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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Calhoun County

Maite Murphy, Circuit Court Judge

PHILLIP SPEARS, PETITIONER,

V.

STATE OF SOUTH CAROLINA, RESPONDENT,

APPELLATE CASE NO. 2014-002096

SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Calhoun County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PHILLIP LEE SPEARS,

APPELLANT

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STATEMENT OF THE CASE

Phillip Lee Spears, appellant, was indicted by the Calhoun County Grand Jury for armed robbery, kidnapping, and possession of a firearm during the commission of a violent crime. On October 1, 2007, appellant proceeded to trial before the Honorable Diane S. Goodstein and a jury. Upon the jury finding appellant guilty as charged, Judge Goodstein sentenced him to five years incarceration for possession of a firearm, thirty years for kidnapping, and thirty years for armed robbery with credit for time served and with all sentences to be served concurrently.

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ARGUMENT

1. The trial judge erred in denying appellant's motion for severance?

Counsel for the co-defendant, Bantan, moved to sever the cases for trial. Counsel for appellant joined in the motion and moved to sever appellant's case for trial. (R. p. 176). The judge erred in denying the severance motions.

The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a co-defendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime. State v. Leonard, 287 S.C. 462, 473, 339 S.E.2d 159, 165 (Ct.App.1986), reversed on other grounds, 292 S.C. 133, 355 S.E.2d 270 (1987). "The trial judge, however, must act cautiously in allowing a joint trial. The judge must carefully consider problems that may arise from a joint trial, such as redacted statements, and must assure protection of each defendant's constitutional right to confront witnesses against him. State v. Singleton, 303 S.C. 313, 315, 400 S.E.2d 487, 488 (1991).

Motions for a severance and separate trial are addressed to the discretion of the trial court. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997); State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Absent a showing of an abuse of discretion, this Court will not disturb the trial court's ruling on appeal. State v. Nelson, 273 S.C. 380, 256 S.E.2d 420 (1979); State v. Dennis, 337 S.C. 275, 281-282, 523 S.E.2d 173, 176 (S.C. 1999)

Counsel for appellant argued that severance was required in order to protect appellant's specific trial right to last argument if he presented no evidence or witnesses.

Counsel further argued that severance was warranted where prejudicial evidence was admissible against his co-defendant but inadmissible against appellant. (R. pp. 179-189). Counsel for appellant indicated that appellant would be prejudiced by a joint trial should Bantan and his counsel approach the case antagonistically by accusing appellant of the crime. Counsel's severance motion was denied; however, the arguments of Bantan's counsel fully validated counsel's concern that appellant could not be tried fairly in a joint trial. The joint trial resulted in appellant's losing his right to be presumed innocent and his right to a fair trial because appellant was forced to defend himself against the prosecution and against his co-defendant.

Counsel for Bantan argued in closing: "Let's talk a little bit about, as I see it, the key points that the prosecution made against Mr. Spears. What do they have against Mr. Spears? I submit to you they've got a confession, they've got a gun, and they've got identification from someone who previously knew him. Knew his family, had seen him at the church events, sporting events, had been around him, had knowledge prior knowledge of him." (R. p. 973, lines 7-14). Bantan's counsel then compared and contrasted the State's case against Bantan with the case against appellant. Counsel pointed out that Bantan did not confess as, in his opinion, did appellant. Counsel for Bantan further argued that there was no gun anywhere which could be put in Bantan's hand. (R. p. 973).

Counsel for Bantan continued his argument by focusing on appellant's supposed confession. Counsel for Bantan urged the jury to credit the testimony of the State's witness, Taneesha Adams, and to believe her testimony against appellant. Counsel for Bantan noted that Taneesha Adams knew appellant. Counsel argued, "Matter of fact,

apparently at one point they had a relationship. That was over, but they were, they still kept in contact. He calls her, by her testimony, that day and says I robbed the Wagon Wheel. Not we robbed the Wagon Wheel. Not Titus and I robbed the Wagon Wheel. The only confession we have, ladies and gentlemen, is from Taneesha Adams saying that Mr. Spears told her I robbed the Wagon Wheel." (R. p. 974). Counsel for Bantan further argued that appellant was "in his bedroom, attempting to flee" at the time of his arrest. (R. p. 974, lines 18-19).

Bantan's counsel further argued that appellant was known to Ms. Rivers while she had never seen Bantan before. (R. p. 973). The result of Bantan's counsel's argument was that this appellant was forced by the judge's denial of severance to face the accusations of the prosecution and of his co-defendant. Appellant was denied the specific right to a fair trial during which he was presumed innocent by the judge's erroneous denial of severance.

II. The trial judge erred in denying appellant's motion to suppress made on the grounds that the warrantless search was conducted in violation of the warrant statute and without valid consent.

At the outset of trial, counsel for the co-defendant, Bantan, moved to suppress evidence seized from a trailer located on Charlotte Circle in the city and county of Orangeburg. Counsel argued that a search warrant was improperly issued to a Calhoun County officer, without jurisdiction to execute, in violation of the warrant statute S.C. Code Ann. Section 17-13-140. (R. pp. 40-43). Counsel for appellant joined in the motion to suppress the evidence produced as the result of the search as violative of the United States and South Carolina Constitutions' bar to unreasonable search and seizure.

Officer Todd Williams testified that on November 6, 2006, he met other Orangeburg County officers and Calhoun County officers at the hospital where appellant's girlfriend had indicated that he could be found and then proceeded to a trailer on Charlotte Circle. Officer Williams testified that they were looking for two individuals involved in an armed robbery of Bells Bait and Tackle Shop a/k/a the Wagon Wheel. (R. p. 46). Williams testified that he attempted to get Mr. Bantan to sign a consent to search his trailer. He testified that Bantan verbally consented to a search but that he refused to sign anything. (R. p. 49). Officer Williams testified and he noted on the unsigned consent form that Bantan said, "I don't care if you search but I'm not signing anything." (R. p. 50).

The prosecution testimony indicated that pursuant to Bantan's verbal consent, officers conducted a search of his home and found items which they believed were consistent with the armed robbery. However, the officer testified that at that point, Bantan withdrew his consent. Officer Williams testified that upon Bantan withdrawing his consent for the search, "We held what we had and got a search warrant." (R. p. 51).

A search warrant was sought by affiant, Calhoun County Officer Golden. The search warrant was issued by an Orangeburg magistrate and executed at Charlotte Circle on November 6, 2006. (R. p. 55). Officer Golden testified that when he was at the crime scene, he heard someone say that one of the robbers could have been from New York. (R. p. 82, line 21-p. 83, line 1). He testified that he thought that the person referenced could be appellant, Phillip Spears. (R. p. 83, lines 2-3). Golden testified that, therefore, he proceeded to the home of appellant's girlfriend, Taneesha Adams. (R. p. 83, line 20-p. 84, line 1). Golden testified that Taneesha informed him that appellant, her boyfriend,

had confessed to her that he had robbed the Wagon Wheel. (R. p. 85, lines 1-4). Taneesha informed Golden that she had seen appellant at Bantan's trailer. Taneesha's brother helpfully volunteered to escort the authorities to the trailer on Charlotte Circle. (R. p. 85).

Golden testified that when he went to the trailer on Charlotte Circle, he first spoke to Anna Amanda. Golden testified that Amanda consented to his entry into the trailer. Golden testified that when he entered the trailer, he saw Bantan and ordered him to walk backwards toward him. The officer testified that he had Bantan go down on his knees with his hands up. (R. p. 87). At that point, Golden testified that Officer Murphree detained Bantan. Golden testified that Bantan gave the officers consent to search and that they proceeded to search the bedroom. However, Golden testified that after the officers had discovered evidence consistent with the robbery, Bantan withdrew his consent.

Golden testified that Bantan withdrew consent when the officers were several minutes into the search of the bedroom. However, he agreed that, prior to trial, he had informed defense counsel that Bantan withdrew his consent almost immediately, while officers were still in the hall and prior to the discovery of any relevant evidence. (R. p. 124). Although prior to trial Golden had indicated that no relevant evidence was discovered during the brief "consent period," at trial, he admitted that numerous items believed consistent with the robbery were discovered and seized pursuant to Bantan's consent. In fact, these items were listed and identified by Golden in his application for the search warrant. (Supp. App. pp. 10-13) The trial judge erred in refusing to suppress the evidence found as the result of the search of the trailer at Charlotte Circle on the

grounds that the search was not authorized by valid consent and not authorized by a valid search warrant under the statute.

First, the supposed consent was plainly not given voluntarily. Ms. Amanda, who supposedly consented to the officers' entry is profoundly mentally challenged and the officers made no inquiry as to whether she was authorized to consent to their entry. Further, Bantan was confronted by armed officers, forced to kneel with his hands in the air, and then handcuffed behind his back. Officer Golden testified that at some point the handcuffs were removed from Bantan. However, he agreed that he had told defense counsel that the cuffs were only removed after Bantan gave consent to search. (R. p. 124). Counsel argued, "And only when he gives the consent to search do they take the handcuffs off. I think clearly that that is coercion." (R. p. 294). Counsel argued that the use of handcuffs and intimidation overcame Bantan's will so that any consent to search was coerced and not voluntary.

The trial judge responded, "So, I've got two police officers telling me that they had him in handcuffs until he gave consent to search." (R. p. 295, lines 1-2). The trial judge noted that she found convincing the testimony indicating that the officers were searching the bedroom while Bantan was lying on the sofa in handcuffs. (R. p. 295, lines 3-6). The trial judge further observed that the officers had said that they had their guns drawn when the consent was obtained. The trial judge observed, "The police officers told me they [guns] were out. . . .." (R. p. 295). The judge noted, "They had the children come out. She took the children out and so, and she talks about the fact that when they came in, she was out. And both police officers told me . . . that you know they had guns drawn." (R. p. 296).

The trial judge observed, "Here's what concerns me. Based on what police officers have told me, we're in a small mobile home. Based on their testimony, both officers had their guns drawn. They order him to back out and down the hall. He's not the person they think they are looking for. When he comes down the hall with his hands up, they tell him to kneel. Their guns are drawn. Keep his hands up. He apparently complies. They handcuff him, they put him on the sofa and they are both there. And in accordance with what Officer Williams tells me and then - - I must say there were three stories told by Officer Golden that I counted. There may be more, but I certainly counted three. But certainly after those three stories, he does tell us that he shared with counsel for the defense that he, Officer Golden, told them that the handcuffs remained on Mr. Bantan until consent to search was obtained. I think that's pretty strong case of coercion." (R. p. 299, line 19-p. 299, line 10).

The trial judge correctly found, "They told him to kneel with his hands over his head. They put handcuffs on him and they held him just that way until he gave consent. And taking the evidence in its totality, there's no question in my mind that that's how that happened despite other stories by one of the officers who testified. And when he was, when he granted consent to search, they took his handcuffs off. So, I don't think that's consent. I think they overcame his will in regards to that search. So, I don't think that that search was consensual." (R. p. 465).

However, the trial judge further found that the search was rehabilitated and validated by the search warrant which the officers eventually obtained on the strength of the evidence discovered pursuant to the supposed consent. This ruling was error. Where the officers rifled through Mr. Bantan's belongings without a warrant while he was held

in handcuffs at gunpoint, the evidence discovered should have been excluded at trial. The trial judge erroneously accepted the State's argument that the evidence was properly discovered and seized pursuant to a validly obtained search warrant and appellant was prejudiced by the error.

The judge asked what the defense position would be if she ruled that there was no valid consent. Counsel responded, indicating that such a finding would justify the granting of the defense motion to suppress all evidence found or obtained directly during that involuntary consent period. (R. p. 300, lines 4-9). Counsel further argued that the evidence obtained during the consent period was used to obtain the search warrant. Counsel argued, "We move to suppress first the evidence that was obtained from during the consent period. And that we would want to attack the search warrant and say it's invalid because the items that have been - - the search warrant was improperly obtained." (R. p. 300, lines 10-19). The judge asked to review the search warrant affidavit. The State agreed that the items discovered and/or seized pursuant to coercion/"consent" included the Bi-Lo receipt, Timberland boots, B.D.U. pants, and money. (R. p. 301). However, the State argued that, "at least the Bi-Lo receipt," should still be admissible under a theory of inevitable discovery. (R. p. 302).

The State's witnesses had testified that the robbers took a large amount of change from the store and, further, that a large amount of change was turned into a CoinStar and that the CoinStar receipt was converted into cash at Bi-Lo. The officers who conducted the search testified that a receipt from Bi-Lo reflecting a CoinStar transaction was found during the search of the trailer at Charlotte Circle. (R. pp. 460-461). The State argued that once the officers had seen the Bi-Lo receipt, whether they seized it at that time or

not, it would inevitably have been seized pursuant to the search warrant. The prosecutor argued,

> They chose to take it at that point, thinking it was taken during the consent. The court believes that they couldn't rightfully take it during that consent period because consent wasn't legally given, they've still taking notice of this. And when they come back with the search warrant there's no reason to believe they couldn't have recovered that item after having a valid search warrant. So, it's the state's theory all the evidence comes in anyway from the valid search warrant and inevitable discovery of that receipt.

(R. p. 302). However, as defense counsel argued, "The evidence taken during the consent to search period included the Bi-Lo receipt. After they take the receipt, they then swear out the affidavit. On the affidavit, it lists evidence consistent with the robbery. One of those items is the [Bi-Lo] receipt." (R. pp. 263-267). The discovery of the receipt and all other evidence discovered at the trailer was accomplished by an illegal search which the judge found violated the Fourth Amendment's prohibition on unreasonable searches and seizures. Likewise, the search warrant was improperly obtained through reliance on the illegally obtained evidence to establish probable cause.

The trial judge ruled: "I do find, though, that this search warrant, that the affidavit given gives rise to probable cause. I do find that the search warrant issued by Judge Houser was appropriately issued." (R. 465). The judge found that if she excised the portion of the warrant affidavit which referenced the results of the illegal search the affidavit contained sufficient evidence to support a finding of probable cause. (R. p. 474). The trial judge erred in finding that the search was valid under the search warrant. The search warrant was invalid, first, because it was issued in violation of the warrant statute. Despite the fact that the warrant was eventually delivered to and executed by an

Orangeburg County officer, the warrant to search the Charlotte Circle trailer in Orangeburg County was issued to a Calhoun County officer without jurisdiction to execute the warrant in Orangeburg county.

