STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
The Honorable R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2020-000537

THE STATE,

Respondent,

v.

DAQUAN JAVOR CRUMMEY,

Petitioner.

INITIAL BRIEF OF RESPONDENT

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A search warrant affidavit which is insufficient on its face to establish probable cause may be supplemented with oral testimony to establish probable cause. The investigator/ affiant testified he supplemented his written affidavit with oral testimony explaining a victim identified Crummey via Facebook pictures and again from a six-person lineup. Does evidence support the trial court's factual finding that the affiant's oral supplementation established probable cause?

STATEMENT OF THE CASE

A Charleston County grand jury indicted Daquan Crummey for first degree burglary, possession of a weapon during the commission of a violent crime, two counts of first degree assault and battery, and four counts of armed robbery. Crummey proceeded to jury trial before the Honorable R. Kirk Griffin on March 10–13, 2020. He was acquitted of one armed robbery count but convicted of the other charges. He was sentenced to fifteen years' incarceration on the burglary charge and each armed robbery charge, ten years for both counts of assault and battery, and five years on the weapons charge, with all sentences to be served concurrently. In this direct appeal, Crummey challenges several of the trial court's evidentiary rulings.

FACTS

On July 23, 2017, two young black males forcibly entered a mobile home in a trailer park in North Charleston and robbed its occupants at gunpoint. (Tr.p.482–98). All of the occupants were Mexican. (Tr.p.343). Only sixteen-year-old Dulce Martinez spoke English. (Tr.p.483; 492–93).

Martinez testified that on the morning of the 23rd, she was at the home of Alberto Garcia, a friend of her father's. (Tr.p.483). Garcia was cooking a meal for a small group of friends. (Tr.p.483–85). After eating, Martinez was standing by the kitchen window waiting for a ride when she noticed two young black men walking on the other side of the trailer park. (Tr.p.484–88). She noticed them because she had not seen them in the trailer park before and not many black families lived there. (Tr.p.488–89). One of the boys was taller than the other. (Tr.p.487). She recognized both of them. (Tr.p.487). She had gone to school with the shorter one and had seen the taller one hanging out by her father's auto shop. (Tr.p.488).

Martinez went to the dining room to sit down. (Tr.p.489). She heard a knock at the door and went to open it. (Tr.p.489). When she opened the door she saw the two "boys." (Tr.p.487–91). She tried to shut the door but one of them pulled it open. (Tr.p.491). They both presented handguns and demanded money from all of the occupants of the trailer. (Tr.p.491). Four of the victims testified and described how the burglars robbed each of them at gunpoint. (Tr.p.360; 391; 423; 491–97). Because Martinez was the only English speaker, she translated the burglars' demands for the others. (Tr.p.493). Each of the victims handed over what

cash they had. (Tr.p.493–94). At one point, the taller burglar struck Martinez in the head with the tip of his handgun. (Tr.p.496). The taller burglar also struck Garcia in the face with the handgun. (Tr.p.357–58). The taller burglar went throughout the home searching for more things to steal while the shorter burglar kept his gun pointed at the victims. (Tr.p.495).

Some moments passed before a neighbor unexpectedly opened the front door, saw what was happening, and quickly shut the door. (Tr.p.499). The burglars fled the home and ran around the back side of the trailer. (Tr.p.499). Martinez called 911 and police arrived to investigate. (Tr.p.499).

Police were not able to gather any physical evidence from the scene. (Tr.p.699–700). Although Martinez recognized both burglars, she did not know their names. She gave their descriptions to police, who told her to let them know if she was able to gather any more information. (Tr.p.507). Later that week, Martinez accompanied lead investigator Zack Kahn to her school, Stahl High School, to see if she could find a picture of one of the burglars in the school yearbook. (Tr.p.507). Martinez located one picture that resembled the shorter burglar and caused her to pause. (Tr.p.508–09). However, upon studying the picture closely she concluded it was not the same person. (Tr.p.510).

A few days later, Martinez was scrolling through Facebook when Duquan Crummey appeared in a live video on her home page. (Tr.p.510–11). She recognized him as the taller burglar. Crummey's Facebook name was

"Runacheckup Youngn." (State's Exhibit #84). In the Facebook pictures Crummey is smiling, revealing a set of gold teeth. (State's Exhibits #84–85).

