SJC-12601

COMMONWEALTH vs. CHRISTIAN GERMAN.

Essex. February 4, 2019. - November 13, 2019.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Robbery. Assault by Means of a Dangerous Weapon. Firearms. Identification. Due Process of Law, Identification. Constitutional Law, Identification. Evidence, Identification, Expert opinion. Witness, Expert.

Indictments found and returned in the Superior Court Department on August 3, 2015.

A pretrial motion to suppress evidence was heard by James F. Lang, J., and the cases were tried before Timothy Q. Feeley, J.

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

Patrick Levin, Committee for Public Counsel Services, for the defendant.

David F. O'Sullivan, Assistant District Attorney, for the Commonwealth.

Anthony Mirenda, K. Neil Austin, Caroline S. Donovan, Madeleine K. Rodriguez, & Meagen Monahan, for New England Innocence Project & others, amici curiae, submitted a brief.

GAZIANO, J. A Superior Court jury convicted the defendant of the armed robbery of a restaurant owner and her employees in Lawrence. In this appeal, the defendant contends that his motion to suppress evidence of a showup identification should have been allowed because the procedure was so unnecessarily suggestive and conducive to mistaken identification as to deny him due process of law. The defendant also challenges several of the trial judge's evidentiary rulings on eyewitness identification.

For the reasons that follow, we affirm the motion judge's denial of the motion to suppress, and discern no reversible error in the trial judge's evidentiary rulings. Accordingly, the defendant's convictions shall be affirmed. We conclude further, however, that, for showup identification procedures conducted after the issuance of the rescript in this case, the officers conducting the showup will be required to provide instructions similar to those used in identifications through photographic arrays.

1. Background. We summarize the facts presented at the hearing on the motion to suppress, based on the findings of the motion judge, supplemented with undisputed facts in the record that are not contrary to the judge's findings. See Commonwealth v. Torres, 433 Mass. 669, 670 (2001).

On a night in June 2015, Maria, a restaurant owner in Lawrence, and three of her wait staff -- Ruth, Jeannie, and Carolyn -- left work at 3 A.M.[1] Carolyn had called a taxicab, which the three servers intended to share; Maria had driven to work. After the women left the restaurant, Carolyn got into the front passenger seat of the taxicab, while Jeannie and Ruth stood with Maria as she locked the door to the restaurant. As the three turned toward the taxicab, a man approached to within a few feet and demanded, "Give me everything."

When the women did not respond, the man pulled out a firearm. He appeared to focus on Jeannie, who was holding a purse, a cellular telephone, and a laptop computer. Maria told her to "throw him everything," and Jeannie tossed the items on the ground near the man. The robber appeared temporarily startled, allowing Maria a chance to run around the corner to her parked vehicle, where she telephoned 911.[2] The taxicab, with Carolyn in the front seat, was driven away at approximately the same time, while Ruth and Jeannie started walking across the

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[1] The record does not include the last names of some of the employees. For consistency, we refer to all by their first names.

[2] Maria described the assailant as a Hispanic man wearing a black jacket with a hood. The area was lit by street lights, and the robber's face was unobscured. The motion judge found, "The three women were able to see him clearly."

street. The robber followed them, continuing to demand their property. A group of men, who were standing on the roof of a nearby building, began yelling at the robber. He fired his weapon toward the men, and then turned and walked away.

Ruth and Jeannie started walking toward the police station, in the opposite direction from the robber. The taxicab driver, who had circled the block, picked them up nearby.[3] They all drove back to the restaurant to attempt to retrieve Jeannie's property, and encountered the defendant, who was walking down the street. He fired the weapon twice in their direction, while Ruth was speaking to 911 dispatchers on her cellular telephone. The taxicab was driven to a nearby parking lot, so the women could meet up with Maria. Ruth got out of the taxicab and into Maria's vehicle. The taxicab driver drove off with Carolyn and Jeannie still inside the vehicle, while Maria, at the request of police, returned to the restaurant.

While these events were unfolding, Lawrence police Officers Ryan Guthrie and Michael Colantuoni, each driving a marked police cruiser, searched the area for a Hispanic male wearing a black hooded jacket. Guthrie, who had heard gunshots from a few blocks away, encountered two parked taxicabs on a street corner. One of the drivers spoke to him in Spanish, which Guthrie did

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[3] The police were unable to locate the taxicab driver.

not understand, and pointed in a specific direction.[4] Guthrie broadcast this information on his police radio, and headed in the direction indicated. When Guthrie stopped briefly, the taxicab driver pulled alongside Guthrie's cruiser and indicated that the suspect had entered a park.

