

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY S. BOWMAN,

APPELLANT

APPELLATE CASE NO. 2011-202926

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court reversibly erred by closing the courtroom for the testimony of two State witnesses based solely on the fear of the witnesses to testify?

- II. Whether the trial court reversibly erred by admitting two out-of-court photographic lineup identifications and subsequent in-court identifications by two State witnesses of Appellant where the only identifying characteristics of Appellant before being shown the lineup was that he wore dark clothes and was dark skinned, where the witnesses covered the faces of the pictures in the lineup to show only the eyes, where Appellant was identified only by his eyes, yet where neither witness could identify any distinguishing characteristics of Appellants eyes despite a large brown scar on Appellant's eye?

STATEMENT OF THE CASE

Appellant Ricky S. Bowman was indicted by the Richland County grand jury on April 15, 2010, for first degree burglary, armed robbery, kidnapping, common law assault and battery of a high and aggravated nature (ABHAN), and possession of a weapon during the commission of a violent crime. Tr. 8, lines 2-7; R. * (Indictments). The charges arose out of Appellant's alleged participation in a home invasion on the night of November 25, 2008. R. * (Indictments).

Appellant's case proceeded to trial before the Honorable G. Thomas Cooper, Jr, and a jury, from November 7 through 9, 2011. Mark Schnee (Counsel) represented Appellant, while April Sampson and Britton All represented the State. Tr. 1. During trial, Appellant presented alibi and identity defenses. The jury found Appellant guilty on all charges, and the trial court imposed the following concurrent sentences of incarceration: twenty years each for first degree burglary, armed robbery, and kidnapping; ten years for ABHAN; and five years for possession of a weapon during the commission of a violent crime. Tr. 517, lines 9-25; Tr. 529, lines 9-24; R. * (Sentence sheets).

STATEMENT OF THE FACTS

Shamael Coit (Shamael), her brother Korey Coit (Korey), Shamael's minor child (Child), and Regina Dennis (Regina) were all at the apartment of Deloris Dennis (Deloris) on the night of November 25, 2008. Tr. 211, lines 3-22; Tr. 240, line 5—Tr. 241, line 3; Tr. 273, line 16—Tr. 274, line 17. Sometime between 9:00 pm and 11:00 pm, while watching *The Housewives of Atlanta*, four armed men broke through the door. One of the men, Sean Toran (Toran) was unmasked, while the remaining three wore hoodies and bandannas to cover their heads and faces. The gunmen questioned the occupants of Deloris' apartment regarding an individual named "Black Shawn," and the location of drugs and guns. Tr. 212, line 14—Tr. 213, line 7; Tr. 220, lines 3-14; Tr. 234, lines 7-13; Tr. 241, lines 5-8; Tr. 243, line 13—Tr. 245, line 4; Tr. 277, lines 16—Tr. 278, line 18.

At a point after the occupants indicated they did not know who Black Shawn was, or the location of any drugs or guns, Deloris was struck twice on the head by one of the three masked assailants whom she described as short and brown skinned. Tr. 281, lines 1-25. At trial, Deloris indicated she saw the man's eyebrows and eyes for "maybe like a minute or more, two." Tr. 282, lines 1-23. The same masked assailant also pointed his gun at Shamael while she sat on the couch holding Child, and threatened her. Tr. 247, line 3—Tr. 249, line 3. Shamael's trial testimony also indicated she could only see the eyes and eyebrows of the assailant when she looked at him for what she approximated as two to three minutes. Tr. 249, line 20—Tr. 250, line 2; Tr. 263, lines 1-21. After realizing they had entered the wrong apartment, the four gunmen left, taking cell phones, purses, and a wallet on the way out, and threatened to kill the occupants of the apartment if they called the police. Shots were heard outside, and Shamael and Child, Regina, Deloris, and Korey left soon

after; Deloris was taken to the hospital where she stayed overnight. Tr. 221, line 9—Tr. 223, line 18; Tr. 232, line 16—Tr. 233, line 21; Tr. 250, lines 250, line 22—Tr. 251, line 2; Tr. 252, line 22—Tr. 253, line 17; Tr. 254, lines 12-18; Tr. 265, line 5—Tr. 266, line 8; tr. 284, line 21—Tr. 285, line 2; Tr. 299, lines 9-16.