Martinez went to Crummey's page and began to screenshot his pictures. (Tr.p.511). She eventually found a picture of Crummey with Denali White, whom she recognized as the shorter burglar. (Tr.p.515). She sent a text to Detective Kahn informing him she had found pictures of the suspects. (Tr.p.518). Martinez explained she looked through the pictures carefully so she did not falsely accuse someone. (Tr.p.520).

Investigator Kahn recognized Crummey from prior dealings. (Tr.p.719). Kahn began investigating Crummey and discovered he had recently been involved in a traffic stop—along with Denali White. (Tr.p.721). Kahn obtained a DMV picture of White. (Tr.p.722). He then compared pictures from Crummey's Facebook page and confirmed White was pictured with Crummey. (Tr.p.722).

Police obtained warrants and arrested both Crummey and White in August. (Tr.p.730). Both had cell phones in their possession when arrested. Police obtained warrants and searched the phones, obtaining text and Facebook messages from Crummey's phone. (Tr.p.732). Police also obtained call detail records and historic location data from Crummey's cell phone provider and confirmed Crummey was listed as the subscriber for that phone number. (Tr.p.733; 888).

The search revealed text messages and calls between Crummey and White on the morning of the burglary. (Tr.p.829–31). One outgoing text message read: "she say we need you for the lick." (Tr.p.831). The two then communicated about White

coming to meet Crummey "before twelve o'clock." (Tr.p.833). Another read: "big one, brah." (Tr.p.833). The response from White read: "Ight say less, my cab, OTW." (Tr.p.834). The phone also revealed calls from Crummey to White in the hour leading up to the robbery, and to another contact designated "Beto Ole Lady." (Tr.p.835). A text message from Crummey to "Beto Ole Lady" read: "Get in position." (Tr.p.836). The next outgoing activity on the phone was a call to "Beto Ole Lady" that lasted 30 seconds at 1:11 p.m. (Tr.p.837). Historic location data revealed Crummey's phone travelled from the area of his home to the area of the crime scene at the time of the burglary. (Tr.p.905; 1082).

Finally, police prepared six-person photo lineups featuring both defendants. Martinez identified Crummey and White from the lineups. (Tr.p.529; State's Exhibits #87–88). She identified Crummey as the taller burglar who assaulted both her and Garcia with a handgun. (Tr.p.539). In her statement accompanying the photo lineup, she stated she knew Crummey "because I've seen him before at school and he also used to be in front of my dad's work." (Tr.p.540). At trial, she explained the first portion of her statement was inaccurate because she did not know Crummey from school, but only from her father's auto shop. (Tr.p.540). She explained she was likely referring to the codefendant, Denali White, whom she did know from school, and actually had several classes with. (Tr.p.540; 612). She identified Crummey in court as the taller burglar. (Tr.p.541).

ARGUMENT

I. The trial court correctly admitted a victim identification based on a non-suggestive six-person photo lineup despite the fact that the victim had previously seen Crummey's picture on Facebook.

Crummey alleges the trial court erred by admitting evidence that Dulce Martinez identified him from a six-person photo lineup. However, he does not allege the lineup itself was unduly suggestive. Instead, he argues the identification was inadmissible because Martinez had previously seen Crummey's picture on Facebook and recognized him as one of the burglars who robbed her at gun point. He claims evidence about the six-person lineup was "incompetent" because it allowed Martinez to "bolster" her prior identification. He claims the lineup was "unnecessary" and "illusory confirmation of something that had been determined," and should have been excluded despite the fact that the police did not use a suggestive procedure. Brief of Appellant at 9.

