STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions
Steven H. John, Circuit Court Judge

Appellate Case No. 2015-000184

THE STATE,.....RESPONDENT

v.

DEREK VANDER COLLIER.....APPELLANT.

INITIAL BRIEF OF RESPONDENT

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2. The trial court properly found Appellant's statements to police were given freely and voluntarily.

3. The trial court properly admitted Kirkman's in-court identification of Appellant where the evidence presented, including the sketch of the suspect created using Kirkman's description, shows: (1) the photo lineup was not unduly suggestive; and (2) based on the totality of the circumstances, the lineup identification was so reliable that there was not a substantial likelihood of Kirkman misidentifying Appellant as the burglar.

STATEMENT OF THE CASE

On February 10, 2014, Appellant was indicted for possession of a weapon during the commission of a violent crime (2014-GS-26-01540) and burglary, second degree (2014-GS-26-01540). On December 9, 2014, Appellant proceeded to trial before the Honorable Steven H. John. Joshua Holford, Esquire, and Johnny Gardner, Esquire represented Appellant; and Assistant Solicitors George Debusk, Jr., Esquire, and W. Grayson Ervin, Esquire, represented the State. After beginning the trial and discovering the State failed to request a Neil v. Biggers[1] hearing to determine whether witness Justin Kirkman could make an in-court identification of Appellant, the trial judge granted Counsel's motion for a mistrial.

The State recalled the case to trial the following day, December 10, 2014, and conducted a Neil v. Biggers hearing. Appellant was convicted of the burglary charge as indicted, but acquitted of the possession of a weapon charge. The trial judge sentenced Appellant to thirteen years' incarceration.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

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

STATEMENT OF FACTS

On November 20 and 21, 2013, the Jamaican Motor Inn ("the Jamaican")—one of the four buildings of the Caribbean Resort complex in Myrtle Beach—was closed so that the doors to the rooms could be painted. Justin Kirkman was one of two subcontractors hired to complete this task, and also to stay behind and monitor the building as the painted doors were required to stay open until they dried. Shortly after midnight on November 21, Kirkman had just completed one of his semi-hourly patrols of the building when he heard a door shut. Knowing that no one else was supposed to be in the building, Kirkman began checking the building when he noticed the lights were on in room 309. Kirkman, who had kept the lights off in all of the rooms of the hotel, because suspicious and decided to check the room. When he opened the door, he discovered Appellant trying to remove the room's TV from its wall mount. When pressed for an explanation of his actions, the man mumbled he was looking for a man named Todd. When pressed with further questions, the man pulled out a handgun. Kirkman quickly left the room and went to the left. Shortly thereafter, Appellant left the room with his hood up. (Tr.p.225, line 23–Tr.p.226, line 12; Tr.p.229, line 24–Tr.p.230, line 7; Tr.p.239, line 9–Tr.p.242, line 13).

Kirkman "waited a minute" before following Appellant and followed him to the parking lot. When Kirkman arrived, Appellant sped past him in "what looked like [a] gold or silver four-door sedan," which he believed to be a Saturn. He noted that in addition to Appellant, a TV was in the car. Kirkman chased after the car in an attempt to get its license plate number, but was unsuccessful. Kirkman immediately called 911 and informed the operator about what had transpired. Kirkman met with responding officers

and informed them about the crime. Approximately one week later, Kirkman met with a police sketch artist and helped her developed a sketch of Appellant. (Tr.p.244, line 8–Tr.p.245, line 21; Tr.p.247, line 4–Tr.p.249, line 13; State's Exhibit 12).

Approximately one month after the crime, officers called Kirkman and asked him to view a photo lineup. Notably, Appellant's picture was the second photo. Kirkman told officers he was "fairly certain" Appellant was the burglar he had seen, but that he could not be "100 percent" certain because of the poor quality of the photos,[2] and he was concerned that if he made a mistake an innocent man could be incarcerated. However, Kirkman told the officers that if he saw Appellant in person, he would be absolutely certain whether Appellant was the burglar he had seen at the Jamaican. (Tr.p.249, line 17–Tr.p.251, line 5).