Guthrie and Colantuoni drove through the park. Within minutes of the 911 call, Guthrie saw a man in a black jacket, later identified as the defendant, walking just south of the park. The man was the first pedestrian Guthrie had encountered during his search.[5] Guthrie activated his lights and siren and tried to head the suspect off. When Guthrie reached a cross street, he observed the defendant emerging from another, in the process of removing his jacket. Upon seeing the police cruiser, the defendant ran away, heading east toward Jackson Street. Guthrie pursued him, yelling for the defendant to stop. Ultimately Colantuoni and another police officer apprehended the defendant on Jackson Street. A pat frisk for weapons revealed a single round of .45 caliber ammunition in the defendant's pants pocket. After being advised of the Miranda rights, and without prompting, the defendant said, "It wasn't me, it was the other

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[4] Guthrie was unaware at that point that the passengers in that taxicab were Ruth and Jeannie.

[5] The judge found that no one "was out and about" in those early morning hours.

guy." He added that if the officers uncuffed him, he would tell them who it was.

Guthrie went to the restaurant to interview Maria and Ruth. Maria translated for Ruth, who did not speak English. Guthrie was able to elicit only the same bare bones description of the robber that had been broadcast by the police dispatcher, i.e., a Hispanic man in a black hooded jacket. Both witnesses said that they would be able to identify the suspect if they saw him. Guthrie instructed Maria and Ruth that the police had a man in custody, that they did not know if he was the robber, and that they needed the witnesses to tell them whether or not he was the robber. Guthrie wanted to transport Maria and Ruth separately to see the defendant on Jackson Street, where he was being detained for purposes of a showup identification. Guthrie advised the witnesses that he intended to transport them one at a time, in the rear seat of his police cruiser. Both protested. Due to their fear of the suspect, they wanted to be together, and asked for assurances that the individual would not be able to see them. Ultimately, Guthrie acquiesced and drove to Jackson Street with both Maria and Ruth in the rear seat.

The defendant was standing in front of a wall, handcuffed, and amidst several police officers. Guthrie illuminated the area with the spotlight of his cruiser. Before Guthrie could pose a question, Maria and Ruth simultaneously identified the

defendant as the robber, Maria in English, and Ruth in Spanish, in words to the effect of, "That's him." When asked about their level of certainty, Maria told Guthrie she was one hundred percent; Ruth, as translated by Maria, said the same thing. The identifications took place within ten minutes of the initial police dispatch.

2. Prior procedure. In August 2015, the defendant was indicted on one count of armed robbery, G. L. c. 265, § 17; three counts of assault by means of a dangerous weapon, G. L. c. 265, § 15B (b); and carrying a firearm without a license, G. L. c. 269, § 10 (a). Prior to trial, he filed a motion to suppress the showup identifications. After an evidentiary hearing, the motion judge denied the motion in a written memorandum and order. In June 2017, the defendant was tried before a Superior Court jury. Although he was able to call an expert on eyewitness identification, his motion in limine to allow the introduction of certain expert testimony relative to witness certainty was denied. The defendant was convicted of all counts. He filed a timely notice of appeal, and we allowed his petition for direct appellate review.

3. Discussion. The defendant contends that suppression is required because the police allowed the two witnesses to participate in the showup identification together, and because the officers did not provide the witnesses with adequate

instructions prior to the showup identification. He argues also that the judge denied the motion to suppress by improper reliance on the Federal standard of admissibility, rather than the appropriate test under art. 12 of the Massachusetts Declaration of Rights. In addition, the defendant challenges two of the judge's evidentiary rulings at trial: the admission of evidence of the witnesses' degree of certainty of their identification, and the denial of his motion to introduce expert testimony with respect to the question of a witness's degree of certainty in an identification.

