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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-001551

THE STATE,

Respondent,

v.

FRANKIE McGEE,

Appellant.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF QUESTION PRESENTED

1. Did the Court of Appeals err in refusing to find that the trial judge erred in admitting identification testimony based on a single photo line-up that was unduly suggestive and inherently unreliable?

STATEMENT OF THE CASE

On May 3, 2009, at 11:00 p.m., petitioner Frankie McGee burglarized the home of Reverend Tryon Eichelberger located in Richland County and murdered Reverend Eichelberger. McGee was arrested months later on March 19, 2010 after an extensive police investigation. In April of 2010, the Richland County grand jury indicted petitioner for murder and burglary in the 1st degree. (2010-GS-40-0121). Petitioner proceeded to trial on August 1, 2011 before the Honorable Clifton Newman and a jury. Attorneys Douglas Strickler, Elizabeth Fielding Pringle, and Jennifer C. Davis represented petitioner. Assistant Solicitors Kathryn Luck Campbell, Dolly Justice Garfield, and Nicole M. Simpson prosecuted the case for the State. On August 10, 2011, the jury convicted petitioner of murder and burglary in the 1st degree. Judge Newman sentenced petitioner to life imprisonment for the murder of Reverend Eichelberger and thirty (30) years for the burglary of his home.[1] (R. 1, 231-65, 272-447, 492-640, 646-53, 670-706, 722-43, 747-841, 845-79, 886-94, 897-951, 953-1053, 1055-1102, 1204-07, 1211-14).

Petitioner appealed his convictions and sentences to the South Carolina Court of Appeals raising two (2) issues. (BOA). Respondent filed a responsive brief. (BOR). On April 30, 2014, the Court of Appeals affirmed petitioner's convictions and sentences. Judge Konduras authored the Opinion. State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014). Petitioner filed a petition for rehearing, which was denied on June 19, 2014. Petitioner filed this Petition for Writ of Certiorari raising one (1) issue. Respondent files this Return to Petition for Writ of Certiorari.

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[1]At sentencing, petitioner's criminal record was provided to Judge Newman. Petitioner was convicted in 1994 of attempted strong armed robbery, in 1997 of attempted strong armed robbery, in 2006 and 2007 of three (3) counts of burglary in the 3rd degree, two (2) counts of grand larceny, and malicious injury to personal property. In the same year, he was also convicted of breach of trust with fraudulent intent and burglary in the 2nd degree. (R. 1206-07).

RESPONDENT'S STATEMENT OF FACTS

The victim, Reverend Tryon Eichelberger, was 87 years old at the time of his murder. Reverend Eichelberger lived on Isaac Street off Farrow Road in the Greenview community of Columbia, S.C. (R. 231-65, 272-97, 309, 506, 888-94).

On May 3, 2009, at 11:00 p.m., Reverend Eichelberger was in his home speaking with Temika Ashford, a former church member, who was there to ask for money to pay her water bill. Reverend Eichelberger and Ms. Ashford were sitting in the living room when they heard a noise in another part of the house. The Reverend went to investigate the noise. Ms. Ashford then heard the Reverend say: "How did you get in here." She then heard a commotion, and hollering. Ms. Ashford knew something bad was happening, left the home, got in her car and drove away because she was afraid. She circled the block, and when she could not reach the Reverend by phone, she returned to his house. As she passed Reverend Eichelberger's home while still driving her car, Ms. Ashford saw a man standing on the Reverend's porch wearing what appeared to be white gloves and holding a metal pipe or stick in his hand. She described the man as a husky light skinned black man with a big belly and receding hairline wearing a white shirt and blue jeans. Ms. Ashford called 911 and then drove to Farrow Road to wait on the police. While she was waiting, she saw the same man again walking on Farrow Road. At this time, the man no longer had the pipe or rod in his hand and no longer had the white gloves on. Once the police arrived at Reverend Eichelberger's residence, Ms. Ashford returned to the Reverend's home. She got out of her car and tried to give police a description of the man and his location but she was told to wait in her car until police cleared the house and determined what had occurred inside. (R. 770-841).

When the call was initially dispatched, the first officer to respond, Chancey Duckett, was inside the Gazbah gas station on Farrow Road about three (3) blocks from Reverend

Eichelberger's home. He was dispatched to Reverend Eichelberger's home in reference to a civil disturbance. As he was traveling North on Farrow Rd. in the direction of the Reverend's home, he also saw a light skinned black man walking alone south on Farrow Rd. wearing a white T-shirt or light gray T-shirt and blue jeans. However, at that time, Officer Duckett did not detain the man because he did not know exactly what had occurred at the Reverend's home nor had he been given a description of the perpetrator. (R. 231-65).

