

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
The Honorable R. Knox McMahon, Circuit Court Judge

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SC Court of Appeals

THE STATE,

Respondent,

v.

JAMES HEYWARD,

Appellant.

Appellate Case No. 2017-001542

BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

- I. Did the trial court err in admitting evidence and testimony regarding (a) an out-of-court photograph lineup where the victim did not make a positive identification and (b) the subsequent positive identification made by the victim at trial?
- II. Did the trial court err in admitting a fingerprint card obtained from a New Jersey database and testimony based on the New Jersey fingerprint card where the New Jersey fingerprint card was not properly authenticated by the State?
- III. Did the trial court err by allowing expert opinion testimony about the operational capabilities of the gun found at Appellant's residence where such testimony was not relevant to the charges against Appellant and was needlessly cumulative and unduly prejudicial?
- IV. Did the trial court err in allowing Appellant's alias "Abdul Muslim" to be included in the indictments and at trial because the alias invited undue religious prejudice against Appellant?
- V. Did the trial court err in admitting gruesome autopsy dissection photographs of the victim's internal head injuries where the photographs lacked probative value and were calculated to inflame the passions of the jury?
- VI. Did the trial court err by denying Appellant's request to remove his shackles during jury selection?
- VII. Did the cumulative errors committed by the trial court have the effect of preventing Appellant from receiving a fair trial, entitling Appellant to a new trial?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. The procedure used by the police was not unduly suggestive and the out-of-court identification made by the child was so reliable that no substantial likelihood of misidentification existed. The following in court identification was therefore properly admissible.
- II. The fingerprint identification card was admissible because the non-hearsay evidence was sufficiently authenticated by a witness who identified the card as the information she obtained from a national database, linking Heyward's distinctive fingerprints to unknown prints obtained from the crime scene.
- III. The testimony regarding whether the gun was operational was highly relevant to the definition of a weapon, as used within the elements of armed robbery and pointing and presenting a firearm, and also to prove malice aforethought for the charge of murder.
- IV. The trial court properly refused to strike to portion of the indictment including Heyward's alias, Abdul Muslim, because significant evidence linked the identity of Abdul Muslim to the crime and the defense's theory of the case was the evidence identified the wrong man.
- V. The trial judge did not abuse his discretion in admitting detailed photographs of the victim's injuries because the pictures were offered to prove malice beyond a reasonable doubt, corroborated the pathologists' testimony about the blunt force trauma to the head, and were limited in number and breadth only to those necessary to illustrate the testimony.
- VI. Heyward offered no evidence any juror saw his shackles during jury selection, so he cannot show prejudice from the trial court's denial of his motion to remove the shackles.
- VII. There is no error, much less cumulative error, and any preserved errors are harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt. A defendant is entitled to a fair trial, not a perfect one, and even a perfect trial would have inevitably resulted in Heyward's conviction.

STATEMENT OF THE CASE

In October of 2016, a Richland County Grand Jury indicted Appellant, James Heyward, aka Abdul Muslim, for two counts of armed robbery, assault and battery in the first degree, burglary in the first degree, two counts of kidnapping, murder, pointing and presenting a firearm, and unlawful possession of a firearm. (Indictments.) Appellant proceeded to a jury trial on July 26, 2017, before the Honorable R. Knox McMahon. Appellant was represented by Steve Krzyston, Esquire, Alicia Goode, Esquire, and Adam Ruffin, Esquire. (Tr. p. 1.) Assistant Solicitors Luck Campbell, Joanna McDuffie, and Nicole Simpson, of the Fifth Circuit Solicitor's Office, represented the State. (Tr. p. 1.)

The jury found Appellant guilty as indicted. (Tr. p. 1299, line 2 – p. 1300, line 3.) Judge McMahon sentenced Appellant to consecutive terms of life imprisonment for murder and burglary. He then sentenced Appellant to a concurrent term of thirty years for armed robbery, a consecutive term of thirty years for the kidnapping of the child, a consecutive term of ten years for assault and battery, two concurrent terms of five years for pointing and presenting a firearm, and unlawful possession of a firearm. (Tr. p. 1337, line 3 – p. 1338, line 10.)

Appellant filed a timely notice of appeal, and Tara C. Sullivan, Esquire, and Chief Appellate Defender Robert M. Dudek filed the Initial Brief of Appellant on August 10, 2018. This Brief of Respondent follows.

STATEMENT OF FACTS

On Sunday, October 11, 2015, Deputy Lakeisha West responded to a 911 call, which she believed to be burglary in progress. As West arrived at the property, she saw a female child, whose hands and feet were still bound, hopping from beneath the carport of a home into the front yard. The child was nervous and scared. (Tr. p. 297, line 10 – p. 301, line 16.) The girl told the deputies her grandmother was inside the house and that a man tied her up and put her in the closet. (Tr. p. 302, lines 13—24.) The girl described her attacker as a black male, with a bald head, wearing an orange shirt, and he asked the girl and her grandmother where their money and jewelry were. (Tr. p. 303, lines 1-13.) The girl described the man telling her to sit down, then choking her grandmother, and then carrying her to a back room and tying her feet and hands. (Tr. p. 303, line 16 – p. 305, line 20.) Inside, the deputies found the body of Ms. Tollison on the floor in the kitchen. (Tr. p. 306, lines 1-5.) The victim's cane walker was beneath her. (Tr. p. 468, lines 6-23.)

At the time of the trial, the victim was ten years old and in fifth grade, but she clearly described the events of the day she and her grandmother were attacked. (Tr. p. 352, lines 8- p. 353, line 1.) The girl said she would attend church with her grandmother every Sunday when her mother dropped her off before work. (Tr. p. 355, line 16 – p. 356, line 8.) After church they were watching some television when someone knocked on the door. (Tr. p. 358, line 7 – p. 359, line 15.) Her grandmother left the room to open the door, which led to the carport. (Tr. p. 360, lines 5- 18.) After a few minutes, the girl went into the kitchen to get her toys from the kitchen table. (Tr. p. 360, line 20 – p. 361, line 17.) When the girl walked into the kitchen, she saw a man carrying a duffel bag and her grandmother sitting at the kitchen table. The man told her to sit, and then he demanded money from her grandmother. (Tr. p. 361, line 18 – p. 362, line 9.) Her

grandmother told the man she did not have any money. Then the man removed a gun from his bag and set it on the table, rolled up his sleeve, and made the girl watch as he strangled her grandmother. (Tr. p. 362, line 10 – p. 364, line 2.) The girl described the gun as gold and rusty, “and it had two spots for bullets,” which she later clarified as “two spots where it shoots out.” (Tr. p. 363, lines 3-14; p. 393, line 6.)

After he killed her grandmother, Heyward carried the girl to a closet, told her to sit in there and closed the door. (Tr. p. 364, lines 17-19.) The man told the girl her grandmother was sleeping, though the girl knew he was lying. (Tr. p. 364, line 23 – p. 365, line 7.) The girl heard him rummaging through rooms in the house before returning to the closet, moving the girl to another room, and then tying her hands and feet with telephone wire and a wire from the wall. (Tr. p. 365, line 17 – p. 367, line 13.) The girl said she struggled to free herself for approximately thirty minutes before falling asleep. (Tr. p. 368, lines 1-15.) The girl awoke when she needed to relieve herself, so she called out to the man. There was no response, but the girl was able to pull herself to her feet by biting a blanket and hopping down the hall. (Tr. p. 368, line 18 – p. 369, line 13.) The girl said she fell multiple times because there were beads all over the floor of the kitchen, but she was able to call 911 on the home telephone on the kitchen table. (Tr. p. 369, line 11- p. 370, line 21.) The girl asked the dispatcher to send police and to contact her mother. (Tr. p. 373, line 11 – p. 375, line 21.)

The girl recalled the interview the day after the murder at the ARC, where she described the attacker. (Tr. p. 379, line 2 – p. 381, line 1.) The girl also recalled the photo lineup with a law enforcement officer and her identification of Heyward as her assailant. (Tr. p. 381, line 9 – p. 384, line 23.) The girl identified Heyward in the courtroom. (Tr. p. 386, lines 1 – 13.)

At the time of the murder, James Hayward was renting some rooms in the home of Mattie Canzater. (Tr. p. 784, line 3 – p. 786, line 20.) Canzater also knew Heyward to go by the names of Abdul and Rasheed. (Tr. p. 789, line 23 – p. 790, line 8.) Ms. Tollison offered to loan Canzater some tables to use at an upcoming yard sale, so Canzater asked Heyward to help her pick up the tables from Tollison's house the Friday before the murder. (Tr. p. 789, lines 2-15.) Canzater and Heyward pulled into the carport to retrieve the tables, but neither went inside the house. (Tr. p. 791, line 16 – p. 792, line 5.) Ms. Tollison showed Canzater some costume jewelry she made and told Canzater she was accumulating pieces to sell. (Tr. p. 794, lines 4-10.)

