THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0590

The State of New Hampshire

v.

Barion Perry

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
HILLSBOROUGH COUNTY SUPERIOR COURT
FOR THE SOUTHERN JUDICIAL DISTRICT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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ISSUE PRESENTED

Whether the trial court properly held that admission of Blandon's out-of-court identification would not violate due process where there was no state facilitated identification procedure and the defendant never argued that none was required; where Blandon spontaneously identified the defendant without any prompting to do so; where Blandon nevertheless had a good view of the defendant in the well lit parking lot, closely watched him for at least a few minutes, accurately described his actions and appearance, and positively identified him minutes after the crime; and where admitting her identification could not have affected the verdict because Ullon also identified the defendant, who was found at the scene with the stolen property.

STATEMENT OF THE CASE

On October 21, 2008, the defendant, Barion Perry, was indicted by the Hillsborough County Grand Jury for the Southern Judicial District with one class B felony count of theft by unauthorized taking, which was subject to an extended term of imprisonment because he had two prior convictions for theft by unauthorized taking and one prior conviction for burglary. ASB 1.[1] *See* RSA 637:3 (2007); RSA 637:11, II(b) (2007). The defendant was also charged by information with the class A misdemeanor offense of criminal mischief. ASB 2. *See* RSA 634:2, I, II(a) (Supp. 2009). Following a two-day jury trial in the Hillsborough County Superior Court for the Southern Judicial District (*Lynn*, C.J.), the defendant was found not guilty of criminal mischief and guilty as charged of theft by unauthorized taking. ASB 1–2; JT-II 288–89. On July 27, 2009, the court (*Barry*, J.) sentenced him to serve three to ten years in the New Hampshire State Prison, and to pay restitution to the victim. ADB 24. That sentence was imposed concurrent with two concurrent terms of four to eight years the court imposed because the defendant had violated the terms of his previously suspended sentences for theft by unauthorized taking and burglary. ASB 24–32. This appeal followed.

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[1] "ADB" refers to the appendix to the defendant's brief.
"ASB" refers to the attached appendix to the State's brief.
"JT-I" and "JT-II" refer to the transcripts of the jury trial on June 16-17, 2009.
"MH" refers to the transcript of the suppression hearing on April 20, 2009.

STATEMENT OF FACTS

A. The State's Evidence At The Suppression Hearing

At 2:53 a.m. on August 15, 2008, Nashua Police Officer Nicole Clay was sent to the parking lot behind 70½ West Hollis Street to investigate "a report about a black male looking through vehicles and attempting to gain entry into vehicles." MH 7–8. When she arrived at the multi-story apartment building, she parked her cruiser out front and walked around to the parking lot. MH 8–9, 12. There were twelve to vivteen cars in the parking lot, which was "fairly well lit" by lights in the parking lot, lights on the back of the building, and streetlights on Ash Street, which was the street at the exit to the parking lot. MH 25–26.

As Officer Clary entered the parking lot, she heard what "sounded like a metal bat hitting the ground," and she saw the defendant carrying two amplifiers and walking toward her from between two vehicles. MH 8–9. She asked him to put the amplifiers down and come talk to her, so he did. MH 9. He then said that he was moving the amplifiers because he had just found them lying on the ground. MH 10. Officer Clay asked where they had come from, and the defendant said "that he had just seen a couple of kids leaving the parking lot," that one of them was wearing a white T-shirt, and that the other one was on Ash Street. MH 10.

Officer Clay walked with the defendant to Ash Street where he pointed out a Hispanic man who was standing outside a nearby house. MH 10–11. The man

said that his name was Rowley Anzani, that he had been in the house all night, that he had just come outside to do something for his mother, that his friend had left half an hour earlier, and that he had not seen anyone else on Ash Street in the last ten minutes. MH 11–12. The defendant kept interjecting "that he had just found the amplifiers and that other kids had stolen them." MH 12.

When Officer Clay and the defendant returned to the parking lot, Alex Clavijo walked over and said that his neighbor had told him that his car had been broken into. MH 12. He also said that the large item missing from his trunk was a wooden box with two speakers mounted inside, and that the amplifiers were also his. MH 36–39. By then, Officer Robert Dunn had arrived, so she asked him to wait with the defendant while she went inside to talk to the neighbor. MH 13–14. The defendant was just standing talking to Officer Dunn in the middle of the parking lot, and he was not handcuffed or otherwise restrained. MH 10–11, 27.

Officer Clay and Clavijo went up to the second or third floor apartment of his neighbor, Nubia Blandon, who came out and spoke to them in the hallway. MH 14. Blandon spoke only Spanish, so Clavijo translated. MH 14. Officer Clay did not tell Blandon that there was a suspect in the parking lot with an officer, and they could not see the parking lot from the hallway. MH 14, 19, 46. Blandon said that she had seen a tall, black man walk through the parking lot, look into all the cars, circle Clavijo's car, and then open the trunk of Clavijo's car and remove a

large box. MH 24–25.[2] Blandon also said that the man had been carrying a bat. MH 25. Officer Clay asked for a description of the man, and Blandon pointed toward the window and said "it was the man standing outside with the police officer." MH 24. Blandon did not describe the defendant's clothing or features because the police were already talking to him. MH 30. Officer Clay did not ask Blandon how long she had been watching the defendant, but it would have taken at least a couple of minutes for him to take the actions she had described. MH 32. A month later, Blandon was unable to identify the defendant's photograph from a photographic array. MH 28.

