STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2013-000320

THE STATE, ...RESPONDENT

v.

PATRICK DEAN LOWRANCE,.....APPELLANT.

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether Appellant's claim that the trial court committed prejudicial error and deprived him of due process of law in failing to suppress Officer Cruell's in-court identification testimony is preserved for appellate review where Appellant failed to object to the identification by way of a pretrial motion at his second trial and also failed to object when the testimony was offered at either trial. Additionally, even if preserved, whether the trial court properly admitted the out-of-court photo identification where it did not result from unduly suggestive police procedures and was so reliable that no substantial likelihood of misidentification existed.

STATEMENT OF THE CASE

Appellant was indicted at the March 2012 term of the grand jury for Greenville County for possession of a stolen motor vehicle (2012-GS-23-1422), failure to stop for a blue light (2012-GS-23-1423), two counts of attempted murder (2012-GS-23-1425 & -1426), and possession of a weapon during the commission of a violent crime (2012-GS-23-1427). He was represented by Brian Johnson, Esquire, and John Crangle, Esquire, of Greenville. (October 8, 2012, Tr.p.1).[1] On October 8-11, 2012, Appellant proceeded to trial by jury pursuant to which he was found guilty of possession of a stolen vehicle. The trial court declared a mistrial on the four remaining charges because the jury was unable to reach a verdict. Appellant was sentenced by the Honorable Steven H. John to three years' imprisonment suspended upon the service of one year's probation. Appellant timely filed a notice of appeal and his conviction was affirmed by this Court. State v. Lowrance, Op. No. 2014-UP-439 (S.C. Ct. App. filed December 3, 2014).

On January 7-10, 2013, Respondent (the State) retried Appellant on the four charges for which he had been granted a mistrial. He was again represented by Mr. Johnson and Mr. Crangle. (Tr.p.1). At the conclusion of the second jury trial he was found guilty as charged. Appellant was sentenced by the Honorable Letitia H. Verdin to twenty-eight (28) years' concurrent imprisonment for each count of attempted murder, five (5) years' concurrent imprisonment for possession of a weapon during the commission of a violent crime, and three (3) years' concurrent imprisonment for failure to stop for a blue light. (Tr.p.692-p.711). He timely filed a notice of intent to appeal his

[1] Because Appellant was subsequently retried on several of the original charges following a mistrial, all references to the transcript from the first trial will include the date, while references to the transcript of the second trial, which is the subject of the current appeal, will not.

convictions and subsequently submitted a brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

In his opening statement at the second trial, the solicitor briefly described the events leading to the charges that were levied against Appellant. On October 28, 2011, Officer Brittany Cruell of the Greenville City Police Department was checking license plates at the Comfort Inn parking lot on Laurens Road when she came across a 2005 GMC Yukon with the wrong tag, one that was registered to a Honda Accord. Suspicious the vehicle might be stolen, she radioed dispatch for backup. Officer Charles Lane responded to the hotel and while Cruell and Lane were in the lobby speaking to management, the vehicle left the parking lot. The officers went to their respective patrol vehicles but Cruell was the first one out of the parking lot and began a solo pursuit. She followed the Yukon onto I-85 towards Atlanta and activated her blue lights during the chase, but terminated her pursuit after the car increased speed, attempted to evade her, and eventually exited the highway and ran a red light. (Tr.p.86-p.88).

Officer Taci Cobb was on patrol in the area and several minutes after Cruell terminated her pursuit, Cobb located the Yukon at the Berkeley Point apartments. As she stepped out of her car and attempted to call in the specific address where she had stopped, she was fired upon. Cobb charged towards the threat and returned fire before getting pinned in the stairwell. Following a second exchange of gunfire, Appellant was struck in the left shoulder. Officer Lane arrived at the apartments just in time to hear the first exchange of gunshots. When he heard the second exchange he reported to dispatch that shots had been fired and tried to assist. As Lane approached the breezeway he was fired

upon as well, so he backed out and tried to clear the building. Appellant fled into the woods and was not located until later that evening when he was apprehended at a friend's house. The gun used to fire at Cobb and Lane was found with Appellant. (Tr.p.88-p.92).

