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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions

The Honorable Roger M. Young, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2015-000709

THE STATE,

Respondent,

v.

DENZEL MARQUISE HEYWARD

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Rules:

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. The trial court erred in permitting the in-court identification of the Appellant by Jujuain Hemingway, because the court failed to consider the appropriate Biggers reliability factors after determining the identification process was highly suggestive, and relied exclusively on the identifying witnesses' dishonesty in a prior line-up as the basis for declaring the identification reliable.

II. The trial court erred in permitting irrelevant and prejudicial evidence of domestic violence towards a testifying co-defendant, where the court ruled cross-examination on an unrelated allegation of sexual abuse against a different individual opened the door to questions regarding the Appellant's relationship with the witness.

III. The trial court erred in commencing sentencing proceedings at 1:30a.m. over the objection of Appellant, and erroneously considered victim impact testimony unrelated to the crimes for which the Appellant was convicted.

COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Although not properly raised, Judge Young properly admitted the of Appellant by witness Jujuain Hemingway because, even though suggestive, the identification was reliable and there was not a substantial likelihood Appellant was misidentified. Furthermore, Appellant was not prejudiced because he was thoroughly cross-examined on the circumstances and reliability of the identification.

II. Although not preserved, the State properly introduced evidence of Appellant's abusive relationship with his girlfriend, Rivers, to explain and rebut testimony elicited by Appellant's attorney that Rivers was abused and mentally unstable. Furthermore, any alleged error is insubstantial and not sufficient to warrant reversal of Appellant's conviction because there is overwhelming evidence of his guilt.

III. While the issue is not properly preserved, Judge Young acted within his discretion in proceeding to sentencing after the jury rendered their verdict in the early morning hours. Judge Young also was free to consider the victim impact presentation.

STATEMENT OF THE CASE

Appellant was indicted at the January 2014 term of the grand jury of Charleston County for murder (2014-GS-10-00762), attempted murder (2014-GS-10-00763), armed robbery (2014-GS-10-00765), and possession of a weapon during the commission of a violent crime. Appellant proceeded to a trial by jury on November 10, 2014, and from November 12-15, 2014, in Charleston, South Carolina. At the conclusion of trial, Appellant was found guilty of attempted murder, armed robbery and the weapons charge. A mistrial was declared on the murder charge. He was sentenced by the Honorable Roger M. Young to imprisonment for a term of thirty years for attempted murder, thirty years for armed robbery, and five years for the weapons charge. The sentences were to run consecutively. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

On the night of May 16, 2012, Appellant, along with Dashaun L. Simmons, and Quasantrina Rivers, drove to Johns Island to rob Kadeem A. Chambers and his brother Jujuain L. Hemingway. The robbery turned sour after a tussle over an assault rifle when Simmons fired multiple shots killing Kadeem. Hemingway was able to escape and later identified Appellant and testified for the State at trial.

Appellant's child's mother, Rivers, turned herself in and also testified for the State. (R. p. 296). She was charged with accessory before the fact to murder and with attempted murder. (R. p. 234-235; p. 299). Rivers testified that on May 16, 2012, she was with Appellant, Simmons, and her daughter, Trinity. (R. p. 259). They dropped off Trinity at Appellant's grandmother's house and initially had plans to go to dinner and then see a movie. (R. p. 260). Rivers testified she and Appellant had a disagreement and she was forced into the car while Appellant's mother and others looked on. (R. p. 260-261). She explained that Appellant pulled her ponytail and told her to get in the car. (R. p. 261). After the altercation, Rivers drove Appellant and Simmons to the home of "Skrill," an acquaintance of Appellant.[1] (R. p. 261). When they arrived, Appellant went into Skrill's home and returned with a duffel bag containing a gun that was then placed in the trunk of the car. (R. p. 263-264). The group then went back to the grandmother's house. (R. p. 265). Another altercation ensued over whether Rivers and Appellant would go to dinner and a movie that evening. (R. p. 264). Appellant again pulled Rivers' hair. (R. p. 267).

[1] The record does not reflect Skrill's real name and witnesses testified they did not know his full name. (R. p. 261-262).

