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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2015-000944

THE STATE,

Respondent,

vs.

DARNELL KERI SLATON,

Appellant.

INITIAL BRIEF OF RESPONDENT

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II. Appellant's argument the trial court erred in denying his motion for a directed verdict is not preserved for appellate review. Notwithstanding the preservation issue, the trial court properly denied Appellant's motion for a directed verdict and submitted the case to the jury where the State presented substantial evidence from which the jury could fairly and logically find Appellant distributed marijuana as required under S.C. Code Ann. § 44-53-370.

STATEMENT OF THE CASE

On July 25, 2013, Appellant was arrested for distribution of marijuana in connection with a controlled purchase of marijuana to a confidential informant working with the York County Multijurisdictional Drug Enforcement Unit. During its December 12, 2013, term, the York County Grand Jury indicted Appellant for distribution of marijuana. On April 20, 2015, Appellant proceeded to a jury trial before the Honorable John C. Hayes, III. On April 21, 2015, the jury convicted Appellant as indicted. Judge Hayes sentenced Appellant to twelve years' imprisonment for distribution of marijuana, as the conviction was his third drug offense. [1] Appellant filed a timely notice of appeal.

[1] Appellant's prior drug offenses include two convictions for possession of marijuana, one conviction for possession of crack cocaine, and one conviction for distribution of crack cocaine.

STATEMENT OF FACTS

In 2012, Sergeant John Rainier of the Rock Hill Police Department was working as an investigator with the York County Multijurisdictional Drug Enforcement Unit (DEU). (Tr. 122). As a member of the DEU, Rainier investigated and enforced narcotics and vice crimes, often with the assistance of confidential informants. (Tr. 122-25).

On October 19, 2012, Rainier met with Jacob "Jake" Ballard, a confidential informant who had been working with the DEU for a few months following a July 2012 arrest for possession of marijuana and driving under suspension. (Tr. 89-93, 123-25). Ballard told Rainier he could purchase marijuana from an individual called "Dough"who lived in Apartment 105 in his apartment complex, located on 151 Clegan Road in Rock Hill, South Carolina. (Tr. 93-95,101, 124-25). Ballard had been to Dough's apartment ten times, was familiar with Dough, and knew he could purchase marijuana from Dough. (Tr. 39, 44). Rainier arranged to meet Ballard at a designated location near Dough's apartment complex in a DEU car. (Tr. 93-95, 125). Investigator Harrellson, a fellow law enforcement officer working with the DEU, accompanied Rainier. (Tr. 136).

When Ballard arrived at the meeting spot, Rainier thoroughly searched Ballard to ensure he did not have any contraband or private money on his person. (Tr. 96, 126). Rainier then equipped Ballard with two cameras (one on his shirt and another on his watch) to record the anticipated marijuana purchase from Dough. (Tr. 97, 126-27). He provided Rainier with forty dollars in documented funds to be used in the controlled purchase of two grams of marijuana from Dough. (Tr. 96, 126). Ballard identified Dough's vehicle in the parking lot to Rainier. (Tr. 25, 137). Rainier then used the vehicle's license plate to obtain utility and Department of Motor Vehicle records (including a photograph and address) of the vehicle's registered owner, Appellant Darnell

Keri Slaton. (Tr. 137). Ballard then left the DEU vehicle and proceeded to Dough's apartment. (Tr. 97, 127). Rainier was able to maintain audio surveillance of Ballard through the recording equipment. (Tr. 127-28). On his walk to Dough's apartment, Ballard spoke with Dough by phone and received instructions from Dough to enter his apartment through an unlocked door.[2] (Tr. 100-101).

Upon reaching Dough's apartment, Ballard entered through the unlocked front door and went into the kitchen pursuant to Dough's instructions. (Tr. 100-102). Ballard then used the forty dollars in documented funds to purchase two grams of marijuana from Dough. (Tr. 102-03). The two discussed the quality of the marijuana before Ballard left. (Tr. 103-04). Ballard was able to record the transaction on both cameras. (Tr. 98, 100, 130). Additionally, Rainier heard the entire transaction live through the recording equipment worn by Ballard. (Tr. 127-28).