First Trial – Neil v. Biggers[2]

Following jury selection at Appellant's first trial, Appellant's counsel advised Judge John he wanted to make a pretrial challenge to Officer Cruell's in-court identification of Appellant. He argued it would constitute a violation of his due process rights based on the undue suggestiveness of the identification. Judge John said they should probably conduct a Neil v. Biggers hearing. (October 8, 2012, Tr.p.57, line 16-p.58, line 20). The State then called Officer Cruell to the stand. She testified she was in the "wide open" lobby of the Comfort Inn and was able to view Appellant for about five minutes as he walked past, only a few feet away. She described the lighting in the hotel as being the same as in the courtroom. Cruell did not have a conversation with Appellant and said she just briefly paid attention to him; however, she noted he was the only other person in the lobby besides herself, Lane, and the hotel employees. She described Appellant as a black male, about thirty years old, wearing a gray shirt and revised her estimate to say she had observed him for only about one minute rather than five. Cruell testified that the following day, after Appellant was arrested, she looked up a picture of him and recognized Appellant as the same person she saw in the hotel the day before. She then made an in-court identification. (October 8, 2012, Tr.p.58, line 21-p.64, line 7). On cross-examination, Cruell was asked to review her incident report and read the description she gave of the man in the hotel. She had written: "A male walked by with

[2] Neil v. Biggers, 409 U.S. 188 (1972).

longer hair. He looked to be about thirty-five or forty years old, but could have been younger of age, wearing a gray shirt." (October 8, 2012, Tr.p.65, lines 14-16).

After hearing arguments, Judge John found he did not have enough information to rule on the suggestiveness of the procedure and asked Appellant's counsel to put Cruell back on the stand. Under further cross-examination by Appellant and questioning from the trial judge, Cruell explained that when she came in for her shift the day after the incident someone at the station told her Appellant had been arrested. Of her own accord, she looked up the photographs of Appellant from the detention center database and identified him as the man from the Comfort Inn. Cruell testified nobody told her the person who was arrested was the same person she saw at the hotel; however, when she saw the photograph she "immediately recognized him." The trial judge recited the relevant factors from Neil v. Biggers and ruled: "I do find in this, taking all of those factors and the facts described, that I will allow the in-court identification of the defendant by the witness." Ultimately, the jury was sworn and the case proceeded to trial. (October 8, 2012, Tr.p.66, line 1-p.73, line 25). Following brief preliminary instructions from the court and opening statements, Officer Cruell was called to testify in the State's case in chief. She described seeing Appellant in the hotel lobby and then identifying him from the photograph following his arrest, and she then made an in-court identification. Appellant did not object to or otherwise challenge this testimony in any way. (October 8, 2012, Tr.p.81-p.90).

Second Trial - Pretrial Matters

On January 7, 2013, the trial judge commenced proceedings in Appellant's retrial. The solicitor noted there were several pretrial matters that could be handled right away.

He announced that the parties were agreeable to adopting Judge John's pretrial rulings from the previous trial, including the ruling "with respect to . . . the Biggers hearing." The solicitor asked Appellant's counsel if he had stated things accurately and Appellant's counsel replied: "As I understand it, res judicata applies." The trial judge stated: "I think I am bound by his [Judge John's] prior rulings unless there's something materially different about this trial. All right." (Tr.p.15, line 1-p.16, line 25). Appellant did not object to or otherwise challenge the trial judge's ruling that she was somehow bound the evidentiary rulings from the first trial, even though there had been a mistrial. Appellant also did say he was attempting to renew or seeking to preserve any particular challenge or objection that had been raised in the first trial. Instead, the parties proceeded to jury qualification, jury selection, opening statements, and the presentation of evidence at the second trial.

