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October 4, 2012

LaNelle C. DuRant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Bobby J. Barton

Dear Ms. DuRant:

I am enclosing two (2) copies of the Final Brief of Respondent, with proof of service, in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar # 15608

WMB/erd
Enclosures

cc: Honorable Jenny A. Kitchings (original and nine enclosed)
Victim Services

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case Tracking No. 2010169826

The State, Respondent,

vs.

Bobby J. Barton, Appellant.

FINAL BRIEF OF RESPONDENT

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II. The trial court properly charged the jury on the law of identification and the charge was complete when viewed as a whole.

III. The trial court did not err in giving the jury a correct and complete charge on the law of armed robbery and the lesser included offense of strong armed robbery.

IV. The trial court did not err in denying Appellant's motion to relieve counsel and appoint substitute counsel.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court did not err in denying Appellant's motion to suppress the identification because the discovery by the victim of Appellant's picture in a "mug shot" magazine was not State action and did not warrant suppression.

Appellant contends the trial court erred in denying his motion to suppress identification by the victim. He asserts the identification was the result of an unduly suggestive procedure because the victim saw Appellant's picture in a "mug shot" magazine prior to his identification of Appellant in a six-person photographic lineup. The procedure actually used by law enforcement was not unduly suggestive and the exposure of the victim to the "mug shot" magazine was not the result of State action. As a result, the trial court properly admitted the victim's identification of Appellant.

In criminal cases, the appellate court sits to review errors of law only. State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012). "Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) (citing State v. Johnson, 311 S.C. 132, 427 S.E.2d 718 (Ct.App.1993)).

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (emphasis added). "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." Liverman, 398 S.C. at ___, 727 S.E.2d at 425-426. Due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary. See Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243 (1977); see also, Perry v. New Hampshire, 132 S.Ct. 716, 718 (2012).

The United States Supreme Court recently discussed the need for a pretrial determination of an identifying witness's reliability in a setting in which police action played no role in the suggestive nature of the identification. Perry, 132 S.Ct. 716. In Perry, the defendant was standing beside an officer in the parking lot when he was spontaneously identified by a witness from a distance. The Court explained:

> We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. Our decisions, however, turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph 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.

Perry, 132 S.Ct. at 720-721. The Court continued: "A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances, the Court said, is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place. . . . This deterrence rationale is inapposite in cases . . . in which the police engaged in no improper conduct." Id. at 726 (citing Manson, 432 U.S. at 112). Finally, the Court holds: "The fallibility of eyewitness evidence does not, without the taint of

improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." Id. at 728.

This Court considered a similar situation in State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000). In that case, one witness identified the defendant from news footage of his post-arrest bond hearing and the other from a mug shot in a newspaper article the morning after the robbery. This Court found, even given the highly suggestive impact of the media influence, the trial court properly allowed the identifications into evidence because neither was the result of a suggestive procedure used by the State. Id. at 612-613, 527 S.E.2d at 392-393.

This Court, just like the Supreme Court in Perry, found no deterrent effect from excluding identifications in which the influence or suggestive nature arose from non-governmental sources. Id. at 614, 527 S.E.2d at 393 (citing State v. Brown, 528 N.E.2d 523, 532 (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. Hence, Manson is inapplicable here. The alleged suggestiveness of the identification, therefore, goes to weight and reliability of the testimony rather than admissibility. Moreover, any prejudicial effect of the testimony could have been cured by effective cross-examination. The testimony was properly admitted.")).

In the instant case, as in Perry and Tisdale, any suggestive influence in the pre-trial out of court identification arose from a non-governmental source. Appellant relies solely on the "mug shot" magazine in order to argue the suggestive nature of the identification. The victim found the magazine and began flipping through it when he identified Appellant as the person who robbed him. (T.62-63; 123-124; R. 39-40; 88-89).

He found the magazine several months before Investigator King called the victim to the sheriff's office to look at a photographic line-up. (T.67-68; 124; R. 44-45; 89). The only State involvement was presenting the victim a six person photographic lineup, in which the victim correctly identified Appellant.[1] (T.41-48; R. 18-25).

