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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Courtney Clyburn-Pope, Circuit Court Judge

RAPHAEL L. PONTOO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2021-001217

SUPPLEMENTAL APPENDIX

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ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RAPHAEL LAMAR PONTOO,

APPELLANT

APPELLATE CASE NO. 2015-000323

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err when it required the appellant to prove his duress defense by a preponderance of the evidence, as contemplated by *Dixon v. United States*, 548 U.S. 1 (2006), despite the fact that the duress defense negates one of the statutory elements of the crime?

2. Did the trial court err when it allowed the State to use the appellant's silence after invoking the protections of *Miranda v. Arizona*, 384 U.S. 436 (1966), to impeach the appellant's testimony in his defense, in contravention of *Doyle v. Ohio,* 426 U.S. 10 (1976)?

3. Did the trial court err by allowing a victim who had 1) never identified the appellant as the suspect in an investigatory photo array, and 2) had in fact identified a person *other* than the appellant as the most likely suspect, to observe the appellant while seated at the defense table and then identify him as the suspect, despite the fact over one year had passed since he could have possibly viewed the appellant, creating a violation of the strictures of *Neil v. Biggers*, 409 U.S. 188 (1972)?

STATEMENT OF THE CASE

From January 26, 2015, through January 28, 2015, appellant Raphael Pontoo was tried in the Circuit Court of South Carolina, in the County of Lexington, on two felony counts. The first count alleged was Armed Robbery in violation of S.C. Code Ann. §16-11-330 (1976); the second was Failure to Stop for a Blue Light Resulting in

Death, in contravention of S.C. Code Ann. § 56-5-750 (1976). After jury selection, the court held two pretrial hearings outside the presence of the jury. The first hearing was conducted to determine voluntariness and permitted use of statements under the standards of *Jackson v. Denno*, 378 U.S. 368 (1964). The second was held to ascertain whether an in court identification of Pontoo by the alleged victim of the armed robbery would be permissible under the scheme adopted by *Neil v. Biggers*, 409 U.S. 188 (1972). The court made preliminary findings on both these evidentiary questions and the case proceeded to trial.

During the trial, as reflected in his pretrial hearing rulings, the trial court judge permitted the State to impeach Pontoo with his post-*Miranda* warning silence. Additionally, the court permitted the purported victim of the armed robbery to make an in-court identification of Pontoo as the perpetrator of the armed robbery, despite the fact that in the pretrial investigation, the purported victim was unable to identify Pontoo as the suspect. Pontoo took the stand in his own defense and claimed that he was not the person who committed the armed robbery. Though he admitted to driving the car that was involved in the failure to stop for a blue light resulting in death charge, Pontoo testified that he was driving the car under duress.

At the conclusion of the State's case-in chief, as well as at the conclusion of Pontoo's testimony, the defense attorney moved for a directed verdict on both counts. The trial judge denied those motions. At the conclusion of all testimony, the State and the defense attorney conferred with the trial court judge on the matter of, *inter alia*, jury instructions. The defense attorney requested a charge that the State had to prove beyond a reasonable doubt the absence of duress. The trial judge ruled,

at the urging of the State, that the proper standard for determining the burden of proof for a duress defense is controlled by *Dixon v. United States,* 548 U.S. 1 (2006). *Dixon* stands for the proposition that unless the affirmative defense negates an element of the crime, affirmative defenses such as duress must be proved by the defense by a preponderance of the evidence. Over the objection of the defense attorney, the trial judge instructed the jury under the *Dixon* standard.

After closing arguments, the trial judge charged the jury. Following approximately two hours of deliberation, the jury returned a verdict of guilty on each of Pontoo's indictments. The defense attorney moved for a new trial based on prior motions and objections lodged. The trial judge acknowledged the defense request for a new trial, but ruled that the verdict was consistent with the evidence that was presented and denied the motion. This appeal was timely filed to seek review of the trial court's rulings.

This appeal remained at the Office of Indigent Defense until being assigned to the Appellant Practice Project. After being assigned to the Appellant Practice Project attorney, there was one additional request for an extension to file this appeal, which was then due on January 11, 2016. The request for extension was unopposed by the State, and was granted with a new due date of February 10, 2016.

FACTS

On the evening of January 23, 2014, appellant Raphael Pontoo was at a nightclub known as The Rock, in Lexington County, South Carolina. (R. p. 79, lines 6-8). Also at the club that night was Jonathan Ruple. (R. p. 79, lines 12-16). Pontoo was with a group of four other people, among them, Alexander Kewon Clemmons.

(R. p. 79, lines 5-17). At some point in the evening, Ruple and Pontoo met in the parking lot of the club. Each had a handgun, and each displayed their handgun to the other. (R. p. 81, lines 1-13). Shortly afterwards they returned to the club. Ruple claims that when he left the club that night, Pontoo robbed him at gunpoint in the parking lot of the club, and took the bag containing the weapon Ruple had previously shown Pontoo. (R. p. 82, lines 18-23). Ruple contends that after the robbery, Pontoo left in a vehicle along with the other four people that accompanied Pontoo that evening. (R. p. 83, lines 6-8). As the car departed the parking lot of the club, Ruple got a partial tag number from the car, and called 911, telling them that he had been robbed in the parking lot of the club. (R. p. 83, lines 9-17).

Pontoo denies having robbed Mr. Ruple. (R. p. 377, lines 2-16). Instead he claims that two people who accompanied him that evening, Alexander Clemmons and Patrick Johnson, entered the car before it departed the parking lot, carrying a bag taken from Mr. Ruple. (R. p. 333, lines 1-11). Pontoo testified that the bag contained the weapon that Ruple had displayed in the parking lot, a nine millimeter pistol. (R. p. 333, lines 9-14).

On that evening, State Trooper Brandon Lee received a "be on the lookout," or BOLO, for the car described by Mr. Ruple in his call to 911. (R. p. 91, lines 5-11). Lee eventually located the car, and after being joined by backup from a Lieutenant Bennett from the Swansea Police Department, initiated a traffic stop. (R. p. 92 line 12-p. 96, line 24). The car pulled over immediately when Lee activated his blue lights. (R. p. 96, lines 15-20). Lee drew his weapon and ordered the occupants out of the vehicle one at a time. (R. p. 97, lines 2-11). The left rear door opened when

Lee commanded the driver's door to be opened. Lee had to tell the passenger seated by the left rear door to shut it so that he could concentrate on the driver. (R. p. 97, lines 17-22). According to the testimony, Pontoo was seated in the rear seat behind the driver. (R. p. 277, lines 7-10). Subsequently, Lee individually ordered the driver, the front seat passenger, and the person seated behind the front seat passenger, to exit the vehicle, to remove their outer garments, and to walk towards Lee so they could be handcuffed. (R. p. 98, line 7- p. 99, line 6).

While the right rear door was still open from the exit of the passenger seated next to it, the car began to drive away. (R. p. 99, lines 12-23). Lee had been joined by Trooper Jason Snider, who pulled to the rear of Lee's vehicle. (R. p. 108, lines 2-17). Snider observed someone in the stopped vehicle jump into the driver's seat jump before it began to drive away. Snider began to pursue the departing vehicle with his blue lights on. (R. p. 108, lines 16-24).

After a high speed pursuit, the fleeing vehicle departed the roadway and crashed into trees. (R. p. 110, line 11-p. 111, line 15). When Snider reached the crashed vehicle, he saw the driver and one other passenger. He identified the driver as Pontoo. (R. p. 112, line 11- p. 114, line 1). A weapon, a nine millimeter handgun, was retrieved from the front passenger seat of the vehicle. (R. p. 133, line 4- p. 134, line 18). It appeared that the vehicle had flipped over during the collision. (R. p. 117, line 18-19). The rear seat passenger was identified as Alexander Clemmons. (R. p. 155, lines 5-10). Clemmons had been unrestrained at the time of the accident. (R. p. 197, lines 17-18). As he was being prepared for transport by helicopter for medical treatment, EMS personnel found a handgun in Clemmons' possession. (R. p.

157, lines 2-9). On January 27, 2014, Clemmons died from injuries sustained in the accident. (R. p. 197, lines 20-21).

