THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions
Honorable John C. Hayes, III, Circuit Court Judge
Trial Court Case No. 2012GS4603890
Appellate Case No. 2013-000684

The State of South Carolina,

Respondent,

v.

Kairon Brenton Maldonado,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN MCCRORY WILSON
Attorney General

AMIE L. CLIFFORD
Special Assistant Attorney General
aclifford@cpc.sc.gov
S.C. Bar No. 1285

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

1675-1A York Highway
Moss Judicial Center
York, South Carolina 29745
(803) 628-3020

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUES

I.

Did the trial court properly admit evidence of Mr. Patel's out-of-court and in-court identifications of Appellant inasmuch as the identification procedures were not unduly suggestive?

II.

Has Appellant properly preserved any issue regarding the trial court's exclusion of testimony that Appellant's statements to law enforcement were consistent? If this issue is properly before the Court, did the trial court err in sustaining the State's objections to Appellant's attempt to have a police officer testify that the statements Appellant gave to the police were consistent because such testimony was improper self-serving hearsay?

III.

Did Appellant fail to preserve any challenge to the qualification of Officer Moreno as an expert in dog tracking by failing to state a ground for his objection? If the issue is properly before this Court, did the trial court err in qualifying Officer Moreno as an expert, and, if there was error, was itharmless beyond a reasonable doubt?

STATEMENT OF THE CASE

Appellant was indicted for the offenses of attempted armed robbery, possession of a firearm during the commission of a violent crime, attempted murder, and criminal conspiracy for crimes that occurred on July 25, 2012, in York County. The case was called for trial on March 18, 2013, and the State *nolle prossed* the count for possession of a firearm during the commission of a violent crime. Appellant pled not guilty to the remaining charges and the case proceeded to trial before a jury.

On March 20, 2013, the jury returned its verdict finding Appellant guilty of attempted armed robbery and criminal conspiracy, but not guilty of attempted murder. After hearing from the State and the defense, the trial court sentenced Appellant to 20 years on the attempted armed robbery and a concurrent five years on the criminal conspiracy.

This appeal follows.

STATEMENT OF FACTS[1]

Ramailo Huey, Kadeem Sanders, and Appellant knew each other, and would go together into the Cherry Road Discount Food and Beverage store (hereafter "the store) on the corner of Cherry Road and Main Street. (Tr. tr. p. 131, line 13 – p. 132, line 13). On the night of July 24, 2012, Ramailo, Kadeem, and Appellant were together when Kadeem and Appellant began talking about robbing a store. (Tr. tr. p. 133, lines 1-22; p. 134, lines 10-11.) Ramailo tried to talk them out of it. He did not warn the store owner or the police. (Tr. tr. p. 133, lines 14-17; p. 137, lines 1 – p. 138, line 14.)

On the night of July 25, 2012, Kadeem and Appellant, as planned and agreed, went to the store for the purpose of robbing it. (Tr. tr. p. 188, line 17 – p. 189, line 18.) Kadeem was carrying a gun he bought from someone for $30.00. (Tr. tr. p. 201, line 21 – p. 204, line 23.)

On the night of July 25, 2012, Vipul Patel was in the store, which he had owned and operated for 16 years. (Tr. tr. p. 141, line 23 – p. 142, line 6.) Only Mr. Patel and his cousin were working in the store that night. (Tr. tr. p. 144, lines 16-24.) The store was scheduled to close at 11:00 p.m. (Tr. tr. p. 144, lines 20-21.)

At approximately 10:52 p.m., Mr. Patel and his cousin were the only persons in the store. Mr. Patel was behind the cash register, which was on the front counter where there are displays for the lottery, candy, chips and other things (some of which block the view over the counter toward the front door). Mr. Patel's cousin was in the back room cleaning a bucket. (Tr. tr. p. 145, lines 4-

[1] The Statement of Facts is based upon only the evidence presented to the jury.

23; p. 163, lines 18-21.) Kadeem and Appellant, two teenagers, came in quickly, which Mr. Patel did not think anything of. (Tr. tr. p. 146, line 3 – p. 147, line 19; p. 187, line 18 – p. 188, line 4.) Kadeem was wearing black jeans, black shirt, and a red bandana on his face. (Tr. tr. p. 192, lines 11-18.) When the two entered the store, they separated. Kadeem stayed near the front door and Appellant came around to the swinging door that opens to the area behind the cash register. (Tr. tr. p. 147, line 20 – p. 148, line 18.) Mr. Patel was paying closer attention to Appellant because he was trying to come in behind the cash register. Mr. Patel, who had been seated, stood up and ran in front and told him to move back. (Tr. tr. p. 144, lines 12-22; p. 149, line 19 – 150, line 4; p. 150, lines 16-20; p. 163, lines 15-17.) Appellant moved back a little bit, but then tried to come back in. Mr. Patel then told him to leave the store with his hand. (Tr. tr. p. 150, lines 21-25.) Appellant then told Mr. Patel to give him the money. (Tr. tr. p. 151, lines 1-2.) Mr. Patel and Appellant were close to each other – Appellant tried to put his hand on the counter. (Tr. tr. p. 152, line 14 – p. 153, line 1.) bAppellant had a hood up,[2] but Mr. Patel could "pretty much" see his face. (Tr. tr. p. 150, lines 8-13.) Mr. Patel was able to look right into his face and he recognized him as someone who had been coming into the store.[3] (Tr. tr. p. 153, lines 2-14.)

Mr. Patel then thought of the security switch near the counter and tried to

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[2] Kadeem testified at trial that Appellant was not wearing a bandana on his face. (Tr. tr. p. 192, lines 19-23.)

[3] On cross-examination, Mr. Patel said that he was guessing that the individual trying to come behind the counter was about 5'5" because the counter is a little high. (Tr. tr. p. 166, lines 10-18.) He also testified that the individual had glasses, and that he did not have a bandana on his face but rather had a hoodie covering part of his face. (Tr. tr. p. 166, lines 2-9; p. 166, line 16 – p. 167, line 4.)

push the switch so that the police would be notified that something bad was happening at the store. (Tr. tr. p. 151, lines 3-18.) As Mr. Patel tried to push the switch, Kadeem – who Mr. Patel had not really seen holding a gun because he had focused his attention on Appellant[4] – shot him twice,[5] with both bullets hitting the cash register before hitting him in his face and shoulder. (Tr. tr. p. 151, line 16 – p. 152, line 7; p. 153, line 25 – p. 154, line 5; p. 160, line 4 – p. 161, line 18; p. 167, line 19 – p. 168, line 17; p. 188, lines 5-16; State's Exhibits 21 and 22.) After he was shot, Mr. Patel fell to the floor. Without trying to get into the cash register or getting any money from the store, Kadeem and Appellant ran out of the store. (Tr. tr. p. 153, lines 15-24; p. 154, lines 6-13; p. 189, lines 22-24.) As they left, one turned around and came back to wipe off the door handle. (State's Exhibit 1/6.)

Mr. Patel's cousin came up from the back and they called the police. A customer came in and tried to help them. (Tr. tr. p. 154, line 14 – p. 155, line 5.)

As the two individuals ran out of the store, Officers Larry Vandermolen and Eric Sizemore, of the Rock Hill Police Department were at the intersection of West Main and South Cherry Road in York County, on a corner of which is located Mr. Patel's store. (Tr. tr. p. 95, line 11 – p. 96, line 8; p. 97, lines 6-8.) As they sat in their patrol car at the light at the intersection at approximately, 10:52 p.m., they were facing the store. (Tr. tr. p. 97, lines 12-17.) They saw two black

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[4] On cross-examination, Mr. Patel admitted that he could have blocked some of what had happened from his memory because of how traumatic it was. (Tr. tr. p. 168, lines 18-21.)

