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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 181569

TIMOTHY JOSAAHN WATSON,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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PRELIMINARY STATEMENT

The trial court did not abuse its discretion in this murder and robbery trial in determining the topics on which the defense expert could testify. The court granted Watson's requests for funds to hire an expert in eyewitness identification to consult with counsel, prepare a report, and ultimately travel from Canada to Virginia to appear at trial. The court carefully considered each topic on which the defense sought to offer testimony from the expert, granting some and declining those which lacked a proper basis for testimony or which were within the common knowledge of jurors. The witness thereafter testified at the trial.

The trial court likewise did not abuse its discretion in instructing the jury. The court gave an instruction regarding the defendant's presumption of innocence and the Commonwealth's burden of proof, an instruction advising the jury of its duty to determine the credibility of witnesses and the weight of the evidence (using its common sense), and an instruction on the consideration of a witness' prior inconsistent statement. Consistent with this Court's decision in Payne v. Commonwealth, 292 Va. 855, 794 S.E.2d 577 (2016), the trial court declined to give a defense proffered instruction addressing specific factors for the consideration of eyewitness identification testimony.

Significantly, Watson, through the cross-examination of Commonwealth witnesses, the testimony of the expert witness, and his closing argument, thoroughly presented for the jury's consideration the issues surrounding the identification by eyewitness Joseph Jackson.

STATEMENT OF THE CASE

Timothy Josaahn Watson was indicted by a grand jury in the Circuit Court of the City of Virginia Beach for murder, conspiracy to commit robbery, two counts of robbery, and two counts of use of a firearm in the commission of qualifying felonies. (JA 1-2).

A jury convicted Watson on all counts and recommended a total sentence of life plus 53 years in prison, and a fine of $100,000. The trial court sentenced Watson in accordance with the jury's verdict. (JA 157-58).

Watson appealed the circuit court's judgment to the Court of Appeals of Virginia. By order of September 4, 2018, a judge of that Court denied the appeal. (JA 167-88). A three-judge panel of the Court of Appeals denied the appeal by order of November 1, 2018. (JA 189). (Record No. 1375-17-1). This Court granted two of Watson's assignments of error by order of May 9, 2019.

ASSIGNMENTS OF ERROR

The Court has granted the following assignments of error:

I. The Court of Appeals erred in affirming the trial court's exclusion of appellant's proffered expert testimony because that evidence was admissible expert testimony and crucial to appellant's defense.

II. The Court of Appeals erred in affirming the trial court's denial of appellant's proffered jury instruction regarding eyewitness identification testimony because the instruction was an accurate statement of law and supported by ample evidence.

STATEMENT OF FACTS

A. The offenses

Joseph Jackson and Paul Abbey visited "gentleman's clubs" in Norfolk and Virginia Beach on May 29, 2015, to celebrate Jackson's birthday. (JA 655-56).

The men first visited "RC's," a club in Norfolk. Upon leaving that club, Abbey spoke to occupants of a gray Ford Fusion car. (JA 659, 986). Abbey and Jackson next traveled to "Cheetah's Lounge" in Virginia Beach. When they arrived at Cheetah's the gray Ford Fusion pulled into the parking lot and parked near them. (JA 661).

Raiquan Turner exited the Ford Fusion first, and spoke to Abbey. (JA 661). Keith Mitchell, the driver of the Ford, and Watson, got out of the car. (JA 662). Watson's girlfriend, Ericka Phillips, also exited the car. (JA 663). Jackson and Abbey entered the club. Watson, Turner, Mitchell, and Phillips entered shortly thereafter. (JA 665, 667). Jackson could see the faces of those four people while they were inside the club. (JA 668). While there, Turner gave Jackson a "thumbs up." (JA 669).

Watson and Phillips left the club first at 12:52, Mitchell left alone at 1:27:28, and Turner left at 1:28:14. (JA 670-71, 672, 720, 721, 722). As the club was closing down, Jackson and Abbey left at 1:44:40. (JA 672, 723). In the parking lot, as Jackson and Abbey walked toward Jackson's Lincoln Navigator, Jackson heard someone say, "run those pockets, homey." (JA 673-74, 732). Jackson looked up from his phone to see Turner run up and put a hand gun in his forehead. (JA 673-74, 769). Turner fired the gun and a bullet grazed Jackson's head, causing

him to fall to the ground. (JA 675). Jackson felt a knee in his back, and then hands in his pockets. (JA 675-76, 782-83). Jackson's wallet was taken from him. (JA 676).