The magazine was not the result of State action, just like the mug shot appearing in the newspaper in Tisdale. No action of the State induced, elicited, or encouraged the identification of Appellant by the victim either in the magazine or at the photographic line-up. As a result, any suggestiveness created by the photograph appearing in the magazine inures to the weight and reliability of the identification, a consideration for the jury, and not to its admissibility to be determined by the trial judge. Appellant had full opportunity to cross-examine the victim and brought out all the information about his prior identification of Appellant through the magazine. (T.64-69; 103-104; 125-131; R. 41-46; 68-69; 90-96). The jury determined the identification was reliable and the State had proven beyond a reasonable doubt Appellant's identity as the robber.

Further, the State asserts the "mug shot" magazine is not nearly as suggestive as the identifications in Perry and Tisdale. In both those cases, the defendant was the sole person subject to identification. In this case, Appellant's picture was just one picture among hundreds in the magazine. (T.123-124; R. 88-89). Further, while the magazine identified their name and crime, the victim testified he did not know Appellant's names and he could not read the crimes charged. (T.68; 124-125; R. 45; 89-90). As a result, he identified Appellant out of the hundreds of pictures in the magazine based solely on the picture identification. If anything, his ability to identify Appellant amongst hundreds of

[1] Appellant does not argue the six-person photographic lineup was unduly suggestive. The line-up, however, is the only source of State action regarding the pre-trial out of court identification by the victim.

photographs in the magazine lends credibility to his subsequent identification of Appellant in the officer created photographic line-up.

Relying on Tisdale and further supported by the United States Supreme Court opinion in Perry, the trial court properly admitted the victim's identification of Appellant and allowed the jury to pass on its ultimate weight and reliability.

II. The trial court properly charged the jury on the law of identification and the charge was complete when viewed as a whole.

Appellant maintains the trial court erred in failing to charge several specific requests to charge related to the victim's identification of Appellant. He maintains the trial court's charge was insufficient regarding the jury's consideration of the identification. The charge, when viewed as a whole, charged the appropriate law in South Carolina and more than adequately informed the jury of their responsibility in considering the identification of Appellant.

"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)). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Id. at 479, 697 S.E.2d at 583

A trial court is required to charge the current and correct law of South Carolina. See State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 73 (2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. See Rayfield, 369 S.C. at 119, 631 S.E.2d at 251; Sheppard, 357 S.C. at 665, 594 S.E.2d at 473; State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006). "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).

In U.S. v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972), the Court recommended "that trial courts include, as a matter of routine, an identification instruction" and provided a model identification instruction. See Speaks v. State, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). "The model instruction, which emphasized that the State had to prove the accuracy of the identification of the defendant beyond a reasonable doubt, 'was designed to focus the attention of the jury on the identification issue and minimize the risk of conviction through false or mistaken identification.'" Speaks, 377 S.C. at 399, 660 S.E.2d at 514 (citing State v. Jones, 344 S.C. 48, 59, 543 S.E.2d 541, 547 (2001)). Further, In State v. Simmons, 308 S.C. 80, 83, 417 S.E.2d 92, 94 (1992), the South Carolina Supreme Court "admonish[ed] the trial bench that in single witness identification cases the court should instruct the jury that the burden of proving the identity of the defendant rests with the state."

The instant case, however, is not a one witness identification case as Patricia Rice, who was present at the time of the robbery, also identified Appellant as the person who committed the robbery. In similar cases, the South Carolina Supreme Court has found the Telfaire instruction unnecessary and even a comment on the facts of the case, which is prohibited under the South Carolina Constitution. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); see also, State v. Robinson, 274 S.C. 198, 262 S.E.2d 729 (1980) (finding under the

circumstances of that case the Telfaire charge would be a comment on the facts and the charge 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."); State v. Motes, 264 S.C. 317, 215 S.E.2d 190 (1975) (finding where two individuals, including the wife driving the vehicle from which the defendant fired fatal shots, identified the defendant, the Telfaire instruction was not necessary because the court's instruction 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); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (finding trial court did not err in refusing to give Telfaire charge because it would amount to charge on the facts of the case and the charge given adequately informed the jury of the need to find the testimony identified the defendant as the offender beyond a reasonable doubt).