Deloris returned to her apartment the following day, as did Regina and Shamael, and called the police. Tr. 223, line 2—Tr. 224, line 4; Tr. 254, lines 1-7; Tr. 288, lines 12—Tr. 289, line 23. Over a week later, Shamael, Regina, and Deloris were contacted by then Investigator William Pegram (Pegram) of the Columbia Police Department on December 4, 2008, who asked the three to come to the police station for the purpose of giving statements; the police “also said that we may have the suspects, to come in and do a photo lineup.” Tr. 24, lines 12-18; Tr. 254, lines 12-25; Tr. 290, lines 2-10; Tr. 366, line 16—Tr. 367, line 10.

When examining the lineup containing Appellant’s photograph, Shamael and Deloris both covered the top and bottom portions of the image with either paper or their hands such that only the eyes and eyebrows were showing. Based upon this view, they indicated to Pegram that Appellant was the masked assailant that struck Deloris and threatened Shamael. Tr. 255, line 15—Tr. 257, line 12; Tr. 291, line 23—Tr. 292, line 24; Tr. 367, lines 11-17; Tr. 368, line 16—Tr. 369, line 14. Although Shamael testified that Appellant’s eyes were brown and set a little further apart from her own, and Deloris indicated at trial that the suspect’s eyebrows were “a little bushy,” neither witness noticed any scars or distinguishing features about Appellant’s eyes themselves, such as a large, dark brown spot on his right eyeball. Tr. 263, lines 1-21; Tr. 300, lines 17—Tr. 301, line 24.

On the day of Appellant’s trial, the State made a pre-trial motion to close the courtroom to the public for the testimony of three of its witnesses: Shamael, Regina, and

Deloris. The State argued the witnesses were afraid to testify due to alleged threats. Tr. 64, line 13—Tr. 65, line 2. Specifically, the State asserted the following to why the courtroom should be closed due to the fears of Shamael and Regina: (1) the threats made during the incident itself in 2008; (2) that postings were allegedly made on Facebook approximately one year before the trial “asking if [Shamael] was the girl who was broken in on;” (3) that her brother Korey received a contact on Facebook from Joanna indicating “she couldn’t just stand by and watch her brother go to prison. She further stated that the system doesn’t care about him being there and we shouldn’t send more black men to jail and to please not send her brother to prison, let him be out so he can be a father;” that Regina received a contact from an unknown source on MySpace in 2008 stating that they had her purse and wanted to return it to her. Tr. 64, line 13—Tr. 65, line 2; R. * (Court’s Ex. Nos. 1 and 2).¹

Over Counsel’s repeated objections, and without examining any of the alleged documents containing purported threats, the trial court agreed to close the courtroom for the pre-trial and trial testimony of both Regina and Shamael, holding “I don’t know who is making all of these alleged threats, but I’ll grant the motion.” Tr. 65, lines 3—Tr. 67, line 25.² Immediately prior to Deloris’ testimony pre-trial hearing, the trial court ordered the courtroom cleared of all nonessential personnel, which remained closed for the pre-trial

¹ The following day, the State produced affidavits from both Regina and Shamael, which were signed and notarized on the second day of trial: November 8, 2013. R. * (Court’s Ex. Nos. 1 and 2).

² Counsel again objected when the State indicated in opening statements that Korey would not testify due to fear; Counsel asserted this further exacerbated the prejudice flowing from the trial court’s closure of the courtroom for the testimony of the first two witnesses before the jury. Tr. 201, line 19—Tr. 202, line 11; Tr. 206, line 13—Tr. 208, line 12. Counsel also renewed his objections at the close of the State’s case, at the close of evidence, and again after the jury returned its verdict. Tr. 417, line 25—Tr. 418, line 2; Tr. 455, line 19—Tr. 456, line 3; Tr. 523, lines 17-22.

testimony Shamael, who testified immediately after Deloris, and was later closed again for Regina. Tr. 87, lines 3-15; Tr. 106, lines 3-10; Tr. 155, line 10—Tr. 156, line 13.