Simmons reunited with Appellant and Rivers who was told to drive to Johns Island to Lorenzo Mehciz's house. (R. p. 271). Kadeem and Hemingway arrived at the scene in a Mercedes and Appellant promptly "bum-rushed" one of the victims. (R. p. 276). Appellant slammed Kadeem against the car. (R. p. 277; R. p. 404). Simmons then came rushing out of the woods armed with an assault rifle. (R. p. 277-278). Simmons ordered the victims to get on the ground. (R. p.279; R. p. 404). Appellant was frustrated that the victims did not have anything for he and Simmons to steal. (R. p. 280). Appellant repeatedly asked, "Where is the money at?" (R. p. 408). Appellant "stomped" Hemingway's head while he was on the ground multiple times. (R. p. 281; R. p. 409). Hemingway kept telling Appellant and Simmons that they did not have anything. (R. p. 410). Out of frustration, Simmons fired a shot towards Hemingway who was still lying on the ground. (R. p. 284). Appellant ordered Rivers to open the trunk of the car the victims arrived in, but Rivers hesitated and Hemingway was then ordered to open the trunk. (R. p. 282). A suitcase was removed from the trunk and placed into the backseat of the car Rivers was driving. (R. p. 283). Kadeem began to fight with Simmons over the gun and two more shots were fired, both striking Kadeem. (R. p. 285; R. p. 416). Appellant and Simmons ran towards the car, the rifle was placed in the backseat, and Rivers drove the car away from the scene. (R. p. 285). Both victims attempted to run. (R. p. 285; R. p. 417). Rivers almost hit Hemingway as he was fleeing while again being shot at by Simmons. Rivers drove back to Skrill's house where the three regrouped. (R. p. 287). Appellant talked to Lorenzo on his phone while en route to Skrill's house and instructed Lorenzo not to discuss what happened in hopes of not being identified as a suspect. (R. p. 291).

Rivers gave multiple statements detailing her involvement and what happened. (R. p. 296). Appellant wrote Rivers numerous letters where he encouraged her not to cooperate with law enforcement and apologized for getting her involved in the situation. (R. p. 311).

Verna Lockhart-Carter also testified at the trial. She is Lorenzo's mother. (R. p. 193). The incident took place in the street nearly in front of her home. (R. p. 192). Lockhart-Carter came home and Lorenzo was outside talking to Appellant and Simmons. (R. p. 195-196). Lockhart-Carter said hello to Appellant who she knew as Fat. (R. p. 218). Appellant and Lorenzo had been friends since high school. (R. p. 218). Lockhart-Carter called Appellant immediately after she heard the shooting because she believed he was involved since he was just outside of her home. (R. p. 223; 219).

ARGUMENT

I.

Although not properly raised, Judge Young properly admitted the identification of Appellant by witness Jujuain Hemingway because, even though suggestive, the identification was reliable and there was not a substantial likelihood Appellant was misidentified. Furthermore, Appellant was not prejudiced because he was thoroughly cross-examined on the circumstances and reliability of the identification.

How the Issue Arose Below

An extensive Neil v. Biggers hearing was held to determine the admissibility of the identification made by Hemingway. (R. p. 36-133). Detective Julius Alexander of the Charleston County Sheriff's Office met with Hemingway hours after the incident on May 17, 2012. (R. p. 36). Hemingway gave an initial statement consisting of three pages where he admitted to leaving out significant details of the incident. (R. p. 39). Hemingway's second statement was more detailed. (R. p. 46). Hemingway described Appellant as having a low haircut and a beard and stated as wearing a red shirt. (R p. 40).

Hemingway was shown multiple lineups, two of which contained photos of Appellant. On May 18th, Alexander returned to speak to Hemingway and presented him with a lineup containing Appellant's photo. (R. p. 42). Hemingway was asked to examine the lineups. He stated that he did not recognize any of the individuals. (R. p. 45). The next day, Charles Lawrence, also of the Charleston County Sheriff's Office, returned to Long, SC to interview Hemingway. (R. p.61-62). He was shown the lineup containing Appellant's photo. (R. p. 62). Hemingway identified Appellant out of the lineup and noted that Appellant had "fat jaws" and a goatee. (R. p. 65). Alexander showed

Hemingway a second and third lineup containing photos of Simmons and Rivers; he was unable to make a positive identification on the codefendants. (R. p. 66).

Hemingway testified he got a good look at Appellant and that he was right in his face. (R. p. 85). Hemingway explained that he was not forthcoming with law enforcement regarding the first lineup because he had not accepted the fact that his brother died. (R. p. 90). He testified he was very angry. (R. p. 90). Hemingway did recognize Appellant in the first photo lineup, but did not tell that to the investigators. (R. p. 92-93). Hemingway explained that he just lost his brother and was not in the frame of mind to cooperate. (R. p. 93).