Second Trial – Testimony of Officer Brittany Cruell

Officer Cruell was the first witness to take the stand on behalf of the State. She described the events of October 28, 2011, explaining that she was working patrol and checking license plates on vehicles in a Comfort Inn parking lot when she came across a 2005 silver GMC Yukon that had the wrong tag. She tried to check the vehicle identification number (VIN) in the windshield but it was covered by an air freshener. Concerned the vehicle might be stolen, Cruell called Officer Lane to meet her and help with further investigation. They went inside to ask the hotel clerk if he or she knew who was driving the vehicle or had a record of a person who had registered the tag in question. Using a series of photographs, Cruell described the layout of the hotel and parking lot. She testified that while talking to the hotel clerk she noticed a black male walk by her.

Cruell said she "just barely noticed him," but knows he had a gray shirt on at the time. She testified he "looked to be older, maybe about 40," but said could have been younger, and commented she did not pay a lot of attention to him. Cruell testified she thought his hair was longer and could have been pulled back. She said the inside of the hotel had florescent lighting like the courtroom, and that she "looked at him in the face." (Tr.p.95-p.107).

Cruell went on to describe her pursuit of the Yukon after it left the hotel, as well as her subsequent response to the scene of the shootout involving Cobb and Lane. (Tr.p.107-p.118). She then testified in regard to reporting to roll call the following day when she learned Appellant had been arrested. Cruell testified she went to the computer in her patrol car and checked the records database for photographs of Appellant. She said she "immediately recognized him as the same male that had walked by myself and Officer Lane the day before in Comfort Inn." (Tr.p.118-p.119). Cruell testified no one told her to look at the database before she looked at the photographs and repeated her comment that she "immediately recognized him as the same male that was at the Comfort Inn." Cruell then made an in-court identification of Appellant. (Tr.p.119-p.121). Both the out-of-court and in-court identifications were made without objection.

Second Trial - Other Evidence

After Officer Cruell finished testifying, the State presented testimony from an Arva Irby, an employee in the Comfort Inn on the morning of the incident who alerted Officers Cruell and Lane when the Yukon was leaving the parking lot. (Tr.p.133-p.136). The State then elicited testimony from Officers Cobb and Lane, the two officers who

were the victims of the attempted murder charges. Cobb responded to a "BOLO"[3] call from officer Cruell in regard to the vehicle that fled from the Comfort Inn. She located a vehicle that looked like a match at a nearby apartment complex and confirmed the license tag number with Cruell. Cobb got out of her car and began walking up the sidewalk toward the apartment building when she saw a muzzle flash and heard at least two gunshots. She saw a person standing on the stairwell and was able to tell it was a black male because she briefly saw his face from the muzzle flash. Cobb drew her service weapon, began returning fire, and took cover. She exchanged shots with the gunman in two distinct bursts, but did not return fire the third time she heard him shooting. At some point Cobb was joined by Officer Lane but could not tell if he fired his weapon. Cobb did not see anyone leave the building after the shooting stopped. (Tr.p.140-p.160).

Officer Lane responded to Cruell's initial request for assistance at the Comfort Inn. He first looked at the GMC Yukon in the parking lot and noticed the air freshener covering the VIN as well as a radar detector on the dashboard. Lane then went inside with Cruell where he heard a hotel employee say the person who drives that car just walked out. He noticed a male driver as the vehicle drove away and, after telling Cruell the direction that vehicle was going, got in his own patrol car and attempted to join her in pursuit. Shortly after terminating the chase, Lane responded to a call about a suspicious person in the same general area where they lost track of the vehicle. He drove through nearby apartment complexes and discovered Cobb's car parked in front of an apartment building near the GMC Yukon he had seen at the Comfort Inn. It had the same air freshener, same radar detector, and same vehicle tag. After he got out of his car, Lane heard two exchanges of gunfire between Cobb and the shooter, drew his weapon, and

[3] "Be on the look-out."

began calling for Cobb. Lane did not fire his weapon because he did not know if Cobb might be in his line of fire. He saw a silhouette of the person shooting at Cobb, but never saw a face or anything specific about that person. (Tr.p.162-p.178).

