

**RECEIVED**

**Mar 18 2021**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM GREENVILLE COUNTY  
Letitia H. Verdin, Circuit Court Judge

---

Appellate Case No. 2019-001918

THE STATE, .....RESPONDENT

v.

ANTHONY KWAME MAYS, .....APPELLANT.

---

**INITIAL BRIEF OF RESPONDENT**

---

ALAN WILSON  
Attorney General

DONALD J. ZELENKA  
Deputy Attorney General

MELODY J. BROWN  
Senior Assistant Deputy Attorney General

Caroline Scrantom  
Assistant Attorney General  
S.C. Bar No. 101357

Post Office Box 11549  
Columbia, South Carolina, 29211  
(803) 734-6305

W. Walter Wilkins, III  
Solicitor, 13th Judicial Circuit

305 E. North St.  
Greenville, South Carolina 29601  
(864) 467-8282

ATTORNEYS FOR RESPONDENT

**TABLE OF CONTENTS**

Table of Contents ..... i

Table of Authorities ..... ii

Appellant’s Statement of Issues on Appeal ..... iii

Respondent’s Counterstatement of Issues on Appeal ..... iii

Statement of the Case.....1

Statement of Facts.....2

Standard of Review.....8

Argument:

The trial court did not err in admitting Poole’s identification of Appellant because the Investigator did not employ a suggestive procedure when he presented Poole with a six-pack photographic lineup, because Poole was lucid and able to describe the certainty of his identification such that the identification was not the product of a substantial likelihood of misidentification, and because Poole’s identification was cumulative to other identification testimony.....8

*Biggers* Prong One: The lineup procedure was not suggestive .....11

*Biggers* Prong Two: The witness identification was not tainted by a substantial likelihood of misidentification .....14

Harmless Error Analysis: The witness identification was cumulative to that of another witness .....17

Conclusion .....19

## TABLE OF AUTHORITIES

### Cases

<i>Bendolph v. State</i> , 997 So.2d, 997 So.2d 1049 (Ala. Crim. App. 2007) .....	12, 14
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673, 106 S.Ct. 1431 (1986).....	18
<i>Manson v. Brathwaite</i> , 432 U.S. 98, 97 S.Ct. 2243 (1977) .....	15
<i>Neil v. Biggers</i> , 409 U.S. 188, 93 S.Ct. 375 (1972).....	8, 10, 11
<i>Patler v. Slayton</i> , 503 F.2d 472 (4th Cir. 1974).....	16
<i>People v. Carpenter</i> , 15 Cal. 4th 312, 935 P.2d 708 (Cal. 1997) .....	12
<i>State v. Brown</i> , 356 S.C. 496, 589 S.E.2d 781 (Ct. App. 2003) .....	11, 17
<i>State v. Byers</i> , 392 S.C. 438, 710 S.E.2d 55 (2011) .....	18
<i>State v. Collier</i> , 421 S.C. 426, 807 S.E.2d 206 (Ct. App. 2017) .....	16
<i>State v. Douglas</i> , 369 S.C. 424, 632 S.E.2d 845 (2006).....	8
<i>State v. Gambrell</i> , 274 S.C. 587, 266 S.E.2d 78 (1980) .....	16
<i>State v. Hardin</i> , 425 S.C. 1, 819 S.E.2d 177 (2018).....	17, 18
<i>State v. Liverman</i> , 398 S.C. 130, 727 S.E.2d 422 (2012) .....	8, 11, 18
<i>State v. Moore</i> , 343 S.C. 282, 540 S.E.2d 445 (2000).....	8, 11, 14, 15
<i>State v. Ramsey</i> , 345 S.C. 607, 550 S.E.2d 294 (2001).....	11
<i>State v. Simmons</i> , 308 S.C. 80, 417 S.E.2d 92 (1992) .....	17
<i>State v. Simmons</i> , 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009) .....	13
<i>State v. Turner</i> , 373 S.C. 121, 644 S.E.2d 693 (2007) .....	12, 16, 17
<i>State v. Washington</i> , 323 S.C. 106, 473 S.E.2d 479 (Ct. App. 1996).....	12, 16
<i>Turbeville v. State</i> , 268 Ga. App. 88, 601 S.E.2d 461 (Ga. Ct. App. 2004) .....	14
<i>United States v. Peebles</i> , 748 F.2d 934 (4th Cir. 1984).....	16

### Rules

Rule 104(c), SCRE.....	11
------------------------	----

## **APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL**

- I. Whether the trial court erred by admitting a photographic lineup and subsequent identification of Appellant, where the witness was hospitalized for emergency surgery, where the police officer who interviewed the witness failed to determine the witness's mental and physical health following the shooting and surgery, where the witness expressed some uncertainty regarding the identification, and where the lineup was unduly suggestive in that it only depicted one heavysset individual—Appellant—such that the identification was unreliable, suggestive, and inadmissible?

## **RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE ON APPEAL**

- II. The trial court did not err in admitting one victim's identification of Appellant because the Investigator did not employ a suggestive procedure when he presented the victim with a six-pack photographic line-up, because the victim was lucid and able to describe the certainty of his identification such that the identification was not the product of a substantial likelihood of misidentification, and because the victim's identification was cumulative to other identification testimony.

