STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County

J. Cordell Maddox, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JOHN FITZGERALD KENNEDY,

APPELLANT,

Appellate Case No. 2013-002621.

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in allowing a photographic lineup into evidence that contained mug shots because it let the jury know appellant had a prior record and deprived him of a fair trial?

RESPONDENT'S COUNTER STATEMENT OF ISSUE ON APPEAL

Whether a new trial is required where the trial court erred in admitting a photo lineup but where no undue prejudice resulted from the admission because the photo was not a traditional "mug shot," because it was unclear to the jury whether the photo was from a prior arrest or a driver's license, and because there was substantial evidence, both direct and circumstantial, that Appellant committed the murder.

RESPONDENT'S STATEMENT OF THE CASE

An Anderson County Grand Jury indicted Appellant, John Fitzgerald Kennedy, in September 2012 for the murder of Claud Schaffer Scott. (Indictment Number 2012-GS-04-02002). On December 2, 2013, Appellant's case was called to trial before the Honorable J. Cordell Maddox. (Tr. p. 1). Appellant was represented by Andrew Potter during the four-day trial. (Tr. p. 1). Assistant Solicitor Catherine T. Huey represented the State. (Tr. p. 1). On December 5, 2013, the jury returned a verdict of guilty. (Tr. p. 433, lines 5–13). Thereafter, Judge Maddox sentenced Appellant to thirty (30) years imprisonment. (Tr. p. 439, lines 14–22) Appellant filed a timely notice of appeal. (Notice of Appeal).

RESPONDENT'S STATEMENT OF FACTS

Victim Identifies Appellant as His Attacker

On the evening of Friday, March 30, 2012, Kimberly King went to check on her seventy-six-year-old neighbor, Claud Schaffer Scott (Victim), who had been very sick when King was at his home earlier that day. (Tr. p. 145, line 20–p. 151, line 15). When she arrived at Victim's home that evening, King found that Victim's front door was closed and locked, which was unusual as the door was normally open wide or, if it was closed, unlocked. (Tr. p. 151, line 16–p. 152, line 11). King began knocking on Victim's door. (Tr. p. 152, lines 8–11). Appellant, who had been living in a camper behind Victim's home for a week or two, came from the back of the house and told King that Victim was asleep and did not want to be bothered. (Tr. p. 147, line 23–p. 148, line 22; Tr. p. 152, lines 12–p. 153, line 3). King noticed that Appellant "was real sweaty and just looked weird." (Tr. p. 152, line 19). King told Appellant that she was "going in anyway" and asked Appellant if the back door was locked. (Tr. p. 153, lines 4–7). According to King, Appellant responded, "no" but then "he fl[ew] around to the back" and locked the back door. (Tr. p. 153, lines 4–13). Appellant then got into a blue car that belonged to Victim and asked King to go with him to the store, but King refused. (Tr. p. 153, line 14–p. 154, line 9). Appellant drove off. (Tr. p. 153, lines 14–23).

King went back around to the front of Victim's house and started beating on the door. (Tr. p. 153, line 14–p. 154, line 22). King heard Victim say, "['G]o away. I don't want to be bothered now. Go away [']" (Tr. p. 154, lines 22–23). But King told Victim to open the door and identified herself to him. (Tr. p. 154, lines 20–25). Victim then opened the door and immediately collapsed in the doorway. (Tr. p. 154, line 25–p. 155,

line 22). King could tell that Victim had been beaten very badly, and she called 9-1-1. (Tr. p. 154, line 25–p. 157, line 5). King told the 9-1-1 dispatcher that Appellant had just left Victim's trailer—she specifically identified him as "John F. Kennedy" to the 9-1-1 dispatcher. (Tr. p. 157, lines 17–20; State's Ex. 4-A).

Another neighbor, David Evans, came over to assist King before emergency personnel arrived. (Tr. p. 157, line 21–p. 159, line 5; Tr. p. 172, line 22–p. 175, line 8). Evans testified that he knelt down beside Victim and asked what happened, and Victim responded, "[']John, the black guy, hit me.[']" (Tr. p. 175, line 6–p. 178, line 20).