[5] Kadeem testified that he shot Mr. Patel because he thought he was reaching for a gun. (tr. tr. p. 199, lines18-22.)

males "frantically" running out of the front entrance, with one of them carrying what appeared to be a long rifle. As they ran around the corner the individual carrying the gun handed it off to the other individual. (Tr. tr. p. 97, line 18 – p 98, line 23.) Assuming the two individuals had just robbed the store, the officers activated their siren and blue lights and pursued them. The two individuals ran together down Pursley Street North and then cut between a house, splitting up. (Tr. tr. p. 98, line 21 – p. 99, line 8.) The officers lost sight of them so they began to drive slowly around the area in an effort to find them. They eventually spotted one of the two individuals; they stopped their vehicle behind him and began to chase him on foot. (Tr. tr. p. 99, lines 11-23; p. 104, line 19 – p. 105, line 25.) They caught him in the yard of a house on Berry Street. (Tr. tr. p. 99, line 24 – p. 100 , line 2; p. 101, lines 16-25.) The individual they caught was Kadeem Sanders. When caught, Mr. Sanders was not wearing a shirt. (Tr. p. 102, lines 10-17.)

Responding to Officers Vandermolen and Sizemore's call about someone running from the store with a firearm, Officer Ashley Doster quickly went to the store. Her blue lights were activated, which resulted in her in-car camera recording the scene outside the store. (Tr. p. 108, line 9 – p. 109, line 15; p. 111, line 19 – p. 113, line 5.) When she arrived, a man inside the store waived her inside. (Tr. tr. p. 109, lines 16-19.) She entered the store and found Mr. Patel lying on the floor in a pool of blood, alive but badly hurt with what appeared to be gunshot wounds. Officer Doster called for an ambulance. (Tr. p. 109, line 25 – p. 110, lines 16.) When the police arrived, Mr. Patel tried to speak but could not

because he was having difficulty breathing and was having to breathe through his mouth. (Tr. p. 155, lines 8-15.) The ambulance came and transported him to an area near the stadium where a helicopter picked him up and flew him to the hospital. (Tr. tr. p. 155, lines 16-19.)

At approximately 11:00 p.m. on July 25, 2012, Officer Johanthan Moreno and Molly, a tracking dog, were called out to the 348 South Cherry Street. (Tr. p. 114, lines 8-18; p. 116, line 22-23; p. 119, lines 19-24.) Officer Moreno was told they were needed to track two suspects fleeing on foot. He met with Officers Vandermolen and Sizemore, who gave him a description of the two suspects, and told him they were fleeing on Pursley Street heading toward Stadium Street. (Tr. p. 120, lines 6-23.) Molly picked up a scent behind the store on Pursley Street that led them to 328 Pursley Street. When they reached the back yard of that residence, they located a rifle under some bushes behind an abandoned car. (Tr. p. 120, line 10 – p. 121, line 21; p. 122, lines 6-7.) Once someone from forensics came and secured the gun, Officer Moreno and Molly continued to track. They also found a red bandana inside a trash can at 333 Bynum Avenue; and, on the steps at the rear of the residence at 328 Berry Street, they located a black, long-sleeve t-shirt. (Tr. tr. p. 124, line 17 – p. 127, line 16; p. 128, lines 11-12.) They did not locate the second suspect. (Tr. tr. p. 127, lines 17-19.)

While the police are looking for the suspects, Romailo was coming back or had come back from Applebee's and was near Chicken King. He saw all of the cars so he started walking towards the store, but the police told him that he could not come on the premises so he walked with his sister toward Teague's Pawn

Shop. (Tr. tr. p. 135, lines 4-11; p. 135, line 25 – p. 136, line 7.) At the time, Romailo had taken his blue shirt off and it was tied around his neck. (Tr. tr. p. 135, lines 12-24.) A police officer drove by, turned around, and stopped Romailo. He detained him in handcuffs until they could see if the dogs picked up his scent, but they did not.[6] (Tr. tr. p. 136, lines 7-11.)

In processing the store, Officer Kevin Sullivan, a forensics officer, located three spent .22 shell casings. (Tr. tr. p. 172, lines 11-19; p. 174, line 3 – p. 175, line 1). He also located and documented holes in the cash register made by projectiles fired from a firearm. (Tr. p. 176, lines 15-18; 179, lines 12-17.) He also took possession of the rifle found away from the scene. (Tr. p. 173, lines 20-21.)

After being arrested shortly after 11:00 p.m. on July 25, 2012, Kadeem Sanders lied and denied any involvement in the crimes. (Tr. tr. p. 193, line 12-18.)

Six days later, on July 31, Detective Cantey came to talk to Mr. Patel at his house. (Tr. tr. p. 155, line 20-23; p. 169, lines 5-7.) At that time, Mr. Patel was on medication, including pain killers. (Tr. tr. p. 170, lines 10-22.) He was not asked for a description of the individuals who came into rob his store, but just to tell them what happened. Mr. Patel then told him that he knew the guy who had tried to come behind the counter.[7] (Tr. tr. p. 155, line 24 – p. 156, line 7; p. 169, lines 8-11; p. 170, lines 3-9.) Detective Cantey showed him a photographic line-up. Without Detective Cantey telling him who to pick, Mr. Patel picked out a

[6] Appellant objected to this testimony, but the trial court never ruled on the objection. (Tr. tr. p. 136, lines 12-13.)

[7] On cross-examination, Mr. Patel testified that he did not remember if the people in the other photographs were customers. (Tr. tr. p. 169, lines 12-18.)

photo of Appellant and identified him as the individual who tried to come behind the counter while the other guy stood by the front door; he initialed Appellant's photo to indicate his selection. His identification was based on what had happened that night. (Tr. p. 156, line 10 – p. 157, line 23; p. 169, lines 19-21State's Exhibit 2.) Mr. Patel also signed a form when he made the identification of Appellant's photo in the line-up. (Tr. tr. p. 158, lines 9-19; State's Exhibit 3.)

From the witness stand, Mr. Patel identified Appellant as the guy that tried to come behind the counter on the night of July 25, 2012, and told Mr. Patel to give him the money. (Tr. tr. p. 159, lines13-19.)

Mr. Patel's store had security cameras that produce video from different angles within and without the store; the cameras do not record sound. They were working on the night of July 25, 2012, and show what transpired in the store and, as the two individuals were leaving, outside the store. (Tr. p. 162, lines 1-24; p. 163, line 2- p. 165, line 17; State's Exhibit 1/6.)

Approximately two weeks before the trial, Romailo said that he thought that Kadeem Sanders was the instigator of the crime. (Tr. tr. p. 140, lines 19 p. 141, line 2.)

Kadeem testified for the State at Appellant's trial and implicated both himself and Appellant. At the end of the State's direct examination of him, he testified that he was receiving a deal in return for testifying truthfully at Appellant's trial. (Tr. tr. p. 190, line 3 – p. 191, line 18.) The defense questioned him about the different "lies" he had told to the police (Tr. tr. p. 913, line 16 – p. 198, line 21) and a letter he wrote to Appellant in which he says he gave himself up, because the police told him they would drop the charges against Appellant, and he told the police that he "got

[Appellant] high and drink" and made Appellant go into the store. (Tr. tr. p. 205, line 1 – p. 206, line 1.)

