STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2014-002176

THE STATE,

Respondent,

vs.

JUJUAN ANDRE HABERSHAM,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

To the extent Appellant is contending on appeal the trial judge erred by refusing to dismiss the indictments based on the alleged loss or destruction of evidence related to the photographic line-ups shown to the victims after the robbery, that issue is not properly preserved for appellate review because it was not raised to or ruled upon by the trial judge during trial. Furthermore, to the extent Appellant is arguing the charges against him should have been dismissed based on an alleged Brady violation, the trial judge properly and correctly denied Appellant's dismissal motion because the line-up evidence was disclosed to Appellant before the trial began with sufficient time for him to be able to adequately and effectively use it during trial.

STATEMENT OF THE CASE

In June of 2011, Appellant Jujuan Andre Habersham was arrested following an investigation into an armed robbery that took place in the parking lot of a marina located in Beaufort, South Carolina. In August of 2011, the Beaufort County Grand Jury indicted Appellant for one count of armed robbery, one count of attempted armed robbery, one count of possession of a weapon during the commission of a violent crime, and one count of possession of a firearm by a person convicted of a crime of violence. On December 8, 2014, a jury trial was commenced in the Beaufort County Court of General Sessions with the Honorable D. Craig Brown, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of thirty years for armed robbery, twenty years for attempted armed robbery, five years for possession of a weapon during the commission of a violent crime, and five years for possession of a firearm by a person convicted of a crime of violence. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

At approximately 2:30 a.m. on June 19, 2011, Jake Parker and Kelsey Brown, two friends who had spent the past few hours drinking and socializing with some companions at the restaurants and bars located in downtown Beaufort, South Carolina, were walking back to their car parked in the parking lot of a marina when they were stopped by two white males in a "very dark" area of the lot. (Tr. p. 164; p. 173; pp. 177-181; pp. 197-199; p. 218). After stopping the pair, one of the men asked them for directions to Hilton Head, South Carolina, and Parker told him how to get there "to the best of [his] ability." (Tr. pp. 180-181; p. 199). After that, Parker and Brown heard a noise, turned around, and observed a black male standing behind them with his hand on a gun that was tucked underneath the waistband of his pants. (Tr. p. 181; p. 200; p. 209). The armed man then ordered them to hand their belongings over to the men who had just asked Parker and Brown for the directions. (Tr. p. 182; p. 200; p. 210; p. 217). Terrified and in shock, Brown quickly gave the men her cash, wallet, keys, and cell phone, and Parker informed them he did not have anything on his person. (Tr. p. 182; p. 185; pp. 200-202; p. 210). The gunman then ordered Parker and Brown to turn around and count to one hundred, and, as they complied, the robbers fled from the area.[1] (Tr. p. 182; pp. 201-202).

Once the robbers were gone, Parker called the police on his cellular phone, which had not been taken during the robbery, and officers from the Beaufort Police Department quickly responded to the scene. (Tr. pp. 164-165; p. 175; pp. 182-183; p. 202). Upon arriving, Corporal Ryan Steady spoke with Parker and Brown about what had occurred, quickly relayed the descriptions of the suspects to his fellow officers, took written statements from both of the victims, and advised Brown to have her credit card

[1] The entire robbery lasted less than five minutes. (Tr. p. 184).

companies monitor her credit cards, which were stolen in the robbery, for any fraudulent activity. (Tr. pp. 165-168; p. 173; p. 183; p. 186; p. 202). Officers then searched the area for the robbers, but were unable to locate them at that time. (Tr. p. 167).

