STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Roger M. Young, Circuit Court Judge

Opinion No. 5537 (S.C. Ct. App. filed February 14, 2018)

Appellate Case No. 2018-000981

State of South Carolina, ... Respondent,

v.

Denzel Heyward, ... Petitioner.

BRIEF OF RESPONDENT

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PETITIONER'S QUESTIONS PRESENTED

I. Did the Court of Appeals err in affirming the admission of identification evidence obtained through successive, unduly suggestive photo line-ups in which the Petitioner was the only repeated subject, where the trial court did not consider the Neil v. Biggers reliability factors bearing on the reliability of the identification, but instead relied on the "credibility" of an eyewitness's testimony at trial?

II. Did the Court of Appeals err in holding that Petitioner's counsel opened the door to previously-excluded testimony related to domestic violence by the Petition towards a testifying co-defendant, where the Petitioner's counsel asked the co-defendant's mother about an unrelated allegation of sexual assault made by the co-defendant against the co-defendant's step-father?

RESPONDENT'S RESTATEMENT OF THE QUESTIONS PRESENTED

I. Whether the court of appeals correctly ruled the trial judge properly found witness Jujuain Hemingway's identification of Petitioner to be reliable

II. Whether the court of appeals correctly found the issue regarding defense counsel opening the door into evidence of Petitioner's abusive relationship with his girlfriend to be unpreserved for review.

STATEMENT OF THE CASE

Petitioner was indicted at the January 2014 term of the grand jury of Charleston County for murder (2014-GS-10-00762), attempted murder (2014-GS-10-00763), armed robbery (2014-GS-10-00765), and possession of a weapon during the commission of a violent crime. Petitioner proceeded to a trial by jury on November 10, 2014, and from November 12-15, 2014, in Charleston, South Carolina. At the conclusion of trial, Petitioner was found guilty of attempted murder, armed robbery, and the weapons charge. A mistrial was declared on the murder charge. He was sentenced by the Honorable Roger M. Young to imprisonment for a term of thirty years for attempted murder, thirty years for armed robbery, and five years for the weapons charge. The sentences were to run consecutively. Petitioner timely filed a notice of appeal, briefing was completed, and the court of appeals issued an opinion affirming Petitioner convictions and sentences on February 14, 2018. Thereafter, Petitioner filed a Petition for Rehearing which was denied by order dated April 26, 2018. Finally, Petitioner filed a Petition for Writ of Certiorari on June 8, 2018. Certiorari was granted on September 21, 2018, and Petitioner submitted his brief on October 29th. This brief follows.

STATEMENT OF FACTS

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

Petitioner's child's mother, Rivers, turned herself in and also testified for the State. (R. p. 296). She was charged with accessory before the fact to murder and with attempted murder. (R.

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

Simmons reunited with Petitioner and Rivers who was told to drive to Johns Island to Lorenzo Mehciz's house. (R. p. 271). Kadeem and Hemingway arrived at the scene in a Mercedes and Petitioner promptly "bum-rushed" one of the victims. (R. p. 276). Petitioner slammed Kadeem against the car. (R. p. 277; R. p. 404). Simmons then came rushing out of the woods armed with an assault rifle. (R. p. 277-278). Simmons ordered the victims to get on the ground. (R. p.279; R. p. 404). Petitioner was frustrated that the victims did not have anything for he and Simmons to steal. (R. p. 280). Petitioner repeatedly asked, "Where is the money at?" (R. p. 408). Petitioner "stomped" Hemingway's head while he was on the ground multiple times. (R. p. 281; R. p. 409). Hemingway kept telling Petitioner and Simmons that they did not have anything. (R. p. 410). Out of frustration, Simmons fired a shot towards Hemingway who was still lying on the ground. (R. p. 284). Petitioner ordered Rivers to open the trunk of the car the victims