I.

The trial court properly admitted evidence of Mr. Patel's out-of-court and in-court identifications of Appellant inasmuch as the identification procedures were not unduly suggestive. (Issue I)

IN CAMERA HEARING

After the jury had been selected, but before it had been sworn, the trial court held an in camera hearing to determine the admissibility of the identification evidence of the victim, Mr. Patel. During that hearing, Mr. Patel testified he was from India and had come to the United States when he was 9 or 10 years old. (Tr. tr. p. 43, lines 5-19.) Once here, he attended school, worked, and attended one year of college. (Tr. tr. p. 43, lines 10-23.) Mr. Patel owns Cherry Road Discount Food and Beverage, a convenience store, with his mother. They have had it for 16 years and, during that time, have seen a lot of the same customers and some of their customers have grown up over the years. (Tr. tr. p. 28, lines 12-21; p. 29, lines 2-10.)

On Wednesday, July 25, 2012, Mr. Patel was working and planning on closing the store at 11:00 p.m. (Tr. tr. p. 27, line 22 – p. 29, line 14.) At approximately eight or 10 minutes before 11:00 p.m., when only Mr. Patel and his cousin were in the store,[8] two teenagers rushed in. (Tr. tr. p. 29, lines 15-23; p. 30, lines 5-7; p. 36, lines 17-24.) Mr. Patel was not frightened when they came in because it was not unusual for folks to run into the store. (Tr. tr. p. 29, line 24 – p. 30, line 11.) When they came in, they separated, with one remaining near the front door and one coming around to the swinging door to the area behind the

[8] Mr. Patel's cousin was in a back room of the store. (Tr. tr. p. 36, lines 20-22.)

cash register. (Tr. tr. p. 30, line 12 – p. 31, line 1.) Mr. Patel focused on the one approaching the door to the area behind the cash register who was trying to come in the swinging counter door. (Tr. tr. p. 31, lines 2-16; p. 37, lines 15 – p. 38, line 24.) Getting up from his seat, Mr. Patel told him to "get out and move back." The guy did, but then came back toward Mr. Patel and the swinging door. (Tr. tr. p. 31, lines 13-17; p. 32, lines 15-24.) The guy near the swinging door then told Mr. Patel to "give me the money," causing Mr. Patel to become concerned. (Tr. tr. p. 31, lines 6-17; p. 32, line 22 – p. 33, line 3.)

Mr. Patel, who has good eyesight, was able to see most of the face of the guy near the counter door. He could not see the guy's entire face because he was wearing a hoodie, but he could see half or almost all of it and the guy was looking at Mr. Patel. (Tr. tr. p. 31, line 25 – p. 32, line 14; p. 40, line 25 – p. 41, line 12.) Mr. Patel recognized him as a customer, someone who had been in the store several times. (Tr. tr. p. 32, lines 4-8.) When asked about the clothing and shoes the guy trying to get through the counter door was wearing, Mr. Patel said "I didn't watch all that. I was scared. I was watching him, not the shoes and pants." (Tr. tr. p. 47, lines 12-13.)

Mr. Patel testified during the hearing that, while he knew there was a teenager near the door, he was "concentrating mainly" on the one trying to get behind the counter where he was. (Tr. p. 33, lines 4-13; p. 37, line 15 – p. 38, line 24.) It all happened very fast – he thinks maybe 5-9 seconds – and he did not remember looking at the teenager at the door and he did not see the gun, but at some point he did look in the direction of the other teenager when he was trying

to hit the safety button. (Tr. tr. p. 37, line 8 – p. 38, line 24.) The teenager near the door then shot Mr. Patel. (Tr. tr. p. 37, line 6; p. 39, lines 5-14.)

Six days after the crime, on July 31, 2012, after Mr. Patel was released from the hospital, Detective Cantey went to Mr. Patel's house to show him a photo line-up. (Tr. tr. p. 33, lines 16-20; p. 51, lines 4-6; p. 53, line 23 – p. 54, line 1.) Detective Cantey testified that he talked to Mr. Patel then about the crime, but that he did not ask for a physical description of the suspects. He said Mr. Patel told him that he recognized the person trying to come behind the counter and telling him to give him the money as a frequent customer. (Tr. tr. p. 51, line 10 – p. 52, line 2; p. 52, line 25 – p. 53, line 6; p. 54, lines 2-6.) When he showed Mr. Patel the lineup, Detective Cantey told Mr. Patel that the person may or may not be in it. He also told Mr. Patel to think of what person looked like that night and compare to each individual photo in the line-up rather than compare each of the photos to the others. (Tr. tr. p. 52, lines 4-10; p 53, lines 7-10.)

When shown the photographic line-up, Mr. Patel said the detective did not tell him to pick somebody out, but Mr. Patel picked out a photo of the person who tried to get behind the counter on July 25th and who had been a customer. Mr. Patel wrote his initials next to the photo in the line-up that he identified. (Tr. tr. p. 33, line 16 – p. 34, line 12; State's Exhibit 2.) Mr. Patel did not remember if any of the persons in the other photos were, or recognize any as, store customers. (Tr. tr. p. 39, line 15 – p. 40, line 20.)

Mr. Patel testified that he looked online at a newspaper article on August 3, 2012, and saw a photograph of Appellant and, for the first time, learned his

name. (Tr. tr. p. 41, line 10 – p. 42, line 4.)

On August 10, Mr. Patel gave police a written statement in which he said that the person who tried to come around the counter was a customer. (Tr. tr. p. 42, line 5 – p. 43, line 1.)

Approximately a month after the attempted armed robbery and shooting, Mr. Patel watched the video from the store's security cameras. (Tr. p. 34, line 20 – p. 35, line 20; p. 46, lines 20-23.)

Mr. Patel identified Appellant in the courtroom as the guy who tried to come behind the counter on July 25, 2012. (Tr. tr. p. 34, lines 13-18.) The defense cross-examined Mr. Patel about his in-court identification of Appellant as follows.

> Q. Of course nobody else was sitting there with me is it?
> A. No. I knew the customer. I knew what happened. So if it's fifty people, I can point him.

(Tr. tr. p. 48, lines 20-22.)

At the conclusion of the *in camera* hearing, Appellant moved to suppress Mr. Patel's identification of Appellant. Addressing the five factors from *Neil v. Biggers*, 409 U.S. 188 (1972), Appellant argued that (1) Mr. Patel did not have an adequate opportunity to view the perpetrators when the crime was committed because it only lasted seven seconds, it was a stressful and violent situation, and, even though Mr. Patel says he did not see the gun, the video showed him turned toward the shooter at the time of the crime so defense counsel did not know how he could have missed it; (2) Mr. Patel's degree of attention was not good because

he only had seven seconds at the most to view the perpetrators; and (3) Mr. Patel, who was under stress when the crime was being committed, did not provide any sort of description until after he saw a photograph of Appellant in a newspaper, the description of the one perpetrator's height he gave in court was inconsistent with Appellant's actual height, and he did not provide a description of the perpetrator's clothing. Appellant also argued that the probative value was far outweighed by the prejudicial effect,[9] and that the evidence of Mr. Patel's identification evidence is not the best evidence of who committed the crime, but rather than the security video of the crime was. (Tr. tr. p. 60, line 9 – p. 61, line 15.) Denying Appellant's motion to suppress, the trial court ruled the identification evidence was admissible.