a. Showup identification procedure. Although disfavored as inherently suggestive, a showup identification conducted in the immediate aftermath of a crime is not necessarily impermissible. Commonwealth v. Dew, 478 Mass. 304, 306 (2017). "[S]uggestiveness alone is not sufficient to render a showup identification inadmissible in evidence" (citation omitted). Commonwealth v. Crayton, 470 Mass. 228, 235 (2014). Under both the Fourteenth Amendment to the United States Constitution and art. 12, a defendant seeking suppression of a showup identification must establish by a preponderance of the evidence that the procedure was unnecessarily suggestive. Id. See Perry v. New Hampshire, 565 U.S. 228, 238-239 (2012); Manson v. Brathwaite, 432 U.S. 98, 110, 113-114 (1977). Under Federal due process requirements, if an identification procedure was

unnecessarily suggestive, yet nonetheless was reliable in the totality of the circumstances, it may still be admissible. See Perry, supra at 239; Manson, supra. Under the more protective requirements of art. 12, an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification is per se excluded. Commonwealth v. Johnson, 473 Mass. 594, 597 (2016).

There may be good reason for police to conduct a showup identification, notwithstanding its inherent suggestiveness, due to "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."[6] Commonwealth v. Austin, 421 Mass. 357, 362 (1995). Otherwise put, in such circumstances, an inherently suggestive procedure may not be unnecessarily suggestive.

In general, a defendant may challenge a showup identification as unnecessarily suggestive in two ways. First,

[6] The defendant does not challenge the motion judge's determination that "there is no question that the police had good cause for conducting a showup identification procedure with the witnesses."

a defendant may attempt to show that the police did not have a good reason to conduct this type of disfavored, inherently suggestive, one-on-one identification procedure. Id. at 361. See Commonwealth v. Figueroa, 468 Mass. 204, 217 (2014); Commonwealth v. Martin, 447 Mass. 274, 282 (2006). Second, a showup identification is unnecessarily suggestive if the procedure utilized by the police includes "special elements of unfairness" (citation omitted). Crayton, 470 Mass. at 236.

i. Whether motion judge applied incorrect standard. The defendant contends that, in denying his motion to suppress the identifications from the showup, the motion judge erroneously applied the less stringent Federal due process test. The defendant maintains that the judge's finding that the two witnesses simultaneously identified the robber meant, "[i]n effect," that the judge ruled the identification admissible because he concluded it was unnecessarily suggestive but otherwise reliable. This argument is without merit.

In determining whether the police procedures rendered the identification unnecessarily suggestive, the motion judge was required to examine "the totality of the circumstances attending the confrontation." Commonwealth v. Odware, 429 Mass. 231, 235 (1999), quoting Commonwealth v. Otsuki, 411 Mass. 218, 232-233 (1991). It is evident he did so here, and did not rest his decision merely on his view of the witnesses' reliability. In

his detailed decision, the judge properly focused on the police officer's justification for allowing the witnesses to view the suspect at the same time. The judge recognized that, in general, witnesses should be shown a suspect separately. Here, however, without the security of being able to remain together, the witnesses otherwise seemed unlikely to participate in the identification procedure, minutes after the traumatic events, and with a possible armed suspect walking around the neighborhood. While the judge properly noted the concern with having two witnesses view a suspect at the same time, their virtually simultaneous responses obviated the risk that one's response could have been formed based on the other's reaction. See Commonwealth v. Cavitt, 460 Mass. 617, 632 (2011) (question raised by motion to suppress identification is whether possible mistaken identification was product of improper police procedures).

ii. Joint participation in the identification procedure. Under art. 12, "[e]ven where there is a good reason to conduct a one-on-one identification procedure, the evidence must be excluded if there are special elements of unfairness, indicating a desire on the part of the police to stack the deck against the defendant" (quotations and alteration omitted). Dew, 478 Mass. at 307, quoting Commonwealth v. Leaster, 395 Mass. 96, 103 (1985). See Commonwealth v. Moon, 380 Mass. 751, 756-759 (1980)

(out-of-court identification suppressed where police identified the defendant by name in front of percipient witness, produced single photograph from automobile presumably operated by assailant, and asked witness to identify suspect).

The defendant argues that there "simply was no justification" for the officers to depart from best practices and allow the witnesses to view the robbery suspect together. See Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices 86 (July 25, 2013) (Study Group Report) ("Witnesses should not participate in identification procedures together"). The Commonwealth agrees that joint witness participation in an identification procedure is "not ideal," but maintains that police had little choice in this case because the witnesses were scared and refused to be separated.