Jackson heard another gunshot. He looked toward Abbey and saw Turner and Watson standing over him. (JA 677-78). One man was reaching down to Abbey's pockets; the other man was looking up. (JA 678, 680). The men ran to a waiting car in a nearby field. (JA 680-81). Abbey died from a gunshot wound to the neck. (JA 1421).

Police officers arrived on the scene within a few minutes. (JA 686). Jackson was shocked and distraught; he had been injured and he knew his friend was dead. (JA 685, 688). He spoke to Detective Elizabeth Roys but had difficulty recounting the details of the crimes. (JA 686-87). Jackson did not tell Detective Roys that two people were involved in the robbery and shooting. (JA 809).

Within 45 minutes, Jackson viewed surveillance videotape inside the club with Detective Thomas Kellogg. (JA 689). At that time, Jackson identified Watson as the man with the gun and Turner as the other person involved in the crimes. (JA 690, 818-19). Jackson identified the assailants based on clothing and stature; Jackson did not see their faces in the surveillance tape. (JA 695).

On June 8, 2015, Detective John Allen, who was not involved in the investigation of the case, showed a series of photographs to Jackson. (JA 741, 873). Jackson positively identified Mitchell and Turner. (JA 746, 753, 796). When shown a six-photo array containing Watson's picture, Jackson rejected the other five photographs and indicated that he was not certain regarding Watson. (JA 750, 797). Jackson did not identify Ericka Phillips. (JA 744). Jackson positively identified Watson at the preliminary hearing. (JA 233, 245).

B. Pre-trial proceedings

1. Motion to suppress identification

Watson moved the circuit court to suppress in-court eyewitness identification by Joseph Jackson identifying Watson as one of the men who robbed him. Watson argued in his written motion that Jackson had admitted to consuming alcoholic beverages on the night in question, that the lighting was dim in the parking lot where the crimes occurred, and that Jackson had suffered a head injury. (JA 3-4). Watson also argued that Jackson had not provided "substantive" identification details about the men who had robbed him and had not positively identified Watson from a photo array, although he had identified co-defendants Mitchell and Turner. (JA 4). Finally, Watson contended that the circumstances at the preliminary hearing were suggestive in that Watson was wearing an orange jail

uniform and shackles and stood next to his attorney. (JA 4, 7-10). The Commonwealth filed a written response to the motion. (JA 14-18).

The court held a hearing on the motion on February 10, 2016. Detective Elizabeth Roys, who spoke to Jackson shortly after the crimes, testified that Jackson told her that one individual robbed him and his friend, although he said there were others in the suspect vehicle. (JA 385, 387). The detective testified that Jackson was extremely emotional upon seeing his friend shot and killed. (JA 393). She testified without objection that in her experience as a police detective, it was not unusual for witnesses to recall more details as time progresses because they are emotional at the time of the trauma. (JA 394). Detective John Allen testified that at the photographic lineup Jackson checked "not sure" next to Watson's picture. (JA 397).

Jackson testified at the hearing regarding his observations of the four people at Cheetah's prior to his entry into the club and during the time he and Abbey were inside the club. (JA 436-40, 440-42). He testified regarding what he saw during the crimes that occurred outside in the parking lot. (JA 443-45).

Jackson testified that he identified Turner and Mitchell with certainty from the photo array, but was not "completely" sure regarding Watson. He estimated

that his level of certainty was "85%." (JA 449). Jackson testified that upon seeing Watson "in person" at the preliminary hearing he was certain. (JA 450-51).

The trial court denied the motion to suppress. (JA 487). The court said that "just for the sake of argument" it assumed that the confrontation at the preliminary hearing was impermissibly suggestive. (JA 487). However, the court, applying the factors from Manson v. Braithwaite, 432 U.S. 98 (1977), concluded, "[w]hen I look at the totality of the circumstances, the identification in the court's opinion is reliable." (JA 487).

2. Motion for funds for an expert witness

Watson moved the trial court to provide funds for Watson to retain the services of Dr. Brian Cutler, "an expert on eyewitness identification." (JA 29).[1] The trial court held a hearing on the motion on June 6, 2016, at which counsel asked the court to approve "up to $2,000" to hire Dr. Cutler to review discovery materials and transcripts, consult with counsel on issues Dr. Cutler could identify, educate counsel, prepare a report, and ultimately testify at trial. (JA 506). The court commented that while it did not know whether Dr. Cutler's testimony would

[1] Dr. Cutler is a psychology professor at the University of Ontario Institute of Technology who has conducted research in "the psychology of eyewitness memory." (JA 1336, 1337).

be admissible at trial, the court authorized $1,500 for counsel to consult with him. (JA 517).

A month after that hearing, Watson filed another motion for additional funds to pay Dr. Cutler to travel to Virginia, observe testimony, and "testify at trial on the subject of eyewitness identification." (JA 47). Watson noted that Dr. Cutler had reviewed the case and prepared a report. (JA 47).