The search warrant was further invalid because it was obtained on the basis of the evidence discovered pursuant to the egregiously coerced "consent" to search. The trial judge erred in finding that the search warrant was valid despite the coerced consent to search. She found that the search warrant affidavit was valid because there was sufficient evidence to support probable cause even after the reference to the items found pursuant to consent was excised.

On appeal from a suppression hearing, the appellate court will give deference to the circuit court's findings but will reverse if there is clear error. State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). The appellate court may conduct its own review of the record to ascertain if there is any evidence to support the ruling. State v. Davis, 371 S.C. 412, 415, 639 S.E.2d 457, 459 (Ct.App. 2006). Here, the trial judge clearly erred in denying the defense motions to suppress all evidence found directly and indirectly as the result of the warrantless, coercive, search of the trailer. The trial judge relied on the analysis from Davis, supra, which was decided on the basis of a Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) analysis. However, this analysis was not appropriate for the facts of this case.

Franks outlined a two-part test for challenging a warrant affidavit's *veracity*. Under Franks, "First, to mandate an evidentiary hearing, there must be 'allegations of deliberate falsehood or of reckless disregard for the truth ... and those allegations must be accompanied by an offer of proof.' ... Second, ... the court must consider the affidavit's

remaining content, with the affidavit's false material set to one side, to determine if it is sufficient to establish probable cause." State v. Davis, 354 S.C. 348, 359-60, 580 S.E.2d 778, 784 (Ct.App.2003) (citing State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999)). "There will be no Franks violation if the affidavit ... still contains sufficient information to establish probable cause." Missouri, at 554, 524 S.E.2d at 397; State v. Davis, 371 S.C. 412, 415-416, 639 S.E.2d 457, 459 (Ct.App. 2006).

In Davis, the Court found, "In determining whether alleged misstatements in an affidavit render a search warrant invalid, the court must conduct the analysis set forth in Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)." The Court had determined that a police officer's statement used to establish probable cause for a search warrant was false and that the statement had been used in the affidavit with reckless disregard for the truth. However, the Davis Court found: "[W]e believe the unfolding circumstances described therein, not the false statement about a positive identification of Craig Davis, was the basis for the issuance of the search warrant, or at least was information sufficient to justify its issuance. The Court concluded that the officer's false statement was only coincidental to the issuance of the search warrant. Davis, 371 S.C. at 418, 639 S.E.2d at 460 (Ct.App. 2006). In contrast, here, the evil was not a false statement but illegally discovered evidence.

Beginning in the early twentieth century, the United States Supreme Court declared that evidence seized in violation of the Fourth Amendment must be excluded in federal criminal proceedings. Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). Later, the Court applied the Fourth Amendment and its exclusionary rule to the individual states as well. See Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6

L.Ed.2d 1081 (1961); Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949). In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures. See S.C. Const. art. I. § 10. The relationship between the two constitutions is significant because "[S]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." State v. Easler, 327 S.C. 121, 131 n. 13, 489 S.E.2d 617, 625 n. 13 (1997).

In addition to language which mirrors the Fourth Amendment, S.C. Const. art. I § 10 contains an express protection of the right to privacy: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, ..." By articulating a specific prohibition against "unreasonable invasions of privacy," the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution resulting in the exclusion of the discovered evidence. State v. Forrester, 343 S.C. 637, 643-645, 541 S.E.2d 837, 840 - 841 (2001).

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The Fourth Amendment does not proscribe all contact between police and citizens, but is designed 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" INS v. Delgado, 466 U.S. 210, 215, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554, 96 S.Ct. 3074, 3081, 49 L.Ed.2d

1116 (1976)); State v. Butler 353 S.C. 383, 389, 577 S.E.2d 498, 501 (Ct.App. 2003). The fruit of the poisonous tree doctrine holds that where evidence would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality, the evidence must be excluded. State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996).

In order to remove the taint of an illegal search, the government must establish a break in the causal connection between the illegality and the evidence thereby obtained. See State v. Greene, 330 S.C. 551, 559, 499 S.E.2d 817, 821 (Ct.App. 1997). The "fruit of the poisonous tree" doctrine holds that evidence which is produced by or directly derived from an illegal search is generally inadmissible against the defendant because of its original taint, though knowledge of facts gained independently of the original and tainted search is admissible. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); In re Jeremiah W. 361 S.C. 620, 624, 606 S.E.2d 766, 768 (S.C. 2004).

Probable cause generally exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.'" United States v. Hodge, 354 F.3d 305, 309 (4th Cir. 2004). Here, the trial judge erred as a matter of law in resolving the illegality of the coerced search by excising the portion of the search warrant affidavit which relied on the illegal search and by then finding that the remainder of the affidavit provided sufficient probable cause. To the contrary, the probative evidence cited by affidavit consisted of the evidence found during the illegal search. Once the reference to that evidence is excised, the affidavit relies almost exclusively on statements as to eyewitness

identification of the defendants. Appellant would argue that the trial judge erred in finding the search warrant valid despite the fact that the affidavit relied on illegally obtained evidence. The judge's ruling was particularly erroneous in light of the fact that the eyewitness identifications otherwise relied upon were the unreliable result of suggestion. See Issue IV. Given the questionable value of the eyewitness identifications, the judge erred in finding that the warrant affidavit sufficiently established probable cause to search without reliance upon the illegally discovered evidence. While the affidavit's indication that the defendants had been identified as the culprits, once the evidence from the trailer is excised, nothing remains to suggest that evidence would be found from a search of the trailer on Charlotte Circle. The evidence illegally discovered in the trailer was the prosecution's probative link to the trailer. In the absence of any reference to the search of the trailer or the evidence discovered, the search warrant affidavit failed to establish probable cause to search the trailer.

III. The trial judge erred in denying appellant's motion to suppress testimony and evidence of the gun found in the room where he was taken into custody.

Counsel for appellant moved to suppress evidence that a gun was found in the room in which he was arrested. Counsel argued: "My motion on the gun is that there was a gun when my client was arrested in North Carolina. There was a gun found under a bed in the bedroom where my client was arrested. The State has brought the gun back and is implying or the assumption that they intended to say that this is the gun that was used during the robbery. My client was not arrested until the 9th which is three days after." (R. p. 307). Counsel argued that entry of the gun would be an attempt by the State to suggest that the gun seized was the gun used in the armed robbery despite the fact that the gun seized belonged to Kim Cherry and despite the fact that the gun seized three days after

the robbery did not match the descriptions of the robber's gun. Counsel argued that entry of the gun in evidence would provide no probative evidence and that the obvious and unfairly prejudicial effect of the gun evidence would outweigh any negligible probative value. (R. p. 307-308).

The State responded by arguing that the gun found matched the general description of the gun used by the armed robber. (R. p. 309). The assistant solicitor argued, ". . . [A]ny question as to whether or not that's his gun, and I have questions as to whether or not that's his gun, goes to the weight more so than admissibility." (R. p. 309, lines 5-11). The State further argued that the gun was relevant because an inference "could be made that that's the gun used in the robbery." (R. p. 309, lines 20-23). Counsel for appellant argued to the contrary that, given Kim Cherry's statement indicating that the gun belonged to her, given the absence of testimony connecting the gun to the robbery or to appellant, and given that the gun did not match the description of the armed robber's gun, entry of the gun in evidence would serve only to require and encourage the jury to speculate to the prejudice of appellant. (R. p. 311).

Counsel pointed out that the gun found under the mattress in a bed at Kim Cherry's house in North Carolina where appellant was found and taken into custody did not match the description of the armed robber's gun. Counsel pointed out that the witnesses had reported that the robber's gun was a silver gun with black trim whereas Kim Cherry's gun was the opposite, i.e., a black gun with silver trim. Counsel argued, "If you look at the gun, the gun is a black gun. It doesn't match the description. . . . It requires the jury to speculate and the jury is not allowed to speculate." (R. p. 311, lines 12-16).

The State argued that the gun was found in the bedroom where the State presumed appellant was staying; however, there was no testimony that appellant was staying with Kim and no indication that he was staying in that room. Actually, the trial judge found that the fact that appellant was found in the room where the gun was located was of minimal probative value. She indicated that to allow the State to admit the gun in evidence because it was found in the room with appellant would unfairly allow the State to give the jury a sense that this is a dangerous person versus that this is the weapon involved. (R. p. 310). However, the judge was more impressed with the State's argument that the semi-automatic matched the general description of the robber's weapon.

The trial judge indicated, "I mean, I don't know that the fact he has a gun when he is found in and of itself is relevant to these issues. But I do think when you tie that back to the fact that it, the gun, matches the general description, that's an entirely different situation." (R. p. 310, lines 13-18). However, defense counsel pointed out, "There were no fingerprints found. There was shells in the gun; there was no ballistics done. There is nothing else connecting my client to that gun at all, as well as I think the testifmony is that the young lady stated that that's her gun." (R. p. 313).

The judge initially ruled, "I'm not going to exclude it at this juncture. I think, based upon what I've heard, there is sufficient evidence if it all comes to fruition that the state will be able to establish a foundation and it is relevant and I would allow it. So, I won't exclude it with a motion to suppress and a motion in limine. If that changes during the time of trial, let me know. In other words, if they can't lay the foundation then it isn't going to come in." (R. p. 313; 316).

SLED agent Donald Johnson testified on proffer that authorities traced a number from the cell phone left at the robbery and found that it was Kim Cherry's telephone number in North Carolina. (R. p. 319). He testified that he proceeded to Ms. Cherry's residence and that she let him in and agreed to speak with him. (Tr. p. 317-319). Agent Johnson testified that Ms. Cherry was gracious and that she "readily" gave consent for him to enter her home. (R. p. 322). Agent Johnson testified that Ms. Cherry told him that appellant was in the bedroom and that when he asked her if there was a weapon in the room she indicated that there was a gun in the room, that it was her gun, and that it was in the bed. The agent testified that Ms. Cherry indicated that the gun belonged to her and he confirmed that, after he had taken custody of the gun, "She said it was hers." (R. p. 321, lines 16-18).

Agent Johnson agreed that the gun was under the mattress, that appellant was standing on the other side of the window, and that the window was between appellant and the bed. (R. p. 325). After the proffer of Johnson's testimony, the judge ruled, "I think it goes to the weight rather than the admissibility, and I would deny your motion to suppress it in limine." (R. p. 332). This ruling was error. Despite indicating that if the State was unable to establish a foundation the evidence would be kept out, the trial judge nevertheless admitted the evidence despite the State's abject failure to establish a foundation for admission.

Rivers testified that the first robber had a black gun. She testified, "I didn't really see his gun because at the time he's jumping the counter. But I could - - I'm not big on guns, but when the gun was pointed at me, it was a black gun. It was trimmed with silver

on top of it, but verbatim, perfectly, no." (R. p. 351, line 20-p. 352, line 1). Rivers testified that she could not offer testimony about the gun "for sure." (R. p. 353).

Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. Rule 401, SCRE; State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). Although evidence is relevant, it may be excluded if the danger of unfair prejudice substantially outweighs its probative value. Rule 403, SCRE; State v. Alexander, supra. Here, the evidence indicating that the officers found a gun under the mattress was wholly irrelevant where the State was unable to establish that the gun was owned or possessed by appellant and also unable to establish any connection between the gun and the crime charged.

The uncontroverted evidence established that the gun belonged to Kim Cherry and not to appellant. There was no testimony connecting appellant to that gun other than the fact that he was present in the room when the gun was discovered under the mattress. No witness testified that the gun was the gun used by the robber at the Wagon Wheel. In fact, the descriptions of the robbery gun did not match Ms. Cherry's gun. The trial judge erred as a matter of law in failing to determine that the unfairly prejudicial effect of admitting the gun found under Kim Cherry's mattress in evidence substantially outweighed the negligible probative value.

IV. The trial judge erred in denying the defense motion to suppress the identifications of Bantan and appellant's motions to suppress the trial testimony identifying him as the robber where the identification procedures were unduly suggsstive leading to a reasonable chance of misidentification.

The decision to admit an eyewitness identification is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of that discretion, or the commission of prejudicial legal error. State v. Govan, 372 S.C. 552, 643 S.E.2d 92, 94 (Ct.App. 2007). The

in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a significantly substantial likelihood of irreparable misidentification. State v. Brown, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct.App.2003). The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an identification. First, a court must ascertain whether the identification process was unduly suggestive. "The court must next decide whether any out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed ... Only if [the procedure] was suggestive need the court consider the second question-whether there was a substantial likelihood of irreparable misidentification." Brown, at 503, 589 S.E.2d at 784 (citations omitted); See Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

The following factors are to be considered in evaluating the totality of the circumstances as to whether an identification is admissible: the opportunity of the witness to view the criminal at the time of the crime; the witness's degree of attention; the accuracy of the witness's prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and the confrontation. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (Ct.App. 2000).

Here, Ms. Rivers and Mr. Bourgeois had little opportunity to view the robbers because they were told not to look at them and they were on the floor with their heads down during the robbery. While the witnesses were likely highly attentive due to the dangerous situation, again, they were threatened and instructed not to look at the robbers. (R. p. 496). The witnesses' descriptions of the robbers differed from each other and from

appellant's actual appearance. Therefore, under the totality of circumstances, both the out-of- court and in-court identifications of Ms. Rivers and Mr. Bourgeois should have been excluded as the unreliable product of an unduly suggestive identification procedure.

Here, the trial court erred in denying appellant's motions to suppress the photo line-up identifications shown to Rivers as unduly suggestive and unreliable and the resulting in-court identification as tainted by the prior suggestive identification procedure. Appellant was deprived of due process of law through identification procedures that were unnecessarily suggestive and conducive to irreparable mistaken identification. Brown, supra. The particular procedure followed by the officers in presenting the line-ups rendered the result of Rivers' identification unreliable given that the witness was shown two photo line-ups in which two of the individuals pictured appeared in both photo arrays. The identification provided by Mr. Bourgeois was rendered unreliable by a pre-trial confrontation during which the victim observed appellant in custody as he was brought in to a hearing scheduled in the Wagon Wheel armed robbery case.

a. Identification provided by Ms. Rivers:

Natasha Rivers worked at Bell's Wagon Wheel bait shop/convenience staore. She testified that at ten o'clock on the morning of November 6, 2006, a male came in and was "casing the store." She testified that he was walking back and forth, making the front door ding, and that he then jumped over the counter. Rivers testified, "He's basically pushing me out the way, and I noticing what's going on and when I look up, there's another man standing in front of me with a ski mask pointing a gun, telling me to get down on the floor. So, during this time, I'm reaching for my two year old son at the time. I'm getting him out of the way and he, the first male that jumped the counter which I now

know was Mr. Phillip Spears, is bringing Mr. Bourgeois, Mr. Williams and Mr. Prezazie back in the store." (R. p. 341).

