ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County
The Honorable Perry M. Buckner, Circuit Court Judge
Appellate Case No. 2018-001216

THE STATE,

Respondent,

vs.

ANDRE NICHOLAS CRAWFORD,

Appellant.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the court erred by admitting photographics line-ups and an in-court identification of appellant by witness Martin, where Martin told the police, while viewing a photographic line up, that appellant was in the "proximity" of the shooting when it occurred, and while remaining in contact with the police a month later, while viewing another lineup, Martin claimed appellant was actually the shooter, since this identification procedure was unduly suggestive and conducive to an irreparable misidentification?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Did the trial court abuse its discretion by admitting two photographic lineups of Appellant and attempted murder victim Bruce Martin's in-court identification of Appellant as the man who shot him where the photographic lineups were not unduly suggestive.? Further, did any possible suggestiveness in the photographic lineups create a very substantial likelihood of irreparable misidentification where the record shows Mr. Martin knew Appellant, he never identified anyone else as the shooter or said that he did not know who shot him, and his failure to sooner identify Appellant as the shooter resulted from temporary memory loss caused by the shooting.

STATEMENT OF THE CASE

Respondent agrees with Appellant's Statement of the Case.

STATEMENT OF FACTS

The facts of this case epitomize the senseless and tragic gun violence that currently permeates American society. Viewed in the light most favorable to the prosecution, the direct and circumstantial evidence presented at trial is that Appellant murdered Jesse Guy and attempted to murder Bruce Martin, by shooting both men as they worked security at a Round O, South Carolina, night club in the early morning hours of May 28, 2016. Appellant's motive for this shooting that ended one man's life, seriously and permanently injured a second man, and left Appellant imprisoned for thirty-five years? Mr. Guy had tasered Appellant's brother, DaQuan, in an effort to break up a fight between DaQuan and another man, and Mr. Martin was assisting Mr. Guy in trying to quell the disturbance.

Eric Bryan testified that his family owns Leon's Social Club in Round O, South Carolina. Leon's is a non-profit private club that is routinely open on Thursday through Saturday and some Sundays. "[I]t's a place where people come together to mingle and to socialize," and the business serves both food and alcohol. Mr. Bryan acts as the doorman at the club, collects the cover charge from members as they enter, and tries to ensure that only members enter the club. He's also responsible for paying the bartenders, the DJ, and security. **R. *58-63*.**

Mr. Bryan worked as the doorman on May 28, 2016. Jesse Guy and Bruce Martin, long-time employees, worked security that night. Although they primarily worked outside, they took turns checking on him. It was "a good night" and the club grossed roughly $1,200.00.[1] Mr. Bryan

[1] He testified that he typically paid the bartenders and his security guards $100.00 each, and he paid the DJ $300.00. **R. *64*.**

testified that he knows both Appellant and DaQuan Crawford. However, Appellant "doesn't come in the club," and he was certain that Appellant "wasn't in the club that night." He also did not see DaQuan Crawford in the club, either. ***R. 62-65***.

Leon's closed around 3:00 a.m. on the 28th. Patrons started to leave and Mr. Bryan took the money from the front door to the back in order to count it.[2] As he was counting the money, he "heard a commotion." So, he secured the money and immediately checked the bartenders. He went out the front door after he was sure they were okay. Once he went outside, he saw Mr. Martin lying in the highway. ***R. 66-70***.

Mr. Bryan quickly realized that Mr. Martin had been shot. A number of people called 911 and he was unsure if he also called. His primary concern was to get Mr. Martin out of the road for safety reasons. However, he soon saw that Mr. Guy had also been shot. Mr. Bryan took off one of the shirts he was wearing and used it to try and stabilize Mr. Martin's condition. ***R. 70-72***.

Mr. Guy was leaning on a vehicle and a number of women were around him when Mr. Bryan last saw him. Mr. Bryan later spoke to police after they arrived. ***R. 72-73; 80***.

Sgt. Jackie Lawson, of the Colleton County Sheriff's Office, was dispatched to Leon's Club on the morning of May 28th and was the first officer on the scene. Deputy Frankie Thompson arrived shortly afterwards. Sgt. Lawson saw Mr. Martin lying in the road and spoke to him, after clearing away a crowd of people surrounding him. Meanwhile, Deputy Thompson spoke to and stood by Mr. Guy, who kept slipping off the hood of a silver Mitsubishi Mirage. ***R. 87-89; 93-94; 98-99***

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[2] As part of the payment for security, the club gives the persons working security free food and drink, "whatever they want." Mr. Bryan was certain that Mr. Martin had already gotten his chicken wings. ***R. 69-70***.

The victims had not yet received medical attention and both were "in pretty bad shape." ***R. 100***. Sgt. Lawson testified that Mr. Martin had been shot in his arm and he was complaining that his chest hurt. After briefly checking on Mr. Martin, Sgt. Lawson "asked pretty much everybody within earshot" if they had seen anything. However, "no one came forward."[3] ***R. 89-90***.

As a result, he immediately grabbed his camera and immediately photographed both victims and as many people who were present as he could. These photographs were introduced as State's Exs. 10 and 12-16. Sgt. Lawson secured the crime scene and turned it over to investigators after both victims had been taken to the hospital. ***R. 90-98***.

Det. Frankie Thompson, the second officer to arrive at Leon's, testified that he attended to Mr. Guy while Sgt. Lawson attended to Mr. Martin. "There was a lady sitting there talking to him and trying to help him stay up on the vehicle." When Det. Thompson asked Mr. Guy where he had been shot, someone pulled up his shirt and Det. Thompson saw where he had been shot in the back. ***R. 101-03***.

Det. Thompson also secured a Taser and a Glock .40 weapon that Mr. Guy had on him. Although Det. Thompson asked the crowd of people standing there what had happened, no one was willing to speak with him. He and Sgt. Lawson left the scene after the investigators arrived. ***R. 103-04***.

Members of Colleton County Fire and Rescue subsequently arrived to treat the victims. It was clear to responders that Mr. Guy had been shot in the back, he was complaining of difficulty breathing and he appeared to be going into shock. Yet, his main concern was for his friend, Bruce Martin. Frank Ptactin, the paramedic who attended to Mr. Martin, testified that "Honestly, when we pulled up, it did not look good at all" for either victim. Mr. Martin appeared to be in worse

[3] Sadly, he testified that this was "not really uncommon for that particular club." ***R. 90***.

shape than Mr. Guy, even though he was conscious. So, Mr. Ptactin treated him first. ***R. 107-14; 118-22; 128-32.***

Both victims were transported to Trident Medical Center. By the time Mr. Martin arrived at the hospital, "he was in a much better state." ***R. 123-24.*** On the other hand, Mr. Guy's vitals immediately declined once treatment began treatment and they further declined while he was being transported to the hospital. It was apparent to Zach Huber, the paramedic attending him, that he was bleeding internally and this could not be controlled. ***R. 132-35.***

Dr. William Dutton, the trauma surgeon who treated Mr. Martin and Mr. Guy at Trident Medical Center testified that Mr. Martin

> had a tube placed for drainage in his chest. He underwent abdominal surgery, which his liver and his diaphragm were repaired. There was significant blood in his belly[] that was drained. He underwent blood resuscitation and was transported to the ICU following that for follow-up care.

R. 136-37; 139-41.

Mr. Martin lost his pulse and required immediate resuscitation on several occasions while was in the hospital. These episodes required him to stay in I.C.U. for an extended period of time, and Dr. Dutton opined that he suffered both physical and emotional trauma as the result of his injuries. ***R. 141-42; 149-50.*** Before Mr. Guy reached the hospital, he "lost his pulse" and he did not have any blood pressure. Although Dr. Dutton operated on him and tried to save his life, he bled out through his liver into his right chest and could not be resuscitated. ***R. 143-45.***

Damon Hampleton testified that he was thirty-seven years old and owned a lawn care business in Walterboro. Mr. Hampleton indicated that he was "[j]ust starting to know Appellant because Appellant was "little" when Mr. Hampleton growing up. Mr. Hampleton also knows Appellant's brother DaQuan as "Red Dog." Mr. Hampleton went to Leon's Club on May 28, 2016, and saw the Crawford brothers inside. He accepted their offer of a drink and then spoke to other

people in the club. ***R. 174-77.***

While Mr. Hampleton was in the club, he heard "like three shots" fired outside. He immediately warned Mr. Bryan, who locked the club. After the police arrived, "Red Dog" re-entered the club, but he did not say anything. Mr. Hampleton spoke to members of the Sheriff's Office when they arrived, told them what he had seen, told them he had not given anyone a ride, and allowed them to search his black Trail Blazer. He testified that he did not leave the club until after law enforcement had departed and he denied giving Appellant or anyone else a ride. ***R. 177-180; 183-87.***

Anthony Hampton testified that he lives in Summerville, but he is originally from the Burr Hill area of Round O. His nickname is "Ant," and Melvin Campbell is his cousin. Although he did not know Appellant, he knows Appellant's brother, "Red Dog." Also, he is "[p]robably" related to the Crawford brothers. ***R. 189-92; 202-03.***

On May 27, 2016, Mr. Hampton and Mr. Campbell went to Leon's to "chill and party" before they went to Myrtle Beach on the 28th. They arrived around 10:00 p.m. and stayed until it closed on the morning of the 28th. When they walked out to their car, which was parked in front of the door, Red Dog "sneaked" Mr. Hampton, meaning that he hit Mr. Hampton in the back of the head. Mr. Hampton immediately defended himself and was "all wrapped up" with Red Dog. They eventually fell to the ground and Mr. Hampton held Red Dog down. ***R. 192-97.***

Mr. Hampton did not see Mr. Campbell as he fought and he did not remember anyone intervening in his struggle with Red Dog. As he tried to get up, he heard two gunshots fired near him and he ran back to the front of the building. However, the only person he saw was another cousin, Keith. Eventually, he found Campbell, who had not seen what happened. The two men immediately left and went to Campbell's home without speaking to members of the Sheriff's

Office. ***R. 196-200***.

