STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Kristi Lea Harrington, Circuit Court Judge
Appellate Case No. 2011-203366

THE STATE,

Respondent,

vs.

DOUGLAS MONRAY THOMPSON,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

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

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

In August of 2010, Appellant Douglas Monray Thompson and his accomplice, Clarence J. Fishburne, were arrested following an investigation into a home invasion and robbery. In October of 2010, the Berkeley County grand jury indicted Appellant and Fishburne for two counts each of armed robbery, two counts each of kidnapping, and one count each of first-degree burglary. In November of 2011, the Berkeley County grand jury re-indicted Appellant and Fishburne for the same offenses. On November 7, 2011, a jury trial was commenced in the Berkeley County court of general sessions with the Honorable Kristi Lea Harrington, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant and Fishburne as indicted. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of fifteen years for each of his convictions and sentenced Fishburne to concurrent terms of imprisonment of twenty years for each of his convictions. Subsequently, Appellant filed a timely notice of appeal.

STATEMENT OF FACTS

Around 10:30 p.m. or 11:00 p.m. on the evening of August 6, 2010, Adao Olivera went out onto the back porch of the apartment he shared in Goose Creek, South Carolina, with his pregnant niece, Paulino Silva ("Paulino"), Paulino's husband, Paulo Silva ("Paulo"), and Paulino and Paulo's young daughter, Carrie, to smoke a cigarette. (R. p. 137; pp. 252-253; p. 264; pp. 438-439; pp. 501-502). A little while later, Paulo joined Olivera on the back porch and began speaking with him. (R. p. 253; p. 287; pp. 438-439; pp. 501-502). A few minutes after that, three black males approached them, displayed a gun, demanded that they give them money, took Paulo's wallet, grabbed Olivera, and began choking him. (R. p. 253; p. 287; pp. 438-440; pp. 501-502). The man with the gun then insisted that Paulo open the back door to the apartment, and Paulo reluctantly did so. (R. p. 255; p. 440; p. 508). When he opened the back door, Paulo saw Paulino, told her they were being robbed, and asked her to go for help in Portuguese. (R. p. 255; p. 502). Paulino then fled from the apartment through the front door before Paulo, Olivera, and the robbers entered the apartment. (R. p. 255; p. 440; p. 502).

After entering the apartment, the gunman demanded to know where Paulo's wife was, and Paulo told him that she was in the front room. (R. p. 255). The men then went to the front room and did not find Paulino. (R. p. 255). In response, the gunman ordered Paulo and Olivera to go upstairs, and Paulo, Olivera, the gunman, and another of the robbers went upstairs and entered one of the bedrooms while the other robber remained downstairs. (R. pp. 255-257; p. 440; p. 452). The gunman then forced Paulo and Olivera to kneel down, and the other robber struck Paulo in the head. (R. p. 256; pp. 440-441). After that, the gunman demanded to know where Paulino was, threatened to kill Paulo, and began counting down while the other robbers began taking the victims' belongings,

including a laptop computer, approximately $600 in cash, and several cellphones. (R. pp. 256-257; p. 279; p. 283).

Meanwhile, after fleeing from the apartment, Paulino ran to the apartment of her neighbor, Lucineia Rodriguez, and knocked on the door until Rodriguez answered. (R. pp. 502-503; p. 511). When Rodriguez opened the door, Paulino told her what had happened, and Rodriguez responded by quickly heading to the Silvas' apartment to rescue Carrie. (R. p. 511). At the Silvas' apartment, Rodriguez encountered a man with a gun, and he told her to come inside. (R. p. 511). She then entered the apartment, headed upstairs, saw a man holding Olivera and Paulo in one of the bedrooms, and went into the other bedroom to retrieve the Silvas' daughter. (R. pp. 511-512).

Upon seeing Rodriguez inside of the apartment, the robbers became panicked and rapidly fled. (R. pp. 256-257; pp. 441-442; p. 512). Afterwards, Paulo and Olivera went outside and met up with some of their neighbors. (R. p. 257; p. 442). Paulo then briefly looked around for the robbers, went to the apartment manager's home, was unable to locate the apartment manager, encountered a Brazilian man, and spoke with him about the robbery. (R. pp. 257-258). While speaking with the Brazilian man, he saw two people walking down the road in clothing different from what the robbers were wearing and told the Brazilian man that he thought they were the robbers. (R. pp. 258-259). The Brazilian man then asked his wife to call the police, and Paulo returned to his apartment. (R. pp. 258-259). Back at the apartment, Paulino discovered a cellphone that was abandoned by the robbers when they fled. (R. p. 455; pp. 504-505).