## STATEMENT OF THE CASE

In a multi-count indictment true-billed in September 2017, the Greenville County Grand Jury indicted Appellant Anthony Kwame Mays for the April, 2, 2017 murder and first degree assault and battery by mob of Azaveon Cook, and for the attempted murder and second degree assault and battery by mob of Jaikario Poole on that same date. (R. pp. \*Indictment).

From November 4 through 8, 2019, the State jointly tried Appellant with co-defendant Shyheem Hassan Rice. (Tr. p. 1). At trial, the State only pursued the charges for murder and attempted murder. (Tr. p. 23, lines 7-12). The Honorable Letitia H. Verdin presided, Assistant Thirteenth Circuit Solicitors Allen Fretwell and Jon Gregory prosecuted the case. Randall Chambers, Esquire, represented Appellant on the charges. (Tr. p. 1).

The jury convicted Appellant of murder and attempted murder. (Tr. p. 911, lines 10-15). Judge Verdin sentenced Appellant to 40 years for the murder of Azaveon Cook, and 30 years for the attempted murder of Jaikario Poole (Tr. p. 922, lines 7-8). Appellant timely served notice of appeal of his convictions and sentence on November 15, 2019. (R. p. \*Notice of Appeal).

## STATEMENT OF FACTS

On Sunday, April 2, 2017, a clear spring day, Kennedi Boyd and Jackie Berger (the “two girls”), and Jackie’s boyfriend Mark Foster were hanging out together at the Boulder Creek Apartments in Greenville. (Tr. p. 259, line 4 – p. 261, line 7; Tr. p. 701, line 6). A fourth person, Jaikario Poole, contacted Boyd because he wanted to come see her. (Tr. p. 260, lines 16-23; Tr. p. 556, lines 4-8). Poole came over to the apartment complex with his roommate Azaveon “Zay” Cook. (Tr. p. 261, lines 8-25). Poole drove a white Crown Victoria. (Tr. p. 557, lines 6-9). Mark Foster and the two girls came outside to greet Poole and Cook when they arrived. (Tr. p. 262, lines 11-14). The two girls got inside Poole’s car, where they visited and smoked weed with Poole and Cook for what felt like about fifteen minutes. (Tr. p. 262, line 19 – p. 263, line 21; Tr. p. 561, lines 17-25).

Then, Mark Foster “approached the car with two other guys.” (Tr. p. 264, lines 1-7; Tr. p. 562, line 24 – p. 563, line 6). “And one of the guys had a gun.” (Tr. p. 264, line 7). The “kind of heavyset” one of the three, who had ear length dreads, knocked on the driver’s window where Poole sat and asked, “What’s up with y’all.” (Tr. p. 563, lines 4-16). He tapped on the window with his gun, (Tr. p. 564, lines 2-9), and told Poole and the others inside to “get out of the car.” (Tr. p. 266, lines 19-21). When the two girls saw the gun, they exited the car and ran away. (Tr. p. 266, lines 22-23; Tr. p. 304, lines 15-16). One of them recognized the guy with the gun as “Cheese.” (Tr. p. 264, lines 10-13).

Mark Foster had known “Cheese”—Appellant Anthony Mays—for “four or five years.” (Tr. p. 336, line 12 – p. 337, line 15). That afternoon, Foster was waiting “on [Appellant] Mays to bring [him] some marijuana.” (Tr. p. 339, lines 2-21). They exchanged phone calls. (Tr. p. 716, lines 1-4). While Foster waited for Appellant Mays to arrive, he hung around the apartment

complex with Shyheem “Doo-Doo” Rice. (Tr. p. 340, lines 8-20; Tr. p. 345, line 19 – p. 346, line 7). Appellant Mays arrived at the complex driving a dark Chevy Malibu. (Tr. p. 349, lines 7-23). He gave Foster some weed. (Tr. p. 350, line 2).

During the exchange, Rice referred to the white Crown Victoria that the two girls were sitting in and said, “I think that’s the Woo Gang . . . .” (Tr. p. 350, lines 2-9). Foster recalled that Appellant Mays responded to Rice’s assertion by pulling out his gun and walking over to the Crown Victoria. (Tr. p. 350, lines 10-19). Foster and Rice went with him. (Tr. p. 351, lines 1-4). Foster stood “in front of the car by the hood.” (Tr. p. 564, lines 10-15; *see* Tr. p. 308, lines 2-23). Appellant Mays “knocked on the window with his weapon” and asked if the occupants were “Woo Gang.” (Tr. p. 351, lines 6-8; Tr. p. 564, line 2 – p. 565, line 5). Appellant Mays was the only one with a gun. (Tr. p. 376, lines 8-13).

Poole, the male in the driver’s seat of the white Crown Victoria, said nothing at first and then answered, “No,” disassociating himself from “Woo Gang.” (Tr. p. 351, lines 9-15; Tr. p. 565, lines 1-6). Appellant Mays responded, “Eat ‘em.” (Tr. p. 352, lines 17-21). Then, the three men outside the car—Foster, Appellant Mays, and Rice—began to fight the two men inside the car. (Tr. p. 352, line 22 – p. 353, line 20). This is when Appellant Mays “walked to the back of the rear car and went to the passenger’s side and opened the [rear] door.” (Tr. p. 354, lines 5-9). Appellant Mays warned others to “move” or to “get down” and started shooting. (Tr. p. 354, lines 11-19). Foster and Rice ran away. (Tr. p. 354, lines 20-23).