Once he arrived at the Reverend's home, Officer Duckett found Ms. Ashford outside the residence and told her to wait in her car. He then entered the home and found Reverend Eichelberger on the kitchen floor bleeding heavily. There was approximately two (2) liters of blood on the kitchen floor. The Reverend was unable to respond to Officer Duckett's questions.[2] (R. 231-65).

Police discovered Reverend Eichelberger's home had been broken into at a side door to the residence located next to the driveway. A metal tool had been used to pry open this door and damage was done to the door and door frame. There were also visible tool marks to the door and door frame. (R. 231-65, 328-46).[3]

Officer Duckett cleared the home, but the perpetrator was gone. He then searched the area surrounding Reverend Eichelberger's home and found *a steel rod* across the street from the

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[2]EMS transported the Reverend to Richland Memorial Hospital. There it was discovered that he had a cracked skull which resulted in swelling of his brain. Reverend Eichelberger died approximately three (3) months later as a result of the injuries he received at the hands of petitioner. He died from blunt force trauma to the head caused by a solid object. (R. 492-512, 886-94, 921).

[3]Petitioner had previously been convicted of two (2) separate burglaries prior to the commission of the burglary of Reverend Eichelberger's home. (R.640-45). *See* S.C.Code Ann. Section 16-11-310 (burglary in the first (1st) degree includes a burglary committed by a person with two (2) or more prior convictions for burglary or housebreaking).

Reverend's home in a neighbor's yard. Officer Duckett also found a pair of white tube socks on a path about twenty-five (25) to thirty (30) yards from the same steel rod in the direction of Farrow Road. Both the rod and the socks appeared to have blood on them. The metal rod was also consistent with the tool marks found on the door to Reverend Eichelberger's home. Both the rod and the white socks were collected by a crime-scene technician for later DNA testing. (R. 231-65, 328-53, 1060-61).

The neighbor in whose yard the pipe was found, Mr. Larry Harp, testified that on *the day of* the burglary and assault on the Reverend, he saw petitioner Frankie McGee in the Reverend's yard at 3:00 p.m. talking on the phone and pacing back and forth several times. He saw petitioner again later that afternoon outside the Reverend's home at about 5:30 p.m. with a plate, napkin, and cup in his hand, and petitioner was eating something. When petitioner left the Reverend's yard this last time, Mr Harp saw him walking headed toward Farrow Road. At this time, Reverend Eichelberger was still in his yard dressed in a suit, wearing a straw hat, and working in his flower garden. The neighbor, Mr. Harp, later positively identified petitioner from a photo-graphic line-up and also identified petitioner at trial as the person he had seen in the victim's yard at 3:00 p.m. and at 5:30 p.m. on May 3, 2009. Mr. Harp also testified that on the night of the burglary and assault, he was awakened about midnight by police because they had found a metal rod at the back of his property near the fence line. Mr. Harp testified that the metal rod did not belong to him, and he informed the police at the time that he did not know how or who put the metal pipe or rod in his yard. (R. 272-97, 691-93, 938-39).

Ms. Ashford was eventually able to give police a description of the man she saw standing on Reverend Eichelberger's porch. Based on Ms. Ashford's description, other officers began looking for the suspect. Police stopped two (2) men walking together in the area and brought Ms.

Ashford to that location. She said one of the men looked like the man she had seen on Reverend Eichelberger's porch, however the clothes he was wearing were not the same.[4] As the investigation proceeded, Ms. Ashford was eventually shown a series of photo line-ups. From one of these, Ms. Ashford told police that two (2) photos in State's Exhibit 123 looked like the suspect. One of the photos in State's Exhibit 123 was a photo of petitioner. Ms. Ashford identified petitioner's photo as the one that looked the most like the person she saw standing on the Reverend's porch with the pipe in his hand. (R. 231-65, R. 473-83, 771-841, 917-18, 920, 930-34, 941, 964-69, 1065-72).

The metal pipe or rod and the two (2) white socks were forwarded to the DNA lab for testing. DNA analysis determined that the blood on the rod belonged to Reverend Eichelberger. DNA testing also revealed the blood on the white socks belonged to Reverend Eichelberger. (R. 518-61, 920-21).

