

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

S.C. SUPREME COURT

Roger M. Young, Circuit Court Judge

Case Nos. 2014-GS-10-00763
2014-GS-10-00765 and 2014-GS-10-00767

Appellate Case No. 2015-000709
Opinion No. 5537, Filed February 14, 2018

The State, ... Respondent,

v.

Denzel Heyward Petitioner

APPENDIX

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 ORIGINAL

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Denzel Heyward, ... Appellant.

FINAL BRIEF OF THE APPELLANT

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September 6, 2016

STATEMENT OF THE ISSUES ON APPEAL

- I. The trial court erred in permitting the in-court identification of the Appellant by Jujuan Hemingway, because the court failed to consider the appropriate Biggers reliability factors after determining the identification process was highly suggestive, and relied exclusively on the identifying witness's dishonesty in a prior line-up as the basis for declaring the identification reliable.
- II. The trial court erred in permitting irrelevant and prejudicial evidence of domestic violence towards a testifying co-defendant, where the court ruled cross-examination on an unrelated allegation of sexual abuse against a different individual opened the door to questions regarding the Appellant's relationship with the witness.
- III. The trial Court erred in commencing sentencing proceedings at 1:30 a.m. over the objection of Appellant, and erroneously considered victim impact testimony unrelated to the crimes for which the Appellant was convicted.

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STATEMENT OF THE CASE

This is an appeal from the verdicts resulting from the joint-trial of Denzel Heyward and Deshaun Simmons, on whom, Mr. Heyward is the Appellant. The indictments charged Denzel Heyward ("Appellant") with four counts arising out of an incident occurring on John's Island, South Carolina, on May 16, 2012. The counts were for (1) the Murder of Kadeem Chambers, pursuant to S.C. Code §16-3-10 (2014-GS-10-00762); (2) the Attempted Murder of Jujuaïn Hemingway, pursuant to S.C. Code § 16-3-29 (2014-GS-10-00763); (3) Armed Robbery, under S.C. Code § 16-11-330(A) (2014-GS-10-0065); and Possession of a Firearm During the Commission of a Violent Crime, under S.C. Code § 16-23-490 (2014-GS-10-0067). R. pp. 9-14. Mr. Heyward's co-defendant, Deshaun Simmons, was indicted on virtually identical counts.

This matter was originally docketed for February, 2014, but was postponed until the term of court beginning November 10, 2014. The matter was tried from November 10th through November 15, 2015.¹ On November 10th, the court heard the Appellant's motion to exclude identification testimony by Jujuaïn Hemingway and Appellant's motion to exclude testimony of Quasantrina Rivers regarding episodes of domestic violence involving Rivers and the Appellant. The trial concluded on Friday, November 15, and the jury began deliberations at 5:15 p.m. Tr. Vol. 3, p. 453; R. p. 622.

The jury deliberated for eight hours, and made multiple requests to the court for additional information. During deliberations, the jury submitted notes to the court requesting (1) copies of recorded jailhouse telephone conversations by

¹ No proceedings were held on November 11th, 2014, in observance of Veteran's Day.

Deshaun Simmons;² and (2) copies of the testimony of Jujain Hemingway and Quasantrina Rivers. Court's Exhibits 1 and 5; R. pp. 689 and 693. After seven hours, the jury informed the court that it was deadlocked on four counts.³ Court's Exhibit 6; R. p. 694; Tr. Vol. 3, p. 461; R. p. 630. The court then gave an Allen charge after which, the jury returned guilty verdicts on the counts for the attempted murder of Jujain Hemingway, armed robbery and the weapons charge. Tr. Vol. 3, p. 462-467; R. pp. 631-636. The jury could not reach a verdict on the murder charge and the court declared a mistrial as to that count. Tr. Vol. 3, p. 470; R. p. 639.

Despite the fact the verdicts were returned at 1:30 a.m. on a Saturday morning, the court proceeded directly to sentencing over defense counsel's objection. Tr. Vol. 3, p. 471; R. p. 640. After hearing victim impact statements, the court sentenced Appellant to the maximum sentence on each conviction for a total of sixty-five (65) years of concurrent time.⁴

Appellant filed post-trial motions, which were denied by Order dated March 17, 2015. Order Denying Post-Trial Motions; R. p. 5-8. The Notice of Appeal was filed on March 23, 2015.

STATEMENT OF THE FACTS

This matter involves incidents occurring in Charleston County in the late hours of May 16, 2012. That evening, Brothers Kadeem Chambers and Jujain

² The jury also requested copies of the state's argument regarding these telephone conversations, which were not provided.

³ The court declined to inquire which charges were settled at that time, so it is unknown which counts were first resolved.

⁴ 30 years for Attempted Murder; 30 years for Armed Robbery; and 5 years for Possession of a Firearm During the Commission of a Violent Crime. Each of these is the maximum penalty allowed by law. See, S.C. Code Ann. Code § 16-3-29; S.C. Code Ann. § 16-11-330(A); S.C. Code Ann. § 16-23-490, respectively.

Hemingway drove from Longs, South Carolina, to 3475 Cynthia Drive, on John's Island near Charleston. When they arrived just before 11:30 p.m., there was an altercation with two individuals outside the house. During the altercation, one of the subjects, wearing a red shirt, kicked Hemingway in the head, and the other subject fired a round at the ground near him. A female subject attempted to open the trunk of Chambers' car, before Hemingway was instructed to open the trunk of the car himself and get back on the ground. Shortly thereafter, Chambers and the subject holding the weapon "tussled," and two shots were fired. Tr. Vol. 3, p. 149-151, 261-262; R. pp. 414-416, 526-527. Chambers was hit with two bullets. Hemingway fled into a nearby construction site, disposing of "dime bags" of marijuana on the way. Tr. Vol. 3, p. 153-154; R. pp. 418-419. The two assailants left in a dark colored sedan driven by the female.

Charleston County Sherriff's Officers responding to 911 reports of shots fired found Chambers behind the wheel of his Mercedes Benz, which he'd crashed into a white truck near the corner of Cynthia Drive. Tr. Vol. 2, pp. 96-97, 99-100; R. pp. 173-174, 176-177. He was taken to the Medical University of South Carolina, where he passed a few hours later.⁵ Officers found Hemingway in a porta-potty at a nearby construction site on Constantine Thorpe Avenue. Hemingway provided a false name and date of birth to officers. Tr. Vol. 3, p. 156; R. p. 421.

On May 17th, investigators interviewed Hemingway about the incident in Longs, South Carolina. Hemingway told investigators that he could identify one

⁵ He had \$648.27 in his pocket at the time. Tr. Vol. 3, p. 37; R. p. 391.

of the participants who was wearing a red shirt. Courts Exhibit 2, Hearing 11/10/14, p. 5; R. p. 663. On the 18th, the officers returned with a "six-pack" line-up containing a photograph of the Appellant, Denzel Heyward. Hemingway failed to make an identification. The next day, officers returned to Longs and escorted Hemingway to the local police precinct, where they showed him another six-pack line-up containing a photograph of Heyward. In the second line-up on May 19th, Hemingway identified Heyward. However, he failed to identify the Co-Defendants Deshaun Simmons or Quasantrina Rivers. Tr. Vol. 1, p. 128; R. p. 66.

On May 18th, Quasantrina Rivers, the mother of Denzel Heyward's daughter, and an alleged accomplice in the incident on May 16th, disclosed her involvement to family members who then contacted police. Rivers subsequently turned herself in and was charged with accessory to murder, accessory to attempted murder and accessory to robbery. Tr. Vol. 2, pp. 214-219; R. pp. 229-234. She provided two statements to investigators on May 19, 2012. On July 12, 2012, she entered a proffer agreement with the state, and subsequently gave a greatly revised account of the events on July 17, 2012. Tr. Vol. 2, pp. 300, l. 24-302, l. 10; R. pp. 317-319; Tr. Vol. 2, pp. 305-306; R. pp. 320-321; and Tr. Vol. 2, p. 315; R. p. 330) She was able to get out of jail as a result of signing the proffer and providing the second statement. Tr. Vol. 2, p. 316, ll. 4-9; R. p. 331.

ARGUMENT

The trial court erred in permitting testimony regarding a highly dubious identification of the Appellant by Jujuan Hemingway. The court failed to consider

the appropriate reliability factors set before admitting the identification, which amounts to an abuse of discretion. The evidence was used repeatedly by the state to bolster its case, which significantly impacted a very closely decided trial.

The court also erred in permitting highly prejudicial and irrelevant character evidence to be put before the jury. Testimony regarding the Appellant's violent relationship with his girlfriend and co-defendant was used to depict the Defendant as a wicked abuser without even the slightest relevancy to the questions at issue in this proceeding. The court erred in ruling the Defendant had opened the door, by raising a completely unrelated issue and abused its discretion in failing to prevent the admission of this highly prejudicial evidence.

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

In a pretrial hearing held on November 10, 2015, the Appellant challenged the line-up identification made by Jujuain Hemingway, pursuant to Neil v. Biggers, 409 U.S. 188 (1972). The hearing concerned two photo line-ups provided to Hemingway on May 18th and 19th and the attendant circumstances of those police interactions.

Charleston County Investigators interviewed Jujuain Hemingway at his mother's house on May 17th, the day after the events occurred on Cynthia Drive. Hemingway provided details of the incident, including that an individual wearing a

red shirt had kicked him.⁶ He indicated the other individual, who fired a rifle shot at the ground near his head, was wearing a white shirt. During the interview, Hemingway's brother indicated to Hemingway that a person named "Fat" was involved in the crime. Tr. Vol. 1, pp. 104, 111, 112, 119; 156-157; R. pp. 42, 49, 50, 57, 94-95. The officers asked him if he knew Fat or Fats. Tr. Vol. 1, p. 167; R. p. 105. In response to questioning, he stated that he could identify the suspects if shown a photograph. Court's Exhibit # 2, p. 5; R. p. 663. Hemingway steadfastly denied at all times that he knew Fat or had any prior knowledge of any person by that name. See, Tr. Vol. 1, p. 158; R. p. 96.