Canzater said the following day, Saturday, she and Heyward had an argument about his use of her property and Heyward told Canzater he would be moving out within a week. (Tr. p. 796, line 16 – p. 799, line 4.) The next morning, Canzater went to church and when she arrived home, Heyward was not in the house. Canzater said when he later returned to her home, he was carrying a large trash bag. (Tr. p. 799, line 5 – p. 801, line 25.) Heyward was also wearing clothes matching the description of the suspect. (Tr. p. 806, lines 2-23.) When Canzater heard about the murder of Ms. Tollison and suspected Heyward was the perpetrator, she confronted him in her home. When Canzater asked Heyward where he was at the time of the murder, he said he went for a walk to clear his head. Canzater noted that after their confrontation ended, Heyward shaved his head and face. (Tr. p. 807, line 9 – p. 815, line 13.) Police later found a Smith and Wesson .32 caliber revolver in a closet in Heyward's room during a search of Canzater's home following his arrest on the Tuesday after the murder. (Tr. p. 844, line 25 – p. 849, line 15.) Several days after Heyward was arrested, he called his wife from jail, and his wife told him she reported a false tip to Crimestoppers to accuse someone else of the murder to divert attention away from Heyward. (Tr. p. 1083, line 6 – p. 1084, line 21.)

Crime scene investigators dusted the storm door and entry door to the kitchen from the carport for fingerprints and were able to collect latent prints from the interior side of the storm door and from the entry door. (T. p. 433, line 19 – p. 435, line 14.) The investigator also found prints on an alarm keypad and a water bottle from the kitchen table. (T. p. 437, lines 6-13.) The victim's neck was swabbed for DNA, along with an abraded area of her chin. (Tr. p. 692, lines 12-17.) The technician took the fingernail scrapings from the victim's hands. (Tr. p. 696, lines 5-14.) Heyward's fingerprints were found on the interior side of the entry door, and on a jewelry box and other items located inside the home. (Tr. p. 262, line 5 – p. 263, line 13.) Heyward's DNA was found under Ms. Tollison's fingernails, from the swab on her neck, and from a swab of a draft stopper found around Ms. Tollison's neck. (Trial Tr. p. 997, line 13 – p. 1002, line 20.)

The victim had multiple injuries to her neck and chin area. The pathologist said the markings were consistent with more than just an arm around the victim's neck. (Trial Tr. p. 717, lines 12-25.) The fractures of the bones and the amount of hemorrhage "buried deep within the neck" indicated the use of force stronger than that of just a ligature. (Trial Tr. p. 717, lines 21-25.) The victim also had multiple injuries from blunt force trauma around her head. (Trial Tr. p. 720, lines 13-22.) The pathologist said these injuries were consistent with being struck several times or thrown against a wall or floor. (Trial Tr. p. 732, lines 1-8.) Ms. Tollison suffered fractures to the cartilage in her neck, as well as a fractured hyoid bone. (Trial Tr. p. 735, lines 5-21.) The cause of death was strangulation. (Tr. p. 742, lines 1-7.)

ARGUMENT

- I. **The procedure used by the police was not unduly suggestive and the out-of-court identification made by the child was so reliable that no substantial likelihood of misidentification existed. The following in court identification was therefore properly admissible.**

Standard of Review

Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such[] or the commission of prejudicial legal error." *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). "However, an eyewitness identification [that] is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law." *Id.* "A criminal defendant may be deprived of due process of law by an identification procedure arranged by police [that] is unnecessarily suggestive and conducive to irreparable mistaken identification." *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004).

How the Issue Was Presented at Trial

The *Neil v. Biggers*¹ hearing was held after the jury was seated but before opening statements. Investigator Joseph Clarke testified that at the time of the crime, he worked in the Special Victims' Unit of the Richland County Sheriff's Department. (Tr. p. 125, lines 6-25.) Clarke was called to the crime scene and then to a hospital to interview a possible eyewitness, an eight-year-old girl. (Tr. p. 126, lines 5-24.) The girl had given a description of the perpetrator to 911 and to responding officers and was able to tell Clarke about what happened. (Tr. p. 127, lines 1-13.) Clarke scheduled an interview of the child at the Assessment Resource Center ("ARC"), which is a controlled environment that specializes in interviewing child victims. (Tr. p. 127, line 15 – p. 128, line 1.) The defense requested the victim be sequestered from any

¹ *Neil v. Biggers*, 409 U.S. 188 (1972).

testimony concerning her identification of Heyward, but the court declined, saying the victim was statutorily and constitutionally entitled to remain in the courtroom. (Tr. p. 128, lines 12-23.) At the time of the interview, investigators had already developed Heyward as a suspect through his fingerprints. (Tr. p. 129, lines 5-12.) Heyward's photograph was placed in a six man lineup generated by special software at SLED. (Tr. p. 128, line 13-p. 129, line 7.) Clarke said the men in the lineup were consistent in their appearance and he would not have used a lineup with any suggestive pictures. (Tr. p. 129, lines 8-20.) After the girl's interview at the ARC, the officers showed her the lineup, and that procedure was video-taped. (State's Exhibit 31.) Clarke told the girl she was brave and asked her to be brave again and look at the lineup and see if she could identify the man who attacked her and her great-grandmother. (Tr. p. 132, lines 2-7.) The girl identified photograph number 3, circled it, and put her initials beside the picture. (Tr. p. 132, lines 12 – 25.) After the girl identified Heyward as the man who murdered her grandmother, she remarked that one of the other photographs looked like the janitor at her school. Clarke questioned her about the comment to make sure she understood the purpose of the lineup and to inquire whether her earlier choice was still, in fact, the man she recognized as the perpetrator. The girl told Clarke she was sure the man in photograph 3 was the man who broke into her house, tied her legs and feet, and carried her into a back room. (Tr. p. 133, line 1 – p. 134, line 6; p. 144, lines 5-24.)

The then ten year old child testified at the hearing before Judge McMahon. The girl remembered the man "tied [her] up with wires," and talked to her. (Tr. p. 146, line 24 – p. 147, line 21.) The girl said it happened during the daytime, and she first saw the man in the kitchen, when he told her to sit down at the kitchen table. (Tr. p. 148, lines 3 – 17.) The girl said he wore nothing over his face and she tried to remember what he looked like. (Tr. p. 148, line 24 – p. 149,

line 16.) The girl recalled the photograph lineup and recognized it when the solicitor showed it to her at the hearing. (Tr. p. 150, line 22 – p. 151, line 11.) The girl testified she recognized the man who killed her grandmother, and she circled his picture and wrote her name by it. (Tr. p. 151, line 12 – p. 152, line 4.) The child then recognized and pointed to Heyward in court as the man who murdered her grandmother. (Trial Tr. p. 153, lines 13-25.)

Dr. Julie Buck, a consultant on eyewitness memory and identification, testified for the defense. (Tr. p. 162, line 3 - 164, line 12.) The consultant showed the lineup used by Investigator Clarke to a group of mock witnesses who had no connection to the crime and asked them to pick out who they thought the suspect must be. (Tr. p. 168, lines 2-10.) Buck said that in a fair lineup, any one photograph should be selected at a rate of 17 percent, or, equal distribution across all the photographs. (Tr. p. 168, lines 11-14.) In her study of online participation, 37 percent chose the defendant's photograph. (Tr. p. 169, lines 11-24.) The expert also said the best practice for a lineup would be a double blind selection, in which the officer administering the lineup did not know which photograph depicted the suspect. (Tr. p. 169, line 25 – p. 171, line 11.)

The consultant also claimed Clarke failed to advise the child of the “ground rules” for the lineup, and that the person sought for the crime may not appear in any of the photographs. (Tr. p. 173, line 17 – p. 174, line 2.) Buck said Clarke's instruction to the child to take her time and look really carefully at the photographs increased the chance of false identification. (Tr. p. 174, line 18 – p. 175, line 8.) Buck said that language pressured the child and implied the child must make a choice. (Tr. p. 175, lines 9-16.) Buck testified that the research indicated “people who are highly stressed during an event tend to be less accurate and more likely to make a false identification.” (Tr. p. 177, lines 23-25.) Buck said the presence of a weapon also tends to reduce eyewitness identification accuracy. (Tr. p. 178, lines 10-20.) Buck then opined that the girl

equivocated in her identification of Heyward and her selection was not clarified. (Tr. p. 179, line 12 – p. 180, line 9.) Buck also claimed Clarke’s positive feedback of the selection encouraged the girl to confirm her choice by circling his photograph. (Tr. p. 180, line 21 – p. 181, line 4.)

Upon cross-examination, the solicitor learned Dr. Buck prepared and submitted a report to the defense that had not been disclosed to the State. (Tr. p. 193, lines 6 -16.) After extensive discussion among the defense, the State, and the trial judge, Dr. Buck was ordered to turn over her report, all data related to her internet mock witness experiment, as well as her notes concerning the preparation of the test. (Tr. p. 193, line 17 – p. 204, line 4.) Dr. Buck acknowledged the girl was able to give details to investigators about the description of the perpetrator (Tr. p. 206, line 10 – p. 208, line 20.) Buck admitted she had not seen statements from witnesses, the defendant’s statement, the DNA or fingerprint reports, or any other physical evidence corroborating the girl’s description of the attacker. (Tr. p. 209, lines 9 – p. 214, line 1.) Dr. Buck said she chose the participants for her experiment from SurveyMonkey.com, but provided no detail about how those participants were chosen for the test other than the participants were paid to take the survey. Buck said it did not matter to her research who actually took the survey. (Tr. p. 214, line 9 – p. 216, line 20.) Regarding the video-taped identification, Dr. Buck acknowledged Clarke told the girl, “I want you to help me and see **if** you can see the bad man that did this to your grandma.” (Tr. p. 219, lines 14-22 (emphasis added).)

