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SJC-12225

COMMONWEALTH vs. DASHEEM DEW.

Essex. May 1, 2017. - November 6, 2017.

Present: Gants, C.J., Lenk, Hines, Gaziano, Lowy, Budd, & Cypher, JJ.[1]

Robbery. Identification. Constitutional Law, Identification. Due Process of Law, Identification. Evidence, Identification. Practice, Criminal, Identification of defendant in courtroom.

Indictment found and returned in the Superior Court Department on February 20, 2014.

A pretrial motion to suppress evidence was heard by Timothy Q. Feeley, J., and the case was tried before him.

The Supreme Judicial Court granted an application for direct appellate review.

Merritt Schnipper for the defendant.

Kenneth E. Steinfield, Assistant District Attorney, for the Commonwealth.

The following submitted briefs for amici curiae:

James L. Brochin, of New York, Patrick Levin, Committee for Public Counsel Services, & Chauncey B. Wood for Committee for Public Counsel Services & others.

[1] Justice Hines participated in the deliberation on this case prior to her retirement.

Steven Penrod, pro se.

GAZIANO, J. This appeal from the defendant's convictions in the Superior Court of masked armed robbery and of being a subsequent offender raises two issues concerning eyewitness identification: first, whether the defendant established by a preponderance of the evidence that a showup identification procedure was so unnecessarily suggestive and conducive to misidentification as to deny him the due process of law; and second, whether the trial judge committed prejudicial error in denying the defendant's motion to preclude the victim from making an in-court identification. In raising this second claim, the defendant argues that an inherently suggestive showup identification can never serve as a prerequisite to an eyewitness's in-court identification under the rule we adopted in Commonwealth v. Collins, 470 Mass. 255, 259-267 (2014).

The case was entered in the Appeals Court, and we allowed the defendant's motion for direct appellate review. We conclude that the defendant has not met his burden of demonstrating that the showup identification procedure was unnecessarily suggestive. We conclude also that there was no abuse of discretion in the judge's decision to allow the in-court identification testimony. In so holding, we decline to extend our holding in Collins, supra, to preclude all in-court

identifications preceded by out-of-court showup identification procedures. Accordingly, we affirm the defendant's convictions.

1. The robbery and showup procedure. Our summary of the facts is based on the findings of the motion judge, who was also the trial judge, after a pretrial evidentiary hearing on the defendant's motion to suppress, supplemented where necessary with undisputed evidence at the motion hearing. See Commonwealth v. Torres, 433 Mass. 669, 670 (2001).

On December 18, 2013, at approximately 7:30 P.M., the victim, a pizza delivery driver, telephoned 911 to report that he had been robbed at knifepoint on Park Street in Beverly. He described the armed robber as a black male, wearing a dark jacket and a red scarf. Beverly police Officer Erik Abrahamson responded to the scene and spoke to the victim.

Given the general description of the suspect, and the fact that the victim had observed the robber flee toward Rantoul Street, Abrahamson immediately drove to Jose Torres's apartment, located a short distance away on Rantoul Street. Abrahamson suspected, from previous interactions with Torres and the defendant, who is African-American, that the two might have been involved in the armed robbery. Torres's mother allowed Abrahamson to enter the apartment. Once inside, Abrahamson found the defendant hiding in Torres's bedroom. The defendant was dressed in a red T-shirt; a black jacket was nearby. Other

occupants of the apartment informed Abrahamson that the defendant had left the apartment earlier in the evening wearing a black jacket and a red scarf. Torres's mother told Abrahamson that she had overheard the defendant using his cellular telephone to order a pizza.

Abrahamson brought the defendant and another person who had been in the apartment to the end of the driveway for a showup identification.[2] The defendant "had his hands cuffed behind his back, and a black jacket over his shoulder(s)." Officer Mark Panjwani of the Beverly police department drove the victim to the front of Torres's apartment building. Panjwani briefly instructed the victim about the showup identification procedure, including that the robber may or may not be shown to him. The victim immediately identified the defendant as the robber. The showup was conducted "[n]o more than thirty minutes, and perhaps less" from the time that the victim reported the crime.

2. Suppression of showup identification evidence. The defendant claims that the judge erred in denying his motion to suppress the results of the showup identification conducted within thirty minutes of the masked armed robbery. After an evidentiary hearing, the judge denied the motion, concluding

[2] The judge found that Abrahamson brought Torres out of the apartment. Abrahamson testified, however, that he brought an individual named Terrence Carter, not Torres, outside for the showup.

that "the procedure used in this case was not unnecessarily or impermissibly suggestive."