Paramedics arrived, treated Victim's wounds as best they could, and then transported Victim to the hospital. (Tr. p. 195, line 7–p. 199, line 3). Multiple police officers responded to the hospital, including Brandon Dunn, who overheard Victim tell emergency room staff that John hurt him (Tr. p. 200, line 7–p. 204, line 9). Detective McKindra Bearden spoke to Victim at the hospital. (Tr. p. 205, line 24–p. 207, line 13). Bearden testified, "I said, do you know who done it? And he said, Josh. And I said, Josh? And he goes, no, John. I had misunderstood him, but he did correct me. He said John done it." (Tr. p. 208, lines 3–6). Investigator Brent Simpson also met with Victim and took Victim's statement. (Tr. p. 327, line 23–p. 329, line 20). Simpson recorded the entire statement using his cell phone. (Tr. p. 329, line 21–p. 332, line 3; State's Ex. 11). In the recording, Victim identifies "John," who lived in Victim's camper, as the man who beat him. (State's Ex. 11). Victim indicates that John hit him with a skillet. (State's Ex. 11). After giving his statement to Simpson, Victim went unconscious and never regained consciousness. (Tr. p. 331, line 25–p. 332, line 3). Victim passed away from his injuries around 7:20 a.m. on March 31, 2012. (Tr. p. 332, lines 18–20).

The Investigation Into Victim's Death

As part of their investigation, the police developed a timeline of both Victim's and Appellant's actions on March 30, 2012. The State presented the details of those timelines at trial. (Tr. p. 345, line 13–p. 346, line 5).

Police learned that Victim sold a van to Margaret Conwell on March 30, 2012, around lunchtime. (Tr. p. 338, line 18–p. 340, line 10). Conwell wrote Victim a $1500 check in exchange for the van. (Tr. p. 340, lines 3–24). Police then obtained surveillance stills from the bank where Victim cashed the check. (Tr. p. 340, line 17–p. 341, line 3). Those stills showed Victim and Appellant in the parking lot of People's Bank around 1:09 p.m. (Tr. p. 341, lines 7–20; State's Exs. 7-A, 7-B). The two then entered the bank, and Appellant sat in the lobby while Victim cashed the check. (Tr. p. 341, line 21–p. 342, line 20; State's Exs. 7-C, 7-E, 7-F, 7-G, 7-H, 7-I) Appellant and Victim left the bank around 1:15 p.m. (Tr. p. 342, line 21–p. 343, line 13; State's Exs. 7-J, 7-K, 7-L). Police never recovered the $1500 that Victim received from the bank that day. (Tr. p. 343, lines 14–18). They only found spare change at Victim's home. (Tr. p. 343, lines 19–21).

As recited in detail above, on the evening of March 30, 2012, King watched Appellant drive away from Victim's home in Victim's blue car shortly before King discovered that Victim had been badly beaten. King called 9-1-1 at 5:51 p.m. on March 30, 2012. (Tr. p. 337, line 22–p. 338, line 14; State's Ex. 4-A). Surveillance video from a Bi-Lo parking lot about eight miles from Victim's home shows Victim's blue Mercury Mystique enter the parking lot at about 6:04 p.m. and a black male park the car and then run away on foot. (Tr. p. 333, line 7–p. 337, line 14; State's Exs. 8, 19-A, 19-B, 19-C).

According to Investigator Simpson, it takes about fifteen or sixteen minutes to drive from Victim's home to that Bi-Lo. (Tr. p. 337, lines 10–14).

Appellant turned himself in on April 1, 2012. (Tr. p. 346, lines 12–13). At that time, police collected the clothing Appellant was wearing and sent it to the lab at the South Carolina Law Enforcement Division (SLED) for testing. (Tr. p. 346, line 18–p. 347, line 10). SLED forensic scientist Catherine Leisy analyzed two cuttings from Appellant's shorts and found the presence of blood. (Tr. p. 311, lines 17–23). She also developed DNA profiles from the cuttings and found that the DNA matched that of Victim. (Tr. p. 311, line 17–p. 312, line 13). According to Leisy, there was a one in two hundred and fifty quadrillion chance of selecting an individual (unrelated to Victim) with a DNA profile matching the DNA found on the shorts. (Tr. p. 311, line 11–p. 312, line 13). Leisy also analyzed swabs from a skillet found at the scene. (Tr. p. 310, line 8–p. 311, line 16). Those swabs tested positive for blood, and the DNA matched that of Victim. (Tr. p. 310, line 8–p. 311, line 16).

