STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CLARENDON COUNTY

Court of General Sessions
D. Craig Brown, Circuit Court Judge

Appellate Case No. 2018-000100

THE STATE,

Respondent,

v.

JEREMIAH JERMAINE BRANDON SMITH, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court erred by allowing a witness to identify Appellant at trial where the witness was shown a non-suggestive six-person photo lineup the week before trial confirming Appellant's identity, Appellant did not move to exclude the witness's in-court identification, and other witnesses also identified Appellant.

STATEMENT OF THE CASE

A Clarendon County grand jury indicted Appellant for Attempted Murder. Appellant proceeded to jury trial before the Honorable D. Craig Brown on January 16, 2018. Appellant was convicted and sentenced to 25 years' incarceration. This appeal follows.

STANDARD OF REVIEW

"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 reversed absent an abuse of discretion or prejudicial legal error." Id. "An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion that is without evidentiary support." State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

STATEMENT OF FACTS

Shortly after midnight on December 20, 2014, Breshaun Pendergrass (Victim) arrived at Browntown Social Club, a bar in Manning. R. 60-62. There he saw Appellant, a friend since childhood. R. 62-63. Victim testified he'd grown up with Appellant "all his life," that they lived close to one another, and that they socialized with each other two or three times per week. R. 63. Although Victim testified he was unaware of any reason Appellant would have been angry with him, he believed Appellant may not have been on good terms with some of his friends. R. 71. Around two or three o'clock in the morning, Victim decided to leave. R. 65-66. As Victim walked outside, he passed Appellant, who was standing by a white "crown vic" type car with a group of friends. R. 66-67; 77. Appellant made a "smart" comment to Victim as he passed, which Victim ignored. R. 72. Victim then heard a gunshot so loud it made his ears ring. R. 76; 79. He tried to take another step but realized he couldn't and fell to the ground unable to move. R. 76. A woman named Cindy Calvin immediately came to his aid. R. 77. Victim was shot in the back and paralyzed from the waist down. R. 77. Victim testified Appellant was only three to five feet away from him when the shot rang out, and that while he did not see Appellant pull the trigger because his back was turned, he felt sure Appellant was the person who shot him. R. 79. Victim was shown a six-person photo lineup while in the hospital and identified Appellant as the shooter. R. 186. Victim testified he already knew he would pick Appellant as the shooter if his picture was in the lineup. R. 91.

Fritz Aguon accompanied Appellant to Browntown that night. He testified he saw Appellant shoot Victim in the back after an argument. R. 115. Appellant then drove Aguon home. R. 114. Aguon told investigators Appellant went to Browntown to settle a "beef." R. 199. Another witness, Shardara Abraham, testified Appellant and Victim were the only two

people in the vicinity of the shot. R. 153. She saw Appellant run to his car and leave immediately after the shooting. R. 151. Cindy Calvin testified she saw Victim exit the bar with Appellant and his friends following behind. R. 159. Two groups, one associated with Victim and one associated with Appellant, had been arguing inside. R. 160. She saw Victim and Appellant talking outside, heard the shot, saw Victim fall to the ground, and saw Appellant immediately run to the car where his friends were waiting. R. 161-63; 174-76. Calvin spoke with a police officer at the scene and gave him her account of what happened, but did not name Appellant as the shooter. R. 54. Calvin testified during trial she knew Appellant by face, but did not know his name on the night of the shooting. R. 164-65. However, Calvin testified during the pretrial hearing that she did know Appellant's name at the time of the incident. R. 13.

Manning Police Lieutenant Sonia Daniels investigated the case. In preparation for trial, she called Cindy Calvin to discuss what she saw. R. 187. Calvin told Daniels she could identify the shooter, and that his name was Brandon.[1] R 166. Daniels had SLED prepare a six person photo lineup and showed it to Calvin on January 9, 2018, the week before trial. R. 23. Calvin identified Appellant as the shooter. R. 24-25; 166. Calvin and Daniels both testified Daniels did not suggest in any way which person she should identify. R. 15; 24; 167. Calvin testified that she picked Appellant from a photo lineup the week before trial. R. 166. She also identified Appellant as the shooter in court. R. 167. The State did not offer the lineup itself into evidence. R. 167.

[1] Appellant goes by his middle name. R. 8.

ARGUMENT

I.

The trial court did not err by allowing a witness to identify Appellant at trial where the witness was shown a non-suggestive six-person photo lineup the week before trial confirming Appellant's identity, Appellant did not move to exclude the witness's in-court identification, and other witnesses also identified Appellant.

Appellant's argument that the trial court erred by allowing Cindy Calvin's in-court identification of Appellant as the person who shot Victim because it was tainted by a suggestive police identification procedure is not preserved for review because it was not raised to the trial court. Trial counsel never argued the photo lineup was an unduly suggestive police identification procedure. Rather, his arguments simply called into question the reliability of Calvin's eyewitness account based on the passage of time, hypothetical discussions with lay community members, and conflicting testimony about who circled Appellant's picture following Calvin's identification. Furthermore, defense counsel did not object during Calvin's trial testimony regarding the lineup or her in-court identification of Appellant, thus failing to preserve even his pretrial objection. Even if preserved, Appellant's argument is meritless because he fails to cite any evidence showing the lineup was unduly suggestive. Finally, any error in admitting Calvin's testimony was harmless because the State proved the same facts through other competent evidence. Because there is evidence in the record to support the trial court's ruling, this Court must affirm.