Rivers testified that when the first robber entered the store, she was about twenty to twenty five feet away from him. (R. p. 341). Rivers testified, "When he came in the store, he had on a ball cap that was pulled down to this eye level. I mean, it you didn't really get in his face, you couldn't really see his face. It was just a dark ball cap." (R. p. 343, lines 21-24). She testified, "When he jumped the counter, he like blew right past me. . . During the time he was blowing past me, I looked at his face and recognized who he was. I didn't know him personally, but I recognized him from the neighborhood." (R. p. 345 lines 2-4). Rivers testified, "When - - after he jumped the counter and I saw his face, and then when I was laying on my kids, it really registered and I started back, I started thinking back how I knew him. And that's when it registered to me." (R. p. 346, lines 12-15).

Rivers testified that the robbery could not have taken more than ten minutes, start to finish. (R. p. 366). She testified that she was afraid for herself and her children during the robbery. Rivers testified that she only looked up at the robbers three or four times, when she was asked a question. (R. p. 367). Rivers described the first armed robber: ""He was kind of a fair skinned black male, with, you could say, bad acne or blackheads, black pimples on his face. . . He had like braids hanging out the back. He had on a dark ball cap that was pulled down to eye level. Which if you didn't wasn't really up on him, couldn't really see who he was. . . . He had like a small blemish mustache that was barely like, two days of not shaving it though. He had on a grey hoodie and faded blue jeans."

(R. p. 345). Rivers agreed that all she could see of the first robber's face was from his chin to his eyes. (R. p. 377).

Counsel for appellant further argued that the Rivers identification of appellant was likely the result of the fact that appellant's name was broadcast at the crime scene as a possible suspect. Counsel argued, "One of the other keys is that the officer who - - the lead investigator who testified yesterday before the court, he testified that somebody mentioned someone from New York, and then he said 'Phillip [Spears]' at the scene prior to the identification, not knowing exactly where Ms. Rivers, Ms. Natasha Rivers [was]. (R. p. 418). Officer Golden had testified, "I can't recall the gentleman's name, ma'am. When we were trying to get the information so we could set up a perimeter, help the bloodhound team, one of the gentlemen said I believe this - - one of the suspects was from New York. And that later that Ms. Natasha could identify one of the suspects because she had went to school with him somewhere down in Gilman, high school. And that's when I said, 'Could it be Phillip Spears?' And I believe the gentleman said could have been, that nature." (R. p. 103). Officer Golden agreed that from that point on, from the time he announced appellant's name as a possible suspect, the investigation focused on appellant. Golden testified that he did not know where the witnesses were at the time he referenced appellant as a possible suspect from New York; he testified that he did not know how loudly he had said appellant's name and that he did not know if the victim witnesses overheard his statement. (R.pp. 132-133).

Counsel for appellant argued: "He said Phillip Spears, I'm sorry, but that he says Phillip Spears. He said it out loud enough for it to have been overheard. He does not know if Ms. Rivers heard or anything of that nature." (R. p. 418-419). Counsel argued

that, particularly because the officer said appellant's name aloud as a possible suspect from New York, the totality of the circumstances made this a very suggestive identification.

Rivers testified that she did not know appellant personally. However, she testified that she knew of appellant and that she knew of him because he was related to Pastor Mood and because she had seen him when he, along with his family, attended the high school basketball games in which she had played. (R. p. 347). However, Rivers testified that she had last seen appellant a year or so before she graduated from high school in 2002. Therefore, she last saw appellant some five years prior to the robbery. (R. p. 546). The totality of the circumstances suggests that River's identification of appellant was most likely a misidentification.

Rivers testified that the afternoon after the robbery, she met Officer Cartwright at another bait and tackle store on Highway 33. Rivers testified that when the officer showed her a photo line-up of possible suspects, "I immediately pointed to Mr. Spears." It is reasonably likely that Rivers was pointing not at a face she recognized as the robber, but at a face she recognized and which resembled the robber. Rivers testified that there was no doubt in her mind that the robber was appellant. (R. p. 355). Later, Rivers went to the sheriff's department in an effort to identify the second robber. She testified that she looked at a photo line up presented on a computer screen and she pointed to co-defendant Bantan as the second man. Rivers testified that she later saw Bantan being unloaded from the transport with the other prisoners for the bond hearing. She testified that in the interim, she had seen a newspaper report which included a picture of Bantan.

However, she testified that the newspaper picture did not alter or sway her identification. (R. p. 361).

Rivers agreed that she gave a police statement soon after the incident. She further agreed that that statement was lacking most of the particulars she had included in her testimony at trial. Rivers' statement did not indicate that the robber jumped over the counter, did not indicate that the robber went to the back to collect the workers who were in the back, and did not include a detailed description of the robbers. (R. pp. 375-376). The trial judge found that Rivers did give a description of the robber. However, the judge referenced only Rivers' indication that the robber had his cap pulled down so that his forehead was hidden. Otherwise, in recalling the supposed description, the judge could point only to Rivers' statements as to her inner processes. (R. p. 421, line 17-p. 422, line 7).

The judge noted that Rivers testified as to her struggle to observe the robber and to remember where she had seen him and that she was able to recall only that she had seen him in the neighborhood. "That she did not know who he was, that she did recognize him although she did not know his name." (R. p. 422, lines 6-8). However, the trial judge erred in failing to take into account how easily Ms. Rivers' vague familiarity and feeling that she knew the robber from somewhere may reasonably have been converted to certainty that the robber was appellant when she heard him mentioned as a possible suspect by Officer Golden and by an anonymous black man in the crowd gathered around the Wagon Wheel after the robbery. Assuming that the actual robber was someone who met appellant's general description, i.e., a black man with bad skin wearing dark clothes, it is reasonably likely that Ms. Rivers, as she pondered where she

knew the robber from, unintentionally and unknowingly combined her vague familiarity with appellant's general appearance as someone she knew from the neighborhood with the overheard statements indicating that one of the robbers was from New York and that the robber was possibly Philip Spears so that her vague familiarity became an unwarranted but unshakeable conviction that the robber was the guy from the neighborhood who was from New York and related to the pastor and who had come to her basketball games many years before.

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." Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (quoting Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)); State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980); State v. Tisdale, 338 S.C. 607, 611-612, 527 S.E.2d 389, 392 (Ct.App.,2000). Here, as defense counsel argued, this was a bad identification due to an unduly suggestive identification procedure. Counsel argued that the display of the photo line-ups was suggestive in that, while it is standard procedure to include six photographs in a photo line-up, in this case, because of duplicate photos appearing in both line-ups shown to Rivers, there were only three new photos in each line-up for her to choose from. Counsel rightly argued that, as a result, each of the accused actually had a one in four chance rather than a one in six chance of being identified as a suspect. (R. p. 416, line 13-p. 417, line 1).

Defense counsel argued that the identification procedure was unduly suggestive and that there was a real chance of misidentification from the totality of the circumstances. Counsel pointed out that Rivers had agreed that she could only see from

the robber's chin to his eyes and that she was not able to clearly see his face. (R. p. 417). Counsel argued that the time for observation was relatively short, approximately ten minutes, and that Rivers was looking down most of the time. Counsel further argued that Rivers was frightened and focusing on the safety of her children. (R. p. 420). Counsel pointed out that Rivers' description did not match appellant perfectly as was suggested by the State. (R. p. 421).

Counsel for appellant's motion to suppress any in-court identification as tainted by the unduly suggestive identification procedure was erroneously denied. (R. p. 419). The trial judge ruled:

> I do not find that it was unduly suggestive. There were six photographs and I think certainly the description that was given by the victim to the robbery was, I certainly think it was reliable. I don't think the lineup was unduly suggestive. And she did give a description. She described in substantial detail that his face was not covered, that his forehead was covered. She talked about her ability to observe him and that she was able as she was on the scene as these events were unfolding that she was struggling to remember where she had seen him and she was able to ascertain that she had seen him in the neighborhood. That she didn't know who he was, that she did recognize him although she did not know his name.
>
> And shortly thereafter, within a mater of hours, the lineup was shown to her. And I took her testimony to mean that not that she ignored the other photographs. That she was just very clear and very certain when she saw Mr. Spears' photograph that that was Mr. Spears. In fact, the person that she recognized.
>
> So I do not find that the lineup was unduly suggestive and I do find that there is - - certainly I don't believe that there was any substantial likelihood of misidentification in the out of court identification.

(R. p. 421, line 18-p. 422, line 17). However, an examination of the supposed description given by Rivers, as recounted by the trial judge, reveals that the judge found that Rivers

gave a reliable, detailed, description because she confirmed that she could only see the robber's face from his chin to his eyes because his forehead was covered by a cap pulled down over his face. These are the "descriptive" terms referenced by the judge. Otherwise, the judge found that Rivers gave a reliable description because she described her struggle to view the robber from her vantage on the floor and her inner struggle to recall where she had seen that man before. Such struggles and musings do not constitute a description. In the end, Rivers actual description of the robber was very general, i.e., the robber was a black man, dressed in black, with bad skin and nappy hair. (R. p. 742, lines 8-10).

The trial judge similarly ruled that River's identification of Bantan was properly admitted before the jury. The judge found that identification procedure of Bantan was likewise not unduly suggestive. However, Rivers had testified that she saw Bantan at the courthouse as he was brought to court, along with other prisoners, for a bond hearing. The judge observed, "Obviously she knew that those individuals were there for a criminal court proceeding and, therefore, certainly suggestive in that he is amongst a number of individuals." (R. p. 424, lines 1-8). However, the judge erred in approving the identifications despite herself noting that the proceedings were somewhat suggestive.

Appellant was prejudiced and his right to due process violated by the judge's finding that River's identifications of the defendants was not the product of suggestive out-of-court identification procedures which created "a very substantial likelihood of irreparable misidentification."

b. Identification provided by Mr. Bourgeois:

Counsel for appellant further objected to the identification testimony of the store owner, Mr. Bourgeois. Counsel argued that while the owner was not shown a photo line-up, his in-court identifications of Bantan and appellant were unreliable as the result of Mr. Bourgeois' seeing Bantan's picture in the newspaper report of the robbery and as the result of his seeing appellant being brought in by officers for a hearing scheduled in the armed robbery case. (R. p. 454, line 11-p. 455, line 3).

Mr. Bourgeois testified that two or three days after the robbery, when he saw Bantan's picture in the newspaper accompanying a report of the armed robbery of the Wagon Wheel, he "knew that he was one of them." (R. p. 437, lines 19-25). In April 2007, Mr. Bourgeois was notified that a bond hearing would be held for those accused of the armed robbery. Accordingly, Mr. Bourgeois testified that at the appointed time, he went to the magistrate's office for the hearing. Mr. Bourgeois testified: "While I was sitting there waiting with a paper, I looked up and he [appellant] came in there. So, I got to see him walk through the front door. . . And the second I seen him, I knew he was the one that put the gun to my head." Mr. Bourgeois testified that appellant was the only prisoner he saw and that he was "the only one." (R. p. 440, lines 4-8; p. 442, lines 19-22). Mr. Bourgeois testified that appellant was the lone prisoner being escorted by deputies into the courtroom for a bond hearing for those the police had accused of committing the armed robbery at the Wagon Wheel.

Officer Graham testified that he went by to notify Mr. Bourgeois of the upcoming bond hearing for appellant.[1] Graham testified that he had no recollection of telling

[1] The witnesses and counsel variously reference the hearing held on the day Mr. Bourgois saw appellant in custody as a bond hearing and as a preliminary hearing. (R. p. 445).

appellant that Mr. Bourgeois had been unable to identify him. (R. p. 450, lines 1-4). However, Officer Graham did recall that shortly after the armed robbery, while still on the scene, Mr. Bourgeois was only able to vaguely identify people but not names and without specifics. (R. p. 450, lines 9-13). Officer Graham was unable to explain why, if Mr. Bourgeois was able to provide any identification whatsoever, he was not shown a photo line-up. (R. p. 452).

Mr. Bourgeois's identification of Bantan was the product of suggestion. Mr. Bourgeois testified that he was present at the time of the bond hearing and that he saw Bantan along with other prisoners being escorted by deputies at the courthouse. (R. p. 455). The trial judge observed in regards to Bantan, "It certainly is suggestive when an individual is going to the courthouse to a bond hearing and they know that, and they know that the person is going to be there. But under the facts as this one was, I don't think it is unduly suggestive because rather than Mr. Bourgeois identifying the defendant Mr. Bantan by virtue of him being called up to the a bond hearing, he observed Mr. Bantan with a group of other people, a group of other African American gentlemen, as I understand it, coming into the courthouse for a - - I don't know why, but he was with a group of inmates, and he talks about him. That he, in a fraction of a second, was able to pick him out. So, I'm not concerned about that. I think you've met the burden and that his in-court identification [of Bantan] will be allowed." (R. p. 455, line 20-p. 456, line 8).

In regard to appellant, the judge likewise ruled that Mr. Bourgeois' in-court identification was reliable and admissible. However, the judge rightly indicated that appellant's situation was different. The judge ruled, "With regards to Mr. Spears it's a little bit different in that [Mr. Bourgeois] didn't see a photograph of him in the newspaper

and he is obviously going to Judge Lake for the purpose of the bond hearing. He knows that, and he - - he, Mr. Spears, he - - is brought into the building with law enforcement surrounding him." (R. p. 456, lines 17-22). However, regarding Mr. Bourgeois' identification of appellant, the judge erred in overruling the objection to the in court identification as being the product of an unduly suggestive pre-trial confrontation. (R. p. 458).

