STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-000978

THE STATE,

Respondent,

v.

SHAWNDELL McCLENTON,

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

STATEMENT OF ISSUES ON APPEAL

I.

The trial court correctly denied Appellant's request for a directed verdict where substantial circumstantial evidence existed to establish that the burglaries occurred at night and that Appellant was inside the apartments.

II.

Under the totality of the circumstances, even though a show-up identification procedure was utilized, the identification was nonetheless reliable such that no substantial likelihood of misidentification existed.

STATEMENT OF THE CASE

Appellant Shawndell McClenton was indicted for two counts of Burglary 1st Degree and one count of Breaking and Entering a Motor Vehicle. (R. pp. 179-84) He proceeded to a jury trial before the Honorable Clifton Newman on April 21-23, 2014. He was found guilty. Judge Newman pronounced a sentence of 24 years for each count of Burglary 1st Degree and a term of 5 years for Breaking and Entering a Motor Vehicle. All sentences were to be served concurrently. (R. p. 178) This appeal follows.

STATEMENT OF FACTS

Two apartments were burglarized in the Peninsula Condominiums on James Island the night of February 25, 2012. (R. p. 50; pp. 85-86) A complex resident, Jeremy Jacobs ("Jacobs"), returned home that evening then took his dog outside. (R. pp. 7-8; pp. 21-22) He saw a man in a white car who appeared to be looking for something in the console. (R. p. 22) The vehicle's dome light illuminated the man so that Jacobs got a good look at him. (R. pp. 22-23) Jacobs also noted a blue Chevy Cavalier parked nearby. (R. p. 23) He also observed the man walk up to the apartment below Jacobs' and approach the door as if to check that it was locked. (R. p. 24) Again, the area near the door was well-lit, so Jacobs had a good view of the man. (R. p. 24) Jacobs then observed Appellant get into the older model blue Chevrolet Cavalier parked nearby and leave. (R. p. 10) He was able to observe that a white female with brown hair in a ponytail was driving the Cavalier. (R. p. 10)

Another complex resident, Warren Johnson ("Johnson"), also observed the man's actions at the white car. Johnson returned to his apartment that night after a trip to the grocery store.[1] (R. pp. 31-32) He noticed an individual in the breezeway as he walked in with his groceries. (R. p. 32) The two exchanged a brief greeting. (R. pp. 33-34) Johnson realized he left his cell phone in his car, and he went outside to retrieve it. (R. p. 34) The man he had passed in the breezeway earlier was "now on the first floor behind a series of bushes here, and when [Johnson] looked over,... [the man] backed...into the breezeway, just backed up [into a different breezeway]." (R. p. 34) Johnson found the man's behavior to be suspicious. (R. p. 35) Johnson returned to his apartment, poured himself a glass of wine and went out onto his porch. (R. p. 35) After about five minutes, Johnson heard

[1] During pre-trial testimony, Johnson stated that he arrived home around 9:00 or 10:00 pm. (Supp. R.. p. 175) He did not provide a specific time in his testimony before the jury.

some rustling, "an awkward sound of glass and plastic and awkward movement." (R. p. 35) Looking down from the porch, Johnson observed the man with bags in a grassy area near an apartment. (R. p. 36; p. 43) The man held a key fob in the air and clicked it a few times. (R. p. 36) Johnson then watched as the man went to a white vehicle which lit up. (R. p. 36) A blue car pulled up next to the white car. (R. p. 37) Johnson then observed the man make several trips between the white car and the blue car. (R. p. 38) Johnson narrated his observations to a 911 dispatcher. (R. p. 39) The call ended with the police nearby. (R. p. 40)

Officer Joe Teich ("Teich") received a dispatch at 10:25 pm to respond to the Peninsula Condos as a result of Johnson's phone call. (R. p. 50; p. 114) Teich arrived less than two minutes after receiving the dispatch. (R. p. 51) Access to the Peninsula Condos could be had only by way of Daniel Ellis Drive, a road off Folly Road. (R. p. 51) Daniel Ellis Drive proceeds past some businesses, including a Lowe's hardware store, and dead-ends in the Peninsula Condos. (R. p. 51; p. 53) Teich parked in the Lowe's parking lot with his headlights on to see anyone leaving the complex. (R. p. 54) He received a description of a blue sedan with a black male wearing a white sweatshirt or sweater. (R. p. 54) A blue sedan with a black male occupant wearing a white shirt "passed through [his] light beam" as it exited the Peninsula Condos. (R. p. 55) Teich initiated a traffic stop. (R. p. 55)

