STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2014-000189

THE STATE,

Respondent,

vs.

LATRONE T. BUTLER,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant was indicted during the June 2012 term of the Charleston County Grand Jury for carjacking, attempted murder, and kidnapping (2012-GS-10-3303; 3304, 3305). Appellant was represented by Mary A. Ford, Esquire, and Shirene C. Hansotia, Esquire. The State was represented by Assistant Solicitors Jennifer K. Shealy and Andrew C. Evans of the Ninth Circuit Solicitor's Office. On January 15, 2014, Appellant proceeded to a jury trial before the Honorable Roger Young, Sr., where he was convicted as indicted of all three offenses. Judge Young sentenced Appellant to twenty years imprisonment for carjacking, thirty years imprisonment for attempted murder, and thirty years imprisonment for kidnapping, with all sentences to be served consecutively.

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

On December 5, 2011, sixty-seven year old widow Letty Martin (hereinafter "Martin") was living by herself at the Jericho Mobile Home Park in Ravenel, South Carolina. (Tr. pp. 90-91). On that day, Martin taught two line dance classes at the Mt. Pleasant Senior Center, ran some errands, and returned home. (Tr. pp. 92-93). After parking her vehicle (a 1996 Acura 3.2 TL) in the carport adjacent to her trailer, Martin began to unload her belongings. (Tr. pp. 93, 95-96). After removing the items from her car, Martin noticed a man coming between her carport and her home. (Tr. p. 96). Martin observed his face before turning around to lock her car. (Tr. p. 96) While her back was turned, the man came behind her, grabbed her left arm and put something that he said was a gun against her ribs. (Tr. p. 96). He told her not to scream or fight or he would shoot. (Tr. pp. 96-97). The man then demanded she unlock her car and hand over her car keys, cell phone, and money; Martin complied. (Tr. pp. 97, 99). He also instructed Martin to get into the passenger seat. (Tr. p. 97).

Once Martin was in the passenger seat, the man drove out of Martin's trailer park and on to a main thoroughfare. (Tr. p. 98). Martin was able to glance at the man, although he repeatedly instructed her not to look at him or he would shoot her. (Tr. pp. 99-100). Martin noticed the man was driving the car in the wrong gear and asked him to correct it, which he did. (Tr. p. 101). The man continued to drive around the general area before eventually stopping in a secluded wooded area; by this time it was completely dark. (Tr. pp. 101-104). The man then pulled Martin from the car, placed her near the car's rear, and instructed her to put her purse on the trunk. (Tr. p. 104). The man then placed one hand on Martin's chin and one on her forehead and repeatedly jerked her head in an attempt to snap her neck. (Tr. pp. 104-105). The man's force was so great that it gave

Martin whiplash. (Tr. p. 104-105). At some point, Martin passed out and woke up on the ground; the man then lifted Martin up and resumed his attempts to break her neck. (Tr. p. 105). The man eventually stopped and fled in Martin's car with her purse when another car approached. (Tr. pp. 105-106).

Martin walked to the nearest home for help. (Tr. 106). When she arrived, she was greeted by Penny Mizell. (Tr. p. 106). Mizell, a resident of Ravenel, was at home with her husband and sixteen year old son when Martin knocked on her door. (Tr. pp. 107, 153). Mizell answered the door and Martin informed her that she had been carjacked and needed help. (Tr. pp. 106, 153). Martin was very distraught and had visible injuries. (Tr. p. 154). Mizell called 911 and spoke with law enforcement, as well as called Martin's family. (Tr. pp. 107-08, 153-55).

Shortly thereafter, Deputies from the Charleston County Sheriff's Office responded to the Mizell home. (Tr. pp. 108, 155, 156). Responding Deputy Don Kejellman spoke with Martin and received initial information about the carjacking and assault. (Tr. pp. 109, 158-59, 160-61). Martin informed law enforcement that the car had a LoJack security detection device that could possibly be used to locate her car. (Tr. p. 109). Martin also provided law enforcement with a description of the man and her vehicle, resulting in alerts to other law enforcement agencies. (Tr. pp. 159, 165-66). Martin described the man as a black male, age twenty-four to thirty, approximately five feet and eleven inches and one-hundred-and-seventy pounds. (Tr. pp. 162-63). Martin also reviewed her physical injuries with law enforcement. (Tr. pp. 109-112). Emergency Medical Services (EMS) came to the Mizell home and treated Martin. (Tr. p. 111-12).