In March of 2010, officers visited Michelle Perry, a dispatcher with Blue Ribbon Cab Company, where Reverend Eichelberger had worked before his retirement. Reverend Eichelberger held church services in a building attached to the Blue Ribbon Cab Company. Officers showed Mrs. Perry a single photograph of petitioner and asked her if she recognized the person in the photograph. Mrs. Perry informed police she recognized petitioner because he came to one of the Reverend's church services too early one morning and then a few days later came back for a Bible study. This occurred in the winter time several months before Reverend Eichelberger was assaulted. (R. 141-44, 654-69, 670-87, 688-93).

As the investigation continued, police determined the pipe or metal rod recovered from Mr.

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[4]This person was later eliminated as a possible suspect through police investigation and DNA testing. (R. 315-19, 629-34, 917-18, 920, 965, 1062).

Harp's back yard was actually a *winch rod* commonly used to tighten straps holding down a load of freight on a flat-bed trailer. Police also determined petitioner had a CDL (commercial) license to operate a tractor trailer which would pull such a flat-bed trailer, and petitioner had work experience that would have exposed him to the use of a winch rod to hold down loads on flat-bed trailers. (R. 845-61, 895-900, 721-30, 765-69).[5]

Police also discovered that on May 2, 2009, the day before the burglary and assault on Reverend Eichelberger, a tractor trailer truck was stolen from the Camden Steel and Metal Company in Camden, S.C. Petitioner was a resident of Camden. Video surveillance captured the theft. Petitioner's sister, Sandra Thomas, saw the video surveillance footage broadcast on the local news and contacted Crime Stoppers because she recognized the person who stole the tractor truck as her brother. Ms. Thomas viewed the video again before trial and testified there was no question the person in the video stealing the truck was her brother. The truck was found on May 3, 2009, the same day as the burglary and assault on Reverend Eichelberger, abandoned in the Greenview area of Columbia next to Happy Daddy Towing Service, about one (1) mile from Reverend Eichelberger's home. Chain link fencing from the perimeter of Camden Steel and Metal Company was found wrapped around the axle of the truck. The fencing had to be cut from the axle before the truck was returned to Camden. The owner of the truck testified the truck was used to haul or pull *a fled-bed trailer*, and it would have contained in its tool box behind the cab *a winch rod* exactly like or just like the one used to murder Reverend Eichelberger. (R. 646-53, 845-61, 901-12, 959, 1080, 1084).

[5]In addition to having a CDL license, petitioner had worked as a brick layer and his former employer testified it was common for loads of bricks to be delivered to job sites on a flat-bed truck with the load of bricks being held down by straps which were loosened by use of a *winch rod*. (R. 721-30).

Subsequently, more involved DNA testing of the white socks indicated petioner's DNA was also present on the interior of the socks on which Reverend Eichelberger's DNA (blood) was found. (R. 518-61, 935-38, 1084, ll. 3-6).

On March 17, 2010, police questioned petitioner while he was incarcerated on other charges at Wateree Correctional Institution. The conversation was tape recorded. Petitioner denied assaulting the Reverend, but made several incriminating statements during the interview. Petitioner admitted he had been in the area and taken his socks off and left them at a store by a dumpster because of his alleged athlete's foot condition. He then stated he did take his socks off and left them next to a light pole. Police recovered the two (2) bloody socks next to a light pole in a grassy field next to Mr. Harp's residence, not at a gas station. Petitioner also denied he stole the truck from Camden; however, he admitted he moved a red tractor truck for a friend while he was in the Greenview area of Columbia. During the interview, petitioner also denied he knew what a *winch rod* was. Petitioner also admitted he had been on Reverend Eichelberger's front porch. Petitioner also admitted he had told someone [his wife] he hurt someone, but he denied it was the victim. (R. 943-51, 960-61, 963, 974, 976, 980, 1006-10, 1012-17, 1027-28, 1029-31, 1034, 1038, State's Ex. 137, R. 1225-1329).

ARGUMENT

The trial judge did not err in admitting the in court identification of the witness who testified petitioner had been to the Reverend's church before on two occasions, and even if the admission of this evidence was erroneous it was harmless given the other overwhelming evidence of petitioner's guilt and the testimony of other witnesses and his own admissions to being in the area of the Reverend's home around the time of the murder.