> I'm not sure that – Well let me just start by saying, first, I find that the lineup that was shown to Mr. Patel, looks like on 7-31, is not unduly suggestive. In fact, I find it is not suggestive at all let alone unduly. All these young men or African Americans, short hair, they appear to very, very similar and I find that the lineup that he was shown was not suggestive at all let alone unduly suggestive, and all of my findings are based on what I consider or what are based on clear and convincing evidence.
>
> I find that the in court identification by Mr. Patel of Mr. Maldonado is admissible. It is not the results of the out of court identification procedure. I do not find the out of court identification procedure created a very substantial or any likelihood of irreparable misidentification. I find under the totality of the circumstances based on lighting, proximity to the witness to the defendant; the witness's opportunity to view the perpetrator, here

[9] The transcript actually has Appellant arguing that the prejudicial effect is outweighed by the probative value, but it is apparent that that was just a misstatement on defense counsel's part. (Tr. tr. p. 61, lines 9-14.)

> the defendant at the time of the crime. His degree of attention, he was like I said the proximity; they were almost face to face. This was someone he already knew.
>
> I find that by – Again I find that by clear and convincing evidence that the witness's identification was reliable and will be allowed to testify before the jury. And that's my finding as to the in court identification of Mr. Maldonado by the victim. All right.

(Tr. tr. p. 61, line 16 – p. 62, line17.)

Thereafter, in the presence of the jury, Mr. Patel and Detective Cantey testified as to Mr. Patel's out-of-court identification of Appellant and Mr. Patel made an in-court identification of Appellant. (See Statement of Facts, *supra.*)

ARGUMENT ON APPEAL

Appellant argues on appeal that the trial court erred in allowing evidence of the out-of-court and the in-court identification of Appellant by Mr. Patel because the out-of-court identification procedure was unduly suggestive due to the fact that Mr. Patel was in pain and on medication at the time it was made, and that the unduly suggestive out-of-court identification, when combined with Mr. Patel's subsequent viewing of a photograph of Appellant in the newspaper, tainted Mr. Patel's subsequent in-court identification.

The State vehemently disagrees with Appellant. The trial court's ruling allowing the identification evidence is supported both by the record and the law.

An identification procedure arranged by law enforcement that is unduly suggestive and conducive to irreparable mistaken identification deprives a defendant of due process of law. *State v. Liverman*, 398 S.C. 130, 138, 727

S.E.2d 422, 425 (2012); *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of reparable misidentification." *Id.*

In *Neil v. Biggers*, *supra*, the Supreme Court of the United States reviewed its prior opinions addressing the admissibility of eyewitness identification[10] and created a two-step analysis for determining whether due process requires the suppression of an eyewitness identification. First, the court must determine whether the identification resulted from unnecessary and unduly suggestive police procedures. *Biggers,* 409 U.S. at 198. See also *Manson v. Brathwaite*, 432 U.S. 98 (1977); *State v. Liverman*, 398 S.C. at 138, 727 S.E.2d at 425-426 (2012). If the answer to that question is "yes," then the court must proceed to the second step in the analysis to determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.* In this second step, the court is to, under the totality of the circumstances, consider the following five factors to assess the reliability of an otherwise unduly 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,

[10] Included in the cases reviewed by the Court in *Neil v. Biggers*, *supra*, was *Simmons v. U.S.*, 390 U.S. 377, 384 (1968), in which the Court had held that "each case must be considered on its own facts, and that convictions based on eye-witness identification at trial following a pretrial identification by photograph will be set aside on that ground if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

(4) the level of certainty demonstrated by the witness at the confrontation, and
(5) the length of time between the crime and the confrontation.

State v. Liverman, 398 S.C. at 138, 727 S.E.2d at 426, citing *Manson v. Brathwaite,* 432 U.S. at 114. The determination of the admissibility of eyewitness identification is to be made by the court during an *in camera* hearing. *State v. Liverman, supra.*

A. The Identification Procedure was not Unduly Suggestive

1. Out-of-court Identification

Following the mandate of *Neil v. Biggers, supra,* and its progeny, any challenge to Mr. Patel's identification of Appellant must begin with the out-of-court identification procedure utilized by law enforcement in this case. To resolve the first step of the analysis, the court is to decide whether something in the photographic line-up or the manner in which it was conducted would have directed the witness' attention to a particular photo included in the array. A review of the photographic line-up reveals that it consists of six similar photographs identical in format and content with young men of the same race, complexion, age group, with very similar hair styles (short, closely trimmed hair), facial features, and build/size. (State's Exhibit 2.) There is nothing about Appellant's photograph, which is number 4 in the line-up, that makes it stand out from the others. Moreover, the testimony of both Mr. Patel and Detective Cantey establish that the manner in which the photographic line-up was shown to or used by Mr. Patel was not suggestive. Mr. Patel was not told or encouraged, either directly or indirectly, to choose any particular photograph.

Moreover, neither the line-up itself nor the procedure used is impacted by Appellant's unsupported attack upon Mr. Patel's mental state at the time of the line-up. Appellant states in his brief that Mr. Patel was in a "groggy state" and under the influence of intoxicating substances (pain medication). (IBOA at 6–8). Despite these representations by Appellant, there is no evidence in the record that Mr. Patel was groggy or even under the undue influence of any medication at the time he identified Appellant from the line-up. In fact, Mr. Patel – in response to questioning by Appellant's trial counsel – said that the medicine did *not* make him groggy (Tr. tr. P. 45, lines 23-25) and did *not* affect him much.[11] (Tr. tr. p.

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[11] This line of questioning went as follows.

> Q. I can't find anything else where you talked to them before that so I'm asking you now if there is any –
>
> A. Yeah because you know I was not in good condition. It was a lot of pains and all that.
>
> Q. Yes, sir. Certainly, certainly. And when they came and talked to you, did they ask you how tall the people were?
>
> A. I don't remember.
>
> * * *
>
> Q. Okay. How much – Did the police ask you any of this information?
>
> A. I don't remember because, you know, I was in pain and, you know, I tried my best to give whatever they asked but I don't remember.
>
> Q. How long did the police stay there that day?
>
> A. They were there until they asked me everything but I was taking so high dose medicine.
>
> A. Let's a talk about that for a second. Not to belittle what happened to you, it was tragic. What kind of medication did they have you on?
>
> A. I don't remember the name of the medicine because they gave me a lot of different, different ones.
>
> Q. Make you sleep?
>
> A. I tried to but I can't. My body didn't work with the medicine so I didn't –
>
> Q. Make you groggy?
>
> A. Tried to make you groggy but it didn't work on

46, lines 11-12.) However, even if there were such evidence, it would be irrelevant to the determination of whether the identification procedure was unduly suggestive and go only to Mr. Patel's credibility before the jury and the weight to be given his testimony by the jury. See *Commonwealth v. Fulmore*, 25 A.3d 340, 348 (Pa. Super. 2011) ("[the fact that the identification took place in a hospital and the victim was on pain medication] is irrelevant to the question of whether the photo array was unduly suggestive. Rather, we find that the victim's hospitalization or medication goes to credibility of the witness and the weight to be accorded his testimony not the suggestiveness of the procedure."); *see also Commonwealth v. Watson*, 455 Mass. 246, 253-254, 915 N.E.2d 1052, 1059 (2009) (knowing that hospitalized victim was under the influence of pain

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> my body. None of the medicine.
> Q. Well the reason I ask you, you say you were taking medicine and your memory is not that good about what they asked you.
> A. Yeah, buy you know I was scared too because what happened to me it scared me like hell because I never seen in my life like that.
> Q. Yes, sir. You were stressed at that time.
> A. Yeah.
> Q. Affected by the medicine?
> A. Not much.
> Q. Well you just testified you couldn't remember because you were on medication.
> A. Yeah, I was on medication too. They were trying to give me a lot of different ones.
> Q. Well were you taking them like the doctor said to?
> A. The doctor told me to take it but it didn't work. That's why we went a couple of times to the hospital back.