The trial judge's erroneous ruling was grounded in her conclusion that Mr. Bourgeois did not know how many individuals were having a bond hearing on the day of appellant's hearing. She indicated, "If there was going to be one bond hearing or fifteen or twenty, he did not know." (R. p. 456). Counsel informed the judge that, in fact, the hearing for the Wagon Wheel armed robbery suspect was the only one being held that day. (R. p. 457). In fact, when he was asked, "So, if - - you didn't know for sure that this was going to be the hearing for Mr. Spears at that time. Is that correct?" Mr. Bourgeois actually responded, "No." (R. p. 440, lines 13-16). However, the judge concluded that Mr. Bourgeois could not have known that appellant was the only accused with a hearing scheduled that day. (R. p. 457). Counsel protested, "But he was told that he was going there for the prelim for my client." (R. p. 457). The judge erred in finding: "I think the burden which has been articulated in the State v. Ora Simmons has been met, and I will allow the in-court identification subject to cross-examination." (R. p. 458).

To the contrary, an identification may be so tainted by the circumstances surrounding a witness seeing the accused at the bond hearing as to require that it be suppressed. State v. Cash, 257 S.C. 249, 185 S.E.2d 525 (1971). In State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992), this Court remanded the case for an *in camera*

hearing where a witness saw a suspect at a bond hearing prior to his in-court identification of the suspect. The Simmons Court found that in such circumstances an *in camera* hearing must be held during which the burden is on the State to establish that the in-court identification was of independent origin or if it was the tainted product of the circumstances surrounding the bond hearing.

Here, the trial judge erred in finding that the State had met its burden of establishing that the in-court identification given by Mr. Bourgeois was wholly independent of and not tainted by his seeing appellant, apparently the sole defendant at the courthouse, accompanied by officers, at the time appointed for a hearing featuring the Wagon Wheel robbery defendant. The trial judge concluded that because Mr. Bourgeois could conceivably have believed that appellant's presence at the courthouse, in custody, at that time, was related to some other case and unconnected to the hearing on the Wagon Wheel robbery, the State had met its burden of establishing that his identification was informed solely by his observing the robber at the time of the crime and independent of any influence resulting from the pre-trial courthouse confrontation. There is no support for this conclusion - - it is the result of sheer speculation on the part of the State and the trial judge.

The evidence established that Mr. Bourgeois was advised by law enforcement that a hearing for one of the Wagon Wheel robbers would be held and he attended, expecting to see the accused robber at that hearing. As Mr. Bourgeois was waiting for the proceeding to be held, appellant was escorted in, alone but for the surrounding police officers. There was no evidence submitted suggesting that Mr. Bourgeois did not put it together and thereafter view and identify appellant, the man he saw being brought to the

Wagon Wheel robbery hearing in custody, as the person who robbed his store. Convictions based on eyewitness identification at trial following a pretrial identification will be set aside only if the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968).

The factors to be considered in determining the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and confrontation. State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980); State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981). Here, as noted, Mr. Bourgeois had little time to freely observe the robbers during the incident and his opportunity to view the robbers was severely hampered by his position on the floor with his head down. Mr. Bourgeois testified that the robber he identified as appellant had a cap pulled down over his face so that he could not fully view the robber's face. (R. p. 429). Mr. Bourgeois testified that whenever he tried to look up, a robber hit him on the head. (R. p. 435).

Mr. Bourgeois was under great stress during the robbery during which he was threatened and abused. The witnesses' prior description of the robber was general with some inaccuracy. After the incident, Mr. Bourgeois was apparently unable to give a detailed description to the authorities and the descriptions that he did give of the robbery and the robbers were inconsistent with those provided by the other witnesses. It is apparent that the officers had so little confidence in Mr. Bourgeois' ability to identify the robbers that he was never shown a photo line-up. Mr. Bourgeois' newly reported ability

to identify the robbers with certainty sprang into existence only after he saw the newspaper report and picture of Bantan and only after he saw appellant in custody at the courthouse.

The judge was required to determine that the State had carried its burden of proving that the in-court identifications were of independent origin and not the tainted product of the circumstances surrounding Mr. Bourgeois' observing appellant in custody at the hearing at the courthouse. The judge erred in determining that the State had carried its burden; in fact, there was no evidence submitted to support the trial judge's ruling that Mr. Bourgeois' identifications were made independently of his suggestive pre-trial confrontations with Bantan's picture and the news report of the crime and with appellant as he was brought into the courthouse by deputies for the scheduled hearing. Likewise, the trial judge erred in ruling that the State had met its burden of proving that Ms. River's out-of-court and in-court identifications were reliable and given independently of the unduly suggestive procedure. Appellant was prejudiced by the erroneous admission of the identifications of him and of his co-defendant such that reversal is warranted.

V. The trial judge erred in denying the motion for mistrial made on the grounds that the prosecution witness, Officer Golden, had injected arbitrary and inadmissible evidence before the jury panel by referencing facts which unfairly prejudiced appellant and which the prosecution had agreed and the trial judge had ruled would not be admitted in evidence?

Defense counsel moved to suppress any mention of drugs being found in the trailer. The judge responded, "And they have already agreed to that in camera - - I mean, when we talked in chambers. (R. p. 486). Defense counsel further moved to suppress any reference to a shotgun being found in the trailer. The trial judge ruled that the shotgun was not relevant and that it would be excluded from evidence as unfairly prejudicial and

lacking in probative value. The judge clearly informed counsel for the State and defense: "Shotgun is out." (R. p. 478, line 6).

However, during the testimony of Officer Golden, the forbidden information was presented before appellant's jury. Golden was asked by the prosecutor what evidence was recovered from the bedroom of the trailer. Despite the judge's prior ruling, Golden answered:

> Coin receipt, Timberland boots was recovered, the dark clothing pants, a ball cap I believe was recovered, and I believe some cash or currency was seized at that time, some bullets, 40 caliber, a shotgun. Plus there was some drugs found.

(R. p. 747, lines 8-15). Defense counsel immediately objected and the jury was dismissed. Defense counsel urged the judge to grant a mistrial in response to the improper and unfairly prejudicial testimony. Counsel reminded the judge that she had ruled that the shotgun would not be admitted in evidence and that the agreement with the prosecution was that there would be no mention of drugs being found in the trailer. (R. p. 747-748). Counsel for appellant joined in the argument for mistrial. (R. p. 748). The prosecution responded, indicating that the forbidden testimony was not intentionally elicited from the officer and urging the judge to issue a curative instruction instead of granting the requested mistrial. (R. p. 748).

Defense counsel argued, "I can't see much more prejudicial than a shotgun and drugs and clearly that was not supposed to come in. And I believe a curative instruction is only going to bring yet more attention to it. It can't be wiped out." (R. p. 748). Counsel for appellant submitted, "As it relates to my client, Your Honor, my client isn't

charged with any drug offenses as well as just by being associated here, it prejudices against my client as well." (R. p. 749).

The trial judge agreed that she had ruled the shotgun out of evidence. She further indicated, "It shouldn't have been mentioned. The shotgun shouldn't have been mentioned and the drugs shouldn't have been mentioned." (R. p. 750). However, the judge then indicated that she was required to save the trial with a curative instruction in all but the most extreme circumstances. The judge determined that she would deny the motion for mistrial but she offered to issue a curative instruction. Both defense attorneys indicated that they could think of no instruction which could cure the damage caused by the prosecution witness' improper testimony. Counsel argued that any instruction would only serve to emphasize the damaging testimony. Counsel for appellant stated, "And it's our position - - I'll just say this for the record - - that's the reason we think the only thing available is a mistrial because there are no curative things that the court can do." (R. p. 732; p. 734, lines 12-18).

Counsel was correct; there was no instruction which the judge could issue which would have served to disabuse the jury of the notion that drugs and a shotgun were found in the trailer and connected to both defendants. The trial judge erred in denying the motion for mistrial where the officer had improperly informed the jury that these accused armed robbers were also in possession of a shotgun and illicit drugs. Such testimony was inadmissible, irrelevant, and its admission before the jury served to attack the character of the defendants, thereby constituting violations of Rules 401, 402, 404(b), and 403, SCRE. Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. Rule 401, SCRE. Rule 402, SCRE provides that

relevant evidence is admissible. However, Rule 404(b) bars the admission of bad character evidence and evidence of prior bad acts against a defendant unless the evidence is admissible under one of the exceptions to the rule. Rule 403 provides that even relevant evidence must be excluded where the probative value is substantially outweighed by the unfairly prejudicial effect.

A mistrial should not be ordered in every case where incompetent evidence is received and later stricken out. State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976). "This Court favors the exercise of the wise discretion of the circuit judge in determining the merits of [a mistrial] motion in each individual case." Id., at 268, 277 S.E.2d 306. Among the factors to be considered are the character of the testimony, the circumstances under which it was offered, the nature of the case, the other testimony in the case, and perhaps other matters. Id.; State v. Thompson 276 S.C. 616, 621, 281 S.E.2d 216, 219 (S.C. 1981).

In this case the character of the testimony was that it was a wholly improper reference to drugs and shotguns which served to attack the character of the accused. The evidence was presented by the State's witness despite the judge's explicit ruling that such testimony was improper, inadmissible, and not allowed. The nature of the case was wholly unrelated to shotguns or drugs, yet these references served to improperly attack the character of the accused. The other testimony in the case, throughout this long trial, had, as the result of the efforts of defense counsel and the trial judge, been free from these improper references up to the point of Officer Golden's apparently deliberate disclosure before the jury. Under these circumstances, where the harm could not

reasonably or effectively be cured, the trial judge erred in denying the defense motion for mistrial.

VI. The trial judge erred in denying the defense motion for mistrial made on the grounds that the jury pool was informed as they began deliberation that appellant and his co-defendant had robbed a bank in Cameron, South Carolina and that the authorities sought to bring them to justice for their crimes?

During deliberations, the jury sent out a note indicating:

It has been brought to the jury's attention that one of the jurors has heard, quote unquote, something about these two guys being targeted by the police for an alleged bank robbery committed in Cameron, South Carolina.

(R. p. 1054, lines 1-11; Court's Exhibit #15). In response to this note, the judge brought in the jurors one by one to ask them about this matter. (Tr. p. 1055). The forewoman advised that one juror had indicated that he heard that the defendants were being targeted for a potential bank robbery. The forewoman confirmed that this comment was made in the presence of all the jurors by juror Gladden. (R. p. 1056).

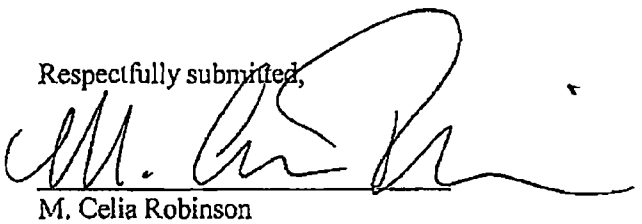
The trial judge examined Juror Gladden. He testified that he was pumping gas on the morning of trial when he overheard a conversation. (R. p. 1060). Gladden testified that two men at the gas pump were talking about the trial and that they indicated "that there was a robbery in Cameron some time back and they was trying to trap these two fellows with it and that's all I said." (R. p. 1060). The trial judge denied the motion for mistrial made on the grounds that the jury had been informed that the defendants were bank robbers. After the judge interviewed each juror, defense counsel argued, "I think all we've done is confirm that the entire jury panel has been tainted by that comment. I think as human beings, event thought they think they would make an attempt not to, to think about that at all and to disavow it, I think its very very difficult to leave those things

out. They've heard something that is clearly prejudicial. They've heard something that we've all been dancing around from the beginning of this trial trying not to have happen and the very worst has happened. I think that the prejudice is so severe that it cannot be cured." (R. p. 1091). Counsel for appellant concurred in this argument. Defense counsel moved for a mistrial on the grounds that the jury had been irreparably tainted by the information that appellant was an accused bank robber. The trial judge erred in denying the motions for mistrial where it was impossible for appellant to receive a fair trial once the jury was tainted.

CONCLUSION

For all the forgoing reasons, appellant's convictions should be overturned and a new trial granted.

Respectfully submitted,



M. Celia Robinson
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of May, 2010.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Corrected Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 4, 2010

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Calhoun County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PHILLIP LEE SPEARS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Corrected Final Brief of Appellant in the above referenced case has been served upon A. West Lee, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 4th day of May, 2010.

M. Celia Robinson
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of May, 2010.

(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014 .

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Calhoun County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

Respondent,

vs.

PHILLIP LEE SPEARS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The Appellant, Phillip Lee Spears, was indicted by the Calhoun County Grand Jury for Armed Robbery (2007-GS-09-0148), Possession of a Firearm or Knife During the Commission of a Violent Crime (2007-GS-09-0219, and Kidnapping (2007-GS-09-0221. The Defendant, represented by Charles Jay Johnson, Jr., Esq., came before the Honorable Diane S. Goodstein and a jury between October 1-4, 8 & 10, 2007. The jury found Appellant guilty as charged, and he was convicted and sentenced to thirty (30) years incarceration for the armed robbery, thirty (30) years for the kidnapping, and five (5) years for the possession of a firearm or knife during the commission of a violent crime. All sentences were ordered to be served concurrently. This appeal timely follows.

ARGUMENT

I.

The trial judge properly denied the Appellant's motion to sever his case from the case of his co-defendant.

Prior to the trial, co-defendant's counsel made a motion to sever the cases, arguing that the defendants could potentially "finger each other" for the crime at any moment. (R. p. 176, lines 14-22). Counsel also asserted that there was evidence in the case which would be probative of one co-defendant's guilt, but not probative of the other's guilt, and that the jury might confuse the cases. (R. p. 176, line 23 - p. 178, line 6). Appellant's counsel joined in the motion. (R. p. 179, line 22 - p. 180, line 4). The trial court denied the motion, holding that mutually antagonistic defenses do not mandate separate trials. (R. p. 180, lines 5-15). On appeal, the Appellant argues that the denial of the severance motion was an error which denied him his right to a fair trial because it resulted in his losing his right to make the last argument if he presented no defense, and caused him to have to face the accusations of both the prosecution and his co-defendant. (I.B.O.A., p. 8).

Charges can be joined in the same indictment and tried together where they: (1) arise out of a single chain of circumstances; (2) are proved by the same evidence; (3) are of the same general nature; and (4) no real right of the defendant has been prejudiced. State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002). In the present case, both defendants were charged with armed robbery, possession of a firearm or knife during the commission of a crime of violence, and kidnapping; resulting from an armed robbery which took place in Calhoun County on November 6, 2006.

Criminal defendants who are jointly tried are not entitled to separate trials as a matter of right. Hughes v. State, 346 S.C. 554, 552 S.E.2d 315 (2001). A motion for severance of trial is addressed to the sound discretion of the trial court. State v. Halcomb, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009). The trial court's ruling will not be disturbed on appeal absent an abuse of that discretion: State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Avery, 374 S.C. 524, 649 S.E.2d102 (Ct. App. 2007).