Ballard exited Dough's apartment with marijuana and headed directly to Rainier and the DEU vehicle. (Tr. 105, 129). Upon reaching the vehicle, Ballard relinquished the marijuana to Rainier. (Tr. 105-06, 129). Rainier searched Ballard again to ensure he did not have any contraband. (Tr. 129). Rainier then presented Ballard with a six-person photo lineup (including Appellant's photograph obtained through the DMV records for Dough's car) and asked Ballard to see if he could identify the person who sold him marijuana. (Tr. 106-08, 136-39). Ballard identified Appellant as the person who sold him marijuana minutes before. (Tr. 106-08, 139-40). Ballard then accompanied Rainier to the police station to give a statement. (Tr. 106, 140-41). Once at the station, Rainier deposited the marijuana in the secured evidence locker. (Tr. 135).

[2] In his brief, Appellant states: "On October 19, 2012, Ballard had dropped by Appellant's apartment unannounced." See IBOA p. 5. However, to the contrary, the record clearly establishes Ballard spoke to Appellant by phone at least once prior to coming to his apartment and Appellant gave him explicit instructions to come into the apartment through an unlocked door once he arrived. (Tr. 95, 101).

On November 13, 2013, Cynthia Mitchum, a drug chemist in the York County Sheriff's Office Drug Analysis Lab, tested the marijuana sample Rainier had deposited in the evidence locker. (Tr. 148-58). Mitchum identified the sample as marijuana and noted its total weight was 2.52 grams. (Tr. 157-58).

Appellant proceeded to a jury trial on April 20, 2015. At the start of trial, the State requested a hearing pursuant to Neil v. Biggers[3]. (Tr. 20). Appellant did not object to the trial court conducting a Biggers hearing and did not argue that such a hearing was unnecessary or prejudicial to him. (Tr. 20). During the Biggers hearing, the State presented testimony from Rainier and Ballard. Rainier testified he showed Ballard the lineup in the backseat of his DEU vehicle shortly after the controlled purchase. (Tr. 24-25). He testified it was daylight when he showed Ballard the lineup. (Tr. 24-25). He testified he received Appellant's name and picture through utility and DMV records obtained when Ballard showed him Dough's car prior to the purchase. (Tr. 25-26, 32). He testified the lineup contained six pictures, including Appellant, and he selected the other five people based on similar physical descriptions to Appellant. (Tr. 25-26). He testified the photographs were not marked in any way. (Tr. 25-26). He testified prior to showing Ballard the lineup, he advised him that the suspect may or may not be included in the lineup and did not suggest whom he should select. (Tr. 25-27). Rainier testified Ballard identified Appellant "almost immediately." (Tr. 27). He testified Appellant was the only light skinned person included in the lineup, but noted the lineup was in black and white. (Tr. 33-34).

Ballard testified he purchased marijuana from Appellant on October 19, 2012. (Tr. 38). He testified he made the controlled buy during the daylight in Appellant's well-

[3] 409 U.S. 188 (1972).

lit kitchen. (Tr. 37-38). He testified he had known Appellant for a year and had seen him approximately ten times, but acknowledged he only knew his by his nickname, Dough. (Tr. 38-39). He testified he identified Appellant from the photo line-up shortly after the controlled buy "as soon as [he] got in the vehicle." (Tr. 40). He testified law enforcement did not suggest any particular suspect to him (Tr. 40). He testified he gave law enforcement a description of the man who sold him marijuana, including that he was an African American male who was heavy set and had a full beard. (Tr. 41, 43). He testified he was able to select Appellant immediately and that he was "a hundred percent sure" Appellant was the person who sold him marijuana. (Tr. 41).

At the conclusion of the hearing, Appellant moved to suppress Ballard's identification, making the following argument:

> Your Honor, for purposes of this hearing, I would ask the Court to make findings where—I would just make just a few points. I would ask the Court to take into consideration the photographs that has been provided and placed into evidence by the State. Mr. Slaton, who was the third photograph by the page that is listed as Image 3, or the second photograph for the first column, is the only light-skinned black male in the six-pack lineup. It's been testified to by both witnesses that that is the only picture of both—that the confidential informant focused in on and went to. We would ask the Court to take that into consideration as to the suggestibility of that photograph.
>
> Officer Rainier despite looking at the photo—the lineup, did not go back and ask for it to be redone in any way. He had not seen Mr. Slaton before, that—that the skin tones between the remaining pictures and Mr. Slaton is significant enough as to, I believe, rise to the level of suggestibility.
>
> Mr. Ballard did indicate he had interacted with the person he knows as Dough prior to this. The only description, however, that he gave to officers was an African-American, heavy-set man, full beard and scruffy. So, no height weight description, nothing else that would help the officers narrow down any particular description.
>
> Moreover, your Honor, in his own—and in his testimony he gave the ten prior instances. Less than five of those, he was under the influence of marijuana when interacting with the person he knows as Dough. I would

> ask the Court to take that into consideration in terms of any findings of suggestibility in the identification procedure in this case.