Standard of Review

(On appeal)

In criminal cases, the appellate court sits to review errors of law only and is bound by the factual findings of the circuit court unless clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

(Admission or exclusion of evidence)

The admission of exclusion of evidence is within the sound discretion of a trial judge, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of a manifest abuse of discretion accompanied by probable prejudice. State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006); State v. Dennis, 402 S.C. 627, 742 S.E.2d 21 (Ct. App. 2013). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

(Admission or exclusion of identification testimony)

A trial court's decision to allow the in-court identification of an accused will not be

reversed absent an abuse of discretion or prejudicial legal error. State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000), *citing* State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 (1995); State v. Brown, 333 S.C. 185, 508 S.E.2d 38 (Ct. App. 1998)(the admission of exclusion of evidence in within the sound discretion of a trial judge and will not be reversed absent an abuse of discretion or prejudicial legal error). Whether an eyewitness' identification is sufficiently reliable is a mixed question of law and fact. State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012), *citing* State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court. Id. Generally, the decision to admit an eyewitness' identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion. Liverman, *citing* Moore.

Admissibility of identification testimony

The test for the admissibility of an eyewitness' identification is whether the method was so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law. Stovall v. Denno, 388 U.S. 293 (1967); State v. Ford, 278 S.C. 384, 296 S.E.2d 866 (1982); State v. Dixon, 284 S.C. 526, 328 S.E.2d (Ct. App. 1985). Where some degree of suggestiveness exists in a pre-trial identification, the suppression of the identification is not automatically required. Manson v. Braithwaite, 432 U.S. 98 (1977); State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980). Suggestiveness alone does not mandate exclusion of evidence. Gibbs v. State, 403 S.C. 484, 744 S.E.d 170 (2013); State v. Gambrell, 274 S.C. 587, 266 S.E.2d 78 (1980); State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980); State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000). Instead, reliability is the linchpin in determining the admissibility of identification evidence. Gibbs, *supra*; State v. Denson, 269 S.C. 407, 237 S.E.2d

761 (1977); Mansfield, 343, S.C. at 78, 538 S.E.2d at 263; State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). In determining the admissibility of an eyewitness' identification, the question is not merely whether the identification procedure was suggestive, but whether under the totality of the circumstances the identification was reliable. State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 448 (2000)("[T]he identification need not be excluded as long as under all the circumstances the identification was reliable notwithstanding any suggestive procedure."), *quoting* Jefferson v. State, 206 Ga. App. 544, 425 S.E.2d 915, 918 (1992). The reliability of an identification procedure depends upon the consideration of a totality of the facts and circumstances of each particular case. State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987); State v. Scipio, 283 S.C. 124, 322 S.E.2d 15 (1984); State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981); State v. Johnson, 318 S.C. 372, 458 S.E.2d 49 (Ct. App. 1995). "Thus the inquiry turns upon 'whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification." Gibbs, *supra*, *quoting* State v. Moore, 343 S.C. at 287, 540 S.E.2d at 448)(other citation omitted). Even if an identification procedure is impermissibly suggestive, the admission of other evidence that positively identifies a defendant renders a suggestive identification procedure harmless error. State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001).

Pertinent Facts

In March 2010, police went to Blue Ribbon Cab Company where the victim had worked before his retirement. Police showed a secretary there, Michelle Perry, a photograph of petitioner and asked her if she recognized the person in the photograph. Ms. Perry informed police she did recognize the person in the photograph. She informed them petitioner had been to Reverend Eichelberger's church twice in the past. He came to the church one (1) morning too early for the service. He came back to the church on a later date and attended a Bible study. Ms. Perry was not

a witness to any of the incidents on the day of the burglary and assault on Reverend Eichelberger which led to his death. She testified petitioner came to these two (2) services several months before Reverend Eichelberger was assaulted. (R. 654-69, 670-87 & 688-93, 695). Other testimony was admitted at trial through other witnesses that petitioner had been in the Greenview area of Columbia before and around the time of the murder, and other testimony was admitted at trial that petitioner was familiar with or knew Reverend Eichelberger before his murder and was at the Reverend's home the day of the murder. (R. 272-97, 740-64, 939, 943-51, 974, 976, 980, 999-1003, 1042-43, 1073-75, State's Ex. 137 [Statement of Petitioner], R. 1225-1329).