Subsequently, on the day after the robbery, Brown was alerted one of her stolen credit cards had been activated and used at a mini-mart grocery store in Hardeeville, South Carolina, to purchase $91.76 worth of goods, and she quickly notified Investigator George Erdel of the Beaufort Police Department about that activity. (Tr. p. 204; pp. 226-228). In response, Investigator Erdel travelled to the grocery store, met with the owner of the store, and spoke with him about the fraudulent transaction that involved Brown's credit card. (Tr. pp. 228-229). After that, he reviewed the surveillance footage of the transaction with the owner before obtaining a copy of the surveillance recording and a receipt from the transaction. (Tr. pp. 229-230; p. 233). Investigator Erdel was then able to identify Appellant Jujuan Andre Habersham as a suspect in the robbery. (Tr. pp. 233-234; pp. 246-247).

Thereafter, once Appellant had been identified as a suspect, Investigator Erdel prepared two photographic line-ups to show the victims. (Tr. p. 234). One of the photographic line-ups consisted of photographs of white males while the other line-up contained Appellant's photograph along with the photographs of several other black males. (Tr. pp. 183-184; pp. 214-215; p. 252). The investigator then showed the line-ups to the victims, but they were unable to identify anyone from the line-ups as the robbers. (Tr. p. 191; pp. 195-196; p. 203; p. 205; pp. 214-215; p. 234).

Subsequently, several days after the robbery, Appellant was apprehended by the Hardeeville Police Department, and Investigator Erdel returned to Hardeeville to speak with Appellant. (Tr. pp. 234-235). At the outset of the ensuing interview, Investigator

Erdel advised Appellant of his rights, and Appellant waived those rights before agreeing to speak with the officer. (Tr. pp. 235-240). Appellant then admitted he was present at the scene of the robbery as it took place. (Tr. p. 241; p. 259; State's Ex. # 1 (Recording of Interview of Appellant)). Despite that admission, Appellant denied he was involved in the crime, denied he possessed a firearm during the incident, and attributed the robbery to individuals he identified as "Roach" and "Joe." (Tr. p. 241; p. 259; State's Ex. # 1). However, Appellant readily acknowledged he was in possession of Brown's credit card, social security card, and identification after the robbery, and he candidly admitted he activated Brown's credit card before using it to buy himself a case of beer, a bottle of liquor, and a carton of cigarettes. (State's Ex. # 1). Appellant was then arrested, indicted for numerous offenses related to the robbery, and proceeded to trial. (Tr. p. 4; Indictments).

At the outset of trial, defense counsel moved to dismiss the charges against Appellant based on an alleged due process violation that he contended resulted from the State's failure to disclose exculpatory evidence in violation of the mandates of Brady v. Maryland, 373 U.S. 83 (1963). (Tr. pp. 89-90). In making that motion, defense counsel asserted nothing in the discovery materials he had initially been provided with indicated the victims had been shown a line-up with Appellant's photograph in it but he had been informed by the solicitor a week before trial such a line-up had, in fact, been shown to the victims without an identification being made.[2] (Tr. pp. 90-91). Based on that late

[2] In addition to his Brady argument, defense counsel asserted he had been prepared to raise an argument based on spoliation of evidence but had since been provided with the line-up purportedly shown to the victims on the preceding day. (Tr. p. 92). After making that statement, defense counsel did not make any further arguments in regard to spoliation of evidence and, instead, acknowledged the line-ups he previously thought had been destroyed were discovered before trial. (Tr. pp. 92-100; p. 108). Similarly, the trial judge did not addressed or rule on a spoliation of evidence claim in denying the dismissal motion. (Tr. pp. 112-113; p. 123).

disclosure, defense counsel contended the State's actions constituted evidence of bad faith while specifically assuring the trial judge he was not contending the solicitor had engaged in any misconduct. (Tr. pp. 92-94; p. 96). Furthermore, defense counsel asserted dismissal was appropriate as a result of the bad faith because he alleged Appellant was prejudiced due to an alleged lack of time to investigate the authenticity of the line-up, an alleged lack of time to explore whether the line-up was unduly suggestive, and a possibility the plea negotiations may have proceeded differently had he been aware of the line-up at an earlier stage in the proceedings. (Tr. pp. 97-99).

