THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY

R. Knox McMahon, Circuit Court Judge

Supreme Court Case No. 2021-000122

Appellate Case No. 2017-001542

The State, ...Respondent,

v.

James Heyward, ...Petitioner.

APPENDIX
VOLUME III

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FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant is currently serving a sentence of life in prison without the possibility of parole plus seventy years following his convictions for murder, burglary in the first degree, armed robbery, two counts of kidnapping, assault and battery in the first degree, pointing and presenting a firearm, and possession by a person of an unlawful weapon having been convicted of a crime of violence. The Richland County Grand Jury indicted Appellant on these charges.

Prior to the commencement of trial, the Honorable R. Knox McMahon conducted evidentiary hearings on a number of issues. The case was called for trial on June 27, 2017, before Judge McMahon. On July 3, 2017, the jury returned a verdict of guilty as to all charges. (R. p. 420, line 2-p. 421, line 6.) The trial court sentenced Appellant to life in prison without the possibility of parole, plus seventy years to be served consecutively and ten years to be served concurrently. (R. p. 422, line 3-p. 423, line 14.) Appellant timely filed his notice of appeal on July 11, 2017.

STATEMENT OF THE FACTS

On October 11, 2015, Alice Tollison was found strangled to death in her home. (R. p. 147, line 18-p. 148, line 2.) Her eight-year old great-granddaughter, G.F., was also found at the scene, after being tied up and left by the assailant. (R. p. 147, line 18-p. 148, line 2, p. 150, lines 6-18, p. 154, lines 15-21, p. 159, lines 22-24.)

G.F. met with Investigator Joe Clarke at the hospital that evening and gave him a description of her assailant. (R. p. 369, line 22-p. 370, line 5.) The next day, G.F. met with Investigator Clarke again at the Assessment and Resource Center, wherein she was provided a photograph lineup in which Appellant was depicted along with five other African-American

men. (R. p. 371, lines 3-8, State Ex. 30.) Their interaction was recorded by video. (R. p. 27, lines 17-24, State Ex. 31.)

The video recording reflects that when presenting the photograph lineup to G.F., Investigator Clarke told her that "I'm going to show you some pictures, okay. . . . I want you to help me and see if you can see the bad man who did this to your grandmomma." (State Ex. 31.) G.F. referenced the photograph of Appellant by stating, "Number three looks kind of like him." (State Ex. 31.) She then commented that she "couldn't really remember if he had facial hair or not." (State Ex. 31.) Investigator Clarke then asked, "Okay, and you feel pretty confident about that?" (State Ex. 31.) While G.F. responded "yes," it is unclear whether she was affirmatively responding to the facial hair comment or the initial remarks about photograph number three. (State Ex. 31.) G.F. subsequently pointed to a photograph and said, "That one kind of looks like my janitor." (State Ex. 31.) Investigator Clarke then turned over the page of photographs so G.F. could no longer see them. (State Ex. 31.) As Investigator Clarke left the room, G.F. asked him, "You're going to try to catch someone who looks like that? But it's probably not exactly because that isn't exactly . . . ." (State Ex. 31.) She appeared to be mid-sentence when Investigator Clarke interrupted her, and she was not given a chance to finish her statement.

Prior to trial, the court conducted a hearing pursuant to Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972), to determine whether G.F.'s photograph lineup identification of Appellant would be admitted and also whether G.F. would be permitted at trial to identify Appellant to the jury as the assailant. (R. p. 17, lines 13-18, p. 117, lines 12-17.) After watching the video recording of the lineup identification procedure, Judge McMahon ruled that these identifications would be allowed. (R. p. 27, lines 17-24, State Ex. 31.) At trial, G.F.'s photograph lineup identification was admitted. (R. p. 165, line 23-p. 169, line 18, p. 372, line 15-p. 372, line 2,

State Ex. 30.) G.F. explained that during the lineup she was asked to "point out the person who [she] -- who looked most like him," and that she tried to choose "which one scare[d her] and which one look[ed] like him." (R. p. 168, line 21-p. 169, line 1.) G.F. also identified Appellant as the assailant in the courtroom during her testimony. (R. p. 169, line 20-p. 170, line 12.)

The same day G.F. participated in the photograph lineup identification, the Richland County Police matched certain fingerprints from the crime scene to a fingerprint card which was attributed to Appellant from the State of New Jersey's Automated Fingerprint Identification System ("AFIS") database. (R. p. 371, lines 6-19, p. 204, lines 11-19, p. 208, lines 1-10.) After his arrest, the police fingerprinted Appellant through Livescan software. (R. p. 225, lines 8-17.) At trial, the State presented testimony from latent print analysis expert Investigator Trisha Odom, who conducted fingerprint analyses comparing the latent prints collected from the crime scene and the New Jersey fingerprint card. (R. p. 197, line 25- p. 196, line 5, p. 202, lines 10-21, p. 224 lines, 1-14.) Defense counsel objected to the introduction of all fingerprint evidence because the fingerprint card from the New Jersey database was never authenticated in accordance with South Carolina law. (R. p. 203, line 18-p. 205, line 2.) During an in camera session, Investigator Odom admitted that she did not know the minimum compliance thresholds for every state in order to place prints into their respective databases. (R. p. 220, line 21-p. 221, line 22.) Nevertheless, the court overruled defense counsel's argument that the New Jersey prints had not been authenticated and ultimately admitted the fingerprint evidence. (R. p. 243, lines 12-17.)

A search warrant was obtained following Appellant's arrest, and a gun was found in the home where Appellant was residing. (R. p. 314, lines 11-13, p. 314, line 25-p. 316, line 5.) At trial, G.F. testified that the assailant had a pistol that was "gold and rusty." (R. p. 146, line 24-p. 147, line 14.) The State elicited detailed testimony about the recovered gun as well. Investigator

Michael Beeler testified that the recovered gun was an unloaded ".32 caliber Smith & Wesson handgun." (R. p. 351, line 24-p. 352, line 3.) During his testimony, the court admitted "the handgun . . . as well as six unfired cartridges" into evidence. (R. p. 352, lines 19-25.)

After the entry of the recovered gun into evidence and the testimony describing the gun, Defense counsel objected to the subsequent testimony of Investigator David Collins, who was offered by the State to opine on the operational capabilities of the recovered firearm. (R. p. 357, line 23- p. 358, line 5.) The court overruled the objection, finding that whether the firearm was "capable of expelling a projectile through explosion. . . . is an essential element of pointing and presenting." (R. p. 360, lines 16-22.) The court further stated that such testimony would also be relevant to finding whether Appellant was armed with a deadly weapon during the robbery. (R. p. 359, line 21-p. 360, line 4.) In addition to testifying about the operational capabilities of the recovered firearm, Investigator Collins testified it was "somewhat worn and the finish [was] in bad condition." (R. p. 357, lines 9-11.)

Defense counsel also objected to the use of the alias "Abdul Muslin" in the indictments and at trial. (R. p. 426, line 2-p. 437, line 14, p. 441, line 11-p. 443, line 19, p. 444, lines 4-10, p. 446, lines 7-20, p. 447, lines 8-16, p. 3, lines 5-10, Motion to Strike, Ex. 1.) The alias was read to the jury pool as part of the indictments and referenced during jury voir dire. (R. p. 4, line 19-p. 16, line 7.) During the trial, the State presented testimony that DNA from the crime scene matched to an "Abdul Muslim" with the national identification number 220688PA. (R. p. 378, line 2-p. 379, line 9.) Previous testimony indicated that Appellant's national identification number was 220688PA, and another State witness testified she knew Appellant as "Abdul." (R. p. 225, lines 10-13, p. 321, line 23-p. 322, line 3.)

Although the State presented DNA evidence at trial, defense counsel presented testimony from Dr. Michael Spence, an expert in forensic DNA analysis, during rebuttal. (R. p. 415, lines 20-23.) Dr. Spence criticized the way in which the State's experts amplified the DNA samples for comparison, testifying that there was "an enormous risk . . . of cross-contamination from defendant or victim into any of the[] evidence samples." (R. p. 416, lines 1-21.) In other words, because of the way the DNA samples were amplified, "there [was] no way of telling whether that mixture [identifying Appellant's DNA] came from the original sample [from the crime scene] and from that place on that item or if the mixture came from a cross-contamination event." (R. p. 416, lines 8-15.)

STANDARD OF REVIEW

"The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion." State v. Sheppard, 391 S.C. 415, 420, 706 S.E.2d 16, 18 (2011) (citation omitted); see also State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.") (citations omitted); State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) ("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 such, or . . . prejudicial legal error.") (citation omitted); State v. Torres, 390 S.C. 618, 622-23, 703 S.E.2d 226, 228 (2010) ("The relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion.") (quoting State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003)) (internal quotation marks omitted); and

State v. Tucker, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995) ("Whether a defendant is restrained during trial is within the trial judge's discretion.").

"An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (citation omitted). Moreover, "[a] failure to exercise discretion amounts to an abuse of that discretion." State v. Hawes, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (internal quotation marks omitted) (quoting Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997)).

The appellate standard of review for questions of law, however, is de novo. See Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("We are free to decide a question of law with no particular deference to the circuit court.") (citation omitted); see, e.g., Moore, 343 S.C. at 288, 540 S.E.2d at 448 ("However, an eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law.") (citations omitted).

When a combination of errors, while individually failing to rise to the level of being sufficiently prejudicial to warrant a new trial,[1] has the effect of preventing a party from receiving a fair trial, then the party is entitled to a new trial. State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999); see also State v. Peterson, 287 S.C. 244, 245, 335 S.E.2d 800, 801 (reversing and remanding criminal case for a new trial "[d]ue to the collective impact of numerous errors committed by the trial court") overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (overruling State v. Peterson to the extent it "require[d] *in favorem vitae* review").

[1] Appellant contends that each argument here is sufficient to reverse; there is no insignificant error in this record. However, if the Court feels that any issue alone does not equal reversible error, then certainly the issues combined demonstrate prejudice and mandate a new trial.

ARGUMENT

I. The trial court erred in admitting evidence and testimony regarding (a) an out-of-court photograph lineup where the victim did not make a positive identification and (b) the subsequent positive identification made by the victim at trial.

The trial court committed reversible error and violated Appellant's rights to due process by admitting evidence and testimony regarding G.F.'s so-called "identification" of Appellant during a photograph lineup and G.F's subsequent identification of Appellant at trial. G.F. was presented with three opportunities to make an identification of her assailant: (1) during the initial photograph lineup, (2) at the pre-trial hearing regarding the admissibility of the initial photograph lineup, and (3) at the trial itself. When presented with six pictures during the initial photograph lineup, G.F. indicated that the photograph of Appellant looked "kind of" like her assailant but advised that it was "not exactly" him. (State Ex. 31.) At the pre-trial hearing, G.F. identified Appellant in the courtroom as the person she saw in the photograph lineup, but she did not identify Appellant as the assailant. (R. p. 46, lines 10-25.) Finally, during the trial, G.F. testified that she was sure Appellant was her assailant. (R. p. 165, line 9-p. 170, line 25.) This succession of events caused the final identification at trial to be virtually inevitable. Because the identification procedure was so unduly suggestive, unreliable, and conducive to irreparable misidentification, the initial "identification" and the subsequent identification at trial should not have been admitted.

The Supreme Court of the United States has warned that misidentification is the "primary evil to be avoided" in identification procedures and that it is "the likelihood of misidentification which violates a defendant's right to due process." Neil, 409 U.S. at 198, 93 S.Ct. at 381-82 (citation omitted). As the South Carolina Supreme Court explained in State v. Moore, Neil v.

Biggers sets out a two-pronged inquiry to guard against the likelihood of misidentification during out-of-court identifications: "First, '[a] court must determine whether the identification process was unduly suggestive . . . . It next must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." 343 S.C. at 287, 540 S.E.2d at 447 (citation omitted) (internal quotation marks omitted). Reliability is determined by a totality of the circumstances test, in which the court considers the following factors: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Neil, 409 U.S. at 199-200, 93 S.Ct. at 382.

Where a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification, a subsequent in-court identification of an accused is inadmissible. State v. Brown, 356 S.C. 496, 502-03, 589 S.E.2d 781, 784 (Ct. App. 2003) (citations omitted). Admission of the in-court identification under such circumstances is a constitutional error. See Thompson v. Leeke, 756 F.2d 314, 317 (4th Cir. 1985) (issuing writ of habeas corpus after finding admission of witness's in-court identification was constitutional error where witness's in-court identification was tainted by a pre-trial photograph display and the witness's in-court identification "might have" at least contributed to petitioner's conviction for armed robbery).

In the present case, the trial court conducted a pre-trial hearing pursuant to Neil v. Biggers in which it found G.F.'s so-called "identification" admissible. (R. p. 17, line 14-p. 115, line 4, p. 116, line 16-p. 123, line 4, State Ex. 30, State Ex. 31.) The trial court found that the so-called initial "identification" was not the result of an unduly suggestive identification process

and, therefore, it did not need to evaluate the second prong of reliability. (R. p. 122, line 18-p. 123, line 2.) In its analysis regarding whether the identification process was unduly suggestive, the trial court disregarded the lack of an actual identification in the initial photograph lineup, holding that whether a definite identification had been made was an issue for the jury rather than one of initial admissibility for the court. (R. p. 121, lines 17-18.) The definitiveness of G.F's initial "identification," however, was an issue for the court to determine before allowing it into evidence. See Foster v. California, 394 U.S. 440, 89 S.Ct. 1127 (1969).

In Foster, a victim was given three opportunities to identify his assailant prior to the trial. 394 U.S. at 441-43, 89 S.Ct. at 1128-29. First, he viewed a physical line-up of three men. Id. at 441, 89 S.Ct. at 1128. "After seeing this lineup, [the victim] could not positively identify [the defendant] as the robber. He 'thought' he was the man, but he was not sure." Id. Next, the victim had a one-to-one sit-down with the defendant but he "still was uncertain whether [the defendant] was one of the robbers." Id. Finally, the victim later viewed a physical lineup of five men, and the defendant was the only person in this second lineup that had been included in the original lineup. Id. at 441-42, 89 S.Ct. at 1128. At this point, the victim "was 'convinced' [the defendant] was the man." Id. at 442, 89 S.Ct. at 1128. The victim later positively identified the defendant at trial. Id.

The Foster Court held that this identification procedure "made it all but inevitable that [the victim] would identify [the defendant] whether or not he was in fact 'the man.'" Id. at 443, 89 S.Ct. at 1129. The victim began by being unable to make any identification, changed to a tentative identification, and ultimately came to a definite identification as a result of the police effectively repeatedly telling the witness that the defendant was the assailant. Id. at 441-43, 89

S.Ct. at 1128-29. The Foster Court found that this was a compelling example of unfair lineup procedures and held that the procedures violated the defendant's right to due process. Id.

Likewise, here, as the video recording reflects, G.F. did not make any identification during the initial photograph lineup. (State Ex. 31.) When showing the initial photograph lineup to G.F., Investigator Clarke encouraged G.F. to be brave and to help him. (State Ex. 31.) He told her that "I'm going to show you some pictures, okay. . . . I want you to help me and see if you can see the bad man who did this to your grandmomma." (State Ex. 31.) He did not, however, tell her that she need not identify anyone if she did not see the "bad man," indicating that the "bad man" would be included in the pictures he would show her and that it was her task to determine which one of the six pictures was the "bad man." (State Ex. 31.) In response, G.F. stated that the photograph of Appellant "looks kind of like" the assailant. (State Ex. 31.) She asked Investigator Clarke, "You're going to try to catch someone who looks like that? But it's probably not exactly because that isn't exactly . . . ." (State Ex. 31.) Like the victim in Foster, she was unable to make a positive identification from the initial lineup, and she even seemed to indicate that the photograph of Appellant was not the assailant.

Although G.F. did not participate in any subsequent lineups, G.F. was later asked during a pre-trial hearing if the Appellant in the courtroom was the same man from the photograph lineup. (R. p. 46, lines 10-25.) At trial, G.F. described the initial photograph lineup and positively identified Appellant, now stating that she had "no doubt" Appellant was the assailant. (R. p. 165, line 9-p. 170, line 25.) Like the evolving identification in Foster, G.F.'s positive identification at trial was surely influenced by the suggestive nature of the initial photograph lineup, her repeated exposure to Appellant's photograph, and the fact that Appellant was the only one from the photograph lineup who was before her when she made her definite identification in

court after Appellant had been charged and was on trial for the crimes. The identification ultimately came about as a result of the State effectively repeatedly telling G.F., only eight years old at the time of the incident, that the Appellant was the "bad man." The identification procedure was, therefore, unduly suggestive, resulting in an inherently unreliable identification. The resulting likelihood of misidentification violates Appellant's right to due process because "there is a reasonable possibility that the [improper identification] might have contributed to the conviction." Thompson, 756 F.2d at 316 (citing Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S. Ct. 229, 230-231 (1963)). As a result, the trial court committed reversible error in admitting the testimony and evidence regarding the initial photograph lineup and G.F.'s in-court identification of Appellant at trial.

II. The trial court erred in admitting a fingerprint card obtained from a New Jersey database and testimony based on the New Jersey fingerprint card because the New Jersey fingerprint card was not properly authenticated by the State.

The trial court abused its discretion in admitting fingerprint evidence without the proper authentication required by Rule 901, SCRE. Specifically, the trial court admitted a fingerprint card received from a New Jersey database attributed to Appellant as well as testimony and a summary of findings of the State's fingerprint analysis expert Trisha Odom regarding a fingerprint match from the crime scene to the New Jersey fingerprint card. (R. p. 202, line 16-p. 214, line 6, p. 236, line 20-p. 243, line 19, p. 253, line 1-p. 277, line 7, State Exs. 214, 215, 216, 217, and 316.) Defense counsel argued that the New Jersey fingerprint card had not been properly authenticated and, therefore, it and the related testimony regarding any conclusions drawn therefrom should be excluded. (R. p. 203, line 9-p. 214, line 3, p. 233, line 16-p.236, line 17.) The trial court improperly allowed evidence regarding the fingerprint match despite the State's failure to establish when and where the New Jersey fingerprint card had been made.

In accordance with the South Carolina Rules of Evidence and South Carolina case law, fingerprint evidence must be authenticated in order to be admissible at trial. See, e.g., State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987) (reversing conviction based on trial court's failure to authenticate fingerprint comparison prior to its admission); Rule 901(a), SCRE ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). Such authentication requires "evidence as to when and by whom the [fingerprint] card was made and that the prints on the card were in fact those of this defendant." Rich, 293 S.C. at 174, 359 S.E.2d at 282 (citation omitted). In State v. Anderson, which clarified the Rich decision following the adoption of the South Carolina Rules of Evidence, the Supreme Court continued to require testimony regarding how one's fingerprints were taken, including testimony that a known fingerprint card was taken at a correctional facility on a certain date, in order to meet the authentication requirement of Rule 901, SCRE. 386 S.C. 120, 128-29, 131-32, 687 S.E.2d 35, 39-40, 41 (2009). Thus, in order for a fingerprint card to be admissible under South Carolina law, the State must elicit testimony regarding when and by whom the prints on the card were made.

Here, the State failed to meet its burden of authentication with respect to the fingerprint card received on October 12, 2015, by the Richland County Sheriff's Department from New Jersey's AFIS database. The State did not present any evidence establishing when and by whom this fingerprint card from New Jersey was made. To the contrary, the State's fingerprint analysis expert Trisha Odom testified regarding her lack of knowledge regarding the thresholds in place in New Jersey for admission of such prints into its AFIS database. (R. p. 220, line 21-p. 221, line 22.) Because the State never presented evidence of when and by whom the New Jersey

fingerprint card was made, it failed to properly authenticate this evidence.[2] Accordingly, the trial court committed reversible error by admitting the evidence regarding the fingerprint match from the crime scene to the fingerprint card from New Jersey.

III. The trial court erred by allowing expert opinion testimony about the operational capabilities of the recovered firearm where such testimony was not relevant to the charges against Appellant and was needlessly cumulative and unduly prejudicial.

The trial court erred in allowing expert opinion testimony about the operational capabilities of the firearm found in the home where Appellant was residing because such testimony was irrelevant, needlessly cumulative, and unduly prejudicial. At trial, the State offered Investigator David Collins as an expert in firearms and tool marks examination and identification and elicited testimony from him regarding whether the firearm recovered from Appellant's residence was operational. (R. p. 356, line 24-p. 365, line 11.) Defense counsel objected to Investigator Collins' testimony because the operational capabilities of the recovered firearm were not relevant to the offenses with which Appellant was charged, and the testimony was needlessly cumulative considering the other evidence introduced by the State, including the firearm itself. (R. p. 357, line 23-p. 359, line 7.) The trial court overruled the objection. (R. p. 359, line 18-p. 361, line 4.) Although the trial court acknowledged previous testimony already established that it was, in fact, a firearm, the trial court ruled that the operational capability of the firearm was relevant to the charges of armed robbery and pointing and presenting. (Id.) First, the trial court held such testimony was relevant to finding whether Appellant was armed with a deadly weapon during the robbery. (R. p. 359, line 18-p. 360, line 4.) The trial court also found

[2] Although Investigator Odom also included in her analysis the "Livescan" fingerprints taken from Appellant following his arrest in this matter, she admitted that she never relied solely on the Livescan prints in making her comparisons and, therefore, her conclusions regarding any possible fingerprint match cannot be extricated from the unauthenticated New Jersey fingerprint card and should not have been admitted. (R. p. 224, lines 1-14, p. 225, lines 8-17.)

that whether the firearm was "capable of expelling a projectile through explosion. . . . [was] an essential element of pointing and presenting." (R. p. 360, lines 5-22.) The trial court's statements of law, however, are incorrect and the testimony was irrelevant and should have been excluded.

First, evidence regarding the operational capabilities of a firearm is not required to establish the offense of armed robbery in South Carolina. South Carolina Code Ann. § 16-11-330, defines armed robbery as "robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor or other deadly weapon . . . ." S.C. Code Ann. § 16-11-330(A). "A 'deadly weapon' is generally defined as 'any article, instrument or substance which is likely to produce death or great bodily harm.'" State v. Campbell, 287 S.C. 377, 379, 339 S.E.2d 109, 109 (1985) (quoting State v. Sturdivant, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981)). "When a person commits a robbery while armed with a pistol or gun, such an instrument is considered a deadly weapon regardless of its inoperability." State v. Heck, 304 S.C. 345, 346, 404 S.E.2d 514, 515 (Ct. App. 1991) (citing State v. Henderson, 286 S.C. 465, 334 S.E.2d 519 (Ct. App. 1985)) (emphasis added). Testimony regarding the operability of the firearm, therefore, was not necessary to establish the offense of armed robbery under South Carolina law.

Next, testimony regarding the operational capabilities of a firearm is also not required to establish the offense of pointing and presenting a firearm in South Carolina. The elements of pointing and presenting under S.C. Code Ann. § 16-23-410 are: (1) pointing or presenting; (2) a loaded or unloaded firearm; (3) at another. State v. Burton, 356 S.C. 259, 264, 589 S.E.2d 6, 8 (2003); see, e.g., In re Spencer R., 387 S.C. 517, 523, 692 S.E.2d 569, 573 (Ct. App. 2010). There is no South Carolina case law that requires proof that the firearm at issue was actually operational in order to establish the offense of pointing and presenting a firearm. To the

contrary, the fact that an unloaded firearm is sufficient to establish the offense reflects that the firearm's operational capability is irrelevant. Again, testimony regarding the operability of the firearm was not necessary to establish the crime of pointing and presenting. Because the trial court incorrectly held that the operational capabilities of the firearm were relevant to establish the armed robbery and pointing and presenting offenses, the trial court committed reversible error by admitting Investigator Collins' testimony.

This error is particularly prejudicial because it allowed needlessly cumulative testimony which the State used in an effort to paint Appellant in a bad light and tie him to the crime scene. As the trial court acknowledged, there was prior testimony that a gun was recovered from Appellant's residence. (R. p. 360, lines 16-18.) Specifically, Chief Stan Smith testified that investigators found a gun in Appellant's residence. (R. p. 314, lines 19-24.) Shortly after, Investigator Michael Beeler provided detailed testimony about the recovered gun, including that it was an unloaded ".32 caliber Smith & Wesson handgun." (R. p. 351, line 24-p. 352, line 3.) During his testimony, the court admitted "the handgun . . . as well as six unfired cartridges" into evidence. (R. p. 352, lines 19-25.) With this testimony and the admission of the gun itself into evidence, there was no need for any additional testimony from Investigator Collins regarding the firearm and its operational capabilities.

However, the wrongful admission of Investigator Collins' testimony allowed the State to hammer yet again on the fact that a gun was found in Appellant's residence, unduly prejudicing the jury against him. Moreover, during the State's closing argument, it relied on Investigator Collins' testimony in an effort to connect the gun recovered from Appellant's residence to the gun used at the scene of the crime. G.F. testified that her assailant had a "gold and rusty" pistol. (R. p. 146, line 24-p. 147, line 9.) During Investigator Collins' testimony regarding the

recovered firearm's operational capabilities, he described it as "somewhat worn" with the finish "in bad condition." (R. p. 367, lines 9-11.) He noted it "is a rather interesting firearm" and stated that "each cartridge has a brass-colored cartridge casing." (R. p. 366, lines 22-23, p. 367, line 24.) In its closing argument, the State relied solely on Investigator Collins' testimony to connect the gun found at Appellant's residence to the one described by G.F.:

> He took out the pistol, it was gold and rusty with two pistol shots, pointed it and put it on the table. . . . [Y]ou have the actual gun before you, you'll have it back there with you, but the pistol shots she was referring to, you can see the gold cartridges that she describes that would be facing her from the revolver. Maybe this is them. This is the part that would be facing her. That's what she saw outside the revolver. And she got it pretty right. You heard testimony from David Collins. It's kind of a unique firearm. It's old and rusty, but it's operable. And it's pretty distinct. It's not like your nine millimeter Glock or a handgun, just a black handgun that she saw on that table, but she's able to see it. And where's that gun found? In his room in his drawers.

(R. p. 419, lines 6-23.) The State used Investigator Collins' testimony in an effort to paint Appellant in a bad light and tie him to the crime scene, clearly prejudicing Appellant. Because this testimony should never have been admitted, the trial court's error should result in a reversal of Appellant's convictions.

IV. The trial court erred in allowing Appellant's alias "Abdul Muslim" to be used in the indictments and at trial because the alias invited undue religious prejudice from the jury.

The trial court violated Appellant's constitutional rights and abused its discretion under Rule 403, SCRE, in allowing Appellant's alias "Abdul Muslim" to be used in the indictments and at trial. Defense counsel argued that the use of Appellant's alias invited undue religious prejudice from the jury and, therefore, should not be allowed. (R. p. 426, line 2-p. 437, line 14, p. 441, line 11-p. 443, line 19, p. 444, lines 4-10, p. 446, lines 7-20, p. 447, lines 8-16, p. 3, lines 5-10, Motion to Strike, Ex. 1.) The trial court improperly refused to exclude the alias, ruling that the potential prejudice it may invite would be handled by jury voir dire instead. (R. p. 443, line

20-p. 444, line 3, p. 444 line 11-p. 446, line 6, p. 446, line 21-p. 447, line 7, p. 447, line 17-p. 448, line 6, p. 3, lines 18-19.)

Courts in this state and in the Fourth Circuit recognize that the mention of religion can invite prejudice and that such evidence can be inadmissible. See Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010) (finding that a Muslim defendant's due process rights had been violated where the solicitor referred to him as a domestic terrorist and referenced the terror attacks of September 11th where the defendant was not on trial for terrorism and the statements served only to improperly evoke religious prejudice and inflame the passions and prejudice of the jury); United States v. Ham, 998 F.2d 1247, 1252-53 (4th Cir. 1993) ("[W]e are especially sensitive to prejudice in a trial where defendants are members of an unpopular religion."); see also United States v. Vue, 13 F.3d 1206, 1213 (8th Cir. 1994) (concluding that a constitutional error occurs when the government "invite[s] the jury to put [a defendant's] racial and cultural background into the balance in determining their guilt"). As recently stated by Judge Davis of the Fourth Circuit Court of Appeals, "appeals to racial, ethnic, or religious prejudice during the course of a trial violate a defendant's Fifth Amendment right to a fair trial." United States v. Garcia-Lagunas, 835 F.3d 479, 501 (4th Cir. 2016) (Davis, J., dissenting) (citation omitted). Further, under Rule 403, SCRE, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

The reference to Appellant's alias "Abdul Muslim" invited undue prejudice from the jury. The State contrasted this Islamic connotation with repeated testimony regarding the victim's Christian beliefs during trial. For example, G.F. testified that she and Ms. Tollison would go to church together every other Sunday. (R. p. 139, lines 13-23.) Another of the State's witness testified she knew Ms. Tollison from church and that they would go to church together

every Sunday. (R. p. 193, line 17-p. 194, line 11, p. 195, line 8-p. 196, line 7.) Another witness mentioned that Ms. Tollison hosted a Bible study. (R. p. 355, line 23.) The use of the "Abdul Muslim" alias here, particularly in light of the repeated references to Ms. Tollison's Christian beliefs, was unduly prejudicial.