Hemingway failed to identify the Appellant during the line-up conducted at his mother's house on May 18th. On the 19th, he was taken to the local precinct and shown another line-up. Appellant was the only person that appeared in both line-ups. Hemingway also testified about the effect of seeing the Appellant in both line-ups:

Q. So they came in, they said, hey, we want to take you and have you look at another lineup?

A. Yes.

Q. Did you find it odd that they would have the same person in the lineup that you recognized from the 18th and now he's in the lineup on the 19th?

A. Yeah.

Q. You did find that odd?

A. They had to know something that I didn't know. They had to know something that I didn't. They keep showing me the same picture.

Q. I'm sorry, could you say that again?

A. They had to know something that I didn't know. They kept showing me the same picture.

Q. They had to know something you didn't know if they were showing you the same picture?

A. Yes.

⁶ Hemingway actually provided two statements on May 17th, a 3 page statement and a 6 page statement. Investigators did not believe his first statement and instructed him to start over. Tr. Vol. 1, p. 154; R. p. 92; See Court's Exhibits 1 and 2, Hearing 11/10/14; R. pp. 656-666.

Tr. Vol 1, pp. 177-178; R. pp. 115-116. Hemingway testified that when the police picked him up on the 19th, he feared they were going to lock him up for not making an identification. Tr., Vol. 1, p. 156; R. p. 94. During the photo line-up conducted at the police station on the 19th, Hemingway identified the Appellant, circled his picture and wrote, "I know him as fatt" on the identification form. State's Exhibit 166; R. pp. 671-677.

During status conferences between counsel for the Defendants and the state, photographic line-ups of the Appellant were discussed. On the Friday preceding trial (and the Biggers Hearing) the solicitor's office disclosed for the first time that Hemingway could have identified the Appellant in the initial line-up but declined to do so.⁷ Hemingway never told Charleston County Sherriff's personnel that he could have identified the Appellant during the first line-up, nor did the solicitor disclose this fact to defense counsel until the Friday evening before trial, despite prior conferences and communications regarding the photo line-ups. Defense counsel brought this delayed disclosure to the attention of the trial court before the hearing. There was a thorough on the record discussion of the failure to disclose. Tr. Vol. 1, p. 80-96; R. pp. 18-34.

After hearing the testimony, the court ruled that the line-up procedure was unduly suggestive. Nevertheless, the court ruled that the second identification was reliable based on the "unique circumstance" that Hemingway had lied to investigators during the first line-up:

⁷ Despite a thousand page production, the claim that Hemingway lied to investigators during the first line-up appeared for the first time in a footnote to the State's Pretrial Brief. Tr. Vol. 1, p. 82; R. p. 20.

So even though the lineup procedure combined – combining the two was unduly suggestive, I don't think it was unreliable because of the unique – very unique circumstances of Mr. Hemingway stating that he had, in fact, already identified it, but because of his anger and his youth had decided not to share that identification with police. All right. So your motion to suppress that will be denied."

Tr. Vol. 1, pp. 194-195; R. pp. 132-133.

The trial court erred in relying on the witness's dishonesty as the sole indicator of reliability. A criminal defendant may be deprived of due process of law by an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification. State v. Moore, 334 S.C. 411, 415, 513 S.E.2d 626, 627 (Ct.App. 1999); *citing* Stovall v. Denno, 388 U.S. 293, 87, S.Ct. 1967, 18 L.Ed.2d 1199 (1967). If a defendant makes a Biggers challenge to an out-of-court identification, the court must evaluate the identification using a two-pronged process. First, the court must determine if the line-up procedure used was unnecessarily suggestive thereby creating a risk of improper identification. If it finds the procedure used is unduly suggestive, the court may nevertheless find that the identification is reliable based on the totality of the circumstances. State v. Moore, 334 S.C. 411, 415, 513 S.E.2d 626, 627-628. The appropriate factors to consider in determining reliability are 1) the opportunity of the witness to view the criminals at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of the witness's prior description; 4) the level of certainty demonstrated by the witness at the confrontation; and 5) the amount of time between the crime and the confrontation. *Id.*

It is beyond dispute that the identification procedure was suggestive, and the solicitor admitted it was problematic. Tr. Vol. 1, p. 192; R. p. 130. The South Carolina Supreme Court has previously found a procedure where a failed photo-identification is followed by another line-up, in which the defendant is the only person included in both confrontations to be suggestive. See State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980). In Stewart, the witness admitted on cross-examination, that the presence of the defendant affected her identification "a little bit." In this case, Hemingway's statements regarding the suggestive nature of the subsequent line-up were much stronger: "They had to know something *that I didn't know. They had to know something that I didn't. They keep showing me the same picture.*" The repeated presentation of Appellant's photographs was tantamount to telling Hemingway: "This is our guy, and we already know it."

In Stewart, the court nevertheless determined the identification was not irreparably tainted by reviewing the reliability factors set forth above. 275 S.C. 447, 451, 272 S.E.2d 628, 630. In this case, the court did not conduct any review using the factors identified in Biggers, or its progeny. Instead, the court relied exclusively on the witness's claim that he lied to investigators at the initial line-up to determine this highly suggestive procedure did not cause irreparable danger of misidentification. Tr. Vol. 1, pp. 193-195; R. pp. 131-132. This was error.

Beyond the obvious contradiction that a lie can form the basis of reliability, the court failed to address the evidence presented by the appellant bearing on the appropriate factors. The Appellant presented considerable evidence bearing on the witness's perception, memory and credibility, which the court did not consider. Failure to evaluate the reliability of an identification in light of the factors identified in Biggers, is a failure to exercise discretion, and amounts to an error of law. State v. Moore, 334 S.C. 411, 513 S.E.2d 626 (Ct. App. 1999).

The incident in question happened at 11:30 p.m. on a stormy night. Hemingway had smoked hallucinogenic drugs a short time before the initial contact. Tr. Vol. 1, p. 164; R. p. 102. Although the incident occurred over the course of five minutes, the witness was face down on the ground for the majority of that time. Tr. Vol. 1, p. 148-49; R. pp. 86-87. The witness claimed that he had an equally good look at both of the assailants [Tr. Vol. 1, p. 147; R. p. 85], but he was unable to identify Deshaun Simmons in a May 19th line-up, the date he was supposedly telling the truth. Tr. Vol. 1, p. 161-162; R. pp. 99-100. It is important to note that there was no line-up featuring Simmons on May 18th. This highlights the suggestive nature of the duplicate line-ups featuring Appellant.

The admission of the out-of-court identification as well as the in-court identification led to considerable prejudice to the Appellant. This case turned exclusively on the credibility and testimony of two witnesses: Hemingway and Rivers. Both witnesses suffered from contradictions in

their statements; both admitted to lying to investigators; and both had clear motives to conceal the true facts of what occurred on Cynthia Drive that night.^{8 9} Accordingly, allowing the in-court identification to create accord in their testimony and bolster Hemingway's credibility was severely detrimental to Appellant's right to a fair trial.

Furthermore, and perhaps more importantly, the prosecution repeatedly used the out-of-court identification to bolster its case. Not only was the out-of-court identification introduced at trial, the solicitor presented it as *two affirmative identifications*. Tr. Vol. 3, pp. 150-176; R. pp. 415-441; Defense counsel's renewed objection appears at p. 168; R. p. 443. At the close of the state's case in chief, it introduced recorded telephone calls of both defendants. State's Exhibit 171, Tr. Vol. 3, p. 331; R. p. 553.¹⁰ In a telephone call from Deshaun Simmons to an unidentified third-party, Simmons repeatedly refers to the victim's identification as pointing to Appellant's guilt. The solicitor highlighted Simmons' comments in her closing arguments:

"[Simmons:] That's why you really need to be keeping up with this case. Dog ain't going nowhere. Too much shit points towards him. He's saying he ain't even been there and the victim picked him out

⁸ Rivers testimony was largely based on what she saw in the rear view mirror of her car. Tr. Vol. 2, p. 309; R. p. 324.

⁹ In her May 19th statement, Rivers stated she was awoken in her car by gun-shots, however in her subsequent statements she stated she was awake when Hemingway and Chambers first arrived. Tr. Vol. 2, p. 305-306; R. pp. 320-321.

¹⁰ At the time the recording was initially played, defense counsel could not make out the content of the telephone call due to the quality of the recording. Although the state disclosed dozens of hours of telephone conversations by both Defendants, it only pin-pointed the calls made by Appellant that it was going to use at trial. Simmons' calls were provided as hours of undifferentiated conversations. See, Motion for New Trial Based on Impermissible Bruton Testimony; R pp. 649-653; Tr. Vol. 3, p. 471; R. p. 640.

of a lineup, the victim. The victim, the victim. That's going to make you look stupid.

[Third Party:] That's what that N say? He say he ain't been there?

[Simmons:] From my understanding, y'all trying to tell you and everybody else he ain't been there and he ain't did this and he ain't did that, but everything is pointing towards him . . ."

The solicitor hammered the line-ups again in her closing arguments—both the out-of-court identifications [Tr. Vol., 3, p. 427; R. p. 615] and Simmons's conversations about the line-ups. Tr. Vol. 3, pp. 429, 431-432; R. pp. 617, 619-620.¹¹

The jury paid close attention to the phone call testimony, and repeatedly requested copies of the telephone calls *and* the solicitor's arguments regarding the calls. Court's Exhibits 1, 3 and 5; R. pp. 689, 691, 693. It must have played a large part in their decision.

This is not a case of overwhelming evidence and the error was not harmless. State v. Singleton, 303 S.C. 313, 400 S.E.2d 487 (1991) (finding that in the absence of overwhelming guilt, the error was not harmless). There was no physical evidence linking either defendant to the crime scene. The only evidence against the Defendants came from the eyewitness testimony of two highly unreliable, and highly motivated witnesses. The jury returned a mixed verdict after a deliberation so lengthy, it was unprecedented in the trial court's experience. Given the closeness of this case, the court cannot say that the admission of this identification testimony was harmless.