Two days later, Martin went to the Sheriff's Office to view a photographic lineup. (Tr. p. 112, 169-70). Smith explained the process to Martin and advised her of her rights,

which Martin voluntarily waived. (Tr. pp. 113-16, 192-93). Smith then showed Martin a photo lineup comprised of six individuals matching the description she previously gave law enforcement; the lineup was compiled by another law enforcement agency with no other involvement in the case. (Tr. p. 113-117, 168-69, 192-93). Based on a tip law enforcement received from Crime Stoppers, Appellant's photograph was included in the six person photo lineup. (Tr. pp. 167-68). Smith had no other involvement in the case beyond showing her the lineup and did not know which person was the suspect when she showed Martin the lineup, which is accordance with office policy. (Tr. pp. 170, 192-95). Martin spent several minutes reviewing the lineup and studying the subject's individual faces before selecting Appellant as the perpetrator, circling his photograph and stating that he looked most like the perpetrator. (Tr. pp. 116-118,170, 193-94). Martin then reviewed her injuries with law enforcement, which were documented by camera. (Tr. p. 119-121, 194).

After Martin identified Appellant as the suspect, law enforcement sent out a BOLO report for Appellant. (Tr. pp. 170-71). Appellant was located the next day, December 8, 2011, at the Hamm Grant Club in Ravenel. (Tr. pp. 171, 199). Martin's vehicle was also found in the parking lot of the club. (Tr. pp. 171, 199). Law enforcement responded to the scene and apprehended Appellant from the club's restroom. (Tr. pp. 171, 199-206). When he was taken into custody, Appellant had the key to Martin's car hidden in his sock. (Tr. p. 206). Law enforcement also took custody of Martin's vehicle, which was towed to the Sheriff's Office evidence compound for processing. (Tr. p. 215). After obtaining a search warrant, Martin's vehicle was searched, photographed, and inventoried. (Tr. p. 215-16). A black wallet containing Appellant's vital records, birth certificate, social security card, paystubs, a South Carolina Beginner's Driving Permit,

and South Carolina Identification Card were found in the vehicle. (Tr. p. 231-34). Appellant's beginner's permit listed his height as five feet and eleven inches and one-hundred-and-ninety pounds. (Tr. pp. 232-33). Law enforcement also recovered men's clothing, a towel, and a remote augmented to look like a makeshift weapon in the vehicle. (Tr. pp. 218-222, 226-230). Law enforcement also took DNA swabs and fingerprint lifts from Martin's vehicle. (Tr. pp. 216-17, 222-226). Law enforcement obtained buccal swabs and fingerprints from Appellant and Martin. (Tr. pp. 171-73, 240-41).

The Charleston County Sheriff's Office sent the fingerprint lifts and known fingerprint samples from Appellant to be tested by a latent print analyst. (Tr. p. 225). Appellant's known prints matched numerous different prints found in Martin's vehicle. (Tr. pp. 247- 250). Additionally, the Charleston County Sheriff's Office sent the DNA swabs from Martin's vehicle and the known DNA samples from Martin and Appellant to the South Carolina Law Enforcement Division (SLED) for testing. (Tr. pp. 175, 234, 269). The SLED analyst who tested the DNA swabs concluded that Appellant's DNA was found on Martin's car and items found within the vehicle. (Tr. pp. 269-278).

Appellant proceeded to a jury trial on January 15, 2014. Appellant moved to suppress Martin's identification of him. (Tr. p. 36-71). The trial court held a hearing pursuant to Neil v. Biggers[1] and heard testimony from Martin, Detective Smith, and Appellant. (Tr. pp. 36-68). Appellant argued that the photographic lineup was unduly suggestive because Appellant's face was more highlighted and located last. (Tr. pp. 68-69). Appellant also argued that Martin only said that Appellant looked most like the perpetrator, not that Appellant was the perpetrator. (Tr. p. 69). Appellant also noted that he has more than seventeen visible tattoos and that Martin's description of her perpetrator

[1] 409 U.S. 188 (1972).

did not mention any tattoos. (Tr. pp. 43, 65-67). In reply, the State acknowledged that Appellant's face did appear to be lighter than the other five photographs and could have grabbed the attention more, but argued that nothing in the lineup was suggestive. (Tr. p. 70). The State also noted that Martin examined all the photographs in the lineup closely before selecting Appellant as most closely resembling the perpetrator and noted the long duration Martin had to observe her perpetrator. (Tr. pp. 70-71). The trial court denied Appellant's motion:

> Well, I find there is nothing suggestive at all about the process, much less unduly suggestive. It's a textbook procedure outlined. Went over the questions with her with a disinterested person, someone who is not involved in the investigation at all so she wouldn't have any way of tipping the victim of looking at any particular one of the photos. And as far as the argument that his picture has more of a highlight or a glare, I mean, I just don't see it. All of these gentlemen have a little bit of a glare to their picture. I mean, it's a flash, is what we're talking about, and I don't see where that draws any attention to the defendant's picture over any of the others such that it would make it an unduly suggestive process.

(Tr. pp. 71-72).

During the trial, Martin's out-of-court identification of Appellant was admitted and Martin made an in-court identification of Appellant. (Tr. pp. 114-18). Martin also testified that she had seen Appellant earlier on the day of the attack knocking on her neighbor's door. (Tr. p. 133). Martin also testified that she had given a black man around Appellant's age a ride to work at Harvest Moon Grill (the same restaurant that Appellant worked) earlier in the year, but could not recall if it was Appellant. (Tr. pp. 135-36).

Following the State's case, Appellant moved for a directed verdict, arguing the State did not present sufficient evidence that Appellant had attempted to kill Martin and that there was no physical evidence tying him to the attack. (Tr. pp. 280-281). The trial

court denied Appellant's motion. (Tr. pp. 281-82). Appellant called one witness in his defense, an investigator with the Charleston County Public Defender's Office, who testified regarding Appellant's numerous tattoos. (Tr. pp. 285-290). Appellant then renewed his motion for a directed verdict, which was again denied by the trial court. (Tr. p. 291).

Appellant requested jury instructions on the lesser included offenses. (Tr. p. 291). At a charging conference on the record the following morning, the trial court noted that Appellant had requested jury instructions on assault and battery of a high and aggravated Nature and assault and battery in the first, second, and third degrees. (Tr. p. 295). The court asked Appellant to elucidate why he was entitled to those lesser included offenses and the following exchange occurred:

> MS. FORD: I think the evidence is Ms. Martin testified the man's hands were around her mouth and her forehead and everything.
>
> THE COURT: And the jerking –
>
> MS. FORD: Yes, but I think it's possible the jury comes to the interpretation that the man does not intend to actually kill her, but, rather, trying to get her to –
>
> THE COURT: A chiropractic adjust or what? I mean, we don't understand it. The only evidence we have is he not only put his hand over her forehead and chin but he was jerking her head to the side. You can't just say one thing. There's no evidence other than that.
>
> MS. FORD: I just think the jury could come to the conclusion that there was not an intent to kill, Your Honor.
>
> THE COURT: How?
>
> MS. FORD: Just because the circumstances she was in a very stressful situation, obviously. She doesn't remember all of the details and everything that was occurring. She passed out, and so I just think –

> THE COURT: And then he resumed the exact same attack. That is uncontroverted evidence. Now, they can believe it or not, but it is uncontroverted that that is what happened. He took his hands, put it over her head and her chin, and snapped her neck to the side till [sic] he passed out. All right [sic]? And then he did it again when she came out. So if you were to say his intent was not to kill her but to cause her to just pass out, well, he accomplished that, so to do it again makes no sense. If you want to say, well, all he wanted to do was cause her to pass out so that he could rob her and take her stuff, he had the opportunity to do that. I'm just trying to think, how is there any view of the evidence that we have that he had anything other than the intent to kill her?
>
> MS. FORD: She passed out but then she came to so the man did it again and got her to pass out again. It didn't work the first time. That's why he had to do it again.
>
> THE COURT: And what?
>
> MS. FORD: I understand that's the only evidence about what happened that evening. We just think the jury could come to the conclusion there was not a specific intent to kill, so in that case, an ABHAN charge and assault and battery first charge and the others would be appropriate, Your Honor. Just cause of the various assaults there is great bodily injury, moderate bodily injury.
>
> THE COURT: You would be entitled to those charges if there was some way to construe the evidence as fitting all those elements without intent to kill, but there is no way to view this evidence, as I see it, other than with an intent to kill, because he did it until she passed out and then he started to do it again and then another car came along. A car came along and spooked him and he dropped her and ran off. I don't know how you construe that as other than an intent to kill, and I've thought about it.

