NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-285

COMMONWEALTH

vs.

TROY HARRIGAN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A Superior Court jury convicted the defendant of various offenses related to his unlawful possession and discharge of a firearm. On appeal, the defendant claims that (1) eyewitness identifications resulted from an unnecessarily suggestive show-up identification procedure, (2) testimony that the victims were "100 percent sure" of the defendant's identity should not have been admitted, (3) the judge should have instructed the jury regarding the effects of "clothing bias" on eyewitness identifications, and (4) the prosecutor's closing argument was improper. The defendant also claims that carjacking is not a violent crime and, therefore, the defendant's prior carjacking conviction was not a proper predicate for his subsequent guilty plea to the charge that he was an armed career criminal (ACC), G. L. c. 269, § 10G (a). We affirm.

Background. We summarize the material facts. Around midnight on July 17, 2015, Tracy Fortes, Nia King, and Amanda Garcia-Solas were lost in the city of Brockton. They were in a car parked on Carroll Street facing the residence at 66 French Avenue. As they sat in the car trying to determine their location, they saw a man approach them from the driveway of the residence at 66 French Avenue. He approached to within approximately five feet of the car. He reached into his waistband, and pulled out a gun. As Fortes sped away, Garcia-Solas saw the man shoot once at the car and twice into the air.

The women later called the police, who told them to wait in the parking lot of a Walgreen's pharmacy. When Brockton police officers arrived, the women described the shooter as a five-foot, seven inch-tall African-American male with facial hair. He was wearing a blue baseball cap with the brim facing forward, a white, sleeveless T-shirt, black shorts, white socks, and white shoes. Within an hour of the victims' call, police responded to the scene of the shooting, where they encountered two African-American males sitting on the steps of the residence at 66 French Ave. Detective Almeida recognized both men, one of whom was the defendant, and observed that the defendant had facial hair and was wearing a blue baseball cap, a white, sleeveless T-shirt, dark shorts, white socks, and white shoes.

The defendant falsely identified himself to Detective Almeida as "Tony." He stated that he had heard gunshots, but denied shooting a gun. After police officers discovered three spent shell casings at the base of the driveway to 66 French Avenue, they requested that the victims return to the scene for a show-up identification. When the defendant was told he would be participating in the procedure, he became "very animated . . . a lot more vocal," and immediately turned his baseball cap around so that the bill of the cap faced backwards.

Detective Almeida, a Cape Verdean male, and Detective Royster, a black male, both of whom the victims knew to be police officers, stood next to the defendant in plain clothes as the victims engaged in the show-up procedure. The victims viewed the defendant from approximately thirty feet away as the defendant was illuminated by headlights and "takedown lights." More than twice the officers turned the brim of the defendant's cap back to the front after the defendant turned it around. Several times they reminded the defendant to face forward after he turned sideways and put his head down. After Forte and King stated they were "100 percent sure" the defendant was the shooter and Garcia-Solas said "that's the guy," the defendant was placed under arrest. At the time of his arrest, the defendant was five feet, eleven inches tall and weighed 180

pounds. His hands tested positive for the presence of gunshot residue, but a firearm was never recovered.

The defendant was charged with three counts of assault by means of a dangerous weapon, G. L. c. 265, § 15B (b), unlawful possession of a firearm, G. L. c. 269, § 10 (a), and unlawful discharge of a firearm within 500 feet of a building, G. L. c. 269, § 12E. The Commonwealth sought an enhanced penalty on the unlawful possession indictment pursuant to G. L. c. 269, § 10G (c), alleging that the defendant was a level three ACC because he previously was convicted of carjacking, assault by means of a dangerous weapon, and two counts of assault and battery. The trial of the substantive offenses was bifurcated from the ACC charge. After the defendant was convicted of the substantive offenses, the Commonwealth agreed to proceed on only so much of the ACC indictment as charged prior convictions for carjacking and assault by means of a dangerous weapon, a level two ACC enhancement pursuant to G. L. c. 269, § 10G (b). The defendant then pleaded guilty to the ACC charge and was sentenced to ten to fifteen years in prison. On the other indictments, the defendant was sentenced to additional terms of incarceration to run concurrently with this sentence.

Discussion. 1. Eyewitness identifications. a. Motion to suppress. The defendant's primary claim is that several "mutually reinforcing errors" related to the victims'

identifications of him as the shooter denied him due process. First, he argues that his motion to suppress the identifications should have been allowed because, although the police had "good reason" to conduct a show-up identification, they made the procedure unnecessarily suggestive by (1) obtaining a description from all three victims at the same time, (2) forcing the defendant to turn the brim of his hat to the front, (3) failing to remove the defendant's handcuffs, (4) conducting the procedure at the scene of the shooting, (5) positioning him between two police officers, and (6) illuminating him with takedown lights. In reviewing the motion judge's decision to deny the motion to suppress, we accept her factual findings unless they are clearly erroneous, see Commonwealth v. Welch, 420 Mass. 646, 651 (1995), and "make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found." Commonwealth v. Mercado, 422 Mass. 367, 369 (1996).