Counsel Apostolou moved to suppress the lineup and argued it was suggestive because Appellant's photo appeared in both lineups (R. p. 131). Judge Young agreed and found the lineup to be unduly suggestive but ruled it was reliable. (R. p.131-133). Judge Young found persuasive Hemingway's testimony that he "was able to identify Appellant on the first day, but just chose to just not verbalize that because he was angry suggests to me that he was not, in fact, influenced by the second lineup." (R. p. 132). Judge Young also relied on Hemingway's explanation that he was seventeen years old at the time, was very angry, and was coping with the traumatic loss of his brother. (R. p. 132-133).

Discussion

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission of evidence is within the sound discretion of the circuit court. State v. Simmons, 384 S.C. 145, 166, 682 S.E.2d 19, 30

(Ct. App .2009). Accordingly, a circuit court's decision to allow the in-court identification of an accused will not be disturbed on appeal absent an abuse of discretion or prejudicial legal error. State v. Govan, 373 S.C. 552, 556, 643 S.E.2d 92, 94 (Ct. App. 2007). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." State v. Singleton, 395 S.C. 6, 13-14, 716 S.E.2d 332, 335-36 (Ct. App. 2011) (quoting Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

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

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

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

An out-of-court identification of a defendant violates due process and must be suppressed when the identification procedure used by law enforcement was impermissibly suggestive and conducive to a substantial likelihood of misidentification. Liverman, 398 S.C. at 138, 727 S.E.2d at 425; State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013). A witness's subsequent in-court identification is inadmissible "if a suggestive out-of-court identification procedure created a very substantial likelihood of *irreparable* misidentification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (emphasis added). Under the two-pronged inquiry as set forth in Biggers, the trial court must first determine whether the identification resulted from "unnecessarily suggestive" police procedures. Liverman, 398 S.C. at 138, 727 S.E.2d at 426; Traylor, 360 S.C. at 81, 600 S.E.2d at 526. If the court finds the identification did

not result from impermissibly suggestive police procedures, the inquiry ends there and the court does not need to consider the second prong. State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013). The defendant bears the burden of proving the identification procedure was impermissible suggestive. Id. at 561, 745 S.E.2d at 141 ("Our supreme court has never placed the burden of disproving suggestiveness on the State. The Fourth Circuit, whose decisions regarding federal constitutional law are binding on us, has held the defendant bears the burden of proving the identification procedure was impermissibly suggestive.").

If the court finds, however, that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless "so reliable that no substantial likelihood of misidentification existed." Liverman, 398 S.C. at 138, 727 S.E.2d at 426. The inquiry must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification. State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007); Singleton, 395 S.C. at 13-14, 716 S.E.2d at 335-36. When determining the likelihood of misidentification, courts must evaluate the totality of the circumstances using the following factors: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98 (1977) (citing Biggers, 409 U.S. at 199–200); Turner, 373 S.C. at 127, 644 S.E.2d at 697; Singleton, 395 S.C. at 13-14, 716 S.E.2d at 335-36.

The photo lineups were properly admitted.[2]

In so far as Appellant challenges the admission of the photo lineups into evidence, the record fully support Judge Young's ruling that the identification was reliable. Hemingway had ample opportunity to view Appellant as evidenced by his testimony that the he had between five and ten minutes to observe Appellant. (R. p. 107). Hemingway noted he stood very close to Appellant when he was asked to open the trunk of the Mercedes. (R. p. 86-87). Hemingway testified he was able to get a "good look" at Appellant because he was right in his face. (R. p. 85). Hemingway emphasized he was able to identify Appellant because of certain distinctive facial characteristics. In his statement to investigators, Hemingway described Appellant to be around 6 foot, 1 inch, wearing a red shirt, low hair cut with a beard. (R. p. 40). He further described the suspect as a black male with facial hair and approximated his weight at 200 pounds. (R. p. 41). As to the degree of certainty factor, Appellant again highlighted the fact that Appellant was near him and was "was in my face." (R. p. 107, lines 7-9). The time between the confrontation and the identification was relatively short. The incident took place the night of May 17 and in the early morning hours of May 18, 2012. The lineups were presented to Appellant on May 18th and May 19, 2012. (R. p. 42; p. 61-62).