Late on January 29, 2014, or early on January 30, 2014, Detective Brian Truex observed Appellant walking and stopped him pursuant to the warrants[3] officers obtained for his arrest. After he was stopped, Appellant provided Detective Truex with a false name to evade arrest. After confirming Appellant's identity, Detective Truex placed him under arrest and transported him to the Myrtle Beach Police Department. Approximately five to ten minutes after the arrest, Dectective Truex began interviewing[4] Appellant. Appellant informed the detective he had smoked crack cocaine approximately forty-five minutes prior to the interview ("First Interview"). However, Appellant did not appear to be under the influence of any drugs; he was articulate, able to answer Detective Truex's

[2] At trial, Kirkman testified Appellant's lineup photo was "black-and-white, fuzzy, not of great quality . . . ." (Tr.p.271 line 23–Tr.p.272, line 2).

[3] In addition to the burglary involved in the instant case, Appellant was also arrested for "dozens" of burglaries at other hotels in the area. (Tr.p.45, lines 2–12; Tr.p.47 lines 1–3; Tr.p.77, lines 6–8).

[4] Detective Carol Allen, who conducted later interviews with Appellant, was also present for part of the First Interview. (Tr.p.317, lines 18–20).

questions in an appropriate manner, was able to provide specific details for each of the burglaries for which he was being investigated, and did not appear to be uncomfortable in any way. In fact, Appellant specifically informed Detective Truex that the crack cocaine was not influencing his decisions and was adamant about proceeding with the First Interview at that time despite Truex's offer to return later. During the interview, Appellant made incriminating statements about the burglary. (Tr.p.45, lines 2–12; Tr.p. 296, line 4–Tr.p.299, line 13; Tr.p.300, line 16–Tr.p.301, line 3; Tr.p.303, line 23–Tr.p.304, line 9; State's Exhibit 17).

Detective Carol Allen conducted two additional interviews with Appellant: one on January 30, 2014 (Second Interview) and one on January 31, 2014 (Third Interview). Notably, Appellant initiated contact and requested the third interview. During this interview, Appellant made additional incriminating statements. At trial, the State only introduced the First and Third Interviews into evidence. (Tr.p.312, line 11–Tr.p.316, line 9; State's Exhibit 18)

ARGUMENT

I.

The trial court properly found Counsel failed to timely object to the State's alleged bolstering of witness Kirkman's credibility during the State's closing argument, and properly limited Counsel's further allegations that Kirkman had an improper motive to lie, based upon the trial court's earlier ruling denying the State's request to introduce Kirkman's prior consistent statements in exchange for Counsel abstaining from arguing or implying Kirkman had an improper motive.

A. Factual and Procedural History

Approximately five years prior to Appellant's trial, Kirkman was convicted of burglary and non-aggravated robbery in Colorado and was sentenced to ten years' probation on those charges. The State initiated discussion of these charges during its direct examination of Kirkman. During cross-examination, Counsel questioned Kirkman's comments to police, challenging: (1) his description of Appellant; (2) his ability to observe the crime, based on the time of night and available light sources; (3) his failure to inform officers that Appellant had a TV in the back of his vehicle; and (4) his description of the car, notably its make and paint color. (Tr.p.238, lines 5–19; Tr.p.257, line 14–Tr.p.259, line 2; Tr.p.260, line 2–Tr.p.262, line 22).

Counsel also engaged in a line of questioning which cast doubt on the truthfulness of Kirkman's story, implying Kirkman was the actual burglar that night. The relevant portion of the exchange proceeded as follows:

> Q: And you're currently on probation?
>
> A: Yes, sir.
>
> Q: And if you were to commit another crime, that probation could be revoked, couldn't it?

. . .

Q: How much time is over your head?

A: Five years.

Q: So you're looking at a possible five years in prison if you are convicted of another crime?

A: That is correct.

. . .

Q: And you certainly didn't have a right to take a TV from that -- from the Jamaican, did you?

A: No, sir.

Q: And if you were caught taking the TV from Room 310 or from any other room in the Jamaican and it was reported you were the only one there, you could be facing possible charges?

A: That is correct.

Q: Which would revoke your probation?

A: Yes, sir, if someone charged me with that.

. . .

Q: And you go up for a review of your probation in June, right?

A: Yes, sir.

Q: It'd be good to have someone like the State on your side during the review, wouldn't it?

A: I think my five years of excellent behavior and working hard to become a good citizen, I think that would speak for -- enough for myself.

. . .

Q: And again, if the hotel found out a TV was missing and you were the only one there and you were arrested for that, you'd face five years in jail?

A: Yes, sir.

(emphasis added). At the conclusion of cross-examination, the trial judge had the jury leave the courtroom, and the State moved to introduce a recorded interview with Kirkman as a prior consistent statement, due to Counsel's questions implying Kirkman fabricated the details of his testimony. Counsel objected to using the prior consistent statement, arguing the use of the statement would be bolstering, and that Appellant's own questions were generalized about what Kirkman "knows and [did not] know." (Tr.p.255, line 24–Tr.p.257, line 5; Tr.p.259, lines 17–24; Tr.p.263, lines 20–23; Tr.p.263, line 25–Tr.p.265, line 8).

