STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CALHOUN COUNTY
The Honorable Maite Murphy, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Appellate Case No. 2017-001673

THE STATE,

Respondent,

v.

UNTONYO FERJEARL JOHNSON,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court erred in admitting Victim's in-court identification of Appellant, when the issue was not preserved for appellate review because Appellant failed to object to the testimony when it was offered at trial and where, even if the issue is preserved, whether the trial court erred in admitting the identification when Victim was already certain who shot him before he was ever shown a picture of Appellant and where the image shown to Victim merely confirmed the identification of the person who shot Victim when he had seen the shooter twice a few hours beforehand, and when Victim provided descriptive details of the shooter's clothing and provided corroborating details to confirm the accuracy of his identification?

II.

Whether the trial court erred in admitting Appellant's statement to law enforcement when the issue was not properly preserved for appellate review because Appellant failed to object to the testimony when it was offered at trial and where even if the issue is preserved whether the trial court erred in admitting Appellant's statement when it was voluntarily given after Appellant was properly advised of his Miranda rights and when Appellant subsequently waived those rights and whether any possible error in admitting the statement was entirely harmless?

STATEMENT OF THE CASE

In January 2016, the Calhoun County Grand Jury indicted Appellant for attempted murder, possession of a firearm during the commission of a violent crime, and possession of a firearm by a person convicted of a violent crime. On July 25-26, 2017, a jury trial was held in the Calhoun County Court of General Sessions with the Honorable Maite Murphy presiding. Appellant was represented by Bakari Sellers, Esq. Respondent (the State) was represented by Assistant Solicitor Ted Lupton of the First Circuit Solicitor's Office. At the conclusion of trial, the jury found Appellant guilty of each charge. Following the verdict, the trial judge sentenced Appellant to a term of twenty-five years' imprisonment for attempted murder, and five years' imprisonment for both weapon possession charges. The sentences ran concurrently with each other resulting in an aggregate total of twenty-five years' imprisonment. Appellant timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

On October 1, 2015, Mark Edmonds (Victim) went to visit his girlfriend, Miranda Dukes (Girlfriend) at the Shell station on Chestnutt Street in Orangeburg where she worked. (Tr. 73-75). While Victim was speaking with Girlfriend, a black male customer, later identified as Appellant, approached them to purchase cigars, but he did not have enough money to do so[1]. (Tr. 74). When Appellant did not have enough money to buy the cigars, he called Girlfriend a bitch and began to insult her. (Tr. 74-75). In response, Victim asked Appellant to stop verbally abusing Girlfriend. (Tr. 75). Appellant became angry with Victim and challenged him to a fight outside of the gas station. (Tr. 76). Victim declined to fight Appellant, and Appellant left the store after a few minutes and went into the woods. (Tr. 76). Victim stayed at the gas station and talked with Girlfriend for approximately thirty more minutes, and then he left to go to his mother's house. (Tr. 77-78).

Victim left the gas station and crossed over into Calhoun County on highway 601. (Tr. Tr. 80, 89). After Victim turned onto highway 176, he pulled down a back road and eventually came to a stop sign where he attempted to turn right. (Tr. 82). While Victim was at the stop sign, Appellant pulled up beside Victim and fired five shots into Victim's car. (Tr. 83). Two shots hit Victim. (Tr. 83). Victim recognized Appellant as the same man he argued with at the gas station. Victim testified Appellant was wearing a distinctive shirt with clouds on it and that Appellant said he "finish what we start" (Tr. 77, 84, 85, line 12). Victim was able to make it to his mother's house where he called law enforcement. When law enforcement arrived at Victim's

[1] It is unclear how law enforcement identified the black male customer as Appellant. Outside the presence of the jury, Counsel for Appellant and the Assistant Solicitor both made reference to a confidential informant identifying Appellant to law enforcement. Each side agreed not to reference this fact in front of the jury. (Tr. 57-58). Therefore, Victim's identification of Appellant in a still photo was not the only means used by law enforcement to identify Appellant.

mother's house, Victim stated he was shot by the same person he argued with at the gas station. (Tr. 113).While at the hospital, Victim was shown a still image of Appellant from the gas station surveillance footage. Victim identified Appellant as the man who shot him. (Tr. 49-50, 86, State's Exhibit 2).

