ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No. 2011-202926

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

RICKY S. BOWMAN,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Appellant was indicted in Richland County in April 2010 for burglary in the first degree, armed robbery, kidnapping, assault and battery of a high and aggravated nature, and possession of a weapon during the commission of a violent crime. On November 7-9, 2011, Appellant proceeded to trial before the Honorable G. Thomas Cooper, Jr., and a jury. The jury found Appellant guilty as indicted, and Judge Cooper sentenced Appellant to a total of twenty years. A timely notice of appeal was served and filed.

ARGUMENT

Background Facts

Appellant and three accomplices, including Sean Toran, decided to rob a drug dealer named "Black Shawn" because Black Shawn had recently robbed Toran at gunpoint and because Appellant had engaged in unsatisfactory dealings with Black Shawn in the past. (R. p. 276-79). On the evening of November 25, 2008, Appellant and his cohorts donned bandannas and hoodies, armed themselves with guns, and proceeded to the apartment they believed belonged to Black Shawn. (R. p. 279-81). Unfortunately for the victims, Appellant got the wrong apartment. (R. p. 281-88). When Appellant and his accomplices burst into the apartment they believed was Black Shawn's, they encountered Delores, Delores's cousin Regina, Delores's friend Shamael, Shamael's three-year-old daughter, and Shamael's brother Korey. (R. p. 173-291). At first, the robbers were unsure about whether they were in the right apartment or not. (R. p. 281-87). They questioned the occupants about the whereabouts of Black Shawn and the "guns and drugs and weed," but the occupants all denied any knowledge of Black Shawn and any illicit items. (R. p. 243). Some of the robbers took the personal possessions of the occupants, including cell phones and purses. (R. p. 196; p. 288, lines 14-25).

Before Appellant was satisfied he had indeed picked the wrong apartment, he questioned both Delores and Shamael at gunpoint. (R. p. 207-216; p. 241-50). Appellant held Delores at gunpoint in her bedroom and told her he "could take [her] breath away." (R. p. 245). When Delores told him she wasn't afraid to die, Appellant hit her in the head with his gun twice, the second time fracturing Delores's pinky when she tried to block the blow with her hand. (R. p. 245). Appellant held Shamael at gunpoint in the living room while Shamael's three-year-old daughter was in her lap. (R. p. 211-213). Appellant

ordered Shamael to tell him where Black Shawn was and asked her if she wanted her child to see her bleed. (R. p. 211, lines 14-16). Appellant's accomplice Toran, who was the only robber not wearing a mask, told Appellant to leave the child alone and apologized for "hit[ting] the wrong spot." (R. p. 214-15). Toran then rounded up all the robbers and they left the apartment. (R. p. 216). However, before leaving, the men told the victims that if they called the police, they would come back and kill them. (R. p. 187, lines 15-18). Shortly after they left, Delores and her guests heard several gunshots from outside and, in response, they "hit the floor." (R. p. 216-17). They waited a brief period of time to be sure the robbers had left, then Shamael took Delores to the hospital where Delores had to have three staples on the top of her head and had to have a splint placed on her broken finger. (R. p. 217; p. 250). Delores was released from the hospital the next day, and she then returned to her apartment and called the police to report the incident. (R. p. 251-53).

After Investigator Pegram of the Columbia Police Department was assigned to the case, he realized there was a connection between the burglary/robbery at Delores's apartment and a previous robbery of Sean Toran by a drug dealer known as "Black Shawn." (R. p. 324-25). About nine days after the robbery at Delores's apartment, Investigator Pegram helped execute a search warrant at 716 Washington Street, an apartment complex where Sean Toran lived. (R. p. 325). During a search of the apartment of Torrell Johnson, police discovered items that had been stolen from Delores and her guests during the robbery. (R. p. 327). Investigator Pegram then had a conversation with Torrell Johnson, who "just started giving it up," telling Investigator Pegram that he knew about the robbery at Delores's apartment and telling him that Appellant and Sean Toran, who also lived at the 716 Washington Street apartment

complex, were involved. (R. p. 328). Mr. Johnson knew details about the crime that had not been released to the public, so Pegram believed Mr. Johnson knew what he was talking about. (R. p. 328-29).

After receiving Appellant and Sean Toran's names from Torrell Johnson, Investigator Pegram immediately put together two photo lineups. (R. p. 330-31). One of the lineups contained Appellant's picture and one contained Sean Toran's picture. (R. p. 330-31). The next day, December 5, 2008, the victims came to the police station to give written statements and view the photo lineups. (R. p. 254, lines 3-4; p. 331). The victims were separated and placed in different rooms for the duration of the lineup procedure. (R. p.332). Both Delores and Shamael identified Appellant after using pieces of paper to cover up all but the eye area of the persons in the photographs. (R. p. 332, lines 22-25). Both Delores and Shamael also identified Sean Toran from the other photo lineup. (R. p. 331). Regina and Korey were not able to identify Appellant, but they did both identify Sean Toran. (R. p. 331, lines 13-17).