Although the victims testified that they were all interviewed together, the motion judge found, based on the officers' testimony to the contrary, that the officers interviewed the victims separately and removed the defendant's handcuffs before the show-up began. We cannot reasonably say that these findings were clearly erroneous because we leave

questions of credibility for the judge's determination. See Commonwealth v. Van Cao, 419 Mass. 383, 384 (1995).

While show-up identifications are generally disfavored, we agree with the motion judge that the nature of the crime and the timing of the investigation justified conducting the show-up identification procedure at the scene. Concerns for public safety, the need for efficient police investigation in the immediate aftermath of a crime, and the usefulness of prompt confirmation of the accuracy of investigatory information provide good reason for the police to use a one-on-one identification procedure. Commonwealth v. Austin, 421 Mass. 357, 362 (1995). Here, the police were investigating a shooting that had occurred only one and one-half hours earlier by a suspect who remained at large. Where the defendant matched the victims' description but was not found with a gun, prompt identifications would inform a decision to continue searching the area for a suspect who could be armed. See Commonwealth v. Meas, 467 Mass. 434, 441-442 (2014). In these circumstances, "[t]he advantages of such an immediate identification override the suggestiveness of the setting." Commonwealth v. Walker, 421 Mass. 90, 95 (1995).

Of course, even where there is good reason for a show-up, suppression is appropriate if the procedure is so unnecessarily suggestive as to be conducive to irreparable mistaken

identification. Commonwealth v. Martin, 447 Mass. 274, 279-280 (2006). We are not persuaded that making the defendant turn the brim of his cap forward was unnecessarily suggestive. One victim described the shooter wearing a baseball cap with the brim facing forward. When the defendant repeatedly attempted to alter his appearance by turning his cap backward during the show-up identification procedure, we see nothing impermissible about the officers directing him to turn it back around.

Finally, the motion judge properly rejected the defendant's claim that the show-up was unnecessarily suggestive because he was flanked by two officers, illuminated with takedown lights, and appeared to be handcuffed during the procedure. First, the motion judge found that the defendant was not handcuffed during the identification procedure. That finding was supported by the evidence and not clearly erroneous. Second, "[i]llumination was needed in view of the fact that the identifications took place" in the early morning hours when it was still dark. Meas, 467 Mass. at 442. Finally, there was no error in the police standing with the defendant during the show-up. See Commonwealth v. Phillips, 452 Mass. 617, 628 (2008), overruled on other grounds by Commonwealth v. Britt, 465 Mass. 87, 100 (2013) (show-up identification was not unnecessarily suggestive where suspect was handcuffed in police vehicle and flanked by police officers).

For all of these reasons, we agree with the motion judge that the defendant failed to establish by a preponderance of the evidence that the show-up identification was so unnecessarily suggestive as to violate his right to due process. Meas, 467 Mass. at 440.

b. Eyewitness identification certainty. Next, the defendant argues that we should rule that statements of certainty in eyewitness identifications should never be admitted because they "have almost no probative value, but are incredibly prejudicial." We decline to create such a new rule where the defendant did not object at trial and statements of eyewitness identification certainty are admissible under existing law. Commonwealth v. Bastaldo, 472 Mass. 16, 32 n.25 (2015), and cases cited. The judge properly instructed the jury that the victims' "expressed certainty . . . may not be a reliable indicator of the accuracy of the identification." No more was required. See Commonwealth v. Gomes, 470 Mass. 352, 372 (2015).

c. Clothing bias instruction. The defendant claims that the trial judge erred when he denied the defendant's request for an instruction that "witnesses at a showup may be more inclined to base their identifications on clothing rather than facial features." We disagree. Consistent with the Model Jury Instructions on Eyewitness Identification, 473 Mass. 1051 (2015), the judge enumerated various factors the jury should

consider in assessing the reliability of the victims' identifications and repeatedly instructed them that the Commonwealth bears the burden of proving the defendant's identity as the perpetrator beyond a reasonable doubt. His charge as a whole adequately covered the issue. See Commonwealth v. McGee, 467 Mass. 141, 154 (2014). Moreover, the defendant suffered no prejudice from the absence of his requested instruction because the issue was squarely before the jury. Defense counsel aggressively cross-examined the victims about the bases for their identifications and the judge instructed the jury on some of the factors the jury should consider in evaluating the identification, leaving the defendant free to argue, as he did, that the witnesses only identified the defendant because he was "a black guy with a hat and a wife beater in front of the place . . . where they were shot at supposedly."