Poole recalled that Foster stayed “in front of the vehicle” while the other two outside began pulling on the door handles of his car and trying to get to the passenger’s side. Poole cut the car on and tried to leave. (Tr. p. 566, lines 8-25). That’s when Poole heard “gunshots ringing” and “bullets ricocheting off the car.” (Tr. p. 566, lines 19-21). A bullet struck Poole. (Tr. p. 566,

line 21). Poole fell to the center of the car and saw Cook let himself out of the backset and run “down the hill.” (Tr. p. 567, lines 9-15). Poole drove towards Cook, finding him “passed out” from his injuries. (Tr. p. 567, line 18 – p. 568, line 5). Poole stopped to pick Cook up and struggled to put him in the backseat of the Crown Victoria. (Tr. p. 568, lines 7-25). Continually struggling to keep Cook alert, Poole called 911 and went to the nearby Spinx station. (Tr. p. 569, lines 5-25).

Appellant Mays “pulled off” from the apartment complex in the Chevy Malibu. (Tr. p. 355, lines 9-12). He called his girlfriend around 4:00 p.m. and asked to be picked up from a location “right around the curve” from the Spinx station. (Tr. p. 670, lines 7-23). As she drove by the gas station on the way to pick up Appellant Mays, she noticed that the Spinx station “had roped off tape.” (Tr. p. 673, lines 18-19). Sometime later that evening, Appellant Mays’s girlfriend overheard him on the phone telling another female he “didn’t have anything to do with it” and to “keep [his] name out of it.” (Tr. p. 677, line 4 – p. 678, line 1).

Officers responded to both the apartment complex and the Spinx station. (Tr. p. 513, line 7-12). At the Spinx station, officers arrived to find the white Crown Victoria parked towards the back of the building, a deceased male subject lying on the ground near the open back passenger door, and a second male subject sitting on a curb and clutching his stomach. (Tr. p. 175, line 15 – p. 176, line 23). Greenville EMTs were dispatched at 1:51 p.m., arrived at the Spinx at 1:58 p.m., and completed their triage of the scene by 2:04 p.m. (Tr. p. 194, line 11 – p. 198, line 18). Cook died as a result of a gunshot wound to the chest. (Tr. p. 490, lines 9-10). The responders called the coroner’s office to the Spinx, dressed Poole’s wounds, and loaded Poole into the ambulance, arriving at the hospital at 2:16 p.m. (Tr. p. 196, line 16 – p. 198, line 19). “About halfway through transport, he started to become hard to wake up and his blood pressure bottomed out,”

indicating he needed definitive care in a trauma unit as soon as possible. (Tr. p. 199, lines 7-16). Poole sustained “very life-threatening” gunshot wounds to his abdomen. (Tr. p. 328, lines 9-23). He was rushed into surgery within ten minutes of arriving at the hospital. (Tr. p. 319 lines 22-24; Tr. p. 324, lines 3-15).

At the apartment complex, officers gathered surveillance video in order to ascertain what vehicles were involved and what time the shooting occurred. (Tr. p. 224, lines 13-18). Having received a description of a white Crown Victoria, officers located video of the white car entering the complex and of a man running from the area and falling down. (Tr. p. 22, line 21 – p. 225, line 11). The white Crown Victoria began to exit, but the driver stopped to drag the fallen man into the backseat before leaving. (Tr. p. 225, lines 9-12). “Shortly thereafter,” a dark Chevy Malibu “cut[ ] all the way around the office building” and then exited the complex in a different direction than the Crown Victoria. (Tr. p. 225, lines 12-17). Another frame showed two girls running away. (Tr. p. 252, lines 10-12). Yet another frame showed two men running away. (Tr. p. 251, line 20 – p. 252, line 6).

Officers processed the white Crown Victoria. (Tr. p. 598, lines 18-22). They lifted three of Appellant’s fingerprints from its exterior: one from the driver’s door and two from the rear passenger’s side door. (Tr. p. 638, line 24 – p. 639, line 7; Tr. p. 635, line 24 – p. 636, line 6 (citing Tr. p. 11, line 18 – p. 12, line 24)). Officers recovered one cartridge casing on the front passenger’s seat, indicating the gun fired inside the car at least once. (Tr. p. 603, lines 8-9; Tr. p. 825, lines 1-4). They recovered a metal jacket in the rear passenger door, another one embedded in the floorboard, and a projectile in an armrest. (Tr. p. 603, lines 21 – p. 605, line 4). The exterior of the car bore “several projectile holes in the rear passenger’s side door” but they were grouped too closely to allow for an accurate trajectory analysis. (Tr. p. 615, lines 20-23).

Similarly, the front driver's side door bore an interior hole from a projectile, with a corresponding dent on the exterior of the door. (Tr. p. 615, line 24 – p. 616, line 2). Though the point of origin was not readily apparent, the bullet's passing from the interior to the exterior of the driver's side door indicated it was fired from the passenger side of the car. (Tr. p. 616, lines 4-11; Tr. p. 825, line 5 – p. 826, line 12).

Later that afternoon, Foster told his mother what happened. (Tr. p. 369, lines 10-25). She took Foster to church, and then to the law enforcement center to report what he had witnessed and to identify Appellant Mays as the shooter. (Tr. p. 370, lines 3-25; Tr. p. 518, line 3 – p. 524, line 14).