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

arrived in, but Rivers hesitated and Hemingway was then ordered to open the trunk. (R. p. 282). A suitcase was removed from the trunk and placed into the backseat of the car Rivers was driving. (R. p. 283). Kadeem began to fight with Simmons over the gun and two more shots were fired, both striking Kadeem. (R. p. 285; R. p. 416). Petitioner and Simmons ran towards the car, the rifle was placed in the backseat, and Rivers drove the car away from the scene. (R. p. 285). Both victims attempted to run. (R. p. 285; R. p. 417). Rivers almost hit Hemingway as he was fleeing while again being shot at by Simmons. Rivers drove back to Skrill's house where the three regrouped. (R. p. 287). Petitioner talked to Lorenzo on his phone while en route to Skrill's house and instructed Lorenzo not to discuss what happened in hopes of not being identified as a suspect. (R. p. 291).

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

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

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "On appeal, the trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs where the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

ARGUMENT

I. The court of appeals correctly ruled the trial judge properly found witness Jujuain Hemingway's identification of Petitioner to be reliable.

The court of appeals was correct in finding that witness Jujain Hemingway's identification of Petitioner, the photo lineups, and related testimony to be admissible. The trial court properly found that the identification made by Hemingway was reliable even though Petitioner's picture appeared in the two lineups shown to him. Judge Young focused on Hemingway's credibility in making this finding and articulated what was necessary to make a proper ruling. Furthermore, the identification was subjected to strong cross examination and was also cumulative to other persuasive evidence. Respondent asks this Court to affirm the court of appeals' decision.[2]

How the Issue Was Raised Below

An extensive Neil v. Biggers[3] hearing was held to determine the admissibility of the identification made by Jujain Hemingway. (R. p. 36-133). Detective Julius Alexander of the Charleston County Sheriff's Office met with Hemingway just hours after the incident on May 17, 2012, where his brother, Kadeem, was murdered. (R. p. 36). Hemingway gave an initial statement consisting of three pages where he later admitted to leaving out significant details of the incident and even lying about his name and date of birth. (R. p. 39). Hemingway's second statement was more detailed. (R. p. 46). Hemingway described Petitioner as having a low haircut, a beard, and stated he was wearing a red shirt. (R. p. 40).

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[2] Petitioner organizes his brief into three separate arguments with the third addressing prejudice and harmless error. This brief addresses those issues within the body of the respective argument sections.

[3] 409 U.S. 188, 93 S. Ct. 375 (1972).

Hemingway was shown multiple lineups, two of which contained photos of Petitioner. On May 18th, Alexander returned to speak to Hemingway and presented him with a lineup containing Petitioner's photo. (R. p. 42). Hemingway was asked to examine the lineups. He stated that he did not recognize any of the individuals. (R. p. 45). The next day, Charles Lawrence, also of the Charleston County Sheriff's Office, returned to Longs, SC to interview Hemingway. (R. p. 61-62). He was shown a lineup containing Petitioner's photo. (R. p. 62). Hemingway identified Petitioner out of the lineup and noted that Petitioner had "fat jaws" and a goatee. (R. p. 65). Alexander showed Hemingway a second and third lineup containing photos of Simmons and Rivers; he was unable to make a positive identification of the codefendants. (R. p. 66).

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

Counsel Apostolou moved to suppress the lineup at the conclusion of the hearing and argued it was suggestive because Petitioner's photo appeared in both lineups (R. p. 131). Judge Young agreed that the lineups were unduly suggestive but ruled they were nonetheless reliable. (R. p.131-133). Judge Young found persuasive Hemingway's testimony that he "was able to identify Mr. Heyward on the first day, but just chose to just not verbalize that because he was angry [which] suggests to me that he was not, in fact, influenced by the second lineup." (R. p. 132). Judge Young also relied on Hemingway's explanation that he was seventeen years old at

the time, was very angry, and was coping with the traumatic loss of his brother. (R. p. 132-133).