Following the accident, Pontoo was transported to Palmetto Health Richland for treatment. (R. p. 204, lines 13-16). Detective Todd Garrick was the lead investigator with the Lexington County Sheriff's Department and the person responsible for obtaining armed robbery arrest warrants in the case. (R. p. 13, lines 6-20). He interviewed Pontoo in an emergency room on the morning of January 24, 2014. (R. p. 16, lines 1-22). He claimed Pontoo was not under arrest at the time. (R. p. 16, lines 23-25). Nonetheless, he claims he administered *Miranda* warnings to Pontoo. (R. p. 7, line 19 - p. 18, line 10). Pontoo denies he was read his *Miranda* rights. (R. p. 62, lines 12-23). Garrick admitted that he put a "hold" on Pontoo so that the Sheriff's Department would be notified before Pontoo was released from the hospital. (R. p. 21, lines 7-13). When questioned, Pontoo refused to answer questions and repeatedly asked why he was being questioned. Pontoo eventually stated he was "through" talking to Garrick. (R. p. 22, lines 3-12). Garrick obtained arrest warrants for Pontoo on January 28, 2014. (R. p. 214, lines 8-9). On January 29, 2014, when the hospital discharged Pontoo, Garrick picked up Pontoo from the hospital and transported him to the detention center. (R. p. 22, lines 13-17).

Garrick also interviewed the robbery victim in the matter, Jonathan Ruple, on January 27, 2014. He showed Ruple a photo array consisting of photos of various individuals to determine if Ruple could pick out the man who robbed him from the lineup. (R. p. 49, lines 1-6). From the lineup, Mr. Ruple narrowed down the suspect to two people, but could not narrow it down to one. (R. p. 49, lines 12-25). He was

shown two separate but identical photo arrays, and on each one, circled the suspect labelled number two and wrote "50%" beside the circle. (R. p. 50, lines 16-22). When asked why he wrote "50%" by the circle, Ruple stated he could not decide whether the suspect was number two or number four. (R. p. 50, line 23-p. 51, line 3). Ruple claimed that he would have been able to distinguish number two from number four if he had been shown a color photograph. (R. p. 51, lines 4-6). Garrick never assembled a color lineup for Ruple to view. (R. p. 60, lines 15-18). Ruple claimed that he had never seen a photo of the person arrested for the armed robbery, nor seen him in person. (R. p. 51, lines 11-16).

The person that Ruple circled in the photo array was not Pontoo. Pontoo was number four in the photo array. (R. p. 60, lines 7-13). Despite the fact that Ruple did not identify Pontoo as the robber on either photo array, the trial court permitted Ruple to identify Pontoo, who was seated at the defense table, to be identified as the one that robbed Ruple. (R. p. 51, lines 17-22). Though he could not positively identify Pontoo three days after the event, Ruple testified that after the passage of over a year, he was one hundred percent certain that Pontoo was the person that robbed him. (R. p. 51, lines 23-24). The defense attorney objected to permitting the identification, alleging the demonstration was suggestive. (R. p. 64, lines 7-20). The State admitted that Ruple picked the wrong person in the photo array. (R. p. 64, lines 22-25).

Pontoo took the stand in his own defense. He admitted that he was driving the car, but said that Clemmons forced him to do so at gunpoint. (R. p. 334, line 25 - p. 335, line 21). He claims the last thing he remembers is that Clemmons reached up

and grabbed the wheel. (R. p. 335, line 25 - p. 336, line 2). Over the defense attorney's objection, the State questioned Pontoo extensively regarding his unwillingness to tell this version of the story to Garrick on January 24, 2014. (R. p. 374, line 14 - p. 375 line 17).

ARGUMENT

I. The Trial Judge's Jury Instructions Improperly Placed the Burden of Proof for the Duress Defense on the Appellant

a. In a Criminal Case, the Burden of Proof is on the State to Prove Every Element of the Crime Beyond a Reasonable Doubt

While this proposition is fundamental, it is critical. "A basic principle of criminal law is that the State has the burden of proof as to all of the essential elements of the crime." *State v. Attardo*, 263 S.C. 546, 550, 211 S.E.2d 868, 870 (1975). Additionally, there must be credible evidence for each element of the crime charged. *State v. Smith*, 274 S.C. 622, 623, 266 S.E.2d 422, 423 (1980). This evidence must be provided by salient and admissible facts. The facts required to prove a statutory crime are delineated in the text of the enacted law. "[I]n determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive . . . ." *McMillan v. Pennsylvania*, 477 U.S. 79, 85, 106 S. Ct. 2411, 2415, 91 L. Ed. 2d 67 (1986)(internal citations omitted). In sum, the State must prove beyond a reasonable doubt every fact that the legislature has chosen to include as an element of the statute. *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071, 25 L. Ed. 2d 368 (1970). Each element of a crime is of equal

weight, and no element is more important than another. *United States v. Jordan*, 509 F.3d 191, 198 (4th Cir. 2007).

b. Normally the State Need Not Carry the Burden of Proof for Affirmative Defenses

The exception to the rule that the State must carry the burden of proof in criminal cases lies in the proof of affirmative defenses. Traditionally, the burden is on the **defendant** to prove an affirmative defense by a preponderance of the evidence. "[A]t common law, the burden of proving affirmative defenses—indeed, all circumstances of justification, excuse or alleviation, rested on the defendant." *Dixon v. United States*, 548 U.S. 1, 8, 126 S. Ct. 2437, 2443, 165 L. Ed. 2d 299 (2006). The South Carolina Supreme Court has determined that normally, the defendant must prove the affirmative defense of duress by a preponderance of the evidence, adopting the rationale of *Dixon. See State v. New*, 371 S.C. 523, 527, 640 S.E.2d 871, 873 (2007).

c. There is an Exception to the Requirement for the Defendant to Prove Affirmative Defense

If the affirmative defense negates an element of the crime, the burden rests with the State to disprove the existence of the affirmative defense. The reason for this is because, "[I]t would be an extreme inconsistency to consider an element of the crime as an affirmative defense, for where the crime is not proven there is no need for defenses." *Attardo*, 263 S.C. 551-52, 211 S.E.2d 868, 870 (1975)(citation omitted). Therefore, if a statutory element of the crime is implicated by the

affirmative defense, it is the burden of the State to disprove the existence of the affirmative defense beyond a reasonable doubt.

d. The Trial Judge's Jury Instruction Erroneously Allocated the Burden of Proof

Pontoo was convicted of Failure to Stop for a Blue Light Resulting in Death, in contravention of S.C. Code Ann. § 56-5-750 (1976). Subsection (a) of this statute contains the elements of the crime as enacted by the legislature.[1] The statute includes as elements, 1) in the absence of mitigating circumstances; 2) defendant drove a motor vehicle on a road, street or highway; 3) defendant was signaled to stop by law enforcement; and 4) defendant did not stop. The jury instruction given by the trial judge did not list the absence of mitigating circumstances as an element of the crime, and neither the State nor the defense attorney took exception to this instruction. (R. p. 415, lines 17-24).

Pontoo took the stand and asserted the affirmative defense of duress, because of his allegation that Clemmons forced him to drive car at gunpoint. Subsequently, at the jury charge conference, Pontoo's counsel suggested a jury instruction that, though not in the record, apparently placed the burden of proof on the State to disprove the defense of duress. (R. p. 389, line 23- p. 391, line 13). The

[1] (A) In the absence of mitigating circumstances, it is unlawful for a motor vehicle driver, while driving on a road, street, or highway of the State, to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light. An attempt to increase the speed of a vehicle or in other manner avoid the pursuing law enforcement vehicle when signaled by a siren or flashing light is prima facie evidence of a violation of this section. Failure to see the flashing light or hear the siren does not excuse a failure to stop when the distance between the vehicles and other road conditions are such that it would be reasonable for a driver to hear or see the signals from the law enforcement vehicle.

S.C. Code Ann. § 56-5-750 (1976)

State objected and suggested that under the auspices of *Dixon v. United States,* 548 U.S. 1 (2006), the proper instruction would place the burden on Pontoo to prove his affirmative defense by a preponderance of the evidence. (R. p. 391, lines 2-4). The defense attorney lodged a timely objection to the instruction. (R. p. 391, line 22-392, line 3; p. 420, line 23 - p. 421, line 3.) The trial court agreed with the State and gave the following instruction, over the defense counsel's objection: "The defendant must prove the affirmative defense of duress by a preponderance or greater weight of the evidence." (R. p. 418, lines 17-19).

"In general, the trial judge is required to charge only the current and correct law of South Carolina, and the law to be charged to the jury is determined by the evidence at trial. To warrant reversal, a trial judge's charge must be both erroneous and prejudicial. "State *v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003)(internal citations omitted). In this matter, the judge failed to charge the current and correct law. He failed to properly charge the violation of Failure to Stop for a Blue Light, because he failed to charge the first element of the crime. There were no objections raised to this error. He also erroneously placed the burden on the defendant to prove duress by a preponderance of the evidence, to which the defense attorney lodged a timely and proper objection. "The State is foreclosed from shifting the burden of proof to the defendant . . . when an affirmative defense *does* negate an element of the crime." *Smith v. United States*, 133 S. Ct. 714, 719, 184 L. Ed. 2d 570 (2013)(internal citations omitted). Though not charged, the "absence of mitigating circumstances" is still an element of the crime, and placing the burden on Pontoo instead of the State regarding the duress defense was impermissible and prejudicial.