The next day, when Poole was in the hospital recovering from surgery, he spoke with officers and identified, with 80% certainty, Appellant Mays as the shooter.<sup>1</sup> (Tr. p. 577, line 6 – p. 579, line 5). Poole recalled his conversation with law enforcement that day. (Tr. p. 571, lines 19-24). He told them he only saw one gun. He told them that Foster stood in the front of the vehicle while the two other men Poole did not know came up to the passenger's side of Poole's car. (Tr. p. 572, line 1 – p. 573, line 14). Poole described the shooter as a little heavier in build with short dreads and some facial hair. (Tr. p. 699, lines 1-5). Poole said that he saw the gun when the shooter tapped on his driver's side window, and that then the person went around to the passenger's side and began shooting. (Tr. p. 699, lines 8-17). He told the officer he was "pretty close" to the shooter and was able to get a good look at him. (Tr. p. 700, lines 17-24).

Officers arrested Appellant Mays the day after the shooting. (Tr. p. 444, line 8 – p. 445, line 8). He provided an audio- and video-recorded statement on the day of his arrest. (Tr. p. 534,

---

<sup>1</sup> Poole's surgeon testified Poole would have been taking pain medication through an IV while he recovered from surgery on April 3. (Tr. p. 333, lines 3-9). He also testified it would not be unusual for Poole to be able to engage in a lucid question-and-answer session the day following surgery. (Tr. p. 333, lines 15-22).

lines 10-22; State's Ex. 91). He generally denied involvement, consistently informing the interviewing officer that he had heard that two boys had been shot at Boulder Creek apartments, but that he did not know anything about it. (State's Ex. 91 from 5:00). He denied having a Chevy Malibu registered to him, and maintained that if he was seen pulling up in a car, it would have been a Honda. (State's Ex. 91 from 5:00; Tr. p. 710, lines 3-4.). He admitted that some people call him "Cheese," but did not offer it as his nickname. (State's Ex. 91 from 5:00; Tr. p. 543, lines 3-5).

Keith Desue, who grew up in the same neighborhood with Appellant Mays and was incarcerated with him for a period of time, testified at Appellant's trial that Appellant Mays came to him in the detention center for help accessing the law library. (Tr. p. 771, line 3 – p. 772, line 10). Appellant Mays told Desue "he killed the wrong guy." (Tr. p. 772, lines 13-16). "He said that he told [them] to get down and he – he shot through the car five times and hit the victim in the chest twice." (Tr. p. 777, lines 16-18). Appellant Mays told Desue he was the only person with a gun, and that he used a .40 caliber Smith and Wesson. (Tr. p. 777, lines 20-21; Tr. p. 779, line 6). Law enforcement only recovered .40 caliber shell casings from the scene. (Tr. p. 646, line 23 – p. 648, line 6; Tr. p. 9, lines 16-19).

## STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” *State v. Liverman*, 398 S.C. 130, 137, 727 S.E.2d 422, 425 (2012). “Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court.” *Id.* (citing *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000)). “Generally, the decision to admit an eye witness identification is at the trial judge’s discretion and will not be disputed on appeal absent an abuse of discretion.” *Id.* “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” *State v. Douglas*, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006).

## ARGUMENT

**The trial court did not err in admitting Poole’s identification of Appellant because the Investigator did not employ a suggestive procedure when he presented Poole with a six-pack photographic line-up, because Poole was lucid and able to describe the certainty of his identification such that the identification was not the product of a substantial likelihood of misidentification, and because Poole’s identification was cumulative to other identification testimony.**

Appellant challenges the identification that one victim, Jaikario Poole, made to Greenville County Investigator Randall Evett while recovering in the hospital. Pre-trial, and pursuant to *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375 (1972), the court received testimony from Investigator Evett and Jaikario Poole. (Tr. p. 69, lines 1-8).

Investigator Evett served as the lead investigator to this case. (Tr. p. 97, lines 1-5). He testified that he and another Detective visited Poole in the hospital on the day after the shooting to present him with a photographic lineup. (Tr. p. 97, lines 6-20). One or two of Poole’s family

members were present in his hospital room at the time. (Tr. p. 97, lines 21-24). Evett knew Poole had been treated for a gunshot wound to the stomach. (Tr. p. 108, lines 7-13). Poole “was conscious and alert” when Evett spoke with him. (Tr. p. 108, lines 15-16). Evett spoke with Poole’s mother but did not speak with any of his treating physicians. (Tr. p. 108, lines 17-24). Evett was not aware of what, if any, medication Poole was taking at the time. (Tr. p. 109, lines 1-10). Evett had a lucid discussion with Poole. (Tr. p. 109, lines 1-20).

Evett presented Poole with a six-person photographic lineup of persons of similar description and informed Poole the suspected shooter may or may not be included. (Tr. p. 98, lines 3-17; State’s Ex. 92 and 93). He told the victim to take his time reviewing the photos and did not suggest that Poole should focus on any particular photo. (Tr. p. 98, lines 18-20). Poole informed Evett he was able to get a good look at the shooter during the incident. (Tr. p. 98, lines 21-22). Poole reviewed the lineup and selected a suspect, stating he was 80% sure that the shooter was depicted in photo number two. (Tr. p. 98, line 23 – p. 99, line 10). Poole also told the Investigator that if the dreadlocks in photo number two were a little longer, he would be positive it was the shooter. (Tr. p. 99, lines 4-5). The suspect depicted in Photo number two was Appellant Mays. (Tr. p. 99, line 19 – p. 100, line 5).

