STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable R. Markley Dennis, Circuit Court Judge
Appellate Case Tracking No. 2012-212968

The State,

Respondent,

vs.

Eugene Thomas,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant Eugene Thomas (Thomas) was indicted by the Greenville County Grand Jury for third degree burglary, possession of a weapon during the commission of a violent crime, and armed robbery. His case came to trial before the Honorable R. Markley Dennis, and a jury, on September 10-11, 2012. Thomas was convicted of third degree burglary, possession of a weapon during the commission of a violent crime, and attempted armed robbery. Thomas was thereafter sentenced to life imprisonment without the possibility of parole for attempted armed robbery pursuant to S.C. Code Ann. §17-25-45. He received a concurrent five years' imprisonment for the third degree burglary and weapon convictions. A Notice of Appeal was filed and served.

STATEMENT OF FACTS

Michael Gordon ("the victim"), a truck driver from Mauldin, also moonlighted as a painter. (R. 81-82). On the afternoon of Wednesday, July 22, 2009, the victim was painting alone inside an apartment complex on Forrest Street in Greenville. (See State's Exhibits 4-8). The complex contains four units. (R. 172). The victim had been painting in Apartment A for about a week. The apartment was vacant. (R. 82-84, 86-87). After finishing up for the day, at "approximately 3:00, 3:30," the victim went into Apartment D, which was also vacant, to wash his hands. Apartment A did not have running water, but the victim had permission to use the sink in Apartment D. (R. 187-88, 172-75).

The victim went to the sink to wash his hands. (R. 88-93; see State's Exhibits 9-12). Although there was no electricity inside the apartment, the victim explained there were no curtains on the windows and that the apartment was "well lit." (R. 93).[1] The victim did not notice anyone inside the apartment at the time. (R. 94). The victim recalled that although he thought the front door was "kind of closed," it did not latch behind him. (R. 94).

As the victim washed his hands in the sink, out of the corner of his eye he noticed the door move. He thought it was the wind. He continued to wash. Then, "the door come open." The victim testified that he turned and observed a black male, whom he later identified as Thomas, standing in the doorway. The victim asked Thomas what he wanted. At that point, Thomas produced a gun from his pocket, pointed it at the victim, and told him to get on the floor. (R. 95-96, 104-05, 112). The victim testified the weapon

[1]The police investigating the scene shortly after the incident also testified the inside of the apartment was "very well lit." It was a "bright" day outside with very few clouds. (R. 131, 144).

was a black, automatic pistol. (R. 105, 112). The victim explained that he was familiar with guns. (R. 105).

The victim immediately dropped face-down on the floor. Thomas then walked to the victim, straddled his legs, and grabbed his wallet and cell phone. (R. 97-98). The victim testified he turned his head when Thomas said something he did not understand. At this point, Thomas "poked" the gun between his shoulder blades as he rummaged through the wallet. The victim said he begged for his life. Thomas responded that he was there for money and did not intend to kill him. (R. 98-99). Thomas placed the wallet on the counter and said he was "wiping stuff down." He told the victim not to look up for a few minutes. Thomas then left the apartment. (R. 99).

After a short while, the victim left the apartment and telephoned the police. (R. 99). The victim testified that he had "like 26 bucks . . . tucked away" inside the back of his wallet and a debit card, but that the only thing stolen from his wallet was a $3 lottery ticket. (R. 100-102, 124). He recalled that the robber went through his wallet "pretty quick." (R. 101).

When the police arrived, the victim gave a description of the robber. (R. 103-04, 126-27). The victim was visibly shaken, but he was able to communicate with the police "very clearly." (R. 127-29). The victim gave another description to the police a few days later. (R. 114). Six days after the incident, the victim identified Thomas in a photograph line-up. (R. 114-18; see State's Exhibit 2). The victim testified he was "almost a hundred percent certain" in his identification. (R. 118, 124). The victim explained that he "was well aware, you know. I got a gun pointed at me, I'm paying attention to what's going

on." (R. 119). At trial, the victim identified Thomas as the person who robbed him. (R. 118-19).

The police lifted several latent fingerprints from the interior and exterior of the front door of Apartment D. (R. 147-49, 206; see State's Exhibit 16). No other fingerprints were removed from the scene. (R. 151-52). Thomas's fingerprints were then compared with the fingerprints on the door, and one fingerprint matched a latent print lifted from the inside of the front door above the handle. (R. 166-67; see State's Exhibit 20).

