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IN THE COURT OF APPEALS
STATE OF GEORGIA

COPY

J. BRODRE BRODES,

Appellant,

versus

STATE OF GEORGIA,

Appellee.

Docket Number **A04A0810**

FILED IN OFFICE
JAN 06 2004
CLERK COURT OF APPEALS OF GA

BRIEF FOR THE APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF FULTON COUNTY
HONORABLE ELIZABETH E. LONG, TRIAL JUDGE

Criminal Indictment Number Z-84658

William L. Martin, III,
Clerk

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Appellant,

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STATE OF GEORGIA,

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Docket Number **A04A0810**

PART ONE

A.

STATEMENT OF THE PLEADINGS

The appellant, J. Brodre Brodes was tried before a jury on August 19 through 21, 2002 and convicted of Armed Robbery, two counts.

On August 23, 2002, the appellant received a sentence of fifteen years on each count to serve ten years in prison with the remaining balance of five years to be served on probation, the sentences on each count to run concurrently (T. 507).

Undersigned appellate counsel was appointed by order and immediately filed a Motion for New Trial dated October 21, 2002. The Amended Motion for New Trial was filed on May 12, 2003.

Appellant's Amended Motion for New Trial was heard on August 25, 2003, and denied, see court's order of September 8, 2003. Appellant's Notice of Appeal was filed on in the Fulton County Superior Court Clerk's office on September 17, 2003.

The Appeal and the record were docketed in the Georgia Court of Appeals on December 17, 2003.

B.

STATEMENT OF FACTS

J. Brodre Brodes was arrested as he sat in his high-school attending class . To this day no one knows how he was selected by the police for investigation. He had become a suspect in an armed robbery occurring two days previous, on October 14, 1996. Two white males, Greg Wilson and Randy Burton were standing by their cars outside the Dwarf-house Chick-filet restaurant, located in Hapeville, in the parking lot around 11:00 in the evening. A black male, described as between 18 to 20 years of age, in a bulky red jacket emblazoned with "Bulls," approached and demanded money from each of the two white males. The encounter lasted "a couple of minutes." Burton asked the perpetrator to leave his wallet so he wouldn't have to cancel credit cards and get a new driver's license. The wallet was thrown down. Burton and Wilson then went inside the restaurant and requested that the police be called. The police arrived ten to fifteen minutes later. The police dusted the wallet for fingerprints.

The investigating officer, Hughes, invited the two victims to view a photo line-up on October 16, 1996. This line-up showed the appellant in the central position, substantially larger than the other photos, and with the top of appellant's head cropped from the photo, quite distinct from the other photos.

Burton was fuzzy on his selection, but did have questions about photo number 5, the defendant . Wilson however did select photo number 5. Burton demanded to see "another picture" of the person because he was not satisfied with the fact that the head was cut off in the photo. The detectives informed him they had no other pictures of the suspect, but they agreed to a physical line-up. The physical line-up was conducted the next day, the defendant having been

arrested based on the photo line-up identification, at which time both victims selected the defendant.

The prosecutor asked Burton on direct examination if he was “absolutely certain” of his selection. Burton replied, “yes.” Similarly, the prosecutor asked Wilson if “he needed to study [the line-up] for a great deal of time?” Wilson answered that he was positive he knew. Wilson could not, and did not at the time of the incident, state any specific description of the perpetrator. He could not relate any details concerning eyes, nose, ears, lips, teeth, chin, etc. He had no memory of any jewelry.

Based on the identification by the victims, and nothing else, Mr. Brodes was arrested, charged and convicted.

C.

STATEMENT OF THE ISSUE

Is it error to charge the jury that they may consider the level of certainty shown by an eyewitness regarding their identification particularly when that evidence is the sole evidence of the State’s case?

PART TWO

ENUMERATION OF ERRORS

1.

It was error for the court to instruct the jury that they may consider the “level of certainty” shown by a witness in making an identification in determining whether the eyewitness identification was credible.

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction of this case because it does not fall within the appellate jurisdiction of the Georgia Supreme Court as enumerated in Article VI, Section VI, Paragraph II of the Constitution of the State of Georgia.

Article VI, Section V, Paragraph III of the Constitution of the State of Georgia provides, in pertinent part, that the Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred by other courts of law.

PART THREE

ARGUMENT AND CITATION OF AUTHORITY

1.

It was error for the court to charge the jury that they may consider the “level of certainty shown by a witness” when considering a witness’s eyewitness identification testimony. (T. 480). This error was adequately preserved by trial counsel’s objection (T. 431), and this issue was pursued at the motion for new trial. Additionally, the eyewitness testimony involved in this case was not supported by any outside corroboration or other evidence.

Dr. Steven Cole was admitted, without objection, as an expert in the field of Eyewitness Identification and Psychology (T. 361).

Dr. Cole reports that research shows that a person’s confidence in the certainty of their identification has no consistent relationship with the accuracy of their identification. (T. 369).

In Jones v. State, 273 Ga. 213 (3)(b) (2000), the Supreme Court noted that there are jurisdictions that no longer give a “level of certainty” instruction and there are those jurisdictions that continue to use the language. The Supreme Court noted too that experts have questioned the common belief that an eyewitness who is certain of his identification is more accurate than other eyewitnesses, Jones v. State, 273 Ga. 213, n. 12 (2000) (regarding scientific studies which supports the unreliability of a relationship of a witness’s confidence and accuracy in identification.).