The Biggers hearing

Prior to the admission of Ms. Perry's testimony, petitioner objected to the admissibility of Ms. Perry's in-court identification of him because police only showed her a one photo line-up. Judge Newman conducted a Neil v. Biggers[6] hearing regarding the reliability of her in-court identification. (R. 654-69). At the conclusion of the hearing, Judge Newman noted that single photo identifications are disfavored; however, based on the totality of the circumstances surrounding Ms. Perry's identification of petitioner and South Carolina law, her out-of-court and in-court identification would be admitted in evidence. Judge Newman did not err in admitting her in-court identification. Regardless, its admission was harmless given it was cumulative to other evidence petitioner was in the Greenview community around the time of the crime and knew Reverend Eichelberger.

[6]Neal v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972).

Analysis

Any challenge to the witness' out of court identification is not preserved

Petitioner admitted in his brief below and admits in his Petition for Certiorari that immediately prior to Ms. Perry's testimony counsel only challenged the admissibility of her *in-court identification*. (IBOR, p. 9; Petition for Writ of Certiorari, p. 9). (See also R. 654-77). It is not clear from petitioner's brief whether he is now challenging the admissibility of the out-of-court identification. However, to the extent he is now challenging the admissibility of the out-of-court identification, that issue is not preserved for appeal.[7] State v. Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001)(to preserve an issue regarding the admissibility of evidence, a contemporaneous objection must be made, and failure to object when the evidence is offered constitutes a waiver of the right to have the issue considered on appeal); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004)(making a motion *in limine* to exclude evidence at the beginning of trial does not preserve issue for review because a motion *in limine* is not a final determination; therefore, the moving party must make a contemporaneous objection when the evidence is introduced); State v. Gagum, 328 S.C. 560, 492 S.E.2d 822 (Ct. App. 1997)(same). As a result, any challenge to the admissibility of the out-of-court identification of petitioner by Ms. Perry must be dismissed.

[7] Pre-trial, petitioner informed the court it would be moving to suppress the out-of-court identification of petitioner by Ms. Perry. (R. 140-42). Judge Newman informed petitioner he would rule on issues regarding this witness prior to or at the time of her being called. Thereafter, before the witness was called petitioner only moved to suppress the in-court identification of this witness, and there was no objection during her testimony to her out-of-court identification. There is no question that petitioner's challenge to the admissibility of the in-court identification is preserved because it was raised *in limine* immediately before the witness testified, therefore an objection during her testimony was not necessary with regard to the in-court identification.

The Lack of Merit of Petitioner's Argument

An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). Generally, "a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by the previous illegal identification or confrontation." State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001).

As the Court of Appeals correctly found, there is no merit to petitioner's argument because the cases relied on by petitioner at trial and on appeal pertain to identifications by eyewitnesses to crimes. *See e.g.* Neil v. Biggers, 409 U.S. 188, 199-200 (1972)(holding the court should consider the following factors when determining the likelihood of misidentification: (1) the witness's opportunity 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 witness's level of certainty at the confrontation; and (5) the time *between the crime and the confrontation*);[8] State v. Traylor, 360 S.C. 74, 82, 600 S.E.2d 523, 527 (2004)(providing the same factors); State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000)("[A]n eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law."). However, Ms. Perry was not an eyewitness to the crime, and she did not identify petitioner as the perpetrator of the crime. *See* Ramsey, 345 S.C. 613, 550 S.E.2d at 297, *and* State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007)(listing 5 factors including degree of attention *at the time of the*

[8] An eyewitness is "[o]ne who personally observes an event." *Black's Law Dictionary*, 667 (9th ed. 2009).

crime and lapse of time between *time of crime* and identification). Perry's testimony related to seeing petitioner a year before the attack and was for the purpose of showing that McGee knew Reverend Eichelberger.

To the extent Biggers applies in this situation, the purpose of the *in camera* hearing is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding *any prior, illegal or tainted out of court identification.* State v. Carlson, 363 S.C. 586, 594, 611 S.E.2d 283, 287 (Ct. App. 2005) *citing* Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967 (1968)(conviction based on suggestive pre-trial identification and subsequent in-court identification will be set aside only if the photographic identification was so suggestive as to give rise to a very substantial likelihood of irreparable misidentification), *and* State v. Moore, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000)("An in-court identification of an accused is inadmissible if a suggestive *out-of-court identification procedure* created a very substantial likelihood of irreparable misidentification."). Only if the *pretrial procedure* was suggestive, should the trial court consider the second question, i.e. whether there is a substantial likelihood of irreparable misidentification. State v. Brown, 356 S.C. 496, 503, 589 S.E.2d 781, 784-85 (Ct. App. 2003) *quoting* Moore, 343 S.C. at 287, 540 S.E.2d at 447-48, *other citation omitted.*