ERROR PRESERVATION

At trial, Appellant first argued the lineup should be excluded because it was shown to Calvin three years after the incident, and that it would be "prejudicial" to Appellant to allow evidence that Calvin picked Appellant from a lineup so far after the incident date. R. 28-29.

Trial counsel argued that Calvin's identification was not credible because "so much time has gone by that she may or may not have come to hear about the case." R. 28. Defense counsel suggested that Calvin had "gotten to hear about this case and to see this[...] defendant and identified him based on information provided by other witnesses." R. 3. His motion to suppress did not allege the police identification procedure or the lineup itself were unduly suggestive. R. 3. Only now on appeal does Appellant allege undue suggestiveness *by the police.* As discussed below, in order to be subject to the exclusionary rule an identification must be tainted by suggestive police action. However, not having made this argument at trial, Appellant is barred from now raising it on appeal. State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997).

Furthermore, Appellant claims the trial court erred by allowing Calvin's in-court identification of Appellant. However, trial counsel never moved to prohibit Calvin from identifying Appellant in court. Rather, defense counsel only requested "that the photo lineups be excluded and testimony as to the photo lineups not be admitted[.]" R. 2. Appellant now makes a completely different argument— that Calvin should not have been allowed to identify Appellant as the shooter at trial at all. Again, this issue is not preserved for appeal because it was not raised at trial.

Finally, Appellant did not object during Calvin's trial testimony regarding the lineup, nor did he object to Calvin's in-court identification of Appellant as the shooter. R. 166-67. A ruling in limine is not a final ruling on the admissibility of evidence. State v. Griffin, 339 S.C. 74, 528 S.E.2d 668 (2000); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999). Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). Because Appellant did not

object during Calvin's trial testimony, even the arguments he raised during the pretrial hearing are unpreserved.

MERITS

Even if Appellant had preserved his issue for review, it is meritless. Appellant has failed to show the police used an unnecessarily suggestive identification procedure, a prerequisite for any due process claim to exclude an eyewitness identification. "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." State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425–26 (2012). The United States Supreme Court has declined to extend the exclusionary rule to "cases in which the suggestive circumstances were not arranged by law enforcement officers," holding instead that the rule only applies "when *the police* have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime." Perry v. New Hampshire, 565 U.S. 228, 232 (2012) (emphasis added). "The due process check for reliability [...] comes into play only after the defendant establishes improper police conduct." Id., 565 U.S. at 241. "When no improper law enforcement activity is involved[...] it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at post-indictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." Id. Trial counsel's argument that Calvin's perception may have been corrupted by "other witnesses" is completely irrelevant to the true inquiry— whether the *police* used unduly suggestive identification procedures.

The only element of police involvement in Calvin's identification of Appellant is the six-person photo lineup shown to Calvin the week before trial. However, Appellant has failed to identify any characteristic of the lineup itself or any surrounding procedure which caused it to be suggestive. This is not a case where police utilized a show-up procedure with an eyewitness viewing a single suspect in person. See, e.g. Neil v. Biggers, 409 U.S. 188 (1972); Stovall v. Denno, 388 U.S. 293 (1967). Nor did the police show Calvin an isolated picture of Appellant, see, e.g. Manson v. Braithwait, 432 U.S. 98 (1977), or a successive group pictures each containing Appellant, see, e.g. Simmons v. U.S., 390 U.S. 377 (1968). Appellant did not allege at trial, and does not allege now, that the appearances of the other men in the lineup were so dissimilar to Appellant's that the lineup was unduly suggestive, as the appellant unsuccessfully claimed on much stronger grounds in State v. Turner, 373 S.C. 121, 644 S.E.2d 693 (2007). See also U.S. v. Wade, 388 U.S. 218, 233 (1967) (giving examples of suggestive identification procedures). Indeed, an examination of the lineup shown to Calvin reveals it contained remarkably similar-looking individuals. State's Exhibit #2. Unlike the lineup shown to Victim, which was prepared by Manning police and contained pictures of other local men known to Victim,[2] the lineup shown to Calvin was prepared by SLED. Defense counsel admitted, "And then the other, this one was produced by SLED. I don't know who these other fellas are, but it was produced just recently." R. 28, lines 14-16. Appellant makes a bare assertion, unsupported by any facts in the record, that "the photographic lineup was an unduly suggestive identification procedure arranged by law enforcement[.]" Brief of Appellant, p. 11. But he has completely failed to show *how* the lineup was suggestive. Absent such a showing, there is no need to even consider whether Calvin's identification was reliable— that is a question of fact for the jury. As

[2] Appellant challenged the admissibility of the lineup shown to Victim at trial based on its inclusion of photographs of other local men, but does not raise this issue on appeal. R. 27.

stated in Perry, "The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." Perry v. New Hampshire, 565 U.S. 228, 245 (2012).