In response, the solicitor indicated the line-ups that had been shown to the victims had only recently been discovered by the investigating officer in a separate case file, and she noted the victims would be testifying during trial, did not select anyone from the line-ups, did not circle anyone in the line-ups, and would not be identifying Appellant during their testimony. (Tr. pp. 101-102). The solicitor additionally asserted defense counsel had been provided with the materials before the trial began, had sufficient time to review them and effectively use them at trial, and would be able to fully cross-examine all of the witnesses in regard to the line-ups. (Tr. pp. 102-104; p. 111). Furthermore, the solicitor asserted the line-ups would not have had any impact on the plea negotiations for the State and did not have any impact on the State's decision to go forward with the trial after they were discovered. (Tr. pp. 104-105).

After considering the arguments of counsel, the trial judge found the previously-undisclosed information had been disclosed to Appellant for five days and, although it was exculpatory, was not intentionally withheld. (Tr. p. 112). The trial judge further concluded no evidence of bad faith had been presented and the information had been disclosed by the solicitor as soon as it became known to her. (Tr. p. 112). Based on the

timing of the disclosure and the amount of time during which Appellant had been aware of the information, the trial judge concluded Appellant had sufficient time for the information to be effectively used during trial, and he noted Appellant would be fully able to cross-examine each and every witness in regard to the line-up evidence. (Tr. p 113). Finally, the trial judge held dismissal was not appropriate in the absence of bad faith or prejudice to Appellant while rejecting Appellant's claim regarding the information's potential impact on plea negotiations as wholly speculative. (Tr. p. 113). For those reasons, the trial judge denied Appellant's dismissal motion. (Tr. p. 113).

Following the trial judge's ruling, defense counsel indicated he wanted to proffer the testimony of the investigating officer in an attempt to establish bad faith, and the trial judge permitted him to call Investigator Erdel to the witness stand. (Tr. pp. 113-114). During the ensuing in camera hearing, Investigator Erdel acknowledged he did not document the fact he showed the victims line-ups in a written report despite the fact he had been trained to document everything that occurred during an investigation. (Tr. pp. 114-117). However, he directly testified his failure to document the information regarding the line-up evidence was not done intentionally. (Tr. p. 120).

After Investigator Erdel's testimony had been proffered, defense counsel urged the trial judge to find the investigator's testimony to be uncredible while contending the failure to document the line-up was an act of bad faith. (Tr. pp. 120-121). The solicitor responded Investigator Erdel's testimony was credible while again contending Appellant suffered no prejudice as a result of the late disclosure of the evidence due to the fact he would be able to fully cross-examine the witnesses about the matter during trial. (Tr. p. 123). After again considering the arguments of counsel, the trial judge reaffirmed his

earlier decision to deny the dismissal motion and indicated his ruling remained the same after he was able to hear the officer's testimony. (Tr. p. 123).

Subsequently, during trial, Corporal Steady testified about his response to the report of the robbery. (Tr. pp. 164-176). Additionally, Parker recounted the details of the incident, confirmed he was shown line-ups a few days after the robbery, and indicated he picked between one and three people out of the line-up of black suspects. (Tr. pp. 180-184; pp. 191-196). However, Parker did not remember circling anything, writing anything, or signing anything during the line-up process. (Tr. p. 194). Moreover, Parker testified he "[did] not recall seeing in the [line-ups] any of the men who robbed [him]" and, instead, indicated he told the officer the people he identified from the line-up simply "look[ed] possibly like what the person that robbed [him] looked like." (Tr. pp. 195-196). Furthermore, Brown testified about her terrifying experience on the night of the incident, confirmed someone used one of her credit cards after the crime, and indicated she was also shown line-ups a few days after she reported the fraudulent use of her credit card to the police. (Tr. p. 205; pp. 214-215). However, she stated she was not able to identify anyone from the line-up. (Tr. p. 205; pp. 214-215).