Absent extraordinary circumstances, police should follow best practices and separate witnesses participating in identification procedures. See United States v. Corgain, 5 F.3d 5, 9 (1st Cir. 1993), citing United States v. Bagley, 772 F.2d 482, 494 (9th Cir. 1985), cert. denied, 475 U.S. 1023 (1986). A failure to separate percipient witnesses may result in a finding that the showup identification is unnecessarily suggestive because the response of one witness influenced

another witness. See Commonwealth v. Soares, 76 Mass. App. Ct. 612, 615 (2010).

That more than one witness is present during an identification procedure does not, however, by itself, render the procedure unnecessarily suggestive. "While there are obvious pitfalls in permitting victims to view photographs in each other's presence, the practice is not ipso facto invalid so as to preclude an identification made as a result thereof" (citation omitted). Commonwealth v. Moynihan, 376 Mass. 468, 476 (1978). See Commonwealth v. Cincotta, 379 Mass. 391, 394 (1979); Commonwealth v. Marks, 12 Mass. App. Ct. 511, 515 (1981).

In this case, the motion judge recognized that the "simultaneous viewing of the defendant by [Maria] and [Ruth] as they were seated together in the back of . . . Guthrie's cruiser" was "concerning." The judge observed that such a practice should be avoided, because there is an "obvious risk that each might influence the identification of the other." Nonetheless, he determined that, in these unusual circumstances, police had a good reason for not conducting separate showup identifications. We agree that, in the extraordinary circumstances presented, the officer's decision to allow the witnesses to view the suspect together was justified by a "difficult investigative problem" involving reluctant witnesses

who had been frightened by a violent crime. See Martin, 447 Mass. at 284 (examining reasons why police utilized particular showup identification procedure).

The officer intended to separate the witnesses and made a good faith effort to do so. The witnesses, however, "balked at [the officer's] request to be transported one at a time to view the suspect in custody." They requested to stay together because they were "scared," and "didn't want the suspect to see them." There was no abuse of discretion in the judge's finding that the officer's acquiescence in the request that the witnesses view the suspect together was justified "[g]iven [the witnesses'] understandable fear, having minutes earlier been menaced by a gunman who fired his weapon in their presence outside [the restaurant] and again at the cab in which [Ruth] was riding."

For similar reasons, the evidence also supports the judge's finding that "[i]t is not clear whether either witness would have been willing to engage in the immediate identification procedure otherwise."[7] This was not, as the defendant contends,

[7] The Commonwealth argues that there was a practical need to keep the witnesses together -- so that Maria could translate for Ruth. The record does not indicate whether a Spanish-speaking officer was available, and, if not, how long it would have taken to secure the services of a translator. Moreover, in deciding that the police were justified in allowing the witnesses to be together when they viewed the suspect, the judge did not address

a matter of speculation. The witnesses told police that they were fearful of identifying the robber and did not want to be seen. Other percipient witnesses, including the two other wait staff, left the area before officers had an opportunity to speak with them. Maria described her employees as "shaken up," and added that one had been so frightened that she vomited. The taxicab driver, another percipient witness, was never located, as the taxicab company declined to track down or provide any information about which drivers were working in the area that night. See Commonwealth v. Kennedy, 426 Mass. 703, 706 (1998) (motion judge entitled to draw reasonable inferences from testimony).

On this record, there was no abuse of discretion in the judge's determination that Maria and Ruth's joint viewing of the suspect did not render the identification procedure unnecessarily suggestive. The judge concluded that the positive identifications were not "affected in any way" by the participation of both witnesses, given the "consistent and unequivocal testimony of both witnesses and of . . . Guthrie that, as soon as [Maria] and [Ruth] saw the defendant, they simultaneously declared that he was the robber." See Johnson,

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Maria's role as Ruth's translator. We therefore decline to consider the issue further.

473 Mass. at 597 (examining analysis of totality of circumstances surrounding identification procedure).[8]

iii. Instructions prior to showup identification. The defendant argued that the failure to provide instructions prior to the showup identification similar to those employed when conducting identification procedures using photographic arrays, as mandated by Commonwealth v. Silva-Santiago, 453 Mass. 782, 797-798 (2009), rendered the showup unnecessarily suggestive. The judge determined that the procedural requirements of Silva-Santiago "[a]t present" apply only to photographic arrays. He concluded that, while it may be "advisable for police departments to develop written instructions for use in showup identifications that mirror" the photographic array instructions, "[t]he failure to promulgate or give such instructions . . . is not a fatal flaw."

