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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Cherokee County
The Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

DIANTE JERMAINE WILLIS,

APPELLANT.

Appellate Case No. 2021-001466

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

- I. Whether the court erred by allowing an in-court identification of appellant where the witness told the investigator she could not identify appellant from the photographic lineup, the investigator then interjected that the lineup was "old jail photos" which resulted in the witness claiming that she recognized appellant's "eyes," and the state then had the witness listen to appellant's voice on a police tape, and had appellant speak to her in court, to grow the witness's confidence in her selection since the identification procedure utilized under these circumstances was unduly suggestive and should not have been allowed under *Neil v. Biggers*, 409 U.S. 188 (1972) standard?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE ON APPEAL

- I. Did the trial court abuse its discretion in permitting the in-court identification where such was based upon the witness's familiarity, observations, and interactions with Appellant, wherein the witness did not make a selection from the photographic lineup, where the court found no unduly suggest procedure thereto, and where the witness's testimony concerning voice identification was based upon to specific instances where she had the opportunity to hear Appellant speak at length during arguments with her friends and family?

STATEMENT OF THE CASE

Diante' Jermaine Willis (hereinafter "Appellant") was indicted for murder of Jerry Lee Scalf, Jr. and possession of a weapon during the commission of a violent crime (2019-GS-11-1436 & 1436A). Appellant proceeded to a jury trial before the Honorable Judge J. Derham Cole on November 30, 2021 through December 2, 2021. Appellant was represented by attorneys Michael Morin, Esq. and Christopher Lee Allen, Esq. The State was represented by Assistant Solicitors Matt Kendall, Esq. and Kim Leskanic, Esq. of the Seventh Judicial Circuit Solicitor's Office. (Tr. p. 1-2).

At the conclusion of the trial Appellant was found guilty on both indicted charges. (Tr. p. 546). Judge Cole sentenced Appellant to life in prison for murder and no sentence was handed down for possession of a weapon during the commission of a violent crime due to the life sentence given for murder. (Tr. p. 552). This appeal now follows.

STATEMENT OF FACTS

The Neil v. Biggers Hearing

Appellant moved to suppress the in-court identification by Harley Scalf (hereinafter "Harley") "on the basis of improper State procedures that were overly suggestive regarding my client's identity." (Tr. p. 8). Appellant argued this issue on two grounds. First, he argued that the officer's body camera footage shows that Harley "intended" to say "I don't see him", but was interrupted by the officer who then explained that some of the pictures might be older. Thereafter, Harley indicated that the eyes are familiar on one of the pictures, which happened to be Appellant's photograph in the lineup. Second, Appellant argued that Harley identified Appellant's voice in a recording presented to her by the State earlier that day, and that the State intended to have Harley testify to her recognition of Appellant's voice. Appellant analogized this to a one-person lineup.

(Tr. p. 8-10).

In response to the voice identification issue, the State argued that Harley was not shown the accompanying video. The solicitor used it for confirmatory purposes only and Harley was not informed beforehand that it was Appellant's voice. (Tr. p. 10; p. 13-14). She simply listened and identified the voice. The State then had Harley explain how she could recognize his voice, to which she explained that she had not only heard the voice during the crime, but also during a prior altercation down the street in her neighborhood. (Tr. p. 10-11). The State argued that voice identification is not treated with the same requirements as a photographic lineup, and her testimony as to recognizing Appellant's voice goes to credibility as opposed to admissibility. (Tr. p. 11). Regarding the photographic lineup, the State argued that Harley's identification of Appellant was made long before the lineup was presented because she recognized Appellant as being the resident of the specific house down the street. Appellant was not a stranger to her; she had become familiar with him from prior occasions and altercations, and she knew him to be a resident of the neighborhood. (Tr. p. 13-14).