In the meantime, Blandon's husband, Joffre Ullon, who had made the initial report about a man trying to break into cars, returned from getting coffee. MH 23, 46. He said that he had seen "a black male walking through the parking lot and lifting up on the [car] door handles." MH 24. Officer Clay asked him for a description of the man, and he also said "it was the man standing outside with the police officer." MH 24. Officer Clay went back outside and saw that the defendant and Officer Dunn had moved to the end of the lot, which was about thirty feet away and not as well lit. MH 26. She then found Clavijo's wooden box and speakers near the exit to the parking lot. MH 40.

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[2] Although the hearing transcript uses the word "truck" several times, it is clear from later testimony that the item was taken from the "trunk" of Clavijo's car. JT-II 169-70.

B. Other Evidence From The State's Case At Trial

The apartment building at 70½ West Hollis Street was between Ash and Palm streets. JT-I 67. Clavijo lived on the fourth floor across the hall from Blandon and Ullon. JT-I 31–33, 120. Their apartment faced the back parking lot where Clavijo kept his black Honda Civic coupe, but his windows faced West Hollis Street, so he could not see the parking lot. JT-I 33–33, 52.

On August 15, 2008, Blandon and Ullon got up at 2:15 a.m. because Ullon had to go to New York. JT-I 108, 130. Blandon went into the kitchen and looked out the window. JT-I 109. It was a long distance down to the parking lot, "but the view was perfect." JT-I 121. Blandon was surprised when she saw a tall black man riding a bicycle through the parking lot and looking into cars, so she kept watching to see what he was doing. JT-I 109, 119. Before Ullon left at 2:30 a.m. to go to Dunkin' Donuts to get coffee, Blandon told him that a black man was riding around on a bicycle in the parking lot. JT-I 124, 130.

Ullon went outside and saw the defendant walking around looking into cars. JT-I 131, 135. As Ullon left the parking lot, he saw a bicycle lying near the Ash Street exit. JT-I 131. The defendant was standing nearby in an area that was well lit, so he turned around to try to hide his face from Ullon. JT-I 131, 138. Ullon drove around the corner and back into the parking lot to try to get a closer look, but the defendant saw headlights and hid behind some cars. JT-I 131, 136.

After Ullon went downstairs, Blandon watched the defendant ride around the parking lot twice and then leave his bicycle by the Ash Street exit and walk over to Clavijo's car. JT-I 109, 121. Only the back of Clavijo's car was visible to her because there was a large vehicle parked next to it. JT-I 110. At first, she thought the defendant might be one of Clavijo's friends, but then she saw him open Clavijo's trunk and remove a box that was very big, so she called Ullon. JT-I 110–11, 126. At that point, she had been watching the defendant for about half an hour, but she was scared and trying to see what he was doing, so she was not paying attention to his clothing. JT-I 112. Ullon told her to call the police, so she did, but they could not understand her, so Ullon called. JT-I 110, 122–23, 132–33.

When Officer Clay walked into the parking lot, she heard a loud metal clang, saw the defendant walking out from between two vehicles carrying two amplifiers, and then saw a metal bat on the ground behind him. JT-I 67–68, 79. The defendant said that he was moving the amplifiers because he had found them in the middle of the parking lot. JT-I 71, 89–90. He also said that two other people had stolen the items and he pointed out Anzani, but Officer Clay determined that Anzani was not involved. JT-I 71, 73–74. At that point, Officer Dunn arrived. JT-I 100.

After Blandon saw Officer Clay walk into the parking lot and talk to the defendant, she went to wake up Clavijo to tell him that someone was "robbing" his

car. JT-I 112–15, 119. Blandon returned to her window and Clavijo grabbed a bat for protection and went downstairs. JT-I 59–61, 112. He then saw that the left rear window on his car was broken, another window was open, there were wires hanging out of the open trunk of the car, and his two amplifiers, a large box containing two speakers, a wrench he used to open the windows, and his metal baseball bat were all missing. JT-I 35–37, 52, 57–58. Clavijo told Officer Clay what was missing, and that Blandon had told him that his car had been broken into. JT-I 40–41. Blandon saw Officer Clay and Clavijo coming upstairs, so she waited at the door and then spoke to them in the hallway. JT-I 117. Ullon returned while the defendant was in the parking lot with an officer, and then he went upstairs. JT-I 131. The police cruisers were parked on West Hollis Street, so they were not visible from the parking lot, the hallway, or the window of Blandon and Ullon's apartment. JT-I 102.

Officer Clay found Clavijo's box and speakers next to a maroon bicycle that was lying near the Ash Street exit to the parking lot, which was only a couple of car lengths from where she had first seen the defendant with the amplifiers. JT-I 39, 47–48, 81. Officer Clay also found Clavijo's vice-grip wrench in the defendant's pocket after he was arrested. JT-I 46, 57–58, 89. The defendant said that it was his wrench, and that he used it to fix his bicycle tires. JT-I 89–90.

Later that morning, the defendant waived his *Miranda* rights and spoke to an officer. JT-II 151–71. He continued to deny breaking into Clavijo's car and

stealing items from it. JT-II 171. He also claimed that earlier the same day, he had bought the same type of stereo equipment that was found in the parking lot. JT-II 155–56. He further claimed that he had used the wrench to fix the tire on his bike earlier that day, but had not ridden the bike to West Hollis Street. JT-II 164, 167. The defendant also asked to have the trunk to Clavijo's car fingerprinted before anyone had said that the trunk had been opened or that items had been stolen from the trunk. JT-II 168–69.

Blandon and Ullon were later separately shown a photograph lineup containing a photograph of the defendant. JT-II 172–77. Blandon could not identify the defendant's photograph because she had not "clearly perceive[d] the details of his face." JT-I 128. Ullon had not seen the defendant's features clearly, but he still "recognized his face," JT-I 137, and "immediately" picked out the defendant's photograph, JT-II 177.