The religious prejudice substantially outweighed any probative value of the alias. The only testimony related to the alias "Abdul Muslim" was testimony that DNA from the crime scene matched to "Abdul Muslim" in a national database. However, this match also included the national identification number 220688PA. (R. p. 378, line 2-p. 379, line 9.) The jury also heard testimony that Appellant's national identification number was 220688PA. (R. p. 255, lines 10-13.) Thus, there was no probative value in using his alias in connection with this DNA match. Moreover, the State never elicited any testimony that Appellant was known as "Abdul Muslim," only that he was known to one witness as "Abdul," indicating that there was no probative value in the "Muslim" reference at all. (R. p. 321, line 23-p. 322, line 3.) Instead, the jury repeatedly heard Appellant referred to in the indictments and the introduction of the case as "Abdul Muslim," inviting undue religious prejudice against him which substantially outweighed any probative value of the alias and violating his constitutional rights. Accordingly, the trial court erred in failing to strike the alias from the indictments and for allowing mention of the alias at trial.

V. The trial court erred in admitting gruesome autopsy dissection photographs of the victim's internal head injuries because the photographs lacked probative value and were calculated to inflame the passions of the jury.

The trial court abused its discretion in admitting unduly prejudicial photographs of Ms. Tollison's internal head injuries. At trial, the State introduced two color photographs taken during Ms. Tollison's autopsy that depicted the front and back of her dissected scalp pulled away from her skull to reveal bruising underneath. (R. p. 292, lines 4-10, p. 294, line 22-p. 295, line

11, State Exs. 14 and 15.) Defense counsel objected to the introduction of these photographs under Rule 403, SCRE, because Ms. Tollison's cause of death was strangulation, and the photographs therefore lacked any probative value. (R. p. 292, line 13-p. 293, line 10, p. 295, line 20-p. 296, line 9.) In addition, they risked undue prejudice based on the gruesome nature of the photographs. (Id.) The trial court committed reversible error by admitting these autopsy photographs because the unfair prejudice they would cause substantially outweighed their probative value. (R. p. 292, line 4-p. 301, line 17.)

The trial court based its decision to admit the photographs on State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014). (R. p. 296, line 18-p. 300, line 5.) However, Collins is distinguishable from the present case for several important reasons. Collins involved the admission of pre-autopsy photographs showing the nature and extent of the victim's injuries, an issue which had been placed into contention by the defense. 409 S.C. 524, 763 S.E.2d 22. There were no eyewitnesses to the incident in Collins so the photographs were necessary to establish what had occurred to the victim. Id. Here, in contrast, G.F. was an eyewitness to Ms. Tollison's death, and she testified as to exactly what had occurred to Ms. Tollison. The nature and extent of the victim's injuries was not in contention, and there was no need to admit graphic photographs taken during Ms. Tollison's autopsy showing her scalp being manipulated away from her skull. The trial court's reliance on Collins was, therefore, error.

Moreover, in admitting the photographs, the trial court incorrectly indicated that the photographs were corroborative of the eyewitness testimony from G.F. (R. p. 298, lines 15-17.) However, G.F. testified only as to the strangulation and never mentioned any injuries to Ms. Tollison's head in her testimony. (R. p. 136, line 8-p. 186, line 7.) This finding of the trial court, therefore, lacks evidentiary support and is error.

The trial court also relied on the testimony of Dr. Amy Durso, who performed the autopsy and took the photographs, indicating that the photographs were corroborative of her testimony and relevant to establish the malice aforethought element of murder. (R. p. 298, lines 6-18.) Although Dr. Durso did testify as to the bruising of the head depicted in the photographs, she testified that Ms. Tollison's cause of death was strangulation and admitted she could not date the bruising of the head. (R. p. 303, line 20-p. 304, line 1, p. 312, line 25-p. 313, line 2.) Moreover, Dr. Durso provided extensive testimony regarding the violent nature of the strangulation and the severity of the injuries to Ms. Tollison resulting from the strangulation. (R. p. 283, line 10-p. 290, line 8, p. 305, line 11-p. 310, line 20.) Thus, the photographs of the bruising to the head were superfluous. See Collins, 409 S.C. at 539, 763 S.E.2d at 30 (Kittredge, J., concurring) ("The detailed and graphic testimony of the pathologist was more than sufficient to enable the State to establish the elements of the offense."). The trial court's reliance on Dr. Durso's testimony to support admission of the photographs is, therefore, error.

The Supreme Court of South Carolina has expressed "growing concern" over the admission of gruesome autopsy photographs. Torres, 390 S.C. at 624, 703 S.E.2d at 229. "Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." Id. at 623, 703 S.E.2d at 228 (citing State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997)). For example, in Torres, the court noted that the trial judge "wisely excluded" "an autopsy dissection photo." Torres, 390 S.C. at 624, 703 S.E.2d at 229. Similarly, in State v. Middleton, the Supreme Court of South Carolina found that color autopsy photographs of the victim, including three that depicted the victim's scalp pulled away from her skull, should be excluded because "[t]he prejudice created by the photographs clearly outweighed any evidentiary value." 288 S.C. 21,

24, 339 S.E.2d 692, 693 (1986) (citations omitted); see also State v. Haselden, 353 S.C. 190, 201, 577 S.E.2d 445, 451 (2003) (holding that pictures of victim's anus in capital case were introduced to inflame the passions and prejudices of jurors and to give impression that victim was possibly sexually assaulted). Like the "wisely excluded" autopsy dissection photograph in Torres and the autopsy dissection photographs which should have been excluded in Middleton, the two photographs of Ms. Tollison's internal head injuries should have been excluded because they are irrelevant, not necessary to substantiate any material facts or conditions, and were merely introduced to inflame the passions of the jury. Accordingly, the trial court committed reversible error in admitting these two autopsy photographs.

VI. The trial court erred in denying Appellant's request to remove his shackles during jury selection.

The trial court abused its discretion in refusing to allow Appellant to appear in court without shackles. Prior to jury selection, defense counsel requested that Appellant's shackles be removed to prevent any prejudice from the jury. (R. p. 2, lines 8-22.) Defense counsel noted that Appellant had been well-behaved on his three prior court appearances in relation to the case, and he noted that any potential jurors in the first two rows of the gallery would certainly see Appellant's shackling. (Id.) The court denied this request without any explanation. (R. p. 2, line 23.)

While the trial judge has discretion to decide whether to shackle a defendant, this discretion requires a balancing of "the prejudicial effect of shackling with the considerations of courtroom decorum and security." Tucker, 320 S.C. at 209, 464 S.E.2d at 107 (citing Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057 (1970)). Because the trial judge failed to engage in any verbal analysis when denying the request to temporarily remove Appellant's shackles, there is nothing in the record to suggest that he properly balanced the considerations at issue or that he

conducted any balancing at all. There was no reference to any concern regarding courtroom decorum and security to counterbalance the obvious prejudice that shackles would impart to potential jurors. Accordingly, the trial judge abused his discretion by either failing to exercise it in the first instance by refusing to conduct the required balancing or because his decision lacks evidentiary support in that there was no evidence of any security concern which would outweigh the prejudice to the Appellant of appearing before potential jurors in shackles. See Hawes, 411 S.C. at 191, 767 S.E.2d at 708 ("A failure to exercise discretion amounts to an abuse of that discretion.") (citation omitted) (internal quotation marks omitted); Pagan, 369 S.C. at 208, 631 S.E.2d at 265 ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.") (citation omitted). The trial judge's refusal to remove Appellant's shackles during jury selection constitutes reversible error.

VII. The cumulative errors committed by the trial court had the effect of preventing Appellant from receiving a fair trial, entitling Appellant to a new trial.

The cumulative error doctrine allows that, even if each error raised alone is insufficient to warrant a new trial, the cumulative effect of those errors is enough to require a new trial. State v. Freeman, 319 S.C. 110, 123, 459 S.E.2d 867, 875 (Ct. App. 1995). The doctrine recognizes that "the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal." Id. As previously demonstrated, the trial court committed numerous errors, each sufficiently prejudicial to warrant reversal individually. Specifically, the trial court: (1) allowed unreliable identification testimony that violated Appellant's right to due process; (2) admitted fingerprint evidence which had not been properly authenticated; (3) allowed irrelevant, needlessly cumulative, and unduly prejudicial testimony regarding the gun recovered from Appellant's residence; (4) allowed mention of Appellant's alias "Abdul Muslim" in the indictments and during trial, inviting religious prejudice against

him; (5) admitted unduly prejudicial autopsy dissection photographs of the victim's internal head injuries; and (6) wrongly refused to remove Appellant's shackles during jury selection.

Each error prejudiced Appellant, and the cumulative prejudicial effect of the errors to Appellant is overwhelming. Without the evidence disputed in this brief, the only direct evidence connecting Appellant to the crimes is evidence that his DNA was at the crime scene. At trial, Appellant presented expert opinion testimony which disputed the DNA evidence. (R. p. 415, lines 20-23.) Thus, the jury could have found reason to believe the DNA evidence was tainted and could not be relied on to place Appellant at the scene of the crime. Thus, without the evidence disputed in this brief, and with the only other evidence disputed by Appellant's expert at trial, a jury could find a lack of direct evidence connecting Appellant to the crimes.

Accordingly, Appellant is entitled to a new trial. See State v. Peterson, 287 S.C. 244, 246, 335 S.E.2d 800, 801 (1985) (holding that "numerous errors committed by the trial court in this death penalty case compels us to reverse and remand for a new trial"), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

CONCLUSION

By reason of the foregoing arguments, Appellant respectfully requests this Court to reverse his convictions and remand this case to the Richland County Court of General Sessions for further proceedings.

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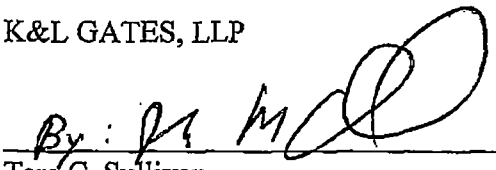
Respectfully submitted,

K&L GATES, LLP



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February 21, 2019

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

R. Knox McMahon, Circuit Court Judge

RECEIVED
FEB 21 2019
SC Court of Appeals

Appellate Case No. 2017-001542

The State, ... Respondent,

v.

James Heyward, ... Appellant.

APPELLANT'S CERTIFICATION OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Susannah R. Cole, Esq., at the Rembert Dennis Building, 1000 Assembly Street, Columbia, South Carolina 29201, this 21st day of February, 2019.

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SUBSCRIBED AND SWORN TO before me
This 21st day of February, 2019.

Notary Public for South Carolina
My Commission Expires: July 5, 2027

ORIGINAL

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
The Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

v.

JAMES HEYWARD,

Appellant.

Appellate Case No. 2017-001542

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In the Court of Appeals

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

I. Did the trial court err in admitting evidence and testimony regarding (a) an out-of-court photograph lineup where the victim did not make a positive identification and (b) the subsequent positive identification made by the victim at trial?

II. Did the trial court err in admitting a fingerprint card obtained from a New Jersey database and testimony based on the New Jersey fingerprint card where the New Jersey fingerprint card was not properly authenticated by the State?

III. Did the trial court err by allowing expert opinion testimony about the operational capabilities of the gun found at Appellant's residence where such testimony was not relevant to the charges against Appellant and was needlessly cumulative and unduly prejudicial?

IV. Did the trial court err in allowing Appellant's alias "Abdul Muslim" to be included in the indictments and at trial because the alias invited undue religious prejudice against Appellant?

V. Did the trial court err in admitting gruesome autopsy dissection photographs of the victim's internal head injuries where the photographs lacked probative value and were calculated to inflame the passions of the jury?

VI. Did the trial court err by denying Appellant's request to remove his shackles during jury selection?

VII. Did the cumulative errors committed by the trial court have the effect of preventing Appellant from receiving a fair trial, entitling Appellant to a new trial?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. The procedure used by the police was not unduly suggestive and the out-of-court identification made by the child was so reliable that no substantial likelihood of misidentification existed. The following in court identification was therefore properly admissible.

II. The fingerprint identification card was admissible because the non-hearsay evidence was sufficiently authenticated by a witness who identified the card as the information she obtained from a national database, linking Heyward's distinctive fingerprints to unknown prints obtained from the crime scene.

III. The testimony regarding whether the gun was operational was highly relevant to the definition of a weapon, as used within the elements of armed robbery and pointing and presenting a firearm, and also to prove malice aforethought for the charge of murder.

IV. The trial court properly refused to strike to portion of the indictment including Heyward's alias, Abdul Muslim, because significant evidence linked the identity of Abdul Muslim to the crime and the defense's theory of the case was the evidence identified the wrong man.

V. The trial judge did not abuse his discretion in admitting detailed photographs of the victim's injuries because the pictures were offered to prove malice beyond a reasonable doubt, corroborated the pathologists' testimony about the blunt force trauma to the head, and were limited in number and breadth only to those necessary to illustrate the testimony.

VI. Heyward offered no evidence any juror saw his shackles during jury selection, so he cannot show prejudice from the trial court's denial of his motion to remove the shackles.

VII. There is no error, much less cumulative error, and any preserved errors are harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt. A defendant is entitled to a fair trial, not a perfect one, and even a perfect trial would have inevitably resulted in Heyward's conviction.

STATEMENT OF THE CASE

In October of 2016, a Richland County Grand Jury indicted Appellant, James Heyward, aka Abdul Muslim, for two counts of armed robbery, assault and battery in the first degree, burglary in the first degree, two counts of kidnapping, murder, pointing and presenting a firearm, and unlawful possession of a firearm. (R. pp. 493-508.) Appellant proceeded to a jury trial on July 26, 2017, before the Honorable R. Knox McMahon. Appellant was represented by Steve Krzyston, Esquire, Alicia Goode, Esquire, and Adam Ruffin, Esquire. (R. p. 1.) Assistant Solicitors Luck Campbell, Joanna McDuffie, and Nicole Simpson, of the Fifth Circuit Solicitor's Office, represented the State. (R. p. 1.)

The jury found Appellant guilty as indicted. (R. p. 420, line 2 – p. 421, line 3.) Judge McMahon sentenced Appellant to consecutive terms of life imprisonment for murder and burglary. He then sentenced Appellant to a concurrent term of thirty years for armed robbery, a consecutive term of thirty years for the kidnapping of the child, a consecutive term of ten years for assault and battery, two concurrent terms of five years for pointing and presenting a firearm, and unlawful possession of a firearm. (R. p. 422, line 3 – p. 423, line 10.)

Appellant filed a timely notice of appeal, and Tara C. Sullivan, Esquire, and Chief Appellate Defender Robert M. Dudek filed the Initial Brief of Appellant on August 10, 2018. This Brief of Respondent follows.

STATEMENT OF FACTS

On Sunday, October 11, 2015, Deputy Lakeisha West responded to a 911 call, which she believed to be burglary in progress. As West arrived at the property, she saw a female child, whose hands and feet were still bound, hopping from beneath the carport of a home into the front yard. The child was nervous and scared. (R. p. 126, line 10 – p. 131, line 16.) The girl told the deputies her grandmother was inside the house and that a man tied her up and put her in the closet. (R. p. 131, lines 13—24.) The girl described her attacker as a black male, with a bald head, wearing an orange shirt, and he asked the girl and her grandmother where their money and jewelry were. (R. p. 132, lines 1-13.) The girl described the man telling her to sit down, then choking her grandmother, and then carrying her to a back room and tying her feet and hands. (R. p. 132-133, line 16 – p. 134, line 20.) Inside, the deputies found the body of Ms. Tollison on the floor in the kitchen. (R. p. 135, lines 1-5.) The victim's cane walker was beneath her. (R. p. 192, lines 6-23.)

At the time of the trial, the victim was ten years old and in fifth grade, but she clearly described the events of the day she and her grandmother were attacked. (R. p. 136, lines 8- p. 137, line 1.) The girl said she would attend church with her grandmother every Sunday when her mother dropped her off before work. (R. p. 139, line 16 – p. 140, line 8.) After church they were watching some television when someone knocked on the door. (R. p. 142, line 7 – p. 143, line 15.) Her grandmother left the room to open the door, which led to the carport. (R. p. 144, lines 5-18.) After a few minutes, the girl went into the kitchen to get her toys from the kitchen table. (R. p. 144, line 20 – p. 145, line 17.) When the girl walked into the kitchen, she saw a man carrying a duffel bag and her grandmother sitting at the kitchen table. The man told her to sit, and then he demanded money from her grandmother. (R. p. 145, line 18 – p. 146, line 9.) Her grandmother

told the man she did not have any money. Then the man removed a gun from his bag and set it on the table, rolled up his sleeve, and made the girl watch as he strangled her grandmother. (R. p. 146-147, line 10 – p. 148, line 2.) The girl described the gun as gold and rusty, "and it had two spots for bullets," which she later clarified as "two spots where it shoots out." (R. p. 147, lines 3-14; p. 178, line 6.)

After he killed her grandmother, Heyward carried the girl to a closet, told her to sit in there and closed the door. (R. p. 148, lines 17-19.) The man told the girl her grandmother was sleeping, though the girl knew he was lying. (R. p. 148, line 23 – p. 149, line 7.) The girl heard him rummaging through rooms in the house before returning to the closet, moving the girl to another room, and then tying her hands and feet with telephone wire and a wire from the wall. (R. p. 149, line 17 – p. 151, line 13.) The girl said she struggled to free herself for approximately thirty minutes before falling asleep. (R. p. 152, lines 1-15.) The girl awoke when she needed to relieve herself, so she called out to the man. There was no response, but the girl was able to pull herself to her feet by biting a blanket and hopping down the hall. (R. p. 152, line 18 – p. 153, line 13.) The girl said she fell multiple times because there were beads all over the floor of the kitchen, but she was able to call 911 on the home telephone on the kitchen table. (R. p. 153, line 11 - p. 154, line 21.) The girl asked the dispatcher to send police and to contact her mother. (R. p. 157, line 11 – p. 159, line 21.)

The girl recalled the interview the day after the murder at the ARC, where she described the attacker. (R. p. 163, line 2 – p. 164, line 1.) The girl also recalled the photo lineup with a law enforcement officer and her identification of Heyward as her assailant. (R. p. 165, line 9 – p. 168, line 23.) The girl identified Heyward in the courtroom. (R. p. 170, lines 1 – 13.)

At the time of the murder, James Hayward was renting some rooms in the home of Mattie Canzater. (R. p. 316, line 3 – p. 318, line 20.) Canzater also knew Heyward to go by the names of Abdul and Rasheed. (R. p. 321, line 23 – p. 322, line 8.) Ms. Tollison offered to loan Canzater some tables to use at an upcoming yard sale, so Canzater asked Heyward to help her pick up the tables from Tollison's house the Friday before the murder. (R. p. 321, lines 2-15.) Canzater and Heyward pulled into the carport to retrieve the tables, but neither went inside the house. (R. p. 323, line 16 – p. 324, line 5.) Ms. Tollison showed Canzater some costume jewelry she made and told Canzater she was accumulating pieces to sell. (R. p. 326, lines 4-10.)

Canzater said the following day, Saturday, she and Heyward had an argument about his use of her property and Heyward told Canzater he would be moving out within a week. (R. p. 328, line 16 – p. 331, line 4.) The next morning, Canzater went to church and when she arrived home, Heyward was not in the house. Canzater said when he later returned to her home, he was carrying a large trash bag. (R. p. 331, line 5 – p. 333, line 25.) Heyward was also wearing clothes matching the description of the suspect. (Tr. p. 338, lines 2-23.) When Canzater heard about the murder of Ms. Tollison and suspected Heyward was the perpetrator, she confronted him in her home. When Canzater asked Heyward where he was at the time of the murder, he said he went for a walk to clear his head. Canzater noted that after their confrontation ended, Heyward shaved his head and face. (R. p. 339, line 9 – p. 347, line 13.) Police later found a Smith and Wesson .32 caliber revolver in a closet in Heyward's room during a search of Canzater's home following his arrest on the Tuesday after the murder. (R. p. 348, line 25 – p. 353, line 15.) Several days after Heyward was arrested, he called his wife from jail, and his wife told him she reported a false tip to Crimestoppers to accuse someone else of the murder to divert attention away from Heyward. (R. p. 413, line 6 – p. 414, line 21.)

Crime scene investigators dusted the storm door and entry door to the kitchen from the carport for fingerprints and were able to collect latent prints from the interior side of the storm door and from the entry door. (R. p. 187, line 19 – p. 189, line 14.) The investigator also found prints on an alarm keypad and a water bottle from the kitchen table. (R. p. 191, lines 6-13.) The victim's neck was swabbed for DNA, along with an abraded area of her chin. (R. p. 278, lines 12-17.) The technician took the fingernail scrapings from the victim's hands. (R. p. 282, lines 5-14.) Heyward's fingerprints were found on the interior side of the entry door, and on a jewelry box and other items located inside the home. (R. p. 124, line 5 – p. 125, line 13.) Heyward's DNA was found under Ms. Tollison's fingernails, from the swab on her neck, and from a swab of a draft stopper found around Ms. Tollison's neck. (R. p. 383, line 13 – p. 385, line 20.)

The victim had multiple injuries to her neck and chin area. The pathologist said the markings were consistent with more than just an arm around the victim's neck. (R. p. 288, lines 12-25.) The fractures of the bones and the amount of hemorrhage "buried deep within the neck" indicated the use of force stronger than that of just a ligature. (R. p. 288, lines 21-25.) The victim also had multiple injuries from blunt force trauma around her head. (R. p. 291, lines 13-22.) The pathologist said these injuries were consistent with being struck several times or thrown against a wall or floor. (R. p. 303, lines 1-8.) Ms. Tollison suffered fractures to the cartilage in her neck, as well as a fractured hyoid bone. (R. p. 306, lines 5-21.) The cause of death was strangulation. (R. p. 313, lines 1-7.)

ARGUMENT

I. **The procedure used by the police was not unduly suggestive and the out-of-court identification made by the child was so reliable that no substantial likelihood of misidentification existed. The following in court identification was therefore properly admissible.**

Standard of Review

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 such[ ] or the commission of prejudicial legal error." *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). "However, an eyewitness identification [that] is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law." *Id.* "A criminal defendant may be deprived of due process of law by an identification procedure arranged by police [that] is unnecessarily suggestive and conducive to irreparable mistaken identification." *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004).

How the Issue Was Presented at Trial

The *Neil v. Biggers*[1] hearing was held after the jury was seated but before opening statements. Investigator Joseph Clarke testified that at the time of the crime, he worked in the Special Victims' Unit of the Richland County Sheriff's Department. (R. p. 18, lines 6-25.) Clarke was called to the crime scene and then to a hospital to interview a possible eyewitness, an eight-year-old girl. (R. p. 19, lines 5-24.) The girl had given a description of the perpetrator to 911 and to responding officers and was able to tell Clarke about what happened. (R. p. 20, lines 1-13.) Clarke scheduled an interview of the child at the Assessment Resource Center ("ARC"), which is a controlled environment that specializes in interviewing child victims. (R. p. 20, line 15 – p. 21, line 1.) The defense requested the victim be sequestered from any testimony

[1] *Neil v. Biggers*, 409 U.S. 188 (1972).

concerning her identification of Heyward, but the court declined, saying the victim was statutorily and constitutionally entitled to remain in the courtroom. (R. p. 21, lines 12-23.) At the time of the interview, investigators had already developed Heyward as a suspect through his fingerprints. (R. p. 22, lines 5-12.) Heyward's photograph was placed in a six man lineup generated by special software at SLED. (R. p. 22, line 13-p. 23, line 7.) Clarke said the men in the lineup were consistent in their appearance and he would not have used a lineup with any suggestive pictures. (R. p. 23, lines 8-20.) After the girl's interview at the ARC, the officers showed her the lineup, and that procedure was video-taped. (State's Exhibit 31.) Clarke told the girl she was brave and asked her to be brave again and look at the lineup and see if she could identify the man who attacked her and her great-grandmother. (R. p. 25, lines 2-7.) The girl identified photograph number 3, circled it, and put her initials beside the picture. (R. p. 25, lines 12 – 25.) After the girl identified Heyward as the man who murdered her grandmother, she remarked that one of the other photographs looked like the janitor at her school. Clarke questioned her about the comment to make sure she understood the purpose of the lineup and to inquire whether her earlier choice was still, in fact, the man she recognized as the perpetrator. The girl told Clarke she was sure the man in photograph 3 was the man who broke into her house, tied her legs and feet, and carried her into a back room. (R. p. 26, line 1 – p. 27, line 6; p. 37, lines 5-24.)

The then ten year old child testified at the hearing before Judge McMahon. The girl remembered the man "tied [her] up with wires," and talked to her. (R. p. 39, line 24 – p. 40, line 21.) The girl said it happened during the daytime, and she first saw the man in the kitchen, when he told her to sit down at the kitchen table. (R. p. 41, lines 3 – 17.) The girl said he wore nothing over his face and she tried to remember what he looked like. (R. p. 41, line 24 – p. 42, line 16.)

The girl recalled the photograph lineup and recognized it when the solicitor showed it to her at the hearing. (R. p. 43, line 22 – p. 44, line 11.) The girl testified she recognized the man who killed her grandmother, and she circled his picture and wrote her name by it. (R. p. 44, line 12 – p. 45, line 4.) The child then recognized and pointed to Heyward in court as the man who murdered her grandmother. (R. p. 46, lines 13-25.)

Dr. Julie Buck, a consultant on eyewitness memory and identification, testified for the defense. (R. p. 55, line 3 - 57, line 12.) The consultant showed the lineup used by Investigator Clarke to a group of mock witnesses who had no connection to the crime and asked them to pick out who they thought the suspect must be. (R. p. 61, lines 2-10.) Buck said that in a fair lineup, any one photograph should be selected at a rate of 17 percent, or, equal distribution across all the photographs. (R. p. 61, lines 11-14.) In her study of online participation, 37 percent chose the defendant's photograph. (R. p. 64, lines 11-24.) The expert also said the best practice for a lineup would be a double blind selection, in which the officer administering the lineup did not know which photograph depicted the suspect. (R. p. 62, line 25 – p. 64, line 11.)

The consultant also claimed Clarke failed to advise the child of the "ground rules' for the lineup, and that the person sought for the crime may not appear in any of the photographs. (R. p. 66, line 17 – p. 67, line 2.) Buck said Clarke's instruction to the child to take her time and look really carefully at the photographs increased the chance of false identification. (R. p. 67, line 18 – p. 68, line 8.) Buck said that language pressured the child and implied the child must make a choice. (R. p. 68, lines 9-16.) Buck testified that the research indicated "people who are highly stressed during an event tend to be less accurate and more likely to make a false identification." (R. p. 70, lines 23-25.) Buck said the presence of a weapon also tends to reduce eyewitness identification accuracy. (R. p. 71, lines 10-20.) Buck then opined that the girl equivocated in her

identification of Heyward and her selection was not clarified. (R. p. 72, line 12 – p. 73, line 9.) Buck also claimed Clarke's positive feedback of the selection encouraged the girl to confirm her choice by circling his photograph. (R. p. 73, line 21 – p. 74, line 4.)

Upon cross-examination, the solicitor learned Dr. Buck prepared and submitted a report to the defense that had not been disclosed to the State. (R. p. 86, lines 6 -16.) After extensive discussion among the defense, the State, and the trial judge, Dr. Buck was ordered to turn over her report, all data related to her internet mock witness experiment, as well as her notes concerning the preparation of the test. (R. p. 86, line 17 – p. 97, line 4.) Dr. Buck acknowledged the girl was able to give details to investigators about the description of the perpetrator (R. p. 99, line 10 – p. 101, line 20.) Buck admitted she had not seen statements from witnesses, the defendant's statement, the DNA or fingerprint reports, or any other physical evidence corroborating the girl's description of the attacker. (R. p. 102, line 9 – p. 107, line 1.) Dr. Buck said she chose the participants for her experiment from SurveyMonkey.com, but provided no detail about how those participants were chosen for the test other than the participants were paid to take the survey. Buck said it did not matter to her research who actually took the survey. (R. p. 107, line 9 – p. 109, line 20.) Regarding the video-taped identification, Dr. Buck acknowledged Clarke told the girl, "I want you to help me and see **if** you can see the bad man that did this to your grandma." (R. p. 112, lines 14-22 (emphasis added).)