During the subsequent investigation the police found a duffle bag in the apartment complex breezeway which held a wallet with Appellant's health card, social security card, and his pawn shop ticket inside. They then went to the Comfort Inn and searched a room that had been registered to "Dean Lowrance." There the police found a backpack with Appellant's driver's license. The police tracked down Appellant and arrested him at a friend's house where they discovered a firearm and a sweatshirt with what appeared to be a bloodstain. Appellant was suffering from a gunshot wound and was taken to the hospital. (Tr.p.192-p.203; p.206-p.215; p.228-p.241; p.246-p.256; p.259-p.260; p.261-p.300; p.304-p.306; p.348-p.356).

The police processed the GMC Yukon for fingerprints and DNA. They also processed the gun and sweatshirt, as well as bullet casings and droplets of blood found at the scene, and a box of ammunition found in the vehicle. A qualified fingerprint expert was able to identify Appellant's fingerprints on the box of ammunition and several places on the exterior of the vehicle. A qualified expert in forensic DNA analysis was able to identify Appellant as the major DNA contributor on the gun found at the place of Appellant's arrest, and as the source of the blood on the sweatshirt and the ground where the shootout took place. A qualified expert in firearms identification was able to match numerous shell casings as having been fired by either Cobb's service weapon, or the gun discovered after Appellant's arrest. (Tr.p.306-p.336; p.364-p.380; p.399-p.403; p.404-p.412; p.424-p.435; p.457-p.463; p.472-p.498; p.512-p.529; p.539-p.540).

Norman Pearson testified he and Appellant were like cousins and had grown up together, and that on the morning of the incident he received a phone call from Appellant. Appellant said he needed a ride because he had run from the police and had been shot. Pearson testified he saw Appellant with the magazine from the gun the day before the incident. (Tr.p.384-p.399). William Brockman testified he and Appellant are neighborhood acquaintances and that on the day of the incident he picked up Appellant from the side of the road to give him a ride. Appellant was wearing a black hoodie and had a bullet hole in his shoulder. (Tr.p.436-p.451).

Motion for a Directed Verdict

After the State rested, Appellant moved for a directed verdict on all charges. The following exchange then occurred between Appellant's counsel and the trial judge.

> Mr. Johnson: And I'd like to renew any and all prior objections, Your Honor. I think I should say this. A lot of things in the previous trial that I didn't say anything in this trial because I understand res judicata applied.
>
> The Court: Yes, sir.
>
> Mr. Johnson: Therefore, Your Honor, I'd like to preserve any objections there as well.
>
> The Court: They are so preserved. Your objections are noted for the record and reiterated for the record and denied.

(Tr.p.545, line 7-p.547, line 22). After hearing from the solicitor in response, the trial court then denied the motion for a directed verdict. (Tr.547, line 23-p.548, line 6).

Defense Case, Closing Arguments, Jury Charge, and Verdict

Appellant testified in his own defense. He admitted sometimes driving the Yukon but claimed the vehicle belonged to his friend "Meat." Appellant also admitted being in the car with Norman Pearson but claimed he did not know there was a gun in the car. He

testified he stayed at the Comfort Inn the night before the incident with Meat and "Tee" but denied walking through the lobby of the hotel before they left in the Yukon. Appellant claimed he and Tee left through the side door and that Meat must have walked through the lobby. He described Meat as being about 6'2 with long hair. He claimed Meat was driving when they left the Comfort Inn and that he argued with Meat about stopping the car when the police were in pursuit. Appellant admitted he was present during the shootout, but provided an explanation for each piece of forensic evidence presented by the State and maintained he did not do anything wrong. (Tr.p.557-p.620). After the defense rested, the State advised the court it would have no reply. The jury was excused and after a brief discussion of the proposed jury charges, the trial judge asked: "Oh, and you renew all your previous motions and your motion for directed verdict as well?" Counsel replied: "I guess I should do that." The judge said: "Okay. They are noted for the record and preserved. I respectfully deny. Thank you." (Tr.p.620, line 9-p.623, line 17).