ARGUMENT

Though the trial court erred in admitting a photo lineup, a new trial is not required as there was no undue prejudice where the photo of Appellant was not a traditional "mug shot" and where it was unclear to the jury whether the photo was from a prior arrest or from a driver's license and where there was substantial evidence, both direct and circumstantial, that Appellant committed the murder.

Introduction

The trial court erred in admitting a photo lineup containing a photo of Appellant from a prior arrest because there was no demonstrable need for the State to introduce the photo, but the error does not require a new trial. Because the photo was not a traditional "mug shot," and because it was unclear from the testimony whether the photo was a driver's license photo or was an arrest photo, the jury was not alerted to Appellant's prior record. Additionally, there was overwhelming evidence of guilt presented at trial, including Victim's dying declaration and forensic evidence, which pointed to Appellant as the person who beat Victim. Therefore, Applicant's conviction should be affirmed as no prejudice resulted from admission of the evidence.

How the Issue Was Raised at Trial

At trial Kimberly King testified that she encountered Appellant coming from the back of Victim's home immediately before finding Victim severely beaten. (Tr. p. 150, line 12–p. 155, line 2). King testified that Appellant had been living in a camper behind Victim's home for one or two weeks. (Tr. p. 148, lines 1–22). According to King, "I didn't really know him until he really like moved in. I didn't know him, know him. I seen him around a few times in the neighborhood before he moved over there. But the most I've ever seen him is five or six times. Maybe seven times." (Tr. p. 148, lines 11–15). During her testimony, King identified Appellant as John F. Kennedy, whom she had

seen at Victim's home on March 30, 2012. (Tr. p. 148, line 23–p. 154, line 16). King also testified that when she met with Investigator Bearden later that evening, she picked Appellant out of a photo display as the man she had seen leaving Victim's home. (Tr. p. 159, line 19–p. 161, line 16). King also signed an affidavit to that effect at that time. (Tr. p. 160, line 25–p. 161, line 16).

The State presented the photo display to the jury through Bearden's testimony. (Tr. p. 208, line 21–p. 216, line 4; State's Ex. 3). Bearden testified to the following:

> This is the photo lineup, the original that I put together and printed that evening and the Affidavit of Photo Identification that I printed that evening at the same time and also filled out on the scene with the witness.
>
> Q. And so when you were putting together the display, what kind of characteristics are you looking for?
>
> A. We have a program that's called Mug Web. And you put in a suspect's name, and you can pick a picture out of a lineup if they've been arrested before and in the system. When you get that picture up, it'll pull up similar—you pull up similar pictures. You go through and choose. What I went through to choose—
>
> Q. And—I'm sorry. Go ahead. I apologize.
>
> A. What I went through to choose would be people with similar coloring as far as skin characteristics, length of hair, facial hair, anything like that, the same age. You want somebody within the same parameter. You don't want exactly the same, but you want similar.
>
> Q. Okay. Now Ms Bearden, you can also pull photos from driver's licenses too; isn't that correct?
>
> A. You can, yes.
>
> Q. Now, in terms of what specific characteristics in this case were you looking for in terms of physical characteristics?
>
> A. I was looking for a black male, middle aged, thin to medium build, approximately—I've already said medium complexion. Short hair,

> some facial hair that looked like the picture that we had of Mr. Kennedy on file.

(Tr. p. 209, line 16–p. 210, line 19). Bearden then went on to describe the procedure she went through in showing the photo lineup to King and in having King sign the affidavit. (Tr. p. 210, line 20–p. 212, line 18).

When the State sought to have the photo display and affidavit published to the jury, defense counsel objected. (Tr. p. 212, line 19–p. 213, line 2; State's Ex. 2, 3). The following discussion then took place *in camera*:

MR. POTTER:	Judge, the main purpose of this objection is the item itself. It's a photo array, and it's clearly not taken from driver's license photographs. These are all mug shots and which my client is one of them. And I think it's unduly prejudicial. At the very least under 403, prejudicial towards my guy because what's going to happen is they're going to take that back there and look at it, and they're going to see mug shots. They're not going to see driver's license photos.
THE COURT:	Well, how was this—I thought it was from driver's license photo?
MS. HUEY:	It could have been. This was from mug shots in this particular case.
THE COURT:	Let me look at it.
MS. HUEY:	I think Ms. Bearden has it. I mean, all you can see is the face, Your Honor.
THE COURT:	All right. You're protected on the record. I'll allow that in. I mean, I—you're assuming they know it's a mug shot. And you and I may know it, but—
MR. POTTER:	Well, I think it's fair to say that's not a photograph from the D.M.V. They're not in a collared shirt or smiling for that matter or anything like that.