Jennifer Hallex, the property manager at the apartments, testified the apartments remained locked. The keys to the apartments were retained inside a coded lockbox, which she would access to show an apartment to prospective tenants. (R. 173, 182-83, 191).[2] Apartment D was previously painted and repaired in March 2009, but Thomas did not work in there. (R. 178-80, 189-90). Thomas had not rented an apartment in the past. (R. 177-78). Hallex stated that she never showed Apartment D to Thomas. The apartment was rented out on July 21 to a woman from Washington, D.C. (R. 182-83). Hallex testified that Thomas had no reason to be in Apartment D. (R. 185).

Several months after the victim identified Thomas, he was arrested at a Greenville motel. (R. 207-10, 217-18). Incident to Thomas's arrest, the police seized a loaded, semi-automatic pistol (State's Exhibit 14) from inside a zipper bag on the bed in his room. There were also two men's watches and a dice game inside the bag. (R. 219-20, 223-25). A latent fingerprint belonging to Thomas was found on the dice game. (R. 235). At trial, the victim identified State's Exhibit 14 as a gun "similar" to the one wielded by Thomas,

[2]The victim had access to the lockbox so that he could work at the apartment complex. (R. 170).

although he was unable to testify that it was the same gun used during the robbery. (R. 112-13). No lottery ticket was recovered in the case. (R. 231).

ARGUMENT

I.

The trial judge properly denied Thomas's motion for a directed verdict. (Issue I).

Thomas argues the trial court erred by not directing a verdict of acquittal because the State failed to present any direct or circumstantial evidence to show that he was guilty of third degree burglary, possession of a weapon during the commission of a violent crime, and attempted armed robbery.[3]

In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict. State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004). During trial, "[w]hen ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." Id. at 593, 606 S.E.2d at 477-78 (citing State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002)) (emphasis added); see also Rule 19(a), SCRCrimP. The trial court should "grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty, as '[s]uspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Cherry, 361 S.C. at 594, 606 S.E.2d at 478. On the other hand, "a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." Id. (emphasis removed).

On appeal, when reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. Id. (citing State v. Burdette, 335 S.C. 34 515 S.E.2d 525 (1999)); State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001); see also State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126,

[3]Thomas was indicted and tried for armed robbery.

127 (2000) (finding that when ruling on cases in which the State has relied exclusively on circumstantial evidence, appellate courts are likewise only concerned with the existence of the evidence and not its weight). If the State has presented any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial court's decision to submit the case to the jury. State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011); Cherry, 361 S.C. at 594, 606 S.E.2d at 478; cf. Mitchell, 341 S.C. at 409, 535 S.E.2d at 127 ("The trial judge is required to submit the case to the jury if there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced'").

"A person is guilty of burglary in the third degree if the person enters a building without consent and with intent to commit a crime therein." S.C. Code Ann. §16-11-313(A); see State v. Donahue, 400 S.C. 604, 735 S.E.2d 547 (Ct. App. 2012).

A person is guilty of attempted armed robbery if the person has a specific intent to commit armed robbery. State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866-67 (Ct. App. 2001); see also State v. Hiott, 276 S.C. 72, 80, 276 S.E.2d 163, 167 (1981) ("An attempt to commit robbery has been defined as the doing of acts toward the commission of robbery, and with such intent, but falling short of actual perpetration of the completed offense..."). "Robbery 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. Bland, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995). The Supreme Court has further described robbery as "the felonious taking and carrying away of goods of another against the will or without consent." State

v. Scipio, 283 S.C. 124, 126, 322 S.E.2d 15, 16 (1984). "The gravamen of a robbery charge is a taking from the person or immediate presence of another by violence or intimidation." State v. Rosemond, 356 S.C. 426, 430, 589 S.E.2d 757, 758–59 (2003) "When determining whether the robbery was committed with intimidation, the trial court should determine whether an ordinary, reasonable person in the victim's position would feel a threat of bodily harm from the perpetrator's acts." Id. at 430, 589 S.E.2d at 759. The crime is "armed robbery" when a person commits a robbery while armed with a deadly weapon or alleging to be armed by the representation of a deadly weapon. Section 16-11-330; State v. Tasco, 292 S.C. 270, 272, 356 S.E.2d 117, 118 (1987); see also State v. Al-Amin, 353 S.C. 405, 424, 578 S.E.2d 32, 42 (Ct. App. 2003) ("Armed robbery occurs when a person commits robbery either while armed with a deadly weapon or while the person was alleging he was armed and was using a representation of a deadly weapon").