This argument is not preserved because it is different from the argument Crummey made at trial. Even if preserved, the argument is meritless. Martinez's identification was hardly "illusory confirmation." Even though Martinez had previously recognized Crummey from Facebook pictures, the six-person lineup was probative to test her recognition of Crummey in a neutral setting. The six-person lineup showed Crummey alongside five other similar-looking individuals, without displaying distinctive features such as clothing and gold teeth. Crummey's entire trial strategy was to show that Martinez's identification was unreliable, making all

identification evidence highly probative to the jury's determination of guilt. Furthermore, even if the probative value was low, the lineup was not unfairly prejudicial. Crummey cites no authority and no good reason to support his assertion that the lineup gave "undeserved credibility to her pretrial identification." Brief of Appellant at 10. Absent a suggestive procedure orchestrated by police, the weight to be given to a witness's identification is a matter for the jury. Having failed to discredit Martinez's identification at trial, Crummey should not be allowed to re-litigate this jury issue on appeal. This Court should affirm.

A. Standard of review.

The decision to admit an eyewitness identification is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of that discretion, or the commission of prejudicial legal error. State v. Govan, 372 S.C. 552, 556, 643 S.E.2d 92, 94 (Ct. App. 2007). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

B. Error preservation.

Crummey's argument is not preserved for review because it is different from the argument he made at trial. During the pretrial hearing on Crummey's motion to suppress the lineup identification, Crummey argued the lineup identification was unreliable. (Tr.p.254). Everyone understood the motion was premised on the allegation that police used an unduly suggestive lineup procedure, as prohibited by the Neil v. Biggers line of cases. See Neil v. Biggers, 409 U.S. 188 (1972)

(explaining police may not use unduly suggestive procedures to procure a witness identification). The trial court, attorneys, and even the court reporter recognized the hearing as an "identification" hearing. (Tr.p.198). The court directed the parties to focus on "whether that identification was reliable and . . . unduly suggestive." (Tr.p.212). The hearing focused on suggestiveness and reliability, with the State even introducing a video recording of the lineup procedure to show police did not suggest to Martinez which picture she should select. (Tr.p.222). When the court announced its ruling, it went through a Biggers analysis focused on the reliability and suggestiveness of the lineup. (Tr.p.258). Crummey never argued the identification was inadmissible under Rule 403, SCRE, a view that has never been endorsed by the appellate courts of this state. An argument not raised and ruled on by the trial court is not preserved for appeal. State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) (explaining "a party cannot argue one theory at trial and a different theory on appeal"). Accordingly, this issue is not preserved for review.

C. Discussion.

The United States Constitution's Due Process clause prohibits police eyewitness identification techniques that are "so suggestive as to violate due process." Manson v. Brathwaite, 432 U.S. 98, 105 (1977). An identification procedure must be *both* unnecessarily suggestive and conducive to irreparable misidentification in order to violate due process. State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). "Only if [the procedure] was suggestive need the court consider the second question–whether there was a substantial likelihood of

irreparable misidentification." State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447–48 (2000).

Crummey fails to satisfy the first prong of the Biggers analysis: that police employed an unduly suggestive identification procedure. See Perry v. New Hampshire, 565 U.S. 228, 241 (2012) (explaining Biggers analysis only comes into play when there has been "improper police conduct"). His argument is premised on the assertion that Martinez's viewing of Crummey's pictures on Facebook corrupted her subsequent identification. But police did not show Martinez Crummey's Facebook page; Martinez viewed it on her own. Accordingly, this was not State conduct and is not a basis for suppression of the subsequent six-person lineup. State v. Tisdale, 338 S.C. 607, 613, 527 S.E.2d 389, 392 (Ct. App. 2000) (explaining identification from media photograph did not violate due process "because the police were not involved"); Kirkland v. State, 854 S.E.2d 508, 512 (Ga. 2021) (explaining the fact that eyewitness viewed a picture of defendant prior to six-person lineup "has no bearing on the identification procedure employed by [police] and provides no evidence that the procedure, itself, was unduly suggestive"); Curry v. State, 305 Ga. 73, 78, 823 S.E.2d 758, 763 (2019) (explaining witness's "viewing of a photograph in the newspaper was not an identification procedure employed by law enforcement").

The only identification procedure arranged by police was the six-person photo lineup. The lineup itself, State's Exhibit #88, contains pictures of six remarkably similar-looking individuals. The accompanying instructions, trial testimony, and video documenting the lineup procedure conclusively demonstrate there was no

improper suggestion by the police. (State's Exhibit #88; Court's Exhibit #8; Tr.p.220–25). The trial court correctly found the procedure was not suggestive. (Tr.p.260).