Subsequently, Investigator Pegram obtained arrest warrants for Appellant and for Sean Toran. (R. p. 333, lines 15-25). Appellant was arrested about a year later after United States Marshals located him in Savannah, Georgia. (R. p. 334). Sean Toran, who was already in jail on drug charges, was also arrested, and he eventually decided to cooperate with the State and testify against Appellant at trial. (R. p. 334; p 273-91). After rejecting the alibi testimony presented by Appellant, the jury convicted Appellant of armed robbery, burglary in the first degree, kidnapping, assault and battery of a high and aggravated nature, and possession of a weapon during the commission of a violent crime. (See R. p. 400-11; p. 458, lines 6-25). The trial judge sentenced Appellant to a total of twenty years. (R. p. 470, lines 9-21).

I. The argument raised on appeal regarding a violation of Appellant's constitutional right to a public trial is not preserved for review because Appellant never raised this argument below. However, assuming the issue was preserved for review, Appellant's right to a public trial was not violated.

Relevant Facts

In a pre-trial motion, the State requested that the courtroom be cleared during the Neil v. Biggers hearing. (R. p. 28, line 10 – p. 29, line 2). The solicitor explained that one of the witnesses, Mr. Toran, had "received threats all weekend," and that the victims had received e-mails from Appellant's sister offering them money not to testify and asking them not to send Appellant to jail. (R. p. 28, lines 16-24). The solicitor stated that, because of the threats, the victims were in fear and asked that "the court be cleared just while they testify." (R. p. 28, line 25 – p. 29, line 2). In response, Appellant's counsel stated as follows:

> Judge, I would object to any clearing of the court. While there have been some allegations, my client and his family maintain they have not done anything of the sort. There is no proof that I've seen, no evidence of e-mails. I certainly haven't been provided copies of any. I believe it's unfair to clear the courtroom, particularly in front of the jury. . . In terms of singling out my client's family, not anyone else. . . Obviously, in front of the jury, I would object to having anyone removed on the basis that it appears that people are leaving from my client's side. If they have any inclination that they're in fear, that prejudices my clients. He has been incarcerated, so it's certainly not from my client himself. (R. p. 29, lines 3-13; p. 31, lines 1-6).

The solicitor agreed that no one would be required to get up and walk out in the presence of the jury. (R. p. 30-31). The trial judge ruled, "I don't know who is making all of these alleged threats, but I'll grant the State's motion." (R. p. 30, lines 3-4). The courtroom was thereafter cleared during the Neil v. Biggers pre-trial hearing testimony of Delores, Shamael, and Regina. (See R. p. 51, lines 3-8; p. 115, lines 13-25; p. 119, line 14 – p. 120, line 2). No further objections or arguments were raised on Appellant's

behalf when the courtroom was cleared during the pre-trial Neil v. Biggers hearing. (See R. p. 51, lines 3-8; p. 115, lines 13-25; p. 119, line 14 – p. 120, line 2).

Later, during trial, the State again raised the issue of clearing the courtroom during the testimony of Regina and Shamael. (R. p. 144-45). The solicitor presented the judge with affidavits from these two victims detailing their fears about testifying. (See R. p. 144, line 22 – p. 145, line 5; Court's Exhibit # 1 & 2). The judge stated he would clear the courtroom "over the objection of the defendant." (R. p. 145, lines 8-9). Appellant's counsel then stated that "in terms of these affidavits, there is nothing in here saying that there is any threats or that there's any fear or any reason for them to believe that there are threats or a reasonable fear from either my client or his family, and I would object to clearing the courtroom **on that basis**." (R. p. 145, lines 15-23). The judge reiterated that the clearing of the courtroom would be for two witnesses only. (R. p. 145, lines 24-25).

Following the parties' opening statements, the State made a formal request that the courtroom be cleared during the testimony of its first two witnesses. (R. p. 170, lines 13-17). Appellant's counsel then stated he had "a couple of issues regarding clearing the courtroom." (R. p. 171, lines 4-5). First, Appellant's counsel moved for a mistrial on the ground that the solicitor's opening statement brought up the fact that "there is an alleged fear of retaliation" on the part of the victims and that if the courtroom were cleared at this point, "all that is doing is validating the arguments to the jury that my client and his family are somehow a threat." (R. p. 171, lines 11-20). Counsel argued that "the prejudicial value of that is now incredibly enhanced based on those arguments in the opening statement." (R. p. 171, lines 20-23). The trial judge overruled the motion and cleared the courtroom, outside the presence of the jury, "just for these first two witnesses." (R. p. 172, lines 10-13). However, the judge allowed a person seeking to

obtain his Rule 403, SCACR, trial experiences to remain in the courtroom and also allowed a victim's advocate to remain in the courtroom. (R. p. 172, lines 13-20).