Therefore, Pontoo's conviction should be overturned, and the case remanded for a new trial.

II. The Trial Judge Erroneously Allowed the State to Impeach the Appellant with Post Miranda Silence

a. *Miranda* Warnings Protect a Defendant's Silence

The right of a defendant accused of a crime to remain silent is enshrined in the seminal case of *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). As a corollary to the protections offered by *Miranda*, it is impermissible to impeach a testifying defendant with post-*Miranda* silence. This is because silence induced pursuant to *Miranda* creates an expectation of reliance on the defendant's part that silence will not be used as a weapon against him. "[W]hile it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S. Ct. 2240, 2245, 49 L. Ed. 2d 91 (1976).

b. Custodial Status is Irrelevant Once Miranda Warnings Are Given and Invoked.

Miranda protections generally attach when a defendant is in custody. "[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." *Miranda*, 384 U.S. at 468, fn 37.

More broadly, even for a suspect that is **not** in custody, once the warnings are given by the police and invoked by the suspect (pre-arrest but post-Miranda

statements), many courts have held that the same protections apply. "When an accused receives the *Miranda* warnings' implicit promise that any silence will not be used against her, it is fundamentally unfair and a violation of due process to then use that silence against her. We believe this is true even where the *Miranda* warnings are given unnecessarily." *Bartley v. Com.*, 445 S.W.3d 1, 9 (Ky. 2014). Likewise,

> It must be noted that, unlike the instant case, *Doyle* dealt with post arrest silence. This distinction is, however, immaterial. The *Doyle* decision was based upon the fact that governmental action (i.e., giving the *Miranda* warning) encouraged or induced silence by assuring the defendant that such silence is protected. Receipt of the *Miranda* warning is the important factor in the *Doyle* analysis, not whether the defendant has been arrested. Therefore, the *Doyle* rationale protects post-*Miranda* silence whether occurring before or after arrest.

State v. Fencl, 109 Wis. 2d 224, 234, 325 N.W.2d 703, 709-10 (1982). "The unfairness of using a defendant's silence following *Miranda* warnings is not mitigated by the absence of custody. . . . Custody is therefore not a prerequisite to a *Doyle* violation." *State v. Plourde*, 208 Conn. 455, 467, 545 A.2d 1071, 1077-78 (1988)(internal citations omitted); *but cf. State v. Robinson*, 496 A.2d 1067, 1068 (Me. 1985)(holding that pre-arrest, post-Miranda silence is due no protections). Thus, the majority of authority holds that the reliance induced by *Miranda* warnings applies with equal force whether or not the defendant is in custody when warned.[2]

[2] For an interesting discussion of trends in this evolving area of law, *see* Andrea M. Harper, *You Have the Right to Remain Silent, But Anything You Don't Say May Be Used Against You: The Admissibility of Silence as Evidence After Salinas v. Texas*, 66 Fla. L. Rev. 1763 (2015).

c. Miranda Rights attached to Pontoo in the Hospital

According to the testimony of Detective Todd Garrett, he read Pontoo his Miranda rights when he interviewed him in the hospital on January 24, 2014. (R. p. 386, line 19- p. 387, line 10). Also according to Garrett, Pontoo said he did not want to talk any more. (R. p. 22, lines 8-12). Garrett testified Pontoo was not under arrest at the time of questioning. (R. p. 26, lines 23-25). However, Pontoo was told he could not leave the hospital. (R. p. 30, lines 7-14). Garrick further testified that there was a "hold" on Pontoo so that he could not leave the hospital without approval of the Sheriff's office. (R. p. 21, lines 7-13). On the other hand, Pontoo testified that he had not been read his Miranda rights before the questioning. (R. p. 25, line 6- 20).

Whether Garrick or Pontoo's account is correct, the *Miranda* rights should have attached to Pontoo. If Garrick is believed, Pontoo was read his rights and said he did not want to talk. If Pontoo is believed, he was in custody (not free to leave because of the hold by the Sheriff's office) and told Garrick he did not want to speak to him. Even if, as the State contends and the trial judge ruled, Pontoo was not in custody, the prosecution team's testimony is that Pontoo was read his rights, he understood them, and he elected not to give a statement.

d. The Trial Judge Erroneously Permitted Pontoo's Silence to be Used for Impeachment

During the trial, Pontoo took the stand to explain his affirmative defense of duress. Over the defense attorney's timely objection, the trial judge permitted the State to question Pontoo repeatedly why he did not tell Garrick about the

circumstances surrounding his duress defense when he was interrogated in the hospital. (R. p. 387, line 19-p. 388, line 17).

This is a *Doyle* violation recognized by South Carolina courts. Questioning Pontoo about his alibi defense after he invoked his Miranda rights is a prohibited tactic. *State v. McIntosh,* 358 S.C. 432, 444, 595 S.E.2d 484, 490 (2004). Further, this is not harmless error - it requires reversal, because the nature and object of the questioning exceeded all bounds set by law. "To be harmless, the record must establish the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant's silence directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming. *State v. Pickens*, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996). None of these factors exist under these facts. Therefore, Pontoo's conviction should be overturned, and the case remanded for a new trial.

III. The In-Court Identification of Pontoo was Unduly Suggestive

a. Constitutional Strictures Require Safeguards in Pre-Trial Identifications

Proper identification of potential suspects in a criminal case implicates due process concerns. The Supreme Court has scribed the considerations relevant to determining whether an identification process is unduly suggestive. Emphasizing that a "totality of the circumstances" must indicate that an identification is reliable, the Court has concluded that, "the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the

criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers,* 409 U.S. 188, 199-200, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401 (1972).

Biggers involved a rape victim that identified a suspect in a show up that occurred seven months after the crime occurred. *Id.* at 195. *Biggers* requires a two-fold inquiry designed to determine if the identification was unduly suggestive, and if so, whether the identification was nevertheless reliable. *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012)The Court noted that few victims of crime have a better opportunity to view their accosters than rape victims. Therefore, despite the lapse of time, the Court found it dispositive that the victim had made no prior identification of the suspect at any show ups, in lineups, or in photo arrays. Thus, they gave great weight to the fact that the victim's record for reliability was good. *Biggers,* 409 U.S. at 201.

When identification is in question, South Carolina requires a hearing outside of the jury's presence. "Where identification is concerned, the general rule is that a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as the 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. Ramsey,* 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001). This approach pre-supposes that the victim made a previous

identification of the suspect that was procured or obtained in a suggestive or otherwise questionable manner.

b. The *Neil v. Biggers* Hearing Itself was Unduly Suggestive

During the pre-trial hearing to validate the victim's out-of-court identification of Pontoo in a photo lineup, it was revealed that the victim had not identified Pontoo as the suspect. On the contrary, three days after the robbery, the victim was shown not one, but two, identical photo arrays. One each one he circled the photo he thought was the suspect. That photo was not of Pontoo, but of a different man. (R. p. 49, lines 1-24). The victim stated that he thought the suspect was one of two people (the other possibility being Pontoo) but he could not pick between them. He therefore circled one of them (not Pontoo) and wrote "50%" next to the photo. (R. p. 50, lines 16-24). He said he could not pick between the two because they were not color photos, and asserted that if he had seen color photos, he could have made the correct choice. (R. p. 50, line 23 - p. 51, line 16).

The victim claimed he had not seen Pontoo, or a picture of him, since the robbery. (R. p. 51, lines 7-16). Nonetheless, despite the fact he could not identify Pontoo three days after the robbery, one year later he claimed that he was "one hundred percent" certain that Pontoo was the robber because, "his face is burned into my brain." (R. p. 51, line 23 - p. 52, line 13). Not surprisingly, when asked if he saw Pontoo in the court, the victim said yes. Incredulously, the first time the victim positively identified Pontoo was when he was in court at the *Neil v. Biggers* hearing. Presumably, he was sitting at the defense table, because when the State asked him,

"You're pointing at the defendant?" The victim responded, "Yes, sir." (R. p. 51, lines 17-22).

This bears repeating - the first time the victim was able to positively identify Pontoo, Pontoo was sitting at the defense table. This is infinitely more prejudicial than an unduly suggestive pre-trial photo array. In fact, the State turned the identity hearing into a one person show-up in the courtroom, with Pontoo sitting at defense counsel table.