The following morning, the trial court heard arguments on the reliability of the out of court identification procedure. (R. p. 116, lines 16-24.) The State argued there was no evidence presented that the lineup itself was suggestive in any way, other than the internet study which identified no discernable reason or feature any of the participants chose photograph 3. (R. p. 116, line 25 – p. 117, line 17.)

The trial court cited to relevant state and federal law, and found Clarke's statements to the girl were in no way suggestive that she should pick any photograph at all or in particular. (R. p. 119, line 8 – p. 120, line 19.) The court found the girl had sufficient time and opportunity to view the perpetrator and the child picked photograph 3 without "any hesitance." The court noted the lineup appeared to contain images of six men within the same age range and with similar facial features. (R. p. 120, line 20 – p. 121, line 18.) The court ruled State's Exhibit 30 and 31, the lineup and the video of the lineup identification, were admissible. (R. p. 122, line 22 – p. 123, line 4.)

Analysis

In *Neil v. Biggers*, 409 U.S. 188 (1972), the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Initially, the trial court must determine whether the identification resulted from "unnecessarily suggestive" police procedures. *State v. Dukes*, 404 S.C. 553, 557–58, 745 S.E.2d 137, 139 (Ct. App. 2013) (citing *Biggers*, 409 U.S. at 198–99). If the court determines the identification did not result from unnecessarily suggestive police procedures, the inquiry ends. *Id.* However, if the court finds law enforcement used "an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless 'so reliable that no substantial likelihood of misidentification existed.'" *Id.* (quoting *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012)). Under the totality of the circumstances, courts are to consider these factors in assessing the reliability of an otherwise unnecessarily suggestive identification procedure: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and

(5) the length of time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. 98 (1977).

Here, the girl testified Heyward instructed her to sit at the table across from her grandmother while he strangled Ms. Tolleson right in front of her. The crime occurred during the daytime, and he was not wearing a mask or any other item to obscure his face. Heyward then tied the girl's hands and feet and then carried her to a closet. In considering the first factor, the child had ample opportunity to view Heyward's face within feet and inches of her own. The girl testified she tried to remember what Heyward looked like while he was committing the crime. (R. p. 41, line 24 – p. 42, line 16.) Although she was young, the girl recalled details about the crime, such as the position of her grandmother at the table and the purplish color of her grandmother's face after she was strangled. Thus, the evidence supports the second factor, that the girl was paying attention during the crime to the best of her ability. Third, the girl described the athletic suit worn by Heyward and his bald hairstyle, which according to Ms. Canzater, was a closely cut hairstyle that he shaved shortly after the murder. As for the fifth factor, the girl identified Heyward in the photograph lineup within one day of the murder. The length of time between the confrontation and the identification was minimal.

It is the fourth factor that Heyward appears to challenge in his appeal. Heyward argues Investigator Clarke did not explicitly tell the girl the perpetrator may not be pictured in the lineup, and that improperly encouraged the child to choose a photograph even though she may not have been certain. (IBOA at p. 11, citing State's Ex. 31.) However, as Investigator Clarke testified, he did not tell the girl the perpetrator was included in the lineup. His exact words were, "I want you to help me and see **if you can see** the bad man who did this to your grandmamma." (State's Ex. 31 (emphasis added).) As the record reveals, Clarke did not tell the girl she must

identify the assailant. Indeed, Clarke made no improper suggestions to the child about whether the man was included in the lineup or which photograph depicted Heyward.

Heyward also contends the girl was not certain of her identification of him in the lineup because the girl said the photograph "looks kind of like" Heyward. (IBOA at p. 11, citing State's Ex. 31.) However, the record reveals that although the child did not remember every detail about Heyward, such as whether he had facial hair, she did understand the difference between a photograph that merely looked familiar and a photograph of the actual man who killed her grandmother. (R. p. 26, lines 4-10.) The child first selected Heyward's photograph as the man who murdered her grandmother. She then viewed another photograph in the lineup and remarked that the man looked like a janitor in her school. (R. p. 26, lines 4-15.) Clarke clarified with the child that she understood the difference between the man she choose as the perpetrator, and the man she choose as having a resemblance to her school janitor. The child told Clarke she was certain of her identification of Heyward as the killer because she "got scared" when she saw him again. (R. p. 26, line 18 – p. 27, line 6.) The testimony shows the child, even as young as she was, was perfectly capable of recognizing the killer and having an emotional reaction to his photograph. Thus, fourth factor of the *Brathwaite* analysis was satisfied, despite Heyward's arguments to the contrary.

Under the totality of the circumstances, the trial court properly found the identification procedure reliable. Having found the out-of-court identification reliable, the admission of the in-court identification of the Heyward by the child was proper. *See State v. Cheeseboro*, 346 S.C. 526, 540, 552 S.E.2d 300, 307-08 (2001) ("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."). Moreover, any challenge to the reliability of the

child's in-court identification of Heyward would not result in suppression of that testimony. *See State v. Lewis*, 363 S.C. 37, 42, 609 S.E.2d 515, 518 (2005) ("the remedy for any alleged suggestiveness of an in-court identification is cross-examination and argument.")

In his argument for suppression of the testimony, Heyward's reliance on *Foster v. California*, 394 U.S. 440 (1969) is misplaced. In *Foster*, the witness did not positively identify the perpetrator in his first viewing of a physical lineup of suspects. The witness then had the opportunity to view Foster again before a second lineup, in which Foster was the only man included from the first lineup. The witness was then confident Foster was the perpetrator, having now seen him on multiple occasions before the positive identification. *Foster*, 394 U.S. at 441-443. The facts of *Foster* are completely unsuitable to the identification in this case. Critically, the in-court identification of *Foster* was doomed because of the precariousness of the out-of-court identification. Here, the child positively identified Heyward at the **first** photograph lineup, held shortly after the murder. Unlike in *Foster*, there were no more attempts to subject the child to photographs of Heyward following that identification because her first identification was confident. *Foster* has no application to the case at hand.

Harmless Error

Even if this Court were to find error in the admission of the out-of-court or in-court identification of Heyward, that admission will not require reversal unless there was a reasonable probability it contributed to Heyward's conviction. Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. *State v. Fletcher*, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness of an error in the admission of evidence generally depends on the materiality of the

evidence in relation to the case as a whole. *State v. Haselden*, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

Here, the State submits any error in the admission of the identification evidence from the victims was harmless and not prejudicial. Notwithstanding the girl's identification of Heyward, his fingerprints were found on the door to the kitchen, as well as on items found inside the house, despite his claims to officers he never entered the home. Heyward's DNA was found under Ms. Tollison's fingernails, as well as on the item wrapped around her neck and on a swab of her neck. The gun described by the child was found in Heyward's possession, and witnesses described the outfit he was wearing as matching the outfit of a man seen outside Ms. Tollison's home at the time of the murder.

The State's case against Heyward was compelling. The identification procedure used resulted in a reliable and positive identification of Heyward as the perpetrator. Even without the identification, the State could prove Heyward's guilt beyond a reasonable doubt. For all of these reasons, his convictions should be affirmed.

II. **The fingerprint identification card was admissible because the non-hearsay evidence was sufficiently authenticated by a witness who identified the card as the information she obtained from a national database, linking Heyward's distinctive fingerprints to unknown prints obtained from the crime scene.**

Standard of Review

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the conclusions of the trial court are based on an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice. *State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995).

How the Issue Was Presented at Trial

After Investigator Trisha Odom was qualified as an expert on latent print analysis, she explained the different types of fingerprints to the jury, how prints are left on varying surfaces, and the longevity of prints. (R. p. 197, lines 11 – p. 202, line 9.) The State sought to introduce Odom's reports of her findings when the defense objected. (R. p. 202, line 10 – p. 203, line 10.) The defense objected to the portions of the report finding a match between several prints in the house and Heyward's because Heyward's known prints were obtained from the Automated Fingerprint Identification System ("AFIS'), submitted by the State of New Jersey pursuant to his incarceration there. (R. p. 203, line 18 – p. 204, line 19.) The defense further argued the State should have compared Heyward's prints to his AFIS card to verify its accuracy before the analysis was performed. (R. p. 204, line 20 – p. 205, line 10.) The proper procedure, according to Heyward, would require the State to call someone from New Jersey who could explain how

Heyward's print was uploaded into AFIS, how the print is maintained in the New Jersey state database, and how that database is maintained. (R. p. 211, lines 20-25.)

The State argued it had been careful not to tread into any area that would discuss Heyward's arrests and incarceration in New Jersey, but would be happy to elicit testimony from Odom concerning how Heyward would be entered into AFIS and matched to his FBI identification number already on file. (R. p. 207, line 14 – p. 209, line 6.)

Citing the Supreme Court of South Carolina's language in *State v. Rich*, 293 S.C. 172, 359 S.E.2d 281 (1987) and *State v. Anderson*, 386 S.C. 120, 128-29, 131-32, 687 S.E.2d 35, 39-40, 41 (2009), the trial court found the print card was not hearsay and the State need not present a witness from New Jersey to authenticate it. (R. p. 212, line 13 – p. 214, line 6.)

During the proffer of testimony, Odom explained that when she first examined the fingerprints from the scene on October 12, 2015, she relied on the fingerprint card generated from the AFIS database. (R. p. 224, lines 1-6.) Odom's first three reports were written on October 12. When Odom performed the remainder of the comparisons and issued her final report, she used the original card obtained from AFIS and the South Carolina card obtained when Heyward was booked into Richland County. (R. p. 224, lines 10-14.) Odom had no doubt the prints obtained from Heyward on booking were the same as the prints obtained from the AFIS database. (R. p. 225, lines 1-7.)

Following the proffer, the defense again argued the testimony about the prints was inadmissible because the prints analyzed on October 12 were not authenticated "because they can't provide the testimony that is required to authenticate the New Jersey print card that was acquired through the FBI database." (R. p. 233, lines 16-24.) The defense argued the analysis

performed on October 16 comparing the crime scene prints to the fingerprint card obtained from Heyward's booking was "not a sufficient basis for authentication." (R. p. 234, lines 2-6.)

The State argued the testimony showed the analyst preliminarily ran the prints on October 12 and received a match on the FBI database. Heyward was arrested and fingerprinted on October 13. Following his arrest, Odom then compared his prints based on the federal and local fingerprint cards. Odom also testified the card obtained from booking and the card she used to make the initial match contained the prints of the same person. (R. p. 234, lines 10-24.)

The court clarified the facts with the following: Officers responded and processed the crime scene on October 11, and they continued processing on the 12th. The officers ultimately released that scene on the 12th. Different officers lift latent prints, some on the interior of the door, some on the jewelry canister, box, and various items. The prints were uploaded to the AFIS system, which is a national databank. The databank returned one match on the 12th. The analysist then made a comparison of the match, Exhibit 217, with the latent prints from the crime scene. Heyward was not under arrest at this time, but he became a suspect. Later on the 12th, a detective showed the child a photographic lineup and the child selected Heyward at the perpetrator of the crime. Investigators then obtained a warrant for Heyward's arrest, and he was arrested on the 13th. Upon his arrest, Heyward's prints were scanned into the local database via the LiveSan system at the detention center. Heyward's Livescan prints were then assigned a unique state identification number. (R. p. 236, line 20 – p. 239, line 15.)

Heyward said he would withdraw any objection to the portions of the report finalized on the 16th because the analysis was performed with the known standard from Richland County. (R. p. 240, lines 1-4.) Heyward maintained an objection to the prints analyzed on the 12th (or based upon Exhibit 217). (R. p. 240, lines 11-13.)

The trial court found the authentication of the FBI database fingerprint card was sufficient pursuant to prevailing common law. The court also found the fingerprint card sufficient for admission under Rule 901 (a), SCRE. (R. p. 241, line 19 – 242, line 18.) The court elaborated with the following:

> Here, you have the unique identifying FBI number in this case. You have an expert testifying that she compared a latent print from the crime scene on the 12th or however many she compared on the 12th to the known prints of James Heyward from -- I've said the FBI, New Jersey. I keep changing my terminology about that. I do that to make sure I'm tracking right.
>
> So I would deny the motion as to lack of authentication in camera at this point. I will deny it as to 217, State's 217. And I note there is a gap. I take that into consideration. There is a gap because there's no comparison that I can actually track between the FBI prints on the 12th, if they were directly or not compared to the LiveScan.

(R. p. 243. lines 5-17.) The court also found the reports (State's Exhibits 214 and 215) admissible pursuant to Rule 1006, SCRE. (R. p. 252, lines 5-25.)

Analysis

In *State v. Rich*, the Supreme Court of South Carolina definitively held that police fingerprint cards do not violate the prohibition against hearsay given that they fall within the business records exception or the public records exception. *Rich*, 293 S.C. at 173, 359 S.E.2d at 281. The Fourth Circuit recognizes this principle and has held that fingerprint cards are not "testimonial" and, thus, do not violate the Confrontation Clause concerns espoused in *Crawford v. Washington*, 541 U.S. 36 (2004). *See United States v. Thornton*, 209 Fed.Appx. 297, 299 (4th Cir.2006) (concluding that fingerprint cards are not "testimonial," and that the admission of such business or public records does not violate the rule in *Crawford*). Although the evidence may not violate the rule prohibiting the admission of hearsay, the evidence must be properly authenticated, nonetheless.

A party offering evidence must meet "[t]he requirement of authentication ... as a

condition precedent to admissibility." Rule 901(a), SCRE. The authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.* "[T]he burden to authenticate ... is not high" and requires only that the proponent "offer[ ] a satisfactory foundation from which the jury could reasonably find that the evidence is authentic." *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir.2014) (decided under Fed.R.Evid. 901(a)(3)); *see also* 29A Am. Jur. 2d Evidence § 1045 (2008) ("The authentication requirement does not demand that the proponent of ... evidence conclusively demonstrate [its] genuineness....").

South Carolina's Rule of Evidence 901 provides a non-exclusive list of ways in which evidence may be authenticated. For example, Rule 901(b)(1) provides generally that a "witness with knowledge" that the testimony is what it is claimed to be may authenticate the evidence. As to the authentication of fingerprint records, particularly, South Carolina case law clarifies Rule 901(b) provides several applicable illustrations of authentication. *See Anderson*, 386 S.C. at 129, 687 S.E.2d at 39. Rule 901(b)(4) provides that a proponent of physical evidence may satisfy the threshold authentication requirement of Rule 901(a) by "internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Rule 901(b)(4), SCRE.

Here, Investigator Odom, an expert in the field of fingerprint analysis, analyzed the latent fingerprints found at Ms. Tollison's home by checking them through the AFIS. Using this technology and comparing the characteristics of the latent fingerprints with those of the known prints, Odom determined first that the unknown prints resulted in a match to Heyward's prints uploaded to AFIS from New Jersey and then that the prints from the crime scene matched the known prints from Heyward obtained from Livescan following his arrest. Odom explained that the prints on the fingerprint card from AFIS would have been taken at a correctional facility and

assigned a unique identifying number. Similarly, when Heyward's prints were processed locally, his prints would also have been assigned a unique state identifying number. Although Odom testified she did not recall performing a direct comparison between the AFIS fingerprint card and the Livescan card, she did compare and confirm both cards matched the latent prints found at the scene.

Consistent with the Court's holding in *Anderson*, Odom's testimony regarding the distinctive characteristics of the Heyward's prints on the fingerprint card was sufficient to support a finding that the fingerprint card was properly authenticated. *See United States v. Patterson,* 277 F.3d 709, 713–14 (4th Cir. 2002) (holding, pursuant to Federal Rule of Evidence 901(b)(4), government provided sufficient authentication of a Tenprinter image where testimony that one of the fingerprints recorded by the Tenprinter matched the fingerprint recovered from the crime scene evidence); *United States v. Lauder*, 409 F.3d 1254, 1265–66 (10th Cir. 2005) (referencing Federal Rule of Evidence 901(b)(4) and finding government presented sufficient evidence that fingerprint card generated by the "live-skin" method accurately reflected defendant's fingerprints where evidence was presented that defendant's known fingerprint was properly recorded, the "live-skin" method functioned properly when it recorded the defendant's print, and the chain of custody was maintained).

Second, 901(b)(7), the public records example, provides for authentication by "[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept." Rule 901(b)(7), SCRE. As the Fourth Circuit held in *Thornton*, the fingerprint cards produced by various law enforcement agencies and maintained by the FBI are admissible as business records or as public records.

Thornton, 209 F. App'x at 299. Thus, to authenticate the business record under this exception, the witness need only show the trial court the card was actually from the database where fingerprint cards of this nature are kept. Here, Investigator Odom testified she obtained the fingerprint card from a national database maintained by the FBI. (R. p. 218, lines 1-17; p. 222, lines 14-21.) Odom said that in order to for the prints to be uploaded into the AFIS system, the prints must meet a common threshold to satisfy AFIS quality for readability and comparison. (R. p. 220, lines 16-22.) Thus, Odom's testimony on the standard procedures used by AFIS to keep the prints was sufficient for authentication. *See State v. Carruth*, 166 S.W.3d 589, 591 (Mo.Ct.App.2005) (holding AFIS fingerprint card was admissible under business records exception to the hearsay rule where witness, who did not take the actual prints, established the standard procedures used by the jurisdiction to collect and maintain fingerprints and testified regarding her determination that the latent prints and the known prints came from the defendant).

Further, Rule 901 (b)(9) provides for authentication by "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." This subsection was recently discussed in *State v. Brown*, 818 S.E.2d 735, 740 (S.C. 2018), to determine the authentication of GPS monitoring records. In *Brown*, the Supreme Court of South Carolina again acknowledged the low burden to authenticate records but required the State to make some minimal showing of the accuracy of the records. *Id.* at 741 ("We emphasize that '[n]o elaborate showing of the accuracy of the recorded data is required;' however, the State must make some showing to authenticate the records." (citing *People v. Rodriguez*, 224 Cal.Rptr.3d 295, 309 (2017)). The Court went on to "require that a witness should have experience with the electronic monitoring system used and provide testimony describing the monitoring system, the process of generating or obtaining the records, and how this process has

produced accurate results for the particular device or data at issue. As noted, the witness need not be an expert." *Brown*, at 742. Thus, in the case of GPS records, the Court would not require a technician from the monitoring company to authenticate the records, instead allowing the State to meet its burden through a witness familiar with the operation of the process or system used to produce the evidence.

In this case, Odom testified regarding when and where Heyward's fingerprints were taken upon his arrest and detention, how the prints were submitted to AFIS, how the prints were submitted to SLED and her lab via the Livescan software, and how the accuracy of the prints maintained in AFIS was corroborated by the Livescan prints. Thus, in accordance with recent prevailing law in *Brown*, Odom's testimony was sufficient to satisfy the authentication requirement under numerous subsections of Rule 901(b).

Contrary to Heyward's assertions, the State is not required to call the analysist from New Jersey who actually took the fingerprints and then uploaded them to AFIS. The State need only show 1) Odom could identify the distinctive characteristics of Heyward's fingerprints, 2) Odom recognized the fingerprint card as originating from the AFIS database where other fingerprints of that nature are kept, and 3) the fingerprint card was an accurate reflection of Heyward's prints as corroborated by the analysis of the Livescan prints to the latent prints found at the scene. Investigator Odom's testimony was more than sufficient to meet the State's low burden to authenticate the fingerprint card. The testimony offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic. *United States v. Hassan*, 742 F.3d at 133. The State, consistent with the requirements of authentication under Rule 901, SCRE, and with numerous state and federal jurisdictions, sufficiently established that the fingerprint card in question was what the State purported it to be.

Harmless Error

Even if this Court were to find the admission of the fingerprint card to be error, any error is entirely harmless in this case. Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. *State v. Fletcher*, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008); *see also, State v. Garner*, 389 S.C. 61, 67–68, 697 S.E.2d 615, 618 (Ct. App. 2010) ("[I]mproper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice. Such error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors.")

Heyward withdrew his objection to the portions of the report analyzing the fingerprints obtained directly from Heyward after his arrest and booking into the detention center. (R. p. 240, lines 1-4.) Heyward maintained an objection only to the prints analyzed on the 12th. (R. p. 240, lines 11-13.) The analyst testified she compared the unknown prints found at the crime scene to those of Heyward processed in the Livescán software in the following days. (R. p. 224, lines 1-14.) Because the analysis performed on those prints were admitted without objection, the jury still heard that Heyward's prints were found on the door to the kitchen from the carport and on some items retrieved from inside the house. Additional testimony about the matching of Heyward's prints at an earlier time in the investigation cannot be reasonably said to have affected the result of the trial. This Court should not set aside his convictions on this matter.

III. **The testimony regarding whether the gun was operational was highly relevant to the definition of a weapon, as used within the elements of armed robbery and pointing and presenting a firearm, and also to prove malice aforethought for the charge of murder.**

Standard of Review

A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009)

How the Issue Was Presented at Trial

Before Investigator David Collins began his testimony, Heyward objected to any testimony from the witness that the gun recovered from Heyward's bedroom was, in fact, operational. Heyward argued the evidence was not relevant to any element of any substantive offense charged and was "superfluous testimony in what looks to be a more than week-long trial." (R. p. 357, line 9 – p. 358, line 5.) Heyward **did not** argue at trial the testimony was unduly prejudicial and inadmissible pursuant to Rule 403, SCRE. (R. p. 357-361.)

The solicitor responded that the testimony was required to prove the firearm was an actual weapon as part of the pointing and presenting the firearm charge. The solicitor also argued the operational firearm was probative of malice, even though Heyward did not use the weapon to murder Ms. Tollison. (R. p. 358, lines 7-17.) The court read its intended charges on pointing and presenting a firearm, as well as armed robbery, and noted there was no testimony yet as to whether the "instrument" could cause death or great bodily harm, or whether it was capable of "expelling a projectile through explosion." (Trial R. p. 359, line 18 – p. 360, line 19.) The court found the testimony on the gun's operation "an essential element of pointing and presenting." The court based his ruling on SCRE Rule 401, saying "relevant evidence means evidence having any tendency to make the existence of any fact that is consummate to a determination of the

action more probable or less probable than it would be without the evidence." (R. p. 360, lines 20-25.)

During his testimony, Collins told the jury his role was to determine whether the firearm functioned properly." (R. p. 365, lines 13-16.) The examiner said the gun was worn and the finish was in bad condition, but the weapon did function and it could propel a projectile through an explosion or pulling the trigger and that a bullet of that caliber, if fired at someone, could cause great bodily injury or death. (R. p. 367, line 2- p. 368, line 10.)

Analysis

Heyward claims for the first time on appeal the admission of the expert testimony on the functionality of the gun was unduly prejudicial. This argument was not raised to and ruled upon by the trial court. For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented, *State v. Simpson*, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996), and with sufficient specificity to inform the circuit court judge of the point being urged by the objector, *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Because Heyward did not object to the prejudicial impact, only the "superfluous" nature of the testimony, the Rule 403, SCRE, argument is not preserved for review.

Even assuming the argument is preserved, it is without merit. Heyward was charged with murder, armed robbery, kidnapping, burglary, pointing and presenting a firearm, and unlawful possession of a weapon. (R. pp. 493-508.) Heyward argues that because the neither armed robbery nor pointing and presenting a firearm contain elements requiring the weapon to be operational, the testimony was irrelevant. (IBOA at 15.)

If solely referring to the language of the armed robbery and pointing and presenting statutes, Heyward is correct. Neither S.C. Code § 16-23-410 (pointing and presenting a firearm)

nor §16-11-330 (armed robbery) explicitly state within the statute the State is required to prove the weapon is operational. The analysis does not end here, however, because the common law and statutory definitions relevant to each of these statutes do require such evidence. As the trial court noted, for purposes of an armed robbery, a deadly weapon is generally defined as "any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Campbell*, 287 S.C. 377, 339 S.E.2d 109 (1985) (holding gasoline could be considered a deadly weapon). As for the charge of pointing and presenting, the preceding statute defines a weapon as a "firearm (rifle, shotgun, pistol, or similar device that propels a projectile through the energy of an explosive), a blackjack, a metal pipe or pole, or any other type of device, or object which may be used to inflict bodily injury or death." S.C. Code Ann. § 16-23-405.

Thus, in both charges made against Heyward, the supporting definitions of the required elements require the State to make some showing the weapon was capable of causing great bodily injury or death. The State is required to prove every element of a crime beyond a reasonable doubt. *See State v. Cheatham*, 349 S.C. 101, 110, 561 S.E.2d 618, 623 (Ct. App., 2002) ("the State is not required to accept a defendant's stipulation of proof because the State still bears the burden of proving every element of a crime beyond a reasonable doubt."). The State was therefore entitled to show the jury that weapon, though old and worn, was fully capable of causing great bodily harm.

Aside from the charges for armed robbery and pointing and presenting a firearm, Heyward was also charged with the murder of Ms. Tollison. "Murder" is the killing of any person with malice aforethought, either express or implied. S.C. Code Ann. § 16-3-10. Malice is a term importing wickedness and excluding a just cause or excuse. *State v Fuller*, 229 S.C. 439, 93 S.E.2d 463 (1956). "Malice," within meaning of South Carolina murder statute, is the

wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. *Young v. Catoe* 205 F.3d 750 (4th Cir. 2000). To prove Heyward guilty of murder, the State was required to convince the jury he killed Ms. Tollison with malice aforethought. Even though he did not ultimately shoot Ms. Tollison, he brought a loaded, operational weapon with him when he gained entry into her home. The girl testified he pulled out the operational weapon and put it on the table where she could clearly see it while he strangled her grandmother. The gun was used as an aid to commit his crimes, and the jury was entitled to know he had the ability to make good on his implied threat to the child.

Appellant's argument he was unfairly prejudiced by the testimony is implausible. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct.App. 1998). "All evidence is meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403]." *Gilchrist*, 329 S.C. at 630, 496 S.E.2d at 429. The jury properly based its decision on Heyward's guilt on the overwhelming evidence Heyward left at the scene of the crime. The functionality of the weapon, though relevant to the definitions of the elements of the crimes charged, had little bearing on the probative value of the enormity of the State's case against Heyward. The trial court committed no abuse of discretion in allowing this testimony, and given the enormity of the State's case, any error in its admission was harmless. This Court must deny relief on this ground.

IV. **The trial court properly refused to strike to portion of the indictment including Heyward's alias, Abdul Muslim, because significant evidence linked the identity of Abdul Muslim to the crime and the defense's theory of the case was the evidence identified the wrong man.**

Standard of Review

Absent an abuse of discretion, a trial court's ruling on a motion to strike will not be reversed. *Mayes v. Paxton* (S.C. 1993) 313 S.C. 109, 437 S.E.2d 66.

How the Issue Was Presented at Trial

On June 5, 2017, before the Honorable Judge R. Knox McMahon, Heyward moved to strike his alias, Abdul Muslim, from his multiple indictments, including murder, kidnapping, assault and battery, armed robbery, pointing and presenting, and another weapons charge. (R. pp. 424-426.) Citing federal law, Heyward argued there was no "factual nexus" between the alias charged in the indictment and the allegations made against him. (R. p. 427, line 2 – p. 430, line 11.) Counsel for Heyward then explained to the trial court how Heyward was developed as a suspect. (R. p. 430, lines 4 – 25.) A partial fingerprint resulted in a hit for James Heyward, and a records check on Heyward found his alias and multiple prior convictions in New Jersey. The defense argued, however, that the State was aware of Heyward's name when he was developed as a suspect and only later found information about his many aliases, but those aliases had nothing to do with the State's focus on this suspect. (R. p. 431, line 1 – p. 433, line 19.)

Heyward then argued that results from a 2011 Gallup poll, which studied perceptions in the years 2004 and 2006, suggested a societal negative perception of Muslims, which would in turn prejudice Heyward. (R. p. 435, line 5 - p. 437, line 3.) Heyward asked the court to either amend the indictment and strike the alias or order the State to refrain from mentioning the alias during the trial. (R. p. 437, lines 6-14.)

The solicitor then explained that the DNA found from the victim's fingernail scrapings produced the Combined DNA Index System ("CODIS") hit to Heyward, who had given the name Abdul Muslim when he was arrested for eluding police and failure to stop in New Jersey. When he was processed into the detention system for that arrest, his DNA was taken and deemed the profile for Abdul Muslim. The solicitor said the match did not report any associated names, such as name James Heyward, only Abdul Muslim. (R. p. 438, lines 1-21.)