Six days later, Appellant called the Orangeburg County Sheriff's Department who directed the call to the Calhoun County Sheriff's Department where Appellant spoke with Captian Regales. (Tr. 33-34, 126, State's Exhibit 21). Appellant then voluntarily came into the Calhoun County Sheriff's Department and met with Investigator Wausaw. (Tr. 26, 126.) While there, Wausaw placed Appellant in handcuffs, indicated he was not free to leave, and advised him of his Miranda rights. (Tr. 126-27, State's Exhibit 21). Wasauw utilized a waiver of rights form and explained Appellant's rights to him. Appellant waived his rights and agreed to speak with Wausaw. (Tr. 127-30, State's Exhibit 21). During his interview, Appellant admitted being at the gas station on October 1st and participating in a verbal altercation with Victim. He also admitted returning to the gas station at some point that day. (Tr. 130-31).

Prior to trial, Appellant moved to suppress Victim's in-court identification. (Tr. 38). The State also filed a motion for a Jackson v. Denno hearing to determine whether Appellant's statement to law enforcement was freely and voluntarily given. (Tr. 24). The trial judge admitted Appellant's statement and ruled that Victim's identification of Appellant was reliable. (Tr. 37-38, 55-57). At the conclusion of trial, Appellant was convicted on all counts.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." State v. Liverman, 398 S.C. 130, 137-138, 727 S.E.2d 422, 425 (2012). "In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). "Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error." Id.

"When reviewing a trial court's ruling concerning voluntariness, this court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." State v. Johnson, 422 S.C. 439, 454, 812 S.E.2d 739, 747 (Ct. App. 2018). (quoting State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001)). "The trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." State v. Johnson, 422 S.C. at 454-455, 812 S.E.2d at 747 (quoting State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001)).

ARGUMENT

I.

The issue of whether the trial court erred in admitting Victim's in-court identification of Appellant is not preserved for appellate review because Appellant failed to object to the testimony when it was offered at trial. Even if preserved, the trial court properly admitted Victim's in-court identification because Victim was already certain who shot him before he was ever shown a picture of Appellant. The still image shown to Victim merely confirmed his identification of the person who shot him after he saw the shooter twice a few hours beforehand, provided descriptive details of the shooter's clothing, and provided corroborating details to confirm the accuracy of his identification.

Appellant contends the trial court erred in admitting Victim's in-court identification of Appellant because Victim was only shown a single still image of Appellant captured from surveillance footage at the gas station prior to trial. Appellant asserts this identification procedure was unduly suggestive. Appellant's argument is without merit. As an initial matter, this argument is not preserved for appellate review because Appellate failed to object to the in-court identification of Appellant when it was offered at trial. (Tr. 86-87). However, even if the issue is preserved, the trial judge did not abuse her discretion in admitting Victim's identification of Appellant, because Victim's identification was reliable and the procedure used by law enforcement was not unnecessarily suggestive. Victim's identification was reliable because he was absolutely certain that Appellant was not only the same person who shot him, but also the same person he argued with at the gas station earlier that day. Additionally, Victim was able to give a description of what Appellant was wearing and said Appellant referenced their earlier argument when he shot Victim. Therefore, the trial judge did not abuse her discretion in admitting Victim's identification of Appellant. Appellant's convictions and sentences should be affirmed.

Issue Preservation

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). "Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011). "Because a ruling on a motion *in limine* is preliminary and subject to change based on developments at trial, a contemporaneous objection must be made again when the evidence is presented at trial. State v. Wiles, 383 S.C. 151, 679 S.E.2d 172 (2009).

Before the jury was sworn, a hearing was held to determine the admissibility of Victim's identification of Appellant. (Tr. 38-50). The trial judge noted that Victim made his identification with absolute certainty and determined that under the totality of the circumstances the identification was reliable, and therefore admissible. (Tr. 55-57). When Victim identified Appellant in front of the jury, Appellant did not renew his objection. (Tr. 77, 86). Because Appellant did not renew his objection to Victim's identification of Appellant, he failed to preserve any issue related to this testimony for appeal. Therefore, this issue is not preserved for further review.

No Abuse of Discretion

Assuming that this issue is preserved for appeal, the trial judge did not abuse her discretion in admitting Victim's identification because it was reliable and not unnecessarily suggestive.

"When a defendant challenges the admissibility of a witness's identification, trial courts employ a two-prong inquiry to determine whether due process requires suppression." State v.