In Silva-Santiago, 453 Mass. at 797, we established "a protocol to be employed before a photographic array is provided

[8] Pointing to the best practices set forth in the Study Group Report, the defendant argues that the police added to the suggestiveness of the identification by failing to elicit a more specific description of the suspect, and by positioning him handcuffed "amidst a bevy of attendant uniformed police officers and marked cruisers." The judge found that these "purported infirmities, either alone or collectively," did not render the showup unnecessarily suggestive. He noted that "[n]one is atypical of showup procedures generally," and that "the heavy presence of the police officers in this instance was justified by the defendant's obstreperousness." We discern no reason to disturb the judge's findings.

to an eyewitness." To reduce the risks of unnecessary suggestiveness and misidentification, the officer conducting the identification procedure should inform the witness, at a minimum, that

> "he will be asked to view a set of photographs; the alleged wrongdoer may or may not be in the photographs depicted in the array; it is just as important to clear a person from suspicion as to identify a person as the wrongdoer; individuals depicted in the photographs may not appear exactly as they did on the date of the incident because features such as weight and head and facial hair are subject to change; regardless of whether an identification is made, the investigation will continue; and the procedure requires the administrator to ask the witness to state, in his or her own words, how certain he or she is of any identification."

Id. at 797-798, citing United States Department of Justice, Eyewitness Evidence: A Guide for Law Enforcement 19, 31-32, 33-34 (1999).

The defendant argues that, in Commonwealth v. Thomas, 476 Mass. 451 (2017), this court "implicitly" held that any identification procedure that does not follow the Silva-Santiago protocol is unnecessarily suggestive. We do not agree. In that case, we examined "what consequence, if any, is appropriate where a police officer who is showing a photographic array to an eyewitness fails to use the protocol that we outlined in [Silva-Santiago, 453 Mass. at 797-798]" (emphasis added). Thomas, supra at 452. We did not determine that the failure to provide a percipient witness with an instruction prior to the showup

identification would render any showup identification inadmissible.

In any event, while he was not required to do so, Guthrie provided the witnesses a critical part of the Silva-Santiago identification instruction prior to the showup identification. As the judge noted, Guthrie's statement informed the witnesses "that the police had a man in custody, that they did not know if he was the robber, and that they needed the witness to tell them whether or not he was the robber." The judge concluded that this instruction served to counteract any perception that the police were "directing the witnesses to confirm a police determination of the suspect's culpability." We see no reason to disturb the judge's conclusion. See Study Group Report, supra at 92 (most significant of pre-identification warnings is that "the offender may or may not be in the photo array or lineup, or the person being shown in a showup"). See also State v. Henderson, 208 N.J. 208, 261 (2011) ("showup administrators should instruct witnesses that the person they are about to view may or may not be the culprit and that they should not feel compelled to make an identification").

iv. Expansion of the Silva-Santiago protocol. We turn to the question whether the Silva-Santiago protocol should be expanded to include a requirement for an instruction prior to the showup identification. In 2013, the Study Group Report,

supra at 23-24, recommended that, before a police officer conducts "a lineup, a showup, or a photo array, he or she should instruct the witness in accordance with [Silva-Santiago], 453 Mass. at 797-798." The Study Group also issued model forms for use by Massachusetts police departments in eyewitness procedures, which included instructions to be used before conducting the showup identification. See id. at 106.

The defendant urges us to mandate this recommended best practice for showup identifications. It makes little sense, he argues, to require "fewer procedural safeguards prior to an inherently suggestive and potentially unreliable showup than are required prior to an otherwise non-suggestive photo array" (emphasis added). The Commonwealth recognizes that, in many instances, instructions prior to the showup identification are "practicable and may be preferable." It argues, however, that a failure to provide such instructions "should be deemed . . . a relevant factor in determining, under the totality of the circumstances, whether police engaged in a procedure so unnecessarily suggestive as to deny due process."