The following morning, the trial court heard arguments on the reliability of the out of court identification procedure. (Tr. p. 227, lines 16-24.) The State argued there was no evidence presented that the lineup itself was suggestive in any way, other than the internet study which identified no discernable reason or feature any of the participants chose photograph 3. (Tr. p. 227, line 25 – p. 228, line 17.)

The trial court cited to relevant state and federal law, and found Clarke's statements to the girl were in no way suggestive that she should pick any photograph at all or in particular. (Tr. p. 230, line 8 – p. 231, line 19.) The court found the girl had sufficient time and opportunity to view the perpetrator and the child picked photograph 3 without "any hesitance." The court noted the lineup appeared to contain images of six men within the same age range and with similar facial features. (Tr. p. 231, line 20 – p. 232, line 18.) The court ruled State's Exhibit 30 and 31, the lineup and the video of the lineup identification, were admissible. (Tr. p. 233, line 22 – p. 234, line 4.)

Analysis

In *Neil v. Biggers*, 409 U.S. 188 (1972), the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Initially, the trial court must determine whether the identification resulted from "unnecessarily suggestive" police procedures. *State v. Dukes*, 404 S.C. 553, 557–58, 745 S.E.2d 137, 139 (Ct. App. 2013) (citing *Biggers*, 409 U.S. at 198–99). If the court determines the identification did not result from unnecessarily suggestive police procedures, the inquiry ends. *Id.* However, if the court finds law enforcement used "an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless 'so reliable that no substantial likelihood of misidentification existed.'" *Id.* (quoting *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012)). Under the totality of the circumstances, courts are to consider these factors in assessing the reliability of an otherwise unnecessarily suggestive identification procedure: (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).

Here, the girl testified Heyward instructed her to sit at the table across from her grandmother while he strangled Ms. Tolleson right in front of her. The crime occurred during the daytime, and he was not wearing a mask or any other item to obscure his face. Heyward then tied the girl's hands and feet and then carried her to a closet. In considering the first factor, the child had ample opportunity to view Heyward's face within feet and inches of her own. The girl testified she tried to remember what Heyward looked like while he was committing the crime. (Trial Tr. p. 148, line 24 – p. 149, line 16.) Although she was young, the girl recalled details about the crime, such as the position of her grandmother at the table and the purplish color of her grandmother's face after she was strangled. Thus, the evidence supports the second factor, that the girl was paying attention during the crime to the best of her ability. Third, the girl described the athletic suit worn by Heyward and his bald hairstyle, which according to Ms. Canzater, was a closely cut hairstyle that he shaved shortly after the murder. As for the fifth factor, the girl identified Heyward in the photograph lineup within one day of the murder. The length of time between the confrontation and the identification was minimal.

It is the fourth factor that Heyward appears to challenge in his appeal. Heyward argues Investigator Clarke did not explicitly tell the girl the perpetrator may not be pictured in the lineup, and that improperly encouraged the child to choose a photograph even though she may not have been certain. (IBOA at p. 11, citing State's Ex. 31.) However, as Investigator Clarke testified, he did not tell the girl the perpetrator was included in the lineup. His exact words were, "I want you to help me and see **if you can see** the bad man who did this to your grandmamma." (State's Ex. 31 (emphasis added).) As the record reveals, Clarke did not tell the girl she must

identify the assailant. Indeed, Clarke made no improper suggestions to the child about whether the man was included in the lineup or which photograph depicted Heyward.

Heyward also contends the girl was not certain of her identification of him in the lineup because the girl said the photograph “looks kind of like” Heyward. (IBOA at p. 11, citing State’s Ex. 31.) However, the record reveals that although the child did not remember every detail about Heyward, such as whether he had facial hair, she did understand the difference between a photograph that merely looked familiar and a photograph of the actual man who killed her grandmother. (Tr. p. 133, lines 4-10.) The child first selected Heyward’s photograph as the man who murdered her grandmother. She then viewed another photograph in the lineup and remarked that the man looked like a janitor in her school. (Tr. p. 133, lines 4-15.) Clarke clarified with the child that she understood the difference between the man she choose as the perpetrator, and the man she choose as having a resemblance to her school janitor. The child told Clarke she was certain of her identification of Heyward as the killer because she “got scared” when she saw him again. (Tr. p. 133, line 18 – p. 134, line 6.) The testimony shows the child, even as young as she was, was perfectly capable of recognizing the killer and having an emotional reaction to his photograph. Thus, fourth factor of the *Brathwaite* analysis was satisfied, despite Heyward’s arguments to the contrary.

Under the totality of the circumstances, the trial court properly found the identification procedure reliable. Having found the out-of-court identification reliable, the admission of the in-court identification of the Heyward by the child was proper. *See State v. Cheeseboro*, 346 S.C. 526, 540, 552 S.E.2d 300, 307-08 (2001) (“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.”). Moreover, any challenge to the reliability of the

child's in-court identification of Heyward would not result in suppression of that testimony. *See State v. Lewis*, 363 S.C. 37, 42, 609 S.E.2d 515, 518 (2005) (“the remedy for any alleged suggestiveness of an in-court identification is cross-examination and argument.”)

In his argument for suppression of the testimony, Heyward's reliance on *Foster v. California*, 394 U.S. 440 (1969) is misplaced. In *Foster*, the witness did not positively identify the perpetrator in his first viewing of a physical lineup of suspects. The witness then had the opportunity to view Foster again before a second lineup, in which Foster was the only man included from the first lineup. The witness was then confident Foster was the perpetrator, having now seen him on multiple occasions before the positive identification. *Foster*, 394 U.S. at 441-443. The facts of *Foster* are completely unsuitable to the identification in this case. Critically, the in-court identification of *Foster* was doomed because of the precariousness of the out-of-court identification. Here, the child positively identified Heyward at the **first** photograph lineup, held shortly after the murder. Unlike in *Foster*, there were no more attempts to subject the child to photographs of Heyward following that identification because her first identification was confident. *Foster* has no application to the case at hand.

Harmless Error

Even if this Court were to find error in the admission of the out-of-court or in-court identification of Heyward, that admission will not require reversal unless there was a reasonable probability it contributed to Heyward's conviction. 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) 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). 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. Notwithstanding the girl’s identification of Heyward, his fingerprints were found on the door to the kitchen, as well as on items found inside the house, despite his claims to officers he never entered the home. Heyward’s DNA was found under Ms. Tollison’s fingernails, as well as on the item wrapped around her neck and on a swab of her neck. The gun described by the child was found in Heyward’s possession, and witnesses described the outfit he was wearing as matching the outfit of a man seen outside Ms. Tollison’s home at the time of the murder.

The State’s case against Heyward was compelling. The identification procedure used resulted in a reliable and positive identification of Heyward as the perpetrator. Even without the identification, the State could prove Heyward’s guilt beyond a reasonable doubt. For all of these reasons, his convictions should be affirmed.

- II. **The fingerprint identification card was admissible because the non-hearsay evidence was sufficiently authenticated by a witness who identified the card as the information she obtained from a national database, linking Heyward's distinctive fingerprints to unknown prints obtained from the crime scene.**

Standard of Review

“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.” *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the conclusions of the trial court are based on an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice. *State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995).

How the Issue Was Presented at Trial

After Investigator Trisha Odom was qualified as an expert on latent print analysis, she explained the different types of fingerprints to the jury, how prints are left on varying surfaces, and the longevity of prints. (Tr. p. 589, lines 11 – p. 594, line 9.) The State sought to introduce Odom's reports of her findings when the defense objected. (Tr. p. 594, line 10 – p. 595, line 10.) The defense objected to the portions of the report finding a match between several prints in the house and Heyward's because Heyward's known prints were obtained from the Automated Fingerprint Identification System (“AFIS”), submitted by the State of New Jersey pursuant to his incarceration there. (Tr. p. 595, line 18 – p. 596, line 19.) The defense further argued the State should have compared Heyward's prints to his AFIS card to verify its accuracy before the analysis was performed. (Tr. p. 596, line 20 – p. 597, line 10.) The proper procedure, according to Heyward, would require the State to call someone from New Jersey who could explain how

Heyward's print was uploaded into AFIS, how the print is maintained in the New Jersey state database, and how that database is maintained. (Tr. p. 603, lines 20-25.)

The State argued it had been careful not to tread into any area that would discuss Heyward's arrests and incarceration in New Jersey, but would be happy to elicit testimony from Odom concerning how Heyward would be entered into AFIS and matched to his FBI identification number already on file. (Tr. p. 599, line 14 – p. 601, line 6.)