At approximately 11:35 p.m., someone from the apartment complex called 911 and reported that two black males wearing red-and-white-striped shirts committed a

robbery at gunpoint.[1] (R. p. 171; p. 442). Officers were then quickly dispatched to the scene, and Deputy Jason Charlton of the Berkeley County Sheriff's Office arrived at the apartment complex at 11:39 p.m. (R. pp. 171-172; pp. 297-299; p. 325). Upon arriving, Deputy Charlton briefly spoke with people standing in the parking lot of the apartment complex, including the Brazilian man who Paulo spoke with, and was advised a laptop was taken during the robbery, the suspects were black males, and the suspects were armed with a gun. (R. p. 258; pp. 301-302). The people in the parking lot then indicated that the robbers were walking along the side of a nearby road, and Deputy Charlton left to try and locate them. (R. p. 303).

Moments later, Deputy Charlton encountered three black males walking away from the apartment complex approximately one-quarter of a mile away from the entrance to it.[2] (R. p. 173; pp. 303-304; p. 357). One of the men was carrying a laptop. (R. p. 304). In response, Deputy Charlton stopped his vehicle and started to approach the men. (R. p. 305). However, upon seeing the officer, Appellant Douglas Monray Thompson, who was carrying the laptop, dropped the computer and began hiking up his pants like he was preparing to run while Clarence J. Fishburne, another of the men, told the others not to run and the third man fled. (R. pp. 305-306; pp. 358-359). Deputy Charlton then detained Appellant and Fishburne, frisked them for weapons, found none, and waited for another officer to arrive on the scene to assist him. (R. pp. 307-308).

[1] During trial, Theresa Barnett, the operations supervisor at the Berkeley County 911 call center, indicated that there was a language barrier between the 911 operator who received the call and the caller who reported the robbery. (R. p. 171).

[2] Deputy Charlton arrived at the location of the men only seconds after leaving the apartment complex. (R. p. 308). The men were the first black males Deputy Charlton encountered, and they were the only black men in the area at the time. (R. pp. 331-332).

A few minutes later, Deputy Robert Ollic of the Berkeley County Sheriff's Office arrived and secured Appellant and Fishburne while Deputy Charlton returned to the apartment complex to speak with the victims. (R. pp. 108-110; p. 174; pp. 307-308). Deputy Charlton then met with Paulo and Olivera along with one of their neighbors, Rubio Hillario, who assisted in translating for the officer and the victims.[3] (R. pp. 259-260; pp. 308-309; p. 443). After speaking with them briefly, Deputy Charlton advised the men that he had detained some people who may or may not be the robbers, told them he wanted them to see if they could identify them, transported them to the location where Appellant and Fishburne were being detained, pulled up in front of the suspects' location, stopped approximately twenty to thirty feet away, and used his spotlight to illuminate Appellant and Fishburne, who were standing in front of Deputy Ollic's vehicle with their hands handcuffed behind their backs and with a police officer beside each of them. (R. p. 260; pp. 270-271; p. 290; pp. 310-311; pp. 333-334; pp. 443-444; p. 454). Upon seeing the suspects, Paulo and Olivera almost instantly began nodding and pointing in the direction of Appellant and Fishburne, quickly identified them as the robbers without any hesitation, and indicated they were certain of their identifications. (R. p. 260; pp. 291-293; pp. 311-312; p. 444).

Thereafter, Appellant and Fishburne were arrested and searched incident to their arrests. (R. p. 313). During the searches, Deputy Charlton discovered two cellphones in Fishburne's pockets, a cellphone in Appellant's pocket, and $442 in cash in Appellant's possession. (R. p. 313; p. 315; p. 318; p. 372). Deputy Charlton then asked Paulo and Olivera to identify the items discovered during the searches, and they identified the two

[3] Paulo and Olivera primarily spoke Portuguese and spoke very little English while Deputy Charlton spoke very little Portuguese. (R. p. 42; p. 309).

cellphones recovered from Fishburne's pockets as phones that belonged to Olivera and identified the laptop as the one taken from their home during the robbery. (R. p. 260; pp. 264-266; pp. 293-294; p. 315; pp. 317-318; pp. 444-446). The victims then provided Deputy Charlton with the cellphone that Paulino found in the apartment after the robbery, and the officer looked inside and found a picture of Fishburne stored in the phone. (R. p. 261; pp. 319-322).

Subsequently, Appellant and Fishburne were indicted for two counts of armed robbery, two counts of kidnapping, and one count of first-degree burglary, and they proceeded to trial together. (R. pp. 7-12; pp. 656-665). At the outset of trial, Fishburne's defense counsel objected to the admission of any identification evidence, and the trial judge conducted an in camera hearing on the motion. (R. p. 19; pp. 30-31; p. 35).