Because the victim had previously made an inaccurate identification in the photo array, he was not cloaked with the aura of reliability afforded to the victim in *Biggers*. "There was, to be sure, a lapse of seven months between the rape and the confrontation. This would be a seriously negative factor in most cases. Here, however, the testimony is undisputed that the victim made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup." *Biggers* at 201.

The defense counsel objected to the showing of two separate lineups. (R. p. 64, lines 7-20). The State contended that the photo arrays were not unduly suggestive, citing the fact the victim picked the wrong person. (R. p. 64, lines 22-23). The trial judge overruled the objection to the photo array. (R. p. 65, lines 21-22). During trial, the defense counsel renewed his objection to the introduction to the line-up, which the trial judge noted on the record. (R. p. 210, lines 7-12).

The identification process was so tainted as to be constitutionally infirm. Therefore, Pontoo's convictions should be reversed and the case remanded for a new trial.

CONCLUSION

The trial judge erred by giving incorrect jury instructions that impermissibly shifted the burden of proof, by allowing the State to impeach Pontoo with his silence after invoking Miranda protections, and by permitting an in-court identification process that did not comport with the fundamental right of due process. Thus, Pontoo respectfully requests that this court vacate the convictions of Pontoo and remand the case to the Circuit Court for a new trial.

Respectfully submitted,

By: RM mc

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ATTORNEYS FOR APPELLANT

This 13th day of September, 2016

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability with Rule 211(b) SCACR, and with 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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ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Lexington County
Honorable Thomas A. Russo, Circuit Court Judge
Appellate Case No. 2015-000323

THE STATE,

Respondent,

vs.

RAPHAEL LAMARR PONTOO,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Appellant's appellate challenge to the trial judge's jury instruction on the defense of duress was not properly preserved for appellate review because the specific argument Appellant is currently asserting on appeal was never presented to the trial judge and is vastly different from the argument made by defense counsel during trial. However, regardless of any issue preservation concerns, the trial judge committed no error in instructing the jury because his duress charge accurately indicated Appellant was required to prove that affirmative defense by a preponderance of the evidence.

II.

Appellant's appellate contention the solicitor's cross-examination of him constituted an improper comment of his post-Miranda silence is not properly preserved for appellate review because defense counsel's trial objection to the solicitor's questioning was not sufficiently specific or clear to alert the trial judge defense counsel was raising the argument Appellant is now raising on appeal. However, notwithstanding any issue preservation concerns, the trial judge committed no error in permitting the solicitor to ask the questions he did on cross-examination because those questions did not improperly impeach Appellant with post-Miranda silence and, instead, properly and permissibly impeached Appellant with his prior inconsistent statements that directly contradicted the duress defense he presented during trial.

III.

Appellant's appellate issue with the admission of the in-court identification evidence is not properly preserved for appellate review because the argument Appellant is now raising on appeal was neither raised to nor ruled upon by the trial judge and is markedly different from the argument defense counsel made during trial when objecting to the admission of any identification evidence. However, notwithstanding any issue preservation concerns, the trial judge properly admitted both the out-of-court and in-court identification evidence during Appellant's trial because the out-of-court identification procedure employed in Appellant's case was not unduly suggestive and did not create a substantial likelihood of irreparable misidentification and the in-court identification of Appellant as the robber was not the product of any out-of-court suggestiveness and, instead, was based on the armed robbery victim's observations of Appellant prior to and during the crime.

STATEMENT OF THE CASE

In January of 2014, Appellant Raphael Lamarr Pontoo was arrested following an investigation into an armed robbery and subsequent high-speed vehicle chase that ended in a fatal crash. In June of 2014, the Lexington County Grand Jury indicted Appellant for one count of armed robbery and one count of failure to stop for a blue light resulting in a death. On January 26, 2015, a jury trial was commenced in the Lexington County Court of General Sessions with the Honorable Thomas A. Russo, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to consecutive terms of imprisonment of ten years for armed robbery and twenty years for failure to stop for a blue light resulting in a death. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

In the early morning hours of January 24, 2014, Jonathan Ruple was hanging out with a friend at the Mile High Club, a bar located in West Columbia, South Carolina, when he decided to show his friend his new Hi-Point nine-millimeter pistol. (R. p. 36; p. 38; pp. 218-219). The two then headed out to the bar's parking lot, and Ruple retrieved the pistol from a book bag stowed in the trunk of his car. (R. p. 38; pp. 219-220). At that point, two men, including one who had dreadlocks and was wearing a black t-shirt, light-colored jeans, and a green puffy jacket, approached Ruple and his friend, and the man with dreadlocks introduced himself as "Los" before striking up a conversation with the pair. (R. p. 37; pp. 40-41; pp. 220-221; p. 224). During the conversation, Ruple and the others discussed a wide variety of topics, and Ruple showed the men his gun. (R. p. 39; p. 221). In return, "Los" showed Ruple a .22-caliber revolver he indicated he had obtained earlier that day, and his companion showed Ruple a chrome-plated .25-caliber pistol. (R. p. 39; pp. 221-222; p. 228). The men then continued to converse with one another for roughly ten to fifteen minutes before Ruple put his pistol back into his book bag, secured the bag on the front passenger's seat of his vehicle, and re-entered the bar with his friend. (R. p. 40; pp. 222-223; pp. 225-226).

Over the course of the next hour or two, Ruple socialized and drank with his friend inside the bar while "Los" and four of his companions hung out by themselves nearby. (R. p. 43; pp. 225-226; p. 238). As the night wound down, Ruple decided to head home, and, as he walked towards the exit, "Los" stopped him and asked him where he was going. (R. p. 45; p. 227). In response, Ruple told "Los" he was going home and then exited the bar, chatted outside with his friend for a few minutes, and got into his car to leave. (R. p. 45; p. 227). At that moment, "Los" approached Ruple's car from the passenger's side, knocked on the window, and chatted with

Ruple for a few moments about a set of vehicle rims. (R. p. 46; pp. 227-228). Then, "Los" suddenly stuck his hand into Ruple's vehicle, grabbed the book bag that contained Ruple's gun, and took off running. (R. p. 46; p. 228).

In response, Ruple speedily chased after "Los" and caught him as he tried to get into a vehicle parked nearby. (R. pp. 46-47; p. 228). The two then fought over the book bag for a few moments before "Los" pulled out his revolver and pointed it at Ruple's face. (R. p. 47; p. 228). At that point, Ruple immediately threw up his hands in surrender, and "Los" got into the nearby vehicle and sped away from the area with Ruple's bag. (R. p. 48; pp. 229-230). However, as "Los" fled, Ruple took down the license tag number of the getaway vehicle, and he quickly reported the robbery to the authorities along with a description of the getaway vehicle. (R. p. 48; pp. 90-91; p. 107; p. 128; p. 229).

Shortly thereafter, Trooper Brandon Lee of the South Carolina Highway Patrol spotted a vehicle matching the description and license tag number of the vehicle involved in the armed robbery, and he pulled the vehicle over to the side of the road after it abruptly slowed down upon encountering him. (R. pp. 90-93; pp. 95-96). He then drew his weapon, requested back-up from his fellow officers, and began ordering the occupants out of the vehicle one at a time starting with the driver. (R. p. 93; p. 97). While he was doing so, an individual seated in the rear of the vehicle on the driver's side repeatedly opened his door and had to be commanded to remain in the vehicle. (R. pp. 98-99). That individual then remained in the vehicle while the driver, Carlisle Jones ("Carlisle"), and two of the other passengers, Iquawn Jones ("Iquawn") and Patrick Johnson, exited the vehicle and were secured.[1] (R. pp. 97-99; pp. 247-248; p. 254; p. 276; pp. 279-281; pp. 310-311; p. 334). At that point, one of the individuals remaining in the

[1] Neither Carlisle, Iquawn, nor Johnson had dreadlocks at that time. (R. p. 248; p. 267; pp. 337-340).

vehicle suddenly jumped into the driver's seat and sped off in the vehicle, and several officers at the scene quickly pursued. (R. pp. 99-100; pp. 107-108; p. 248).