The State agreed to amend the indictment to remove the alias if the defense did not intend to challenge the DNA results. The State also pointed out the indictment did not include Heyward's eight other aliases because they were not relevant to his culpability, but the DNA match, and its connection to the defendant, was critical to the State's case. (R. p. 438, line 23 – p. 439, line 10.)

The court summarized its understanding of the facts as follows: The DNA profile from the victim's fingernails resulted in a match to Abdul Muslim. The fingerprint card for Abdul Muslim was then matched to James Heyward. (R. p. 440, lines 2-17.) The solicitor then again offered to amend the indictment if Heyward agreed he was not challenging the DNA evidence. (R. p. 440, lines 20-22.)

The court ruled that any potential prejudice could be addressed and cured in voir dire. (R. p. 443, line 22 – p. 444, line 3.) The court went on to explain that the introduction of the alias at trial should be examined under the rules of evidence, particularly Rules 401, 402, and 403, to fully weigh the probative value against its potential prejudicial impact. The court explained that the DNA hit to Abdul Muslim, even if James Heyward was already developed as a suspect, could have been exculpatory or inculpatory to James Heyward. The court found that the investigation

linking the identity of James Heyward to Abdul Muslim was relevant to the State's burden to prove the elements of the crimes charged. (R. p. 444, line 18 – p. 445, line 25.)

Analysis

The inclusion of an alias in an indictment is not inherently prejudicial; it does not automatically conjure the image of a hardened criminal. *See United States v. Esposito*, 423 F.Supp. 908, 911 (S.D.N.Y.1976). Rather, the inclusion of an alias is relevant and permissible when it is necessary to identify the defendant in connection with the acts charged in the indictment. *E.g. United States v. Clark*, 541 F.2d 1016, 1018 (4th Cir.1976); *State v. Monahan*, 480 A.2d 863, 867 (1984). Further, where the accused is known by different names, it is lawful for the indictment to identify the accused by all such names as alias dicta. *Merneigh v. State*, 531 S.E.2d 152, 158. (Ga. Ct. App. 2000).

On appeal, Heyward argues the inclusion of his alias, Abdul Muslim, in the reading of the indictments to the jury unfairly prejudiced him, not because an alias connotes a criminal background, but because the particular alias injects an assumed bias against non-Christian religions. (IBOA at 17-18.) Heyward does not suggest, and the record does not support any implication, that the solicitor made any improper comment regarding Heyward's religion in the opening or closing arguments, sought to introduce any other improper evidence related to Heyward's religion, or asked any improper questions of any witnesses. Heyward's sole allegation of religious bias stems from the use of his alias, Abdul Muslim, in the indictments read by the trial court and later mentioned during the testimony of the DNA database administrator.

The probative value of the alias became clear in the testimony of database administrator John Barron. (R. p. 374, lines 4-20.) Barron explained that DNA evidence was submitted to the national database and a match was returned from New Jersey (R. p. 375, line 22 – p. 376, line

15.) The name returned with the match was Abdul Muslim and also included a birthday, a state identification number, and a national identification number. Barron then performed a comparison between the Abdul Muslim sample and the known sample of James Heyward. Barron testified the samples matched. (R. p. 379, lines 14-25.)

Although this testimony may not have seemed significant at the time, Heyward's strategy to question the accuracy of the DNA analysis became evident during the cross-examination of Dr. Gray Amick, the Richland County Sheriff's Department DNA laboratory director. (R. p. 382, lines 1-22; pp. 389-412) The defense's strategy was to suggest the analysts had not performed a thorough search of the unknown DNA profiles found at the crime scene, suggesting the possibility the actual culprit was not discovered. (R. p. 401, line 8 p. 410, line 20.) As the trial judge noted in his pre-trial refusal to strike the alias from the indictment, the DNA match to a third name, Abdul Muslim, could have been exculpatory or inculpatory to James Heyward, depending on how the testimony developed at trial. Because Heyward the challenged the accuracy of the investigation of the identity of the unknown profile, the accuracy of the investigation of the identity of James Heyward to Abdul Muslim was relevant to the State's burden to prove the elements of the crimes charged. (R. p. 444, line 18 – p. 445, line 25.) The State did agree not to object to the motion to strike the indictments if Heyward agreed he would not challenge the DNA evidence, but Heyward would not alter his strategy. He cannot now complain because the strategy failed.

As he did at trial, Heyward boldly asserts the mere mention of the alias results in a prejudice against him based on religious bias. In support of his position pre-trial, he argued a Gallop poll based on questions posited in 2004 and 2006 revealed intolerance to Muslims. That data, even if true, obtained three and five years following the attacks of September 11, 2001, is

hardly dispositive of the mere mention of a name in 2017. Further, Heyward's reliance on *Vasquez v. State,* 388 S.C. 447, 698 S.E.2d 561 (2010), *United States v. Ham,* 998 F.2d 1247, 1252-53 (4th Cir. 1993), and *United States v. Vue*, 13 F.3d 1206, 1213 (8th Cir. 1994), is misplaced. In *Vazquez*, the South Carolina Supreme Court found a due process violation from the prosecutor's comments referring to the Muslim defendant as a domestic terrorist in closing arguments, in which he also referred to the September 11th attacks. *Vazquez*, 388 S.C. at 460, 698 S.E.2 at 567. In *Ham*, Fourth Circuit Court of Appeals found the prosecutor's introduction of unrelated evidence of bad acts by members of the religious community unduly prejudiced the defendant at his trial for unrelated charges. *Ham*, 998 F.2d at 1254. In *Vue*, the defendants challenged the admission of certain testimony related to the likelihood of the involvement in opium smuggling of persons of Hmong descent. *Vue*, 13 F.3d at 1211. The Eighth Circuit agreed, finding testimony tying the ethnic descent of a defendant to the ethnic characteristics of drug dealers in a specific geographic area or a specific type of drug trade improper. *Id.* at 1213. If any of these cases are applicable to the case at hand, they would only illustrate how the mere mention of the name, Abdul Muslim, was in no way unduly prejudicial by the standards of prevailing case law. The solicitor made no references to Heyward's religion nor introduced any evidence of religious activities or trends. The State only sought to link the name returned from the national database to the person on trial for murder, foreclosing Heyward's argument the DNA belonged entirely to an unknown male. This issue is without merit.

V. **The trial judge did not abuse his discretion in admitting detailed photographs of the victim's injuries because the pictures were offered to prove malice beyond a reasonable doubt, corroborated the pathologists' testimony about the blunt force trauma to the head, and were limited in number and breadth only to those necessary to illustrate the testimony.**

Standard of Review

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). "If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." *Id.* "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 207 (Ct.App.2008) (internal quotation marks omitted).

How the Issue Was Presented at Trial

In a pre-trial motion before Judge McMahon on June 22, 2017, the defense objected to several matters. (R. pp. 449-453.) Concerning particular autopsy photographs, Heyward argued Exhibits 4, 5, 6, 7, 9, 16, 17, and 18 were all cumulative. (R. p. 461, line 18 – p. 462, line 24.) Heyward objected to State's Exhibits 14 and 15 as irrelevant and "gruesome." (R. p. 462, lines 2-9.) The State asked the trial judge to defer ruling on the admissibility until the State's pathologist testified because the doctor had identified those photographs as necessary for her to explain the scope of the victim's injuries. (R. p. 463, lines 1-9.) The solicitor also said the photograph of the victim's face corroborated the testimony of the victim's grandchild, who would testify she saw her grandmother killed and described the color of her face after the strangulation. (R. p. 463, lines 10-20.) The State also agreed to withdraw Exhibits 17 and 18. (R. p. 466, lines 3-9.) The court reserved its ruling pending the testimony of the witnesses. (R. p. 467, line 5 – p. 468, line 9.)

Later at trial, Dr. Amy Durso, the State's pathologist, testified about the injuries she found on MS. Tollison's body. Dr. Durso described finding multiple blunt force injuries to the victim's head on four different planes of the skull. (R. p. 291, lines 11-22.) Dr. Durso testified some of the injuries would not be visible to an external inspection because they would be covered with the victim's hair, but the injuries would be visible if the scalp was reflected. (R. p. 291, line 23 – p. 292, line 3.) The State asked Dr. Durso if photographs of the reflected scalp would assist her testimony and she indicated affirmatively. The State then moved to enter State's Exhibits 14 and 15 into evidence. (R. p. 292, lines 4-12.) Heyward objected pursuant to Rule 403, SCRE. (R. p. 292, lines 11-13.) Heyward argued because the injuries to the head were not the cause of death, the photographs should be excluded as irrelevant and unduly prejudicial. (R. p. 293, lines 1-10.)

During a proffer of testimony, Dr. Durso explained the photographs demonstrated there was more than just a strangulation—there was a struggle, and Ms. Tollison's head was struck on multiple different areas. (R. p. 293, line 21 – p. 294, line 1.) Dr. Durso said the injuries contributed to the cause of death and the photographs were demonstrative of those injuries because "it's easiest with a picture." (R. p. 294, lines 2-11.) The doctor then used the photographs to demonstrate where the injuries occurred on Ms. Tollison's head. (R. p. 295, lines 2-11.)

The trial court cited to *State v. Collins,* 409 S.C. 524, 763 S.E.2d 22 (2014), and found the probative value of the photographs outweighed the prejudicial impact. The court found the photographs probative of malice because the exhibits indicated a violent struggle occurred at the time of Ms. Tollison's death. Accordingly, the court denied Heyward's objections and admitted Exhibits 14 and 15 into evidence. (R. p. 296, line 11 – p. 300, line 5.)

Analysis

The brutality of Ms. Tollison's murder was shocking. The photographs offered captured the violence inflicted upon her and the various types of wounds she suffered at the hands of James Heyward. There was an eyewitness to the crime, the eight year old granddaughter of the victim, who described watching Heyward strangle her grandmother at the kitchen table. However, the girl was also locked in a closet for a significant period of time. The State theorized Heyward used his arm to choke Ms. Tollison and then later returned to "finish her off" with the draft-stopper that was found wrapped around her neck. (R. p: 417, lines 14-22.) The State argued Heyward's actions showed a total disregard for human life, proving the required element of malice in the murder of Ms. Tollison. (R. p. 418, lines 9-19.) The proof of malice was reflected by the victim's own body. The State was entitled to make its case, despite the gruesome nature of the photographs, because the pictures were the easiest, and most demonstrative manner to communicate that evidence to the jury.

In *Collins*, the circuit court admitted into evidence seven pre-autopsy photographs of a child who died of "extensive traumatic injury" after being severely mauled by dogs. *Id.* at 528–33, 763 S.E.2d at 25–27. The South Carolina Court of Appeals reversed, finding the circuit court erroneously admitted the photographs, and the error was not harmless. *Id.* at 533, 763 S.E.2d at 27. However, the Supreme Court reversed the Court of Appeals, finding the photographs were "highly probative, corroborative, and material in establishing the elements of the offenses charged; [their] probative value outweighed [their] potential prejudice; and the appellate court should not have invaded the trial court's discretion in admitting this crucial evidence based on its emotional reaction to the subject matter presented." *Id.* at 534–35, 763 S.E.2d at 28.

In *State v. Gray*, 408 S.C. 601, 759 S.E.2d 162 (Ct. App. 2014), the circuit court admitted into evidence eleven photographs of a victim—taken before and during autopsy—who died after being severely beaten during two separate fights on the same day. The Court of Appeals determined it was within the circuit court's discretion to admit eight of the photographs of high probative value presenting minimal danger of unfair prejudice, noting the photographs "contain no blood or gory anatomical details, and thus pose little, if any, danger of unfair prejudice." *Id.* at 609, 759 S.E.2d at 164. As for the remaining three photographs, which were taken during autopsy and showed the victim's exposed skull and brain, the Court concluded they too had probative value; they corroborated the pathologist's findings concerning the extent and location of the victim's head injuries and cause of death and were important to the State's ability to prove malice. *Id.* at 612–16, 759 S.E.2d at 166–68.

In *State v. Kelly*, 319 S.C. 173, 460 S.E.2d 368 (1995), our Supreme Court found photographs showing blood patterns on the victim and area around the victim were probative as to the element of malice. The Court noted the defense position that the defendant should only be convicted of voluntary manslaughter, and reasoned the evidence reflecting "the entire crime scene," which included "charts, photographs, and video [that] also were relevant to establish malice." *Id.*, 319 S.C. at 178, 460 S.E.2d at 370. In particular, the Court reasoned:

> ... The charts, photographs, and video here depicted the excess nature of the killing. The relevance of ... these items and their probative value on the issue of malice was great enough to negate the risk of the jury's basing its decision on an improper passion.

Id., 319 S.C. at 178, 460 S.E.2d at 371.

Here, the photographs were used to specifically demonstrate, explain, and corroborate the location and extent of the blunt force trauma wounds, in addition to the strangulation wounds, all of which were evidence of malice. In his brief, Heyward incorrectly argues the testimony was

unnecessary to establish what occurred to the victim because the girl witnessed the crime, distinguishing the case at hand from *Collins*, in which there were no eyewitnesses. (IBOA at 20.) However, although the girl did see Heyward attack her grandmother, she did not witness the entirety of the crime. Thus, the photographs provided the jury with more information than that available to the child. Moreover, the photographs were entered during the State's case in chief. Heyward had not yet elected his right to refuse to testify. Without knowing how Heyward would defend the murder charge, the State sought to prove malice, in part, from the unnecessary brutality inflicted on Ms. Tollison.

Heyward argues the photographs were not needed because the girl provided eyewitness testimony to the murder, then inconsistently argues the trial court erred in finding the photographs corroborated the girl's story because the girl never testified about injuries to Ms. Tollison's head. (IBOA at 20.) This gap in the testimony is precisely the reason the photographs, in conjunction with the testimony of the pathologist, were significant. Dr. Durso testified the trauma to the head was a contributing factor to the cause of death. She also testified the wounds would not be visible externally because the victim's hair would obscure the injuries. (R. p. 291, line 23 – p. 292, line 3.) The photographs corroborated this testimony. Consequently, there were distinct and necessary reasons to submit the photographs. *See State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010) ("'If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.'") (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353); *State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct.App. 2008) ("Admitting photographs which serve to corroborate testimony is not an abuse of discretion."). *See also State v. Kelsey*, 331 S.C. 50, 76, 502 S.E.2d 63, 76 (1998) (photographs of various bone and bomb fragments and clothing found at crime scene were admissible in murder prosecution to corroborate testimony

concerning condition of victim's body as first discovered by police at crime scene, and location of bone and bomb fragments supported testimony that bomb had been detonated in victim's mouth).

Finally, any error in the introduction of these photographs must be viewed as non-prejudicial and harmless beyond a reasonable doubt, since it could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). As noted earlier, the evidence against Heyward was overwhelming. Despite the compelling evidence, Heyward ultimately argued he was not the perpetrator of the crime. The jury simply did not believe him.

VI. Heyward offered no evidence any juror saw his shackles during jury selection, so he cannot show prejudice from the trial court's denial of his motion to remove the shackles.

Standard of Review

Whether a defendant is restrained during trial is within the trial judge's discretion. The trial judge is to balance the prejudicial effect of shackling with the considerations of courtroom decorum and security. *Illinois v. Allen*, 397 U.S. 337 (1970). The trial judge is the best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and prevention of other crimes. *State v. Tucker*, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995).

How the Issue Was Presented at Trial

Before jury selection began, Heyward asked to court to remove the shackles from his feet, arguing the shackles could be seen from the first two rows of the gallery directly behind Heyward. (R. p. 2, lines 11-15.) Heyward requested the removal for the duration of the jury selection. (R. p. 2, lines 16-17.)

The trial court denied the motion without elaboration. (R. p. 2, line 23.)

Analysis

As a general proposition, a criminal defendant has the right to appear in court free from physical restraints. "The law has long forbidden routine use of visible shackles during the guilt phase; it permits a [s]tate to shackle a criminal defendant only in the presence of a special need." *Deck v. Missouri*, 544 U.S. 622, 626 (2005). A defendant's appearance in shackles "may reverse the presumption of innocence by causing jury prejudice thereby denying him due process." *Jones v. Meyer*, 899 F.2d 883, 884 (9th Cir.); *see Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995) (holding that because of the potential for prejudice, due process requires that shackles be used as a "last resort"). However, "the trial judge is the best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and prevention of other crimes." *State v. Tucker*, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995).

"In order for a criminal defendant to enjoy the maximum benefit of the presumption of innocence, our courts should make every reasonable effort to present the defendant before the jury in a manner that does not suggest, expressly or impliedly, that he or she is a dangerous character whose guilt is a foregone conclusion... The negative connotations of restraints, nevertheless, are without significance **unless the fact of the restraints comes to the attention**

of the jury." *State v. Brawley*, 137 A.3d 757, 760 (Ct. 2016), citing *State v. Webb*, 680 A.2d 147(1996) (emphasis added). It is the defendant's burden to show that the presence of shackles prejudiced him in some way. *See U.S. v. Mayes*, 158 F.3d 1215, 1226-27 (11th Cir. 1998) (even if court abused its discretion in ordering defendants to wear leg irons during trial, defendants failed to demonstrate prejudice and were not denied fair trial); *Castillo v. Stainer*, 983 F.2d 145,147 (9th Cir. 1992) (error in restraining defendant harmless where restraint could not be seen by the jury); *State v. Williams*, 485 A.2d 570 (Ct. 1985) ("the record does not indicate ... [and] the defendant [does not] claim that any offer of proof was made as to whether the jurors could or did view the restraints when on the defendant").

In the present case, the record indicates the trial court denied Heyward's request to remove his shackles during jury selection. However, the defense did not make any offer of proof at trial with respect to whether the jury **could** or **did** see the restraints. The only argument in support of the claim was that **if** a jury member sat in the front two rows directly behind Heyward, the juror **might** be able to see under the defense table and view the leg shackles. Apart from the statement of Heyward's counsel expressing his concern, the record contains no evidence the possibility of a viewing prejudiced the minds of the jurors against Heyward. The record was not developed to include whether any potential juror sat in the two rows behind Heyward during jury selection, nor was there any evidence on the record concerning the clothing Heyward wore or the nature of the restraints. Further, Heyward did not request the trial judge to admonish the jury to disregard any viewing and draw no inferences from the fact that he was in leg restraints in the courtroom. In fact, defense counsel never renewed or amplified his initial objection after the conclusion of jury selection. Therefore, Heyward has failed to establish that the trial court's

refusal to remove his shackles during jury selection compromised his presumption of innocence in any manner.

VII. **There is no error, much less cumulative error, and any preserved errors are harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt. A defendant is entitled to a fair trial, not a perfect one, and even a perfect trial would have inevitably resulted in Heyward's conviction.**

Lastly, Heyward argues this Court should grant a new trial on the basis of the cumulative error doctrine. This ground was neither raised at trial nor in any motion for new trial and is therefore not preserved for review. The exact name of the legal doctrine employed does not need to be used to preserve an argument, but it must be clear that the argument has been presented on that ground. *State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001).

Nonetheless, the cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial. *State v. Beekman*, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013) (citing *State v. Johnson,* 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)). An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground. *Id*; *see also State v. McEachern*, 399 S.C. 125, 150, 731 S.E. 2d 604, 617 (Ct. App. 2012) (stating, "even if the court did commit any errors, we believe those errors to be harmless such that Hollie can show neither prejudice, nor that the errors affected her right to a fair trial"). The Constitution entitles a criminal defendant to a fair trial, not a perfect one. *State v. Mitchell*, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998) (finding reversal on cumulative error doctrine not warranted).

Further, our courts have addressed the issue of an unpreserved cumulative error doctrine, concluding the doctrine is not recognized when an appellant asks the court to consider the

unpreserved issues for review. *See State v. Beekman*, 405 S.C. 225, 238, 746 S.E.2d 483, 490 (Ct. App. 2013) ("our appellate courts do not apply the plain error rule"); *State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (noting appellant clearly sought for the appellate court to apply the plain error rule and stating as follows: "This Court, however, has routinely held the plain error rule does not apply in South Carolina state courts. Instead, a party must have a contemporaneous and specific objection to preserve an issue for appellate review. ") As in *Beekman* and *Sheppard*, Appellant asks this court to apply the plain error doctrine by combing the record for issues and arguing for the first time on appeal the cumulative effect of these matters deprived him of a fair trial.

Further, despite the numerous issues presented on appeal, the record reflects the trial court exercised its discretion soundly at each instance, or the record did not support any claim of prejudice. The out of court identification of Heyward as the killer was both positive and reliable. The fingerprint card obtained from AFIS was properly authenticated by the fingerprint expert who analyzed the prints. The functionality of the gun was relevant to the defined elements of two of the crimes charged and was probative of Heyward's malice when he entered the home. The mere mention of Heyward's alias invited no religious prejudice but did connect Heyward to a national DNA database. The autopsy photographs were relevant to prove malice from the brutality of the crime against Ms. Tollison. Finally, even though the trial court did not explain his reasoning for the denial of the motion to remove he shackles, Heyward cannot show prejudice because there was no evidence any jurors actually saw the shackles. The State presented compelling direct evidence and substantial circumstantial evidence of Heyward's guilt.

Heyward's attempt to stack the deck does not change the equation: the sum of all zeros is still zero. Moreover, the cumulative effect of any errors this Court might find fails to undermine

the fact that Heyward did receive a fair trial. This case does not warrant reversal on cumulative error. "As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *State v. Mitchell*, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998) (finding reversal on cumulative error doctrine not warranted). Heyward suffered no constitutional deprivation.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

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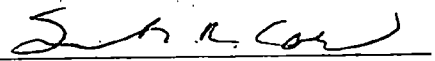
BY: 
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February 21, 2019.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
The Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

v.

JAMES HEYWARD,

Appellant.

Appellate Case No. 2017-001542

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 21st day of February, 2019.

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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2017-001542

The State, ... Respondent,

v.

James Heyward, ... Appellant.

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ARGUMENT

I. The trial court erred in admitting evidence and testimony regarding (a) an out-of-court photograph lineup where the victim did not make a positive identification and (b) the subsequent positive identification made by the victim at trial.

As set forth in the Appellant's Brief, the United States Supreme Court established a two-pronged inquiry a court must undertake to evaluate the admissibility of an out-of-court identification in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 1127 (1972). Although the State acknowledges this two-pronged inquiry, the State failed to separately address the first prong regarding whether the identification procedure was unduly suggestive, apparently conceding that issue.[1] Instead, the State focused only on the second prong—the factors to be used in assessing the reliability of an otherwise unduly suggestive identification procedure. (Resp't's Br. pp. 8–16.) The State seems to suggest in its reliability analysis, however, that the identification procedure was not unduly suggestive because Investigator Clarke directed G.F. as follows: "I want you to help me and see **if you can see** the bad man who did this to your grandmama." (Resp't's Br. pp. 13–14 (emphasis added by the State).) The State seems to suggest the use of the word "if" would somehow imply to an eight-year-old child that she need not choose any particular picture or that the perpetrator may not be included in the lineup.

The photograph lineup, however, was unduly suggestive in the manner in which it was conducted. (State's Ex. 31.) First, Investigator Clarke's instructions to G.F. actually imply the opposite of what the State contends. His exhortation that G.F. needed to "help" him would certainly encourage a child to take some form of action—here, choosing one of the six pictures presented to her. Moreover, his instruction for her to "see if [she] can see" is more of a test of her ability rather than an indication that the perpetrator might not be included in the photograph

1. The first prong in Neil v. Biggers was the basis for the trial court's ruling in admitting the so-called identification in this matter. (R. p. 122, line 18-p. 123, line 2.)

lineup. For example, a child's homework may say "see if you can find the match" or "see if you can fill in the blanks" or a parent may tell a child they want to "see if you can clean your plate" or "see if you can shoot this basket." The use of "see if you can" in those instances urges taking the desired action rather than indicating that taking no action is a possibility.

Investigator Clarke's own testimony about the lineup during the Biggers hearing supports this interpretation. He testified that, "I went into the room, just spoke with her briefly, told her she was a brave little girl, and I needed her to be brave for us again, and I asked her to pick out the man that had done something to her and her great-grandmother." (R. p. 25, lines 4-7.) It is evident from his own words that Investigator Clarke believed he was asking G.F. to pick a photograph, and he gave G.F. no indication that she should only pick a photograph that she was confident was the perpetrator, much less any indication that not picking a photograph was an option.

The photograph lineup was also unduly suggestive because Investigator Clarke hurriedly accepted G.F.'s non-identification as though it were a certain identification and even interrupted her as she was expressing doubt about the choice. G.F. stated that "Number three looks **kind of** like him." (State's Ex. 31.) (emphasis added). She subsequently pointed out another photograph and said it "kind of looks like my janitor," causing Investigator Clarke to quickly turn over the page so G.F. could no longer see or comment on any of the photographs. (State's Ex. 31.) Investigator Clarke also interrupted G.F. as she was asking if Investigator Clarke would "try to catch someone who looks like that . . . because that isn't exactly . . . ." (State's Ex. 31.) G.F. **never** indicated that Appellant was actually the perpetrator and seemed to indicate that Appellant was **not** the assailant at the photograph lineup. As acknowledged by the State, Appellant was already a suspect at the time of the lineup, which would explain Investigator Clarke's willingness

to pounce on the less-than-positive statement made by G.F. and attempt to prevent her from any further explication. (Resp't's Br. p. 9.) For these reasons, the photograph lineup procedure was unduly suggestive, and the so-called identification made as a result should not have been admitted.

Moreover, the overall identification process, which evolved from G.F.'s non-identification at the photograph lineup, to confirming that Appellant was the person in the photograph at the pre-trial hearing, to G.F.'s certain identification of Appellant as the perpetrator at trial, was unduly suggestive. The State argues that Appellant's reliance on Foster v. California, 394 U.S. 440 (1969), regarding an evolving identification is misplaced. (Resp't's Br. p. 15.) Specifically, the State argues that the in-court identification in Foster was doomed because of the precariousness of the out-of-court identification but that, here, G.F. positively and confidently identified Appellant at the photograph lineup. (Resp't's Br. p. 15.) The State completely ignores that G.F. did not make a positive and confident identification at the photograph lineup. To the contrary, G.F. said only that the photograph of Appellant looked "kind of" like the perpetrator but that it wasn't "exactly" him. (State's Ex. 31.) Again, G.F. **never** actually identified Appellant as the perpetrator and seemed to indicate that Appellant was **not** the assailant at the photograph lineup. It was only at trial, after she had been repeatedly exposed to Appellant's photograph and where Appellant was the only one from the photograph lineup and the only one on trial, that G.F. finally made a positive and confident identification of Appellant as the perpetrator. This identification process violated Appellant's rights to due process and should not have been allowed.

With respect to the second prong of the Biggers analysis, G.F.'s so-called "identification" of Appellant was not sufficiently reliable to rescue the State's unduly suggestive identification

procedure. To evaluate reliability, courts must consider the following factors under the totality of the circumstances: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Biggers, 409 U.S. at 199–200, 93 S.Ct. at 382.

G.F.'s inconsistent prior descriptions of the perpetrator, her uncertainty at the photograph lineup, and the length of time between the crime and confrontation created a substantial likelihood of misidentification such that the trial court should not have admitted the out-of-court "identification" or the subsequent in-court identification.

The State argues that the third factor—the accuracy of the witness' prior description of the criminal—supports the admission of the so-called identification because G.F. described the athletic suit worn by Appellant. (Resp't's Br. p. 13.) If she had, that description would be consistent with the State's theory at trial that the perpetrator wore a track suit that was brown with orange stripes. (R. p. 354, lines 3-4.) However, the State's portrayal of G.F.'s prior description is not reflective of the record. G.F. was asked to describe the assailant for the first time in a 911 call and responded that "he's black, that's it." (State's Ex. 42.) Later in the same call, she again states that the assailant was "black, that's all I know." (State's Ex. 42.) In response to questions from an officer at the scene that can be heard in the 911 recording, G.F. stated that the assailant was wearing an orange jersey and that she didn't see his hair. (State's Ex. 42.) After hearing G.F.'s description, the officer at the scene reported that the suspect was a "black male, orange jersey." (State Ex. 42.)