C. The Defendant's Testimony At Trial

The defendant testified that he was 6′ 2″ tall. JT-II 224. He claimed that he always carried an Allen wrench and a vice-grip wrench identical to Clavijo's so that he could fix his bicycle tires, and that the officer had lied when she testified she had found only the vice-grip wrench in his pocket. JT-II 198–99, 243–44. He also claimed that he had been riding his bicycle earlier that day, that he had gotten a flat rear tire when he swerved to avoid a bunny and hit the curb, that he could

not fix the rear tire because the wrench worked only on the front tire, that he had left the bicycle in the bushes behind a house on Amherst Street, and that he had walked to West Hollis Street. JT-II 199–201, 206–08.

The defendant claimed that the day before, he had bought a truck, the same type of amplifier Clavijo had, and a box and speakers similar to Clavijo's, and that although he often installed stereo equipment, someone on Ash Street was keeping the truck, so he had cut through the parking lot at 2:30 a.m. to go check on it. JT-II 201–03, 208, 228. He also claimed that he had seen three men, one of whom was as dark skinned as he was, and one of whom was riding a bicycle that was a lighter color than his silver bicycle, going through the alley to the parking lot, but it had taken him three to five minutes to get across the street, so they had been gone by the time he arrived at the parking lot. JT-II 199, 214–15, 235. He further claimed that he had never mentioned the other man's bicycle before because he had not known until trial that a bicycle was involved, but then admitted that he had known from police reports that Blandon had seen the thief riding a bicycle, and that a bicycle had been found near the box and speakers. JT-I 236, 239.

The defendant claimed that people often left electronics in the alley, that he had seen two objects in the middle of the parking lot and was trying to be a Good Samaritan and move them before they got run over, and that the officer had confronted him before he determined what they were. JT-II 207, 216–18, 222.

D. Relevant Events Before And During Trial

Prior to trial, the defendant moved to suppress Blandon's identification "pursuant to [p]art I, [a]rticle 15 of the New Hampshire Constitution, the Fourteenth Amendment [to] the United States Constitution, and the holdings of *Neil v. Biggers*, 409 U.S. 188 [(1972),] and *State v. LeClair*, 118 N.H. 214 (1978)." ADB 1. He argued that the identification procedure had been "unnecessarily suggestive" and "essentially a one-man show-up" where Blandon had "definitely" identified the defendant "only because she [had seen] him being arrested," and had "relie[d] heavily on context cues, such as handcuffs and police cruisers . . . ." ADB 3. He also argued that Blandon "was only able to describe him as tall, skinny and black," but "was unable to describe facial features, length of hair, hair style or what the perpetrator was wearing," and "was unable to pick him out of a line-up, which indicate[d] that she did not have sufficient time or opportunity to observe the alleged perpetrator on August 15, 2008." ADB 4.

On March 2, 2009, the State objected, arguing that the motion was untimely, and requesting additional time to respond. ADB 5. On March 11, the State filed a memorandum of law and argued that "Blandon's identification of the defendant was not facilitated by the police in any fashion," ADB 10, and that there had been no unnecessary or suggestive procedure where Blandon had "witnessed the defendant's commission of the crime first hand" and had then identified him "independently from police facilitation," ADB 12. The State also argued that the

identification had been "reliable and based on observations uninfluenced by any suggestive procedures used by the police" where it was clear: (1) that Blandon had "an excellent opportunity to view the defendant" because she had described his actions in detail and had, "without hesitation, identified him as the one with the officer," ADB 14; (2) that Blandon had paid a great degree of attention because she had accurately described the defendant's "gender and race," had said "that he was carrying a bat which was found at the scene," and had said that he had "removed a large object from the victim's car, which proved to be accurate," ADB 14; (3) that although Blandon had not given a detailed description, she had accurately described the defendant's "physical characteristics," ADB 14; (4) that Blandon had been certain and had "immediately identified him as the one in the back of the parking lot standing with the officer," ADB 14; and (5) that Blandon had made the identification "only a matter of minutes after the occurrence of the crime in question," ADB 15.

At a hearing on April 20, 2009, the defendant confirmed that he was not moving to suppress Ullon's out-of-court identifications. MH 21–23. He then argued that Blandon's identification should be excluded because "the investigation that Officer Clay conducted and the fact that she told [him] to remain where he was as well as her lack of follow-up with the eyewitnesses [was] enough of a state action . . . ." MH 42. The State argued that because Officer Clay had gone with the defendant to talk to Anzani, had asked the defendant to stand with another

officer only because there was an ongoing investigation, had not restrained the defendant in any way, and had not suggested that he was the suspect, MH 42, there were "no specific actions taken by the police that would establish that they[were] suggesting the identification of the defendant," which was required "in order to say that it was unduly suggestive," MH 43. The State also argued that the officers could not have controlled the conditions of Blandon's identification because they had not known that she had looking out the window. MH 43–44. The defendant then argued that Blandon had relied on context cues such as uniformed police officers and cruisers and that she had been unable to identify him when those cues were not present. MH 44. The State argued that Blandon's failure to select the defendant's photograph went only to the weight of the identification. MH 45.