(Tr. p. 213, line 6–p. 214, line 4). Ultimately, the trial court found the photos to be admissible. (Tr. p. 214, lines 11–12).

Upon the jury's return to the court room, defense counsel immediately asked for a bench conference. (Tr. 214, lines 13–18). Judge Maddox and counsel then conferred off the record. (Tr. p. 214, lines 20–21). Judge Maddox announced that they had taken up an objection off the record and that they would preserve the objection during a break. (Tr. p. 214, lines 22–25). The trial court then allowed the State to publish the photo display and affidavit to the jury. (Tr. p. 215, line 1–p. 216, line 4).

At the next break, the following discussion took place:

THE COURT: Okay, Let's go back to the objection and go ahead and document that. We had an off-the-record conversation in which the objection was made. And I'll be happy to hear from you.

MR. POTTER: Judge, the testimony was she took the photographs from booking photos from the Sheriff's department. And that's the reason for the objection of it being admitted because it implies that my client has been arrested before and that there's a prior record with the court—excuse me—with law enforcement.

In addition to that, the photograph has Anderson County Sheriff's Department written—or Sheriff's office written on top of it. It can easily be inferred these are booking photographs. These are not photographs taken from the D.M.V.

THE COURT: It says it on the pictures?

MR. POTTER: It says it right above the pictures.

MS. HUEY: Just printed from her computer, Your Honor.

THE COURT: Okay.

MR. POTTER: And in big bold letters, Anderson County Sheriff's Office is written on there. And again, Judge, I think

	it's highly prejudicial that those are photographs that clearly are booking shots.
THE COURT:	Okay. All right. Well—and you're protected for the record. I think it's admissible. It would probably be better if it came from driver's licenses, but I don't think that makes it inadmissible.

(Tr. p. 222, line 2–p. 223, line 6).

Defense counsel renewed his objection to the photo array at the end of the State's case, but the trial court specifically found the photo array was more probative than prejudicial. (Tr. p. 370, line 15–p. 375, line 23).

Standard of Review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). 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 McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

The South Carolina Supreme Court has held that

> the introduction of a "mug shot" is reversible error unless it is shown that: (1) The state had a demonstrable need to introduce the photograph; and (2) the photographs themselves, if shown to the jury, must not imply that the defendant had a prior criminal record; and (3) the photograph must not be introduced in such a manner to draw attention to the source or implication of the photograph.

State v Tate, 288 S.C. 104, 106, 341 S.E.2d 380, 381 (1986) (citing *State v Robinson*, 274 S.C. 198, 262 S.E.2d 729 (1980); *State v Denson*, 269 S.C. 407, 237 S.E.2d 761 (1977); *United States v Harrington*, 490 F.2d 487 (2d Cir. 1973)).

Though the Court has cautioned that the use of mug shot photos should be avoided, where the erroneous admission of such a photo did not result in prejudice, the

Court has affirmed the conviction of the defendant. *State v Traylor*, 360 S.C. 74, 84–85, 600 S.E.2d 523, 528 (2004). Additionally, the Court has recognized that any resulting prejudice could be harmless in light of other occurrences at trial. *Tate*, 288 S.C. at 106, 341 S.E.2d at 381.

No Demonstrable Need to Introduce Photo Lineup

Initially, Respondent must concede that the State did not have a demonstrable need to introduce the photo lineup. Though the State was not asked for and did not offer the reason for seeking to have the photo lineup admitted, the circumstances under which the photo lineup was presented in this case are substantially similar to the circumstances of *Tate*[1] where the South Carolina Supreme Court found the prosecution had no demonstrable need to introduce a photo lineup. 288 S.C. at 106, 341 S.E.2d at 381 ("The victim positively identified appellant in court, and there was testimony by Detective Parris that she had picked appellant out of a photographic lineup. Given this competent evidence proving identity, we fail to see the demonstrable need to introduce the 'mug shot.'"). Thus, Respondent feels constrained to concede that here, too, there was no demonstrable need to admit the photo lineup.