They went to Myrtle Beach the next day. The Colleton County Sheriff's Office contacted him "months later," but he had not seen who did the shooting. He also claimed that he did not know how his fight with Red Dog was broken up. ***R. 200-01***.

Melvin Campbell testified that he is from Round O and that Mr. Hampton is his first cousin. Mr. Campbell is familiar with Appellant and DaQuan "Red Dog" Crawford because they grew up in the same area and they are distant relatives. Mr. Campbell goes to Leon's Club every Friday night, and his birthday was earlier in the week of May 28, 2016. So, he and Mr. Hampton went to Leon's around 11:30 p.m. on the 27th, to celebrate and party before travelling to Myrtle Beach on the 28th They stayed at Leon's, partying and socializing until the club closed on the morning of the 28th. ***R. 205-09***.

When they left the club, Mr. Campbell walked ahead of Mr. Hampton. Everything was calm until Mr. Campbell reached to open his car door. That's when he saw Red Dog "snuck [my cousin] from behind." ***R. 209; 211-12***.

> I tried to come back around to try to freeze the situation, stop it from happening, but everybody was trying to break it apart and they were locked up. So, I couldn't get to him in time, so I turned and asked … Andre what's going on? Why [did] your brother [do] that? And he just walked off. So I said I'll go try to, you know, aid my cousin, to help him out. You know, try to get everything calm, calmed down. And that's when I heard shots.
>
> …. I heard like three at first. But then I ducked and I ran back in the club, … trying to protect myself because I didn't know where it was coming [from] … know, it was spur of the moment and I ran back in ….

R. 212, lines 11-23.

Mr. Campbell did not see who fired the shots, but he had seen the two security guards breaking up the fight. He went back outside once the situation had calmed down and he saw that Mr. Hampton was safe. They left the club and went to Myrtle Beach later that morning without

speaking to law enforcement. However, the Sheriff's Office subsequently called him at work. ***R. 212-16.***

On May 28, 2016, Rusty Davis was the sergeant in the criminal investigations division of the Colleton County Sheriff's Office. He processed the scene at Leon's Club. Although he took measurements and photographs at the scene, he did not recover any shell casings. ***R. 218-30; 234.***

Det. Kelly Padgett, of the Colleton County Sheriff's Office, arrived at Leon's Club around 4:14 a.m. on May 28th. She first spoke to other investigators who were present. She then assisted with processing the crime scene and collecting evidence. However, she likewise did not recover any shell casings. She became the lead investigator for the case the following week. ***R. 236-42.***

She and Det. Wallace thereafter interviewed several witnesses who had information about the shooting, but most of the witnesses were uncooperative. They also executed a search warrant on the Appellant's Walterboro, South Carolina home and collected two cell phones in the search. One phoned belonged to Appellant and the other belonged to his brother, DaQuan. They later obtained search warrants for the two phones and executed those warrants, but they did not discover anything of evidentiary value. ***R. 242-43; 248.***

Kirt Wallace was a detective with the Colleton County Sheriff's Office in May of 2016. Early on May 28, 2016, he received a call at his Goose Creek home and was dispatched to Trident Medical Center, in order to meet with Mr. Martin. Det. Wallace went to the hospital but was unable to talk to Mr. Martin because Mr. Martin was heavily medicated and his mental and physical state were too bad for him to discuss the case. Det. Wallace later spoke with Mr. Martin in the I.C.U. on May 30th, and Mr. Martin said that he did not see the shooter but he saw the silver or gray gun. ***R. 251-55; 289-90.***[4]

[4] Det. Wallace was thereafter assigned to assist Det. Padgett. ***R. 254.***

Sgt. Brian Varnadoe had also responded to the scene on May 28th and he spoke to some of the people who were present. He also searched Mr. Hampleton's vehicle, with Mr. Hampleton's consent. However, there was no blood, gun, damage to the vehicle, or anything that suggested Mr. Hampleton might have been the shooter. ***R. 374-78***.

Because the investigation revealed that DaQuan Crawford had been involved in the altercation at Leon's, officers determined that Appellant was potentially a witness. Det. Wallace and Sgt. Varnadoe went to Appellant's Walterboro residence on May 31, 2016, and he agreed to speak with them at the Sheriff's Office annex. They transported him there, un-handcuffed. They also repeatedly made it clear to him that he was not under arrest and that he was free to leave anytime he wished.[5] ***R. 254-57; 379-82***.

Appellant, who did not appear to be under the influence of drugs or alcohol, freely spoke to the officers and did not invoke either his right to counsel or his right to remain silent. The conversation was video recorded. *See* State's Exs. 31 and 33. Because of the poor audio quality of State's Ex. 31, however, a transcript was made of the audio and it was introduced as State's Ex. 44, ***R. 548-80; R. 381-87***. *See also* **Supp. *R. 1-2; 3-7; 8-9***.

Appellant said that he had gone to Leon's on the 27th with his brother DaQuan and that DaQuan had gotten into a fight with "Ant," whom Appellant claimed began the fight without provocation. He initially claimed that he did not know who had broken up the fight in which his brother was involved and that they left as soon as the fight ended. ***R. 257-58; 381-87;*** State's Ex. 44, ***R. 551-62***.

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[5] He was not given his *Miranda v. Arizona*, 384 U.S. 436 (1966), rights because he was not under arrest or in custody and was merely considered a witness.

However, he eventually admitted that he had heard three gunshots fired behind him. He did not know who fired the shots and said that he had not previously mentioned the shooting because he had not been asked. He said that he was scared and that everyone started running after the shots were fired. He allegedly got into a black Trail Blazer driven by his cousin, Pee Wee or Twin, which had been parked on the right side of the club. His cousin supposedly took him home, and he claimed that he did not know how DaQuan left the club. ***R. 258-60;*** State's Ex. 44, ***R. 562-73***.

When Sgt. Varnadoe confronted Appellant with the fact he had interviewed the owner of the black Trail Blazer (Mr. Hampleton) at the scene on the 28th and asked how Appellant's version was possible, Appellant replied, "I guess he drove fast. I don't know." State's Ex. 44, ***R. 574-75***.

Also on May 31st, Det. Padgett requested photographic lineups from SLED because

> ... we ... began receiving tips and information on individuals who had been on scene and may have been involved in an altercation or a fight. And we received the name of an individual after we interviewed Andre Crawford, who he claims had given him a ride home. And that's how ... we ended up with three different names. One of those was the Defendant, Andre Crawford. So, requested photo line-up on his brother, DaQuan Crawford, as well as Damon Hampleton ....

R. 258.

Det. Wallace went to the hospital on June 4, 2016, and presented two photographic lineups to Mr. Martin. ***R. 260***. *See also* Argument, *infra*. Mr. Martin was shown the first photographic lineup (State's Ex. 40) and asked whether he could identify the person he saw fighting on May 28th. Mr. Martin immediately identified DaQuan Crawford as the fighter. Det. Wallace then showed him a second photographic lineup (State's Ex. 41) and asked whether he could identify "the person who was in close proximity to the fight. He immediately selected Appellant as that man. He was positive about both identifications. ***R. 262-71***.

Det. Wallace testified that Mr. Martin was not able to provide any additional information

about the crime on June 4th and had given the following explanation for his memory problems: "He said at the time, it's like a dream you're trying to remember. You know you seen something, you know you have a recollection of it, but you just can't really remember what it was." As a result, Det. Wallace asked him to call if he remembered anything else. ***R. 172-73; 290-92***.