(Tr. pp. 295-98). The court then asked the State to respond, to which the prosecutor replied that there was nothing in the record warranting the inclusion of the lesser included offenses. (Tr. p. 298). The Court agreed, stating: "I just don't see how you can have the uncontroverted evidence that we have and not view that evidence as not having an intent

to kill, and that's the only way you get the lesser included. I agree, they are lesser includeds but the facts have to support them, and there is no way to view the uncontroverted evidence as whoever did it. She says it was him, had the intent to kill her at that time. So I'm not going to allow lesser included. It's is straight up attempted murder, kidnapping, carjacking." (Tr. p. 298). Appellant also requested a specific jury instruction on the identification procedure, which the trial court charged over the State's objection. (Tr. p. 299-301).

The jury convicted Appellant as indicted of attempted murder, kidnapping, and carjacking. (Tr. p. 342). The State informed the court that Appellant was eligible for life without parole pursuant to S.C. Code Ann. 17-25-45 based on his prior record and requested that the court impose a lengthy term of imprisonment with consecutive sentences. (Tr. p. 348). After listening to mitigation from Appellant's counsel, the trial court sentenced Appellant to twenty years imprisonment for carjacking, thirty years imprisonment for attempted murder, and thirty years imprisonment for kidnapping, with all sentences to be served consecutively. (Tr. p. 349-52)

ARGUMENT

I. The trial court properly admitted Martin's in-court identification testimony, where the out-of-court identification did not result from unduly suggestive police procedures and was so reliable that no substantial likelihood of misidentification existed.

Appellant contends the trial court erred in denying his motion to suppress the in-court identification testimony provided by Martin, arguing that the testimony was based on unduly suggestive law enforcement procedures that were inherently unreliable and created an identification that is conducive to irreparable misidentification. However, the trial court properly admitted Martin's identification testimony, as there was ample evidence supporting the circuit court's findings that: (1) the out-of-court photographic lineup identification did not result from unduly suggestive police procedures; and (2) under the totality of the circumstances the out-of-court identification was so reliable that no substantial likelihood of misidentification existed. Furthermore, any error in the admission of Martin's identification testimony was harmless given the other overwhelming evidence of Appellant's guilt. For all of these reasons, Appellant's challenge to the identification testimony should be denied and his convictions should be affirmed.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission of evidence is within the sound discretion of the circuit court. State v. Simmons, 384 S.C. 145, 166, 682 S.E.2d 19, 30 (Ct. App .2009). Accordingly, a circuit court's decision to allow the in-court

identification of an accused will not be disturbed on appeal absent an abuse of discretion or prejudicial legal error. Id.; State v. Govan, 373 S.C. 552, 556, 643 S.E.2d 92, 94 (Ct. App. 2007). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." State v. Singleton, 395 S.C. 6, 13-14, 716 S.E.2d 332, 335-36 (Ct. App. 2011) (quoting Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

Discussion / Analysis

An out-of-court identification of a defendant violates due process and must be suppressed when the identification procedure used by law enforcement was impermissibly suggestive and conducive to a substantial likelihood of misidentification. State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012); State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013). A witness's subsequent in-court identification 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) (emphasis added). Trial courts employ a two-pronged inquiry to determine whether due process requires suppression of an out-of-court eyewitness identification. Liverman, 398 S.C. at 138, 727 S.E.2d at 426. First, the court must determine whether the identification resulted from "unnecessarily suggestive" police procedures. Biggers, 409 U.S. at 198-99; Liverman, 398 S.C. at 138, 727 S.E.2d at 426; Traylor, 360 S.C. at 81, 600 S.E.2d at 526. If the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there and the court does not need to consider the second prong. State v. Dukes, 404 S.C. 553, 557-

58, 745 S.E.2d 137, 139 (Ct. App. 2013). The defendant bears the burden of proving the identification procedure was impermissible suggestive. Id. at 561, 745 S.E.2d at 141 ("Our supreme court has never placed the burden of disproving suggestiveness on the State. The Fourth Circuit, whose decisions regarding federal constitutional law are binding on us, has held the defendant bears the burden of proving the identification procedure was impermissibly suggestive.").