¹¹ In addition to the excerpt above, the solicitor also made the following reference: Simmons: "The bitch telling on me is what's really got me fucked up right now. Fat, they picked him out of a line-up." Tr. Vol. 3, p. 429; R. p. 617.

Finally, by condoning this highly suggestive process (and the concomitant late disclosure of this material information), the court would be providing a blueprint for investigators and prosecutors to circumvent reliable procedures.

Accordingly, the trial court should reverse the convictions of the Appellant based on the improper admission of evidence, or in the alternative, remand the case for further proceedings consistent with the court's decision in State v. Moore, 334 S.C. 411, 513 S.E.2d 626 (remanding case for additional determinations by the trial court, where the court failed to make a determination using the proper Biggers factors.).

- II. The trial court erred in permitting irrelevant and prejudicial evidence of domestic violence towards a testifying co-defendant that significantly prejudiced the outcome of the trial.

Before trial, the Appellant moved to exclude any testimony about allegations of domestic abuse by the Appellant against Quasantrina Rivers ("Rivers"), an alleged co-conspirator and prosecution witness. The state sought to introduce numerous incidents of domestic violence, including video of the Appellant hitting Rivers months before May 16th. The state argued the violent incidents during the course of the relationship showed the violent nature of the relationship, and specifically the Appellant's violent temperament toward Rivers. Tr. Vol 1, pp. 200-213; R. pp. 138-151. They further argued that the incidents showed that Rivers was under the control of the Appellant. The court properly rejected these arguments, noting the state's efforts to depict Appellant as a violent abuser, directly contravened the purpose of Rule 404(b), which is to exclude character evidence offered to prove a character trait of the defendant

consistent with the crime charged.¹² The court did not totally foreclose the possibility that the state *might* be able to introduce the domestic violence incidents if it was necessary to rehabilitate Rivers following her cross-examination. Tr. Vol 1, pp. 212-213; R. pp. 150-151.⁴

During the cross-examination of Rivers' Mother, Sidearis Singleton, Defense Counsel inquired whether Singleton knew if Rivers had accused Singleton's husband of sexual abuse:

Q. Do you know if [Rivers has] had some mental health issues?

A. I am unsure about that.

Q. Do you know whether she's accused anyone in your family of sexually assaulting her?

A. I'm not sure about that, sir.

Q. Do you have a husband at the present time?

A. Yes, sir.

Q. And what is his name?

A. His name is Phillip.

Q. Do you know whether [Rivers] has ever accused Phillip of sexually assaulting her?

A. No sir.

Q. You do not know whether that's true or not?

A. No sir.

Q. You're still presently married to Phillip?

A. Yes, sir.

Q. All right. And if [Rivers] had accused him of sexually molesting her, then you would not be married to him if you believed those were correct; is that true?

A. Correct.

Q. You're uncertain whether [Rivers] has ever accused Phillip of sexually assaulting her?

¹² "[Y]our trying to say he's a really bad guy and, therefore, he's convicted -- he should be convicted of this, look at all these other things that he did. And that's exactly what character evidence is usually not allowed to do." Tr. Vol 1, p. 206; R. p. 144.

Tr. Vol. 2, pp. 224-225; R. pp. 239-240. The obvious intent of defense counsel, was to elicit testimony regarding a specific instance of fabrication by Rivers. The suggestion made was that Rivers' mother did not believe the specific allegation of sexual abuse made against her husband.

On redirect, the State then proceeded to ask Ms. Singleton "Who do you know that abused [Rivers]." Tr. Vol. 2, p. 232; R. p. 247. Defense counsel immediately objected. The court initially stated that defense counsel had opened the door, then conducted a sidebar conference with counsel before permitting the line of questioning.

Despite its prior ruling to exclude this testimony, the court permitted Mrs. Singleton to testify extensively regarding the abusive relationship between Appellant and Rivers. Tr. Vol. 2, pp. 233-235; R. pp. 248-250. Singleton testified that the Appellant abused Rivers on multiple occasions, in multiple localities and that she personally disapproved of him having a relationship with her daughter.

Defense counsel further objected to the statements, because Singleton's testimony was based on what Rivers "shared" with her regarding the source of bruises and physical injuries, and that Mrs. Singleton was speculating on the source of her daughter's injuries. Tr. Vol. 2, p. 235; R. p. 250.¹³ The court summarily overruled the second objection.¹⁴

¹³ Although Defense counsel stated the testimony was "speculative," it was clear from the context that he intended a hearsay objection because, the witness was not competent to testify to the circumstances surrounding the actual injuries.

¹⁴ The state also tried to introduce a photograph of Rivers showing abrasions to her hairline and face, which the court excluded. The photographs were made a court's exhibit. Tr. Vol. 2, p. 234, l. 24-p. 235, l. 4; R. pp. 250-251; Tr. Vol. 2, p. 237, l. 3-13; R. pp. 252].

The state called Rivers as its next witness. The state began its *direct* examination of Rivers by eliciting testimony that Denzel Heyward was violent towards her. Tr. Vol. 2, p. 240-241; R. pp. 255-256. The testimony was not introduced as part of a timeline of the events, nor was it linked in any way to the crime alleged. No questions were asked about diminution of her free will or her subservience to the Appellant. The line of questions was gratuitous character assassination.

- i. The Court erred in ruling defense counsel had "opened the door" to the prejudicial testimony, because it was not responsive or relevant to the issues addressed in the cross-examination.

The trial court erred in concluding defense counsel's questions on Rivers allegations against her step-father regarding sexual abuse opened the door to testimony regarding the Appellant's relationship with Rivers. Our courts have borrowed the following succinct summary of the "Opening the Door" doctrine: "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." State v. Young, 364 S.C. 476, 613 S.E.2d 386 (2005); quoting State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984) (alterations in original) (citing State v. Albert, 303 N.C. 173, 277 S.E.2d 439, 441 (1981)).

However, there must be a logical, subject-matter nexus between the door opening evidence and the inferences created therefrom, and the "rebuttal" or "explanation" that enters because of the newly opened door. Evidence that does not explain or rebut what the defendant put forward is not properly admitted

under the doctrine of "opening the door." See, State v. Foster, 354 S.C. 614, 623, 582 S.E.2d 426, 431, (2003).

For example, in State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998), the court allowed the introduction of an eight year old criminal domestic violence conviction against the defendant, who was on trial for the murder of his wife. The court allowed the conviction to come in on cross-examination because it specifically rebutted the defendant's testimony on direct that his marital relationship had only recently deteriorated within the last few years.

Thus, the doctrine operates to permit one party to respond to an inference or impression created by the other party, however it does not permit the admission of new subject matter based on any attenuated connection advanced by the state. The New York Court of Appeals described the doctrine's limitations as follows:

The "opening the door" theory must necessarily be approached on a case-by-case basis. As a result, this principle is not readily amenable to any prescribed set of rules. (See McCormick, Evidence [2d ed], § 57.) Nonetheless, it does have its limitations. By simply broaching a new issue on cross-examination, a party does not thereby run the risk that all evidence, no matter how remote or tangential to the subject matter opened up, will be brought out on redirect. Rather, the trial court must limit the inquiry on redirect to the "subject-matter of the cross-examination [which] bear[s] upon the question at issue." Moreover, the court should only allow so much additional evidence to be introduced on redirect as is necessary to "meet what has been brought out in the meantime upon the cross-examination." (6 Wigmore, Evidence [Chadbourn rev ed], § 1896, p 737; The "opening the door" theory does not provide an independent basis for introducing new evidence on redirect; nor does it afford a party the opportunity to place evidence before the jury that should have been brought out on direct examination. The principle merely allows a party to explain or clarify on redirect matters that have been put in issue for the first time on cross-examination, and the trial court should normally "exclude all

evidence which has not been made necessary by the opponent's case in reply." (6 Wigmore, § 1873, p 672 [emphasis in original].)

People v. Melendez, 55 N.Y.2d 445, 452-453, 434 N.E.2d 1324, 1328 (1982).

In Melendez, defense counsel asked the investigating officer if he considered the defendant a suspect at the time of a particular interview. On redirect, the prosecutor extensively questioned the investigator about the basis for his suspicions, including the hearsay statements by "concerned citizens" implicating the defendant in the crimes. In finding the defendant had not opened the door, the court noted that:

"the passageway thus created was not so wide as to admit the hearsay testimony directly implicating the defendant in the crimes charged. The door was opened only as to whether the witness considered [defendant] a suspect. Thus, it was error to broaden the scope of inquiry to include all the hearsay information the detective had learned from other people as part of his investigation of this case."

Melendez, 55 N.Y.2nd 445, 453, 434 N.E.2d 1324, 1328-1329 (1982).

In this case the evidence introduced through Sidearis Singleton on redirect was inapposite to defense counsel's inquiry, which was clearly directed at Rivers' credibility. Bringing out alleged domestic violence at the hands of the Appellant did nothing to elucidate the prior line of questioning or rebut inferences created by it. The State did not ask one question about the allegations against the witness's husband, nor did the prosecutor ask any questions about sexual abuse. Nothing in the redirect tended to show that Rivers was more credible or honest. Additionally, there was absolutely no testimony about how the physical abuse related to the mental health of Rivers, which was the vague, pretextual segue

used by the prosecution to shoe-horn this character assassination into evidence.¹⁵

This extremely prejudicial evidence was totally unrelated to what had come before, and served no purpose other than to tar the Appellant as a violent, woman-beater. Because the evidence did not rebut—or even relate—to the cross-examination, its admission was error. This is compounded by the fact that the trial court was fully aware of the state's improper purpose for offering this evidence.

- ii. The Court Should have excluded the evidence under Rules 404(B) and Rule 403, SCRE, because it was inflammatory, prejudicial, and had no probative value.