On June 6th, Det. Wallace arrested Appellant for obstruction of justice based on the information that Appellant gave in the May 31st interview as to how he got home from Leon's on the morning of the shooting because officers had already spoken to Mr. Hampleton and searched his black Trail Blazer. Appellant gave a video-recorded statement to Sgt. Varnadoe on the 6th (State's Ex. 33), in which Appellant was evasive and did not answer questions asked of him. ***R. 261-62; 394-403***.

Sometime between June 4th and June 28th, Det. Wallace went to Mr. Martin's house and did a "welfare check." He did not show any photographs to Mr. Martin on that day. On June 28th, Mr. Martin called Det. Wallace and said that "I remember everything now. I remember who shot me." Det. Wallace told Mr. Martin to come to Det. Wallace's office "so we can sit down and get this on audio and video and, perhaps, present him with another photo line-up in reference to the additional information that he now remembered at the time." ***R. 173-74***.

Mr. Martin went to Det. Wallace's office on the 29th. Det. Wallace again showed him two photographic lineups (State's Exs. 43 and 44). When shown the first lineup (*see* State's Ex. 43) this time, Mr. Martin immediately identified DaQuan Crawford as the fighter, and he immediately identified Appellant as the shooter when he viewed the second lineup (*see* State's Ex. 44). Again, he was very certain as to both identifications and never wavered on the persons he had selected. ***R. 175-84; 285-86; 298-99***. Det. Wallace learned at that time that Appellant and his brother were regulars at Leon's. ***R. 284***.

Mr. Martin testified that he was disabled as the result of being shot. He explained that "my ribs, my diaphragm and spleen and kidney got injured and both of my lungs collapsed."[6] He still had "breathing issues, nerve issues" and Post-Traumatic Stress Disorder (PTSD) at the time of trial. He did not have any of these problems before being shot. ***R. 304, lines 4-24; 339, line 21 – 341, line 11.***

He further testified that he had worked security for eight years before the shooting, beginning when he was providing "contract security for [Naval] weapons station in January, 2008. Jesse Guy began working there at the same time. The men became friends and remained friends until Mr. Guy was murdered. At the time of the shooting, both men worked for security companies. Mr. Martin had also provided personal protection and worked security at clubs in Charleston and Colleton Counties, since 2009. ***R. 304, line 25 – 309, line 16.***

Both men had to be certified annually by SLED. This qualification included CPR and non-lethal weapons training. ***R. 305, lines 10-25.*** Additionally, Mr. Martin testified that he had worked security at nightclubs over 1,000 times (***R. 306, line 20 – 307, line 1***), and that he was trained to be observant,[7] much like a police officer. ***R. 313, lines 3-19.***

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[6] The bullet with which he was shot was not removed from his chest until March 9, 2018. ***R. 339, line 21 – 341, line 11.***

[7] Specifically, he testified that:

> I'm trained to be observant, how to -- learn how to paint a picture with everything that you see and keep that mental picture in your pocket, always keep your head on a swivel. Asking questions, if you see somebody, just talk to them, have a normal conversation. You may not know their name, but you are always going to know their face. ... [Also, I pay] ... [a]ttention to detail, looking to see who gets out of what car, clothing, the number of people that you may see, always keep a mental count of the number of people that attends an establishment, knowing who they are accompanied with, always looking at height, weight, you know, skin color.

R. 313, lines 3-16. *See also* ***R. 353, line 18 – 355, line 4.***

Mr. Martin's job at Leon's Club was to pat-down anyone entering the club and to provide security outside of it. Even though Appellant "never really came inside the club," he had previously seen Appellant with DaQuan Crawford outside Leon's Club "about five times" before the shooting. (Appellant was always with his brother). These were brief encounters but he described the front of the club as "pretty well lit." ***R. 311, line 8 – 318, line 18; 313, line 20 – 317, line 10; 318, lines 5-20.***[8]

With respect to the morning he was shot, Mr. Martin testified that he arrived at Leon's Club around midnight on the morning of May 28, 2016, and he would pat-down patrons who entered the club. There is a light outside the club that illuminated the parking lot, and he was at or near the front door of the club. He had his back to the club and this gave him a clear view of the entire parking lot. "It was a real easy night," without any incidents. He saw both Appellant and DaQuan Crawford. They arrived sometime after him and they were standing between two parked cars, talking, the rest of the morning. ***R. 319, line 18 – 325, line 16; 326, line 5 – 327, line 13.***

Mr. Martin testified that shortly before the club closed, he went inside and got some free food that was part of his payment that morning. He then went back outside, placed the food in his car, and he remained outside until the club closed at 3:30 a.m. At that point, Mr. Guy was standing to his right. The next thing Mr. Martin knew, two women ran past him. "[T]hey actually cussed and they was like oh, snap, they['re] fighting." ***R. 325, lines 19-20; 327, line 16 – 331, line 1.***

Mr. Martin testified that:

> That's when I look and I see Jesse [Guy] run to the fight. So, that's when ... I went to the fight and I saw Jesse grab the Defendant's brother. .... And was trying to pull him off. And as I was approaching, that's when I saw Jesse actually pull his taser out and said, Taser, taser, and tased him one time just to try to make them let go.

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[8] Mr. Martin had seen DaQuan Crawford, whom he did not know by name, at the club between thirty and fifty times. ***R. 317, line 2- 318, line 1.***

> And that's when I came and I grabbed the guy he was tussling with, and was trying to just pull them apart. And then, I heard Jesse yell, Taser, taser again, and that's when … the Defendant's brother let go and we pulled them apart.
>
> So, we pulled them apart, it was -- We was facing each other and when we pulled them apart, our backs was towards the club and we had them facing the road – we was facing the road right there. And soon, like immediately after that happened, … I heard footsteps and I heard the Defendant, and he said, That's messed up what y'all doing to my brother. I turned and I saw him, and that's when he fired them shots.

R. 331, lines 4-24. *See also* ***R. 331, line 25 – 333, line 15; 334, line 24 – 335, line 17; 357, line 13 – 358, line 12.***

Mr. Martin testified that he got "a very good look" at Appellant. "I was able to see a gun, I was able to see his clothing, even the color of his shoes." Therefore, he was [o]ne hundred percent" certain that Appellant was the shooter. ***R. 335, line 25 – 336, line 8.***[9]

Mr. Martin confirmed that Det. Wallace initially visited him after he went to the hospital, on May 28, 2016, before he went into surgery. Det. Wallace was merely checking on him, did not show him any photographs, and said that "they will be back to … see me." The second time Det. Wallace came to see him, "I told him briefly about the night in question. Just small little bits and pieces of what I could remember, but nothing hard core," in terms of identifying who had shot him. ***R. 341, line 23 – 342, line 22; 359, lines 19-25; 364, line 20 – 365, line 2.***

Mr. Martin next saw Det. Wallace on June 4th, while he was still in I.C.U. His fiancé was also present. This time, Det. Wallace showed him two sheets of paper, each with six pictures on

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[9] Mr. Martin remembered that after he was shot, he "stumbled" into the road holding his chest. Also, he called for Mr. Guy as the crowd dispersed. Mr. Guy came to him and when he said that he had been hit, Mr. Guy promised to get him help. Mr. Guy ran to the right and Mr. Martin never saw his friend again. ***R. 336, lines 12-21; 337, line 16 – 338, line 1.*** He also remembered part of the ride to the hospital in the ambulance and seeing his family before being taken into surgery. ***R. 339, lines 14-20.***

it, *i.e.*, the photographic lineups.[10] With respect to the first set of photographs, which he identified as State's Ex. 40, he was asked if he could remember "seeing anyone involved in the fight." With the second set of photographs, which he identified as State's Ex. 41, he was asked "if I remembered seeing anyone in the vicinity of the fight." ***R. 342, line 23 – 345, line 11; 360, line 22- 361, line 13.***

Mr. Martin was able to select a person from each lineup. Appellant's brother, DaQuan was fighting and Appellant was the person in the vicinity of the fight. He was "[a] hundred percent sure" about each of his selections, and neither Det. Wallace nor his fiancé suggested whom he should select from either photographic lineup. ***R. 345, line 12 – 346, line 15.***

When questioned about what he told Det. Wallace that day, he testified that:

> I was telling him that, you know, I could see the clothing and I could see the gun, but … the face is like it wants to come to me, but it's not coming to me directly. And he said -- he said, All right. Just don't pressure it, you know, we've got time to talk, … just get better.

See ***R. 346, lines 16-24.*** He thought that he was shot with a .40 caliber weapon. ***R. 358, lines 13-19.***

According to Mr. Martin, he saw Det. Wallace two more times. "I contacted Detective Wallace a couple of weeks after I got home and I informed him that I remembered everything of what I saw that night, including the shooter." Det. Wallace told him to come to the Sheriff's Office Annex and give a statement. So, Mr. Martin went there the next day with his best friend. Mr. Martin did not remember a specific date but testified that it was "towards the end of June." ***R. 346, line 25 – 347, line 24.***

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[10] While he was not completely certain on the date, he testified that this was the first time that Det. Wallace had shown him any photographs.