(Tr. 47-49). Notably, Appellant did not argue that a Biggers hearing was improper or prejudicial. In reply, the State argued the lineup was not suggestive and noted Ballard was absolutely certain Appellant was the person who sold him drugs minutes prior. (Tr. 48-49). The trial court found the lineup procedure was not impermissibly suggestive, noting,

> Well, you never have six identical-looking individuals. In this particular lineup, Mr. Slaton does have lighter skin and a fuller beard. But looking at the totality of the circumstances I cannot find—or, I find that the Defense has not shown, by a preponderance of the evidence, that the identification procedure was impermissibly suggestive.

(Tr. 49). The trial court elaborated that the manner in which Rainier presented the lineup to Ballard was also "not impermissibly suggestive looking at the totality of the entire procedure." (Tr. 49). The trial court further found there was no substantial likelihood of irreparable misidentification and that the identification was reliable. (Tr. 49-51).

During its case, the State presented Ballard, Rainier, and Mitchum. The State also presented Jamie Faulkenberry, an officer with the City of Rock Hill Police Department also assigned to the DEU. (Tr. 163-64). Faulkenberry arrested Appellant on July 25, 2013. (Tr. 164). When asked his address during booking, Faulkenberry reported Appellant listed his address as the same apartment where Ballard purchased marijuana—151 Clegan Road, Apartment 105 in Rock Hill, South Carolina. (Tr. 35, 38, 95,101, 137, 164).

At the close of the State's case, Appellant moved for a directed verdict without any supporting argument. (Tr. 166). The trial court denied Appellant's motion, finding "substantial direct evidence or plenty of direct evidence from which a jury could

conclude that a distribution of marijuana took place, and that Mr. Slaton was, in fact, the individual involved in distributing the marijuana to Mr. Ballard on the date and that the time and place in question . . . ." (Tr. 166-67). Appellant elected not to present any witnesses. The jury convicted Appellant as indicted. (Tr. 208).

ARGUMENT

I. Appellant's claims the trial court erred in conducting a Neil v. Biggers hearing is not preserved for appellate review. Notwithstanding the preservation issue, the trial court properly conducted a Biggers hearing and admitted Ballard's in-court identification testimony, where the out-of-court identification did not result from unduly suggestive police procedures and was so reliable that no substantial likelihood of misidentification existed. Furthermore, any alleged error was harmless and had no impact on Appellant's case.

Appellant contends for the first time on appeal that the trial court erred in conducting a Neil v. Biggers hearing to determine the admissibility of the Ballard's identification. Specifically, Appellant asserts a Biggers hearing "was an inappropriate vehicle for determining the admissibility of the photographic lineup because the hearing focuses on the witness' perspective and actions in evaluating suggestibility of the identification, rather than the creation and substance of the photographic lineup itself." (IBOA 8). Appellant argues the lineup was "suggestive and defective in its creation," independent of Ballard, based on Rainier's use of Appellant's DMV photograph "before ever laying eyes on Appellant himself" and only selecting African American males matching a general resemblance to Appellant, resulting in a suggestive lineup with Appellant as the only light-skinned African American.

However, this Court should affirm the trial court and uphold Appellant's conviction for several reasons. Initially, Appellant's claims that the trial court erred in conducting a Biggers hearing is not preserved for appellate review. Additionally, notwithstanding the lack of preservation, the trial court properly conducted a Biggers hearing and admitted Ballard's in-court identification testimony, where the out-of-court identification did not result from unduly suggestive police procedures and was so reliable that no substantial likelihood of misidentification existed. Furthermore, any alleged error

was harmless and had no impact on Appellant's case. This Court should affirm Appellant's conviction.