One day later, G.F. was interviewed at the Assessment Resource Center by Kristen Dixon. At the conclusion of that interview, Investigator Clarke came in and presented her with the photo lineup. G.F. told the interviewer at the outset, "I do not remember every single thing, like I told the police officers, because I went to bed; I actually went to bed." (State's Ex. 31.) Later in the ARC interview, G.F. reported that the assailant was wearing a hoodie but did not have the hood on. (State's Ex. 31.) G.F.'s change in description may well have been the result of discussions she had with the officers responding at the scene not captured on the 911 call or the result of discussions she had with the officers or doctors in the hospital. There is no evidence in the record documenting those discussions or any descriptions she made therein. Because the officers had begun developing Appellant as a suspect by that point, it is possible they provided additional information to G.F. about Appellant in the interim in an effort to jog her memory. Regardless, G.F.'s second description of a hoodie is markedly different than her initial statement that he was wearing an orange jersey, and is also significantly different than the brown tracksuit with stripes the State claimed the perpetrator was wearing at trial. Importantly, G.F. never described any of the assailant's facial features, tattoos (or lack thereof), or any other defining features in any of her descriptions. See State v. Moore, 343 S.C. 282, 289–90, 540 S.E.2d 445, 449 (2000) (finding an unreliable identification where an eyewitness' description was limited to the suspect's race, clothing, and height, rather than any facial or other distinguishing features). G.F.'s contradictory statements regarding her assailant's appearance indicate that her so-called "identification" was not reliable.

The State also asserts that the fourth factor—certainty demonstrated by the witness at the photograph lineup—supports the admission of the so-called identification. (Resp't's Br. p. 13–14.) However, as detailed above, G.F. did not make a certain identification at the photograph

lineup and even indicated that Appellant was not her assailant. Therefore, her "identification" was not certain and was not so reliable as to overcome any undue suggestiveness.

Finally, the State asserts that the fifth factor—length of time between the confrontation and the identification—supports admission of G.F.'s "identification" because it took place only one day after the incident. (Resp't's Br. p. 13.) Although G.F.'s so-called identification was made fairly close in time to the incident, this factor is less weighty here due to the contradictions of her more contemporaneous descriptions. G.F.'s prior descriptions, made even closer to the time of the crime, did not ultimately match the State's theory at trial regarding Appellant's clothing on the day of the murder. Under the totality of the circumstances, G.F's so-called identification was not sufficiently reliable to rescue the State's unduly suggestive identification procedure, and it should not have been admitted.

In summary, Investigator Clarke told G.F. to "see if you can see the bad man" in much the same way a parent might tell a child to "see if you can finish your supper." Under those highly suggestive circumstances, G.F. was presented with no other choice than to pick one of the men out of the photograph lineup. Thus, she chose the photo of the person she thought looked most like the assailant. Unsurprisingly, she chose the same photo as 37 percent of the participants in Appellant's identification expert's survey. (R. p. 62, lines 11-14.) There is no faulting an eight-year-old child for failing to accurately remember details about her assailant; the very same child understandably stated that she did not remember everything and that she wanted to brainwash herself. (State's Ex. 31.) However, to conclude that the child's purported identification was so sufficiently reliable as to outweigh the suggestive nature of the identification procedure would require the court to ignore the significant indicia of unreliability set forth above. The trial court's admission of the identification, as well as G.F.'s subsequent in-

court identification, violated Appellant's right to a fair trial and he is accordingly entitled to a new trial.

II. The trial court erred in admitting a fingerprint card obtained from a New Jersey database and testimony based on the New Jersey fingerprint card because the New Jersey fingerprint card was not properly authenticated by the State.

In response to Appellant's argument that the New Jersey fingerprint card was not properly authenticated and therefore the trial judge should not have admitted it, the State contends that it only has to show that Investigator Odom (the State's fingerprint expert) could identify the distinctive characteristics of Appellant's fingerprints; that Odom recognized the fingerprint card as originating from the Automated Fingerprint Identification System ("AFIS") database where other fingerprints of that nature are kept; and that the fingerprint card was an accurate reflection of Heyward's prints. The State's three authentication arguments fail, and even assuming the State could show those things, it would still not be sufficient to authenticate the New Jersey fingerprint card under the standard established by State v. Anderson, 386 S.C. 120, 687 S.E.2d 35 (2009).

As an initial matter, it is critical that Investigator Odom did not delineate in her report between the New Jersey fingerprint card she obtained through AFIS and the South Carolina card obtained when Appellant's prints were taken in Richland County. (R. p. 224, lines 1-14, p. 225, lines 8-17.) She may not have had a doubt that the prints were the same, but she admitted that she never did a detailed comparison between the New Jersey prints and the South Carolina prints. (R. p. 224, lines 1-14, p. 225, lines 8-17.) Because she could not delineate between which set of prints she used in her report, the report was itself inadmissible because there is no way to extricate the unauthenticated evidence therein (the New Jersey fingerprints) from the authenticated evidence (the South Carolina fingerprints). As for the reports being admissible

pursuant to South Carolina Rule of Evidence 1006, under that rule a summary is only admissible if the underlying data is admissible under state law. That was not the case here because a portion of the underlying data was not authenticated.

It is telling that the State focuses on non-South Carolina precedent interpreting the Federal Rules of Evidence in its response, rather than on the authentication requirements set forth in State v. Rich and State v. Anderson. To meet the authentication requirements under Rule 901 of the South Carolina Rules of Evidence, the South Carolina Supreme Court requires testimony regarding how a person's fingerprints were taken, including testimony that a known fingerprint card was taken at a correctional facility on a certain date. Anderson, 386 S.C. at 128–29, 131–32, 687 S.E.2d at 39–40, 41. Because the State did not introduce any testimony as to how Appellant's fingerprints were taken for the New Jersey card, including testimony about where and how those prints were taken and what day they were taken on, the State cannot authenticate the New Jersey fingerprints as a matter of South Carolina law under Anderson. In its effort to get around Anderson, the State also ignores the comment to Rule 901(b)(7), which provides "[a]s to the authentication of police fingerprint records, see State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987)." Both that comment and Anderson clearly indicate how to authenticate fingerprint evidence **in South Carolina**, and any reference to other authority is an attempt to circumvent South Carolina's requirements.

To be clear, Appellant does not contend that the State is required to introduce testimony from the actual person who took the New Jersey fingerprints, or even necessarily a person from New Jersey. However, where the State fails to present evidence establishing where, when and by whom the New Jersey fingerprint card was made, how those fingerprints were submitted to the

AFIS, and how an accurate record of them was maintained in the AFIS, the State has simply not met its burden of authenticating that fingerprint card under Anderson.

Rather than arguing that they satisfied Anderson's standard, the State contends it properly authenticated the New Jersey fingerprints under Rule 901(b)(4), Rule 901(b)(7), and State v. Brown, 424 S.C. 479, 818 S.E.2d 735 (2018). With regard to its Rule 901(b)(4) argument, the State cites United States v. Patterson, 277 F.3d 709, 713–14 (4th Cir. 2002), and United States v. Lauder, 409 F.3d 1254, 1265–66 (10th Cir. 2005). Those two cases pre-date Anderson and applied federal law and the Federal Rules of Evidence. More importantly, however, the authentication question presented in Patterson was whether the Tenprinter fingerprint image reliably imaged the defendant's fingerprints in much the same way as a party might challenge whether a photograph reliably depicts a crime scene. 277 F.3d 709, 713. That question is completely different than the question presented here—whether the New Jersey fingerprint card can be authenticated as a fingerprint card taken on a certain date, at a certain time, by a certain person. In other words, is the New Jersey fingerprint card what it purports to be; is it authentic? Appellant does not challenge whether the machine accurately imaged Appellant's finger. Rather, Appellant challenges the admissibility of the card because the State provided no evidence about where and when the card was made, who made it, and whether it meets the New Jersey criteria for its making. It is that evidence that the State cannot authenticate, not whether the prints rendered by the New Jersey machine match Appellant's actual fingerprint.

In Patterson, there was no witness that examined the defendant's fingers to verify that they were accurately rendered on a Tenprinter fingerprint image, and the deputy who operated the Tenprinter lacked knowledge as to how the Tenprinter worked and as to the accuracy of the images it produced. Id. Because those ordinary testimonial methods of authentication were

unavailable, the court looked to the internal patterns method discussed in Federal Rule of Evidence 901(b)(4). Id. In Patterson, a print was recovered from a bag containing cocaine base that the police discovered during their investigation of the defendant. Id. at 712. Subsequently, an expert witness testified that the print matched one of the defendant's prints from the Tenprinter image. Id. at 712–13. The court ultimately found that the internal patterns or other distinctive characteristics of the Tenprinter image, taken in conjunction with the circumstances, provided an adequate foundation to admit the Tenprinter image because of expert testimony that the Tenprinter print matched the print found on the container discovered during the police's investigation.

In United States v. Lauder, the Tenth Circuit was confronted with similar facts to Patterson. 409 F.3d at 1265–66. Applying Patterson, the Tenth Circuit concluded that the "live-skin" fingerprint cards the government sought to admit were sufficiently authenticated under the circumstances where there was testimony that the defendant's known fingerprint was properly recorded, that the machine functioned properly when it recorded the defendant's fingerprint, and that the chain of custody was maintained. Id. at 1266. The State did not present any such testimony at Appellant's trial, and thus even under Patterson and Lauder the New Jersey fingerprint card was still not properly authenticated.

Like the State's argument as to South Carolina Rule of Evidence 901(b)(4), its Rule 901(b)(7) argument also primarily relies on a case interpreting federal law and the Federal Rules of Evidence. In an unpublished decision issued three years before Anderson, the Fourth Circuit held that the district judge did not abuse his discretion in admitting fingerprint cards at trial, finding that the cards were admissible as either business records or public records. United States. v. Thornton, 209 F. App'x 297, 299 (4th Cir. 2006). **Those methods are both**

exceptions to hearsay, rather than authentication methods. See id. The Fourth Circuit's sparse opinion in Thornton does not even discuss the basis for the challenge to the admissibility of those fingerprint cards. See id. The State, without citation, asserts that all that is required to authenticate the fingerprint card under this exception is for the witness to show that the card was actually from the database where fingerprint cards of that nature are kept. (Resp't's Br. p. 23.) It is not clear where the State's proposed standard comes from, but it is certainly not found in Thornton.

The other case the State cites in support of this argument is State v. Carruth, a Missouri Court of Appeals case that also predates Anderson and that **deals with hearsay rules rather than authentication.** In Carruth, the court held that an AFIS fingerprint card was admissible under the business records exception to the hearsay rule where a witness established the standard procedures used by the jurisdiction to collect arrestees' fingerprints. 166 S.W.3d 589, 591 (Mo. Ct. App. 2005). To the extent Carruth applies outside of the hearsay context, it supports Appellant's contention that there must be a witness to testify about New Jersey's fingerprinting and storage procedures in order to authenticate the New Jersey fingerprint card in this case. There was no such witness here, and thus the State cannot show that it properly authenticated the New Jersey fingerprint card under the business records method set forth in Rule 901(b)(7).

Finally, the State cites State v. Brown as support for its argument that the fingerprint card was authenticated under Rule 901(b)(9) of the South Carolina Rules of Evidence. To the extent it applies, Brown simply illustrates Appellant's argument. In Brown, the South Carolina Supreme Court held that although authentication is a low standard and that the witness need not be an expert, a witness testifying about a GPS monitoring system should have experience with the system and provide testimony describing the system, the process the system uses, and how

the system presents accurate results for the particular data at issue. Id. at 492, 818 S.E.2d at 742. Because the officer who testified about the GPS system in Brown did not provide such testimony, the court concluded that the State had failed to authenticate the accuracy of the GPS records. Id.

If the Court is inclined to apply the Brown standard here, Appellant should win. Investigator Odom was admittedly not familiar with the New Jersey system, much less the procedures and standards used in New Jersey, or when, where, and by whom the prints were taken. She therefore could not opine on whether the card was authentic. As stated above, Appellant does not argue that the State needed to call an expert on the New Jersey system, merely someone who could attest that the fingerprint card is what it says it is, and was familiar with New Jersey's fingerprinting system, the process that system uses to get fingerprints, and that the process for fingerprinting was properly completed in this instance. Because the State failed to produce such testimony, the trial court erred in concluding that the New Jersey fingerprint card had been properly authenticated.

The trial court's admission of the fingerprint evidence substantially prejudiced Appellant at trial and is alone a sufficient basis for reversal. See State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987) (reversing and remanding for a new trial where the trial court improperly admitted unauthenticated fingerprint evidence). However, taken in conjunction with the inappropriate admission of the various identifications and the other errors discussed below, the cumulative error is too great to constitute harmless error.

III. The trial court erred by allowing expert opinion testimony about the operational capabilities of the recovered firearm where such testimony was not relevant to the charges against Appellant and was needlessly cumulative and unduly prejudicial.

On this issue, the State notes in its response that Appellant did not argue at trial that the testimony about the operational capabilities of the recovered firearm was prejudicial under Rule 403 of the South Carolina Rules of Evidence. That is true, but Appellant is not arguing that the evidence was unduly prejudicial under Rule 403 on appeal. Instead, Appellant is arguing that the trial court's decision to allow that testimony was improper on relevancy and cumulativeness grounds and that the trial court's decision accordingly prejudiced Appellant at trial.

As established in Appellant's initial brief, the operability of the firearm is not a necessary statutory or common law element that must be proven beyond a reasonable doubt for either armed robbery or pointing and presenting a firearm. See State v. Heck, 304 S.C. 345, 346, 404 S.E.2d 514, 515 (Ct. App. 1991) (holding that "when a person commits robbery while armed with a pistol or gun, such an instrument is considered a deadly weapon regardless of its operability"); State v. Burton, 356 S.C. 259, 263, 589 S.E.2d 6, 8 (2003) (noting that "[t]he elements of pointing and presenting a firearm are (1) pointing or presenting; (2) a loaded **or unloaded** firearm; (3) at another"). As established in State v. Heck, which the State conveniently ignores, the operability of a firearm is irrelevant because it makes no difference for armed robbery. Id. at 346, 404 S.E.2d at 515. As for pointing and presenting, the fact that an unloaded firearm still satisfies the elements of that offense demonstrates that operability is not required for that offense either. Burton, 356 S.C. at 263, 589 S.E.2d at 8. Accordingly, the trial court committed legal error in concluding that the expert's testimony about the operability of the firearm was relevant because operability was a necessary element of those offenses.

Importantly, the trial court made no finding as to whether that testimony was relevant for purposes of showing the premeditation element of murder, ruling only that the expert testimony was relevant for purposes of meeting the elements of armed robbery and pointing and presenting.

(R. p. 359, line 18-p. 360, line 22.) In any event, the expert's testimony as to the operability of the firearm was cumulative with regard to the State's purported purpose of showing malice because it is the presence of the gun, not its operation, that shows premeditation. The State had already introduced evidence that the gun was present, so there was no need for further testimony about its operability other than to inflame the passions of the jury. The trial court's error of law substantially prejudiced Appellant.

IV. The trial court erred in allowing Appellant's alias "Abdul Muslim" to be used in the indictments and at trial because the alias invited undue religious prejudice from the jury.

The State argues that its inclusion of Appellant's alias in the indictment and its DNA expert's testimony about that alias was necessary to identify Appellant in connection with the DNA profile match the DNA database returned. However, in the State's brief, they acknowledge that in addition to Appellant's alias, the DNA profile match also included a state identification number, a birthday, and a national identification number. (Resp't's Br. p. 33.) Either of those identification numbers could have been used in lieu of the prejudicial alias, but the State insisted on using the alias in an attempt to inflame the passion of the jury. At trial, the Solicitor contrasted Appellant's alias with the victim's Christian beliefs. Here, because the inclusion of Appellant's alias was **not necessary** to identify him in connection with the acts charged in the indictment as in United States v. Clark, 541 F.2d 1016, 1018 (4th Cir. 1976), the trial court should have granted Appellant's motion to strike the alias from the indictment and should have sustained Appellant's objection to the DNA expert's use of Appellant's alias in her testimony.

As for any argument that Appellant created this issue by failing to agree not to challenge the DNA evidence, the State cannot force a defendant to choose between challenging evidence or being subjected to improper religious bias. Moreover, at trial the Solicitor repeatedly brought up

the victim's Christian beliefs in an apparent effort to improperly contrast the victim's religious beliefs with Appellant's Muslim beliefs. The trial court's decision to allow the State to introduce Appellant's alias where other identifying information could have been used instead prejudiced Appellant and should result in a new trial.

V. The trial court erred in admitting gruesome autopsy dissection photographs of the victim's internal head injuries because the photographs lacked probative value and were calculated to inflame the passions of the jury.

The State argues in response that it introduced the autopsy photographs as relevant evidence of malice. However, Dr. Durso's testimony itself regarding the victim's wounds went to this element and the gruesome photographs were cumulative of her testimony and simply piling on. Rather than being introduced for corroboration or proving malice, the photographs were introduced to inflame the passions of the jury.

Dr. Durso may have testified that the head trauma was a contributing factor to Ms. Tollison's cause of death, but she ultimately testified that the cause of death was strangulation. (R. p. 313, line 2.) That cause of death is consistent with G.F.'s testimony, and there is no testimony other than Dr. Durso's that the assailant struck Ms. Tollison in the head. Dr. Durso further testified that "you can't date a contusion." (R. p. 303, line 25-p. 304, line 1.) Thus, the only corroboration the photos might be used for is corroboration of Dr. Durso's own testimony, which was sufficiently detailed and graphic by itself to allow the State to establish malice. Accordingly, the photographs were needlessly cumulative and should not have been admitted. See State v. Collins, 409 S.C. 524, 539, 763 S.E.2d 22, 30 (2014). For those reasons, the danger of unfair prejudice from those photographs' admission substantially outweighed their probative value under Rule 403 of the South Carolina Rules of Evidence. Their admission prejudiced Appellant's right to a fair trial and constituted reversible error.

VI. The trial court erred in denying Appellant's request to remove his shackles during jury selection.

The State notes that a criminal defendant generally has the right to appear in court free from shackles. Here, however, the trial court denied Appellant's request to remove his shackles during jury selection. The State asserts that it is Appellant's burden to show that a juror saw the shackles during jury selection and that the presence of shackles prejudiced him in some way. As set forth in the State's brief, "[a] defendant's appearance in shackles may reduce the presumption of innocence by causing jury prejudice thereby denying him due process." (Resp't's Br. p. 41 (quoting Jones v. Meyer, 899 F.2d 883, 883 (9th Cir. 1990)).)

The prejudice to Appellant was not mitigated here like it was in the cases cited by the State. In United States v. Mayes, the defendant's leg restraints were hidden from the jury's view by tablecloths and railings, the jury never saw the defendant enter or leave the courtroom, and the defendant's leg irons were muffled to avoid any sounds. 158 F.3d 1215, 1226–27 (11th Cir. 1998). Similarly, in Castillo v. Stainer, the defendant's restraint was a waist chain that could not be seen by the jury. 983 F.2d 145, 147 (9th Cir. 1992). Finally, in State v. Williams, the trial court put up a panel at the defense table and ensured that the jurors entered from a place where they could not see the defendant's shackles. 485 A.2d 570, 574–75 (Conn. 1985).

As for the State's position that Appellant must make an offer of proof that the jury could or did see the restraints, there is no South Carolina precedent that so requires. The trial court denied Appellant's request to remove the shackles before jury selection without engaging in any analysis whatsoever as required by State v. Tucker. 320 S.C. 206, 209, 404 S.E.2d 105, 107 (1995) ("The trial judge is to balance the prejudicial effect of shackling with the considerations of courtroom decorum and security."); (R. p. 2, line 23.) When making that request, Appellant's counsel stated on the record that "[i]f you are within any of the first two rows of the gallery . . .

directly behind Mr. Heyward, you can see that shackling." (R. p. 2, lines 13-14.) Shackles are not invisible. They were readily observable by the potential jurors seated closest to Appellant, and the only evidence in the record is that the shackles could be seen.

The State contends that Appellant should have renewed his objection, made an offer of proof that one or more jurors saw the shackles, and/or requested an instruction from the trial court admonishing the jury to disregard the shackles and not to draw any inferences from them. First, the State does not suggest how such an offer of proof could be made, nor is it obvious. The most natural method for such a proffer would be additional *voir dire* of the jury. Doing so and asking whether the juror saw Appellant's shackles, however, would only reinforce that Appellant was in shackles and would simply prejudice him further. As for requesting an instruction from the trial court, such an instruction would only draw further attention to the restraints. Because the damage had been done, and there was no reasonable method of proffering additional evidence, there was no reason for Appellant to renew his objection to the shackles at the conclusion of jury selection.

There was no evidence in the record to suggest that Appellant needed to be shackled during jury selection, as the only evidence in the record was that Appellant had never been "discourteous to the staff, the Richland County Sheriff's Department, the bailiffs or this Court." (R. p. 2, lines 19-20.) Then, Appellant was not even shackled during trial. That effective self-reversal by the trial court further undermines any rationale the trial court might have had for leaving him shackled without any explanation during jury selection. The trial court's complete failure to conduct any balancing analysis was a significant reversible error that substantially prejudiced Appellant's right to a fair trial.

VII. The cumulative errors committed by the trial court had the effect of preventing Appellant from receiving a fair trial entitling Appellant to a new trial.

The State, without citation, contends that Appellant has failed to preserve his cumulative error doctrine argument by not raising it at trial. That is an incorrect statement of law not reflected in any of the cumulative error decisions cited by the State in its response brief. Moreover, Appellant's arguments are all based on specific, preserved issues that were presented to and ruled on by the trial court. It does not follow that an appellate court not be allowed to consider the cumulative effect of properly preserved objections in the absence of an additional cumulative objection at trial.

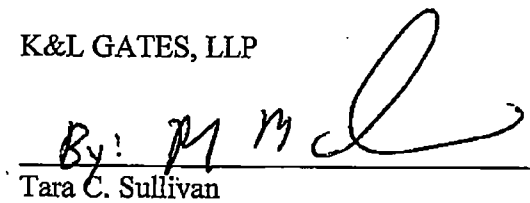
The trial court erred in this case by: (1) allowing unreliable identification testimony that violated Appellant's right to due process; (2) admitting fingerprint evidence which has not been properly authenticated; (3) allowing irrelevant, needlessly cumulative, and unduly prejudicial testimony regarding the gun recovered from Appellant's residence; (4) allowing mention of Appellant's alias "Abdul Muslim" in the indictments and during trial, inviting religious prejudice against him; (5) admitting unduly prejudicial autopsy dissection photographs of the victim's internal head injuries; and (6) wrongly refusing to remove Appellant's shackles during jury selection. Each of those errors alone prejudiced Appellant, but taken together their cumulative prejudicial effect cannot stand uncorrected. As set forth in Appellant's initial brief, the only remaining evidence after correcting these errors is the DNA evidence, about which Appellant introduced substantial doubt at trial.

CONCLUSION

Appellant may not be entitled to a perfect trial, but he is at least entitled to a fair one. For the reasons set forth above and in Appellant's initial brief, he did not get one. We ask the Court to reverse and remand for a new trial.

Respectfully submitted,

K&L GATES, LLP

By: 

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February 21, 2019

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2017-001542

The State, ...Respondent,

v.

James Heyward, ...Appellant.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Susannah R. Cole, Esq., at the Rembert Dennis Building, 1000 Assembly Street, Columbia, South Carolina 29201, this 21st day of February, 2019.

<signature block next page>

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SUBSCRIBED AND SWORN TO before me
This 21st day of February, 2019.

_____
Notary Public for South Carolina
My Commission Expires: July 5, 2027

The South Carolina Court of Appeals

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Re: The State v. James Heyward
Appellate Case No. 2017-001542

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

V Claire Allen

CLERK

cc: Robert Michael Dudek, Esquire
Alan McCrory Wilson, Esquire
Melody Jane Brown, Esquire
Donald J. Zelenka, Esquire
Heather Savitz Weiss, Esquire
The Honorable R. Knox McMahon

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

James Heyward, Appellant.

Appellate Case No. 2017-001542

Appeal From Richland County
R. Knox McMahon, Circuit Court Judge

Opinion No. 5776
Heard February 6, 2020 – Filed October 14, 2020

AFFIRMED

Tara C. Sullivan, Jennifer Hess Thiem, and John Whitney McGreevy, all of K&L Gates, LLP, of Charleston; and Chief Appellate Defender Robert Michael Dudek, of Columbia, all for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General Melody Jane Brown, Senior Assistant Attorney General Heather Savitz Weiss, Assistant Attorney General Susannah Rawl Cole, and Assistant Attorney General William Joseph Maye, all of Columbia, for Respondent.

WILLIAMS, J.: In this criminal appeal, James Heyward appeals his convictions for murder, burglary in the first degree, armed robbery, two counts of kidnapping, assault and battery in the first degree, pointing and presenting a firearm, and

possession of a weapon by a person convicted of a violent crime. On appeal, Heyward argues the trial court erred in admitting (1) an eyewitness's out-of-court and in-court identifications of him, (2) a fingerprint card obtained from a New Jersey database and expert opinion testimony based on those fingerprints, (3) expert opinion testimony about the operational capabilities of the gun found at Heyward's residence, and (4) autopsy dissection photographs of the victim's internal head injuries. Heyward also argues the trial court erred in allowing his alias "Abdul Muslim" to be included in the indictments and in denying his request to remove his shackles during jury selection. Finally, Heyward argues he is entitled to a new trial due to the cumulative errors committed by the trial court. We affirm.

FACTS/PROCEDURAL HISTORY

On October 11, 2015, authorities responded to what they believed to be a burglary in progress and found Alice Tollison (Victim) strangled to death in her home. Her eight-year-old granddaughter (Granddaughter) was bound at her wrists and ankles.

At trial, Investigator Trisha Odom of the Richland County Sheriff's Department was qualified as an expert on latent print analysis. She testified that after uploading fingerprints found at the crime scene (the Crime Scene Fingerprints) into a national database known as the Integrated Automated Fingerprint Identification System (AFIS), the sheriff's department received a match for those fingerprints from New Jersey. The match linked to an FBI number, the name James Heyward, and the associated fingerprints (the N.J. Fingerprints). Investigator Odom compared the N.J. Fingerprints to the Crime Scene Fingerprints, determined they were a match, and wrote three reports. Heyward was subsequently arrested, and his fingerprints were taken at the jail (the Booking Fingerprints). Investigator Odom completed subsequent reports using both the N.J. Fingerprints and the Booking Fingerprints. Although she did not conduct a minutia comparison between the N.J. Fingerprints and the Booking Fingerprints, she conducted a pattern comparison, and she testified there was no doubt in her mind the same person made the two sets of prints. Heyward objected to the admission of summaries of Investigator Odom's reports, arguing the initial reports used the unauthenticated N.J. Fingerprints and any analysis of later fingerprints is inadmissible because she did not indicate she compared a known standard (i.e. the Booking Fingerprints) with the N.J. Fingerprints. The trial court found the State presented sufficient evidence to satisfy the authentication requirements and overruled Heyward's objection.

The day after Victim's murder, Granddaughter was interviewed at the Assessment and Resource Center (ARC)[1] and that interview was video recorded (the Recording).[2] Following that interview, while she was still being recorded, Investigator Joe Clarke, an investigator in the Richland County Sheriff's Department's Special Victims Unit, met with Granddaughter. Investigator Clarke showed Granddaughter a lineup, which consisted of six African American men (the Lineup), and Granddaughter selected number three, which was a picture of Heyward. Heyward was subsequently arrested and indicted.

Prior to trial, the trial court conducted a hearing pursuant to *Neil v. Biggers*[3] to determine the admissibility of Granddaughter's identification of Heyward based on the Lineup. During the *Biggers* hearing, Investigator Clarke testified the South Carolina Law Enforcement Division (SLED) prepared the Lineup using a database and when he received the Lineup, he evaluated it to ensure it was fair. He also testified as to the contents of the interview, and the trial court viewed the recording of the interview. Granddaughter testified about her identification based on the Lineup, and when asked if she picked number three because she recognized him, Granddaughter responded affirmatively. Granddaughter pointed to Heyward in the courtroom when asked if that man was in the room. The trial court found there was no undue suggestiveness in Granddaughter's identification based on the Lineup and found the Lineup and the Recording were admissible.

Prior to trial, the trial court also held a hearing on and denied Heyward's motion to strike his alias, "Abdul Muslim," from the indictments. The trial court also denied Heyward's pretrial motion to remove his ankle shackles during jury selection. The trial court agreed to reserve its ruling on a pretrial motion concerning autopsy photographs until after the testimony of Dr. Amy Durso, the State's pathologist. The photographs were admitted at trial following the in camera testimony of Dr. Durso.

At trial, Granddaughter testified she was at Victim's house when someone knocked on the door. Granddaughter later walked into the kitchen, where she found Victim and a man with a duffel bag. The man told her to sit down across the table from Victim before he put a gold rusty gun with two spots for bullets on the table. He

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[1] ARC is a third-party entity through the Department of Mental Health that has a medical team and forensic investigators who interview children in a controlled environment without law enforcement.