When they met, Mr. Martin told Det. Wallace, "I remembered the shooter, I remembered the guy that shot me and he showed me another photo line-up in the same form of this one." The photographic lineup did not have anything written on it. Mr. Martin "circled the same two individuals ... on the photo line-ups on two separate papers. I circled the Defendant's brother [in State's Ex. 42] as the fighter and I circled the Defendant [in State's Ex. 43] as the shooter." ***R. 347, line 25 – 349, line 14***.[11]

He also dated and signed each lineup. He was "[a] hundred percent" certain that Appellant was the person that shot him. He also made an in-court identification of Appellant as the man who shot him. ***R. 349, line 13 – 350, line 20***.

Dr. Cynthia Schandl a forensic pathologist, performed an autopsy on Mr. Guy. She testified that he was approximately 6'1" tall and weighed 289 lbs. ***R. 173***. She opined that the cause of death was "[l]ung and liver destruction due to [a] single penetrating gunshot wound to the back." She determined that the manner of death was homicide. She found an entrance wound in Mr. Guy's back but no exit wound. Using x-rays, she was able to recover the bullet (State's Ex. 28-A). ***R. 161-72***.

Dr. Charles Roberts testified that he was a cardiothoracic surgeon at Trident Medical Center in March of 2018. ***R. 404-05***. Mr. Martin was referred to Dr. Roberts by an area doctor because the bullet from the May 28, 2016, shooting was still lodged in the wall of his left chest. Dr. Roberts surgically removed that bullet (State's Ex. 34) on March 9, 2018, and the bullet was thereafter given to law enforcement. ***R. 405-10***.

SLED Agent James Green testified that he is a forensic firearms examiner in SLED's

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[11] He again told Det. Wallace that Appellant had been near the fight. ***R. 367, line 23 – 368, line 23***.

forensic services laboratory. He received and examined both the bullet removed from Mr. Guy at autopsy (State's Ex. 28-A) and the bullet removed from Mr. Martin's chest (State's Ex. 34). He concluded that "they were fired by the same firearm." He further opined that "State's Exhibit 28A was most consistent with bullets loaded into a 38 Special and/or 357 Magnum caliber cartridges." He could not determine which caliber bullet it was without a weapon for comparison because "38 Special and 357 Magnum, both of those separate calibers use the same diameter bullet." Further, he accounted for the absence of cartridge casings at the scene by explaining that "99.9 percent of the firearms in those calibers firearms are revolvers" and "very few ... [revolvers] eject the cartridge cases out." ***R. 417-24***.

STANDARD OF REVIEW

In criminal cases, appellate courts only review errors of law. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). An appellate court gives great deference to the trial judge when reviewing an evidentiary ruling because the reception or exclusion of evidence is a matter largely in the trial judge's sound discretion. *State v. Groome*, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); *see also State v. Torres*, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010). "Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. .... 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 discretion." *State v. Liverman*, 398 S.C. 130, 137-38, 727 S.E.2d 422, 425 (2012). *See also State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) (same); *State v. Brown*, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct.App. 2003) (same); *State v. Mansfield*, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000). Applying this standard of review, Respondent submits that the Court should affirm the trial court's ruling and the judgment of conviction should be affirmed.

ARGUMENT

I. The trial court did not abuse its discretion by admitting two photographic lineups of Appellant and attempted murder victim Bruce Martin's in-court identification of Appellant as the man who shot him because the photographic lineups were not unduly suggestive. Further, any possible suggestiveness in the photographic lineups did not create a very substantial likelihood of irreparable misidentification where the record shows Mr. Martin knew Appellant, he never identified anyone else as the shooter or said that he did not know who shot him, and his failure to sooner identify Appellant as the shooter resulted from temporary memory loss caused by the shooting.

Appellant claims that the trial court erroneously admitted two photographic lineups and attempted murder victim Bruce Martin's in-court identification of Appellant as the person who shot him. He argues that Martin's identification of him was allegedly the result of an unduly suggestive identification procedure that was conducive to an irreparable misidentification, since Martin identified him roughly a week after the shooting (on June 4, 2016) as being "in close proximity or that was in some shape, form, or fashion involved in" the shooting and did not identify him as the shooter until twenty-five days later (on June 29, 2016). Respondent submits that the trial court did not abuse its discretion because the photographic lineups were not unduly suggestive. Further, any possible suggestiveness in the photographic lineups did not create a very substantial likelihood of irreparable misidentification where the record shows Mr. Martin knew Appellant, he never identified anyone else as the shooter or said that he did not know who shot him, and his failure to sooner identify Appellant as the shooter resulted from temporary memory loss caused by the shooting. Also, Appellant's attacks on the admissibility of Mr. Martin's identification go to the weight he believes it should have been accorded, as opposed to its admissibility, and several arguments are contradicted by the record of the pretrial hearing.

A. How Issue developed below.

On December 11, 2017, the Honorable Brooks Goldsmith held a pretrial *Neil v. Biggers*, 409 U.S. 188 (1972), hearing on the identification procedure utilized when the attempted murder

victim, Bruce Martin, identified Appellant as the person that shot him and murder victim, Jessie Guy. ***R. 3-40.***[12] Detective Kirt Wallace, formerly of the Colleton County Sherriff's Office, was the only witness at this hearing. He testified that he was "the secondary detective assigned to th[e] case." ***R. 4, line 6 – 5, line 4***. Det. Wallace received a call at his Goose Creek home early on May 28, 2016, and was dispatched to Trident Medical Center, in order to meet with Bruce Martin. ***R. 5, line 18 – 6, line 10***.

Det. Wallace's contact with Mr. Martin on the 28th was very limited and only lasted roughly ten minutes because Mr. Martin was "heavily sedated" and was in "critical condition." Therefore, Det. Wallace felt that "he was in no condition ... to talk about anything" related to the case. ***R. 6, line 20 – 7, line 25; 27, line 18 – 28, line 6***.

Det. Wallace next visited Mr. Martin at the hospital on May 30, 2016. Although Mr. Martin was in the ICU unit, he was in "much better condition" and was "definitely more lucid." On this visit, Mr. Martin told Det. Wallace "how he saw the incident and what he experienced at the club." ***R. 8, line 3 – 9, line 1; 11, line 6-20***.

Det. Wallace saw Mr. Martin at the hospital, again, on Saturday, June 4, 2016. On this occasion, Mr. Martin was even more lucid. Det. Wallace showed him two photographic lineups.[13] The first photographic lineup (State's Ex. 10) consisted of six photographs of individuals on a single page. Each of the individuals was of the same race and each had similar height, weight and other characteristics. Det. Wallace advised him that the person involved in the fight on the 28th might be or might not be in the lineup. He was also advised that if he did see the suspect, he should

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[12] Judge Goldsmith did not preside over the subsequent trial. Because has Appellant has cited the December transcript as Respondent has done the same.

[13] The photographic lineups were requested by the lead detective, Det. Kelly Padgett, "a day or two" after Det. Wallace's May 30th meeting with Mr. Martin. ***R. 10, lines 3-14***.

circle the photograph, initial it, and date it. ***R. 9, line 2 – 10, line 2; 11, line 20 – 14, line 2; 18, line 5 – 19, line 7.***

After viewing the lineup for less than ten seconds, Mr. Martin selected Appellant's brother, DaQuan Crawford, as the person who had been fighting immediately before the shooting and he never indicated that he had changed his mind. A woman who was either Mr. Martin's wife or fiancé, was present in the room, but neither she nor Det. Wallace did anything to suggest or to influence Mr. Martin's selection, in any manner. Also, Det. Wallace had not shown any single photographs to him before showing him the lineup. ***R. 9, lines 2-7; 14, line 24 – 15, line 24; 16, lines 8-18.***

Det. Wallace then showed Mr. Martin a second photographic lineup (State's Ex. 11) to see whether he could identify anyone as being "in close proximity or that was in some shape, form, or fashion involved in the situation." Again, the lineup consisted of six photographs of individuals on a single page. Each person was of the same race and each had similar height, weight and other characteristics. Also, Det. Wallace advised him that the suspect might or might not be in the lineup, but if he did see the suspect, he should circle the photograph, initial it, and date it. ***R. 14, lines 3-10; 15, line 25 – 16, line 7.***

Mr. Martin immediately identified Appellant as someone who was near the incident. He appeared certain and made the identification without hesitating. Neither the woman present nor Det. Wallace did anything to suggest or to influence Mr. Martin's selection, in any manner and Det. Wallace had not showed any single photographs to him before he viewed the lineup. ***R. 16, line 19 – 19, line 7.*** In discussing the shooting, Mr. Martin never said that he did not see the shooting. Rather, he first said that he actually saw the gun. Because Mr. Martin had experienced a traumatic situation and his memory was obviously getting better with the passage of time, Det.

