STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Maite D. Murphy, Circuit Court Judge

Appellate Case No. 2015-000516

THE STATE, ...RESPONDENT

v.

ARCHIE MORE HARDIN, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General
S.C. Bar No. 8729

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

DAVID M. PASCOE, JR.
Solicitor, First Judicial Circuit

140 N. Main Street, Suite 102
Summerville, S.C. 29483
(843) 871-2640

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly denied Appellant's motion for a continuance prior to trial where Appellant failed to establish the grant of any additional time would have enabled him to produce admissible exculpatory evidence or to raise additional points beneficial to his defense during trial.

2. Whether the trial court properly concluded that while the procedure used by the police was unduly suggestive, the out-of-court identification made by the three victims was nevertheless so reliable that no substantial likelihood of misidentification.

3. Whether the trial court properly admitted evidence collected during the search of Appellant's apartment where he gave written consent for the search of his apartment, he placed no specific or significant limits on the scope of that consent, and he made no unequivocal statement or act to withdraw that consent.

STATEMENT OF THE CASE

Archie More Hardin (Appellant) was indicted at the September 8, 2014 term of the grand jury for Orangeburg County for three (3) counts of kidnapping (2014-GS-38-888, -889, & -890), one count of armed robbery (2014-GS-38-891), one count of assault and battery of a high and aggravated nature (2014-GS-38-892), and one count of possession of a weapon during a violent crime (2014-GS-38-893). He was represented by Assistant Public Defenders Breen Stevens and Doug Mellard of the First Circuit Public Defender's Office. Respondent (the State) was represented by Assistant Solicitors Ashley Cornwell and Sarah Ford of the First Circuit Solicitor's Office. On February 23-27, 2015, Appellant proceeded to trial by jury pursuant to which he was found guilty as charged. He was sentenced by the Honorable Maite D. Murphy to thirty (30) years' concurrent imprisonment for each count of kidnapping, thirty (30) years' concurrent imprisonment for armed robbery, twenty (20) years' concurrent imprisonment for assault and battery of a high and aggravated nature, and five (5) years' consecutive imprisonment for possession of a weapon during a violent crime, for an aggregate sentence of thirty-five (35) years' imprisonment. (R.p.719-735; R.p.716-p.717). Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

As described by the solicitor in her opening statement, what started as a normal morning at the T-Mobile store in Orangeburg on May 16, 2014, soon turned into a terrifying day for three employees when the store was robbed by two, armed men. Shortly after 10 a.m., Appellant entered the store and talked with employee Jarron Weaver about getting an iPad for his daughter. He said he was going outside to call his wife and reentered a few minutes later to discuss getting his credit checked for the purchase. Appellant then left a second time; however, after the only other customer exited the store, he and another man came in waving guns while wearing masks and gloves. They pointed the guns at Weaver, forced him and the store manager, Thomas Sims, the back of the store, and then ordered them to the ground. The robbers used duct tape to bind Waver's and Sims' hands behind their backs and their feet together. They then retrieved a third employee, Kirstie Berry, from behind the store where she had gone out to smoke a cigarette. Appellant punched Berry in the face, grabbed her by the hair, pulled her back into the store, and ordered her to the ground. He pistol whipped Berry in the back of the head and then duct taped her hands and feet.

Appellant and the other man ransacked the storage room and started filling two black bags with telephones, electronics, and other items. They exited the back of the store where two witnesses saw them jump a fence and drive off in a gray car. In addition to the items from the store, the robbers also stole Sims' book bag which contained a personal iPad which had the "Locate my iPad" app. By activating the app using Sims' father's phone, the police tracked the stolen iPad to an apartment in Columbia. When they arrived, they found a gray, four-door Toyota parked in front of an apartment and saw Appellant coming out towards the car. He admitted it was his car. The iPad was subsequently located behind a dumpster at the apartment, and during a search of Appellant's apartment, the police found the items stolen from the T-

Mobile store as well as two guns which matched the description of the guns used in the robbery. The police then took a photograph of Appellant and texted it to police in Orangeburg who showed it to the three victims, each of whom identified Appellant as one of the robbers. (R.p.349-p.355).

Pretrial Motions

Prior to the commencement of trial, the trial court held an extensive pretrial hearing on a number of motions, including Appellant's motion for a continuance (R.p.13-p.30), Appellant's motion to suppress evidence discovered during the warrantless search of his apartment (R.p.39-p.40; p.72), and Appellant's request for a Neil v. Biggers[1] hearing to challenge the reliability of his out-of-court identification by the three victims and the admissibility of their identification testimony which the State intended to offer at trial.

Motion for a Continuance

On February 23, 2015, the day Appellant's case was scheduled for trial, Appellant filed a written motion for a continuance in which he asked the trial court to continue his case and mandate a scheduling conference. He complained that although DNA swabs were taken from multiple locations associated with the charged offense, those swabs were never tested. Appellant asserted the results of such tests would likely be exculpatory in nature because they would indicate his DNA was not present in the tested areas. He argued he should be granted a continuance because: (1) the State utilized its unconstitutional control of the docket[2] to schedule his trial before forensic evidence in the possession of the State and its agents had been tested and turned over to the defense and (2) the State's denial of access to DNA evidence for testing

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

[2] See State v. Langford , 400 S.C. 421, 735 S.E.2d 471 (2012) (holding that solicitor control of the docket violates the separation of powers doctrine).

effectively hindered his fundamental due process right to prepare and present a full and complete defense, such as any assertion of third-party guilt. (February 23, 2015, "Motion for Continuance"). The same day, the State filed a memorandum in opposition of continuance arguing that none of the evidence sought to be tested by Appellant is exculpatory or essential to his case. In regard to possible "touch" DNA taken from the vehicle, the solicitor noted Appellant had admitted ownership of the car and therefore DNA could only serve as neutral or inculpatory. In regard to touch DNA taken from the firearms, the solicitor noted they were recovered from inside Appellant's apartment and he was the only person with access to them at the time. She also noted the victims stated the armed robbers were wearing gloves during the robbery. Thus, similar to the car, DNA evidence could only serve as neutral or inculpatory. (February 23, 2015, "State's Memo in Opposition to Continuance and Disclosure of DNA Evidence.").

On the morning of February 23, 2015, the trial court convened a hearing to address pretrial motions. After denying Appellant's motion to relieve counsel and appoint a new attorney, the trial court heard arguments on his motion for a continuance. Appellant argued the same grounds set forth in his written motion, first claiming the results of the DNA testing would go directly and materially to his defense, which was third-party guilt. He argued he had a right to the information and that it was needed to be able to present a full, fair, and complete defense to the jury. Appellant offered that if the Court did not want to require the State to analyze the evidence, the defense team would do it themselves using funding already acquired ex parte from the court; however, Appellant would need a continuance to do this. (R.p.13-p.17). The State responded with the same argument set forth in its written response, arguing the touch DNA could not be exculpatory under the circumstances of the case and that there was no prejudice to Appellant by not having it tested. In regard to third-party guilt the solicitor explained that

Appellant was positively identified as one of two armed robbers and that any outstanding issues in regard to the second armed robber had no bearing on whether Appellant was guilty or not. (R.p.17-p.22). Appellant continued to argue why he believed testing of the DNA touch evidence could be relevant to his defense. (R.p.22-p.25). Ultimately, the trial court ruled on the due process challenge as follows:

> Based upon – I've had the opportunity to review both briefs as well as listen to the arguments of counsel. I'm going to respectfully deny your motion for continuance. The evidence that's sought by the Defense is potentially not exculpatory and I don't think it is exculpatory in nature. If anything, as the State said, it could be inculpatory in nature. Certainly nothing prevented the Defense from acquiring this type of evidence or testing prior to the State. The State's not required to send everything to SLED to be analyzed. That's certainly within their discretion as to how they want to proceed in the prosecution of a case. So your motion will be respectfully denied as outlined in the State's response.

