NO. COA22-719 TWENTY-EIGHTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

)

v. ) From Buncombe County

) 17 CRS 87031

DAVON SMITH )

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DEFENDANT-APPELLANT’S BRIEF

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# ISSUES PRESENTED

1. Did the trial court err by failing to instruct the jury on second-degree murder where, in the light most favorable to Davon, the jury could find that he did not premeditate and deliberate before shooting Mr. Shields?
2. Did the trial court err by failing to give Davon’s proposed instruction on intent, premeditation, and deliberation for adolescents where the instruction was a correct statement of the law regarding adolescent brain science and was necessary for the jury to properly weigh the evidence?
3. Did the trial court err or commit plain error by admitting a video of Mellasia Skyes’s interview and her identification of Davon as the shooter because the video and the identification constituted inadmissible hearsay and violated Evidence Rule 403?
4. Did the trial court err or commit plain error by admitting evidence that Samantha Pulliam identified Davon as the shooter because the procedures investigators used to obtain the identification were impermissibly suggestive?
5. Did the trial court commit plain error by permitting officers to testify that Ms. Pulliam and Ms. Skyes were forthcoming and unequivocal when they identified Davon because the detectives were in no better position than the jury to make this conclusion and their testimony invaded the province of the jury to make credibility determinations?
6. Does the cumulative prejudice from the trial court’s errors require a new trial?

**STATEMENT OF THE CASE**

On 4 December 2017, Davon Smith was indicted for first-degree murder and possession of a handgun by a minor. (R.pp. 9-10) At the time of the offense, Davon was 16. (R.pp. 5-8, 83) The State tried the case during the 7 June 2021 Criminal Session of Buncombe County Superior Court. At the conclusion of the trial, the State dismissed the possession of a handgun by a minor charge. (R.p. 77) The jury then found Davon guilty of first-degree murder. (R.p. 78) The trial court sentenced Davon to life in prison with the possibility of parole. (R.pp. 81-89, 92-93) Davon appealed. (R.p. 94)

**STATEMENT OF THE FACTS**

Around noon on 25 June 2017, the Asheville Police Department received 911 calls regarding shots fired at Pisgah View Apartments. Officers arrived and found a Black male lying behind one of the apartment buildings. He was surrounded by a large crowd of people and was lying in a puddle of blood. He was not breathing. (4T.pp. 430-31) Firefighters arrived and determined that the man was Rondy Shields. (4T.p. 456) Paramedics took Mr. Shields to a hospital where he later died. (4T.p. 454) An autopsy determined that Mr. Shields died from a gunshot wound to the back. (6T.p. 740)

Investigators obtained surveillance videos from Pisgah View Apartments. (4T.p. 475) One of the videos showed a gold car outside of the apartments. A few women were in the gold car. In the video, Mr. Shields walked out of the apartments. At the same time, another car pulled up and stopped next to the gold car. A person in a hoodie got out of the second car, walked toward Mr. Shields, and shot him. (4T.pp. 472-73)

Later that day, Samantha Pulliam went to the Asheville Police Department to discuss the shooting because officers “told [her] that [she] was on camera and that [she] had no choice.” (4T.p. 485) Ms. Pulliam was accompanied by her boyfriend. During the first part of the interview, officers asked her boyfriend to wait outside of the interview room. One of the officers then told Ms. Pulliam that it looked like she and her friends had called Mr. Shields “to try to set him up.” (Ex.p. 22)[[1]](#footnote-2) During a break in the interview, Ms. Pulliam told her boyfriend that an officer had accused her of helping plan Mr. Shield’s murder. (Ex.pp. 24, 34)

After the break, an officer allowed Ms. Pulliam’s boyfriend to stay in the room while an officer showed Ms. Pulliam a photo array. When the officer showed Ms. Pulliam the second photo, she paused and looked at her boyfriend. (State’s Exhibit #2 from suppress hearing, 1:08:23) After, she said, “That’s him,” and that her confidence level was “[a] hundred.” (Ex.p. 52) The second photo was a picture of Davon. (Ex.p. 124, 4T.pp. 491-92) During a break a few moments later, she told her boyfriend, “I don’t want them thinking I set nobody up because I ain’t set no mother fucking body up.” (Ex.p. 55)

At trial, Ms. Pulliam identified the gold car in the surveillance video as hers. (4T.p. 489) She told investigators that she had been at Pisgah View Apartments earlier that day to pick up her granddaughter. According to Ms. Pulliam, a silver car pulled up next to hers and someone got out and “clicked a gun.” Ms. Pulliam said she “grabbed his arm” and tried to stop the shooter. However, the person shot Mr. Shields, got back in the car, and left. (4T.p. 490)

When asked about the shooting at trial, Ms. Pulliam said she “didn’t see anybody get out of any car” and only got a “glimpse” of the shooter’s face. (4T.p. 481) Although she identified the shooter by the nickname “Bop,” she said she “didn’t know him.” (4T.p. 481) She stated, “That’s what I’ve heard them call him. I don’t know for certain.” (4T.p. 486) The prosecutor also asked Ms. Pulliam if she saw Bop shoot Mr. Shields, but Ms. Pulliam said, “I heard a gunshot, but I don’t know where it went.” (4T.p. 484) When the prosecutor asked where the shooter went after the shooting, Ms. Pulliam said, “I don’t know” and that “[t]he person ran off.” (4T.p. 485) She identified Davon at trial. She also testified that she “[w]asn’t a hundred percent,” but chose Davon’s picture because it “looked the closest.” (4T.pp. 491-92)

Two days later, Ms. Pulliam returned to the police department with Mellasia Skyes. Ms. Skyes was the mother of Ms. Pulliam’s granddaughter and was with Ms. Pulliam at Pisgah View Apartments on the day of the shooting. (4T.p. 478) When the prosecutor asked Ms. Skyes at trial what happened on the day of the shooting, she said, “I don’t remember what happened that day.” (4T.p. 521) When the prosecutor asked if she remembered the shooting, she responded, “I don’t. That was four years ago, five years ago. I don’t remember none of this. I don’t remember nothing from that day at all.” (4T.p. 529) When asked if she remembered giving an interview to detectives two days after the shooting, Ms. Skyes said, “No.” (4T.p. 524) Ms. Skyes remembered picking out a picture of Davon, but she did not recall signing a form stating that Davon was the shooter. (4T.p. 526) She simply believed the officers wanted to know if she knew who Davon was. (4T.p. 527) She also did not remember expressing any level of confidence when she chose the picture of Davon. (4T.p. 527)

The prosecutor continued to ask Ms. Skyes about her interview with investigators. Ms. Skyes repeatedly testified that she did not remember what happened during the interview. For example, when asked if she identified the shooter during the interview, Ms. Skyes said, “No, sir” and “I don’t think I did that ever.” (4T.p. 531) The prosecutor also showed Ms. Skyes a transcript of the interview and asked if it refreshed her recollection. Ms. Skyes responded, “It doesn’t. That’s what I’m talking about. It doesn’t.” (4T.p. 530) A few moments later, the prosecutor pressed Ms. Skyes again to read the transcript and see if it refreshed her recollection and was accurate. Ms. Skyes responded, “It’s not.” (4T.p. 534)

In light of Ms. Skyes’s testimony, the prosecutor asked the court to admit a video of her interview through the recorded recollection exception to the Hearsay Rule. (4T.p. 539) The defense attorney objected and, after arguments, the court ruled that the interview qualified as a recorded recollection. (5T.pp. 566-571) The court then overruled the defense attorney’s objection and allowed the prosecutor to play the interview for the jury. (5T.pp. 621, 625)

During the interview, Ms. Skyes said she heard gunshots and tried to grab the gun and pull it away. However, she was not able to stop the shooting. After, she ran over to Mr. Shields and yelled for help. (Ex.pp. 83-84) When investigators asked Ms. Skyes to identify the shooter, she repeatedly said she couldn’t identify the person. For example, she said, “I seen his face, but, like, I don’t know who he is. I never seen him before.” (Ex.p. 87)

Investigators pressed Ms. Skyes for several minutes to identify the shooter, asserting that she would want a witness to speak up if her child were killed. (Ex.pp. 101-02) A few moments later, Ms. Skyes said she was stuck because Mr. Shields and Davon were both cousins of hers. (Ex.pp. 106-07) She also said that Davon was the shooter. She explained that earlier on the day of the shooting, Davon had smoked a blunt. At some point, he learned that Mr. Shields, who was 20 years old, had sex with Davon’s younger sister, who was 14 years old. (Ex.p. 96) Ms. Skyes said that Davon became angry, but she calmed him down and convinced him not to shoot Mr. Shields. According to Ms. Skyes, Davon “kept saying he wasn’t going to do it. He said, ‘I’m not going to do it. I’m just going to fight him.’” (Ex.p. 110)

Ms. Skyes further explained that after she calmed Davon down, Davon left with another person, Mahogany Fair, and that Fair encouraged Davon to shoot Mr. Shields. (Ex.p. 110) Ms. Skyes heard Fair say to Davon, “What you waiting for? Go ahead! Y’all know he was guilty. What is you waiting for, Bop? He right there. What is you waiting for?” (Ex.p. 111) A detective then asked Ms. Skyes when she heard Fair talking to Davon. Ms. Skyes responded, “When he got out the car.” (Ex.p. 111) Ms. Skyes explained that after Davon got out of the car, he walked up and shot Mr. Shields. (Ex.pp. 108-09) According to Ms. Skyes, Fair was encouraging Davon to shoot Mr. Shields while he was shooting. (Ex.p. 108) At the end of the interview, Ms. Skyes picked Davon’s picture out of a photo lineup and said her level of confidence was 10 on a scale of 1 to 10. (Ex.pp. 116-17)

In the months after the shooting, investigators could not find Davon. He was arrested on 8 November 2017 at a motel in Asheville. (5T.pp. 655-56)

Davon was 16 on the offense date. (R.pp. 5-8, 83) At sentencing, evidence showed that Davon’s mother was 16 when Davon was conceived. (Ex.p. 204) Davon’s family gave him the nickname “Bop” because “his head would bobble and he would fall over” when he was a baby (8T.p. 1004) Records indicated that Davon went without food at times when he was in elementary school. (Ex.p. 206) There were also several unsubstantiated DSS complaints filed against Davon’s mother. (Ex.pp. 206-07) As explained in a social history admitted during sentencing, DSS visited Davon’s family virtually every year of his life until he was 14. (Ex.p. 207) Davon’s family also faced unstable housing. They moved multiple times a year and, at other points, were homeless. (Ex.p. 208)

Davon’s father had a lengthy criminal record and went to prison in 2012 as an habitual felon. (Ex.p. 208) According to the social history, Davon “took on the role of the ‘man’ of the house.” (Ex.p. 213) “He often had to get home to ‘take care of’ his siblings, and it was Davon who got them to school some days.” (Ex.p. 213)

In 2012, Davon earned a scholarship to attend the French Broad River Academy. Between 2012 and 2014, he was the only Black student enrolled at the school. Davon did well in sixth grade. He also played soccer in a youth league. According to one of his coaches, the team “all loved” Davon, who was a “dominant force” on the field. (8T.p. 1023) Other coaches believed Davon was talented enough to play soccer professionally. (Ex.p. 212) In seventh grade, however, Davon began to struggle. That year, his family lost their housing and, according to a family friend, “they spent months sleeping out of the car or going from hotel rooms.” (8T.p. 1006) In May 2014, Davon was expelled from the French Broad River Academy for plagiarism. Peggy Will, the mother of one of Davon’s friends, testified at sentencing that other parents were “angry” and pleaded with the school to let Davon stay. (8T.p. 1007) However, the school would not budge and Davon completed eighth-grade at Asheville Middle School. (Ex.p. 211)

Davon entered Asheville High School in ninth grade, but he rarely attended. After his expulsion from the French Broad River Academy, he quit sports and lost contact with the coaches and adults who had supported him. (Ex.p. 212) In 2015, he entered an admission in juvenile court for theft of a vehicle and successfully completed probation. (Ex.p. 212) On 28 March 2017 – three months before the shooting – he withdrew from high school. (Ex.p. 212) Ms. Will testified that by the time of the shooting, Davon was “so young and surrounded . . . by people egging him on.” (8T.p. 1009) She further testified,

If I had an angry 16-year-old and he was surrounded by people telling him to do it and somebody gave him a gun, I would say that having grown up in that where life is just so fleeting, every one of our children would have done the same thing. I have no – under the right circumstances, I believe most of us can pull that trigger.