The court (*Sullivan*, J.) denied the motion by order dated April 28, 2009. ADB 17–23. It ruled that "Blandon's identification of [the defendant] was not derived from any suggestive technique employed by the police." ADB 21 (citing *State v. Fecteau*, 133 N.H. 860 (1991)). It also ruled that although the facts that there were "less-than-ideal conditions for identification," that the defendant "was standing with a uniformed officer in the parking lot where the crime occurred," "that he was the only black male in the vicinity," and that Blandon could not later identify him in a photographic array might cast doubt on her identification, ADB 21, those facts "d[id] not make the police behavior more suggestive," so it "need not consider whether the identification was otherwise reliable," ADB 22 (citing

State v. Allard, 123 N.H. 209, 213, *cert. denied,* 464 U.S. 933 (1983)), or "whether there was an independent source for the in-court identification," ADB 22 (citing *State v. Howe*, 129 N.H. 120, 125 (1987)). Blandon's out-of-court identification was admitted at trial, JT-I 77, but she was not asked to make an in-court identification.

SUMMARY OF THE ARGUMENT

The trial court properly denied the motion to suppress Blandon's out-of-court identification. The argument that the court erred in excluding the identification solely because it had not been manufactured by any state action is not preserved. Further, the court had actually held that that the actions of the police were not unnecessarily suggestive. That decision was not against the weight of the evidence, which demonstrated that the police cruisers had been parked where they could not be seen from the parking lot or from windows facing the parking lot, an officer had stood with the defendant only because there was an ongoing investigation and he had information, the officers had not restrained the defendant in any way, the officers had not known that Blandon had been looking out her window at the parking lot, Officer Clay had spoken to Blandon in a hallway from which they could not see the defendant, no one had told Blandon that the defendant was a suspect, and no one had asked Blandon to identify a suspect when she spontaneously pointed and identified the thief as the person standing with an officer. Further, the identification was reliable where Blandon had closely watched the defendant commit the crime in a well-lit parking lot, had accurately described his actions and his physical characteristics, and had identified him within minutes of the crime. Moreover, Ullon's identification was admitted without objection and the other evidence of guilt was overwhelming.

ARGUMENT

THE ADMISSION OF BLANDON'S OUT-OF-COURT IDENTIFICATION DID NOT VIOLATE DUE PROCESS WHERE THERE WAS NO IDENTIFICATION PROCEDURE THAT WAS UNNECESSARY AND SUGGESTIVE, WHERE THE IDENTIFICATION WAS RELIABLE, AND WHERE ADMISSION OF THE IDENTIFICATION WAS HARMLESS.

The defendant argues that the motion court erred in denying his motion to suppress the out-of-court identification by Blandon. DB 15.

> On appeal from a motion to suppress, [this Court] will not overturn the trial court's finding unless, after reviewing the record, [it] conclude[s] that it is contrary to the weight of the evidence. To determine whether the superior court's ruling is contrary to the weight of the evidence, [this Court will] ask whether the identification procedures were so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant was] denied due process of law. The defendant has the burden of proving unnecessary suggestiveness. If [he] fails to meet this burden, [this Court's] inquiry will end, and [it] will uphold the trial court's ruling.

State v. Fecteau, 133 N.H. 860, 867 (1991) (quotations and citations omitted); *see also State v. Allen*, 133 N.H. 306, 312 (1990) ("There is no need to consider the reliability issue unless the [out-of-court] procedures have been shown to be unnecessarily suggestive.").

The defendant argues that the court erred in ruling "that the identification was not the product of an unnecessarily suggestive procedure solely because the police did not manufacture the identification" where "[t]he First Circuit Court of Appeals explicitly rejected this reasoning in *United States v. De Leon-Quinones*,

588 F.3d 748, 754 (1st Cir. 2009)[, *cert. denied*, 78 U.S.L.W. 3580 (U.S. Apr. 5, 2010) (No. 09-9462)]." DB 16. That argument is not preserved.

In his motion to suppress, the defendant argued only that the identification was unnecessarily suggestive because it was "essentially a one-man show-up" at which Blandon had "relie[d] heavily on context cues, such as handcuffs and police cruisers, to make that identification," and that it was unreliable, ADB 3–4. At the hearing on the motion to suppress, he argued only "that the investigation that Officer Clay conducted and the fact that she told [him] to remain where he was as well as her lack of follow[-]up with the eyewitnesses [was] enough of a state action . . . ." MH 42. Therefore, his argument that no state action is required in order for the court to find that there was a violation of due process is not preserved. *See State v. Bell-Rogers*, 159 N.H. 178, 182 (2009) (declining to address unpreserved claims that a photographic array was unnecessarily suggestive); *State v. Whittey*, 134 N.H. 310, 312 (1991) (declining to address unpreserved claim "that the evidence was insufficient to establish the reliability of the identification by the clear and convincing standard required by part I, article 15 of the New Hampshire Constitution").

It is also worth noting that "[t]he majority of jurisdictions that have considered the issue [have] determined otherwise." *People v. Owens*, 97 P.3d 227, 233 (Colo. Ct. App. 2004) (citing *United States v. Zeiler*, 470 F.2d 717, 720 (3d Cir. 1972); *Semple v. State*, 519 S.E.2d 912, 914 (Ga. 1999); *Harris v. State*, 619

N.E.2d 577, 581 (Ind. 1993); *Wilson v Commonwealth*, 695 S.W. 2d 854, 857 (Ky. 1985); *Tidwell v. State*, 784 S.W.2d 645, 647 (Mo. Ct. App. 1990); *State v. Brown*, 528 N.E.2d 523, 532 (Ohio 1988); *State v. Pailon*, 590 A.2d 858, 863 (R.I. 1991); *State v. Reid*, 91 S.W.3d 247, 272 (Tenn. 2002)), *cert. denied*, No. 04SC244, 2004 WL 1813920 (Colo. Aug. 16, 2004); *see also Glover v. Burge*, 652 F. Supp. 2d 373, 378 (W.D.N.Y. 2009); *State v. Nordstrom*, 25 P.3d 717, 729 (Ariz. 2001); *Sheffield v. United States*, 397 A.2d 963, 966–67 (D.C.), *cert. denied*, 441 U.S. 965 (1979); *Commonwealth v. Sylvia*, 921 N.E.2d 968, 976 (Mass. 2010); *People v. Marte*, 912 N.E.2d 37, 39 (N.Y. 2009), *cert. denied*, 130 S. Ct. 1501 (2010); *Rogers v. State*, 774 S.W.2d 247, 260 (Tex. Crim. App. 1989), *overruled on other grounds by Peek v. State*, 106 S.W.3d 72, 79 (Tex. Crim. App. 2003). *But see Dunnigan v. Keane*, 137 F.3d 117, 128 (2d Cir. 1998); *Thigpen v. Cory*, 804 F.2d 893, 895 (6th Cir. 1986).