The evidentiary value of “level of certainty” is akin to the peculiar inference of flight¹, a charge discontinued in Renner v. State, 260 Ga. 515, where the court reasoned:

The charge serves no real purpose, as it is a particularization of the general charge on circumstantial evidence, and. . . the state is free to use circumstantial evidence of flight to argue the defendant's guilt. . . . Moreover, the charge inevitably carries with it the potential of being interpreted by the jury as an intimation of opinion by the court that there is evidence of flight and that the circumstances of flight imply the guilt of the defendant; this is especially true since the trial court does not give specific charges on other circumstances from which guilt or innocence may be inferred.

Isn't this also true of the charge on “level of certainty?” Is it no less an undue emphasis of a specific circumstance from which guilt or innocence may be inferred? According to Blackburn, it is “within the common knowledge of a juror that the certainty of witness's identification does not necessarily reflect its accuracy,” Armstead v. State, 255 Ga. App. 385 (2002). Isn't this true of flight? Isn't it common knowledge that just because a suspect runs it doesn't always mean consciousness of guilt? Why not continue to instruct jurors they may consider flight? For the same reason we ought not instruct jurors to consider “level of certainty.” It inevitably carries with it the potential of being interpreted by the jury as an intimation of opinion by the court that there is evidence of certainty to be considered.

¹ “[T]he flight of a person accused of a crime, if proven, or the attempted flight of a person accused of a crime, if established by the evidence, may be considered by the jury in determining whether or not such accused is guilty of the alleged crime. If you find from the evidence in this case that there was flight on the part of the Defendant, you may consider whether or not you will draw any inference of guilt from that flight or similar acts, if any such has been proven. Flight is subject to explanation. You decide the weight to be given to such evidence, if any, and whether to draw any inference of a consciousness of guilt or not. It's for you, the jury, to decide from the evidence whether or not there was any flight on the part of the Defendant in this case and, if so, whether such was due to a sense of guilt or for some other reason, and if for other reasons then no inference hurtful to the Defendant should be drawn.”

Analyzing the jury charge reveals that not all of the factors are suspect. The distinguishing element of the “level of certainty” factor is that it is based on opinion evidence. In contrast, the other factors charged to the jury revolve around questions of fact.

For example:

“Identity is a question of fact for determination by the jury. It is dependent upon the credibility of the witness or witnesses offered for this purpose, and you have the right to consider all of the factors previously charged you regarding credibility of witnesses.

Some, but not all, of the factors you may consider, in assessing reliability of identification, are:

a. The opportunity of the witness to view the alleged perpetrator at the time of the alleged incident; . . .”

No doubt in any given case there will be evidence of the time of day, the lights in a parking lot, or the full moon shining, how long the encounter lasted, and so on. This kind of evidence has nothing to do with *opinion* per se and is generally in the form of testimony regarding the actual conditions observed by a witness.

“b. The witness's degree of attention toward the alleged perpetrator at the time of the alleged incident;. . .”

Again, while it may encroach into the area of opinion evidence, still it will be the presentation of facts testified to by a given witness regarding the circumstances *at the time of the encounter* which goes to the element of “degree of attention.” For example, a witness might respond to questioning by saying, “I was in my car, and did not see him approach.” Or, “I was standing perfectly still for five minutes looking right at him.” Clearly this kind of evidence involves questions of *facts*.

However, the level of certainty issue is quite different:

“c. The level of certainty shown by the witness about his/her identification;”

This isn't an instruction on questions of fact, this is an emphasis by the judge on opinion testimony. It is certainly permissible for the State to ask the witness “Are you sure?” After all, the witness has just *given an opinion* about their level of certainty. Nine times out of ten a prosecutor has engaged in lawful pretrial preparation with a witness and fully understands just how well the presentation of opinion evidence will be to the jury. Consider the following exchange between the prosecutor and his witness from the trial at issue:

Mr. Barton, how certain are you of your identification of the defendant?

Positive.

100 percent certain?

Yes sir.

Is there any doubt in your mind that you picked the wrong man?

No sir, I did not pick the wrong man.

Are you absolutely confident you picked the right man? Yes sir.

(T. 237).

The prosecutor argued “level of certainty” (T. 467, 470). The emphasis on “certainty” is always a powerfully promoted element of the State’s case. This is particularly true in a case without corroborating evidence. It is worthy to note here that at the Motion for New Trial, the State agreed there was no outside corroborating evidence, that, “this was simply two victims’ word against the defendant’s word.” (Motion for New Trial T. 29).

The court’s imprimatur of this element is no different than the evil found in Renner. It is an emphasis of an unsustainable concept by the court.

Take Renner’s logic and substitute the concept of flight with level of certainty:

Moreover, the charge inevitably carries with it the potential of being interpreted by the jury as an intimation of opinion by the court that there is evidence

of ~~flight certainty~~ and that the ~~circumstances of flight certainty~~ implies the guilt of the defendant.

Why should the court instruct the jury that the jury can consider a witness's *own opinion about his identification*? Is there a similar charge regarding expert testimony? Do we instruct a jury that if an expert says, "I'm sure of my findings, there can be no doubt" they may consider this as evidence?