(8T.pp. 1009-10)

**ARGUMENT**

1. **The trial court erred by failing to instruct the jury on second-degree murder because, in the light most favorable to Davon, the jury could find that he did not premeditate and deliberate before shooting Mr. Shields.**

The evidence in this case supported an instruction on second-degree murder. The evidence showed that Davon – a 16-year-old boy – learned that the 20-year-old victim had had sex with his 14-year-old sister. The evidence also showed that Davon smoked marijuana on the day of the shooting. In addition, Ms. Skyes made clear that Davon only wanted to fight Mr. Shields, but that Mahogany Fair kept telling him to kill Mr. Shields instead. Under these circumstances, a jury could rationally find that Davon did not act under a “cool state of blood” or with premeditation and deliberation. In the light most favorable to Davon, a jury could rationally find that he only acted with malice, reacting impulsively to the repeated provocation from Fair to shoot Mr. Shields. This case should be remanded for a new trial.

* 1. **Standard of review.**

Arguments challenging jury instructions are reviewed *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466 (2009).

* 1. **This issue is preserved for review.**

During the charge conference, the defense attorney asked for an instruction on second-degree murder. (6T.p. 873) The trial court denied the request. (7T.pp. 892) The defense attorney objected, asserting that “there’s evidence to support a second-degree instruction.” The trial court overruled the objection. (7T.p. 897) Therefore, this issue is preserved. N.C. R. App. P. 10(a)(2); *State v. Collins*, 334 N.C. 54, 61 (1993).

* 1. **The evidence showed that Davon only wanted to fight Mr. Shields but shot him after being provoked by a peer.**

The trial court has a duty to instruct the jury on any lesser-included offenses that are supported by the evidence. *State v. Whitaker*, 316 N.C. 515, 520 (1986). When a defendant argues on appeal that the trial court failed to instruct on a lesser included offense, the issue must be decided by viewing the evidence in the light most favorable to the defendant. *State v. Barlowe*, 337 N.C. 371, 378 (1994).

A court must submit any lesser included offense to the jury unless the evidence points “inexorably and unerringly” to the defendant’s guilt on the greater offense. *Whitaker*, 316 N.C. at 522 (citation omitted). “[T]he test for determining whether the jury must be instructed on second-degree murder is whether there is *any* evidence in the record which would support a verdict of second-degree murder.” *State v. Conaway*, 339 N.C. 487, 514 (1995) (emphasis added). “Where there is conflicting evidence as to an essential element of the crime charged, the court should instruct the jury with regard to any lesser included offense *supported by any version of the evidence*.” *State v. Jones*, 304 N.C. 323, 331 (1981) (emphasis in original). If “more than one inference” may be drawn from the evidence, it is error for the trial court not to instruct on a lesser offense. *State v. Gause*, 227 N.C. 26, 30 (1946). Ultimately, an instruction on a lesser offense is warranted where there is “some doubt or conflict” regarding the elements of the greater offense. *State v. Wright*, 304 N.C. 349, 353 (1981).

In the light most favorable to Davon, the evidence did not show that he acted with premeditation and deliberation. Premeditation means that defendant formed the intent to kill for some period of time, however short, before the actual killing. *State v. Corn*, 303 N.C. 293, 297 (1981). “Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by legal provocation or lawful or just cause.” *State v. Thomas*, 350 N.C. 315, 347 (1999). As our Supreme Court has explained, “[t]he deliberation part of the crime requires a thought like, ‘Wait, what about the consequences? Well, I’ll do it anyway.’” *State v. Buchanan*, 287 N.C. 408, 418 (1975) (citation omitted), *overruled on other grounds* *in State v. Leach*, 340 N.C. 236, 242 (1995).

In *State v. Poole*, 298 N.C. 254 (1979), the defendant was convicted of first-degree murder and appealed. The evidence showed that the victim and a friend went to a bar after a softball game. While at the bar, the defendant swung at the victim’s friend because the victim’s friend spoke to the defendant’s girlfriend. The defendant apologized. Later, the defendant followed the victim and his friend as they left the bar. He apologized again but said that the victim “had gone for bad.” *Id*. at 255. The defendant then exchanged words with the victim, ran to his truck, and pulled out a rifle. The defendant’s girlfriend ran up to the defendant and yelled at him not to shoot, but he shot the victim. *Id*. at 255-56.

Our Supreme Court granted a new trial because the trial court declined to instruct the jury on second-degree murder. According to the Court, an instruction on second-degree murder was warranted because “a jury could infer that the defendant did not think before acting and did not act cooly [sic] and calmly with premeditation and deliberation.” *Id*. at 257.

As in *Poole*, a jury in this case could infer that Davon did not think before shooting Mr. Shields and that he did not act “cooly and calmly” with premeditation and deliberation. As an initial matter, Davon was a 16-year-old boy when the shooting happened. The law has long recognized that a child “cannot be compared with an adult in full possession of his senses . . . .” *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962). Unlike adults, children “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.” *J.D.B. v. North Carolina*, 564 U.S. 261, 262 (2011). Further, courts now recognize that adolescence is marked by a “lack of maturity and an underdeveloped sense of responsibility . . . .” *Roper v. Simmons*, 543 U.S. 551, 569 (2005). More than thirty years ago, the United States Supreme Court already understood that the “likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.” *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988).

In addition, Ms. Skyes stated that Davon had recently learned that Mr. Shields had had sex with his sister. At the time, Mr. Shields was 20-years-old and Davon’s sister was 14-years-old.[[2]](#footnote-3) (Ex.pp. 90, 96) Davon had also smoked marijuana earlier on the day of the shooting. (Ex.p. 112) Additionally, Ms. Skyes stated that while Davon was angry at Mr. Shields for having sex with his younger sister, he did not want to shoot him. She said she had “talked [Davon] out of it and . . . had calmed him down earlier that day and told him if [Mr. Shields] just get [inaudible], like, fight him. Don’t shoot.” (Ex.p. 110) Davon agreed. According to Ms. Skyes, Davon said, “I’m not going to do it. I’m just going to fight him.” (Ex.p. 110)

However, Ms. Skyes went on to explain that Davon left with Mahogany Fair and that Fair

kept saying, ‘Come on, Bop. I know where he at. He at the top. Let’s go to the top.’ And, she was, like, ‘Come on, Bop. We at the bottom.’ And, she was like, ‘Bop, you can’t let this slide. That’s your little sister. She’s 14.’ And, she kept leaning in Bop’s ear. Kept telling him to do it. Like, he said and kept saying he wasn’t going to do it. He said, ‘I’m not going to do it. I’m just going to fight him.’ But the girl kept telling him to do it.

(Ex.p. 110) Fair encouraged Davon to shoot Mr. Shields as he got out of the car and even as he was shooting at Mr. Shields. (Ex.pp. 108, 111) Ms. Skyes further explained, “I just kept hearing her say, ‘What you waiting for? Go ahead! Y’all know he was guilty. What is you waiting for, Bop? He right there. What is you waiting for?’ And, she just kept screaming, like, ‘Go ahead. What is you waiting for?’” (Ex.p. 111)

When an appellate court reviews the trial court’s refusal to instruct on a lesser-included offense, the question is not whether the evidence was sufficient to support the conviction of the greater offense. Instead, the question is whether the evidence “would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater.” *Beck v. Alabama*, 447 U.S. 625, 635 (1980). In the light most favorable to the defense, the evidence showed that Davon, a 16-year-old, shot Mr. Shields after smoking marijuana; after learning that Mr. Shields, a 20-year-old, had sex with his 14-year-old sister; and after being hectored and bullied by Mahogany Fair. Therefore, a jury could infer that Davon did not act “coolly and calmy” or with premeditation and deliberation when he shot Mr. Shields, and rationally find him guilty of second-degree murder. *See State v. Beck*, 163 N.C. App. 469, 474 (2004) (“defendant’s consumption of alcohol and testimony that he was ‘mad’ could allow a jury to conclude that defendant was not acting in a ‘cool state of blood’ and did not form the intent to kill over some period of time.”), *rev’d in part on other grounds*, 359 N.C. 611 (2005).

* 1. **A new trial is required.**

To demonstrate prejudice, the defendant must normally show that there is a reasonable possibility that a different result would have been reached without the error. N.C. Gen. Stat. § 15A-1443(a). However, our Supreme Court has made clear that “[i]t is reversible error for the trial court not to submit to the jury such lesser included offenses to the crime charged as are supported by the evidence.” *State v. Lytton*, 319 N.C. 422, 426-27 (1987). Therefore, once it has been shown that the evidence supported the lesser offense, prejudice has been demonstrated.

Additionally, a trial court’s failure to submit a lesser-included offense to the jury is not cured by a guilty verdict on the greater offense because “it cannot be known whether the jury would have convicted of a lesser degree if the permissible degrees arising on the evidence had been correctly submitted to the jury.” *Poole*, 298 N.C. at 257. As it cannot be known whether the jury would have returned a guilty verdict for second-degree murder if the court had submitted the offense to the jury, Davon’s first-degree murder conviction must be remanded for a new trial.

If prejudice must be shown, a new trial is still required. In *State v. Clark*, 201 N.C. App. 319, 327 (2009), this Court discussed multiple prior decisions granting new trials for the failure of the trial court to instruct on lesser offenses. The cases discussed in *Clark* were all reviewed for plain error. In this case, by contrast, the error is preserved. Thus, if the failure to instruct on a lesser offense warrants relief under plain error review, there is a greater likelihood of relief where – as here – the case is subject to prejudicial error review.

Here, Davon was prejudiced because there was a reasonable possibility that at least one juror would not have voted to convict Davon of first-degree murder if the court had instructed on second-degree murder. *See, e.g., State v. Lynch*, 271 N.C. App. 532, 544 (2020) (granting a new trial under prejudicial error review because it was “reasonably possible that at least one juror would have had reasonable doubt of Defendant’s guilt” in light of the trial court’s error). When the trial court refuses to instruct on a lesser offense that is supported by the evidence, the jury is “likely to resolve its doubts in favor of conviction.” *Keeble v. United States*, 412 U.S. 205, 212-13 (1973). *See also* *State v. Thomas*, 325 N.C. 583, 599 (1989) (holding that it was “important” for the trial court to instruct on the lesser offense of involuntary manslaughter so the jury would “not be forced to choose between guilty as charged or not guilty”). So too here. There was no third option in this case; it was all or nothing. There is a reasonable possibility that one or more jurors would not have voted for first-degree murder had the court instructed on second-degree murder. This case must therefore be remanded for a new trial.