Wyatt, 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017). "First, the court must determine whether the identification resulted from 'unnecessarily suggestive' police identification procedures." Id. (quoting Neil v. Biggers, 409 U.S. 188, 198-199 (1972)). "An in court identification of an accused is inadmissible if a suggestive and 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). "If the court finds the police procedures were not suggestive, or that suggestive procedures were necessary under the circumstances, the inquiry ends there and the court need not consider the second prong." State v. Wyatt, 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017) "If, however, the court determines the procedures were both suggestive and unnecessary, the court must then determine 'whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.'" State v. Wyatt, 421 S.C. at 311, 806 S.E.2d at 710 (citing State v. Liverman, 398 S.C. 130, 727 S.E.2d 422, 426 (2012)). The United States Supreme Court has prescribed a number of factors to be considered by appellate courts when determining whether a risk of misidentification existed. The factors to be considered include: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. " Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

Here, Victim had ample opportunity to view Appellant at the Shell station only one hour before the shooting occurred. (Tr. 76-77). The store was well-lit and Victim stood approximately two feet away from Appellant as they argued for approximately ten to fifteen minutes. (Tr. 40-41, 77). Victim was able to describe Appellant's clothing as being a distinctive

shirt with clouds on it. (Tr. 77). Approximately one hour later, Victim had a second opportunity to view Appellant. (Tr. 43). On the second occasion, Appellant pulled up next to Victim's vehicle just a short distance away in the daylight. (Tr. 83). Victim testified he recognized Appellant from the same distinctive shirt he wore and from the fact it was "after I just seen him at the store and we had words." (Tr. 43-44 lines 25-1, 84-85). Appellant even referenced their previous argument when he said "[I] finish what we start." (Tr. 85 line 12).

When considering the Biggers factors, the trial judge properly admitted Victim's in-court identification. Victim certainly had ample opportunity to view Appellant in a well-lit gas station and in a car which pulled up next to his in the daylight. (Tr. 40-41, 77, 83). Victim accurately described Appellant's distinctive shirt, and was absolutely certain in his identification. (Tr. 44, 77, 91). As soon as law enforcement arrived at Victim's mother's house, Victim said the person who shot him was the same person from the gas station. (Tr. 113). Just a few hours later in the hospital, Victim identified Appellant in a still photo from the gas station (Tr. 48, 50). The photo showed Appellant wearing the same distinctive shirt described by Victim. (State's Exhibit 2). The photo shown to Victim is distinguishable from the typical one person photo lineups that our appellate courts have cautioned against. Victim never wavered in his assertion that the person who shot him was the same person that he argued with at the gas station. Therefore, Victim already knew who shot him. The photo shown to Victim was merely used to clarify and confirm that officers were looking for the correct person. Law enforcement also received information from a confidential informant that the person in the still image was Appellant. (Tr. 57-58). Appellant never challenged this identification and it was not mentioned by either side before the jury, but it was nevertheless used by law enforcement to identify Appellant as the shooter.

Therefore, it was a proper factor for the trial judge to consider in deciding whether to admit Victim's identification of Appellant.

Because the shooter was already identified, the identification procedure used by law enforcement was not unnecessarily suggestive. Even if the identification procedure was suggestive, the procedure used by law enforcement was necessary under the circumstances. Victim knew who shot him already and never wavered in that regard. Therefore, it was incumbent on law enforcement to clarify Victim's identification using the surveillance footage from the gas station. (State's Exhibit 19). Even if this Court determines the identification procedure to be suggestive and unnecessary, no substantial likelihood of misidentification existed. Victim was absolutely certain who shot him and gave corroborating details to verify that the person who he argued with at the gas station was the same person who shot him. (Tr. 77, 85). Therefore, the trial judge did not abuse her discretion in admitting Victim's identification of Appellant at trial. Appellant's convictions and sentences should be affirmed.

II.

The issue of whether the trial court erred in admitting Appellant's statement to law enforcement is not preserved for appellate review because Appellant failed to object to the testimony when it was offered at trial. Even if preserved, the trial court properly determined that the statement made by Appellant was voluntarily given because Appellant was properly advised of his Miranda rights and choose to waive those rights and give a statement to law enforcement. Finally, any possible error in admitting the statement was entirely harmless.

Appellant argues the trial court erred in admitting Appellant's statement to Investigator Wausaw because the statement was not freely and voluntarily given. Appellant's argument is without merit. As an initial matter, Appellant's argument is not preserved for appellate review because Appellate failed to object to the relevant testimony when it was offered at trial. Furthermore, even if the issue is preserved, the trial judge did not err in admitting the statement because evidence shows Appellant voluntarily came to the Calhoun County Sheriff's Department

and was advised of his Miranda rights in writing. Appellant chose to waive his rights and provide a statement to investigator Wausaw, therefore the trial judge did not err in admitting Appellant's statement. However, even if the trial judge did err in admitting the statement, any error is entirely harmless because Appellant did not confess to shooting Victim but merely admitted having argued with someone at the gas station. Appellant's convictions and sentences should be affirmed.