Poole testified that he was with his mother and grandmother at the hospital when Investigator Evett presented him with the photo lineup. (Tr. p. 115, line 22 – p. 116, line 10). Poole testified he was receiving medication through an IV at the time. (Tr. p. 122, lines 6-8). Poole testified he received all of the photographs on one piece of paper, the photos were of similar description, nobody indicated which photo he should choose, and Evett told him to “take as much time as needed” to review the pictures. (Tr. p. 116, line 13 – p. 117, line 8).

Poole testified he told Evett that he was “pretty sure” that photograph number two in the

lineup depicted the shooter. (Tr. p. 117, line 16 – p. 118, line 3). Poole indicated his selection by circling and initialing photo two. (Tr. p. 118, lines 2-24; State’s Ex. 92). Poole also completed an affidavit stating he was “80% sure he shot at us at Boulder Creek Apts.” (State’s Ex. 93). Poole testified that he was 80% sure rather than 100% sure because the person in the photograph had shorter dreadlocks than the shooter. (Tr. p. 116, lines 20-22; Tr. p. 117, lines 21-23; Tr. p. 122, lines 9-17). Poole testified he felt that he got a good look at the shooter at the time of the incident because the shooter was right at his car window at one point. (Tr. p. 117, lines 9-15). Poole then made an in-court identification of Appellant Mays as the shooter. (Tr. p. 119, line 6 – p. 120, line 8).

The trial court admitted Poole’s identification, reasoning:

. . . I do find that the process was not unduly suggestive.

As I look at this, while I might think that Person Number 2 looks a little heavier set, I might think that about Number 6, and I might think that about Number 4 as well. And the witness testified they had a good opportunity to see the person who shot him, and that that person was very close to him, I believe right outside the window. And when he identified the person, he said, you know, something very changeable is that he said he’s 80 percent sure and that he would be sure if the person’s hair was a little longer. And certainly, that’s something that can be changed and manipulated and altered, you know, just over time. And he just says if the hair was different or longer than he would be completely sure.

And it was close in time between the crime itself and from the time that he picked this witness out. And, . . . Mr. Poole seems to have a good recollection of that day. He seems to – seemed to have understood what was going on very well. Of course, I know he was in a stressful situation and in a difficult situation, but the officer testified he seemed lucid and clearheaded, and therefore, I’m going to allow the identification in this case as least to be presented to the jury.

(Tr. p. 146, line 13 – p. 147, line 14).<sup>2</sup>

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375,

---

<sup>2</sup> Objection renewed at Tr. p. 576, lines 14-22; Tr. p. 578, lines 15-2; and Tr. p. 704, lines 21-25.

(1972). “Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.” *State v. Liverman*, 398 S.C. at 138, 727 S.E.2d at 426 (citing *Biggers*, 409 U.S. at 198, 93 S.Ct. at 382). Prior to admitting an eyewitness identification, the trial court should conduct an *in camera* hearing “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); Rule 104(c), SCRE.

The trial court did not err in admitting Poole’s identification. The record fails to support any inference that Investigator Evett utilized a suggestive line-up procedure. *State v. Moore*, 343 S.C. at 288, 540 S.E.2d at 448 (“an eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law”). Further, the record supports the trial court’s evaluation of the reliability of Poole’s identification. *State v. Brown*, 356 S.C. 496, 503, 589 S.E.2d 781, 785 (Ct. App. 2003) (“Reliability is the linchpin in determining the admissibility of identification testimony.”).

***Biggers* Prong One: The lineup procedure was not suggestive.**

Referring to the first prong of the *Biggers* test, Appellant contends that Investigator Evett employed a suggestive lineup procedure on the basis that Mays appears more heavyset than the other five persons included in the six-pack. (Br. of App. at 8). Appellant’s counsel posited that Mays was “the most heavyset person there” in the lineup, and that he stood out in a significant manner because witnesses indicated that they saw a heavyset person at the scene. (Tr. p. 145, lines 14-24). However, during the *Biggers* hearing, Investigator Evett testified he did not “know

how you could tell he was heavier by not seeing below the neckline.” (Tr. p. 111, lines 2-3; *see* State’s Ex. 92). Evett agreed in a limited fashion that, “if you draw that [conclusion] from the base of his facial [appear]ance being thicker, then yes.” But Evett was quick to qualify that “there’s nothing below the waist [or jawline]” in the photographs. (Tr. p. 110, line 25 – p. 111, line 8). Moreover, Poole qualified the strength of his identification on the basis of the length of the braids in the suspect’s hair, not on the basis of weight or build. (Tr. p. 116, lines 20-22; Tr. p. 117, lines 21-23; Tr. p. 122, lines 9-17).