1. **The trial court erred by failing to give Davon’s proposed instruction on intent, premeditation, and deliberation for adolescents because the instruction was a correct statement of the law regarding adolescents and was necessary for the jury to properly weigh the evidence.**

The trial court also improperly denied the defense attorney’s request for a special instruction on the intent, premeditation, and deliberation elements of first-degree murder. The instruction explained that the law recognizes differences in the way adolescents and adults think. Although the instruction was novel, it was nevertheless proper. Because the State alleged that Davon acted with premeditation and deliberation when he shot Mr. Shields, the outcome of the trial rested in large measure on Davon’s mental state at the time of the shooting. However, Davon was only 16 years old on the offense date. Further, the law recognizes that adolescents do not think the same way as adults. Had the court instructed the jury to consider the way adolescents are different than adults when weighing all of the circumstances surrounding intent, premeditation, and deliberation in this case, the jury may well have concluded that Davon was not guilty of first-degree murder. Consequently, this case should be remanded for a new trial.

* 1. **Standard of review.**

Arguments challenging jury instructions are reviewed *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466 (2009).

* 1. **This issue is preserved for review.**

During the charge conference, the defense attorney asked the court to give an instruction on intent, premeditation, and deliberation for adolescents. (6T.p. 874) He also presented a written instruction, which stated in part:

In this case, you may examine the defendant’s actions and words, and all of the circumstances surrounding the offense, to determine what the defendant’s state of mind was at the time of the offense. However, the law recognizes that juveniles are not the same as adults. An adult is presumed to be in full possession of his senses and knowledgeable of the consequences of his actions. By contrast, the brains of adolescents are not fully developed in the areas that control impulses, foresee consequences, and temper emotions. Additionally, adolescents often lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.

You should consider all the circumstances in this case, any reasonable inferences you draw from the evidence, and differences between the way that adult and adolescent brains function in determining whether the State has proved beyond a reasonable doubt that the defendant intentionally killed the victim after premeditation and deliberation.

(R.pp. 42-43)

The trial court declined to give the instruction. (6T.pp. 877, 880) The defense attorney objected, but the court overruled the objection. (7T.pp. 892, 897) The defense attorney therefore preserved this issue. N.C. R. App. P. 10(a)(2); *State v. Smith*, 311 N.C. 287, 290 (1984).

* 1. **The proposed instruction reflected well-established legal rulings regarding adolescent brain development.**

“If a request is made for a jury instruction which is correct in itself and supported by evidence, the trial court must give the instruction at least in substance.” *State v. Harvell*, 334 N.C. 356, 364 (1993). “The proffered instruction must . . . contain a correct legal request and be pertinent to the evidence and the issues of the case.” *State v. Scales*, 28 N.C. App. 509, 513 (1976).

In this case, the defense attorney asked for an instruction explaining that the jury should take into account Davon’s status as a teenager when weighing the *mens rea* component of first-degree murder. This was a valid request. First, a long-standing principle of American jurisprudence is that a crime generally requires both an unlawful act (the *actus reus*) and a culpable mental state (the *mens rea*). As our Supreme Court has explained, the common law traditionally mandated both an “evil deed and . . . a guilty mind.” *State v. Mercer*, 275 N.C. 108, 116 (1969) (citation omitted). In other words, “wrongdoing must be conscious to be criminal.” *Morissette v. United States*, 342 U.S. 246, 252 (1952).

Further, the *mens rea* element “serves the critical purpose in criminal law of differentiating behavior by degrees of culpability.” Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. Rev. 539, 540 (2016). That is, *mens rea* is “necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” *Carter v. United States*, 530 U.S. 255, 269 (2000) (citation omitted). As Justice Oliver Wendell Holmes famously recognized, “even a dog distinguishes between being stumbled over and being kicked.” Oliver Wendell Holmes Jr., The Common Law 3 (1881). In this regard, North Carolina recognizes different gradations of crimes depending largely on the defendant’s mental state of mind at the time of the offense. For homicides, first-degree murder is “obviously the most serious” offense. *State v. Davis*, 290 N.C. 511, 548 (1976). However, the existence of lesser offenses like second-degree murder and manslaughter shows that some homicides are “less culpable” because they do not involve killing another “with the cold blood of premeditation and deliberation.” *State v. Rainey*, 154 N.C. App. 282, 288 (2002).

Second, an instruction on *mens rea* was warranted because Davon was only 16 years old on the offense date. It is well-settled that young people are categorically less culpable than adults because of their immaturity, impulsivity, vulnerability to peer pressure, and lack of control over their life circumstances. *Miller v. Alabama*, 567 U.S. 460, 471 (2012). That is, a child “cannot be compared with an adult in full possession of his senses . . . .” *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962). Unlike adults, children “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.” *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (citation omitted).

Based on these concerns, “it is the odd legal rule that does not have some form of exception for children.” *Miller*, 567 U.S. at 481. Age is a factor in determining negligence in civil cases, *Watson v. Stallings*, 270 N.C. 187, 194 (1967), and whether the defendant acted in self-defense in criminal cases. *State v. Clay*, 297 N.C. 555, 563 (1979). Age is also a factor in custody determinations under *Miranda v. Arizona*, 384 U.S. 436 (1966), *J.D.B.*, 564 U.S. at 277, and voluntariness claims for confessions. *Haley v. Ohio*, 332 U.S. 596, 599 (1948). As explained by the Supreme Court, a child’s age is “a reality that courts cannot simply ignore.” *J.D.B.*, 564 U.S. at 277. Ultimately, “[i]f *mens rea* is meant to ‘demarcate culpability with precision and consistency,’ then it must separate adolescent from adult mental capacity.” Marjory Anne Henderson Marquardt, *Fallacious Reasoning: Revisiting the Roper Trilogy in Light of the Sexual-Abuse-to-Prison Pipeline*, 72 Stan. L. Rev. 749, 776 (2020) (citation omitted).

It is reversible error to deny a request for an instruction on the defendant’s mental condition that is supported by the record. *See* *State v. Rose*, 323 N.C. 455, 457-58 (1988) (“Defendant’s requested instruction would have allowed the jury to focus on defendant’s mental condition as it pertained to his ability to premeditate and deliberate.”). Here, the trial court should have given the proposed instruction because the instruction properly framed the *mens rea* component of this case. The trial judge has a duty to “instruct the jury on all substantial features of a case.” *State v. Bogle*, 324 N.C. 190, 199 (1989). The State alleged that Davon acted with intent, premeditation, and deliberation when he shot Mr. Shields. However, Davon was not an adult with a fully mature brain. He was 16 years old and subject to all the challenges that teenagers face – impulsivity, peer pressure, and an inability to foresee consequences. The proposed instruction would have enabled the jury to determine, based on factors recognized by the law, whether Davon had the necessary *mens rea* for first-degree murder. The trial court therefore erred by failing to give the instruction.

* 1. **The trial court’s failure to give the proposed instruction prejudiced Davon and warrants a new trial.**

To demonstrate prejudice, the defendant must show there is a reasonable possibility that a different result would have been reached without the error. N.C. Gen. Stat. § 15A-1443(a). This case satisfies N.C. Gen. Stat. § 15A-1443(a) because it demonstrates with remarkable clarity many of the characteristics of adolescent brain development. First and foremost, this case illustrates the power of peer pressure on teenagers. Although Davon told Ms. Skyes that he was not going to kill Mr. Shields, he eventually succumbed to Fair’s unrelenting pressure and ended up shooting Mr. Shields instead. In addition, the evidence shows that Davon lashed out at Mr. Shields out of anger that Mr. Shields, a 20-year-old man, had sex with his 14-year-old sister. Specifically, Ms. Skyes’ statement indicated that Davon was guided more by emotions than any ability he might have had to think about the consequences of shooting Mr. Shields. These factors – the influence of peer pressure, as well as emotionally-charged and impulsive decision-making without the moderating force of a fully functioning frontal lobe – are the hallmarks of adolescent thinking. *Miller*, 567 U.S. at 471.

Had the trial court instructed the jury to consider *all* of the circumstances surrounding Davon’s decision to shoot Mr. Shields – including differences between adolescents and adults that are now firmly reflected in the law – there is a reasonable possibility that one or more jurors would not have found that Davon acted with intent, premeditation, and deliberation when he shot Mr. Shields. Therefore, because Davon was prejudiced by the trial court’s failure to give the proposed instruction, this case must be remanded for a new trial.

1. **The trial court erred or committed plain error by admitting a video of Mellasia Skyes’s interview and her identification of Davon as the shooter because the video and the identification constituted inadmissible hearsay and violated Evidence Rule 403.**

The trial court also erred by admitting a video of Ms. Skyes’s interview with investigators and her identification of Davon. These statements were hearsay and were inadmissible under Evidence Rule 403. Further, the statements were prejudicial. As part of her testimony, Ms. Skyes repeatedly testified that she did not remember the shooting and she did not recall signing a form identifying Davon as the shooter. However, the trial court allowed the State to introduce a video of Ms. Skyes’s interview, at the end of which she said Davon shot Mr. Shields. The court also permitted the State to introduce the photo array that investigators showed Ms. Skyes, which included the photo of Davon that she identified. The prosecutor then relied on the interview and photo array to convince the jury to convict Davon. In light of these circumstances, this case should be remanded for a new trial.

* 1. **Standard of review.**

Whether the trial court improperly admitted hearsay is reviewed *de novo*. *State v. Hazelwood*, 187 N.C. App. 94, 98 (2007). Under *de novo* review, the reviewing court considers the matter anew. *Sutton v. N.C. Dep’t of Labor*, 132 N.C. App. 387, 389 (1999). Alternatively, this issue should be reviewed for plain error, which is an error that had a probable impact on the jury’s verdict. *State v. Lawrence*, 365 N.C. 506, 518 (2012).

* 1. **Procedural history.**

Prior to trial, the defense attorney filed a motion in limine and a motion to suppress, both involving Ms. Skyes’s interview with investigators and her identification of Davon. (R.pp. 11-24) After pre-trial hearings, the trial court denied the motions. (1T.pp. 32, 3T pp 179-81)

At trial, the State called Ms. Skyes as a witness. She repeatedly testified that she did not remember what happened on the offense date and had little memory of her interview with investigators. (4T.pp. 521-39) The prosecutor then moved to admit a transcript of her interview as a recorded recollection. (4T.p. 539) The prosecutor, defense attorney, and judge discussed the applicability of the recorded recollection exception and then recessed for the evening. (4T.pp. 540-544)

The next morning, the defense attorney presented a 7-page memorandum explaining that the out-of-court statements Ms. Skyes’s made to investigators were admissible as recorded recollections. (R.pp 34-41) He argued that admitting the statements “would be a confrontation issue” because he would not be able to “confront this recording that happened, you know, some four years ago.” (5T.p. 560) He also stated that admitting the statements would violate Evidence Rule 403. (5T.p. 561) Then, he stated,

I’ve renewed my motion that I made pretrial numerous times during the course of Ms. Skyes testimony. I’m renewing it again now to at least have a voir dire on her. But at this stage, I mean, it’s almost been a fiasco in front of this jury about, you know, the prosecutor questioning her and then trying to basically, you know, get her to say things she just can’t remember, you know, crossing her about the photo lineup and all these kind of things in front of this jury.