The court also held a pre-trial hearing pursuant to Neil v. Biggers. Pegram made six-pack photographic lineups with Appellant and Toran. Tr. 123, line 18-2—Tr. 124, line 15; Tr. 366, lines 16-25. Deloris stated that she was called by Pegram, who asked her “would I come and see if I could identify them.” Tr. 96, lines 16-17. Pegram later admitted at trial that the only identifying characteristics given regarding Appellant’s alleged appearance was that the suspect was a short, brown skinned man; prior to the lineup, nothing was ever stated about the eyes of the assailants. Tr. 367, line 21-25. Only Shamael and Deloris identified Appellant in the lineup, based solely upon his eyes; Toran was also identified. Tr. 89, lines 23-24; Tr. 96, line 18—Tr. 99, line 18; Tr. 112, line 22—Tr. 115, line 23. Afterward, Pegram told Shamael and Deloris that the suspects they identified were Appellant and Toran. Tr. 268, lines 10-16. Yet, even when the witnesses gave statements to Pegram after the photographic lineup was finished, neither Shamael nor Deloris mentioned any description of Appellant’s eyes. Tr. 134, line 1—Tr. 135, line 12; Tr. 137, lines 6-20; see also Tr. 403, lines 14-21; Tr. 398, line 12—Tr. 339, line 16.

Over Counsel’s objections, the trial court held that the lineups were not unduly suggestive; further, the court indicated that even the lineups were unduly suggestive, the Biggers factors supported admission of the evidence. Tr. 172, line 7—Tr. 175, line 7. Accordingly, the trial court allowed the out-of-court identifications by Shamael and Deloris, and ruled that their in-court identifications “would not be objectionable.” Tr. 175, lines 9-14. During trial, the court permitted in and out-of-court identifications of Appellant. Tr. 256, line 16—Tr. 260, line 23; Tr. 291, line 23—Tr. 294, line 17.

At the end of Appellant's trial, the jury found him guilty as charged. Tr. 517, lines 9-25. The trial court sentenced Appellant to a total of twenty years incarceration. Tr. 529, lines 9-24; R. * (Sentence sheets).

This appeal follows.

ARGUMENT

I. The trial court reversibly erred by closing the courtroom for the testimony of two State witnesses based solely on the fear of the witnesses to testify.

The trial court reversibly erred by closing the courtroom during the pre-trial testimony of three State witnesses, and the trial testimony of two State witnesses. Such action by the court violated Appellant's right to a public trial through the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, Section 14 of the State Constitution of South Carolina.

"The Sixth Amendment directs, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial" Presley v. Georgia, 558 U.S. 209, 130 S.Ct. 721, 722 (2010); see also State v. Sinclair, 275 S.C. 608, 611, 274 S.E.2d 411, 413 (1981) (acknowledging the right to an open trial under both state and federal constitutions). Further, "[t]he Court in In re. Oliver, 333 U.S. 257, 273, 68 S.Ct. 499 (1948), made it clear that this right extends to the States. The Sixth Amendment right, as the quoted language makes explicit, is the right of the accused." Presley, 558 U.S. 209, 130 S.Ct. at 722. In this vein, "[o]ur cases have uniformly recognized that the public-trial guarantee as one created for the benefit of the defendant." Id. 558 U.S. 209, 130 S.Ct. at 724. Also, "to the extent there is an independent public interest in the Sixth Amendment public-trial guarantee, it applies with full force to suppression hearings." Waller v. Georgia, 467 U.S. 39, 65 n.5, 104 S.Ct. 2210, 2216 n.5 (1984).

"In addition to ensuring that judge and prosecutor carry out their duties properly, a public trial encourages witnesses to come forward and discourages perjury." Waller, 467 U.S. at 65, 104 S.Ct. at 2215. "And without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter what the

offense he may be charged.” Oliver, 333 U.S. at 271-72, 68 S.Ct. at 507. Therefore, “[i]n view of this nation’s historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment’s guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.” Oliver, 333 U.S. at 273, 68 S.Ct. at 507.

Although “the right to an open trial may give way in certain cases to other rights or interests, such as the defendant’s right to a fair trial or the government’s interest in inhibiting disclosure of sensitive information,” instances such as these “will be rare . . . and the balance of the interests must be struck with special care.” Waller, 467 U.S. at 45, 104 S.Ct. at 2215; see also Presley, 558 U.S. 209, 130 S.Ct. at 724. Thus, the presumption of openness may be overcome only under certain stringent circumstances: (1) “the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced;” (2) “the closure must be no broader than necessary to protect that interest;” (3) “the trial court must consider reasonable alternatives to closing the proceeding;” and (4) “it must make findings adequate to support the closure.” See Presley, 558 U.S. 209, 130 S.Ct. at 724; see also Waller, 467 U.S. at 48, 104 S.Ct. at 2216 (citing Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 511-12, 104 S.Ct. 819, 824 (1984)).

