomplice's damaging testimony and other corroborative evidence linking [Thompson] to the crime, the improper in-court identification by the clerk was merely cumulative to independent and overwhelming evidence of guilt."); see also State v. Bryant, 369 S.C. 511,

94 ("The decision to admit an eyewitness identification is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of that discretion, or the commission of prejudicial legal error."); see also Brathwaite, 432 U.S. at 116 ("[W]e cannot say that under all of the circumstances of this case there is a 'very substantial likelihood of irreparable misidentification.' Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." (citation omitted)). Appellant's convictions should be affirmed.

518, 633 S.E.2d 152, 156 (2006) ("[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result."); cf. State v. Jenkins, 412 S.C. 643, 652, 773 S.E.2d 906, 910 (2015) ("Notwithstanding the DNA evidence, there was abundant, independent evidence in the record from which the jury could have found [Jenkins] guilty.").

CONCLUSION

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

Respectfully submitted,

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September 14, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable R. Keith Kelly, Circuit Court Judge
Appellate Case No. 2016-001536

THE STATE,

Respondent,

vs.

COREY ANDREW BROWN,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies 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."

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PROOF OF SERVICE

I, Mark R. Farthing, certify that I have served the within Final Brief of Respondent on Appellant by sending two copies of the same to:

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I further certify that all parties required by Rule to be served have been served.
This 14th day of September, 2017.

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