The United States Supreme Court has developed a two pronged inquiry to determine the admissibility of an out-of-court or in-court identification. State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012), *citing* Biggers, 409 U.S. at 198 *and* Manson v. Braithwaite, 432 U.S. 98, 114, 97 S.Ct. 2243 (1977); State v. Spears 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011), *quoting* Moore, 343 S.C. at 287, 540 S.E.2d at 447 (*citing* Biggers, 409 U.S. at 198-99). First, the court must ascertain whether the identification process was *unduly* suggestive. Moore, 343 S.C. at 287,

540 S.E.2d at 447. Next, the court must decide whether the out-of-court identification was nevertheless was so reliable that no substantial likelihood of misidentification existed. Id.

"The inquiry must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification." State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007). As previously stated, the following factors are to be considered when evaluating the totality of the circumstances when determining the likelihood of misidentification: (1) the witnesses' opportunity to view the perpetrator at the time of the crime, (2) the witnesses' 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 prior confrontation, and (5) the length of time between the crime and the confrontation. Id. at 127; 644 S.E.2d at 696-97.

Even if the out court procedure is suggestive, the in-court identification is admissible if based on information independent of the out-of-court procedure. State v. Carlson, 363 S.C. 586, 600, 611 S.E.2d 283, 290 (Ct. App. 2005), *citing* State v. Rogers, 263 S.C. 373, 210 S.E.2d 604 (1974). The State bears the burden of proving the identification was based on an independent source by clear and convincing evidence. Id. at 377, 210 S.E.2d at 606.

Judge Newman did not abuse his discretion in admitting the in-court identification of Ms. Perry under the totality of the circumstances. Ms. Perry testified that when police came to her place of employment and showed her the photograph they did not insist or tell her that she knew or had previously seen the person in the photograph. They did not tell her she had to identify anyone. The question they asked was open ended, i.e. had she ever seen this person before or did she recognize the person. The record shows police showed the same photograph to several other employees of the cab company and none of those witnesses recognized the person in the picture.

The record shows the identification procedure was not *unduly* suggestive. [9]

Further, Ms. Perry testified she recognized petitioner not because police showed her the photograph but because she remembered petitioner coming to Reverend Eichelberger's church on two (2) previous occasions several months before the assault on Reverend Eichelberger. The record shows her identification was made only fifteen (15) months after seeing petitioner at the church and less than a year since the assault on Reverend Eichelberger. *See* State v. McCord, 349 S.C. 477, 482-83, 562 S.E.2d 689, 692 (Ct. App. 2009) (admitting identification by victim of assault over six (6) years after the assault had taken place). She testified that on the first (1st) occasion, petitioner was with a young woman and he was too early for the church service. She testified she spoke with petitioner face to face and explained to him he was too early for the church service and would have to wait. As a result, petitioner had to sit in the lobby area in front of her for approximately twenty-five (25) minutes. This occurred around 10:30 a.m. in the morning in the reception area of the cab company. *See* State v. Scipio, 283 S.C. 124, 322 S.E.2d 15 (1984)(identification held reliable where the victim observed the accused for 4 to 4 and ½ minutes at arms-length in a well-lighted store); State v. Johnson, 311 S.C. 132, 427 S.E.2d 718 (Ct. App. 1993)(in-court identification held reliable, where the witness saw the perpetrator for 3 minutes in a well-lighted store and identified defendant in a show-up 10 minutes after robbery). She testified she had the opportunity to view him continuously during that twenty-five (25) minute period, as she was a dispatcher at the front window, and she remembered that it was a cold day and petitioner was wearing a heavy jacket because of the weather. *See* State v. Nelson, 250 S.C. 6, 156 S.E.2d 341 (1967)(where robber was in the store for about 5 minutes, in a well-lit area, a few feet from the

[9] In fact, Petitioner did not even challenge the admissibility of the out-of-court identification. Apparently, it was for this reason that the Court of Appeals noted there was nothing for them to review as far as the admissibility of the trial testimony of Ms. Perry.