In the present case, the trial court erroneously granted the State’s motion, and closed the courtroom for testimony of Deloris, Shamael, and Regina during the Biggers suppression hearing, as well as during the trial testimony of Regina and Shamael. First, the only interest offered by the State in support of its motion was the naked assertion that the witnesses were afraid based on prior contacts through social media which they speculated

were related to the defendant. Specifically, the State asserted the following to why the courtroom should be closed due to the fears of Shamael and Regina: (1) the threats made during the incident itself in 2008; (2) that postings were allegedly made on Facebook approximately one year before the trial “asking if [Shamael] was the girl who was broken in on;” (3) that her brother Korey received a contact on Facebook from Joanna indicating “she couldn’t just stand by and watch her brother go to prison.”³ She further stated that the system doesn’t care about him being there and we shouldn’t send more black men to jail and to please not send her brother to prison, let him be out so he can be a father;” that Regina received a contact from an unknown source on MySpace in 2008 stating that they had her purse and wanted to return it to her. Tr. 64, line 13—Tr. 65, line 2; R. * (Court’s Ex. Nos. 1 and 2).

However, as to the first concern, the alleged threat was made three years prior to Appellant’s trial, and Appellant was in jail. Thus, even if Appellant threatened the witnesses during the incident, such a threat was far too attenuated, and the ability to carry it out implausible. Further, the right to a public trial would be too easily eroded if any person subjected to a home invasion or armed robbery, accompanied by a threat, could have the courtroom closed simply because they have a fear of testifying. As indicated above, the right to a public trial belongs to the defendant, and cannot be overcome by the discomfort of the accuser to testify in public absent some pressing, overriding interest.

Next, the alleged posting to a witness’ Facebook page was likewise too attenuated to be a pressing threat. Moreover, the content of the purported contact belies the notion that

³ Although the affidavit of Regina also indicated a sibling of Appellant purportedly attempted to contact Deloris through Facebook and offer money not to testify, no such affidavit was provided by Deloris regarding the alleged contact. R. * (Court’s Ex. # 2).

was even a threat at all, much less that it was done by Appellant or at his direction. Finally, the third reason advanced by the State also falls well short of being a threat. Even assuming without conceding that the person making the contact was Appellant's sister, the content of the message was not a threat; rather, it was a plea for mercy. Also, it was purportedly made on Korey's social media page, not one belonging to Regina, Shamael, or Deloris. Therefore, the State's proffered reasons for closing the courtroom during the testimony of critical State witnesses failed to advance an overriding interest that is likely to be prejudiced. Presley, 558 U.S. 209, 130 S.Ct. at 724.

Second, the closure was broader than necessary to protect the interest offered by the State. Assuming without conceding that the State's facts actually advanced an overriding interest, the only people whom it believed it could identify as threatening the witnesses were Appellant (during the incident three years before the incident), and Appellant's sister. However, Appellant was shackled during his trial; thus, any residual "threat" he posed from his alleged words to the witnesses during the incident three years before the trial was effectively neutralized. Tr. 10, line 13—Tr. 11, line 13. Additionally, had Appellant's sister actually made a plea for mercy to Korey on his Facebook page, it was to Korey, not to any of the testifying witnesses. Thus, trial court erred because the closure was broader than necessary to protect the interest offered by the State.

Third, the trial court failed to consider any reasonable alternatives to closing the proceedings. For example, the trial court could have simply removed Appellant's sister during the testimony of Korey's sister, Shamael, rather than clearing the entire courtroom for the testimony of multiple, critical State witnesses both during the pre-trial suppression

hearing, and during the trial itself before the jury. Yet, without making an attempt to seek reasonable alternatives to closing the pre-trial Biggers hearing during the testimony of Regina, Shamael, and Deloris, or the trial testimony of Regina and Shamael, the trial court simply agreed with the State to close the proceedings. Tr. 66, lines 3-4. Consequently, the trial court erred by failing to consider any reasonable alternatives to closing the proceedings.