No Prejudice to Appellant

The South Carolina Supreme Court has "fervently caution[ed] trial court judges against utilization of mug shot photos unless absolutely necessary." *Traylor*, 360 S.C. at 85, 600 S.E.2d at 528. Even so, the Court affirmed an appellant's conviction where the State had no demonstrable need to introduce a photo lineup, but the admission did not

[1] In *Tate* the eyewitness/victim was blindfolded but was able to give a description of one of her assailants. 288 S C. at 105, 341 S.E.2d at 381. She later picked him out of a six-person lineup. *Id* At trial the eyewitness/victim identified Tate as one of her assailants, and the prosecution presented testimony that she picked Tate out of a lineup. *Id*

result in prejudice.[2] *Id* at 85–86, 600 S.E.2d at 528. In this case, the admission of the mug shot photo did not prejudice Appellant because, to the jury's knowledge, the photo could have been a driver's license photo rather than an arrest photo. Moreover, the State presented overwhelming evidence of Appellant's guilt. Thus, this Court should affirm Appellant's conviction.

Photograph Did Not Imply a Criminal Record

Respondent submits that the photo used in the lineup introduced at trial did not imply that Appellant had a criminal record. Appellant has summarily stated that "all three prerequisites are met in this case[,]" (Initial Br. of Appellant p. 8), but has failed to address the nature of the photograph itself. Respondent would submit that the mug shot used in the photo lineup is similar to those that South Carolina courts have found acceptable in other cases—the photo is only a frontal view of each subject's head and shoulders, there is a blank background behind each subject in the photos, and the photos

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[2] *Tate* states that it is "*reversible* error" to admit a mug shot without meeting its three prerequisites. 288 S.C. at 105, 341 S.E.2d at 381 (emphasis added). But, as previously noted, the South Carolina Supreme Court has not reversed where an erroneous admission of a photo lineup did not result in prejudice. *Traylor*, 360 S.C. 84–85, 600 S.E.2d 528 (citing *State v Locklair*, 341 S.C. 352, 535 S.E2d 420 (2000), *cert denied* 531 U.S. 1093 (2001) (error without prejudice does not warrant reversal)). Thus, it does not appear that our courts find errors under *Tate* to be *per se* reversible, and Respondent has sought to follow this lead in applying the *Tate* standard to the facts of the instant case.

Even if some other standard were applicable in this case, such as a harmless beyond a reasonable doubt standard, *see, e g*, *Bishop v United States*, 983 A.2d 1029 (D.C. Ct. App. 2009) (applying a harmless beyond a reasonable doubt standard "[b]ecause the limitation on the use of mug shots at trial has 'constitutional underpinnings'"), the circumstances of this case would meet such a standard, *State v Thompson*, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003) ("Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." (citing *State v Pickens*, 320 S.C. 528, 466 S.E.2d 364 (1996); *State v King*, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002)). Respondent has designated the entire record for this Court's review in case the Court chooses to apply a harmless beyond a reasonable doubt standard.

have been cropped so that no placards are visible. *See State v Robinson*, 274 S.C. 198, 200–01, 262 S.E.2d 729, 730 (1980) (finding nothing to imply a prior criminal record and noting that the jury could assume the photo was a result of the investigation for murder where a photo lineup showed three different poses of each subject and blacked out written material on the face of each photo); *State v Denson*, 269 S.C. 407, 412–13, 237 S.E.2d 761, 764 (1977) (finding photos did not imply a prior criminal record where "[t]he photographs were not the juxtaposed full face and profile photographic display normally associated with 'mug shot.' Neither did the appearance of the words 'Richland County' on one of the photographs inform the jury that appellant had a prior criminal record"); *State v Ford*, 334 S.C. 444, 450 n.3, 513 S.E.2d 385, 388 n.3 (Ct. App. 1999) (finding a mug shot admissible where "[o]nly the heads and necks of the individuals in the lineup photographs were visible in the photo lineup. The remainder of each photograph was cut away. No identifying clothing or placards were visible in the lineup."); *cf Tate*, 288 S.C. at 105, 341 S.E.2d at 380 (finding a photo "clearly" implied a prior record where "[t]he photographs in question were typical police photographs, taken when a person has been arrested, depicting the appellant in two classic poses; a standing close-up facial view and a standing close-up side view. In each picture a small board with the date 11-20-82 and the words 'SPTBG. CO. SHERIFF' is hangıng around appellant's neck."). As counsel for the State noted and the trial court acknowledged, the photos used in the lineup could have been driver's license photos. Thus, the lineup photo of Appellant did not imply a prior criminal record.