The trial judge disagreed, and noted Counsel asked Kirkman "very specific" questions regarding details of the report he made to police and details about the crime. After listening to the recording of the prior consistent statement, Counsel admitted he challenged the details of Kirkman's description of the Saturn, and that the State could only play the portion of the statement involving the vehicle's description. The State disagreed with Counsel's characterization of his cross-examination and claimed that Counsel also attacked Kirkman's description of Appellant to police, as well as the amount of time Kirkman was able to observe Appellant. (Tr.p.265, line 10–Tr.p.267, line 12).

The trial judge found, pursuant to Rule 801, SCRE, and State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003), that although Counsel's questions about Kirkman's prior inconsistent statement called his credibility into question, Counsel's questions did not rise to the level of charging the witness with recent fabrication or improper influence or motive. The trial judge further stated:

> The only argument that I can see is if [Counsel] is attempting and will attempt in the future through other

> witnesses [and arguing] at closing an improper influence or motive and that . . . to save himself from a probation violating that he is lying now to save himself . . . . So, if it's the [intention] of [Counsel] to make that argument to the Jury that this witness is lying to save himself from going back to jail, then I am going to allow the statement, because that is an argument by [Counsel] of improper influence or motive.

After conversing with Appellant, Counsel stated it was not their intention to argue Kirkman's testimony was the result of an improper influence or motive. Accordingly, the trial judge found the State was not permitted to introduce Kirkman's prior consistent statement pursuant to Rule 801, SCRE. (Tr.p.267, line 13–Tr.p.269, line 21).

On redirect, the State asked Kirkman whether revocation of his probation was "tremendous incentive to tell the truth," to which Kirkman replied in the affirmative. Kirkman, when specifically questioned, also denied stealing televisions from the Jamaican. (Tr.p.270, lines 19–24).

During its closing, the State repeatedly commented on Kirkman's testimony. The most notable of the State's comments were:

> What was [Kirkman's] motivation to give his statement, he was doing his job, his job was to patrol that hotel and make sure nobody took the stuff. . . . What further motivation does [Kirkman] have to tell the truth? . . . If he were to be convicted of lying to the police or lying to the [c]ourt, he would go to jail, he could go to prison. He has a lot of incentive to tell the truth . . . Again, everything [Kirkman] says lines up with the rest of the testimony, lines up with the admissions of [Appellant] himself. [Kirkman] has no motivation to lie. [He] is a reliable witness.

Counsel failed to object to these comments during and after the State's closing. (Tr.p.373, lines 8–23; Tr.p.376, lines 13–19; Tr.p.377, lines 5–8).

During closing, Counsel attacked Kirkman's general credibility and reliability. However, at one point, Counsel attempted to imply Kirkman had an improper motivation for testifying. Notably, Counsel stated: "You tell me who has got motivation. Justin Kirkman has motivation, already convicted felon already on probation." The State immediately objected, and the jury exited the courtroom so the parties could discuss Counsel's comments. Based on the open attack on Kirkman's credibility, the State moved to reopen the case so that it could introduce his prior consistent statement into evidence. Counsel objected, claiming that they should not be precluded from attacking Kirkman's credibility and reliability. (Tr.p.389, line 6–Tr.p.390, line 20).

The trial judge berated Counsel, and noted that the reason he did not permit the State to play Kirkman's prior consistent statement was because Counsel promised they would not imply Kirkman had an improper motive for testifying. Counsel insisted they were not implying Kirkman had an improper motive, and that the State had improperly bolstered Kirkman's testimony by stating Kirkman would face perjury charges if he was lying. Accordingly, Counsel contended the State opened to the door to the discussion of Kirkman's motivation. However, the Court quickly noted that Counsel failed to timely object to the State's alleged "bolstering" and were thus unable to address that issue at that time. (Tr.p.390, line 21–Tr.p.393, line 21).

After hearing additional arguments from both parties about reopening the case to allow the prior consistent statement into evidence, the trial judge noted he had the authority to grant the State's motion to reopen the case and introduce the prior consistent statement, but decided against doing so. However, he noted Counsel was making arguments to the jury that the trial judge "had clearly indicated [Counsel] [were] not to

make," because they had chosen to not make said arguments in exchange for the exclusion of the prior consistent statement. Accordingly, the trial judge ordered Counsel to abstain from any further arguments regarding Kirkman's motive but allowed counsel to attack Kirkman's credibility in any other way. (Tr.p.393, line 25–Tr.p.397, line 15).