If the court finds, however, that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless "so reliable that no substantial likelihood of misidentification existed." Liverman, 398 S.C. at 138, 727 S.E.2d at 426. 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); Singleton, 395 S.C. at 13-14, 716 S.E.2d at 335-36. When determining the likelihood of misidentification, courts must evaluate the totality of the circumstances using the following factors: (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. Turner, 373 S.C. at 127, 644 S.E.2d at 697; Singleton, 395 S.C. at 13-14, 716 S.E.2d at 335-36.

In the case at bar, the lineup was created by disinterested law enforcement agencies and given to Martin by a member of the Charleston County Sheriff's Office who had no other involvement in the case. Detective Perkins testified that the lineup was created at his request by SLED in conjunction with the Charleston County Detention Center. (Tr. p. 168). Perkins asked for Appellant's photograph to be included in the

lineup due to a Crime Stoppers tip but had no input on the other five people included in the lineup or the location of Appellant's picture within the lineup. (Tr. p. 167-69). Martin testified the law enforcement officer who presented the photographic lineup to her did not indicate whom she should select. (Tr. pp. 114-115). Detective Smith confirmed this account, testifying that she did not know who was the suspect or if a suspect was even included within the six photo lineup. (Tr. pp. 192-93). Smith elaborated that her only involvement in the case was limited to showing Martin the lineup in accordance with policy at the Charleston County Sheriff's Office that an uninvolved party give lineups. (Tr. pp. 191-93). Both Martin and Smith testified that Martin took her time when viewing the lineup, studying the face of each person included in the lineup before selecting Appellant as the perpetrator. (Tr. pp. 116, 193).

Appellant argued the lineup was nevertheless unduly suggestive because his photograph was highlighted and in the last position, making him more noticeable to Martin. The trial court disagreed and found the lineup was not unduly suggestive, noting that there was "nothing suggestive at all about the process, much less unduly suggestive." (Tr. p. 71). The court described the lineup as "a textbook procedure" and noted that the lineup was given by a disinterested person not involved with the investigation whatsoever. (Tr. p. 71). Regarding Appellant's claim that Appellant's picture has more of a highlight, the court noted: "I just don't see it. All of these gentlemen have a little bit of a glare to their picture. I mean, it's a flash, is what we're talking about, and I don't see where that draws any attention to the defendant's picture over any of the others such that it would make it an unduly suggestive process." (Tr. pp. 71-2). The photographic lineup itself support's the trial court's observations, as there are slightly different coloring and lighting effects to each of the photographs. Additionally, Appellant's argument that the

lineup was unduly suggestive because he is positioned last is preposterous, as the same could be said if Appellant's photograph were listed first, or in the middle, or any other position that he wishes to characterize as suggestive without merit. Appellant failed to carry his burden of proving the identification procedure was impermissibly suggestive.

As there was evidence to support the trial court's decision, that court did not abuse its discretion in ruling the procedure was not impermissibly suggestive. Dukes, 404 S.C. at 563, 745 S.E.2d at 142. Consequently, this Court should affirm the trial court's ruling and need not consider the second prong of Biggers. Id. To the extent this Court disagrees, the State submits there was also sufficient evidence that the out-of-court identification was reliable under the totality of the circumstances.

At the pre-trial hearing, Martin described the perpetrator as a black male, between five-ten to six feet tall and approximately one-hundred-and-eighty pounds in his late twenties, this was the same description she gave law enforcement the evening of her attack. (Tr. pp. 37, 42). This description was consistent with the photograph of Appellant law enforcement used in their lineup and was also consistent with the photographs of the other five subjects included in the lineup. Martin testified that she was shown the lineup two days later and selected Appellant. (Tr. p. 37). Appellant testified that she had seen Appellant the morning of the attack knocking on her neighbor's door. (Tr. p. 44). She testified that the incident occurred at approximately five p.m. when it was still light outside. (Tr. p. 46). Martin testified that she viewed Appellant when he initially walked close to her home before the carjacking. (Tr. p. 96). She testified she was also able to view the perpetrator while they were driving. (Tr. p. 47). Detective Smith testified that Martin took her time studying the lineup before selecting Appellant and did not have any difficulty or hesitation. (Tr. p.p. 193-94).

Appellant argues the identification made by Martin was not reliable because Martin "stated multiple times that she was too scared to look at the man. Many of the times she didn't get to look at [him]." (Tr. p. 69). Appellant also argues that Martin's description is too generic and fails to mention his numerous tattoos. (Tr. p. 69). Finally, Appellant argues that Martin was not certain in her identification, only stating that Appellant looked most like the man who carjacked her.