A photo line-up is not unduly suggestive so long as the defendant “does not stand out in comparison with the other individuals in the line-up.” *State v. Turner*, 373 S.C. 121, 127-28, 644 S.E.2d 693, 697 (2007) (line-up with varying background colors not unduly suggestive where all six photos depict men with facial hair and a “built” frame, “as described by the victim”); *State v. Washington*, 323 S.C. 106, 112, 473 S.E.2d 479, 482 (Ct. App. 1996) (upholding identification based on totality of circumstances, rejecting defendant’s claim that he was the only person in the line-up with a medium length afro-style haircut and a dark background). Slight variations among the persons included in the line-up are permissible. *Id.* “Because human beings do not look exactly alike, differences are inevitable.” *People v. Carpenter*, 15 Cal. 4th 312, 367, 935 P.2d 708, 737 (Cal. 1997) (affirming admissibility of identification of defendant “in a six-man physical lineup”), *abrogated on other grounds by People v. Diaz*, 60 Cal. 4th 1176, 345 P.3d 62 (Cal. 2015).

Where, as here, “the appearance of the other subjects in the line-up [i]s not completely inconsistent” with the descriptions offered by the victim, the line-up is not suggestive and the identification should be upheld. *Bendolph v. State*, 997 So.2d 997 So.2d 1049, 1055 (Ala. Crim. App. 2007) (finding subjects in photo line-up were not inconsistent with victim’s describing the

perpetrator as “thick,” rejecting defendant’s contention that the line-up was disparate in height and weight). The six-pack line-up Investigator Evett presented to Poole depicts no more than slight variations among individuals. (State’s Ex. 92). Each person pictured has an oval-shaped face. Each person pictured has facial hair comparable in both amount and formation. Each person pictured has braided hair of short-to-medium length. Each person pictured has a comparable skin tone, with variations in skin tone appearing to the naked eye to have been affected by the lighting in which the photographs were taken. These slight variations do not render the six-pack line-up unduly suggestive.<sup>3</sup> *State v. Simmons*, 384 S.C. 145, 168, 682 S.E.2d 19, 31 (Ct. App. 2009) (“Despite Simmons’s contention that his ears were smaller than those of the other individuals in the line-up, his photograph does not stand out in such a way as to render the line-up unduly suggestive.”).

Each person in the six-pack also appears of comparable build: the photographs are closely cropped so that each person pictured has nearly the same degree of slope from his neck to his shoulders. (State’s Ex. 92). Any discernible variation in the width of Appellant’s face from the others can also be attributed to his photograph being more closely cropped on the left-hand side than some of the others. As Investigator Evett noted in his *Biggers* testimony, it would be difficult to conclude that one person was heavysset without the ability to view the person below his jawline. (Tr. p. 110, line 25 – p. 111, line 8). Thus, as the trial court assessed, “while I might think that Person Number 2 looks a little heavier set, I might think that about Number 6, and I might think that about Number 4 as well.” (Tr. p. 146, lines 17-20). Though Appellant argues he

---

<sup>3</sup> Though not addressed by Appellant, the manner in which Investigator Evett presented the line-up to Poole was not unduly suggestive. Evett did not prompt Poole to focus on any one photograph in the six-pack, and informed him the shooter may or may not be included in the six-pack. (Tr. p. 98, lines 16-20; Tr. p. 117, lines 6-8). Both Evett and Poole testified that Poole was instructed to take as much time as needed. (Tr. p. 98, lines 3-18; Tr. p. 117, line 3-5).

is the sole heavyset person in the six-pack, “most of the subjects are not substantially smaller than” he, and the line-up is not unduly suggestive. *Bendolph v. State*, 997 So.2d at 1055 (affirming admissibility of eyewitness identification “[a]lthough two of the subjects appear to be somewhat thinner than the appellant”); *Turbeville v. State*, 268 Ga. App. 88, 92, 601 S.E.2d 461, 466 (Ga. Ct. App. 2004) (line-up not unduly suggestive where “all of the men pictured were approximately the same age [and] that they all had short hair and similar facial hair to that of the defendant,” and rejecting defendant’s contention that two persons pictured did not appear heavyset).

***Biggers* Prong Two: The witness identification was not tainted by a substantial likelihood of misidentification.**

As to the second prong of *Biggers*, Appellant argued before the trial court that there existed “a substantial likelihood of misidentification because the witness himself said that he was pretty sure,” rather than entirely sure, that number two was the shooter. (Tr. p. 146, lines 4-12). On appeal, Appellant furthers that “Poole’s hospitalization and recent life-saving surgery likely prevented his identification from being reliable enough to be admissible.” (Br. of App. at 8). Appellant’s argument circumvents the record laid before the trial court and ignores the factors the court examines when ruling upon the second prong of the *Biggers* test.

“Only if the procedure was suggestive need the court consider the second question—whether there was a substantial likelihood of irreparable misidentification.” *State v. Moore*, 343 S.C. at 287, 540 S.E.2d at 447-48 (internal quotation omitted). Even assuming suggestiveness in this case, the totality of the circumstances pertaining to Poole’s eyewitness identification are not accompanied by any such likelihood. *Id.* The court should consider “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the

confrontation, and the time between the crime and the confrontation.” *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253 (1977). In ruling on Appellant’s motion, the trial court considered the percentage of certainty with which Poole made the identification, Poole’s ability to view the perpetrator during the incident, and the passage of time between the crime and the identification. (Tr. p. 146, line 20 – p. 147, line 6). The court also addressed Poole’s ability to recollect the identification procedure as well as his capacity to engage with Investigator Evett. (Tr. p. 147, lines 6-14). The record supports these findings.