A. Issue Preservation

As an initial matter, Appellant's argument that the trial court erred in conducting a Biggers hearing is not preserved for this Court's review. In order for an issue to properly be preserved for appellate review, the issue must be: (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); see JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has 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) (emphasis added).

In the present case, Appellant contends on appeal the trial court erred in conducting a Biggers hearing because it "was an inappropriate vehicle for determining the admissibility of the photographic lineup [as] the hearing focuses on the witness' perspective and actions in evaluating suggestibility of the identification, rather than the creation and substance of the photographic lineup itself." (IBOA 8). However, defense counsel never objected to the trial court conducting a Biggers hearing and failed to make this argument below. See State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991) ("Where an objection and the ground therefor is not stated in the record, there is no basis for appellate review."). Instead, following an unopposed Biggers hearing, during which defense counsel cross-examined both of the State's witnesses, defense

counsel argued the lineup should be excluded based on both an inherently suggestive lineup and likelihood Ballard misidentified him. (Tr. 47-48). Therefore, defense counsel's argument that a Biggers hearing was not the appropriate method of inquiry was not presented to the trial court and the trial court never ruled on the issue. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but **it must be clear that the argument has been presented on that ground**." (emphasis added)).

Because defense counsel did not raise the issue Appellant is now raising on appeal to the trial court, Appellant's appellate issue cannot properly be considered or addressed for the first time on appeal. See 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."); 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."); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). As a result, Appellant's challenge to the propriety of the trial court conducting a Biggers hearing was not properly preserved for appellate review and should be rejected on issue preservation grounds. 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."); cf. 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)."). Therefore, Appellant's issue regarding the propriety of the Biggers hearing to determine if the lineup was suggestive is not preserved for appellate review. This Court should affirm Appellant's conviction.

B. Propriety of the Admission of the Challenged Testimony

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). Appellate courts are 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. 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)).

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425-26 (2012) (citing State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). "An in-court identification of an accused is inadmissible if a suggestive out-of-court

identification procedure created a very substantial likelihood of irreparable misidentification." Id.

In Neil v. Biggers, the United States Supreme Court established a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Liverman, 398 S.C. at138-39, 727 S.E.2d at 426. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198.

In South Carolina, our courts have held this determination should be made during an *in camera* hearing, outside of the presence of the jury. See State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (holding that generally, a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as a person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation); State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992) (same); see also Rule 104(c), SCRE (providing that "[h]earings on the admissibility of . . . pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury"). "The purpose of the *in camera* hearing is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification." Ramsey, 345 S.C. at 613, 550 S.E.2d at 297.

An out-of-court identification of a defendant violates due process and must be suppressed when the identification procedure used by law enforcement was impermissibly suggestive and conducive to a substantial likelihood of misidentification.

Liverman, 398 S.C. at 138, 727 S.E.2d at 425; 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). Under the two-pronged inquiry as set forth in Biggers, the trial court must first determine whether the identification resulted from "unnecessarily suggestive" police procedures. Liverman, 398 S.C. at 138, 727 S.E.2d at 426; Traylor, 360 S.C. at 81, 600 S.E.2d at 526. If the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there and the court does not need to consider the second prong. State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013). The defendant bears the burden of proving the identification procedure was impermissible suggestive. Id. at 561, 745 S.E.2d at 141 ("Our supreme court has never placed the burden of disproving suggestiveness on the State. The Fourth Circuit, whose decisions regarding federal constitutional law are binding on us, has held the defendant bears the burden of proving the identification procedure was impermissibly suggestive.").

If the court finds, however, that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless "so reliable that no substantial likelihood of misidentification existed." Liverman, 398 S.C. at 138, 727 S.E.2d at 426. The inquiry must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification. State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007); Singleton, 395 S.C. at 13-14, 716 S.E.2d at 335-36. When determining the likelihood of misidentification, courts must evaluate the totality of the circumstances using the

following factors: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98 (1977) (citing Biggers, 409 U.S. at 199–200); Turner, 373 S.C. at 127, 644 S.E.2d at 697; Singleton, 395 S.C. at 13-14, 716 S.E.2d at 335-36.