Subsequently, the State moved to also close the courtroom during the trial testimony of Sean Toran, a co-defendant of Appellant. (R. p. 271, line 9 – p. 273, line 1). The solicitor stated that Mr. Toran had completed an affidavit detailing the threats he had received and indicated Mr. Toran had received threatening phone calls. (R. p. 271, lines 14-22). The solicitor also stated that Mr. Toran was concerned about his safety and "would feel more free in his testimony" if Appellant's family members were not in the courtroom "staring him down." (R. p. 272, lines 12-16). The trial judge denied the request to close the courtroom, finding that Toran and the two victims were in entirely different positions since the victims were "women with children" and Toran was a co-defendant. (R. p. 272, lines 3-24). Appellant's counsel made no comment during this exchange. (See R. p. 271-73).

After the close of all the testimony, Appellant's counsel renewed his motion for mistrial based upon the solicitor's comments in her opening statement regarding the fear of the victims, stating that he believed the solicitor's comments, coupled with the fact that Appellant's family members were removed during the testimony of two of the victims, warranted a mistrial. (R. p. 419-20). In response, the solicitor pointed out that the courtroom was cleared "without the jury even knowing what had happened," and therefore, Appellant had not been prejudiced. (R. p. 420, line 23 – p. 421, line 2). The trial judge denied the motion for mistrial for the reasons he stated on the record previously. (R. p. 421, lines 10-12).

Issue Preservation

Appellant now argues on appeal that the trial judge erred by closing the courtroom during the pre-trial testimony of three State witnesses, and during the trial testimony of two State witnesses, because doing so violated Appellant's constitutional right to a public trial. This argument is not preserved for appellate review. The only two points Appellant raised below to the trial judge when he opposed the closure of the courtroom were that there was insufficient proof of threats by Appellant or his family members and that closure of the courtroom was prejudicial to Appellant because, if done in the presence of the jury, it would reinforce the notion that the witnesses were afraid of Appellant. (See R. p. 28-31; p. 144-45; p. 170-72; p. 420-21). Appellant never once mentioned a violation of his right to a public trial and never once mentioned the Sixth Amendment. Consequently, the issue raised on appeal regarding a violation of Appellant's constitutional right to a public trial is not preserved for appellate review. See In re Care and Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to and ruled on by the trial court to be preserved for appeal."); State v. McWee, 322 S.C. 387, 391, 472 S.E.2d 235, 238 (1996) (where defendant failed to cite to a constitutional basis for his objection at trial, the constitutional issue raised on appeal was not preserved for review); State v. Carlson, 363 S.C. 586, 598, 611 S.E.2d 283, 289 (Ct. App. 2005) (constitutional arguments are not exempt from the error preservation rules); State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (citation omitted) (in order to preserve an alleged error for review, a specific objection must be made to alert the court regarding the precise nature of the error); State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (citations omitted) (a party may not argue one ground at trial and an alternate ground on

appeal). Therefore, this Court must dismiss Appellant's Issue I on error preservation grounds.

The Sixth Amendment was not Violated

Even if the issue had been preserved, the State submits that there was no violation of Appellant's Sixth Amendment right to a public trial where there was no "closure" of the courtroom to the public as contemplated by Presley v. Georgia, 558 U.S. 209 (2010). See also Waller v. Georgia, 467 U.S. 39 (1984) and In re Oliver, 333 U.S. 257 (1948). In Presley, the judge closed the courtroom to all members of the public during the jury voir dire. See Presley at 210; see also United States v. Villagomez, 708 F.Supp.2d 1105, 1125 (D.N. Mariana Islands 2010). In Appellant's case, at least one member of the public - a lawyer watching the proceedings to obtain his Rule 403 trial experiences - was present during all of the proceedings, and Appellant's family members were excused from the courtroom for only a limited period of time.[1] (See R. p. 172, lines 13-20). See State v. Lormor, 172 Wash.2d 85, 93, 257 P.3d 624, 629 (2011) (holding that "a 'closure' of a courtroom occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave"). Thus, Appellant's trial was not a "secret trial" as proscribed by our Constitution. See In re Oliver at 266-73 (discussing the long-standing fear of secret trials as the foundation for the Sixth Amendment right to public trials); see also Caudill v. Peyton, 368 F.2d 563, 565 (4th Cir. 1966) (disapproving an *in camera* trial in the judge's chambers). Accordingly, since there was not a total "closure" of the courtroom to the public, Appellant's Sixth Amendment rights were not violated.