Fourth, the trial court failed to make findings adequate to support the closure. The only indication of the trial court's findings before it was actually done was as follows:

I don't know who is making all of these alleged threats, but
I'll grant the State's motion.

Tr. 66, lines 3-4. Based on the Court's ruling, (1) admitted it did not know who allegedly made contact with the State's witnesses, and (2) admitted the "threats" were merely alleged rather than substantiated; in other words, it did not even determine whether the purported contacts constituted threats to the State's witnesses before taking the drastic measure of closing the courtroom to the public during testimony of critical State witnesses. Thus, the trial court erred as a matter of law by failing to make findings adequate to support closure.

Indeed, the only glimpse of the trial court's reasoning appeared after Regina and Shamael testified at trial when the State again sought closure immediately before Toran testified. Specifically, the court denied closure for Toran because he was not a female with a child, and anonymity was not a concern because Toran was already charged with the same offenses:

I understand this is not a case of seeking anonymity as were
the first two, correct?

.....

[Toran] is a different—in a different situation than the
previous two women, and you know, we've got women with
children and here we have a codefendant.

Tr. 307, line 9—Tr. 308, line 24. As an initial matter, these findings by the trial court were made in support of its decision denying the State its motion to close the court for Toran's testimony, and not in support of its decision prior to closing the courtroom for Regina, Shamael, and Deloris.

Yet, even assuming without conceding that these findings were made in support of its decision to close the courtroom for Regina, Shamael, and Deloris, the identities of Regina, Shamael, and Deloris were already a matter of public record since they were included in the incident reports, and the trial transcript of the present case. Succinctly stated, this case is fundamentally different than one where the identity of a government witness is unknown and must be protected due to ongoing concerns. Accordingly, anonymity cannot suffice as an adequate concern under the circumstances of the present case where, as discussed under the first prong, the witnesses faced no actual or credible threat, nor were they undercover government assets involved in an ongoing investigation. Furthermore, the gender and status as a parent are likewise insufficient as an adequate or legitimate concern; if it did, then countless trials could likewise close the courtroom simply because a witness was a female parent. Therefore, the trial court erred by failing to make findings adequate to support the closure.

Thus, none of the four conjunctive factors required for closing a courtroom during a criminal trial were satisfied in Appellant's case. As a result, the trial court erred by closing the courtroom during the pre-trial Biggers hearing testimony of Regina, Shamael, and Deloris, and during the trial testimony of Regina and Shamael.

Further, Appellant was prejudiced by the trial court's erroneous closure of the courtroom. First, although the South Carolina Supreme Court in State v. Sinclair, 275 S.C.

608, 614, 274 S.E.2d 411, 414 (1981) applied the harmless error standard in 1981 to a case where the courtroom was closed, the United States Supreme Court in 1984 acknowledged and specifically agreed with the analysis applied in federal courts viewing inappropriate closures of the courtroom as errors falling outside of the harmless error analysis.

Specifically, in Waller v. Georgia, the Court noted the following:

The general view appears to be that of the Court of Appeals for the Third Circuit. It noted in an en banc opinion that a requirement of prejudice be shown “would in most cases deprive {the defendant} of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury.” While the benefits of a public trial are frequently intangible, the Framers plainly thought them nonetheless real.

Waller, 467 U.S. at 2217 n.9, 104 S.Ct. at 50 n.9 (quoting United States ex rel. v. Rundle, 419 F.2d 599, 608 (1969)). Therefore, prejudice is presumed due to the trial court’s erroneous and improper closure of the courtroom during the pre-trial and trial testimony at Appellant’s trial.

Moreover, Appellant was prejudiced by the trial court’s erroneous closure of the courtroom even under the harmless error standard. A constitutional error may be harmless only where the reviewing court is able to declare a belief “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967); see also Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436 (1986).⁴ “No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be

⁴ Additionally, it is the burden of the party benefitting from the trial error to prove it was harmless beyond a reasonable doubt. See, e.g., Chapman, 386 U.S. at 24, 87 S.Ct. at 828.

determined from its relationship to the entire case.” State v. Reeves, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990).