Perhaps in recognition of this fact, Crummey does not allege that the lineup itself was suggestive. Instead, he argues the identification evidence was "incompetent" under Rule 403, SCRE. Brief of Appellant at 9. While Crummey's brief cites constitutional cases centering on suggestive police identification procedures, he primarily contends it was unfair under Rule 403 to even *show* Martinez a six-person lineup because she had previously identified Crummey through Facebook pictures she viewed independently of the police. Crummey is essentially repeating his co-defendant's bizarre trial argument that when police show a witness who is familiar with the suspect a "neutral lineup . . . that is, in its very nature, suggestive." (Tr.p.257). Co-defendant's counsel made this argument despite his admission that the lineup itself was not suggestive, declaring "it is a facially good identification procedure . . . ." (Tr.p.531).

Despite the fact that Crummey's entire trial strategy was to cast doubt on Martinez's identification, he now claims the neutral six-person lineup was "illusory confirmation of something that had been determined." Brief of Appellant at 9. Crummey seems to be claiming the six-person lineup had no probative value because Martinez's initial identification based on the Facebook pictures conclusively "determined" her ability to identify Crummey. He then claims it was "unfair" for the police to test Martinez's ability to recognize Crummey, and that her

identification was inadmissible for the jury's consideration. He does not cite any case that supports his assertion.

Contrary to Crummey's argument, there is nothing unfair about testing a witness's ability to recognize a suspect in a non-suggestive lineup procedure when the victim has previously seen a picture of the suspect. On the contrary, there is great probative value in an eyewitness's ability to identify a suspect through a photo lineup consisting of six similar-looking individuals without individualized clothing or context. The six-person lineup identification was inherently more challenging than Martinez's identification based on pictures located on Crummey's Facebook page. After initially recognizing Crummey, there was little doubt Martinez would recognize him in each subsequent Facebook photo because each picture presumably featured Crummey. By contrast, a six-person lineup consisting of six similar-looking individuals does actually test the witness's degree of recognition, even if the witness has previously viewed a picture of the suspect in a context where he would be easily recognizable.[1]

In the six-person lineup, Crummey is not wearing any distinctive clothes and has his mouth shut to conceal his distinctive gold teeth, which are visible in the

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[1] It should be noted that even Martinez's identification of Crummey from Facebook was not suggestive. Martinez testified she has around two thousand Facebook friends. (Tr.p.569–91). No one presented Crummey's photo for her to identify in connection with the burglary; it happened to appear on her homepage and she recognized him. There was no suggestion involved at all, much less orchestration by police. Furthermore, Martinez was already familiar with Crummey, and testified she recognized him on the day of the robbery but did not know his name. (Tr.p.487).

Facebook pictures. (State's Exhibit #84–85). Martinez was not friends with Crummey. She had merely seen him around her father's auto shop. (Tr.p.234). Crummey was of a different race than Martinez, which may have affected her ability to identify him. In fact, Crummey elicited testimony from an expert witness that cross-racial identifications are inherently less reliable. (Tr.p.988–89). The expert even testified specifically about "studies that deal specifically with Hispanic individuals identifying African Americans[.]" (Tr.p.989). Yet on appeal, Crummey claims it was unavoidable that Martinez would choose his picture out of a neutral lineup depicting six remarkably similar-looking individuals.

Even if the lineup was made less probative by the fact that Martinez had viewed pictures of Crummey, surely it had *some* probative value. The State in a criminal case has the highest burden of proof in the law: proof beyond a reasonable doubt. Evidence tending to shed light on the central issue in a prosecution for most violent offenses has great probative value and should be admitted under all but the most extreme circumstances. See State v. Quattlebaum, 338 S.C. 441, 453, 527 S.E.2d 105, 111 (2000) ("It seems to be well settled that litigants . . . should not be hampered in their choice of those by whom they choose to prove their cases"); State v. Jackson, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005) (explaining the State "has the right to prove every element of the crime charged"). And even if there was some prejudice in the lineup procedure, the prejudice must *substantially* outweigh the probative value. See Rule 403, SCRE (providing that "[a]lthough relevant, evidence may be excluded if its probative value is *substantially* outweighed by the danger of