[1] Notably, Appellant's family members could have been sequestered had they been potential witnesses. See Rule 615, SCRE ("Exclusion of Witnesses").

Even if this Court finds that there was a closure in this case triggering the Sixth Amendment's protection, the test set forth in Presley v. Georgia may not be the appropriate test since any closure in this case was only partial and temporary. Inasmuch as partial closures do not implicate the same Sixth Amendment concerns as do total closures, and since there are no U.S. Supreme Court cases indicating how a court should address a partial closure, the U.S. Circuit Courts have developed a test specifically tailored to partial and temporary closures. See United States v. Deluca, 137 F.3d 24, 33-34 (1st Cir. 1998); Nieto v. Sullivan, 879 F.2d 743, 753 (10th Cir. 1989); United States v. Sherlock, 865 F.2d 1069, 1077 (9th Cir. 1989); Judd v. Haley, 250 F.3d 1308 (11th Cir. 2001); Woods v. Kuhlmann, 977 F.2d 74 (2d Cir. 1992); United States v. Osborne, 68 F.3d 94, 98-99 (5th Cir.1995); United States v. Farmer, 32 F.3d 369, 371 (8th Cir. 1994); see also Bell v. Jarvis, 236 F.3d 149, 168 (4th Cir. 2000). This test varies only slightly from the test set forth in Presley v. Georgia. Under the Presley test, (1) there must be an "overriding interest" that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the trial judge must consider reasonable alternatives to closing the proceeding; and (4) the trial judge must make adequate findings to support the closure. Presley v. Georgia at 214 (citing Waller). The partial closure test created in the U.S. Circuit Courts is the same as the Presley test except that a "substantial reason" for the closure is required rather than an "overriding interest." See, e.g., United States v. Sherlock, 865 F.2d at 1076-77.

In Appellant's case, it is clear from the record that the trial judge agreed to partially close the courtroom during some of the testimony because he was concerned that the presence of Appellant's family members in the courtroom would inhibit the witnesses' truthful testimony, considering that the witnesses felt threatened by improper

pre-trial contact. A trial judge is accorded broad discretion in conducting a criminal trial, and the trial judge has a duty to help to ensure that the truth is ascertained. See State v. Vickers, 226 S.C. 301, 306, 84 S.E.2d 873, 876 (1954) ("The purpose of a trial in a criminal case is to ascertain the truth of the matters charged against the defendant, and it is a part of the business of the trial judge to see that this end is attained.") (quoting State v. Furtick et al., 147 S.C. 82, 144 S.E. 839, 840 (1928)); State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007). ("[A] trial court is given enormous discretion in conducting a criminal trial."); State v. Hawkins, 300 S.C. 225, 226, 387 S.E.2d 251 (1989); ("The wide discretion accorded presiding judges, embedded in the law of South Carolina, is essential to the orderly administration of justice."); State v. Barton, 325 S.C. 522, 529, 481 S.E.2d 439, 443 (Ct. App. 1997) ("A trial judge has the inherent power to maintain order and decorum in his courtroom.") (citations omitted).

Here, the "overriding interest" or "substantial reason" justifying a partial closure was ensuring that the witnesses felt free to testify truthfully regarding the facts without being inhibited by the presence of persons by whom they felt threatened. Similar concerns have been held to be sufficiently compelling reasons justifying closure of a proceeding. See, e.g., State v. Gee, 262, S.C. 373, 384-85, 204 S.E.2d 727, 731-32 (1974); State v. Sinclair, 275 S.C. 608, 614, 274 S.E.2d 411, 414 (1981); United States Ex Rel. Laws v. Yeager, 448 F.2d 74, 80-81 (3d Cir. 1971); Woods v. Kuhlmann, 977 F.2d 74 (2d Cir. 1992); Nieto v. Sullivan, 879 F.2d 743, 753-54 (10th Cir. 1989); United States v. Farmer, 32 F.3d 369, 371 (8th Cir. 1994); U. S. ex rel. Bruno v. Herold, 408 F.2d 125 (2d Cir. 1969); Lowe v. State, 141 Ga.App. 433, 436, 233 S.E.2d 807, 809-810 (Ga. App. 1977); State v. Rusin, 153 Vt. 36, 40-41, 568 A.2d 403, 406 (1989); Hackett v.