B. Analysis

Appellant argues the trial judge erred in limiting Appellant's closing argument and preventing him from responding to the State's "bolstering" of Kirkman's credibility. The State disagrees with Appellant's allegation of error; the State's arguments were not bolstering as defined by South Carolina law, and Counsel failed to timely object to the State's comments. Additionally, Counsel: (1) implied Kirkman had an improper motive during cross-examination, prior to the trial judge's ruling limiting the scope of his attack; (2) was given the opportunity to respond to the State's comments, but elected not to do so in exchange for the trial judge preventing the State from introducing Kirkman's prior consistent statement; and (3) was permitted to, and did, attack the general credibility of Kirkman on cross-examination and during his closing arguments.

The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed absent a prejudicial abuse of discretion. State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007); see State v. Heath, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958) ("Necessarily the conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Pursuant to the trial judge's discretion regarding the manner in which a criminal trial is conducted, a trial judge has the discretion to control the time at which the testimony will be introduced, to reopen the evidentiary record, and to allow additional evidence or testimony to be presented. State v. Humphery, 276 S.C. 42, 43, 274 S.E.2d 918, 918 (1981); see State v. Clyburn, 16 S.C. 375, 378 (1882) ("The conduct of a case in the Circuit Court, so far as relates to the time when testimony may be introduced, must be left to the discretion of the Circuit judge, to be governed by the particular circumstances of each case."). Critically, "[a] trial is a search for the truth; concomitantly, liberality is the linchpin of the rule." State v. Wren, 322 S.C. 103, 105, 470 S.E.2d 111, 112 (Ct. App. 1996).

Likewise, decisions as to whether to admit or exclude evidence are generally left to the sound discretion of the trial judge. State v. Groome, 274 S.C. 189, 190-91, 262 S.E.2d 31, 32 (1980). As a result, an appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.").

"A solicitor's argument concerning the credibility of the State's witnesses based on the record and its reasonable inferences is not error." State v. Caldwell, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990). However, "[a] solicitor's closing argument must not appeal to the personal biases of the jurors," and further "may not be calculated to arouse the jurors' passions or prejudices." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Improper vouching or bolstering "occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony." State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001).

Under South Carolina law, a witness's prior consistent statement may be used as substantive evidence to rehabilitate a trial witness. State v. Foster, 354 S.C. 614, 621, 582 S.E.2d 426, 430 (2003). However, such a statement is admissible under Rule 801(d)(1)(B), SCRE or is not admissible at all. Id. To be admissible, a consistent statement must be "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication or before the alleged improper influence or motive arose." Rule 803 (d)(1)(b), SCRE (emphasis added).

Conduct that would otherwise be improper may be excused under the "invited reply" doctrine if a party's conduct was an appropriate response to statements or arguments made by the opposing party. United States v. Young, 470 U.S. 1, 13 (1985); Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004). However, the invited response doctrine, applied to a party's closing arguments, is not used to justify the use of

improper comments, but merely to determine their effect on the trial as a whole. See Vaughn, 362 S.C. at 169, 607 S.E.2d at 75. In fact, the better policy, rather than allowing invited responses to another party's inappropriate comments during closing, is to object to the opposing party's improper statements along with a timely warning and curative instruction to the jury. See Young, 470 U.S. at 13. Failure to make a timely objection to inappropriate closing arguments fails to preserve such issues for appellate review. See id.

Initially, the State notes Appellant's argument is not preserved because Counsel failed to timely object to the State's closing arguments. See id. Furthermore, even if the State's comments were inappropriate, they did not justify Counsel making their own inappropriate comments. See Vaughn, 362 S.C. at 169, 607 S.E.2d at 75.

Moreover, the State's comments about Kirkman's motive did not constitute bolstering. The State's argument that Kirkman had no motive to lie was based on information raised by counsel during cross-examination—that he was on probation for crimes which occurred five years prior to trial and that conviction of any crimes would result in him losing his probation—and reasonable inferences about that information—that Kirkman would not risk endangering his probation by lying to police. Discussion of facts in the record and reasonable inferences that can be drawn therefrom does not constitute bolstering. See Caldwell, 300 S.C. at 505, 388 S.E.2d at 822.