The court held a hearing on the motion on September 14, 2016, at which Watson advised the court that in order for Dr. Cutler to appear in person, the fee would approach $8,000. Thus, Watson requested $8,000. (JA 599). The court granted the motion. (JA 609). The court noted that it was only approving the funding for the expert witness, but was not ruling at that time on the admissibility of the expert testimony. (JA 609).

C. The trial

During opening statement, as well as during Jackson's testimony and in closing argument, the defense noted that it was not contesting that Watson went to Cheetah's on the night in question. (JA 636, 715, 1779).

The prosecution played clips taken from the club's surveillance system. Jackson identified the assailants in the clips. (JA 710-14, 718-24). Jackson testified at the trial that he saw Watson standing over Abbey's body. (JA 752).

Jackson acknowledged that on the night of the shooting, he had mistakenly indicated that Watson was the shooter, instead of Turner. (JA 814-15). He testified that he first realized that Turner was the shooter at the photographic lineup. (JA 813). Jackson testified that when he was shown the photo arrays, he was 85% sure regarding Watson. (JA 750, 797). He said that when he was able to see Watson in person at the preliminary hearing and could observe his entire face, stature, build, and skin color, he was 100% certain of his identification of Watson. (JA 754).

Detective Allen testified that his only involvement in the case was conducting the photographic lineup. He explained to the jury that this process was used to avoid any bias; he did not know who the suspects were or the victims. (JA 873-74). He provided specific instructions to Jackson. (JA 875).

Keith Mitchell, the driver of the car carrying Watson and Turner during the crimes, testified about the crimes. Mitchell testified that he and Turner, Watson, and Phillips went to RC's in Norfolk and followed another car to Cheetah's Lounge. (JA 989-90). Mitchell testified that after leaving the building at Cheetah's, Watson initiated a conversation about needing money. (JA 995). Watson gave Turner a handgun. (JA 996). Mitchell testified that he moved the car as Watson directed him to. (JA 998). He testified that he heard two gunshots. (JA

998). As he drove the car away, Mitchell heard Turner say, "I think I just shot somebody." (JA 1001).

1. Expert testimony

On the fourth day of the trial, defense expert witness, Dr. Cutler, was called out of sequence, during the Commonwealth's case, in order to accommodate his travel schedule. (JA 1201). Prior to Cutler's testimony, the trial court heard a proffer of the topics on which Watson sought to offer testimony from Cutler. Defense counsel and the prosecutor examined Dr. Cutler in detail outside the presence of the jury, which examination spans 30 pages of the trial transcript. (JA 1258-88). The court then excused the witness and counsel argued regarding the admissibility of Cutler's testimony on various topics concerning eyewitness identification. (JA 1288).

The court permitted expert witness testimony on the effect of stress, weapons focus, and the presence of multiple perpetrators on eyewitness identification. (JA 1305-06). The court disallowed testimony regarding the effect of exposure time, "unconscious transference," confidence feedback, and confidence inflation. (JA 1304, 1305-06). Dr. Cutler then testified before the jury. (JA 1335-55).

2. Jury instructions

The trial court gave 23 instructions to the jury, including instructions regarding the defendant's presumption of innocence and the Commonwealth's burden of proof (JA 105), the task of the jury to judge the credibility of the witnesses and the weight of the evidence, using its common sense (JA 108), and how it must consider evidence of a witness' prior inconsistent statement. (JA 114). As pertinent to this appeal, the court declined to give defense proffered Instruction B, which addressed explicit factors for consideration in weighing eyewitness identification testimony. (JA 129-30).

3. Summation

Watson argued in closing argument to the jury that Jackson was mistaken in his identification of Watson as a participant in the crimes. He noted that Jackson had been drinking that night, Watson was a stranger to him, and the lighting conditions were not good. (JA 1783). Watson argued that Jackson was under great stress and focused on a weapon, both of which limited his ability to pay attention to the identity of the assailants. (JA 1784). Watson spoke of experiences that jurors likely had had where they had seen someone they believed they knew, but upon moving closer they realized it was not that person. (JA 1786). Watson argued that the increase in Jackson's confidence in his identification of Watson

from the photo lineup to trial was influenced by seeing Jackson in court three times, wearing an orange jumpsuit and shackles. (JA 1788-89). Watson reminded the jury that Jackson had been incorrect in some of his early statements to the police. (JA 1789-90).

ARGUMENT

I. The Court of Appeals correctly determined that the trial court did not abuse its discretion in limiting the testimony of the defense expert witness.