A defendant who alleges on appeal that he was improperly tried jointly must show prejudice before appellate court will reverse his conviction. State v. Smith, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004). In the present case, the Appellant first argues that prejudice resulted from the mutually antagonistic defenses presented by the co-defendants at trial, citing several examples of co-defendant's counsel attempted to bolster his client's claim of innocence by reciting the evidence against Appellant However, the general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a co-defendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime. State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999) *see also* State v. Halcomb, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009)(the rule allowing joint trials is not impugned simply because the co-defendants may present evidence accusing each other of the crime).

The Appellant next argues that he was unfairly prejudiced by the admission of evidence at trial which was probative of his co-defendant's guilt, but not of his own.

However, South Carolina courts have held that defendants are not entitled to separate trials based on the "spillover effect" of evidence admitted against co-defendants during a joint trial. *See* State v. Stuckey, 347 S.C. 484, 556 S.E.2d 403 (Ct. App. 2001)(defendants charged with murder, kidnapping, and other crimes were not entitled to separate trials based on possible prejudice from the "spill over effect" from evidence admitted against other co-defendants during joint trial; the defendants were all charged with criminal conspiracy and all of the evidence admitted in the joint trial would have been admissible against each defendant if they had been granted a separate trial). In the present case, both defendants were charged with committing the same crimes. Further, the State argued that no evidence was admissible against one defendant and not admissible against the other defendant which the defense could not address on cross-examination. As an example, the State cited a statement made by the Appellant which did not in any way implicate the co-defendant, arguing that because the co-defendant was not implicated, his attorney could cross-examine freely. (R. p. 178, lines 16-25).

With regard to Appellant counsel's argument that he was erroneously denied his right to the last argument if he presented no defense, this is also insufficient to merit relief. *See* State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972)(where defendants were jointly indicted and one defendant introduced evidence, the State was entitled to closing argument and the co-defendant's request to be allowed the closing argument to the jury was properly denied; further, the fact that the introduction of evidence by one defendant may operate to deprive a co-defendant, who offers no evidence, of the right to the closing argument to the jury, to which such co-defendant would be entitled if tried separately, affords no ground upon which

to order separate trials) In any case, Appellant presented a defense, as well as witnesses in support thereof, at trial. As such, Respondent submits that this issue is moot.

There is no clearly defined rule for determining when a defendant is entitled to a separate trial, because the exercise of discretion means that the decision must be based upon a just and proper consideration of the particular circumstances which are presented to the court in each case. Halcomb, 676 S.E.2d at 153. The trial judge must act cautiously in allowing a joint trial; the judge must carefully consider problems that may arise from a joint trial, such as redacted statements, and must assure protection of each defendant's constitutional right to confront witnesses against him Dennis, 337 S.C. at 281-82. A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial. Walker, 366 S.C. at 657.

In the present case, the judge acted extremely cautiously, hearing arguments from the State and both defense attorneys regarding the motion to sever in addition to reviewing relevant case law before ruling that insufficient prejudice existed to require a severance. R. p. 176, line 14 - p. 180, line 15). Also, the judge gave the following cautionary instruction in her opening remarks:

> Now, ladies and gentlemen, I charge you, I instruct you as you now know that there are two defendants in this case, Mr. Bantan and Mr. Spears. And each of these gentlemen is charged with armed robbery, kidnapping, and possession of a firearm or knife during the commission of a crime of violence. The case of each defendant and the evidence and the law concerning that defendant should be considered separately and individually. Your verdict does not have to be the same for both defendants. The fact that you may find one defendant guilty or not guilty should not control your verdict as to the other defendant. (R. p. 495, line 19 - p. 496, line 5).

Further, the judge reiterated these instructions in her charge to the jury at the end of the proceedings, saying "the case of each defendant and the evidence and the law concerning that defendant should be considered separately and individually. Your verdict does not have to be the same for both defendants." (R. p. 1029, lines 21-25).

Respondent submits that although the Appellant submits several reasons why the trial court allegedly committed error in refusing his motion for severance of trial, each of these reasons is refuted by South Carolina case law. In addition, the trial judge took great care to ensure that no significant trial rights of the co-defendants were prejudiced by the joint trial. As such, respondent submits that no error was committed in denying the motion for severance, that this specific claim should be denied, and this Court should affirm the findings of the lower court.

II.

The trial judge properly denied Appellant's motion to suppress evidence obtained during the original warrant-less search and the subsequent search pursuant to the search warrant.

On appeal, the Appellant argues that the warrant-less search conducted at 140 Charlotte Circle was invalid on the basis that the consent given by co-defendant Bantan was coerced and involuntary. Further, the Appellant argues that the subsequent search pursuant to the search warrant was invalid on the basis that it did not comply with the warrant statute (17-13-140) and that the evidence used to obtain the search warrant was obtained during an improper warrant-less search, making the search warrant 'fruit of the poisonous tree.

Respondent first submits that this issue has not been preserved for appellate review, and should not be addressed by this Court. In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). Issues not raised and ruled upon by the trial court will not be considered on appeal. State v. Passmore, 363 S.C. 568, 611 S.E.2d 273, 281 (Ct. App. 2005).

This general rule has been extended to cases where there are multiple co-defendants and one co-defendant raises an issue with respect to his client, but other co-defendants do not separately raise the issue or join in the original objection/motion. *See* State v. Carriker, 269 S.C. 553, 238 S.E.2d 678 (1977)(where defendant's counsel made no objection on point at trial, point could not be raised on appeal, even though co-defendant did object on such point at trial); *see also* State v. Brannon, 347 S.C. 85, 552 S.E.2d 773 (Ct. App. 2001)(issue challenged on appeal was not preserved for appellate review with regard to defendant because defendant neither raised the issue at trial nor joined in co-defendant's motion to suppress).

At trial, co-defendant's counsel moved to suppress the evidence obtained via the warrant-less search and subsequent search pursuant to the search warrant, arguing that the search pursuant to the consent was invalid because the consent was coerced, (R. p. 293, line 13 - p. 294, line 2), and the subsequent search was invalid because the search warrant did not meet the standards set forth in the warrant statute, (R. p. 40, lines 4-19). Although appellant's attorney stated the he also had some issues related to the search warrant, his centered around the time denoted on the warrant. (R. p. 44, lines 3-23). In

fact Appellant's counsel never argued, prior to or following co-defendant's motion to suppress, that the consent was coerced or that the search warrant was invalid per the warrant statute; nor did he affirmatively state that he joined in the co-defendant's motion to suppress. Further, although Appellant's counsel cross-examined the witnesses put up during the suppression hearing, his questioning did not focus on coercion or the warrant statute. During his cross-examination of Officer of Williams, Appellant's attorney sought to elicit testimony that his search was based on information provided by Calhoun County officers. (R. p. 72, line 5 - p. 75, line 9). During his cross-examination of Officer Golden, Appellant's attorney sought to elicit testimony that the officer had provided conflicting statements regarding when the consent to search was rescinded (R. p. 124, line 19 - p. 129, line 3), and that the identification of his client was faulty (R. p. 130, line 9 - p. 140, line 13). Finally, during his cross examination of a witness called by co-defendant, appellant's attorney merely asked if the witness had seen his client on the day in question. (R. p. 171, lines 8-11).

In the present case, Appellant neither raised the issue on his own at trial nor joined in his co-defendant's motion to suppress. As such, this issue presented on appeal was not preserved for appellate review with respect to Appellant, and should not be considered by this Court. Therefore, this Court should affirm the findings of the lower court.

In any event, even if this Court finds that co-defendant's motion to suppress sufficiently preserved the issues for appellate review, Appellant cannot show prejudice with relation to the specific issue of involuntary consent because that issue was actually decided in the defendants' favor at trial. The trial judge stated that she was

uncomfortable with the way this alleged consent was given, that she didn't think it was consensual and believed that the co-defendant's will had been overcome. (R. p. 465, lines 3-5) Citing State v. Davis as standing for the proposition that when a portion of a search warrant is found to be invalid the appropriate way to handle it is to excise that portion and then look at the remainder of the search warrant to see if it still gives rise to probable cause, the trial judge excised the part of the affidavit pertaining to items found during the consent period. (R. p. 464, line 21 - p. 465, line 1). However, the trial judge held that the remainder of the affidavit still gave rise to probable cause. (R. p. 465, lines 20-22).

Regarding the search warrant's alleged non-compliance with South Carolina Code Section 17-13-140, Respondent submits that the trial judge committed no error in determining that the search warrant did comply with the requirements of the warrant statute and denying the co-defendant's motion to suppress.

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Moore, 377 S.C. 299, 659 S.E.2d 256 (Ct. App. 2008). An abuse of discretion occurs when the conclusions of the circuit court either lack evidentiary support or are controlled by an error of law. State v. Adams, 377 S.C. 334, 659 S.E.2d 272 (Ct. App. 2008).

Co-defendant's counsel argued at trial that the officer to whom the search warrant was issued was a Calhoun County officer lacking the jurisdiction in Orangeburg County, where the subject property was located. Counsel further argued that this was not in

accordance with the warrant statute, and that as a result, the search warrant was invalid. (R. p. 40, lines 4 - 19). South Carolina Code Section 17-13-140 states, in pertinent part:

> A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant. If the magistrate, municipal judge, or other judicial officer abovementioned is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. In the case of a warrant issued by a magistrate or a judge of a court of record, it shall be directed to any peace officer having jurisdiction in the county where issued, including members of the South Carolina Law Enforcement Division, and shall be returnable to the issuing magistrate. In case of a warrant issued by a judge of a court of record, it shall be returnable to a magistrate having jurisdiction of the area where the property is located or the person to be searched is found. If any warrant is issued by any municipal judicial officer to municipal police officers, the return shall be made to the issuing municipal judicial officer. Any warrant issued shall command the officer to whom it is directed to forthwith search the person or place named for the property specified.
> Any warrant issued hereunder shall be executed and return made only within ten days after it is dated. The officer executing the warrant shall make and deliver a signed inventory of any articles seized by virtue of the warrant, which shall be delivered to the judicial officer to whom the return is to be made, and if a copy of the inventory is demanded by the person from whose person or premises the property is taken, a copy of the inventory shall be delivered to him.

S.C. Code §17-13-140 (2003).

The State argued that the search warrant was signed by an Orangeburg Municipal judge, was executed by an Orangeburg County officer, and that while the signed search warrant was given to a Calhoun County officer, the officer was merely acting as a courier of sorts between the municipal judge of Orangeburg and Lt. Williams, an officer of Orangeburg County, who actually executed the warrant. (R. p. 38, line 11 - p. 39, line 15). In support of this fact, the State elicited testimony from Officer Williams of Orangeburg County, who testified that he personally executed the search warrant,

personally conducted the search, and personally did an inventory of items recovered during the search.. (R. p. 52, line 21 - p. 53, line 6). The State also elicited the testimony of Officer Golden of Calhoun County, who testified that he was the one who submitted the affidavit for the search warrant to the municipal judge because the crime actually took place in Calhoun County. (R. p. 101, lines 5-11). Officer Golden also testified that it was an Orangeburg municipal judge that signed the search warrant, that he took the precaution of having an Orangeburg City Police Officer with him at the time he presented the affidavit to the judge, and that he delivered it to Williams, an Orangeburg County officer, to execute. (R. p. 97, lines 2-19).

After hearing arguments by the State and co-defendant's counsel, the trial judge ruled that the search warrant was appropriately issued. (R. p. 466, lines 22-24). The trial judge found that Officer Golden merely delivered the search warrant to Officer Williams, who was an Orangeburg County officer with jurisdiction to execute it. (R. p. 466, lines 3-10) The trial judge also found that, while a Calhoun County officer was the affiant for the search warrant, it does not matter where one lives when they give an affidavit for a search warrant (R. p. 466, lines 1-15) Further, the trial judge found that the warrant was not directed to Golden, as co-defendant's counsel had asserted, but rather it was directed to 'police officers in Orangeburg County.' (R. p. 466, lines 15-18).

Because the trial judge ruled that the search warrant was valid, the Appellant must show that her ruling was not supported by any evidence or based upon an error of law in order to prevail on appeal. Respondent submits that the plain text of §17-13-140 makes no requirement that the affiant for a search warrant must also have jurisdiction over the

area in which the warrant is to be served, and the weight of evidence at trial was that all critical functions relating to the warrant were performed by Orangeburg County or City officials. As such, Respondent submits that the judge did not abuse her discretion in determining the search warrant was valid, and that the Appellant has failed to carry his burden of proof. Therefore, this specific claim should be denied, and this Court should affirm the findings of the lower court.

III.

The trial judge properly denied the Appellant's motion to suppress testimony and evidence of the gun found in the room where Appellant was found and taken into custody.

Appellant argues on appeal that evidence relating to the gun found in the bedroom where Appellant was found and taken into custody should have been suppressed on the grounds that it was more prejudicial than probative. Respondent submits, however, that this issue was not adequately preserved for appellate review and should not be considered buy this court.

In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). Issues not raised and ruled upon by the trial court will not be considered on appeal. State v. Passmore, 363 S.C. 568, 611 S.E.2d 273, 281 (Ct. App. 2005). This general rule has also been held to apply to motions in limine. *See* State v. Tapp, 2009 WL 982258 (Ct. App. 2009)(A motion in limine is not a final determination on the matter

and does not preserve the issue for appeal; the moving party, therefore, must make a contemporaneous objection when the evidence is introduced).

In the present case, although Appellant's lawyer moved to suppress the introduction of the gun prior to trial, the trial judge held that she would not suppress the evidence in limine. (R. p. 473, lines 17-22). When the gun was next mentioned (R. p. 599, lines 9-20), during trial, Appellant's counsel made no objection. As a result, this issue was not adequately preserved for appellate review and should not be considered by this Court.

Further, it was actually Appellant's attorney who introduced the gun into evidence. (R. p. 644, lines 13-14). As a result, even if this issue would have otherwise been preserved for appellate review, the right to appeal this issue was waived with the defense's introduction of the gun into evidence. *See* State v. Dunlap, 346 S.C. 312, 550 S.E.2d 889 (Ct. App. 2001)(party cannot complain of prejudice resulting from the admission of evidence when he opened the door to admission); *see also* State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008)(defendant may open the door to what would otherwise be improper evidence through his own introduction of evidence or witness examination). Here, Appellant's counsel did not just open the door to the introduction of said evidence, he actually introduced it. As such, Appellant waived his right to have the issue of the gun's admission considered on appeal.