Citing the Supreme Court of South Carolina's language in *State v. Rich*, 293 S.C. 172, 359 S.E.2d 281 (1987) and *State v. Anderson*, 386 S.C. 120, 128-29, 131-32, 687 S.E.2d 35, 39-40, 41 (2009), the trial court found the print card was not hearsay and the State need not present a witness from New Jersey to authenticate it. (Tr. p. 604, line 13 – p. 606, line 6.)

During the proffer of testimony, Odom explained that when she first examined the fingerprints from the scene on October 12, 2015, she relied on the fingerprint card generated from the AFIS database. (Tr. p. 616, lines 1-6.) Odom's first three reports were written on October 12. When Odom performed the remainder of the comparisons and issued her final report, she used the original card obtained from AFIS and the South Carolina card obtained when Heyward was booked into Richland County. (Tr. p. 616, lines 10-14.) Odom had no doubt the prints obtained from Heyward on booking were the same as the prints obtained from the AFIS database. (Tr. p. 617, lines 1-7.)

Following the proffer, the defense again argued the testimony about the prints was inadmissible because the prints analyzed on October 12 were not authenticated "because they can't provide the testimony that is required to authenticate the New Jersey print card that was acquired through the FBI database." (Tr. p. 625, lines 16-24.) The defense argued the analysis

performed on October 16 comparing the crime scene prints to the fingerprint card obtained from Heyward's booking was "not a sufficient basis for authentication." (Tr. p. 626, lines 2-6.)

The State argued the testimony showed the analyst preliminarily ran the prints on October 12 and received a match on the FBI database. Heyward was arrested and fingerprinted on October 13. Following his arrest, Odom then compared his prints based on the federal and local fingerprint cards. Odom also testified the card obtained from booking and the card she used to make the initial match contained the prints of the same person. (Tr. p. 626, lines 10-24.)

The court clarified the facts with the following: Officers responded and processed the crime scene on October 11, and they continued processing on the 12th. The officers ultimately released that scene on the 12th. Different officers lift latent prints, some on the interior of the door, some on the jewelry canister, box, and various items. The prints were uploaded to the AFIS system, which is a national databank. The databank returned one match on the 12th. The analyst then made a comparison of the match, Exhibit 217, with the latent prints from the crime scene. Heyward was not under arrest at this time, but he became a suspect. Later on the 12th, a detective showed the child a photographic lineup and the child selected Heyward at the perpetrator of the crime. Investigators then obtained a warrant for Heyward's arrest, and he was arrested on the 13th. Upon his arrest, Heyward's prints were scanned into the local database via the LiveSan system at the detention center. Heyward's Livescan prints were then assigned a unique state identification number. (Tr. p. 628, line 20 – p. 631, line 15.)

Heyward said he would withdraw any objection to the portions of the report finalized on the 16th because the analysis was performed with the known standard from Richland County. (Tr. p. 632, lines 1-4.) Heyward maintained an objection to the prints analyzed on the 12th (or based upon Exhibit 217). (Tr. p. 632, lines 11-13.)

The trial court found the authentication of the FBI database fingerprint card was sufficient pursuant to prevailing common law. The court also found the fingerprint card sufficient for admission under Rule 901 (a), SCRE. (Tr. p. 633, line 19 – 634, line 18.) The court elaborated with the following:

Here, you have the unique identifying FBI number in this case. You have an expert testifying that she compared a latent print from the crime scene on the 12th or however many she compared on the 12th to the known prints of James Heyward from -- I've said the FBI, New Jersey. I keep changing my terminology about that. I do that to make sure I'm tracking right.

So I would deny the motion as to lack of authentication in camera at this point. I will deny it as to 217, State's 217. And I note there is a gap. I take that into consideration. There is a gap because there's no comparison that I can actually track between the FBI prints on the 12th, if they were directly or not compared to the LiveScan.

(Trial Tr. p. 635. lines 5-17.) The court also found the reports (State's Exhibits 214 and 215) admissible pursuant to Rule 1006, SCRE. (Trial Tr. p. 644, lines 5-25.)

Analysis

In *State v. Rich*, the Supreme Court of South Carolina definitively held that police fingerprint cards do not violate the prohibition against hearsay given that they fall within the business records exception or the public records exception. *Rich*, 293 S.C. at 173, 359 S.E.2d at 281. The Fourth Circuit recognizes this principle and has held that fingerprint cards are not “testimonial” and, thus, do not violate the Confrontation Clause concerns espoused in *Crawford v. Washington*, 541 U.S. 36 (2004). See *United States v. Thornton*, 209 Fed.Appx. 297, 299 (4th Cir.2006) (concluding that fingerprint cards are not “testimonial,” and that the admission of such business or public records does not violate the rule in *Crawford*). Although the evidence may not violate the rule prohibiting the admission of hearsay, the evidence must be properly authenticated, nonetheless.

A party offering evidence must meet “[t]he requirement of authentication ... as a

condition precedent to admissibility.” Rule 901(a), SCRE. The authentication requirement “is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” *Id.* “[T]he burden to authenticate ... is not high” and requires only that the proponent “offer[] a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.” *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir.2014) (decided under Fed.R.Evid. 901(a)(3)); *see also* 29A Am. Jur. 2d Evidence § 1045 (2008) (“The authentication requirement does not demand that the proponent of ... evidence conclusively demonstrate [its] genuineness....”).

South Carolina’s Rule of Evidence 901 provides a non-exclusive list of ways in which evidence may be authenticated. For example, Rule 901(b)(1) provides generally that a “witness with knowledge” that the testimony is what it is claimed to be may authenticate the evidence. As to the authentication of fingerprint records, particularly, South Carolina case law clarifies Rule 901(b) provides several applicable illustrations of authentication. *See Anderson*, 386 S.C. at 129, 687 S.E.2d at 39. Rule 901(b)(4) provides that a proponent of physical evidence may satisfy the threshold authentication requirement of Rule 901(a) by “internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.” Rule 901(b)(4), SCRE.

Here, Investigator Odom, an expert in the field of fingerprint analysis, analyzed the latent fingerprints found at Ms. Tollison’s home by checking them through the AFIS. Using this technology and comparing the characteristics of the latent fingerprints with those of the known prints, Odom determined first that the unknown prints resulted in a match to Heyward’s prints uploaded to AFIS from New Jersey and then that the prints from the crime scene matched the known prints from Heyward obtained from Livescan following his arrest. Odom explained that the prints on the fingerprint card from AFIS would have been taken at a correctional facility and

assigned a unique identifying number. Similarly, when Heyward's prints were processed locally, his prints would also have been assigned a unique state identifying number. Although Odom testified she did not recall performing a direct comparison between the AFIS fingerprint card and the Livescan card, she did compare and confirm both cards matched the latent prints found at the scene.

Consistent with the Court's holding in *Anderson*, Odom's testimony regarding the distinctive characteristics of the Heyward's prints on the fingerprint card was sufficient to support a finding that the fingerprint card was properly authenticated. *See United States v. Patterson*, 277 F.3d 709, 713–14 (4th Cir. 2002) (holding, pursuant to Federal Rule of Evidence 901(b)(4), government provided sufficient authentication of a Tenprinter image where testimony that one of the fingerprints recorded by the Tenprinter matched the fingerprint recovered from the crime scene evidence); *United States v. Lauder*, 409 F.3d 1254, 1265–66 (10th Cir. 2005) (referencing Federal Rule of Evidence 901(b)(4) and finding government presented sufficient evidence that fingerprint card generated by the "live-skin" method accurately reflected defendant's fingerprints where evidence was presented that defendant's known fingerprint was properly recorded, the "live-skin" method functioned properly when it recorded the defendant's print, and the chain of custody was maintained).

Second, 901(b)(7), the public records example, provides for authentication by "[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept." Rule 901(b)(7), SCRE. As the Fourth Circuit held in *Thornton*, the fingerprint cards produced by various law enforcement agencies and maintained by the FBI are admissible as business records or as public records.

Thornton, 209 F. App'x at 299. Thus, to authenticate the business record under this exception, the witness need only show the trial court the card was actually from the database where fingerprint cards of this nature are kept. Here, Investigator Odom testified she obtained the fingerprint card from a national database maintained by the FBI. (Tr. p. 610, lines 1-17; p. 614, lines 14-21.) Odom said that in order to for the prints to be uploaded into the AFIS system, the prints must meet a common threshold to satisfy AFIS quality for readability and comparison. (Tr. p. 612, lines 16-22.) Thus, Odom's testimony on the standard procedures used by AFIS to keep the prints was sufficient for authentication. *See State v. Carruth*, 166 S.W.3d 589, 591 (Mo.Ct.App.2005) (holding AFIS fingerprint card was admissible under business records exception to the hearsay rule where witness, who did not take the actual prints, established the standard procedures used by the jurisdiction to collect and maintain fingerprints and testified regarding her determination that the latent prints and the known prints came from the defendant).

