STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions
Lee S. Alford, Circuit Court Judge

Appellate Case No. 2014-002436

THE STATE, ...RESPONDENT

v.

DAVID W. DOVER, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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The trial court's admission of testimony respecting a photographic lineup was proper pursuant to Rule 801(d) (1), SCRE; nevertheless, any error was harmless.

STATEMENT OF THE CASE

Appellant was indicted at the May 2014, term of the grand jury for York County for second degree burglary and larceny. Appellant proceeded to trial by jury pursuant to which Appellant was found guilty of second degree burglary and was acquitted of the larceny charge. On November 13, 2014, Appellant was sentenced by the Honorable Lee S. Alford to years' eight (8) imprisonment. Appellant filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

At the time of the incident, the victim, his wife and two children, ages three and five, lived on McFarland Road in York, South Carolina. (Tr. p. 106-107). The victim served as the primary caregiver for the children while the victim's his wife worked as a horse veterinarian. (Tr. p. 107).

The victim drove his children to day school the morning of February 10, 2014. The day school is approximately 9 miles from the home. The victim returned home where he remained until he picked the children up at noon and drove home. (Tr. p. 108). The victim was surprised to find a "rotten" truck in his driveway. The victim did not recognize the truck. (Tr. pp. 112; 109; 132 - 133). The victim pulled in the driveway behind the truck. (Tr. p. 108). As the victim opened his vehicle door to investigate, he saw Appellant exit his home and walk down the back steps with the victim's television in his arms. (Tr. p. 109). The victim did not know Appellant. (Tr. p. 134). Appellant and the victim may eye contact as Appellant turned toward the "rotten" truck. (Tr. pp, 110; 129). Appellant put the television down and ran but the victim cut off Appellant's escape route and confronted Appellant. (Tr. pp. 109-110; 145). The victim described Appellant as scared and half-crying. Appellant begged the victim not to contact law enforcement authorities. (Tr. p. 110). The victim directed Appellant to return the television and walked with Appellant to the victim's bedroom as Appellant returned the television to the location in the home from which it was stolen. (Tr. pp. 111; 146). The victim then hit Appellant. (Tr. p. 111). Appellant fled to his truck but was blocked in by the victim's vehicle. (Tr. p. 112). The victim walked up to Appellant's window as Appellant was "shivering" and begging. (Tr. p. 139). Appellant then sped away, driving through the

victim's yard spinning the wheels of the truck in the soggy ground and escaping through the woods. (Tr. pp. 111-112; 116-117). The victim called 9-1-1 and reported the license tag number on the truck Appellant was driving as he sped away from the crime scene. (Tr. p. 113). The victim identified Appellant in court as the person he saw coming out of his home with the television. (Tr. pp. 134 – 135). The victim also testified that the television cost five hundred and eighteen dollars. (Tr. p. 134).

York County Sheriff's Deputy Robert Ellis received a call between 12:20 p.m. and 12:30 p.m. in reference to a burglary that had just occurred. He arrived at the scene approximately fifteen (15) minutes later. (Tr. pp. 168-169; see also p. 188). Ellis was met by the upset victim who described what transpired when the victim arrived home after picking his children up from day school. (Tr. pp. 171-172). Ellis observed deep grooves in the victim's yard that were consistent with the information provided by the victim. (Tr. p. 173). The victim advised Ellis that the doors to his home were left unlocked and Ellis did not find signs of a forced entry into the home. Tr. p. 193. The victim reported the license tag of the truck and Ellis provided the information to the dispatch operator in order to secure the name and address for the tag. (Tr. p. 172). Ellis sent deputies to the address related to the license tag. (Tr. p. 172). Ellis followed his officers to the address which was less than a one minute drive from the scene of the crime. (Tr. p. 177). Ellis found the two deputies he dispatched and the truck matching the tag number reported by the victim at Appellant's residence. Fresh mud was found on the tires and dripping off of the truck. (Tr. pp. 178-179). Appellant was not present. (Tr. p. 182).