In addition to that testimony, Investigator Erdel testified before the jury and detailed the investigatory discoveries that led to Appellant's arrest. (Tr. pp. 226-234). Additionally, he indicated he presented photographic line-ups to the victims, noted the victims were unable to identify anyone from the line-ups, and acknowledged he failed to document the fact the line-ups were shown in his case file. (Tr. p. 234). He then discussed Appellant's admission to being present during the robbery, and Appellant's incriminating statements were played for the jury. (Tr. pp. 236-243). Thereafter, on cross-examination, defense counsel questioned Investigator Erdel extensively about the

line-ups, and the officer again confirmed he did not document any information related to the line-ups, stated Appellant's photograph was included in the line-ups but was not selected, and noted he had only recently located the line-ups that were shown to the victims prior to trial. (Tr. p. 248; pp. 251-252). Furthermore, Investigator Erdel testified he was not sure if Appellant was one of the individuals Parker pointed to in the line-up while acknowledging he mislead Appellant during the interview by informing him the victims had identified him from the line-ups. (Tr. pp. 253-254).

Following the investigator's testimony, the State rested its case, and Appellant then rested his case without presenting any evidence or testimony. (Tr. p. 281; p. 291). Thereafter, during the closing arguments, defense counsel argued to the jury Investigator Erdel's actions in regard to the line-ups were an attempt to hold back evidence tending to show Appellant was innocent while reminding the jury neither Brown nor Parker had been able to identify Appellant from the line-ups. (Tr. pp. 292-314). Subsequently, at the conclusion of trial, the jury convicted Appellant as indicted. (Tr. pp. 344-345). Following the verdict, the trial judge sentenced Appellant to an aggregate term of imprisonment of thirty years. (Tr. p. 360).

ARGUMENT

To the extent Appellant is contending on appeal the trial judge erred by refusing to dismiss the indictments based on the alleged loss or destruction of evidence related to the photographic line-ups shown to the victims after the robbery, that issue is not properly preserved for appellate review because it was not raised to or ruled upon by the trial judge during trial. Furthermore, to the extent Appellant is arguing the charges against him should have been dismissed based on an alleged Brady violation, the trial judge properly and correctly denied Appellant's dismissal motion because the line-up evidence was disclosed to Appellant before the trial began with sufficient time for him to be able to adequately and effectively use it during trial.

On appeal, Appellant contends the trial judge erred by refusing to dismiss the indicted charges with prejudice. In support of that contention, Appellant maintains he presented evidence and testimony establishing evidence related to the photographic line-ups shown to the victims after the robbery was lost and destroyed in bad faith and could not be replaced with any other comparable evidence or testimony, which he asserts established a violation of the mandates of the constitutional analysis articulated in the United States Supreme Court's decision in Arizona v. Youngblood, 488 U.S. 51 (1988). Appellant further maintains the State initially suppressed and only partially provided some previously-undisclosed line-up evidence prior to trial, which he appears to be asserting violated the mandates of the constitutional analysis articulated in the United States Supreme Court's decision in Brady v. Maryland, 373 U.S. 83 (1963). Initially, to the extent Appellant contends the trial judge erred by failing to dismiss the charges based on the loss or destruction of evidence, that issue was not properly preserved for appellate review because it was not properly raised to or ruled upon by the trial judge and, thus, cannot properly be considered for the first time on appeal. Likewise, to the extent Appellant contends the trial judge erred by failing to dismiss the charges based on an alleged Brady violation, no Brady violation occurred in Appellant's case in light of the

fact Appellant was provided with the line-up evidence with sufficient time to adequately and effectively use that evidence during trial. Furthermore, due to the fact Appellant was able to effectively use the evidence by eliciting testimony regarding the victims' inability to identify him from the line-ups coupled with the fact Appellant's own statements established he was present at the scene of the robbery when it occurred, the late disclosure of the evidence could have in no way undermined confidence in the outcome of the trial under the circumstances. For those reasons, the trial judge correctly declined to dismiss Appellant's charges. Appellant's convictions should be affirmed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "On appeal, the trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs where the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

ANALYSIS

A. Applicability of Issue Preservation Rules Preventing Appellate Review of Appellant's Appellate Claim Regarding the Loss or Destruction of the Line-Up Evidence

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). Imposing issue preservation requirements on a party "is meant to enable the lower court to rule properly

after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000).