We repeatedly have held that one-on-one identification procedures, such as showup identifications, are generally disfavored as inherently suggestive. See, e.g., Commonwealth v. Figueroa, 468 Mass. 204, 217 (2014); Commonwealth v. Meas, 467 Mass. 434, 441, cert. denied, 135 S. Ct. 150 (2014); Commonwealth v. Martin, 447 Mass. 274, 279 (2006). A showup identification conducted in the immediate aftermath of a crime is not, however, presumptively impermissible. In order for the results of a showup identification to be excluded, a defendant is required to prove, by a preponderance of the evidence, "that the showup was 'so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny [the defendant] due process of law'" (citation omitted). See Martin, supra at 279-280. "If the identification passes muster under this test, then it is for the jury to decide what weight to give to the identification." Commonwealth v. Amaral, 81 Mass. App. Ct. 143, 148 (2012).

Police are permitted to conduct a showup identification if there is a "good reason" to secure the prompt identification of a suspect. See Figueroa, 468 Mass. at 217-218 ("good reason" to conduct showup identification two and one-half hours after fatal shooting). The existence of "good reason" for a show up

identification is a question of law to be decided by an appellate court, based on facts found by the motion judge. Commonwealth v. Austin, 421 Mass. 357, 362 (1995). Factors relevant to this inquiry include "the nature of the crime involved and corresponding concerns for public safety; the need for efficient police investigation in the immediate aftermath of a crime; and the usefulness of prompt confirmation of the accuracy of investigatory information, which if in error, will release the police quickly to follow another track." Id. See Commonwealth v. Crayton, 470 Mass. 228, 235-236 (2014) ("there is generally 'good reason' where the showup identification occurs within a few hours of the crime, because it is important to learn whether the police have captured the perpetrator or whether the perpetrator is still at large, and because a prompt identification is more likely to be accurate when the witness's recollection of the events is still fresh").

Even where there is a good reason to conduct a one-on-one identification procedure, the evidence must be excluded "[i]f there are special elements of unfairness, indicating a desire on the part of the police to 'stack the deck' against the defendant." Commonwealth v. Leaster, 395 Mass. 96, 103 (1985), citing Commonwealth v. Moon, 380 Mass. 751, 756-759 (1980). See Figueroa, 468 Mass. at 217.

The defendant suggests that the Commonwealth, at "a

superficial level," appears to have satisfied the requirements for a showup identification because the procedure "occurred in close temporal proximity" to the crime, while the witness's memory was fresh, and the showup enabled an efficient police investigation. He argues, however, that a more thorough examination of the facts reveals a need for per se exclusion because (1) the police had probable cause to arrest the defendant and therefore ample time to assemble a nonsuggestive photographic array; (2) the police inserted special elements of unfairness by improperly draping a black jacket over the defendant in order to influence the victim's identification of the suspect; and (3) the police further stacked the deck by placing a person with a lighter complexion next to the defendant. Having considered each of the defendant's arguments, we conclude that he has not demonstrated error in the denial of his motion to suppress.

The defendant focuses first on the judge's conclusion that the need for an efficient police investigation constituted a good reason to conduct the showup identification here. The judge determined that, "although probable cause may have existed to arrest [the defendant] prior to the show-up, good police practices warranted immediate confirmation of Abrahamson's investigation, in order to permit the investigation to pursue other avenues in the event of a negative identification." The

defendant argues, however, that the investigators should have arrested him and then asked the victim to review a nonsuggestive photographic array the following morning.

In Martin, 447 Mass. at 280, we held that the failure of the police to pursue alternative investigatory techniques does not, standing alone, render an identification suggestive. The fundamental question is whether the police "acted permissibly" in conducting the showup identification procedure. Id. The answer does not depend on the availability or reasonableness of pursuing an alternative identification procedure. See Commonwealth v. Forte, 469 Mass. 469, 476, 478 n.15 (2014) (rejecting claim that one-on-one display of defendant's image on videotape was unnecessarily suggestive because police were required to first show eyewitness photographic array or conduct lineup after arrest).

Applying the Austin factors to the circumstances in this case, we discern no reason to disturb the judge's finding that the police had a good reason to conduct the showup identification. Officers were investigating a crime of violence involving the robbery of a delivery driver at knifepoint. The victim immediately called 911 and told the first responding police officer that he would be able to identify his assailant. Within thirty minutes of the 911 call, the police tracked a likely robbery suspect to a nearby apartment. There was a

corresponding need promptly to confirm or dispel the investigating officer's suspicions. See Meas, 467 Mass. at 441-442; Commonwealth v. Phillips, 452 Mass. 617, 629 (2008).

The defendant argues that the police improperly draped a black coat over his shoulders in order to conflate the victim's identification of an individual with his identification of an article of clothing. As a threshold matter, the defendant must clear a procedural hurdle because he did not raise this argument in the Superior Court. In his motion to suppress, the defendant argued, in general terms, that the identification was "so unnecessarily suggestive as to give rise to a very substantial likelihood of misidentification." During the hearing on the motion, the defendant did not argue that the police draped the jacket over his shoulders in order to exert an improper influence on the victim's identification. Rather, he argued that the police "could have arrested him and taken him back to the police station and done a proper line-up," and that they stacked the deck by placing him next to someone "who clearly does not match the description given by the victim."