Rule 404(b), SCRE,¹⁶ prohibits the introduction of the defendant's prior bad acts reflecting on the defendant's character. The fear being that the jury might convict based on the defendant's characteristics rather than evidence of the elements of the crime charged. In State v. Smith, 391 S.C. 353, 705 S.E. 491 (Ct. App. 2011), this court reviewed the proper 404(B) analysis to be conducted by the trial court. First, to submit evidence of other crimes or bad acts for which there is no conviction, the offering party must demonstrate the defendant committed the act by clear and convincing evidence. Id. If the court is satisfied that the evidence is clear and convincing, the offering party must then demonstrate "a logical connection" between the prior act and a material element of the offense charged. Id. The "material elements" are limited to those

¹⁵ Tr. Vol. 2, p. 232, l. 23-p. 233, l. 2.; R. pp. 247-248.

¹⁶ "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

enumerated in the rule, namely: "motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

Here there was no logical relevancy between the abuse testimony and any aspect of the crimes charges. The relationship between Rivers and the Appellant did not have any bearing on what occurred that night, in terms of motive, identity or a common scheme or plan. Nor did the testimony reflect Appellant's intent to commit those crimes. It was stand-alone character evidence, offered for no reason other than to make Rivers appear sympathetic and depict the Appellant as a monster.

Furthermore, even if the act is proven by clear and convincing evidence, and it is connected to a material element, the court must still engage in a Rule 403 analysis. Rule 403 provides that when the prejudicial effect of evidence substantially outweighs its probative value, the evidence may be excluded. State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991). Appellant was entitled to an on the record determination of the admissibility of the evidence pursuant to Rule 403. State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013). (When the record does not reflect any such analysis was performed, the proper remedy is a remand for a determination of the admissibility of the evidence). There is no way the probative value of this evidence could outweigh the prejudice. Accordingly, this matter should be remanded for further proceedings consistent with Spears.

As is discussed above, this was an extremely close case: the jury deliberated in excess of eight hours, and sent numerous notes to the court for copies of the trial testimony. The only evidence of what occurred on Cynthia

Drive came from two witnesses, Quasantrina Rivers and Jujain Hemingway, who both admitted to lying to investigators during the course of the investigation. See, e.g. Tr. Vol. 2, pp. 364-365; R. pp. 379-380. Both witnesses provided several conflicting statements to the police. These statements tended to add new and necessary elements of the crimes charged as the trial drew nearer. See, e.g. Tr. Vol. 2, pp. 301-307; R. pp. 316-322; and Tr. Vol. 2, pp. 317-18; R. pp. 332-333; See also, Tr. Vol., 2, p. 347; R. p. 362, Rivers adding the asportation element of armed robbery by including the removal of a suitcase to her statement two days before trial). Rivers had obvious reasons for deflecting blame and imputing worse conduct to the co-defendants, including the reduction in her own punishment. Tr. Vol. 2, pp. 315-16; R. pp. 330-331. As her cross-examination revealed, she faced greatly reduced penalties due to her collaboration with prosecutors. *Id.*

Without the jury crediting Rivers testimony, it is very likely that the conviction for the attempted murder of Jujain Hemingway would not have occurred. Rivers provided the only testimony about a shot being fired from the car as the assailants left the scene. Tr. Vol. 2, p. 271; R. p. 286. This last shot was not corroborated by Hemingway or the 911 calls entered into evidence.

Attempted murder is a specific intent crime, and the defendant must have the specific intent to accomplish the result of murder. State v. King, 412 S.C. 403, 410, 772 S.E.2d. 189, 193, cert. granted March 28, 2016, Case No. 2015-001278). All the other events of the evening, while violent, could be viewed as efforts at intimidation. It is extremely important to note that the jury did not

convict on the murder charge. The obvious conclusion is that they did not see the gunshots during a struggle as rising to the requisite intent. Without the alleged final shot at Hemingway, the evidence shows a warning shot aimed at the ground [Tr. Vol. 2, p. 269; R. p. 284] and a deliberate effort to avoid hitting Mr. Hemingway with the car. Tr. Vol. 2, p. 271, l. 15-18; R. p. 286. On that record, the jury could have easily found there was no specific intent to kill Mr. Hemingway.

Finally, the fact that the State was allowing to introduce this evidence in its case in chief significantly impacted the Appellant's decision to take the stand. The

Accordingly, there was considerable prejudice from admitting this testimony to condemn the Appellant and beatify his co-conspirator. The error requires reversal for a new trial.

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

Deliberations continued until after 1:00 a.m. on November 15th. During that time, the jury submitted numerous notes to the court requesting additional information and assistance, which required trial counsel's attention. After an Allen charge given after midnight, they returned a split verdict at 1:11 a.m. The jury was discharged around 1:30 a.m., at which point the trial judge moved directly to sentencing. Appellant's counsel as well as counsel for Simmons moved to postpone the sentencing hearing, given the exhausting week of court and the extremely late hour. The solicitor argued that the victims' family had

traveled from Longs, South Carolina, and that the sister of Kadeem Chambers, who had prepared a statement, had to be at work the next day (Saturday) at 2:00 p.m. The court denied the motion, noting the victims' family had come from out of town and delaying the sentencing would be a "hardship." Tr. Vol. 3, 471-472; R. pp. 640-641.

The Solicitor then presented victim impact testimony in the form of pictures of Kadeem Chambers, a video memorial of Kadeem Chambers, and a letter read by Talia Chambers, Kadeem's sister, which focused on the family's loss due to Chambers' death. She requested the court to have "no mercy on Denzel Heyward." Tr. Vol. 3, p. 472-475; R. pp. 641-644. Prior to the presentation, the solicitor did not appear to be familiar with the evidence to be offered, and there was no indication that it was provided to the Appellant.¹⁷ The trial judge appeared to be greatly affected by the video tribute to Chambers.¹⁸ The solicitor then argued that the court should give consecutive sentences and reminded the judge that "one young man lost his life that evening." Tr. Vol. 3, p. 476; R. p. 645.

The Appellant was prejudiced by the conduct of this immediate sentencing hearing at 1:30 a.m., without adequate opportunity to review the materials to be considered by the court. Due Process, at the least, means the opportunity to be heard at a meaningful time and in a meaningful manner. Armstrong v. Manzo, 380 U.S. 545, 552 (1965). South Carolina's sentencing procedures are such that defendants do not receive victim impact testimony until after the delivery of a

¹⁷ Tr. Vol. 3, 472-473; R. pp. 641-642.

¹⁸ Defendant's Motion to Reconsider Sentence Imposed, dated November 21, 2014, p. 2; R. pp. 654-655.

verdict. S.C. Code Ann. 16-3-1550(F).¹⁹ While the court has an obligation to hear all impact testimony offered under the statute, the Defendant's right to review these materials for the purpose of responding does not attach until after a guilty verdict is delivered. *Id.*

By proceeding directly to sentencing at such a late hour, the court deprived Appellant of an adequate opportunity to prepare for the sentencing hearing. From the record, it is clear that the solicitor herself had not had an opportunity to review the materials. Counsel for Simmons, echoed by Appellant's counsel, noted that the jury did not convict either defendant for the murder of Kadeem Chambers, and thus, considering impact testimony focusing exclusively on the loss of Chamber's life in the sentencing process was inappropriate. *Tr. Vol.*, 3, p. 477; *R. p.* 646. Appellant was sentenced to maximum sentences for each of the crimes, based almost entirely on imputed liability. Based on the circumstances, the proceedings did not provide the Defendant with an adequate opportunity to make a meaningful presentation, and the Appellant requests a remand for a new sentencing hearing, providing Appellant a real opportunity to be heard.

¹⁹ S.C. Code Ann. § 16-3-1550 (F): "The circuit or family court must hear or review any victim impact statement, whether written or oral, before sentencing. Within a reasonable period of time before sentencing, the prosecuting agency must make available to the defense any written victim impact statement and the court must allow the defense an opportunity to respond to the statement. However, the victim impact statement must not be provided to the defense until the defendant has been found guilty by a judge or jury. The victim impact statement and its contents are not admissible as evidence in any trial."

Conclusion

The severely prejudicial effects of unreliable and inadmissible evidence on Mr. Heyward's case undermined his right to a fair trial. The court should reverse the convictions in the lower court and remand for a new trial. Because the sentencing hearing at 1:30 a.m. deprived the Defendant of an adequate opportunity to make a meaningful presentation, the court should remand for a new sentencing hearing.

Respectfully Submitted,

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September 6, 2016.

Columbia, South Carolina.

ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions

The Honorable Roger M. Young, Circuit Court Judge

RECEIVED

SEP 12 2016

SC Court of Appeals

Appellate Case No. 2015-000709

THE STATE,

Respondent,

v.

DENZEL HEYWARD,

Appellant.

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. The trial court erred in permitting the in-court identification of the Appellant by Jujuaín Hemingway, because the court failed to consider the appropriate Biggers reliability factors after determining the identification process was highly suggestive, and relied exclusively on the identifying witnesses' dishonesty in a prior line-up as the basis for declaring the identification reliable.
- II. The trial court erred in permitting irrelevant and prejudicial evidence of domestic violence towards a testifying co-defendant, where the court ruled cross-examination on an unrelated allegation of sexual abuse against a different individual opened the door to questions regarding the Appellant's relationship with the witness.
- III. The trial court erred in commencing sentencing proceedings at 1:30a.m. over the objection of Appellant, and erroneously considered victim impact testimony unrelated to the crimes for which the Appellant was convicted.

COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Although not properly raised, Judge Young properly admitted the of Appellant by witness Jujuaín Hemingway because, even though suggestive, the identification was reliable and there was not a substantial likelihood Appellant was misidentified. Furthermore, Appellant was not prejudiced because he was thoroughly cross-examined on the circumstances and reliability of the identification.
- II. Although not preserved, the State properly introduced evidence of Appellant's abusive relationship with his girlfriend, Rivers, to explain and rebut testimony elicited by Appellant's attorney that Rivers was abused and mentally unstable. Furthermore, any alleged error is insubstantial and not sufficient to warrant reversal of Appellant's conviction because there is overwhelming evidence of his guilt.
- III. While the issue is not properly preserved, Judge Young acted within his discretion in proceeding to sentencing after the jury rendered their verdict in the early morning hours. Judge Young also was free to consider the victim impact presentation.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

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

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

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

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

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

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

ARGUMENT

I.