State, 266 Ind. 103, 110-11, 360 N.E.2d 1000, 1004 (1977); People v Mack, 178 A.D.2d 661, 577 N.Y.S.2d 892 (2d Dep't 1991).

Second, the "closure" in this case was partial and only lasted for as long as was necessary. Further, arguably, there were no reasonable alternatives except for closure of the courtroom during the witnesses' testimony, and the judge closed the courtroom outside the presence of the jury so that Appellant would not be prejudiced. Finally, although the trial judge could have been more explicit in his ruling, his intent is apparent from the record. However, if this court determines that the judge's findings are insufficient, Respondent submits that a remand to the trial judge for further findings would be appropriate rather than reversal of the entire trial. See State v. Colf, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000); Timothy C. Doughtie Advertising, Inc. v. Nelsen Steel and Wire Co., Inc., 284 S.C. 27, 324 S.E.2d 329 (Ct. App. 1984); Golden Strip Motors, Inc. v. Pennsylvania Nat. Mut. Cas. Ins. Co., 288 S.C. 548, 343 S.E.2d 659 (Ct. App. 1986) (all holding that remand for further factual findings was appropriate where the trial court failed to rule on an issue); see also United States v. Galloway, 937 F.2d 542, 546-47 (10th Cir. 1991) (remanding Sixth Amendment issue to the district court with directions to supplement the record with the facts and reasoning upon which a partial closure of the courtroom was based, since granting a new trial without such findings being made would constitute a windfall and would not be in the public interest, especially where the defendant failed to object to the lack of findings by the district court); Yung v. Walker, 341 F.3d 104 (2d Cir. 2003) (remanding Sixth Amendment public trial issue to the district court for further findings); Kendrick v. State, 661 N.E.2d 1242 (Ind.App. 1996) (since the lower court failed to make adequate findings on the record regarding his

partial closure of the courtroom, case was remanded for trial court to enter specific findings).

Finally, even if this Court finds that the trial court committed error in closing the courtroom, this Court should conclude that this error was too trivial to violate the Sixth Amendment. Such a conclusion would not be without support. Some of the U.S. Circuit Courts, and some state courts, have adopted a "triviality exception" to the Sixth Amendment's public trial guarantee. See, e.g., United States v. Perry, 479 F.3d 885, 889-91 (D.C. Cir. 2007); United States v. Gupta, 650 F.3d 863, 867-72 (2d Cir. 2011); Com. v. Alebord, 80 Mass.App.Ct. 432, 439-40, 953 N.E.2d 744 (Mass.App.Ct. 2011); Barrows v. U.S., 15 A.3d 673, 676-81 (D.C. 2011); Kelly v. State, 195 Md.App. 403, 420-29, 6 A.3d 396, 406-11 (Md.App. 2010). Further, in United States v. Gupta, the Second Circuit Court of Appeals determined that the triviality exception is consistent with the United States Supreme Court's opinion in Presley v. Georgia. Gupta, 650 F.3d 863, 867-72 (2d Cir. 2011). Under the triviality exception, a court looks to whether the actions of the court, and the effect such actions had on the conduct of the trial, deprived the defendant – whether innocent or guilty – of the protections of the Sixth Amendment. See Gupta at 867. Thus, a determination that the exclusion was trivial means that the error was not significant enough to rise to the level of a constitutional violation. See id. The core values protected by the Sixth Amendment are examined, and whether a particular closure implicates the Sixth Amendment depends upon whether the closure undermines these values. Id. These core values are as follows: (1) to ensure a fair trial; (2) to remind the prosecutor and the judge of their responsibility to the accused and the importance of their functions; (3) to encourage witnesses to come forward; and (4) to

discourage perjury. Peterson v. Williams, 85 F.3d 39, 41-43 (2d Cir. 1996) (citing Waller at 46-47).

As discussed previously, a partial and temporary closure does not implicate the same Sixth Amendment concerns as does a total closure of the courtroom for the entire duration of a trial. In this case, the partial and temporary closure was too trivial to constitute a violation of Appellant's Sixth Amendment rights. The trial was not conducted in secret since at least one member of the public was present, and the core values of the Sixth Amendment were not subverted. In fact, the partial and temporary closure arguably furthered these core values because it allowed the witnesses to testify freely and fully without being inhibited by the presence of persons by whom they felt threatened. Accordingly, this Court should conclude that any error with respect to the closure of the courtroom in this case was trivial and did not violate Appellant's Sixth Amendment right to a public trial.

II. The specific arguments Appellant raises on appeal regarding the victims' identifications of Appellant are not preserved for review because these arguments were not made to the trial judge below. In any event, Appellant's argument that the trial court erred in admitting the victims' identifications is without merit where the identification process was not suggestive in any way and where the identifications were reliable under the totality of the circumstances.