Appellant argues that the lineup was not reliable because Hemingway's testimony was not credible. It is clear Judge Young found Hemingway's testimony to be credible since he partially based his ruling it. This Court should not disturb that finding. "We give

[2] In his brief, Appellant frames his argument challenging Hemingway's *in*-court identification of Appellant and does not seem to challenge the admission of the photo lineups into evidence. Hemingway testified extensively at trial but did not give a classic in-court identification. He was not asked to identify or point out Appellant during his testimony. Hemingway does identify Appellant through the admission of the photo lineups. Respondent questions whether Appellant has properly presented this issue for this Court's review and focuses the argument on whether the photo lineups were properly admitted.

great deference to a judge's findings when matters of credibility are involved since we lack the opportunity to directly observe the witnesses." Solomon v. State, 313 S.C. 526, 443 S.E.2d 540, 542 (1994). While Hemingway gave a less detailed statement and told investigators that he did not recognize any individuals in the first photo lineup, Judge Young excused these actions and found the identification reliable because of "the unique – very unique circumstances" concerning Hemingway's justifications. (R. p. 132-133). According to Hemingway, the fact that Appellant was in both lineups did not have any impact on him in making the identification. (R. p. 116). Therefore, based on the totality of the circumstances Hemingway's in-court identification of Appellant was reliable.

Appellant cites State v. Stewart[3] in support of his argument that the identification should have been suppressed. Stewart is instructive because it reiterates that suggestiveness alone does not require the exclusion of evidence and sets out the appropriate factors to consider as addressed above. Id at 450, 272 S.E.2d at 629; see Perry v. New Hampshire, ___ U.S. ___, ___, 132 S. Ct. 716, 720 (2012), 132 S. Ct. at 728 ("[T]he jury, not the judge, traditionally determines the reliability of evidence."); see also State v. Brown, 356 S.C. at 504, 589 S.E.2d at 785 ("Reliability is the linchpin in determining the admissibility of identification testimony."). The facts here are more suited to admission than those in Stewart. In Stewart, the witness testified she had a full view of the appellant, she gave an accurate description, and only two weeks had passed since the robbery. Here, Hemingway similarly had a full, up close view of Appellant, gave an accurate description and was shown the lineups just in the two days following the incident. Here, there was not a substantial likelihood of misidentification such that it should be excluded entirely. See Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983)

[3] 275 S.C. 447, 272 S.E.2d 628 (1980).

(characterizing the exclusion of identification evidence from trial as a "drastic sanction" that should only be employed where the reliability of the evidence is "manifestly suspect"). Judge Young properly allowed the jury to weigh the evidence concerning the identification.

Furthermore, Appellant did not suffer any prejudice by having the lineups admitted into evidence. Defense counsel were able to cross examine Hemingway extensively on both the suggestiveness and the reliability of the lineups. See State v. Liverman, 398 S.C. 130, 143-44, 727 S.E.2d 422, 428-29 (2012) (finding any error in the admission of identification evidence to be harmless where the reliability of the identification evidence was fully vetted at trial, the weaknesses in the evidence were exposed on cross-examination, and defense counsel reminded the jury of those weaknesses during closing arguments). Counsel Apostolou highlighted the fact that Hemingway failed to identify Appellant in the first lineup that contained his photo. (R. p. 456-58). Counsel Apostolou also reminding Hemingway of his testimony from the Biggers hearing where he stated he felt like the "police must know something because they keep showing you the same guy; is that correct?" (R. p. 458). This identification was also cumulative to the eyewitness testimony given by Rivers which was more consistent.

II.

Although not preserved, the State properly introduced evidence of Appellant's abusive relationship with his girlfriend, Rivers, to explain and rebut testimony elicited by Appellant's attorney that Rivers was abused and mentally unstable. Furthermore, any alleged error is insubstantial and not sufficient to warrant reversal of Appellant's conviction because there is overwhelming evidence of his guilt.

How the Issue Arose Below

After the Biggers hearing was completed, the parties took up the issue of whether evidence regarding Appellant and Rivers' would be admissible. (R. p. 138-150). Counsel Apostolou brought it to Judge Young's attention that there had been allegations made by Rivers that Appellant physically abused her in the past. (R. p. 138). Counsel Apostolou hoped to have excluded any testimony regarding any prior bad acts. (R. p. 138-39). Solicitor Shealy laid out her position that Appellant had control over Rivers and that she was "sort of under the spell of Denzel Heyward." (R. p. 139). Judge Young noted that an incident that happened the night of the incident would be different than an incident months prior. (R. p. 142-43). Judge Young cautioned that he had not been presented with any argument to support the allegation's admission pursuant to Rule 404(b), SCRE. (R. p. 145). Judge Young also noted that the door could be opened by the defense which would make the evidence admissible. (R. p. 146-47).