Next, the parties made closing arguments. Appellant's counsel began his argument by attacking the identification of Appellant made by Officer Cruell. He argued Cruell was merely aiming to please her fellow officers by claiming the person arrested was the person she saw in the lobby of the Comfort Inn. (Tr.p.628-p.645). In his response, the solicitor made a detailed argument laying out the mountain of incriminating evidence connecting Appellant to the crimes. Though he briefly mentioned Cruell's identification of Appellant, he admitted the description in her incident report did not precisely match Appellant's actual appearance. (Tr.p.645-p.673).

Thereafter, the trial judge charged the jury on the applicable law including the burden of proof, the presumption of innocence, the roles of the judge and jury, reasonable doubt, direct and circumstantial evidence, credibility of witnesses, expert witnesses, criminal intent, accomplice liability, mere presence, and the elements of the charged crimes. No particular charge was given in regard to identification evidence. Appellant did not take exception to or object to the jury charge. (R.p.673-p.690).

At the conclusion of the jury trial Appellant was found guilty as charged. He was sentenced by the trial judge to twenty-eight (28) years' concurrent imprisonment for each count of attempted murder, five (5) years' concurrent imprisonment for possession of a weapon during the commission of a violent crime, and three (3) years' concurrent imprisonment for failure to stop for a blue light. (Tr.p.692-p.711).

ARGUMENT

I.

Appellant's claim that the trial court committed prejudicial error and deprived him of due process of law in failing to suppress Officer Cruell's in-court identification testimony is not preserved for appellate review because Appellant failed to object to the identification by way of a pretrial motion at his second trial and also failed to object when the testimony was offered at either trial. In addition, even if preserved, the trial court properly allowed the identification because the out-of-court lineup identification did not result from unduly suggestive police procedures and was so reliable that no substantial likelihood of misidentification existed.

Appellant argues the trial court committed prejudicial error and deprived him of due process of law by finding Officer Cruell's identification was sufficiently reliable to be presented to the jury. This argument is not preserved for appellate review because Appellant failed to make any pretrial motion to suppress the identification at his second trial and because Appellant failed to object to the identification evidence when it was offered to the jury at either his first or second trial. Furthermore, even if Appellant's pretrial objection from his first trial was sufficient to preserve this issue for appeal, there was ample evidence supporting the circuit court's decision where: (1) the out-of-court photo identification did not result from unduly suggestive police procedures; and (2) under the totality of the circumstances the out-of-court identification was so reliable that no substantial likelihood of misidentification existed. Finally, any error in the admission of Officer Cruell's identification testimony was harmless given the cumulative nature of the evidence under Appellant's theory of defense and given the other overwhelming evidence of Appellant's guilt. For all of these reasons, Appellant's challenge to Officer Cruell's identification testimony should be dismissed and his convictions should be affirmed.

Issue Preservation

Initially, Appellant's argument is not preserved for review because Appellant failed to seek an in camera hearing on the in-court identification at his second trial. A mistrial is the equivalent of no trial and leaves the cause pending in the circuit court. State v. Woods, 382 S.C. 153, 158, 676 S.E.2d 128, 131 (2009); State v. Smith, 336 S.C. 39, 43, 518 S.E.2d 294, 296 (Ct. App. 1999). Thus, a court ruling as to admissibility and competency of testimony during a trial which is later declared a mistrial results in no binding adjudication of the rights of the parties. Woods, 382 S.C. at 158, 676 S.E.2d at 131; Keels v. Powell, 213 S.C. 570, 572, 50 S.E.2d 704, 705 (1948); Smith, 336 S.C. at 43, 518 S.E.2d at 296. "Because a mistrial is the equivalent of no trial, the trial judge could not rely on any evidentiary rulings from the nugatory proceeding." Smith, 336 S.C. at 43-44, 518 S.E.2d at 296. Thus, despite defense counsel's mistaken belief that res judicata applied in regard to the pretrial evidentiary rulings from his first trial, and the trial judge's mistaken belief that she was bound by Judge John's prior evidentiary decisions, the effect of the hung jury and the mistrial on the charges which are the subject of the second trial was to render the first trial nugatory. By failing to move to suppress Officer Cruell's identification at the second trial, failing to request a Neil v. Biggers hearing at the second trial, or otherwise failing to object to the identification, Appellant waived any right he had to challenge the out-of-court identification procedure or the in-court identification on appeal, and the issue is not preserved for appellate review.