Even if the issue were properly before the Court—and the statements in question actually constituted bolstering—Appellant was not prejudiced by the trial judge's alleged error because Counsel, at several points throughout the trial, directly and indirectly alleged Kirkman had an improper motive. A cursory review of the trial transcript of Kirkman's cross-examination shows Counsel asked numerous questions which implied

Kirkman had an improper motive in reporting the burglary to police and identifying Appellant. Moreover, Counsel made a direct accusation of said improper motive during closing argument, and although the trial judge ordered Counsel to abstain from further allegations of improper motive, no corrective instruction was issued. Accordingly, the trial judge did not err.

II.

The trial court properly found Appellant's statements to police were given freely and voluntarily.

A. Factual and Procedural History

Prior to trial, a Jackson v. Denno hearing was held to determine the admissibility of incriminating statements Appellant made during his three interviews with police. Detective Truex, the officer who conducted the First Interview, testified that interview began within minutes of Appellant's arrest and arrival at the Myrtle Beach Police Department. Detective Truex recorded the First Interview, and started the recording before even bringing Appellant into the room. Detective Truex gave Appellant his Miranda[5] rights, and discovered Appellant had smoked crack cocaine approximately forty-five minutes prior to the interview. However, Appellant informed the detective that it did not influence him or impact his ability to speak with him. Detective Truex testified he had spent years interacting with individuals under the influence of drugs and alcohol, and that Appellant did not appear to be under the effects of crack cocaine at that time. Specifically, Detective Truex noted Appellant: (1) did not appear to be suffering from any physical discomfort; (2) was able to understand everything Truex stated during the interview; (3) was articulate; and (4) was able to describe facts about each of the crimes to which he was confessing, which matched up with known details of each of the crimes. Detective Truex admitted that crack cocaine could potentially impair a person's ability to make decisions. (Tr.p.38, line 4–Tr.p.42, line 4; Tr.p.43, line 23–Tr.p.45, line 17).

Counsel argued against the admission of Appellant's incriminating statements. He believed, considering the totality of the circumstances, that Appellant's use of crack

[5] Miranda v. Arizona, 384 U.S. 436 (1966).

cocaine prior to the interview impaired his judgment, his ability to appreciate the gravity of his charges, and his decision to speak with police. Counsel furthered argued Appellant's Second and Third Interviews were inadmissible because Appellant would not have requested, or given incriminating statements during, his subsequent interviews with police but for the fact he had incriminated himself during the First Interview. (Tr.p.54, line 12–Tr.p.57, line 10; Tr.p.86, line 9–Tr.p.87, line 4).

The trial judge found, based on the totality of the circumstances, that the only evidence Appellant had smoked crack cocaine prior to the First interview was his own statements to police. The trial judge also found, from listening to the recording of the First Interview, that: (1) Appellant was adequately apprised of his constitutional rights; (2) Appellant refused Detective Truex's offer to conduct the First Interview later; (3) the recording showed Appellant did not experience any kind of mental impairment during the interview; and (4) Appellant was not coerced in any way into giving his statements. When ruling on the admissibility of Appellant's Third Interview, the trial judge found Appellant's will was not overborne, and that he did not find "anything in the record that would indicate that [Appellant's statements] [were] anything but voluntary . . . ." He further found the State had shown, "by the greater weight of preponderance of the evidence," that Appellant's statements were given freely. (Tr.p.60, line 4–Tr.p.62, line 8; Tr.p.88, line 6–Tr.p.90, line 21).

B. Analysis

Appellant argues the trial judge erred in finding Appellant's statements to police were freely and voluntary given because Appellant was under the influence of crack cocaine during the First Interview, which made him desperate to do anything to get out of

jail, including making incriminating statements to Detective Truex. Appellant further contends that the incriminating statements he made during the Second and Third Interviews were involuntary as a result of his First Interview statements. The State disagrees with Appellant's allegations of error; the State provided substantial evidence to the trial judge showing that Appellant's faculties were not meaningfully affected by any crack cocaine he may or may not have consumed, and that under the totality of the circumstances his First Interview statements were knowingly, intelligibly, and voluntarily made.

The process for ascertaining whether a statement is voluntary is bifurcated because the process involves determinations by both the trial judge and the jury. State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (Ct. App. 2007). Initially, the trial judge must conduct an evidentiary hearing in the absence of the jury. Id. At this phase of the proceedings, the State must show the statement was voluntarily made by a preponderance of the evidence. Id. If the trial court determines the State met its burden, the statement is submitted to the jury where its voluntariness must be established beyond a reasonable doubt. Id.