[2] Granddaughter's interview at ARC was consistent with her testimony at trial.

[3] 409 U.S. 188 (1972).

demanded money from Victim, and when Victim denied having money, he put his arms around her neck and strangled her to death. The man then took Granddaughter to a closet and closed the door. When he returned and she asked him what was happening, he said Victim was sleeping. The man later took Granddaughter to a different room where he bound her hands and feet. Granddaughter struggled to get loose but eventually fell asleep, and when she woke up, the man was no longer in the home. Granddaughter was able to get to a phone and call 911. She further testified she remembered her interview at ARC and the Lineup, and she identified Heyward in the courtroom.

Mattie Canzater testified that at the time of Victim's murder, Heyward and his wife were renting two rooms in her home. She knew Heyward went by the names of Abdul and Rasheed. The Friday before the murder, she took Heyward to Victim's house to pick up tables for a yard sale, but they did not go inside. The day of Victim's murder, she did not see Heyward before church, and when she returned home after 3:00 P.M., Heyward's family was in the home, but he was not. When Heyward returned, he was carrying a large black trash bag. The next morning, she learned Victim was murdered, and she was afraid because the suspect's description matched Heyward's attire when he came home the day before. She confronted Heyward and told him Victim's gardener told the police she and Heyward had been there, the suspect's description fit him, and she knew he was not home around the time of the murder. Immediately after she confronted Heyward, he shaved his hair.

Lieutenant Kevin Isenhoward testified that during a phone call between Heyward and Heyward's wife that occurred while Heyward was incarcerated, Heyward's wife told Heyward she called CrimeStoppers and tried to blame a man named Derek for Victim's murder in an attempt to divert attention away from him. Chief Stan Smith testified a gun that matched the description given to officers by Granddaughter was found in a closet in the home where Heyward was residing. The handgun was admitted into evidence, and the State offered as an expert Investigator David Collins, a fire and tool marks examiner in the forensic sciences laboratory for the Richland County Sheriff's Department. Heyward objected to Investigator Collins as a witness, arguing Investigator Collins would be testifying as to whether or not the gun found at Heyward's residence was operational, which was irrelevant. The trial court overruled Heyward's objection.

Dr. Gray Amick, the laboratory director with the Richland County Sheriff's Department, testified Heyward's DNA was found under Victim's fingernails, on a swab of her neck, and on a swab of a draft stopper found around her neck. There was additional testimony that Heyward's fingerprints were found on the interior

side of the entry door at Victim's home, on a jewelry box, and on other items located inside the home.

The jury found Heyward guilty as indicted, and Heyward was sentenced to two consecutive terms of life imprisonment without the possibility of parole for murder and burglary, a consecutive term of thirty years for armed robbery, a consecutive term of thirty years for kidnapping, a consecutive term of ten years for assault and battery, and two concurrent terms of five years for pointing and presenting a firearm and unlawful possession of a firearm. This appeal followed.

ISSUES ON APPEAL

I. Did the trial court err in admitting evidence and testimony regarding Granddaughter's identification of Heyward from the Lineup and her subsequent in-court identification?

II. Did the trial court err in admitting the N.J. Fingerprints and testimony based on the N.J. Fingerprints?

III. Did the trial court err in allowing expert opinion testimony about the operational capabilities of the gun?

IV. Did the trial court err in allowing Heyward's alias, "Abdul Muslim," to be included in the indictments and at trial?

V. Did the trial court err in admitting the photographs of Victim's internal head injuries?

VI. Did the trial court err in denying Heyward's request to remove his shackles during jury selection?

VII. Did the trial court err in denying Heyward's motion for a new trial?

LAW/ANALYSIS

I. Eyewitness Identification

Heyward contends the trial court erred in admitting evidence and testimony regarding (1) Granddaughter's out-of-court identification of him based on the Lineup and (2) her subsequent in-court identification. Specifically, Heyward

argues Granddaughter's identifications should not have been admitted because (1) she did not make a positive identification when she viewed the Lineup and (2) the Lineup was unduly suggestive, unreliable, and conducive to irreparable misidentification. We disagree.

"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 such, or the commission of prejudicial legal error." *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000).

a. Positive Identification

First, Heyward contends Granddaughter did not make an out-of-court identification when viewing the Lineup. We disagree.

In *State v. Washington*, while evaluating the reliability of the witness's identification of the defendant, this court addressed the certainty of the witness's identification. 323 S.C. 106, 111–12, 473 S.E.2d 479, 481–82 (Ct. App. 1996). When the witness picked the defendant from a photographic lineup, he indicated he was "ninety nine percent sure" the defendant was the person who attempted to rob him, and his signed statement noted the defendant "best resembles" the attempted robber. *Id.* at 411, 473 S.E.2d at 481. This court found certainty is not always required in the identification of witnesses "[b]ecause the jury ha[s] the opportunity to observe the witness and attach the credibility it deem[s] proper to [the witness's] testimony, including the certainty or uncertainty of [the] identification." *Id.* at 111–12, 473 S.E.2d at 481–82.[4]

Granddaughter's out-of-court identification based on the Lineup was captured in the Recording. The Recording shows that after viewing the Lineup, Granddaughter indicated "Number three looks kind of like him . . . . Number three." Granddaughter circled the number three and wrote her first name next to it. Granddaughter then stated: "You're going to try to catch someone who looks like that . . . but it's probably not exactly because that isn't exactly . . . ." Investigator

[4] In concluding that certainty is not always required in the identification by a witness, the court in *Washington* cited *United States v. Peoples*, in which the Fourth Circuit Court of Appeals upheld the South Carolina district court's admission of an in-court identification by a witness and noted "an identification is not unreliable because it is phrased in uncertain terms." 323 S.C. at 111, 473 S.E.2d at 481–82 (citing *United States v. Peoples*, 748 F.2d 934, 936 (4th Cir. 1984) (per curiam)).

Clarke asked Granddaughter if she felt confident that was the man she picked out, and she stated, "Yes. That looked a lot like him . . . and I get really scared when I see him." When Granddaughter indicated that another man in the Lineup looked like her janitor, Investigator Clarke sought assurance that the other man did not look like the man who came into her house, and Granddaughter stated he did not. As the entirety of the trial transcript was not provided in the record, it is not clear if the jury viewed the Recording. However, even if the Recording was not viewed by the jury, Granddaughter stated, in the presence of the jury, that when viewing the Lineup, she looked for the person who looked most like the man who killed Victim and she selected number three because he scared her and he looked like him. Additionally, Heyward was able to cross-examine Granddaughter about the Lineup and about her conversation with Investigator Clarke. Based on the foregoing, we find the trial court did not err in admitting evidence regarding Granddaughter's out-of-court identification. Even though there was arguably some uncertainty in her initial selection, the jury was able to observe Granddaughter and attach credibility to her testimony. *See id.* (finding certainty is not always required in the identification of witnesses because the jury is able to observe the witness and consider the certainty or uncertainty of the identification when determining the witness's credibility).

b. Suggestiveness and Reliability

Heyward also argues Granddaughter's out-of-court identification from the Lineup and her subsequent in-court identification of him should not have been admitted because the Lineup was unduly suggestive, unreliable, and conducive to irreparable misidentification. We disagree.

"[A]n eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law." *Moore*, 343 S.C. at 288, 540 S.E.2d at 448. "[W]hether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." *Id.* "In reviewing mixed questions of law and fact, whe[n] the evidence supports but one reasonable inference, the question becomes a matter of law for the court." *Id.*

In *Neil v. Biggers*, the Supreme Court set forth a two-prong inquiry to determine the admissibility of out-of-court identifications. 409 U.S. at 198–99. The first prong requires the court to determine whether the out-of-court identification was a result of "unnecessarily suggestive" police procedures. *State v. Dukes*, 404 S.C. 553, 557, 745 S.E.2d 137, 139 (Ct. App. 2013) (quoting *Biggers*, 409 U.S. at 198–99). If the court finds that impermissibly suggestive police procedures were not used, the inquiry ends, and the court does not consider the second prong. *Id.* at

557–58, 745 S.E.2d at 139. However, if the court finds impermissibly suggestive identification procedures were used, the court must determine whether the identification was "so reliable that no substantial likelihood of misidentification existed." *Id.* at 558, 745 S.E.2d at 139 (quoting *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012)). If an out-of-court identification is the result of unnecessarily suggestive police procedures, an in-court identification is inadmissible. *State v. Brown*, 356 S.C. 496, 502–03, 589 S.E.2d 781, 784 (Ct. App. 2003).

Heyward argues Investigator Clarke telling Granddaughter to be brave and help him without telling her she did not have to choose anyone before showing her the Lineup was unnecessarily suggestive. However, before showing Granddaughter the Lineup, Investigator Clarke said, "See *if* you can see the bad man who did this to your grandmomma" and noted "*if* you see the man you saw in your house yesterday that hurt your grandma, I want you to tell me, okay?" (emphasis added). Although Investigator Clarke did not specifically tell Granddaughter she did not have to choose anyone from the Lineup, we found no authority requiring him to do so. Furthermore, Investigator Clarke's use of the word "if" suggested to Granddaughter she did not have to choose someone from the Lineup. The record also indicates Granddaughter did not believe she had to choose someone from the Lineup because at trial, she testified she would not have picked anyone from the Lineup if she did not see someone that looked like the man who killed Victim. At trial, Granddaughter stood by her selection of Heyward when she (1) indicated number three in the Lineup was the man who tied her up and killed Victim, (2) pointed to Heyward when asked if that man was in the courtroom, and (3) stated there was no doubt in her mind that Heyward was the man who hurt Victim.

Heyward also argues Granddaughter's repeated exposure to Heyward's photograph and the fact that Heyward was the only one from the Lineup present in the courtroom when Granddaughter made her in-court identification influenced her identification of Heyward as Victim's killer. We disagree. Nothing in the record indicates Granddaughter was exposed to Heyward's photograph repeatedly, and we found no authority requiring other members of a photograph lineup to be present in court. Because we find the Lineup was not unduly suggestive, we are not required to consider whether Granddaughter's identification of Heyward was reliable. *See Dukes*, 404 S.C. at 557–58, 745 S.E.2d at 139 (stating if the court finds that impermissibly suggestive police procedures were not used, the inquiry ends, and the court does not consider the second prong of reliability). Thus, we find the trial court did not abuse its discretion in admitting evidence and testimony regarding Granddaughter's out-of-court identification of Heyward. *See Moore*, 343 S.C. at

288, 540 S.E.2d at 448 ("[T]he decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error.").

Furthermore, Heyward's challenge of Granddaughter's in-court identification was predicated upon his argument that the out-of-court identification was improper. *See Brown*, 356 S.C. at 502–03, 589 S.E.2d at 784 (finding that if an out-of-court identification is the result of unnecessarily suggestive police procedures, an in-court identification is inadmissible). Because we find the trial court did not err in admitting the out-of-court identification, we find the trial court did not abuse its discretion in admitting the in-court identification. *See Moore*, 343 S.C. at 288, 540 S.E.2d at 448 ("[T]he decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error."); *see also Brown*, 356 S.C. at 502–03, 589 S.E.2d at 784 ("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.")

II. Fingerprints

Heyward contends the trial court erred in admitting the N.J. Fingerprints because they were not properly authenticated by the State. Specifically, Heyward contends the trial court improperly allowed evidence regarding the match between the N.J. Fingerprints and the Crime Scene Fingerprints because the State failed to establish when and where the N.J. Fingerprints were taken. Although we agree the State failed to establish when and where the N.J. Fingerprints were taken, we, nevertheless, find the N.J. Fingerprints were properly authenticated.

"The admissibility of evidence is within the sound discretion of the trial judge." *State v. Mansfield*, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000). "Accordingly, evidentiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion or the commission of a legal error which results in prejudice to the defendant." *Id.* "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). "Where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,' an insubstantial error that does not affect the result of the trial is considered harmless." *Id.* at 447, 710 S.E.2d at 60 (quoting *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)).

In evaluating the admissibility of fingerprint cards, our supreme court has adopted a two-prong approach. *State v. Anderson*, 386 S.C. 120, 126, 687 S.E.2d 35, 38 (2009). First, the court must determine "whether the fingerprint card was testimonial in nature and, if so, fell within an exception to the hearsay rule." *Id.* If there is an applicable hearsay exception, the court then must assess authentication. *Id.*

On appeal, Heyward does not contend the N.J. Fingerprints were hearsay. Thus, we confine our analysis to the determination of the authenticity of the N.J. Fingerprints.

In *Anderson*, our supreme court provided an analysis of the pertinent rules of evidence to highlight ways in which fingerprints could be authenticated. *Id.* at 128–29, 687 S.E.2d at 39. The court cited to the non-exhaustive examples of authentication contained in Rule 901(b), SCRE. *Id.* at 129, 687 S.E.2d at 39. The court found Rule 901(b)(4),[5] (7),[6] and (9),[7] provided for authentication of the fingerprints obtained from AFIS in that case. *Id.* at 129–32, 687 S.E.2d at 39–41. It also found even if the evidence did not precisely fit within one of the examples provided in Rule 901(b), a more generalized approach to Rule 901 would also provide for authentication in that case because an expert in fingerprint analysis "testified regarding the method and technology in which he analyzed the latent fingerprints with the known prints . . . [, which] included a thorough explanation of how an arrestee's fingerprints are taken, stored, and maintained." *Id.* at 131–32, 687 S.E.2d at 41. The court also noted that the expert used the officially-maintained known fingerprints and opined that they matched the latent fingerprint found at the victims' home. *Id.* at 132, 687 S.E.2d at 41. Our supreme court found this was sufficient "to support a finding that the matter in question [was] what [the State] claim[ed]." *Id.* (quoting Rule 901(a), SCRE).

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[5] Rule 901(b)(4) states "[the a]ppearance, contents, substance, internal patterns, or other distinctive characteristics [of the item], taken together with all the circumstances" may be used to authenticate evidence.

[6] Rule 901(b)(7) provides authentication can be established by "[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept."

[7] Rule 901(b)(9) provides authentication can be established by "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result."

In this case, we find Rule 901(b)(3), SCRE, allows the authentication of the N.J. Fingerprints. Rule 901(b)(3) provides "[a c]omparison by the trier of fact or by expert witnesses with specimens which have been authenticated" can authenticate evidence. On appeal, Heyward does not argue that the Booking Fingerprints were not authenticated. *Smith v. State*, 413 S.C. 194, 196, 775 S.E.2d 696, 697 (2015) (stating an unappealed ruling is the law of the case). Investigator Odom was qualified as an expert in latent print analysis. Although she stated she did not conduct a minutia comparison between the N.J. Fingerprints and the Booking Fingerprints, she compared the two sets of fingerprints and stated that pattern wise, the prints were the same. Investigator Odom testified there was no doubt the same person made the N.J. Fingerprints and the Booking Fingerprints. Because Investigator Odom compared the N.J. Fingerprints with the authenticated Booking Fingerprints, the N.J. Fingerprints were authenticated by the comparison of the two sets of fingerprints by the expert witness pursuant to Rule 901(b)(3).[8] Thus, we find the trial court did not err in admitting the N.J. Fingerprints.

III. Operational Capabilities of the Gun

Heyward argues the trial court erred in allowing expert testimony about the operational capabilities of the recovered firearm. Specifically, he contends the testimony was not relevant to the charges against him and was needlessly

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[8] Furthermore, even if the N.J. Fingerprints would not have been properly authenticated, any error was harmless because it did not prejudice Heyward. *See State v. Adams*, 354 S.C. 361, 381, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A]n insubstantial error not affecting the result of the trial is harmless where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" (quoting *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989))). Investigator Odom testified she used both the N.J. Fingerprints and the Booking Fingerprints to determine that Heyward's fingerprints matched the fingerprints found at the crime scene. Outside of the other fingerprint evidence, Granddaughter identified Heyward as Victim's killer; DNA evidence obtained at the crime scene was a match to Heyward; a gun matching Granddaughter's description of the assailant's gun was found in the home in which Heyward was living; there was testimony that Heyward's wife called in a false CrimeStopper tip to divert attention from him; and Canzater testified Heyward had been to Victim's home with her, was wearing clothing that matched the description of the suspect on the day of the murder, and shaved his head after she confronted him with the news of Victim's death.

cumulative and prejudicial. We find the trial court erred in allowing the expert testimony, but such error was harmless.

"The decision to admit or exclude testimony from an expert witness rests within the trial court's sound discretion." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). Thus, the trial court's admission of expert testimony will not be reversed unless there was an abuse of discretion, which occurs when the trial court's decision is based on an error of law or a factual conclusion without evidentiary support. *Id.* "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

The trial court found the operability of the gun was relevant to the pointing and presenting charge. The trial court also found the operability of the gun was relevant to the robbery charge as to whether or not the gun was an instrument that could cause great bodily harm. We disagree.

Section 16-23-410 of the South Carolina Code (2015) provides: "It is unlawful for a person to present or point at another person a loaded or unloaded firearm." Section 16-23-405 of the South Carolina Code (2015) defines "firearm" for purposes of chapter 23, which includes section 16-23-410, as a "rifle, shotgun, pistol, or similar device that propels a projectile through the energy of an explosive." Subsection 16-11-330(A) of the South Carolina Code (2015) defines armed robbery as follows:

> [R]obbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon.

"All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quoting *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000)). "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *Id.* at 351, 688 S.E.2d at 575 (quoting *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463

(1995)). However, "[c]ourts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." *Id.*

Because section 16-23-410 provides it is unlawful to present or point an unloaded firearm at another person, it would produce an absurd result that would defeat the plain legislative intent of the pointing and presenting charge to require proof that the firearm is capable of propelling a projectile while also allowing an unloaded gun to meet the criteria. Likewise, because subsection 16-11-330(A) provides that being armed with a representation of a deadly weapon meets the criteria for armed robbery, it would produce an absurd result to require proof that the firearm was operational. Thus, we find the trial court abused its discretion in allowing expert testimony about the operational capabilities of the firearm because such testimony was not relevant to Heyward's charges.

However, we find this error harmless because it did not prejudice Heyward. *See Adams*, 354 S.C. at 381, 580 S.E.2d at 795 ("[A]n insubstantial error not affecting the result of the trial is harmless where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" (quoting *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584)). Granddaughter identified Heyward as Victim's killer; fingerprint and DNA evidence obtained at the crime scene were matched to Heyward; a gun matching Granddaughter's description of the assailant's gun was found in the home where Heyward lived; there was testimony that Heyward's wife called in a false CrimeStopper tip to divert attention from Heyward; and Canzater testified Heyward had been to Victim's home with her, was wearing clothing that matched the description of the suspect on the day of the murder, and shaved his head after she confronted him with the news of Victim's death. Thus, we find the admission of the expert testimony regarding the operational capabilities of the gun was harmless and does not require reversal.

IV. The Alias

Heyward contends the trial court erred in allowing his alias "Abdul Muslim" to be used in the indictments and at trial because use of the alias invited undue prejudice from the jury. We disagree.

An appellate court reviews the trial court's ruling on a motion to strike for an abuse of discretion. *United States v. Williams*, 445 F.3d 724, 733 (4th Cir. Ct. App. 2006); *Totaro v. Turner*, 273 S.C. 134, 135, 254 S.E.2d 800, 801 (1979).

In *United States v. Clark*, the Fourth Circuit Court of Appeals held:

> If the Government intends to introduce evidence of an alias and the use of that alias is necessary to identify the defendant in connection with the acts charged in the indictment, the inclusion of the alias in the indictment is both relevant and permissible, and a pretrial motion to strike should not be granted.

541 F.2d 1016, 1018 (4th Cir. 1976) (per curiam). "However, if the prosecution either fails to offer proof relating to the alias or the alias, although proven, holds no relationship to the acts charged, a motion to strike may be renewed, the alias stricken and an appropriate instruction given to the jury." *Id.* "Motions to strike surplusage from an indictment will be granted only where the challenged allegations are 'not relevant to the crime charged and are inflammatory and prejudicial.'" *United States v. Scarpa*, 913 F.2d 993, 1013 (2nd Cir. 1990) (quoting *United States v. Napolitano*, 552 F. Supp. 465, 480 (S.D.N.Y. 1982)). "[I]f evidence of the allegation is admissible and relevant to the charge, then regardless of how prejudicial the language is, it may not be stricken." *Id.* (alteration in original) (quoting *United States v. DePalma*, 461 F. Supp. 778, 797 (S.D.N.Y. 1978)). "Aliases and nicknames should not be stricken from an indictment when evidence regarding those aliases or nicknames will be presented to the jury at trial." *United States v. Rittweger*, 259 F. Supp.2d 275, 293 (S.D.N.Y. 2003).

We find the trial court properly denied Heyward's pretrial motion to strike the alias because the State established it intended "to introduce evidence of an alias and [that] the use of that alias [was] necessary to identify [Heyward] in connection with the acts charged in the indictment." *See Clark*, 541 F.2d at 1018 ("If the Government intends to introduce evidence of an alias and the use of that alias is necessary to identify the defendant in connection with the acts charged in the indictment, the inclusion of the alias in the indictment is both relevant and permissible, and a pretrial motion to strike should not be granted."). During the pretrial motions hearing, the State indicated DNA found under Victim's fingernail scrapings produced a Combined DNA Index System (CODIS) hit that linked the sample to Abdul Muslim. Heyward's name was not associated with the hit, but the information on Abdul Muslim found through CODIS included fingerprints that matched Heyward's fingerprints. The State argued it believed Heyward was going to challenge the DNA expert's, Dr. Greg Amick, findings, so it thought the alias was relevant because it supported Dr. Amick's findings. The State further indicated it would amend the indictment to remove "Abdul Muslim" if Heyward agreed not to challenge the DNA evidence. Based on the foregoing, we find the

State sufficiently established it intended to introduce evidence of the alias and that the alias was necessary to connect the acts charged with Heyward.[9]

Based on the foregoing, we find the trial court did not err in denying Heyward's motion to strike the alias from the indictments.[10]

V. The Photographs

Heyward argues the trial court erred in admitting autopsy dissection photographs (the Photographs) of Victim's internal head injuries because the Photographs were irrelevant, lacked probative value, and were calculated to inflame the passions of the jury. Specifically, Heyward asserts the Photographs lacked probative value because the cause of Victim's death was strangulation, not injuries to her head, and because the Photographs led to a risk of undue prejudice based on their gruesome nature. We disagree.

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). A trial court's "decision regarding the

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[9] The State offered proof at trial that the alias held a relationship to the acts charged. However, even if it would have failed to do so, the use of the alias would not have been an error because Heyward did not renew his motion to strike. *See id.* ("[I]f the prosecution either fails to offer proof relating to the alias or the alias, although proven, holds no relationship to the acts charged, a motion to strike may be renewed, the alias stricken and an appropriate instruction given to the jury."); *id.* (finding even though the existence of the appellant's alias did not connect his identity to the robbery, because the appellant did not renew his motion to strike and because there was no showing the use of the alias was prejudicial, the use of the alias was not an error).

[10] Heyward also argues he was unfairly prejudiced by the inclusion of the alias. We disagree. *See Scarpa*, 913 F.2d at 1013 ("[I]f evidence of the allegation is admissible and relevant to the charge, then regardless of how prejudicial the language is, it may not be stricken." (alteration in original) (quoting *DePalma*, 461 F. Supp. at 797)). Furthermore, the trial court noted it believed any potential prejudice stemming from the alias could be addressed by voir dire, and Heyward conceded "I certainly do not disagree with you that voir dire can address the issue of prejudice." *See State v. Rios*, 388 S.C. 335, 341, 696 S.E.2d 608, 612 (Ct. App. 2010) (stating appellate review of an issue is not preserved when it was conceded at trial).

comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)). In balancing the danger of unfair prejudice with the probative value of a piece of evidence, "the determination must be based on the entire record and will turn on the facts of each case." *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008).

"To be classified as unfairly prejudicial, photographs must have a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010) (quoting *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)). "[P]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to the issues at trial." *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). However, "[i]t is well settled in this state that '[i]f the [. . .] photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.'" *Torres*, 390 S.C. at 623, 703 S.E.2d at 229 (first alteration in original) (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353). Our courts have found autopsy photographs may be admitted "in an effort to show the circumstances of the crime and character of the defendant." *Id.* "'The mere fact that an item of evidence is gruesome or revolting, if it sheds light on, strengthens or gives character to other evidence sustaining the issues in the case, should not exclude it.'" *Collins*, 409 S.C. at 535, 763 S.E.2d at 28 (quoting *Nichols v. State*, 100 So. 2d 750, 756 (Ala. 1958)).

In *State v. Gray*, this court found the trial court did not abuse its discretion when it admitted three photographs, which were taken during an autopsy and showed the victim's exposed skull and brain. 408 S.C. 601, 609, 619, 759 S.E.2d 160, 165, 170 (Ct. App. 2014). This court found the photographs had probative value because they corroborated the pathologist's findings concerning the extent and location of the victim's head injuries and cause of death and were important to the State's ability to prove malice. *Id.* at 612–16, 759 S.E.2d at 166–68.

In the present case, we find the trial court properly evaluated the probative value of the Photographs with respect to the question of malice. *See State v. Hawes*, 423 S.C. 118, 130–31, 813 S.E.2d 513, 519–20 (Ct. App. 2018) (finding the trial court did not abuse its discretion when it admitted crime scene photographs that established the circumstances of the crime scene, corroborated the testimony of a witness and a responding officer, and were relevant to the issue of malice); *id.* at 131, 813 S.E.2d at 520 (noting "the crime scene photographs were relevant to the issue of malice because they showed how, where, and how many times [the victim]

was attacked."); *see also Nance*, 320 S.C. at 508, 466 S.E.2d at 353 (finding photographs of the victim's stab wounds were "relevant to the issue of malice"). Heyward was charged with murder, and section 16-3-10 of the South Carolina Code (2015) provides, "'Murder' is the killing of any person with malice aforethought, either express or implied." "'Malice aforethought' is defined as 'the requisite mental state for common-law murder' and it utilizes four possible mental states to encompass both specific and general intent to commit the crime." *State v. Kinard*, 373 S.C. 500, 503, 646 S.E.2d 168, 169 (Ct. App. 2007) (quoting *Black's Law Dictionary* (7th ed. 1999)), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). Dr. Durso testified Victim's head injuries demonstrated that a struggle occurred and Victim suffered a violent death. Dr. Durso stated the injuries show Victim was struck on multiple planes of her head and there was not just one terminal fall, which indicated there was more than just a strangulation. Thus, we find the Photographs were important to establish that Heyward acted with malice. *See Nance*, 320 S.C. at 508, 466 S.E.2d at 353; *Gray*, 408 S.C. at 614, 759 S.E.2d at 167.

Furthermore, we find the trial court properly determined the Photographs corroborated Dr. Durso's testimony. *See Torres*, 390 S.C. at 623, 703 S.E.2d at 229 ("It is well settled in this state that '[i]f the [. . .] photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.'" (first alteration in original) (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353)). Although Victim's cause of death was strangulation, Dr. Durso testified Victim's head injuries indicated she suffered a violent death involving more than just strangulation and that those injuries contributed to her conclusion of the cause of death. Dr. Durso also testified the Photographs would be necessary to assist her in explaining Victim's head injuries to the jury. Thus, we find Dr. Durso's testimony increased the probative value of the Photographs because her use of the Photographs to explain Victim's injuries demonstrated "the extent and nature of the injuries in a way that would not be as easily understood based on [expert] testimony alone." *State v. Holder*, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009).

Moreover, we have viewed the photographs, and we find they were not unduly prejudicial to Heyward. *See Torres*, 390 S.C. at 623, 703 S.E.2d at 228–29 ("To be classified as unfairly prejudicial, photographs must have a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" (quoting *Franklin*, 318 S.C. at 55, 456 S.E.2d at 361)). Based on the foregoing, we find the trial court did not abuse its discretion in admitting the Photographs.

VI. The Shackles

Heyward contends the trial court erred in denying his request to remove his shackles during jury selection. Specifically, Heyward argues the trial court abused its discretion because (1) it failed to properly exercise its discretion and (2) there was no evidence of a security concern that would outweigh the prejudice to Heyward of appearing before potential jurors in shackles. We agree the trial court abused its discretion in denying Heyward's motion to remove his shackles during jury selection, but we find such error was harmless.

"Whether a defendant is restrained during trial is within the trial judge's discretion. The trial judge is to balance the prejudicial effect of shackling with the considerations of courtroom decorum and security." *State v. Tucker*, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995).