Significantly, "[i]f a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). Moreover, an appellant is limited on appeal solely to the grounds raised during trial. State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997). As a result, an appellant is precluded from arguing one ground or theory in support of an issue during trial and then a different ground or theory in support of the issue on appeal. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (instructing a defendant cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

In the case sub judice, Appellant primarily contends on appeal the trial judge erred in failing to dismiss the charges against him because he presented evidence and testimony establishing evidence related to the photographic line-ups shown to the victims was lost and destroyed in bad faith and could not be replaced. Importantly though, defense counsel did **not** make such an argument during trial. Instead, during trial, defense counsel argued Appellant's charges should be dismissed because the State had suppressed and failed to disclose exculpatory evidence **until** just before trial, which he contended constituted a Brady violation. Furthermore, aside from making a brief, conclusory statement he **had** intended to raise a spoliation of evidence argument that he quickly followed by directly asserting the line-up evidence had **not** actually been destroyed, defense counsel made no statements to the trial judge contending, suggesting,

or implying the State had intentionally destroyed or lost irreplaceable evidence favorable to the defense.[3] See State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (recognizing an issue conceded during trial cannot subsequently be argued on appeal); see also State v. Crocker, 366 S.C. 394, 399, n. 1, 621 S.E.2d 890, 893 (Ct. App. 2005) ("[C]onclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review."). Thus, in arguing for dismissal during trial, defense counsel conceded the evidence Appellant now contends was destroyed was not actually destroyed while raising no argument the evidence Appellant now contends was destroyed could not be replaced in any way. See Patterson, 324 S.C. at 19, 482 S.E.2d at 767 ("Appellant is limited to the grounds raised at trial."); see also State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000) (holding Benton's challenge to the trial judge's refusal to give a requested charge was not preserved for appellate review where Benton "argued one ground in support of a circumstantial evidence charge at trial (State only presented circumstantial evidence of intent) and argues another ground in support of the charge on appeal (palm print is circumstantial evidence)"). As a result, Appellant is precluded from raising those arguments for the first time on appeal. See State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) ("The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal."); see also State v. Senter, 396 S.C. 547, 555, 722 S.E.2d 233, 237 (Ct. App. 2011) ("Because Senter failed to raise this argument to the trial court, it is not preserved for our review.").

[3] Specifically, during trial, defense counsel stated: "Your Honor, I came on Monday prepared to argue -- and I am still arguing -- but prepared to argue spoliation in addition to Brady violation." (Tr. p. 92). Defense counsel then followed that statement by asserting: "But what I can say, Your Honor, is that I attempted to discuss this on Friday. And that was – and the reason I bring that up is because that was when we thought that these lineups were destroyed. It wasn't until the next week that we found out that they hadn't." (R. p. 108).

Moreover, notwithstanding the fact Appellant failed to raise any argument regarding spoliation of evidence to the trial judge, the trial judge did **not** rule on a spoliation of evidence argument during Appellant's trial. See State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. **If the issue is raised but not ruled on, it is not preserved for appeal.**" (emphasis added)); see also In re Care and Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to **and ruled upon** by the trial court to be preserved for appellate review." (emphasis added)). Instead, based on the arguments presented to him, the trial judge ruled on Appellant's Brady argument and concluded no Brady violation had occurred because the previously-undisclosed line-up evidence **had been disclosed** to Appellant in sufficient time for it to be effectively used during trial. Thus, the fact the trial judge concluded the evidence had been disclosed demonstrates the trial judge did not perceive defense counsel's trial arguments to constitute a claim that irreplaceable evidence had been lost or destroyed, and the trial judge certainly did not rule on such an argument or issue in light of his findings. See State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974) ("Only matter that has been ruled on below can be reviewed[.]"). Accordingly, because Appellant's appellate argument regarding the alleged loss or destruction of evidence was not presented to the trial judge during trial **and** the trial judge did not rule on such an argument, any issue regarding the alleged loss or destruction of evidence related to the photographic line-ups was not properly preserved for appellate review and cannot appropriately be considered or addressed for the first time on appeal. See State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court "cannot address unpreserved