Considering the remaining elements of the charge on eyewitness identification it is apparent that they tend to be about questions of fact:

- d. The possibility of mistaken identity;
- e. Whether the witness's identification may have been influenced by factors other than the view that the witness claimed to have;
- f. Whether the witness, on any prior occasion, did not identify the defendant in this case as the alleged perpetrator."

These remaining elements all go to testimony about facts, not opinion. However, it is interesting to note in Renner, the court supported its decision to discontinue the flight charge based on overemphasis, "since the trial court *does not give specific charges on other circumstances* from which guilt or innocence may be inferred."

How is the entire charge on eyewitness identification justified in light of this jurisprudence?

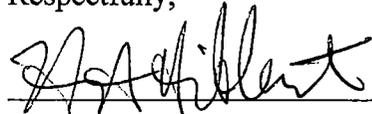
An adequate charge on Eyewitness Identification could be simplified as follows:

Identity is a question of fact for determination by you, the jury. It is dependent upon the credibility of the witness or the witnesses offered for this purpose. You have the right to consider any and all circumstances in assessing whether the identification made by the witness or witnesses is reliable.

CONCLUSION

Appellant prays that his conviction be reversed and a new trial granted on the basis that the "level of certainty" charge is not a viable ingredient of a witness's credibility.

Respectfully,

A handwritten signature in black ink, appearing to read "H.A. Hibbert", written over a horizontal line.

Henry A. Hibbert

Georgia Bar Number 350510

Counsel for Mr. Brodes

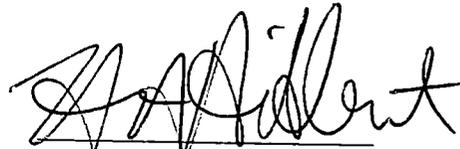
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the within and foregoing Brief of Appellant, prior to being offered for filing in accordance with Rule 5 of the Rules of the Georgia Court of Appeals, upon the following party by the U. S. mail with adequate postage affixed to the following address:

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This the 5TH Day of January, 2004,



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IN THE COURT OF APPEALS
STATE OF GEORGIA

J. BRODRE BRODES,

Appellant,

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ENUMERATION OF ERROR

It was error for the court to instruct the jury that they may consider the “level of certainty” shown by a witness in making an identification in determining whether the eyewitness identification was credible.

Respectfully,



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IN THE COURT OF APPEALS OF GEORGIA

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Appellant,)

vs.)

Case No. A04A0810

THE STATE OF GEORGIA,)

Appellee.)

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BRIEF OF APPELLEE

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IN THE COURT OF APPEALS OF GEORGIA

J. BRODRE BRODES,)
)
 Appellant,)
)
 vs.) Case No. A04A0810
)
 THE STATE OF GEORGIA,)
)
 Appellee.)
 _____)

BRIEF OF APPELLEE
STATE OF GEORGIA

STATEMENT OF THE CASE

Appellant was indicted by a Fulton County Grand Jury on December 6, 1996 on two counts of Armed Robbery. (R. 16-18). A jury trial commenced on June 28, 1999 before the Honorable William W. Daniel. On July 1, 1999, a jury returned a verdict of guilty on both counts. (R. 252). The trial court sentenced Appellant on each count to a split sentence of fifteen years to serve ten, balance probated. (R. 264). The sentences were run concurrently. (R. 264).

Appellant timely filed his Motion for New Trial on September 21, 1999 and amended it on December 20, 1999. (R. 268, 270). On or about February 21, 2000, the State was served with a second Amended Motion for New Trial adding a supplemental

enumeration of error.¹ On April 5, 2000, Appellant filed his third Amended Motion for New Trial redrafting his fifth enumeration of error. (R. 274). On April 19, 2000, the trial court denied Appellant's Motion for New Trial. (R. 276). Appellant filed his Notice of Appeal to this Court on April 25, 2000. (R. 277). After considering the briefs of both parties, this Court reversed Appellant's conviction finding that the trial court abused its discretion when it granted the State's motion *in limine* to prevent Appellant from presenting expert testimony on the issue of vagaries of eyewitness identification. (R. 3-14). The remittitur was returned on March 2, 2002. (R. 3).

Subsequently, on August 19, 2002, a second jury trial commenced before the Honorable Elizabeth A. Long. On August 23, 2002, the jury returned a verdict of guilty on both counts. (T-484). The trial court sentenced Appellant on each count to a split sentence of fifteen years to serve ten, balance probated. (R. 450). The sentences were run concurrently. (R. 450).

Appellant timely filed his Motion for New Trial on September 5, 2002. (R. 452). Appellant filed a Motion for Out-of-Time Appeal on October 10, 2002 which the trial court granted on October 15, 2002. (R. 454, 456).² On October 23, 2002, Appellant filed

¹The record does not indicate that the motion was ever filed.

²Appellant incorrectly concluded that a timely Motion for New Trial had not been filed on his behalf.

his second Motion for New Trial. (R. 458). Appellant filed his Amended Motion for New Trial on May 13, 2003. (R. 464).

On September 8, 2003, the trial court denied Appellant's Motion for New Trial. (R. 467). Appellant filed his Notice of Appeal to this Court on September 18, 2003. (R. 1).