In any event, this Court need not decide whether state action is required for a violation of due process because, contrary to the defendant's claim, a review of the opinion of the court makes it clear that it did not rule "that the identification was not the product of an unnecessarily suggestive procedure solely because the police did not manufacture the identification." DB 16. The court said:

> Mrs. Blandon pointed out Mr. Perry from her apartment window without any inducement from the police. Officer Clay did not ask Ms. Blandon whether the man standing in the parking lot was the man [she] had seen breaking into Mr. Clavijo's car and she did not direct Ms. Blandon's attention towards the window. On the

> contrary, Officer Clay could not even see Mr. Perry and Officer Dunn from where she was standing by the door of the apartment. Ms. Blandon's identification of Mr. Perry was spontaneously given when Officer Clay asked for a more specific description of the man Ms. Blandon had seen earlier. The fact that Mr. Perry was standing in the parking lot with Officer Dunn was coincidental; Officer Clay did not manufacture the situation in order to secure an identification. Thus, Ms. Blandon's identification of Mr. Perry was not derived from any suggestive technique employed by the police. *See State v. Fecteau*, 133 N.H. 860 (1991) (officer's behavior not unnecessarily suggestive where they took no action to facilitate the victim's identification of defendant made after an accidental run-in).
>
> Mr. Perry argues that the parking lot was dark, creating less-than-ideal conditions for identification, and the only reasons that Ms. Blandon was able to identify him was because he was standing with a uniformed officer in the parking lot where the crime occurred and that he was the only black male in the vicinity. He claims that his argument is supported by Ms. Blandon's inability to identify him in the photo array. The [c]ourt recognizes that these facts may cast doubt on Ms. Blandon's identification. However, they d[id] not make the police behavior more suggestive. The police did not indicate that Mr. Perry was their primary suspect—Mr. Perry was not handcuffed or otherwise restrained and, as discussed above, the officers did not direct Ms. Blandon's attention to Mr. Perry. Therefore, while Mr. Perry can inquire into the accuracy of Ms. Blandon's identification based on the environmental conditions and her later inability to identify him, these factors do not alter the suggestiveness of the police behavior. Because *the police procedures were not unnecessarily suggestive*, the identification is admissible, and the [c]ourt need not consider whether the identification was otherwise reliable.

ADB 22 (emphasis added). Therefore, it is clear that the court did not go on to the second prong of the analysis and consider the reliability of the identification because there was no unnecessarily suggestive identification procedure.

That ruling is consistent with the holding *De Leon-Quinones*. In that case, the court said: "Because the due process focus in the identification context is on

the fairness of the trial and not exclusively on police deterrence, it follows that federal courts should scrutinize *all suggestive identification procedures*, not just those orchestrated by the police, to determine if they would sufficiently taint the trial so as to deprive the defendant of due process." *De Leon-Quinones*, 588 F.3d at 754 (emphasis added). Therefore, under *De Leon-Quinones*, there has to have been a "suggestive identification procedure" before the reliability of the identification is scrutinized.

Further, although the court in *De Leon-Quinones* cited to its prior holding in *United States v. Lopez-Lopez*, 282 F.3d 1 (1st Cir. 2002), as supporting a position contrary to the position it was then taking, *De Leon-Quinones*, 588 F.3d at 754, a closer look at those opinions demonstrates that they were not truly inconsistent. In both *De Leon-Quinones*, and the case it relied on, *United States v. Bouthot*, 878 F.2d 1506, 1516 (1st Cir. 1989), there had been an identification procedure that was unnecessary and suggestive. In *De Leon-Quinones*, the witnesses had been unable to identify the defendant at trial until they saw him leaving, and then being led back into, the courtroom in handcuffs. *De Leon-Quinones*, 588 F.3d at 750–51. Because the witnesses had seen the defendant in handcuffs, the court "assume[d] that the encounter was unnecessarily suggestive." *Id.* at 754.

In *Bouthot*, the witness had seen two of the five defendants, but he had not "provide[d] any specific details—age, height, weight," and he had been unable to

identify the men from a photographic lineup. Bouthout, 878 F.2d at 1513. However, twenty months after he had spoken to other witnesses at the state trial, had seen "all five defendants being brought into court in handcuffs, and [had] observed the proceedings that followed," he had identified all five defendants from a photographic lineup presented by federal officers preparing for trial. *Id.* at 1514. In that case, the government "never challenged the district court's conclusions that the . . . courthouse confrontations were (a) impermissibly suggestive and (b) created a 'substantial likelihood of irreparable misidentification.'" *Id.* at 1516. Therefore, neither of those cases analyzed whether there had in fact been an unnecessarily suggestive identification procedure, and even if they had, state actors had put the defendants in handcuffs and had taken them into a courtroom where they knew the witnesses were sitting, which was unnecessarily suggestive.