(R.p.25, lines 5-17).

Next, relying on Langford and Article I, Section 8 of the South Carolina Constitution, and the Sixth and Fourteenth Amendments to the U.S. Constitution, Appellant argued the solicitor's control of the docket was a fundamental affront to due process and fairness because it effectively denied him access to information that was essential to the preparation of his defense. He again asked for a continuance a scheduling order. (R.p.25-p.28). The State responded by noting it had given Appellant notice over a month before trial that the case would be called so the defense would have time to prepare and look through the State's case file. The solicitor also repeated her explanation for why the DNA evidence would not be exculpatory. (R.p.28-p.29). The trial court ruled:

> Based upon the case law of this State, to include Langford, which is held in abeyance pursuant to the Supreme Court Order at this time, that the Court will respectfully deny your motion for continuance. The Court finds that the Defense is not prejudiced by

> the case being called to trial, that they have had ample notice and time and opportunity to prepare for trial. So your motion is respectfully denied.

(R.p.30, line 25-p.31, line 7).

Motion to Suppress Evidence from Search

At the pretrial hearing, Appellant moved to suppress the evidence obtained in the warrantless search of his residence on grounds that he revoked the initial consent he had given to that search before any of that evidence had been discovered by the police. (R.p.39-p.40). The State responded that it intended to call at least one witness on the consent to search issue. The solicitor also noted the Defense was likely to make a Biggers motion and a Denno[3] motion and that because the same witnesses would also testify as to those two issues, the trial court may want to handle all three matters with each witness as they were called to the stand. (R.p.40-p.42.). Appellant agreed that he was seeking hearings pursuant to Denno and Biggers and agreed to the procedure proposed by the solicitor as long as everyone believed they could keep the three issues straight. (R.p.42)

First, the State called Corporal Leonard Cain of the Orangeburg County Sheriff's Office to the stand. He explained he assisted in the investigation of the armed robbery of the T-Mobile store and described how the police had used the "Find my iPad" application to track the stolen iPad to Appellant's apartment. Cain testified they located a gray vehicle with the door open parked in front of an apartment building, and then saw Appellant coming down the stairs towards the car. Appellant admitted the car belonged to him and initially claimed he was at the apartment visiting friends, but the police determined Appellant was lying and it was in fact his apartment. Cain said another officer, Investigator Wade, asked if Appellant would sign a consent form to search his residence and that Cain was present for the conversation between Appellant and

[3] Jackson v. Denno, 378 U.S. 368 (1964).

Wade. He identified the consent to search form that was presented to Appellant and it was later admitted into evidence as State's Exhibit #1. Cain testified Appellant agreed to sign the consent form and Cain then read the language from the form into the record. The form is dated May 16, 2014, at 2 p.m. and identifies the address of the Apartment to be searched. (R.p.43-p.58; p.540).

The form is signed by Appellant and two officers who served as witnesses and it reads as follows:

> I, Hardin, Archie, do hereby consent to search of my premise and/or automobile with out a search warrant by Officers of the Columbia Police Department, Columbia, South Carolina. These Officers are authorized by me to take from the premises and/or automobile letters, papers, materials, or other property which they desire.
>
> Description of property to be searched is described as follows:
>
> B/M 5'10 190-200 walks with limp
>
> Any stolen property (IPAD) Any Firearms Hand Gun DW
>
> I am aware that any evidence obtained as a result of the search can be used against me in a court of law.
>
> By signature below I understand at any time I can withdraw the consent.
>
> This written permission is being given by me to the above officers voluntarily and without threats or promise or any kind.

(R.p.736 (State's Exhibit #1). Cain testified that after receiving consent, police did an initial protective sweep of the apartment and looked for an iPad; however, when the iPad was subsequently located near a dumpster behind the apartment, officers went back into Appellant's apartment to do a second search, during which they discovered some phones. (R.p.59-p.62).

On cross-examination, Cain acknowledged there were four armed officers present when Appellant signed the consent form. He also acknowledged that the portion of the form

describing the property the police were seeking[4] appeared to be written with two different pens because the part describing "any firearms" and "hand gun" was in slightly thicker writing and was followed by the initials "DW." Cain said he was not sure when Wade added the second part. (R.p.72-p.80).

Next, the State called Sergeant John Stokes of the Orangeburg County Sheriff's Office. He served as the lead investigator of the armed robbery. Stokes testified that once the consent to search form was signed, the police discovered several iPhones and iPads which were stolen from the T-Mobile store as well as two handguns in Appellant's apartment. (R.p.81-p.86; p.90, lines 16-24).

The following day, after jury qualification and selection, the State called Investigator Darius Wade of the Columbia Police Department to the stand. He explained that on May 16, 2014, he had contact with Corporal Cain regarding an armed robbery that occurred in Orangeburg and that he assisted in the investigation. Using the "Locate my iPad" app, he helped track the movement of the stolen iPad, which eventually let him to an apartment complex in Columbia. Wade offered testimony consistent with Cain in regard to locating a car which matched the description of the vehicle used in the armed robbery, encountering Appellant coming from the apartment, and Appellant admitting it was his car. He testified he told Appellant they were looking for a man that walks with a limp and a stolen iPad and that Appellant consented to a search of his apartment. Wade identified the voluntary consent to search form and testified he was the officer who filled in the blanks on that form, including the "[d]escription of property to be searched." He acknowledged the property was described using

[4] The form used by the Columbia Police Department authorizes officers to search the premises for "letters, papers, materials, or other property which they desire" and then provides a blank for the executing officers to give a "Description of property to be searched." Here, however, instead of simply describing the property to be searched, it appears Investigator Wade attempted to give a description of the particular items the police hoped to find during that search.

two different pens, but that both were in his handwriting. Wade explained the language about firearms and handguns and his initials "DW" were added later, but after the police had located the stolen property from the T-Mobile store. (R.p.229-p.237).

Wade testified he explained everything in the consent form to Appellant and asked him a few questions to ensure he could read and write and understand what he was signing. When he initially told Appellant the police wanted to go up to the apartment to search, Appellant asked if he would be allowed to accompany the officers. Wade advised Appellant he could be present and that Appellant could stop the search at any time. He had Appellant stand by the front door during the protective sweep and testified that while doing the initial search he and another officer saw a box in plain view which contained several different types of cell phones. He identified three photographs that were taken of the box and its contents and those photographs were later admitted at trial without objection. Wade then had the app play a sound on the stolen iPad, which he heard coming from the dumpster next to the building. The police located the iPad next to the dumpster, wrapped in a plastic bad. They then returned to the apartment to conduct a second search, at which point they questioned Appellant about the box of cell phones. Wade testified that during this second search they found a bag containing more cell phones and a second bag containing one or two handguns. He explained he added the additional language to the consent to search form before the second search and before they had discovered the guns. Wade explained to Appellant that he was adding this language while they were in Appellant's living room. He testified Appellant did not object to the second search or withdraw his consent in any way, even though he was told he could stop the search at any time and could require the police to get a search warrant. (R.p.237-p.246; p.546-p.547; State's Exhibit #1(p.736), State's Exhibit #17, State's Exhibit #24, & State's Exhibit #47).

On cross-examination, Wade agreed that there were three or four other officers present when they first approached Appellant and that they did a pat-down search for weapons before asking for consent to search the apartment. He also agreed that he was the one who added the language to the consent form regarding firearms and handguns between the initial sweep when they saw the box of cell phones, and the subsequent search when they then found the guns. Wade acknowledged Appellant's consent could have been withdrawn and that Appellant was free to tell the officers to stop searching; however, he offered no testimony to suggest Appellant actually attempted to withdraw consent at any point prior to the discovery of either the stolen property and the guns in his apartment. (R.p.254-p.266).