STATEMENT OF FACTS

On October 14, 1996, Walter Randy Barton and Greg Wilson went to the Chick-Fil-A in Hapeville, Fulton County, Georgia following a softball game. (T-214, 262). After their meal, the two men left the restaurant and engaged in a conversation near their cars in the restaurant parking lot. (T-215-216, 238, 262, 276). Mr. Barton and Mr. Wilson observed Appellant approaching them from the back of the parking lot. (T-216, 263). Appellant brandished a gun and pointed it at Mr. Barton's mid-section. (T-216, 224, 277-278). Appellant cocked the gun and demanded Mr. Barton's money. (T-219, 222-224, 263, 265). Mr. Barton gave Appellant his wallet which contained some money. (T-224-225). After robbing Mr. Barton, Appellant told Mr. Wilson "yours too." (T-225, 265). Mr. Wilson reached in his pocket and gave Appellant his money. (T-225, 266). Appellant pointed the gun in Mr. Wilson's face as well. (T-359-360).

The two victims reported the crime immediately. (T-226, 269). Mr. Barton provided sufficient details about Appellant's appearance in order to sketch a composite

drawing. (T-229, 249). Two days after the armed robbery, Mr. Barton was shown a photographic line-up and he stated that although there was one photograph that "caught his eye," he would not make an identification until he was "100 percent sure." (T-228, 252-253). Mr. Barton told Lieutenant Melissa Jane Hughes that he thought he knew who the subject was in the photographic line-up, but he was not sure and that he would rather have a physical line-up. (T-228, 252-253). After viewing a physical line-up three days after the armed robbery, Mr. Barton selected Appellant as the perpetrator. (T-230).

Mr. Wilson also examined the photographic line-up on the second day after the armed robbery and immediately identified Appellant as the perpetrator. (T-269-270). On the third day after the armed robbery, Mr. Wilson selected Appellant from the physical line-up as the person who robbed him at gunpoint. (T-272). Appellant was subsequently charged with two counts of armed robbery.

Further facts will be developed below as necessary to address the issues raised on appeal.

ARGUMENT AND CITATION OF AUTHORITY

THE TRIAL COURT DID NOT ERR IN CHARGING THE JURY ON THE LAW OF IDENTIFICATION.

In his sole enumeration error, Appellant contends that the trial court erred when it instructed the jury as to eyewitness identification. After the jury has heard all the evidence, it is the trial judge's duty to instruct the jury on all the principles of law which apply to the case. Green v. State, 208 Ga. App. 1 (1993) and Pope v. State, 52 Ga. App. 411 (1936). With respect to the reliability of the identity of Appellant, the trial court judge charged the jury as follows:

[i]dentity is a question of fact for determination by . . . the jury. It is dependent upon the credibility of the witness or witnesses offered for this purpose, and [the jury has] the right to consider all the facts previously charged regarding credibility of witnesses. Some, but not all, of the factors [the jury] may consider in assessing reliability of identification are, the opportunity of the witness to view the alleged perpetrator at the time of the alleged incident, the witness' degree of attention towards the alleged perpetrator at the time of the alleged incident, the level of certainty shown by the witness about his identification, the possibility of mistaken identity, whether the witness' identification may have been influenced by factors other than the view that the witness claimed to have had, whether the witness on any prior occasion did not identify [Appellant] in this case as the alleged perpetrator. (T-480).

Although the instruction given to the jury on the issue of identity is a correct statement of law which has been approved by the Council of Superior Court Judges,³ Appellant contends that it was error to instruct the jury that they may consider the level of certainty shown by an eyewitness regarding their identification as one of the factors when determining the reliability and credibility of the eyewitness' identification. Because the evidence was relevant and admissible the jury can be instructed to consider the relevancy of that testimony since a jury may consider all relevant testimony. *See generally Crozier v. State*, 263 Ga. 866 (1994).

Identity is a question of fact to be determined by the jury and the jury must determine the credibility which should be given to a witness's testimony. *Perry v. State*, 158 Ga. App. 349 (1981) and *Sawyers v. State*, 211 Ga. App. 668 (1994). Factors which may be considered in determining whether there was a substantial likelihood of misidentification include: (1) the opportunity to view the defendant at the time of the offense; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated; and (5) the length of time between the crime and the identification. *Pack v. State*, 182 Ga. App. 618 (1987) and *Armstrong v. State*, 249 Ga. App. 772 (2001). In evaluating these factors, just as the trial court is the

³See Suggested Pattern Jury Instructions, Vol. II: Criminal Cases (2d ed. 1991), p. 39-40 and *generally Snider v. State*, 200 Ga. App. 12 (1991).

trier of fact in a motion to suppress the pre-trial identification, the jury is the trier of fact at trial, and must judge the credibility and believability of the witnesses and the weight of and conflict in the evidence. In the case at bar, the jury was instructed as follows regarding the credibility and believability of witnesses:

[it is] for you to determine what witness or witnesses you will believe and which witness or witnesses you will not believe, if there are some that you do not believe. In passing upon their credibility, you may consider all the facts and circumstances of the case, the witness' manner of testifying, their intelligence, their interest or lack of interest, their means and opportunity for knowing the facts which they testify about, the probability or improbability of their testimony and of the occurrences which they testify about. You may also consider their personal credibility insofar as it may legitimately appear from the trial of this case. (T- 476).