A. Standard of Review

The admission or exclusion of expert testimony lies in the sound discretion of the trial court. Payne v. Commonwealth, 277 Va. 531, 542, 674 S.E.2d 835, 841 (2009). Where a decision is reviewed for an abuse of discretion, the appellate court does not substitute its own judgment "for that of the trial court," but considers "only whether the record fairly supports the trial court's action." Grattan v. Commonwealth, 278 Va. 602, 620, 685 S.E.2d 634, 644 (2009) (citation omitted). The exercise of discretion allows for disagreement among "conscientious jurists" and recognizes the "venerable belief that the judge closest to the contest is the judge best able to discern where the equities lie." Du v. Commonwealth, 292 Va. 555, 564, 790 S.E.2d 493, 499 (2016) (citations omitted).

Expert testimony "is admissible when it concerns matters not within the ordinary knowledge of the jury." Payne, 277 Va. at 542, 674 S.E.2d at 841. See Dowdy v. Commonwealth, 278 Va. 577, 600, 686 S.E.2d 710, 723 (2009) (expert testimony admissible when it concerns matters not within ordinary knowledge of jury such that it may assist jury's understanding of evidence presented). The "sole purpose of permitting expert testimony is to assist the trier of fact to understand the evidence presented or to determine a fact in issue." Velasquez v. Commonwealth, 263 Va. 95, 103, 557 S.E.2d 213, 218 (2002).

B. The trial court determined the topics about which Dr. Cutler could testify after his extensive proffer outside the presence of the jury.

Prior to Dr. Cutler's proffer, the court noted that the witness would not be permitted to testify that Jackson was "wrong." (JA 1204-05). The court also noted that testimony regarding lighting conditions and alcohol consumption were "off the table." (JA 1251). The court found that lighting was a factor within the common knowledge of the jurors and that there were numerous photographs for the jurors to review. (JA 1251). The court rejected testimony regarding Jackson's alcohol consumption because of the lack of data regarding how much Jackson had consumed over what period of time and thus such testimony would involve "a lot

of speculation." (JA 1251). The court added, however, that counsel would be able to argue those matters. (JA 1251).

1. The proffer

The witness addressed numerous topics in the proffer. He testified that moderate stress can cause a witness to be more vigilant and more attentive to an event. (JA 1259). He said that extreme levels of stress also can cause the witness to focus, but it also produces anxiety, which can interfere with encoding information into memory. (JA 1259-60). He agreed that if, within a short time frame the witness is removed from the stressful environment, and has a chance to calm down, recall could improve. (JA 1287).

Dr. Cutler also said that when a weapon is visually present, the witness tends to focus attention on the weapon. (JA 1262). He added that because "attentional capacities" are limited, when a weapon is visually present a witness has less attention to focus on an assailant's face or physical characteristics. (JA 1262). Dr. Cutler agreed that when the weapon disappears, the effect of weapons focus disappears as well. (JA 1277). Dr. Cutler also testified that "[m]ultiple perpetrators can divide the witness's attention." (JA 1262).

Dr. Cutler described "unconscious transference," as unknowingly transferring the identity of a familiar person to the perpetrator. (JA 1263, 1283).

He testified that such transference is more likely to occur when the witness does not get a good look at the assailant. (JA 1264). He testified that nothing about the photo lineup procedures in this case would cause concern for unconscious transference. (JA 1279).

With regard to eyewitness confidence, Dr. Cutler said under "some very specific circumstances" there is a "moderately strong relation" between confidence and accuracy. (JA 1265). But he added that some people are just more confident than others. (JA 1266). Dr. Cutler said that information gleaned by the witness after identification can make a witness more confident. (JA 1266-67). Cutler said that he did not see any evidence of improper feedback by the police regarding identification. He said that seeing a suspect in court "could validate the identification and increase confidence." (JA 1270). Dr. Cutler, however, testified that "[w]ithout a more explicit and descriptive statement" of the witness' confidence at the lineup, "there is no way of knowing whether confidence inflation has occurred." (JA 1272). In response to the prosecutor's question, Cutler acknowledged that the police had followed a model policy. (JA 1279).

2. The trial court's ruling

Following the proffer, the court excluded testimony on the "exposure time" that the witness viewed the assailant because it was a matter within the jurors'

understanding. (JA 1289). The court ruled that the witness would not be permitted to testify about unconscious transference because the witness had not found evidence of that principle in this case. (JA 1297-99).