Wallace told Mr. Martin to call if he could remember anything else about the shooting. ***R. 19, line 8 – 20, line 18.***

Later in June, Det. Wallace went by Mr. Martin's house for a wellness check. Mr. Martin's memory was still "kind of fuzzy." So, Det. Wallace told Mr. Martin to let him know if Mr. Martin remembered anything. Det. Wallace did not show Mr. Martin any photographs on this visit. ***R. 21, lines 4-22; 29, lines 9-16.***

Det. Wallace testified that Mr. Martin called on June 28, 2016, and said that he remembered who shot him. Det. Wallace "advised him to come down to our office so we can document it, have him to write a statement and get it on video and audio." ***R. 20, line 23 – 21, line 3; 21, line 23 – 22, line 1.***

Mr. Martin came to the Sheriff's Office annex on June 28, 2016, and Det. Wallace presented two "fresh" photographic lineups (State's Exhibits 12 and 13) that did not have any markings on them. He followed "the same procedure" in presenting these lineups, except Det. Wallace's recollection was that he presented both lineups to Mr. Martin at the same time. Mr. Martin immediately selected Appellant (State's Ex. 13) as the person who had shot him and DaQuan Crawford (State's Ex. 12) as the person who was fighting, by circling, initialing, and dating their respective photographs. Again, he did not hesitate in making the selection and he was very certain that Appellant was the shooter. Although another man was with Mr. Martin, neither this man nor Det. Wallace did anything to suggest or influence Mr. Martin's selection.[14] ***R. 22, line 6 – 25, line 17; 30, lines 4-7.***

[14] Also, Det. Wallace did not show him any other single photographs, and Det. Wallace only showed him the June 4th and June 29th lineups. ***R. 26, lines 19-23.***

After Mr. Martin had identified Appellant as the shooter and DaQuan Crawford as one of the persons who had been fighting, he discussed the shooting:

> ... [T]he main thing that he mentioned in this particular incident, ... he specifically said that while he was breaking up the fight or assisting in breaking up the fight, ... he remembered a voice saying, That's wrong what you're doing to my brother. That ... person saying that is what made him look back to see where that voice is coming from. And that's when he said that he identified Mr. Andre Crawford. And upon that person saying, That's wrong what you're doing to my brother and the minute that he actually looked back is when shots was fired.

R. 25, line 22 – 26, line 8. When Det. Wallace asked him how he knew Appellant or DaQuan Crawford, he said, "They are regulars, they normally come to the club." ***R. 26, lines 9-15***.

The State argued that the identification was admissible because the photographic lineups were not unduly suggestive, that Det. Wallace followed procedures which "are recognized throughout the United States," that Det. Wallace "did not suggest or influence Mr. Martin's decision to choose anyone in any manner," and that Mr. Martin "was given the photo line-ups and allowed to make the decision himself." Further, Mr. Martin was "completely coherent at the time," he made a selection without hesitation, and "he was very sure about his selection." The State also argued that "[h]e talked about how his memory came back, it was coming back over a period of time," and that "he actually indicated that DaQuan Crawford was the person that he selected as being involved in the fight" on both occasions. Mr. Martin also indicated that Appellant "was near the fight in his first photo line-up" and that Appellant was "the person who shot him in the second photo line-up that he saw on June 29th, 2016." ***R. 30, line 20 – 32, line 4***.

Appellant contended that what was most significant was "where we end up at the June 29th identification, instead of each individual identification procedure under the *Biggers* factors. See *Biggers*, 409 U.S. at 199-200. More specifically, he argued that:

> we've gone from [I] can't identify the shooter to oh, I recognize these two guys as having been there, which my client, of course, has admitted the whole time, along

with a lot of other people being there, to June 29th, no, I'm certain that this is the guy that shot me.

R. 32, lines 6-17.

Appellant further maintained that the *Biggers* factors required suppression of the identification. While he did not contest Mr. Brown's opportunity to view the assailant, he suggested that "the statement varies as to what he would say the degree of attention he had. Ultimately, they're saying I was fully zoomed in on it. Others say, I don't remember, I just kind of saw a gun." He further argued that "I think we really hit it with number three, which is accuracy of the prior description." ***R. 32, line 18 – 33, line 6.***

Appellant conceded that the Court in *Biggers* was referring to whether "the actual description of the person changes." However, he suggested that "it also can be envisioned as accuracy of that person's role." Here, Mr. Brown's description of Appellant's role, "a little over a week after the event" was that Appellant was merely present and he did not mention either that Appellant shot him or said anything. This description has changed "to oh, that person was there and around, but, you know, I can't say that person shot me or didn't shoot me, to oh, I'm one hundred percent sure now." Thus, Mr. Brown's prior descriptions were inaccurate. ***R. 32, line 18 – 34, line 6.***

Appellant discounted the fourth *Biggers* factor, Mr. Brown's level of certainty, arguing that "the science is that level of certainty has absolutely nothing to do with the reliability of a statement of eyewitness testimony. And … I think the changing story of the identification kind of bears that out." As to the length of time between the crime and the confrontation, he argued that Mr. Brown was first shown the photographs a week after the crimes. He further suggested that the identification process was "useless[]" because Mr. Brown was shown photographs of someone whom he already knew and Mr. Brown could have immediately identified Appellant but did not.

"While I would say each individual interview was not necessarily done improperly, certainly, we would say that the collective weight of leading up to a final identification of Mr. Crawford is not reliable scientifically."[15] As a result, he claimed the identification was "inherently unreliable." ***R. 34, line 7 – 35, line 25.***

In reply, the State first noted that Det. Wallace "never testified that Mr. Brown said he actually had no idea" who the shooter was. Rather, "he simply did not remember at that time because of the traumatic event." Further, the accuracy of the prior description was satisfied because Mr. Brown consistently told Det. Wallace that "DaQuan Crawford was the person who was involved in the fight." He also consistently said that both Appellant and DaQuan Crawford were involved in or near the fight. ***R. 6, lines 2-22.***

With respect to the level of certainty, the State noted that Det. Wallace testified Mr. Brown said "he had seen these gentlemen numerous times in the past. And he actually turned and he actually was able to see the person who actually said to him, That's wrong what you're doing to my brother, looked at Mr. Crawford and is able to identify him." Therefore, the State argued that the motion to suppress should be denied, and that the identification and the photographic lineups should be admitted. ***R. 36, line 23 – 37, line 12.***

Judge Goldsmith denied Appellant's motion because he found that "the photographs were not unduly suggestive." ***R. 37, lines 13-18.*** Appellant then objected to the introduction of the photographic lineups as unduly prejudicial because both Det. Wallace and Mr. Brown would testify that Mr. Brown selected Appellant from the photographic lineups. ***R. 37, line 19 – 69, line7.***

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[15] He conceded that he did not have an expert to present *in camera* testimony on the unreliability of the identification, but stated he would have an expert to testify at trial if Judge Goldsmith ruled the identification was admissible. ***R. 35, lines 17-21.***

Following the State's response opposing his motion and explaining why the photographic lineups were relevant, Judge Goldsmith denied this motion as well. ***R. 39, line 8 – 40, line 8.***

In the subsequent trial, Appellant did not object to Det. Wallace's testimony that Mr. Martin had identified DaQuan Crawford as the person involved in the fight (State's Ex. 40) and Appellant as a person in the proximity of the fight (State's Ex. 41) on June 4, 2016 (***R. 262, line 17 – 269, line 6***), until the State moved to introduce the lineups. At that point, the trial judge stated that the parties had previously informed him that they had agreed to rely on Judge Goldsmith's earlier ruling. The parties confirmed that this was correct and the trial judge agreed to "make a record of that at the appropriate time." ***R. 269, line 7 – 270, line 4.***

Appellant likewise renewed his objection, on the same basis, when the State moved to introduce the lineups from Mr. Martin's June 29, 2006 identification of DaQuan Crawford as the involved in the fight (State's Ex. 42) and Appellant as a person in the proximity of the fight (State's Ex. 43). ***R. 281, lines 9-23***. After Det. Wallace's testimony, the trial judge stated on the record that he had been advised that Judge Goldsmith had held a *Neil v. Biggers* hearing on December 11, 2017, and that the parties had agreed to be bound by his ruling. ***R. 301, line 18 – 302, line 4.***

B. Discussion.

An identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification may deprive a criminal defendant of due process of law. *Stovall v. Denno*, 388 U.S. 293 (1967). *See also Stale v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). *Biggers* established a two-pronged test to determine the admissibility of an out-of-court identification. The trial judge must first determine whether the identification process was unduly suggestive. *Biggers*, 409 U.S. at 198. "Only if the pretrial procedure was suggestive, need the [trial] court consider the second question - whether there is a substantial likelihood of irreparable

misidentification." *Brown*, 356 S.C. at 503, 589 S.E.2d at 784-85 (quoting *Moore*, 343 S.C. at 287, 540 S.E.2d at 447-48). Even assuming that an identification procedure was suggestive, suppression is not automatically required. *Id.*

Rather, the court must then determine whether the out-of-court identification was nevertheless so reliable under the totality of the circumstances that no substantial likelihood of misidentification existed. *Biggers*, 409 U.S. at 199.[16] The relevant factors to be considered under the totality of circumstances include: (1) the opportunity of the witness to view the accused; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Biggers*, 409 U.S. at 199-200. *See also Liverman*, 398 S.C. at 138, 727 S.E.2d at 426. However, "reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (footnote added). Thus, an in-court identification of an accused is inadmissible only if, under the totality of the circumstances, a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. *Id.* "Short of that point, such

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[16] The *Biggers* Court explained: "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." *Id.* at 198. Yet, "unnecessary suggestiveness alone" does not require the exclusion of evidence. *Id.* at 198-99.