victim who stated that she had a good look at his face, victim had sufficient opportunity to view suspect and made a positive identification of suspect eight weeks after robbery). She also testified she remembered when Reverend Eichelberger arrived that morning, petitioner, his lady friend, and Reverend Eichelberger went in to the church service together. She also testified she had the opportunity to see petitioner on another occasion. She testified that on what she believed was the Tuesday of the following week, petitioner returned and attended a Bible study conducted by Reverend Eichelberger. So, she actually viewed him on two (2) separate occasions, and there was no testimony at the Biggers hearing that police coerced or suggested to her that she knew the person they were asking about. *See* State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005)(eyewitness could make reliable in-court identification where he spoke with defendant for 15 to 20 minutes about 2 weeks before the crime and then viewed defendant a 2nd time during the shooting in a well-lit room and could see through sheer bandana and recognized defendant's gold teeth). While she told one officer petitioner's picture seemed to favor the person who had come in two (2) times previously to the church,[10] the record shows she also informed Detective Sumter that day that she remembered petitioner walking in with Reverend Eichelberger on two (2) occasions, and she testified pretrial that if it was not petitioner, then petitioner had a twin. (R. 654-69, 669-87, 688-707). In ruling on the admissibility of her in-court identification, Judge Newman stated as follows:

> Single person show ups are disfavored because they are suggestive in nature.[11] However, the courts in the state have held that they may be reliable

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[10]*See* State v. Hopper, 215 S.C. 74, 78-79, 54 S.E.2d 517, 518-19 (1949)(absolute certainty of a witness is not required for identification to be admissible); State v. Brown, 333 S.C. 185, 508 S.E.2d 38 (Ct. App. 1998)(same); State v. Washington, 323 S.C. 106, 473 S.E.2d 479 (Ct. App. 1996)(same or similar); United States v. Peoples, 748 F.2d 934 (4th Cir. 1984)(similar).

[11]*See* Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968)(identifications arising from single photo displays are generally viewed with suspicion); State v. Tisdale, 338 S.C. 607, 527

> under the totality of the circumstances if the state shows that the identification was nevertheless so reliable that no substantial likelihood of misidentification exists.
> In this instance, she saw him on two occasions. She says she saw him for a period of twenty-five minutes or so. That it was an unusual circumstance that he arrived unusually early for their church services. She said she saw him. She says she recognized him. She says that she can identify him. I find that the motion to suppress should be denied, and I deny it.

(R. 668, ln. 19 - 669, ln. 6). Based on the totality of the circumstances surrounding the out of court identification as testified to by Ms. Perry, there is no substantial likelihood of misidentification based on the handing to her and others at her employment a photograph and asking if she or others recognized the person. The State proved by clear and convincing evidence Mr. Perry's identification of petitioner was based on an independent source, her memory of petitioner being at Reverend Eichelberger's church on two (2) previous occasions. *See* State v. Roach, 364 S.C. 422, 613 S.E.2d 791 (Ct. App. 2005), *vacated in part, affirmed in part,* 337 S.C. 2, 659 S.E.2d 107 (2008). *See also* State v. Nelson, 250 S.C. 6, 156 S.E.2d 341 (1967). Petitioner has failed to show Judge Newman abused his discretion in the admission of this evidence. As a result, the Court of Appeals did not err, and this petition must be dismissed.

Harmless Error

Further, as the Court of Appeals correctly found, even assuming *arguendo* Judge Newman erred in admitting the testimony of Ms. Perry, the error was harmless and could not have affected the verdict. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (*citing* Arnold v. State,

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S.E.2d 329 (Ct. App. 2000); Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967)(show-ups, or showing a person singly for identification, are widely condemned); State v. Patrick, 318 S.C. 352, 457 S.E.2d 632 (Ct. App. 1995)(witness prior identification of defendant, which occurred in a courtroom while the defendant was being tried for another crime, contained a degree of suggestiveness).

309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992); State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002).

Ms. Perry was not an eyewitness to the crime and did not identify petitioner as the perpetrator of the burglary and murder. Ms. Perry's testimony only helped establish petitioner had been in the Greenview area of Columbia before, i.e. Reverend Eichelberger's church, and he knew Reverend Eichelberger. There was testimony from several other witnesses in the case establishing these very facts. **(R. 272-97, 740-64, 939, 943-51, 974, 976, 980, 999-1003, 1042-43, 1073-75).** *See* State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012)(admission of evidence can be harmless where testimony was similar to testimony of another witness admitted at trial); State v. Page, 378 S.C. 476, 483-84, 663 S.E.2d 357, 360 (Ct. App. 2008)(holding error is harmless where it could not reasonably have affected the trial's outcome, and considering as one factor whether the evidence was cumulative to other testimony).