Issue Preservation

As an initial matter, this issue is not properly preserved for appellate review. The State, rather than Appellant, initially requested the Jackson v. Denno hearing. (Tr. 24). At the conclusion of the hearing, Appellant objected to the admission of his statement. (Tr. 37). The trial judge ruled that the statement was freely and voluntarily given. (Tr. 37-38). However, Appellant did not renew his objection to the admission of Appellant's statement when it was offered at trial. (Tr. 130). Therefore, Appellant did not properly preserve this issue for appeal.

Statement Freely and Voluntarily Given

The Fifth Amendment does not provide a uniform protection against every statement made to law enforcement officials. State v. Miller, 375 S.C. 370, 380, 652 S.E.2d 444, 449 (Ct. App. 2007). "Miranda rights attach only if the suspect is subject to custodial interrogation." State v. Lynch, 375 S.C. 628, 633, 654 S.E.2d 292, 295 (Ct. App. 2007). "In determining whether a confession was given 'voluntarily,' [the appellate court] must consider the totality of the circumstances surrounding the defendant's giving the confession." State v. Pittman, 373 S.C. 527, 566, 647 S.E.2d 144, 164 (2007). The question for an appellate court to consider is "whether the defendant's will was overborne when he confessed." State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996). However, "[t]he trial court's factual conclusions as to the

voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d. 240, 252 (2001). This Court's standard of review for evaluating proof of voluntariness is "limited to determining whether the trial court's ruling is supported by any evidence." State v. Breeze, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008).

Here, evidence supports the trial judge's conclusion that Appellant's statement was voluntary. Appellant voluntarily came to the Calhoun County Sheriff's Department to speak with law enforcement (Tr. 26, 126). Upon arrival, Appellant was placed under arrest and told that he was not free to leave. (Tr. 26). However, Appellant was advised of his Miranda rights via a written form that he signed and acknowledged he understood. (Tr. 27-28, 127-30, State's Exhibit 21). Appellant advised he had completed twelve years of school and that he could read and write. (State's Exhibit 21). Appellant voluntarily waived his rights and spoke with Wausaw for approximately eight minutes. (Tr. 28-29, 32, 130-31). Wausaw testified he never threatened Appellant or made any promises to him in exchange for his statement. (Tr. 129). Appellant did not present any evidence he was threatened or otherwise coerced into giving his statement to law enforcement. The interview terminated after Wausaw told Appellant he was being charged with attempted murder. (Tr. 132).

The State proved by a preponderance of the evidence that Appellant's statement was freely and voluntarily given. Wausaw testified that Appellant voluntarily came to the Sheriff's office to speak with him. While Appellant was not free to leave and was placed in handcuffs, Appellant nonetheless acknowledged that he understood his rights in writing and freely gave a statement to law enforcement. Thus, evidence supports the trial judge's conclusion that

Appellant's statement was voluntary. Accordingly, the trial judge did not err in admitting Appellant's statement into evidence.

Harmless Error

Even if we assume that the trial judge erred in admitting Appellant's statement, Appellant never admitted to shooting Victim in his statement but merely admitted going to the gas station and getting into an argument with someone. Therefore, any error in admitting Appellant's statement is entirely harmless.

"Whether an error is harmless depends on the circumstances of the particular case." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). An "error without prejudice does not warrant reversal." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." Thompson, 352 S.C. at 562, 575 S.E.2d at 83.

The evidence against Appellant was overwhelming. Appellant was identified by Victim in court and in a still image from the gas station surveillance footage. (Tr. 77, 86). Appellant was also clearly depicted in the surveillance footage and in a still image from that footage wearing the shirt that Victim described. (State's Exhibit 2, State's Exhibit 19). In his statement to law enforcement, Appellant admitted he was at the gas station and exchanged words with someone there, but he did not admit to shooting Victim. (Tr. 29, 130). Even if the trial judge had excluded Appellant's statement, there was still more than sufficient evidence presented to prove

Appellant's guilt. Therefore, any error by the trial judge in admitting Appellant's statement was harmless. Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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November 8, 2018

STATE OF SOUTH CAROLINA
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APPEAL FROM CALHOUN COUNTY
The Honorable Maite Murphy, Circuit Court Judge

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THE STATE,

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UNTONYO FERJEARL JOHNSON,

Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Taylor Gilliam, Esquire
S.C. Commission on Indigent Defense
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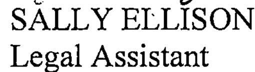
I further certify that all parties required by Rule to be served have been served.
This eighth day of November, 2018.



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November 8, 2018

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RE: State v. Untonyo Ferjearl Johnson
Appellate Case No. 2017-001673

Dear Mr. Gilliam:

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

Sincerely,

Scott Matthews
Assistant Attorney General
Bar # 101464

JSM/ab
Enclosures

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