Pursuant to Mass. R. Crim. P. 13 (a) (2), as appearing in 442 Mass. 1516 (2004), a motion to suppress "shall state the grounds on which it is based and shall include in separately numbered paragraphs all reasons, defenses, or objections then available, which shall be set forth with particularity." "This

requirement alerts the judge and the Commonwealth to the suppression theories at issue, and allows the Commonwealth to limit its evidence to these theories." Commonwealth v. Silva, 440 Mass. 772, 781 (2004).

Abrahamson testified at the motion hearing that the defendant "was handcuffed behind his back and we had draped the black jacket over his shoulders" and that the jacket helped conceal the defendant's hands from the witness.[3] On cross-examination, defense counsel did not make any inquiry about that decision. The judge noted that "[The defendant] had his hands cuffed behind his back, and a black jacket over his shoulder(s)," but did not discuss the impact of the black jacket on the victim's identification of the defendant.

Because the defendant did not raise this issue before the motion judge, he has waived the argument. See Commonwealth v. Garcia, 409 Mass. 675, 678 (1991). We nonetheless review to determine whether there was a substantial risk of a miscarriage of justice. See Commonwealth v. Arzola, 470 Mass. 809, 814 (2015), cert. denied, 136 S. Ct. 792 (2016). We discern no such

[3] At trial, Abrahamson offered another reason for police having draped the black jacket over the defendant's shoulders -- the robbery suspect was wearing a black jacket, and Abrahamson had seen the defendant wearing a black jacket in the past. "[I]n reviewing a judge's ruling on a motion to suppress, an appellate court 'may not rely on facts developed at trial' even where the testimony differed materially from that given at trial" (citation omitted). Commonwealth v. Gonzalez, 469 Mass. 410, 416 (2014).

error.

The defendant's claim that the identification procedure "treated identification of the jacket police draped over [him] as identification of him as an individual" is factually flawed. The victim was not asked to identify the robber's clothing. Panjwani instructed the victim to identify the "person who had robbed him," and to describe the robber by the clothing he was wearing. The victim immediately identified the defendant as the robber and, following Panjwani's instructions, stated that the robber was the person wearing the dark jacket.[4]

The defendant argues also that the police "stacked the deck" by placing him next to Carter, rather than next to Torres. Abrahamson testified that he brought Carter outside to stand with the defendant for two reasons. First, Carter also left the Rantoul Street apartment near the time of the robbery. Second, Carter was wearing a "mostly" black jacket, and "at night on Park Street . . . he loosely matched the description of the robbery suspect." Abrahamson stated that both Carter and Torres had been wearing dark jackets on the evening of the robbery. Carter wore a black varsity-type jacket with red sleeves, and Torres wore a dark-colored pea coat. Abrahamson described Carter as looking like "someone from an island descent," with

[4] According to Abrahamson, the victim stated that he focused on the robber's facial features above the red scarf, describing the robber's eyes, skin color, and width of his nose.

light eyes and a "tannish" complexion. He described Torres as Hispanic, with dark hair.

The defendant has not shown that this part of the showup identification inserted a special element of unfairness. The defendant, who bore the burden of proof, did not introduce any evidence at the hearing of the differences in skin tone between Carter and Torres. On this record, there is no factual basis from which to conclude that the police inserted special elements of unfairness against the defendant by placing him next to a "tannish" person, as opposed to a "Hispanic" person. Contrast Moon, 380 Mass. at 758-759 (special elements of unfairness occurred in manner in which police conducted showup, including showing victim single photograph pulled from vehicle associated with crime).

3. In-court identification. We turn to the issue of in-court identification, first summarizing the testimony introduced at trial, and at a hearing on the defendant's motion in limine seeking to preclude the Commonwealth from asking the victim to identify him in front of the jury.

The jury could have found the following facts. In the early evening of December 18, 2013, an individual ordered two pizzas and a bottle of soda from a local pizza parlor in Beverly, and provided a delivery address on Park Street. A short time later, the caller changed the delivery address to a

different street number on Park Street. The victim was familiar with the area, but could not locate the specific street address. During his search for the address, the victim drove past an individual standing on the corner of Park Street and Roundy Street. He described the individual (later identified as the defendant) as a black man, dressed in a dark or black jacket with the hood pulled up.

The victim pulled into a parking lot and unsuccessfully attempted to contact the pizza customer by dialing the telephone number printed on the delivery slip. He then drove slowly toward the defendant. The defendant waved him over, and said that the order was for him. When the victim remarked that he could not find a number the given address on Park Street, the defendant replied, "[T]hat's my house." On closer examination, the victim observed that the defendant was wearing a red scarf, which covered his face "from below the eyes down." This did not alarm the victim because it was very cold and cloudy.