A review of our existing jurisprudence suggests that pre-showup instructions appear to be in current use by many Massachusetts police departments. See, e.g., Commonwealth v. Moore, 480 Mass. 799, 804 (2018) (officers instructed witnesses prior to showup identification that it was just as important to

clear innocent person as it was to identify guilty one, and that individuals witnesses were about to see might or might not be wearing same clothing); Dew, 478 Mass. at 306 (using instructions prior to showup identification, including that robber may or may not be person shown to witness); Commonwealth v. Bresilla, 470 Mass. 422, 425 (2015) (officer provided witness with "precautionary advisements" prior to showup identification); Commonwealth v. Meas, 467 Mass. 434, 438, cert. denied, 135 S. Ct. 150 (2014) (officer provided witnesses with instructions prior to showup identification in accordance with "Show-up Identification Checklist" prepared by district attorney's office); Commonwealth v. Pearson, 87 Mass. App. Ct. 720, 722 (2015) (police read eyewitness instructions from card prior to conducting showup identification). See also Study Group Report, supra at 99 ("Over the past few years, Massachusetts police departments have begun to issue their officers cards containing standardized showup instructions").

We conclude that it is prudent, going forward, to require that police provide witnesses with an instruction prior to a showup identification as recommended by the Study Group Report. "Not only would such a protocol provide important information to the eyewitness that may reduce the risk of a misidentification, but adhering to it would permit the law enforcement officer following the protocol to testify more accurately and with

greater precision as to what the witness was told prior to the identification." Silva-Santiago, 453 Mass. at 798. Prior to a showup identification, the officer conducting the procedure will be required to instruct the witness as follows:[9]

> "You are going to be asked to view a person; the alleged wrongdoer may or may not be the person you are about to view; it is just as important to clear an innocent person from suspicion as it is to identify the wrongdoer; regardless of whether you identify someone, we will continue to investigate; if you identify someone, I will ask you to state, in your own words, how certain you are."

See Study Group Report, supra at 106. The failure to instruct a witness prior to a showup identification will carry the same consequences as a failure to follow the Silva-Santiago protocols. See Thomas, 476 Mass. at 459 ("[I]t affects a judge's evaluation of the admissibility of the identification; and, where it is found admissible, it affects the judge's instructions to the jury regarding their evaluation of the accuracy of the identification").

b. Introduction of certainty evidence at trial. The defendant argues that the trial judge erred in allowing testimony by both of the percipient witnesses that they were one hundred percent certain they had identified the robber.

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[9] Because a showup identification is conducted in the immediate aftermath of a crime, this instruction differs slightly from the instruction provided where a witness is to be shown a photographic array. Compare Commonwealth v. Silva-Santiago, 453 Mass. 782, 797-798 (2009).

The defendant moved in limine to exclude any testimony regarding the witnesses' confidence or certainty in their identifications. As grounds for the exclusion, the defendant argued that, absent testimony from a "certified expert" of a strong correlation between witness confidence and witness accuracy, the testimony was not relevant; rather, it was misleading, and constituted improper opinion evidence. The defendant also argued that jurors place unwarranted reliance on statements of confidence when assessing eyewitness identification testimony. The motion was denied.

Maria testified, over the defendant's objection, that she informed the police that she was one hundred percent sure that she recognized the defendant as the robber. She also testified that, when asked about her degree of certainty, Ruth had responded "[one] hundred percent." In addition, Guthrie testified that both witnesses answered that they were one hundred percent certain of their identifications.

It is well established that an eyewitness may be permitted to testify as to his or her level of certainty, and the weight of this evidence is for the jury. See Commonwealth v. Bastaldo, 472 Mass. 16, 32 n.25 (2015), citing Commonwealth v. Cruz, 445 Mass. 589, 596 (2005), and Commonwealth v. Watkins, 63 Mass. App. Ct. 69, 74-75 (2005). Indeed, the Silva-Santiago protocol requires police to ask an eyewitness "to state, in his or her

own words, how certain he or she is of any identification." Silva-Santiago, 453 Mass. at 798. Because witness certainty has been shown not to be a reliable estimate of accuracy, however, this evidence must be treated with caution. "Where an eyewitness makes a positive identification and expresses a level of certainty immediately after the identification procedure, there is some correlation between certainty and accuracy, but there is not yet a near consensus regarding the strength of that correlation." Commonwealth v. Gomes, 470 Mass. 352, 370 (2015), S.C., 478 Mass. 1025 (2018). To the contrary, "under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy" (citation omitted). Id. Accordingly, we require a trial judge to provide a cautionary instruction warning jurors not to afford too much weight to a statement of witness certainty. Id.

Here, the trial judge properly instructed, verbatim with our model instruction,

> "You may consider a witness's identification even where the witness is not free from doubt regarding its accuracy, but you should also consider that a witness's expressed certainty in an identification standing alone may not be a reliable indicator of the accuracy of the identification, especially where the witness did not describe that level of certainty when the witness first made the identification."