errors"); see also State v. Vanderbilt, 287 S.C. 597, 598, 340 S.E.2d 543, 554 (1986) ("Issues not properly preserved at trial may not be raised for the first time on appeal."). Appellant's convictions should be affirmed.[4]

B. Propriety of the Trial Judge's Denial of the Motion to Dismiss Based on an Alleged Brady Violation

"Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." California v. Trombetta, 467 U.S. 479, 485 (1984). To ensure prosecutions comport prevailing notions of fundamental fairness, the United States Supreme Court articulated a rule in its

[4] Notably, even assuming Appellant's appellate argument regarding the alleged loss or destruction of the line-up evidence had somehow been preserved for appellate review despite the fact it was not properly raised to or ruled upon by the trial judge, the extreme remedy of the dismissal of the charges against Appellant would have nonetheless been inappropriate because, just as the trial judge found, the evidence and testimony presented during trial established the State did not engage in any bad faith in Appellant's case in light of Investigator Erdel's testimony coupled with the fact the evidence was disclosed prior to trial and, even if physical evidence regarding the line-ups had been lost, evidence of comparable value to the line-up evidence was available through the testimony of the victims and Investigator Erdel, which, just as the physical evidence would have established, demonstrated to the jury Appellant's photograph was included in one of the line-ups shown to the victims but was not identified as the photograph of one of the robber. See State v. Mabe, 306 S.C. 355, 358-359, 412 S.E.2d 386, 388 (1991) (explaining a defendant must show either the State destroyed the evidence in bad faith **or** the State destroyed evidence possessing an exculpatory value apparent before the evidence was destroyed **and** no other evidence of comparable value can be obtained by other means in order to warrant the dismissal of a case based on the loss or destruction of evidence); see also Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993) ("[E]xculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."); State v. Cheeseboro, 346 S.C. 526, 538, 552 S.E.2d 300, 306 (2001) ("The State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant."); see generally Jean v. Collins, 221 F.3d 656, 663 (4th Cir. 2000) (instructing bad faith in the context of the loss or destruction of evidence "requires that the officer have intentionally withheld the evidence for the purpose of depriving the plaintiff of the use of that evidence during his criminal trial"); cf. State v. Reaves, 414 S.C. 118, __, 777 S.E.2d 213, 218 (2015) ("[A]lthough we acknowledge there are deeply troubling aspects of the investigation in this case, the errors made by the police do not indicate bad faith as is required to dismiss an indictment under the federal constitutional test."); Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 357 (2005) (holding evidence establishing a witness did not identify Porter at the scene of the crime did not constitute material exculpatory evidence in light of the significance of that evidence in relation to other evidence presented in the case establishing Porter's guilt); State v. Moses, 390 S.C. 502, 519, 702 S.E.2d 395, 404 (Ct. App. 2010) ("The defense asserts the tape 'would most likely' have allowed it to identify witnesses who *may reasonably* have presented favorable evidence or evidence which could have lead the defense to impeachment evidence. Standing alone, this assertion is insufficient."); State v. Breeze, 379 S.C. 538, 546, 665 S.E.2d 247, 251 (Ct. App. 2008) ("The foregoing demonstrates the State's actions were not in bad faith but rather an inadvertent mistake."); State v. Hutton, 358 S.C. 622, 632, 595 S.E.2d 876, 882 (Ct. App. 2004) ("Nor can we find appellant could not obtain other evidence of comparable value by other means. The trial court allowed trial counsel to thoroughly cross-examine Bellinger about the first statement he gave and its contents.").