The court ruled that the expert would be permitted to testify regarding the relationship of stress on memory. (JA 1290-91). With regard to testimony about weapons focus, the court found that it was "part and parcel of stress" and ruled that it would allow such testimony. (JA 1294). Watson argued that the witness should be able to testify that the presence of multiple perpetrators affect eyewitness identification because an individual has a "finite level or processing capacity" multiple assailants divides the witness' attention. (JA 1295). The court ruled that testimony regarding multiple perpetrators also would be allowed. (JA 1295).

The court ruled that "eyewitness confidence correlating with accuracy is common sense." (JA 1304). The court did not permit expert testimony on that topic. (JA 1304). The court, likewise, disallowed evidence of "confidence inflation," because that concept also was "within the common province and knowledge of the ordinary juror." (JA 1304).

3. Dr. Cutler testified before the jury

Dr. Cutler testified that the "information we encode into our memory . . . depends on what we're attending to at the time and other factors such [as] our level

of distraction." (JA 1340). He explained that people may be distracted by "other events" or by "your own thoughts." (JA 1340). The witness testified that memories decay over time. (JA 1341). He added, however, that "memory can be influenced by what information we learn later." (JA 1341). He testified:

> If we learn more accurate information later, it can increase the completeness and accuracy of our memories. But if we learn inaccurate information, misleading information, that misleading information can become incorporated into our memories as well. We may also fill in the gaps in our memories as time goes on. So those factors can influence memory at the storage stage.

(JA 1341). Thus, although the court had excluded evidence regarding post-identification information, (JA 1304), Dr. Cutler actually addressed that topic before the jury.

Dr. Cutler testified that people have "limited attentional capacity" and performance slips when "trying to attend to multiple things at once." (JA 1342). He testified that these factors can affect eyewitness identification. (JA 1342-43). As he did during his proffer, Dr. Cutler testified before the jury that moderate stress can make a person more vigilant and attentive. He added that very high levels of stress can have the same effect, but also lead to anxiety and fear, which can interfere with "encoding." (JA 1343). He explained that thinking about other things, such as how to escape the situation, "can make it more difficult" to "focus and encode information into memory." (JA 1343). He said, "[i]t makes us less

accurate." (JA 1344). He testified that while people tend to remember traumatic events, stress "can interfere" with accurately recalling details. (JA 1345).

The witness also told the jury that the visual presence of a weapon and the presence of multiple assailants can create more errors in eyewitness identification because those factors divide attention, which is limited. (JA 1345-46). He summarized that these factors challenge the ability to "encode information." (JA 1347).

Dr. Cutler acknowledged, with regard to the effect of multiple perpetrators, that the fewer the number of assailants, the less distracted the witness will be. (JA 1347-48). He also agreed that the effect of weapons focus completely disappears once the weapon is no longer visually present. (JA 1348). Dr. Cutler also acknowledged that a witness' high stress at the time he is interviewed also can cause the witness to have difficulty in recalling information. (JA 1349). He also agreed that once the witness has had time to calm down and is no longer experiencing high stress, it is easier for that person to recall details. (JA 1350).[2]

[2] That opinion is consistent with Detective Roys' observation that witnesses recall more details as time progresses, when the trauma is not as fresh. (JA 394).

C. The trial court did not abuse its discretion.

This Court has not explicitly addressed the issue of the admissibility of expert testimony regarding eyewitness identification.[3] The Court of Appeals, however, has addressed the issue. In Currie v. Commonwealth, 30 Va. App. 58, 515 S.E.2d 335 (1999), the Court affirmed Currie's convictions for attempted rape and assault and battery and ruled the trial court had not abused its discretion in limiting the topics on which Currie's eyewitness identification expert could testify. See id. at 65, 515 S.E.2d at 339.

The Court of Appeals opined that generally, the "trustworthiness of eyewitness observations" is not beyond the knowledge and experience of a juror, and can be explored in cross-examination and closing argument. Id. at 64, 515 S.E.2d at 338. The Court noted, however, that it had previously recognized that that in "some 'narrow' circumstances, expert testimony may be useful to the jury." Id. (quoting Rodriguez v. Commonwealth, 20 Va. App. 122, 127, 455 S.E.2d 724, 727 (1995). The Currie Court, again relying on Rodriguez, identified those areas as including "cross-racial identification, identification after a long delay,

[3] In Townes v. Commonwealth, 234 Va. 307, 332, 362 S.E.2d 650, 664 (1987), the Court rejected Townes' argument that the court should have appointed an "identification expert."

identification after observation under stress, and psychological phenomena as the feedback factor and unconscious transference." Id. at 65, 515 S.E.2d at 338.[4]

The trial court in Currie did not permit expert testimony regarding the correlation between eyewitness certainty and accuracy, the effect of stress and the presence of a weapon on the identification, or the concept of transference. Id. at 63, 515 S.E.2d at 337. The Court of Appeals did not find an abuse of discretion in the trial court's ruling. Id. at 65-66, 515 S.E.2d at 339. As in the instant case, defense counsel in Currie "addressed in argument to the jury" issues limited by the trial court. Id. at 65, 515 S.E.2d at 339.