In *Deck v. Missouri*, the defendant was shackled with leg irons, handcuffs, and a belly chain, which would have been readily apparent to the jury, during the penalty phase of a capital case. 544 U.S. 622, 624 (2005). The State claimed the Missouri Supreme Court's decision met the Constitution's requirements regarding the shackling of a defendant during trial because the Missouri Supreme Court properly found (1) the record lacked evidence that the jury saw the defendant's restraints, (2) the trial court acted within its discretion, and (3) the defendant suffered no prejudice. *Id.* at 634. The Supreme Court disagreed, noting the record (1) indicated the jury was aware of the defendant's shackles and (2) contained no formal or informal findings. *Id.* The Supreme Court further indicated Missouri's argument failed to take into account the Court's statement in *Holbrook v. Flynn* that shackling is "inherently prejudicial." *Id.* at 635 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986)). Ultimately, the Supreme Court held "the Constitution forbids the use of *visible* shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial." *Id.* at 624 (quoting *Holbrook*, 475 U.S. at 568–69 (emphasis added)).

Like in *Deck*, the record contains no formal or informal findings of fact to indicate the trial court exercised its discretion in denying Heyward's request to remove his shackles as the trial court merely stated "that motion is denied." *Id.* at 634 (rejecting Missouri's argument that the trial court acted in its discretion because the record contained no formal or informal findings). The record is devoid of any reason why Heyward should have been shackled. There were no concerns of courtroom decorum or security raised, as the only mention of courtroom security was Heyward's assertion that he was well-behaved in his three prior court

appearances. Thus, we find the trial court abused its discretion in denying Heyward's request to remove his shackles during jury selection. *See Tucker*, 320 S.C. at 209, 464 S.E.2d at 107 ("The trial judge is to balance the prejudicial effect of shackling with the considerations of courtroom decorum and security"); *see also Deck*, 544 U.S. at 624 ("[T]he Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial." (quoting *Holbrook*, 475 U.S. at 568–69)); *State v. Brawley*, 137 A.3d 757, 761 (Conn. 2016) (noting a trial court must ensure its reasons for ordering the use of shackles are detailed in the record).

However, we find any error in denying the motion to remove Heyward's shackles was harmless because Heyward was not prejudiced. *See State v. Northcutt*, 372 S.C. 207, 217, 641 S.E.2d 873, 878 (2007) ("Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it 'could not reasonably have affected the result of the trial.'" (quoting *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985))).

In regards to the burden of proof, *Deck* provided:

> [W]here a court, without adequate justification, orders the defendant to wear shackles *that will be seen by the jury*, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'

544 U.S at 635 (second alteration in original) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967) (emphasis added)). However, the court in *Deck* repeatedly noted the visibility of the defendant's shackles,[11] and we have not found any Supreme Court or South Carolina authority directly addressing whether the

[11] The Court noted the record made it "clear that the jury was aware of the shackles." *Id.* at 634. The Supreme Court also referred to "visible shackles," "restraints visible to the jury," and "shackles that will be seen by the jury." *Id.* at 624, 626, 628–29, 632, 635.

heightened burden in *Deck* applies when it is not obvious from the record that the shackles were observed.

In *State v. Johnson*, the defendant argued the trial court erred in denying his motion for mistrial based on his being brought into the courthouse in handcuffs and accompanied by police personnel because he argued jurors may have seen him and that he had been prejudiced by the indicia of guilt. 422 S.C. 439, 446, 812 S.E.2d 739, 742, 745 (Ct. App. 2018). This court did not directly address *Deck* or whether the heightened burden of proof is applied when it is not obvious from the record that shackles were observed. However, this court found the trial court did not err in denying the defendant's motion for a mistrial based on his being brought into the courthouse in handcuffs and surrounded by police personnel because "the record fail[ed] to demonstrate any juror observed this activity or that any juror was prejudiced." *Id.* at 458, 812 S.E.2d at 749.

We find this court's approach in *Johnson* is in line with courts in other jurisdictions that have specifically found "that *Deck*'s heightened constitutional standard is applicable only when there is evidence that jurors observed the restraints or that they were plainly visible," and thus, "absent evidence that a juror observed the restraints . . . a trial court's error in shackling a defendant is harmless."[12] *Hoang v.*

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[12] *See also Brawley*, 137 A.3d at 760 (indicating that in cases in which the jury cannot see any shackling, "'[t]he defendant bears the burden of showing he has suffered prejudice by establishing a factual record demonstrating that the members of the jury knew of the restraints'" except for in cases in which a court requires a defendant to wear shackles that will be seen by the jury without adequate justification (quoting *State v. Webb*, 680 A.2d 147, 183 (Conn. 1996))); *id.* at 762 n.3 ("*Deck* makes clear that a heightened burden falls on the state when the unwarranted restraints *are visible* to the jury, and not when as in [*United States v.*] *Banegas* [600 F.3d 342 (5th Cir. 2010)], the record is silent on the matter."); *Mendoza v. Berghuis*, 544 F.3d 650, 654 (6th Cir. 2008) ("*Deck*'s facts and holding . . . concerned only *visible* restraints at trial. The Supreme Court was careful to repeat this limitation throughout its opinion."); *People v. Letner & Tobin*, 235 P.3d 62, 106 (Cal. 2010) (indicating *Deck* did not support the contention that the prosecution was required to disprove the visibility of the restraints when the record contained no evidence that the jury observed the defendant wearing shackles); *United States v. Baker*, 432 F.3d 1189, 1246 (11th Cir. 2005) (finding the combination of the number of defendants, the defense's opportunity to respond to the court's concerns and raise alternative proposals, "and the lack of any record evidence that the jury could see the shackles" showed the district court did not

People, 323 P.3d 780, 785–86 (Colo. 2014).[13] Although Heyward objected to being shackled at his feet, arguing any potential juror in the first two rows of the gallery directly behind him could see the shackles, nothing in the record indicates that any of the jurors who were selected for Heyward's trial could or did see his shackles. We also note Heyward was only shackled during the jury selection and he was not shackled during trial. *See State v. Clark*, 24 P.3d 1006, 1029 (Wash. 2001) (en banc) ("Because the impact of shackling on the presumption of innocence is the overarching constitutional concern, it would logically follow that in the minds of the jurors [the defendant's] shackling on the first day of voir dire was more than logically offset by over two weeks of observing Clark in the courtroom without shackles."). Based on the foregoing, we find the trial court's error in denying Heyward's motion to remove his shackles during jury selection did not constitute reversible error.

VII. Cumulative Error

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abuse its discretion in shackling a defendant), *abrogated on other grounds by Davis v. Washington*, 547 U.S. 813, 821 (2006); *State v. Johnson*, 229 P.3d 523, 533 (N.M. 2010) (indicating the factors tending to show prejudice were not violated when there was no indication the jury saw the defendant's leg irons so that the defendant's presumption of innocence was not violated); *Bell v. State*, 415 S.W.3d. 278, 283 (Tex. Crim. App. 2013) (indicating when the record did not show a reasonable probability that the jury was aware of the defendant's shackles, the heightened constitutional standard did not apply).

[13] In contrast, we note that in *Banegas*, the Fifth Circuit Court of Appeals applied the heightened harmless error standard set forth in *Deck* for cases in which the circuit court did not provide a reason for shackling a defendant and the reasons for shackling a defendant are not apparent based on the specific facts of the case. 600 F.3d at 345–46. The court found "the defendant need not demonstrate actual prejudice on appeal to make out a due process violation; rather the burden is on the government to prove 'beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained.'" *Id.* (footnote omitted) (quoting *Deck*, 544 U.S. at 635). The court in *Banegas* vacated the defendant's conviction and remanded his case for a new trial because the district court did not express individualized reasons for its decision to shackle the defendant with leg irons and the government did not proffer evidence to prove beyond a reasonable doubt that the defendant's presumably visible leg irons did not contribute to the jury verdict. *Id.* at 347.

Heyward argues he is entitled to a new trial because cumulative errors committed by the trial court had the effect of preventing him from receiving a fair trial. We disagree.

We find this issue is not preserved for our review because Heyward neither raised the cumulative error doctrine to the trial court nor did he argue he was entitled to a new trial based upon errors made during the trial. *See State v. Beekman*, 405 S.C. 225, 236, 746 S.E.2d 483, 489 (Ct. App. 2013) (noting the cumulative error doctrine was not preserved for appeal when the appellant did not raise the doctrine to the trial court or argue he was entitled to a new trial based upon errors made during the trial), *aff'd*, 415 S.C. 632, 785 S.E.2d 202 (2016).

CONCLUSION

Based on the foregoing, Heyward's convictions are

AFFIRMED.

KONDUROS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Nov 13 2020
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2017-001542

The State, ...Respondent,

v.

James Heyward, ...Appellant.

PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240 of the South Carolina Appellate Court Rules, Appellant James Heyward requests rehearing of this Court's opinion issued October 14, 2020, affirming Mr. Heyward's convictions. *See State v. Heyward*, Op. No. 5776 (S.C. Ct. App. filed October 14, 2020 (Shearouse Adv. Sh. No. 40 at 32)). This Court overlooked or misapprehended several points and should therefore grant rehearing and reverse Mr. Heyward's convictions.

ARGUMENT

I. This Court erred in affirming the trial court's admission of evidence and testimony regarding (a) an out-of-court photograph lineup where the victim did not make a positive identification and (b) the subsequent positive identification made by the victim at trial.

This Court affirmed the admissibility of evidence and testimony regarding Granddaughter's so-called "identification" of Appellant during a photograph lineup and

Granddaughter's subsequent identification of Appellant at trial. *See Heyward*, Op. No. 5776, at 40. As an initial matter, the Court overlooked or misapprehended the suggestive nature of the photograph lineup itself. The Court accorded undue weight to Granddaughter's purported ability to appreciate the nuance and importance of Investigator Clarke's use of the word "if" to telepath to Granddaughter that she did not have to choose someone from the lineup. This overlooks the reality that Granddaughter was a recently-traumatized eight-year-old girl and Investigator Clarke's suggestive exhortation "to help [him] and see if you can see the bad man" was intended to elicit a selection, leaving Granddaughter with no option but to choose one of the photographs. Although an adult might be able to pick up on the nuance of the word "if," the suggestive nature of Investigator Clarke asking such a young child to be "brave" and help him, coupled with his request to "see if you can see the bad man," clearly suggested to Granddaughter that she should pick one of the photographs and thereby created an unduly suggestive lineup procedure.

Moreover, the Court overlooked or misapprehended Appellant's argument that the overall identification process was unduly suggestive as evidenced by Granddaughter's evolving level of certainty at each stage of the process. The Court stated that "[n]othing in the record indicates Granddaughter was exposed to Heyward's photograph repeatedly, and we found no authority requiring other members of a photograph lineup to be present in court." *See Heyward*, Op. No. 5776, at 40. Appellant has not contended that the other persons included in the photograph lineup needed to be present in the courtroom at trial. Rather, Appellant's argument was that the process of seeing Appellant's picture in the photograph lineup (where the only clear indication Granddaughter gave was that she was *not* confident in her identification), to seeing the photograph lineup picture again, along with Appellant in person, at the pre-trial *Neil v. Biggers* hearing (where she merely identified Appellant in the courtroom as being the same person she

saw in the photograph lineup), followed by seeing Appellant again at trial (when she testified that she was sure Appellant was her assailant), was an unduly suggestive process which inevitably caused her certainty to evolve and increase over time with each subsequent exposure to Appellant.

Appellant's argument largely rested on the United States Supreme Court case *Foster v. California*, which held that, like here, a process which began with an inability to make any identification which then evolved into a definite identification throughout the course of repeated identification opportunities was inadmissible because the procedure "made it all but inevitable that [the victim] would identify [the defendant] whether or not he was in fact 'the man.'" 394 U.S. 440, 443, 89 S.Ct. 1127, 1129 (1969). This Court's Opinion does not even address the binding precedent of *Foster v. California* upon which Appellant's argument is largely based.

Instead, this Court relied primarily on *State v. Washington*, 323 S.C. 106, 473 S.E.2d 479 (Ct. App. 1996), to find that Granddaughter's so-called identification was admissible because, even though "there was arguably some uncertainty in her initial selection," "certainty is not always required in the identification of witnesses." *Heyward*, Op. No. 5776, at 38. However, the situation in the *Washington* case is distinguishable from the evolving identification here. In *Washington*, the victim indicated he was "99 percent sure" when he chose the defendant from an initial photograph lineup and later testified in court that he had "no doubt" that the defendant was his assailant—merely a 1% difference between the certainty levels in the two identification opportunities. *Washington*, 323 S.C. at 108, 473 S.E.2d at 480. The *Washington* court noted that even though the victim was 99% certain of his initial identification, even such a miniscule level of uncertainty "cause[d] this court some concern." *Id.* at 111, 473 S.E.2d at 481. This uncertainty is all the more concerning here, where Granddaughter initially indicated only that

Appellant's photograph "looks *kind of* like him" and asked, "You're going to try to catch someone who looks like that? But it's *probably not exactly* because *that isn't exactly* . . ." before she was interrupted by Investigator Clarke and not allowed to finish her statement. *Heyward*, Op. No. 5776, at 38 (emphasis added). However, by the time of trial, she was sure Appellant was her assailant. This is a much more drastic evolution of a victim's identification than the 1% increase in certainty between the identification opportunities that caused the *Washington* court such concern. This Court overlooked this important distinction when relying on *Washington* to support its ruling.

Moreover, this Court noted that the *Washington* court cited *United States v. Peoples*, 748 F.2d 934 (4th Cir. 1984), for the proposition that "an identification is not unreliable because it is phrased in uncertain terms." *Heyward*, Op. No. 5776, at 38 n.4. Although *Peoples* includes this statement, the certainty of a witness identification was not actually at issue in the *Peoples* case. *See United States v. Peoples*, 748 F.2d 934, 936 (4th Cir. 1984) (per curiam).

The *Peoples* court cited to *Patler v. Slayton*, 503 F.2d 472 (4th Cir. 1974), to support this proposition, but a thorough reading of *Patler* reveals that it is distinguishable from the present case and actually lends support to Appellant's position. Unlike here, where Granddaughter testified at trial that she was sure Appellant was her assailant, neither of the witnesses in *Patler* were allowed to make a positive, in-court identification at trial. 503 F.2d at 474–76. Instead, the trial judge, recognizing that the show-up identification procedures to which the witnesses were exposed had been improper, "made certain that the questioning was limited to eliciting only what they saw at the scene and an inconclusive comparison with Patler's physical appearance." 503 F.2d at 476. The *Patler* court noted that the testimony regarding the inconclusive comparison with Patler's physical appearance "*barely* skirted constitutional error, for if there is a line

between 'resemblance' and 'identification' testimony it is admittedly thin." *Id.* (emphasis added). The court noted that the spirit of excluding positive identifications garnered as a result of improper show-up identification procedures "is to prevent the conviction of those who may be innocent when a susceptible witness is unfairly allowed to conclude: 'he is the guilty one.'" *Id.* at 476–77. Here, however, Granddaughter was able to do exactly that—conclude at trial that Appellant was her assailant despite the unconstitutionally suggestive identification procedure to which she had been exposed.

For these reasons, this Court should grant rehearing and reverse Mr. Heyward's convictions.

II. This Court erred in affirming the trial court's admission of a fingerprint card obtained from a New Jersey database and testimony based on the New Jersey fingerprint card.

The Court concluded that the trial court properly admitted the New Jersey fingerprint card under South Carolina Rule of Evidence 901(b)(3). *Heyward*, Op. No. 5776, at 42. In order to reach this conclusion, the Court overlooked the requirements for fingerprint authentication set forth in *State v. Anderson*, 386 S.C. 120, 687 S.E.2d 35 (2009), in favor of a novel authentication method for fingerprints that is inconsistent with South Carolina law and the requirements set forth in *Anderson*. Specifically, the Court concluded that the State's fingerprint expert had compared Appellant's known fingerprints—the prints taken when he was arrested and fingerprinted by Richland County in connection with this case—with the prints on the fingerprint card the investigators obtained through the AFIS system from New Jersey, and that the fingerprint expert's comparison of the two fingerprint cards was sufficient to authenticate the New Jersey fingerprints obtained through AFIS pursuant to Rule 901(b)(3). *Heyward*, Op. No. 5776, at 42.

No other South Carolina case cites Rule 901(b)(3) for the authentication of fingerprints. Instead, South Carolina's seminal case on fingerprint authentication is *Anderson*, 386 S.C. at 120, 687 S.E.2d at 35. In *Anderson*, the State's fingerprint expert testified about using AFIS to find potential matching fingerprints by taking the latent fingerprints at the scene and comparing those fingerprints to the prints obtained through AFIS. *Id.* at 123, 687 S.E.2d at 36. Critically, the fingerprint expert in *Anderson* also testified that the prints on the AFIS card were taken at a correctional facility, on a specific date, and assigned a unique state identifying number. *Id.* at 128, 687 S.E.2d at 39–40. As this Court recognized, there was no such testimony here. *Heyward*, Op. No. 5776, at 41 ("[W]e agree the State failed to establish when and where the N.J. Fingerprints were taken . . ."). Accordingly, this Court overlooked the State's admitted failure to meet the requirements of *Anderson* when finding that the New Jersey fingerprint card was nevertheless authenticated. This Court's novel reliance on Rule 901(b)(3) instead is inconsistent with governing South Carolina law.

Even if authentication under Rule 901(b)(3) was permissible, the comparison conducted by the State's fingerprint expert was insufficient to authenticate the fingerprints at issue. As the Court recognized, the State's fingerprint expert's comparison between the Richland County prints and the New Jersey prints obtained through AFIS was limited to a pattern comparison and was not a minutia comparison. *Heyward*, Op. No. 5776, at 42. The Court failed to appreciate the importance of the distinction between the two types of comparisons. When Investigator Odom testified about her comparison of the fingerprints obtained at the crime scene to Appellant's known fingerprints, she testified that she used the ACE-V methodology, which is a peer reviewed and scientifically accepted method of comparing fingerprints. (*See* R. p. 260, lines 1–17.) Investigator Odom's analysis using the ACE-V methodology was a minutia

comparison, which she conceded she did not do in her comparison between the Richland County prints and the New Jersey prints obtained through AFIS. (*See* R. p. 618, lines 1–8.) To the extent that Rule 901(b)(3) is a permissible method for authenticating fingerprints (which Appellant contends it is not), the State's fingerprint expert would have needed to use the scientifically accepted and peer reviewed ACE-V methodology to reliably authenticate the New Jersey fingerprints. Her admitted use of a simple pattern comparison is insufficient.

Finally, the admission of the improperly authenticated New Jersey fingerprints was not harmless error. As explained in Appellant's briefs, Investigator Odom did not delineate between the Richland County prints and the New Jersey prints in her report on the fingerprint evidence. Accordingly, her use of the improperly authenticated New Jersey fingerprints in that report would mean that the entire report was inadmissible and the critical fingerprint evidence would not have been presented to the jury. The trial court erred in holding that the New Jersey fingerprint card was properly authenticated, the error was not harmless, and this Court should grant rehearing and reverse Mr. Heyward's convictions.

III. This Court erred in finding the trial court's erroneous allowance of expert opinion testimony about the operational capabilities of the recovered firearm was harmless.

This Court concluded that the trial court erred in allowing expert opinion testimony regarding the operational capabilities of the firearm recovered from Appellant's home but determined that the trial court's error was harmless. *Heyward*, Op. No. 5776, at 45. The admission of this testimony was not harmless. The wrongful admission of Investigator Collins' testimony about the operational capabilities of the firearm allowed the State to hammer yet again on the fact that a gun was found in Appellant's residence, unduly prejudicing the jury against him. In fact, during the State's closing argument, the State relied solely on Investigator Collins' testimony to connect the gun found at Appellant's residence to the one described by

Granddaughter. (*See* R. p. 419, lines 6–23.) The State used Investigator Collins' testimony in an effort to paint Appellant in a bad light and tie him to the crime scene, clearly prejudicing Appellant. Because this testimony should never have been admitted and caused Appellant significant prejudice, this Court should grant rehearing and reverse Appellant's convictions.

IV. This Court erred in affirming the trial court's allowance of Appellant's alias "Abdul Muslim" for use in the indictments and at trial.

The Court concluded that Appellant's alias "Abdul Muslim" was necessary to connect the DNA from the crime scene to Appellant because the DNA matched to "Abdul Muslim" in a national database. *Heyward*, Op. No. 5776, at 46–47. However, the Court failed to address that this match also included the national identification number 220688PA. (R. p. 378, line 2–p. 379, line 9.) The jury also heard testimony that Appellant's national identification number was 220688PA. (R. p. 255, lines 10–13.) Thus, there was no probative value in using Appellant's alias in connection with this DNA match because the State could have simply used the national identification number instead. Moreover, the State never elicited any testimony that Appellant was known as "Abdul Muslim," only that he was known to one witness as "Abdul," indicating that there was no probative value in the "Muslim" reference at all. (R. p. 321, line 23–p. 322, line 3.)

Because the trial court erroneously denied Appellant's motion to strike the alias, the jury repeatedly heard Appellant referred to in the indictments and the introduction of the case as "Abdul Muslim," inviting undue religious prejudice against him which substantially outweighed any probative value of the alias and violated his constitutional rights. Trial counsel presented substantial uncontroverted evidence at the pre-trial hearing on Appellant's motion to strike demonstrating the prejudice associated with the State's use of Appellant's "Abdul Muslim" alias.

(*See* R. p. 12, line 5–p. 14, line 15.) The use of the alias was unnecessary and prejudicial and should not have been allowed.

Finally, this Court incorrectly stated that the State's use of Appellant's alias would not have been error because Appellant did not renew his motion to strike the alias at trial. *Heyward*, Op. No. 5776, at 47 n.9. However, this is not accurate. Appellant's trial counsel did renew the motion to strike at the beginning of trial. (R. p. 45, lines 5–8). Likewise, this Court incorrectly stated that Appellant's counsel conceded this issue by acknowledging that prejudice from the alias could be "addressed" by voir dire. *Heyward*, Op. No. 5776, at 47 n.10. However, trial counsel's statement about voir dire was not a concession of the issue in any way; it was merely an acknowledgement that voir dire could address—but not entirely solve—the issue after having preserved the issue on the record. Because Appellant's alias should have been stricken from the indictment and from use at trial, this Court should grant rehearing and reverse Mr. Heyward's convictions.

V. This Court erred in affirming the trial court's admission of gruesome autopsy dissection photographs of the victim's internal head injuries.

This Court erred in affirming the trial court's admission of gruesome autopsy dissection photographs of the victim's internal head injuries. First, this Court erred in affirming the trial court's admission of gruesome autopsy photographs of internal injuries on the basis that the photographs were probative of the issue of malice. *See Heyward*, Op. No. 5776, at 49. However, "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant *or* not necessary to substantiate material facts or conditions." *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (emphasis added). Even assuming these gruesome autopsy photographs were probative of malice, they were not necessary to substantiate malice here. Dr. Durso's extensive testimony regarding the violent

nature of the strangulation and severity of the injuries to Ms. Tollison was sufficient on the issue of malice, rendering the photographs "superfluous." *See State v. Collins*, 409 S.C. 524, 539, 763 S.E.2d 22, 30 (2014) (Kittredge, J., concurring) ("The detailed and graphic testimony of the pathologist was more than sufficient to enable the State to establish the elements of the offense."). Because the photographs were calculated to arouse the sympathy or prejudice of the jury, and were not necessary to substantiate malice, this Court erred in affirming the trial court's decision that the autopsy photographs should be admitted based on their probative value on the issue of malice.

This Court also erred in affirming the trial court's determination that the autopsy photographs corroborated Dr. Durso's testimony. *See Heyward*, Op. No. 5776, at 49. Again, however, "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are . . . not necessary to substantiate material facts or conditions." *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010). The extent and nature of the victim's injuries was sufficiently explained by Dr. Durso's testimony, and the photographs were unnecessary and should not have been admitted.

Lastly, this Court erred in finding that the photographs are not unduly prejudicial. *See Heyward*, Op. No. 5776, at 50. The Supreme Court of South Carolina has expressed a "growing concern" over the admission of gruesome autopsy photographs. *Id.* at 624, 703 S.E.2d at 229. Further, the Supreme Court of South Carolina has specifically held that color autopsy photographs of the victim, including photographs that depicted the victim's scalp pulled away from her skull, should be excluded because "[t]he prejudice created by the photographs clearly outweighed any evidentiary value." *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (citations omitted). Likewise, the prejudice caused by the admission of these gruesome

autopsy photographs outweighed any evidentiary value, and this Court erred in affirming their admission by the trial court.

VI. This Court erred in finding the trial court's erroneous denial of Appellant's request to remove his shackles during jury selection was harmless.

This Court erred in finding that the trial court's erroneous denial of Appellant's request to remove his shackles during jury selection was harmless because Appellant was not prejudiced. *Heyward*, Op. No. 5776, at 50. This Court misapprehended or overlooked the fact that this conclusion is contrary to binding precedent of the United States Supreme Court, which this Court actually cited in its Opinion, stating that shackling is "inherently prejudicial." *Holbrook v. Flynn,* 475 U.S. 560, 568–69, 106 S.Ct. 1340, 1345–46 (1986). Appellant's due process rights were violated by the trial court's admitted abuse of discretion in refusing to grant Appellant's request to remove his shackles, and this error is inherently prejudicial to Appellant. This error is, therefore, not harmless.

This Court also mistakenly refused to apply the burden-shifting required by *Deck v. Missouri*, 544 U.S. 622. 125 S.Ct. 2007 (2005), because, as this Court incorrectly concluded, "it is not obvious from the record that the shackles were observed." *Heyward*, Op. No. 5776, at 52. However, it is obvious from the record in this case that the shackles were observed. Importantly, in *Deck*, the record upon which the Supreme Court relied for establishing that the shackles were visible consisted entirely of the objections made by Deck's attorney for removal of the shackles. Specifically, Deck's attorney objected "because of the fact that Mr. Deck is shackled in front of the jury . . . ." *Deck*, 544 U.S. at 634, 125 S.Ct. at 2015 (finding that the record "makes clear that the jury was aware of the shackles" and specifically citing to Deck's attorney's objection on the record "that 'Mr. Deck was shackled *in front of the jury*'") (emphasis added by court). Likewise,

here, Appellant's attorney's objections were sufficient to establish that his leg shackles were visible. On the record, Appellant's trial counsel objected to Appellant's shackling, stating:

> We moved on Thursday of last week to prevent presumptive shackling of Mr. Heyward. At current, he is shackled at the feet. If you are within any of the first two rows of the gallery, if you will, directly behind Mr. Heyward, you can see that shackling. Until selection is completed, we would ask the court that Mr. Heyward's shackles be removed.

(R. p. 39, lines 8–22.) The visibility of Appellant's shackles was the very basis for the objection. Accordingly, this Court overlooked that the record here establishes just what the record in *Deck* established—that Appellant's shackles worn during jury selection were visible.

This Court also refused to apply the burden-shifting required by *Deck* on the basis that although Appellant argued that potential jurors in the first two rows of the gallery could see the shackles, the record does not establish that any of the jurors who were actually selected for Appellant's trial could or did see the shackles. *Heyward*, Op. No. 5776, at 53–54. However, again, this Court overlooked that the objections to the shackles worn in *Deck* were, just as the objections here, made during the jury selection phase of the proceeding. Accordingly, this Court overlooked that this is not a proper basis upon which to refuse to apply the burden-shifting required by *Deck* as, again, the record here established just what the record in *Deck* established as well. Accordingly, because Appellant was forced to wear shackles, admittedly without adequate justification, which the record establishes were visible during jury selection, Appellant "need not demonstrate actual prejudice to make out a due process violation" here. *Deck*, 544 U.S. at 635, 125 S.Ct. at 2015 (citing *Holbrook*, 475 U.S. at 568, 106 S.Ct. at 1340).

Finally, this Court's reliance on *State v. Johnson* in reaching its conclusion that the heightened standard in *Deck* does not apply to Appellant's case is misguided. *Heyward*, Op. No. 5776, at 52–54. In *State v. Johnson*, the defendant was being brought from the police car outside

into the courthouse in handcuffs, and the record failed to demonstrate whether any juror happened to see this procession. 422 S.C. 439, 812 S.E.2d 739. This is a completely different scenario from Appellant's situation where the record clearly establishes that he was shackled while inside the courtroom directly in front of the rows of his potential jurors, from which twelve individuals would be selected to determine his guilt or innocence. In fact, the *Johnson* court cites to *State v. Moore* for the following proposition: "We think that when a jury or members thereof see an accused *outside the courtroom* in chains or handcuffs the situation is psychologically different and less likely to create prejudice in the minds of the jury." *Johnson*, 422 S.C. at 458, 812 S.E.2d at 749 (quoting *State v. Moore*, 257 S.C. 147, 152–32, 184 S.E.2d 546, 549 (1971)) (emphasis added). This Court overlooked this significant distinction from the *Johnson* case and should not have relied thereon. The trial court wrongly refused to remove Appellant's shackles, and this error was not harmless.