Harley was then called to testify in-camera for the trial court. She testified that she lives on Coach Hill Drive, and that she was present at the time of her twin brother's murder on May 3, 2019. (Tr. p. 15-16). She was installing a pool in the backyard when she heard her brother arguing. She went to investigate and found him in an argument with a tall, skinny, young, African-American. *She was approximately 12 feet away from the suspect at the time of the shooting, and though she did not see his whole face, she did see his eyes.* (Tr. p. 16-18). She then testified that she had seen this person before, both from his frequent walks up and down their neighborhood road (as many as six times a day) as well as during a prior argument. (Tr. p. 19). She testified that he typically wore dark clothing and always had his face partially covered. Nonetheless, from the

frequent observations she learned his specific walk and mannerisms. She also knew where he lived, as he would come and go from the two-story white house that can be seen from her porch. (Tr. p. 20). She testified to a prior argument that she watched take place from 10 feet away between her brother's friend, Michael Guyton, and Appellant. This argument took place in front of Appellant's home. (Tr. p. 21). Harley even testified that Appellant's mother came out of the home and apologized for her son's behavior after the argument with Mr. Guyton. (Tr. p. 25).

Harley had an opportunity to hear his voice during this argument, as it lasted for approximately 10 minutes, and she recognized it as the same voice as her brother's assailant. (Tr. p. 22; p. 23-24). Harley testified that the man from that prior argument was the same person who shot her brother. She was confident in the identification because it was the same person who would regularly come out of that house, and for whom she showed the same mannerisms and behaviors she had come to recognize, such as his distinctive walk with a hand in the front of his pants. (Tr. p. 22-24).

She testified that following the shooting, the assailant took off running toward Raintree Lane and the location of his home. (Tr. p. 26). Harley testified that law enforcement arrived and she spoke with officers before being shown a photo lineup. She testified that she identified the resident of the two-story house as the assailant and directed them to that house. (Tr. p. 27). After making that identification, she was later shown a photo lineup. She recalled being told that the assailant may not be in the pictures provided, but did not initially recall being told anything else. (Tr. p. 28-29). Upon more specific questioning, she did recall the officer mentioning that the photos were old jail photos. (Tr. p. 29). However, upon review of the lineup she could not make a confident selection, and merely noted that one photo had "eyes" that looked like the assailant's. (Tr. p. 30). She then made an in-camera identification of Appellant as the assailant from that night,

and testified that he had since changed the look of his hair. (Tr. p. 31-32). She testified that he originally had a “box cut” and that his new hair style was cut shorter. (Tr. p. 32). This line of questioning drew an objection from the defense, but it was overruled as the solicitor explained that it goes to demonstrate that she can make an in-court identification and articulate the details of how he looked at the time of the shooting in comparison to the date of trial. (Tr. p. 33-34).

Harley next testified that she had an opportunity to hear Appellant’s voice prior to the shooting. She had the opportunity to hear Appellant for approximately five minutes prior to the shooting, as well as during a previous argument that took place in front of Appellant’s home. She testified with certainty that the voices from both incidents were the same. (Tr. p. 34; p. 35). She was also able to testify as to the content of the argument prior to the shooting, noting that Appellant was yelling: “You’re the one that makes false accusations.” (Tr. p. 35).

Harley testified that she had also recently heard and identified Appellant’s voice during a recording played for her that morning. She testified that she did not know what it was she was listening to, did not see who was speaking in the clip, and did not recall what was told to her prior to listening to the audio clip. She testified that it was “just a voice” and that it was the same voice of the assailant that she had heard on the prior two occasions. Harley was “a thousand percent” certain that the voices from all three instances belonged to the same person. (Tr. p. 36-37).

The trial court noted that it was uncertain of Harley’s ability to make an in-court identification, despite not having seen Appellant’s face, since Appellant had not demonstrated any mannerisms or walking while in the court room. (Tr. p. 38-39). Objection was raised, but the trial court then granted the solicitor’s request to have Appellant speak: “Stop making false allegations against me.” Upon hearing the Appellant speak, Harley confirmed that it matched the voice of the assailant on the night of the shooting. (Tr. p. 41-42). On cross-examination Harley testified that

she was contacted by the solicitor and asked how she could provide identification. She told them that she could identify his voice, and “the way he stands and all.” (Tr. p. 44). They then played a clip and asked if she could identify it. (Tr. p. 45).