Once the defendant confirmed that he had ordered two pizzas and a bottle of soda, the victim pulled over to the side of the road and got out of the vehicle. As soon as he did so, the defendant produced a folding knife from his pocket, which he opened with a "click[ing]" sound, and demanded "all the money." The defendant initially pressed the knife to the victim's throat, but lowered it to the victim's rib cage when a vehicle

passed by. The victim attempted to talk the defendant out of robbing him. When this proved unsuccessful, he handed over a small amount of cash.

As soon as the defendant walked away, the victim telephoned 911, got back into his vehicle, and followed the defendant down Park Street. The defendant turned left onto Creek Street, and continued walking toward Rantoul Street. On the advice of the police dispatcher, the victim stopped following the defendant; he stopped at the corner of Park and Creek Streets to await their arrival.

At 7:30 P.M., Abrahamson arrived at the victim's vehicle. The victim repeated the description he had provided to the dispatcher: the assailant was a black male, wearing a dark jacket and a red scarf. He also told Abrahamson that he would be able to identify the robber. Based on this description, Abrahamson drove a few blocks away to an apartment on Rantoul Street. He knew the residents, Torres and his mother, from previously "interacting with them in [his] capacity [of] being a police officer." Abrahamson also was aware that a group of young men frequented the apartment, and that the defendant was the only African-American in that group.

After Abrahamson knocked on her door, Torre's mother allowed Abrahamson to enter. Her son was in the apartment, along with a group of his friends, including the defendant.

Abrahamson found the defendant in Torres's bedroom pressed up against a wall. He was wearing jeans, sneakers, and a red T-shirt. The defendant's black winter jacket was located on either the floor or the mattress. There was snow on the ground, and the bottoms of the defendant's sneakers were wet.

Abrahamson decided to conduct a showup identification. He testified that he brought the defendant outside to the end of the driveway, explaining that he had draped the defendant's black jacket over him because he "had personally seen [the defendant] wearing a black jacket prior to this date. And additionally, [the defendant] had been handcuffed, and [Abrahamson] believe[d] the jacket covered that behind his back." Abrahamson had Carter, another person who had been with the group in the apartment, stand next to the defendant.

Panjwani brought the victim to Rantoul Street to identify or exclude "a suspect." Panjwani explained to the victim that "[they] were going to drive by a location, and if he recognized an individual, the individual that may have been responsible for robbing him, to let [Panjwani] know." When they arrived in front of the defendant's apartment building on Rantoul Street, the victim was able to observe four men standing at the entrance to the driveway: the defendant and Carter next to each other, and one uniformed police officer on each side. The area was illuminated by street lights and headlights from the police

cruisers. While seated in the rear of a police sport utility vehicle, at a distance of approximately fifteen feet, and "within ten seconds" or "fairly immediately" after they pulled up, the victim identified the defendant as the robber. He told Panjwani that he recognized the defendant from "the unique shape of his nose, as well as his eyes."

The Commonwealth introduced evidence to corroborate the victim's identification. The defendant's friends testified that he had left the apartment between 6:30 and 7 P.M. that evening, wearing a black jacket; they did not know his whereabouts for a short period of time; and he returned to the apartment breathing a little heavily. Police also found a silver folding knife, which opened with a distinctive "clicking" sound, and a red bandana in Torres's bedroom. One of the defendant's friends testified that the knife belonged to the defendant.

The defendant and the Commonwealth each filed motions in limine regarding an in-court identification of the defendant by the victim. The judge allowed the Commonwealth's motion to permit an in-court identification. He determined that the victim had made an unequivocal out-of-court identification, noting that, under Collins, "it has to be certain. In other words, if someone does an out-of-court [identification] and says, well, I think that's the one, I don't think he can come into court and say, yes, I'm certain he's the one."

We have established rules governing the admissibility of in-court identifications. In Crayton, 470 Mass. at 236, we examined the admissibility of an in-court identification that was not preceded by an eyewitness's prior, nonsuggestive, out-of-court identification. We observed that "in-court identification is comparable in its suggestiveness to a showup identification." To lessen the unfairness of suggestive in-court identification testimony, we concluded that, "[w]here an eyewitness has not participated before trial in an identification procedure, we shall treat the in-court identification as an in-court showup, and shall admit it in evidence only where there is 'good reason' for its admission." Id. at 241. A "good reason," in this context, consists of circumstances where an in-court identification is not material to a determination of guilt or innocence, and serves merely to inform the jury that "the person sitting in the court room is the person whose conduct is at issue." Id. at 242. For example, a police officer would be entitled to identify a person he or she had placed under arrest, and a spouse would be entitled to identify his or her domestic abuser. Id. at 242-243.