Over the course of the next few minutes, the driver of the vehicle led officers on a high-speed chase that reached speeds in excess of one-hundred miles per hour. (R. pp. 108-109; p. 125). The chase continued until the driver, who had dreadlocks that were visible to the pursuing officers, lost control of the vehicle as he approached the intersection of two separate highways, and the vehicle went off the road before crashing into a nearby wooded area. (R. p. 101; pp. 110-111; pp. 117-118; pp. 128-129). The pursuing officers then quickly exited their vehicles and ran to the crashed vehicle. (R. p. 102; p. 131). When they reached it, they found Appellant Raphael Lamarr Pontoo pinned into the driver's seat by a tree branch that went through the vehicle's windshield along with another individual, Alexander Clemmons, unconscious and severely injured in a rear seat.[2] (R. pp. 102-104; pp. 112-114; p. 136; pp. 141-142). Additionally, the officers observed a black Hi-Point nine-millimeter pistol resting on the front passenger's seat in close proximity to Appellant's outstretched hand, and that weapon was quickly secured.[3] (R. p. 114; p. 132; p. 134).

In the ensuing minutes, emergency medical personnel responded to the scene of the crash, and they rapidly transported Clemmons, who was unconscious and unresponsive, to a landing zone so he could be taken to a hospital by helicopter. (R. pp. 140-143; pp. 155-157; pp. 159-160). As they waited for the helicopter, Clemmons's condition began to deteriorate, and paramedic Amanda Sucher from Lexington County Emergency Medical Services removed his clothing, which included an orange jacket and dark jeans, to aid in the provision of medical

[2] At that time, Appellant had dreadlocks and Clemmons had short, frizzy hair. (R. p. 104; p. 110; p. 131; p. 156; pp. 159-160; pp. 165-166; p. 198).

[3] Later on, a book bag, a phone, and several winter coats were located at the scene of the crash, and each of the items was collected as evidence. (R. pp. 169-170; p. 180; p. 185).

treatment. (R. p. 138; pp. 144-146). Upon doing so, she discovered a handgun hidden behind Clemmons's left knee. (R. pp. 146-147; p. 157). Clemmons was then transported to the hospital by helicopter. (R. p. 197).

Meanwhile, firefighters cut into the crashed vehicle to enable Appellant's removal, and Appellant was rapidly transported to the hospital once he was extricated from it. (R. p. 158; p. 162). While Appellant received treatment at the hospital, a .22-caliber pistol fell out of his clothing. (R. pp. 187-188; p. 194). That gun was then secured and subsequently turned over to the Lexington County Sheriff's Office. (R. p. 188). Likewise, officers also obtained Appellant's clothing from the hospital, which included a black t-shirt and light-colored jeans. (R. p. 204-205).

Thereafter, on January 27, 2014, Clemmons succumbed to the traumatic head injuries he sustained in the crash and died. (R. p. 197; pp. 199-200). A few days later, Appellant was released from the hospital, and he was placed under arrest as he left the hospital for his involvement in the armed robbery and Clemmons's death. (R. p. 214). Subsequently, Appellant was indicted for armed robbery and failure to stop for a blue light resulting in a death, and he elected to proceed forward to trial. (R. p. 2; pp. 436-437; pp. 439-440).

At the outset of trial, the trial judge conducted an in camera hearing at defense counsel's request in regard to the admissibility of statements attributed to Appellant subsequent to the fatal crash. (R. p. 11). During the hearing, Detective Garrick testified he and another officer met with Appellant at the hospital on the date of the incident, informed Appellant of his rights, and spoke with Appellant about what had occurred. (R. pp. 16-18; pp. 21-22). As they spoke, the detective stated Appellant became "very argumentative" and repeatedly insisted he did not know anything and did not remember anything before terminating the conversation with the officers. (R. p. 18;

pp. 22-24). Detective Garrick further indicated Appellant was not under arrest and was free to leave at that time, but he acknowledged he asked hospital staff to notify him before Appellant was released from the hospital. (R. pp. 16-18; p. 21). Additionally, Detective Garrick stated he later drove Appellant to the detention center when he was discharged from the hospital, he believed he informed Appellant of his rights at that time but was not certain, he did not ask Appellant any questions, and Appellant stated no one would believe him if the officers hit him. (R. pp. 19-20). Following the presentation of that testimony, Appellant took the witness stand, denied saying anything to Detective Garrick other than stating he did not want to talk to him, and insisted the detective did not inform his of his rights, did not tell him he had a right to remain silent, and did not tell him anything he said could be used against him. (R. pp. 25-28). Appellant further stated he was informed he could not leave, but he admitted hospital personnel told him that as opposed to the officers based on his medical condition. (R. p. 30).

At the conclusion of the hearing, defense counsel challenged the admission of Appellant's alleged statements at the hospital on the grounds Appellant was in custody at the time of the questioning but was not informed of his rights. (R. p. 31). Similarly, defense counsel argued Appellant's alleged statements on the way to the detention center were irrelevant, overly prejudicial, were made while Appellant was in custody, and were made without him being informed of his rights. (R. pp. 30-31). In rebuttal, the solicitor asserted Appellant's statements from the hospital were admissible because Appellant was not in custody at that time and was informed of his rights prior to any questioning. (R. pp. 32-33). The solicitor further asserted the admissibility of Appellant's statements on the way to the detention center was dependent on the defense presented during trial. (R. p. 32). After considering the arguments of counsel, the trial judge found Appellant was not in custody at the time he made the statements in the hospital and,

based on that ruling, made no ruling in regard to whether Appellant had been informed of his rights at that time. (R. p. 34). Likewise, the trial judge ruled Appellant's statements on the way to the detention center were potentially admissible as they were not made in response to any interrogation, but he declined to fully rule on those statements at that time due to the potential issues related to relevancy. (R. p. 34).

Thereafter, the trial judge conducted another in camera hearing at defense counsel's request in regard to the admissibility of identification evidence related to the armed robbery. (R. p. 10; p. 35). During the hearing, Ruple testified about the armed robbery, indicated he had a good opportunity to view the robber's face prior to the robbery, and noted he was only two feet away from the robber when they conversed for ten to fifteen minutes before the crime occurred. (R. pp. 39-40; p. 46). Ruple further noted the area where he spoke with the robber was lit by a street light located only a few feet away. (R. p. 40). Regarding the appearance of the robber, Ruple indicated "Los" had dreadlocks, was roughly 5'9" to 5'10" tall, weighed approximately 180 pounds, and was wearing a green puffy jacket, a black t-shirt, and "silver grayish" jeans. (R. pp. 40-42). Ruple further indicated he got a good look at the robber inside the bar over the next few hours and saw him again when "Los" pointed a gun at him during the course of the armed robbery. (R. pp. 43-44; p. 47). After that, Ruple indicated he was shown two identical black-and-white photographic lineups subsequent to the robbery by Detective Garrick, was provided with no hints or suggestions, and was able to narrow down the robber to the second and fourth individuals depicted in the lineups with complete certainty.[4] (R. pp. 48-50). However, Ruple indicated he was not able to choose between the two with certainty because of the absence of color photographs and ultimately selected the second individual while writing he was only fifty percent certain on the lineup sheets. (R. pp. 49-51). Furthermore, Ruple indicated he was

[4] Appellant was the fourth individual depicted in the photographic lineups. (R. p. 60; p. 211).

completely certain Appellant was the armed robber, was experiencing recurring nightmares of Appellant's face, and would select the fourth individual depicted in the photographic lineups if he could repeat the process again. (R. pp. 51-52).

In addition to Ruple's testimony, Detective Garrick testified during the hearing and recounted the circumstances of the photographic lineup procedure. (R. p. 55). Specifically, the officer indicated he met with Ruple three days after the armed robbery and obtained a description of the suspect from Ruple, which was consistent with Appellant's physical appearance and the clothing Appellant was wearing on the date of the incident. (R. pp. 55-57). Detective Garrick testified he then showed two identical black-and-white photographic lineups to Ruple that contained Appellant's photograph as the fourth individual depicted.[5] (R. pp. 58-60; p. 62). After that, he stated Ruple narrowed the robber down to the second and fourth individuals depicted in the lineup while ultimately selecting the second individual with only fifty percent certainty. (R. pp. 59-60). The detective further indicated he never showed Ruple any pictures other than the ones contained in the photographic lineups and did not advise Ruple he selected the wrong individual. (R. p. 60).

At the conclusion of the hearing, defense counsel generally argued the presentation of two separate photographic lineups was somehow unduly suggestive while also contending the "lineup showing demonstration" was suggestive.[6] (R. p. 64). For those reasons, defense counsel contended both the out-of-court and in-court identifications of Appellant should be excluded.

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[5] Regarding the two identical photographic lineups, Detective Garrick indicated he prepared a second lineup so he would have one to retain in his file. (R. p. 59; pp. 62-63).