The crime scene was processed and fingerprints belonging to Appellant were found on the front screen of the television. (Tr. pp. 213; 234-235; 273 – 275; 287). Deputy Lovelace testified that she reported to the scene and found the Deputy Ellis speaking with the victim who was highly agitated. (Tr. p. 289). She was briefed by Deputy Ellis, left the scene, and traveled the four-minute drive to the address related to the tag number for the "rotten" truck. Lovelace found a vehicle matching the description of the perpetrator's vehicle when she arrived at Appellant's residence. (Tr. pp. 290-292). Appellant was not there so Lovelace returned to her office and requested a SLED generated photographic lineup. She received the lineup by email, printed it, gathered the appropriate forms, and presented the photographic lineup to the victim at the scene. (Tr. pp. 292 – 96). The victim immediately selected Appellant's photograph from the lineup. (Tr. pp. 298-299). When asked by the prosecutor who the victim identified as the person coming out of the home, Appellant objected on the ground of hearsay. (Tr. pp. 332- 333).

ARGUMENT

The trial court's admission of testimony respecting a photographic lineup was proper pursuant to Rule 801(d) (1), SCRE; nevertheless, any error was harmless.

Appellant asserts the trial court erred in admitting hearsay testimony from the investigating officer about the victim's identification of Appellant in a photographic lineup because the victim failed to testify about the lineup in his direct examination. He also contends that the investigating officer's testimony about the victim's selection of Appellant's photograph constituted improper bolstering of the victim's credibility. The State submits, first, that the argument respecting bolstering was not properly preserved for appellate review and cannot be considered by this Court because an objection on that ground was never made to or ruled upon by the trial court. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]."); id. at 142, 587 S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground on appeal."). Second, the testimony in question was properly admitted pursuant to Rule 801(d) (1), SCRE, and even if error exists, it is harmless in view of the overwhelming evidence of Appellant's guilt and the cumulative nature of the testimony in question. Appellant's argument is simply without merit.

Factual Background

Prior to the presentation of testimony, the prosecutor notified the trial court that a photographic lineup was presented to the victim during the investigation. (Tr. p. 20). The victim testified at trial and identified Appellant in court as the person he saw exit his

home with a television. After the victim's testimony and before the testimony of the officer conducting the photographic lineup, Appellant inquired whether the trial court wanted to conduct a Neil v Biggers[1] hearing to address the lineup. (Tr. p. 152).

During the *in camera* hearing, York County Sheriff's Deputy Lovelace testified that she presented a photographic line-up to the victim at 2:48 p.m. on February 10, 2014 at the victim's residence. (Tr. pp. 155; 162). She testified that the photographs were generated through a SLED database. (Tr. pp. 155-56; 162 - 63). Deputy Lovelace presented the six photographs to the victim without names, information, or markings. The only items and information presented to the victim were the photographs and correlating numbers. (Tr. pp. 156- 157). She informed the victim that the line-up may or may not contain the photograph of the perpetrator, that hairstyles and facial hair may change, and that true complexion might not be correctly depicted. She advised the victim to disregard markings and numbers and any difference in the style or type of photograph. (Tr. p. 157). Deputy Lovelace asked the victim to review the photographs and tell her whether he saw the perpetrator. (Tr. p. 158). Lovelace did not point to, suggest or comment on any of the photographs and no one in her presence attempted to influence the victim's decision. (Tr. p. 158). Lovelace testified that the victim chose photograph number 2 and that she saw him circle and initial his choice at the time. (Tr. pp. 159-160). Photograph number 2 is a photograph of Appellant. (Tr. p. 161).

At the conclusion of the hearing, Appellant expressly stated that he had no objection to the testimony and lineup for purposes of the Neil v. Biggers hearing but asked that the State elicit testimony clarifying that the photographs in the lineup were generated from Department of Motor Vehicle records and not booking records. (Tr. p.

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

165). The trial court determined that the requirements for admission were met. (Tr. p. 166).

During her trial testimony before the jury, Deputy Lovelace testified that after reporting to the scene of the crime, she traveled the four minute distance from the crime scene to Appellant's home but Appellant was not at home. Lovelace returned to her office and asked SLED to generate a photographic lineup which she received by email and printed. (Tr. pp. 290 – 293). Lovelace traveled back to the scene of the crime a few hours after the incident and presented the photographic lineup to the victim. (Tr. pp. 295 - 296). Lovelace testified that she told the victim that the perpetrator's photograph may or may not be included among the photographs presented, that hairstyles and facial hair may change, and that true complexion might not be correctly depicted. (Tr. p. 298). Deputy Lovelace asked the victim to review the photographs and tell her whether he saw the perpetrator. (Tr. p. 298). Lovelace testified that Appellant was able to select a photograph from the lineup. (Tr. p. 298). When Lovelace was asked which photograph was selected by the victim, Appellant objected on the ground it "goes to hearsay" because the victim did not testify that he identified anyone. (Tr. p. 299). The prosecutor responded, "He did actually, Your Honor. He pointed to it, circled it and showed ---." (Tr. p. 299). The trial court agreed and overruled the objection. (Tr. p. 299). Lovelace testified that the victim immediately selected photograph 2, became agitated and said "that is the person that committed the offense." (Tr. p. 299). Lovelace testified that photograph 2 is a photograph of Appellant. (Tr. p. 299). When the prosecutor offered the lineup as evidence, Appellant responded, "subject to my previous objection that it contains hearsay. My recollection is that they didn't show that to (the victim) when he