Sidearis Singleton, Rivers' mother, she testified for the State at trial. (R. p. 227). She was called to recount her conversation with Rivers where she told her to turn herself in to the authorities after learning what happened. (R. p. 231). On cross examination, Counsel Apostolou opening his questioning of Singleton on whether she was aware Rivers had attempted suicide. (R. p. 239). He continued and asked questions about whether Singleton was aware that Rivers had been abused. (R. p. 239). After an

objection to a question regarding whether Singleton knew Rivers was a stripper, Counsel Apostolou argued the question was relevant to Rivers' mental state. (R. p. 240-41).

On redirect, Singleton explained that Appellant is the one who abused Rivers physically, not her father. (R. p. 248). Singleton testified there were physical signs of abuse such as missing hair and a busted lip. (R. p. 249). She explained that Rivers was abused more than once. (R. p. 250). Quasantrina Rivers testified following her mother. (R. p. 254). Rivers explained she endured a violent relationship with Appellant as the aggressor. (R. p. 255).

Discussion

This issue is not preserved.

First, Respondent this issue is not preserved because no objection was made to this testimony. Appellant bears the burden of presenting an adequate record sufficiently complete so the appellate court is able to review the lower court's actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999). An argument not raised to and ruled on by the trial court is not preserved for appeal. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) (objection must be entered on a specific ground at trial to preserve an appeal); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). "The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error." State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). The exact name of the legal doctrine employed does not need to be used to preserve an argument, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001).

In response to Counsel Apostolou's questioning on whether she knew Rivers had been abused, Solicitor Shealy asked Singleton who had abused Rivers. (R. p. 247-48). Counsel Apostolou voiced an objection and an off the record bench conference was held. (R. p. 248). Counsel Apostolou did not make a specific argument in support of his objection. Respondent recognizes that an argument was likely articulated at the bench conference, but the objection must be made on the record at some point. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001) (An objection made during an off-the-record conference and not made part of the record does not preserve the question for review.) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Furthermore, no objection was made during Rivers testimony on direct examination. Rivers testified that her relationship with Appellant "included some violence." (R. p. 255-56). Rivers briefly testified that she was subject to abuse by Appellant. (R. p. 256). As no objection was made when this testimony was received, the issue is not preserved for review.

The testimony that Appellant had abused Rivers in the past was properly admitted because the door was opened.

Even if preserved, the testimony was properly admitted. During cross examination of Singleton, Counsel Apostolou opened the door to the issue of abuse. A party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991). When a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003). A party will be

unsuccessful in opposing the admission of evidence if that party was the one who opened the door. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991). "Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge." State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2009) (citations omitted).

The State properly elicited testimony from Singleton and Rivers to explain whether she was abused. The questioning of Singleton and Rivers was proper because the State is entitled to explain the circumstances surrounding whether Rivers was abused. Appellant argues for a much narrower construction of the "opening the door" doctrine. Appellant argues the State was limiting in clarifying the one instance of sexual abuse alleged by Counsel Apostolou. The State was not limited to just explaining the allegation of sexual abuse supposedly made by Rivers. The State was properly allowed to give a full and fair context of the abuse. Counsel Apostolou also opened the door to Rivers' mental health and state of mind when he asked whether Singleton knew Rivers had attempted suicide. The State was permitted to also explain why Rivers was not in a stable mental state which allowed it to introduce evidence that Appellant was physically abusive.

Appellant also argues the evidence was not admissible pursuant to Rule 403, SCRE. As discussed above, no objection was made, so we are unable to speculate as to what Judge Young would have ruled had such an objection been made. Regardless, the evidence of an abusive relationship would have survived an objection under Rule 403 because the probative value is not substantially outweighed by any unfair prejudice. It is not likely the jury would have presumed Appellant planned a robbery and partook in a

murder because he was physical with his girlfriend. The evidence is also probative and necessary to explain the allegation raised by Counsel Apostolou.

Any error was harmless in light of the significant evidence proving Appellant's guilt.

Additionally, there is overwhelming evidence of Appellant's guilt. The fact that Hemingway and Rivers' version of events were so consistent prevents this Court from finding any prejudice. It was established that Appellant was wearing a red shirt by both Hemingway and Rivers. (R. p. 274; R. p. 158). An analysis of Appellant's phone done by Willis Walker placed Appellant at the scene. (R. p. 539-40). Lorenzo's mother, Lockhart-Carter also placed Appellant at the scene. (R. p. 218). It was also corroborated that Fat is Appellant's nickname. (R. p. 222-23; p. 235; p. 248; p. 326). Kadeem, as he was about to pass away, told first responders that Fat is the one who shot him. (R. p. 187).