Introduction of Photograph Did Not Draw Attention to the Source or Implication of the Photograph

When Bearden explained how she made the photo lineup, she stated that she used a program called Mug Web[3] to obtain a photo of Appellant and to find photos of men with similar characteristics. (Tr. p. 209, line 21–p. 210, line 19). Bearden further testified that the program allows someone to pull pictures of those who have previously been arrested, but she also acknowledged that the program allows someone to pull from driver's license photos. (Tr. p. 209, line 21–p. 210, line 12). While describing her process in creating the lineup in Appellant's case, she stated she looked for photos of men with similar characteristics to the photo of Appellant that they had "on file." (Tr. p. 210, line 16–19).

Respondent submits that this testimony did not draw attention to the source or implication of the photo—as far as the jury was concerned, the photos in the lineup could have been from arrests or from driver's licenses (or some combination of both). Even in a case where the jury was told that lineup photos "came from the files of the Richland County Sheriff's Department and the Columbia Police Department," the South Carolina Supreme Court found "no intimation in the record that the admission of the photographs

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[3] During defense counsel's *in camera* cross-examination of Bearden at the pre-trial *Neil v Biggers* hearing, Bearden testified that Mug Web is the "in-house jail system[.]" (Tr. p. 78, lines 15–18). Bearden further explained,

> The way the system works is you put the target name and pick a picture out. If they've been arrested multiple times or even one time, then it will pick the matching person's the same parameter. Then you physically go through and choose. Because sometimes the computer will put stuff in there incorrect. You'll have a white female in the white males.

(Tr. p. 78, line 21–p. 79, line 2). The jury did not hear this explanation of the Mug Web system.

in any way focused the jury's attention on the source of the photos." *Denson*, 269 S.C. at 413, 237 S.E.2d at 764. Here, too, Respondent submits that the photo lineup was not introduced in a manner as to draw attention to the source of the photos.[4] Thus, no prejudice resulted from the admission of the photo lineup containing Appellant's mug shot.

If this Court finds that Bearden's statement regarding her access to arrest photos through Mug Web to be prejudicial, Respondent submits that Bearden's additional

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[4] Respondent draws this Court's attention to *State v Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), which Respondent finds instructive on the issue of prejudice. In that case, Council moved for a mistrial after a SLED agent testified that he pulled Council's fingerprint card from SLED records for comparison. *Id* at 11, 515 S.E.2d at 513. The South Carolina Supreme Court found that the trial court did not err in refusing to grant a mistrial because

> it is questionable whether the jury even understood the implication of [the SLED agent's] statement. This Court has held that similar references to a defendant's past conduct were too vague to be prejudicial. *See State v Singleton*, 284 S.C. 388, 326 S.E.2d 153 *cert denied,* 471 U.S. 1111 (1985) (references to appellant's prior crimes were vague); *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996) *cert denied,* 520 U.S. 1123 (appellant's possible drug dealing was merely suggested and no testimony was presented concerning such behavior). Further, the State never attempted to introduce appellant's prior criminal record during the guilt phase of the trial. Instead, only an inadvertent vague reference was made to appellant's prior record. *See State v Robinson*, 238 S.C. 140, 119 S.E.2d 671 (1961) (this Court pointed out that even if the testimony created the inference in the jury's mind that the accused had committed another crime the State never attempted to prove the accused had been convicted of some other crime). Thus, we conclude this reference was not prejudicial.