During the hearing, Deputy Charlton testified he responded to the report of a home invasion at the victims' apartment complex, was advised that three suspects were involved, and learned the suspects used a gun and took a laptop during the robbery. (R. pp. 35-37). At the time of the hearing, Deputy Charlton could not remember the specifics of the reported descriptions of the suspects he received but recalled that the victims described the suspects as black males. (R. p. 75; p. 88; p. 90). After receiving the description of the suspects, Deputy Charlton indicated he encountered three men matching the descriptions of the robbers only one-quarter of a mile away from the apartment complex where the robbery occurred and that one of the men was carrying a laptop. (R. p. 38). Based on his observations, Deputy Charlton stated he approached the men, one of the men dropped the laptop, another of the men told the others not to flee, and the third man fled. (R. pp. 38-40). He testified he then detained the two that did not flee until Deputy Ollic arrived on the scene, went to the apartment complex, told the

victims that he found two men who may or may not have committed the robbery, asked them to come view the men, and directly brought them to Appellant and Fishburne's location. (R. pp. 40-43). Upon arriving, the officer indicated Appellant and Fishburne were positioned in front of a police vehicle with their hands handcuffed behind their backs, he used a spotlight to illuminate them, and the victims "rather instantly" identified them as the robbers without any prompting or hesitation. (R. pp. 44-47). Subsequently, Deputy Charlton stated the victims were shown property recovered during the investigation and search of Appellant and Fishburne and the victims identified that property as belonging to them. (R. p. 50; p. 66). He further noted Appellant and Fishburne were the only non-uniformed people on the scene during the show-up, the victims were not separated during the show-up, and he could not remember if the victims indicated that one of the suspects changed his shirt after the robbery. (R. p. 61; pp. 63-64; pp. 83-84).

In addition to Deputy Charlton's testimony, Deputy Ollic testified about the details of the show-up. (R. pp. 110-111). During his testimony, Deputy Ollic stated the suspects had their hands handcuffed behind their backs at the time of the show-up, he placed the suspects in front of a patrol car, the suspects were illuminated, and he stood out of the victims' line of sight while the identifications were made. (R. pp. 109-111). He further stated the suspects were identified one at a time and there were no other black males at the scene at the time of the identifications. (R. pp. 122-123).

Additionally, Olivera testified about the circumstances of his out-of-court identifications of Appellant and Fishburne as the robbers. (R. p. 129). Regarding the identifications, Olivera stated he was asked to identify the robbers not long after the robbery and was taken to their location. (R. p. 128). Once there, he indicated both

suspects were detained fifty feet from him, he saw them clearly after they were illuminated, he identified them as the robbers who went upstairs during the robbery, and he was certain of his identifications. (R. pp. 128-129; p. 146). He further testified he immediately recognized them as the robbers when the police vehicle stopped in front of them, was not told who to pick, thought one of the robbers was wearing a blue t-shirt but could not remember if that robber was present during the show-up, and personally felt like all black males have "a lot of similar facial features." (R. p. 130; p. 135; p. 147).

Similarly, Paulo also testified about the circumstances of his identifications of the robbers. (R. p. 153). Regarding the identifications, he stated he was asked to view some men shortly after the robbery to see if they were the people who robbed him, he was taken approximately 200 yards from the apartment complex, the suspects were illuminated, and he immediately recognized the suspects as the robbers and was certain of his identifications. (R. pp. 151-153). He also testified that he prepared a statement after the crimes indicating that the robber who choked Olivera was wearing a blue t-shirt but that neither of the men at the show-up was wearing such a shirt. (R. p. 155). Furthermore, he stated the show-up was performed approximately an hour after the robbery while conceding he was not good at estimating time and further indicated he believed many black males look similar. (R. p. 161; p. 168).

At the conclusion of the hearing, Appellant's defense counsel argued the show-up identification procedure used in the case was unduly suggestive. (R. pp. 193-194). In support of that contention, Appellant's defense counsel asserted one of the victims indicated all black males looked the same to him, the victims did not have a good opportunity to view the suspects during the robbery, the victims did not know what was going on because the robbery occurred late at night, the victims' descriptions of the

suspects did not contain sufficient detail and were inconsistent in regard to Appellant and Fishburne's clothing, there was confusion regarding the number of robbers and the certainty of the victims' identifications, and the details of the show-up were suggestive as both Appellant and Fishburne were handcuffed and placed in front of a police vehicle. (R. pp. 195-198). For those reasons, Appellant's defense counsel moved for the victims' out-of-court identifications to be suppressed, and Fishburne's defense counsel joined in the motion. (R. pp. 201-202).

In response, the solicitor asserted the show-up identification procedure used was not unduly suggestive and there was no substantial likelihood of misidentification. (R. p. 203). In support of that assertion, the solicitor noted the victims had an extensive opportunity to view the robbers during the incident, the victims' attention was focused because of fear, and any deficiencies in the victims' descriptions of the perpetrators resulted from language barrier issues. (R. pp. 203-204). The solicitor further noted the show-up was conducted shortly after the crimes only a short distance away from the scene of the crimes while the victims' memories were still fresh and at a time when the suspects had not had time to dispose of the victims' laptop and cellphones. (R. pp. 204-205). Based on those circumstances, the solicitor asserted there was no substantial likelihood of misidentification and the identifications should be admitted. (R. p. 207).