In Collins, 470 Mass. at 258, we addressed the admissibility of an in-court identification preceded by a less than certain out-of-court identification. In that case, the

witness had observed the perpetrator outside her bedroom door for a few seconds before gunshots were fired. A month later, police showed the witness a photographic array consisting of eight separate photographs. Id. at 258-259. At first, the witness said "no" after viewing each photograph in a sequential order. Id. at 259-260. She then stated that she believed the perpetrator either was no. eight (a filler) or no. four (the defendant). Id. at 260. In a trial conducted more than two years after the shooting, the witness identified the defendant in-court, without hesitation, as the shooter. Id.

We noted that the witness's in-court identification posed a "danger . . . that the jury may disregard or minimize the earlier failure to make a positive identification during a nonsuggestive identification procedure, and give undue weight to the unnecessarily suggestive in-court identification." Id. at 262. To remedy this unfairness, in Collins, supra at 265, we expanded our jurisprudence, and concluded that an eyewitness who makes "less than an unequivocal" identification of a defendant in a nonsuggestive, out-of-court, identification procedure, subsequently may not offer an in-court identification of that defendant without good reason.

The defendant and the Commonwealth dispute the application of the Crayton-Collins in-court identification rules to the circumstances. The defendant contends that an inherently

suggestive showup identification is always questionable, and therefore can never produce an "unequivocal" identification within the meaning of Collins. He argues that the trial judge erred by treating the witness's expressed level of verbal certainty as controlling "without regard to the suggestiveness of the procedure that produced that certainty."

The Commonwealth, on the other hand, maintains that the trial judge properly found that the victim made an unequivocal out-of-court identification "even though it arose from an inherently suggestive procedure." According to the Commonwealth, the term "unequivocal" means precisely what it says -- "unambiguous; clear; free from uncertainty." The Commonwealth suggests that a judge would have the discretion to exclude an in-court identification if its probative value were substantially outweighed by the risk of unfair prejudice.

Although the defendant raises important issues regarding the potential disproportionate impact of inherently suggestive, in-court identification testimony on the jury, the Commonwealth has the better argument in these circumstances. The judge properly applied the standard articulated in Collins, and found that the victim made an unequivocal positive identification of the defendant. The police officer conducting the showup instructed the victim to "give [the officer] a clothing description if he recognized the individual." The victim,

"within ten seconds," or "fairly immediately," identified the defendant as the robber. This was not a case, as it was in Collins, 470 Mass. at 262, where the eyewitness was "unable to make a positive identification of the defendant or lacked confidence" in her out-of-court identification.

We take this opportunity to clarify the standard governing in-court identifications preceded by an admissible out-of-court identification. In-court identifications will not be permitted (absent good cause) where a witness participated in an out-of-court identification procedure that "produced something less than an unequivocal positive identification." See Collins, 470 Mass. at 262. A witness makes an "unequivocal positive identification" when he or she successfully identifies the defendant as the perpetrator, such that the statement of identification is clear and free from doubt.

Finally, we set forth an alternative theory for a trial judge to consider in deciding whether to permit an eyewitness to identify a defendant in the court room. A judge applying "[c]ommon law principles of fairness" has the discretion to exclude unreliable eyewitness identification testimony (citation omitted). See Commonwealth v. Johnson, 473 Mass. 594, 598-599 (2016). "Even if otherwise admissible, a judge may suppress identification evidence if 'its probative value is substantially outweighed by the danger of unfair prejudice'" (citation

omitted). Commonwealth v. Carter, 475 Mass. 512, 518 (2016). See Commonwealth v. McWilliams, 473 Mass. 606, 616 (2016) (judge must weigh probative value of identification against danger of unfair prejudice "where a judge finds an identification to be especially suggestive"); Commonwealth v. Alcide, 472 Mass. 150, 166 (2015) (judge's authority to exclude unreliable identification testimony is "closely related" to general discretion to exclude evidence more prejudicial than probative); Mass. G. Evid. § 403 (2017) (court may exclude relevant evidence if its probative value is substantially outweighed by danger of unfair prejudice).