Further, Rule 901 (b)(9) provides for authentication by “[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.” This subsection was recently discussed in *State v. Brown*, 818 S.E.2d 735, 740 (S.C. 2018), to determine the authentication of GPS monitoring records. In *Brown*, the Supreme Court of South Carolina again acknowledged the low burden to authenticate records but required the State to make some minimal showing of the accuracy of the records. *Id.* at 741 (“We emphasize that ‘[n]o elaborate showing of the accuracy of the recorded data is required;’ however, the State must make some showing to authenticate the records.” (citing *People v. Rodriguez*, 224 Cal.Rptr.3d 295, 309 (2017))). The Court went on to “require that a witness should have experience with the electronic monitoring system used and provide testimony describing the monitoring system, the process of generating or obtaining the records, and how this process has

produced accurate results for the particular device or data at issue. As noted, the witness need not be an expert.” *Brown*, at 742. Thus, in the case of GPS records, the Court would not require a technician from the monitoring company to authenticate the records, instead allowing the State to meet its burden through a witness familiar with the operation of the process or system used to produce the evidence.

In this case, Odom testified regarding when and where Heyward’s fingerprints were taken upon his arrest and detention, how the prints were submitted to AFIS, how the prints were submitted to SLED and her lab via the Livescan software, and how the accuracy of the prints maintained in AFIS was corroborated by the Livescan prints. Thus, in accordance with recent prevailing law in *Brown*, Odom’s testimony was sufficient to satisfy the authentication requirement under numerous subsections of Rule 901(b).

Contrary to Heyward’s assertions, the State is not required to call the analyst from New Jersey who actually took the fingerprints and then uploaded them to AFIS. The State need only show 1) Odom could identify the distinctive characteristics of Heyward’s fingerprints, 2) Odom recognized the fingerprint card as originating from the AFIS database where other fingerprints of that nature are kept, and 3) the fingerprint card was an accurate reflection of Heyward’s prints as corroborated by the analysis of the Livescan prints to the latent prints found at the scene. Investigator Odom’s testimony was more than sufficient to meet the State’s low burden to authenticate the fingerprint card. The testimony offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic. *United States v. Hassan*, 742 F.3d at 133. The State, consistent with the requirements of authentication under Rule 901, SCRE, and with numerous state and federal jurisdictions, sufficiently established that the fingerprint card in question was what the State purported it to be.

Harmless Error

Even if this Court were to find the admission of the fingerprint card to be error, any error is entirely harmless in this case. 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); *see also, State v. Garner*, 389 S.C. 61, 67–68, 697 S.E.2d 615, 618 (Ct. App. 2010) (“[I]mproper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice. Such error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors.”)

Heyward withdrew his objection to the portions of the report analyzing the fingerprints obtained directly from Heyward after his arrest and booking into the detention center. (Tr. p. 632, lines 1-4.) Heyward maintained an objection only to the prints analyzed on the 12th. (Tr. p. 632, lines 11-13.) The analyst testified she compared the unknown prints found at the crime scene to those of Heyward processed in the Livescan software in the following days. (Tr. p. 616, lines 1-14.) Because the analysis performed on those prints were admitted without objection, the jury still heard that Heyward’s prints were found on the door to the kitchen from the carport and on some items retrieved from inside the house. Additional testimony about the matching of Heyward’s prints at an earlier time in the investigation cannot be reasonably said to have affected the result of the trial. This Court should not set aside his convictions on this matter.

- III. **The testimony regarding whether the gun was operational was highly relevant to the definition of a weapon, as used within the elements of armed robbery and pointing and presenting a firearm, and also to prove malice aforethought for the charge of murder.**

Standard of Review

A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009)

How the Issue Was Presented at Trial

Before Investigator David Collins began his testimony, Heyward objected to any testimony from the witness that the gun recovered from Heyward's bedroom was, in fact, operational. Heyward argued the evidence was not relevant to any element of any substantive offense charged and was "superfluous testimony in what looks to be a more than week-long trial." (Tr. p. 886, line 9 – p. 887, line 5.) Heyward **did not** argue at trial the testimony was unduly prejudicial and inadmissible pursuant to Rule 403, SCRE. (Tr. p. 886-890.)

The solicitor responded that the testimony was required to prove the firearm was an actual weapon as part of the pointing and presenting the firearm charge. The solicitor also argued the operational firearm was probative of malice, even though Heyward did not use the weapon to murder Ms. Tollison. (Tr. p. 887, lines 7-17.) The court read its intended charges on pointing and presenting a firearm, as well as armed robbery, and noted there was no testimony yet as to whether the "instrument" could cause death or great bodily harm, or whether it was capable of "expelling a projectile through explosion." (Trial Tr. p. 888, line 18 – p. 889, line 19.) The court found the testimony on the gun's operation "an essential element of pointing and presenting." The court based his ruling on SCRE Rule 401, saying "relevant evidence means evidence having any tendency to make the existence of any fact that is consummate to a determination of the

action more probable or less probable than it would be without the evidence.” (Tr. p. 889, lines 20-25.)

During his testimony, Collins told the jury his role was to determine whether the firearm functioned properly.” (Tr. p. 894, lines 13-16.) The examiner said the gun was worn and the finish was in bad condition, but the weapon did function and it could propel a projectile through an explosion or pulling the trigger and that a bullet of that caliber, if fired at someone, could cause great bodily injury or death. (Tr. p. 896, line 2- p. 897, line 10.)

Analysis

Heyward claims for the first time on appeal the admission of the expert testimony on the functionality of the gun was unduly prejudicial. This argument was not raised to and ruled upon by the trial court. For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented, *State v. Simpson*, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996), and with sufficient specificity to inform the circuit court judge of the point being urged by the objector, *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Because Heyward did not object to the prejudicial impact, only the “superfluous” nature of the testimony, the Rule 403, SCRE, argument is not preserved for review.

Even assuming the argument is preserved, it is without merit. Heyward was charged with murder, armed robbery, kidnapping, burglary, pointing and presenting a firearm, and unlawful possession of a weapon. (Indictments.) Heyward argues that because the neither armed robbery nor pointing and presenting a firearm contain elements requiring the weapon to be operational, the testimony was irrelevant. (IBOA at 15.)

If solely referring to the language of the armed robbery and pointing and presenting statutes, Heyward is correct. Neither S.C. Code § 16-23-410 (pointing and presenting a firearm)

nor §16-11-330 (armed robbery) explicitly state within the statute the State is required to prove the weapon is operational, The analysis does not end here, however, because the common law and statutory definitions relevant to each of these statutes do require such evidence. As the trial court noted, for purposes of an armed robbery, a deadly weapon is generally defined as “any article, instrument or substance which is likely to produce death or great bodily harm.” *State v. Campbell*, 287 S.C. 377, 339 S.E.2d 109 (1985) (holding gasoline could be considered a deadly weapon). As for the charge of pointing and presenting, the preceding statute defines a weapon as a “firearm (rifle, shotgun, pistol, or similar device that propels a projectile through the energy of an explosive), a blackjack, a metal pipe or pole, or any other type of device, or object which may be used to inflict bodily injury or death.” S.C. Code Ann. § 16-23-405.

Thus, in both charges made against Heyward, the supporting definitions of the required elements require the State to make some showing the weapon was capable of causing great bodily injury or death. The State is required to prove every element of a crime beyond a reasonable doubt. *See State v. Cheatham*, 349 S.C. 101, 110, 561 S.E.2d 618, 623 (Ct. App. 2002) (“the State is not required to accept a defendant's stipulation of proof because the State still bears the burden of proving every element of a crime beyond a reasonable doubt.”). The State was therefore entitled to show the jury that weapon, though old and worn, was fully capable of causing great bodily harm.

Aside from the charges for armed robbery and pointing and presenting a firearm, Heyward was also charged with the murder of Ms. Tollison. “Murder” is the killing of any person with malice aforethought, either express or implied. S.C. Code Ann. § 16-3-10. Malice is a term importing wickedness and excluding a just cause or excuse. *State v Fuller*, 229 S.C. 439, 93 S.E.2d 463 (1956). “Malice,” within meaning of South Carolina murder statute, is the

wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. *Young v. Catoe* 205 F.3d 750 (4th Cir. 2000). To prove Heyward guilty of murder, the State was required to convince the jury he killed Ms. Tollison with malice aforethought. Even though he did not ultimately shoot Ms. Tollison, he brought a loaded, operational weapon with him when he gained entry into her home. The girl testified he pulled out the operational weapon and put it on the table where she could clearly see it while he strangled her grandmother. The gun was used as an aid to commit his crimes, and the jury was entitled to know he had the ability to make good on his implied threat to the child.

Appellant's argument he was unfairly prejudiced by the testimony is implausible. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct.App. 1998). "All evidence is meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403]." *Gilchrist*, 329 S.C. at 630, 496 S.E.2d at 429. The jury properly based its decision on Heyward's guilt on the overwhelming evidence Heyward left at the scene of the crime. The functionality of the weapon, though relevant to the definitions of the elements of the crimes charged, had little bearing on the probative value of the enormity of the State's case against Heyward. The trial court committed no abuse of discretion in allowing this testimony, and given the enormity of the State's case, any error in its admission was harmless. This Court must deny relief on this ground.