Discussion

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission of evidence is within the sound discretion of the circuit court. State v. Simmons, 384 S.C. 145, 166, 682 S.E.2d 19, 30 (Ct. App .2009). Accordingly, a circuit court's decision to allow the in-court identification of an accused will not be disturbed on appeal absent an abuse of discretion or prejudicial legal error. State v. Govan, 373 S.C. 552, 556, 643 S.E.2d 92, 94 (Ct. App. 2007). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." State v. Singleton, 395 S.C. 6, 13-14, 716 S.E.2d 332, 335-36 (Ct. App. 2011) (quoting Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

In Neil v. Biggers, the United States Supreme Court established a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. State v. Liverman, 398 S.C. 130, 138-39, 727 S.E.2d 422, 426 (2012). Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198. "A criminal defendant may be deprived of due process of law by an identification procedure

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

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

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

inquiry as set forth in Biggers, the trial court must first determine whether the identification resulted from "unnecessarily suggestive" police procedures. Liverman, 398 S.C. at 138, 727 S.E.2d at 426; Traylor, 360 S.C. at 81, 600 S.E.2d at 526. If the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there and the court does not need to consider the second prong. State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013). The defendant bears the burden of proving the identification procedure was impermissible suggestive. Id. at 561, 745 S.E.2d at 141 ("Our supreme court has never placed the burden of disproving suggestiveness on the State. The Fourth Circuit has held . . . the defendant bears the burden of proving the identification procedure was impermissibly suggestive.").

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

The identifications were properly admitted.

The record fully supports Judge Young's ruling that Hemingway's identification was reliable. Petitioner primarily contends Judge Young erred by not articulating specific findings on each reliability factor set forth in Biggers and argues that a failure to do so is reversible error. Petitioner cites State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000) in support of his argument. Moore held that the trial court's failure to reach the second prong of Biggers and the reliability factors was error. That analysis was not done because the trial court did not find the identification procedure to be suggestive and found it unnecessary to reach the second prong. This Court reversed that finding and went on to determine that the identification was also not reliable. The case here is easily distinguishable because Judge Young found that the lineup and the identification were suggestive and then properly considered whether the lineups were nevertheless reliable. Judge Young focused his analysis on whether he was persuaded by Hemingway's testimony that he recognized Petitioner in the first lineup but chose not to identify him at that time. Judge Young found Hemingway's testimony credible and partially based his ruling on that testimony. This Court should not disturb that finding. "We give great deference to a judge's findings when matters of credibility are involved since we lack the opportunity to directly observe the witnesses." Solomon v. State, 313 S.C. 526, 443 S.E.2d 540, 542 (1994). While Hemingway gave a less detailed statement and told investigators that he did not recognize any individuals in the first photo lineup, Judge Young excused these actions and found the identification reliable because of "the unique – very unique circumstances" concerning Hemingway's justifications. (R. p. 132-133). According to Hemingway, the fact that Petitioner was in both lineups did not have any impact on him in making the identification. (R. p. 116). More to the point, Counsel Apostolou only argued generally for suppression, not that the factors

would carry the day and require suppression. Admission turned on whether Judge Young believed Hemingway's testimony that he was not influenced by the prior lineup. The factors listed in Biggers were not really at issue. The bottom line is that Hemingway's reliability and credibility were paramount to the specific factors. Thus, based on the totality of the circumstances, Hemingway's identification of Petitioner was reliable.

In response to Petitioner's argument, trial courts are not constitutionally required to articulate specific factual findings as to the specific Biggers factors, but instead are to evaluate the reliability on the totality of the circumstances in each particular case. See Montgomery v. Louisiana, __ U.S. __, 136 S. Ct. 718, 735 (2016) (explaining a sentencing judge is *not* constitutionally required to make any specific findings of fact on the record when sentencing a juvenile offender pursuant to the guidelines of Miller[4]).