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

How the Issue Arose Below

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

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

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

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

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

Discussion

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

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

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

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

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

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

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

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

The photo lineups were properly admitted.²

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

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

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

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

Appellant cites State v. Stewart³ in support of his argument that the identification should have been suppressed. Stewart is instructive because it reiterates that suggestiveness alone does not require the exclusion of evidence and sets out the appropriate factors to consider as addressed above. Id at 450, 272 S.E.2d at 629; see Perry v. New Hampshire, ___ U.S. ___, ___, 132 S. Ct. 716, 720 (2012), 132 S. Ct. at 728 ("[T]he jury, not the judge, traditionally determines the reliability of evidence."); see also State v. Brown, 356 S.C. at 504, 589 S.E.2d at 785 ("Reliability is the linchpin in determining the admissibility of identification testimony."). The facts here are more suited to admission than those in Stewart. In Stewart, the witness testified she had a full view of the appellant, she gave an accurate description, and only two weeks had passed since the robbery. Here, Hemingway similarly had a full, up close view of Appellant, gave an accurate description and was shown the lineups just in the two days following the incident. Here, there was not a substantial likelihood of misidentification such that it should be excluded entirely. See Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983)

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

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

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

II.

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

How the Issue Arose Below

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

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

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

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

Discussion

This issue is not preserved.

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

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

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

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

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

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

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

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

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

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

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

III.

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

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

How the Issue Arose Below

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

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

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

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

Discussion

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

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

Preservation

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

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

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

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

CONCLUSION

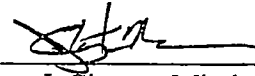
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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September 12, 2016

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Roger M. Young, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Case Nos. 2014-GS-10-00763
2014-GS-10-00765 and 2014-GS-10-00767

Appellate Case No. 2015-000709

The State, ... Respondent,

v.

Denzel Heyward Appellant

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September 6, 2016

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The Appellant, Denzel Marquise Heyward, responds to the Brief of Respondent as follows:

- A. The errors were not harmless because they materially affected the perception of the testimony of JuJuain Hemingway and Quasantrina Rivers, whose testimony was the only significant evidence against Mr. Heyward.

In his initial brief, the Mr. Hemingway identified two critical and prejudicial errors. The first was the improper admission of JuJuain Hemingway's identification of Mr. Heyward following highly suggestive, repetitive line-ups used by law enforcement.¹ The second was the admission of testimony regarding the physical abuse of Quasantrina Rivers by Mr. Heyward.² The State repeatedly used the specious identification in multiple contexts to undergird the shaky and contradictory testimony of Hemingway. [See Final Brief of Appellant, p. 11-12]. The State also repeatedly referenced physical abuse, which depicted the Appellant as the type of person who uses physical violence to coerce others to bend to his will. These errors were not harmless in view of the pivotal nature of the testimony.

The harmless error doctrine should be used guardedly and on a case-by-case basis. State v. Morris, 289 S.C. 294, 297, 345 S.E.2d 477, 479. No definite rule of law governs finding an error harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Gillian, 360 S.C. 433, 454-55, 602 S.E.2d 62, 73 (Ct.App.2004) (citing State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990)).

¹ See Brief of Appellant at p.4-13.

² See Brief of Appellant at p. 13-22.

Whether an error is harmless depends on the particular facts of each case. Two factors bearing on the harm of an error are (1) the importance of the witness's testimony in the prosecution's case and (2) the overall strength of the prosecution's case. State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438 (1986)).

Here, the prosecution and the jury relied almost exclusively on the testimony of JuJuain Hemingway and Quasantrina Rivers. Where the credibility of a witness is of paramount importance to a claim or a defense, an error bearing on that witness's credibility is not harmless. See State v. Morris, 289 S.C. at 298, 345 S.E.2d at 479 ("Error which substantially damages the defendant's credibility cannot be held harmless where such credibility is essential to his defense"). The credibility of these two witnesses was the single most important factor in the outcome of this closely-decided case. The jury deliberated for over eight hours, and during that time, reviewed the testimony of these two witnesses. Court's Exhibits No. 1 and No. 5; R. pp. 689 and 693. After a deadlock on four counts and an Allen charge, the jury returned a mixed verdict, failing to come to a conclusion on two charges. The deliberation was so lengthy, it was unprecedented in the trial court's experience. Tr. Vol. 3, p. 470; R. p. 639. Given the closeness of this case, the Court cannot say that the admission of the identification and physical abuse did not have a bearing on the outcome.

B. No Other Overwhelming Evidence of Guilt.

Additionally, the state did not present any other overwhelming evidence of guilt, such that the verdict is free from doubt despite the errors bearing on this testimony. See, State v. Singleton, 303 S.C. 313, 400 S.E.2d 487 (1991) (finding that in the absence of overwhelming guilt, the error was not harmless).

Overwhelming evidence is evidence which tends to show guilt to such an extent that no other reasonable conclusion can be reached. State v. Bailey, 298 S.C. 5, 1, 377 S.E.2d 581, 584 (1989).

In support of its contention that the record contained overwhelming evidence of guilt, the state relies on "identifications" provided by Kadeem Chambers and Verna Lockhart-Carter. (Brief of Respondent, pp. 17-18).³ The evidence was inconsistent, incompetent and incompatible with the state's theory of the case. Neither of these "identifications" were conclusive evidence that Denzel Heyward engaged in an armed robbery or attempted murder on Cynthia Drive that night.

- i. Kadeem Chambers' Identification of "Fat," was internally inconsistent and irreconcilable with the State's theory of the case.

Kadeem Chambers' identification of Mr. Heyward referred to by the State [Tr. Vol. 2, p. 110; R. p. 187; Initial Brief of Respondent, p. 17] was not internally consistent or consistent with the State's case. A first responder testified that Kadeem Chambers indicated "Fat or Fet" shot him. However, the investigators that interviewed Kadeem Chambers actually reported to his brother that Kadeem

³ Respondent also cites cell tower data indicating Mr. Heyward's phone was in the John's Island area that night. Of course, Mr. Heyward's family lived right around the corner [Tr. Vol. 2, p. 177; R. p. 224], so this could hardly be considered overwhelming evidence of his guilt.

identified "Fat Chuck" as his shooter. Tr. Vol. 3, p. 190; R. p. 455. Not only are the statements vague and inconsistent, but both statements are, in fact, totally irreconcilable with the remainder of the State's evidence and theory of the case, which identified Deshaun Simmons as the actual shooter.

ii. Verna Lockhard-Carter's Testimony did not Provide Overwhelming Evidence of Guilt.

Verna Lockhard-Carter is the mother of Lorenzo Mehciz and resides in the home on Cynthia Avenue near the incident location. Lorenzo Mehciz was called as a witness, but invoked his Fifth Amendment right against self-incrimination. Tr. Vol. 3, p. 125. Ms. Lockhart-Carter testified that when she returned from work around 9:00 p.m., a few hours before the incident, she saw her son and another person in front of her house. Tr. Vol. 2, p. 147-148; R. p. 194-195. Her son, Lorenzo, told her that "Fat" was one of the people outside her home. Tr. Vol. 2, p. 149; R. p. 196. Defense counsel objected to the hearsay identification, and after an on the record argument, the objection was sustained. Tr. Vol. 2, p. 149-163, 165; R. pp. 196-210, 213. Later in the examination, and still based on her son's statement, Ms. Lockhart-Carter said "Hi, Fat," before walking into the house. The court ordered the jury to disregard Ms. Lockhart-Carter's identification of "Fat." Tr. Vol. 2, p. 165-166; R. p. 212-213. Also, based on her son's earlier statement, Ms. Lockhart-Carter stated that she believed "Fat" was implicated in the activities outside her home. Tr. Vol. 2, p. 175; R. p. 222.⁴ She again qualified this information as being premised on her son's remarks.

⁴ Ms. Lockhart-Carter's testimony also included a helpful alibi for her son, who was inside the house during the incident. Tr. Vol. 2, p. 169; R. p. 216.

The State's treatment of Ms. Lockhart-Carter on the stand shows that her testimony was not compelling evidence of guilt. Although Ms. Lockhart-Carter's testimony was consistent with her prior statements to the police, the State moved to have Ms. Lockhart-Carter declared a hostile witness in an off the record bench conference. Tr. Vol. p. 170; R. p. 217. The motion was granted over defense counsel's objection, and Ms. Lockhart-Carter's prior statements were essentially read into the record, without an opportunity to respond to questions. Tr. Vol. 2, p. 175; R. p. 222. Despite this tactic, Ms. Lockhart-Carter consistently stated that she only thought "Fat" was there because her son had told her so. Additionally, she had no knowledge of what actually occurred out on the street as she was in her home during the events. Tr. Vol. 2, p. 176-177; R. p. 223-224.

The record reflects that the jury was confused by the testimony of Ms. Lockhart-Carter and her treatment as a hostile witness. During its marathon deliberation, the jury requested clarification of the term "hostile witness" in a note to the trial court. Court's Exhibit No. 2; R. p. 690.

In short, Kadeem Chambers inconsistently identified a person named "Fat Chuck" or "Fet" as the person who shot him, which is in direct conflict with the testimony of the State's chief witnesses, who identified Deshaun Simmons as the shooter. Ms. Lockhart-Carter's testimony was circumstantial hearsay from her son—a potential participant in the crime who refused to testify based on his own fears of self-incrimination. The testimony hardly confirmed any events that occurred on the street, and at most placed Mr. Heyward at the scene two hours before those events transpired. Neither piece of evidence conclusively

establishes the state's theory of what happened on Cynthia Drive at 11:30 p.m.,
nor is it sufficient to excuse the errors.

CONCLUSION

Because the erroneous admission of identification evidence and physical abuse allegations related to the most important testimony at trial, they cannot be brushed aside as harmless. Additionally, outside the testimony affected, there was little compelling evidence of what actually occurred at Cynthia Drive. Accordingly, the Appellant requests that this court reverse the decisions of the trial court and remand for a new trial.

Respectfully Submitted,

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September 6, 2016.

Columbia, South Carolina.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Denzel Marquise Heyward, Appellant.