However, even if this Court finds that the issue was not waived and was adequately preserved for appeal, Respondent submits that no error was committed in the trial court's denial of Appellant's motion to suppress testimony or evidence relating to the

gun. The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Moore, 377 S.C. 299, 659 S.E.2d 256 (Ct. App. 2008). An abuse of discretion occurs when the conclusions of the circuit court either lack evidentiary support or are controlled by an error of law. State v. Adams, 377 S.C. 334, 659 S.E.2d 272 (Ct. App. 2008).

Trial judges are also given broad discretion in ruling on questions concerning the relevancy of evidence. *See* State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991)(trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence, and his decisions will be reversed only if there is a clear abuse of discretion). Evidence is relevant if it tends to establish or make more or less probable some matter which is in issue upon which it directly or indirectly bears. Id. Even if the trial judge decides evidence is relevant, it may still be excluded if its probative of the evidence is substantially outweighed by the danger of unfair prejudice. Id.

At the suppression hearing prior to trial, Appellant's counsel argued that the gun in question was not found on Appellant's person, belonged to someone else, one Ms. Cherry, and was actually found under the mattress in the bedroom of a home belonging to her. (R. p. 307, lines 7-18). Further, Appellant's counsel presented testimony from the officer who found the gun that Ms. Cherry told him before he ever found the gun that there was a gun in the room in question, and that it belonged to her. (R. p. 326, lines 10-14).

The State responded by arguing that the gun found matched the general description of the gun used by the armed robber and was found in the general proximity

of the Appellant when he was apprehended. (R. p. 309, lines 5-8). The State further argued that the gun was relevant because an inference could be made that it was the gun used in the robbery. (R. p. 309, lines 20-23). The State asserted that any question as to whether or not the gun actually belonged to the Appellant went to the weight of the evidence rather than the admissibility. (R. p. 309, lines 5-11).

The trial judge ruled that she would not exclude the gun in limine, that based on what she had heard, if the state established a foundation for the gun it would be allowed into evidence. She further noted that if anything changed during the trial, the defense could object at that time. (R. p. 313, lines 3-12). As stated before, Appellant's counsel did not object at the time of the subsequent mention of the gun, and in fact later introduced the actual gun into evidence himself.

A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances. State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008). Respondent submits that the trial court's ruling in limine was based upon the arguments and testimony presented by the parties. Further, Respondent submits that there was evidence to support the trial judge's ruling and that the ruling was not based on an error of the law. As such, Respondent submits that the trial judge's ruling clearly fell within her broad discretion. Therefore, Respondent submits that Appellant has shown no error, that this specific claim should be denied, and that this Court should affirm the findings of the lower court.

IV.

The trial judge properly denied the defense motion to suppress the evidence and testimony identifying Appellant as one of the robbers where the identification procedures were not unduly suggestive and did not lead to a substantial likelihood of irreparable misidentification.

Appellant argues on appeal that "the trial judge erred in denying the defense motion to suppress the identifications of Bantan and appellant's motions to suppress the trial testimony identifying him as the robber where the identification procedures were unduly suggestive leading to a reasonable chance of misidentification." (I.B.O.A., p. 23).

Respondent reads the first part of Appellant's argument to say that the trial court erred in denying the co-defendant's motion to suppress his identification. Appellant has no standing to make this argument. *See* State v. McDonald, 267 S.C. 588, 230 S.E.2d 617 (1976)(one may not generally assert a violation of another's constitutional rights). As co-defendant Bantan's argument was that the allegedly improper identification effectively denied him his right to a fair trial, a constitutional right belonging to him only, Appellant has no standing to assert a violation thereof.

Regarding Appellant's second contention, that the trial judge erred in denying appellant's motion to suppress trial testimony identifying him as one of the robbers, Respondent first submits that Appellant has failed to preserve this issue for appellate review.

In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691

(2003). Issues not raised and ruled upon by the trial court will not be considered on appeal. State v. Passmore, 363 S.C. 568, 611 S.E.2d 273, 281 (Ct. App. 2005). This general rule has also been held to apply to motions in limine. *See* State v. Tapp, 2009 WL 982258 (Ct. App. 2009)(A motion in limine is not a final determination on the matter and does not preserve the issue for appeal; the moving party, therefore, must make a contemporaneous objection when the evidence is introduced).

Although Appellant argued in limine that the identification testimony concerning his client should be suppressed because the identification process used by the State was unduly suggestive, neither he nor his counsel made a contemporaneous objection when in-court identifications were made at trial. State's witness Natasha Rivers, an employee of the store which was robbed, identified Appellant on several occasions throughout her testimony, each time without objection. (R. p. 513, lines 16-25; p. 521, lines 8-11; p. 538, lines 20-22). Likewise, Appellant failed to register a timely objection when State's witness J.K. Bourgeois identified Appellant on several occasions at trial. (R. p. 596, line 3- p. 598, line 18; p. 621, lines 8-19).

A defendant must object to an in-court identification to properly preserve the issue for appellate review. State v. Govan, 372 S.C. 552, 643 S.E.2d 92 (Ct. App. 2007). Despite the fact that appellant made a motion in limine to suppress evidence and testimony relating to the identification of his client, this issue has not been adequately preserved for appellate review. As such, this Court should not consider this issue, and should affirm the findings of the lower court.

Even if this Court finds that the issue was preserved for appellate review, Respondent submits that no error was committed in denying Appellant's motion to suppress.

A criminal defendant may be deprived of due process of law through an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification; the in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a significantly substantial likelihood of irreparable misidentification. State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (Ct. App. 2003). However, the decision to admit an eyewitness identification is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of that discretion, or the commission of prejudicial legal error. State v. Govan, 372 S.C. 552, 643 S.E.2d 92 (Ct. App. 2007).

In determining admissibility of out-of-court identification, a court must first ascertain whether identification process was unduly suggestive. State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (Ct. App. 2003). However, suggestiveness in a pre-trial identification alone does not mandate the exclusion of such evidence. Id. An identification may be reliable under the totality of the circumstances even when a suggestive procedure has been used. State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980). Where there is a finding of undue suggestiveness, the court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (Ct. App. 2003); *see also* State v. Govan, 372 S.C. 552, 643 S.E.2d 92 (Ct. App.

2007)(even where the out of court procedure is found to be unduly suggestive, in-court identification is admissible if the State can prove by clear and convincing evidence that the identification is reliable based on information independent of the out-of court procedure).

To determine whether an identification is reliable, it is necessary to consider: (1) opportunity of witness to view criminal at time of crime; (2) witness's degree of attention; (3) accuracy of witness's prior description of criminal; (4) level of certainty demonstrated by witness at the confrontation; and (5) amount of time between time and confrontation. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000).

With respect to Ms. Rivers's identification of the Appellant, at the suppression hearing, Appellant's counsel argued that Ms. Rivers's identification was likely the result of the fact that appellant's name was broadcast at the crime scene as a possible suspect. (R. 418, line 3 - p. 419, line 4). Appellant's counsel also argued that the photo lineups used for both Appellant and his co-defendant each had two of the same photos (not the co-defendants) on them, and that this was also suggestive (R. p. 419, lines 5-12).

The State argued, however, that Ms. Rivers immediately picked both co-defendants out of the photo lineups, and that there was no indication she was ever aware that some of the same pictures may have been used in both lineups. (R. p. 420, lines 2-11). Further, Ms. Rivers testified during the suppression hearing that although Appellant had his hat pulled low, he came right past her and she immediately recognized him 'from the neighborhood.' (R. p. 343, line 16 - p. 344, line 13). Ms. Rivers also testified that she knew his family, and that Appellant used to attend some of her games when she

played basketball in high school. (R. p. 346, line 19 - p. 347, line 13). Ms. Rivers went on to describe Appellant in great detail, saying that he was a fair-skinned, African-American male with acne, braided hair, and a thin mustache. (R. p. 345, line 16 - p. 346, line 5).

The trial judge ruled that the out-of-court identification procedures were not unduly suggestive, saying that there were six photos in each lineup, and that Ms. Rivers's testimony suggested that the lineup was brought to her within hours of the crime and that she immediately pointed out the Appellant, ignoring the other pictures. (R. p. 421, line 17 - p. 422, line 17). The judge also noted that Ms. Rivers described Appellant in substantial detail and claimed to recognize him. (R. p. 421, line 24 - p.422, line 7).

With respect to Ms. Rivers's identification of the Appellant, Respondent submits that the trial judge did not abuse her discretion in allowing the evidence relating to identification. First, the trial judge performed the appropriate test, first analyzing the suggestiveness of the out-of-court procedure, and subsequently analyzing factors independent of that procedure. As such, her ruling was not based on an error of law. Secondly, there was evidence to support her ruling that Rivers's certainty as to Appellant's identity as one of the robbers pre-dated any allegedly suggestive procedures. As such, the motion to suppress the identification evidence was validly denied with respect to Ms. Rivers.

With regard to Mr. Bourgeois's identification of the Appellant, Appellant's counsel argues on appeal that Bourgeois's identification was the result of an unduly suggestive pre-trial confrontation. Respondent first notes that although Appellant

contested Bourgeois's identification at the suppression hearing, his stated argument against admission was that Bourgeois was never shown a photo lineup. He never explicitly mentioned that the witness's presence at the bond hearing was unduly suggestive of Appellant's identity. As such, Respondent again submits that this issue has not been adequately preserved for appellate review. *See* State v. Thomason, 355 S.C. 278, 584 S.E.2d 143 (Ct. App. 2003)(holding that a party cannot argue one theory at trial and a different theory on appeal).

Respondent also submits, however, that even if this issue is found to be preserved, the trial judge did not abuse her discretion in finding that the fact that the witness saw Appellant at the bond hearing was not unduly suggestive. Although Appellant argues that the witness could only vaguely identify Appellant prior to the bond hearing, and that as a result the bond hearing had to have been what led to his certainty at the time of trial, the State argued, and the trial judge agreed, that although the witness knew the Appellant would have a bond hearing on the day in question, he did not know that the Appellant was the only defendant in the courthouse that day, and that he could have been just one of many. The trial judge further asserted that the witness did not know if there were people appearing for bond hearings before or after defendant. The court held that, as a result, the witness would not necessarily make the connection that the Appellant was there for a hearing regarding the armed robbery, and as such this confrontation did not unduly influence his identification of Appellant. (R. p. 456, line 17 - p. 458, line 12).

In addition, Bourgeois testified at the suppression hearing that the Appellant was right in his face for a period of time during the robbery, that he was between five-ten and

five-eleven, might have weighed between 150-160 pounds, had bumps on his face, and 'scruffy-looking mustache.' (R. p. 429, line 16 - p. 430, line 22). Mr. Bourgeois also testified that since the incident, he saw both co-defendants in his dreams. (R. p. 438, lines 4-5).

With respect to Mr. Bourgeois's identification of the Appellant, Respondent submits that the trial judge did not abuse her discretion in allowing the evidence relating to identification. First, the trial judge performed the appropriate test, first analyzing the suggestiveness of the out-of-court procedure, and subsequently analyzing factors independent of that procedure. As such, her ruling was not based on an error of law. Secondly, there was evidence to support her ruling that the confrontation at the bond hearing was not unduly suggestive, and that Bourgeois's certainty as to Appellant's identity as one of the robbers pre-dated any allegedly suggestive confrontation at the bond hearing anyway. As such, the motion to suppress the identification evidence was validly denied with respect to Ms. Bourgeois.

In a criminal prosecution, short of circumstances which show there is a very substantial likelihood of irreparable misidentification of defendant, evidence of identification including circumstances and weight, are for the jury. State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980). Respondent submits that the trial judge correctly held that, given the totality of the circumstance, the out-of-court procedures were not unduly suggestive. However, respondent also submits that even if this Court were to find that the out-of-court procedures employed were suggestive, there was ample evidence presented at the suppression hearing that the witnesses were able to reliably identify the Appellant

based on information independent of suggestive procedures. As such, Respondent submits that Appellant is unable to show any error resulting from the trial court's refusal to suppress the identification evidence. Therefore, this specific claim should be denied, and this Court should affirm the findings of the lower court.

V.

The trial judge did not err in denying Appellant's motion for a mistrial on the basis of incompetent testimony offered by Officer Golden.

Appellant argues on appeal that the trial judge erred in denying the motion for a mistrial made on the grounds that the prosecution witness had injected arbitrary and inadmissible evidence before the jury by referencing facts that the trial judge had previously ruled would not be submitted into evidence.

The decision to grant or deny a motion for mistrial is a matter within the trial court's sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). Although the decision to grant a mistrial is vested in the sound discretion of the trial court, a mistrial is proper only where it is dictated by manifest necessity or the ends of public justice. State v. Rowlands, 343 S.C. 454, 539 S.E.2d 717 (Ct. App. 2000). A mistrial should be declared only when absolutely necessary. State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008).

Whether a mistrial is manifestly necessary is a fact specific inquiry, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2004). The granting of

the motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way. State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). The trial judge should exhaust other methods to cure possible prejudice before aborting a trial. Council, 335 S.C. at 13, 515 S.E.2d at 514 (1999).

A mistrial should not be ordered in every case where incompetent evidence is received. Adams, 354 S.C. at 377, 580 S.E.2d at 793 (Ct. App. 2004). Generally, where there is a concern regarding improperly admitted elicited testimony, a curative instruction to disregard the testimony is deemed to have cured any alleged error. State v. Edwards, 373 S.C. 230, 644 S.E.2d 66 (Ct. App. 2007).

In the present case, co-defendant's counsel objected and moved for a mistrial immediately following the introduction of testimony regarding drugs and a shotgun found at co-defendant's home. Appellant's counsel joined in the motion. (R. p. 747, line 16 - p. 748, line 6). However, the trial judge noted that the law instructed her to save trials from a mistrial situation whenever possible, and that mistrials were to be granted only in the most extreme of situations. (R. p. 750, lines 17-20). As such, the trial judge elected to deny the motion for mistrial and give a curative instruction instead, instructing the jury to disregard the complained of testimony. (R. p. 750, line 21 - p. 752, line 1). Respondent submits that the trial judge minimized any potential prejudice via its curative instruction to the jury, and that as a result the trial judges's decision to deny the motion for mistrial was not error, and fell within her broad discretion.