Appellant was the passenger in the vehicle, wearing a white shirt. (R. p. 58) The driver was a female, Dawn Lee ("Lee"), and there was a young infant in the car. (R. p. 60) Appellant informed Teich that Lee had dropped him off at the complex to see a friend, but he had been unable to find the friend's apartment so she picked him up. (R. p. 66) Within five minutes of initiating the stop, Teich received information a forced entry

was involved, and he received additional information regarding the items missing from the burglarized apartments. (R. p. 59; p. 63)

Teich was given Lee's consent to look in the trunk of the car. (R. pp. 63-65) He immediately noticed a white trash bag as described by Johnson. (R. p. 69) The bags contained wine bottles and electronic items which were reported missing from the burglarized apartments. (R. p. 70; p. 73) A tire tool was in the trunk alongside the items. (R. p. 78) A screwdriver, a crowbar, and a flashlight were also in the car. (R. p. 71; p. 73; pp. 76-77) A watch, jewelry, and cameras taken from the apartments were found in the pockets of a coat Appellant was sitting on in the car. (R. pp. 74-76)

Meanwhile, back in his apartment, Jacobs saw blue lights outside. (R. p. 24) Jacobs saw police officers with flashlights near the white car. (R. p. 10, pp. 24-25) Jacobs informed the officers that he had seen the man who he believed owned the car earlier, but the man had left with someone else. (R. p. 11, p. 25) Officers asked Jacobs to accompany them to see if Appellant was the man Jacobs saw at the white car. (R. p. 11) Jacobs was brought to the Lowe's parking lot. (R. p. 11, p. 25) Jacobs identified Appellant without hesitation as the man he had seen in the white car earlier. (R. pp. 11-12, p. 26) Jacobs was very certain of his identification, rating his certainty on a scale of one to ten, a "ten out of ten." (R. pp. 11-12, p. 26, p. 28) Jacobs recognized Appellant not only by his facial features but also by his clothing, a "white sweater pullover and dark jeans." (R. p. 12) Appellant was in handcuffs when Jacobs observed him. (R. p. 14) Johnson was able to identify the blue vehicle stopped by police just outside the complex as the blue vehicle he observed as he spoke to dispatch. (R. p. 41)

One of the victims, Amanda Mitchell ("Mitchell"), reported she went over to a friend's house on the evening of February 25, 2012. Around 9:30, after she had been away from home for about 2 hours, she received a phone call from police asking her to return home immediately. (R. p. 106) Mitchell testified it was dark out, the sun just setting, when she left for her friend's house. (R. p. 106; p. 111) Mitchell worked as a sales representative for a wine and spirits company, and she kept several bottles of wine in her home. (R. p. 107) She owned a white Hyundai Sonata which she left at the apartment complex that night. (R. pp. 106-107) Mitchell kept a spare key in her dresser. (R. p. 109) Upon returning home, she noted several missing items: shoes, wine, personal computer, work computer, a digital camera, and jewelry. (R. pp. 107-108) Her missing items were among those found in Appellant's car. (R. p. 108) Marks on her apartment door seemed to indicate that some sort of straight edged implement had been used to gain entry. (R. pp. 90-91)

The other victim, Caitlyn Horton ("Horton"), left her apartment the night of February 25, 2012, around 6:30 or 7:00 pm. (R. p. 127) She left a window open with the screen in place. (R. pp. 94-96; p. 120) When police arrived, the screen was removed outside, and that was the presumed point of entry. (R. p. 95) A wallet containing her social security card was taken but returned to her after it was recovered in Appellant's car. (R. p. 120)

In a statement to police, Appellant claimed he was dropped off at the apartments by a friend but would not say who the friend was. (R. p. 124; State's Exhibit 34, video statement)

ARGUMENT

I.

The trial court correctly denied Appellant's request for a directed verdict where substantial circumstantial evidence existed to establish that the burglaries occurred at night and that Appellant was inside the apartments.

Appellant contends the trial judge erred in denying his directed verdict motions as to both counts of Burglary 1st Degree. In support of that contention, Appellant maintains he was entitled to a directed verdict because there is insufficient establishing the entering or remaining occurred at nighttime. See S.C. Code §16-11-311(A)(3)(2012). Appellant bases his motion on supposed deficiencies relating to (1) whether the evidence established the crimes occurred at night and (2) whether the evidence established that he entered the burglarized apartments. The trial court correctly denied the motion for directed verdict where substantial circumstantial evidence established that the burglaries crimes occurred at night and that Appellant was the perpetrator. Appellant's conviction should be affirmed.