- IV. **The trial court properly refused to strike to portion of the indictment including Heyward’s alias, Abdul Muslim, because significant evidence linked the identity of Abdul Muslim to the crime and the defense’s theory of the case was the evidence identified the wrong man.**

Standard of Review

Absent an abuse of discretion, a trial court's ruling on a motion to strike will not be reversed. *Mayes v. Paxton* (S.C. 1993) 313 S.C. 109, 437 S.E.2d 66.

How the Issue Was Presented at Trial

On June 5, 2017, before the Honorable Judge R. Knox McMahon, Heyward moved to strike his alias, Abdul Muslim, from his multiple indictments, including murder, kidnapping, assault and battery, armed robbery, pointing and presenting, and another weapons charge. (Tr. June 5, 2017, pp. 1-3.) Citing federal law, Heyward argued there was no “factual nexus” between the alias charged in the indictment and the allegations made against him. (Tr. June 5, 2017, p. 4, line 2 – p. 7, line 11.) Counsel for Heyward then explained to the trial court how Heyward was developed as a suspect. (Tr. June 5, 2017, p. 7, lines 4 – 25.) A partial fingerprint resulted in a hit for James Heyward, and a records check on Heyward found his alias and multiple prior convictions in New Jersey. The defense argued, however, that the State was aware of Heyward’s name when he was developed as a suspect and only later found information about his many aliases, but those aliases had nothing to do with the State’s focus on this suspect. (Tr. June 5, 2017, p. 8, line 1 – p. 10, line 19.)

Heyward then argued that results from a 2011 Gallup poll, which studied perceptions in the years 2004 and 2006, suggested a societal negative perception of Muslims, which would in turn prejudice Heyward. (Tr. June 5, 2017, p. 12, line 5 - p. 14, line 3.) Heyward asked the court to either amend the indictment and strike the alias or order the State to refrain from mentioning the alias during the trial. (Tr. June 5, 2017, p. 14, lines 6-14.)

The solicitor then explained that the DNA found from the victim's fingernail scrapings produced the Combined DNA Index System ("CODIS") hit to Heyward, who had given the name Abdul Muslim when he was arrested for eluding police and failure to stop in New Jersey. When he was processed into the detention system for that arrest, his DNA was taken and deemed the profile for Abdul Muslim. The solicitor said the match did not report any associated names, such as name James Heyward, only Abdul Muslim. (Tr. June 5, 2017, p. 15, lines 1-21.)

The State agreed to amend the indictment to remove the alias if the defense did not intend to challenge the DNA results. The State also pointed out the indictment did not include Heyward's eight other aliases because they were not relevant to his culpability, but the DNA match, and its connection to the defendant, was critical to the State's case. (Tr. June 5, 2017, p. 15, line 23 – p. 16, line 10.)

The court summarized its understanding of the facts as follows: The DNA profile from the victim's fingernails resulted in a match to Abdul Muslim. The fingerprint card for Abdul Muslim was then matched to James Heyward. (Tr. June 5, 2017, p. 17, lines 2-17.) The solicitor then again offered to amend the indictment if Heyward agreed he was not challenging the DNA evidence. (Tr. June 5, 2017, p. 17, lines 20-22.)

The court ruled that any potential prejudice could be addressed and cured in voir dire. (Tr. June 5, 2017, p. 20, line 22 – p. 21, line 3.) The court went on to explain that the introduction of the alias at trial should be examined under the rules of evidence, particularly Rules 401, 402, and 403, to fully weigh the probative value against its potential prejudicial impact. The court explained that the DNA hit to Abdul Muslim, even if James Heyward was already developed as a suspect, could have been exculpatory or inculpatory to James Heyward. The court found that the investigation linking the identity of James Heyward to Abdul Muslim

was relevant to the State's burden to prove the elements of the crimes charged. (Tr. June 5, 2017, p. 21, line 18 – p. 22, line 25.)

Analysis

The inclusion of an alias in an indictment is not inherently prejudicial; it does not automatically conjure the image of a hardened criminal. *See United States v. Esposito*, 423 F.Supp. 908, 911 (S.D.N.Y.1976). Rather, the inclusion of an alias is relevant and permissible when it is necessary to identify the defendant in connection with the acts charged in the indictment. *E.g. United States v. Clark*, 541 F.2d 1016, 1018 (4th Cir.1976); *State v. Monahan*, 480 A.2d 863, 867 (1984). Further, where the accused is known by different names, it is lawful for the indictment to identify the accused by all such names as alias dicta. *Merneigh v. State*, 531 S.E.2d 152, 158. (Ga. Ct. App. 2000).

On appeal, Heyward argues the inclusion of his alias, Abdul Muslim, in the reading of the indictments to the jury unfairly prejudiced him, not because an alias connotes a criminal background, but because the particular alias injects an assumed bias against non-Christian religions. (IBOA at 17-18.) Heyward does not suggest, and the record does not support any implication, that the solicitor made any improper comment regarding Heyward's religion in the opening or closing arguments, sought to introduce any other improper evidence related to Heyward's religion, or asked any improper questions of any witnesses. Heyward's sole allegation of religious bias stems from the use of his alias, Abdul Muslim, in the indictments read by the trial court and later mentioned during the testimony of the DNA database administrator.

The probative value of the alias became clear in the testimony of database administrator John Barron. (Tr. p. 964, lines 4-20.) Barron explained that DNA evidence was submitted to the national database and a match was returned from New Jersey (Tr. p. 965, line 22 – p. 966, line

15.) The name returned with the match was Abdul Muslim and also included a birthday, a state identification number, and a national identification number. Barron then performed a comparison between the Abdul Muslim sample and the known sample of James Heyward. Barron testified the samples matched. (Tr. p. 969, lines 14-25.)

Although this testimony may not have seemed significant at the time, Heyward's strategy to question the accuracy of the DNA analysis became evident during the cross-examination of Dr. Gray Amick, the Richland County Sheriff's Department DNA laboratory director. (Tr. p. 972, lines 1-22; pp. 1008-1031.) The defense's strategy was to suggest the analysts had not performed a thorough search of the unknown DNA profiles found at the crime scene, suggesting the possibility the actual culprit was not discovered. (Tr. p. 1020, line 8 p. 1029, line 20.) As the trial judge noted in his pre-trial refusal to strike the alias from the indictment, the DNA match to a third name, Abdul Muslim, could have been exculpatory or inculpatory to James Heyward, depending on how the testimony developed at trial. Because Heyward challenged the accuracy of the investigation of the identity of the unknown profile, the accuracy of the investigation of the identity of James Heyward to Abdul Muslim was relevant to the State's burden to prove the elements of the crimes charged. (Tr. June 5, 2017, p. 21, line 18 – p. 22, line 25.) The State did agree not to object to the motion to strike the indictments if Heyward agreed he would not challenge the DNA evidence, but Heyward would not alter his strategy. He cannot now complain because the strategy failed.

As he did at trial, Heyward boldly asserts the mere mention of the alias results in a prejudice against him based on religious bias. In support of his position pre-trial, he argued a Gallop poll based on questions posited in 2004 and 2006 revealed intolerance to Muslims. That data, even if true, obtained three and five years following the attacks of September 11, 2001, is

hardly dispositive of the mere mention of a name in 2017. Further, Heyward's reliance on *Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010), *United States v. Ham*, 998 F.2d 1247, 1252-53 (4th Cir. 1993), and *United States v. Vue*, 13 F.3d 1206, 1213 (8th Cir. 1994), is misplaced. In *Vazquez*, the South Carolina Supreme Court found a due process violation from the prosecutor's comments referring to the Muslim defendant as a domestic terrorist in closing arguments, in which he also referred to the September 11th attacks. *Vazquez*, 388 S.C. at 460, 698 S.E.2 at 567. In *Ham*, Fourth Circuit Court of Appeals found the prosecutor's introduction of unrelated evidence of bad acts by members of the religious community unduly prejudiced the defendant at his trial for unrelated charges. *Ham*, 998 F.2d at 1254. In *Vue*, the defendants challenged the admission of certain testimony related to the likelihood of the involvement in opium smuggling of persons of Hmong descent. *Vue*, 13 F.3d at 1211. The Eighth Circuit agreed, finding testimony tying the ethnic descent of a defendant to the ethnic characteristics of drug dealers in a specific geographic area or a specific type of drug trade improper. *Id.* at 1213. If any of these cases are applicable to the case at hand, they would only illustrate how the mere mention of the name, Abdul Muslim, was in no way unduly prejudicial by the standards of prevailing case law. The solicitor made no references to Heyward's religion nor introduced any evidence of religious activities or trends. The State only sought to link the name returned from the national database to the person on trial for murder, foreclosing Heyward's argument the DNA belonged entirely to an unknown male. This issue is without merit.