After the jury was sworn, the trial court gave preliminary instructions and excused the jury for the day. Appellant then testified on his own behalf in regard to the search. He claimed that on May 16, 2014, as he was coming out of his apartment and was getting into his car, the police approached with their guns drawn, so he got out with his hands up. Appellant said there were approximately eight officers with their guns drawn on him, and that they immediately began searching his car. He testified Investigator Wade asked to search his apartment and in response he said no, unless they had a warrant. Appellant claimed the police said they would detain him while they went back to Orangeburg to get a warrant, so in order to "alleviate the scene" he ultimately agreed to sign the consent form. He testified he did not feel pressured to sign the consent form, but he felt it would be best just to get it over with. Appellant said that when he first signed the consent form, the thick writing about firearms and handguns was not on the form and was added later. He testified he was handcuffed outside the door of the apartment during the initial search but that afterwards the police locked the door and he was then taken down to a patrol car, at which point Cain retrieved the key from another officer and went back up

to the apartment a second time. Appellant testified that when Cain came back down to the parking lot, Wade approached Appellant again with the consent form. He claimed Wade promised that if they found any handguns in the apartment he would not be charged by Columbia, and would leave any charges up to Orangeburg. Appellant testified Wade added the language about firearms and handguns and asked him to sign the form again; however, Appellant responded by saying: "I'm not going to sign that form no more. . . Y'all searched my apartment one time you didn't find anything. You went back in there without me being present. I don't know what you done or what you did do, but I'm not signing it." (R.p.279-p.287, line 25). Appellant testified he specifically did not give the officers permission to search a second time, but they did it anyway. (R.p.288).

On cross-examination, Appellant admitted it was his signature on the consent to search form and that he understood what he was signing. He testified he saw the part of the form saying he could withdraw consent and he signed the form with the understanding that he could withdraw his consent at any time. When asked if, at any time, he tried to withdraw his consent, Appellant said: "No. I didn't have no reason to." He testified he never told the police to stop or that he did not want them searching his apartment. Appellant then repeated his claim that he never withdrew his consent. (R.p293-p.296). On redirect, Appellant claimed that when he said that he never withdrew his consent he was only referring to the first police search. He testified he never gave the police consent to search the apartment a second time and that when Wade added language to the consent form he did not sign it again. Appellant testified the police did not have his consent to search the apartment again. (R.p.307-p.308).

At the conclusion of the testimony, the parties argued their respective positions. Appellant did not claim he was coerced to give consent or otherwise challenge his initial consent

to the search of his apartment. Instead, he argued that when Investigator Wade altered the consent form by adding additional information, his consent was effectively revoked as evidenced by his refusal to sign the form a second time. Appellant argued his consent was withdrawn and therefore, it was an unconstitutional warrantless search. (R.p.309-p.312). The solicitor responded that, in looking at the evidence in the light most favorable to the non-moving party, the evidence showed Appellant voluntarily signed the consent form and thereby gave his consent to search his apartment. She argued Appellant was never pressured to sign the form, willingly gave his consent to the officers, and never withdrew that consent. The solicitor further argued that even if the trial court found consent was lacking, the discovery of the stolen property and guns would have been valid under the inevitable discovery doctrine because the iPad was tracked to Appellant's apartment building, he was driving a vehicle matching the one used in the armed robbery, and the three victims positively identified Appellant as one of the two robbers. She said this information was sufficient probable cause to get a search warrant for the apartment. (R.p.312-p.314). Appellant noted the proper standard was to evaluate consent under the totality of the circumstances and argued consent was not given. He also argued inevitable discovery does not apply to the apartment because the iPad was located outside. (R.p.314-p.315).

At the conclusion of the hearing, the trial court found "the consent was valid and voluntary" and therefore "the search is valid and the items that were found in the apartment and in the car are admissible." The trial judge found the officers' testimony was credible and that Appellant's testimony was contradictory which raised questions about his veracity. Ultimately, the trial court concluded "the added language in there was explained to the Defendant and the consent was never withdrawn and, therefore, the items that were found will be admissible." (R.p.340-p.341).

Motion to Suppress Identification: Neil v. Biggers

As noted above, Appellant requested a Neil v. Biggers hearing on the identification issue. (R.p.42). Testimony regarding identification was interspersed with testimony regarding the search of Appellant's apartment and the admissibility of his statements to the police. First, in regard to the identification, Corporal Cain testified that prior to locating the iPad and prior to Appellant's arrest he took a photo of Appellant with his county issued cell phone and sent it to Lieutenant Schumpert in Orangeburg. He was subsequently advised by Schumpert that Appellant had been identified by the victims of the armed robbery. Cain identified a printed copy of the photo he sent, which was marked and entered as State's Exhibit #2. (R.p.62-p.64).

Next, Sergeant Stokes testified he was the officer who instructed Cain to take the photo of Appellant to send to Lieutenant Schumpert. He explained the photo was shown to the three victims and they positively identified Appellant as having robbed the T-Mobile store that morning. (R.p.86; p.92). On cross-examination, Stokes acknowledged an officer in uniform is also visible in the photo, standing behind Appellant. He likewise acknowledged the photo was shown to the victims on a cell phone, not as a print-out or as part of a "six-pack" photo lineup. Stokes also acknowledged that during the investigation he took a statement from a Mr. Walters, an eyewitness who was nearby at the time of the crime, in which Walters said Schumpert had shown him two photographs. Finally, Stokes acknowledged that several days after the robbery the police put together a six-card photo lineup which did not include Appellant's photograph and that victim Thomas Sims, Jr., identified somebody from that lineup as one of the robbers. (R.p.118-p.127; p.129-p.132). On redirect Stokes explained the six-card photo lineup was presented to Sims on May 21, 2014, in an effort to ascertain the identity of the co-defendant, and

that he was not attempting to determine if Sims could further identify Appellant. (R.p.140-p.141).

Following jury qualification and selection, the State proceeded to call each of the three victims to describe the armed robbery as well as their out-of-court identification of Appellant. Store manager Thomas Sims, Jr., saw Appellant come into the T-Mobile store and watched him talk with his employee, Jarron Weaver, about getting an iPad for his daughter. Sims said he was able to view Appellant for five to ten minutes before he left the store first time, then saw Appellant briefly return, leave again, and then come in a third time with another guy. The two men had guns and told him and Weaver to get to the back of the store where they ordered them to the ground and duct taped their hands behind their backs and their feet together. Sims testified the police later showed him a photograph on a cell phone and asked if he could identify the person in the photo. He said he was immediately able to identify the person in the photograph as the person that robbed the store. (R.p.172-p.178). On cross-examination, Sims was questioned about his opportunity to see the men who robbed the store, discrepancies in the details he gave when describing those men to the police, and being shown a single photograph on a cell phone which included an officer in the background., (R.p.178-p.197).

Store employee Jarron Weaver testified he talked with Appellant, face to face, for ten to fifteen minutes the first time he came into the T-Mobile store and then again for another five to ten minutes the second time he came in prior to the robbery. He testified the robbery itself lasted ten to fifteen minutes during which he was taken to the back at gunpoint, ordered to the floor, and duct taped. Weaver described being shown the cell phone photograph of Appellant by the police. He testified he was taken over to the side, by himself, and shown the picture and was

able to immediately recognize Appellant as the person who robbed the store. Weaver said he was a hundred percent certain of the identification. (R.p.197-p.202).