testified." (Tr. p. 300). The court overruled the objection and admitted testimony and lineup as evidence, finding that the victim's testimony that he was able to identify the perpetrator was sufficient to allow admission. (Tr. p. 300).

On cross-examination, Lovelace confirmed that she received the photographic lineup from SLED, that she presented the lineup to the victim approximately two hours after the incident, and that the victim did not ask for the perpetrator's name after the victim selected the photograph. (Tr. p. 325).

Discussion

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The admission or exclusion of evidence is within the sound discretion of the trial court. State v. Parvin, 413 S.C. 497, 777 S.E.2d 1 (2014); State v. Simmons, 384 S.C. 145, 166, 682 S.E.2d 19, 30 (Ct. App .2009). In reviewing findings on admissibility of evidence, appellate courts are limited to determining whether the trial judge abused his or her discretion, and whether that abuse of discretion has prejudiced the defendant. State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct.App. 2013). An abuse of discretion occurs when the trial court's ruling lacks evidentiary support or is controlled by an error of law. State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011). "Appellate courts recognize that the trial judge has considerable latitude [in the admissibility of evidence] and will not disturb such rulings absent a prejudicial abuse of discretion." Id. at 497, 748 S.E.2d at 241. In criminal cases, appellate courts do not reevaluate the facts based on their view of the evidence, but merely determine whether the trial judge's ruling is supported by any evidence. Wilson, at 6, 545 S.E.2d at 829; State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

"To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." State v. Singleton, 395 S.C. 6, 13-14, 716 S.E.2d 332, 335-36 (Ct. App. 2011) (quoting Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)). "An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant." Id. (quoting State v. Lee-Grigg, 374 S.C. 388, 414, 649 S.E.2d 41, 55 (Ct. App. 2007)).

Hearsay statements are not admissible except as provided by our rules of evidence or other rules prescribed by our supreme court or by statute. Rule 802, SCRE. Rule 801(c), SCRE, defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A statement is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Rule 801(a), SCRE; see also State v. Roach, 364 S.C. 422, 613 S.E.2d 791 (Ct.App. 2005). However, pursuant to Rule 801(d) (1), SCRE, a statement is **not** hearsay if the declarant testifies at trial, is subject to cross-examination concerning the statement and the statement is "one of identification of a person made after perceiving the person." See Rule 801(d) (1); Alex Sanders & John Nichols, Trial Handbook for South Carolina Lawyers § 16:5 (2d ed. 2002; updated September 2015). Evidence regarding pretrial identifications is admissible if not the product of unconstitutional procedures. State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980); State v. Gambrell, 274 S.C. 587, 266 S.E.2d 78 (1980).

In this case, a Neil v. Biggers hearing was conducted to establish the constitutional prerequisites prior to admission of evidence respecting the photographic lineup. At the conclusion of the hearing, Appellant indicated he had no objection to admission of the photographic lineup. Appellant also did not object to the earlier in-court identification by the victim. See State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012) (stating that an out-of-court identification violates due process and must be suppressed when the procedure used was impermissibly suggestive and conducive to a substantial likelihood of irreparable misidentification.); State v. Dukes, 404 S.CC. 553, 745 S.E.2d 137 (2013)(stating that an in-court identification is inadmissible if predicated upon a suggestive out of court identification procedure used was impermissibly suggestive and conducive to a substantial likelihood of irreparable misidentification.). The victim who made the statement of identification from the photographic lineup was called at as a witness at trial and was subject to cross-examination by Appellant. Appellant simply chose not to exercise his right to inquire about the victim's identification of Appellant from the photographic lineup. See State v. Plyler, 275 S.C. 291, 295, 270 S.E.2d 126, 128 (1980) ("Because the declarant of the out-of-court assertions testified, the truth of the statements were not dependent on the credibility of individuals not present in the courtroom. Since the declarant was subject to cross-examination, which is the very objective of the hearsay rule, exclusion of relevant evidence serves no purpose."). Deputy Lovelace's testimony that the victim selected Appellant from the photographic array is not hearsay and the trial court properly overruled the objection to admission of the testimony.