Section 16-23-490(A) imposes a penalty, in addition to the penalty for the underlying offense, on those convicted of possessing a firearm during the commission of a violent crime. It provides, in pertinent part:

> [i]f a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60,[4] he must be imprisoned five years, in addition to the punishment provided for the principal crime.

The testimony in this case established that Thomas entered Apartment D without permission, with a gun, and intended to commit the crime of armed robbery. Therefore,

[4]Section 16-1-60 provides that armed robbery and attempted armed robbery, as defined in §16-11-330(A) & (B), are violent crimes.

the crime of burglary in the third degree was established sufficiently to withstand a directed verdict motion. Testimony also showed that it was the intent of Thomas, at the very least, to use a deadly weapon to rob the victim of money, goods, or personal property. The victim testified that a lottery ticket was taken from his wallet. Therefore, the crime of armed robbery and possession of the deadly weapon during the commission of a violent crime[5] was sufficiently established to withstand a directed verdict motion.

In addition, the victim positively identified Thomas in a photograph lineup[6] and at trial as the one who robbed him. He further described the gun Thomas used, and identified the gun seized from Thomas's bag at the time of his arrest as the type of gun pointed at him. Finally, Thomas's fingerprint was lifted from the inside of the front door of Apartment D. The apartment was normally locked, and testimony established Thomas had neither rented the apartment nor a legitimate reason to be inside the apartment. State v. Wimbush, 347 S.C. 513, 556 S.E.2d 413 (Ct. App. 2001); cf. State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000) (finding evidence warranted directed verdict where the only evidence linking the defendant to the burglary was a fingerprint found outside the dwelling near the point of entry).

The evidence at trial, when viewed collectively, presented a jury question as to Thomas's guilt for the offenses charged and supports the trial court's decision to deny the directed verdict motion. Thomas's arguments to the contrary improperly focus on the weight of the evidence presented at trial rather than its sufficiency. State v. Condrey, 349

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[5]See footnote 4, supra.

[6]Thomas challenges his identification in the photograph lineup. The issue is addressed in Argument II, infra.

S.C. 184, 562 S.E.2d 320 (Ct. App. 2002); State v. Peer, 320 S.C. 546, 466 S.E.2d 375 (Ct. App. 1996).

II.

Thomas's Issue is not available for appellate review. The trial court did not err in refusing to suppress the pre-trial photograph lineup identification. (Issues II & III).

Prior to trial, the trial court conducted a pre-trial hearing to determine the admissibility of the victim's identification of Thomas in the photograph lineup.

The State presented the testimony of Greenville Police Detective Collis Flavell, who met with the victim in his office at the law enforcement center on July 28, 2009, only six days after the incident, to show him a photograph lineup (State's Exhibit 1). (R. 20-21). Flavell testified Thomas was developed as a suspect through the description provided by the victim, and that the other subjects in the lineup were computer-generated. He explained, "I tried to make them as similar as I could to [Thomas's] photo."(R. 22-23).

The victim told Flavell that he had never before viewed a photograph lineup. Flavell discussed the procedure with the victim and explained "[t]hat the person may or may not be in the lineup. . . . I told him not to feel like he had to pick someone out of the lineup just because I was showing him the lineup." The victim indicated to Flavell that he understood, and "that he did not want an innocent person charged." (R. 21-22, 26). Flavell handed the lineup to the victim. The victim identified Thomas (#5) within a few "seconds,"and he indicated his selection on the lineup in a written statement. (R. 26-28, 30; see State's Exhibit 2). Flavell recalled that the victim "did not say he was 100%, he said he was almost 100% that that was the guy who robbed him." (R. 31).

Flavell testified that he made no suggestions to the victim during the lineup procedure. (R. 26, 30). No other photographs had been shown to the victim beforehand.

(R. 27). Flavell stated the photograph of Thomas included in the lineup was about one month old. (R. 28).

The victim said that he never before had been the victim of a crime. (R. 35). The victim testified that on the afternoon of July 22, 2009, he was washing up at a sink inside Apartment D after painting in another apartment. Nobody else was inside Apartment D. The victim said he had pushed the door when he went into the apartment, but recalled that it never did completely shut. The door was about 12 feet away from the sink. (R. 35-37). He testified it was sunny outside, and that the inside of the apartment was "well lit" because there were no blinds on the windows. (R. 37).