(5T.p. 562)

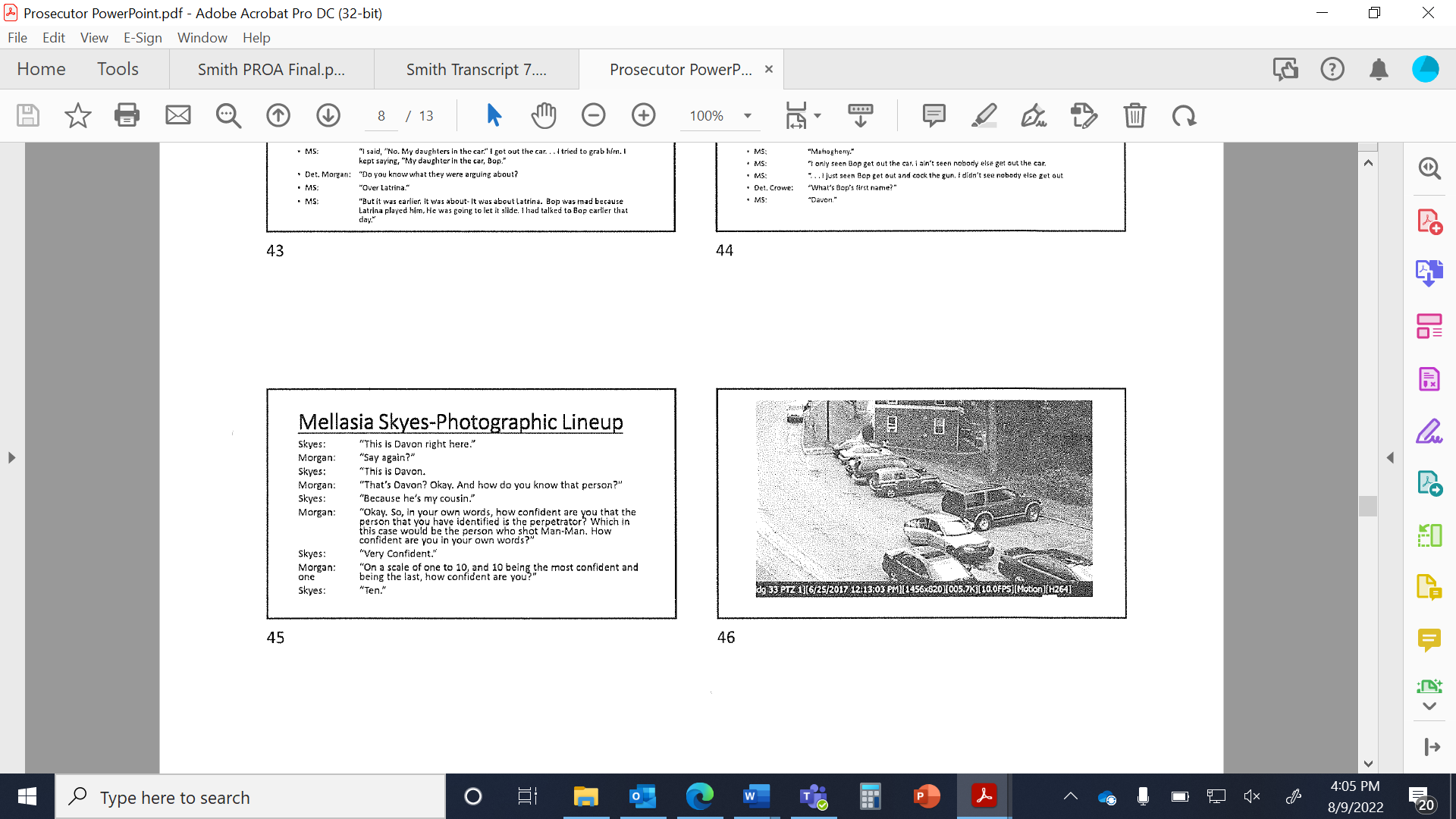
The court concluded that the evidence qualified as a recorded recollection because Ms. Skyes

presently has a recollection of having made a statement; the witness presently has an insufficient recollection of the contents of that statement; that the circumstances surrounding the statement indicating that the witness had knowledge of the events at the time the statement was made; that the statement actually was made by the witness at the time on the occasion of June 27th, 2017; not only was it made by her, it was adopted by her by her signing of an acknowledgment of her selection of the photograph from the photographic lineup; that statement was made while her memory of those events were still fresh, having occurred only two days prior thereto; and that the memorandum that was made in this instance, the memorandum is twofold, it consists of a video and audio recording as well as a written memorandum that accurately reflect what was actually being said.

(5T.pp. 569-70) The court said it would allow the prosecutor to play a video of the interview, but it would not allow the prosecutor to introduce a transcript of the interview. (5T.p. 570) The defense attorney objected. (5T.pp. 573-74)

Later, over objection, the prosecutor introduced the photo array that investigators showed to Ms. Skyes, which included the picture of Davon that she identified. The photo array also indicated that Ms. Skyes said she was “very confident” about her identification of Davon and that her level of confidence was “10.” (5T.p. 628, Ex pp 139-46) After Ms. Skyes concluded her testimony, the defense attorney renewed his hearsay objection and moved to strike the video. The court denied the arguments. (5T.p. 640)

During closing argument, the prosecutor used a PowerPoint presentation that included verbatim quotes from the Ms. Skyes’s interview. (R.p. 51) At one point, he showed the following slide:



Then, he said, “During her photographic lineup when Detective Morgan is handing her the photographs, the folders, hands one, when she gets to the photo of Mr. Smith she says, this is Davon right here. And Detective Morgan says, say again? She says, this is Davon.” The defense attorney objected and the trial court sustained the objection. (7T.p. 920) The court then instructed the jury that the attorneys were allowed to use PowerPoint, but that “what you’re seeing is a tool prepared by the [prosecutor] as part of his closing statement to you. And what is being, what has been presented to you is not an exhibit that was received into evidence in this case, but he is allowed to argue to you what he contends the evidence showed.” (7T.p. 921)

After the prosecutor finished his argument, the defense attorney made a motion for a mistrial because the prosecutor used “verbatim wording from the transcript” of Ms. Skyes’s interview that the trial court “rule[d] was not to be admitted as an exhibit.” (7T.p. 935) The court denied the motion. (7T.p. 936) During the jury charge, the court instructed the jurors that while Ms. Skyes’s out-of-court statements were not part of the testimony offered in the case, the jurors should nevertheless examine the circumstances under which the statements were made to determine whether they were truthful and the weight they would give the statements. (R.p. 62)

* 1. **Ms. Skyes’s interview and identification of Davon did not qualify as recorded recollections.**

Under Evidence Rule 801, hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Generally, hearsay is not admissible. N.C. R. Evid. 802. In this case, the trial court admitted Ms. Skyes’s out-of-court statements as a recorded recollection under Evidence Rule 803(5). (5T.pp. 569-70) The exception renders admissible “[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly.”

The exception “applies in an instance where a witness is unable to remember the events which were recorded, but the witness recalls having made the entry at a time when the fact was fresh in her memory, and the witness knew she recorded it correctly.” *State v. Spinks*, 136 N.C. App. 153, 158-59 (1999). Under the exception, an out-of-court statement is not admissible unless the witness testifies that the statement “represent[s] his recollection at the time it was made.” *Superior Tile, Marble Terrazzo Corp. v. Rickey Office Equip., Inc.*, 70 N.C. App. 258, 263 (1984). *See also* 2 Brandis and Broun on North Carolina Evidence § 224 (2021) (stating that while the witness need not create the record itself, “it is enough that she be able to testify that she saw it at a time when the facts were fresh in her memory, and that it actually represented her recollection at the time.”).

In *Spinks*, the prosecutor asked one of the State’s witnesses about the offense, but the witness did not remember what happened. The prosecutor then presented the witness with a written statement that purported to be a summary of oral statements the witness gave to police. The witness disagreed with some parts of the statement and said she could not remember other parts. After, the prosecutor introduced the statement into evidence. The prosecutor also asked the witness to read the statement to the jury. This Court granted a new trial because the witness’s statement did not qualify as a recorded recollection. The witness’s testimony did not show that she adopted the statement when it was fresh in her memory or that it reflected her knowledge correctly. *Spinks*, 136 N.C. App. at 159.

Similarly, this Court reversed convictions in *State v. Hollingsworth*, 78 N.C. App. 578 (1985) based in part on the improper admission of out-of-court statements under the recorded recollection exception. There, the State indicted the defendant with armed robbery and assault charges involving his mother. At trial, the State presented a letter the defendant’s mother wrote to the sheriff identifying the defendant as the perpetrator. This Court held that the admission of the letter was reversible error because the defendant’s mother “testified that when she wrote the letter, it did not correctly reflect her knowledge of the events and she did not know facts that she had forgotten by the time of the trial . . . .” *Id*. at 581.

As in *Spinks* and *Hollingsworth*, the video of Ms. Skyes’s interview with police and her identification of Davon did not satisfy the criteria for recorded recollections. As an initial matter, Ms. Skyes did not testify that she gave the interview or identified Davon when the shooting was “fresh” in her memory as required by Rule 803(5).

In addition, Ms. Skyes did not testify that the interview and her identification of Davon reflected her knowledge of the shooting correctly. During her testimony, the State repeatedly asked Ms. Skyes about the shooting and her interview with investigators. However, she repeatedly said she had no memory of the shooting and very little memory of the interview. When the prosecutor asked her what happened on the day of the shooting, Ms. Skyes said, “I don’t remember what happened that day.” (4T.p. 521) She also did not recall signing a form saying that Davon was the shooter or expressing any confidence level regarding her identification of the shooter. (4T.p. 525) When the prosecutor asked whether seeing a transcript would refresh Ms. Skyes’s recollection, Ms. Skyes said, “It doesn’t. That’s what I’m talking about. It doesn’t.” (4T.p. 530) Although Ms. Skyes remembered choosing a picture of Davon, she did not think that, by choosing the picture, she had identified Davon as the perpetrator. (4T.pp. 525, 527) Ultimately, over a span of eighteen transcript pages, Ms. Skyes repeatedly testified that she did not remember what happened during the shooting or what she said to investigators during the interview. (4T.pp. 521-539)

With respect to the specific requirements of Evidence Rule 803(5), there are three parts of Ms. Skyes’s testimony that show the interview and identification of Davon did not reflect her knowledge correctly. First, the prosecutor asked Ms. Skyes, “Do you remember telling [investigators] what you saw?” Ms. Skyes answered, “No, sir.” (4T.p. 532) Second, the prosecutor asked Ms. Skyes to review a transcript of the interview in order to establish that it was accurate, but Ms. Skyes responded, “It’s not.” (4T.p. 534) Third, when the prosecutor asked Ms. Skyes if she remembered telling investigators “the truth” during the interview, Ms. Skyes answered, “I don’t remember nothing from four years ago.” (4T.p. 539)

To be admissible as a recorded recollection, a statement must reflect the witness’s knowledge correctly. N.C. R. Evid. 803(5). Ms. Skyes’s interview with investigators and her identification of Davon did not satisfy that requirement. She did not testify that the video of her interview with investigators or her identification of Davon – including statements that she was “confident” of her identification and that her confidence level was a “10” – constituted an accurate reflection of her memory of the shooting at the time she made the statements. Therefore, the video of the interview and evidence that Ms. Skyes identified Davon were not admissible as recorded recollections.

Finally, the trial court’s ruling also violated the Rule 803(5) proscription that “[i]f admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.” The Official Commentary to Rule 803 states that this prohibition was intended to “prevent a jury from giving too much weight to a written statement that cannot be effectively cross-examined.” A recording qualifies as a “record” under the recorded recollection exception. *State v. Wilson*, 197 N.C. App. 154, 160 (2009). *See also* 2 Brandis and Broun on North Carolina Evidence § 224 (2021) (Evidence Rule 803(5) applies to a “tape or similar recording”).