The *Biggers* hearing testimony establishes that Poole selected Appellant from the six-pack and certified he was “80% sure he” was the shooter. (State’s Ex. 93). Poole testified that the shooter stood next to his car window and Poole was able to get a good look at him during the incident. (Tr. p. 117, lines 12-14). The shooting incident was a stressful event demanding all of Poole’s attention.<sup>4</sup> *See State v. Moore*, 343 S.C. at 290 & n.6, 540 S.E.2d at 449 & n.6 (finding witness’ “attention was likely not as acute as it might have been had she been the victim of a crime” because “the attention of a mere passerby is likely to be less acute than that of a victim”). Poole testified that he was “pretty sure” that he had identified Appellant from the line-up, and that he was not completely and absolutely certain only for the precise reason that the person in the photograph had hair that was a little shorter than the shooter’s. (Tr. p. 117, line 19-23; Tr. p. 122, lines 9-17). Poole also testified the person he selected from the six-pack “looks exactly the same” as the shooter. (Tr. p. 118, lines 4-6). This identification occurred the day after the shooting. (Tr. p. 121, lines 7-9).

As to his medical condition at the time he made this selection, Poole testified he was

---

<sup>4</sup> Before the jury, Poole testified he “was terrified at the time.” (Tr. p. 565, line 1). The incident began when Appellant tapped on Poole’s car window with a gun. (Tr. p. 564, lines 2-9). It immediately escalated even after Poole told Appellant he was not affiliated with the “Woo Gang.” (Tr. p. 565, lines 1-24).

under general anesthesia for surgery the day prior. (Tr. p. 121, lines 7-21). He testified he had an IV and was receiving pain medication at the time that Investigator Evett visited. (Tr. p. 121, line 22 – p. 122, line 8). However, Poole delivered his recollection of his interactions with Evett in the same manner that Evett did. (Tr. p. 97, line 6 – p. 99, line 18; Tr. p. 111, line 9 – p. 112, line 2; Tr. p. 115, line 23 – p. 118, line 24). Further, Evett testified Poole “was conscious and alert” when they spoke, and that Poole “was lucid and talking” during the interview process.<sup>5</sup> (Tr. p. 108, line 7 – p. 109, line 20).

No, Poole did not select Appellant from the photo line-up with 100% certainty. “However, certainty is not required.” *State v. Washington*, 323 S.C. at 111, 473 S.E.2d at 481 (identification made with 99% certainty admissible). An eyewitness identification is still admissible even when the witness qualifies the person identified only “best resembles” the perpetrator. *Id.* at 112, 473 S.C.2d at 482 (relying upon *United States v. Peebles*, 748 F.2d 934 (4th Cir. 1984) (per curiam); *Patler v. Slayton*, 503 F.2d 472 (4th Cir. 1974)). Provided that the victim had ample opportunity to view the assailant’s full face at time of crime and provided a description and an accurate photo identification from a line-up shortly thereafter, a “high degree of certainty” is all that is required for the identification’s admissibility.<sup>6</sup> *State v. Turner*, 373 S.C. at 128, 644 S.E.2d at 697.

---

<sup>5</sup> Before the jury, the State elicited testimony from Poole’s treating surgeon that it would not be unusual for Poole to be able to engage in a lucid question-and-answer session that day. (Tr. p. 333, lines 15-22). The surgeon testified that the effects of general anesthesia would not be felt the day after surgery. (Tr. p. 334, lines 1-5).

<sup>6</sup> Our appellate courts have consistently upheld the admission of eyewitness identifications made within a short period of time after the crime and after the identifier had a suitable opportunity to view the perpetrator during the crime. *E.g.*, *State v. Gambrell*, 274 S.C. 587, 590, 266 S.E.2d 78, 81 (1980) (“ . . . we find nothing to justify the conclusion there was a substantial likelihood of irreparable misidentification. The victim had the opportunity to observe her assailant for fifteen to twenty minutes in a well-lit room”); *State v. Collier*, 421 S.C. 426, 441, 807 S.E.2d 206, 214

In *Turner*, the high degree of certainty was apparent from the speed at which the victim selected the defendant's photograph from the line-up. *Id.* Poole selected Appellant from the six-pack with a high degree of certainty as well. Though he was admitted to the hospital at the time and had undergone surgery the day before, Poole clearly and lucidly articulated to Investigator Evett that he was 80% certain that the shooter appeared as person number two in the six-pack lineup. Poole at that time specifically articulated that the length of that person's hair did not match the length of the braids he observed during the assault and shooting, and testified at the *Biggers* hearing that the person he selected otherwise "looks exactly the same" as the shooter. (Tr. p. 117, line 21 – p. 118, line 25). As the trial court noted, the length of one's hair is easily subject to alteration. (Tr. p. 146, line 23 – p. 147, line 4). Importantly, Poole had a clear opportunity to view the shooter at the time of the incident and did not couch his degree of certainty on any unalterable biological factor, such as the shape of the shooter's face or the color of his eyes. Accordingly, Poole's identification does not suffer from a substantial likelihood of irreparable misidentification and was properly admitted by the trial court.