The only fact which could arguably resemble a suggestive act by police is Calvin's testimony that while she picked out Appellant and initialed beneath his picture, Daniels actually circled the picture. R. 14. Daniels disputed Calvin's recollection, testifying Calvin circled Appellant's picture. R. 26. Defense counsel argued the lineup should have been excluded because of this conflicting testimony. R. 30. While this conflict created a legitimate topic for cross-examination, it does not constitute a reason to prevent Calvin from testifying that Appellant shot Victim. Calvin and Lt. Daniels both gave uncontradicted testimony that Calvin picked out Appellant on her own, without any suggestion by Daniels. R. 14-15; 25. Defense counsel chose not to even ask Calvin during the pretrial hearing whether Daniels suggested she pick Appellant. Instead, he asked whether "someone" suggested it was Appellant who shot Victim, which Calvin denied. R. 16-17. This further demonstrates that Appellant's theory at trial was that Calvin's recollection was tainted by some lay member of the community, not by a suggestive identification procedure by law enforcement. When defense counsel attempted to elicit testimony from Calvin during trial that she "got a little help" identifying Appellant, Calvin again flatly denied the allegation, insisting that Lt. Daniels did not suggest in any way that she pick Appellant. R. 169. There was no testimony to the contrary.

Appellant's claim that Calvin's identification was somehow corrupted by a suggestive lineup is specious considering Calvin identified Appellant by name in a telephone conversation with Daniels *before the lineup even existed.* Calvin knew whom she was talking about. Far from

a suggestion, the lineup was a confirmation that the Brandon whom Calvin was referring to was in fact Appellant, who had already been identified by two other witnesses—Victim and Aguon. See State v. Liverman, 398 S.C. 130, 142, 727 S.E.2d 422, 427 (2012) (holding show-up identification was "merely confirmatory" because witness knew suspect). The judge correctly cited State v. Singleton, 395 S.C. 6, 716 S.E.2d 232 (Ct. App. 2011), where this Court affirmed a trial judge's finding that an in-court identification was not the product of unduly suggestive techniques where the witness personally knew the suspect but did not originally name him to police. Id., 395 S.C. at 14 ("Because Victim had prior knowledge of Singleton, we conclude the identification process was not unduly suggestive.").

Lastly, Appellant assigns error to the trial judge's comment that a Neil v. Biggers hearing isn't necessary when the identifying witness personally knows the suspect, even though the comment was made *after the judge conducted a Neil v. Biggers hearing.* The comment has no bearing on the case. The trial judge conducted a full hearing, found the lineup was not suggestive, and only in passing opined that a Neil v. Biggers hearing is not necessary when the witness personally knows the suspect. R. 31. Had the judge refused to conduct a hearing, Appellant may have a valid argument. But here, the judge conducted a full hearing and heard uncontradicted testimony that Daniels did not suggest in any way whom Calvin should pick, that Calvin already knew Appellant at the time of the incident, and that Calvin identified Appellant by name before the lineup even existed. His post-hearing comment is totally irrelevant to his decision to allow Calvin's testimony, and has no bearing on whether the lineup shown to Calvin was unduly suggestive.

Finally, any error in the identification procedure would be harmless because two others, Victim and Aguon, also identified Appellant as the shooter. Another witness, Shardara

Abraham, saw Appellant talking with Victim and running away immediately after the shot. R. 150. The same facts were present in Singleton, where the court found that any error in the identification procedure was cumulative to other witnesses' identification. See Singleton, 395 S.C. at 14. Aguon's testimony was more descriptive than Calvin's, and he even told police Appellant went to the bar to settle a "beef" and that he saw Appellant pull the gun from his waistband and shoot Victim. R. 200. There can be little doubt that Appellant was at least present at Browntown at the time of the incident. Appellant's sister, Sierra Smith, testified Appellant admitted to her that he was at the bar that night. R. 212. Smith also confirmed that Victim and Appellant grew up together, and even ate meals at each other's grandparents' houses, confirming that Victim's identification was almost certainly not mistaken. R. 222. Defense counsel all but conceded Appellant was present at the scene and argued that mere presence isn't sufficient for guilt. R. 236. Calvin's testimony was cumulative to the testimony of Victim, Arguon, Abraham, Smith, and the police officers who interviewed them. Any error was harmless. State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 732 (1989) (holding admission of evidence is harmless where it is merely cumulative of other evidence).

Not only is Appellant's argument unpreserved, but he has failed to cite any evidence that Calvin's pretrial or in-court identification of Appellant was tainted by a suggestive police identification procedure. Furthermore, any error is harmless because Calvin's testimony was cumulative to other competent evidence. This court should affirm.

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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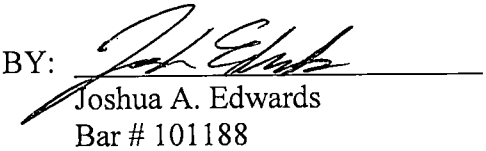
BY: 
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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