Store employee Kirstie Berry testified about being outside on a smoke break when she was "snatched" into the back door of the T-Mobile store, ordered to the ground, hit in the back of the head before being duct taped on the floor. She said she got a good look at her assailant because she was turned directly face-to-face with him, less than a foot away, when she was pulled into the store. Berry testified about being shown the photo. She said she was immediately able to identify Appellant as the guy who robbed the store and who tied her up. Berry testified she was one hundred percent certain of the identification and then identified Appellant in the courtroom. (R.p.213-p.218).

At the conclusion of the testimony, the parties argued their respective positions in regard to the admissibility of Appellant's identification by the victims. Appellant referenced the two-pronged Biggers inquiry and argued the identification procedure used by the police was both unduly suggestive and so unreliable that it created a substantial likelihood of misidentification. He argued the act of showing the victims a single photo of him, with an officer standing directly behind, rather than a six-pack photo lineup or a traditional standup lineup with actual people was unduly suggestive. Appellant then argued that given the limited opportunity to view the robbers at the time of the offense, the degree of attention, the accuracy of the prior descriptions, and the length of time between the armed robbery and the identification of the photograph, there was a substantial likelihood of misidentification. He asked that the out-of-court identifications and any in-court identifications be suppressed. (R.p.321-p.327). The solicitor acknowledged that show-up identification procedures that involve a single suspect are generally disfavored; however, they may be proper when they occur shortly after the crime while the witnesses' memories are still

fresh and the suspect has not had time to alter his looks. She then went through the factors supporting admission of the identification including the substantial opportunity the victims had to look at Appellant, the fact that they continued to have a conversation in close proximity with the robber when guns were pointed at them, the relative accuracy of their descriptions of the robbers, and the fact that the identifications were made only three hours after the robbery while their memory was still fresh. The solicitor argued that even if the trial court determined the procedure was unduly suggestive, it still did not create a substantial likelihood of irreparable misidentification and therefore the motion to suppress should be denied. (R.p.327-p.331).

The following morning the trial court ruled on the identification issue. Although it found the procedure used by the police in showing the individual photograph to the victims was unduly suggestive, it nevertheless found the identification of Appellant was sufficiently reliable to allow admission of the testimony. The trial court examined the likelihood of misidentification by considering the totality of the circumstances. It specifically noted: (1) the victims had ample opportunity during daylight hours to view the robbers at the time of the crime, (2) the victims were able to pay close attention to what the person looked like, (3) the victims gave accurate descriptions of the perpetrator, (4) the victims testified their level of certainty was one hundred percent, and (5) the length of time between the armed robbery and the confrontation when they identified the photograph was short in nature. Ultimately, the trial court found the identification of Appellant was proper and denied Appellant's motion to suppress. (R.p.341-p.342).

Trial

After ruling on each pretrial motion, the case proceeded to trial and the parties gave opening statements. (R.p.342-p.358). First, the solicitor described the evidence that would be presented at trial, which would focus on testimony from the three victims working at the T-

Mobile store on the day of the robbery. (R.p.349-p.355). Next, Appellant presented his theory of defense, which consisted of the claim that he was not guilty of armed robbery or kidnapping because he was not in Orangeburg on the day the T-Mobile store was robbed. He noted the lack of any DNA evidence or fingerprint evidence tying him to the crime, and pointed out the fact that the DNA evidence which was collected was never even tested by the State. (R.p.255-p.358).

The State then called Sims, Weaver, and Berry to describe the armed robbery in detail to the jury. Each of the victims identified the guns recovered from Appellant's apartment as the guns used in the armed robbery, and they made in-court identifications of Appellant as one of the two armed robbers. Each victim testified he or she was one hundred percent sure of the identification. (R.p.358-p.438). The State then called a series of law enforcement officers to the stand to describe the response to, and investigation of, the armed robbery. These officers included: Lieutenant Antonia Turkvant, Investigator Samuel S. Norton, Sergeant John C. Stokes, Investigator William Ketcherside, Sergeant Rashad Moore, and Corporal Leonard Cain, all of the Orangeburg County Sheriff's Office; as well as Investigator Darius Wade of the Columbia Police Department. (R.p.438-p.456; p.469-p.588; p.595-p.615). The State also elicited testimony from Hyrett Hamilton, a resident of the apartment complex that was behind the T-Mobile store who saw two black males dressed in mostly black come over the fence with a box, and head towards the parking lot (R.p.456-p.461), and Destiny Brown, another resident of the apartment complex who saw two men carrying boxes who got into a small car and drive away shortly after the armed robbery, and who identified a photograph of Appellant's car as the car the two men were driving. (R.p.462-p.468). Finally, the State introduced testimony from Steve Reynolds, the CEO of Air Wireless, a company that owns six T-Mobile stores in South Carolina. Reynolds responded to the report of the robbery by producing an inventory report reflecting which items were stolen.

Those items were valued at thirty-seven thousand two hundred and ninety-nine dollars. (R.p.591-p.594).

After the State rested, Appellant made a motion for a directed verdict and that motion was denied. (R.p.615-p.618). Appellant then testified on his own behalf. He testified he did not rob the T-Mobile store on May 16, 2014, did not kidnap the three victims, did not hit Berry in the back of the head, and did not point a gun at anyone. Appellant claimed he was never in Orangeburg the day of the robbery. According to Appellant, he lent his rental car to his friend "Black" on the morning of May 16, 2014, and that Black had the car for four and a half or five hours before returning it around 12:30 or 1:00 that afternoon. He said when he loaned the car to Black, there was nothing in the car, but when Black returned the car it contained a laundry basket with dirty clothes, two tennis shoe boxes, a brown box, and a black bag. Appellant said he and Black then drove around Columbia to find something to eat and to try to find a hotel room for Black, but ultimately ended up back at Appellant's apartment because Black kept seeing a Dodge Charger wherever they stopped and believed they were being followed by Black's parole officer. Appellant testified Black asked to leave his stuff at Appellant's apartment while Appellant went to return the rental car, so the two men carried the boxes and other items up to his apartment. He said neither was wearing gloves at the time. Appellant testified that Black walked towards the back of the apartment complex to see if their mutual friend "Joe" could take him to find a hotel, and as Appellant was about to leave his apartment to return the rental car, a bunch of police cars pulled up. (R.p.626-p.634).

Next, Appellant offered his version about the search of his apartment and his arrest. He admitted he told the police it was his car and admitted that he initially signed the consent form for the police to search his apartment because he did not have anything to hide. Appellant

claimed, however, that the officers went back up to his apartment to conduct a second search, after which Investigator Wade approached him about signing the consent form a second time after he had added language about firearms. He testified he told Wade he would not sign the consent form again but that the police searched the apartment a second time anyway, at which point they found Black's stuff. (R.p.634-p.646). On cross-examination Appellant admitted that during his bond hearing he said "I'm guilty" but claimed he got cut off before explaining he meant he felt like he was being treated like he was already guilty. (R.p.646-p.655).

At the conclusion of Appellant's testimony, the defense rested and re-raised Appellant's motions for directed verdict. The trial court denied those motions. (R.p.657-p.658). The State then made a closing statement on the law, and the parties made closing arguments. (R.p.659-p.686). Appellant argued he was not guilty of the crimes and that the police actions in charging him were a rush to judgment because they presumed him guilty from the start rather than conducting a fair and through investigation. He criticized the police for failing to try hard enough to identify and track down Black, and he attacked the identification testimony from the three victims by pointing out inconsistencies in their descriptions and the suggestiveness of the photo identification the day of the armed robbery. Appellant then criticized the police for failing to conduct DNA testing of the duct tape, the boxes, the car, or the guns, despite either actually collecting DNA or having the ability to collect DNA from these items. (R.p.664-p.673). In response, the solicitor detailed the testimony offered from each witness during the course of the trial and how they all pointed conclusively to Appellant's guilt for the crimes charged. She focused on the identification testimony from the three victims and the discovery of the stolen items in or near Appellant's apartment. (R.p.673-p.686).