(Tr. tr. p. 44, line 19 – p. 46, line 19). In context, it appears as if Mr. Patel was testifying that the medicine did not affect him at the time of his meeting with the police but that he, at the time of trial, could not remember what the police had asked him and exactly what was said during that July 31 meeting in his house because of the stress and pain he had been in.

Moreover, Detective Cantey testified on cross-examination during the hearing that Mr. Patel was in pain, but was not disoriented. (Tr. tr. p. 52, lines 22-24.)

medication such that he was "groggy" and "lethargic" when the photographic array was administered, officer's decision to proceed with identification procedure did not render it impermissibly suggestive where witness understood officer, felt up to viewing the photographs, and indicated a desire to proceed with the identification).

The record and law supports the trial court's determination that neither the photographic line-up itself nor the manner in which it was conducted were suggestive, much less unduly suggestive. Therefore, the trial court properly admitted the evidence of the out-of-court identification.

2. In-Court Identification

In his attack upon the admissibility of Mr. Patel's in-court identification of Appellant, Appellant relies upon two points: (1), even if Mr. Patel was "no longer taking pain medication and groggy in subsequent interviews or identifications, the taint of unreliability lingered" such that all identification evidence after Mr. Patel's initial identification is unreliable; and (2) between Mr. Patel's out-of-court identification of Appellant and his in-court identification of Appellant, Mr. Patel saw Appellant's photograph in the newspaper on August 3, 2012, and that viewing further tainted the subsequent in-court identification.

Appellant's argument about any lingering taint of unreliability from the fact that he was in pain and taking medication when he made the out-of-court identification is without merit. As discussed thoroughly above,

- the out-of-court identification was not unduly suggestive so it could not have tainted the subsequent in-court identification;

- Mr. Patel was not disoriented at the time of the photographic line-up; and
- that Mr. Patel was in pain and taking medication at the time of the photographic line-up is irrelevant to the admissibility of the out-of-court identification and the subsequent in-court identification. Instead, those are facts the jury may consider when deciding Mr. Patel's credibility and the weight to be given the evidence of the out-of-court identification.

Appellant's second attack upon the in-court identification based upon the intervening viewing of a photograph in a newspaper's online article about the crime is likewise without merit. As this Court noted in *State v. Tisdale*, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000), media identifications of an accused do not constitute identification procedures requiring analysis under *Neil v. Biggers, supra,* and its progeny. And, while this Court noted that other courts that have reached this conclusion have also recognized the possibility of a case "where the mind of a witness is so clouded by suggestions from nongovernment sources that a conviction based principally on the testimony of that witness violates due process," *State v. Tisdale*, 338 S.C. at 613, 527 S.E.2d at 392, this is not such a case. The media identification here was simply the viewing of a photograph of Appellant in an online newspaper article about the crime approximately nine days after Mr. Patel's identification of Appellant in the photographic line-up and over seven months before the in-court identification at trial.

It is clear from a review of Mr. Patel's testimony that his in-court

identification was based upon his observations of the individual who tried to come behind the counter on July 25th during the crime. (Tr. tr. p. 34, lines 13-18; p. 48, lines 20-22.) The record and law supports the trial court's determination that the in-court identification procedure was not based on any out-of-court identification. Therefore, the trial court properly admitted the evidence of the in-court identification.

B. Even if the Identification Procedure was Unduly Suggestive, the Identifications were So Reliable that No Substantial Likelihood of Misidentification Existed

Assuming *arguendo* this Court were to find Mr. Patel's identifications of Appellant did result from unnecessary and unduly suggestive police procedures such that it must proceed to the second step in the *Neil v. Biggers*, *supra*, analysis, the State maintains both of the identifications was nevertheless so reliable that no substantial likelihood of misidentification existed.

As stated earlier, in assessing the reliability of the identifications, there are five factors that must be considered under the totality of the circumstances.

> (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.

State v. Liverman, 398 S.C. at 138, 727 S.E.2d at 426. At trial, Appellant only challenged the reliability of the identifications on the basis of the first three factors above – opportunity to view the perpetrator, the witness's degree of

attention, and the accuracy of the witness' prior description. (Tr. tr. p. 60, line 9 – p. 61, line 15). On appeal, he is challenging the reliability of the identifications on the basis of the first four bases above, including for the first time on appeal the factor dealing with the level of certainty demonstrated by the witness at the confrontation.[12] (IBOA at 8-10.)

Under the well established rules of issue preservation and appellate procedure, a party can neither raise an issue for the first time on appeal nor raise one ground below and another on appeal. *State v. Brockmeyer*, 406 S.C. 324, 350, 751 S.E.2d 645, 659 (2013); *State v. Sterling*, 396 S.C. 599, 617-618, 723 S.E.2d 176 (2012); *State v. Baker*, 390 56, 700 S.E.2d 440 (Ct. App. 2010). Inasmuch as Appellant at trial only challenged the reliability of the identifications on the basis of the first three of the five factors above – opportunity to view the perpetrator, the witness's degree of attention, and the accuracy of the witness' prior description – that is all that is properly before this Court.

Turning to the three factors, it is clear that Mr. Patel only had a brief time to view the perpetrators. A review of video from the store's security cameras (State's Exhibit 1/6) reveal that the event, from the moment the perpetrators opened the door to when Mr. Patel was shot, lasted between 13 and 14 seconds long. During that time, as Mr. Patel testified and the security video shows, Mr. Patel was very close[13] to the perpetrator trying to come through the swinging

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[12] In his appellate brief, Appellant concedes that the fifth factor concerning the time between the crime and identification "does not weigh against the reliability of Patel's identification." (IBOA at 10.)

[13] The Supreme Court's opinion in *State v. Moore*, 334 S.C. 411, 421, 513 S.E.2d 626, 631 (1999), *affirmed in part and reversed in part by*, *State v. Moore*, 343 S.C.

counter door and that his attention was focused on that individual. Thus, while it was a brief time, it was sufficient. *See Coleman v. Alabama*, 399 U.S. 1 (1970) (identification procedure not impermissibly suggestive; victim of shooting able to see perpetrators in headlights of passing car for only a few seconds).

The second factor is determining the reliability of an identification resulting from an unduly suggestive procedure is the witness's degree of attention. In this case, Mr. Patel testified repeatedly that he was focused on the individual trying to come through the door to the counter. The security video supports this as well – except for a glance or two in the direction of the individual near the door, Mr. Patel is looking at and interacting with the individual at the counter door (State's Exhibit 1/6.) In addition to this evidence, there exists the inference or presumption that "a person in fear of his life presumably has a more acute degree of attention to his surroundings than a mere passerby." *State v. Washington*, 323 S.C. 106, 111, 473 S.E.2d 479, 481 (Ct. App. 1996). See also *State v. Ford*, 278 S.C. 384, 386, 296 S.E.2d 866, 867 (1982).