This hearing is commonly referred to as a Jackson v. Denno hearing based on the United States Supreme Court's decision in that case. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). This Court has noted the following:

> Our role when reviewing a trial court's ruling concerning the admissibility of a statement upon proof of its voluntariness is not to reevaluate the facts based on our view of the preponderance of the evidence. Rather, our standard of review is limited to determining whether the trial court's ruling is supported by any evidence. Thus, on appeal the trial court's findings as to the voluntariness of a

> statement will not be reversed unless they are so erroneous as to show an abuse of discretion.

State v. Breeze, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008).

Based on the Fifth Amendment's protection against self-incrimination, the United States Supreme Court announced, "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards. . . ." Miranda v. Arizona, 384 U.S. 436 (1966). Before the accused is subjected to custodial interrogation, he or she must be informed of the right to remain silent; any statement made may be used as evidence against him or her; the right to the presence of an attorney; and if he or she cannot afford an attorney one will be appointed prior to questioning. State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App.1996).

Volunteered exculpatory or inculpatory statements arising from custodial interrogation are not barred by the Fifth Amendment. Id. The test of voluntariness is whether a suspect's will was overborne by the circumstances surrounding the given statement. Miller, 375 S.C. at 384, 652 S.E.2d at 451. In making this determination, the trial court must examine the totality of the circumstances surrounding the statement. Id.

Evidence of possible intoxication alone is insufficient to require a statement to be excluded. "Proof of accused's intoxication short of rendering him unconscious of what he is saying, does not require, in every case, that statements he made while in that condition be excluded from evidence." State v. Collins, 266 S.C. 566, 573, 225 S.E.2d 189, 193 (1976).

In State v. Saxon, 261 S.C. 523, 201 S.E.2d 114 (1973), the Supreme Court found the following:

> The fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words. Therefore, proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that he did not realize what he was saying.

Id., 261 S.C. at 529, 201 S.E.2d at 117. Evidence of intoxication will only go to the weight and credibility of the confession, but does not require the confession be excluded from evidence. Id.

C.J.S. advises as follows:

> Declarations, admissions, or confessions of an accused, otherwise voluntary, are not to be excluded merely because he or she was intoxicated at the time of making them, provided the accused had sufficient mental capacity to know what he or she was saying. Although incriminating statements are not voluntary if attributable to intoxication, intoxication alone is not sufficient to negate an otherwise voluntary act. Thus the fact that the accused's confession is taken while he or she is under the influence of alcohol is not dispositive of the issue of voluntariness. However, in some circumstances the influence of alcohol may be so severe as to render the confession involuntary.

23 C.J.S. Criminal Law § 1256.

In the instant case, Detective Truex testified he gave Appellant his Miranda rights. He informed the court that he had years' worth of experience with interacting with individuals under the influence of drugs and alcohol, and that Appellant did not appear to be under the effects of crack cocaine at that time. He specifically noted Appellant was articulate, able to describe each of his crimes, and did not appear to be in any physical discomfort. The audio recording of Appellant's First Interview corroborates Detective Truex's testimony. Therefore, the trial court's ruling is supported by evidence. See Breeze. It is also supported by lack of evidence, since there is no evidence that McNeil

was intoxicated to the point of not understanding what he was saying. See Saxon. Accordingly, the trial court did not err.

III.

The trial court properly admitted Kirkman's in-court identification of Appellant where the evidence presented, including the sketch of the suspect created using Kirkman's description, shows: (1) the photo lineup was not unduly suggestive; and (2) based on the totality of the circumstances, the lineup identification was so reliable that there was not a substantial likelihood of Kirkman misidentifying Appellant as the burglar.

A. Factual and Procedural History

During the Neil v. Biggers hearing, Detective Todd MacPherson testified Appellant became a suspect in the case after Appellant's fingerprints were found on a TV stolen from the Caribbean Resort Complex. At that point, MacPherson used the police department's database to create a photo lineup of Appellant and five similar-looking men. He printed out the lineup in grayscale, in a random order, and asked a separate officer to conduct the photo lineup so as to avoid influencing Kirkman's identification. (Tr.p.279, line 9–Tr.p.281, line 23; Tr.p.283, line 22–Tr.p.284, line 6).