Although the trial court did not admit the transcript of Ms. Skyes’s interview, it admitted the video. The court’s ruling allowing the State to introduce and then play the video of Ms. Skyes’s interview, as well as admitting the photo array with Ms. Skyes’s written identification of Davon, violated the recorded recollection exception. Further, the court’s decision to allow the prosecutor to use extensive quotes from the video – with slides that appeared to use transcripts of the interview – also violated Rule 803(5). Just like the Official Commentary stated, the defense attorney was correctly concerned that the court’s admission of Ms. Skyes’s out-of-court statements and their use by the State “would be a confrontation issue” because he was unable to “confront this recording that happened, you know, some four years ago.” (5T p 560)

* 1. **The admission of Ms. Skyes’s interview and identification of Davon violated Evidence Rule 403.**

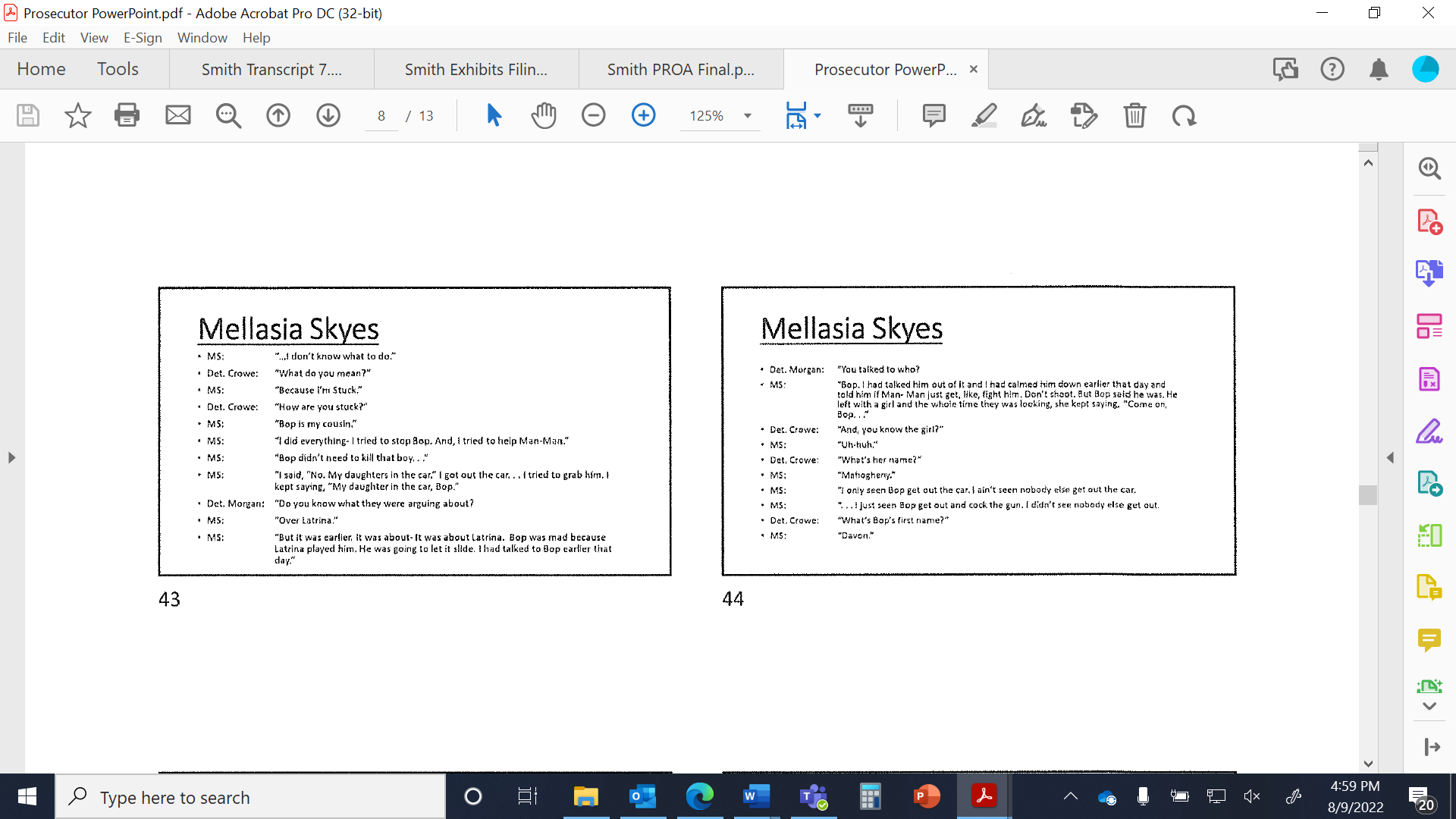
The admission of Ms. Skyes’s interview and identification of Davon also violated Evidence Rule 403, which states that evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The probative value of Ms. Skyes’s interview was limited because she said both that (1) she did not know who the shooter was and (2) she knew the shooter was Davon. (Ex pp 87, 96) The defense attorney summed up the problem by asking, “What part of the statement is accurate?” (5T.p. 460) Because Ms. Skyes’s statements about the identity of the shooter were contradictory, the probative value of the statements was low.

At the same time, the statements were prejudicial and confusing. They were prejudicial because the State was able to cherry-pick Ms. Skyes’s identification of Davon at the end of the interview and then assert in closing that her confidence in the identification was a “[t]en out of ten” and unwavering. (7T.p. 922) The statements were confusing because they were contradictory and were not clarified by Ms. Skyes’s in-court testimony. This confusion was reflected in the court’s instructions, which stated both that Ms. Skyes’s out-of-court statements were “not part of the testimony offered in this case” and that the jury should determine whether the statements were truthful and how much weight to give them. (R.p. 62) Ultimately, the prejudice and confusion from the statements substantially outweighed any probative value the statements might have had. *See State v. Hunt*, 324 N.C. 343 (1989) (admission of witness’s out-of-court statement violated Rule 403 in part because of the “inculpatory substance of the statement”).

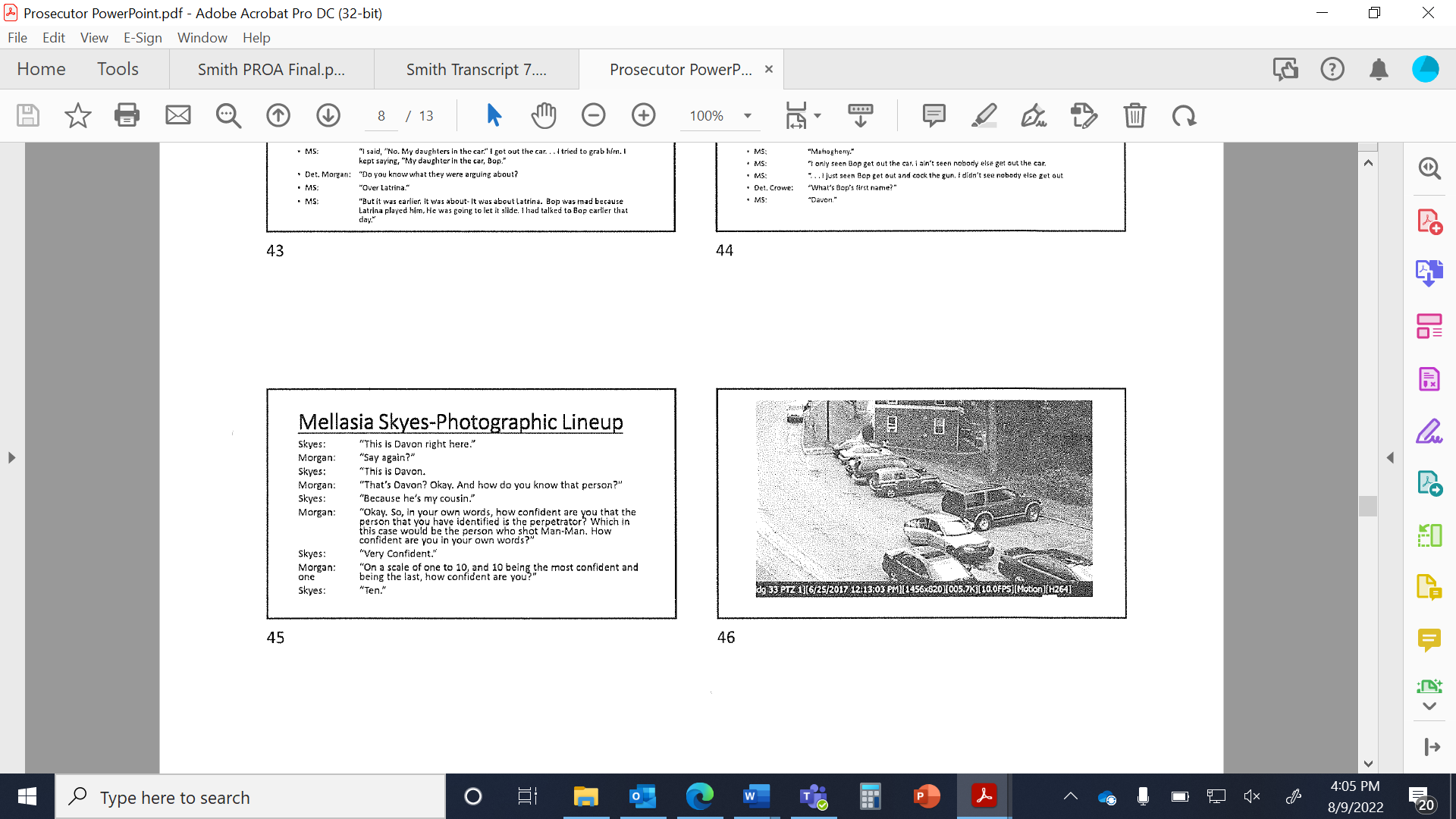
* 1. **A new trial is warranted.**

The admission of the video of Ms. Skyes’s interview and her identification of Davon prejudiced Davon. Eyewitness identification testimony has a powerful impact on juries. *State v. Gamble*, 243 N.C. App. 414, 419 (2015). Indeed, as described below in Issue V, the prosecutor specifically elicited testimony from two detectives to bolster Ms. Skyes’s identification of Davon. Both detectives said that Ms. Skyes’s was not “forthcoming” at first, but that her demeanor changed and she did not “waiver” after identifying Davon as the shooter. (5T.pp. 670-672, 6T p 826)

Further, the prosecutor capitalized on Ms. Skyes’s identification of Davon. *Cf. State v. Moore*, 366 N.C. 100, 107 (2012) (denying relief because the prosecutor did not “emphasize” or “capitalize on” improperly admitted evidence). He argued in closing that for 40 minutes, Ms. Skyes denied knowing who the shooter was, but then said she was “stuck” because Davon was her cousin. (7T.p. 919) Then, he showed the following slide, (R.p. 51), and quoted Ms. Skyes’s statement that Davon “didn’t need to kill that boy.” (7T.p. 919)



A moment later, the prosecutor showed the jury another slide. (R.p. 51)



He then asserted that Ms. Skyes was “very confident . . . [t]en out of ten,” and that she “identified her cousin in this case as the shooter of Mr. Shields. Never wavered. Never changed her opinion.” (7T.p. 922)

Ultimately, the State’s prosecution rested in large measure on Ms. Skyes’s identification of Davon. It is not clear from the surveillance video who the shooter was. Davon did not confess. There was no fingerprint or DNA evidence linking Davon to the shooting. Mahogany Fair did not testify against Davon. In light of these circumstances, Ms. Skyes’s out-of-court statements were vital to the State’s case against Davon.