[6] Specifically, defense counsel argued: "It's our position that the showing of the two separate lineups and both as far as the face lineup and the gun lineup that that is a suggestive process and we believe that they should be excluded under [Appellant]'s due process rights and the Fifth and Fourteenth Amendments and Article 1, Section 3 of the South Carolina Constitution, his right to a fair trial under the Sixth Amendment of the U.S. and Article 1, Section 14 of the South Carolina Constitution. Your Honor, we believe the lineup showing demonstration was suggestive and it does not meet the standard and therefore they should be excluded any in court identification of [Appellant] and/or the gun should be excluded. Thank you." (R. p. 64).

(R. p. 64). In response, the solicitor argued the identification procedure used was not suggestive and asserted it did not become so simply because two identical copies of the same photographic lineup were shown to Ruple. (R. pp. 64-65). After considering the arguments of counsel, the trial judge ruled the identification evidence was admissible after finding no evidence was presented suggesting the lineups were prepared in a suggestive manner or shown to Ruple in a suggestive fashion. (R. pp. 65-66).

Subsequently, during trial, the law enforcement officers who responded to the report of the armed robbery testified about the details of the stop of the vehicle involved in that crime, the subsequent high-speed chase that followed the stop, and their discovery of Appellant in the driver's seat of the robber's vehicle after it crashed into a heavily wooded area. (R. pp. 90-104; pp. 107-118; pp. 128-134; pp. 246-250; pp. 253-255). Similarly, the medical personnel and other emergency responders involved in the case testified about their responses to the crash and the fatal injuries sustained by Clemmons through that incident. (R. pp. 138-148; pp. 152-166; pp. 196-200). Furthermore, testimony was presented establishing a book bag and a Hi-Point nine-millimeter pistol were recovered from the scene of the crash while a .22-caliber revolver was recovered from the hospital after it fell out of Appellant's clothing there.[7] (R. p. 114; p. 132; p. 134; pp. 169-170; pp. 187-188; p. 194).

In addition to the presentation of that testimony, Detective Garrick testified about his investigation into the crash and subsequent arrest of Appellant for his role in the crimes. (R. p. 201; p. 214). During his testimony, the officer further testified over objection about the photographic lineups he showed to Ruple after the incident, and he noted Ruple selected the second photograph contained in the lineups with an expressed certainty level of fifty percent

[7] Later during trial, Ruple identified the gun recovered from the scene of the crash as the one stolen from him on the night of the incident and confirmed the serials numbers of the recovered gun matched the serial numbers of his gun. (R. p. 236).

despite the fact Appellant's photograph was the fourth one depicted in those lineups. (R. pp. 208-213). Likewise, Ruple testified about the details of the armed robbery that preceded the fatal crash before also discussing the photographic lineups presented to him after the robbery. (R. pp. 218-233). In discussing the lineups, Ruple acknowledged he incorrectly identified the second person depicted, explained he was unable to properly distinguish between the pictures due to their lack of color, and stated he believed at the time of trial the fourth person depicted in the lineups was the robber. (R. pp. 231-233). Moreover, without objection, he identified Appellant in the courtroom as the robber and expressed absolute certainty in his in-court identification. (R. p. 234).

Furthermore, Carlisle and Johnson, two of the Appellant's associates who were present on the night of the armed robbery and fatal crash, recounted their experiences on the night of the incident. (R. p. 262; p. 294). Specifically, regarding that night, they both stated they went to a bar with Appellant, Iquawn, and Clemmons, and each of the men confirmed Appellant was the only one in their group with dreadlocks. (R. pp. 266-269; pp. 296-298). Furthermore, Carlisle stated he observed Appellant snatch a bag out of another person's car when they were all getting ready to leave the bar for the evening, Appellant began "tussling" with a man, Appellant pulled out a gun, and the other man threw up his hands in response. (R. pp. 273-275). After that, Carlisle testified Appellant jumped into their car, he chastised Appellant for what he had done while receiving no response, they were subsequently stopped by a trooper after they went to get something to eat, and someone took off in his car during the course of the stop after he, Iquawn, and Johnson exited the vehicle. (R. pp. 276-282). Similarly, Johnson recounted he was in the car waiting to head home from the bar when he observed Appellant, who he had seen with a black revolver earlier that evening, "tussling" with another man until that man put up his hands.

(R. pp. 294-295; pp. 305-306). Then, Johnson stated Appellant got into the car with a bag and appeared to put something into his pants. (R. p. 305; p. 307). After that, Johnson indicated they went to get something to eat, they were subsequently stopped by a trooper, he was ordered out of the car along with Iquawn and Carlisle, and the car then sped off with Appellant and Clemmons still inside. (R. pp. 308-312).

Thereafter, the State rested its case, and Appellant elected to testify in his own defense. (R. pp. 326-327). During his testimony, Appellant acknowledged he went to the bar with Clemmons and the others on the night of the incident and claimed he observed a man attempt to trade his gun to Clemmons for Johnson's .25-caliber pistol, which he asserted was in Clemmons's possession. (R. pp. 327-331). Subsequent to that, Appellant asserted he got into Carlisle's car to go home and began watching a movie in the car. (R. pp. 331-332). A few minutes later, Appellant claimed Iquawn, Clemmons, and Johnson returned to the car with Johnson in possession of the nine-millimeter pistol that belonged to the man he encountered earlier at the bar. (R. pp. 332-333). After that, Appellant asserted they all went to get food together, he remained in the car while the others did so, they all left the restaurant, they were subsequently stopped by a trooper, and everyone but him and Clemmons was ordered from the vehicle. (R. p. 334). At that point, Appellant claimed Clemmons stated he was not going to jail, grabbed the stolen nine-millimeter pistol, cocked it, pointed it at him, and forced him to drive away from the stop at gunpoint. (R. p. 335). Appellant insisted he then continued to drive until Clemmons grabbed the wheel, and he asserted he could not remember anything after that. (R. pp. 335-336).

Subsequently, during cross-examination, the solicitor questioned Appellant about the firearm he was alleged to have possessed on the night of the incident, and Appellant admitted he

was in possession of a .22-caliber revolver that night, asserted he carried the gun into the bar for "the protection of society," claimed he gave it to Clemmons while inside the bar, and insisted he never got his revolver back. (R. pp. 347-350; p. 359). As the cross-examination continued, the solicitor asked Appellant if he remembered speaking with Detective Garrick at the hospital following the incident, and Appellant – consistent with his earlier in camera testimony – claimed the officer came into the hospital room and he told him he did not want to talk to him. (R. pp. 25-28; p. 374). The solicitor then asked Appellant whether he told the detective at the hospital he did not know anything and did not remember anything about the incident, and Appellant denied that he did while claiming he simply told the officer he did not want to speak with him. (R. p. 374). After that, the solicitor asked Appellant if he admitted to having had an opportunity to tell the detective the story he testified to during trial, and defense counsel objected while simply stating "Fifth Amendment." (R. p. 375). The trial judge then asked for the question to be repeated and, upon hearing the question, ruled Appellant could answer it. (R. p. 375). At that point, Appellant responded he could have told the officer his story that day but did not want to talk to him. (R. p. 375).

Thereafter, the defense rested, and Detective Garrick was called to the witness stand in reply to testify about his meeting with Appellant at the hospital. (R. p. 383; p. 386). During his reply testimony, the detective indicated he informed Appellant of his rights when he met with him at the hospital on the date of the incident. (R. p. 386). At that point, defense counsel renewed his objection from the in camera hearing, and the trial judge overruled the objection. (R. p. 387). Detective Garrick then recounted he asked Appellant to tell him what happened and Appellant responded by repeatedly stating he did not know what happened and did not remember what happened. (R. p. 388).

Following the presentation of that testimony, the State again rested its case, and the trial judge conducted a charge conference to discuss his intended jury instructions with the parties. (R. pp. 388-389). During the charge conference, the solicitor noted duress was an affirmative defense that the defendant was required to prove by a preponderance of the evidence, and the trial judge confirmed his proposed instruction included such language. (R. pp. 390-391). The trial judge then asked defense counsel if he had any issues with the proposed instruction while noting a duress instruction suggested by defense counsel during an off-the-record discussion was covered by his proposed instruction. (R. p. 391). In response, defense counsel conceded he believed the trial judge's proposed instruction to be a correct statement of South Carolina law while asserting he objected to that statement as burden shifting based on his belief a defendant should not "have to prove anything." (R. p. 391). The trial judge then noted defense counsel's objection for the record. (R. p. 392).

As the trial proceeded forward, the parties presented their closing arguments to the jury. (R. pp. 394-409). During his closing argument, defense counsel focused the jury's attention on the fact the State allegedly failed to present any evidence about what occurred in the car prior to the crash and called the jurors' attention to perceived weaknesses and inconsistencies in the evidence presented. (R. pp. 394-398). Thereafter, the solicitor used his closing argument to point out the lack of credibility in Appellant's testimony and discuss the strength of the evidence of Appellant's guilt. (R. pp. 399-409). However, the solicitor made no reference whatsoever to Appellant's failure to provide his allegedly exculpatory story to Detective Garrick prior to trial. (R. pp. 399-409).