The trial judge charged the jury on the State's burden of proof, the presumption of innocence, reasonable doubt, the roles of the judge and jury, direct evidence, circumstantial evidence, criminal intent, accomplice liability, mere presence, credibility of witnesses, expert witnesses, statements made by the defendant, and the elements of the crimes. (R.p.686-p.706). In regard to identity, the trial judge specifically charged the jury as follows:

> Identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification of the Defendant. You must consider the believability of each identification witness in the same way as any other witness. You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. This will be affected by things like how long or short a time was available. How far or close the witness was, the lighting conditions and whether the witness had the chance to see or know the person in the past. Once again, I instruct you, the burden of proof is on the State and extends to every element of the crime charged. And this specifically includes of proving beyond a reasonable doubt the identity of the Defendant as a person who committed the crime. If, after examining the testimony you have a reasonable doubt as to the accuracy of the identification, you must find the Defendant not guilty.

(R.p.692, line 22-p.693, line 13). Except for an objection to the trial judge's failure to give a circumstantial evidence charge pursuant to State v. Logan, Appellant made no other objections to the jury charge or verdict form. (R.p.706).

At the end of trial, after deliberating for approximately an hour and twenty-five minutes, the jury found Appellant guilty of each charge. Appellant renewed all prior motions, including pretrial motions and the directed verdict motions, and made a motion for a new trial, arguing there was no evidence to support the conviction. The trial court denied the motions and sentenced Appellant to thirty (30) years' concurrent imprisonment for each count of kidnapping, thirty (30) years' concurrent imprisonment for armed robbery, twenty (20) years' concurrent imprisonment for assault and battery of a high and aggravated nature, and five (5) years'

consecutive imprisonment for possession of a weapon during a violent crime, for an aggregate sentence of thirty-five (35) years' imprisonment. (R.p.719-735; Tr.p.706-p.717).

ARGUMENT

I.

The trial court properly denied Appellant's motion for a continuance prior to trial because Appellant failed to establish the grant of any additional time would have enabled him to produce admissible exculpatory evidence or to raise additional points beneficial to his defense during trial.

Appellant argues the trial court erred in refusing to grant his motion for a continuance so he could have DNA evidence analyzed by an expert because he alleges that DNA evidence was possibly exculpatory. Relying primarily on our supreme court's opinion in State v. Tanner, 299 S.C. 459, 385 S.E.2d 832 (1989), he contends he made more than the required showing that other evidence on his behalf could have been introduced if he had been given more time prior to trial. Appellant argues that because the DNA evidence "might well have been exculpatory," the trial court's decision to deny his request for a continuance should be overturned in the interests of justice and his constitutional due process rights. (Brief of Appellant, p.9-p.13). The State disagrees and submits Appellant's argument is without merit. Contrary to Appellant's contentions, the trial judge committed no error in refusing to grant a continuance prior to trial because Appellant failed to establish the grant of any additional time would have enabled him to produce admissible exculpatory evidence or to raise additional points beneficial to his defense during trial.[5] Appellant's convictions should be affirmed.

[5] In addition to Appellant failing to make the requisite showing, the trial court also properly denied the request for a continuance where defense counsel knew of the existence of the DNA evidence well before trial and had sufficient time to seek independent DNA testing but instead waited in hopes the State would test the touch DNA first.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Gordon, 414 S.C. 94, 98, 777 S.E.2d 376, 378 (2015). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but, instead, simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829 (emphasis added). "In South Carolina '[t]he grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record.'" State v. Hill, 409 S.C. 50, 59, 760 S.E.2d 802, 807 (2014) (quoting Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007)); see also State v. Squires, 248 S.C. 239, 244, 149 S.E.2d 601, 603 (1966) ("It is well settled in this jurisdiction, as well as in most others, that the trial court's refusal of a motion for continuance in a criminal case will not be disturbed in the absence of a clear and conclusive abuse of discretion."). As stated by our Supreme Court: "Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) (citing State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957).

Discussion / Analysis

Here, a continuance was not warranted based on the State's decision not to have the touch DNA tested, because any such testing could not have proved exculpatory to Appellant or the allegations involved in his case and, thus, were not pertinent to his defense. See State v. Geer, 391 S.C. 179, 192, 705 S.E.2d 441, 448 (Ct. App. 2010) (holding the trial judge did not abuse his discretion in denying Geer's continuance request where "the State's late disclosure of the

evidence did not impair Geer's ability to present a defense regarding whether she possessed crack cocaine"). In arguing the trial judge erred by refusing to grant a continuance, Appellant contends the grant of a continuance would have permitted defense counsel to test the DNA evidence to possibly show his DNA was not on the guns used in the armed robbery or in his own car, "which might well have been exculpatory." (Brief of Appellant, p.13). He also suggests that without the DNA results, they were prevented from arguing a third-party defense and he claims that in closing, the State acknowledged "the un-analyzed DNA, fingerprint, and duct tape evidence might well have proved that [Appellant] was innocent and fingered his friend "Black." (Brief of Appellant, p.11-p.12).

Initially, the State submits Appellant misrepresents the State's closing argument. The solicitor never agreed or admitted the untested DNA evidence could be exculpatory. Instead, she was merely paraphrasing Appellant's argument that it could somehow prove his innocence, and was explaining how the defense would attempt to characterize DNA results as either favorable or neutral regardless of the result. (R.p.679-p.680). In any event, as argued by the State in both its written and oral responses to Appellant's motion, and as found by the trial judge, none of the evidence sought to be tested by Appellant could have been exculpatory or essential to his case. In regard to DNA taken from the vehicle, Appellant admitted ownership of the car and therefore DNA could only serve as neutral or inculpatory. In regard to DNA taken from the firearms, those guns were recovered from inside Appellant's apartment and he was the only person with access to them at the time of his arrest. Also, the victims gave statements that the armed robbers were wearing gloves during the robbery. Thus, similar to the evidence from the car, DNA evidence could only serve as neutral or inculpatory. In regard to Appellant's claim that he could use the possible absence of his DNA to pursue third-party guilt, Appellant was positively

identified as one of two armed robbers; therefore, any outstanding issues in regard to the second armed robber also could have no bearing on whether Appellant himself was guilty or not. (February 23, 2015, "State's Memo in Opposition to Continuance and Disclosure of DNA Evidence"; R.p.17-p.22; p.25, lines 5-17). Thus here, as in Squires, there is no showing that any other evidence on behalf of Appellant could have been produced, or that any other points in his behalf could have been raised had more time been granted. With or without the actual DNA results, Appellant was able to make the same arguments in his defense.

Appellant's reliance on Tanner is unpersuasive. In Tanner, blood, skin, and hair samples were taken from the car Tanner was alleged to have been driving at the time of the felony DUI. Tanner, 299 S.C. at 462, 385 S.E.2d at 834. Although Tanner's attorney became aware of the existence of these samples some time before trial, in response to at least six inquiries and discovery motions, he was informed by the solicitor's office that the samples were lost or misplaced. Id. Here, Appellant was aware of the DNA samples well before trial and was never informed they were lost, misplaced, or otherwise unavailable. Also in Tanner, the trial court failed to even consider the potential exculpatory value of the evidence. Tanner, 299 S.C. at 463, 385 S.E.2d at 834. Here, the trial court considered the potential exculpatory value and found it had none. Finally, in Tanner the primary defense was that he was not driving at the time of the accident such that evidence of the victim's hair or blood on the driver's side of the vehicle could have supported Tanner's contention he was merely a passenger. Tanner, 299 S.C. at 463, 385 S.E.2d at 834. Here, as found by the trial court, Appellant failed to show how the presence or absence of his DNA in the car or on the guns could have actively supported his theory of defense. At best, the evidence would have been neutral, offering nothing exculpatory.