Here, the State was permitted to present the only two people that personally identified Appellant in an out-of-court photographic lineup as one of their masked assailants before the jury without the pressure of public scrutiny; to say that their testimony and credibility were critical is an understatement. Waller, 467 U.S. at 65, 104 S.Ct. at 2215. Additionally, the State’s theme running throughout the trial—from its opening statements, through to its closing argument—was fear felt by the occupants of Deloris’ apartment. Tr. 191, lines 16—Tr. 192, line 8; Tr. 201, line 19—Tr. 202, line 11; Tr. 473, line 17—Tr. 476, line 11. Thus, the highly irregular action of closing the courtroom for the testimony of these witnesses, even if cleared out of the jury’s presence,⁵ served to heighten the importance of witnesses’ testimony, and validate the State’s argument. Therefore, the error was not harmless beyond a reasonable doubt, as it likely contributed to the verdict.

⁵ Tr. 67, lines 7-9.

II. The trial court reversibly erred by admitting two out-of-court photographic lineup identifications and subsequent in-court identifications by two State witnesses of Appellant where the only identifying characteristics of Appellant before being shown the lineup was that he wore dark clothes and was dark skinned, where the witnesses covered the faces of the pictures in the lineup to show only the eyes, where Appellant was identified only by his eyes, yet where neither witness could identify any distinguishing characteristics of Appellants eyes despite a large brown scar on Appellant's right eye.

The trial court reversibly erred by failing to suppress the out-of-court and in-court identifications of Appellant by Shamael and Deloris during Appellant's trial.

"A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (citing State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000)). Thus, the general rule concerning identification "is that a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous identification or confrontation." State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (citing State v. Cash, 257 S.C. 249 185 S.E.2d 525 (1971)).

The two-prong inquiry used to determine the admissibility of an out-of-court identification is as follows: (1) whether the identification process was unduly suggestive; and if so, (2) whether the out-of-court identification was so nevertheless so reliable that no substantial likelihood of misidentification existed. See Moore, 343 S.C. at 287, 540 S.E.2d at 447; see also Neil v. Biggers, 409 U.S. 188, 198-200, 93 S.Ct. 375, 382 (1972).

In the present case, the identification process was unduly suggestive due to the circumstances under which the witnesses were called to the police station. For example, when the witnesses were called to the station more than a week after the incident, Deloris

stated that she was called by Pegram, who asked her “would I come and see if I could identify them.” Tr. 96, lines 16-17. Thus, the witnesses were told by law enforcement to come to the police station with the expectation that suspects were arrested and only needed to be identified. Therefore, the identification process was unduly prejudicial because the witnesses were tainted by the investigator who called them prior to even being shown the photographic lineups.

Moreover, a substantial likelihood of misidentification of Appellant existed in this case. Several factors should be considered when evaluating the totality of the circumstances to determine the likelihood of misidentification, including the following: (1) the witness’ opportunity to view the perpetrator at the time of the offense; (2) the witness’ degree of attention; (3) the accuracy of the witness’ prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the offense and confrontation. See Manson v. Braithwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253 (1977) (citing Biggers, 409 U.S. at 199-200, 93 S.Ct. at 382); Traylor, 360 S.C. at 82, 600 S.E.2d at 527. “Only after a determination as to the reliability of a witness’ identification has been made by the trial court may the witness testify before the jury.” Moore, 343 S.C. at 289, 540 S.E.2d at 449 (citing State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999)). “An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification.” Traylor, 360 S.C. at 81, 600 S.E.2d at 526.

In the case at bar, the witnesses did not have sufficient opportunity to view the perpetrator at the time of the offense. Shamael and Deloris saw three assailants whose heads and faces were covered with “hoodies” and bandannas through the entirety of the incident;

Shamael also saw Toran, who became unmasked at some point. Tr. 89, lines 15-24; Tr. 108, lines 6-7; Tr. 109, lines 16-24. In fact, Deloris described the assailant later identified as Appellant as wearing the bandanna “across his eyes,” and was brown skinned. Tr. 93, lines 2-13. Further, although Shamael indicated she saw the masked gunman for “a few minutes,” she also admitted that she did not notice any scars or tattoos (despite the fact that Appellant has a large brown burn mark on his right eye). Tr. 117, lines 6-11; Tr. 263, lines 1-21; Tr. 300, lines 23—Tr. 301, line 7; Tr. 437, lines 13-19. Therefore, although both witnesses had an opportunity to see the assailant they identified as Appellant, they only had an opportunity to see at most a small area of the eyes, which was without the remainder of the context of the entire face.