Appellate Case No. 2015-000709

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. 5537
Heard November 16, 2017 – Filed February 14, 2018

AFFIRMED

Donald Michael Mathison of the Richland County Public Defender's Office and Chief Appellate Defender Robert Michael Dudek, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General James Clayton Mitchell, III, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

LOCKEMY, C.J.: Denzel Heyward appeals his convictions for attempted murder, armed robbery, and possession of a weapon during the commission of a violent crime. Heyward argues the trial court erred in (1) admitting a photo lineup identification into evidence; (2) admitting evidence of domestic violence by Heyward against a witness; and (3) commencing sentencing proceedings at 1:30

a.m. and permitting victim impact testimony unrelated to the crimes for which Heyward was convicted. We affirm.

FACTS/PROCEDURAL BACKGROUND

Heyward was indicted in January 2014 for the murder of Kadeem Chambers, the attempted murder of Jujuan Hemingway, armed robbery, and possession of a weapon during the commission of a violent crime. A jury trial was held November 10-15, 2014.

At trial, Quasantrina Rivers¹ testified for the State. According to Rivers, on the night of May 16, 2012, she drove Heyward and Dashaun Simmons² to Johns Island, South Carolina. Rivers testified she and Heyward had a disagreement that night and she was forced into the car. Rivers drove Heyward and Simmons to the home of "Skrill," a friend of Heyward. When they arrived, Heyward entered Skrill's home and returned with a duffel bag containing a gun that he then placed in the trunk of Rivers' car. Rivers then drove Heyward and Simmons to the home of Lorenzo Mehcz. According to Rivers, Chambers and Hemingway arrived at Lorenzo's home in another car shortly thereafter. Rivers testified Heyward approached Chambers and "bum-rushed" him, slamming him against his car. Simmons, armed with a gun, then ran towards the men and ordered Chambers and Hemingway to get on the ground. Heyward and Simmons repeatedly asked Chambers and Hemingway, "Where is the money at" and the men replied they didn't have anything. Rivers testified Heyward "stomped" Hemingway's head while he was on the ground multiple times. Simmons then fired a shot towards Hemingway who was still lying on the ground. According to Rivers, Chambers began tussling with Simmons on the ground and two more shots were fired, both striking Chambers. Heyward and Simmons ran back towards Rivers' car, placed the gun in the backseat, and Rivers drove the car away from the scene. Chambers and Hemingway also ran from the scene. Chambers was found by officers shortly after the shooting bleeding heavily in his wrecked car. Chambers told an officer he was shot by "Fat." Several witnesses stated Heyward's nickname is "Fat." Chambers later died at the hospital.

¹ Rivers is the mother of Heyward's daughter.

² Simmons was indicted on identical counts as Heyward and the two men were tried together.

After the shooting, Rivers drove Heyward and Simmons back to Skril's house. Rivers testified Heyward talked to Lorenzo on the phone after the shooting and instructed Lorenzo not to discuss what happened.³ Verna Lockhart-Carter, Lorenzo's mother, also testified at the trial. The shooting took place outside the home she shared with Lorenzo. Lockhart-Carter testified she arrived home on the night of May 16, 2012, and Lorenzo was outside talking to Heyward.

On May 17, 2012, just hours after the shooting, Hemingway gave descriptions of the assailants to investigators. On May 18, 2012, investigators presented Hemingway with a six-person photo lineup containing Heyward's photo. Hemingway failed to make an identification. The following day, investigators presented Hemingway with a second photo lineup also containing a photo of Heyward. Hemingway identified Heyward. Hemingway was unable to identify Simmons or Rivers in subsequent photo lineups. Heyward was subsequently arrested.

The jury found Heyward guilty of attempted murder, armed robbery, and possession of a weapon during the commission of a violent crime. A mistrial was declared as to the murder charge. The trial court sentenced Heyward to consecutive sentences of thirty years for attempted murder, thirty years for armed robbery, and five years for the weapons charge. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, this [c]ourt sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." *State v. Laney*, 367 S.C. 639, 643, 627 S.E.2d 726, 729 (2006). An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012).

LAW/ANALYSIS

I. Admission of photo lineup identification

Heyward argues the trial court erred in admitting the photo lineup identification made by Hemingway. We disagree.

³ Rivers was charged with accessory after the fact to murder, attempted murder, and armed robbery. The State agreed to reduce Rivers' bond in exchange for her proffered statement.

The decision of whether to admit or exclude evidence is within the sound discretion of the trial court. *State v. Jackson*, 384 S.C. 29, 34, 681 S.E.2d 17, 19 (Ct. App. 2009). Likewise, the determination of whether to admit an eyewitness's identification is at the discretion of the trial court. *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). This court will not disturb the trial court's admissibility determinations absent a prejudicial abuse of discretion. *State v. Adkins*, 353 S.C. 312, 326, 577 S.E.2d 460, 468 (Ct. App. 2003).

In *Neil v. Biggers*, the United States Supreme Court set forth a two-pronged test to determine whether due process requires the suppression of an eyewitness identification. 409 U.S. 188, 198-200 (1972). To ensure due process, *Neil v. Biggers* requires courts to assess, on a case-by-case basis, the following: (1) whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, (2) whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012).

"Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (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." *Id.*

In the instant case, a *Neil v. Biggers* hearing was held prior to trial to determine the admissibility of the photo lineup identification made by Hemingway. At the hearing, Hemingway testified he got a "good look" at the two men involved in the shooting because they were "right in [his] face." Hemingway further testified he was not truthful with investigators regarding the first photo lineup he was shown. According to Hemingway, he recognized Heyward in the first lineup but didn't tell investigators because he was "scared," "angry," and "hadn't accepted the fact that [Chambers] was gone." Hemingway subsequently testified he thought investigators "[knew] something [he] didn't know" because they kept "showing me the same picture."

Defense counsel moved to suppress the lineup arguing it was unduly suggestive because Heyward's photo appeared in both lineups shown to Hemingway. The trial court agreed, but ruled the lineup was reliable. The court found persuasive Hemingway's testimony that he "was able to identify [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."

On appeal, Heyward argues the trial court erred in (1) failing to consider the *Neil v. Biggers* reliability factors after finding the photo lineup was unduly suggestive, and (2) relying exclusively on Hemingway's explanation for his dishonesty.

We find the trial court did not abuse its discretion in admitting Hemingway's identification of Heyward. The court's finding the lineup was reliable was supported by the evidence. Hemingway had ample opportunity to view Heyward at the time of the crime as evidenced by his testimony that he was able to observe Heyward for between five and ten minutes. Hemingway noted he stood next to Heyward when he was asked to open the trunk of his car. As to his level of certainty, Hemingway testified he was able to get a "good look" at Heyward because he was right in his face. Hemingway was also able to describe Heyward's height, facial hair, and clothing. In addition, given Hemingway identified Heyward one day after the crime was committed, the length of time between the crime and the identification was not so prolonged to be unreliable.

In addition, as to Heyward's second error claim, we note the trial court heard all of the testimony and determined Hemingway was untruthful when he claimed he did not see Heyward in the first photo lineup. Because the trial court was in a better position to judge Hemingway's credibility, we do not believe the court abused its discretion in finding Hemingway recognized Heyward in the first photo lineup. *See State v. Tutton*, 354 S.C. 319, 325-26, 580 S.E.2d 186, 190 (Ct. App. 2003) ("The determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity.").

Even assuming the trial court erred in admitting Hemingway's photo lineup identification, we find Heyward was not prejudiced by its admission. Defense counsel was able to cross examine Heyward on both the suggestiveness and the reliability of the lineups. *See Liverman*, 398 S.C. at 143-44, 727 S.E.2d at 428-29 (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). The photo lineup identification was also cumulative to the eyewitness testimony given by Rivers and Hemingway's in-court identification of Heyward. Accordingly, we affirm the trial court's decision to admit the identification.

II. Evidence of domestic violence

Heyward argues the trial court erred in admitting evidence he physically abused Rivers. We disagree.

Prior to trial, defense counsel moved to exclude any testimony regarding allegations made by Rivers that Heyward had physically abused her. The solicitor stated Heyward had control over Rivers and she was "sort of under the spell of Denzel Heyward." The trial court noted an incident of abuse that happened the night of the shooting would be different from an incident of abuse months prior. The court held it had not been presented with any argument to support the admission of the domestic violence allegations pursuant to Rule 404(b), SCRE. The court also noted the door could be opened by the defense, which would make the evidence admissible.

Sidearis Singleton, Rivers' mother, testified for the State at trial. In her testimony, Singleton recounted her conversation with Rivers where she told Rivers to turn herself in to the authorities after learning about the shooting. On cross examination, defense counsel questioned Singleton about whether she was aware Rivers had attempted suicide. He also asked Singleton whether she was aware if Rivers had ever accused Singleton's husband of sexual assault. Next, defense counsel asked Singleton if she was aware Rivers had worked as a stripper. The solicitor objected to that question based on relevancy and defense counsel argued the question was relevant to Rivers' mental state. The court sustained the objection.

On redirect, the State asked Singleton who had abused Rivers. Defense counsel objected without specificity and the court stated "[w]ell you raised the -- you raised the issue. I guess she would -- you introduced it, so --." Subsequently, an off-the-record bench conference was held. Thereafter, Singleton testified Rivers was abused by Heyward. According to Singleton, Rivers was abused more than once and her injuries included a busted lip and pulled out hair. Rivers later testified she endured a violent relationship with Heyward as the aggressor.

On appeal, Heyward argues (1) the court erred in ruling defense counsel had opened the door to the abuse testimony, and (2) the court should have excluded the evidence under Rules 404(B) and 403, SCRE because it was inflammatory, prejudicial, and had no probative value.

A party who opens the door to evidence cannot complain of its admission. *State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991). "[W]hen 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. Beam*, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999). "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. 2008).