Brady decision requiring the prosecution to provide a defendant with any evidence in the prosecution's possession that might be favorable to the accused and material to guilt or punishment. State v. McCray, 413 S.C. 76, 95, 773 S.E.2d 914, 924 (Ct. App. 2015).

"Pursuant to Brady, the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Sheppard v. State, 357 S.C. 646, 659, 594 S.E.2d 462, 470 (2004). A Brady claim is complete if the accused can demonstrate: (1) the evidence was favorable to the accused; (2) it was in the possession of or known to the prosecution; (3) it was suppressed by the prosecution; and (4) it was material to guilt or punishment." Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999).

To order to demonstrate materiality for purposes of establishing a Brady violation, the aggrieved party must show "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 434 (1995). Significantly, evidence is material for Brady purposes "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985); see Strickler v. Green, 527 U.S. 263, 281 (1999) (explaining there is no real Brady violation "unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict"). However, evidence is not material under Brady if the accused received a fair trial resulting in a just verdict even without the allegedly suppressed evidence. Kyles, 514 U.S. at 434. Likewise, "information is not deemed 'material' if the

defense discovers the information in time to adequately use it at trial." State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998).

In the case at bar, the trial judge properly denied Appellant's motion to dismiss his charges based on an alleged Brady violation because Appellant failed to establish the requisite factors necessary to warrant the extreme sanction of dismissal. Most significantly, Appellant failed to establish the State suppressed favorable, material evidence in his case. Instead, just as the trial judge concluded, the evidence and testimony presented during trial established Appellant was provided with the allegedly-suppressed information regarding the photographic line-ups shown to the victims shortly before the trial began.[5] See generally Bryant, 372 S.C. at 316, 642 S.E.2d at 588 ("[T]he acquisition of requested documents at the last minute is not uncommon in the practice of law[.]"). As a result, Appellant was fully able to – and did – cross-examine the victims and the investigating officer in regard to the photographic line-ups and elicit testimony establishing the victims were unable to identify him as the robber despite the fact his photograph was included in the line-up. See Sheppard, 357 S.C. at 660, 594 S.E.2d at 470 ("Given the fact he was given Cole's statements in time for cross-examination, there is not a reasonable probability the outcome of the trial would have been different had the statements been disclosed prior to trial."); Kennerly, 331 S.C. at 453, 503 S.E.2d at 220 ("Since the information was used by Kennerly at trial, there is nothing to suggest that the result of her trial would have been different had the State disclosed the information to her."); see also United States v. Smith Grading and Paving, Inc., 760 F.2d 527, 532 (4th Cir. 1985) ("No due process violation occurs as long as Brady material is disclosed to a

[5] Notably, Appellant did **not** seek a continuance or request more time to review or investigate the evidence that was disclosed shortly before trial. See State v. Whipple, 324 S.C. 43, 51, 476 S.E.2d 683, 687 (1996) ("By proceeding to trial without further objection, Whipple waived any right to complain [about the opportunity he had to review discovery material provided directly before trial].").

defendant in time for its effective use of trial. In this case, the exculpatory information was put before the jury during cross-examination of the very first trial witness. The information was available for use in the defendant's cross-examination of all further government witnesses as well as in the defendants' case in chief. The disclosure of this exculpatory evidence, at trial, does not rise to the level of a constitutional violation." (citation omitted)). Thus, Appellant was wholly able to take advantage of the line-up evidence in articulating his defense to the jury.