When presented with a motion for a directed verdict, the trial judge 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). 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 judge's ruling. State v. Cherry, 361 S.C. 588, 593-594, 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).

Here, the State presented substantial circumstantial evidence that the burglaries occurred at night. In fact, there is no evidence that the burglary occurred any time other than at night. Horton's estimate of leaving home around 6:30 or 7:00 pm, a time after sunset in late February, was the earliest time frame given for the burglaries.[2] When Horton left home, her window was open with screen intact and her wallet was inside the house. Mitchell's affirmation that the sun was setting when she left home and that her home was undisturbed when she left leads to the inference that the burglary of her home occurred after sunset. Mitchell also stated she had been away from home for at most 2 hours when police telephoned her. While she believed that she received the call around 9:30 pm, she had to have received the call after the police were dispatched at 10:25 pm. Therefore, it may be inferred that Mitchell may have left home even later.

The night time frame is even more solidly supported by the testimony of Johnson and Jacobs. Jacobs guessed that he returned home at 8:00 or 9:00 pm. (R. p. 21) He further noted that outdoor lights illuminated Appellant when Appellant approached an apartment door and dome lights shone on Appellant while he rifled through the white car. (R. p. 22; p. 24) The need for lights leads to an inference that it was dark outside. Johnson first saw the accused empty handed and then later saw the accused with trash bags full of

[2] Data regarding the time of sunset was not presented at trial. Nonetheless, an appellate court can take judicial notice of something that was not before the trial court if it is indisputable. Wise v. Wise, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011); Masters v. Rodgers Development Group, 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984).The U.S. Naval Observatory Astronomical Applications Department lists sunset on February 25, 2012, in Charleston, South Carolina, at 6:13 pm and lists end of civil twilight at 6:38 pm. (http://aa.usno.navy.mil/data/docs/RS_OneDay.php)

bulky items just before calling police. It may therefore be inferred that the burglary of Mitchell's apartment occurred in between those sightings. Johnson immediately phoned police and narrated what he saw as the man carried a bag and clicked Mitchell's key fob in the air. Police were dispatched while Johnson was on the phone. Therefore, it is likely that the burglaries occurred just before the 10:25 pm dispatch. Appellant's vehicle was stopped within minutes of leaving the complex while Johnson was still on the phone. Teich's note that he saw the vehicle in his headlights and his concern for the infant in the cold night air reaffirm that the stop occurred after dark.

Appellant also argues that there is a lack of evidence placing him inside the apartments. A screen was removed from the window of Horton's apartment and a wallet was removed after she left her home. The wallet was found in Appellant's possession within a short time of the burglary as he left the apartment complex. It may be inferred that the person entered through the screen which was removed after Horton left home in order to gain entry. Appellant's possession of the wallet within the immediate time and vicinity of the taking leads to the inference that he was the person who went inside the apartment and removed it.

Marks on Mitchell's door indicated forced entry. Johnson saw Appellant not carrying anything in a neighboring breezeway. Within minutes, the time it took him to pour a glass of wine and walk onto his balcony, Johnson heard noises in the vicinity of Mitchell's apartment. Johnson immediately saw Appellant was seen carrying a bag of items and clicking Mitchell's key fob in the air. Johnson described the noise as akin to someone taking out the recycling. Among the stolen items in the bag were bottles of wine. A bag containing wine bottles and other objects would logically make a sound like that of someone taking out recycling. This leads to the inference that the noise Johnson

heard was Appellant leaving Mitchell's apartment with the stolen items. The stolen items were found in Appellant's possession within minutes of the sighting. All of this leads to the inference that Appellant was the person who entered the apartment and took the items. This inference is further supported by the presence of tools in the vehicle which could have been used to enter.

Further, Appellant's larcenous intent was on full display when Jacobs and Johnson saw him use the stolen key fob to gain unauthorized entry into Mitchell's car. It is logical to infer that if Appellant intended to gain unlawful access to Mitchell's car by using the stolen key fob, he would be likely to gain unlawful access to the home from which the key fob was stolen. His use of the key fob to commit a further crime forecloses any innocent explanation for his possession of the stolen goods.