After considering the arguments of counsel, the trial judge denied Appellant and Fishburne's motion to suppress the identification evidence. (R. p. 212). In making that ruling, the trial judge found the show-up identification procedure was not unduly suggestive based on the facts that it occurred within an hour of the crimes near the scene of the crimes and that the suspects matched the limited description that was provided and were still in possession of the victims' belongings. (R. p. 211). The trial judge further

found the victims had an opportunity to view the suspects and expressed certainty in their identifications. (R. pp. 211-212).

Thereafter, during trial, Deputy Charlton and the victims testified about the robbery, the ensuing law enforcement investigation into the robbery, and the identifications of Appellant and Fishburne as two of the robbers. (R. pp. 252-266; pp. 298-322; pp. 438-447; pp. 501-504; pp. 511-512). During his testimony before the jury, Paulo testified he got a good look at the robbers, identified them during the show-up conducted after the robbery, and was entirely certain of his identifications. (R. p. 260; pp. 292-293). He further identified the laptop introduced into evidence during trial as the one that was taken from his apartment during the robbery. (R. pp. 264-266; pp. 293-294). Subsequently, on cross-examination, he acknowledged he had previously prepared a statement indicating one of the robbers was wearing blue clothing even though neither of the men he identified was wearing blue clothing. (R. pp. 267-268). He further acknowledged he had previously indicated that the faces of black men all looked the same to him. (R. p. 287).

During Deputy Charlton's testimony, he noted the identifications of Appellant and Fishburne were made without any hesitancy shortly after the crimes and that the victims' property was discovered in a search of Appellant and Fishburne after they were identified. (R. p. 301; p. 308; pp. 312-313; p. 315; p. 334). He further stated the victims' identifications of Appellant and Fishburne as the robbers occurred "almost instantly" upon seeing them. (R. pp. 311-312). Additionally, he noted that Appellant was carrying the victims' laptop when he first encountered him and that Fishburne's cellphone was located in the victims' apartment after the robbery. (R. p. 306; pp. 321-322). Subsequently, on cross-examination, he acknowledged the victims were not separated

during the show-up and he did not find any clothing or a gun during his investigation. (R. p. 336; pp. 339-340).

Furthermore, during Olivera's testimony, Olivera indicated he got a good look at all three of the robbers during the robbery since none of them were wearing masks, he could clearly see the suspects during the show-up, and he was certain of his identifications. (R. p. 444; pp. 457-458). He further noted his cellphones were discovered during a search of the suspects after they were apprehended and the cellphone of one of the robbers was discovered in his home after the robbery. (R. pp. 445-447). Subsequently, on cross-examination, he acknowledged he did not know any black males and had previously testified all black males have similar facial features. (R. pp. 464-465).

At the conclusion of the evidentiary phase of trial, the parties presented their closing arguments to the jury. (R. p. 516; pp. 529-530; pp. 537-603). During his closing argument, Fishburne's defense counsel attacked the reliability of the out-of-court identifications made by Silva and Olivera while reminding the jury that both of the victims indicated "black men look similar." (R. pp. 560-561). Likewise, during his closing argument, Appellant's defense counsel specifically challenged the reliability of the victims' out-of-court identifications by pointing out the discrepancies in their testimony and emphasizing to the jury that the victims both acknowledged that all black men looked the same to them. (R. pp. 569-572).

Following the presentation of the closing arguments, the trial judge instructed the jury on the applicable law. (R. pp. 604-623). As part of her jury charge, the trial judge instructed the jury that Appellant and Fishburne were presumed to be innocent, that the State had the burden of proving their guilt beyond a reasonable doubt, and that it was the

duty of the jury to determine the credibility and believability of the witnesses who testified during trial. (R. pp. 608-611). Additionally, regarding the identification of the perpetrators of the crimes, the trial judge instructed:

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

(R. pp. 613-614).

Thereafter, at the conclusion of trial, the jury convicted Appellant and Fishburne of all of the indicted offenses. (R. pp. 627-628). Following the verdict, Fishburne personally addressed the trial judge during the sentencing proceedings, expressed remorse for what happened to the victims, and prayed for forgiveness. (R. pp. 642-643). The trial judge then sentenced Appellant to an aggregate term of imprisonment of fifteen years and Fishburne to an aggregate term of imprisonment of twenty years. (R. pp. 643-644; pp. 653-654).

ARGUMENT

The trial judge committed no error in admitting evidence of the victims' out-of-court identifications of Appellant and his accomplice as the perpetrators of the charged offenses because the show-up identification procedure that was employed in Appellant and his accomplice's case was not unduly suggestive and the identification evidence was still reliable under the totality of the circumstances even if the show-up identification procedure was unduly suggestive. However, even assuming the trial judge somehow erred in admitting the identification evidence, any error was entirely harmless in light of the other overwhelming evidence of guilt presented during trial and the procedural safeguards in place that enabled Appellant and his accomplice to call into question the reliability of the identification evidence.