The third factor is the accuracy of the witness's prior description of the perpetrator. In this case, we do not have a description provided by Mr. Patel because when law enforcement first became involved, he was badly injured (two gunshot wounds, including one to his cheek); he was soon thereafter being treated at the scene by EMS; and later he was removed from the scene for transport to the hospital. Law enforcement really did not have a chance to talk to Mr. Patel that night and he did not really have a chance to talk to them. The record establishes

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282, 540 S.E.2d 445 (2000), relied upon by Appellant is factually distinguishable in that, while the witness in that case only observed the perpetrator for a very brief period of time, it was "at some distance."

that no one ever asked Mr. Patel for a description of the perpetrators before he was shown the photographic line-up. While Mr. Patel testified in response to defense cross-examination during the in camera hearing that he had told the officer on the day he was shown the line-up that the perpetrator who tried to come in through the counter door was wearing a hoodie, Detective Cantey said he did not get a description from him. (Tr. tr. p. 44, line 7 – p. 46, line 19; p. 52, line 25 – p. 53, line 16.) Mr. Patel's testimony about the height of the perpetrator who tried to come in through the counter door and whether the perpetrator was wearing glasses was not testimony about what Mr. Patel had told the police. It was simply information provided by Mr. Patel during the hearing in an effort to answer the cross-examination questions of defense counsel. (Tr. tr. p. 45, line 5-6; p. 46, line 24 – p. 47, line 8.) So that information is not really a description for purposes of *Neil v. Biggers, supra.* Moreover, Appellant's challenge to Mr. Patel's testimony about his estimate of the perpetrator's height was based upon his trial counsel's unsworn statement as to Appellant's actual height. As such, it is improper. See *State v. Rogers*, 263 S.C. 373, 210 S.E.2d 604 (1974).

In addition to the above considerations, courts have held that the reliability of eyewitness identification is actually bolstered when the witness knows the person who committed the crime. See *State v. Washington*, 323 S.C. at 112, 473 S.E.2d at 482 (victim's identification was reliable because she had seen defendant before, knew his nickname, and had opportunity to observe him as last customer in store night of crime); *State v. Hoopingarner,* 845 S.W.2d 89, 93 (Mo. Ct. App. 1993) ("An additional circumstance supporting reliability [of an

eyewitness identification] arises where the witness already knows the defendant and recognizes him at the scene of the crime."); *State v. Butler,* 331 N.C. 227, 237, 415 S.E.2d 719, 724 (1992) ("The danger that a suggestive photographic line-up will result in a misidentification is much greater when the witness has never seen the perpetrator prior to the time of the crime.") The fact that Mr. Patel recognized the perpetrator trying to come behind the cash register as someone he knew by sight, but not by name, because he was a customer of the store, bolsters the reliability of his identification.

Therefore, even assuming *arguendo* this Court were to find Mr. Patel's identifications of Appellant did result from unnecessary and unduly suggestive police procedures, it can only conclude that both of the identifications was nevertheless so reliable that no substantial likelihood of misidentification existed.

II.

Appellant has not properly preserved any issue regarding the trial court's exclusion of testimony that Appellant's statements to law enforcement were consistent. Even if this issue is properly before the court, the trial court properly sustained the State's objections to Appellant's attempt to have a police officer testify that the statements Appellant gave to the police were consistent with each other because such testimony was improper self-serving hearsay. (Issue II)

During the presentation of the defense's case, Appellant called Detective Cantey to the stand. He testified that he was a detective with the Rock Hill Police Department and was in charge of the investigation in this case. (Tr. tr. p. 211, lines 1-6.) Upon learning that there were two suspects in the area, the police tried to set up a perimeter and called a K-9 unit out. (Tr. tr. p. 211, lines 14-24.) He talked to Appellant the day after his arrest, on August 2 or 3, 2012. (Tr. tr. p. 212, lines 14-19.) When defense counsel asked Detective Cantey if Appellant had maintained the same story, the State objected on the ground of hearsay. (Tr. tr. p. 212, lines 20-23.) The jury was sent out and an in camera hearing was held. (Tr. tr. p. 212, line 25 – p. 213, line 2.)

During the *in camera* hearing, the defense first argued that the statements made by Appellant to law enforcement were statements made by a party-opponent under Rule 801 (d)(2), SCRE, and, therefore, not hearsay. The State contended that a party's own statements would not be the statements of a "party-opponent" under the Rule, but would be inadmissible self-serving hearsay. (Tr. tr. p. 213,

line 3 – p. 214, line 2.) The trial court asked the defense to make a proffer, and they did so as follows.

> Q. He told you he wasn't there that night. Correct, sir?
> A. I'm sorry. I misunderstood you.
> * * *
> A. He told me what?
> Q. When you interviewed Mr. Maldonado shortly after this occurred, he told you he was not there. Correct? At the store.
> A. I interviewed Mr. Maldonado after his arrest and he told me that he was not there the night of the shooting.
> Q. Okay. He told you he was in the Innsbook Apartments. Correct?
> A. In the playground there. Yes, sir.
> Q. Yes, sir. And told you he were there with two guys named Marcus and –
> A. I think it was David.
> Q. Marcus and David?
> A. Yes, sir.
> Q. Okay. And as a matter of fact he firmly maintained that story with a subsequent interview with another detective. Correct?
> A. Yes, sir.

(Tr. tr. p. 214, line 9 – p. 215, line 6.) At the conclusion of the proffer, the State argued that the proffered testimony did not fall under Rule 801(d)(2), and that there was no exception to the hearsay rule that would allow a nontestifying defendant to introduce his own self-serving statements containing an alibi. (Tr. tr. p. 215, lines 11-23.) The State then provided the trial court and the defense with copies of *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000), and *State v. Atchison*, 268 S.C. 588, 235 S.E.2d 294 (1977). In response to the State's position, Appellant argued that the testimony was admissible under the co-conspirator exception to the hearsay rule because they were made in furtherance

of or in the course of a conspiracy. (Tr. tr. p. 216, line 23 – p. 217, line 7.) The trial court sustained the State's objection, referring in its ruling to both the *Atchison* and *Terry* decisions. (Tr. tr. p. 217, lines 19-24.)

Appellant then requested that he be allowed to ask Detective Cantey, in the presence of the jury, if Appellant's statements to law enforcement had been consistent. He argued that since the co-defendant had given multiple versions of what happened that night, he should be able to introduce evidence that Appellant's statements had been consistent in an effort to attack the credibility of the co-defendant. (Tr. p. 219, lines 10 – 23.) The trial court denied the request finding that it was an attempt by the defense to get in "through the back door" that Appellant's statements have been consistently exculpatory. (Tr. tr. p. 219, line 18 – p. 220, line 7.)

Thereafter, when the jury returned to the courtroom, Appellant had Detective Cantey confirm that there was no forensic evidence linking Appellant to the crime. (Tr. tr. p. 221, lines 1-10.)

On appeal, Appellant argues that the trial court erred in not allowing him to present evidence that the statements he made to police were consistent because the evidence was not hearsay since it was not offered to prove the truth of the contents of the statement.

Respondent first notes that this issue is not preserved for appeal. At trial, appellant moved to be allowed to present evidence that Appellant's statements to law enforcement were consistent; the only argument advanced in support of this request was that Appellant should be allowed to present evidence that his

statements had been consistent since the record had established that the cooperating co-defendant had given several inconsistent statements and the admission of this evidence would purportedly go the co-defendant's credibility.[14] For the first time on appeal, Appellant has argued that the testimony that his statements were consistent is not hearsay because the testimony was not offered to prove the truth of those statements.