However, these arguments are without merit. First, Appellant's argument that Martin did not have ample opportunity to view her attacker completely ignores Martin's testimony that she was able to look at her attacker multiple times during the lengthy car ride, as well as before the attack when he was approaching her. Martin's attention was heightened throughout her encounter with the perpetrator, but particularly when he was approaching her home, as she stated that she was "annoyed" and concerned that someone was walking so closely to her residence, in between the trailer and carport. (Tr. p. 96). Additionally, Appellant's argument that Martin's description is "very, very generic" is misconstruing the record, as Martin gave an accurate description of her attacker including race, age, height, and weight. Moreover, Appellant's contention that Martin's identification was not certain is also not supported by the record; both Martin and Smith testified that Martin did not have any hesitancy or difficulty in making her identification. The mere fact that Martin's wording was that Appellant looked "most like" her Appellant does not make the identification unreliable. Finally, Martin selected Appellant from the lineup only two days after the attack. Further, a review of Martin's trial testimony indicates that her in-court identification of Appellant originated not from any taint associated with the allegedly suggestive photo lineup, but from Martin's observation of Appellant prior to and at the time of the attack. Thus, the in-court identification was

properly admitted as it had an independent origin. Liverman, 398 S.C. at 142, 727 S.E.2d at 428. Under the totality of the circumstances, Martin's pre-trial and in-court identifications were reliable. Therefore, the trial court did not abuse its discretion in denying Appellant's motion to suppress the identification testimony, and Appellant's convictions should be affirmed.

Harmless Error

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. Baccus, 367 S.C. at 55, 625 S.E.2d at 223. Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). An admission of improper evidence is considered harmless when it is merely cumulative to other properly admitted evidence. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

Here, any error in the admission of the identification evidence from Martin was harmless, merely cumulative to other evidence, and not prejudicial. The identification by Martin was cumulative to and corroborated by other evidence indicating that Appellant was the perpetrator, such as: Appellant's DNA and fingerprints found in Martin's

vehicle; Appellant's clothing and other personal items (including various identification documents and pay stubs) located in the vehicle, and Appellant's possession of the key to Martin's vehicle that he was actively trying to conceal in his sock when he was taken into custody. See State v. Simmons, 308 S.C. 80, 83, 417 S.E.2d 92, 94 (1992) ("We note that, under certain circumstances, if the identification is corroborated by either circumstantial or direct evidence, then the harmless error rule might be applicable."). Because the challenged identification evidence was cumulative to other properly-admitted evidence, any error in the admission of that identification evidence was completely harmless and could not have affected the result at trial. See Singleton, 395 S.C. at 14-15, 716 S.E.2d at 336 (finding harmless error in the admission of identification testimony where two co-conspirators testified against Singleton and identified him as a participant in the robbery). Furthermore, the propriety of Appellant's conviction is reinforced by the other protections he was afforded at trial, including his Sixth Amendment right to confront the eyewitness, his right to the effective assistance of an attorney who attempted to expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments, the trial court's eyewitness-specific jury instruction, and the constitutional requirement that the State prove Appellant's guilt beyond a reasonable doubt. Liverman, 398 S.C. at 142-43, 727 S.E.2d at 428. For all of these reasons, Appellant's convictions should be affirmed.

II. The trial court properly declined Appellant's request to charge the jury on the lesser included offenses of assault and battery of a high and aggravated nature and assault and battery of the first, second, and third degrees, where no evidence was presented at trial from which the jury could infer that the lesser, rather than the greater, offense was committed and where any alleged error was harmless.

Appellant argues the trial court erred in failing to charge the lesser included offenses of assault and battery of a high and aggravated nature and assault and battery of the first, second, and third degrees based on the degree of bodily injury Martin suffered. He maintains that Martin only suffered from whiplash, abrasions, and bruising that were treated without hospitalization, which do not infer an intent to kill or even rise to the level of great or moderate bodily injury. The State disagrees and submits that Appellant's argument is without merit, as the only conclusion that can be reached from Appellant's conduct is an intent to kill. Furthermore, even if the court's decision was error, it was harmless because it did not contribute to the jury's verdict. For those reasons, Appellant's convictions should be affirmed.

Standard of Review

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). The trial court only commits reversible error if it fails to give a requested charge on an

issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 838, 849 (1993).

"A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Green, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012). "The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tends to show the defendant was guilty only of the lesser offense." State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006). In reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). An appellate court will not reverse a trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006).