Appellant's case differs from the cases of Odems v. State, 395 S.C. 582, 720 S.E.2d 48 (2012); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000); and State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), most fundamentally in that the circumstantial evidence in Appellant's case places him *at the specific scene* of the burglaries *during the narrow time frame* in which the crimes were committed. Appellant matched a specific physical description, occupied a vehicle as described and later identified, and was in possession of the items taken just moments before. The items found in Appellant's possession were removed within the same time frame as evidence of forced entry. Additionally, the direct evidence that Appellant used victim Mitchell's stolen key fob to break into her car negates any other reasonable explanation for the circumstances. See Odems at 591, 720 S.E.2d 53 ("However, substantial circumstantial proof of Petitioner's involvement in one of the four offenses would prove Petitioner's involvement as to all offenses.")

While Odems v. State, 395 S.C. 582, 720 S.E.2d 48 (2012) may seem to share similarities with Appellant's case, it varies in certain crucial elements. In Odems, an individual telephoned police as she observed two men get out of a brown car and knock on her cousin's door. As the witness continued to observe, she later saw one of the men place something in the trunk of the car. An hour and a half lapsed before officers stopped three men in a brown Cadillac. The location of the traffic stop was not connected to the burglary. Shortly after the driver revealed he had a suspended license, all three men fled on foot. One of the passengers, Odems, knocked on a stranger's door a short time later, explaining he needed a ride. The woman offered to let him use her phone. Odems told the woman that if police came she should tell them he was her boyfriend, explaining,

> 'he was with somebody that didn't have a driver's license or that had a suspended driver's license and that the person had gotten pulled over and that he didn't want to get in any trouble.'

Id. at 585, 720 S.E.2d 49. Police arrived and found the driver of the brown Cadillac and the other passenger hiding in the back yard. A search of the Cadillac yielded several items stolen from the victim's home in the trunk, out of view of the passenger area. Fingerprints collected from the car and stolen goods belonged to the driver and other passenger but not Odems. The driver testified he picked Odems up after the burglaries without telling him what they had just done. The other passenger admitted he was with the driver during the burglaries and Odems was with them when they were stopped by police, but he never gave any statement implicating Odems.

The present case is readily distinguishable. The Appellant was captured just as he completed the burglaries (as opposed to the hour and a half time lapse between the burglary and the traffic stop in Odems). Appellant was stopped as he left the premises

burglarized (as opposed to an unrelated location in Odems). Appellant was identified as the person being seen in the area of the crimes (as opposed to the scant description of two, not three, individuals in Odems). Appellant was the person seen putting stolen items in the trunk, and some of the stolen items were found in a coat Appellant was sitting on (as opposed to Odems where the items were in the trunk and fingerprints linked them only to the other two occupants). Appellant was identified using the stolen key fob to open a vehicle (as opposed to fingerprints relating only to the other occupants of the vehicle in Odems). There is also direct evidence of Appellant breaking into victim Mitchell's vehicle as the event was witnessed by both Johnson and Jacobs. The circumstantial evidence in Appellant's case is markedly greater than the evidence presented in Odems.

Appellant cites to State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000) in support of his contention that he was entitled to a directed verdict. Mitchell was a case based entirely on circumstantial evidence. However, the circumstances were much different than those in the case at bar. In Mitchell, the victim had 10 bottles of beer in his refrigerator at lunchtime one day, but when he came home all 10 bottles were gone. Six days later, the victim discovered broken glass in a spare bedroom. Pushing the blinds back, he discovered the window was broken. At that point, the victim checked his valuables and determined that two guns were missing. The victim then reported the incidents to police. When the police arrived the following day, they found the glass from the window had been somewhat swept up inside the home. They found no glass outside. They did find a window screen from which they developed the defendant's fingerprint. The defendant had been a guest in the victim's home on several prior occasions. The Mitchell court found that in the absence of any evidence of when the screen had been

removed or whether the screen was in place when the window was broken, the fingerprint did not prove entry where Mitchell "had been in and around the victim's house at least three times prior to the burglary." Id. at. 409, 535 S.E.2d 126, 127.

In Mitchell, the circumstantial evidence failed to establish a specific time frame or even a temporal connection between the broken window and the missing beer and guns. In contrast, Appellant was seen fleeing the vicinity of victim Mitchell's apartment with a bag and clicking Mitchell's key fob in the air. He was stopped minutes later and was found to be in possession of items from Mitchell's and Horton's apartments. The burglaries occurred no earlier than 6:30 or 7:00 pm when Horton left her home with her window screen intact or no earlier than sunset when victim Mitchell left her home without tool marks on the door and no later than the 10:25 dispatch. Appellant was placed at the scene of the burglaries within a short time frame and circumstances indicated the breaking occurred at the same time the items went missing. Further, where the defendant in Mitchell had been an invited houseguest at the property, thereby providing an innocent explanation for why his fingerprint would be found, Appellant had no history of visiting the Peninsula Condos or, more specifically, the victims.