CONCLUSION

For the foregoing reasons, Appellant James Heyward respectfully requests that this Court grant rehearing, reconsider its ruling on each of the above issues, and reverse Mr. Heyward's convictions.

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Respectfully submitted,

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November 13, 2020

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Nov 13 2020
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2017-001542

The State, ...Respondent,

v.

James Heyward, ...Appellant.

CERTIFICATE OF SERVICE

I certify that a true copy of the Petition for Rehearing in the above referenced case has been served upon W. Joseph Maye, Assistant Attorney General, South Carolina Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211-1549, this 13th day of November, 2020.

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IN THE COURT OF APPEALS

RECEIVED
Nov 30 2020
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2017-001542

The State, ...Respondent,

v.

James Heyward.....Appellant.

RETURN TO PETITION FOR REHEARING

On November 13, 2020, pursuant to Rules 221(a) and 240 of the South Carolina Appellate Court Rules, Appellant James Heyward submitted a Petition for Rehearing on this Court's Opinion issued October 14, 2020, affirming Appellant's convictions and sentencing. See *State v. Heyward*, Op. No. 5776 (S.C. Ct. App. Filed October 14, 2020). By letter dated November 18, 2020, Respondent was instructed to file a Return to the Petition within ten days. Contrary to the arguments of Appellant, this Court did not err in its analysis and application of the law in affirming Appellant's convictions. Appellant's Petition for Rehearing should be denied.

ARGUMENT

I. This Court properly held that the admission of testimony by the trial court concerning the granddaughter's out-of-court identification and in-court identification of Appellant was not an abuse of discretion.

This Court correctly concluded that the eight-year-old granddaughter of Victim made an out-of-court identification of Appellant during the photographic lineup and that the lineup was not

presented in an unduly suggestive manner. Moreover, this Court properly found that the trial court did not abuse its discretion in admitting the evidence and testimony of the granddaughter at trial regarding her out-of-court photographic lineup and her in-court identification of Appellant as the perpetrator.

Appellant's argument that the photographic lineup was unduly suggestive is simply without merit. The officer's presentation of the photographic lineup to the granddaughter clearly demonstrated that she was to let him know "if" she saw the man who broke into her home and killed her grandmother. (State's Ex. 31). The remaining commentary does nothing to change that fact and simply constitutes the officer trying to behave as gently and professionally as he can with a young victim. None of the circumstances of this photographic lineup would have swayed her toward any particular selection or indicate that the she *had* to make a selection. Following this process, the granddaughter selected, circled, and initialed photograph number 3 that contained Appellant's photograph. Appellant was most certainly selected by the granddaughter during this photographic lineup and this Court was correct to agree.

The Court accurately reflected the discussion that the granddaughter had during her selection. This exchange, wherein the granddaughter clarified that "Yes. That looked a lot like him ... and I get really scared when I see him" provided proof of her confidence as well as an emotional response to seeing Appellant's photograph. Appellant's argument that the granddaughter was not confident in her selection disregards the granddaughter's own statements and reactions in favor of Appellant's strained and feeble interpretation.

At best, Appellant's argument confuses the concept of "confident" with being absolutely "certain". However, such a distinction is irrelevant for admission at trial. As was discussed at length by this Court, even if a selection lacks a 100% confidence, it is nonetheless admissible under

State v. Washington. 323 S.C. 106, 111–12, 473 S.E.2d 479, 481–82 (Ct. App. 1996). This was an astute and proper ruling. *State v. Heyward*, No. 2017-001542, 2020 WL 6053505, at *3-*4 (S.C. Ct. App. Oct. 14, 2020)

Appellant's argument that *Foster v. California* should be controlling law in this case is meritless. The witness in *Foster* did not positively identify the perpetrator in his first viewing of the physical lineup of suspects. However, upon the conduct of a second lineup, Mr. Foster was the only individual who was also presented in the first lineup. It was at that time the victim identified Mr. Foster as the perpetrator and expressed that he was confident that Mr. Foster was the perpetrator. *Foster v. California*, 394 U.S. 440, 441-443 (1969). Such a factual pattern bears absolutely no resemblance to granddaughter's selection of Appellant on her first and only photographic lineup, along with her explanation to the officer that she was confident in her selection because "[t]hat looked a lot like him .. and I get really scared when I see him." Moreover, Appellant's argument that this Court erred in finding that the granddaughter was not "repeatedly" exposed Appellant's photograph such that it tainted her in-court identification is likewise meritless. The only opportunities to view the lineup were the initial presentation of the photograph lineup, the *Neil v. Biggers* hearing, and the trial itself. The granddaughter was able to perform an in-court identification of Appellant during the *Neil v. Biggers* hearing, and did so again during trial. Her in-court identification is not tainted by the repeated exposure to Appellant's photograph, as no such exposure occurred. This Court's findings to the same were proper. *Id.* at *5.

Appellant has failed to identify any error by this Court regarding the admission of the photographic lineup and in-court identifications of Appellant. Appellant's Petition should therefore be denied.

II. This Court did not err in finding no abuse of discretion by the trial court for admitting the N.J. AFIS database fingerprints as properly authenticated by Rule 901(b)(3).

Appellant argues that this Court erred in its finding that the trial court properly admitted the N.J. AFIS database fingerprints as properly authenticated. There is no meritorious basis for such an argument.

This Court properly relied upon *State v. Anderson* for determining the admissibility of fingerprint cards and likewise properly noted that Rule 901 does not provide an exhaustive list of the methods in which authentication can be achieved. This Court properly noted that the South Carolina Supreme Court in *Anderson* explicitly acknowledged that expert testimony could be used to authenticate fingerprint cards and properly concluded that the expert testimony offered at trial was sufficient to authenticate the N.J. AFIS fingerprint cards in question. The record shows that Investigator Odom matched the latent prints to both the Booking fingerprints and to the N.J. AFIS fingerprints. The testimony offered by Investigator Odom demonstrated that there was "no doubt" that the same person made the previously authenticated Booking fingerprints and the N.J. AFIS fingerprints.

This Court's ruling finding that the trial court did not err in authenticating the N.J. AFIS fingerprints is well-supported by the record and the South Carolina Rules of Evidence. This Court was correct to hold that the N.J. AFIS fingerprints were properly authenticated and admitted under Rule 901(b)(3). Appellant has failed to identify any error by this Court and Appellant's Petition should therefore be denied.

III. This Court properly concluded that the admission of expert testimony about the recovered firearm was harmless and did not require reversal of Appellant's convictions and sentences.

This Court's ruling was proper as to Appellant's third issue. Appellant failed to demonstrate that he was actually prejudiced by the expert testimony regarding whether the

recovered gun was functional. While the expert testimony was admitted for purposes of proving that Appellant pointed and presented a firearm and that Appellant was armed with a deadly weapon during a robbery, these matters were ultimately deemed irrelevant by the language of each statute and thereby negated the need for the expert testimony. This Court was correct in its conclusion that the admission of such testimony was harmless though, even in the absence of the statutory relevance.

Appellant's crimes may not have involve the functional ability of the gun, but they certainly focused on the gun as significant evidence establishing the identity of Appellant – the gun found in his possession matched the description provided by the granddaughter. With that simple fact established for the jury, it does not create prejudice to discuss the irrelevant operational capability of the gun. This Court properly concluded the same. *State v. Heyward*, No. 2017-001542, 2020 WL 6053505, at *8 (S.C. Ct. App. Oct. 14, 2020). Appellant's argument that the State utilized the testimony of the expert in closing as a basis for prejudice is mistaken, as the fact that the recovered gun matched the granddaughter's description could have been "hammered" upon in closing even if the expert had not testified. There is nothing within the record to demonstrate prejudice against Appellant in this matter.

The admission of the expert testimony was entirely harmless and this Court's ruling was proper. Appellant's Petitioner should be denied and his convictions and sentences should be affirmed.

IV. This Court properly concluded that the trial court did not err in denying Appellant's motion to strike regarding reference to Appellant's alias "Abdul Muslim".

Appellant claims that this court erred in affirming the trial court's decision to deny the motion to strike any reference to Appellant's alias Abdul Muslim. There is no error in this Court's decision.

This Court properly noted "'if the prosecution either fails to offer proof relating to the alias or the alias, although proven, holds no relationship to the acts charged, a motion to strike may be renewed, the alias stricken and an appropriate instruction given to the jury.'" *Id.* at *8 (citing *United States v. Clark*, 541 F.2d 1016, 1018 (4th Cir. 1976). Appellant's alias was pertinent to both the DNA evidence, as that was the name the DNA evidence was labeled under, as well as a key witness who testified that she knew Appellant by his alias name and not "James Heyward". The State argued appropriately that it intended to offer such evidence of the alias that was necessary to identify Appellant in connection with the charged acts. The State satisfied its threshold to be able to reference the alias and this Court was correct to conclude the same. In addition, and contrary to Appellant's unsubstantiated argument, the record is completely devoid of any evidence of prejudice stemming from the alias due to religious bias. Appellant has failed to identify any error by this Court and Appellant's Petition should therefore be denied.

V. This court did not err in its ruling that the autopsy photographs were properly admitted at trial.

Appellant contends that this court erred in affirming the trial court's decision to admit the autopsy photos. Appellant argues that these photos were gruesome and admittedly solely for the purpose of arousing the sympathy and passions of the jury. This Court correctly denied this claim, finding no error on the part of the trial court.

Here the trial court correctly cited that relevancy, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and that a trial court's ruling on the comparative prejudice and probative value from such photographs should only be disturbed in exceptional circumstances. *Id.* at *9 (citing *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996)); *Id.* at *9 (citing State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014)).This Court likewise properly cited to authority that supported the admission of autopsy photographs for

the purposes of supporting the element of malice as well as the corroboration of the medical examiner's testimony. *Id.* at *10 (citing *State v. Hawes*, 423 S.C. 118, 130–31, 813 S.E.2d 513, 519–20 (Ct. App. 2018)); *Id.* at *10 (State v. Gray, 408 S.C. 601, 612-16, 759 S.E.2d 160, 166-68 (Ct. App. 2014). Appellant's case provided both grounds for admissibility of the photos as they established malice and corroborated the testimony of Dr. Durso at trial.

This was a particularly brutal murder and the pictures were the best demonstrative means of conveying that brutality and the malice that accompanied it. Although Victim's granddaughter witnesses the initial attack, she was not able to witness the entire crime and the State's theory argued that Appellant returned to Victim to finish her off once the child was restrained in the closet. These photos demonstrated the malice that accompanied the entirety of crime. As this Court ruled, such a basis for admission is in harmony with existing case law. Likewise, the court was correct to find that these photos corroborated the medical findings provided by Dr. Durso. This Court's reasoning and legal basis for its decision was well-founded and proper. Appellant's Petition for Rehearing should be denied.

VI. The ruling of the Court was proper in finding that Appellant was not prejudiced as a result of his shackles remaining during jury selection.

Appellant's sixth issue argues that this Court erred in finding harmless error for the trial court's denial of the motion to remove Appellant's leg shackles during jury selection. The ruling of this Court was proper. Appellant failed to demonstrate prejudice from the issue due to the fact that he can provide no evidence that any juror ever saw the leg shackles in question.

As was noted by this Court in its Opinion, the determination of whether an error is harmless depends upon the circumstances of the case, and the judgement of prejudice from an error must be determined from its relationship to the entire case. *Id.* at *12 (citing S*tate v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)). The existing precedent dictates that, in the absence of a

safety concern, it is only restraints that are "visible" to the jury that bring about prejudice to a defendant during trial. *Deck v. Missouri*, 544 U.S. 622, 632, 125 S. Ct. 2007, 2014, 161 L. Ed. 2d 953 (2005).

Appellant's argument that this Court's decision is contrary to "binding precedent" of *Holbrook v. Flynn* is drastically mistaken. The holding in *Holbrook* dealt with the presence of additional uniformed police officers at the defendant's trial. The reference to "inherently prejudicial" shackling was used by comparison, and was precipitated by the circumstance that the complained of security existed in a "conspicuous, or at least noticeable" way. *Holbrook v. Flynn*, 475 U.S. 560, 569, 106 S. Ct. 1340, 1346, 89 L. Ed. 2d 525 (1986). The decision in *Holbrook* does not establish a comprehensive conclusion that any shackled defendant, visible or not visible, absent established justifications for safety, creates inherent prejudice warranting reversal. As this Court points out with thorough analysis, the rule falls upon the question of "visible" shackling decided in *Deck v. Missouri*. *Id.* at *11 (citing *Deck v. Missouri*, 544 U.S. 622, 624, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005). In *Deck* the record demonstrated that the defendant had leg, hand, and midsection shackling, as well as an on the record discussion wherein the court explicitly acknowledged that the jury had seen the defendant's shackles. *Deck v. Missouri*, 544 U.S. 622, 625, 634, 125 S. Ct. 2007, 2010, 2015, 161 L. Ed. 2d 953 (2005). Those are not the circumstances of this case. Appellant's restraints were not visible to the jury and Appellant failed to present evidence a juror somehow saw the restraints or was made aware of them during the course of jury selection.

This Court correctly identified that this type of issue has been addressed by our South Carolina Supreme Court before. In *State v. Johnson*, the defendant made a motion for mistrial on the basis that he was brought into the courthouse in handcuffs and surrounded by police personnel.

The South Carolina Supreme Court's evaluation of the issue, though brief, focused on the lack of record demonstrating that a juror actually witnessed such activity and found that no prejudice could arise as a result.[1] This Court correctly identified the basis for the Supreme Court's ruling. *Id.* at *12 (citing *State v. Johnson*, 422 S.C. 439, 458, 812 S.E.2d 739, 749 (Ct. App. 2018), reh'g denied (Apr. 26, 2018), cert. denied (Aug. 3, 2018). This Court correctly noted that while the Court's opinion in *State v. Johnson* did not directly address *Deck*, it relied upon the fact that record lacked any evidence that Johnson's shackles and police escort into the courtroom was actually witnessed by a juror or that this led to a juror being prejudiced. *Id.*

In comparison, this record likewise lacks any proof that the jury witnessed Appellant's shackling. Counsel's sole argument for the motion was that the first two rows of the gallery seating located directly behind Appellant could potentially see the leg shackles. Appellant failed to demonstrate that any of his jurors actually saw his shackles, or that any of his jurors sat in the gallery area where counsel claimed the shackles could be visible. As was the case in *State v. Johnson*, in Appellant's case there was no evidence presented that any juror saw Appellant's shackles or that the shackles were plainly visible to the jury, and as such the trial court's motion denying the removal of shackles was harmless. *Id.* at *12 (citing *State v. Johnson*, 422 S.C. 439, 446, 812 S.E.2d 739, 742, 745 (Ct. App. 2018)).

Appellant's dearth of record support fails to satisfy the standard in *Deck* which demands that restraints actually be seen by the jury before prejudice is established. The ruling of this Court was therefore proper.

[1] Appellant's argument that State v. Johnson was improperly relied upon due to the court's citation to State v. Moore, is without merit as a parenthetical citation in support of the Court's ruling does not negate the fact that the basis for the decision rested with whether a member of the jury was aware of the defendant's shackles and a police accompaniment.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that Appellant's Petition for Rehearing be denied and that the convictions and sentencing of the trial court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

November 30, 2020.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case No. 2017-001542

THE STATE,

RESPONDENT,

vs.

JAMES HEYWARD,

APPELLANT.

PROOF OF SERVICE

I, Donna D'Alessio, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Return to Petition for Rehearing, and Proof of Service has been forwarded to Appellant's counsel, Tara C. Sullivan, Esq., via email today, November 30, 2020 to tara.sullivan@klgates.com, and to Rdudek@sccid.sc.gov., as well as to his assistant, hkellner@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 30th day of November, 2020.

Donna D'Alessio,
Legal Assistant to W. Joseph Maye
Assistant Attorney General

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2017-001542

The State, ...Respondent,

v.

James Heyward, ...Appellant.

REPLY TO RETURN TO PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240 of the South Carolina Appellate Court Rules, Appellant James Heyward hereby replies to the Respondent's Return to Petition for Rehearing ("Return"). Appellant maintains that this Court overlooked or misapprehended several points and should therefore grant rehearing and reverse Mr. Heyward's convictions.

ARGUMENT

I. This Court erred in affirming the trial court's admission of evidence and testimony regarding (a) an out-of-court photograph lineup where the victim did not make a positive identification and (b) the subsequent positive identification made by the victim at trial.

In its Return, Respondent argues that the photograph lineup was not presented in an unduly suggestive manner and that the circumstances surrounding the photographic lineup would not have swayed Granddaughter toward a selection. However, Granddaughter's age and the

recent trauma she experienced before being presented with the lineup must not be overlooked. As an eight-year old child, Granddaughter was unable to appreciate the nuance and importance of Investigator Clarke's use of the word "if" to suggest that she did not have to choose someone from the lineup. Investigator Clarke asking such a young child to be "brave" and help him, coupled with his request to "see if you can see the bad man," clearly suggested to Granddaughter that she should pick one of the photographs and thereby created an unduly suggestive lineup procedure.

Moreover, Respondent and the Court overlooked or misapprehended Appellant's argument that the overall identification process was unduly suggestive as evidenced by Granddaughter's evolving level of certainty at each stage of the process. Respondent characterizes Granddaughter's identification of Appellant as "confident." However, the only clear indication Granddaughter gave when presented with Appellant's picture in the photograph lineup was that she was *not* confident in her identification. Granddaughter's confidence only evolved after seeing the photograph lineup picture again, along with Appellant in person, at the pre-trial *Neil v. Biggers* hearing (where she merely identified Appellant in the courtroom as being the same person she saw in the photograph lineup) and seeing Appellant again at trial (when she testified that she was sure Appellant was her assailant). As such, the entire identification process was unduly suggestive which inevitably caused her certainty to evolve and increase over time with each subsequent exposure to Appellant.

Respondent argues in the Return that *Foster v. California* is factually inapplicable to Appellant's case and, therefore, this Court's Opinion was correct in failing to address this binding precedent. 394 U.S. 440, 89 S.Ct. 1127 (1969). However, Respondent is in error and this Court should have addressed *Foster v. California*, upon which the majority of Appellant's

argument is based. This case and *Foster v. California* involve almost identical factual circumstances. *Id.* In both cases, the only witness was presented with an initial lineup of alleged perpetrators, the witness expressed doubt about identifying the correct perpetrator in the initial lineup, and only after subsequent exposures to one individual present in the initial lineup, did the witness become "certain" that the one individual who had been repeatedly exposed to the witness committed the crime. *Id.* at 441–42, 89 S. Ct. at 1128. As such, *Foster* is directly applicable to Appellant's case and should not have been disregarded by this Court. For these reasons, this Court should grant rehearing and reverse Mr. Heyward's convictions.

II. This Court erred in affirming the trial court's admission of a fingerprint card obtained from a New Jersey database and testimony based on the New Jersey fingerprint card.

Respondent argues that this Court properly relied upon *State v. Anderson* and South Carolina Rule of Evidence 901(b)(3) in determining the admissibility of the New Jersey fingerprint card. However, the Court and Respondent overlooked the requirements for fingerprint authentication set forth in *State v. Anderson*, 386 S.C. 120, 687 S.E.2d 35 (2009), in favor of a novel authentication method for fingerprints that is inconsistent with South Carolina law and the requirements set forth in *Anderson*.

Respondent argues that the South Carolina Supreme Court in *Anderson* explicitly acknowledged that expert testimony could be used to authenticate fingerprint cards and is, therefore, acceptable in this case. However, while expert testimony may be used to authenticate fingerprint cards, *Anderson* provides certain requirements to ensure that the expert has sufficient knowledge to authenticate the fingerprint cards. *Id.* at 128, 687 S.E.2d at 39 ("[A]uthentication . . . requires evidence as to *when and by whom* the [fingerprint] card was made and that the prints on the card were in fact those of this defendant.") (emphasis added by the Court) (internal citations omitted). The State admittedly failed to meet the requirements of *Anderson* because it

failed to establish when and where the New Jersey Fingerprints were taken. *Heyward*, Op. No. 5776, at 41 ("[W]e agree the State failed to establish when and where the N.J. Fingerprints were taken . . ."). Accordingly, this Court overlooked the State's admitted failure to meet the requirements of *Anderson* when finding that the New Jersey fingerprint card was nevertheless authenticated. This Court's novel reliance on Rule 901(b)(3) instead is inconsistent with governing South Carolina law and Respondent offers no binding authority to support authentication and admission of fingerprints under Rule 901(b)(3). The trial court erred in holding that the New Jersey fingerprint card was properly authenticated, the error was not harmless, and this Court should grant rehearing and reverse Mr. Heyward's convictions.

III. This Court erred in finding the trial court's erroneous allowance of expert opinion testimony about the operational capabilities of the recovered firearm was harmless.

Respondent argues that Appellant failed to demonstrate that he was actually prejudiced by the trial court's erroneous admission of expert opinion testimony regarding the operational capabilities of the firearm recovered from Appellant's home. The admission of this testimony was not harmless. The wrongful admission of Investigator Collins' testimony about the operational capabilities of the firearm allowed the State to hammer yet again on the fact that a gun was found in Appellant's residence, unduly prejudicing the jury against him. Respondent argues that the State could have hammered on the fact that the recovered gun matched the Granddaughter's description in closing without the expert testimony. However, the State relied *solely* on this testimony that should never have been admitted in an effort to paint Appellant in a bad light and tie him to the crime scene, clearly prejudicing Appellant. (*See* R. p. 419, lines 6–23.) Because this testimony should never have been admitted and caused Appellant significant prejudice, this Court should grant rehearing and reverse Appellant's convictions.

IV. This Court erred in affirming the trial court's allowance of Appellant's alias "Abdul Muslim" for use in the indictments and at trial.

Respondent argues that Appellant's alias "Adbul Muslim" was pertinent to both the DNA evidence, as that was the name the DNA evidence was labeled under, and key witness testimony. However, Respondent and the Court overlooked that the DNA from the crime scene matched to a national identification number 220688PA, (R. p. 378, line 2–p. 379, line 9), and the jury also heard testimony that Appellant's national identification number was 220688PA. (R. p. 255, lines 10–13.) As such, there was no probative value in using Appellant's alias in connection with this DNA match because the State could have simply used the national identification number instead. Moreover, the State never elicited any testimony that Appellant was known as "Abdul Muslim," only that he was also known to one witness as "Abdul," indicating that there was no probative value in the "Muslim" reference at all. (R. p. 321, line 23–p. 322, line 3.)

Respondent also argues that the record is devoid of any evidence or prejudice stemming from the alias due to religious bias. However, trial counsel presented substantial uncontroverted evidence at the pre-trial hearing on Appellant's motion to strike demonstrating the prejudice associated with the State's use of Appellant's "Abdul Muslim" alias. (*See* R. p. 12, line 5–p. 14, line 15.) Moreover, the State contrasted the Islamic connotation of Appellant's alias with repeated testimony regarding the victim's Christian beliefs during trial (R. p. 139, lines 13-23; R. 193, Line 17-p.194, line 11; p. 195, line 8-p. 196, line 7; p. 355, line 23). The use of the alias was unnecessary, prejudicial, in violation of Appellant's rights to due process, and should not have been allowed.

V. This Court erred in affirming the trial court's admission of gruesome autopsy dissection photographs of the victim's internal head injuries.

Respondent argues that the gruesome autopsy photographs are admissible to establish malice and corroborate Dr. Durso's testimony regarding the nature of the victim's injuries.

However, "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant *or* not necessary to substantiate material facts or conditions." *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (emphasis added). Respondent fails to address Appellant's argument that these gruesome autopsy photographs were not necessary to substantiate malice here or corroborate Dr. Durso's testimony, as Dr. Durso's extensive testimony regarding the violent nature of the strangulation and severity of the injuries to Ms. Tollison was sufficient on the issue of malice, rendering the photographs "superfluous." *See State v. Collins*, 409 S.C. 524, 539, 763 S.E.2d 22, 30 (2014) (Kittredge, J., concurring) ("The detailed and graphic testimony of the pathologist was more than sufficient to enable the State to establish the elements of the offense."). The photographs were unnecessary and should not have been admitted. Furthermore, the prejudice caused by the admission of these gruesome autopsy photographs outweighed any evidentiary value, and this Court erred in affirming their admission by the trial court.

VI. This Court erred in finding the trial court's erroneous denial of Appellant's request to remove his shackles during jury selection was harmless.

Respondent first argues that Appellant cannot rely on the language of the United States Supreme Court in *Holbrook v. Flynn,* 475 U.S. 560, 568–69, 106 S.Ct. 1340, 1345–46 (1986), which states that shackling is "inherently prejudicial," simply because this language was used by comparison to the facts of the *Holbrook* case. However, this Court noted in its Opinion that in *Deck vs. Missouri*, 544 U.S. 622 (2005), the State of Missouri's "argument failed to take into account the Supreme Court's statement in *Holbrook v. Flynn* that shackling is 'inherently prejudicial.'" *Heyward*, Op. No. 5776, at 50 (citations omitted). In his Petition for Rehearing, Appellant is doing exactly that—urging this Court to take into account the United States Supreme Court's statement that shackling is inherently prejudicial. Appellant's due process

rights were violated by the trial court's admitted abuse of discretion in refusing to grant Appellant's request to remove his shackles, and this error is inherently prejudicial to Appellant. This error is, therefore, not harmless.

Respondent next argues that Appellant's restraints were not visible to the jury and that Appellant failed to present any evidence that a juror saw or became aware of the restraints during the course of jury selection. However, it is obvious from the record in this case that Appellant's shackles were visible. As Respondent notes, in *Deck*, it was established that the jury had seen the defendant's shackles based entirely on the defense counsel's objection. *Deck*, 544 U.S. at 634, 125 S.Ct. at 2015 (emphasis added by court). Likewise, the record here establishes that Appellant's shackles were visible because Appellant's trial counsel's objected to the shackling on that very basis. Accordingly, this Court overlooked that the record here establishes just what the record in *Deck* established—that Appellant's shackles worn during jury selection were visible.

Respondent also argues that Appellant failed to satisfy the requisite standard required for *Deck* burden-shifting to apply. However, again, Respondent and this Court have overlooked that the objections to the shackles worn in *Deck* were, just as the objections here, made during the jury selection phase of the proceeding. Accordingly, this Court overlooked that this is not a proper basis upon which to refuse to apply the burden-shifting required by *Deck*. Accordingly, because Appellant was forced to wear shackles, admittedly without adequate justification, which the record establishes were visible during jury selection, Appellant "need not demonstrate actual prejudice to make out a due process violation" here. *Deck*, 544 U.S. at 635, 125 S.Ct. at 2015 (citing *Holbrook*, 475 U.S. at 568, 106 S.Ct. at 1340).

Respondent also argues that this Court's reliance on *State v. Johnson* in reaching its conclusion that the heightened standard in *Deck* does not apply to Appellant's case is appropriate. However, the factual scenario in *State v. Johnson,* 422 S.C. 439, 812 S.E.2d 739, where the defendant was being brought from the police car outside into the courthouse in handcuffs is completely different from Appellant's situation where the record clearly establishes that he was shackled while inside the courtroom directly in front of the rows of his potential jurors. This Court overlooked this significant distinction from the *Johnson* case and should not have relied thereon. The trial court wrongly refused to remove Appellant's shackles, and this error was not harmless.

CONCLUSION

For the foregoing reasons, Appellant James Heyward respectfully requests that this Court grant rehearing, reconsider its ruling on each of the above issues, and reverse Mr. Heyward's convictions.

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Respectfully submitted,

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December 7, 2020

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2017-001542

The State, ...Respondent,

v.

James Heyward, ...Appellant.

CERTIFICATE OF SERVICE

I certify that a true copy of Appellant's Reply to Return to Petition for Rehearing in the above referenced case has been served upon W. Joseph Maye, Assistant Attorney General, South Carolina Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211-1549, this 7th day of December, 2020.

<signature block next page>

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ATTORNEYS FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

v.

James Heyward, Appellant.

Appellate Case No. 2017-001542

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
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FILED
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