Kirkman testified that during the burglary, he viewed Appellant's uncovered face in the hotel room for approximately fifteen to twenty seconds from about thirty feet away. He tentatively selected two photos from the lineup, and then narrowed his selection down to Appellant's photo. He stated he selected the photo based solely on "familiarity," and was "pretty sure" Appellant's photo showed the same man he observed burgling the Jamaican. However, Kirkman admitted he was not one hundred percent certain of his identification due to (1) the poor quality of the lineup photos, and (2) his anxiety over implicating an innocent man in the burglary, including a specific fear that he may have selected Appellant's photo because the burglar was wearing a hoodie the night

of the crime. Kirkman told officers that if he could view Appellant in person, he would be "[one] hundred percent" certain whether Appellant was the burglar. Accordingly, Kirkman testified at the hearing that the second he saw Appellant in the courtroom, he was absolutely certain Appellant was the man he observed at the Jamaican. (Tr.p.144, lines 8–18; Tr.p.146, line 16–Tr.p.149, line 6; Tr.p.158, lines 5–25).

Counsel moved to have Kirkman's photo lineup and in-court identifications suppressed, arguing: (1) the lineup was unduly suggestive based on Appellant's photo being the only one in which the subject wore a hoodie, and Kirkman's inability to identify Appellant with complete certainty at that time; (2) Kirkman's identification of Appellant in the lineup was unreliable because he only viewed the burglar's uncovered face for approximately fifteen seconds, Appellant was wearing a hoodie in the photo, it was dark outside when Kirkman viewed the burglar, Kirkman's initial description of police did not match the one given at the hearing, a year passed between the crime and Kirkman's in-court identification, and Kirkman lacked certainty during the lineup; and (3) Kirkman's in-court identification was based solely on the "suggestive" photo lineup procedure. (Tr.p.168, line 8–Tr.p.170, line 6).

The trial judge noted it was "unusual" that Kirkman did not identify Appellant's picture at the time of the lineup with one hundred percent certainty, but found Kirkman's conditional identification of Appellant in the lineup, and his testimony that, after viewing him in person, Appellant was the burglar, was persuasive. The trial judge also found Kirkman's identification was reliable, noting: (1) Kirkman testified he had a clear view of Appellant's face for at least fifteen to twenty seconds; (2) Kirkman testified the light was on in the burgled room; (3) Kirkman gave police an accurate description of Appellant;

and (4) Kirkman was fairly sure of his photo lineup identification, but absolutely sure about his in-court identification. The trial judge did not rule on admissibility of the photo lineup identification, and gave Counsel the option to use the photo lineup identification on cross-examination. Counsel accepted, and withdrew their motion to suppress the lineup evidence. Counsel then informed the trial judge that Kirkman had been present for the earlier Jackson v. Denno hearing and they were unsure of whether Kirkman's identification was influenced by hearing Appellant's inculpatory statements. The State informed the trial judge that Kirkman was present for only part of the Jackson v. Denno hearing, the portion concerning Appellant's discussion about other individuals and their crimes. (Tr.p.171, line 21–Tr.p.176, line 8).

Counsel renewed their motion to suppress the in-court identification prior to trial, which was again denied by the trial judge. (Tr.p.207, lines 4–21; Tr.p.251, lines 6–25).

B. Analysis

Appellant argues the photo lineup was unduly suggestive; he contends Kirkman's own testimony, including his statement that he was concerned he identified Appellant based on him wearing a hoodie in the lineup photo, showed that the similarity in clothing between Appellant and the burglar did affect his identification. Appellant also argues that the State did not provide evidence showing that the lineup identification was so reliable that there was no substantial likelihood of misidentification, noting: (1) Kirkman stood thirty to thirty-five feet away from the suspect at the crime scene; (2) Kirkman viewed the suspect's uncovered face for approximately fifteen to twenty seconds; and (3) the lineup was performed a month after the crime. Appellant also notes that Kirkman was present in the courtroom during the Jackson v. Denno hearing, and heard the

recordings of Appellant's inculpatory statements to police, and that Counsel failed to ask for Kirkman to be sequesetered during that hearing because Counsel was not informed that Kirkman would be making an in-court identification.

The State disagrees with Appellant's allegations of error. Initially, the State notes Appellant's issues regarding the in-court identification are not preserved for review because Counsel failed to object to the identification when it was made at trial. See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) (stating that making a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination, and requiring a party to make a contemporaneous objection when the evidence is introduced). Moreover, even if this issue were preserved for appellate review, it is without merit for numerous reasons: (1) the evidence provided at the Neil v. Biggers hearing shows Kirkman's lineup identification was based on his observations the night of the burglary, and was therefore not unduly suggestive; (2) the evidence also shows there is no substantial likelihood that Kirkman misidentified Appellant in the lineup; and (3) any issue concerning Kirkman's presence during the Jackson v. Denno hearing is not preserved for review because Counsel failed to timely object to his presence, and even it if were preserved, the evidence shows Kirkman was not present for any part of the hearing in which Appellant's inculpatory statements were discussed.