As stated in Argument I, the well established rules of issue preservation and appellate procedure preclude a party from raising an issue for the first time on appeal and from raising one ground below and another on appeal. *State v. Brockmeyer, supra*; *State v. Sterling, supra*; *State v. Baker, supra.* Inasmuch as Appellant has changed the ground of his argument, he has failed to preserve or present any issue for this Court to review. *Id.*

However, assuming *arguendo*, this Court finds that Appellant has properly preserved and presented his challenge to the trial court's ruling excluding the evidence of his statements' consistency he proffered for the purpose of attacking the co-defendant's testimony, his argument is without merit. There was no error in the trial court's ruling.

In criminal cases, this Court reviews errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Wilson,* 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001); *State v. Nelson*, 380 S.C. 226, 228-229, 669 S.E.2d 595, 596 (Ct. App. 2008). The admission of evidence is within

[14] Appellant initially attempted to admit the actual statements he made, but the trial court sustained the State's objection. (Tr. tr. p. 213, line 3 – p. 214, line 2; (Tr. tr. p. 216, line 23 – p. 217, line 24.) Appellant has not appealed that ruling, but instead only appealed the subsequent ruling disallowing his questioning of Detective Cantey as to whether his statements were consistent.

the sound discretion of the trial court, whose exercise of such will not be disturbed on appeal absent an abuse of that discretion. *State v. Nelson, supra*; *State v. Pittman,* 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007). To constitute an abuse of discretion, the conclusions of the trial court must lack evidentiary support or be controlled by an error of law. *Id.*

Hearsay is defined as is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Rule 801 further defines a "statement" as either an oral or written assertion, or nonverbal conduct of a person, if it is intended by the person as an assertion. Rule 801 (a).

It is well established that a defendant cannot introduce his own self-serving hearsay statements. *State v. Sweet*, 270, S.C. 97, 100, 240 S.E.2d 648, 649 (1978); *State v. Atchison*, 268 S.C. at 594-595, 235 S.E.2d at 297.

> [A] defendant cannot introduce in his defense his own statements made to others.

State v. Adams, 68 S.C. 421, 47 S.E. 676, 677 (1904).

The trial court properly excluded the proffered evidence for two reasons, one addressed by the trial court and one not addressed, but supported by the record. While the trial court did not address the relevance of the proffered evidence, it is clear that the proffered evidence did not go to Kadeem's credibility (it did not, as required by Rule 401, SCRE, make Kadeem's credibility any more or less certain). Because it was simply not relevant for its proffered purpose, it was properly excludable.

Moreover, despite Appellant's assertions to the contrary, having a witness

attest to the consistency of Appellant's statements does go the content of the statements. And, because the label of "consistent" implicitly reflects upon the content of the statements, the evidence was clearly being offered for the truth of the matter asserted. The fact that Appellant was not seeking the admission of the statements themselves does not impact this conclusion. This proffered evidence was the functional equivalent of hearsay, which the trial court properly excluded as self-serving.[15] *See State v. Sweet, supra; State v. Atchinson, supra; State v. Adams, supra.*

[15] The trial court also found that admitting evidence of the consistency of the statements could only have been construed by the jury to mean that Appellant had consistently given exculpatory statements. Such evidence would have been much more likely to result in the bolstering of Appellant's credibility without him having to take the witness stand and be subject to cross-examination by the state. That clearly would have been improper.

III.

By failing to include a ground of objection, Appellant failed to preserve any challenge to the qualification of Officer Moreno as an expert in dog tracking. If the issue is properly before this Court, the trial court did not err in qualifying Officer Moreno as an expert, and, if there were error, it was harmless beyond a reasonable doubt. (Issue III)

The State called Officer Johathan Moreno, a K-9 Officer and canine handler with the Rock Hill Police Department, to the stand. (Tr. tr. p. 114, lines 5-13.) He testified that he had been qualified in a court of record as an expert tracking dog handler (Tr. tr. p. 114, lines 14-16), and also that he had some experience and training in tracking with a canine. (Tr. tr. p. 114, lines 17-19). He explained that he started his training in handling a tracking dog in 2011, when he was sent to a week-long handler's school in Kings Mountain where he trained with a variety of agencies from across the east coast. Officer Moreno also trains with his canine sixteen hours a month (four hours a week), and they respond to call outs such as in this case where the canine is used to apprehend suspects. The canine he works with, Molly, is used only for tracking people. (Tr. tr. p. 115, lines 4-14.) In addition to the monthly trainings with his dog, he has done "real life, real crime" tracks with her. In some of those cases, they were successful in tracking down a suspect and in others they find things that suspects discard as they are running away. (Tr. tr. p. 115, line 15 – p. 116, line 1.) The State offered Officer Moreno as an expert tracking dog handler. (Tr. p. 116, lines 2-3.) Appellant then asked Officer Moreno how many suspects had he run down prior

to the events in this case in July 2012; Officer Moreno replied he had run down two by July 2012. (Tr. p. 116, lines 9-15). Appellant then told the trial court he did not think Officer Moreno was qualified, but the trial court ruled against him and qualified him as a canine handler. (Tr. tr. p. 116, lines 16-18.)

After being qualified as an expert in dog tracking, Officer Moreno testified that he and Molly were called out to 348 South Cherry Street at approximately 11:00 p.m. on July 25, 2012. (Tr. p. 116, line 22-23; p. 119, lines 19-24.) Officer Moreno was told they were needed to track two suspects fleeing on foot. He met with Officers Vandermolen and Sizemore, who gave him a description of the two suspects, and told him they were last seen running on Pursley Street heading toward Stadium Street. (Tr. p. 120, lines 6-23.) Molly picked up a scent behind the store on Pursley Street that led them to 328 Pursley Street. When they reached the back yard of that residence, they located a rifle under some bushes behind an abandoned car. (Tr. p. 120, line 10 – p. 121, line 21; p. 122, lines 6-7.) Once someone from forensics came and secured the gun, Officer Moreno and Molly continued to track. They also found a red bandana inside a trash can at 333 Bynum Avenue, and, on the steps at the rear of the residence at 328 Berry Street, they located a black, long-sleeve t-shirt. (Tr. tr. p. 124, line 17 – p. 127, line 16; p. 128, lines 11-12.) They did not locate the second suspect. (Tr. tr. p. 127, lines 17-19.)

On appeal, Appellant argues the trial court erred in qualifying Officer Moreno as an expert in canine tracking because he had only been working as a canine handler for approximately a year before the crimes in this case, he and his

canine had only run down two suspects as of July 2012, and no evidence had been presented as to whether the canine was a breed characterized by an acute sense of smell or any other indicia of her reliability. (IBOA at 13.)

The State first maintains that Appellant has not preserved any issue for appeal. Appellant's objection at trial was a general one – "Your Honor, I submit he is not qualified." (Tr. tr. p. 116, line 16.) Because he did not state any grounds for his objection, he failed to preserve any issue for appeal. See *State v. Byers*, 392 S.C. 438, 445-446, 710 S.E.2d 55, 58-59 (2011) (to preserve error for appellate review, party must make contemporaneous objection on a specific ground(s)).

However, if this Court were to find the issue preserved for appeal, Respondent disagrees with Appellant's assertion of error.

There are six prerequisites to laying a sufficient foundation for the admission of dog tracking evidence in the state courts of South Carolina:

> (1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702, SCRE;
>
> (2) the evidence shows the dog is of a breed characterized by an acute power of scent;
>
> (3) the dog has been trained to follow a trail by scent;
>
> (4) by experience the dog is found to be reliable;
>
> (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and
>
> (6) the trail was not otherwise contaminated.