In light of the fact Appellant was fully able to use the previously-undisclosed line-up evidence during trial, the outcome of Appellant's trial could **not** have been impacted by the delays associated with the disclosure of the line-up information, which was particularly apparent due to the fact Appellant's own statements actually placed him at the scene of robbery even though the victims were unable to do so.[67] See Clark, 315 S.C. at 388, 434 S.E.2d at 268 ("Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."); Arizona v. Fulminante, 499 U.S. 279, 296 (1991) ("A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted

[6] In arguing his charges should have been dismissed, Appellant contends on appeal the alleged suppression and destruction of the line-up evidence prejudiced him by preventing him from exploring a third-party guilt defense based on the individuals Parker pointed out in the line-up. Notwithstanding the fact Parker testified the people he pointed out of the line-up simply possibly looked like the robber as opposed to were actually the robber, the speculative possibility the allegedly suppressed or destroyed evidence could have possibly been favorable to Appellant's defense does not establish the evidence was material in a constitutional sense. See United States v. Agurs, 427 U.S. 97, 109-110 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.").

[7] Notably, in regard to Appellant's incriminating statement, Appellant has not challenged on appeal the trial judge's determination the statement was knowingly and voluntarily given. Accordingly, the trial judge's ruling in that regard is the law of the case. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (finding unchallenged rulings are the law of the case).

against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.' " (citation omitted and brackets in original)). Therefore, under those circumstances, Appellant failed to establish a Brady violation, and the trial judge properly denied his motion to dismiss the charges as a result.[8] Appellant's convictions should be affirmed.

[8] In arguing for dismissal on appeal, Appellant has made several statements that appear to suggest he is alleging the solicitor in his case engaged in prosecutorial misconduct. To the extent Appellant is raising such a troubling and misguided argument on appeal, any claim of prosecutorial misconduct in Appellant's case is wholly unsupported by anything appearing in the trial record and is entirely at odds with the representations of Appellant's defense counsel from trial, who specifically asserted he was **not** alleging the solicitor engaged in any misconduct in regard to the line-up evidence. See generally State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal.").

CONCLUSION

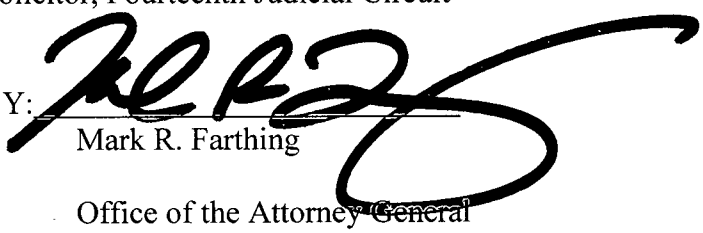
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

ISAAC McDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

BY: 
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ATTORNEYS FOR RESPONDENT

December 2, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

Appeal from Beaufort County
Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2014-002176

THE STATE,

Respondent,

vs.

JUJUAN ANDRE HABERSHAM,

Appellant.

PROOF OF SERVICE

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

James A. Brown, Jr.
Law Offices of Jim Brown, P.A.
Post Office Box 592
Beaufort, SC 29901

I further certify that all parties required by Rule to be served have been served.
This 2nd day of December, 2015.

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December 2, 2015

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RE: State v. Jujuan Andre Habersham – Appellate Case No. 2014-002176

Dear Mr. Brown:

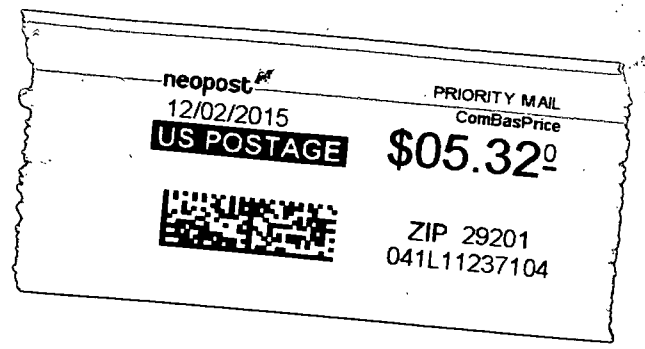
I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

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



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