In order to establish prejudice from an evidentiary error, the appellant must show that, absent the error, there would have been a different result at trial. *State v. Lynch*, 271 N.C. App. 532, 544 (2020). When the error is preserved, the appellant must show that a different outcome was reasonably possible. *Id*. The standard under plain error is that a different outcome was reasonably probable. *State v. Tyson*, 195 N.C. App. 327, 337 (2009). Given how central Ms. Skyes’s testimony was to the State’s case, it is both reasonably possible and reasonably probable that the outcome of the trial would have been different had the trial court excluded the video of Ms. Skyes’s interview and her identification of Davon from the evidence.

Without Ms. Skyes’ out-of-court statements, the State’s case rested on Ms. Pulliam’s identification of Davon. However, Ms. Pulliam testified that she “didn’t see anybody get out of any car” and that she only got a “glimpse” of the shooter’s face. (4T.p. 481) She also testified, “I heard a gunshot, but I don’t know where it went.” (4T.p. 484) When asked where the shooter went after the shooting, Ms. Pulliam said, “I don’t know” and that “[t]he person ran off.” (4T.p. 485) In light of how hesitant Ms. Pulliam was in her description of the shooting, it is reasonably possible and reasonably probable that one or more jurors would not have voted to convict Davon had the court excluded Ms. Skyes’s out-of-court statements from the evidence. Consequently, this case should be remanded for a new trial.

1. **The trial court erred or committed plain error by admitting evidence that Samantha Pulliam identified Davon as the shooter because the procedures investigators used to obtain the identification were impermissibly suggestive.**

If this Court finds that the admission of Ms. Skyes’s out-of-court statements was not prejudicial because Ms. Pulliam identified Davon, it should nevertheless grant a new trial because Ms. Pulliam’s identification was inadmissible. Ms. Pulliam did not get a good look at the shooter and did not know Davon. Further, a detective told Ms. Pulliam that it appeared she set Mr. Shields up. Then, when another detective showed Ms. Pulliam a picture of Davon, Ms. Pulliam looked at her boyfriend before stating that the person in the picture was the shooter. Based on these circumstances, the admission of Ms. Pulliam’s out-of-court and in-court identifications of Davon violated due process because the procedures used by investigators to obtain the identification were so impermissibly suggestive that there was a substantial likelihood of irreparable misidentification.

* 1. **Standard of review.**

Whether a witness’s identification of a defendant violates due process is a question of law that is reviewed *de novo*. *State v. Malone*, 373 N.C. 134, 145 (2019). Under *de novo* review, the reviewing court considers the matter anew. *Sutton v. N.C. Dep’t of Labor*, 132 N.C. App. 387, 389 (1999). Alternatively, this issue should be reviewed for plain error, which is an error that had a probable impact on the jury’s verdict. *State v. Lawrence*, 365 N.C. 506, 518 (2012).

* 1. **This issue is preserved for review.**

Prior to trial, the defense attorney filed a motion to suppress Ms. Pulliam’s identification of Davon asserting that the admission of her identification would violate due process under the United States and North Carolina constitutions because the procedures investigators used to obtain the identification created the likelihood of irreparable misidentification. (R.pp. 15-24) After a pre-trial hearing, the trial court denied the motion. (3T.pp. 179-81) As part of its ruling, the court stated that Ms. Pulliam indicated she “knew the person who had perpetrated the crime” and “knew the person from prior acquaintance . . . .” (3T.p. 180) The court also stated that Ms. Pulliam “readily and immediately” identified a photograph of Davon and that she asserted that she “knew the person” and was “personally acquainted to him . . . .” (3T.pp. 180-81)

When the State called Ms. Pulliam to testify, the defense attorney asserted, “[J]ust for the record I would like to renew my previous motion regarding Ms. Pulliam.” The trial court responded, “Yes, sir. So noted.” (4T.pp. 476-477) The defense attorney did not object when Ms. Pulliam identified Davon as the shooter during her testimony or when the court admitted a written statement Ms. Pulliam prepared (State’s Exhibit #8) and a photo array in which she identified Davon (State’s Exhibit #9). However, the defense attorney’s motion challenging her identification and his renewal of the motion preserved this argument for review. N.C. Gen. Stat. § 15A-1446(d)(10) (stating that a party’s failure to object to evidence does not render the party’s argument on appeal unpreserved when there has been an “improperly overruled objection” and the “[s]ubsequent admission of evidence” involves the same line of questioning); *State v. Corbett*, 2021-NCSC-18, ¶ 55; *State v. Graham*, 2022-NCCOA-297, ¶ 19.

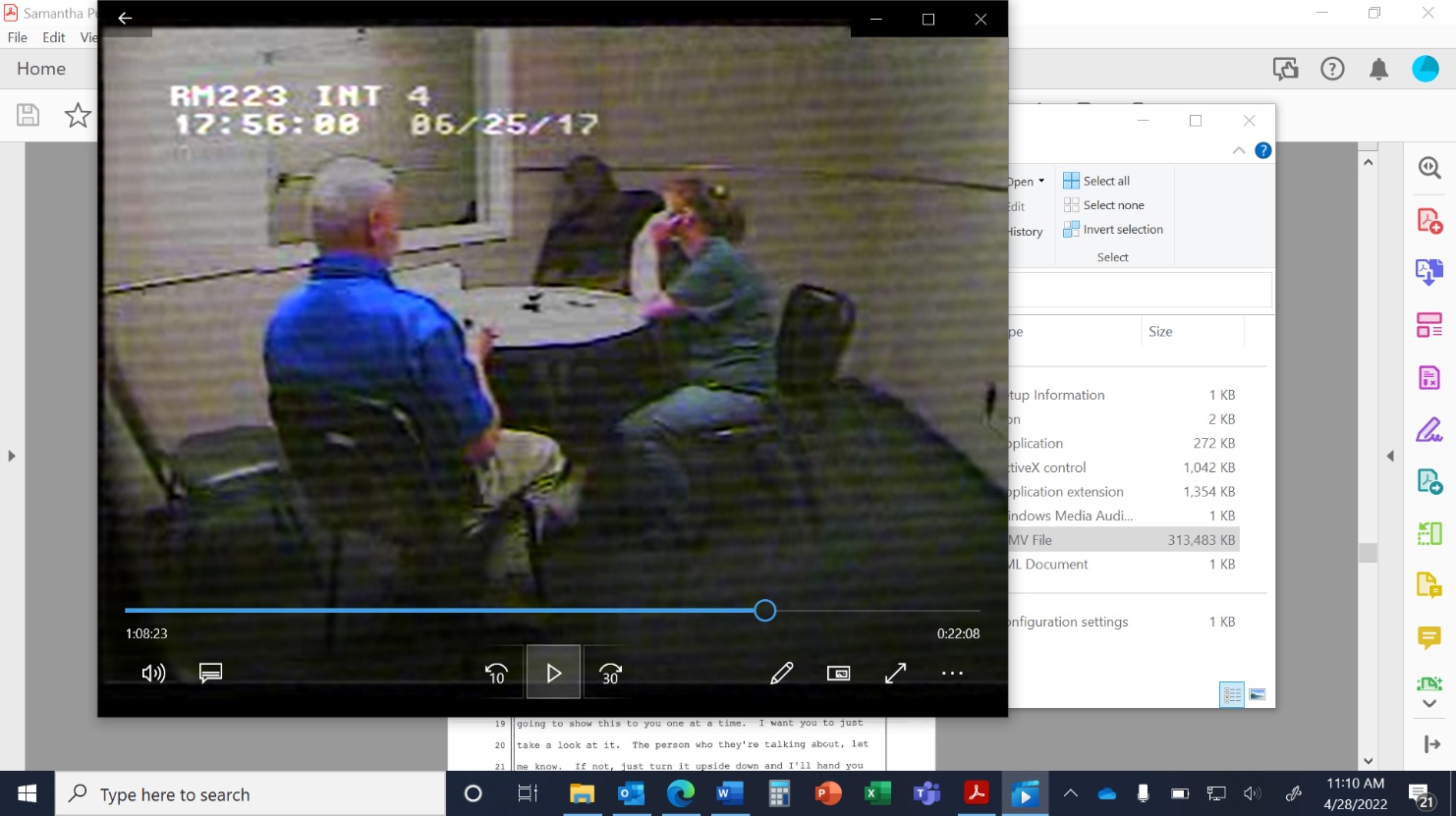
* 1. **The totality of the circumstances show that Ms. Pulliam’s identification of Davon was not reliable.**

Courts have long recognized the potential unreliability of eyewitness testimony and the unique risks to reliability posed by suggestive police procedures. *See United States v. Wade*, 388 U.S. 218, 228 (1967). In light of these concerns, the United States Supreme Court has held that the Fourteenth Amendment Due Process Clause compels exclusion of eyewitness identification evidence that (1) was obtained by an unnecessarily suggestive police procedure and (2) lacks reliability under the totality of circumstances. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). An identification is not reliable if the procedures used to obtain it give rise to a “substantial likelihood of irreparable misidentification.” *Simmons v. United States*, 390 U.S. 377, 384 (1968).

The admissibility of an identification is determined by weighing “the corrupting effect of the suggestive identification” against factors showing the identification to be reliable. *Id*. Some of the factors used to determine whether an identification procedure involved the risk of irreparable misidentification include the opportunity of the witness to view the suspect during the commission of the offense, the witness’s degree of attention, the accuracy of the witness’s prior description, the witness’s level of certainty, and the time between the crime and the confrontation. *State v. Pigott*, 320 N.C. 96, 99-100 (1987). These factors are “not exclusive.” *State v. Derri*, 511 P.3d 1267, 1282 (Wash. 2022). Instead, “each case must be considered on its own facts . . . .” *Simmons v. United States*, 390 U.S. 377, 384 (1968). Ultimately, the determination depends on “the totality of the circumstances.” *State v. Artis*, 31 N.C. App. 193, 198 (1976).

The trial court found that Ms. Pulliam’s identification of Davon was admissible because she “knew the person who had perpetrated the crime” and “readily and immediately” identified a photograph of Davon during her interview. (3T.p. 180) But the evidence established otherwise. For example, Ms. Pulliam stated during the interview that she believed the shooter was named “Bop.” However, when a detective asked Ms. Pulliam if she knew Bop’s name, she said, “I just know he runs around out there. I’ve seen him, but ***I don’t know him***.” (Ex.p. 9) (emphasis added) Thus, it was not accurate that Ms. Pulliam “knew” the shooter.

Additionally, Ms. Pulliam did not “readily and immediately” identify a photograph of Davon. During the interview, a detective showed Ms. Pulliam a photo array containing folders with individual pictures. When Ms. Pulliam opened the folder with Davon’s picture, she hesitated. She then turned to her boyfriend and looked at him. This moment occurs shortly after the one-hour-and-eight-minute marker in the interrogation video and can be seen below.



After looking at her boyfriend, Ms. Pulliam said, “That’s him.” (Ex.p. 52) Thus, it was also not accurate that Ms. Pulliam “readily and immediately” identified Davon. Ms. Pulliam identified the photo of Davon only after locking eyes with her boyfriend. Both of the court’s findings, therefore, were not supported by the record. *See State v. Mettrick*, 54 N.C. App. 1, 10 (1981) (granting a new trial in part because the trial court’s findings about a witness’s identification were not supported by the evidence).

Moreover, weighing the relevant factors demonstrates that the procedures used by investigators were unduly suggestive and gave rise to a substantial risk of irreparable misidentification. First, by her own admission, Ms. Pulliam did not have a good opportunity to view the shooter or observe the shooting with a high degree of attention. She testified that she “didn’t see anybody get out of any car” and only got a “glimpse” of the shooter’s face. (4T.p. 481) Although she “heard a gunshot,” she testified that she did not “know where it went.” (4T.p. 484) Finally, when the prosecutor asked Ms. Pulliam where the shooter went after the shooting, she said, “I don’t know” and that “[t]he person ran off.” (4T.p. 485)

Second, Ms. Pulliam did not give any description of the shooter. When detectives interviewed Ms. Pulliam, they did not ask for her to give a description. She also did not provide a description at trial.