In a case such as this, for example, the judge would be required to balance the probative value of the victim's potential in-court identification of the defendant against the danger of unfair prejudice. The victim's in-court identification is probative because it serves to corroborate other evidence that the person accused of the crime is, in fact, the perpetrator. See United States v. Cotto-Aponte, 30 F.3d 4, 6 (1st Cir. 1994). Here, the other evidence of the defendant's guilt included the showup identification and the circumstantial evidence introduced to demonstrate that the defendant robbed the victim. The judge would be required to examine the probative value of the identification testimony in light of "the strength of its source independent of the

suggestive circumstances of the identification." Carter, 475 Mass. at 518-519, quoting Johnson, 473 Mass. at 601. "Relevant factors include 'the witness's opportunity to observe the offender at the time of the crime, the amount of time between the crime and the identification, whether the witness's earlier description of the perpetrator matches the defendant, . . . whether the witness earlier identified another person as the perpetrator or failed to identify the defendant as the perpetrator,' and 'the witness's prior familiarity with the person identified.'" Carter, supra at 519, quoting Johnson, supra. On the other side of the scale, in this determination, the judge would balance the probative value of this evidence with the danger of unfair prejudice inherent in an in-court identification taking into account that the jury may give unfair weight to this suggestive evidence. See Collins, 470 Mass. at 265.

Judgments affirmed.

GANTS, C.J. (concurring, with whom Budd, J., joins). I agree with the court that the judge did not err in admitting in evidence the victim's out-of-court showup identification where the defendant waived the argument that draping a black jacket over the shoulders of the defendant needlessly added to the suggestiveness inherent in a showup identification. See Commonwealth v. Crayton, 470 Mass. 228, 236 (2014), quoting Commonwealth v. Figueroa, 468 Mass. 204, 217 (2014) ("[e]ven where there is 'good reason' for a showup identification, it may still be suppressed if the identification procedure so needlessly adds to the suggestiveness inherent in such an identification that it is 'conducive to irreparable mistaken identification'"); Commonwealth v. Leaster, 395 Mass. 96, 103 (1985) (even where showup occurs promptly after crime, "if there are special elements of unfairness, indicating a desire on the part of the police to 'stack the deck' against the defendant, an identification resulting from such a confrontation would be inadmissible"). I also agree that the convictions in this case should be affirmed. I write separately because I disagree with the court's analysis regarding the admissibility of the victim's in-court identification of the defendant.

The court errs when it concludes that "[t]he judge properly applied the standard articulated in Collins" by admitting the in-court identification after finding that the victim made an

unequivocal positive identification of the defendant. Ante at . As the court correctly notes, in Collins, the prior out-of-court identification procedure by the eyewitness was a nonsuggestive photographic array with eight photographs. Commonwealth v. Collins, 470 Mass. 255, 260 (2014). It was neither a suggestive lineup or photographic array, nor a showup identification. Because the court was not presented with a suggestive out-of-court identification procedure, we expressly declared in Collins, supra at 262 n.8, "We do not address the admissibility of an in-court identification where there has been a suggestive pretrial identification procedure." Consequently, the judge could not possibly have "properly applied the standard articulated in Collins," because the standard articulated in Collins expressly did not apply to a showup identification, which we have long recognized to be inherently suggestive. See Crayton, 470 Mass. at 235, quoting Commonwealth v. Martin, 447 Mass. 274, 279 (2006) ("[o]ne-on-one identifications are generally disfavored because they are viewed as inherently suggestive").[1]

[1] We noted in Commonwealth v. Crayton, 470 Mass. 228, 236 n.13 (2014):

> "Showups pose an additional risk of misidentification that is not present with lineups or photographic arrays. As the Supreme Judicial Court Study Group on Eyewitness Testimony explained: '[U]nlike lineups, showups have no mechanism to distinguish witnesses who are guessing from those who

The appropriate question, then, is not whether the judge correctly applied the Collins standard, which expressly did not apply to suggestive identification procedures, but what standard should apply to the admission of an in-court identification after an unequivocally positive identification of the defendant by an eyewitness at a showup identification that is admissible in evidence.[2] The court correctly recognizes that the "[c]ommon law principles of fairness" that we applied in both Crayton and Collins to the admission of the in-court identification in those cases is essentially a determination whether the probative value of the in-court identification evidence is substantially outweighed by the danger of unfair prejudice. Ante at , citing Mass. G. Evid. § 403 (2017). That same weighing of

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> actually recognize the suspect. In an unbiased lineup, an unreliable witness will often be exposed by a "false positive" response identifying a known innocent subject. By contrast, because showups involve a lone suspect, every witness who guesses will positively identify the suspect, and every positive identification is regarded as a "hit." For that reason, misidentifications that occur in showups are less likely to be discovered as mistakes.' Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices 76 (July 25, 2013) . . . . See generally Dysart & Lindsay, Show-Up Identifications: Suggestive Technique or Reliable Method?, in 2 Handbook of Eyewitness Psychology 137 (2007)."

[2] I do not address the admissibility of an in-court identification where the out-of-court identification was suppressed because the identification procedure was so suggestive that it was conducive to irreparable mistaken identification. Those circumstances are not presented here.

probative value against the danger of unfair prejudice should be applied here, but the analysis is a bit different.