unfair prejudice") (emphasis added). Martinez's identification was the central issue in the entire case, making the circumstances of her identification highly probative. See State v. Stephens, 398 S.C. 314, 320, 728 S.E.2d 68, 72 (Ct. App. 2012) (explaining the "central theme of Stephens's defense was discrediting Bates's identification of him in the lineup. By doing so, he made the photographic lineup far more important than it might otherwise have been, thereby increasing its probative value."). Given that the strength of Martinez's identification was of paramount importance, the prejudice would have to be extremely high to exclude it.

Crummey argues the lineup identification should have been excluded because it was not "necessary" to the State's case. Brief of Appellant at 9. But evidence "need not be 'necessary' to the State's case in order to be admitted." State v. Daise, 421 S.C. 442, 464, 807 S.E.2d 710, 721 (Ct. App. 2017). Rather, "[e]vidence is admissible if 'logically relevant' to establish a material fact or element of the crime." Id.

Furthermore, there was nothing *unfair* about police testing Martinez's ability to pick Crummey's image from a six-person lineup. If the lineup had as little probative value as Crummey suggests, the jury could simply not give it any weight. See Perry v. New Hampshire, 565 U.S. 228, 237 (2012) (explaining the "Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by *affording the defendant means to persuade the jury that the evidence should be*

discounted as unworthy of credit") (emphasis added). Indeed, this was what Crummey urged the jury to do in his closing argument. (Tr.p.1092–96).

There is no support in precedent or in practice for Crummey's assertion that the only legitimate purpose of a photo lineup is "to pick out an individual when identity was not previously known." Brief of Appellant at 7. Taken to its logical conclusion, this argument would bar legitimate identification procedures in a host of cases where an eyewitness has a tenuous prior knowledge of the suspect. Tellingly, Crummey has not cited a single case that supports the premise of his argument. In fact, our Supreme Court has held that a witness's prior knowledge of a suspect is a factor weighing *in favor* of admissibility of even a suggestive show-up identification because the witness's prior knowledge makes the identification *more reliable*. State v. Liverman, 398 S.C. 130, 141, 727 S.E.2d 422, 427 (2012) (explaining the "suggestive nature of a show-up is mitigated by the witness's prior knowledge of the accused"); See also Bean v. State, 240 Md. App. 342, 358, 205 A.3d 26, 36, cert. denied, 464 Md. 591, 212 A.3d 398 (2019) (collecting cases and explaining it is "not improper or unreasonable for [police] to confirm" a witnesses's independent identification). The Liverman court emphasized that absent improper State conduct, the "creditworthiness" of an eyewitness identification is a jury question. Liverman, 398 S.C. at 141, 727 S.E.2d at 427.

Crummey has not addressed Liverman and the cases cited therein or attempted to explain why courts have repeatedly sanctioned the identification procedure he claims to be so unfairly prejudicial. Instead, he cites irrelevant cases

concerning suggestive identification procedures that have nothing to do with his bemusing argument that the neutral six-person lineup gave "undeserved credibility to her pretrial identification." Brief of Appellant at 10. His reliance on State v. Lawson, 424 S.C. 51, 817 S.E.2d (Ct.App.2018), is particularly misplaced, as the issue in that case was that the State introduced gratuitous evidence that Lawson had previously served a prison sentence. There was no such evidence introduced in this case.

Finally, even if there was some degree of unfair prejudice in the lineup procedure, the balancing required by Rule 403, SCRE, is the province of the trial court. "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014). The appellate court reviews a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and is "obligated to give *great deference* to the trial court's judgment." Id. (emphasis added). Given the significant probative value of the neutral six-person lineup, the lack of unfairness, and the dearth of authority to support Crummey's argument, he has failed to show an abuse of discretion. This Court should affirm.

II. The trial court correctly admitted two Facebook pictures under the name "Runacheckup Youngn" because the pictures corroborated the victim's testimony explaining how she first identified Crummey and one of the pictures showed Crummey with his codefendant, proving they were associates.