Finally, in State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), the victim's body was discovered after a fire in her home. She had also suffered a blunt force injury, but the weapon used was never found. Several items belonging to the victim were found in a burn pile on neighboring property belonging to Bostick's mother. Bostick's mother denied using accelerants for the burn pile, but accelerants were found. Bostick's clothing and shoes were found to have blood on them, but DNA analysis was inconclusive. A pattern of gasoline was also noted on Bostick's shoes. The victim's son last visited her home approximately an hour before returning to find the home in flames. Bostick

testified he was at a cookout then napped at his mother's house. Bostick stated the sirens of the emergency responders awoke him. Bostick's family members testified that the victim's son showed little emotion when his mother's remains were found, and the two had argued the day before. While evidence was presented that the victim had money in her home on Sundays, there was no evidence that Bostick was aware of this. No evidence regarding the contents of a briefcase found in the victim's home was presented.

Again, Bostick is a stark contrast to Appellant's case. There was no evidence Bostick used or had control of the burn pile in his mother's yard about a quarter of a mile away (where in the present case the stolen items are directly linked to Appellant and were in his control in the coat and trunk of the car). No evidence placed Bostick at the victim's home at any time (where in the present case evidence places Appellant just outside the door of the burglarized apartments at the crucial time). Further, nothing indicated the items in the burn pile were missing in connection with the victim's death (where in this case the items in Appellant's possession were in the homes of the victims just before the break-ins).

In sum, Appellant's case is readily distinguishable from the cases of Odems, Mitchell, and Bostick. Appellant was specifically placed at the location at the time of the burglaries, even just outside the door of one apartment. He was found to be in possession of the stolen items just outside the apartment complex within minutes of his crimes. The apartments were undisturbed and the items in Appellant's possession were safely inside the victim's homes when they left at sunset. The signs of forced entry (Horton's removed window screen and the tool marks on Mitchell's the door) coincided with the items being removed from the homes. Further, there was direct evidence Appellant used the key fob removed from victim Mitchell's apartment to gain access to her car. The car breaking

provides additional circumstantial evidence of the burglaries and negates any reasonable alternative explanation for his possession of the goods or presence at the Peninsula Condos. This certainly amounts to substantial circumstantial evidence of his guilt, and the trial judge correctly denied Appellant's requests for directed verdict and submitted the burglary charges to the jury.

II.

Under the totality of the circumstances, even though a show-up identification procedure was utilized, the identification was nonetheless reliable such that no substantial likelihood of misidentification existed.

Jacobs identified Appellant during a show-up identification. The trial court noted that single person show-ups are highly suggestive in nature but found that the identification nonetheless bore indicia of reliability and denied Appellant's motion to suppress Jacobs' identification.[3] (R. pp. 15-16) "Generally the decision to admit an eyewitness identification is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion, or the commission of prejudicial legal error." State v. Brown, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App. 2003)

In Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972), the United States Supreme Court reviewed its prior opinions addressing the admissibility of eyewitness identification and created a two-step analysis for determining whether due process requires the suppression of an eyewitness identification. As stated in State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012):

> 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 identification was nevertheless so reliable that no substantial likelihood of misidentification existed.

[3] Jacobs did not identify Appellant in court. Therefore this analysis is limited to the admissibility of testimony regarding the out of court identification.

"Suggestiveness alone does not mandate the exclusion of evidence." State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000). If an identification procedure is found to be unduly suggestive, the court should consider the totality of the circumstances in determining whether the identification was nevertheless reliable such that no substantial likelihood of misidentification existed. Id. Five factors have been enumerated for consideration in this second step:

> 1. The witness's opportunity to view the perpetrator at the time of the crime,
> 2. The witness's degree of attention,
> 3. The accuracy of the witness's prior description of the perpetrator,
> 4. The level of certainty demonstrated by the witness at the confrontation, and
> 5. The length of time between the crime and the confrontation.

Id.; Manson v. Braithewaite, 432 U.S. 98, 114, 97 S.Ct. 2243 (1977). "

Show-up identifications, though suggestive,

> ...may be proper where they occur shortly after the alleged crime, near the scene of the crime, as the witness's memory is still fresh, where the suspect has not had time to alter his looks or dispose of evidence, and the show-up may expedite the release of innocent suspects and enable the police to determine whether to continue searching.