In the case at bar, the trial court correctly and appropriately conducted a Biggers hearing to determine if Ballard's in-court identification of Appellant was admissible. Appellant's argument that a Biggers hearing "was an inappropriate vehicle for determining the admissibility of the photographic lineup because the hearing focuses on the witness' perspective and actions in evaluating the suggestibility of the identification[,] rather than the creation and substance of the photographic lineup itself" is legally misguided and erroneous. On the contrary, a Biggers hearing analyzes precisely this—determining whether "the creation and substance of the photographic lineup itself" was impermissibly suggestive—through the Biggers inquiry into the police procedures surrounding the lineup. This includes the creation of the lineup, not merely how the police gave the lineup to the eyewitness as Appellant avers. See generally Gibbs v. State, 403 S.C. 484, 493, 744 S.E.2d 170, 175 (2013) ("After conducting a thorough *in camera* Neil v. Biggers hearing, the trial court determined the identification procedures utilized by the police, ***specifically the photographic lineup*** and the suggestive show-up, were not unduly suggestive. We find support for the PCR court's determination that the trial court did not abuse its discretion in finding the photographic lineup identifications were reliable, as there was not a substantial likelihood of misidentification.") (emphasis added); State v. Gambrell, 274 S.C. 587, 266 S.E.2d 78 (1980) (holding the identification

procedures were not so impermissibly suggestive as to give rise to likelihood of misidentification, where six photographs shown to victim of criminal sexual conduct were chosen at random from police files, fact that she could not differentiate between two of photographs because, in her words, they "looked so much alike," belied any assertion they were selected or arranged in manner likely to suggest to her to identify defendant, and although man whose photograph was selected along with defendant's at photographic lineup was not included in physical lineup, consisting of six men chosen from pool of detainees, victim testified she identified defendant based on her recollection of incident). As a Biggers hearing was the proper inquiry to determine if the lineup was suggestive—in both creation and substance—the trial court properly held a Biggers hearing to determine if the identification was admissible.

Furthermore, the trial court properly determined Ballard's identification was admissible following the proper inquiry set forth in Neil v. Biggers and its progeny. Rainier created the photographic lineup with DMV photographs of the suspect and five other African American males with similar facial features and physical descriptions. (Tr. 25, State's Ex. No. 3). Rainier obtained the photograph of Appellant by searching the utility and DMV records of the car belonging to the suspect based on the confidential informant's prior knowledge of Appellant. Despite Appellant's arguments to the contrary, Rainier creating the lineup without having met or seen Appellant is not dispositive as to whether the lineup was suggestive. See IBOA 9 ("In the present case, Sergeant Rainier created the lineup shown to Ballard before ever laying eyes on Appellant himself, and only selected other African American males supposed to resemble Appellant using only a general description from Department of Motor Vehicle (DMV) records.") Often law enforcement officers have not met nor seen a suspect before and instead must rely upon

descriptions from witnesses when compiling a photographic line up. Furthermore, both Ballard and Rainier testified there were no markings other indicators on the lineup shown to Ballard to suggest whom he should identify. Rainier also did not indicate, either though verbal or non-verbal communication, which of the six photographs was the intended suspect. Rather, Rainier told Ballard the suspect may or may not be included in the lineup. Ballard automatically selected Appellant as the person who sold him marijuana without any hesitation.

Appellant argued the lineup was nevertheless unduly suggestive because his photograph was highlighted when compared to the other five photographs. The trial court disagreed, ruling Appellant "ha[d] not shown, by a preponderance of the evidence, that the identification procedure was impermissibly suggestive." (Tr. 49). The court noted, "you never gad six identical-looking individuals [in a photographic lineup]." (Tr. 49). The trial court elaborated: "The procedure includes ***not just the photo lineup***, but the way it's presented, and I find that, while there is a difference in the skin tone and the amount of facial hair on Mr.—or, the one who was circled by Mr. Ballard as being the—being Dough, I'm not sure how you spell that, but I find that it was—it's not impermissibly suggestive looking at the totality of the entire procedure." (Tr. 49) (emphasis added). The trial court's comments during its ruling shown it appropriately considered the composition of the lineup when determining if it was unduly suggestive. Appellant failed to carry his burden of proving the identification procedure was impermissibly suggestive.