Next, Crummey alleges the trial court erred by admitting two Facebook pictures, one of which shows Crummey together with his codefendant. He claims the danger of unfair prejudice was substantially greater than the probative value of the photographs because one of the pictures, State's Exhibit # 84, shows Crummey apparently holding money next to his ear as if it was a cell phone while standing with another individual who is holding money. The other, State's Exhibit # 85, shows Crummey with his codefendant, Denali White, with Crummey smoking a cigar. Crummey has failed to show an abuse of discretion. The probative value of the pictures was high for several reasons. State's #84 showed Crummey's Facebook home page, with his picture above the name "Runacheckup Youngn." This was how Dulce Martinez first identified Crummey, making this a highly relevant and corroborative piece of evidence. State's #85 shows Crummey together with his codefendant, Denali White, demonstrating they were associates. Conversely, the danger of unfair prejudice was low; there is nothing inherently wrong with smoking a cigar or holding money. Under the highly deferential standard of review for 403 rulings, this Court should affirm.

A. <u>Standard of review.</u>

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Collins, 409 S.C. 524, 530, 763 S.E.2d 22, 25 (2014). A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. Collins, 409 S.C. at 534, 763 S.E.2d at 28. "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Daise, 421 S.C. 442, 464, 807 S.E.2d 710, 721 (Ct. App. 2017).

B. Discussion.

All relevant evidence is admissible, except as otherwise provided by the rules of evidence or other statute. Rule 402, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Stephens, 398 S.C. 314, 320, 728 S.E.2d 68, 71 (Ct. App. 2012). "The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27 (2014). "If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." Id.

State's Exhibit #84 was highly corroborative of Dulce Martinez's critical testimony explaining how she first identified Crummey as the person who robbed and assaulted her. It was a crucial part of the State's case, essential to explaining the course of the investigation. Accordingly, the picture was relevant and admissible. See Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27 (2014) ("If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it."). Furthermore, the picture had great probative value because it allowed the jury to judge Martinez's reliability based on the actual pictures she saw when making her initial identification. Denali White's lawyer questioned Martinez's ability to recognize anyone from the Facebook pictures, particularly since she viewed them on a small cell phone screen. (Tr.p.594). See State v. Stephens, 398 S.C. 314, 321, 728 S.E.2d 68, 72 (Ct. App. 2012) ("Only by viewing the actual lineup could the jury determine for itself whether the allegedly poor picture quality or the six-photograph format likely influenced [the witness's] identification."). Finally, the picture showed Crummey's picture above the name "Runacheckup Youngn." Crummey would later identify himself on a jail call by this same alias, making the picture relevant to show Crummey was the person controlling the Facebook account. (Tr.p.795). Because the picture was corroborative of and relevant to Martinez's testimony and relevant to connect Crummey to the Facebook page, it had significant probative value.

By contrast, the danger of unfair prejudice was low. There is nothing illegal or inherently wrong about holding money, or standing next to a person who is

holding money. Neither Crummey nor the other person pictured appears to be holding a particularly large amount of money. Crummey's trial argument that the jury could have concluded the money was the fruit of the robbery was rightly rejected by the trial court, which concluded there was not "anything inherently unduly prejudicial" about the photograph. (Tr.p.469). Crummey has failed to demonstrate unfair prejudice. See State v. Jackson, 364 S.C. 329, 333, 613 S.E.2d 374, 376 (2005) (rejecting argument that picture showing defendant wearing prison jumpsuit at a Halloween party was inadmissible because it suggested he "had a light-hearted attitude toward lawlessness and found criminal behavior amusing"). Under the highly deferential standard of review, this Court should not overturn the trial court's ruling.