The victim recalled that he "seen the door kind of move" out of the corner of his eye, but he thought it was the wind and continued washing his hands. Then, the door "swung open." The victim turned around and faced a man standing there. (R. 35-37, 48). He recalled, "it was broad daylight. I didn't have no problem seeing." (R. 37, 58). The victim was able to see the man "face to face," and he testified that his face was not concealed. (R. 50, 58-59).

When the victim asked the man what he wanted, he pulled out a gun and told the victim to lie on the floor. (R. 37-40). The robber straddled him and rummaged through his pockets. The victim turned his head and the robber stuck the gun between his shoulder blades. The victim stated, "I felt like I was going to get shot." (R. 40-41, 58). The robber then went through his wallet and went out the door. (R. 42).

The victim waited a few minutes, then left the apartment and called the police. (R. 42-43). He gave the police a description of the robber. (R. 43). The victim testified he had never seen the man before. (R. 44).

The victim recalled being shown the photograph lineup by Flavell, who explained the procedure to him. (R. 44). Flavell told the victim that he did not have to pick anyone out of the lineup. The victim testified that after he looked at the lineup, he identified #5 "not long" thereafter. (R. 44-46). The victim said he was not shown any other arrays or photographs beforehand. (R. 46). The victim said he was "[a]lmost a hundred percent" certain with his identification, and explained that "I'm not a hundred percent pretty much on nothing." (R. 53-54, 56). The victim testified that Flavell made no suggestions to him during the procedure. (R. 46-47).

During the hearing, the victim identified Thomas as the person he picked out from the lineup. (R. 47).

At the conclusion of the hearing, defense counsel moved to suppress the victim's identification on the basis that the pre-trial photograph identification was tainted, relying on the Neil v. Biggers factors.[7] (Tr. 99-100). The trial court noted, however, that "the real question here is that whether or not the identification was unduly suggestive" and then, whether there is a substantial likelihood for misidentification. The trial court held the photograph lineup was not suggestive and found the ensuing identification by the victim was reliable. (R. 69).

On appeal, Thomas argues the trial court erred in failing to suppress the identification, because the photograph lineup was unduly suggestive so as to give rise to a very substantial likelihood of misidentification.

The preservation of his Issue is dubious. A defendant must object to an in-court identification to properly preserve the issue for appeal. See State v. Wakefield, 323 S.C. 189, 473 S.E.2d 831 (Ct. App. 1996) ("Wakefield was required to object to the in-court

[7]Neil v. Biggers, 409 U.S. 188 (1972).

identification at trial to properly preserve this issue for appeal"). Arguments not raised to and ruled upon by the trial court are not preserved for appellate review. State v. Wise, 359 S.C. 14, 596 S.E.2d 475 (2004). A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). A defendant may not argue one ground below and another on appeal. State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003). This rule also applies to constitutional arguments. See State v. Owens, 378 S.C. 636, 638, 664 S.E.2d 80, 81 (2008).

Here, defense counsel objected to the identification testimony based solely upon the Neil v. Biggers factors, to wit, the length of time between the incident and the identification (six days), the reliability of the victim's description of the robber, and the victim's degree of attention during the incident. Defense counsel never made mention of the "suggestiveness" of the photograph lineup, although the trial court *sua sponte* ruled the lineup was not suggestive. An issue is not preserved for appeal merely because the trial court mentions it in its ruling. See Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 64 S.E.2d 253 (1951). In fact, at no time did defense counsel argue the suggestiveness of the photograph lineup in the first instance. Accordingly, because the suggestiveness of the lineup was not raised to the trial court below, Thomas's arguments are not preserved for appellate review.

In any event, the trial court did not err in refusing to suppress the pre-trial photograph lineup identification. An out-of-court identification of the defendant violates due process and must be suppressed when the identification procedure used by police was

impermissibly suggestive and conducive to a substantial likelihood of misidentification. State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012). A witness's subsequent in-court identification is inadmissible "if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004); see also Biggers, 409 U.S. at 198 ("While the phrase ['a very substantial likelihood of irreparable misidentification'] was coined as a standard for determining whether an in-court identification would be admissible ..., with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself").