Detective Parnell testified as to the creation and presentation of the photo lineup. (Tr. p. 52-53). He testified that he informed Harley that the culprit may or may not be in the photos provided, and that she should only circle a photo if she was 100% certain of her choice. (Tr. p. 52-53). He testified that Harley was not initially able to make a selection. He then noted to her that the photos may not be current photographs. After which, she stated that “Number 3” (Appellant’s photograph) had similar eyes to what she had previously seen during the incident. However, she was still not certain and could not make an actual selection. (Tr. p. 54-55).

On cross, Detective Parnell confirmed that there is no policy in place preventing the officer from knowing whether the suspect in question is included in the lineup presented to a witness, nor is there any office policy regarding interruption. (Tr. p. 58). He confirmed that Harley had said the words “I don’t” prior to his interjection stating that the photos may not be current, and afterward she commented about the similarities of the eyes in picture number 3. (Tr. p. 60, lines 2-6). However, she still followed with an indication that she was not sure if it was the assailant. (Tr. p. 60).

Thereafter, the parties reiterated their arguments to the trial court. Appellant presumed that the State would argue that the photo lineup comment about the eyes constituted an identification. Appellant preemptively disagreed. (Tr. p. 62). Appellant then argued that the voice identification procedure was overly suggestive, and equivalent to a single-person lineup. (Tr. p. 68-69). The State contended that all Harley had done was listen ahead of time to determine if the voice was recognized or not, and that such is treated differently than photograph lineups. The State also noted

that the defense would be able to bring these issues up during cross-examination to challenge the identification's veracity or credibility. (Tr. p. 65-66). Contrary to Appellant's presumption, the State did not argue that the photo lineup constituted an independent identification. Instead, the State argued that the photo lineup along with all the other factors collectively provided a substantial and reliable basis for her to provide an in-court identification. (Tr. p. 66). The State further argued that even if the lineup were to be considered tainted, Harley was still able to identify Appellant as the man living in the identified residence, and that the photo lineup could not have impacted the prior identification provided by Harley to police that night. (Tr. p. 67).

In consideration of the testimony and arguments presented, the trial court noted that Appellant was inevitably speculating as to what Harley was *about to say*, and she was never asked during her in-camera testimony precisely what she *would have said* after the words "I don't". In any case, the trial court ultimately found the speculative content of Harley's interrupted sentence immaterial because the officer's interjection was not suggestive of any particular photo nor suggestive that the culprit was in fact included in the lineup. (Tr. p. 71, line 17 through p. 73, line 18). The trial court further concluded that it was clear that Harley did not select number 3 as being the assailant, but simply offered consideration that his eyes looked similar. The trial court then confirmed with the State that it did not intend to offer the lineup as evidence that she picked out Appellant as the assailant. (Tr. p. 74). Instead, the State agreed that mention of the lineup would only come in response to an attack upon her identification, and not in its case-in-chief. (Tr. p. 75).

The trial court concluded the issue by finding that there was no basis to exclude the witness's testimony, as the photo lineup procedure was not improperly suggestive and there is no unconstitutional police conduct employed to get her to make an identification. (Tr. p. 76-77). Moreover, the trial court noted that the witness's in-court identification "based upon sufficient

experience, knowledge, observation, familiarity . . . is subject to tests by examination” and that it is for the jury to decide whether her identification is credible. (Tr. p. 77, lines 7-16; p. 77-78).

Regarding the voice identification issue, the trial court adjourned for lunch and gave the attorneys time to further research the matter. (Tr. p. 79-80). Following this exchange, other possible issues were discussed and resolved and the jury was brought in for qualification and selection. The parties then returned to the discussion of the voice identification issue. The State referenced discussions that took place in chambers and reiterated that it would not have the witness identify Appellant’s voice in court, nor through an admitted recording. Instead, she would only testify that she recognized Appellant’s voice from the shooting and the prior altercation. *Appellant did not object to this arrangement.* (Tr. p. 153).

The Trial

On the night of May 3, 2019, Appellant engaged in an argument with Jerry Lee Scalf, Jr. (hereinafter “Victim”) in front of his twin sister’s home on *** Coach Hill Drive. (Tr. p. 186-190). The argument ended when Appellant shot Victim three times, with one of the bullets striking his aorta and resulting in his death. (Tr. p. 338). The evidence against Appellant came in the form various eyewitness accounts and forensic evidence collected through the murder investigation.