In contrast, in *Lopez-Lopez*, two police officer witnesses had "immediately, spontaneously, and without being prompted, identified the defendant," who was handcuffed and sitting on a bench in the police station. *Lopez-Lopez*, 282 F.3d at 11. The defendant argued that "that the police could easily have used less suggestive identification procedures and that there was no good reason for allowing the detainees to sit on the first floor of the [police] station where [the officers] might easily see them." *Id.* In rejecting that claim, the court first found that the officers had been "unaware that specific people had been arrested" and had not anticipated seeing detainees suspected of the crime at the police station.

Id. It then ruled: (1) that the argument was flawed because it "assume[d] that an identification was intentionally contemplated by the police," but the police "were not attempting to undertake an identification; the detainees were simply sitting downstairs"; and (2) that although the "police might have been more careful," "it was not unreasonable for them to opt against holding the suspects upstairs where the administrative offices [were] located." *Id.* Therefore, in that case, unlike in *De Leon-Quinones* and *Bouthot*, there was no unnecessarily suggestive identification procedure because the police were not attempting to get an identification and the encounter was accidental.

Similarly, in *State v. Fecteau*, 133 N.H. 860 (1991), an officer had taken the witnesses to Fecteau's probable cause hearing to see if they could identify him. *Id.* at 865. He "chose that date in order to ensure that many people would be present in the courtroom and thus reduce the risk that the two witnesses would focus unjustifiably on the Fecteau." *Id.* He also chose to wait until shortly after court was scheduled to begin to bring the witnesses to the courthouse in order to "reduce the likelihood of the women meeting Fecteau by himself in a hallway." *Id.* He intended to wait for another officer to signal him that Fecteau was in the courtroom, so he would know it was safe to bring the witnesses inside. *Id.* However, the defendant arrived late, got out of his van in the middle of the street, and walked into the courthouse while the officer was still outside talking to the women. *Id.* The officer then tried to "unobtrusively block their view" and

"distract them by continuing the conversation," but both women "saw Fecteau and later told the police that they instantly recognized him." *Id.* this Court ruled that the "encounter was plainly accidental and precisely the sort of meeting which [the officer had taken] great pains to avoid," and that "[t]he police [could] not be faulted for such an accident." *Id.* at 867; *see also United States v. Rogers*, 387 F.3d 925, 937 (7th Cir. 2004) ("courts have held accidental encounters between a witness and a suspect to be non-suggestive").

Here, the circumstances of the identification are clearly distinguishable from those in *De Leon-Quinones* and *Bouthot*, and even less suggestive than those in *Lopez-Lopez* and *Fecteau*. When Officer Clay arrived at West Hollis Street, she parked her cruiser in front of the building and walked to the parking lot. MH 8–9, 12. She then encountered the defendant carrying some of the stolen property. MH 39. He claimed that "kids" who had just left the area had stolen that property and that he was just moving it, and he provided a description of one of those kids and said that the other one would be on Ash Street. MH 10–11. He then pointed toward a man on Ash Street and said that the man had been in the parking lot. MH 11. Officer Clay spoke to that person, but he denied being involved. MH 11–12. While they were talking, the defendant "kept saying that he had just found the amplifiers and that other kids had stolen them." MH 12.

When Officer Clay and the defendant walked back in to the parking lot, Clavijo walked over and said he had found out through a neighbor that his car had

been broken into. MH 12. Officer Clay asked Officer Dunn "to stay with Mr. Perry because it was an ongoing investigation and [they] needed to make sure [they] had all parties that had knowledge of the situation to remain on scene until [they] figured out what was going on." MH 13. The defendant was just standing there and he was not handcuffed or restrained in any way, MH 10–11, 14. At that time, the officer did not know that there was an eyewitness. MH 45.

Officer Clay spoke to Blandon in the hallway where neither of them could see the parking lot or the defendant. MH 14, 17. Officer Clay never pointed out the defendant to Blandon or indicated in any way that there was a suspect. MH 14. She merely asked Blandon to describe what she had seen. MH 18. Blandon then said that she had seen a tall, black man, MH 30, "walk and look into all of the cars in the parking lot and that he then circled Mr. Clavijo's car," opened the trunk, and removed a large item, MH 24–25. She also said she had seen him "carrying a bat." MH 25. Officer Clay asked for a more specific description, and Blandon said "it was the man that was in the back parking lot standing with the police officer." MH 18. As she did, "[s]he kind of went back into her apartment and pointed towards the window to show . . . that she had already looked out the window to see Mr. Perry and Officer Dunn standing in the parking lot." MH 18.

The foregoing facts clearly demonstrate: (1) that Officer Clay asked Officer Dunn to stay with the defendant only because the defendant had information about an ongoing investigation, not because they believed he was the thief; (2) that

Officer Clay was unaware that Blandon had seen the defendant standing with Officer Dunn; and (3) that neither Officer Clay nor anyone else had asked Blandon to identify a suspect or had even suggested that there was a suspect. Therefore, the officers had not "implicitly conveyed their opinion of the criminal's identity to the witness by means of [any identification procedure]." *Bell-Rogers*, 159 N.H. at 181 (quotations and citations omitted).

Further, "[t]he term 'showup' itself denotes a police procedure" because that term means "an out-of-court pretrial identification *procedure* in which a suspect *is presented* singly to a witness *for identification purposes*." *State v. Hibl,* 714 N.W.2d 194, 201 (Wis. 2006). Therefore, as demonstrated above, contrary to the defendant's claim, the identification could not have been "the product of the functional equivalent of a one-man show-up." DB 16. *Cf. Stovall v. Denno*, 388 U.S. 293, 302 (1967) (one-man show-up where the police took the defendant to the witness's hospital room), *overruled on other grounds by Griffith v. Kentucky*, 479 U.S. 314 (1987); *United States v. Newman*, 144 F.3d 531, 535 (7th Cir. 1998) (one-man show-up where the police brought the witnesses in separate cars to Newman's house, "which was cordoned off by yellow crime scene tape," and then brought Newman "in handcuffs to a spot approximately eight to ten yards from each car"); *State v. LeClair*, 118 N.H. 214, 218 (1978) (showing of a single photograph of the defendant to the witness "amounted to a one-man show-up").