In Payne v. Commonwealth, 65 Va. App. 194, 776 S.E.2d 442 (2015), the Court of Appeals, in addressing a claim that the trial court had erred in denying funds for an expert in eyewitness identification, discussed the admissibility of such testimony.[5] Payne sought testimony regarding "eye-witness misidentification, weapons focus, and cross-racial misidentification." Id. at 219, 776 S.E.2d at 454. The Court of Appeals expressed concern that Payne actually was seeking an expert to "testify about the infirmities of a specific witness' testimony." Id. at 221, 776

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[4] As Watson acknowledged at trial, all of the participants belonged to the same race. (JA 604). Thus, there was no issue of cross-racial identification.

[5] This Court did not grant Payne's appeal regarding the denial of funds to hire an eyewitness identification expert. The Court granted the appeal only as to the jury instruction issue and the issue of the admissibility of certain testimony of a police officer. Payne, 292 Va. at 859, 794 S.E.2d at 578-79.

S.E.2d at 455. The Court of Appeals found that the proposed testimony would address matters within the "common knowledge and experience of the jurors" and thus it would not be admissible. Id. at 222, 776 S.E.2d at 455.

Furthermore, in Payne, the Court of Appeals noted that Payne had questioned the victim extensively on topics bearing upon his identification of Payne, and then argued those points in his summation. Id. at 222, 776 S.E.2d at 456. The Court of Appeals concluded that the trial court had not abused its discretion in declining to authorize funds for the expert witness. Id. at 223, 776 S.E.2d at 456.

Watson has cited a number of cases from other jurisdictions in support of his argument. He cites several cases that discuss research regarding the relationship between witness confidence and accuracy. (Def. Br.at 14-15). Many of those cases, however, recognize that the admission of expert testimony nevertheless is reviewed under an abuse of discretion standard. For example, in United States v. Bartlett, 567 F.3d 901 (7th Cir. 2009), the court acknowledged that psychological research had "undermine[d] the lay intuition" that confident memories are accurate ones. Id. at 906. The court, however affirmed the trial court's decision to exclude expert testimony on the concept, noting that the court had "held, many times, that a trial court does not abuse its discretion by excluding expert evidence about the

reliability of eyewitness testimony." Id.[6] In Bartlett, several of the witnesses who identified the defendant knew him well. Id.

Watson also cites several out of state cases regarding post-identification information and confidence inflation. In State v. Almaraz, 301 P.3d 242 (Idaho 2013), the court found that the trial court had abused its discretion in excluding expert testimony regarding the interview between the witness and a police officer at the time of the identification procedure.

The defense had sought to play the audio tape of the interview and allow the expert witness to "point out how the interview violated established guidelines." Id. at 257. In reversing the conviction, the Supreme Court of Idaho acknowledged that the trial court has discretion in excluding testimony regarding eyewitness identification. Id. at 258. The court noted that in reaching its holding, "this Court still recognizes that an expert cannot opine to the accuracy of the eyewitness identification or the credibility of any witness." Id. The court concluded, however, that "an expert witness may testify to specific instances of police suggestiveness that may call into question the reliability of the eyewitness testimony." Id.

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[6] The court commented that "using expert testimony to explore [the relationship between confidence and accuracy] may sidetrack a trial." Bartlett, 567 F.3d at 906.

In this case, there was no evidence of any deviation from best identification practices by the police. Indeed, Dr. Cutler agreed that they had followed the model policy. (JA 1279). And, as noted above, Dr. Cutler did in fact testify on the issue of post-identification information irrespective of the trial court's ruling, when he testified that "memory can be influenced by what information we learn later," and that "if we learn inaccurate information, misleading information, that misleading information can become incorporated into our memories as well." (JA 1341).

D. Watson addressed factors affecting eyewitness identification during his cross-examination of Jackson and in his summation to the jury.

During his cross-examination, Jackson acknowledged that Turner had placed a gun in his face, actually against his forehead, and that while the gun was in his face his focus was on the weapon. (JA 767-69). Jackson agreed that the incident was the most stressful situation of his life. (JA 769). Jackson acknowledged that after the photo lineup he had seen Watson at court hearings where Watson was wearing an orange jumpsuit and handcuffs. (JA 797-98, 799).

Jackson conceded that immediately after the crimes he made mistakes in his statements to the police. Jackson acknowledged that he told Detective Roys shortly after the crime that the shooter had left with the woman, which would mean

the shooter was Watson. (JA 803). Jackson agreed that initially he had only described a single gunman being involved in the crimes. (JA 814-15).