In Collins, 470 Mass. at 262, we recognized the substantial danger of unfair prejudice arising from an in-court identification where the witness had not made an unequivocal positive identification of the defendant in a nonsuggestive identification procedure: "the danger is that the jury may disregard or minimize the earlier failure to make a positive identification during a nonsuggestive identification procedure, and give undue weight to the unnecessarily suggestive in-court identification." There were three sources of such danger. First, "[w]here eyewitnesses before trial were unable to make a positive identification of the defendant or lacked confidence in their identification, they are likely to regard the defendant's prosecution as confirmation that the defendant is the 'right' person and, as a result, may develop an artificially inflated level of confidence in their in-court identification." Id. at 262-263. Second, "cross-examination cannot always be expected to reveal an inaccurate in-court identification where 'most jurors are unaware of the weak correlation between confidence and accuracy and of witness susceptibility to "manipulation by suggestive procedures or confirming feedback."'" Id. at 264, quoting Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices 20 (July

25, 2013) (SJC Study Group Report). Third, "[w]here confirmatory feedback artificially inflates an eyewitness's level of confidence in his or her identification, there is also a substantial risk that the eyewitness's memory of the crime at trial will 'improve.'" Collins, supra at 263. We noted that studies have shown that "an eyewitness, now certain that the defendant was the perpetrator of the crime she observed, may recall that she saw the perpetrator more clearly, and saw more details of his appearance, than the witness had recalled during the nonsuggestive out-of-court identification procedure where she was unable to make a positive identification." See id., citing SJC Study Group Report, supra at 82-83. "This enhancement of memory makes it more difficult for juries to assess the accuracy of an in-court identification." Collins, supra at 263-264. "As a result, not only is an eyewitness likely to have an inflated level of confidence in an in-court showup identification, but a jury may give more weight to it than to the nonsuggestive pretrial identification that yielded something less than a positive identification.'" Id. at 264.

We also have recognized that in-court identifications generally have little probative value. "Although the defendant is not alone in the court room, even a witness who had never seen the defendant will infer that the defendant is sitting with counsel at the defense table, and can easily infer who is the

defendant and who is the attorney." Crayton, 470 Mass. at 237. In Crayton, we noted:

> "In fact, in-court identifications may be more suggestive than showups. . . . At a showup that occurs within hours of a crime, the eyewitness likely knows that the police suspect the individual, but unless the police say more than they should, the eyewitness is unlikely to know how confident the police are in their suspicion. However, where the prosecutor asks the eyewitness if the person who committed the crime is in the court room, the eyewitness knows that the defendant has been charged and is being tried for that crime. The presence of the defendant in the court room is likely to be understood by the eyewitness as confirmation that the prosecutor, as a result of the criminal investigation, believes that the defendant is the person whom the eyewitness saw commit the crime. Under such circumstances, eyewitnesses may identify the defendant out of reliance on the prosecutor and in conformity with what is expected of them rather than because their memory is reliable."

Id.

In Collins, 470 Mass. at 265, we essentially ruled that, where there was not an unequivocal positive identification arising from a nonsuggestive out-of-court identification procedure, the considerable danger of unfair prejudice arising from an in-court identification generally will substantially outweigh its probative value, so under our common-law principles of fairness the in-court identification should not be admitted unless justified for "good reason." We noted that "good reason" in such circumstances "usually would require a showing that the in-court identification is more reliable than the witness's earlier failure to make a positive identification and that it

poses little risk of misidentification despite its suggestiveness," such as "where the victim was familiar with the defendant (as in a domestic violence case) and only failed to identify the defendant in the earlier identification procedure because of fear or an unwillingness to cooperate with the police at the time." Id. at 265 & n.16.

The balancing analysis is a bit different where the eyewitness has made an unequivocal positive identification of the defendant in an inherently suggestive procedure such as a showup. The minimal probative value remains the same, but the danger of unfair prejudice is less because the witness already has declared that he or she is certain that the defendant is the perpetrator. The testimony at trial of a witness who expressed such certainty in his or her original identification is less vulnerable to the confirmatory or bolstering effects of an in-court identification. The danger of unfair prejudice in such circumstances is the risk that the jury will focus on, and give undue weight to, an in-court identification that has minimal probative value rather than focus on, and evaluate the appropriate weight to be given to, the witness's showup identification.

This danger of unfair prejudice, although less than the danger presented in Collins, is still substantial. The timing of a showup identification significantly affects the probability

of its accuracy. As we noted in our Model Jury Instructions on Eyewitness Identification, 473 Mass. 1051, 1056 endnote x (2015), quoting State v. Lawson, 352 Or. 724, 783 (2012) (Appendix):

> "Showups are most likely to be reliable when they occur immediately after viewing the criminal perpetrator in action, ostensibly because the benefits of a fresh memory outweigh the inherent suggestiveness of the procedure. In as little as two hours after an event occurs, however, the likelihood of misidentification in a showup procedure increases dramatically."