In addition, Appellant's argument is not preserved for review because Appellant failed to object when the identification evidence was presented to the jury at either his first or second trial. Generally, a motion in limine seeks a pretrial evidentiary ruling to

prevent the disclosure of potentially prejudicial evidence to the jury, and a ruling on such a motion is preliminary and subject to change based on developments during trial. State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999). A ruling on a motion in limine does not constitute a final ruling on the admissibility of evidence. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). Therefore, an objection must be made at the time the evidence is introduced during trial in order to preserve the issue for appellate review. State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993); State v. Atieh, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012); State v. Burton, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct. App. 1997). "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." State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). Additionally, if the trial court clearly indicates its ruling is final rather than preliminary, the issue is preserved for appellate review. State v. Wiles, 383 S.C. 151, 157, 679 S.E.2d 172, 175 (2009); Atieh, 397 S.C. at 647, 725 S.E.2d at 733.

In the instant case, Appellant failed to preserve any challenge to the identification evidence for appellate review. Before the jury was sworn in the first trial, the trial court held a Neil v. Biggers hearing regarding the reliability of Cruell's out-of-court identification of Appellant and the admissibility of the identification testimony the State was considering offering at trial. The trial judge issued a preliminary ruling finding the identification process was not unduly suggestive and that the identification itself was reliable. Following an introductory jury charge and opening statements, the State called Officer Cruell to the stand to tell the jury about her investigation at the Comfort Inn and

her pursuit of the GMC Yukon. During Cruell's testimony, the State sought to elicit the identification evidence addressed in the trial court's pretrial ruling. Cruell proceeded to describe her out-of-court identification of Appellant and then she made an in-court identification of Appellant. Appellant did not object to or otherwise attempt to renew any his pretrial challenge to Cruell's identification. Similarly at the second trial, Appellant did not object to or otherwise attempt to renew any previous challenge to Cruell's identification testimony when it was offered to the jury.

Because Appellant did not make a contemporaneous objection to any identification evidence elicited during trial in the jury's presence, he failed to preserve any issue related to the trial court's pretrial rulings on the identifications by Cruell. See State v. Turner, 373 S.C. 121, 126, n.1, 644 S.E.2d 693, 696 (2007) (finding the issue regarding an in-court identification was not preserved when the appellant objected pre-trial to a suggestive identification procedure and again during trial to the procedure but never objected to the subsequent in-court identification). Therefore, this issue is not preserved for further review. To the extent this Court finds the identification issue was properly preserved, the State submits it is nevertheless without merit.

Standard of Review

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

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

Discussion / Analysis

An out-of-court identification of the defendant violates due process and must be suppressed when the identification procedure used by police was impermissibly suggestive and conducive to a substantial likelihood of misidentification. State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012); State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013). A witness's subsequent in-court identification is inadmissible "if a suggestive out-of-court identification procedure created a very substantial likelihood of *irreparable* misidentification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (emphasis added). Trial courts employ a two-pronged inquiry to determine whether due process requires suppression of an out-of-court eyewitness identification. Liverman, 398 S.C. at 138, 727 S.E.2d at 426. First, the court must determine whether the identification resulted from "unnecessarily suggestive" police procedures. Biggers, 409 U.S. at 198-99; Liverman, 398 S.C. at 138, 727 S.E.2d at 426; Traylor, 360 S.C. at 81, 600 S.E.2d at 526. If the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there and

the court does not need to consider the second prong. State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013). The defendant bears the burden of proving the identification procedure was impermissibly suggestive. Id. at 561, 745 S.E.2d at 141 ("Our supreme court has never placed the burden of disproving suggestiveness on the State. The Fourth Circuit, whose decisions regarding federal constitutional law are binding on us, has held the defendant bears the burden of proving the identification procedure was impermissibly suggestive.").