In criminal cases, appellate courts only review errors of law. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question

becomes a matter of law for the court." State v. Liverman, 398 S.C. 130, 137-38, 727 S.E.2d 422, 425 (2012). "Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000).

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). "A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification." Id.

In Neil v. Biggers, 409 U.S. 188, 198 (1972), the United States Supreme Court set forth a two-part test for courts to use in determining whether due process requires suppression of an eyewitness identification. "First, the court must determine whether the identification resulted from 'unnecessarily suggestive' police procedures." Dukes, 404 S.C. at 557, 745 S.E.2d at 139 (emphasis added). "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." Id. at 557-58, 745 S.E.2d at 139. "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.'" Id. at 558, 745 S.E.2d at 139. The defendant bears the burden of proving the identification procedure was impermissibly suggestive. Id. at 561, 745 S.E.2d at 141 ("Our supreme court has never placed the burden of disproving suggestiveness on the State. The Fourth Circuit, whose decisions regarding federal constitutional law are binding on us, has held the defendant bears the burden of proving the identification procedure was impermissibly suggestive.").

Kirkman's in-court identification did not result from an unduly suggestive photo lineup. Appellant mischaracterizes Kirkman's testimony regarding Appellant's lineup photo and the hooded sweatshirt; Kirkman testified he was fairly certain Appellant was the burglar, but expressed concern about the hoodie issue because of the poor quality of the lineup photos and his desire to avoid implicating an innocent man.

Additionally, the evidence presented at the Neil v. Biggers demonstrated that the lineup identification was reliable and that it is unlikely that Kirkman identified the wrong man. While Kirkman did express some hesitation whether Appellant's photo depicted the burglar he saw, Kirkman stated the reasons for his hesitation were: (1) the lineup photos were in black and white and of poor quality; and (2) he was concerned that if he was wrong, an innocent man might be prosecuted for the crime. However, Kirkman told officers that he would be "100 percent" certain whether Appellant was the burglar if he saw him in person. At trial, Kirkman informed the court that he was sure Appellant was the burglar "the second [he] saw his face" in the courtroom. Officer MacPherson also testified that Appellant's picture was inserted into the photo lineup because he received

information that Appellant's fingerprints were found on another TV stolen from the Caribbean Resort Complex. Moreover, given Appellant's incriminating statements to police, during which he described various details of the numerous burglaries he committed, it is unlikely Appellant identified the wrong man in the photo lineup.

The State also notes that Appellant's issue with Kirkman's presence during the Jackson v. Denno hearing is without merit. Even before Counsel knew the State would ask Kirkman to make an in-court identification, Counsel knew they wanted the State's witnesses sequestered so as not to be influenced by the trial evidence. This is clearly evidenced by Counsel's motion to sequester the witnesses immediately before trial. (Tr.p.91, line 24–Tr.p.92, line 1). Accordingly, Counsel's failure to request sequestration was solely because they failed to make a timely motion. Moreover, even if the issue were preserved, Kirkman was not present for the part of the Jackson v. Denno hearing in which Appellant's inculpatory statements were presented; Kirkman only heard Appellant's statements in which he was discussing not his own crimes, but those of other people he knew. (Tr.p.175, line 9–Tr.p.176, line 8).

Accordingly, the trial judge did not did not err and Appellant's conviction and sentences should be affirmed.

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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ATTORNEYS FOR RESPONDENT

March 28, 2016

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions
Steven H. John, Circuit Court Judge

Appellate Case No. 2015-000184

THE STATE, ...RESPONDENT

v.

DEREK VANDER COLLIER.....APPELLANT.

PROOF OF SERVICE

I, Anne Mueller, 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:

John L. Warren III, Esquire
Simmons Law Firm, LLC
Post Office Box 5
Columbia, South Carolina 29201

I further certify that all parties required by Rule to be served have been served. This 28th day of March, 2016.

Anne Mueller

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Legal Assistant

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ALAN WILSON
ATTORNEY GENERAL

March 28, 2016

John L. Warren III, Esquire
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Post Office Box 5
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RE: State v. Derek Vander Collier
Appellate Case No. 2015-000184

Dear Mr. Warren:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

William F. Schumacher, IV
Assistant Attorney General
S.C. Bar No. 100231

Enclosures

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