Third, Ms. Pulliam told investigators that she was not familiar with the shooter. Although she had seen the shooter on occasion, she admitted that she did not know him. (Ex.p. 9)

Fourth, although Ms. Pulliam stated that she was 100% confident of her identification, there were significant reasons to doubt her confidence. “The scientific community has understood for decades that eyewitness identifications that are certain and confident are not necessarily accurate. Rather, a witness may honestly hold beliefs about what he or she saw that are distorted, inaccurate, or even completely wrong.” *Bey v. Superintendent Greene SCI*, 856 F.3d 230, 240 (3d Cir. 2017). Additionally, Ms. Pulliam later revised her confidence level down, testifying at trial that it “wasn’t a hundred percent” and that she only chose the picture of Davon because it “looked the closest.” (4T.p. 491) She also admitted that she did not get a good look at the shooter and that she did not know Davon. (4T.p. 481) Thus, Ms. Pulliam’s confidence in her identification was not as certain as she initially stated.

Fifth, Ms. Pulliam did not make her identification soon after the shooting. “Most cases giving substantial weight to this factor . . . involve identifications within an hour of the crime.” *Velez v. Schmer*, 724 F.2d 249, 252 (1st Cir. 1984). In this case, the shooting occurred around noon and Pulliam made her identification approximately four to five hours later at around 4:30 or 5:00 p.m. (2T.p. 81, 4T.p. 430)

Sixth, Ms. Pulliam made the identification after being pressured by officers. According to Ms. Pulliam, she went to the police department because officers “told [her] that I was on camera and that I had no choice.” (4T.p. 485) Then, during the interview, one of the officers accused Ms. Pulliam of setting up Mr. Shields. Specifically, Detective Crowe said that “it looked like you guys were trying to call him up there to try to set him up.” (Ex.p. 22) During a break in the discussion, after Detective Crowe stepped out of the interview room, Ms. Pulliam told her boyfriend, “That fucking man [inaudible] and said everybody said y’all was on the phone trying to set him up.” (Ex.p. 34) She also said, “He said we were on our phones. It was like we was calling [Mr. Shields] to have [Mr. Shields] to come out and we set him up.” (Ex.p. 24) Then, Ms. Pulliam said, “He got to bring me paper, but he want me to write down what I saw because he said, until I came to talk to him, that it really looks like we set him up.” (Ex.p. 25)

Later, Ms. Pulliam identified Davon’s picture. (Ex.p. 52) However, she told her boyfriend a few minutes after, “I don’t want them thinking I set nobody up because I ain’t set no mother fucking body up.” (Ex.p. 55)

Seventh, Ms. Pulliam relied on her boyfriend to identify Davon. The transcript of the interview indicates that Ms. Pulliam said “That’s him” after Detective Allen showed her a picture. However, as seen above in the screenshot, Ms. Pulliam did not identify Davon until after pausing and making eye contact with her boyfriend.

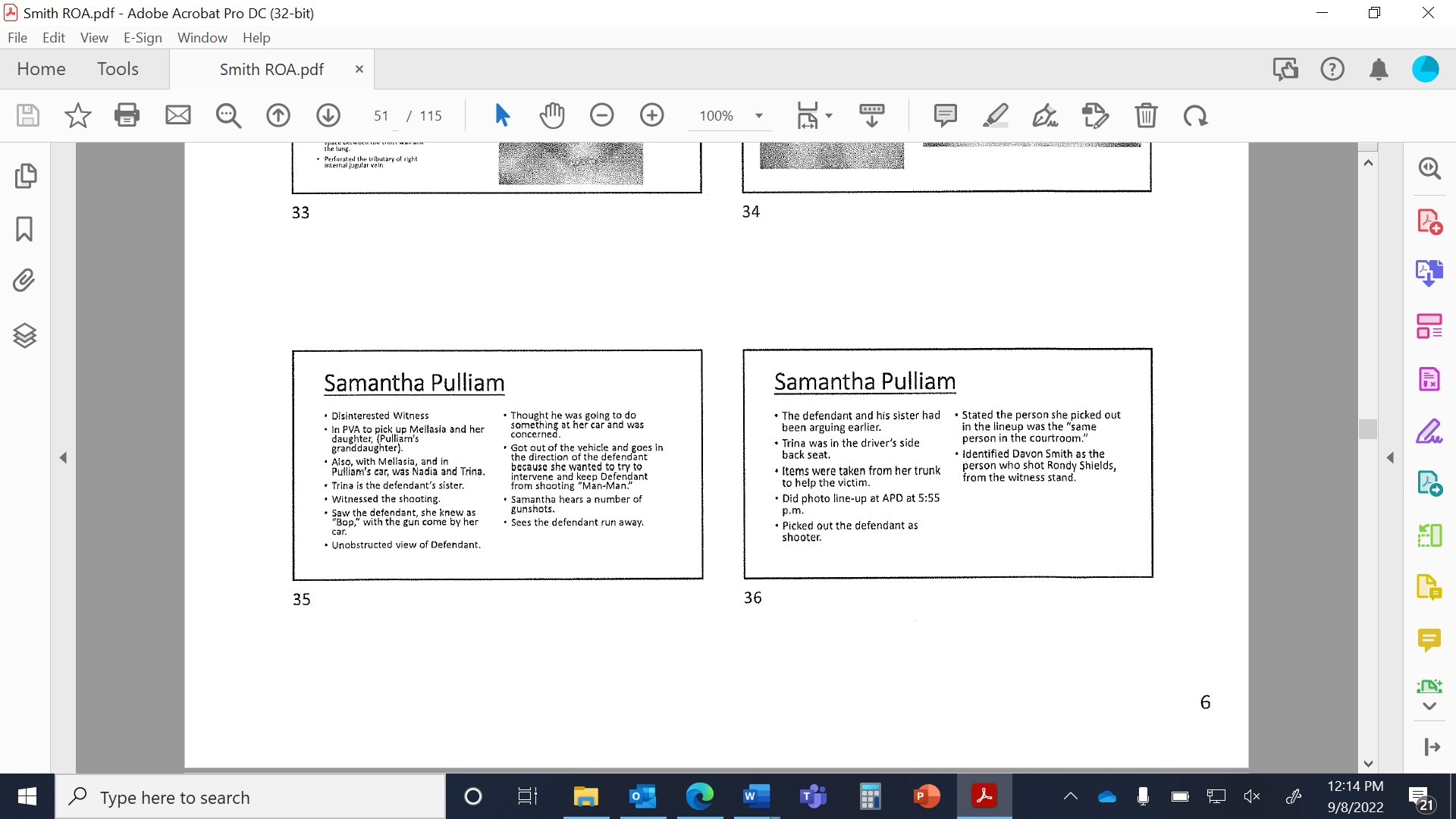
Under the totality of the circumstances, the procedures employed by investigators to obtain an identification from Ms. Pulliam created a substantial likelihood of irreparable misidentification. Ms. Pulliam identified a picture of Davon four to five hours after the shooting and said she was 100% confident he was the shooter. However, by her own admission, she did not get a good look at the shooter and did not know Davon. Prior to her identification, an officer accused Ms. Pulliam of setting Mr. Shields up. Ms. Pulliam was unnerved by the accusation, telling her boyfriend that she had to write down what she saw because it looked like she was involved in the shooting. Then, Ms. Pulliam only identified Davon after pausing and looking at her boyfriend. Ultimately, these procedures were so suggestive that they created a substantial likelihood of irreparable misidentification.

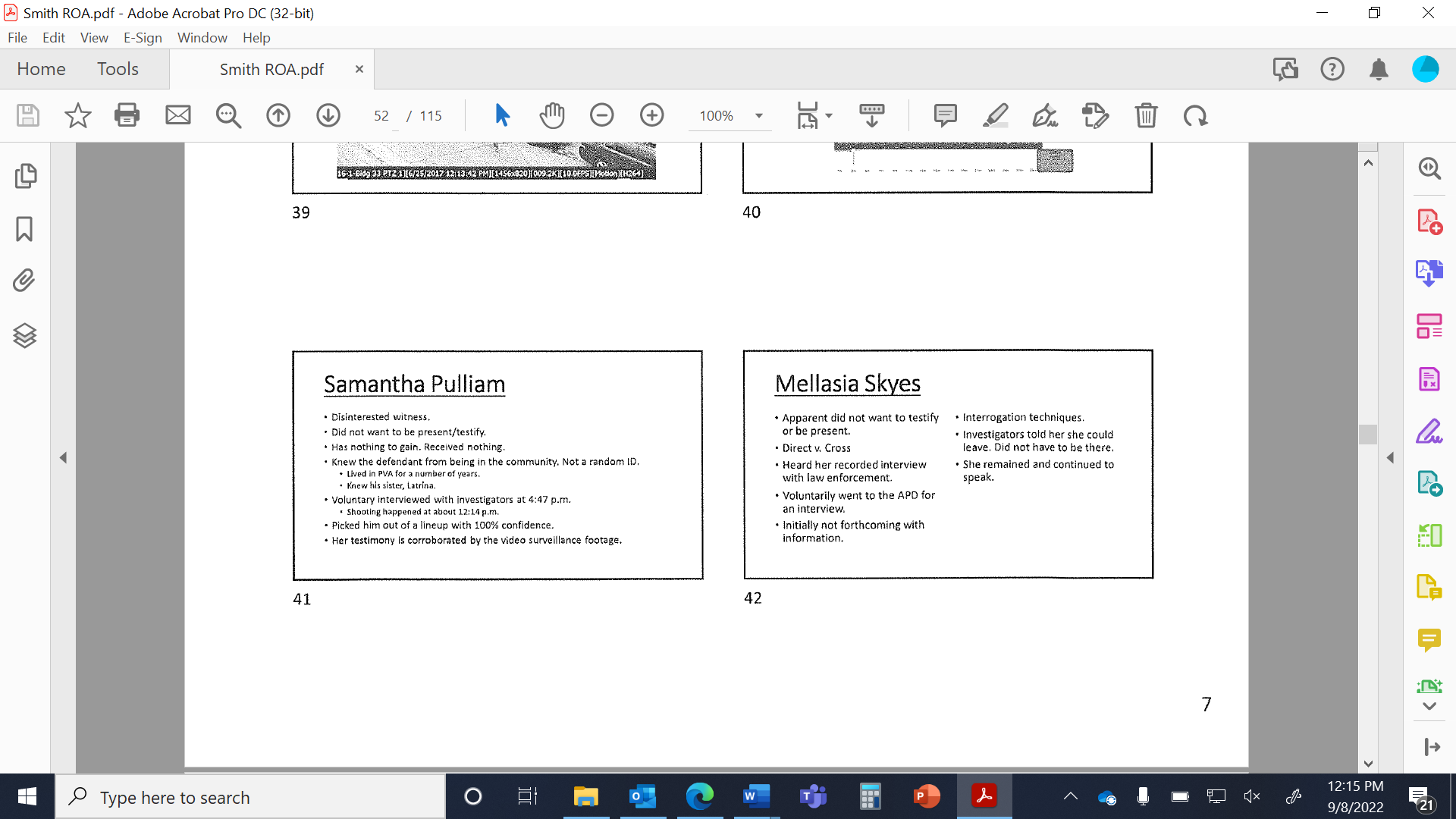
Finally, although the trial court may separately admit a witness’s in-court identification if the identification is independent from an unduly suggestive procedure, *Mettrick*, 54 N.C. App. at 8, Ms. Pulliam’s in-court identification was not sufficiently reliable to be admissible. As described above, she admitted during her in-court testimony that she “didn’t see anybody get out of any car” and only got a “glimpse” of the shooter’s face. (4T.p. 481) Then, when the prosecutor asked if she knew Davon, she said, “I just knew him from hearsay, like hearing of him and stuff like that, but I didn’t know him.” (4T.p. 482) She also admitted at trial that her initial confidence level of 100% wasn’t accurate and that she chose the picture of Davon because it “looked the closest” to the person she glimpsed. (4T.p. 491) Under these circumstances, Ms. Pulliam’s in-court identification of Davon was also not admissible. The court therefore erred by admitting Ms. Pulliam’s out-of-court and in-court identifications, including her testimony identifying Davon as the shooter and State’s Exhibits #8 and #9.