Trial courts employ a two-pronged inquiry to determine whether due process requires suppression of an out-of-court eyewitness identification. Liverman, 398 S.C. at 138, 727 S.E.2d at 426. First, the court must determine whether the identification resulted from "unnecessarily suggestive" police procedures. Biggers, 409 U.S. at 198-99; see also Perry v. New Hampshire, ___ U.S. ___, ___ n. 1, 132 S.Ct. 716, 721 n. 1 (2012) (stating "what triggers due process concerns is police use of an unnecessarily suggestive identification procedure"); Liverman, 398 S.C. at 138, 727 S.E.2d at 426 (stating the standard for impermissible suggestiveness as whether the police procedures were "unnecessary and unduly suggestive"); Traylor, 360 S.C. at 81, 600 S.E.2d at 526 (stating the standard as whether the police procedures were "unduly suggestive"). If the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there and the court does not need to consider the second prong. See United States v. Sanders, 708 F.3d 976, 984 (7th Cir. 2013) (citing Perry for the

proposition that "courts will only consider the second prong if a challenged procedure does not pass muster under the first").

If the court finds, however, that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless "so reliable that no substantial likelihood of misidentification existed." Liverman, 398 S.C. at 138, 727 S.E.2d at 426 (citing Biggers, 409 U.S. at 199). Even assuming an identification procedure is suggestive, it need not be excluded so long as, under all the circumstances, the identification was reliable notwithstanding the suggestiveness. The inquiry must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification. State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447-48 (2000); State v. Stewart, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980). The following factors should be considered in evaluating the totality of the circumstances to determine the likelihood of a misidentification: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. State v. Cheeseboro, 346 S.C. 526, 541, 552 S.E.2d 300, 308 (2001).

There is nothing about the photographs or the way they were introduced which made the procedure suggestive. (See State's Exhibit 2). The victim came to the police station and was shown a group of six photographs. No other photographs were presented to him. The other photographs included in the lineup were computer-generated to best match Thomas's photograph, which was taken about a month before the crimes. There is

no evidence that Thomas was singled out from the other members of the photograph lineup. After looking at the photographs a short time, the victim selected #5, Thomas's photograph. There is no evidence the police expressly or implicitly suggested to the victim which photograph was of a suspect. In fact, the victim was told that he did not have to pick anyone out of the lineup. Because Thomas's identification did not result from an impermissibly suggestive police procedure and Thomas has failed to meet his burden to show any evidence to the contrary,[8] the inquiry should end and this Court does not need to consider the second prong. State v. Dukes, 404 S.C. 553, 745 S.E.2d 137 (Ct. App. 2013).

Moreover, even if the identification procedure used is deemed suggestive, the victim's identification of Thomas was nevertheless reliable in light of the totality of the circumstances surrounding the confrontation. First, the record reflects that the victim had ample opportunity to view Thomas from inside the apartment when he was confronted. The apartment was well-lighted, and the victim paid particular attention to Thomas because he pointed a gun at him and the victim thought that he was going to die. A person in fear of his life presumably has a more acute degree of attention to his surroundings than a mere passerby. State v. Ford, 278 S.C. 384, 296 S.E.2d 866 (1982); State v. Johnson, 318 S.C. 372, 458 S.E.2d 49 (Ct. App. 1995). The victim testified that he was able to view Thomas face-to-face, who stood about 8-10 feet away with the gun in his hand. Although Thomas raises some discrepancies regarding details of the victim's identification of the physical features of the robber, his general description of the robber was consistent with Thomas's appearance in the lineup. See State v. Mansfield, 343 S.C.

[8]See State v. Dukes, 404 S.C. 553, 561 & n.4, 745 S.E.2d 137, 141 & n.4 (Ct. App. 2013) (noting that appellate courts have never placed the burden of disproving suggestiveness on the State).

66, 79-80, 538 S.E.2d 257, 264 (Ct. App. 2000) (finding eye witness identification "on the whole was accurate" even though the witness described the perpetrator as having plaits in his hair and wearing tennis shoes while the defendant actually had an afro and wore boots). For example, the victim described the robber as an African-American male, with "long dreadlocks, Mustache and goatee." (R. 38-39). When he was shown the photograph lineup, the victim picked Thomas's photograph immediately and was "[a]lmost a hundred percent" certain about his identification. A witness's identification need not be one hundred percent certain in order to meet due process requirements of identification testimony. State v. Brown, 333 S.C. 185, 190, 508 S.E.2d 38, 41 (Ct. App. 1998); State v. Washington, 323 S.C. 106, 111, 473 S.E.2d 479, 481 (Ct. App. 1996); see United States v. Peoples, 748 F.2d 934 (4th Cir. 1984) (finding testimony that defendant merely "resembled" one of the bank robbers admissible). Finally, only a short period of time (six days) elapsed between the crime and the victim's identification. For example, appellate courts have previously found reliable out-of-court identifications made after several weeks. Stewart, 275 S.C. at 250, 272 S.E.2d at 629; State v. Gambrell, 274 S.C. 587, 266 S.E.2d 78 (1980); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999); see State v. McCord, 349 S.C. 477, 562 S.E.2d 689 (Ct. App. 2002) (upholding admission of victim's in-court identification several years after sexual assault).