Id at 13, 515 S.E.2d at 514. In a footnote to that section, the Court distinguished *Council* from *Tate* and indicated that the real prejudice in *Tate* was that the date on the mug shot "infer[red] to the jury that [Tate] had a prior criminal record." *Id* at 13 n.7, 515 S.E.2d at 514 n.7. The Court further explained, "[i]n this case, the fingerprint card was never introduced into evidence, and therefore the jury was not aware of when SLED obtained the card. Therefore, there was no evidence before the jury or when or for what purpose the fingerprint card was made." Similarly, in the instant case, there was no evidence before the jury of when or for what purpose Appellant's photo was taken.

testimony cured any prejudice. Specifically, counsel for the State had Bearden clarify that Mug Web allows someone to pull from driver's license photos, too.[5] Thus, any prejudicial effect that resulted when Bearden referenced arrest photos was neutralized by that clarification. *Cf Tate*, 288 S.C. at 106, 341 S.E.2d at 381 ("The prejudicial effect of these photographs outweighs their probative value and the prejudice was neither cured nor rendered harmless by other events which occurred at trial.").

<u>Overwhelming Evidence of Guilt</u>

While Respondent maintains that the jury did not know from Bearden's testimony whether Appellant had a prior criminal record, even if this Court finds to the contrary, Respondent submits that such admission was rendered harmless where there was overwhelming evidence of guilt. As such, this Court should affirm Appellant's conviction.

In this case, the State presented overwhelming evidence of Appellant's guilt. The State presented evidence at trial that Victim was brutally beaten on March 30, 2012, and that the injuries he sustained in the beating resulted in his death. The State presented the following evidence to prove that Appellant committed the murder:

- Appellant was with Victim earlier in the day when Victim cashed a check for $1500;
- An eyewitness saw Appellant at Victim's home (the crime scene) immediately before finding Victim severely beaten inside his home;

[5] By using the pronoun "she" in his brief, Appellant has conflated Bearden's testimony with the assistant solicitor's statements to the trial court. (Initial Br. of Appellant, p. 7–8). To be clear, the assistant solicitor admitted to the trial court (outside the jury's presence) that the photos could have been driver's license photos but were actually mug shots. Bearden, on the other hand, is the one who "chose" the mug shots for the lineup and mentioned Mug Web in front of the jury.

- The same eyewitness testified that Appellant told her Victim was sleeping and then locked the back door to Victim's home, thereby preventing her from entering Victim's home;
- Appellant tried to get the eyewitness to leave Victim's home before he fled the scene in Victim's car;
- Appellant abandoned Victim's car in a parking lot eight miles away from Victim's home and ran away on foot;
- Victim told multiple individuals that Appellant beat him;
- Victim told police he was beaten with a skillet and forensic tests confirmed the presence of Victim's blood on the skillet; and
- Forensic tests confirmed that Victim's DNA was found on Appellant's shorts.

Respondent would further note that the State did not refer to the photo lineup again after its admission. Nor did the State reference the lineup in closing arguments. In light of the overwhelming evidence of Appellant's guilt, any prejudice[6] that resulted from any vague suggestion that Appellant had a prior record was rendered harmless at Appellant's trial.

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[6] In his brief Appellant also asserts that the prejudicial effect of the mug shot outweighed any probative value. (Initial Br. of Appellant, p. 8). However, the trial court expressly found the lineup more probative than prejudicial under S.C. R. Evid. 403, and that finding should not be disturbed absent abuse of discretion. *State v Hamilton*, 344 S.C. 344, 358, 543 S.E.2d 586, 593 (Ct App. 2001) ("We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment), *overruled on other grounds by State v Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

As argued above, the photo lineup itself did not indicate to the jury that Petitioner had a prior record—those photos could have been driver's license photos. Thus, there was no danger of unfair prejudice to Appellant in admitting the lineup. Additionally, there was some probative value in proving that King correctly identified Appellant as the man she saw at Victim's home on March 30th. The photo lineup and affidavit establish that fact (though the probative value of that evidence is admittedly less significant in the context of the whole trial because other evidence establishes that same fact—namely, King's in-court identification of Appellant and both King's and Bearden's testimony that King identified Appellant in the lineup).

CONCLUSION

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

Respectfully submitted,

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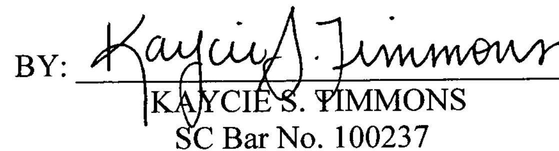
BY: 
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October 22, 2014
Columbia, South Carolina