Similarly, State's Exhibit #85 depicts Crummey standing next to his codefendant. The photograph was relevant to show a connection between them and to corroborate Martinez's account of her initial identification. Accordingly, it was admissible. See Collins, 409 S.C. at 534, 763 S.E.2d at 27. By contrast, the danger of unfair prejudice was low. There is nothing wrong with smoking a cigar, and Crummey's conclusory assertion that the picture was "prejudicial" is insufficient to overturn the trial court's discretionary ruling to the contrary. The fact that Crummey's codefendant was holding up his middle finger in the photograph likewise was not unfairly prejudicial to Crummey. In short, the minimal danger of unfair prejudice did not substantially outweigh the probative value. It is clear that the trial court carefully considered the comparative probative value and potential

for prejudice, and it indicated that any more than two pictures would likely become cumulative. (Tr.p.478). This is not an "exceptional circumstance" requiring reversal of a trial court's highly discretionary 403 ruling. See Collins, 409 S.C. at 534, 763 S.E.2d at 28. This Court should affirm.

III. The trial court correctly admitted a portion of a jail phone call in which Crummey identifies himself by the alias "Runacheckup," the same alias Crummey used on his Facebook page.

Crummey asserts the trial court erred by admitting a portion of a phone call Crummey made from jail wherein he identifies himself as "Runacheckup." This was the same alias Crummey used on his Facebook page, which is how Martinez first identified him. This made the call probative to confirm that Crummey had control of the Facebook page and its contents. By contrast, there was nothing prejudicial about the call, which was stopped after Crummey identified himself as "Runacheckup." This Court should affirm.

A. Standard of review.

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Collins, 409 S.C. 524, 530, 763 S.E.2d 22, 25 (2014). A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. Collins, 409 S.C. at 534, 763 S.E.2d at 28. "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Daise, 421 S.C. 442, 464, 807 S.E.2d 710, 721 (Ct. App. 2017).

B. Discussion.

All relevant evidence is admissible, except as otherwise provided by the rules of evidence or other statute. Rule 402 SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

The jail call was relevant because Crummey verbally identified himself by the same alias he used on his Facebook page: "Runacheckup." (State's Exhibit #101; Tr.p.794–95). As discussed above, this was how Dulce Martinez first identified Crummey and his codefendant. Accordingly, the call was relevant to prove Crummey had control of the Facebook page.

By contrast, the call was not unfairly prejudicial. The only prejudicial effect Crummey identifies is that the call "made clear Appellant was incarcerated at the county jail." Brief of Appellant at 14. However, the jury must have been aware that Crummey had been arrested; not only is it common knowledge that criminal defendants are arrested when charged with a crime, a law enforcement witness testified specifically that Crummey was arrested with his codefendant Denali White. (Tr.p.730). Because the State stopped the recording after only 50 seconds, the only portion of the call the jury heard was the portion where Crummey identifies himself as "Runacheckup." (Tr.p.795). Accordingly, there was no bad act evidence (or any other content) in the call. Cf. State v. King, 422 S.C. 47, 69, 810 S.E.2d 18, 30 (2017) (finding abuse of discretion where trial court admitted a

"fifteen-minute recording . . . riddled with profanity, racial slurs, and impermissible references to King's prior bad acts" without listening to the recording, where admission of call logs was sufficient to establish probative value). Crummey has not shown an abuse of discretion. Furthermore, and for the same reasons, any error in the admission of the call was harmless. See State v. Byers, 392 S.C. 438, 448, 710 S.E.2d 55, 60 (2011) (explaining "[e]rror is harmless when it could not reasonably have affected the result of the trial"). Under the highly deferential standard of review, this Court should affirm.

IV. The trial court correctly admitted evidence obtained pursuant to a search warrant because the investigator testified he supplemented the warrant affidavit with oral testimony establishing probable cause.

Finally, Crummey alleges the trial court erred by refusing to suppress the contents of his cell phone obtained pursuant to a search warrant. The State agrees with the trial court's ruling that the warrant affidavit, standing alone, was insufficient to establish probable cause. The affidavit's conclusory statement that Crummey and White were "developed as suspects" was not sufficient by itself to establish probable cause to arrest Crummey. (Court's Exhibit #1). However, the State strongly disagrees with Crummey's assertion that the investigator did not offer any "specifics" about the supplemental oral testimony he presented to the magistrate. Investigator Kahn testified explicitly that he gave specific details about his investigation to the magistrate when obtaining the warrant, including the central fact establishing probable cause: Dulce Martinez's identification. Because evidence supports the trial court's ruling that probable cause existed, Crummey has not shown an abuse of discretion in the court's refusal to suppress the phone's contents. This Court should affirm.