The crime was witnessed by a number of Victim’s friends and family. Victim’s twin sister Harley Scalf testified that upon hearing the argument in front of her home, she left her backyard to investigate. She found her brother in an argument with a “young”, “tall and kind of skinny” African-American man dressed in dark clothing. (Tr. p. 189-191; p. 200). After coming to the front yard she was beside her brother, between 6 to 10 feet away from Appellant, and standing near the back of Victim’s red Camaro. She overheard the argument from Appellant saying that Victim “[is] the one that wants to make false accusations.” (Tr. p. 191-192). She witnessed Appellant push her

brother and then witnessed her brother eventually push Appellant back. She then heard her brother yell that Appellant had a gun and as she took cover from behind the Camaro, she heard gunshots.¹ She then watched as the shooter ran away through her neighbor's yard and toward his house on Raintree Lane – the two-story white house that can be seen from her front porch. (Tr. p. 192-193; p. 194; p. 197). Harley testified that prior to the shooting, she was previously familiar with Appellant. She testified Appellant would walk around the neighborhood numerous times a day in the month leading up to the shooting. She testified that he would always be wearing dark clothing, and “would always have something like covering his face, but from here down. (Indicates.)” (Tr. p. 193, line 17 through p. 194, line 12). At this stage of her testimony, Harley testified explicitly that the shooter lived in the two-story white house that is three houses down on Raintree Lane. (Tr. p. 194, line 7 through p. 195, line 2). Harley was also present during a prior argument between Appellant and her brother's friend; the argument took place in front of Appellant's home on Raintree Lane. She was able to “hear him really well” during that prior argument. However, the argument did not involve her, and she was not able to see Appellant during that time. (Tr. p. 195, line 12 through p. 196, line 4).

Harley testified that the voice she heard during the first argument in front of Appellant's home, was the same voice of the man who shot her brother. (Tr. p. 197, lines 13-24). Following this testimony Harley provided a description of the shooter, again describing him as a tall and skinny African American who had “a box cut kind of haircut” with the sides cut so that it would stand up. (Tr. p. 198, lines 1-12). She did not provide a precise height, but testified that he was

¹ Appellant contends that Harley never informed police that she saw Appellant with a gun that night. (Initial Brief of Appellant, p. 9). Her testimony was clarified on further redirect examination that she could not describe the gun for police. However, her statement to law enforcement clearly indicated that she saw Appellant with a gun. (Tr. p. 218-219).

taller than she was and had a distinctive walk where his hand was always in the front of his pants. (Tr. p. 198, lines 13-24). She further identified his eyes as a distinguishing characteristic. (Tr. p. 199, lines 1-3). Harley then identified Appellant in court as the man who shot her brother. (Tr. p. 199, lines 12-25). She testified that she was “a thousand percent sure” of her identification. (Tr. p. 201).

On cross-examination, Harley testified that it was dark outside at the time of the shooting, but that Appellant’s home is still visible from her porch. (Tr. p. 203). She testified that she was not able to tell police the assailant’s name, and that she had not seen his face. (Tr. p. 210). She further testified that she did not see Appellant’s “face” during the previous argument in front of his home. (Tr. p. 210). However, she testified that his “eyes” were the extent of her ability to identify Appellant when asked by the State to try and do so.² (Tr. p. 211, lines 1-5). Harley clarified on redirect that her recognition of physical characteristics went beyond “eyes”, and reiterated that his height, physique, haircut, ethnicity, and distinguish walk were also part of her identification. (Tr. p. 213-214). Harley further agreed that she saw Appellant on a regular basis. He was not a stranger; he was someone from the neighborhood with whom she was familiar. (Tr. p. 215-216).

Ms. Harley Scalf’s wife, Kyla Scalf, was also present at the time of shooting. Kyla likewise testified that the man arguing with Victim prior to his death was the man she had seen walking at various times in the neighborhood, and she knew the two-story white house on Raintree Lane to be his home based on his frequent comings and goings from the home. (Tr. p. 221-223). She testified that he ran toward this house immediately after the shooting. (Tr. p. 225). Though she testified that she was unable to get a good look at Appellant’s face, she was a few feet away from

² The State made no reference to the prior out-of-court lineup discussed at length during the *Neil v. Biggers* hearing. Appellant brought it up independently.