The victim's pre-trial identification of Thomas was reliable under the totality of the circumstances. The identification satisfies the due process criteria of Biggers and appellate decisions in South Carolina. The trial court did not err in failing to grant Thomas's motion to suppress the victim's pre-trial identification of him. Additionally, the trial court properly allowed the in-court identification. Thomas's arguments are matters

properly left to the jury to weigh and are not relevant to the admissibility of the identification testimony. State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009); State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000); see Stewart, 275 S.C. at 451, 272 S.E.2d at 630 ("[w]e 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").

III.

The trial judge properly refused to submit the offense of strong arm robbery to the jury for their consideration. (Issue IV).

At the conclusion of the case, the trial judge refused to submit the lesser offense of strong arm robbery to the jury for their consideration. (R. 254-55). Appellant contends the trial court erred.

Armed robbery is "the crime of robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon...." S.C. Code Ann. §16-11-330. Strong arm robbery 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. Rosemond, 356 S.C. 426, 589 S.E.2d 757 (2003). Strong arm robbery is a lesser-included offense of armed robbery. State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002).

The law to be charged is determined by the evidence presented at trial. State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986). "A trial [court] is required to charge a jury on a lesser included offense if there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater." State v. Drafts, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986); State v. Murphy, 322 S.C. 321, 471 S.E.2d 739 (Ct. App. 1996). However, the trial court should refuse to charge on a lesser-included offense where there is no evidence the defendant committed the lesser rather than the greater offense. State v. Smith, 315 S.C. 547, 549, 446 S.E.2d 411, 413 (1994). In other words, where there is no evidence to support a finding that the defendant was guilty only of the lesser offense, there is no error in the failure to charge the lesser offense. State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994); State v. Hollman, 245 S.C. 362, 140

S.E.2d 597 (1965). "The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty of only the lesser offense." State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006). An appellate court cannot reverse the trial court's refusal to give a requested jury instruction unless the refusal was both erroneous and prejudicial. State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002); State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000).

In the present case, there is nothing in the record that tended to show Thomas was guilty solely of strong arm robbery. The testimony at trial is undisputed. Thomas confronted the victim with a handgun inside the apartment with the intent to rob him. He "poked" the gun between the victim's shoulder blades as the victim lay on the floor, and he rummaged through the victim's wallet. The victim identified a gun later seized at the time of Thomas's arrest as the type of gun used during the robbery. There is simply no disputed factual element of the offense charged, *i.e.*, that Thomas was armed during the commission of the crimes, to warrant a charge on strong arm robbery. State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); see State v. Drayton, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987) (finding no evidence to support a jury charge on the lesser offense of robbery when the State alleged a defendant was guilty of armed robbery for using a gun to rob a gas station and the defendant alleged that the victim voluntarily gave him money from the cash register); cf. State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996) (at trial, three different witnesses testified that a BB gun, water gun, toy, or fake gun was used in the commission of the robbery, which was held sufficient evidence from which the jury could have found the lesser crime of strong arm robbery had been committed).

Taking Thomas's argument to its logical conclusion would require the submission of a lesser-included offense in every armed robbery case. This is simply not the law in South Carolina. The evidence in this case when viewed as a whole was not such that if could be inferred that Thomas committed the lesser offense rather than the charged offense. State v. Golston, 399 S.C. 393, 732 S.E.2d 175 (Ct. App. 2012).

CONCLUSION

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

Respectfully submitted,

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March 7, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable R. Markley Dennis, Circuit Court Judge
Appellate Case Tracking No. 2012-212968

The State,

Respondent,

vs.

Eugene Thomas,

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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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:

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I further certify that all parties required by Rule to be served have been served.

This 7th day of March, 2014.

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