While Judge Young did not articulate findings for each Biggers factor, testimony regarding the factors was clearly elicited by the State and considered by Judge Young. Hemingway had ample opportunity to view Petitioner as evidenced by his testimony that he had between five and ten minutes to observe Petitioner. (R. p. 107). Hemingway noted he stood very close to Petitioner when he was asked to open the trunk of the Mercedes. (R. p. 86-87). Hemingway testified he was able to get a "good look" at Petitioner because he was right in his face. (R. p. 85). Hemingway emphasized he was able to identify Petitioner because of certain distinctive facial characteristics. In his statement to investigators, Hemingway described Petitioner to be around 6 foot, 1 inch, wearing a red shirt, low hair cut with a beard. (R. p. 40). He further described the suspect as a black male with facial hair and approximated his weight at 200 pounds. (R. p. 41). As to the degree of certainty factor, Petitioner again highlighted the fact

[4] Miller v. Alabama, 567 U.S. 460 (2012) (holding that mandatory life without parole sentences for those under the age of 18 at the time of their crimes violates the 8th Amendment).

that Petitioner was near him and was "was in my face." (R. p. 107, lines 7-9). The time between the confrontation and the identification was relatively short. The incident took place the night of May 17 and in the early morning hours of May 18, 2012. The lineups were presented to Petitioner on May 18th and May 19, 2012. (R. p. 42; p. 61-62).

Petitioner cited State v. Stewart[5] in his brief to support his argument that the identification should have been suppressed. Stewart is instructive because it reiterates that suggestiveness alone does not require the exclusion of evidence and sets out the appropriate factors to consider as addressed above. Id at 450, 272 S.E.2d at 629; see Perry v. New Hampshire, 565 U.S. 228, 232, 132 S. Ct. 716, 720 (2012), 132 S. Ct. at 728 ("[T]he jury, not the judge, traditionally determines the reliability of evidence."); see also State v. Brown, 356 S.C. at 504, 589 S.E.2d at 785 ("Reliability is the linchpin in determining the admissibility of identification testimony."). The facts here are actually more suited to admission than those in Stewart. In Stewart, the witness testified she had a full view of the appellant, she gave an accurate description, and only two weeks had passed since the robbery. Here, Hemingway similarly had a full, up close view of Petitioner, gave an accurate description and was shown the lineups just in the two days following the incident. Here, there was not a substantial likelihood of misidentification such that it should be excluded entirely. See Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983) (characterizing the exclusion of identification evidence from trial as a "drastic sanction" that should only be employed where the reliability of the evidence is "manifestly suspect"). Accordingly, Judge Young properly allowed the jury to weigh the evidence concerning the identification.

Furthermore, the court of appeals correctly found Petitioner did not suffer any prejudice

[5] 275 S.C. 447, 272 S.E.2d 628 (1980).

by having the lineups admitted into evidence. Defense Counsel were able to cross examine Hemingway extensively on both the suggestiveness and the reliability of the lineups. See State v. Liverman, 398 S.C. 130, 143-44, 727 S.E.2d 422, 428-29 (2012) (finding any error in the admission of identification evidence to be harmless where the reliability of the identification evidence was fully vetted at trial, the weaknesses in the evidence were exposed on cross-examination, and defense counsel reminded the jury of those weaknesses during closing arguments). On cross, Counsel Apostolou highlighted the fact that Hemingway failed to identify Petitioner in the first lineup that contained his photo. (R. p. 456-58). Counsel Apostolou also reminding Hemingway of his testimony from the Biggers hearing where he stated he felt like the "police must know something because they keep showing you the same guy; is that correct?" (R. p. 458). Also, in closing arguments Counsel Apostolou actually argued that Hemingway knew Petitioner but did not want to reveal that fact. (R. p. 583-85; 599-600). Counsel Apostolou argued that this was a drug deal gone bad rather than a robbery of an innocent victim. Lastly, the identification was also cumulative to the eyewitness testimony given by Rivers which was more consistent.

II. The court of appeals correctly found the issue regarding defense counsel opening the door into evidence of Petitioner's abusive relationship with his girlfriend to be unpreserved for review.