See SJC Study Group Report, supra at 76, citing Yarmey, Yarmey, & Yarmey, Accuracy of Eyewitness Identifications in Showups and Lineups, 20 L. & Hum. Behav. 459, 464 (1996) (in study, showup conducted immediately after crime produced same error rate as lineup conducted in same time frame; delay of two hours increased misidentification rate in showup to fifty-eight per cent versus fourteen per cent for lineup). The circumstances of the showup may also affect the probability of its accuracy. See SJC Study Group Report, supra, citing Dysart, Lindsay, & Dupuis, Show-Ups: The Critical Issue of Clothing Bias, 20 Applied Cognitive Psychology 1009 (2006) (witnesses at showup may be more inclined to base identifications on clothing rather than on facial features; studies indicate that showups present especially high risk of misidentification for suspects wearing clothing similar to that of perpetrator). Allowing an in-court identification in addition to a showup identification creates a

risk that the jury will gloss over these particular aspects of the showup identification and simply accept the subsequent in-court identification.

Here, the probative value of the in-court identification was negligible. The victim did not know the perpetrator, and had never seen him before. Because the perpetrator was wearing a hooded black jacket and covered his face with a red scarf, the victim was only able to see part of the perpetrator's nose, his eyes, and, perhaps, a bit of his forehead. The victim's testimony at trial occurred approximately one and one-half years after the robbery. The victim had described the robber as a black male; the defendant was the only black male in the court room. The likelihood that the victim recalled the perpetrator's nose, eyes, and forehead so well that he could reliably identify the perpetrator approximately eighteen months after the crime in a court room where the defendant was the only black male is so small that it borders on the microscopic.[3]

The court erroneously finds the in-court identification to have probative value "because it serves to corroborate other evidence that the person accused of the crime is, in fact, the

[3] At best, the victim might reliably have identified the defendant in the court room as the person he identified in the showup. That would not have been an identification separate and distinct from the showup, but that was not the question asked and answered. Instead, the victim was asked whether he could identify "the person who robbed" him. The victim answered "yes" and then pointed to the defendant.

perpetrator." Ante at . But this says nothing more than that the positive in-court identification has probative value because the other evidence demonstrates the defendant's guilt. By this standard, a Ouija board has probative value if it points to the guilt of a defendant because it corroborates the other compelling evidence of his guilt. The probative value of evidence must be evaluated on whether it fairly adds to the weight of the other evidence, not simply on whether it is consistent with that evidence.

In contrast, given the circumstances of the showup in this case, the danger of unfair prejudice arising from deflecting the jury's focus away from the showup identification was significant. This showup had serious flaws and warranted the jury's careful scrutiny. First, it was not a pure showup; the victim at trial testified that the police told him they had caught two people, and the police showed him two individuals, only one of whom was an African-American.[4] Second, the victim told the police that the robber wore a black jacket, and the police officer draped a black jacket over the defendant's

[4] The identification was also cross-racial; the victim's primary language is Kurdish, so we infer he is not African-American. See Commonwealth v. Bastaldo, 472 Mass. 16, 23 (2015) ("The existence of the 'cross-race effect' . . . -- that people are generally less accurate at identifying members of other races than they are at identifying members of their own race -- has reached a near consensus in the relevant scientific community and has been recognized by courts and scholars alike [footnotes omitted]").

shoulders during the showup, even though he was not wearing a black jacket when he was apprehended by the police. Third, the police officer at the showup asked the victim to describe the "person who had robbed him" by the clothing the person was wearing, which likely focused the victim's attention on the black jacket.

Under these circumstances, where the probative value of the in-court identification plainly was substantially outweighed by the danger of unfair prejudice, I conclude that it was an abuse of discretion to admit the in-court identification. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014), quoting Picciotto v. Continental Cas. Co., 512 F.3d 9, 15 (1st Cir. 2008) ("a judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made 'a clear error of judgment in weighing' the factors relevant to the decision, . . . such that the decision falls outside the range of reasonable alternatives").[5]

[5] I do not suggest that it will always be an abuse of discretion to admit an in-court identification where there is a positive showup identification. For instance, it might be appropriate to admit an in-court identification "where the eyewitness was familiar with the defendant before the commission of the crime, such as where a victim testifies to a crime of domestic violence." Crayton, 470 Mass. at 242. In such instances, identification often is not truly at issue, and the jury will understand that the identification is intended simply to confirm that the person the witness is describing is the defendant in the court room. Id. at 242-243.

I nonetheless vote to affirm the defendant's convictions because I conclude that the admission of the in-court identification, although error, was not prejudicial error. I agree with the court that the evidence of the defendant's guilt apart from the identifications was quite strong, and I am convinced that the victim's in-court identification here "did not influence the jury, or had but very slight effect." Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994).