State v. Govan, 372 S.C. 552, 643 S.E.2d 92 (Ct. App. 2007).

In the present case, the trial court correctly determined that the show-up procedure was unduly suggestive but nonetheless bore sufficient indicia of reliability such that no likelihood of misidentification existed. The trial court's finding is well-supported by the evidence. In particular, Jacobs had a good opportunity to view Appellant in the white car and in the breezeway, gave an accurate description, was certain

of his identification, and the show-up occurred shortly after the crime while Jacobs' memory was still fresh.

Jacobs had a good opportunity to view Appellant both in the white car and in the lighting of the breezeway. Jacobs took note of the man in the white car:

> It looked like the person in the vehicle owned it. They were just - - the door was open. The dome light was on. They looked like they were searching for something in the middle compartment there of the car.

(R. p. 9; p. 22) Jacobs observed Appellant as he walked by the vehicle, estimating that he was approximately 2-3 feet away from Appellant. (R. p. 9) He passed Appellant when he initially came home and again when taking the dog out. (R. pp. 9-10) He had time to get a good look at the man's face and clothing. (R. pp. 9-10, pp. 22-23) He also observed the man walk up to the apartment below Jacobs' and check the door. (R. p. 24) Jacobs noted that the breezeway is well-lit as there is an overhead light near the apartment door which gave him a very clear view of the man. (R. p. 8, p. 22, p. 24) It appeared to Jacobs that the man checked the door to see if it was locked. (R. p. 24) Jacobs then observed Appellant get into an older model blue Chevrolet Cavalier parked nearby and leave. (R. p. 10) He was able to observe that a white female with brown hair in a ponytail was driving the Cavalier. (R. p. 10)

While Jacobs had no particular reason to pay careful attention to the man, Jacobs described himself as a normally attentive person, someone who tries to be aware of his surroundings. (R. p. 13) Jacobs appears to have been attentive in this matter as the information he gave coincided with Appellant at the time of his arrest. In addition to accurately noting the blue car and its driver, Jacobs was able to give an accurate description of the man he had seen, describing a black male, around 6 feet tall and 200

pounds wearing a white fleece top and dark blue jeans. (R. p. 14) See State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (Ct. App. 2003) (noting accuracy of description where witness described man riding a bicycle wearing a blue coat with a black backpack).

After returning to his apartment, Jacobs saw blue lights outside. (R. p. 24) Jacobs saw police officers with flashlights near the white car. (R. p. 10, pp. 24-25) Jacobs informed the officers that he had seen the man who he believed owned the car earlier, but the man had left with someone else. (R. p. 11, p. 25) Officers asked Jacobs to accompany them to attempt to identify the individual. (R. p. 11) Jacobs was brought to the Lowe's parking lot where Appellant had been pulled over. (R. p. 11, p. 25) Jacobs stated that "it wasn't terribly long, maybe 30, 40 minutes" between the time he saw Appellant initially and the identification at Lowe's. (R. p. 26) This immediate time frame also weighs in favor of admissibility. State v. Govan, supra. (trial court did not abuse its discretion in admitting show-up identification conducted within 45 minutes of robbery).

Jacobs' level of certainty also weighs in favor of admission. Jacobs identified Appellant without hesitation as the man he had seen in the white car earlier. (R. pp. 11-12, p. 126) Jacobs was very certain of his identification, rating his certainty on a scale of one to ten, a "ten out of ten." (R. pp. 11-12, p. 26, p. 28) Jacobs recognized Appellant not only by his facial features but also by his clothing, a "white sweater pullover and dark jeans." (R. p. 12)

Based on the foregoing, the trial court did not abuse its discretion in finding Jacobs' identification admissible. While a show-up identification may be inherently suggestive, under the circumstances of this case there is not a very substantial likelihood of irreparable misidentification, and the matter was properly submitted to the jury.

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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May 20, 2015

STATE OF SOUTH CAROLINA

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Appellant.

CERTFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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May 20, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County
The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-000978

THE STATE,

Respondent,

v.

SHAWNDELL McCLENTON,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Final Brief of Respondent on Appellant by depositing one copy of the same in the United States mail, postage prepaid, addressed to each of his counsel of record, Joshua B. Raffini, Esquire, Pruitt & Pruitt, 101 N. Murray Avenue, Anderson, SC 29625, and Robert M. Dudek, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211-1589.

I further certify that all parties required by Rule to be served have been served. This 20th day of May, 2015.

Anne Mueller

ANNE MUELLER
Legal Assistant

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