In his motion in limine, the defendant argued that the certainty evidence should be excluded because of the lack of correlation between witness confidence and identification

accuracy, and the improper weight jurors place on eyewitness confidence. He argued also that certainty testimony constitutes inadmissible opinion evidence. On appeal, the defendant raises a different issue concerning the role of confirmatory feedback on statements of witness certainty.

The defendant acknowledges that, while generally discouraging the introduction of certainty evidence, the Study Group recommended that certainty testimony be admitted in evidence "where the statement of certainty occurred immediately after [an] out-of-court identification" or "within the judge's discretion, on redirect[,] rebuttal, or in other circumstances where the defendant challenges the witness's certainty." Study Group Report, supra at 113. This recommendation, he argues, is "generally sound, with one caveat: certainty testimony should only be admissible where it is elicited immediately after a non-suggestive double-blind lineup pursuant to the Silva-Santiago protocol." In this context, the witness's confidence has not been "corrupted by implicit or explicit confirmatory feedback." Because it is conducted in the aftermath of a crime, a showup identification is unlikely to be double-blind. Thus, the defendant argues, a showup "is always suspect," and statements of certainty provided during a suspect identification procedure should not be admissible.

The defendant argues also that the confidence testimony should have been excluded in this case because the witnesses, not the police, were the source of improper confirmatory feedback. He maintains that "[e]ach victim was reinforced by witnessing the other victim's identification prior to being asked how certain she was of her own."

Because the defendant did not argue at trial that the statements of certainty were inadmissible due to potential confirmatory feedback, we review this claim to determine whether any error created a substantial risk of a miscarriage of justice. See Commonwealth v. Garcia, 409 Mass. 675, 678-679 (1991); Commonwealth v. Kozec, 399 Mass. 514, 518 n.8 (1987). We discern no error in the introduction of this testimony. The police elicited certainty statements from the witnesses, as set forth in the Silva-Santiago protocol. See Silva-Santiago, 453 Mass. at 798. See also Study Group Report, supra at 106 (showup procedure includes requirement that police ask witnesses to state level of certainty). In his final charge, the judge instructed the jury on limitations in this type of evidence and how they should consider a witness's assertions of certainty. See Silva-Santiago, supra (discussing appropriate limiting instructions). See also Gomes, 470 Mass. at 372. While joint witness participation in the identification procedure clearly raises the possibility of improper confirmatory feedback, and

such identifications ordinarily are strongly discouraged, the identifications here were both simultaneous and immediate upon seeing the defendant, minutes after the crime.[10]

c. Trial judge's rulings on expert opinion testimony. The defendant called Dr. John Bulevich, an associate professor of psychology at Stockton University, as an expert witness. Bulevich teaches experimental and cognitive psychology, and specializes in the study of the retrieval process within human memory.

Prior to Bulevich's testimony, the prosecutor objected to proposed testimony that a general, broad description of a suspect is more likely to produce a false identification than where a witness is able to provide a much more detailed, individual description. Defense counsel represented that Bulevich would testify "when a person is stopped who matches a general description, which I would say that this clearly is, that it's more likely to produce a false identification." The judge expressed concern about allowing an expert to testify to the correlation between stopping a person who matches a general description and the likelihood of a false identification. He commented that the likelihood that the police stopped the

[10] We note as well that the judge who considered the defendant's motion to suppress before trial determined after an evidentiary hearing, and stated explicitly in his decision, that neither witness's certainty had been affected by the other.

robber, as opposed to an innocent person walking in the vicinity, depended upon many factors, including when and where the suspect was stopped in relation to the location of the crime, and how many people were out on the street at the time of the stop. The judge concluded that an expert cannot comment on the accuracy of the particular showup identification at issue, "and that's exactly what this is trying to do." Accordingly, he ordered that portion of the proposed testimony excluded, but allowed Bulevich to testify as an expert.

The defendant argues that the judge's exclusion of this portion of Bulevich's testimony violated his fundamental right to present a defense. See Chambers v. Mississippi, 410 U.S. 284, 302 (1973). The judge's decision to exclude certain testimony, however, did not preclude the expert from testifying to the significance of the witness's ability to describe the perpetrator. The judge explained, "[Y]ou can certainly ask about general descriptions, but, as I understand your proffer, it goes to the police conduct [in stopping the defendant based on the description], not the witness['s] conduct or . . . witness reliability."