Appellant contends that the eyewitness' level of certainty is opinion testimony and the jury should not be able to consider a witness' own opinion about his identification. Pursuant to O.C.G.A. §24-9-65 opinion evidence is admissible in the trial of any case.⁴ Any evidence which logically tends to prove or disprove a material fact which is at issue in the case, and every act or circumstance serving to clarify a material issue or issues is relevant. Crozier, 263 Ga. at 867. This Court, in Mitchell v. State, 228 Ga. App. 74, 76 (1997), held that "the degree of certainty that a witness has in his own

⁴O.C.G.A. §24-9-65 states that where the question under examination, and to be decided by the jury, shall be one of opinion, any witness may swear to his opinion or belief, giving his reasons therefor.

testimony is highly relevant." Therefore, a witness may testify as to the certainty or lack of certainty of his identification. *See generally Semple v. State*, 271 Ga. 416 (1999). Furthermore, in *Jones v. State*, 273 Ga. 213 (2000), the Supreme Court of Georgia held that testimony regarding an eyewitness' confidence of their identification is not an impermissible opinion regarding an ultimate issue since the ultimate issue of the eyewitness' veracity is left to the jury.

In *Evans v. State*, 261 Ga. App. 22 (2003), the defendant claimed that the trial court erred in allowing the prosecutor to ask one of the victims about his identification of him as the perpetrator. The question posed to the victim was: "[i]s there any doubt in your mind that the person with the gun that night is that man sitting at the table?" *Id.* at 23. The victim responded: "[n]o doubt. I know for sure." *Id.* This Court held that where "certainty" of an eyewitness' identification is an issue, such issue may be explored on direct and cross-examination. *Id.* at 24. Such was done thoroughly in the case at bar. This Court further held in *Evans* that the "reliability" of that witness' identification may be made a

jury issue through skillful cross-examination regarding topics such as a witness' opportunity to view the accused at the time of the crime; a witness' degree of attention; the accuracy of the witness' prior description of the accused; a witness' level of certainty at the confrontation with the accused; and the length of time between the crime and the confrontation. *Id.*

Because the "certainty" and the "reliability" of the witnesses' identification were issues properly presented to the jury through evidence by their testimony and the testimony of Appellant's expert witness, the trial court was correct in instructing the jury to assess the reliability of the witnesses' identification based upon the opportunity of the witnesses to view Appellant; the degree of attention the witnesses displayed at the time of the viewing; the possibility of mistaken identity; the influence other sources might have had on the identifications; prior misidentifications by the witnesses; and the witnesses' level of certainty of their identification. Moreover, the jury was instructed that it was "not required to accept the opinion testimony of any witness, expert or otherwise." (T- 478). Therefore, the jury was properly instructed that it could disregard the eyewitnesses' opinion regarding their level of certainty in identifying Appellant.

Despite Appellant's argument to the contrary, juries are instructed that persons deemed as an expert in certain areas can give their opinions derived from their knowledge of that area, and the jury was instructed regarding the same in the case at bar. (T- 478). Appellant certainly wanted the jury to consider the expert witness' opinion concerning misidentification in an effort to impact the weight the jury gave to the eyewitnesses' testimony. A finding that the jury instruction on "level of certainty" is improper would command a finding that a jury can consider expert witness' opinion testimony that vagaries exist in cross-racial identification, but cannot consider the eyewitness' level of

certainty in his identification. This result would be illogical.

In Armstead v. State, 255 Ga. App. 385 (2002), the defendant alleged as error the trial court's instruction concerning identification. The defendant in Armstead challenged the same "level of certainty" charge that Appellant contends is erroneous. In Armstead, this Court held that the Supreme Court "having decided two prior cases in which this issue was raised, has not disapproved of this charge, and we decline to do so." Id. at 387. As this Court correctly notes in Armstead, the complained-of instruction states that the jury "may consider" the certainty of the identification. Id. at 388. It does not require that the jury consider "certainty" and "certainty" is only one of six factors which the jury may consider. Id. The jury, in the case at bar, was also instructed that "certainty" was a factor it "may consider" in assessing the reliability of the identification. (T- 480). The jury was further instructed that "the possibility of mistaken identity" was another factor it may consider in assessing the reliability of the identification. (T- 480). Finally, the jury was instructed that the State must prove that the witnesses sufficiently identified Appellant beyond a reasonable doubt as the perpetrator of the offenses and if it did not find that Appellant had been sufficiently identified beyond a reasonable doubt, then it must acquit Appellant. (T- 481). Therefore, the trial court properly instructed the jury as to the identification or misidentification of Appellant. The complained-of charge is an accurate statement of law, especially when the totality of the charges are examined. *See generally*

Roker v. State, 262 Ga. 220, 222 (1992)(*holding* that charge is to be read as a whole).

The trial court did not err in instructing the jury regarding the "level of certainty" of the eyewitness' identification.