Appellant contends the trial judge erred in admitting evidence of the victims' out-of-court identifications of Appellant and Fishburne as the perpetrators of the charged offenses. In support of that contention, Appellant maintains that the show-up identification procedure used in his case was unduly suggestive, a substantial likelihood of misidentification existed, and the identification evidence was inherently unreliable. To the contrary, the trial judge properly declined to suppress the identification evidence because the show-up identification procedure used in Appellant's case was not unduly suggestive under the totality of the circumstances. Furthermore, even if the show-up identification procedure was unduly suggestive, the trial judge nonetheless properly admitted the identification evidence because the evidence was reliable under the totality of the circumstances and there was no very substantial likelihood of misidentification. For those reasons, the trial judge committed no error in admitting the identification evidence. However, even assuming the trial judge somehow erred in admitting the evidence, any error was entirely harmless in light of the other overwhelming evidence of guilt presented during trial and the procedural safeguards in place that enabled Appellant and Fishburne to call into question the reliability of the identification evidence. Appellant's convictions should be affirmed.

A. Propriety of the Admission of the Identification Evidence

The reception or exclusion of evidence is a matter left largely to the sound discretion of the trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); see State v. Govan, 372 S.C. 552, 556, 643 S.E.2d 92, 94 (Ct. App. 2007) ("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."). On appeal, appellate courts give "great deference" to trial judges when reviewing evidentiary rulings. State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010); see 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."). Moreover, an appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."); 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."). "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).

In determining the admissibility of evidence of an out-of-court identification, a court must conduct a two-prong inquiry into the matter. See Neil v. Biggers, 409 U.S.

188, 199-200 (1972) (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 unduly suggestive and then determining whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Govan, 372 S.C. at 558, 643 S.E.2d at 95; 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."). A trial judge should only exclude the identification evidence if there is " 'a **very substantial** likelihood of irreparable misidentification.' " Perry v. New Hampshire, ___ U.S. ___, ___, 132 S. Ct. 716, 720 (2012) (emphasis added and citation omitted). Significantly, the exclusion of evidence is a "drastic sanction" and should be "limited to identification testimony which is manifestly suspect." Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983).

Amongst the various identification procedures, single person show-ups are disfavored because they are inherently suggestive. State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999). However, "[m]ost eyewitness identifications involve some element of suggestion[,]" and suggestiveness alone does not mandate the exclusion of identification evidence. Perry, 132 S. Ct. at 727; see State v. Brown, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct. App. 2003) ("Suggestiveness alone does not mandate the exclusion of evidence."). Accordingly, there is no bright line rule concerning show-ups, and the admissibility of an identification made during a show-up is controlled by the particular facts and circumstances of each individual case. Gibbs v.

State, 403 S.C. 484, 494, 744 S.E.2d 170, 175 (2013); see Perry, 132 S. Ct. at 720 ("An identification infected by improper police influence, our case law holds, is not automatically excluded.").

If a show-up is conducted, the show-up may be proper where it occurs: (1) shortly after the alleged crime; (2) near the scene of the crime; (3) while the witness' memory is still fresh; (4) when the suspect has not had time to alter his looks or dispose of evidence; and (5) when it may expedite the release of innocent suspects and enable the police to determine whether they need to continue searching. Brown, 356 S.C. at 503-504, 589 S.E.2d at 785; see also Willis v. Garrison, 624 F.2d 491, 493-494 (4th Cir. 1980) (acknowledging show-ups are inherently suggestive but recognizing prompt on-the-scene show-up identifications can promote fairness by enhancing the reliability of the identifications and permitting the expeditious release of innocent suspects). The use of a show-up is less objectionable the closer the show-up is in time and proximity to the scene of the crime. Brown, 356 S.C. at 504, 589 S.E.2d at 785. Furthermore, a show-up may even be proper where the police refer to the suspect as a suspect and the suspect is handcuffed and in the presence of law enforcement officers. Id.

However, even assuming the particular show-up procedure used in a case is found to be unduly suggestive, the witness' identification may still be admissible if the State can prove by clear and convincing evidence that the identification is reliable notwithstanding the suggestiveness of the show-up. Govan, 372 S.C. at 559, 643 S.E.2d at 95-96. "Reliability is the linchpin in determining the admissibility of identification testimony." Brown, 356 S.C. at 504, 589 S.E.2d at 785. To determine 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."). "[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." Perry, 132 S. Ct. at 720.