We find the trial court did not abuse its discretion in admitting Singleton's testimony regarding domestic violence. First, we note defense counsel's objection during Singleton's testimony was not specific and no objection was made following the off-the-record bench conference. *See State v. New*, 338 S.C. 313, 318, 526 S.E.2d 237, 239 (Ct. App. 1999) (holding a general objection which does not specify the particular ground on which the objection is based is insufficient to preserve the issue for review); *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) ("An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review."). Second, we find defense counsel opened the door to the issue of abuse during the cross-examination of Singleton. Finally, we find Singleton's testimony as to the abuse suffered by Rivers was cumulative to Rivers' own testimony regarding abuse. We note no objection was made during Rivers' testimony on direct examination that Heyward was abusive towards her during their relationship.

III. Sentencing

Heyward argues the trial court erred in commencing sentencing proceedings at 1:30 a.m. and permitting victim impact testimony unrelated to the crimes for which he was convicted. We disagree.

Following the dismissal of the jury at 1:30 a.m., Heyward asked the trial court to "delay sentencing due to the hour to the extent we've all been here." The State asked the court to proceed with the sentencing because the victim's family was from out of town and one family member had to work the following day. The State argued it would "be a great hardship for these folks to come back for sentencing." The trial court denied Heyward's request and proceeded with sentencing. The State presented the court with victim impact testimony in the form of pictures of Chambers, a video tribute prepared by Chambers' family, and a letter read by Chambers' sister.

On appeal, Heyward argues (1) his due process rights were violated by the late hour of his sentencing; (2) he was not given adequate notice of the materials the victims would present to the court; and (3) the court erroneously allowed testimony focusing on Chambers' death when the jury did not convict Heyward of Chambers' murder.

We find these arguments are not preserved for our review. Heyward did not object to the court conducting sentencing at a late hour as a violation of his due process rights. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground."); *State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (stating a party cannot argue one ground below and then argue another ground on appeal). Furthermore, Heyward did not raise any objection to the presentation of the victim impact testimony. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court].").

CONCLUSION

We affirm Heyward's convictions for attempted murder, armed robbery, and possession of a weapon during the commission of a violent crime.

AFFIRMED.

HUFF and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Roger M. Young, Circuit Court Judge

Case Nos. 2014-GS-10-00763
2014-GS-10-00765 and 2014-GS-10-00767

Appellate Case No. 2015-000709
Opinion No. 5537, Filed February 14, 2018

RECEIVED

MAR 16 2018

SC Court of Appeals

The State, ... Respondent,

v.

Denzel Heyward Appellant

PETITION FOR REHEARING

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March 16, 2018.

PETITION FOR REHEARING

The Appellant, Denzel M. Heyward, petitions the court for reconsideration and/or rehearing of the Court of Appeals Opinion No. 5537 (filed February 14, 2018), pursuant to Rule 221(a), SCACR, based on the following grounds:

I. Appellant respectfully submits that the Court overlooked Appellant's principal argument that the trial court failed to conduct any analysis of the reliability factors and evidence presented during the pre-trial Biggers hearing, which was an abuse of discretion under the Court's precedent in State v. Moore, 334 S.C. 411, 415, 513 S.E.2d 626, (Ct. App. 1999), (finding failure to conduct Biggers factor analysis to be an abuse of discretion) *reversed in part on other grounds*, 343 S.C. 282, 288, 540 S.E.2d 445 (2000). The Appellant, the Respondent and the Court (Opinion at Page 4-5) all concur that the trial court only passed on the credibility of the witness's statements at the time of trial rather than analyzing the reliability of the identification based on the objective factors specified in Neil v. Biggers, and its progeny. Instead of addressing whether the trial court exercised its discretion, this Court engaged in its own fact-finding. In doing so, this Court did not consider the totality of the circumstances, but rather applied a deferential standard that only considered the sufficiency of the record to support findings that were never made at the trial court below.

Appellant and his co-defendant, Dashaun Simmons, were tried jointly in Charleston County for murder, attempted murder, armed robbery and possession of a weapon during a violent crime, for incidents occurring on May 16, 2012. Hemingway had failed to make an identification of Appellant during a "six-pack" photo line-up conducted at his home one day after the incident. The next day, investigators took

Hemingway to police headquarters and gave him another line-up featuring Appellant. When shown the subsequent line-up at the police station. Hemingway testified that the investigators "had to know something [he] didn't know . . . They keep showing [him] the same picture." R. pp. 115-116. Hemingway testified that he feared he would be incarcerated for failing to identify Appellant. R. p. 94. Hemingway then identified Appellant during the second line-up. Hemingway never identified the other co-defendants, who were only presented in a single line-up, rather than multiple line-ups.

Prior to the trial of this case, the Appellant moved to suppress the out-of-court and in-court identification of Appellant by Jujuain Hemingway pursuant to Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). To ensure due process, Neil v. Biggers requires courts to assess, on a case-by-case basis, the following: (1) whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, (2) whether the out-of court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Opinion at 4, *citing* State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). "Under the totality of the circumstances, the factors to be considered is assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to review 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. *Id.* Any one factor weighing in favor of reliability is not dispositive. See, e.g. State v. Moore, 343 S.C. 282, 289 (noting closeness in time, did not outweigh other factors).

The trial court made the following finding after the Biggers hearing:¹

"Well, I find that the lineup was unduly suggestive because they showed up with a lineup with the Defendant in it, and then 24 hours later showed up with a different lineup but there was one picture that was the same and that was the Defendant. And as the one witness said, well, that suggested to me they knew something. And then I think it taints that lineup and makes it unduly suggestive; however, that's just the first prong of the analysis.

The second prong is, even though it was unduly suggestive, it was nevertheless reliable. And considering Mr. Jujuain Hemingway's testimony that he, in fact, was able to identify Mr. Heyward on the first day, but just chose to just not verbalize that because he was angry suggests to me that he was not, in fact, influenced by the second lineup. He stated, yeah, that suggested to me that they knew something that I didn't know, but at the same time he states that he had already made the identification. So the second one didn't influence his first – it couldn't have influenced his first lineup, so – or his first identification.

So even though the lineup procedure combined – combining the two was unduly suggestive, *I don't think it was unreliable because of the unique – very unique circumstances of Mr. Hemingway stating that he had, in fact, already identified it, but because of his anger and his youth had decided not to share that identification with police.*

All right. So your motion to suppress that will be denied."
(emphasis added)

R. pp. 193-195. The trial court did not address any of evidentiary facts bearing on the Biggers factors, including: (1) the incident occurred at 11:30 p.m. on a stormy night; (2) Hemingway had smoked hallucinogenic drugs a short time before the initial contact; (R. p. 102); (3) the witness was face down on the ground for the majority of the interaction (R. pp. 86-87); (4) the witness claimed that he had an equally good look at *both* of the assailants (Opinion p. 4, R. p. 85), but was never able to identify the co-defendant. See, State v. Moore, 540 S.E.2d 445, 343 S.C. 282, 249 (2000) (noting concern that witness was unable to identify co-defendant at time of confrontation despite claim that

¹ "I find that the lineup was unduly suggestive because they showed up with a lineup with the Defendant in it, and then 24 hours later showed up with a different lineup but there was one picture that was the same and that was the Defendant. And as the one witness said, well, that suggested to me they knew something. And then I think it taints that lineup and makes it unduly suggestive." R. pp. 193-194.

witness had seen the co-defendant's face). Nor did the trial court consider the evidence discussed by the State on appeal and adopted by this Court to support reliability. See, Opinion p. 5.

In State v. Moore, this Court found that the trial court failed to exercise its discretion because the trial judge declined to examine the reliability of an eyewitness identification using the Biggers factors. In that case, the trial judge did not make a finding that the identification was reliable in light of the factors, stating:

"The court's finding is that there is evidence—I won't say reliable, but I think that's a matter for the jury—that she can identify them. I don't find it unduly suggestive. I find the issues—the weight is a matter for the jury."

343 S.C. at 415, 513 S.E.2d at _____. In Moore, the Court of Appeals ruled that the trial court "did not evaluate the reliability of Davis's identification in light of the above factors and did not make a determination that her identification was reliable. This was error." *Id.*

The exact same error has occurred in this case. It is indisputable that the trial court never passed on the evidence bearing on the objective factors set forth in Biggers relating to the reliability of Hemingway's perception before making a final ruling. Instead, the trial court only made a determination based on the credibility of the witness's statement that he had lied during the first line-up – a fact that was not disclosed to law enforcement for years after the line-ups occurred.

This determination is in direct conflict with Biggers, which directs the court to assess the "level of certainty *demonstrated at the time of the confrontation*." It is clear, that the witness outwardly demonstrated *no certainty* at the time of the initial confrontation. Then, the next day, after being taken into a police station where he

feared for his liberty, the witness demonstrated absolute certainty and even identified the Appellant by name. To reject the objective evidence on this factor for an after the fact explanation subverts the purpose of entire Biggers analysis, because it replaces the objective review of the totality of the circumstances with a subjective credibility test.

B. In conducting it's own *de novo* review of the evidence this Court overlooked or neglected to consider the totality of the circumstances. Although ostensibly reviewing the lower court for an abuse of discretion, this Court actually passed on the credibility and import of a number of factual matters (Opinion at 5), about which the trial court made no findings whatsoever. In doing so, it either exceeded the scope of review, State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, ___, (2001) (holding the Court of Appeals erred in taking a *de novo* approach to admissibility of evidence), or abused its discretion in failing to consider the totality of the circumstances.

In conducting this *de novo* analysis, the Court failed to discuss or consider the totality of the circumstances surrounding the identification, and instead searched the record only for evidence that would support findings that were *never made by the trial court*. In doing so, the Court overlooked many of the most important facts on this issue, including the highly suggestive and coercive actions of law enforcement in taking custody of the eyewitness Hemingway; the time of day; the intoxication of the witness, the position of the witness on the ground; and the witness's inconsistency in his ability to identify other participants.

Accordingly, Appellant asks that the court reconsider its decision to include analysis of all facts and evidence bearing on the question of reliability.

C. Appellant submits that this Court misapprehended or misstated the rule in State v. Liverman, 398 S.C. at 143-44, 727 S.E.2d at 428-429, to the extent the Opinion suggests that the ability to vet identification evidence at trial will always cure the erroneous admission of identification evidence that would otherwise violate a defendant's due process rights. In its Opinion, the court suggests that Liverman holds that "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." Opinion at 5. Of course, such a broad reading of Liverman would make pre-trial misidentification safeguards meaningless.