Appellant sought a charge even more detailed than the Telfaire charge. Specifically, he asked the court to charge:

> 1. Whether the witness knew the defendant before the crime took place.
> 2. Whether the witness had a good opportunity to see the person.
> 3. Whether the witness seemed as though he was paying careful attention to what was going on.
> 4. Whether any description given by the witness was close to the way the defendant actually looked.
> 5. How much time had passed between the crime and the first identification by the witness.
> 6. Whether, at the time of the first identification by the witness, the conditions were such that the witness was likely to make a mistake because he was "cued" by the circumstances, for example, was the witness asked to pick out the person he saw from a group of similar people, was the witness asked to pick the defendant from a group of

> dissimilar persons, or was the witness simply asked if the defendant standing alone was the person involved?

(Defense Counsel's Request 7; R. 194). Appellant acknowledges the court gave the first two portions of the requested charge. It is the last four Appellant contends should have been given. The charges, especially number 6, are an impermissible comment on the specific facts of this case and are unnecessary to convey to the jury the importance of finding the identification was made beyond a reasonable doubt.

The charge given in the instant case, when viewed as a whole, more than adequately informed the jury of its role in determining the reliability and weight to be afforded the victim's identification of Appellant. The trial court informed the jury of their function in determining the credibility of witnesses; including their ability to believe or reject any portion of the testimony, and the fact they may consider whether the witness has an interest in the result of the trial or is prejudiced for or against the defendant. (T.247; R. 168). Further, the court provided a standard reasonable doubt charge indicating the State's burden of proving "each and every element" beyond a reasonable doubt, and properly defining reasonable doubt. (T.248-249; R. 169-170).

The trial court then specifically instructed the jury regarding the issue of the identification of Appellant. The court charged:

> A sign - - an issue in this case is the identification of the Defendant as the person who committed the crime charged. The State has the burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt the accuracy of the Defendant - - excuse me - - the accuracy of the identification of the Defendant before you may convict him. Identification testimony is an expression or belief or impression by - - expression of belief or impression by a witness. You must determine the accuracy of the identification of the Defendant. You must

> consider the believability of each identification witness in the same way as any other witness.
>
> You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. This will be affected by things like how long or short a time was available to view, how far or close the witness was, the lighting conditions and whether the witness had the chance to see or know the person in the past. Once again, I instruct you that the burden of proof on the State extends to every element of the crime charged and this specifically includes the burden of proving beyond a reasonable doubt the identity of the Defendant as the person who committed this offense or these offenses.

(T.249-250; R. 170-171). The instructions given in this case adequately informed the jury of its role as arbiter of reliability and whether the State met its burden of demonstrating Appellant's identity as the robber beyond a reasonable doubt. The trial court, therefore, did not err in refusing to give the remainder of Appellant's requested charge.

III. The trial court did not err in giving the jury a correct and complete charge on the law of armed robbery and the lesser included offense of strong armed robbery.

Appellant contends the trial court erred in providing the jury a corrected statement of the law which he asserts highlights the fact armed robbery may be proven where an individual uses a representation of a weapon. The trial court provided the jury with a complete and correct statement of the law as he is required.

The trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "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). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Mattison, 388 S.C. 469, 478–79, 697 S.E.2d 578, 583 (2010).

In this case, the court was required to properly charge the jury regarding the law of armed robbery and common law robbery. Armed robbery occurs when a "person . . . commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon. S.C. Code Ann. § 16–11–330 (2003) (emphasis added). The jury may, therefore, convict Appellant or armed robbery if it finds he committed the robbery while armed with a deadly weapon, or if Appellant represented he was and the victim believed it to be a deadly weapon. Only if the jury finds Appellant did not use a weapon and Appellant did not allege he was using a representation of a weapon then the jury should consider the lesser included

offense of robbery. "Included in armed robbery is the lesser included offense of robbery, which is defined as 'the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.'" State v. Mitchell, 382 S.C. 1, 4-5, 675 S.E.2d 435, 437 (2009).

The trial court properly charged the jury on the definition and elements of armed robbery. Explaining in order to convict Appellant of armed robbery, the State must prove "beyond a reasonable doubt that the Defendant was armed with a deadly weapon during the robbery or alleged, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon." (T. 261; R. 182). The court then defined a deadly weapon. The trial court then explained: "Now, if you find that the State has failed to prove that the Defendant was armed with a deadly weapon, you may then consider whether the State has proved beyond a reasonable doubt that the Defendant committed robbery, which is also known as strong arm robbery." (T.262; R. 183). The court then defined robbery for the jury.