Under these circumstances, the trial court did not abuse its broad discretion by refusing to grant a continuance and delay the trial. See State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) ("The denial of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion resulting in prejudice."). Accordingly, for all the foregoing reasons, Appellant failed to meet his burden of establishing the trial judge's refusal to grant a continuance constituted a prejudicial abuse of discretion. See Squires, 248 S.C. at 244, 149 S.E.2d at 603 ("It is well settled in this jurisdiction, as well as in most others, that the trial court's refusal of a motion for continuance in a criminal case will not be disturbed in the absence of a **clear and conclusive** abuse of discretion." (emphasis added)). As a result, there is no basis to disturb the trial judge's decision on appeal. See State v. Motley, 251 S.C. 568, 572, 164 S.E.2d 569, 570 (1968) ("When a motion for a continuance is based upon the contention that counsel for the defendant has not had time to prepare his case its denial by **the trial court has rarely been disturbed on appeal**." (emphasis added)); see also Calderon v. California, 525 U.S. 141, 146 (1998) ("The social costs of retrial or resentencing are significant. . . . The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." (citations omitted)). Appellant's convictions should be affirmed.

II.

The trial court properly concluded that while the procedure used by the police was unduly suggestive, the out-of-court identification made by the three victims was nevertheless so reliable that no substantial likelihood of misidentification existed.

Appellant argues that although the trial court utilized the appropriate two-pronged Biggers inquiry to analyze the admissibility of the victims' out-of-court identifications, it erred when applying the second prong of that analysis because: "There was no weighing of the individual "totality of circumstances" factors against one another by the trial court." Relying primarily on our supreme court's opinion in State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000), Appellant argues his identification was "clearly inadmissible and should therefore have been excluded by the trial Court." (Brief of Appellant, p.12-p.16). The State disagrees and submits Appellant's argument is without merit. Under the totality of the circumstances, the three victims' out-of-court and in-court identifications were reliable. The trial court did not abuse its broad discretion in admitting those identifications and Appellant's convictions should be affirmed.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission or exclusion of evidence rests within the sound discretion of the trial judge. State v. Johnson, 413 S.C. 458, 466, 776 S.E.2d 367, 371 (2015); 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. Simmons, 384 S.C. at 166, 682 S.E.2d at 30; 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)).

Law / Analysis

An out-of-court identification of the defendant violates due process and must be suppressed when the identification procedure used by police was impermissibly suggestive and conducive to a substantial likelihood of misidentification. State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012); State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013). A witness's subsequent in-court identification is inadmissible "if a suggestive out-of-court identification procedure created a very substantial likelihood of *irreparable* misidentification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (emphasis added). Trial courts employ a two-pronged inquiry to determine whether due process requires suppression of an out-of-court eyewitness identification. Liverman, 398 S.C. at 138, 727 S.E.2d at 426. First, the court must determine whether the identification resulted from "unnecessarily suggestive" police procedures. Biggers, 409 U.S. at 198-99; Liverman, 398 S.C. at 138, 727 S.E.2d at 426; Traylor, 360 S.C. at 81, 600 S.E.2d at 526. If the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there and the court does not need to consider the second prong. State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013). The defendant bears the burden of proving the identification procedure was 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. 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 regard to the identification procedure, the testimony established that the police took a photograph of Appellant near the time of his arrest and showed that single photograph to the three victims approximately three hours after the armed robbery. Upon looking at the photograph, each victim identified Appellant as one of the people who robbed the T-Mobile store. An officer in uniform is visible in the photo, standing behind Appellant. (R.p.62-p.64; p.86; p.92; R.p.118-p.127; p.129-p.132; State's Exhibit No. 2). Based on these facts, the trial court concluded Appellant had carried his burden of proving the identification procedure was impermissibly suggestive and moved on to evaluate the reliability of the identifications under the

totality of the circumstances using the five relevant factors, concluding the identification was proper and should be admitted. (R.p.341-p.342). The State submits there was ample evidence in the record to support the trial court's ruling that the three out-of-court identifications were reliable under the totality of the circumstances.

When the police arrived at the scene, the victims gave statements describing the armed robbers, including descriptions of what they were wearing at the time of the armed robbery. At the pretrial hearing they also gave descriptions and detailed their opportunity to see Appellant during the encounter. Store manager Thomas Sims, Jr., testified he was able to view Appellant for five to ten minutes before he left the store first time, then saw Appellant briefly return, leave again, and then come in a third time with another man, both of whom were carrying guns. He said Appellant was wearing a black shirt and khakis as well as sunglasses and a hat when he first entered the store, and was still wearing the exact same clothing during the robbery. Sims testified he was immediately able to identify the person in the photograph as the person that robbed the store. (R.p.172-p.178). Store employee Jarron Weaver testified he talked with Appellant, face to face, for ten to fifteen minutes the first time he came into the T-Mobile store and then again for another five to ten minutes the second time he came in prior to the robbery. He said Appellant had on a baseball cap and sunglasses and acknowledged in his statement to the police he had noted not just the hat and glasses, but also described Appellant as wearing a black shirt over a grey shirt, and khaki pants. Weaver testified he was shown the picture and was able to immediately recognize Appellant as the person who robbed the store, and that he was one hundred percent certain of the identification. (R.p.197-p.202). Store employee Kirstie Berry testified she got a good look at Appellant because she was turned directly face-to-face with him, less than a foot away, when she was pulled into the store. She said he was wearing a lavender

shirt with a black t-shirt over it, blue jeans, a hat, and sunglasses. Berry testified she was immediately able to identify Appellant as the guy who robbed the store and who tied her up, and testified she was one hundred percent certain of the identification. (R.p.213-p.218).

Based on this testimony and the testimony of the police officers who took the photo of Appellant, sent it to Orangeburg, and showed it to the victims, the trial court evaluated the likelihood of misidentification by considering the totality of the circumstances. The court specifically noted: (1) the victims had ample opportunity during daylight hours to view the robbers at the time of the crime, (2) the victims were able to pay close attention to what the person looked like, (3) the victims gave accurate descriptions of the perpetrator, (4) the victims testified their level of certainty was one hundred percent, and (5) the length of time between the armed robbery and the confrontation when they identified the photograph was short in nature. The trial court found the identification of Appellant was proper and reliable and denied Appellant's motion to suppress. (R.p.341-p.342).

The evidence supports this finding; therefore, the trial court did not abuse its discretion and should be affirmed. Dukes, 404 S.C. at 563, 745 S.E.2d at 142. Each of the three victims had excellent opportunities to view Appellant before and during the armed robbery because they all saw Appellant's face. Weaver actually carried on a face-to-face conversation with Appellant for fifteen to twenty-five minutes. When the robbery occurred, the victims attention was heightened because they had guns pointed at them and were being ordered to the ground. Although not perfectly aligned in every single detail, the victims all gave very consistent descriptions of Appellant which focused on his hat, his sunglasses, and his black shirt. They also testified they were absolutely certain they had made a correct identification from the photograph. Finally, the photograph was presented only three hours after the crime, and it was presented

independently to each victim. Under the totality of the circumstances, the victims' out-of-court and in-court identifications were clearly reliable.