Analysis / Discussion

The Omnibus Crime Reduction and Sentencing Reform Act of 2010 substantially overhauled the state's criminal law in regard to assault and battery offenses. It codifies attempted murder in section 16-3-29 and four degrees of assault and battery in section 16-3-600. S.C. Code Ann. §§ 16-3-29 & 16-3-600 (Supp. 2013). The new degrees of assault and battery are, in descending order of severity, assault and battery of a high and aggravated nature, and assault and battery in the first, second, and third degrees. Under the statute, assault and battery of a high and aggravated nature, is a lesser-included offense of attempted murder. Id. § 16-3-600(B)(3). Assault and battery in the first degree is a lesser-included offense of both attempted murder and assault and battery of a high and aggravated nature,. Id. § 16-3-600(C)(3). Further, assault and battery in the second

and third degree are each lesser-included offenses of every preceding offense. Id. § 16-3-600(D)(3) & (E)(3).

In the present case, Appellant requested that the trial court instruct the jury on all lesser included offenses. (Tr. p. 291). The court asked Appellant what evidence entitled him to jury instructions on the lesser included offenses. (Tr. p. 295). Appellant replied that he was entitled to all four lesser included offenses because the jury could find that Appellant lacked intent to kill Martin and based on the degree of Martin's injuries. (Tr. pp. 297-98). The trial court disagreed, stating: "You would be entitled to those charges if there was some way to construe the evidence as fitting all those elements without intent to kill, but there is no way to view this evidence, as I see it, other than with an intent to kill, because he did it until she passed out and then he started to do it again and then another car came along. A car came along and spooked him and he dropped her and ran off. I don't know how you construe that as other than an intent to kill, and I've thought about it." (Tr. p. 298). He elaborated: "I just don't see how you can have the uncontroverted evidence that we have and not view that evidence as not having an intent to kill, and that's the only way you get the lesser included. I agree, they are lesser includeds but the facts have to support them, and there is no way to view the uncontroverted evidence as whoever did it. She says it was him, had the intent to kill her at that time. So I'm not going to allow lesser included. It's is straight up attempted murder, kidnapping, carjacking." (Tr. p. 298). Appellant contends this was error.

S.C. Code Ann. § 16-3-29 provides: "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-600(B)(1) provides: "A person commits the offense of assault and battery of a high and aggravated nature if the person

unlawfully injures another person, and (a) great bodily injury to another person results; or (b) the act is accomplished by means likely to produce death or great bodily injury." Assault and battery of a high and aggravated nature is a lesser included offense of attempted murder. S.C. Code Ann. § 16-3-600(B)(3).

S.C. Code Ann. § 16-3-600(C)(1) provides: "A person commits the offense of assault and battery in the first degree if the person unlawfully: (a) injures another person, and the act: (i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or (b) offers or attempts to injure another person with the present ability to do so, and the act: (i) is accomplished by means likely to produce death or great bodily injury; or (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft." Assault and battery in the first degree is a lesser included offense of assault and battery of a high and aggravated nature. S.C. Code Ann. § 16-3-600(C)(3).

S.C. Code Ann. § 16-3-600(D)(1) provides: "A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and: (a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted; or (b) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing." Assault and battery in the second degree is a lesser-included offense of assault and battery in the first degree, assault and battery of a high and aggravated nature, and attempted murder. S.C. Code Ann. § 16-3-600(D)(3).

S.C. Code Ann. § 16-3-600(E)(1) provides: "person commits the offense of assault and battery in the third degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so." Assault and battery in the third degree is a lesser-included offense of assault and battery in the second degree, assault and battery in the first degree, assault and battery of a high and aggravated nature, and attempted murder. S.C. Code Ann. § 16-3-600(E)(3).