Moreover, as demonstrated above, Blandon seeing the defendant with an officer was not intentional or preventable because the police did not know that she was in a position to see the defendant at that time. Therefore, there was no unnecessarily suggestive identification procedure because "[t]he police cannot be faulted for such an accident." *Fecteau*, 133 N.H. at 867; *see also Amadi v. Herndon*, No. CV 06-04832 GW, 2009 WL 863545 at *7 (C.D. Cal. 2009) (no identification procedures were used where the police did not orchestrate or initiate a spontaneous identification); *State v. Mitchell*, 453 So. 2d 1260, 1263 (La. Ct. App.) (no identification procedure was used where the victim noticed Mitchell at the police station and "made an unsolicited spontaneous identification" that "was independent of any police procedure"), *writ denied*, 457 So. 2d 16 (La. 1984); *cf. Stovall*, 388 U.S. at 302 (one-man show-up identification procedure was not unnecessary where "an immediate hospital confrontation was imperative" because the witness was the only person who could exonerate Stovall and it was not clear how long the witness would live (quotation and citation omitted)); *LeClair*, 118 N.H. at 218 ("showing of the photograph and the conducting of the show[-]up were unnecessarily suggestive, because there were no exigent circumstances which would justify not using less suggestive methods," and because "the police by various means indicated to [the victim] that the defendant was the one they wanted him to identify, even when he was viewing [a lineup] with four photographs").

In any event, even assuming that there had been an unnecessarily suggestive identification procedure, it did not "render the identification unreliable and inadmissible." *State v. Cyr*, 122 N.H. 1155, 1158 (1982).

> The law is well-settled that when unnecessarily suggestive police identification procedures are used, the State must demonstrate by clear and convincing evidence, in light of the totality of the circumstances, that the identification was nonetheless reliable, based on observations uninfluenced by the suggestive procedures used by the police. The five factors indicating the reliability of the identification under this totality of the circumstances test are: (1) the witness's opportunity to view the suspect; (2) the witness's degree of attention; (3) the accuracy of any prior description given by the witness; (4) the witness's level of certainty at the time of the identification; and (5) the time lapse between the crime and the identification.

State v. Whittey, 134 N.H. 310, 312 (1991). "[T]he prejudicial effect of the suggestive identification is balanced against [those] reliability factors." *State v. Allard*, 123 N.H. 209, 213, *cert. denied*, 464 U.S. 933 (1983).

Here, the factors favoring reliability clearly outweighed any possible minimal suggestiveness caused by Officer Dunn merely standing with the unrestrained defendant in the parking lot. Blandon had a good opportunity to view the defendant because she watched him commit the crime in a parking lot that was lit up by lights in the parking lot, lights on the building, and streetlights on Ash Street. MH 25–26. *See Whittey*, 134 N.H. at 313 (fact that "the area was well-lit" contributed to a finding that the witness had a good "opportunity to view" the defendant); *State v. Howe*, 129 N.H. 120, 124 (1987) (lighting conditions are a factor to be considered in determining the reliability of an identification).

Blandon also had to have paid a great deal of attention to what the defendant was doing because she described the actions he took in detail—walking around the parking lot looking into cars, circling Clavijo's car, opening Clavijo's trunk, removing a large item, and carrying a bat. MH 24, 36. Those descriptions were demonstrably accurate were Officer Clay testified that she had seen the defendant carrying the amplifiers, that Clavijo had said that two amplifiers and a large wooden box with two speakers had been taken from the trunk of his car, and that she had found the box and amplifiers near the car. MH 9–10, 30, 36–37, 39.

Further, although Officer Clay speculated that the actions described by Blandon could have taken as little as a couple of minutes to occur, she also said that there were twelve to fifteen cars in the parking lot. MH 25. Therefore, although two minutes would have been a sufficient amount of time for Blandon to have seen the defendant and accurately identified him, it was reasonable to conclude that she had watched him for an even longer amount of time.

In addition, although the defendant makes much of the fact that Blandon could not later identify him in a photographic lineup, Blandon saw the defendant from an upstairs window, so could not have been expected to have seen his facial features clearly enough to have been able to distinguish them from those of other persons with the similar features. MH 29. Further, she described the person who she had seen as a tall, black man, MH 30, and the defendant is a black man, who is

over six feet tall.[3] Therefore, "her description of [him], although lacking in some details, substantially agreed with the defendant's appearance." *Whittey*, 134 N.H. at 314; *see also State v. Heald*, 120 N.H. 319, 323 (1980) (although descriptions given by three witnesses varied in detail, they were sufficiently accurate to be reliable.).

Moreover, as demonstrated in the statement of facts, Blandon's "level of certainty at the time of identification was unequivocal." *State v. Guay*, 130 N.H. 413, 418 (1988). The identification was also made within a matter of minutes after she observed the defendant committing the offense, so the delay at issue here was "considerably shorter than the seven months the United States Supreme Court stated 'would be a seriously negative factor in most cases.'" *Howe*, 129 N.H. at 125 (quoting *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972)). "It is unlikely that [her] recollection would fade during the period of time in question so as to render the identification unreliable." *Howe*, 129 N.H. at 125 (addressing a lapse of time of three weeks). Therefore, because there was no "substantial likelihood that there was an irreparable misidentification," this is not one of those "extraordinary cases" where identification evidence should have been taken from the jury. *De Leon-Quinones*, 588 F.3d at 753 (quotation and citation omitted).