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

disagrees, the State submits there was also sufficient evidence that the out-of-court identification was reliable under the totality of the circumstances.[4]

At the Biggers hearing, Ballard testified he had known Appellant for over a year and had hung out with him at least ten times prior to the drug transaction in question. (Tr. 39). He further testified the transaction took place during the daylight and the apartment and kitchen where the buy took place was well lit. (Tr. 38). Ballard testified the transaction took two to three minutes and he was within reaching distance of Appellant. (Tr. 38). He testified Rainier showed him the photographic lineup within minutes of completing the controlled buy. (Tr. 39-41). He testified he selected Appellant and was "a hundred percent sure" he identified the correct person. (Tr. 41-42). Additionally, Ballard's description of the suspect as a heavy-set African American male with a full beard matches the photograph of Appellant Ballard selected during the photographic lineup. (Tr. 43, State's Ex. No. 3). Further, a review of Ballard's trial testimony indicates his in-court identification of Appellant originated not from any taint associated with the allegedly suggestive photo lineup, but from Ballard's observation of Appellant prior to and at the time of the controlled purchase. Thus, the in-court identification was properly admitted as it had an independent origin. Liverman, 398 S.C. at 142, 727 S.E.2d at 428. Under the totality of the circumstances, Ballard's pre-trial and in-court identifications were reliable. Therefore, the trial court did not abuse its discretion in denying Appellant's

[4] Appellant fails to raise any challenge against the inherent reliability of Ballard's identification in his Initial Brief. As the issue is not challenged, it is deemed abandoned on appeal. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal."); Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue, 342 S.C. 34, 42 n. 7, 535 S.E.2d 642, 647 n. 7 (2000) (conclusory arguments in brief deemed abandoned); Solomon v. City Realty Co., 262 S.C. 198, 201, 203 S.E.2d 435, 436 (1974) (same); Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106 n. 3, 439 S.E.2d 283, 285 n. 3 (Ct. App. 1993) ("[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority.").

motion to suppress the identification testimony, and Appellant's convictions should be affirmed.

C. Harmless Error

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

Here, any error in the admission of the identification evidence from Ballard was harmless, merely cumulative to other evidence, and not prejudicial. The identification by Ballard was cumulative to and corroborated by other evidence indicating Appellant was the person who sold Ballard marijuana during the controlled purchase, such as: the two video recordings of the drug transaction (State's Ex. No. 1 and 2), the still photographs from these videos (State's Ex. No. 5 and 6), and the testimony of Officer Jamie Faulkenberry confirming Appellant's address was the same as the location of the

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

II. **Appellant's argument the trial court erred in denying his motion for a directed verdict is not preserved for appellate review. Notwithstanding the preservation issue, the trial court properly denied Appellant's motion for a directed verdict and submitted the case to the jury where the State presented substantial evidence from which the jury could fairly and logically find Appellant distributed marijuana as required under S.C. Code Ann. § 44-53-370.**

Appellant contends the trial court erred in denying his directed verdict motion. In support of that contention, Appellant for the first time on appeal argues the State failed to present sufficient evidence to establish any distribution of marijuana took place. Appellant asserts for the first time that Rainier's search of Ballard was insufficient to ensure Ballard was not hiding the marijuana on himself, specifically in his "very private areas." (IBOA 11). Perplexingly, Appellant simultaneously asserts for the first time hat the recordings do not ensure Ballard did not acquire the marijuana from a hidden location while on route to Appellant's apartment. (IBOA 11-12). Appellant further argues for the first time that the recording equipment did not sufficiently show any marijuana being exchanged. (IBOA 11-12). Finally, Appellant asserts for the first time that because the total marijuana a weight was more than two grams, making it improbable a marijuana purchase occurred, because it is "unlikel[y] that a drug dealer would give away drugs for free and in excess of what was negotiated for . . .". To the contrary, the State presented evidence and testimony establishing Appellant distributed marijuana. Viewing that evidence and testimony in a light most favorable to the State as required, the jury could logically and rationally conclude Appellant distributed marijuana. Accordingly, the trial court properly denied Appellant's directed verdict motion and submitted the case to the jury. Appellant's conviction should be affirmed.

A. Issue Preservation

As an initial matter, Appellant's argument the trial court erred in denying his motion for a directed verdict is not preserved for this Court's review. In order for an issue to properly be preserved for appellate review, the issue must be: (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); see JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has 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) (emphasis added).