A. Standard of review.

On appeals from a motion to suppress based on Fourth Amendment grounds, the appellate court applies a deferential standard of review and will reverse if there is clear error. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). The appellate court must affirm if there is any evidence to support the trial court's

ruling. State v. Frasier, 431 S.C. 234, 248, 847 S.E.2d 274, 281 (Ct. App. 2020), reh'g denied (Sept. 21, 2020).

B. Discussion.

A search warrant may issue only upon a finding of probable cause. State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997). A search warrant may be issued "only upon affidavit sworn to before the magistrate ... establishing the grounds for the warrant." S.C.Code Ann. § 17–13–140 (2014). "Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient." State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990). However, a search warrant that is insufficient in itself to establish probable cause may be supplemented by sworn oral testimony. Weston, 329 S.C. at 290, 494 S.E.2d at 802. "If it is determined that the affidavit was in fact supplemented by sworn oral testimony . . . thereby establishing probable cause, the validity of the warrant may be upheld." State v. Johnson, 302 S.C. 243, 249, 395 S.E.2d 167, 170 (1990).

Contrary to Crummey's assertion, the investigator/affiant in this case testified specifically that he supplemented his written warrant affidavit with supplemental oral testimony laying out the probable cause to search Crummey's phone. It is true that Investigator Kahn spoke in general terms for much of the hearing about what he would normally explain to a magistrate. The magistrate also testified generally about the warrant procedure, explaining she carefully

scrutinizes each warrant affidavit that comes before her. (Tr.p.159). However, Kahn testified specifically:

> I had to obviously explain as to how we got to Duquan Crummey and Denali White as the suspects for this home invasion, and that's obviously you know, our investigation has led us to this. The, one of the victims also provided us with some Facebook information and that also linked Daquan Crummey, and then also . . . Duquan and Denali were also subjects of a traffic stop prior to them being arrested for us. And that's how I was able to at least come up with a relationship between the two. . . .

(Tr.p.82). The prosecutor clarified: "And all that information you just discussed you knew prior to that date?" The officer responded: "Yes, sir." (Tr.p.82).

Khan then recounted the victim's identification of Crummey via Facebook. (Tr.p.97–98). He testified he relayed "[a]ll that information, plus the fact that how we developed these two suspects " to the magistrate. (Tr.p.98–99). He further described "how those arrests came to be in detail . . . ." (Tr.p.101). He testified he gave the court details, specifically that *Martinez identified Crummey in a six-person photo lineup.* (Tr.p.105). He further shared that Crummey had been found to be associated with White, who was also identified by Martinez. (Tr.p.105; 107). Responding to defense counsel's assertions that he could not remember what he told the magistrate, Kahn responded: "I'm not assuming. That's exactly what I did." (Tr.p.127).

The trial court correctly found Kahn's supplementary oral testimony established probable cause. He recognized that "Detective Khan did testify that he told Judge Steinberg that these, the defendants in this case . . . had been picked out of a photo lineup. And he testified he told her that before she signed the warrant."

(Tr.p.174). This factual finding is entitled to great deference from this Court. State v. Edwards, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009) (explaining the appellate court is "bound by the trial court's factual findings unless they are clearly erroneous").

Investigator Kahn's testimony explaining that an eyewitness identified Crummey from Facebook pictures and a six-person lineup plainly supports the trial court's factual finding that supplemental oral testimony established probable cause. Cf. State v. Weston, 329 S.C. 287, 292, 494 S.E.2d 801, 803 (1997) (holding testimony regarding oral supplementation was insufficient where "prosecutor stated that neither the affiant nor the ministerial recorder could remember [officer's oral supplementation], and it was not the practice of the ministerial recorder to ask questions"). Under the applicable deferential standard of review, this Court needn't go any further. This Court should affirm.

CONCLUSION

For all the foregoing reasons, the State respectfully asks that this Court affirm White's conviction and sentence.

Respectfully submitted,

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