In any event, Respondent submits that this issue was not properly preserved for appellate review. Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient or move for a mistrial to preserve the issue for appellate review. State v. White, 371 S.C. 439, 639 S.E.2d 160 (Ct. App. 2006). *See also* State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996)(no issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial).

Here, although Appellant's counsel did join in the motion for mistrial and state prior to the trial judge's ruling on the motion that he believed 'the only thing available is a mistrial because there are no curative things that the court can do,' (R. p. 747, line 24 - p. 752, line 23), there was no further objection after the judge issued her ruling. (R. p. 754, lines 12-17). Because of Appellant's failure to renew his objection or motion for mistrial, Respondent submits that this issue was not preserved for appellate review.

However, even if this Court finds that the issue was preserved, and error was in fact committed, Respondent submits that any error was harmless. Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Adams, 354 S.C. at 380-81, 580 S.E.2d at 795 (Ct. App. 2004); *see also* State v. Curry, 370 S.C. 674, 636 S.E.2d 649)(error is harmless when it could not have reasonably affected the result of the trial).

An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant. State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41 (Ct. App. 2007).

VI.

The trial judge did not err in denying Appellant's motion for a mistrial made on the grounds that the jury pool was informed as they began deliberations that the Appellant and his co-defendant had robbed a bank in Cameron, South Carolina and that the authorities sought to bring them to justice for their crimes.

The decision to grant or deny a motion for mistrial is a matter within the trial court's sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). Although the decision to grant a mistrial is vested in the sound discretion of the trial court, a mistrial is proper only where it is dictated by manifest necessity or the ends of public justice. State v. Rowlands, 343 S.C. 454, 539 S.E.2d 717 (Ct. App. 2000). A mistrial should be declared only when absolutely necessary. State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008).

Whether a mistrial is manifestly necessary is a fact specific inquiry, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2004). The granting of the motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way. State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). The trial judge should exhaust other methods to cure possible prejudice before aborting a trial. Council, 335 S.C. at 13, 515 S.E.2d at 514 (1999).

Generally, determination of whether extraneous information received by a juror during the course of the trial is prejudicial is a matter for determination by the trial judge. State v. Galbreath, 359 S.C. 398, 597 S.E.2d 845 (Ct. App. 2004). When an allegation is made that extraneous information may have improperly influenced jurors, the relevant factors to be considered are the number of jurors exposed, the weight of the evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice. Id. Where a defendant seeks a new trial on the basis of juror misconduct, he is required to prove both the alleged misconduct and the resulting prejudice. Id.

During jury deliberations, the jury sent out a note indicating that it had been brought to the jury's attention that one of the jurors had heard something about the two co-defendants also being targeted by police for an alleged armed bank robbery committed in Cameron, South Carolina. (R. p. 1054, lines 1-11). The trial judge denied the motion for a mistrial, gave a curative instruction to each juror, and further polled each juror in order to determine to her satisfaction that the jury could disavow themselves of this knowledge in consideration of the case. (R. p. 1069, line 21 - p. 1096, line 8).

Respondent submits that the trial judge committed no error in denying Appellant's motion for mistrial. She did as law the instructed her to do, seeking to exhaust other methods to cure possible prejudice before aborting the trial. In fact, she not only gave a curative instruction, she gave a curative instruction to each individual juror and polled them to determine if they could disavow themselves of the information in question in consideration of the case before them, thus increasing the likelihood the curative

measures would be effective. Further, there was substantial evidence admitted against Appellant at trial, including his statement to his girlfriend that he robbed the store in question, the in and out-of-court identifications identifying Appellant as one of the robbers, and the evidence obtained as a result of the search warrant. Hence, Respondent submits that although the entire jury heard the extraneous information, the potential for prejudice was minimized and the trial judge's actions in denying the motion for mistrial clearly fell within her broad discretion.

However, even if this Court finds that error was in fact committed, Respondent submits that any error was harmless. Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Adams, 354 S.C. at 380-81, 580 S.E.2d at 795 (Ct. App. 2004); *see also* State v. Curry, 370 S.C. 674, 636 S.E.2d 649)(error is harmless when it could not have reasonably affected the result of the trial).

An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant. State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41 (Ct. App. 2007). No definite rule of law governs finding an error harmless; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Id.; *see also* State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002)(in determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict).

As noted before, there was a great deal of other evidence, such as the out-of-court and in-court identifications, and the other admissible evidence found pursuant to the search warrant that tended to prove the defendant's guilt, which was wholly independent of any

speculative knowledge of prior robberies. As such, Respondent submits that even if the denial of the motion for mistrial was error, Appellant is unable to prove prejudice, and that as a result, any error is harmless. Therefore, Respondent submits that this specific claim should be denied, and that this Court should affirm the findings of the lower court.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Calhoun County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

Respondent,

vs.

PHILLIP LEE SPEARS,

Appellant.

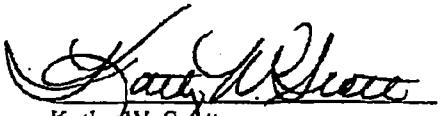
PROOF OF SERVICE

I, Kathy W. Scott, certify that I have served the Final Brief of Respondent on Appellant by depositing three copies of the same in the United States mail, postage prepaid, addressed to:

M. Celia Robinson, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 3rd day of November, 2009.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Phillip Lee Spears, Appellant.

Appeal From Calhoun County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 4843
Heard March 10, 2011 – Filed June 15, 2011

AFFIRMED

Assistant Appellate Defender M. Celia Robinson and Appellate Defender Breen R. Stevens, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott and Assistant Attorney General A. West Lee, of Columbia; and Solicitor David M. Pascoe, Jr., of Summerville, for Respondent.

GEATHERS, J.: Phillip Lee Spears appeals his convictions for armed robbery, kidnapping, and possession of a firearm during the commission of a violent crime. Spears argues the trial court erred in: (1) denying his motion to sever his case from his codefendant's case prior to trial; (2) denying his motion to suppress trial testimony and evidence of a gun found in the room where Spears was taken into custody; (3) denying his motion to suppress the in-court identifications of both defendants on the ground that the out-of-court identification process was unduly suggestive; (4) denying his motion to suppress evidence that Spears submits was obtained without a valid search warrant and without valid consent; and (5) denying his motion for a mistrial, which was based on multiple grounds. We affirm.

FACTS / PROCEDURAL HISTORY

On November 6, 2006, two men entered Bell's Bait and Tackle Shop in Elloree, South Carolina (also known as, and hereinafter, the Wagon Wheel). The men held the store owner and several of his employees[1] on the floor at gunpoint while they proceeded to rob the store. The robbers absconded with over $200 in cash, approximately $580 in rolled coins, and several packs of Newport cigarettes.

James Bourgeois (the owner of the Wagon Wheel) called 911, and the police arrived within ten minutes. Natasha Rivers, a store employee, was able to provide the police with a detailed description of both suspects. As a result of her description, police developed Phillip Spears as a suspect. Later that same day, approximately four hours after the robbery, police showed Rivers a photo line-up and she immediately identified Spears. Rivers testified she was one hundred percent certain that Spears was the same gunman who first entered the Wagon Wheel that morning. Around six-thirty or seven o'clock on the evening of the robbery, Rivers was shown a second photo line-up. Rivers said she saw the second line-up on a computer screen at the sheriff's office. Rivers immediately pointed to Spears's codefendant,

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[1] The victims were Natasha Rivers, James Bourgeois, Cleveland Williams, and Iskier Prezzie. Rivers's two minor children were also in the store on the morning of the robbery.

Titus Bantan, although she noted Bantan's hair was different in the photo line-up than it had been when she saw him that morning.

The police investigation led them to the home of Spears's ex-girlfriend, Tanesha Adams. Through Adams, police learned that prior to the robbery Spears had called Adams at 5:00 a.m. and again at 7:00 a.m. to ask her whether she knew if the Wagon Wheel had video cameras. Adams testified she told Spears she did not know. While the police were still present, Spears called Adams again. Adams testified Spears admitted to her over the telephone that he robbed the Wagon Wheel that morning.

During the same police visit, Adams's brother told police about a mobile home in Orangeburg, South Carolina, where he said Spears sometimes stayed. Adams's brother volunteered to show police the mobile home. Police arrived at 140 Charlotte Circle in Orangeburg armed with an arrest warrant for Spears. The police entered with their guns drawn and ordered an unknown suspect to back down the hallway with his hands up. After the suspect was detained, the police identified him as Bantan, not Spears. Officer Williams stated, "Initially [Bantan] was handcuffed. Once we believed that he was going to sign the permission to search, of course he was unhandcuffed . . . ." Although Bantan initially consented to a search of the mobile home, Bantan later withdrew his consent after the police located items consistent with the robbery.

The officers then left and obtained a search warrant, which they executed at 9:00 p.m. on the evening of the robbery. They recovered Timberland boots and army fatigue style pants that matched the description of the clothing worn by one of the robbers, several packs of Newport cigarettes, $260 in twenty dollar bills, and a "Coinstar" receipt showing $300 in coins that had been exchanged for cash at a nearby Bi-Lo a few hours after the robbery. Even though the trial court noted Bantan's initial consent was invalid, the trial court ruled all the evidence obtained through the search was admissible via the doctrine of inevitable discovery.

Bantan and Spears were tried together for the Wagon Wheel robbery. A jury convicted both defendants on all counts. The trial court sentenced Spears to thirty years' imprisonment for kidnapping, thirty years'

imprisonment for armed robbery, and five years' imprisonment for possession of a firearm during the commission of a violent crime, to run concurrently. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

I. Motion to Sever

Spears filed a motion in limine to sever his case from that of his codefendant, Titus Bantan, and the trial court denied Spears's motion. Specifically, the trial court noted that mutually antagonistic defenses do not mandate separate trials. On appeal, Spears argues severance was required because he was forced to defend himself against the prosecution and against Bantan, and this denied him the specific right to a fair trial.

"A motion for severance is addressed to the sound discretion of the trial court." State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002). "The trial court's ruling will not be disturbed on appeal absent an abuse of that discretion." State v. Rice, 368 S.C. 610, 613, 629 S.E.2d 393, 394 (Ct. App. 2006). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id. at 613, 629 S.E.2d at 395.

"Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced." Simmons, 352 S.C. at 350, 573 S.E.2d at 860. "Offenses are considered to be of the same general nature where they are interconnected." State v. Jones, 325 S.C. 310, 315, 479 S.E.2d 517, 519 (Ct. App. 1996). "Conversely, offenses which are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together." Id.

"A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct. App. 2005) (emphasis added). An example of a specific trial right that may be prejudiced from a joint trial is the constitutional right to cross-examination when one codefendant's confession expressly implicates another codefendant but the confessor does not take the witness stand. Bruton v. United States, 391 U.S. 123, 135-37 (1968).

"A defendant who alleges he was improperly tried jointly must show prejudice before an appellate court will reverse his conviction." State v. Halcomb, 382 S.C. 432, 440, 676 S.E.2d 149, 153 (Ct. App. 2009). "The rule allowing joint trials is not impugned simply because the codefendants may present evidence accusing each other of the crime." Id. "A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial." State v. Stuckey, 347 S.C. 484, 497, 556 S.E.2d 403, 409 (Ct. App. 2001) (citations and quotation marks omitted).

We affirm the trial court's denial of a severance because there was no abuse of discretion; the ruling was supported by the evidence and not affected by an error of law. Rice, 368 S.C. at 613, 629 S.E.2d at 395. The evidence against Spears and Bantan was interconnected. Both defendants were charged with an armed robbery that occurred at the Wagon Wheel on the morning of November 6, 2006. Both defendants were charged with kidnapping the same victims during the robbery. Both defendants were charged with possession of a firearm during the commission of these crimes. Finally, Spears's ex-girlfriend, Tanesha Adams, and Adams's brother led police to Bantan's mobile home, which contained evidence corresponding to the items victims testified were stolen from the Wagon Wheel.

Furthermore, no specific trial right was prejudiced by the joinder of these codefendants' trials. See Bruton, 391 U.S. at 135-37 (finding a specific trial right was prejudiced and that prejudice could not be remedied with a curative instruction when one codefendant expressly implicated the other codefendant in his oral confession but refused to take the witness stand).

Although the State presented evidence that Spears confessed to committing the crime to Adams over the telephone, there was no evidence Spears implicated Bantan during the call. In addition, Bantan did not implicate Spears at any point during the police investigation. Therefore, we hold the trial court did not abuse its discretion in denying Spears's motion for a severance.

Spears also argues severance was warranted because he suffered prejudice during Bantan's closing argument, which emphasized the plethora of evidence against Spears in contrast to the scant evidence against Bantan. We disagree. South Carolina law provides that mutually antagonistic defenses, or the possibility that codefendants may accuse each other of the crime, does not necessarily warrant a severance. See State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999); Halcomb, 382 S.C. at 440, 676 S.E.2d at 153. In addition, the trial court gave a cautionary instruction to the jury during its opening remarks that it should consider the evidence against each defendant separately. See Stuckey, 347 S.C. at 497, 556 S.E.2d at 409 (noting a proper cautionary instruction may help to protect the individual rights of each defendant and ensure that no prejudice results from a joint trial).

Finally, Spears argues severance was required in order to protect his specific trial right to argue last during closing arguments if he presented no evidence or witnesses. We decline to address this argument as it was not argued below, and therefore it is not properly preserved for this court's review. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

II. Motion to Suppress Evidence of Gun

Spears was arrested three days after the Wagon Wheel robbery at a residence in North Carolina. A gun was found under the mattress in the bedroom where Spears was staying. Spears filed a motion in limine to suppress evidence of the gun, arguing there was no evidence he ever possessed the gun, such as fingerprints or testimony that the gun belonged to

him. Spears further contended Bourgeois's statement to police described a silver automatic gun with black trim, whereas the gun found near Spears at the time of his arrest was a black gun with silver trim. The trial court denied the motion to suppress, noting any discrepancies between the victims' description of the gun they saw during the robbery and the gun found near Spears at the time of his arrest would go to the weight of the evidence rather than to its admissibility. However, the trial court noted that the State would need to lay a proper foundation for the admission of the gun during the course of the trial.