Appellate contends that he is entitled to jury instructions on all lesser included offenses because the jury could infer from the evidence that he was guilty of any of the four lesser offenses. To the contrary, the trial court properly declined to instruct the jury on any of the lesser included offenses because the evidence presented during trial only supported a conclusion that Appellant was trying to kill Martin during the assault. Martin testified that Appellant forcefully jerked her head, with one hand placed on her forehead and the other hand on her chin, in an attempt to snap her neck. (Tr. pp. 104-05). Martin testified that Appellant acted with such force that she had whiplash following the event. (Tr. p. 104). After passing out on the ground, Appellant then jerked her off of the ground and continued trying to snap her neck. (Tr. p. 105). Appellant only ceased when another vehicle approached. (Tr. p. 105). Based on this evidence, the jury could only find that Appellant committed attempted murder or was not guilty. See State v. Mallory, 270 S.C. 519, 523, 242 S.E.2d 693, 695 (1978) ("[I]t is not error to refuse to submit the question of simple assault and battery to the jury under an indictment for assault and battery of a high and aggravated nature, unless there is testimony tending to show that the defendant is *only* guilty of a simple assault and battery." (emphasis added)); see also State v. Small, 307 S.C. 92, 94, 413 S.E.2d 870, 871 (Ct. App. 1992) ("The evidence does not warrant the charge of the lesser offense of simple assault. Small was guilty of assault and battery

of a high and aggravated nature or not guilty. Accordingly, there is no merit to his claim that the court erred in refusing to give the requested charge."). As no evidence was presented supporting a finding that the assault on Martin was anything other than attempted murder, the trial court did not err in declining to instruct the jury on the lesser included offenses. Appellant's convictions should be affirmed.

Harmless Error

Errors are considered to be harmless when they could not reasonably have affected the result of the trial. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003). "It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him." State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 285, 288 (1947). When a review of the entire record establishes an error is harmless beyond a reasonable doubt, an appellate court should not reverse a conviction. State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003).

Any error with respect to a jury instruction is subject to a harmless error analysis. See State v. Middleton, 407 S.C. 312, 317 n. 2, 755 S.E.2d 432, 435 n. 2 (2014) (holding a trial court's refusal to give a jury charge on a lesser-included offense that is supported by the evidence is subject to harmless error analysis). "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.' " Id. (quoting State v. Kerr, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct.App.1998)). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to

the verdict rendered." Id. (citation omitted). "Thus, whether or not the error was harmless is a fact-intensive inquiry." Id.

In Middleton, the appellant intentionally drove up to a stopped vehicle and shot at the two occupants at least five times. Id. at 314–15, 755 S.E.2d at 433–34. Neither passenger was struck due to the quick thinking of one, who jumped into the driver's seat and ran appellant off the road. Id. One passenger did sustain minor lacerations from the broken glass. Id. The appellant was charged with two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. Id. The trial court instructed the jury on the lesser included offense of assault and battery in the first degree as to the injured occupant, but refused to do the same as to the uninjured occupant. Id. at 315-16, 755 S.E.2d 434. Our Supreme Court found "[t]he trial judge misconstrued the statutory definition of assault and battery in the first degree as requiring an injury to the victim." Id. at 315–16, 755 S.E.2d at 434–435. However, the Court determined that harmless error because "the only conclusion established by the evidence is that Appellant was guilty of attempted murder." Id. at 319, 755 S.E.2d at 436.

In the present case, even assuming the trial court erred in declining to instruct the jury on the lesser included offenses of assault and battery of a high and aggravated nature and assault and battery in the first, second, and third degrees, any error was entirely harmless and did not contribute to the jury's verdict. Martin testified that Appellant forcefully jerked on her neck in an attempt to break it until she passed out, then resumed the activity until a car approached. There was no testimony or other evidence presented to refute Martin's account. Therefore, the evidence presented in this case can only lead to the conclusion that Appellant was either guilty of attempted murder or of nothing. See State v. Battle, 408 S.C. 109, 122, 757 S.E.2d 737, 743-44 (Ct. App. 2014), reh'g denied

(May 22, 2014), cert. denied (Nov. 20, 2014) (the trial court's erroneous refusal to instruct the jury on the lesser included offense was not harmless beyond a reasonable doubt because "u[n]like Middleton, the evidence does not support one clear cut conclusion" due to conflicting evidence.") Appellant's convictions should be affirmed.

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

January 16, 2015

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Roger M. Young, Sr., Circuit Court Judge

RECEIVED
JAN 16 2015
SC Court of Appeals

Appellate Case No. 2014-000189

THE STATE,

Respondent,

vs.

LATRONE T. BUTLER,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.
This 16th day of Jan, 2015.

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ALAN WILSON
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January 15, 2015

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RE: State v. Latrone T. Butler – Appellate Case No. 2014-000189

Dear Mrs. Hudgins:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Megan Harrigan Jameson
Assistant Attorney General
S.C. Bar No. 100108

MHJ/
Enclosures

cc: The Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services