Unduly Suggestive Identification Procedure

Appellant now asserts that the trial court should have suppressed the victims' identifications of Appellant, first arguing that "the identification process was unduly suggestive due to the circumstances under which the witnesses were called to the police station." (Brief of Appellant, p. 18). Specifically, Appellant contends that, where victim Delores testified that Investigator Pegram called her and asked her to come to the police station to "see if I could identify them," the identification process was "unduly

prejudicial" because the witnesses were "tainted by the investigator" who gave them the "expectation that suspects were arrested and only needed to be identified." (Brief of Appellant, p. 19). However, Appellant never made this argument to the trial judge below.[2] (See R. p. 132-39). Accordingly, since the issue presented on appeal was not raised or ruled upon below, this issue is not preserved for appellate review. See, e.g., State v. Adams, 332 S.C. 139, 144, 504 S.E.2d 124, 126-27 (Ct. App. 1998) (argument not preserved for appeal where precise issue not presented to the trial court); State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (a party may not argue one ground at trial and another ground on appeal).

Even if the issue had been properly preserved, Appellant's contention that the lineup procedure was unduly suggestive is without merit. Appellant cites no case law supporting the proposition that Investigator Pegram's comment to Delores regarding the reason for her coming to the police station - to see if she could identify the perpetrators - was improper.[3] Appellant also fails to adequately explain why this comment would be "unduly suggestive," especially considering that Investigator Pegram never told the victims that the perpetrator was necessarily in the photo lineup and never in any manner suggested which of the photographs the witnesses should pick. (See R. p. 60-64; p. 76-84; p. 88-92). Notably, in State v. Davis, our Supreme Court held that an officer's instruction to the witness, made while handing a witness a photographic lineup, to "see if

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[2] In fact, the only argument made below that *might* be construed as an argument that the lineup was unduly suggestive was counsel's assertion that "[t]here is nothing on the record that shows that based on the description of the eyes that lineups were done in order to show anything of similar eyes for any possible suspects. I believe the out-of-court lineup has been tainted." (R. p. 132, lines 20-24; see also p. 133, lines 10-11).

[3] Appellant points to the testimony of Delores during her pre-trial testimony paraphrasing what Investigator Pegram said to her when he contacted her about coming to view the photo lineup; however, Appellant does not specifically contend that any of the comments made to the other identification witness, Shamael, were improper. (See R. p. 60, lines 12-17; p. 76, lines 18-23). Also, notably, at trial, Delores testified that when Investigator Pegram contacted her, he merely "asked if I would come by the office and write a statement." (R. p. 253-54).

she recognized anyone," was not unduly suggestive since there was no suggestion in the record that the police officer insinuated which photograph belonged to the defendant and since witnesses are "clearly" aware that "the reason [they are] requested to view [a] photographic lineup [i]s because the police ha[ve] a suspect." State v. Davis, 309 S.C. 326, 339, 422 S.E.2d 133, 141 (1992), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); State v. Mansfield, 343 S.C. 66, 74-76, 538 S.E.2d 257, 261-62 (Ct. App. 2000) (it was apparently not suggestive for the police to tell a witness that they "have a suspect" for the witness to look at in a one-man show-up); see also Clark v. State, 271 Ga. 6, 13, 515 S.E.2d 155, 162 (Ga. 1999) (although a police officer displaying a lineup to a witness should avoid expressly telling the person that the lineup contains the police officer's suspect, "such a statement does not make a lineup impermissibly suggestive since the very fact that a lineup is being conducted suggests that a suspect is contained therein"); Rimmer v. State, 825 So. 2d 304, 317 (Fla. 2002) ("the fact that the police told [the witness] prior to his viewing the physical lineup that they had included a suspect in the lineup does not taint [the witness's] identification" where the photo spread consists of six men with similar characteristics and there is no evidence that the police directed the victim's attention to the defendant's photograph); Kelly v. State, 18 S.W.3d 239, 243 (Tex. App. 2000) ("a lineup is not rendered impermissibly suggestive merely because the complainant is informed that it contains a 'suspect,' because a complainant would 'normally assume that to be the case.'") (quotation omitted); State v. Timmons, 956 S.W.2d 277, 283 (Mo. App. 1997) ("Mr. Timmons further argues that the lineup was suggestive because the police had stated to the victims that a possible subject was in the lineup. Whether the police suggested a suspect was present is moot, however, as 'it is implicit in a line-up or photographic array