2. Closing argument. In an effort to bolster the victims' credibility, the prosecutor asked the jury to consider the fact that the victims "describe[d] those events to you up on that stand, in front of 14 strangers, in front of a courtroom, in front of the person that shot them." The defendant objected to this statement, which, he claims, improperly urged the jury to believe the victims simply because they came to court to testify. "Where credibility is at issue, it is certainly proper

for counsel to argue from the evidence why a witness should be believed." Commonwealth v. Raposa, 440 Mass. 684, 694-695 (2004), quoting Commonwealth v. Thomas, 401 Mass. 109, 116 (1987). However, it is impermissible for a prosecutor to "suggest to the jury that a victim's testimony is entitled to greater credibility merely by virtue of her willingness to come into court to testify." Commonwealth v. Helberg, 73 Mass. App. Ct. 175, 179 (2008).

Mindful of these principles, we conclude that the above-quoted portion of the prosecutor's argument was improper. However, considering the remarks in the context of the entire closing argument, the judge's instructions to the jury, and the evidence produced at trial, we see no prejudice. See Commonwealth v. Lyons, 426 Mass. 466, 471 (1998). The comment was isolated, and the judge properly instructed the jury on what constituted evidence, how credibility should be determined, and the requirement of proof beyond a reasonable doubt. Moreover, the evidence of the defendant's guilt was strong. He matched the victims' detailed descriptions of the shooter; the victims positively identified him within one and one-half hours of the shooting; he gave a false name to the police; he attempted to conceal his appearance during the show-up; and his hands tested positive for gunshot residue. In light of the strength of this evidence, we cannot reasonably say that the improper comment

possibly made a difference in the jury's conclusion. See Commonwealth v. Kater, 432 Mass. 404, 422-423 (2000).

We are not persuaded by the defendant's unpreserved claim that the prosecutor impermissibly disparaged the defense in his closing argument. While the prosecutor's suggestion that the race-based aspect of defense counsel's argument was insulting to the jurors' intelligence and "dangerous" was an unnecessary characterization, the absence of an objection is some indication that the tone of the argument was not as harsh as the defendant now claims. See Lyons, 426 Mass. at 471. In any event, for the reasons set forth above, nothing in the prosecutor's closing argument created a substantial risk of a miscarriage of justice.

3. Guilty plea. The defendant's final claim is that his plea of guilty to being a level two ACC must be vacated because carjacking is not a violent crime and, therefore, there was an insufficient factual basis for his guilty plea. Under the Armed Career Criminal Act (ACCA), a "violent crime" is

> "any crime punishable by imprisonment for a term exceeding one year . . . that: (i) has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another; (ii) is burglary, extortion, arson or kidnapping; (iii) involves the use of explosives; or (iv) otherwise involves conduct that presents a serious risk of physical injury to another."

G. L. c. 140, § 121. See G. L. c. 269, § 10G (e). It is undisputed that the crime of carjacking is punishable by a term

of imprisonment greater than one year. The Supreme Judicial Court has ruled that the fourth clause of the definition of violent crime, the so-called "residual" clause, is unconstitutionally vague. Commonwealth v. Beal, 474 Mass. 341, 351 (2016). Accordingly, in the circumstances here, the only potentially applicable section of the definition is the first clause, the so-called "force" clause.

The elements of the offense of carjacking are that the defendant (1) with the intent to steal a motor vehicle, (2) assaults, confines, maims, or puts any person in fear, (3) for the purpose of stealing the motor vehicle. G. L. c. 265, § 21A. The Supreme Judicial Court has stated that "the offense of carjacking 'has as an element the use, attempted use or threatened use of physical force . . . against the person of another[,] G. L. c. 140, § 121[, and] there is no question that, if committed by an adult, [the crime of carjacking] would constitute a 'violent crime' that may be applied to enhance a sentence under [G. L. c. 269,] § 10G." Commonwealth v. Anderson, 461 Mass. 616, 628 (2012). The defendant argues that Anderson is not binding because this statement merely reflects an uncontested judicial assumption that carjacking is a violent crime. Even assuming, without deciding, that the elements of carjacking are not categorically violent, by pleading guilty as a level two ACC pursuant to a favorable agreement with the

Commonwealth, the defendant "waived any claim to the lack of sufficient evidence that he committed a violent crime" (quotation omitted). Commonwealth v. Wentworth, 482 Mass. 664, 673 (2019). After consultation with counsel, the defendant executed a written waiver of rights form in which he stated, "I also understand that I give up my right to appeal . . . the Court's acceptance of my plea of guilty . . . and imposition of sentence." This plea of guilty waived all nonjurisdictional defects.[1] See Commonwealth v. Buckley, 76 Mass. App. Ct. 123, 130 (2010). Accordingly, we agree with the Commonwealth that the issue is not properly before us on direct appeal.

Judgments affirmed.

By the Court (Kinder, Sacks & Shin, JJ.[2]),

Joseph F. Stanton

Clerk

Entered: September 30, 2019.

[1] We are not persuaded by the defendant's claim that "carjacking is never a valid predicate," such that the defect was jurisdictional. Even if the elements of carjacking are not categorically violent, the Commonwealth can prove the required use of force through extrinsic evidence. Wentworth, 482 Mass. at 676.

[2] The panelists are listed in order of seniority.