In closing argument, Watson focused on Jackson's identification and argued that the jurors should find that he was mistaken in his identification of Watson. Watson argued about stress and weapons focus, and that Jackson's confidence in his identification of Watson had increased after the photo lineup, after Jackson saw Watson in court in a jail uniform and restraints. (JA 1783-84, 1788-89). Although Watson did not refer to the process as "transference," he encouraged the jurors to think of a situation when they had seen someone in a crowd, believed him to be an acquaintance, but upon a closer look realized he was not the acquaintance. (JA 1786). Watson reminded jurors that Jackson had been mistaken in some of his early statements to the police. (JA 1789-90).

In sum, the trial court permitted Dr. Cutler to testify regarding matters not within the jury's knowledge. Arguably, Dr. Cutler testified beyond the limitation set by the court. During cross-examination, Watson addressed matters affecting Jackson's eyewitness identification. In closing argument, Watson argued, without objection, regarding factors affecting the identification, including topics the court had excluded from the expert's testimony. In light of these factors, there was no

reversible error in the trial court's ruling on the admissibility of the expert testimony.

II. The Court of Appeals correctly determined that the trial court did not abuse its discretion in declining to give Watson's proposed Instruction B because other granted instructions fully and fairly covered the principle included in that proposed instruction.

The trial court did not abuse its discretion in refusing Watson's proposed jury instruction addressing factors for consideration regarding the reliability of eyewitness identification testimony. The granted instructions in the case sufficiently instructed the jury on the issue of the reliability of eyewitness identification. The defense addressed Jackson's identification through cross-examination and summation. And, as addressed above, Watson presented expert testimony regarding factors affecting eyewitness identification.

A. Standard of Review

"Whether to give or deny jury instructions 'rest[s] in the sound discretion of the trial court.'" Hilton v. Commonwealth, 293 Va. 293, 302, 797 S.E.2d 781, 786 (2017) (quoting Cooper v. Commonwealth, 277 Va. 377, 381, 673 S.E.2d 185, 187 (2009)) (further citations omitted); see Sarafin v. Commonwealth, 288 Va. 320, 325, 764 S.E.2d 71, 74 (2014). An appellate court reviews jury instructions "to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises." Payne v. Commonwealth, 292 Va. 855, 869, 794 S.E.2d

577, 584 (2016) (quoting Lawlor v. Commonwealth, 285 Va. 187, 228, 738 S.E.2d 847, 870 (2013)). "In deciding whether a particular instruction is proper [the appellate court] view[s] the facts in the light most favorable to the proponent of the instruction." Sarafin, 288 Va. at 325, 764 S.E.2d at 74.

A trial court may reject a proposed jury instruction if its contents are adequately covered by another instruction. Hilton, 293 Va. at 302, 797 S.E.2d at 786; accord Howsare v. Commonwealth, 293 Va. 439, 443, 799 S.E.2d 512, 515 (2017); Daniels v. Commonwealth, 275 Va. 460, 466, 657 S.E.2d 84, 87 (2008). This Court presumes that "jurors follow the instructions they are given." Bryant v. Commonwealth, 295 Va. 302, 311, 811 S.E.2d 250, 254 (2018).

B. The granted instructions adequately covered the issues before the jury.

In its unanimous opinion in Payne, this Court rejected the defendant's claim that the trial court erred in denying his proposed eyewitness identification instruction. The Court ruled that "a court may exercise its discretion and properly exclude an instruction that both correctly states the law and is supported by the evidence when other granted instructions fully and fairly cover the relevant principle of law." Payne, 292 Va. at 869, 794 S.E.2d at 584 (citation omitted).

The Court in Payne found that the granted instructions, particularly the witness credibility instruction, fully and fairly instructed the jury regarding the

evaluation of eyewitness identification testimony. See id. at 870-71, 794 S.E.2d at 585.[7] Likewise here, the trial court did not abuse its discretion in denying Watson's proffered instruction.

Here, as in Payne, the trial court gave the model instruction (2.500) on witness credibility. Instruction 4 provided:

> [Y]ou are the judges of the facts, the credibility of the witnesses, and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and if any have been shown, their prior inconsistent statements or whether they have knowingly testified untruthfully as to any material fact in the case.
>
> You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.
>
> You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

(JA 108).

Indeed, in Payne, this Court found that this jury instruction on witness credibility also covered the issue of *reliability*. The Court held:

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[7] Payne challenged the refusal of an instruction based on United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972), which addressed factors surrounding the crime and identifications made by the witness. Payne, 292 Va. at 867, 794 S.E.2d at 583.