Appellant's reliance on Moore is misplaced. In Moore, our Supreme Court found that under the facts of that case, the identification was unreliable as a matter of law. Moore, 343 S.C. at 288, 540 S.E.2d at 447. Although the Court noted that only one of the five factors weighed in favor of reliability—the amount of time between the crime and the confrontation—and found that single factor was "clearly outweighed by the other factors," the Court did not, as Appellant suggests, weigh the individual factors "against one another." Id. at 289, 540 S.E.2d at 448-49. Instead, the Court applied the totality of the circumstances analysis just as it has been described, by evaluating the totality of the circumstances using the five identified factors. The facts in Moore are easily distinguished from the facts in this case. Moore was "not a case in which the witness had an opportunity to observe defendant in close proximity for some considerable period of time." Id. at 289, 540 S.E.2d at 449. Instead, "the witness saw the two defendants for only a brief period of time, at some distance." Id. Here, the victims all saw Appellant either for a long period of time, in very close proximity, or both. As to the second factor, the witness' attention in Moore "was likely not as acute as it might have been had she been the victim of a crime." Id. Here, there were three witnesses and they were all victims of the crimes. In Moore, "the degree of accuracy of [the witness'] description [was] tenuous, at best." Id. Here, the three victims gave consistent descriptions Appellant's attire during the crimes and, as noted by the trial court, their level of certainty was one hundred percent. Thus, unlike the facts in Moore, the facts in Appellant's case support the trial court's finding there was no substantial likelihood of these being irreparable misidentifications. Consequently, the trial court did not abuse its discretion in

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

Harmless Error

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

Here, the State submits any error in the admission of the identification evidence from the victims was harmless and not prejudicial. The identification evidence was undoubtedly strong because it directly implicated Appellant as one of the two armed robbers; however, there was significant and substantial direct and circumstantial evidence independently proving his participation in armed robbery. This includes the identification of Appellant's car as the car used in the robbery, the identification of the guns found in Appellant's apartment as the guns used in the armed robbery, and the discovery of the merchandise and personal property stolen from the T-Mobile store in or near Appellant's apartment less than three hours after the crime. 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."). Furthermore, Appellant answered affirmatively during cross-examination at trial that after his arrest he was riding "back to Orangeburg" when he told Investigator Cain he would help them find Black (R.p.651, lines 12-16), despite testifying on direct that he had not been to Orangeburg at all on the day of the robbery. See State v. Kirkpatrick, 320 S.C. 38, 43, 462 S.E.2d 884, 888 (Ct. App. 1995) ("The erroneous admission of the key evidence was harmless inasmuch as Kirkpatrick admitted he rented the U-Haul in question and bought a lock, with two keys, to put on it. Thus, the evidence of the key linking Kirkpatrick to the U-Haul was merely cumulative."). Because the challenged identification evidence was cumulative to other properly-admitted evidence, any error in the admission of that identification evidence was 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 victims, his right to the effective assistance of an attorney who attempted to expose the flaws in the victims' 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.

III.

The trial court properly admitted evidence collected during the search of Appellant's apartment where he gave written consent for the search of his apartment, he placed no specific or significant limits on the scope of that consent, and he made no unequivocal statement or act to withdraw that consent.

Appellant argues the evidence collected in the second warrantless search of his apartment was not properly admitted because, although he gave consent to the first search, he "effectively withdrew consent, thereby requiring a search warrant to search his residence a second time." The State disagrees and submits Appellant's argument is entirely without merit.

Standard of Review

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012), cert. denied, ___ U.S. ___, 133 S. Ct. 2779 (2013); State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. Brown, 401 S.C. at 87, 736 S.E.2d at 265; State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. Brown, 401 S.C. at 87, 736 S.E.2d at 265; State v. Jennings, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011); State v. Morris, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. Thus, when reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to

support it; the appellate court may reverse only for clear error. Brown, 401 S.C. at 87, 736 S.E.2d at 265.

Law / Analysis

The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. The South Carolina Constitution provides similar protection against unreasonable searches and seizures and unreasonable invasions of privacy. S.C. Const. art. I, § 10. A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property. Brown, 401 S.C. at 88, 736 S.E.2d at 266; State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (quoting Horton v. California, 496 U.S. 128, 133 (1990)). The Fourth Amendment itself provides no remedy for a violation of the warrant requirement. Davis v. United States, 564 U.S. 229, 231 (2011). However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment. Id.; Brown, 401 S.C. at 88, 736 S.E.2d at 266. Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement. Brown, 401 S.C. at 89, 736 S.E.2d at 266; Wright, 391 S.C. at 442, 706 S.E.2d at 327. These exceptions include the following: (1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, (6) consent, and (7) abandonment. Brown, 401 S.C. at 89, 736 S.E.2d at 266; State v. Dupree, 319 S.C. 454, 456, 462 S.E.2d 279, 287 (1995); State v. Moore, 377 S.C. 299, 309, 659 S.E.2d 256, 261 (Ct. App. 2008).

Consent

Whether consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances. State v. Wallace, 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977); State v. Mattison, 352 S.C. 577, 584, 575 S.E.2d 852, 855 (Ct. App. 2003). The State bears the burden of establishing the voluntariness of the consent. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Mattison, 352 S.C. at 584, 575 S.E.2d at 855. The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the trial judge. Mattison, 352 S.C. at 584-85, 575 S.E.2d at 856; State v. Dorce, 320 S.C. 480, 482, 465 S.E.2d 772, 773 (Ct. App. 1995). A trial judge's conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion. Mattison, 352 S.C. at 585, 575 S.E.2d at 856.

Under our state constitution suspects are free to limit the scope of the searches to which they consent. State v. Forrester, 343 S.C. 637, 648, 541 S.E.2d 837, 843 (2001); State v. Funderburk, 367 S.C. 236, 240, 625 S.E.2d 248, 250 (Ct. App. 2006); Mattison, 352 S.C. at 585, 575 S.E.2d at 856. When relying on the consent of a suspect, a police officer's search must not exceed the scope of the consent granted or the search becomes unreasonable. Forrester, 343 S.C. at 648, 541 S.E.2d at 843; Funderburk, 367 S.C. at 240, 625 S.E.2d at 250; Mattison, 352 S.C. at 585, 575 S.E.2d at 856. Even in a situation where police have received a general and unqualified consent, " 'the police do not have carte blanche to do whatever they please.'" Forrester, 343 S.C. at 648-49, 541 S.E.2d at 843 (quoting 3 Wayne R. LaFave, *Search and Seizure* § 8.1(c), at 612 (3d ed. 1996)). The scope of the consent is measured by a test of "'objective' reasonableness - what would the typical reasonable person have understood by the exchange between the officer

and the suspect?" Florida v. Jimeno, 500 U.S. 248, 251 (1991); Mattison, 352 S.C. at 585-86, 575 S.E.2d at 856. Conduct falling short of "an unequivocal act or statement of withdrawal" is not sufficiently indicative of an intent to withdraw consent. Mattison, 352 S.C. at 587, 575 S.E.2d at 858; United States v. Alfaro, 935 F.2d 64, 67 (5th Cir. 1991). Effective withdrawal of consent to search requires unequivocal conduct, in the form of either an act, statement or some combination of the two that is inconsistent with consent previously given. Mattison, 352 S.C. at 585, 575 S.E.2d at 858; Burton v. United States, 657 A.2d 741 (D.C. 1994).