CONCLUSION

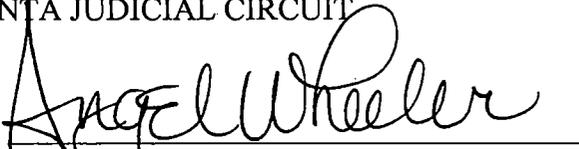
For the foregoing reasons, Appellee respectfully requests that this Honorable Court deny Appellant Brodes' appeal and affirm the decision of the trial court.

Respectfully submitted this 26 day of January, 2004.

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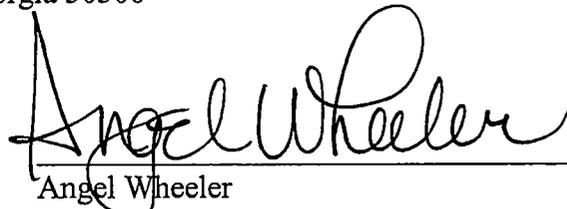
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Atlanta Judicial Circuit

Fulton County District Attorney's Office
Atlanta Judicial Circuit
Fulton County Courthouse
136 Pryor Street, S.W.
Atlanta, Georgia 30303
(404) 730-7895

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2004, I served a copy of the foregoing **Appellee's Brief** on the counsel for Appellant, by mailing a copy of the same, postage prepaid, to:

Mr. Henry A. Hibbert
1451 N. Decatur Road
Atlanta, Georgia 30306

A handwritten signature in black ink that reads "Angel Wheeler". The signature is written in a cursive style and is positioned above a horizontal line.

Angel Wheeler
Assistant District Attorney
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(404) 730-7895
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THIRD DIVISION
BLACKBURN, P. J.,
BARNES and MIKELL, JJ.

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, September 5, 2002)
<http://www.gaappeals.us/rules/>



August 5, 2004

In the Court of Appeals of Georgia

A04A0810. BRODES v. THE STATE.

BA-033C

BARNES, Judge.

A jury convicted J. Brodre Brodes of two counts of armed robbery, and the trial court sentenced him to 15 years on each count, to serve 10 years in prison and the remaining 5 years on probation. The only evidence connecting Brodes to the crime was his identification as the perpetrator by the two victims. Brodes appeals, contending that the trial court erred in giving the pattern jury charge on identification, specifically the portion that instructs the jury that it may consider the witness's level of certainty in assessing the reliability of the witnesses' identification of the defendant as man who robbed them. For the reasons that follow, we affirm.

This court reversed Brodes' conviction after the first trial, finding that the trial court erred in refusing to allow Brodes to call his expert witness Stephen Cole, who

held a Ph.D. in human experimental psychology and would have testified about the problems inherent in eyewitness identification. *Brodes v. State*, 250 Ga. App. 323, 324 (1) (551 SE2d 757) (2001). We held that:

[f]irst, the record shows that the testimony would have aided the jury in evaluating the reliability of the victims' identifications of Brodes. Cole would have testified about several factors affecting the accuracy of eyewitness identification that were otherwise not likely to be fully understood by jurors. Those factors are highly relevant in this case, which involves cross-racial identifications by victims who were at gunpoint and who professed confidence in their identifications. Second, the record shows no other effective means for Brodes to illustrate the potential weaknesses of the victims' identifications. Although defense counsel cross-examined the victims, the testimony of an expert witness was the only way to put before the jury the empirical evidence proffered by Cole. Moreover, we cannot say that the exclusion of Cole's testimony was harmless error. The only evidence against Brodes was the victims' identifications of him, and Brodes's only defense was mistaken identity. Thus, the reliability of the victims' identifications was the pivotal issue.

(Footnotes omitted.) *Id.* at 325.

Upon retrial, Brodes' expert testified that, among other things, his research shows that there is no correlation between the degree of an eyewitness's certainty about his identification of a subject and the accuracy of the degree of the eyewitness's identification. In other words, someone who is highly confident that they have identified a suspect is not more likely to identify the right person than someone who is not as confident.

Brodes objected to the trial court's standard pattern charge to the jury, and argues here that instructing the jury to consider the witness's level of certainty "inevitably carries with it the potential of being interpreted by the jury as an intimation of opinion by the court that there is evidence of certainty to be considered." The trial court charged the jury as follows:

Identity is a question of fact for determination by you, the jury. It is dependent upon the credibility of the witness or witnesses offered for this purpose, and you have the right to consider all of the facts previously charged regarding credibility of witnesses. Some, but not all[,] of the factors you may consider in assessing reliability of identification are the opportunity of the witness to view the alleged perpetrator at the time of the alleged incident, the witness' degree of attention towards the alleged perpetrator at the time of the alleged incident, *the level of certainty shown by the witness about his identification*, the possibility of mistaken identity, whether the witness' identification may have been influenced by factors other than the view that the witness claimed to have had, whether the witness on any prior occasion did not identify the defendant in this case as the alleged perpetrator. (Emphasis supplied.)

Brodes argues that, unlike the other factors the jury is instructed to consider, such as the witness's opportunity to see the perpetrator or degree of attention, a witness's level of certainty is not a factual observation, but an intimation of opinion. Brodes analogizes the evidentiary value of "level of certainty" to the evidentiary value of the former pattern charge that instructed the jury that it could consider

whether to draw an inference of guilt from the accused's flight. In abolishing that charge, the Georgia Supreme Court held that

the charge inevitably carries with it the potential of being interpreted by the jury as an intimation of opinion by the court that there is evidence of flight and that the circumstances of flight imply the guilt of the defendant; this is especially true since the trial court does not give specific charges on other circumstances from which guilt or innocence may be inferred.