that one of the persons shown is a suspect.'") (quotation and citation omitted); State v. Smith, 681 So.2d 980, 986 (La. App. 1996) ("Even if the officers told the witnesses a suspect would be in each lineup, such a statement does not, in itself, constitute suggestiveness as it is assumed that, when a person is asked to view a lineup, a suspect will be included.") (citation omitted); State v. Boutte, 447 So. 2d 1229, 1231 (La. App. 1984) ("The defendant claims that the lineup was suggestive since the victims were told that a suspect would be in the lineup. This, in itself does not constitute suggestiveness, for it is generally assumed that when one is called to examine a physical lineup there is a suspect in the crowd.") (citations omitted); State v. Garcia, 235 Neb. 53, 59-60, 453 N.W.2d 469, 474 (Neb. 1990) ("Though Detective Salak advised Otto that a suspect was pictured in the photographic array, a police officer's comment that a lineup or photographic array contains a suspect or a suspect's picture does not render the identification procedure unduly suggestive inasmuch as a witness would assume that to be the case.") (citations omitted); People v. Williams, 117 Ill. App. 2d 34, 43, 254 N.E.2d 81, 86 (Ill. App. 1969) ("When a witness is asked to view a line-up, there is, necessarily, an implied suggestion that the police investigation has led them to believe that one of the persons exhibited in the line-up may have committed the crime. . . . The remarks complained of in the instant case were not unfairly suggestive or prejudicial to defendants; they merely verbalized the obvious.").

Therefore, Appellant's argument that the identification process was unduly suggestive based upon Investigator Pegram's comment to victim Delores is plainly without merit, and this Court need not reach the second prong of the Biggers test.

Substantial Likelihood of Misidentification

Appellant also argues that a substantial likelihood of misidentification of Appellant existed under the totality of the circumstances, including that the witnesses did not have sufficient opportunity to view the perpetrator at the time of the offense; the witnesses' degree of attention was low due to the circumstances of the incident; the description given of Appellant was exceedingly vague and inaccurate; and the identifications were made looking only at the eyes in the photographic lineup. (See Brief of Appellant, p. 19-21). However, in the pre-trial Neil v. Biggers hearing, Appellant's only arguments were based upon the accuracy of the victims' prior descriptions of the perpetrator (R. p. 132, lines 14-24; p. 133, lines 10-11) and that the time period between the crime and the showing of the lineup was "11 days." (R. p. 132, line 25 – p. 133, line 2). Appellant's counsel also argued that "the procedure is unreliable based on covering the majority of the face only looking at eyes when that's not how the lineups were originally set up." (R. p. 133, lines 6-9). Because Appellant's arguments below were different than the ones he raises on appeal, his issue regarding a "substantial likelihood of misidentification" is not preserved for appellate review. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial.").

Assuming this issue was preserved for review, the trial judge did not err in admitting the victims' identifications of Appellant. Under Neil v. Biggers, 409 U.S. 188 (1972), there is a two-prong inquiry used to determine the admissibility of out-of-court identifications. State v. Brown, 356 S.C. 496, 503, 589 S.E.2d 781, 784 (Ct. App. 2003). First, the court must determine if the identification process was unduly suggestive. Id. (citing State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000)). If the court finds that a suggestive procedure has in fact been used, the court should then determine whether the

identification was nonetheless reliable, and therefore admissible in evidence, under the totality of the circumstances. Id. (citations omitted). The following factors are normally considered to determine the reliability of an identification: "(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the confrontation." Id. at 503, 589 S.E.2d at 784 (citation omitted).

The decision to admit eyewitness identifications is within the trial judge's discretion and will not be disturbed on appeal absent an abuse of that discretion or the commission of prejudicial legal error. State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000).

In this case, contrary to Appellant's assertions on appeal, the victims' testimony supported that their identifications were reliable under the totality of the circumstances. Delores was the first victim who identified Appellant from a photographic lineup. (R. p. 51-69). Delores indicated that she had a good opportunity to view Appellant because he was standing "right in [her] face" for a full minute or two, had a gun pointed at her head, and eventually hit her with the gun two times after she talked back to him. (R. p. 56-57). Delores described Appellant as a black male who was shorter than co-defendant Sean Toran, brown-skinned (about the same complexion as herself), and testified he had on dark clothes with a bandanna across his face, but she could see his eyes and eyebrows. (R. p. 54-57; p. 60; p. 87-88; p. 98, lines 8-12; p. 246; p. 330, lines 16-22; p. 345, lines 15-16). She testified that she specifically remembered his eyes and recalled that his eyes were "dilated" and his eyebrows were "a little bushy." (R. p. 66, lines 7-8; p. 265, lines

8-12). Delores made her identification of Appellant ten days after the crime. (R. p. 331, lines 8-10). Delores covered up the lower portion of each man's face in the lineup since, during the crime, the perpetrator had that portion of his face covered. (R. p. 61, line 22 – p. 62, line 3; p. 67, lines 9-15; p. 69, lines 7-8). Finally, Delores was "100 percent" sure of her identification of Appellant despite the fact that she identified him solely based on his eyes. (R. p. 69, lines 9-10; p. 90, lines 16-23; p. 256, lines 17-21; p. 258, lines 6-17).