Although due process does not require a state court "to conduct a hearing outside the presence of the jury whenever a defendant contends that a witness' identification of him was arrived at improperly," *Watkins v. Sowders*, 449 U.S. 341, 349 (1981), the South Carolina Supreme Court has ruled that "this determination should be made during an *in camera* hearing, outside of the presence of the jury" as a matter of state law. See *Liverman*, 398 S.C. at 139, 727 S.E.2d at 426. *See also* Rule 104(c), SCRE (providing that "[h]earings on the admissibility of ... pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury"). "The purpose of the *in camera* hearing is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification." *State v. Ramsey*, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001).

evidence is for the jury to weigh." *Id.* at 116. *See also Harker v. Maryland*, 800 F.2d 437, 443 (4th Cir. 1986) (The exclusion of identification evidence is a "drastic sanction" that is "limited to identification testimony which is manifestly suspect").

At the outset, Respondent would clarify five misleading points on which Appellant has based his assignment of error. First, he supports his argument with both testimony from the December 11th hearing and the subsequent trial.[17] However, he is limited to the evidence presented

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[17] For instance, he relies on both Mr. Martin's subsequent trial testimony and the testimony of defense witness Dr. Dawn McQuiston, an expert on eyewitness memory. However, neither witness testified at the December 11, 2017 hearing. Thus, the Court should not consider their testimony in connection with this issue. *Id. See also I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments"); *State v. Benton*, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000) (an issue is unpreserved if a defendant argues one ground at trial and a different ground on appeal). Moreover, to the extent that her testimony calls into question the Supreme Court's reasoning in the *Stovall* line of cases, the reasoning of the Supreme Court controls. *See State v. Ledbetter*, 881 A.2d 290, 312-13 (Conn. 2005), *cert. denied*, 547 U.S. 1082 (2006) (reaffirming the validity of the *Biggers* factors for purposes of the Connecticut constitution and concluding that scientific studies on relationship between confidence and accuracy of identification were "not definitive").

Respondent further notes that the appellate courts in the State of New York and the federal courts in the Second Circuit have consistently and quite correctly recognized that a victim need not testify at a *Biggers* hearing, and that the defendant is not entitled to compulsory process at such a hearing. See *People v. Chipp*, 75 N.Y.2d 327, 553 N.Y.S.2d 72, 552 N.E.2d 608 (N.Y. 1990); *Mitchell v. Herbert*, 01-CV-681, 2008 WL 342975, 8 (W.D.N.Y., Feb. 6, 2008); *Smith v. Smith*, 2003 WL 22290984, 6-9 (S.D.N.Y., Sept. 29, 2003) (rejecting argument that the trial court deprived defendant of his right to present a defense, as guaranteed by the Sixth and Fourteenth Amendments, by refusing to allow defendant to call witnesses to testify at the hearing). *See also Jones v. State*, 395 Md. 97, 116-18 & n. 13, 909 A.2d 650, 661-62 & n. 13 (Md. Ct.App. 2005) (finding that defendant's motion to suppress a pretrial identification made by a witness from a photo array was sufficient to place trial court and the state on notice of nature of defendant's evidentiary challenge, and thus defendant was entitled at hearing on motion to call detective who presented photo array to testify to facts and circumstances surrounding identification procedure; however, explaining that "**Our holding today should not be read as creating an absolute right of defendants to call any or all witnesses at a suppression hearing**. Specifically, as the issue is not before us, we do

to Judge Goldsmith because the parties accepted Judge Goldsmith's denial of the motion to suppress as a final ruling on the issue and the trial judge did not make any additional rulings on the matter but, quite appropriately, accepted their stipulation. See *Kirkland v. Allcraft Steel Co.*, 329 S.C. 389, 393, 496 S.E.2d 624, 626 (1998) ("A stipulation is an agreement, admission[,] or concession made in judicial proceedings by the parties thereto or their attorneys. Stipulations ... are binding upon those who make them"); *Belue v. Fetner*, 251 S.C. 600, 606, 164 S.E.2d 753, 755 (1968) ("When counsel enter into an agreed stipulation of fact as a basis for decision by the court, both sides will be bound by such agreed stipulation, and the court will not go beyond such stipulation to determine the facts upon which the case is to be decided").

Second, Appellant maintains that police had contact with Mr. Martin five times from May 28, 2016, until he identified Appellant as the person who shot him on June 29, 2016. While true, it is a disingenuous and exceptionally misleading point. Although Det. Wallace testified that he went to the hospital on May 28th, he did not speak with Mr. Brown about the crime because Mr. Brown was "heavily sedated" and in "critical condition." Det. Wallace first spoke to Mr. Brown about the crimes on May 30th. On that occasion, Mr. Brown discussed what had occurred on the 28th. Det. Wallace next spoke to Mr. Brown on June 4th, when Mr. Brown identified Appellant as having been present at the time of the fight involving Daquan Crawford.

Det. Wallace thereafter visited Mr. Brown sometime between June 4th and June 28th. However, this amounted to little more than a welfare check because Mr. Martin's memory was still somewhat "fuzzy." At that time, Det. Wallace asked Mr. Brown to call if he remembered anything else about the incident. Mr. Brown then called Det. Wallace on June 28th and said that he knew

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not address whether a defendant may call the identifying witness at the hearing") (emphasis added).

who had shot him. He then identified Appellant as the shooter on June 29th. So, Mr. Brown had only had spoken with Det. Wallace three times before he called and said that he remembered the shooter was Appellant. The identification from the photographic lineup on the 29th was the fourth true interaction he had with law enforcement and was merely intended to confirm what he had said that he knew: that Appellant shot him.

Third, Appellant asserts on page 12 that Mr. Brown viewed three photographic lineups with Appellant's picture in it. This is contrary to the record, which reflects beyond cavil that he was only shown the same lineup twice. *See* State's pretrial Exs. 11 and 13. (These were introduced at trial as State's Exs. 41 and 43). Fourth, Appellant quotes defense counsel's contention that Mr. Brown's description of the incident " 'has changed from the same person, from didn't see anything to oh, that person was there and around, but, you know, I can't say that person shot me or didn't shoot me, to oh, I'm one hundred percent sure now.' "Again, his claim is, again, exceptionally misleading. Appellant premises this argument on the cross-examination of Sgt. Jackie Lawson from the trial. ***R. 99, lines 14-24***. Yet, the transcript of the December 11, 2017 hearing does not contain this evidence. Instead, it unerringly reflects that Mr. Brown discussed what had occurred on the 28th the very first time he spoke with Det. Wallace on the 30th, as discussed.

Fifth, Appellant complains that "the trial court in this case made no specific findings as to why it found the identification procedure, given the totality of circumstances, was not unduly suggestive or why there was not a substantial likelihood of irreparable misidentification such that the identification was not unreliable." However, this argument is not properly before this Court on appeal because it was not raised below. *See Benton*, 338 S.C. at 157, 526 S.E.2d at 231 (an issue is unpreserved if a defendant argues one ground at trial and a different ground on appeal).

When the record is viewed correctly, it is clear that there is no evidence, whatsoever, that the identification procedure used in each identification was suggestive. The photographic lineups that were shown to Mr. Martin were prepared at the request of the lead detective, and none of the men depicted in the pictures contained in the lineups with Appellant with in it (State's pretrial Exs. 11 and 13) stood out from the others. *Accord State v. Gambrell*, 274 S.C. 587, 590, 266 S.E.2d 78, 80 (1980) ("The six photographs shown to the victim were chosen at random from police files"). All were pictures of persons of comparable size, apparently of similar age, similar appearance, all were African American, and all had similar physical characteristics. *Accord State v. Patterson*, 337 S.C. 215, 230, 522 S.E.2d 845, 852 (Ct.App. 1999).