At the pretrial hearing, Appellant moved to suppress the evidence obtained in the warrantless search of his residence on grounds that he revoked the initial consent he had given to that search before any of that evidence had been discovered by the police. (R.p.39-p.40). The State responded by calling witnesses on the consent to search issue. Corporal Leonard Cain of the Orangeburg County Sheriff's Office was present for the conversation when another officer, Investigator Wade, asked if Appellant would sign a consent form to search his residence. He identified the consent to search form that was presented to Appellant and it was later admitted into evidence as State's Exhibit #1. Cain testified Appellant agreed to sign the consent form. The form is dated May 16, 2014, at 2 p.m. and identifies the address of the apartment to be searched. (R.p.43-p.58; p.540; State's Exhibit #1(p.736)). Cain testified that after receiving consent, police did an initial protective sweep of the apartment and looked for an iPad; however, when the iPad was subsequently located near a dumpster behind the apartment, officers went back into Appellant's apartment to do a second search, during which they discovered some phones. (R.p.59-p.62). On cross-examination, Cain acknowledged that the portion of the form listing the property the police were seeking appeared to be written with two different pens because the part describing "any firearms" and "hand gun" was in slightly thicker writing and

was followed by the initials "DW." Cain said he was not sure when Wade added the second part. (R.p.72-p.80).

Sergeant John Stokes of the Orangeburg County Sheriff's Office served as the lead investigator of the armed robbery and testified that after the consent to search form was signed the police discovered several iPhones and iPads which were stolen from the T-Mobile store, as well as two handguns in Appellant's apartment. (R.p.81-p.86; p.90, lines 16-24).

Investigator Darius Wade of the Columbia Police Department explained that on May 16, 2014, he had contact with Corporal Cain regarding an armed robbery that occurred in Orangeburg and that he assisted in the investigation. He testified he told Appellant they were looking for a man that walks with a limp and a stolen iPad and Appellant consented to a search of his apartment. Wade identified the voluntary consent to search form and testified he was the officer who filled in the blanks on that form, including the "[d]escription of property to be searched." He acknowledged the personal property he listed was described using two different pens, but both were in his handwriting. Wade explained the language about firearms and handguns and his initials "DW" were added later, but not until after the police had located the stolen property from the T-Mobile store. (R.p.229-p.237).

Wade testified he explained everything in the consent form to Appellant and asked him a few questions to ensure he could read and write and understand what he was signing. He advised Appellant he could stop the search at any time. Wade testified that while doing the initial search he and another officer saw a box, in plain view, which contained several different types of cell phones. Wade subsequently had the app play a sound on the stolen iPad, which he heard coming from the dumpster next to the building. The police located an iPad next to the dumpster, wrapped in a plastic bag. They then returned to the apartment to conduct a second search, at

which point they actually questioned Appellant about the box of cell phones they had previously seen. During this second search they found a bag containing more cell phones and a second bag containing one or two handguns. Wade explained he added the additional language to the consent to search form before the second search and before they had discovered the guns. Wade testified he explained to Appellant that he was adding this language while they were in Appellant's living room. Appellant did not object to the second search or withdraw his consent in any way, even though he was told he could stop the search at any time and could require the police to get a search warrant. (R.p.237-p.246; p.546-p.547; State's Exhibit #1(p.736), State's Exhibit #17, State's Exhibit #24, & State's Exhibit #47). On cross-examination, Wade acknowledged Appellant's consent could have been withdrawn and that Appellant was free to tell the officers to stop searching; however, he offered no testimony to suggest Appellant actually attempted to withdraw consent at any point prior to the discovery of the additional evidence in his apartment. (R.p.254-p.266).

Appellant testified on his own behalf and said that although he initially declined to consent, in order to "alleviate the scene" he ultimately agreed to sign the consent form and allow the search of his apartment. He testified he did not feel pressured to sign the consent form, but he felt it would be best just to get it over with. Appellant confirmed that when he first signed the consent form, the thick writing about firearms and handguns was not on the form and was added later. He testified he was handcuffed outside the door of the apartment during the initial search but that afterwards the police locked the door and he was then taken down to a patrol car, at which point Cain retrieved the key from another officer and went back up to the apartment a second time. Appellant testified that when Cain came back down to the parking lot, Wade approached Appellant again with the consent form. Appellant testified Wade added the language

about firearms and handguns and asked him to sign the form again; however, Appellant responded by saying: "I'm not going to sign that form no more. . . Y'all searched my apartment one time you didn't find anything. You went back in there without me being present. I don't know what you done or what you did do, but I'm not signing it." (R.p.279-p.287, line 25). Appellant testified he specifically did not give the officers permission to search a second time, but they did it anyway. (R.p.288).

On cross-examination, Appellant admitted it was his signature on the consent to search form and that he understood what he was signing. He testified he saw the part of the form saying he could withdraw consent and he signed the form with the understanding that he could withdraw his consent at any time. When asked if, at any time, he tried to withdraw his consent, Appellant said: "No. I didn't have no reason to." He testified he never told the police to stop or that he did not want them searching his apartment. Appellant then repeated his claim that he never withdrew his consent. (R.p293-p.296). On redirect, Appellant claimed that when he testified he never withdrew his consent he was only referring to the first police search. He maintained he never gave the police consent to search the apartment a second time and claimed that when Wade added language to the consent form he did not sign it again. Appellant testified the police did not have his consent to search the apartment again. (R.p.307-p.308).

At the conclusion of the testimony, Appellant did not argue he was coerced to give consent or otherwise challenge his initial consent to the search of his apartment. Instead, he argued that when Investigator Wade altered the consent form by adding additional information, his consent was effectively revoked as evidenced by his refusal to sign the form a second time. Appellant argued his consent was withdrawn and therefore, it was an unconstitutional warrantless search. (R.p.309-p.312).

The trial court found "the consent was valid and voluntary" and therefore "the search is valid and the items that were found in the apartment and in the car are admissible." The trial judge found the officers' testimony was credible and that Appellant's testimony was contradictory which raised questions about his veracity. Ultimately, the trial court concluded "the added language in there was explained to the Defendant and the consent was never withdrawn and, therefore, the items that were found will be admissible." (R.p.340-p.341).

On appeal, Appellant continues to argue he withdrew consent, which invalidated the second warrantless search of his apartment. Appellant contends he effectively withdrew his consent when he refused/failed to sign the consent to search form a second time, after Wade had added language. However, as explained above, Appellant gave written consent for the search of his apartment, placed no specific or significant limits on the scope of that consent, and made no actual statement or act to withdraw that consent. At one point he even admitted he did not withdraw consent, although he tried to rehabilitate this admission by reversing his testimony on redirect. Ultimately, the trial court found Appellant's claims in regard to withdrawing consent were not credible and Wade's testimony that Appellant raised no objection to the added language or the second search was credible. Those credibility findings must be given great deference by this Court. Mattison, 352 S.C. at 584-85, 575 S.E.2d at 856. Appellant's mere failure to re-sign form by which he previously gave his consent falls far short of an unequivocal act or statement of withdrawal, particularly where, as Wade testified, he explained to Appellant that he was adding the language and Appellant did not object to the second search or attempt to withdraw his consent in any way. See Mattison, 352 S.C. at 585, 575 S.E.2d at 858 (holding Mattison's act of lowering his hands as the officer searched his groin area fell short of an unequivocal act or statement of withdrawal).

The trial court's denial of Appellant's motion to suppress did not constitute an abuse of discretion. Under a totality of circumstances, the evidence presented at the suppression hearing supports the trial court's determination that: "the added language in there was explained to the [Appellant] and the consent was never withdrawn." (R.p.340-p.341). Therefore, that determination and Appellant's convictions should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

DAVID M. PASCOE, JR.
Solicitor, First Judicial Circuit

BY: 
J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
April 25, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Maite D. Murphy, Circuit Court Judge

Appellate Case No. 2015-000516

THE STATE,.....RESPONDENT

v.

ARCHIE MORE HARDIN,.....APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

DAVID M. PASCOE, JR.
Solicitor, First Judicial Circuit

BY: _____
J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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