At the conclusion of the closing arguments, the trial judge instructed the jury on the relevant and applicable law. (R. pp. 410-420). During his jury instructions, the trial judge

explained to the jury the burden of proof was on the State, the defendant was presumed to be innocent, and the defendant was not required to prove his innocence to the jury. (R. pp. 411-412). Additionally, the trial judge instructed the jury in regard to the elements of the indicted offenses. (R. pp. 415-418). Specifically, in instructing the jury on the offense of failure to stop for a blue light resulting in a death, the trial judge stated:

> Now, he's charged in this case with failure to stop for a blue light resulting in death. In order to prove this crime the State must prove beyond a reasonable doubt that the defendant was driving the motor vehicle on a road, street or highway of this state; that the defendant was signaled to stop by a law enforcement vehicle by means of a sire and/or flashing light, and that the defendant did not stop. An official signal requiring a motorist to stop may be a siren or flashing lights, but both are not required. An attempt to increase speed of a vehicle or in some other manner to avoid the pursuing law enforcement vehicle when signaled by a siren and/or flashing light may be considered as evidence of failure to stop for a blue light. However, it is merely an evidentiary fact to be taken into consideration by you along with the other evidence in this case and is to be given whatever weight that you think it should receive. If you find that the State has proved beyond a reasonable doubt that the defendant failed to stop for a blue light and his actions resulted in the death of another, that would satisfy the elements of the offense of failing to stop for a blue light resulting in death.

(R. pp. 415-416). Furthermore, the trial judge explained to the jury duress or coercion had been raised as a defense in Appellant's case and indicated such a defense had to be proven by a preponderance of the evidence. (R. p. 418).

Following the presentation of those instructions, the trial judge inquired of the parties if they had any objections to his jury instructions aside from defense counsel's earlier objection to the duress instruction. (R. pp. 420-421). In response, both defense counsel and the solicitor stated they did not have any additional objections. (R. pp. 420-421). The jurors then began their deliberations and ultimately convicted Appellant of both of the indicted offenses. (R. p. 421; p. 425). Thereafter, the trial judge sentenced Appellant to an aggregate term of imprisonment of thirty years based on those convictions. (R. p. 434).

ARGUMENT

I.

Appellant's appellate challenge to the trial judge's jury instruction on the defense of duress was not properly preserved for appellate review because the specific argument Appellant is currently asserting on appeal was never presented to the trial judge and is vastly different from the argument made by defense counsel during trial. However, regardless of any issue preservation concerns, the trial judge committed no error in instructing the jury because his duress charge accurately indicated Appellant was required to prove that affirmative defense by a preponderance of the evidence.

Appellant contends the trial judge erred in instructing the jury on the defense of duress. In support of that contention, Appellant maintains the trial judge's duress jury instruction, which placed the burden of proving that defense on Appellant, was defective because the State was allegedly required to prove the "absence of mitigating circumstances," including duress, in order to establish the elements of the offense of failure to stop for a blue light resulting in a death. Initially, any issue in regard to the trial judge's duress jury instruction was not properly preserved for appellate review because the argument Appellant is currently asserting on appeal was never presented to the trial judge and is starkly different from the argument made by defense counsel during trial. However, even if the Appellant's appellate argument was somehow preserved for appellate review, the trial judge committed no error in instructing the jury on the defense of duress, and his jury instructions correctly covered the relevant law applicable to Appellant's case, including in regard to who had the burden of proving the affirmative defense of duress. Appellant's convictions should be affirmed.

A. Issue Preservation

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the trial court a fair opportunity to rule on the

issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Significantly, the application of issue preservation requirements ensures the trial court has an opportunity "to rule properly after it considered all relevant facts, law, and **arguments**." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (emphasis added). Furthermore, the application of such rules prevents an appellant from reserving a known error in the hopes of receiving a favorable outcome at trial and then using that error to obtain another trial in the event the desired outcome does not come to fruition. See State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) ("One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal."); State v. Burnett, 226 S.C. 421, 424, 85 S.E.2d 744, 746 (1954) ("A defendant may not reserve vices in his trial, of which he has notice as here, taking his chances of a favorable verdict, and in case of disappointment, use the error to obtain another trial."); State v. Ballew, 83 S.C. 82, 87, 63 S.E. 688, 690 (1909) ("The general principle that a party can not take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment, is universally recognized and obviously just.").

In order for an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). If an error is not presented to and ruled upon by the

trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Moreover, a party cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); see State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."); 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.").

In the case sub judice, Appellant concedes on appeal the defense of duress generally must be proven by a criminal defendant pursuant to South Carolina law but asserts an instruction informing the jury of the general law regarding the duress defense was not appropriate under the specific circumstances of his case because the State was allegedly required to disprove the existence of duress in order to satisfy its burden of proof regarding the elements of the failure to stop offense. In making that argument, Appellant further maintains the trial judge allegedly incorrectly instructed the jury on the elements of that offense. Importantly though, defense counsel did **not** raise such arguments during trial. Instead, in objecting to the trial judge's proposed jury instruction on duress, defense counsel simply contended – contrary to Appellant's argument on appeal – the general law on duress was incorrect and a defendant should never be required to prove anything.[8] Significantly, defense counsel **never** argued to the trial judge the

[8] Specifically, after the trial judge indicated he intended to instruct the jury the defendant had to prove the defense of duress by a preponderance of the evidence, defense counsel raised the following objection: "Your Honor, I do believe that that is the law of South Carolina, however, I would still object that it is burden shifting and the defendant shouldn't have to prove anything and object to it as his right to a trial under the Sixth Amendment and Article 1 Section 14 of the State Constitution and take an exception to Your Honor's ruling." (R. pp. 391-392).

general duress instruction was inappropriate in his particular case based on a contention the State had the burden of disproving the existence of duress as an element of the offense, and the fact such an argument was not raised was best evidenced by the fact defense counsel specifically indicated he had no objections to the trial judge's jury instructions, including his instruction on the elements of the failure to stop offense, aside from his general disagreement with the duress instruction.[9] See State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) (finding an appellate argument involving a jury instruction to be unpreserved because defense counsel explicitly stated he had no objection to the trial judge's instruction); State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) (holding Rios waived his right to allege error with a jury charge on appeal where the trial court specifically asked if there were any objections to the instructions given and Rios responded there were none). As a result, the trial judge was never presented with an opportunity to consider or rule upon the argument Appellant is now raising on appeal and, in fact, did not consider or rule upon such an argument. See Queen's Grant, 368 S.C. at 372-373, 628 S.E.2d at 919 ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." (citations omitted)); see also Patterson, 324 S.C. at 19, 482 S.E.2d at 767 ("Appellant is limited to the grounds raised at trial.").

Accordingly, because Appellant is raising an entirely different argument in regard to the duress jury instruction on appeal from the one raised to the trial judge and the trial judge never ruled upon Appellant's current argument, Appellant's appellate argument is not properly preserved for appellate review and cannot appropriately be raised or considered on appeal. See State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000) (finding Benton's appellate

[9] Notably, Appellant readily concedes on appeal defense counsel did **not** object to the trial judge's jury instruction on the elements of failure to stop for a blue light resulting in a death. (App. Br. p. 10).

challenge to the trial judge's refusal to give a requested charge was not preserved for appellate review where Benton "argued one ground in support of a circumstantial evidence charge at trial (State only presented circumstantial evidence of intent) and argues another ground in support of the charge on appeal (palm print is circumstantial evidence)."); In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review."); see also State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court "cannot address unpreserved errors"). Appellant's convictions should be affirmed.

B. Propriety of the Trial Judge's Jury Instruction on the Defense of Duress

The purpose of a trial judge's jury instructions is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). When instructing a jury on the law, a trial judge is required to charge only the current and correct law of South Carolina. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003). In doing so, a trial judge is only required to instruct the jury on the substance of the law and **does not** have to use any particular verbiage. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). A trial judge's jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.").

In reviewing a trial judge's jury instructions for error, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); see Todd v. State, 355 S.C. 396, 402, 585

S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation in analyzing whether the defendant's due process rights have been violated."). When reviewing the trial judge's jury instructions, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal."); see also State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied.").