Appellant Cannot Establish Prejudice

Even assuming that admission of Deputy Lovelace's testimony was error, any error is undeniably harmless and Appellant is not entitled to reversal of his conviction. "[I]mproper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice. Such error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors." State v. Garner, 389 S.C. 61, 67-68, 697 S.E.2d 615, 618 (Ct.App. 2010); see also State v. Hendricks, 408 S.C. 525, 535, 759 S.E.2d 434, 439 (Ct.App. 2014). If the appellate court finds error, it must thereafter review the other evidence presented at trial to determine whether the error is harmless beyond a reasonable doubt. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Fletcer, 379 S.C. 17, 664 S.E.2d 480 (2008). "An admission of improper evidence is considered harmless when it is merely cumulative to other properly admitted evidence. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Byers, 392 S.C. 438, 447, 710 s.E.2d 55, 60 (2011), citing State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006); State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); see also State v. Jenkins, 412 S.C. 643, 773 S.E.2d 906 (2014) ("appellate courts must determine the materiality and prejudicial character of the error in relation to the entire crime."); State v. Black, 400 S.C. 10, 26, 732 S.E.2d 880, 890 (2012) ("In determining harmless error regarding any issue of witness credibility, we will consider the importance of the witness's testimony to the prosecution's case, whether

the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case.").

First, Appellant cannot establish prejudice because any error in admitting Deputy Lovelace's testimony about the victim's selection of Appellant's photograph was harmless because it was merely cumulative to the victim's earlier, unequivocal in-court identification of Appellant as the perpetrator. Appellant did not object to the in-court identification by the victim and did not question the victim about his identification of Appellant as the perpetrator during Appellant's cross-examination of the victim. State v. Parvin, at 497, 777 S.E.2d at 5, citing State v. Townsend, 321 S.C. 55, 59, 467 S.E.2d 138,141 (Ct.App. 1996); State v. Kirby, 325 S.C. 390, 396-97, 481 S.E.2d 150, 153 (Ct.App. 1996). Lovelace's testimony was cumulative to properly admitted evidence on the issue of identification of Appellant as the perpetrator. State v. Hendricks, at 535, 759 S.E.2d at 439, citing State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 93-94(2011).

Second, there is no reasonable probability the testimony Appellant challenges affected the outcome of the trial relating to Appellant's burglary charge. See State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct.App. 2004) (finding that error in excluding evidence was harmless given the overwhelming evidence against the defendant). There was overwhelming evidence independent of Lovelace's testimony concerning the lineup from which the jury could have found Appellant guilty. Our appellate courts "must determine the materiality and prejudicial character of the error in relation to the entire case." State v. Jenkins, 412 S.C. 643, 651, 773 S.E.2d 906, 910 (2015). The State presented the direct, eyewitness testimony of the victim who found Appellant coming out

of the victim's bedroom carrying the television. The victim testified that after altercations with Appellant outside and inside of the home, he obtained and reported the license tag number and description of the unique truck the perpetrator used during the commission of and escape from the crime. The victim observed and reported to officers that Appellant fled the crime scene by driving his truck through Appellant's soggy yard leaving deep grooves in the ground. Officers obtained the address registered for the license tag of the truck and immediately drove to that address. Officers responding to the address found a truck matching the description provided by the victim, bearing the license tag reported, and covered with fresh, wet mud. The truck was located within minutes of the victim's home. Additionally, Appellant's fingerprint was found on the television Appellant left at the scene when he fled. Moreover, the victim identified Appellant in court as the perpetrator he saw at his home. Appellant did not object to the in-court identification or challenge the victim's identification on cross-examination and no credibility problems existed respecting the victim's testimony.

Admission of the testimony from Deputy Lovelace respecting the victim's selection of Appellant's photograph, if error, was harmless.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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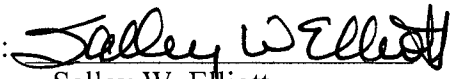
BY: 
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Columbia, South Carolina
November 9, 2015

STATE OF SOUTH CAROLINA
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DAVID W. DOVER, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter* , both dated November 9, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certified that all parties required by Rule to be served have been served. This 9th, day of November, 2015.

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