Appellant at the time of the shooting, recognized him by his body type, height, build, skin-tone, mannerisms, and the way he walked. (Tr. p. 223-224). She was certain that man responsible for shooting Victim was the man she had seen walking the neighborhood and living in the home on Raintree Lane. (Tr. p. 226-227). The State presented additional testimony from Rashod Davidson, who identified Appellant and testified that Appellant did indeed live at the Raintree Lane home in question. (Tr. p. 254; p. 256).

Steven Manning was the third eyewitness to the crime and testified similarly to Kyla and Harley. He testified that the assailant was a tall and skinny African-American male, who was wearing dark colored clothing at the time of the shooting. He had seen him come and go from the driveway of the home on Raintree, and was certain that the man he had likewise seen pacing around the neighborhood was the man who committed the shooting. (Tr. p. 392; p. 395; p. 401). Mr. Manning also testified to hearing additional gunshots a couple of minutes *after* Victim had been shot. (Tr. p. 405).

This corroborated the testimony offered by Mr. John Earls, who lived down the road at the intersection of Maplewood and Raintree Lane. (Tr. p. 235). Mr. Earls was cooking food when he heard some noise outside. He described the sound as “pops” that might have been gunshots. (Tr. p. 236-237). Upon his first look he did not see anything. (Tr. p. 236). However, he came back moments later and saw a man near his car, which was parked on Raintree Lane. He testified that the man looked hectic and scared. When he asked the man if he was alright the man ignored him and cut across his yard and began jogging toward Maplewood. Mr. Earls described the man as tall, athletic, and having a dark complexion. He was wearing a dark jersey, some jogging pants, a hat of some kind, and did not appear to be using a flashlight. Mr. Earls called 911 to report the information. (Tr. p. 237-238). However, a few minutes later Mr. Earls heard “more pops” like

gunshots and soon saw who he believed to be the same man as before. Only this time the man did not have a shirt on. (Tr. p. 239-240). He explained that on the first encounter he saw the man heading toward Filter Plant Road, and on the second encounter the man was running back toward Raintree. (Tr. p. 240-241).

Upon arrival on the scene, law enforcement was informed that the shooter lived in the two-story house on Raintree Lane. (Tr. p. 306). Officer Jeffrey Cole responded to the scene and then proceeded to the suspect's home. He attempted to make contact, but no one came to the door. He and Lt. Peterson would soon return to the home to try again. Upon their return they knocked and again received no answer. However, while they were standing on the front porch they heard scuffling near the home. They shined their lights and saw Appellant. He was already jogging at that moment, but upon being spotted he "took off running" to flee from the officers. Appellant kept running to the other side of the house but was ultimately caught.³ (Tr. p. 272-274). Officer Benji Peterson testified similarly and noted that Appellant fit the description of the shooter. He further noted that Appellant was attempting to return to the home believed to belong to the shooter. (Tr. p. 308-309). Appellant was taken into custody with no shoes or shirt on. (Tr. p. 464).

Appellant's hands were tested for gunshot residue and the analysis demonstrated a positive GSR result. (Tr. p. 351; p. 348-349). Forensics also recovered an intact "JLab" earbud at the scene of the shooting. A subsequent search of Appellant's vehicle led to the discovery of a matching JLab charging case for such an earbud. (Tr. p. 364-365; p. 369-370; p. 379; p. 462). A search of the Raintree Lane house believed to belong to Appellant resulted in the police finding Appellant's diploma, wallet, and driver's license. (Tr. p. 372). During the interview with detectives, Appellant

³ Appellant's assertion to the officers was that when he realized it was the police, he stopped running.

informed the officers that he had been wearing a Clemson jersey. (Tr. p. 465). Police ultimately found a Clemson hat and a dark blue in color Clemson football jersey in the trash can located at *** Maplewood. (Tr. p. 462; p. 467; p. 374-376). Appellant also informed the detective that Victim and his family were the people he believed were responsible for making false police reports against him. (Tr. p. 473-474).