In State v. Mansfield, 343 S.C. 66, 69-70, 538 S.E.2d 257, 259 (Ct. App. 2000), this Court considered whether identification evidence obtained from a show-up identification procedure conducted at a police station was properly admitted during trial. In that case, a neighbor witnessed a man later identified as Mansfield attempting to break into a home in his neighborhood in the middle of the afternoon. Id. During the attempted break-in, the neighbor looked right at Mansfield's face and attempted to speak with him before Mansfield quickly exited the area. Id. at 70, 538 S.E.2d at 259. Thereafter, the neighbor contacted the authorities and correctly described Mansfield's height, race, skin tone, and shirt but incorrectly indicated that Mansfield was wearing white shorts and tennis shoes and had his hair in plaits. Id. A short time later, Mansfield was apprehended while wearing grey sweat pants pulled up to his knees and boots and with his hair in an afro. Id. at 70-71, 538 S.E.2d at 259. Following his apprehension, Mansfield was transported to a police station, and the neighbor identified him as the attempted burglar. Id. at 71, 538 S.E.2d at 259. Subsequently, Mansfield sought the exclusion of the neighbor's identification of him as the perpetrator of the crime, the motion was denied, and Mansfield appealed. Id. at 71-72, 538 S.E.2d at 259-260. On appeal, this Court

affirmed Mansfield's conviction after finding the neighbor's identification of Mansfield to be reliable under totality of the circumstances. Id. at 79-80, 538 S.E.2d at 263-264. In reaching that conclusion, this Court relied upon the following circumstances supporting the reliability of the identification: (1) the neighbor's attention was heightened; (2) the neighbor had a good opportunity to view the attempted burglar in good lighting; (3) the neighbor expressed certainty in his identification of Mansfield; (4) the neighbor's description of Mansfield was generally consistent even though there were slight discrepancies in the description of Mansfield's hair and clothing; and (5) the show-up was conducted less than an hour after the crime. Id.

Likewise, in State v. Govan, 372 S.C. at 555, 643 S.E.2d at 93, this Court again considered the admissibility of identification evidence obtained through the use of a show-up identification procedure. In that case, law enforcement officers responded to the scene of an armed robbery, and one of the victims described the suspect to the officers as a black male wearing a black jacket and a black hat or rag. Id. at 555, 643 S.E.2d at 94. Roughly forty-five minutes after the robbery, Govan, who fit the description of the armed robbery suspect, was apprehended after abandoning evidence and attempting to flee from the police. Id. at 556, 643 S.E.2d at 94. Following Govan's arrest, the victim was transported to Govan's location and identified him as the perpetrator of the robbery. Id. Subsequently, during trial, Govan moved to exclude any identification evidence, the trial judge denied his motion, and Govan appealed. Id. at 558, 643 S.E.2d at 95. On appeal, this Court initially found the victim's out-of-court identification of Govan was not unduly suggestive in light of the fact that it occurred near the scene of the crime shortly after the crime was committed. Id. at 558-559, 643 S.E.2d at 95. Thereafter, this Court found the identification was reliable even if the show-up identification procedure was unduly

suggestive because the victim viewed Govan in a well-lit building from close proximity during the robbery, the victim had heightened attention due to the circumstances of the crime, the show-up occurred shortly after the crime, and the victim expressed certainty regarding his identification. Id. at 559-560, 643 S.E.2d at 96. For those reasons, this Court found the show-up was not unduly suggestive and was reliable under the totality of the circumstances and affirmed the trial judge's decision to admit the identification evidence. Id. at 560, 643 S.E.2d at 96.

In the case sub judice, the trial judge did not abuse her discretion in admitting the identification evidence because, although suggestive, the show-up identification procedure used in Appellant and Fishburne's case was not unduly suggestive. However, even if the particular circumstances of the show-up identification procedure employed rendered it unduly suggestive, the trial judge nonetheless properly admitted the identification evidence because the out-of-court identifications were reliable under the totality of the circumstances such that there was no "very substantial" likelihood of misidentification. See Perry, 132 S. Ct. at 720 (indicating that identification evidence should **only** be excluded where a very substantial likelihood of misidentification exists).

Initially, regarding the suggestiveness of the show-up identification procedure used, the investigating officers conducted the show-up in such a manner that it was not so suggestive that it was improper. Critically, the show-up was conducted within an hour of the robbery and, thus, took place shortly after the incident. Cf. Govan, 372 S.C. at 559, 643 S.E.2d at 95 (finding a show-up that occurred within approximately forty-five minutes of a robbery was not unduly suggestive). In fact, Deputy Charlton testified he apprehended Appellant and Fishburne within minutes of the 911 call about the robbery coming in, and he quickly transported the victims to Appellant and Fishburne's location