Renner v. State, 260 Ga. 515, 518 (3) (b) (397 SE2d 683) (1990). Brodes argues that instructing the jury to consider the eyewitness's level of certainty in his identification of the accused is also "an undue emphasis of a specific circumstance from which guilt or innocence may be inferred."

The identification charge Brodes objects to is, as he noted, a pattern charge. Suggested Pattern Jury Instructions, Council of Superior Court Judges of Georgia, Vol. II, Criminal Cases (2d ed. 1991), p. 39. We have previously considered whether "the level of certainty" of an identification is a reliable consideration and rejected the argument that giving the pattern charge is error. *Armstead v. State*, 255 Ga. App. 385, 386-387 (2) (565 SE2d 579) (2002).

It is within the common knowledge of a juror that the certainty of a witness's identification does not necessarily reflect its accuracy, and the language of the instruction makes this clear. The current pattern jury instruction provides that the juror "may consider," not "must consider,"

the certainty of identification. Certainty is only one of the six factors in the pattern jury instruction. Another factor the juror may consider is the possibility of mistaken identity. The juror determines how much weight to give each of the factors. The charge also provides that identification is dependent on the credibility of the witness and that the testimony, facts, and circumstances of the case must identify the defendant beyond a reasonable doubt as the perpetrator.

Id. at 388. We noted in *Armstead* that the Georgia Supreme Court, “having decided two prior cases in which this issue was raised, has not disapproved of this charge, and we decline to do so.” Id. at 387. Accord, *Wright v. State*, 265 Ga. App. 855, 858 (1) (c) (595 SE2d 664) (2004); *Darnell v. State*, 257 Ga. App. 555, 558 (5) (571 SE2d 547) (2002).

Accordingly, the trial court did not err in giving the pattern charge on identification.

Judgment affirmed. Blackburn, P. J., and Mikell, J., concur.

**THIRD DIVISION
BLACKBURN, P. J.,
BARNES and MIKELL, JJ.**

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, September 5, 2002)
<http://www.gaappeals.us/rules/>

August 31, 2005

In the Court of Appeals of Georgia

A04A0810. BRODES v. THE STATE.

BARNES, Judge.

Our opinion in this case affirming J. Brodre Brodes' conviction (268 Ga. App. 895 (602 SE2d 895) (2004) has been reversed by the Supreme Court in *Brodes v. State*, 279 Ga. 435 (614 SE2d 766) (2005). Our earlier opinion and judgment are accordingly vacated, the decision of the Supreme Court is adopted as our decision, the judgment of the trial court is reversed, and the case is remanded to the trial court for a new trial.

Judgment reversed with direction. Blackburn, P. J., and Mikell, J., concur.

REMITTITUR

Court of Appeals of the State of Georgia

ATLANTA, AUGUST 31, 2005

The Court of Appeals having met, the following judgment was rendered:

**COURT OF APPEALS CASE NO. A04A0810
J. BODRE BRODES V. THE STATE**

This case came before this court on appeal from the SUPERIOR Court of Fulton County; it is considered and adjudged that

**THE JUDGMENT OF THE COURT BELOW BE REVERSED WITH DIRECTION.
BLACKBURN, P.J., BARNES AND MIKELL, JJ., CONCUR.**

LC NUMBERS: Z84658

Court of Appeals of the State of Georgia

*Clerk's Office, Atlanta, **SEP 15, 2005***

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.



*Court of Appeals Cost \$80.00. O.C.G.A. Sec. 5-6-10.
No costs are payable to the Court of Appeals.*

CLERK'S OFFICE
SUPREME COURT of GEORGIA

244 Washington Street, Room 572

Atlanta, Georgia 30334

Business Hours: Monday - Friday, 8:30 a.m. to 4:30 p.m.

Sherie M. Welch, Clerk

(404) 656-3470

Docketing Date: August 24, 2004

To the Clerk of the Court of Appeals of Georgia:

You are hereby notified that there has been filed in this office on this day a petition to the Supreme Court for a writ of certiorari to the Court of Appeals in the case of **S04C2101**

j.

J. BRODRE BRODES v. THE STATE

Clerk, Supreme Court of Georgia

Case No. A04A0810

Court of Appeals of Georgia

Notice of Petition for Certiorari

filed in office

Clerk, Court of Appeals of Georgia

SUPREME COURT OF GEORGIA

ATLANTA

NOV 22 2004

The Honorable Supreme Court met pursuant to adjournment.
The following order was passed:

Case No. S04G2101

J. BRODRE BRODES v. THE STATE

Upon consideration of the petition for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the certiorari be granted and that this order operate as the writ. The case will be automatically assigned to the calendar for March 2005 for hearing upon the record now of file.

C/A Case No. A04A0810

All the Justices concur, except Hines, J., who dissents.

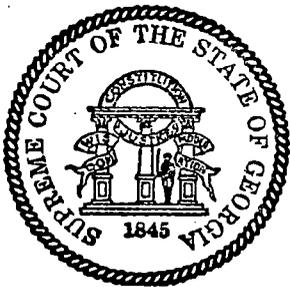
SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Chief Deputy Clerk.