Also, Det. Wallace never expressly or implicitly suggested to Mr. Martin which photograph was the suspected shooter. Instead, Det. Wallace advised Mr. Martin on both occasions that the suspect might or might not be in the lineup, but if he did see the suspect, he should circle the photograph, initial it, and date it. Likewise, Det. Wallace did not show Mr. Martin any individual photographs before he viewed the photographic lineups on June 4th and June 29th. On both June 4th and June 29th, Mr. Martin immediately selected Appellant as the individual he had seen on the early morning of May 28, 2016.

On June 4th, he selected Appellant as being "in close proximity or that was in some shape, form, or fashion involved in the situation." On June 29th, he selected Appellant as the person who had shot him. He did this on both occasions by circling, initialing, and dating his photograph in pretrial State's Exs. 11 and 13, respectively.[18] On both occasions, he did not hesitate in selecting Appellant. Rather, he immediately identified Appellant and he was very certain both times that

[18] Apparently, the photographic line used on the 29th consisted of the same persons as that used on June 4th, but the lineup itself was "clean" and there were no markings on it.

Appellant was person that he had seen. Also, Mr. Martin had called Det. Wallace on June 28th and said that he knew who had shot him before he identified Appellant as the shooter on June 29th.

He likewise told Det. Wallace on the 29th that:

> [W]hile he was breaking up the fight or assisting in breaking up the fight, all right, he remembered a voice saying, That's wrong what you're doing to my brother. That ... person saying that is what made him look back to see where that voice is coming from. And that's when he said that he identified Mr. Andre Crawford. And upon that person saying, That's wrong what you're doing to my brother and the minute that he actually looked back is when shots was fired.

R. 25, line 22 – 26, line 8. Further, Mr. Martin told Det. Wallace that he knew Appellant and DaQuan Crawford because they were "regulars" at the club. ***R. 26, lines 9-15***.

Although the Court in *Liverman* overruled *State v. McLeod*,[19] and held that the trial court must hold a *Biggers* hearing even when the eyewitness knows a defendant prior to the crime, the Court nevertheless recognized "the fact that an identification witness knows the accused remains a significant factor in determining reliability." The Court also concluded that "[t]he suggestive nature of [an identification procedure] is mitigated by the witness's prior knowledge of the accused." *Liverman*, 398 S.C. at 141, 727 S.E.2d at 427; *see also State v. Spears*, 393 S.C. 466, 481, 713 S.E.2d 324, 331-32 (Ct.App. 2011) (holding that photographic lineups were not unduly suggestive and that no substantial likelihood of irreparable misidentification existed when the witness was one "hundred percent sure" the defendant committed the robbery and the witness testified that she recognized the defendant "during the course of the robbery as someone she knew 'from the neighborhood' "). Indeed, the Court in *Liverman* went further and "concur[red] with those jurisdictions that consider the show-up identification procedure, normally considered unduly

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[19] *State v. McLeod*, 260 S.C. 445, 196 S.E.2d 645 (1973), *overruled*, *State v. Liverman*, 398 S.C. 130, 140-41, 727 S.E.2d 422, 427 (2012).

suggestive, as merely confirmatory" where the eyewitness knows the accused prior to the crime *See Liverman*, 398 S.C. at 141-42, 727 S.E.2d at 427-28.[20]

As the Court explained in *People v. Rodriguez*, 79 N.Y.2d 445, 583 N.Y.S.2d 814, 593 N.E.2d 268, 272 (1992), "A court's invocation of the 'confirmatory identification' exception is thus tantamount to a conclusion that, as a matter of law, the witness is so familiar with the defendant that there is 'little or no risk' that police suggestion could lead to a misidentification." Because Mr. Martin already knew the Crawford brothers, his identification of Appellant on June 29th, through the less suggestive process of a photographic lineup, was "merely confirmatory." *See Liverman*, 398 S.C. at 141, 727 S.E.2d at 427. Accordingly, to the extent that there was any possible suggestiveness in the photographic lineups used, Mr. Martin's prior knowledge of Appellant mitigated that suggestiveness, such that there was no substantial likelihood of irreparable misidentification. *Id. See also State v. Spears*, 393 S.C. 466, 481, 713 S.E.2d 324, 331-32 (Ct.App. 2011) (finding that photographic lineups were not unduly suggestive and that no substantial likelihood of irreparable misidentification existed when the witness was one "hundred percent sure" the defendant committed the robbery and the witness testified that she recognized the defendant "during the course of the robbery as someone she knew 'from the neighborhood' ").

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[20] This conclusion is consistent with "[t]he driving force behind *United States v. Wade*, 388 U.S. 218 ... (1967), *Gilbert v. California*, 388 U.S. 263 ... (1967) (right to counsel at a post-indictment line-up), and *Stovall*." *Brathwaite*, 432 U.S. at 111-12. As the Court explained in *Brathwaite*, "Usually the witness must testify about an encounter with a *total stranger* under circumstances of emergency or emotional stress. The witness' recollection of the *stranger* can be distorted easily by the circumstances or by later actions of the police." *Id.* at 112 (emphasis added). *See also Wade*, 388 U.S. at 228 ("Mr. Justice Frankfurter once said: '.... The identification of *strangers* is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials' ") (emphasis added). Obviously, the same concerns are absent when the eyewitness knows the accused.

Although Appellant does not cite to the United States Supreme Court's decision in *Foster v. California*, 394 U.S. 440 (1969), Respondent submits that *Foster* does not require reversal. In *Foster*, the witness did not identify Foster the first time he confronted him, even though there was a suggestive, three man lineup. *Id.* at 441. The most that the witness could say was that "[h]e 'thought' [the accused] was the man, but he was not sure." He was still unable to make a positive identification even after he had spoken to the accused. *Id.*

A week or ten days later, the police arranged yet another lineup. The accused was the only person in that lineup that the witness had previously viewed. After viewing this lineup, the witness made a definite identification. *Id.* at 141-42. The Court found that "this case presents a compelling example of unfair lineup procedures," *id.* at 142. The Court then held that all of the identifications inadmissible and found "[t]he suggestive elements in this identification procedure made it all but inevitable that [the witness] would identify petitioner whether or not he was in fact 'the man.' " *Id.* at 443.

Unlike *Foster*, here Mr. Martin had temporary memory problems as the result of being shot by Appellant. However, he never failed to identify Appellant a having been present at the time of the crime. He simply did not initially say that Appellant had shot him. Moreover, once he regained his memory, it was clear that he knew Appellant from previously seeing Appellant at the club, and he told Det. Wallace that he knew who had shot him before he viewed the second photographic lineup and identified Appellant as the shooter.

Even assuming *arguendo* that this Court finds the evidence does not support Judge Goldsmith's ruling, the trial record reflects that any error in his ruling is harmless beyond a reasonable doubt. *See Liverman*, 398 S.C. at 141-44, 727 S.E.2d at 427-29 (finding error in failing to hold *Biggers* hearing harmless where the record demonstrated there was no substantial

likelihood of irreparable misidentification). Det. Wallace's testimony before the jury closely tracked his earlier testimony. *See* ***R. 251, line 12 – 255, line 17; 260, line 5 – 261, line 5; 262, line 1 – 286, line 23***. Mr. Martin's testimony is set forth in the "Statement of Facts," *supra*.

The State likewise elicited testimony relevant to this issue through Dr. William Dutton, the trauma surgeon who treated Mr. Martin at Trident Medical Center, who testified that Mr. Martin

> had a tube placed for drainage in his chest. He underwent abdominal surgery, which his liver and his diaphragm were repaired. There was significant blood in his belly[] that was drained. He underwent blood resuscitation and was transported to the ICU following that for follow-up care.

R. 136, line 21 – 137, line 1; 139, line 23 – 141, line 2.

Mr. Martin lost his pulse and required immediate resuscitation on several occasions while was in the hospital. These episodes required him to stay in I.C.U. for an extended period of time, and Dr. Dutton opined that he suffered both physical and emotional trauma as the result of his injuries. ***R. 141, line 24 – 142, line 17; 149, line 18 – 150, line 1***. Dr. Dutton explained that:

> It's multi-faceted in both [physically] and [psychologically]. Psychologically, it can cause hyperacute memories of certain events. In some individuals, it can cause loss of memory. It can cause difficulty with short term memory as well as difficulty translating short term memory into long term memory. There's high incidents of [post-traumatic] stress syndrome in trauma patients in which they have a spectrum. A number of different psychological issues depending upon the individual.

R. 142, line 19 – 143, line 2.

He elaborated at length on cross-examination:

> ... [T]rauma at any point, whether it's blunt trauma, whether it's an assault, whether it's a gunshot wound can be very stimulating to certain parts of the brain. So those, in some individuals that can generate a very hyperacute memory complex. .... So, they may have flashes of memory, they feel like they're there, they may see things over and over again with all of the associated feelings that they had at the time. Trauma itself, ... because of endorphins and because of how the brain works can intensify these feelings and it can also change them so that they're not quite accurate. So, somebody involved in a trauma may remember it a certain way and it may not be entirely accurate, but they feel like that is exactly how it happened.