The court, however, failed to instruct the jury that the only way to consider the lesser included offense of robbery or strong arm robbery, was for the jury also to find the State failed to prove Appellant did not allege he was armed while using a representation of a deadly weapon or an object the victim reasonably believed to be a weapon. (T.262; R. 183). The State correctly pointed out the court's failure to charge the jury must find the State failed to prove both possible means of demonstrating armed robbery before considering the lesser included offense. (T.263-264; R. 184-185).

The court then provided the jury with a correct charge on the law of armed robbery and the lesser included offense of robbery. The court properly defined the elements of armed robbery. Then the court correctly explained what the jury had to find in order to consider the lesser included offense. Specifically the judge charged: If you find that the State has failed to prove that the Defendant was armed with a deadly weapon or with a representation of a deadly weapon after having alleged that he was armed, then you may consider whether or not, uh, he is guilty of Strong Arm Robbery." (T.265; R. 186).

The trial court merely gave a correct, and complete, statement of the law as he is obligated. Appellant cannot be prejudiced by the trial court's charge when the charge is entirely correct based on the relevant law or armed robbery and the lesser included offense of robbery or strong arm robbery.

IV. The trial court did not err in denying Appellant's motion to relieve counsel and appoint substitute counsel.

Appellant contends the trial court erred in denying his motion to relieve his counsel and appoint new counsel based on counsel's alleged disclosing a confidentiality. Counsel did not disclose any confidential information, did not believe the information was provided to her in confidence, and used the information at a preliminary hearing to benefit Appellant. As a result, there was evidence supporting the trial court's denial of Appellant's motion to relieve counsel.

An accused has the right to the assistance of counsel. U.S. Const. amend. VI; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). "[A] motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." State v. Justus, 392 S.C. 416, 418, 709 S.E.2d 668, 670 (2011); State v. Gregory, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005). Appellant bears the burden to show satisfactory cause for removal. State v. Graddick, 345 S.C. 383, 386, 548 S.E.2d 210, 211 (2001).

Appellant filed his motion to relieve counsel on August 9, the first date of trial. The motion was dated August 6. Counsel received notice of trial nearly two weeks before and indicated she gave Appellant notice his case had been called. Appellant, therefore, waited until right as trial was beginning to move to relieve his counsel. (T.6-7; Court's Exhibit 1; R. 6-7; 196).

Appellant maintained his counsel breached confidentiality by disclosing information he divulged to her for use as a surprise at trial. He alleges he told his counsel about his relationship with the woman present with him at the robbery. He maintained he

told counsel they lived together and she was "an ex-live-in common law wife." He asserted he gave counsel the information so she could "make a file" and "use [the information] as an element of surprise in this court." (T.9-10; R. 9-10).

Counsel testified she was not given the information in confidence. She presented the information to an investigator to get him to look in that direction to determine if there was more there than originally determined. (T.11; 11). She maintained the real issue between her and Appellant was his desire to file motions and make arguments as a form of hybrid representation which is not allowed. (T.11-13; R. 11-13). See Jones v. State, 348 S.C. 13, 558 S.E.2d 517 (2002)(counsel cannot serve as a mere conduit for pro se documents in an effort to avoid the prohibition against hybrid representation and the displeasure of his client) and Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989)(no right to hybrid representation).

Most significantly, Patricia Rice, the woman with him at the robbery was testifying on behalf of the State as a witness against Appellant. The State certainly would know this information from her, and the solicitor even put on the record the fact he knew the two had lived together. As a result, Appellant's information would not have been a surprise at trial. He also specifically indicated he received the information from the Rice, his witness, and not opposing counsel. (T.15; R. 15).

Appellant failed to provide a sufficient basis to warrant removal of his counsel and the trial judge certainly did not abuse his discretion in denying Appellant's motion, especially in light of the solicitor's ability to learn the information directly from the State's own witness.

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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Assistant Attorney General

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ATTORNEYS FOR RESPONDENT

October 4, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Edward W. Miller, Circuit Court Judge
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The State, Respondent,

vs.

Bobby J. Barton, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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STATE OF SOUTH CAROLINA

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Appeal from Greenville County
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The State, Respondent,

vs.

Bobby J. Barton, Appellant.

PROOF OF SERVICE

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

LaNelle C. DuRant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served. This 4th day of October, 2012.

Ellen R. DuBois

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