State v. White, 382 S.C. 265, 272, 676 S.E.2d 684, 687 (2009).

The first prerequisite is that the dog handler satisfies the qualifications of

an expert under Rule 702, SCRE. That rule provides that a witness may qualify as an expert by knowledge, skill, experience, training, or education. *Id.*

> The qualification of an expert witness and the admissibility of the expert's testimony are matters largely within the trial court's discretion. To present expert testimony, a party must show the witness possesses through either study or experience the knowledge or skill in a business, profession, or science making him or her better qualified than the jury to form an opinion on the particular subject in question.

(Citation omitted.) *State v. Harris*, 318 S.C. 178, 181, 456 S.E.2d 433, 435 (Ct. App. 1995). See also *State v. Goode,* 305 S.C. 176, 178, 406 S.E.2d 391, 393 (Ct. App. 1991) (no abuse of discretion in qualifying witness as expert as long as witness has, by study or practical experience, such knowledge of subject matter of testimony as would allow him to guide and assist jury in resolving factual issue that is beyond scope of jury's good judgment and common knowledge). Here, Officer Moreno had gone through a week-long training, worked with his canine four hours a week on training exercise, had been working as a tracking dog handler for about a year (since sometime in 2011) when the tracking in this case occurred on July 25, 2012, and had worked two call outs with his canine by July 25, 2012. His training and experience in the area of dog tracking clearly made him better qualified than the jury to form an opinion on the particular subject in question. The first prerequisite of *State v. White*, *supra*, was satisfied.

The second prerequisite is the evidence shows the dog is of a breed characterized by an acute power of scent. In this case, there was no testimony of canine Molly's breed (a photograph of Molly was introduced as State's Exhibit

14). However, there was evidence of the selection process for a tracking dog that Molly successfully completed – the testing from any early age, through play, to determine whether a dog has a good enough sense of smell to be a tracker. (Tr. tr. p. 117, lines 9-24.) The State contends that this is sufficient to satisfy the second prerequisite of *State v. White*, *supra*.[16]

There was sufficient evidence presented to establish both prerequisites three and four. Officer Moreno testified in some detail as to the training of Molly to follow scent and track people. He also testified that Molly had proved to be reliable. The fact that she had not had as many opportunities to track is a matter that goes not to the qualification of Officer Moreno as an expert, but to the jury's determination of his credibility and the weight to be given to his evidence. Moreover, Appellant thoroughly cross-examined Officer Moreno about Molly's limited "real life" tracking experience.

Prerequisites five and six relate to the tracking in the instant case. The evidence establishes that canine Molly was put on the track the two suspects were believed to have taken within a short period of time. While we do not know when they began the actual tracking, the record establishes that they were called out at around 11:00 p.m., minutes after the crimes occurred. Moreover, there is no evidence that the trail was otherwise contaminated. The State contends that the evidence was sufficient to satisfy these final two prerequisites of *State v. White*, *supra*.

Inasmuch as the prerequisites set out in *White* were satisfied, the trial court

[16] This should be especially so in those cases where the defense does not challenge this specific factor of expert qualification because, had an objection been raised, the State could have presented the evidence at that time.

properly qualified Officer Moreno as an expert in canine tracking.

Furthermore, even if there were error in Officer Moreno's qualification as an expert, it would be harmless beyond a reasonable doubt. There were two people involved in this crime, Appellant and Kadeem. Kadeem testified at trial that he bought the rifle used in the crimes for $30.00, that he and Appellant planned to rob Mr. Patel at gunpoint, that he was wearing a black shirt and a red bandana when they entered the store, that he was the one armed with the rifle during the crime, and that he shot Mr. Patel. The evidence recovered through the canine tracking was a rifle, black t-shirt, and red bandana, and tended to inculpate Kadeem and not Appellant. Moreover, there was overwhelming evidence of Appellant's guilt – the identification of Mr. Patel; the testimony of Romailo that on July 24, 2012, Appellant and Kadeem were planning to rob Mr. Patel's store; and the testimony of Kadeem that he and Appellant committed the robbery.

CONCLUSION

For the foregoing reasons and any other appearing in the Record on Appeal (as provided for in Rule 220, SCACR), this Court should affirm the judgment of the circuit court.

Respectfully submitted,

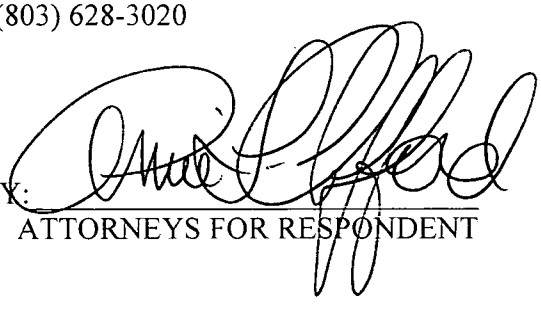
ALAN MCCRORY WILSON
Attorney General

AMIE L. CLIFFORD
Special Assistant Attorney General
aclifford@cpc.sc.gov

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

1675-1A York Highway
Moss Judicial Center
York, South Carolina 29745
(803) 628-3020



BY: _____
ATTORNEYS FOR RESPONDENT

March 20, 2014

Columbia, South Carolina

RECEIVED
MAR 20 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Honorable John C. Hayes, III, Circuit Court Judge
Trial Court Case No. 2012GS4603890
Appellate Case No. 2013-000684

The State of South Carolina,

Respondent,

v.

Kairon Brenton Maldonado,

Appellant.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Pages from Transcript of Proceedings ("-" to be read as "through"):

27-48	104-105	140-142	174-176	201-206
50-54	108-110	144-147	179	211-217
60-62	114-129	149-170	187-193	219-221
95-102	131-138	172	199	

2. State's Exhibits 1, 2, 3, 6, 7, 8, 9, 14, 21, and 22.

#182

I certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,

ALAN MCCRORY WILSON
Attorney General

AMIE L. CLIFFORD
Special Assistant Attorney General
aclifford@cpc.sc.gov

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Columbia, South Carolina 29211
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Solicitor, Sixteenth Judicial Circuit

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BY: _____
ATTORNEYS FOR RESPONDENT

#282

March 20, 2014

Columbia, South Carolina

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The State of South Carolina,

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Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal on Appellant, Kairon Brenton Maldonado, by depositing two copies of such in the United States Mail, first class postage prepaid, on March 20, 2014, addressed to his attorney of record, Rebecca K. Lindahl, Esquire, Katten Muchin Rosenman LLP, 550 South Tryon Street, Suite 2900, Charlotte, North Carolina 29802.

Ellen DuBois

ELLEN DuBOIS
Legal Assistant

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727 or 760-3072

March 20, 2014

Columbia, South Carolina

ALAN WILSON
ATTORNEY GENERAL

March 20, 2014

Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *State v. Kairon Brenton Maldonado*

Dear Ms. Kitchings:

Enclosed for filing, please find the original and two (2) copies of each the State's Initial Brief of Respondent served on Appellant in the above-referenced appeal and Designation of Matter to be Included in Record on Appeal. I have also enclosed the original Proof of Service indicating service of the Brief and Designation on today's date.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,

Amie L. Clifford
Special Assistant Attorney General
aclifford@cpc.sc.gov
S.C. Bar No. 1285

Enclosures (as stated)

cc: Rebecca K. Lindahl, Esquire, Counsel for Appellant
(with two copies of Brief and Designation & one copy of Proof of Service)
Robert M. Dudek, Chief Appellate Defender
(with one copy of Brief and Designation & one copy of Proof of Service)