If the court finds, however, that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless "so reliable that no substantial likelihood of misidentification existed." Liverman, 398 S.C. at 138, 727 S.E.2d at 426. The inquiry must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification. State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007); Singleton, 395 S.C. at 13-14, 716 S.E.2d at 335-36. When determining the likelihood of misidentification, courts must evaluate the totality of the circumstances using the following factors: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Turner, 373 S.C. at 127, 644 S.E.2d at 697; Singleton, 395 S.C. at 13-14, 716 S.E.2d at 335-36.

In the instant case, Cruell testified at the original Neil v. Biggers hearing that she looked up the photographs of Appellant from the detention center database of her own

accord and identified him as the man from the Comfort Inn. Cruell testified nobody told her the person who was arrested was the same person she saw at the hotel and that when she saw the photograph she "immediately recognized him." Judge John recited the relevant factors from Neil v. Biggers and ruled: "I do find in this, taking all of those factors and the facts described, that I will allow the in-court identification of the defendant by the witness." (October 8, 2012, Tr.p.66, line 1-p.73, line 25). This finding constituted a finding that the identification procedure was not unnecessarily suggestive and that finding is clearly supported by the record. Appellant simply failed to carry his burden of proving the identification procedure was impermissibly suggestive.

On appeal, Appellant argues the circumstances of his case are similar to a single person show-up. He states: "An identification of a suspect by a witness who is presented one option, absent a line-up, is almost certainly unduly suggestive." (Brief of Appellant, p.8). Appellant goes on to argue that because Cruell identified him from a single mug shot after being told he was in custody, because no other possibilities were considered, offered, or provided, and because there was no line-up of other possible suspects, the procedure employed was unduly suggestive. (Brief of Appellant, p. 9). However, this argument misses the point. A procedure cannot be suggestive where it was not "made under suggestive circumstances arranged by law enforcement." Liverman, 398 S.C. at 134, 727 S.E.2d at 423 (emphasis added).

Here Cruell, who happens to be a police officer, chose to look up Appellant's photo on her own. Nobody presented her with the photo or asked her to make the identification. Instead, she remembered the person she saw in the hotel lobby and sought out a photo of the individual subsequently arrested to see if he was that person she had

seen. There is nothing suggestive about this process because it was not arranged by law enforcement. Indeed, this Court has affirmed a trial court's finding that an identification procedure was not unduly suggestive precisely because it was not the result of "an act by the police of a suggestive manner." Dukes, 404 S.C. at 562, 745 S.E.2d at 142. In Dukes, the officer suggested the witness look at photographs in a "photo book" to see if he could identify the person who shot the victim. Id. at 556, 745 S.E.2d at 138. However, when the officer got up from the table to get the photo book, the witness saw other photographs in a file the officer left on the table and identified the defendant from one of the photographs in the officer's file. Id. This Court focused on the witness's testimony that the officer "did not present the photos to [the witness] or instruct him to choose one." Id. The trial court concluded the identification procedure was not impermissibly suggestive because: "It does not appear, even taking into consideration the report of the investigator, that there was any corrupting effect, that there was any intentional act, that there was any deliberate act, there was any act by the police of a suggestive manner." Dukes, 404 S.C. at 562-63, 745 S.E.2d at 142. Here, there likewise was not an act by the police of a suggestive manner. Since there was evidence to support the first trial court's decision, that court did not abuse its discretion in ruling the procedure was not impermissibly suggestive. Dukes, 404 S.C. at 563, 745 S.E.2d at 142.