Next, Shamael’s and Deloris’ degree of attention would have been low due to the factual scenario of the incident itself. As all described, four armed assailants barged into Deloris’ apartment shouting and looking for someone—Black Shawn—whom none of the occupants knew. When Deloris purportedly “saw” Appellant, it was over the difficult circumstances with the barrel of a gun pointed at her, and eventually with blood in her eyes. As for Shamael, she allegedly “saw” Appellant while holding Child and singing a song to Child, with a gun pointed at her head, and over the threats of her assailant. And, as the prosecution repeatedly emphasized, the occupants were stricken with fear. Under such circumstances, the degree of attention of Shamael and Deloris would likely have been low.

Moreover, the description of the assailant purported to be Appellant was exceedingly vague: brown skinned with dark clothes. Tr. 367, line 21-25. This is unsurprising given the coverings over the assailant’s head and face, as well as the circumstances of the incident itself. In fact, neither Deloris nor Shamael ever told law enforcement anything about the

assailant's eyes either before or after the photographic lineup. Tr. 134, line 1—Tr. 135, line 12; Tr. 137, lines 6-20; see also Tr. 403, lines 14-21; Tr. 398, line 12—Tr. 339, line 16 The first inkling that police had was when both witnesses covered the top and bottom of the faces in the six-pack photographic lineup containing Appellant's picture. Tr. 89, lines 23-24; Tr. 96, line 18—Tr. 99, line 18; Tr. 112, line 22—Tr. 115, line 23; see also Tr. 255, line 15—Tr. 257, line 12; Tr. 291, line 23—Tr. 292, line 24; Tr. 367, lines 11-17; Tr. 368, line 16—Tr. 369, line 14. Yet, even using this method, neither witness was able to identify the most distinguishing characteristic of Appellant's eyes: the large brown burn mark on his right eye. Accordingly, the witness' prior description of the perpetrator—particularly the primary characteristic by which he was identified—was inaccurate.

Additionally, although both witnesses appeared certain about the identifications they made, it was nonetheless made looking only at a small portion of the pictures: the eyes. Therefore, given the concealment of the assailant's head and face, the circumstances under which the witnesses saw the assailant, and the lack of either detail or accuracy in their identification of the assailant—particularly his eyes—all created a substantial likelihood of misidentification when Shamael and Deloris identified Appellant on December 5, 2013, as one of the three masked assailants from the incident on November 25, 2008. Accordingly, the trial court erred in admitting the out-of-court identifications, as well as the in-court identifications of Appellant by Shamael and Deloris at Appellant's trial.

Further, Appellant was prejudiced by admission of testimony from Martin and Vaught regarding pre-trial identification, as well as admission of the photographic line-up. As previously indicated, a constitutional error may be harmless only where the reviewing court is able to declare a belief "beyond a reasonable doubt that the error complained of did

not contribute to the verdict obtained.” Chapman, 386 U.S. at 24, 87 S.Ct. at 828; see also Van Arsdall, 475 U.S. at 681, 106 S.Ct. at 1436. “No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.” Reeves, 301 S.C. at 193-94, 391 S.E.2d at 243.

In the case at bar, the State relied upon the identification of Appellant by Shamael and Deloris to prove its case. Without these two witnesses, there would be no independent identification of Appellant to corroborate Toran’s trial testimony, which he admittedly gave in hopes of securing a deal for himself. Moreover, the State repeatedly referenced the identification of Appellant by Shamael and Deloris in its closing argument. Tr. 476, line 1—Tr. 478, line 25. Indeed, the State expressly reminded the jury it would have the six-pack lineup with them during deliberations:


She looked at him for as long as she could, and when she had the opportunity, she did a six-pack identification. You’re going to have these back there with you.

Tr. 476, lines 10-13. Finally, the error struck to the heart of the defense itself: identity. Therefore, the error was not harmless beyond a reasonable doubt because it likely contributed to the verdict obtained.

CONCLUSION

For the foregoing reasons, Appellant Ricky Bowman respectfully requests reversal of his convictions, and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen Richard Stevens", written over a horizontal line.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of April, 2013.