STANDARD OF REVIEW

“Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact.” *State v. Liverman*, 398 S.C. 130, 137–38, 727 S.E.2d 422, 425 (2012). “In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court.” *Id.* “Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion.” *Id.* “An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.” *State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001).

ARGUMENT

I. Appellant’s voice identification issue is ultimately unpreserved for appellate review and is otherwise meritless as the State did not actually introduce an in-court voice identification by Harley Scalf.

As a threshold matter, Appellant’s challenge to the supposed voice identification by witness Harley Scalf is not preserved for appellate review. Appellant ultimately abandoned the issue and raised no objection to the solicitor’s reiterations that it would not play an audio clip, not have Appellant speak so as to conduct an in-court voice identification, and only have Harley testify as to her recognition of the voice from the two incidents with Appellant in her neighborhood. Appellant did not raise any objection to this arrangement, the Court did not reach a legal ruling on the issue, and there is consequently no preservation of the voice recognition issue for appellate

review. Moreover, the manner in which Harley testified does not constitute an in-court identification that can be attacked as tainted by improper state procedure.

The law of South Carolina concerning issue preservation is well settled. “To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court.” *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (citing *State v. Johnson*, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996)). “The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error.” *Id.* (citing *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001)). “If a party fails to properly object, the party is procedurally barred from raising the issue on appeal.” *Id.* at 59 (citing *State v. Pauling*, 322 S.C. 95, 99, 470 S.E.2d 106, 109 (1996)).

Here, Appellant has failed to satisfy these necessary steps for preservation of the issue on appeal. First, though an argument was raised at the outset of the hearing on the basis of using audio clips and in-court identifications, Appellant made no objection to the State’s assertions that it would only elicit testimony from Harley regarding her recognition of Appellant’s voice on the basis of her prior encounters with him. Though Respondent finds no error in the State’s chosen approach, a contemporaneous objection was necessary here to preserve the issue for appeal and Appellant failed to raise any such objection. In truth, the record seems to suggest that Appellant had agreed to this arrangement reached in chambers. (Tr. p. 152, line 18 through p. 153, line 25). Secondly, during this exchange the Court did not issue a ruling on the matter. To argue error on the part of the trial court in an appeal, there must be an actual ruling from the court constituting error. Here, there is none. This issue is not preserved for appellate review.

Moreover, the *alleged* legal error by the court in permitting a tainted in-court voice identification never actually took place at trial. Appellant initially raised the issue as being

tantamount to a one-person lineup, but the record shows that Harley never saw the video and was not made aware that Appellant was the individual speaking. (Tr. p. 13-14). She only heard it. Regardless, Appellant's arguments came with some recognized limitations and assumptions for what would take place at trial. His position in full reads:

Now, my position is, if Ms. Scalf wants to testify that she remembers his voice from what was said, I can't do anything with that. However, I would argue that the State has tainted that – that by showing her an interview of my client and going, "is this the voice you heard?" Essentially, creating a one-person lineup to which she says, "Yes." And Now they want her to come in and say, "Yeah. I heard his voice," and they want to – at trial, play the video of my client being interviewed so she can say, "Yeah. That's the voice I heard."

(Tr. p. 10, lines 2-14) (emphasis added). After considerable argument and discussion of other matters, Appellant returned to the issue and reiterated his arguments against in-court voice identification. (Tr. p. 63-64). However, the issue was resolved by the State agreeing not to present the audio clip and not to seek an in-court voice identification by Harley Scalf.⁴ Instead, the State would simply question her as to whether she recognized the voice of her brother's assailant as being the voice of the individual arguing with Michael Guyton. Appellant's early arguments concede that he cannot challenge the witness's ability to testify in that manner, and no in-court voice identification was offered at trial. Appellant's alleged error in this regard simply did not occur.

⁴ Appellant has not provided any case law suggesting that *Neil v. Biggers* is directly applicable to voice identification matters. But regardless, the record shows that Harley recognized Appellant's voice from her prior encounters with him in the neighborhood *and made her familiarity known to the State prior to being played an audio clip or hearing Appellant making a voice recitation*. As she did not testify to anything more than her established familiarity from these prior encounters, there can be no basis to suggest her previously established recognition of Appellant's voice is somehow tainted.