Likewise, to extent she relied upon the ruling from the first trial, the second trial judge did not err in allowing Cruell to make an in-court identification of Appellant as the man who walked through the lobby of the Comfort Inn before the chase. Consequently, this Court should affirm the trial court's ruling and need not consider the second prong of Biggers. Id. To the extent this Court disagrees, the State submits there was also

sufficient evidence to support a conclusion that the out-of-court identification was reliable under the totality of the circumstances.

Appellant argues the identification made by Cruell was not reliable because she testified she paid attention "just briefly" and "didn't pay a lot of attention to him." Although Cruell's description in the incident report was not one hundred percent consistent with Appellant's appearance in the booking photographs she viewed, Cruell testified she observed Appellant for approximately one minute in a well-lit hotel lobby and "immediately recognized" him when she looked at his photo. Cruell had a good opportunity to view Appellant at the time he walked past. Her attention was likely heightened because she was investigating a possible stolen vehicle. Cruell gave a partially accurate description of the person, identifying him by both gender and race. Although she said he looked about 40, she also said he might have been younger. Cruell then testified she was certain she had made a correct identification from the photo. Finally, the identification was made only one day after the crime. Under the totality of the circumstances, Officer Cruell's out-of-court and in-court identifications were both reliable. Therefore, the trial court did not abuse its discretion in denying Appellant's motion to suppress the identification testimony, and Appellant's convictions should be affirmed.

Harmless Error

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. Baccus, 367 S.C. at 55,

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

Here, the State submits any error in the admission of the identification evidence from Cruell was harmless, cumulative to other evidence under his theory of defense, and not prejudicial. The identification by Cruell merely placed Appellant at the Comfort Inn before the police chase, evidence which was cumulative to and corroborated by Appellant's own testimony. He admitted he was at the hotel before the chase, in the Yukon during the chase, and present during the shootout after the chase. See State v. Simmons, 308 S.C. 80, 83, 417 S.E.2d 92, 94 (1992) ("We note that, under certain circumstances, if the identification is corroborated by either circumstantial or direct evidence, then the harmless error rule might be applicable."). Appellant admitted he was present both in his testimony and in his closing argument to the jury. (R.p.286, line 18-p.287, line 6). See State v. Kirkpatrick, 320 S.C. 38, 43, 462 S.E.2d 884, 888 (Ct. App. 1995) ("The erroneous admission of the key evidence was harmless inasmuch as Kirkpatrick admitted he rented the U-Haul in question and bought a lock, with two keys,

to put on it. Thus, the evidence of the key linking Kirkpatrick to the U-Haul was merely cumulative."). Because the challenged identification evidence was cumulative to other properly-admitted evidence, any error in the admission of that identification evidence was completely harmless and could not have affected the result at trial. See Singleton, 395 S.C. at 14-15, 716 S.E.2d at 336 (finding harmless error in the admission of identification testimony where two co-conspirators testified against Singleton and identified him as a participant in the robbery). Furthermore, despite Appellant's creative explanations at trial, the forensic evidence alone constituted overwhelming evidence of his guilt. Finally, the propriety of Appellant's conviction is reinforced by the other protections he was afforded at trial, including his Sixth Amendment right to confront the eyewitness, his right to the effective assistance of an attorney who attempted to expose the flaws in Cruell's testimony during cross-examination and during opening and closing arguments, and the constitutional requirement that the State prove Appellant's guilt beyond a reasonable doubt. Liverman, 398 S.C. at 142-43, 727 S.E.2d at 428. For all of these reasons, Appellant's convictions should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the convictions and sentences of the lower court be affirmed.

Respectfully submitted,

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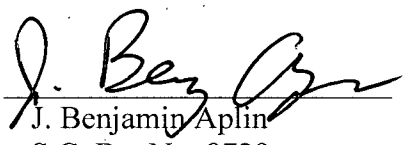
BY: 
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Columbia, South Carolina
November 9, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2013-000320

THE STATE,.....RESPONDENT

v.

PATRICK DEAN LOWRANCE,.....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 his attorney of record:

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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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