- V. **The trial judge did not abuse his discretion in admitting detailed photographs of the victim's injuries because the pictures were offered to prove malice beyond a reasonable doubt, corroborated the pathologists' testimony about the blunt force trauma to the head, and were limited in number and breadth only to those necessary to illustrate the testimony.**

Standard of Review

“The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court.” *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). “If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.” *Id.* “A trial judge’s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.” *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 207 (Ct.App.2008) (internal quotation marks omitted).

How the Issue Was Presented at Trial

In a pre-trial motion before Judge McMahon on June 22, 2017, the defense objected to several matters. (Tr. June 22, 2017, pp. 1-5.) Concerning particular autopsy photographs, Heyward argued Exhibits 4, 5, 6, 7, 9, 16, 17, and 18 were all cumulative. (Tr. June 22, 2017, p. 13, line 18 – p. 14, line 24.) Heyward objected to State’s Exhibits 14 and 15 as irrelevant and “gruesome.” (Tr. June 22, 2017, p. 14, lines 2-9.) The State asked the trial judge to defer ruling on the admissibility until the State’s pathologist testified because the doctor had identified those photographs as necessary for her to explain the scope of the victim’s injuries. (Tr. June 22, 2017, p. 15, lines 1-9.) The solicitor also said the photograph of the victim’s face corroborated the testimony of the victim’s grandchild, who would testify she saw her grandmother killed and described the color of her face after the strangulation. (Tr. June 22, 2017, p. 15, lines 10-20.) The State also agreed to withdraw Exhibits 17 and 18. (Tr. June 22, 2017, p. 18, lines 3-9.) The court

reserved its ruling pending the testimony of the witnesses. (Tr. June 22, 2017, p. 19, line 5 – p. 20, line 9.)

Later at trial, Dr. Amy Durso, the State's pathologist, testified about the injuries she found on MS. Tollison's body. Dr. Durso described finding multiple blunt force injuries to the victim's head on four different planes of the skull. (Tr. p. 720, lines 11-22.) Dr. Durso testified some of the injuries would not be visible to an external inspection because they would be covered with the victim's hair, but the injuries would be visible if the scalp was reflected. (Tr. p. 720, line 23 – p. 721, line 3.) The State asked Dr. Durso if photographs of the reflected scalp would assist her testimony and she indicated affirmatively. The State then moved to enter State's Exhibits 14 and 15 into evidence. (Tr. p. 721, lines 4-12.) Heyward objected pursuant to Rule 403, SCRE. (Tr. p. 721, lines 11-13.) Heyward argued because the injuries to the head were not the cause of death, the photographs should be excluded as irrelevant and unduly prejudicial. (Tr. p. 722, lines 1-10.)

During a proffer of testimony, Dr. Durso explained the photographs demonstrated there was more than just a strangulation—there was a struggle, and Ms. Tollison's head was struck on multiple different areas. (Tr. p. 722, line 21 – p. 723, line 1.) Dr. Durso said the injuries contributed to the cause of death and the photographs were demonstrative of those injuries because “it's easiest with a picture.” (Tr. p. 723, lines 2-11.) The doctor then used to photographs to demonstrate where the injuries occurred on Ms. Tollison's head. (Tr. p. 724, lines 2-11.)

The trial court cited to *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014), and found the probative value of the photographs outweighed the prejudicial impact. The court found the photographs probative of malice because the exhibits indicated a violent struggle occurred at the

time of Ms. Tollison's death. Accordingly, the court denied Heyward's objections and admitted Exhibits 14 and 15 into evidence. (Tr. p. 725, line 11 – p. 729, line 5.)

Analysis

The brutality of Ms. Tollison's murder was shocking. The photographs offered captured the violence inflicted upon her and the various types of wounds she suffered at the hands of James Heyward. There was an eyewitness to the crime, the eight year old granddaughter of the victim, who described watching Heyward strangle her grandmother at the kitchen table. However, the girl was also locked in a closet for a significant period of time. The State theorized Heyward used his arm to choke Ms. Tollison and then later returned to "finish her off" with the draft-stopper that was found wrapped around her neck. (Tr. p. 1209, lines 14-22.) The State argued Heyward's actions showed a total disregard for human life, proving the required element of malice in the murder of Ms. Tollison. (Tr. p. 1210, lines 9-19.) The proof of malice was reflected by the victim's own body. The State was entitled to make its case, despite the gruesome nature of the photographs, because the pictures were the easiest, and most demonstrative manner to communicate that evidence to the jury.

In *Collins*, the circuit court admitted into evidence seven pre-autopsy photographs of a child who died of "extensive traumatic injury" after being severely mauled by dogs. *Id.* at 528–33, 763 S.E.2d at 25–27. The South Carolina Court of Appeals reversed, finding the circuit court erroneously admitted the photographs, and the error was not harmless. *Id.* at 533, 763 S.E.2d at 27. However, the Supreme Court reversed the Court of Appeals, finding the photographs were "highly probative, corroborative, and material in establishing the elements of the offenses charged; [their] probative value outweighed [their] potential prejudice; and the appellate court

should not have invaded the trial court's discretion in admitting this crucial evidence based on its emotional reaction to the subject matter presented.” *Id.* at 534–35, 763 S.E.2d at 28.

In *State v. Gray*, 408 S.C. 601, 759 S.E.2d 162 (Ct. App. 2014), the circuit court admitted into evidence eleven photographs of a victim—taken before and during autopsy—who died after being severely beaten during two separate fights on the same day. The Court of Appeals determined it was within the circuit court's discretion to admit eight of the photographs of high probative value presenting minimal danger of unfair prejudice, noting the photographs “contain no blood or gory anatomical details, and thus pose little, if any, danger of unfair prejudice.” *Id.* at 609, 759 S.E.2d at 164. As for the remaining three photographs, which were taken during autopsy and showed the victim's exposed skull and brain, the Court concluded they too had probative value; they corroborated the pathologist's findings concerning the extent and location of the victim's head injuries and cause of death and were important to the State's ability to prove malice. *Id.* at 612–16, 759 S.E.2d at 166–68.

In *State v. Kelly*, 319 S.C. 173, 460 S.E.2d 368 (1995), our Supreme Court found photographs showing blood patterns on the victim and area around the victim were probative as to the element of malice. The Court noted the defense position that the defendant should only be convicted of voluntary manslaughter, and reasoned the evidence reflecting “the entire crime scene,” which included “charts, photographs, and video [that] also were relevant to establish malice.” *Id.*, 319 S.C. at 178, 460 S.E.2d at 370. In particular, the Court reasoned:

... The charts, photographs, and video here depicted the excess nature of the killing. The relevance of ... these items and their probative value on the issue of malice was great enough to negate the risk of the jury's basing its decision on an improper passion.

Id., 319 S.C. at 178, 460 S.E.2d at 371.

Here, the photographs were used to specifically demonstrate, explain, and corroborate the location and extent of the blunt force trauma wounds, in addition to the strangulation wounds, all of which were evidence of malice. In his brief, Heyward incorrectly argues the testimony was unnecessary to establish what occurred to the victim because the girl witnessed the crime, distinguishing the case at hand from *Collins*, in which there were no eyewitnesses. (IBOA at 20.) However, although the girl did see Heyward attack her grandmother, she did not witness the entirety of the crime. Thus, the photographs provided the jury with more information than that available to the child. Moreover, the photographs were entered during the State's case in chief. Heyward had not yet elected his right to refuse to testify. Without knowing how Heyward would defend the murder charge, the State sought to prove malice, in part, from the unnecessary brutality inflicted on Ms. Tollison.

Heyward argues the photographs were not needed because the girl provided eyewitness testimony to the murder, then inconsistently argues the trial court erred in finding the photographs corroborated the girl's story because the girl never testified about injuries to Ms. Tollison's head. (IBOA at 20.) This gap in the testimony is precisely the reason the photographs, in conjunction with the testimony of the pathologist, were significant. Dr. Durso testified the trauma to the head was a contributing factor to the cause of death. She also testified the wounds would not be visible externally because the victim's hair would obscure the injuries. (Tr. p. 720, line 23 – p. 721, line 3.) The photographs corroborated this testimony. Consequently, there were distinct and necessary reasons to submit the photographs. *See State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010) (“If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.”) (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353); *State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct.App. 2008) (“Admitting photographs

which serve to corroborate testimony is not an abuse of discretion.”). *See also State v. Kelsey*, 331 S.C. 50, 76, 502 S.E.2d 63, 76 (1998) (photographs of various bone and bomb fragments and clothing found at crime scene were admissible in murder prosecution to corroborate testimony concerning condition of victim’s body as first discovered by police at crime scene, and location of bone and bomb fragments supported testimony that bomb had been detonated in victim’s mouth).

Finally, any error in the introduction of these photographs must be viewed as non-prejudicial and harmless beyond a reasonable doubt, since it could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) (“Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial”); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (“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”). As noted earlier, the evidence against Heyward was overwhelming. Despite the compelling evidence, Heyward ultimately argued he was not the perpetrator of the crime. The jury simply did believe him.