Shamael was the second victim to identify Appellant in a pre-trial photo lineup. Shamael got a good look at Appellant because Appellant stood less than two feet from her, "right in front of [her] face," while making threatening statements to her and pointing a gun at her and her daughter. (R. p. 72-75). Although Appellant had on dark, baggy clothes and had a bandanna over the lower part of his face, Shamael stared at Appellant's eyes the whole time he was in front of her, which was "for a few minutes." (R. p. 72-76; p. 81, lines 9-12). Shamael testified that she had been an ophthalmological assistant for the past eight years and that she "know[s] people's eyes." (R. p. 80, lines 15-23). She stated that she "studied" Appellant's eyes that night and remembered them, and stated she was able to see Appellant's eyes and his eyebrows despite the bandanna. (R. p. 80; p. 213, lines 20-24). Shamael described Appellant as a black male who was shorter than co-defendant Sean Toran, brown-skinned, and wearing dark clothes and a bandanna across his face. (R. p. 76, lines 12-17; p. 98, lines 8-12; p. 218; p. 345, lines 15-16). Like Delores, Shamael made her identification of Appellant ten days after the crime. (R. p. 331, lines 8-10). Also like Delores, Shamael covered the lower portions of the faces in the lineup photos.[4] (R. p. 77-78). Shamael testified that she was "110 percent sure" of

[4] As mentioned previously, the lineups were shown separately while the victims were in different rooms, and the victims did not have contact with one another during this time. (R. p. 88-92).

her identification of Appellant "because those were the same eyes I saw that night." (R. p. 77, line 14; p. 78, lines 11-13).

In sum, both victims had a good opportunity to view Appellant, who stood in front of them for at least a couple of minutes with a gun pointed at them while threatening them. Both victims had a high degree of attention focused on Appellant during this time. See, e.g., State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999) (a victim in fear for his life has a heightened degree of attention). Further, although the descriptions given by both victims were not detailed, they were indeed accurate, and the fact that neither victim noticed the burn mark in one of Appellant's eyes is not fatal. See State v. Mansfield, 343 S.C. 66, 79–80, 538 S.E.2d 257, 264 (Ct. App. 2000) (finding eye witness identification "on the whole was accurate" even though the witness described the perpetrator as having plaits in his hair and wearing tennis shoes while the defendant actually had an afro and wore boots); see also Manson v. Brathwaite, 432 U.S. 98, 117 (1977) (the reliability of an identification is a jury issue despite the fact that there may be elements of untrustworthiness in the identification because "[j]uries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature"). Each victim was absolutely certain about her identification of Appellant, and both identifications took place only ten days after the crime. See State v. Patterson, 337 S.C. 215, 230-31, 522 S.E.2d 845, 853 (Ct. App. 1999) (noting that the identification took place "only two weeks" after the crime). Finally, despite the fact that Appellant had much of his face covered during the crime, ***both*** of the victims who had direct, face-to-face contact with Appellant that night were able to identify him based upon his eyes. Clearly, the fact that both victims picked the same eyes solidifies the accuracy and reliability of the identifications.

In conclusion, since there was testimony supporting the trial judge's determination that the identifications of Appellant were reliable under the totality of the circumstances, the admission of the victims' out-of-court and in-court identifications must be upheld. (See R. p. 174, line 6 – p. 175, line 14). See Patterson at 228, 522 S.E.2d at 851 (a trial court's rulings on admissibility of identification evidence should not be reversed on appeal absent abuse of discretion or prejudicial legal error).

CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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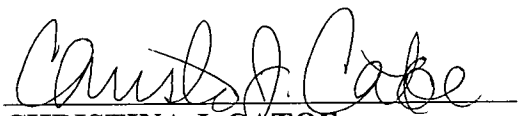

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ATTORNEYS FOR RESPONDENT

August 22, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No. 2011-202926

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

RICKY S. BOWMAN,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.**

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AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **BENJAMIN JOHN TRIPP**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **22nd day of August, 2013.**

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SWORN to before me this 22nd day of August, 2013.

Notary Public for South Carolina.
My Commission Expires: 7/18/2017