**Harmless Error Analysis: The witness identification was cumulative to that of another witness.**

"[U]nder certain circumstances, if the identification is corroborated by either circumstantial or direct evidence, then the harmless error rule might be applicable." *State v. Simmons*, 308 S.C. 80, 83, 417 S.E.2d 92, 94 (1992). Harmless error also applies when "the challenged identification evidence was cumulative to other properly admitted evidence." *State v.*

---

(Ct. App. 2017) (the witness had "viewed the suspect face-to-face and in good lighting for ten to fifteen seconds" without distraction at the time of the incident, described the perpetrator shortly thereafter in a manner resembling the photo selected from the line-up); *State v. Brown*, 365 S.C. at 505-06, 589 S.E.2d at 785-86 (eyewitness identification admissible even though it was made about three car lengths away from the incident, where nothing blocked the view, the lighting was sufficient, the witness was "100 percent focused," had a good, but brief, opportunity to view the perpetrator, and made the identification shortly thereafter).

*Hardin*, 425 S.C. 1, 15, 819 S.E.2d 177, 185 (2018). “A harmless error analysis is contextual and specific to the circumstances of the case.” *State v. Byers*, 392 S.C. 438, 448-49, 710 S.E.2d 55, 60 (2011). In conducting a harmless error analysis, the court should consider the particular facts of the case and various other factors: “the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.” *State v. Liverman*, 398 S.C. at 141, 727 S.E.2d at 427 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 1432 (1986)). Only an error which could have reasonably affected the outcome of the trial requires reversal. *State v. Hardin*, 425 S.C. at 15, 819 S.E.2d at 184.

As Appellant has conceded, he “acquiesced to the introduction of Foster’s identification.” (Br. of App. at 6; Tr. p. 145, lines 6-7). Marcus Foster testified that he knew Appellant prior to the shooting, called him to the scene that day, and stood in front of the victim’s car watching Appellant engage first as the aggressor, and then as the shooter. (Tr. p. 336, line 12 – p. 354, line 24). At trial, Foster’s eyewitness identification preceded that made by Poole, and was entirely cumulative of that made by Poole. It is important to note that Foster testified he had known Appellant for some time prior to these events, because “the fact that an identification witness knows the accused remains a significant factor in determining reliability.” *State v. Liverman*, 398 S.C. at 141, 727 S.E.2d at 427 (finding witness’s prior knowledge of the accused renders a show-up identification “merely confirmatory” rather than suggestive). Given the cumulative nature and reliability of Foster’s identification testimony, any error in the introduction of Poole’s eyewitness identification was harmless beyond a reasonable doubt. *State v. Hardin*, 425 S.C. at 16, 819

S.E.2d at 185 (finding eyewitness identification cumulative to other properly admitted evidence and harmless beyond a reasonable doubt).

**CONCLUSION**

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON  
Attorney General

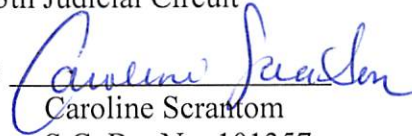
DONALD J. ZELENKA  
Deputy Attorney General

MELODY J. BROWN  
Senior Assistant Deputy Attorney General

Caroline Scrantom  
Assistant Attorney General

W. Walter Wilkins, III  
Solicitor, 13th Judicial Circuit

BY:

  
Caroline Scrantom  
S.C. Bar No. 101357

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-6305

ATTORNEYS FOR RESPONDENT

March 18, 2021  
Columbia, South Carolina

**RECEIVED**  
**Mar 18 2021**  
**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM GREENVILLE COUNTY  
Letitia H. Verdin, Circuit Court Judge

---

Appellate Case No. 2019-001918

THE STATE, .....RESPONDENT

v.

ANTHONY KWAME MAYS, .....APPELLANT.

---

**PROOF OF SERVICE**

---

I, Brandy Rankin, as an employee of the Respondent, hereby certify that per the March 20, 2020 Order of the Chief Justice, the *Initial Brief of Respondent* and *Designation of Matter*, and *Certificate of Service* have been forwarded to Appellant's counsel, Taylor D. Gilliam, Esq., via email today, March 18, 2021 to [tgilliam@sccid.sc.gov](mailto:tgilliam@sccid.sc.gov) and to Mr. Gilliam's assistant, Mary Allgire at [mallgire@sccid.sc.gov](mailto:mallgire@sccid.sc.gov) .

I further certified that all parties required by Rule to be served have been served. This 18th day of March, 2021.

*Brandy Rankin*

Brandy Rankin, Legal Assistant to:  
Caroline Scrantom  
Assistant Attorney General

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211-1549  
(803) 734-3727

## **Brandy Rankin**

---

**To:** tgilliam@sccid.sc.gov  
**Cc:** Allgire, Mary; Caroline Scrantom; Melody Brown  
**Subject:** ANTHONY KWAME MAYS - Initial Brief of Respondent, Designation of Matter, Proof of Service, Appellate Case No. 2019-001918  
**Attachments:** Initial Brief of Respondent, Designation of Matter, Proof of Service, Anthony Kwame Mays, Appellate Case No. 2019-001918, 3-18-21 (02518118xD2C78).pdf

Dear Mr. Gilliam

Please find attached the Respondent's Initial Brief, Designation of Matter, Proof of Service. These documents will be filed today with the South Carolina Court of Appeals. Have a good day!

Sincerely,

*Brandy Rankin*

Legal Assistant  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211-1549

BrandyRankin@scag.gov  
Phone: 803-734-6305  
Fax: 803-734-4035