> There are other problems that could develop along with that. So, you imagine somebody who has been in trauma, now they're in the hospital, they receive sedative medication, they receive opioid medication, everything sort of gets jumbled up. They may be on the ventilator sedated for ... several weeks, a week or more. That can also generate memories. Those memories aren't necessarily true.
>
> It can also have the [effect] of decreasing a person's ability to remember things in the short term. So, they might remember everything that happened when they were playing football in high school and not be able to remember things on a day-to-day basis, like where their keys are or what they were doing when they were walking towards the kitchen.
>
> But *whenever you get into how the brain interprets things, it gets very confusing.* So, *some* of these *patients can't generate their short term memories, so things that are experienced in daily activities into long term memories that are lasting.* And *it affects everyone differently.*
>
> So, what we see in trauma is a high incidence of -- and, you know, the idea of [post-traumatic] stress syndrome came out of trauma. So, these are patients that have issues. Either, they are issues with visually remembering things and causing it to feel like it's occurring again to issues with sleeping, to issues with memory. You know, there's a full spectrum of how it presents in different individuals. And it's very hard to sort of dial that in for ... one description fits all.

R. 150, line 25 – 152, line 20 (emphasis added).

Applying the *Biggers* factors to the evidence presented at trial, *see Biggers*, 409 U.S. at 199-200, it is clear that there was "no substantial likelihood of irreparable misidentification" and that any error is harmless beyond a reasonable doubt. First, although Mr. Martin only saw Appellant briefly when the shooting occurred, he looked directly at Appellant at that time. Also, he had observed Appellant and DaQuan Crawford throughout the early morning of May 28th, at a relatively short distance, in the club's well lit parking lot. Moreover, the shooter said, "That's messed up what y'all doing to my brother," and it is undisputed that Appellant's brother, DaQuan, was involved in the fight.

The second factor is the degree of attention. Mr. Martin's training and extensive experience working security support the conclusion that he paid greater attention to detail than an average

crime victim. *Cf. Brathwaite*, 432 U.S. at 115 ("... Glover was not a casual or passing observer, as is so often the case with eyewitness identification. Trooper Glover was a trained police officer on duty and specialized and dangerous duty ... [and] as a specially trained, assigned, and experienced officer, he could be expected to pay scrupulous attention to detail, for he knew that subsequently he would have to find and arrest his vendor. In addition, he knew that his claimed observations would be subject later to close scrutiny and examination at any trial").

The third factor is the accuracy of the description. Although Mr. Martin initially did not provide a description of the shooter, it became very clear that he knew Appellant before the shooting because he had seen Appellant at the club "about five times" before the shooting. Once he regained his memory, he called Det. Wallace on June 28th and said that he knew both who had shot him and what had happened. Also, he testified that he was able to see the gun, Appellant's clothing, and the color of Appellant's shoes. The parties simply did not question him further about the clothing or shoes. His failure to sooner provide specific details, including that Appellant was the person who shot him, is explained by his testimony that he suffers from PTSD as the result of the shooting and Dr. Dutton's testimony on how severe trauma, such as that Mr. Martin suffered, may impact an individual's memory.

He then made the confirmatory identification on June 29th. *Liverman*, 398 S.C. at 141-42, 727 S.E.2d at 427-28; *Spears*, 393 S.C. at 481, 713 S.E.2d at 331-32; *State v. Starks*, 2014-UP-490, 2014 WL 8728545, *1 (Ct. App., Oct. 29, 2014) ("The show-up served the primary purpose of identifying Starks as the person Williams knew before the crime, and she identified him as the person who committed the crime based on her prior knowledge of him -- not as a result of suggestive police procedures") (citing *Liverman*). The fourth *Biggers* factor, the level of certainty demonstrated by the witness at the confrontation, likewise weighs in favor of admitting the

identification because Mr. Martin was one hundred percent certain on both occasions he identified Appellant.

As to the length of time between the crime and the confrontation, he first identified Appellant as being in the vicinity of the fight one week after the shooting. The delay in making this identification was the result of having to wait until his physical and cognitive condition had improved to the point where he could discuss what had occurred. The second identification was then made twenty-five days later, after he had regained his memory of the events of the 28th. Again, his failure to sooner identify Appellant as the shooter is explained by his testimony that he suffers from PTSD as the result of the shooting and Dr. Dutton's testimony on how severe trauma, such as that Mr. Martin suffered, may impact an individual's memory.

Moreover, Appellant was able to vet any supposed weaknesses in Mr. Martin's identification of him as the shooter. In addition to his cross-examination of Det. Wallace, Mr. Martin, and Dr. Dutton, Appellant presented the testimony of an expert on eyewitness memory, psychologist Dr. Dawn McQuiston. ***R. 436-41***. Dr. McQuiston testified at length about

- the different stages in which people process information to develop short-term and long-term memories;
- that information which does not make it from a short-term memory to long-term memory is lost and not recoverable;
- how gaps in memories can be "filled in" by information acquired from others or by individuals thinking about an event;
- that the more a person tends to "rehearse information that [he] may have gotten from another source, the more … [a person] think[s] about it being [his] own idea;"
- that persons who have added "incorrect information" into their memory would not necessarily be aware that the memory was false;
- that memories do not "necessarily change over time" but they do tend to fade over time;

- that there has been "a lot of research on false memories and researchers can implant ... false memories ... into people and they have no idea that it was done during that research process;

- that "[a]ttention is a mechanism that we use to filter out irrelevant information while hanging onto the most relevance information in any given situation;"

- that the ability "to attend to a lot of information at once [is] limited," and people "can't attend to everything that's happening all at one time;"

- that errors can be sometimes made in how persons perceive information and that different factors may impact an individual's perception, including the environment, stress, and fear;

- that stressful situations can lead to a higher probability of errors in memory;[21]

- that a person can make a mistake in their identification even if they are involved with a familiar individual;

- that familiarity with an individual tends to increase confidence in the memory, such that familiarity doesn't guarantee an accurate identification;

- that experts in the field generally support the conclusions surrounding perception, memory, stress, and familiarity to which she testified;

- that confidence in an identification "is not as great of a predictor of accuracy as would seem to be intuitive ... [and] is not a perfect predictor of accuracy;"

- that there are "guidelines" on how lineups should be administered[22] and that recent research indicated the person administering a lineup should not know who the suspect, so as to avoid giving cues to the eyewitness;

- that, to her knowledge, such a "blind administration" was not used in this case;

- that Mr. Martin's viewing a line-up multiple times containing the same photo of the Appellant raised red flags for her because "only the first one counts, since the first viewing of the photograph "is the true test of a person's memory;"

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[21] However, she was unable to assess how PTSD impacts the accuracy of memory. ***R. 451, lines 13-16.***

[22] She explained that - as was done in this case - "the fillers in that line-up should be a good resemblance, be of a good resemblance to the suspect to make it a fair test of the witness's memory. Presenting a line-up, showing several photos is a less or unbiased way of presenting an identification procedure versus just showing one picture." ***R. 456, lines 8-13.***

- that other factors, such as "the commitment effect" could have caused the subsequent identification(s), or the eyewitness may have identified the individual in a subsequent lineup because the person pictured has become familiar as the result of the original identification;

- that an in-court identification " doesn't add anything more to" the reliability of the earlier identification;

- that a person with a false memory is not necessarily lying; and

- that a person can be one hundred percent positive about a false or incorrect identification.

R. 441, line 14 – 460, line 9.[23]

Appellant latter used the various points he made on cross-examination and Dr. McQuiston's expert testimony to suggest in closing argument that Mr. Martin's identification was not reliable. *See* ***R. 483, line 18 – 500, line 11***. Further, the trial judge instructed the jury on their responsibility to determine the credibility of witnesses (***R. 509-10***), and he gave a lengthy instruction on identification testimony. ***R. 512, line 10 – 513, line11***. In light of this charge and the current trial record, any error was harmless beyond a reasonable doubt. *See Liverman*, 398 S.C. at 143-44 & n. 7, 727 S.E.2d at 428-29 & n. 7.

CONCLUSION

Wherefore, Respondent respectfully submits that the judgment, conviction, and sentence of the lower court should be affirmed.

Respectfully Submitted,

ALAN WILSON
Attorney General

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[23] She admitted on cross-examination that none of the science to which she testified was exact, that she had not spoken to Mr. Martin, that confidence can sometimes be a good predictor of reliability, and that a person being shot would focus his attention on the shooter. ***R. 461, line 25 – 463, line 18***.

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March 18, 2020.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County
The Honorable Perry M. Buckner, Circuit Court Judge
Appellate Case No. 2018-001216

THE STATE,

Respondent,

vs.

ANDRE NICHOLAS CRAWFORD,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 18th day of March, 2020.

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