> [A]n instruction that the jury may consider eyewitnesses' "opportunity for knowing the truth and for having observed the things about which they testified" does inform it that it may consider not only whether the eyewitness honestly believes what he or she testifies to on the stand, but also whether he or she had the capacity and opportunity to accurately and reliably form that belief.

Payne, 292 Va. at 871, 794 S.E.2d at 585.

The trial court here also gave Instruction 1, which recited that the Commonwealth was required to prove "each and every element of the offense beyond a reasonable doubt." (JA 105). And, the court advised the jury on how it should consider an inconsistent statement of a witness. (JA 114).

This Court noted in Daniels, and again in Payne, that the Court had not adopted a rule *prohibiting* an instruction on eyewitness identification, or that a trial court would abuse its discretion by granting such an instruction. See Payne, 292 Va. at 872, 794 S.E.2d at 586. Neither has the Court adopted a rule *requiring* such an instruction in every case involving eyewitness identification. Id. The trial court here declined to grant Watson's eyewitness identification instruction. Given the totality of the evidence and the granted instructions, the court did not abuse its discretion in so ruling.

It should be noted that here, while Jackson's testimony was critical, unlike in Payne, the evidence of identification came not only from the victim of the offense, but also through testimony of co-defendant Keith Mitchell, who described the

events and participants in the incident. (JA 989-1001). While Watson disputes his participation in the crime, he conceded that he was present with Turner, Mitchell and Phillips. (JA 636, 715, 1779). See generally United States v. Redwood, 216 F.Supp.3d 890, 896 (N.D. Ill 2016).

Watson argues on appeal that his proffered instruction was included as part of Note 2.800 in the Virginia Model Jury Instructions book.[8] (Def. Br. at 19). The note recognizes that this Court has held that in the proper case a trial court would not abuse its discretion in giving an instruction which addressed factors affecting eyewitness identification. Thus, in an effort "to assist the practitioner" suggested language that could be included in such an instruction was provided in the Note. It is not a standard model instruction.[9]

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[8] At trial, Watson acknowledged that his proffered instruction was based on the note found in the Virginia Model Jury Instruction book. (JA 1735).

[9] Not all of the provisions of the suggested instruction are appropriate in every case involving eyewitness identification. For example, Watson's proffered instruction would have advised the jury that it could consider "whether the procedures used by law enforcement had any influence on the witness's identification," including the manner in which photographs were selected or presented or comments made by officers. (JA 130). In this case, there was no allegation that the lineup was in any way improper. It was conducted by an officer who was not involved in the case and there was no evidence that Detective Allen made any improper comments in connection with the identification process. Watson's own expert acknowledged that the police followed the model policy. (JA 1279). Thus, that portion of the instruction was not proper here.

Nothing in the "Note on Eyewitness Identification" contained in the model jury instruction book suggests that a trial court abuses its discretion in declining to give an instruction based on the note's sample language.

C. Watson was able to address identification issues through presentation of expert testimony, during cross-examination of witnesses, and in closing argument.

As noted in Argument I above, Watson's cross-examination of Jackson and his closing argument focused on the identification issue. The examination and summation were adequate to allow the jury to conclude that Jackson's identification of Watson was not reliable. "The jury's choice not to do so is not attributable to a defect in the court's instructions." Payne, 292 Va. at 872, 794 S.E.2d at 586. Indeed, as this Court held in Payne, matters that are appropriate for robust closing argument are not necessarily properly included in a jury instruction. Id. at 871, 794 S.E.2d at 585.

CONCLUSION

Because the trial court properly exercised its discretion in determining the appropriate parameters of the expert's testimony and in fully instructing the jury so that it could determine the reliability of the eyewitness' testimony, the judgment of the Court of Appeals of Virginia and the Circuit Court of the City of Virginia Beach should be affirmed.

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

On July 12, 2019, this brief was filed electronically with this Court and the required paper copies were hand-delivered to the Clerk's Office in compliance with Rule 5:26. A copy of the document was emailed to Roger A. Whitus, Assistant Public Defender, at rwhitus@vir.idc.virginia.gov. A copy was also sent by email to Amy C. Lishinski, at amy.lishinski@wilmerhale.com, amicus counsel for the American Psychological Association.

The undersigned certifies that the brief complies with the page and word count limitations of Rule 5:26(b). The brief, excluding the cover page, table of contents, table of authorities and certificate, contains 6,885 words.

The Commonwealth desires to present oral argument in this case.

By: /s/
Virginia B. Theisen
Senior Assistant Attorney General

A courtesy copy has been sent to the trial judge and prosecutors.