Liverman involved an identification where the witness was a prior acquaintance of the Defendant. In South Carolina, such cases did not even fall under the scope of Biggers, until the United States Supreme Court's decision in Perry v. New Hampshire, 565 U.S. 228, 132 S.Ct. 716 (2012). See State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973) (no pretrial hearing on reliability and admissibility of identification evidence was necessary where the eyewitness knows the accused).

In Liverman, the court concluded that the error of not having a full in camera hearing was harmless, because the identification was nevertheless reliable, largely based on the witness's prior knowledge of the defendant. 398 S.C. 141, 727 S.E.2d 427. Only in "reinforcing" this primary conclusion, did the court state that the vetting of evidence at trial provided *additional* support for their conclusion. 398 S.C. 142-144, 398 S.E.2d at 143-144.

In short, cross-examination and trial rights are *not* a standalone cure for improperly admitted identification evidence under Liverman. The court's statement of the law on this point is a dangerous erosion of defendants' due process rights, and may undermine fair proceedings in the future.

II. Appellant respectfully submits that the court overlooked portions of the record and briefs in concluding the Appellant's arguments to exclude evidence relating to domestic abuse by the appellant against Qusantrina Rivers were not preserved. Appellant's arguments were clearly articulated and presented to the court in a pre-trial motion and the basis of Appellant's contemporaneous, renewed objection was clear from the context.

Before trial, the Appellant moved to exclude any testimony about allegations of domestic abuse by the Appellant against Quasantrina Rivers ("Rivers"), an alleged co-conspirator and prosecution witness. The state sought to introduce numerous incidents of domestic violence, including video of the Appellant hitting Rivers months before May 16, 2012. The state argued the violent incidents during the course of the relationship showed the violent nature of the relationship, and specifically the Appellant's violent temperament toward Rivers. Tr. Vol 1, pp. 200-213; R. pp. 138-151. They further argued that the incidents showed that Rivers was under the control of the Appellant. The court properly rejected these arguments, noting the state's efforts to depict Appellant as a violent abuser, directly contravened the purpose of Rule 404(b), which is to exclude character evidence offered to prove a character trait of the defendant

consistent with the crime charged.² The court did not totally foreclose the possibility that the state *might* be able to introduce the domestic violence incidents if it was necessary to rehabilitate Rivers following her cross-examination. Tr. Vol 1, pp. 212-213; R. pp. 150-151.

Before Rivers testified, her mother, Sidearis Singleton took the stand. During the cross-examination of Rivers' mother, Defense Counsel inquired whether Singleton knew if Rivers had accused Singleton's husband of sexual abuse:

Q. Do you know if [Rivers has] had some mental health issues?

A. I am unsure about that.

Q. Do you know whether she's accused anyone in your family of sexually assaulting her?

A. I'm not sure about that, sir.

Q. Do you have a husband at the present time?

A. Yes, sir.

Q. And what is his name?

A. His name is Phillip.

Q. Do you know whether [Rivers] has ever accused Phillip of sexually assaulting her?

A. No sir.

Q. You do not know whether that's true or not?

A. No sir.

Q. You're still presently married to Phillip?

A. Yes, sir.

Q. All right. And if [Rivers] had accused him of sexually molesting her, then you would not be married to him if you believed those were correct; is that true?

A. Correct.

Q. You're uncertain whether [Rivers] has ever accused Phillip of sexually assaulting her?

² "[Y]our trying to say he's a really bad guy and, therefore, he's convicted -- he should be convicted of this, look at all these other things that he did. And that's exactly what character evidence is usually not allowed to do." Tr. Vol 1, p. 206; R. p. 144.

Tr. Vol. 2, pp. 224-225; R. pp. 239-240. The obvious intent of defense counsel, was to elicit testimony regarding a specific instance of fabrication by Rivers. The only suggestion made was that Rivers' mother did not believe the specific allegation of sexual abuse made against her husband.

On redirect, the State then proceeded to ask Ms. Singleton "Who do you know that abused [Rivers]." Tr. Vol. 2, p. 232; R. p. 247. Defense counsel immediately objected. The court immediately stated that defense counsel had opened the door. *Id.*

Despite its prior ruling to exclude this testimony on this subject, the court permitted Mrs. Singleton to testify extensively regarding the abusive relationship between Appellant and Rivers. Tr. Vol. 2, pp. 233-235; R. pp. 248-250. Singleton testified that the Appellant abused Rivers on multiple occasions, in multiple localities and that she personally disapproved of him having a relationship with her daughter.

A. First, this Court ruled that the objection of counsel was "not specific." Opinion at 6. However, specific grounds for an objection are only necessary where the grounds are not clear from the context. Rule 103(a)(1), SCRE. Prior to trial, defense counsel moved to exclude any testimony regarding alleged domestic violence between Appellant and his co-defendant Quasantrina Rivers. An extensive pre-trial Lyle hearing took place based on counsel's Rule 404(b) arguments. At the conclusion of the pre-trial hearing, the trial court expressly ruled that the evidence the solicitor sought to introduce was directly excluded under Rule 404(b). The trial judge summarized the hearing as follows:

"[Y]our trying to say he's a really bad guy and, therefore, he's convicted – he should be convicted of this, look at all these other things that he did. And that's exactly what character evidence is usually not allowed to do."

When the solicitor sought to introduce the exact same evidence through Sidearis Singleton at trial, the basis for defense counsel's objection was immediately apparent from the context.

B. Appellant submits that the court overlooked the Appellant's primary argument related to the impermissible character evidence, in that this Court did not provide any basis or supporting for its conclusion that defense counsel opened the door to the testimony of Sidearis Singleton. Without any explanation or analysis, the court states "we find defense counsel opened the door to the issue of abuse during the cross-examination of Singleton." Opinion at 7. This Court did not provide any explanation for this conclusion.

Rule 220(b), SCACR, requires that the reasons for the court's decision must be stated in writing. In reviewing the Opinion, no explanation for the court's conclusion is offered. In fact, the Opinion is starkly contrasted with the authorities cited by the Court, each of which provides an explanation for *why* the "door was opened" in each case.

In State v. Robertson, 305 S.C. 469, 409 S.E.2d 404, the South Carolina Supreme Court explained that a defendant could not complain of evidence linking a group to drug dealing, when the defendant's own attorney has previously solicited evidence of the same group's involvement in drug dealing.

In State v. Beam, 336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999), defense counsel questioned a state's expert about a certain type of test that had not been performed on some evidence, then complained of prejudice when the test was performed during the trial and the results were admitted as evidence against the defendant.

In State v. Page, 378 S.C. 476, 378 S.E.2d 357 (Ct. App. 2008), this Court went to extensive lengths to explain how the cross-examination by defense counsel created specific inferences about the state's investigation, but ultimately ruled that the line of questioning did not justify the admission of excluded evidence to rehabilitate an investigator.

In each case, the court articulated the specific transaction or subject matter nexus between the evidence or questions which opened a "door," or in the case of Page, the lack thereof. The Appellant's main argument on this issue was that there was no logical basis or subject matter relationship between defense counsel's questions and the evidence introduced by Sidearis Singleton. Testimony related to domestic abuse by a spouse or boyfriend does not in any way, explain, rebut or illuminate any suggestion or inference about Quasantrina River's totally unrelated allegations of sexual abuse against her step-father. The Appellant incorporates his arguments set forth in pages 16-19 of the Appellant's Final Brief, and requests that the court address this issue in accordance with Rule 220, SCACR.

C. Finally, the court overlooked Appellant's argument about the failure of the trial court to conduct a Rule 403 analysis as described in State v. Smith, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011). Brief of Appellant, pp. 19-22. By not addressing Appellant's argument on this issue it has issued an opinion in conflict with this Court's recent decision in State v. King, 416 S.C. 92, 784 S.E.2d 252, (2016), *cert. granted, decision pending*, which held that a circuit court's failure to conduct a Rule 404(b) analysis, including an analysis under Rule 403, is an error requiring remand for a determination on the record.

III. The Court overlooked the objections raised to the late sentencing and the consideration of victim impact evidence related only to Kadeem Chambers. As noted in Appellant's brief, trial counsel objected to proceeding with the sentencing at 1:30 in the morning. Additionally, trial counsel joined in his co-defendants arguments on the consideration of improper victim impact testimony, Tr. Vol., 3, p. 477; R. p. 646, and submitted a post-trial motion to reconsider sentencing which raised both issues again. R. pp. 654-655. The court ruled on the motion as well. R. pp. 5-8. To the extent precise language or strict issue preservation protocols were not followed, it is to be expected when court's conduct hearings at 1:30 a.m. Additionally, "[a] party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). "The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it [could] be reasonably understood by the trial [court]." McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct.App.1996). The trial court ruled, indicating an understanding of the objection. Accordingly, these arguments are preserved for review.

Respectfully Submitted,



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March 16, 2018

Columbia, South Carolina.

The South Carolina Court of Appeals

The State, Respondent,

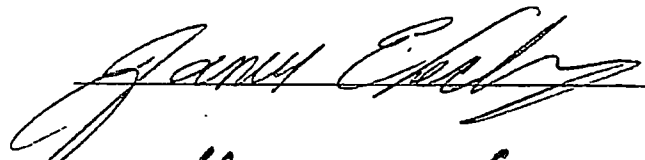
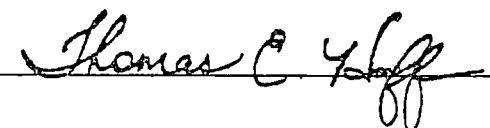
v.

Denzel Marquise Heyward, Appellant.

Appellate Case No. 2015-000709

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

Robert Michael Dudek, Esquire
Alan McCrory Wilson, Esquire
Donald Michael Mathison, Esquire
James Clayton Mitchell, III, Esquire

FILED

April 26, 2018

Scarlett Anne Wilson, Esquire