Specifically pertaining to directed verdict motions, more than a general directed verdict motion is required to preserve a directed verdict ruling. See In re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (holding that more than a general directed verdict motion is required to preserve a directed verdict ruling); State v. Kennerly, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998) ("In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review."), aff'd, 337 S.C. 617, 524 S.E.2d 837 (1999)("A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not presented to the trial court below."), See also State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998) (noting a general or nonspecific objection presents no issue for appellate review).

In the present case, Appellant failed to present any supporting grounds or argument with his motion for a directed verdict. See Tr. 166 ("And at this time, we would move for a directed verdict.") Appellant failed to state any grounds for his motion and presented no argument to the trial court in support of this motion. Therefore, Appellant's arguments raised for the first time in his brief are not preserved for this Court's review. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but **it must be clear that the argument has been presented on that ground.**" (emphasis added)).

Because defense counsel did not raise the issue Appellant is now raising on appeal to the trial court, Appellant's appellate issue cannot properly be considered or addressed for the first time on appeal. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). As a result, Appellant's challenge to the propriety of the trial court denying his directed verdict motion is not properly preserved for appellate review and should be rejected on issue preservation grounds. 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.") Therefore, Appellant's arguments regarding the trial court's denial of his directed verdict motion is not preserved for appellate review. This Court should affirm Appellant's conviction.

B. Propriety of Denial of Appellant's Directed Verdict Motion

When presented with a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence and not its weight. State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997). The trial court should deny a directed verdict motion and submit the case to the jury if there is any substantial evidence reasonably

tending to prove the guilt of the accused or from which guilt may be fairly or logically deduced. State v. Robinson, 310 S.C. 535, 538, 426 S.E.2d 317, 319 (1992); see State v. Littlejohn, 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955) ("[O]n a motion for direction of verdict, the trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced."); see also Crawford v. United States, 375 F.2d 332, 334 (D.C. Cir. 1967) ("The jury question of whether there was proof of guilt beyond a reasonable doubt presents a stricter or higher standard than the trial court's consideration of whether there is sufficient evidence to allow the jury to find guilt beyond a reasonable doubt, and it rests in the unreviewable ratiocinations of twelve reasonable persons whose deliberations are protected by the highest security.").

On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is ***any*** direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial court's ruling. State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004). The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law."

State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986); see also Crawford, 375 F.2d at 334 ("It is not the function of appellate judges to weigh the evidence and decide that if they had doubts other reasonable persons were compelled to have the same doubts. If that were the test the jury of twelve would be relegated to the very low grade function of secondary fact finders.").

In South Carolina, it is illegal to distribute marijuana. See S.C. Code Ann. § 44-53-370(a)(1) (prohibiting the distribution of a controlled substance); § 44-53-190(d) (establishing marijuana as a controlled substance in South Carolina). Accordingly, to establish a defendant is guilty of distribution marijuana, the State must prove beyond a reasonable doubt: (1) that the substance involved was in fact marijuana; (2) that the defendant had possession (either actual or constructive) of that marijuana; and (3) that the defendant distributed or sold the marijuana at the time and place and in the manner alleged. Id. S.C. Code Ann. § 44-53-110 provides: "'[d]istribute' means to deliver (other than by administering or dispensing) a controlled substance." It means the actual or constructive transfer of the controlled substance with or without payment. S.C. Code Ann. § 44-53-110 further states: "'Deliver' or 'delivery' means the actual, constructive, or attempted transfer of a controlled drug or paraphernalia whether or not there exists an agency relationship." Sale is defined in the law as the act of selling, the exchange of property of any kind for an agreed sum of money or other valuable consideration. In drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially. State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009) (citing State v. Attardo, 263 S.C. 546, 550, 211 S.E.2d 868, 869 (1975)). Knowledge can be proven by the evidence of acts, declarations, or conduct of the accused

from which the inference may be drawn that the accused knew of the existence of the prohibited substances. Id.

In the case at bar, looking at the evidence and all reasonable inferences in the light most favorable to the State as required, the State presented direct evidence Appellant distributed marijuana to Ballard on October 19, 2012, at 151 Clegan Road, Apartment 105, in Rock Hill, South Carolina. As to the first required element, the State presented direct evidence the substance in question was marijuana though the testimony of drug chemist Cynthia Mitchum of the York County Sheriff's Office Drug Analysis Laboratory. Mitchum's testimony and her report, introduced as State's Ex. No. 7, established the green leafy substance was 2.52 grams of marijuana. (Tr. 157-58, State's Ex. No. 7).