Appellant's reliance upon error as to voice identification is unpreserved and nonexistent.

Appellant's conviction and sentence should be affirmed.

- II. **The trial court was within its discretion to permit Harley's in-court identification, as there was no unduly suggestive procedure implemented by the state during the photographic lineup and the witness ultimately did not make a selection from which a subsequent in-court identification could become tainted under *Neil v. Biggers*.**

The trial court was well within its discretion to find no unduly suggestive procedure by law enforcement during the photographic lineup and permit Harley to give an in-court identification of Appellant based upon her established experience, knowledge, observation, and familiarity. Such is a question of credibility for the jury that is tested under the crucible of cross-examination. Ultimately, *Neil v. Biggers* and the law of unduly suggestive out-of-court identification is not even applicable to this issue. Appellant's allegation is not an out-of-court identification upon which the witness relied that could then reasonably create a future irreparable misidentification in court. Harley had already identified Appellant as the shooter and directed the police to his home just minutes after the shooting took place. She did not attempt a photographic lineup identification until much later. Once presented with the photographic lineup, she simply commented on the similarity of his eyes – which was one of the many preestablished bases for her familiarity with Appellant. There was no abuse of discretion by the trial court in this matter.

“A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification.” *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). “An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification.” *Id.* So as to preserve due process, the United States Supreme Court in *Neil v. Biggers* established a two-prong

test for determining whether suppression of an eyewitness's identification is necessary. First, courts must assess such issues on a case-by-case basis and determine whether the identification resulted from unduly suggestive police procedures, and second, if so, the court must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification arises. *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) (citing *Neil v. Biggers*, 409 U.S. 188, 198, 93 S. Ct. 375, 381, 34 L. Ed. 2d 401 (1972)). In application of that standard, our South Carolina Supreme Court has further held that “[t]he purpose of an in-camera hearing when the State offers identification witnesses is for the trial court to decide ‘whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification.’” *Gibbs v. State*, 403 S.C. 484, 493, 744 S.E.2d 170, 174–75 (2013) (quoting *State v. Ramsey*, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001)). “Where the ‘indicators of [a witness]’ ability to make an accurate identification’ are ‘outweighed by the corrupting effect’ of law enforcement suggestion, the identification should be suppressed.” *Perry v. New Hampshire*, 565 U.S. 228, 132 S. Ct. 716, 718, 181 L. Ed. 2d 694 (2012) (citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243 (1977)).

In consideration of the issue from a broader perspective, the Court's articulation of the purpose of in-camera testimony in *Gibbs* and *Ramsey* is particularly impactful. The photographic lineup was not an out-of-court identification by the witness. The State acknowledged this and agreed that it would not seek to present it as such in its case-in-chief, and instead only utilize it if Harley's identification were to be attacked by the defense. The State correctly argued that it simply serves as one of the many bases for which an in-court identification can be collectively considered reliable. Moreover, before any testimony was offered regarding the photographic lineup, Harley testified that she saw the assailant's eyes on the night of the crime. (Tr. p. 18, lines 6-10). As she

did consistently through her testimony, Harley differentiated between being able to see the assailant's "eyes" and being able to see the assailant's "face". (Tr. p. 17, line 20 through p. 18, line 10; p. 40; p. 199).

A thorough and fair reading of the record demonstrates that Harley testified to seeing the assailant's eyes during the shooting and her limited consideration of the photographic lineup did not go any further than *confirming* her recognition of his eyes as one of the characteristics that supported her identification of Appellant as the shooter for the police when she directed them to his home just minutes after the shooting. The Court in *Gibbs* carries this assurance further wherein it demonstrates that an untainted out-of-court identification occurring before the complained of identification, more aptly renders the second out-of-court identification as "merely confirmatory" and leaves intact the reliability of the witness's identification. *Id.* at 494, 744 S.E.2d at 175. Appellant cannot legally claim that Harley's in-court identification of Appellant was tainted by an out-of-court identification derived from unduly suggestive police procedure, because there was no actual identification. See *State v. Scipio*, 283 S.C. 124, 127, 322 S.E.2d 15, 17 (1984)(finding that an in-court identification of defendant by victim was still admissible even though victim failed to identify defendant in a photographic lineup). Stated another way, there can be no irreparable misidentification stemming from a supposedly tainted photographic lineup, when the witness had already independently identified Appellant and rested her identification on numerous bases of familiarity from having had Appellant as a nearby neighbor.