A handwritten signature in cursive script, reading "Lynn M. Stinchcomb".



SUPREME COURT OF GEORGIA
Clerk's Office

Atlanta, NOV 22 2004

TO ALL COUNSEL:

Case No. S04C2101 J. BRODRE BRODES v. THE STATE

The Supreme Court today granted the writ of certiorari in this case. All the Justices concur, except Hines, J., who dissents.

This case will be assigned to the **March, 2005**, oral argument calendar automatically under Supreme Court Rule 50 (2), as amended September 13, 1996.

This Court is particularly concerned with the following issue or issues:

Whether a trial court errs in using the "level of certainty" charge in instructing the jury on assessing the reliability of an eyewitness identification.

Briefs should be submitted only on these points. See Supreme Court Rule 45.

Sincerely,



Jan Eidson

COURT OF APPEALS OF GEORGIA

334 STATE JUDICIAL BUILDING
ATLANTA, GEORGIA 30334
(404) 656-3450

APPEAL SUMMARY PAGE

CLASSIFICATION: Armed Robbery

CASE NUMBER: A04A0810 DATE OF DOCKETING: DECEMBER 17, 2003

STYLE: J. BODRE BRODES V. THE STATE

RELATED CASES:

A01A1575 RE
A01A0575 RE

LOWER COURT SUMMARY INFORMATION:

FULTON County SUPERIOR COURT

TRIAL JUDGE: HONORABLE ELIZABETH LONG

DATE OF JUDGMENT: 09-08-2003 NOTICE OF APPEAL DATE: 09-18-2003

Z84658

RECORDS DESCRIPTION:

PARTS:

121703	LOWERCOURT RECORDS.	01
121703	TRANSCRIPTS.	04

COURT OF APPEALS CODE: 93-033 C
TERM: Apr. Cal. Mo.: APR/04

DIVISION 3 PANEL CIR PATH: 98, 93, 92.
DIVISION 3 PANEL CIR PATH: 98, 93, 92, 97, 99, 94, 95.

COURT OF APPEALS OF GEORGIA

334 STATE JUDICIAL BUILDING
ATLANTA, GEORGIA 30334
(404) 656-3450

APPEAL SUMMARY PAGE

CASE NUMBER: A04A0810 DATE OF DOCKETING: DECEMBER 17, 2003

STYLE: J. BODRE BRODES V. THE STATE

FULTON County SUPERIOR COURT
TRIAL JUDGE:

ATTORNEY REGISTER:

ATTORNEYS FOR APPELLANT:

Mr. Henry Allen Hibbert
CROMWELL & HIBBERT
1451 N. DECATUR ROAD
ATLANTA GA 303060000

ATTORNEYS FOR APPELLEE:

Mr. Paul L. Howard
DISTRICT ATTORNEY
136 PRYOR STREET, S.W.
3RD FLOOR
ATLANTA GA 303030000

COURT OF APPEALS OF GEORGIA

334 STATE JUDICIAL BUILDING
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NOTICE OF DOCKETING

Mr. Henry Allen Hibbert
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1451 N. DECATUR ROAD
ATLANTA GA 303060000

APPEAL CASE NUMBER: A04A0810 DATE OF DOCKETING: DECEMBER 17, 2003

STYLE: J. BODRE BRODES V. THE STATE

IMPORTANT RULE REQUIREMENTS AND INFORMATION

Appellant's brief which shall include as Part II an Enumerations of Errors shall be filed within 20 days of docketing. No appellant's brief shall be received for filing without the \$80.00 filing fee or sufficient paupers's affidavit (OCGA Section 5-6-4).

Appellee's brief shall be filed within 40 days after the docketing date or 20 days after the filing of the brief of the appellaent, whichever is LATER.

Failure to timely file briefs or responsive briefs or to follow any of the Court's rules or orders may cause the appeal to be dismissed or may cause non-consideration of the Appellee's brief, and may subject the offender to contempt.

The contents of a properly addressed registered or certified mailing shall be deemed filed on the U. S. Postal Service hand stamped postmark date if it is stamped on the envelope or container. Motions for reconsideration are deemed filed on the date actually received in the clerk's Office.

If oral argument is requested and approved by this Court in accordance with Rule 28, as revised effective Sept. 1, 1995, this case will be scheduled for oral argument on APR 06, , 2004 before the THIRD Division: BLACKBURN, PJ, BARNES, J, MIKELL, J
A printed calendar showing the exact date of argument will be mailed to counsel of record. If you do not receive a calendar at least ten days prior to the tentative oral argument date, please contact the Clerk's Office.

There shall be no communications relating to pending appeals to any judge or member of the judge's staff.

IF YOU HAVE A QUESTION OR PROBLEM, PLEASE CALL THIS OFFICE.

WILLIAM L. MARTIN, III, CLERK

COURT OF APPEALS OF GEORGIA

334 STATE JUDICIAL BUILDING
ATLANTA, GEORGIA 30334
(404) 656-3450

Business Hours: Monday - Friday, 8:30 a.m. to 4:30 p.m.

NOTICE OF DOCKETING

Mr. Paul L. Howard
DISTRICT ATTORNEY
136 PRYOR STREET, S.W.
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