following their apprehension. Additionally, the show-up unquestionably occurred near the scene of the crimes as Deputy Charlton stopped Appellant and Fishburne only one-quarter of a mile away from the scene of the incident. Also, due to the brief period of time between the incident and the show-up, the witnesses' memories were still fresh, and they were able to express absolutely certainty in their identifications. Furthermore, although some evidence suggested the suspects may have had time to alter their looks prior to the show-up by possibly changing their shirts, Appellant and Fishburne had **not** had time to dispose of the proceeds of the robbery and were still in possession of a large quantity of cash, two of Olivera's cellphones, and a laptop computer stolen from the victims' apartment. Cf. id. ("Since one officer observed Govan drop the paper bag full of money and Govan was still in possession of his gun when he was apprehended, it would appear he had not had enough time to dispose of evidence."). Finally, the show-up certainly would have expedited Appellant and Fishburne's release and enabled the police to continue their search if the victims had indicated Appellant and Fishburne were not, in fact, the robbers. Accordingly, under those circumstances, the show-up identification procedure used was not **unduly** suggestive, and the trial judge properly declined to find that it was so. See Brown, 356 S.C. at 503-504, 589 S.E.2d at 785 (indicating that a show-up may be proper where it occurs: (1) shortly after the alleged crime; (2) near the scene of the crime; (3) while the witness' memory is still fresh; (4) when the suspect has not had time to alter his looks or dispose of evidence; and (5) when it may expedite the release of innocent suspects and enable the police to determine whether they need to continue searching); see also Govan, 372 S.C. at 559, 643 S.E.2d at 95 ("We find that although this show-up was suggestive, it was not unduly suggestive under the above noted test.").

However, regardless of the fact that the show-up identification procedure was **not** unduly suggestive, the victims' identifications of Appellant and Fishburne were reliable under the totality of the circumstances such that no very substantial likelihood of misidentification existed even if the show-up had been unduly suggestive. Initially, both victims had an excellent opportunity to view Appellant and Fishburne during the course of the robbery because none of the robbers wore masks. In fact, both victims testified during trial that they had good opportunities to view the robbers, and both Paulo and Olivera saw the robbers' unobstructed faces. Additionally, the attention of the victims was heightened due to the facts that they were the victims of an armed robbery and that the robbers threatened them with a gun and used physical force upon them. See Govan, 372 at 560, 643 S.E.2d at 96 (recognizing that the victim's attention would have been heightened during an armed robbery); Blassingame, 338 S.C. at 252, 525 S.E.2d at 541-542 ("A person in fear of his life presumably has a more acute degree of attention to his surroundings than a mere passerby."). Also, although the victims' descriptions of the robbers do not appear to have been highly detailed, Deputy Charlton testified that the appearances of Appellant, Fishburne, and their confederate matched the descriptions of the suspects that were provided to him. 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 and most importantly, both of the victims immediately recognized Appellant and Fishburne as the robbers upon seeing them and expressed absolute certainty in their identifications without hesitation or reservation. 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."). Notably, the victims were both completely certain of their identifications despite the fact that they were conscious of and accepting of their own deficiencies in distinguishing the faces of black males. Finally, the show-up was conducted within an hour of the incident only one-quarter of a mile away from the location where the robbery occurred. Accordingly, when considering the totality of the circumstances surrounding the out-of-court identifications of Appellant and Fishburne, the identifications were sufficiently reliable such that there was no substantial likelihood of misidentification, and it was ultimately for the jury to decide if the identifications were sufficiently reliable to constitute proof of Appellant and Fishburne's guilt. See Perry, 132 S. Ct. at 728 ("[T]he jury, not the judge, traditionally determines the reliability of evidence."); see also Brown, 356 S.C. at 504, 589 S.E.2d at 785 ("Reliability is the linchpin in determining the admissibility of identification testimony.").

When considering the totality of the circumstance surrounding the show-up identification procedure employed in Appellant and Fishburne's case, the show-up was not unduly suggestive and there was no substantial likelihood of misidentification even if it was unduly suggestive. For those reasons, the trial judge did not abuse her broad discretion in 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 (characterizing the exclusion of identification evidence from trial as a "drastic sanction" that should **only** be employed where the reliability of the evidence is "manifestly suspect"); see also Perry, 132 S. Ct. at 720 ("[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."). Accordingly, the trial judge committed no error in denying Appellant's motion to suppress the victims' out-of-court identifications of Appellant and Fishburne as the robbers. Cf. Manson v. Brathwaite, 432 U.S. 98, 116 (1977) ("[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.

B. Harmlessness of Any Error in the Admission of the Identification Evidence

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484

(2008). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

In the case at bar, even assuming the trial judge somehow erred in admitting the out-of-court identification evidence, any error was entirely harmless under the facts and circumstances of Appellant and Fishburne's case. As a result, Appellant could have suffered no prejudice from the admission of the identification evidence, and his convictions should not be reversed based on the admission of that evidence.