VI. **Heyward offered no evidence any juror saw his shackles during jury selection, so he cannot show prejudice from the trial court’s denial of his motion to remove the shackles.**

Standard of Review

Whether a defendant is restrained during trial is within the trial judge's discretion. The trial judge is to balance the prejudicial effect of shackling with the considerations of courtroom decorum and security. *Illinois v. Allen*, 397 U.S. 337 (1970). The trial judge is the best equipped to decide the extent to which security measures should be adopted to prevent disruption of the

trial, harm to those in the courtroom, escape of the accused, and prevention of other crimes. *State v. Tucker*, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995).

How the Issue Was Presented at Trial

Before jury selection began, Heyward asked to court to remove the shackles from his feet, arguing the shackles could be seen from the first two rows of the gallery directly behind Heyward. (T. p. 39, lines 11-15.) Heyward requested the removal for the duration of the jury selection. (T. p. 39, lines 16-17.)

The trial court denied the motion without elaboration. (T. p. 39, line 23.)

Analysis

As a general proposition, a criminal defendant has the right to appear in court free from physical restraints. “The law has long forbidden routine use of visible shackles during the guilt phase; it permits a [s]tate to shackle a criminal defendant only in the presence of a special need.” *Deck v. Missouri*, 544 U.S. 622, 626 (2005). A defendant's appearance in shackles “may reverse the presumption of innocence by causing jury prejudice thereby denying him due process.” *Jones v. Meyer*, 899 F.2d 883, 884 (9th Cir.); see *Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995) (holding that because of the potential for prejudice, due process requires that shackles be used as a “last resort”). However, “the trial judge is the best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and prevention of other crimes.” *State v. Tucker*, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995).

“In order for a criminal defendant to enjoy the maximum benefit of the presumption of innocence, our courts should make every reasonable effort to present the defendant before the jury in a manner that does not suggest, expressly or impliedly, that he or she is a dangerous

character whose guilt is a foregone conclusion.... The negative connotations of restraints, nevertheless, are without significance **unless the fact of the restraints comes to the attention of the jury.**” *State v. Brawley*, 137 A.3d 757, 760 (Ct. 2016), citing *State v. Webb*, 680 A.2d 147(1996) (emphasis added). It is the defendant's burden to show that the presence of shackles prejudiced him in some way. *See U.S. v. Mayes*, 158 F.3d 1215, 1226-27 (11th Cir. 1998) (even if court abused its discretion in ordering defendants to wear leg irons during trial, defendants failed to demonstrate prejudice and were not denied fair trial); *Castillo v. Stainer*, 983 F.2d 145,147 (9th Cir. 1992) (error in restraining defendant harmless where restraint could not be seen by the jury); *State v. Williams*, 485 A.2d 570 (Ct. 1985) (“the record does not indicate ... [and] the defendant [does not] claim that any offer of proof was made as to whether the jurors could or did view the restraints when on the defendant”).

In the present case, the record indicates the trial court denied Heyward’s request to remove his shackles during jury selection. However, the defense did not make any offer of proof at trial with respect to whether the jury **could** or **did** see the restraints. The only argument in support of the claim was that **if** a jury member sat in the front two rows directly behind Heyward, the juror **might** be able to see under the defense table and view the leg shackles. Apart from the statement of Heyward’s counsel expressing his concern, the record contains no evidence the possibility of a viewing prejudiced the minds of the jurors against Heyward. The record was not developed to include whether any potential juror sat in the two rows behind Heyward during jury selection, nor was there any evidence on the record concerning the clothing Heyward wore or the nature of the restraints. Further, Heyward did not request the trial judge to admonish the jury to disregard any viewing and draw no inferences from the fact that he was in leg restraints in the courtroom. In fact, defense counsel never renewed or amplified his initial objection after the

conclusion of jury selection. Therefore, Heyward has failed to establish that the trial court's refusal to remove his shackles during jury selection compromised his presumption of innocence in any manner.

VII. **There is no error, much less cumulative error, and any preserved errors are harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt. A defendant is entitled to a fair trial, not a perfect one, and even a perfect trial would have inevitably resulted in Heyward's conviction.**

Lastly, Heyward argues this Court should grant a new trial on the basis of the cumulative error doctrine. This ground was neither raised at trial nor in any motion for new trial and is therefore not preserved for review. 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).

Nonetheless, the cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial. *State v. Beekman*, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013) (citing *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)). An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground. *Id*; see also *State v. McEachern*, 399 S.C. 125, 150, 731 S.E. 2d 604, 617 (Ct. App. 2012) (stating, "even if the court did commit any errors, we believe those errors to be harmless such that Hollie can show neither prejudice, nor that the errors affected her right to a fair trial"). The Constitution entitles a criminal defendant to a fair trial, not a perfect one. *State v. Mitchell*, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998) (finding reversal on cumulative error doctrine not warranted).

Further, our courts have addressed the issue of an unpreserved cumulative error doctrine, concluding the doctrine is not recognized when an appellant asks the court to consider the unpreserved issues for review. *See State v. Beekman*, 405 S.C. 225, 238, 746 S.E.2d 483, 490 (Ct. App. 2013) (“our appellate courts do not apply the plain error rule”); *State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (noting appellant clearly sought for the appellate court to apply the plain error rule and stating as follows: “This Court, however, has routinely held the plain error rule does not apply in South Carolina state courts. Instead, a party must have a contemporaneous and specific objection to preserve an issue for appellate review. “) As in *Beekman* and *Sheppard*, Appellant asks this court to apply the plain error doctrine by combing the record for issues and arguing for the first time on appeal the cumulative effect of these matters deprived him of a fair trial.

Further, despite the numerous issues presented on appeal, the record reflects the trial court exercised its discretion soundly at each instance, or the record did not support any claim of prejudice. The out of court identification of Heyward as the killer was both positive and reliable. The fingerprint card obtained from AFIS was properly authenticated by the fingerprint expert who analyzed the prints. The functionality of the gun was relevant to the defined elements of two of the crimes charged and was probative of Heyward’s malice when he entered the home. The mere mention of Heyward’s alias invited no religious prejudice but did connect Heyward to a national DNA database. The autopsy photographs were relevant to prove malice from the brutality of the crime against Ms. Tollison. Finally, even though the trial court did not explain his reasoning for the denial of the motion to remove he shackles, Heyward cannot show prejudice because there was no evidence any jurors actually saw the shackles. The State presented compelling direct evidence and substantial circumstantial evidence of Heyward’s guilt.

Heyward's attempt to stack the deck does not change the equation: the sum of all zeros is still zero. Moreover, the cumulative effect of any errors this Court might find fails to undermine the fact that Heyward did receive a fair trial. This case does not warrant reversal on cumulative error. "As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *State v. Mitchell*, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998) (finding reversal on cumulative error doctrine not warranted). Heyward suffered no constitutional deprivation.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

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Senior Assistant Deputy Attorney General

SUSANNAH R. COLE
Assistant Attorney General

BY: 
SUSANNAH R. COLE

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

November 26, 2018.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
The Honorable R. Knox McMahon, Circuit Court Judge

RECEIVED
NOV 26 2018
SC Court of Appeals

THE STATE,

Respondent,

v.

JAMES HEYWARD,

Appellant.

Appellate Case No. 2017-002221

CERTIFICATE OF SERVICE

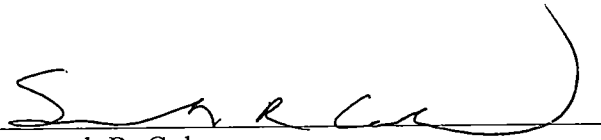
I, Susannah Cole, counsel for Respondent, certify that I have served the within Brief of Respondent on Appellant by depositing two (2) copies of the same via inter-agency mail, addressed to his attorneys of record at:

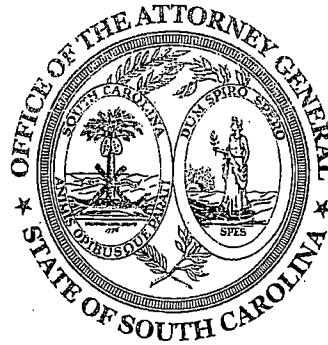
Robert Dudek,
Chief Appellate Defender
SCCID/Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

Tara C. Sullivan, Esquire
134 Meeting Street, Suite 500
Charleston, SC 29401

I further certify that all parties required by Rule to be served have been served.

This 26th day of November, 2018.


Susannah R. Cole
Assistant Attorney General
SC Bar No. 68383



ALAN WILSON
ATTORNEY GENERAL

November 26, 2018

RECEIVED

NOV 26 2018

SC Court of Appeals

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *The State v. James Heyward*
Appeal from Richland County
Appellate Case No. 2017-001542

Dear Ms. Kitchings:

Enclosed for filing in your office is the original Initial Brief of Respondent, Designation of Matter and Certificate of Service in the above-captioned matter.

Thank you for your assistance in this matter.

Sincerely,

SUSANNAH R. COLE
Assistant Attorney General

SRC/ams
Enclosures

cc: Robert Dudek, Esq. (w/two copies of encls.)
Tara C. Sullivan, Esq. (w/two copies of encls.)
The Honorable Heather S. Weiss, Solicitor, Fifth Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)