How the Issue Arose Below

After the Biggers hearing was completed, the parties took up the issue of whether evidence regarding Petitioner's abusive relationship with Rivers would be admissible. (R. p. 138-150). Counsel Apostolou brought it to Judge Young's attention that there had been allegations made by Rivers that Petitioner physically abused her in the past. (R. p. 138). Counsel Apostolou hoped to have excluded any testimony regarding any prior bad acts. (R. p. 138-39). Solicitor

Shealy laid out her position that Petitioner had control over Rivers and that she was "sort of under the spell of Denzel Heyward." (R. p. 139). Judge Young noted that an incident that happened the night of the crime would be different than an incident months prior. (R. p. 142-43). Judge Young cautioned that he had not been presented with any argument to support the allegation's admission pursuant to Rule 404(b), SCRE. (R. p. 145). Judge Young also keenly noted that the door could be opened by the defense which would make the evidence admissible. (R. p. 146-47).

Sidearis Singleton, Rivers' mother, testified for the State at trial. (R. p. 227). She was called to recount her conversation with Rivers where she told her to turn herself in to the authorities after learning what happened. (R. p. 231). On cross examination, Counsel Apostolou opened his questioning of Singleton on whether she was aware Rivers had attempted suicide. (R. p. 239). He immediately continued and asked questions about whether Singleton was aware that Rivers had been abused. (R. p. 239). In response to an objection to a question regarding whether Singleton knew Rivers was a stripper, Counsel Apostolou argued the question was relevant to Rivers' mental state. (R. p. 240-41).

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

Discussion

This issue is not preserved.

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

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

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

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

Even if preserved, the court of appeals was correct in ruling the testimony was properly admitted. During cross examination of Singleton, Counsel Apostolou opened the door to the issue of abuse and to Rivers' mental state. A party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991). When a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003). A party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991). "Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge." State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2009) (citations omitted).

The State properly elicited testimony from Singleton and Rivers to explain whether she was abused. The questioning of Singleton and Rivers was proper because the State is entitled to explain the circumstances surrounding whether Rivers was abused. Petitioner argues for a much narrower construction of the "opening the door" doctrine. Petitioner argues the State was limited

in clarifying the one instance of sexual abuse alleged by Counsel Apostolou. To the contrary, the State was not limited to just explaining the allegation of sexual abuse supposedly made by Rivers. The State was properly allowed to give a full and fair context of the abuse. Counsel Apostolou also opened the door to Rivers' mental health and state of mind when he asked whether Singleton knew Rivers had attempted suicide. The State was permitted to also explain how Rivers' mental state was affected by the physical abuse that she withstood from Petitioner.

Petitioner also emphasizes that the evidence was not admissible pursuant to Rule 403, SCRE, but as discussed above, no objection was made, so we are unable to speculate as to what Judge Young would have ruled had such an objection been made. Regardless, the evidence of an abusive relationship would have survived an objection under Rule 403 because the probative value is not substantially outweighed by any unfair prejudice. It is not likely the jury would have presumed Petitioner planned a robbery and partook in a murder because he was abusive towards his girlfriend. The evidence is also probative and necessary to explain the allegation raised by Counsel Apostolou.

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

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

CONCLUSION

For the reasons stated above, the decision of the court of appeals and the trial court's judgment and conviction should be affirmed.

Respectfully submitted,

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December 10, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
DEC 10 2018
S.C. SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Roger M. Young, Circuit Court Judge

Opinion No. 5537 (S.C. Ct. App. filed February 14, 2018)

Appellate Case No. 2018-000981

State of South Carolina, ...Respondent,

v.

Denzel Heyward, ...Petitioner.

PROOF OF SERVICE

I, Troyeshi Brailey, Legal Coordinator, hereby certify that I have served the within *Brief of Respondent*, dated December 10, 2018, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served. This 10th day of December, 2018.

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