Addressing more precisely the rulings of the trial court, Appellant has failed to demonstrate that the trial court abused its discretion. First, the trial court was correct in noting that Harley did not actually state: "I don't see him." Her testimony was "I don't" and her in-camera examination did not bring to light what she would have said. Appellant was merely speculating for purposes

of supporting an otherwise deficient argument. Moreover, the trial court was likewise correct in noting that the interjecting commentary by the officer that the photos are old jail photos (or some other equivalent comment) is not unduly suggestive. (Tr. p. 76-77). It would not highlight one picture over another and it would not indicate to Harley that the assailant's photo is in fact included in the lineup. Appellant fails the first prong under *Neil v. Biggers*, and he certainly cannot demonstrate that the trial court's consideration of the issue amounts to an abuse of discretion.

With the trial court finding no basis to satisfy the first prong, application of the second prong can only be performed in *arguendo*. After finding no unduly suggestive procedure, the trial court also correctly noted that even if the interjection was unduly suggestive, it did not result in an identification from the lineup by the witness. (Tr. p. 76, lines 23-25). As a result, subsequent taint leading to misidentification cannot arise. Lastly, in addressing the basis for an in-court identification, the trial court noted that the sufficiency of Harley's experience, knowledge, observation, [and] familiarity is a question for the jury and would be subjected to cross-examination, rendering the motion to suppress improper.⁵ (Tr. p. 77, line 7 through p. 78, line 17); See *Perry v. New Hampshire*, 565 U.S. 228, 245, 132 S. Ct. 716, 728, 181 L. Ed. 2d 694 (2012)([T]he jury, not the judge, traditionally determines the reliability of evidence."). This ruling was likewise a proper exercise of discretion in this case.

In addition to the arguments demonstrating a lack of abuse of discretion in this case, there is a strong alternative argument for harmless error. "Most trial errors, even those which violate a defendant's constitutional rights, are subject to harmless-error analysis." *State v. Rivera*, 402 S.C.

⁵ Appellant asserts that the trial court utilized an improper legal standard of review. (Initial Brief of Appellant, p. 13). The trial court's mention of the apparent honesty and credibility of the witness in general does not negate the fact that it explicitly considered the question of unduly suggestive police procedure and found the arguments of Appellant lacking.

225, 246, 741 S.E.2d 694, 705 (2013) “A harmless error analysis is contextual and specific to the circumstances of the case.” *State v. Liverman*, 398 S.C. 130, 141, 727 S.E.2d 422, 427 (2012); See *State v. Wyatt*, 421 S.C. 306, 315, 806 S.E.2d 708, 713 (2017)(noting the applicability of harmless error to evaluation of the *Neil v. Biggers* prongs). The case against Appellant constitutes overwhelming evidence of guilt. And while Appellant’s arguments seek to attack the propriety of Harley’s identification, it leaves unchallenged the equivalent identifications provided by Kyla Scalf and Steven Manning, who both identified Appellant as the shooter and the resident of the two-story white house on Raintree Lane based upon their own opportunities to observe Appellant in the neighborhood. Moreover, the GSR kit, the disposed of jersey, the matching earbud, and the corroborative interview with Appellant wherein he confirmed the nature of his dispute with Victim and the Scalf family all strongly support the jury’s guilty verdict.⁶

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

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⁶ Appellant attempts to argue that Victim’s friends and family who testified in this trial based their suspicions of Appellant on the basis that “he was a man who acted strangely . . .” That is a considerable mischaracterization of the collective testimony offered at trial, where such behavior was repeatedly acknowledged as a basis for confirming Appellant’s *identity*, not for establishing suspicion of his guilt or propensity to commit a violent crime.

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