* 1. **A new trial is warranted.**

The admission of Ms. Pulliam’s identification prejudiced Davon and requires a new trial. The surveillance video did not show who the shooter was and Davon did not confess to the shooting. Thus, the prosecutor relied on Ms. Pulliam’s identification to convince the jury to convict Davon. The prosecutor argued that when Ms. Pulliam identified Davon as the shooter, she had “[n]o hesitation, no question about it.” (7T.p. 915) He also asserted that Ms. Pulliam “came in here and she told you the truth the best that she could, and she told the police the truth on June the 25th of 2017.” (7T.pp. 915-16) Then, he stated that Ms. Pulliam “picked [Davon] out of a lineup with a hundred percent confidence. No question.” (7T.p. 916)

The prosecutor also showed the jury the following slides about Ms. Pulliam. (R.pp. 49-50)





“A conviction which rests on a mistaken identification is a gross miscarriage of justice.” *Stovall v. Denno*, 388 U.S. 293, 297 (1967). Here, Davon’s conviction hinged in large measure on Ms. Pulliam’s identification. Therefore, it is reasonably possible and reasonably probable that one or more jurors would not have voted to convict Davon if the trial court had excluded Ms. Pulliam’s identification of Davon from the evidence. This case should be remanded for a new trial.

1. **The trial court committed plain error by permitting officers to testify that Ms. Pulliam and Ms. Skyes were forthcoming and unequivocal when they identified Davon because the detectives were in no better position than the jury to make this conclusion and their testimony invaded the province of the jury to make credibility determinations.**

This Court should also grant a new trial because the trial court allowed the State to put its thumb on the scales of Davon’s trial. The court permitted detectives to testify that Ms. Skyes was “standoffish” and “uncomfortable” when she denied having any knowledge of the shooting, but that she and Ms. Pulliam were “forthcoming” and “unequivocal” when they identified Davon. This was improper. Evidence Rule 701 bars witnesses from giving opinion testimony when – as here – the jury is in just as good a position to make its own determination. Further, witnesses are not permitted to make credibility determinations because that’s the jury’s job. Because there was no confession or physical evidence linking Davon to the shooting, the testimony of the detectives prejudiced Davon. That is, the court improperly allowed the detectives to bolster identifications that – as described above – had significant problems. Ms. Skyes initially denied knowing anything about the shooting, but then said that Davon was the shooter. Ms. Pulliam testified that she did not get a good look at the shooter. Because the trial court improperly admitted the testimony of detectives that resolved a critical issue at Davon’s trial, this case must be remanded for a new trial.

* 1. **Standard of review.**

This issue should be reviewed for plain error. Plain error is error that had a probable impact on the jury’s verdict. *State v. Lawrence*, 365 N.C. 506, 518 (2012).

* 1. **Procedural history.**

After Ms. Skyes testified, Detective Tracey Crowe testified that Ms. Skyes’s demeanor during the first part of the interview was “[s]tandoffish, very uncomfortable speaking with us,” but that her demeanor changed “[w]hen she began to tell the truth.” (5T.pp. 671-72) The defense attorney objected. The trial court sustained the objection and instructed the jury not to consider Detective Crowe’s statement. However, Detective Crowe went on to testify that Ms. Skyes’s “story” changed and that, afterward, her description of the shooting did not “waver” and she was “unequivocal” about the identity of the shooter. (5T.p. 672)

The following day, Detective Morgan testified that Ms. Pulliam came to her interview voluntarily and was “forthcoming” with information related to the shooting. (6T.p. 807) He also testified that Ms. Skyes was “initially very reluctant and not very forthcoming with information” during the first part of her interview. (6T.p. 826) However, he stated that after Detective Crowe spoke in a “personal nature” with Ms. Skyes, she became more “forthcoming.” (6T.p. 827)

* 1. **The trial court allowed the State to tilt the evidence in its favor.**

According to Evidence Rule 701, a lay witness may give an opinion if it is “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” However, testimony is not admissible as lay opinion when the jury is just as qualified as the witness to determine the issue. *State v. Belk*, 201 N.C. App. 412, 414 (2009).

In addition, a witness may not give an opinion about the credibility of evidence, which is “a field in which jurors are supreme and require no assistance . . . .” *State v. Holloway*, 82 N.C. App. 586, 587 (1986). The task of resolving inconsistencies in the evidence is the “sole province of the jury.” *State v. Riggins*, 321 N.C. 107, 110 (1987). Consequently, it is error for a trial court to allow a witness to comment on the credibility of another witness. *State v. Heath*, 316 N.C. 337, 343 (1986).

In this case, the detectives were in no better position than the jury to determine whether Ms. Skyes was “standoffish” or “uncomfortable” when she initially spoke to them. Similarly, they were no better qualified than the jury to determine that Ms. Skyes and Ms. Pulliam were “forthcoming” when they identified Davon. In both instances, the sole purpose of the detectives’ testimony was to bolster Ms. Skyes’s and Ms. Pulliam’s identifications of Davon. But this testimony was unquestionably inadmissible. “The jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial – determination of the truth.” *State v. Chul Yun Kim*, 318 N.C. 614, 621 (1986). The court therefore erred by allowing the detectives to give their opinions about the credibility of Ms. Skyes’s and Ms. Pulliam’s identifications of Davon.

* 1. **A new trial is warranted.**

The admission of Ms. Pulliam’s identification prejudiced Davon and requires a new trial. Davon did not confess and no physical evidence linked Davon to the shooting. The surveillance video did not show who the shooter was. In light of these circumstances, Ms. Skyes’s and Ms. Pulliam’s identifications were critical to the State. However, the opinion testimony provided by Detective Crowe and Detective Morgan significantly bolstered their identifications.

Our Supreme Court long ago recognized that the testimony of law enforcement officers carries “great weight with the jury.” *Tyndall v. Harvey C. Hines Co.*, 226 N.C. 620, 623 (1946). So has this Court. *Belk*, 201 N.C. App. at 418 (granting a new trial because the jury likely accorded “significant weight” to the opinion testimony provided by an officer). By permitting the detectives to give their opinions on the credibility of Ms. Skyes’s and Ms. Pulliam’s identifications, the trial court “may have tipped the scales in favor of the prosecution” and induced the jury to resolve the question of whether to believe the identifications in favor of the State. *State v. Cuthrell*, 233 N.C. 274, 276 (1951). The admission of the detectives’ testimony thus had a probable impact on the jury verdict and warrants a new trial.

1. **The cumulative prejudice from the trial court’s errors requires a new trial.**

If this Court does not find that any of the errors in this case warrant relief individually, it should nevertheless grant a new trial because of the cumulative effect of the preserved errors. The trial court’s rulings undermined Davon’s trial in two concrete ways: (1) They allowed the jury to consider two inadmissible identifications of Davon while at the same time (2) they prevented the jury from considering an appropriate crime and appropriate factors in determining Davon’s guilt based on evidence that was admitted as part of one of the identifications. Because of the combined effect of these errors, this Court should grant a new trial.

* 1. **Standard of review.**

Whether the cumulative effect of the trial court’s errors prejudiced the defendant is reviewed *de novo*. *See generally State v. White*, 331 N.C. 604, 616 (1992).

* 1. **The combined effect of the preserved errors requires a new trial.**

Although some errors do not warrant relief individually, there are other errors, when “considered together,” that are sufficiently prejudicial to warrant a new trial. *State v. Dilldine*, 22 N.C. App. 229, 233 (1974). That is, some cumulative errors lead to reversal when, “taken as a whole,” they “deprived [the] defendant of his due process right to a fair trial free from prejudicial error.” *State v. Canady*, 355 N.C. 242, 254 (2002). *See also* *State v. Hembree*, 368 N.C. 2, 20 (2015) (“Regardless of whether any single error would have been prejudicial in isolation, we conclude that the cumulative effect of these three errors deprived defendant of a fair trial”). Ultimately, there are occasions when there are “too many deviations” to hold multiple errors harmless. *State v. Godwin*, 95 N.C. App. 565, 571 (1989).

This is one of those occasions.

Here, the trial court allowed the jury to consider two separate identifications that were both inadmissible. The prosecutor then relied on both identifications to convince the jury to convict Davon of first-degree murder. (R.pp. 49-51; 7T.p. 909-923)

At the same time, the trial court prevented the jury from considering an appropriate lesser-included offense – second-degree murder – that was based on one of the identifications that the trial court should not have admitted in the first place. That is, when the trial court improperly admitted Ms. Skyes’s out-of-court identification of Davon, it should have recognized that the statements Ms. Skyes made when she identified Davon supported an instruction on second-degree murder. Specifically, her comments showed that Davon did not premeditate or deliberate before shooting Mr. Shields.

And, finally, the trial court prevented the jury from considering whether the conduct Ms. Skyes described when she identified Davon showed intent, premeditation, and deliberation based on factors that the law recognizes as relevant to the question of culpability for young defendants. As described above in Issue II, Ms. Skyes’s statements showed that Davon’s conduct reflected multiple factors – such as peer pressure, emotionally-charged decision-making, and impulsivity – that differentiate adolescent behavior from adult behavior. Accordingly, even if this Court concludes that the preserved errors described in this brief were not prejudicial on their own, this Court should nevertheless grant a new trial because the combined effect of all of these errors prejudiced Davon and violated his right to a fair trial.

# CONCLUSION

For the foregoing reasons, this Court should grant Davon a new trial.

Respectfully submitted, this the 10th day of October, 2022.

(Electronically Submitted)

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**CERTIFICATE OF COMPLIANCE WITH RULE 28(j)**

I hereby certify that this brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure and this Court’s 19 September 2022 order issued in this appeal in that it is printed in thirteen-point Century Schoolbook font and the body of the brief, including footnotes, citations, and PowerPoint slides included in the arguments, contains no more than 13,500 words as indicated by Microsoft Word, the program used to prepare the brief.

This the 10th day of October, 2022.

(Electronically Submitted)

David W. Andrews

Assistant Appellate Defender

**CERTIFICATE O****F SERVICE**

I certify that a copy of the foregoing brief has been served upon Ms. Calloway-Durham, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, by emailing a copy of the brief to the following email address: scalloway@ncdoj.gov.

This, the 10th day of October, 2022.

(Electronically Submitted)

David W. Andrews

Assistant Appellate Defender

1. “Ex.p.” refers to individual exhibit pages in the Rule 9(d) volume for this appeal. [↑](#footnote-ref-2)
2. If this information is accurate, Mr. Shields potentially committed the Class B1 felony of statutory rape of person who is 15 years old or younger. N.C. Gen. Stat. § 14-27.25. [↑](#footnote-ref-3)