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[3] Although no testimony about the defendant's height was admitted at the suppression hearing, he testified at trial that he is 6′ 2″ tall, JT-II 224, and the fact that he was tall would have been obvious to the court at the suppression hearing.

In any event, even if the identification had been the result of an unnecessarily suggestive identification procedure, and even if the identification had been unreliable, reversal is not warranted. "The mere fact that some unreliable identification testimony was received does not establish a denial of the due process right to a fair trial." *State v. Monteiro*, 110 N.H. 95, 99 (1970) (quotation and citation omitted). "The right is to be tested by assessing the totality of proof on the identification issue." *Id.* (quotation and citation omitted). Here, even if Blandon's identification should not have been admitted, the "error was harmless . . . because [this Court] can say beyond a reasonable doubt that the [admission of the out-of-court identification] did not affect the verdict." *Fecteau*, 133 N.H. at 868.

At trial, Blandon was "subjected to vigorous and extended cross-examination." *Monteiro*, 110 N.H. at 99. Further, "as bearing upon the correctness of the identification the jury could find from other evidence that the defendant [was the person who had committed the offense]." *Id.* Ullon's out-of-court identification of the defendant was admitted without objection. JT-I 134–35, 137. In addition, Officer Clay saw the defendant with Clavijo's amplifiers in his hands in the parking lot, she heard him drop Clavijo's metal bat and then saw that bat behind the defendant, she found Clavijo's box and speakers about two car lengths away from where the defendant had been standing with the amplifiers, and she found Clavijo's vice-grip wrench in the defendant's pocket. JT-I 39, 47–48,

57–58, 67–68, 79, 81, 89. Moreover, as demonstrated in the statement of facts, although "the jury was asked to decide between two different versions of the same event, the defendant impeached his own credibility . . . ." *State v. Hebert*, 158 N.H. 306, 317 (2009). Therefore, "[t]aken together, these circumstances leave little room for doubt that the identification was correct, even though the identification procedure employed may have in some respects fallen short of the ideal." *Monteiro*, 110 N.H. at 100 (quotation, citation, and ellipsis omitted); *see also State v. Perron*, 122 N.H. 941, 949 (1982) ("the strength of [the witness's] identification of the defendant on the night he was assaulted, plus the previous valid photographic identifications, render[ed] defense counsel's failure to seek exclusion of the corporeal identification harmless error.").

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a 5-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,
Michael A. Delaney
Attorney General

May 4, 2010

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I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Alex Parsons, counsel of record.

Susan P. McGinnis

APPENDIX TABLE OF CONTENTS

D.O.B. 09/05/79
NPD #: 08-61180-AR
NDC #: 08-CR-8109

RSA Ch 637:3
Theft by Unauthorized Taking
Class B Extended Term Felony
10 - 30 years NHSP, $4,000 fine

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT

INDICTMENT

At the Superior Court, holden at **Nashua,** within and for the County of Hillsborough aforesaid, in the month of **October** of the year **two thousand and eight,** the **GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE,** on their oath, present that

BARION PERRY

08-S-1797

445 Willow Street
Manchester NH

on or about the **15th day of August** in the year **2008 ,** at **Nashua** in the County of Hillsborough aforesaid, **did commit the crime of THEFT BY UNAUTHORIZED TAKING, in that Barion Perry, with a purpose to deprive the owner thereof, exercised unauthorized control over Punch speakers and Sony amplifiers, the property of Alex Clavijo, by breaking into Alex Clavijo's vehicle and removing the items, and after having been twice before convicted of theft of property or services, and after having twice been imprisoned on sentences in excess of one year; to wit, on or about March 5, 2001 and November 27, 2007, Barion Perry was convicted of Theft by Unauthorized Taking, and on February 18, 1999 Barion Perry was convicted of Burglary, all convictions out of Hillsborough Superior Court – ~~North~~ SOUTH, in Manchester, New Hampshire,** contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.

6/2/08
Date

Foreperson

Verdict - GUILTY
6/17/09
Judge Barry
clerk - WMS
Record - C Carder

Marguerite L. Wageling
Hillsborough County Attorney

by: Patricia M. LaFrance, Assistant County Attorney

D.O.B. 09/05/79
NPD #: 08-61180-AR
NDC #: 08-CR-8110

RSA Ch 634:2
Criminal Mischief
Class A Misdemeanor
12 months HOC, $2,000 fine

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT

INFORMATION

To the Superior Court, holden at **Nashua,** within and for the County of Hillsborough, aforesaid, on the **21st** day of **October** in the year **two thousand and eight,** now comes **Assistant Hillsborough County Attorney Patricia M. LaFrance, Esq.,** in the name and on behalf of the State of New Hampshire, upon information and complaint, that:

BARION PERRY

445 Willow Street
Manchester NH

085-1798

on or about the **15TH day of August**
in the year **2008,** at **Nashua**
in the County of Hillsborough aforesaid, **did commit the crime of CRIMINAL MISCHIEF in that, Barion Perry, having no right to do so nor any reasonable basis for belief of having such a right, purposely damaged the property of another by smashing a window of Alex Clavijo's motor vehicle, with a pecuniary loss in excess of $100.00,**
contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

Verdict - Not Guilty
6/17/09
Clerk - [illegible]
Judge - Barry J

Respectfully submitted,

October 21, 2008
Date

Patricia M. LaFrance
Assistant Hillsborough County Attorney

Cert Record - Carlson