The State also proved beyond a reasonable doubt that Appellant had possession of the marijuana and sold it to Ballard on October 19, 2012. Ballard and Rainier's testimony established Ballard was thoroughly searched before exiting Rainier's cruiser and no contraband was found on his person.[5] (Tr. 96, 115, 125, 143-44). Rainier provided Ballard with forty dollars in documented funds to purchase tow grams of marijuana from Appellant. (Tr. 96, 126). Ballard was then equipped with two different video cameras—providing law enforcement with both video and audio surveillance—that recorded Ballard's every movement from before he left the car until he returned following the controlled buy. (Tr. 93. 97-98, 116, 126-29, 145, State's Ex. No. 1 & 2). Additionally, Rainier was able to surveille Ballard's movements and actions through live-streamed audio from both cameras. (Tr. 127-29). Both cameras show Ballard exiting the police

[5] Appellant's assertion that Rainier's search of Ballard was cursory is not supported by the record. The only evidence before the trial court, and ultimately the jury, is that the search was "very thorough" and "very close" to a strip search. (Tr. 144). Furthermore, Appellant's speculation that Ballard was hiding marijuana within his "very private areas" is also not supported by the record.

cruiser, walking directly to Appellant's apartment without any interruption or delay. (State's Ex. No 1 & 2). Neither video shows Ballard stopping to retrieve anything along the way, as Appellant suggests. See State's Ex. No. 1 & 2. Both cameras recorded Ballard inside Appellant's apartment purchasing the marijuana. (State's Ex. No. 1, 2, 5, & 6). Ballard testified he gave Appellant the forty dollars in documented funds provided by Rainier to purchase two grams of marijuana from Appellant. (Tr. 103). Ballard and Appellant then discussed the quality of the marijuana, as explained by Ballard as he narrated the videos during his testimony. (Tr. 103-04). Ballard explicitly testified the comments regarding tasting like fruit and water were in reference to the high quality of the marijuana he purchased. (Tr. 104).[6] Ballard then left Appellant's apartment and went directly to Rainier's vehicle, where he gave the marijuana from the controlled purchase to Rainier. (Tr. 105-06. 129). Rainier then searched Ballard an additional time, ensuring he did not have any contraband or money on his person. (Tr. 132). Ballard then identified Appellant as to the person who sold him marijuana from a six person photographic lineup. (Tr. 106-08, 139, State's Ex. No. 1, 2, &3). Finally, when arrested, Appellant listed is address as the location of the controlled buy—151 Clegan Road, Apartment 105, in Rock Hill, South Carolina. Critically, viewing that evidence and testimony in a light most favorable to the State as required, the jury could have rationally and logically concluded Appellant distributed marijuana to Ballard. Appellant's conviction should be affirmed.

[6] Appellant's contention that "the State erroneously interpreted their conversation talking about juice ice pops to be discussing the taste or fragrance of marijuana" is wholly unsubstantiated by the record. Furthermore, the State's comments during its closing argument were directly related to Ballard's testimony concerning the meaning of these comments, and therefore, were appropriately confined to the record. See State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996) ("A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it.").

CONCLUSION

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

Respectfully submitted,

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December 31, 2015

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
DEC 31 2015
SC Court of Appeals

APPEAL FROM YORK COUNTY
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2015-000944

THE STATE,

Respondent,

vs.

DARNELL KERI SLATON,

Appellant.

PROOF OF SERVICE

I, Megan Harrigan Jameson, 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:

William G. Yarborough, III, Esquire
522 North Church Street
Greenville, SC 29601

I further certify that all parties required by Rule to be served have been served.
This 31st day of December, 2015.

Megan Harrigan Jameson

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ALAN WILSON
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RECEIVED
DEC 31 2015
SC Court of Appeals

December 31, 2015

William G. Yarborough, III, Esquire
522 North Church Street
Greenville, SC 29601

RE: State v. Darnell Keri Slaton – Appellate Case No. 2015-000944

Dear Mr. Yarborough:

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

Sincerely,

Megan Harrigan Jameson

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

MHJ/
Enclosures

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