Initially, even without the identification evidence, the other evidence presented during trial overwhelmingly established Appellant and Fishburne's guilt for the indicted offenses. Critically, testimony and evidence was presented establishing Appellant, Fishburne, and another man were walking along the side of the road in close proximity to the scene of the robbery shortly after the incident occurred. When they saw a police officer stop nearby and begin to approach them, Fishburne found it necessary to encourage his confederates not to flee, Appellant immediately dropped a laptop he was carrying to the ground, and their accomplice quickly fled from the area. See State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) ("As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of

consciousness of guilt."); State v. Al-Amin, 353 S.C. 405, 413, 578 S.E.2d 32, 36 (Ct. App. 2003) ("Flight from prosecution is admissible as evidence of guilt."); see also Illinois v. Wardlow, 528 U.S. 119, 124 (2000) ("Headlong flight – wherever it occurs – is the consummate act of evasion: It is not necessarily indicative of wrongdoing but it is certainly suggestive of such."). Significantly, the laptop that Appellant dropped to the ground was the laptop stolen from the victims' apartment only minutes earlier. See State v. Lyles, 211 S.C. 334, 339, 45 S.E.2d 181, 183 (1947) (instructing that proof of a defendant's possession of recently-stolen property supports an inference that the defendant was the person who stole the property); see also State v. Cooper, 279 S.C. 301, 302, 306 S.E.2d 598, 599 (1983) (instructing that the inference to be drawn from recent possession of stolen property is an evidentiary fact as opposed to a rebuttable presumption and constitutes circumstantial evidence of guilt). Thereafter, law enforcement officers discovered Fishburne had two of Olivera's cellphones in his pockets and Appellant was carrying a large quantity of cash in his pocket, and the victims located Fishburne's cellphone in their apartment shortly after the robbery. See McNamara v. Henkel, 226 U.S. 520, 525 (1913) ("Possession of [recently stolen property] in these circumstances tended to show guilty participation in the burglary. This is but to accord the evidence, if unexplained, its natural probative force."); see also Barnes v. United States, 412 U.S. 837, 845-846 (1973) (approving of a jury instruction allowing for the jury to infer the defendant's guilt from his unexplained possession of recently stolen property and recognizing common sense and experience support such an inference). In light of that overwhelming evidence of guilt, the out-of-court identification evidence could not have had any impact on the verdict. See State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988) ("[I]n view of the overwhelming evidence of appellant's

guilt, we hold any error harmless beyond a reasonable doubt."); see also State v. Singleton, 395 S.C. 6, 14, 716 S.E.2d 332, 336 (Ct. App. 2011) (finding any error in the admission of identification evidence to be harmless in light of the overwhelming evidence of guilt presented during trial).

Furthermore, notwithstanding the overwhelming nature of the other evidence presented during trial, other procedural safeguards protected Appellant from suffering any undue prejudice from the admission of the out-of-court identification evidence. Specifically, the trial judge thoroughly instructed the jury on the State's burden of proof, the defendants' presumed innocence, and the necessity that the State prove the defendants' identity as the perpetrators of the charged offenses beyond a reasonable doubt. The trial judge also specifically instructed the jury on the factors to be considered in evaluating identification evidence. Beyond the trial judge's instructions, defense counsel for Appellant and Fishburne also were able to expose any deficiencies in the victims' identifications of Appellant and Fishburne through their cross-examinations of the witnesses and were able to continue calling into question the reliability of the identification evidence in their closing arguments. Cf. Liverman, 398 S.C. at 143-144, 727 S.E.2d at 428-429 (finding any error in the admission of identification evidence to be harmless where the reliability of the identification evidence was fully vetted at trial, the weaknesses in the evidence were exposed on cross-examination, and defense counsel reminded the jury of those weaknesses during closing arguments). In light of those procedural safeguards, any error in the admission of the identification evidence was rendered harmless. See Perry, 132 S. Ct. at 728-729 ("We also take account of other safeguards built into our adversary system that caution juries against placing undue weight on the eyewitnesses testimony of questionable reliability. These protections

include the defendant's Sixth Amendment right to confront the eyewitness. Another is the defendant's right to effective assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments. Eyewitness-specific jury instructions, which many federal and state courts haves adopted, likewise warn the jury to take care in appraising identification evidence. The constitutional requirement that the government prove the defendant's guilt beyond a reasonable doubt also impedes convictions based on dubious identification evidence." (citations and footnote omitted)).

In light of the other overwhelming evidence of guilt presented during trial and the procedural safeguards built into the trial process that enabled Appellant and Fishburne to fully call into question the reliability of the identification evidence during trial, any error that could have resulted from the admission of the out-of-court identification evidence was rendered entirely harmless. See Bailey, 298 S.C. at 5, 377 S.E.2d at 584 ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result."). Appellant's convictions should be affirmed.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

BY: 
Mark R. Farthing

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

ATTORNEYS FOR RESPONDENT

August 30, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Kristi Lea Harrington, Circuit Court Judge
Appellate Case No. 2011-203366

THE STATE,

Respondent,

vs.

DOUGLAS MONRAY THOMPSON,

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."

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

BY: _____
Mark R. Farthing

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

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

I further certify that all parties required by Rule to be served have been served. This 30th day of August, 2013.

Ellen R. DuBois

ELLEN R. DuBOIS
Legal Assistant

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

ALAN WILSON
ATTORNEY GENERAL

August 30, 2013

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

RE: State v. Douglas Monray Thompson – Appellate Case No. 2011-203366

Dear Ms. DuRant:

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

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

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