Mr. Harp, Reverend Eichelberger's neighbor, testified he saw petitioner in Reverend Eichelberger's front yard on the day of the burglary and assault. The first time he saw petitioner he was beside Reverend Eichelberger's home using a telephone and pacing back and forth. The 2nd time he saw him was around 5:30 p.m. in Reverend Eichelberger's yard eating food and Reverend Eichelberger was also in the yard at the same time working in his flower bed. Mr. Harp positively identified petitioner from a photographic line-up and at trial. Petitioner is not challenging Mr. Harp's identification of him on appeal. This testimony established petitioner was in the area on the day of the crime, at the victim's residence, and he knew the victim.

Another witness, Ivan Moore, testified he saw petitioner in the area in the days surrounding the murder of Reverend Eichelberger. **(R. 747-64).** Further, petitioner's DNA was found on the socks in the grassy field beside Mr. Harp's home, establishing petitioner's presence in the area.

Detective Arthur Thomas also testified that their investigation had uncovered that petitioner had attended Reverend Eichelberger's church on several occasions. **(R. 939, 980).** Detective Reese also testified without objection that police were able to connect petitioner to Reverend Eichelberger's church through Ms. Perry. **(R. 1074-75).** Detective Sumter also testified without objection to Ms. Perry's out-of-court identification of petitioner as having previously been to the church 2 times in February of 2009. **(R. 695-707).**

Finally, petitioner's own statements to law enforcement established the same facts as Ms. Perry's testimony. Petitioner admitted to police he had been to Reverend Eichelberger's church and residence, had been in the Greenview area, and had driven a red tractor truck which was abandoned in the area. **(R. 943-51, 974, 976, 980, 999-1003, 1006-10, 1027-28, 1042-43, 1047, 1048-53, State's Ex. 137, R. 1225-1329).**

As a result, the admission of Ms. Perry's testimony was harmless beyond a reasonable doubt. *See* Liverman, *supra* (evidence can be harmless where testimony was similar to testimony of another witness whose testimony was admitted at trial); Page, 378 S.C. at 483-84, 663 S.E.2d 357 (holding error is harmless where it could not reasonably have affected the trial's outcome, and considering as one factor whether the evidence was cumulative to other testimony). This Court will not set aside a conviction for an insubstantial error not affecting the result when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached. State v. Kelley, 319 S.C.173, 460 S.E.2d 368 (1995).

Finally, petitioner's guilt was conclusively established by his DNA found in the white socks which also contained the blood of Reverend Eichelberger and which were found in close

proximity to the murder weapon which contained Reverend Eichelberger's DNA.[12] Further, it was established separate from the challenged evidence, that petitioner had worked in the trucking and construction industry and had knowledge of and familiarity with a *winch bar,* the murder weapon. And, petitioner's identity was established by the victim's neighbor who placed petitioner at the crime scene just hours before the murder of the victim. Finally, petitioner was placed in the area of the victim's home by his theft of the truck from Camden and his abandonment of the same, with fencing material wrapped around the truck's axle, close to the crime scene one (1) day before the burglary and assault of Reverend Eichelberger. Further, this evidence established why petitioner was on foot on the day the victim was murdered and was in need of Reverend Eichelberger's assistance. As a result, petitioner's guilt was proven independent of *the challenged evidence.* State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001)(even if an identification procedure is impermissibly suggestive, the admission of other evidence that positively identifies a defendant renders such procedure harmless error). Any error in the admission of Ms. Perry's in-court identification was harmless beyond any doubt.

CONCLUSION

For the above stated reasons, the petition for writ of certiorari must be denied.

Respectfully submitted,

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[12]The perpetrator of the murder was seen standing on the victim's front porch immediately after the burglary and assault wearing what appeared to be *white* gloves and holding some type of *metal rod.*

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August 13, 2014

CERTIFICATE OF SERVICE

I, Anthony Mabry, hereby certify that I have served the ***Return to Petition for Writ of Certiorari*** in the foregoing action by depositing copies in the Interagency Mail to Kathrine H. Hudgins, Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 13th day of August, 2014.

ANTHONY MABRY
Assistant Attorney General