III.

While the issue is not properly preserved, Judge Young acted within his discretion in proceeding to sentencing after the jury rendered their verdict in the early morning hours. Judge Young also was free to consider the victim impact presentation.

Finally, Appellant argues his due process rights were violated by being sentenced after the jury had deliberated into the early morning hours. Appellant further asserts he was not given adequate notice of the materials the victims would present to Judge Young.

How the Issue Arose Below

Judge Young instructed the jury and then dismissed the panel to deliberate the verdicts at 5:25 pm. (R. p. 622). A note from the jury was received at 7:44 pm. (R. p. 622). The jury wanted to rehear certain testimony and arguments. (R. p. 622). Judge Young brought the jury back in at 8:04 p.m. to inform them that they would be provided

the audio testimony of Rivers and Hemingway but would not be able to rehear closing arguments made by the attorneys. (R. p. 626-628). Another note was received informing the court that the jury was in agreement on four counts. (R. p. 630). Judge Young then gave the jury a moderate Allen charge encouraging the jurors to consider their fellow jurors' opinions of the case. (R. p. 631-634). Counsel Apostolou noted an objection to the charge before it was given. (R. p. 630).

At 1:08 a.m. the court received a note from the jury stating they could not reach an agreement on some charges. (R. p. 634). The jurors were instructed to complete the verdict forms. (R. p. 635). Appellant and Simmons were convicted of attempted murder, armed robbery, and possession of a weapon during the commission of a violent crime. (R. p. 636). The jury was dismissed at 1:30 a.m. (R. p. 639). Judge Young declared a mistrial on the two murder charges. (R. p. 639).

Counsel Apostolou asked Judge Young to: "defer sentencing due to the hour to the extent we've all been here." (R. p. 640). Solicitor Shealy asked Judge Young to go ahead with sentencing because the victim's family was in town from Longs, South Carolina and one family member had to be at work later that afternoon. (R. p. 641). Judge Young proceeded with sentencing. (R. p. 641).

Discussion

First, this issue is not preserved for this Court's review. Counsel Apostolou did not object to Judge Young conducting sentencing at such a late hour as a violation of his due process rights. Appellant argues on appeal that his due process rights were violated because the sentencing hearing was held at 1:30 a.m. Appellant also argues he was not

provided ample notice of the victim impact testimony to prepare a mitigation presentation.

Preservation

Counsel Apostolou did not articulate his grounds for objecting to the sentencing going forward. He only vaguely stated that due to the time he ask that Judge Young defer sentencing. He does not mention due process in this brief objection. The objection was not made with enough specificity to preserve the issue. Furthermore, Counsel Apostolou did not object to the presentation of the victim impact testimony. Appellant raises this issue for the first time on this appeal. See State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal."); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial.").

It was within Judge Young's discretion to proceed directly to sentencing after the jury deliberated into the early morning hours.

Even assuming a proper objection was raised and ruled upon, this issue is without merit. Appellant's argument is based on speculation in that Judge Young would not have sentenced Appellant as harshly if he had deferred sentencing. There is nothing in the record to support that argument. Respondent submits this is akin to a continuance request and that the same principles apply. The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion. State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002). Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth. State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957). Judge Young did not abuse his discretion in

As to the statement written by the victim's sister, there is nothing in the record to suggest that Appellant was not given proper notice of the impact statement. Appellant argues that Judge Young improperly considered a video tribute composed by the victim's family. There is also no indication that Judge Young actually viewed this video. Solicitor Shealy asks if Judge Young would be willing to watch this video. (R. p. 641, line 24 – p. 642, line 8). The record does not reflect the playing of any video and there was no further mention of the video in the transcript. In any event, there was no error if Judge Young viewed and considered the slide show. Prior to determining what sentence to impose, "a judge may appropriately conduct an inquiry broad in scope, *largely unlimited* either as to the kind of information he may consider or *the source from which it may come*." State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (emphasis added). Respondent submits Judge Young properly conducting the sentencing hearing.

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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September 12, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
ROGER M. YOUNG, Circuit Court Judge

Appellate Case No. 2015–000709

THE STATE,.....RESPONDENT

v.

DENZEL HEYWARD,.....APPELLANT.

CERTIFICATE OF COUNSEL

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

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