Bulevich testified that memory works in three stages: encoding (the initial perception of an event); storage (when information is stored in the mind prior to recall); and retrieval (when the information is extracted). Errors often

occur at the encoding stage of memory, as a result of a lack of attention to details as individuals navigate through a complex environment. At the retrieval stage, complex events must be pieced together from scratch, resulting in the possibility that the event may be assembled incorrectly, and therefore misremembered. Because stored information can be pieced together incorrectly; memory does not function in the same way as an audio-visual recording which may be replayed.

Bulevich also testified to his opinions regarding the suggestiveness of showup identification procedures, confirmation bias, and "the weapon focus effect." He testified, based on research in this field, that showup identification procedures are inherently suggestive. "[A] witness who has . . . seen a crime and you show a single individual and you say is this the person who did it. It's more likely in that particular case for the person to essentially respond in the affirmative." Bulevich explained that confirmation bias exists where "people become more sure or more confident of a judgment they've made with regard typically to an identification after they've been given confirming feedback." In addition, Bulevich described research on the "weapon focus effect," which shows that a weapon tends to draw witnesses' attention away from the perpetrator, such that they are able to describe firearms used in an offense accurately

and in detail, but may have poor memories concerning other aspects of the event, including the perpetrator.

The defendant maintains that his defense of mistaken identification was supported by "three pillars": the victims' inability accurately to observe the robber given the circumstances of the offense; the inadequate general description used by police to arrest him; and the suggestive nature of the showup identification procedure. The defendant contends that the judge's ruling "left one of those three pillars bereft of evidentiary support, rendering the entire foundation wobbly."

Qualified expert testimony is admissible if it "will assist the trier of fact in determining a fact in issue or in understanding the evidence" (citation omitted). Commonwealth v. Little, 453 Mass. 766, 768 (2009). See Mass. G. Evid. § 702 (2019). In the area of eyewitness identification, expert witness testimony "may be an important means of explaining counterintuitive principles." Commonwealth v. Snyder, 475 Mass. 445, 451 (2016). "Eyewitness identification expert testimony also may be an important means of explaining how other variables relevant in a particular case can affect the reliability of the identification at issue." Id. See Gomes, 470 Mass. at 366 (discussing value of expert testimony "accurately [to] discern the reliable eyewitness identification from the unreliable").

A trial judge retains discretion in deciding whether to allow the introduction of expert testimony. See Snyder, 475 Mass. at 451-452. See also Commonwealth v. Watson, 455 Mass. 246, 257 (2009) ("expert testimony concerning the reliability of eyewitness identification is not admissible as of right, but is left to the discretion of the trial judge"); Commonwealth v. Kent K., 427 Mass. 754, 762 (1998); Commonwealth v. Santoli, 424 Mass. 837, 838 (1997). We review the exclusion of expert testimony under an abuse of discretion standard, and consider whether the judge made a "clear error of judgment in weighing" the relevant factors "such that the decision falls outside the range of reasonable alternatives" (citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

We conclude that the judge did not abuse his discretion here. The defendant was permitted to elicit expert testimony concerning the correlation between a witness's ability to describe a suspect and the reliability of a subsequent identification. At a sidebar, the judge also ruled that the defendant could ask,

> "about the effect that the extent of the description has or has been found to have on eyewitness identifications, the reliability of them, but I don't want to hear those words it's more of a general description makes it more likely that it will be an erroneous one."

When counsel responded that she was not sure how to ask the question without the witness answering as the judge described,

the judge clarified, "You can inquire about whether it affects identification, but I don't want an answer, an opinion that it makes it more likely that it's wrong." Given these limitations, and counsel's repeated statement that the witness likely would respond as the judge had precluded, counsel chose not to enter into that area of questioning.

The judge's comments at sidebar indicate his concern that the testimony could have been misleading had the expert testified, as counsel represented would be likely, that, in the expert's opinion, the police did not have an adequate basis to stop the defendant. The exclusion of this testimony did not deprive the defendant of his constitutional right to a defense. As stated, counsel elicited significant other testimony concerning scientific studies on how memories may be confused, distorted, or jumbled in retrieval, including the particularly relevant testimony on the "weapons effect" and a witness's insufficient observations of other aspects of the crime when confronted by a firearm being pointed at the witness.

Judgments affirmed.