On appeal, Spears argues the trial court erred in its in limine ruling that the gun was admissible despite acknowledging the State would need to establish a proper foundation during trial. Spears submits the gun was irrelevant because the State was unable to establish he owned it and was also unable to establish any connection between the gun and the crimes for which he was indicted. Finally, Spears contends the prejudicial effect of admitting the gun substantially outweighed the probative value.

During trial, Rivers testified she saw Spears with a black gun trimmed with silver on the top. Bourgeois testified he saw Spears with a dark colored gun with chrome parts on it.[2] The State displayed the gun found near Spears to Bourgeois, and he stated it looked similar to the gun he saw on the day of the robbery. Finally, Cleveland Williams (another store employee) testified during trial that the gun found near Spears at the time of his arrest in North Carolina looked "almost exact[ly]" the same as the gun he saw on the day of the robbery.

Spears did not object to any of the victims' trial testimony regarding the appearance of the gun or its similarity to the gun found near Spears at the time of his arrest. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("[M]aking a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in

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[2] Spears's trial counsel cross-examined Bourgeois extensively regarding the discrepancy between his description of the gun in his written statement to police (silver with black trim) and his description of the gun at trial (dark colored with chrome parts).

limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.") (citations and quotation marks omitted). In addition, the motion in limine did not occur immediately prior to the victims' testimony regarding the gun. See id. ("However, where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection."). Therefore, Spears's argument regarding the admissibility of the testimony concerning the gun is not preserved for our review.

Spears did object, however, when the State moved the actual gun into evidence. Therefore, we proceed to evaluate that ruling on the merits. "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Moore, 377 S.C. 299, 305-06, 659 S.E.2d 256, 259 (Ct. App. 2008) (citations and quotation marks omitted). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." Id. at 306, 659 S.E.2d at 259 (citations and quotation marks omitted).

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See Rule 401, SCRE. However, relevant evidence may be excluded when its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Rule 403, SCRE. "Evidence is unfairly prejudicial in the context of Rule 403, if the evidence has an undue tendency to suggest a decision on an improper basis, such as an emotional one." S.C. Dep't of Soc. Servs. v. Lisa C., 380 S.C. 406, 417, 669 S.E.2d 647, 653 (Ct. App. 2008).

We believe the trial court did not err in admitting evidence of the gun. The State laid a proper foundation for admission of the gun. Specifically, several victims testified the gun found near Spears was very similar to the gun they saw him with on the day of the robbery. Because this evidence was relevant and highly probative, we believe the trial court properly admitted it.

III. Motion to Suppress In-Court Identifications

Spears suggests the trial court erred in denying his motion to suppress both the out-of-court and the in-court identifications of Spears and Bantan when the out-of-court identification procedures were unduly suggestive.

"The United States Supreme Court has developed a two-prong[ed] inquiry to determine the admissibility of an out-of-court identification." State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000) (citing Neil v. Biggers, 409 U.S. 188, 198-99 (1972)). First, a 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 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). The following factors are to be considered in evaluating the totality of the circumstances when determining the likelihood of misidentification:

> (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.

Id. at 127, 644 S.E.2d at 696-97.

Spears failed to contemporaneously object when Rivers or Bourgeois made in-court identifications of the defendants during their direct testimony, despite the fact that both witnesses identified Spears and Bantan as the gunmen who robbed the Wagon Wheel on several occasions during the course of their testimony. Consequently, any issue with respect to the

witnesses' in-court identifications is not properly before this court. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("[M]aking a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.") (citations and quotation marks omitted). In addition, Spears's motion in limine to suppress this evidence did not occur immediately prior to the victims' in-court-identifications of Spears and Bantan. See id. ("However, where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection.").

Spears did contemporaneously object to the introduction of the photo line-ups for both Bantan and Spears. However, we do not believe the photo line-ups were unduly suggestive. In addition, the identification process was so reliable that no substantial likelihood of misidentification existed. See Moore, 343 S.C. at 287, 540 S.E.2d at 447. Shortly after the robbery, Rivers was able to provide a detailed description of both of the suspects to police. Rivers testified she "directly" pointed to the photo of Spears when she saw the photo line-up, and she was "a hundred percent sure" Spears was the man who entered the Wagon Wheel first that morning. In addition, Rivers saw the first photo line-up only four hours after the robbery. Finally, Rivers testified she recognized Spears during the course of the robbery as someone she knew "from the neighborhood." Rivers saw the photo line-up of Bantan the evening of the robbery, and she "directly" pointed to Bantan as well. Viewing the totality of the circumstances, no substantial likelihood of misidentification existed. See Turner, 373 S.C. at 127, 644 S.E.2d at 696-97.

IV. Motion to Suppress Evidence Obtained in Search

In a motion in limine to exclude all evidence obtained via the search, the trial court ruled Bantan's initial consent to search was invalid based on the fact that his will was overcome. However, after redacting the sentence in the search warrant affidavit referencing Bantan's consent, the trial court found that the affidavit attached to the search warrant still gave rise to probable cause. Therefore, the trial court ruled that all the evidence obtained through

the search was admissible via the doctrine of inevitable discovery. On appeal, Spears argues that because Bantan's initial consent was invalid, the subsequent search warrant was also invalid because it was obtained on the basis of illegally discovered evidence. In the absence of this illegally discovered evidence, Spears contends the search warrant affidavit failed to establish probable cause to search the mobile home. Spears further argues the search warrant for evidence seized from 140 Charlotte Circle in Orangeburg, SC, was invalid as it was issued to a Calhoun County officer who was without jurisdiction to execute the warrant.

"The trial judge's factual findings on whether evidence should be suppressed due to a Fourth Amendment violation are reviewed for clear error." State v. Baccus, 367 S.C. 41, 48-49, 625 S.E.2d 216, 220 (2006). The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV; see also S.C. Const. art. I § 10. The United States Supreme Court adopted the federal exclusionary rule to prevent the admission of evidence at trial that was unlawfully seized in violation of the Fourth Amendment and subsequently expanded that rule to apply to the individual states via the Due Process clause. Weeks v. United States, 232 U.S. 383, 398 (1914), overruled by Mapp v. Ohio, 367 U.S. 643, 655 (1961). However, the United States Supreme Court has narrowly interpreted the scope of the exclusionary rule in recent years. See Hudson v. Michigan, 547 U.S. 586, 591-94 (2006) (holding violation of the "knock and announce" rule did not warrant the exclusion of all evidence obtained in a search, and noting that the exclusionary rule generates "substantial societal costs") (citations and quotation marks omitted).

The inevitable discovery doctrine, one exception to the exclusionary rule, states that if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, the information is admissible despite the fact it was illegally obtained. Nix v. Williams, 467 U.S. 431, 444 (1984). As explained by the Nix Court, "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the

trial proceedings." Id. at 447. Therefore, in Nix, the Court allowed the introduction of physical evidence of the victim's body despite the fact that the defendant's statements regarding the location of the body had been obtained in violation of his right to counsel. Id. at 437, 449-50. The Court noted that search parties were approaching the location of the body, and there was testimony that it would only have taken an additional three to five hours to discover the victim's body if the search had continued. Id. at 449.

"A search warrant may issue only upon a finding of probable cause." State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). The duty of the appellate court is simply to determine whether the magistrate had a substantial basis for concluding that probable cause existed. Id. at 144, 519 S.E.2d at 349 (citing Illinois v. Gates, 462 U.S. 213, 238-39 (1983)). "The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." State v. Dunbar, 361 S.C. 240, 253, 603 S.E.2d 615, 622 (Ct. App. 2004) (citing Gates, 462 U.S. at 238). "The appellate court should give great deference to a magistrate's determination of probable cause." Dunbar, 361 S.C. at 253, 603 S.E.2d at 622.

In the instant case, the trial court found that all the evidence recovered from 140 Charlotte Circle was admissible under the inevitable discovery exception. We agree. Relying on State v. Davis, 371 S.C. 412, 639 S.E.2d 457 (2007), the trial court first redacted any reference to Bantan's initial consent due to the fact that his will was overcome by the officers' show of force and then found the remaining search warrant still gave rise to probable cause to search the residence. See Davis, 371 S.C. at 415-17, 639 S.E.2d at 459-60 (noting that a court may redact alleged misstatements in an affidavit and consider the remaining content of the affidavit to determine whether it is sufficient to establish probable cause). The remaining portion of the search warrant, as read into the record by the trial court, was as follows:

> An armed robbery occurred at Bell's Bait and Tackle Shop in Elloree, South Carolina, and a suspect, Phillip Spears, was positively identified by a store clerk from a six photo line-up compiled by SLED.

> Information was received by officers from the Calhoun County Sheriff's Office that suspect sometimes stayed at 140 Charlotte Circle in the City of Orangeburg, so officers responded to that location. Upon arriving at 140 Charlotte Circle, a second suspect, Titus Bantan, was located and had also been positively identified from a six photo line-up compiled by SLED as one of the armed robbery suspects.

As previously discussed, we believe the out-of-court photo identifications of Spears and Bantan were valid and not the product of unduly suggestive procedures. In addition, we disagree with Spears's contention that the affidavit mentions any of the evidence initially located by police during the period of Bantan's initial consent. Viewing the totality of the circumstances, the magistrate had a substantial basis for determining evidence relevant to the Wagon Wheel robbery would be found at 140 Charlotte Circle. See Bellamy, 336 S.C. at 144, 519 S.E.2d at 349. We hold the trial court properly found that the magistrate had a substantial basis for concluding that probable cause existed. Accordingly, the evidence recovered from 140 Charlotte Circle was admissible under the inevitable discovery doctrine as the evidence would have been found subject to the valid search warrant, regardless of whether Bantan was coerced to give consent during the initial search. See Nix, 467 U.S. at 443-44, 447.

We need not address Spears's remaining argument with respect to whether the search warrant was improperly issued to an officer without jurisdiction to execute the warrant because the entire argument on appeal consists of a single sentence. See State v. Cutro, 332 S.C. 100, 108 n.1, 504 S.E.2d 324, 328 n.1 (1998) (noting a one sentence argument is too conclusory to present any issue on appeal).

V. Motion for a Mistrial

Spears argues the trial court erred in denying his motion for a mistrial after Officer Christopher Golden improperly introduced testimony concerning .40-caliber bullets, drugs, and a shotgun recovered during the

search of 140 Charlotte Circle. Spears further argues the trial court erred in denying his second motion for a mistrial on the ground that the jury was improperly influenced by extraneous information regarding another robbery that Spears and Bantan allegedly committed.

"The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion." State v. Kelly, 372 S.C. 167, 170, 641 S.E.2d 468, 470 (Ct. App. 2007) (citation and quotation marks omitted). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) (citation and quotation marks omitted).

"The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Goodwin, 384 S.C. 588, 605, 683 S.E.2d 500, 509 (Ct. App. 2009) (citation and quotation marks omitted). "An instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission unless . . . it is probable that notwithstanding such instruction or withdrawal the accused was prejudiced." State v. Simpson, 325 S.C. 37, 43, 479 S.E.2d 57, 60 (1996). "Error is harmless when it could not reasonably have affected the result of the trial." State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990).

We affirm the trial court's denial of both of Spears's mistrial motions. During pre-trial motions, the trial court ruled that the State was not to refer to drugs, a shotgun, or .40-caliber bullets, all of which were found in Bantan's mobile home at the time of the search. During trial, Officer Golden was listing the items recovered from 140 Charlotte Circle and he mentioned recovering "some bullets, .40-caliber, a shotgun. Plus, there [were] some drugs found." Bantan's counsel immediately objected and moved for a mistrial after Officer Golden improperly testified about these items. Spears's counsel joined in the motion for a mistrial. The State conceded Officer Golden's testimony regarding a shotgun and drugs was inadmissible. The trial court agreed the items should not have been mentioned, but denied Bantan's motion for a mistrial. The trial court offered to give a curative

instruction for the jury to disregard "the testimony that was given by [Officer Golden] for ten seconds before we took our break." Both Bantan and Spears declined any curative instruction by the trial court, arguing the instruction would only bring more attention to the prejudicial testimony and that a mistrial was the only remedy.

We affirm the trial court's denial of Spears's first mistrial motion as the testimony was harmless in light of the overwhelming evidence of guilt presented at trial. See Reeves, 301 S.C. at 194, 391 S.E.2d at 243 ("Error is harmless when it could not reasonably have affected the result of the trial."). Specifically, Rivers and Bourgeois testified at trial that they were both one hundred percent certain that Spears was the first gunman who entered the Wagon Wheel. In addition, the State presented evidence that Spears confessed to committing the robbery over the phone to Adams.

Spears argues the trial court erred in denying his second mistrial motion based on extraneous information published to the jury concerning an unrelated bank robbery. However, Spears's appellate brief fails to cite any legal authority in support of this argument. Therefore, this argument has been abandoned on appeal. State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) (recognizing an argument is deemed abandoned on appeal when it is merely conclusory and made without supporting authority).

Finally, during oral argument, Spears's appellate counsel suggested the trial court erred in denying his mistrial motions because the trial court did not evaluate all of the mistrial factors on the record before ruling on the motion. See State v. Thompson, 276 S.C. 616, 621, 281 S.E.2d 216, 219 (1981) (listing several factors to be considered by the trial court in evaluating the merits of a mistrial motion). We decline to address this argument as it was raised for the first time during oral argument and was not addressed in Spears's appellate brief. Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) (holding an appellant may not use oral argument as a vehicle to argue issues not argued in the appellant's brief).

CONCLUSION

For all of the foregoing reasons, the decision of the circuit court is **AFFIRMED.**

WILLIAMS, and LOCKEMY, JJ., concur.

The South Carolina Court of Appeals

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CLERK

V. CLAIRE ALLEN
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July 1, 2011

REMITTITUR

The Honorable Kenneth Hasty
PO Box 709
St. Matthews, SC 29135-0709

Re: The State v. Spears, Phillip Lee
2007-GS-09-00148 2007-GS-09-00219 2007-GS-09-00221

Dear Mr. Hasty:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

The exhibit being returned is: State's Ex 15/Court's Ex. 12- Coinstar receipt. Please sign attached copy of this letter and return to acknowledge receipt of this item.

Sincerely,

Renee S. Johnson
Administrative Specialist

TAG/rj

cc: Appellate Defender Breen R. Stevens
Phillip Lee Spears # 297965
Assistant Attorney General A. West Lee
David M. Pascoe, Jr.

Receipt Acknowledgement:

Name:_____ Date:_____