In the case at bar, Appellant raised the issue of duress during trial as a defense to the charge of failure to stop for a blue light resulting in death. As a result, the trial judge instructed the jury on the law regarding duress and – consistent with South Carolina law – explained Appellant had the burden of proving his duress defense by a preponderance of the evidence. See State v. New, 371 S.C. 523, 526-527, 640 S.E.2d 871, 873 (2007) ("Duress excuses the crime but does not negate any element of the offense. . . . Generally, affirmative defenses must be established by a preponderance of the evidence."). Accordingly, because the trial judge's jury instruction on the defense of duress constituted a correct statement of the law in South Carolina, the trial judge committed no error in instructing the jury in Appellant's case. See Sheppard, 357 S.C. at 665, 594 S.E.2d at 472-473 ("A jury charge is correct if it contains the correct definition of the law when read as a whole."); cf. New, 371 S.C. at 526-527, 640 S.E.2d at 873 ("[T]he trial judge properly charged the jury that [New] had the burden to prove his defense of duress by a preponderance of the evidence.").

In arguing to the contrary, Appellant contends – for the first time on appeal – "[t]he absence of mitigating circumstances" is an element of the offense of failure to stop for a blue light and, for that reason, claims he allegedly did not have the burden of proving the existence of duress. See S.C. Code Ann. § 56-5-750(A) ("**In the absence of mitigating circumstances**, it is unlawful for a motor vehicle driver, while driving on a road, street, or highway of the State, to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light." (emphasis added)). Instead, he contends the State had the burden of proving its absence in light of that statutory language. See Smith v. United States, __ U.S. __, 133 S. Ct. 714, 719 (2013) (recognizing the State is only foreclosed from shifting the burden of proving an affirmative defense to the defendant when the affirmative defense negates an element of the crime).

Importantly though, the statutory language identified by Appellant is **not** an element of the failure to stop offense or descriptive of that offense and, instead, is a proviso creating an exception to the offense defined and described by the words that follow. See Cain v. South Carolina Pub. Serv. Auth., 222 S.C. 200, 213, 72 S.E.2d 177, 183 (1952) (" 'The natural and appropriate office of a proviso is to modify the operation of that part of the statute immediately preceding the proviso, or to restrain or qualify the generality of the language that it follows.' " (citation omitted)); see also State v. Clarke, 302 S.C. 423, 425-426, 396 S.E.2d 827, 827-828 (1990) ("The general rule, when dealing with statutory crimes to which there are exceptions, is that the defendant 'has the burden of excusing or justifying his act; and hence the burden may be on him to bring himself within an exception in the statute or to prove the issuance of a license or permit.' . . . [A]n exception to a criminal offense shall be negatived in the indictment only if the language of the exception must be regarded as descriptive of the offense. If not, the exception is a matter of defense and need not be negatived in the indictment. . . . The statutory exceptions

are matters of defense for which a defendant bears the burden of production." (citations omitted)); cf. State v. Stone, 320 S.C. 395, 398, 465 S.E.2d 576, 577 (Ct. App. 1995) ("Although § 20-7-370 has no application to an 'employee lawfully engaged in the sale or delivery of [beer] in an unopened container,' the burden of proving the exception to the statute's application belonged to the defendants and not to the State." (brackets in original)). As a result, the inclusion of the proviso did not shift the standard burden of proof in regard to who was required to prove the defense of duress and, instead, simply created an exception a criminal defendant, including Appellant, could prove to negate any criminal liability that would otherwise result from the proof presented by the State. See State v. Attardo, 263 S.C. 546, 552, 211 S.E.2d 868, 871 (1975) ("It is also well established in case law that when the State has made out a prima facie case under a statute and the defendant claims to fall within an 'exception' or 'proviso' in the statute the burden is on the defendant to establish such a defense."); see also McKelvey v. United States, 260 U.S. 353, 357 (1922) ("By repeated decision it has come to be settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that **it is incumbent on one who relies on such an exception to set it up and establish it**." (emphasis added)).

Significantly, demonstrating the legislature did not intend to require the State to disprove the existence of undefined mitigating circumstances, such a requirement would be virtually impossible to satisfy in light of the fact it would require the State to prove a negative, which ordinarily cannot be done. See Burkhart, 350 S.C. at 265, 565 S.E.2d at 305 (Pleicones, J., concurring in resulting) (recognizing requiring the State to disprove a defense "imposes an

impossible burden on the State" by, in essence, forcing the State to prove a negative); see also State v. Lee, 375 S.C. 394, 402, 653 S.E.2d 259, 263 (2007) (Toal, C.J., dissenting) ("No Court may justifiably ask a litigant to prove a negative[.]"); see generally Piedmont & Arlington Life Ins. Co. v. Ewing, 92 U.S. 377, 378 (1875) ("While it may be easy enough to prove the affirmative of one of these questions, it is next to impossible to prove the negative."). In essence, such a requirement would force the State to prove the absence of any conceivable circumstance that could potentially be construed to be mitigating, which would be impossible to do without the knowledge possessed by the individual actor accused of the crime and would lead to absurb results not permitted by our rules of statutory construction. See Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002) ("[A] court must reject a statute's interpretation leading to absurd results not intended by the Legislature."); State v. Johnson, 396 S.C. 182, 189, 720 S.E.2d 516, 520 (Ct. App. 2011) ("[C]ourts will reject a statutory interpretation that would lead to an absurd result not intended by the legislature or that would defeat plain legislative intention."); cf. Spann v. Phoenix Ins. Co. of Hartford, Conn., 83 S.C. 262, 264, 65 S.E. 232, 233 (1909) ("To hold that the insurer must prove that there was no waiver would impose the impossible task of proving not one fact, but an indefinite number of negatives. It is not conceivable how the insurance company would set about putting in array all the forms which waiver might assume, and proving that it did not do any one of the indefinite number of things which might tend to show waiver."). For that reason, it is clear the legislature intended the "[i]n the absence of mitigating circumstances" language to serve as an exception to the offense as opposed to an element and, as such, intended for a defendant to be required to establish the applicability of that exception in order to benefit from it. See Morrison v. California, 291 U.S. 82, 88-89 (1934) ("The decisions are manifold that within limits of reason and fairness the

burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.").

Accordingly, for the foregoing reasons, the trial judge correctly instructed the jury on the affirmative defense of duress as it related to the offense of failure to stop for a blue light resulting in a death, and his instructions were fully consistent with the relevant and applicable South Carolina law. See Sheppard, 357 S.C. at 665, 594 S.E.2d at 472-473 (recognizing a jury charge is correct if it correctly defines the relevant and applicable law when read as a whole). Under those circumstances, reversal is not warranted in Appellant's case. See Rye, 375 S.C. at 123, 651 S.E.2d at 323 ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied."). Appellant's convictions should be affirmed.

II.

Appellant's appellate contention the solicitor's cross-examination of him constituted an improper comment of his post-Miranda silence is not properly preserved for appellate review because defense counsel's trial objection to the solicitor's questioning was not sufficiently specific or clear to alert the trial judge defense counsel was raising the argument Appellant is now raising on appeal. However, notwithstanding any issue preservation concerns, the trial judge committed no error in permitting the solicitor to ask the questions he did on cross-examination because those questions did not improperly impeach Appellant with post-Miranda silence and, instead, properly and permissibly impeached Appellant with his prior inconsistent statements that directly contradicted the duress defense he presented during trial.

On appeal, Appellant contends the trial judge reversibly erred by permitting the solicitor to question him about his failure to inform Detective Garrick about his duress defense when they spoke with one another in the hospital following the incident. In support of that contention, Appellant maintains the solicitor's questioning constituted an improper comment on his post-Miranda silence in violation of the mandates of the United States Supreme Court's decision in Doyle v. Ohio, 426 U.S. 610, 619 (1976). Initially, Appellant's appellate contention the solicitor's questioning constituted a Doyle violation is not properly preserved for appellate review because defense counsel's trial objection, which was based on the Fifth Amendment, was not sufficiently specific or clear to alert the trial judge a contention was being raised Appellant's due process rights pursuant to the Fourteenth Amendment were being violated. However, notwithstanding any issue preservation concerns, the solicitor's cross-examination of Appellant did not violate the mandates of Doyle because his questioning in regard to Appellant's prior statements to Detective Garrick and failure to reveal his duress defense to the officer did not constitute improper impeachment with post-Miranda silence and, instead, constituted entirely proper impeachment with Appellant's prior inconsistent statements that directly contradicted Appellant's trial testimony regarding his duress defense. Thus, even assuming defense counsel's objection has somehow been sufficient to preserve for review the argument Appellant is now

raising on appeal, the trial judge properly overruled that objection and permitted the solicitor to continue his cross-examination of Appellant. Appellant's convictions should be affirmed.

A. Issue Preservation

Pursuant to our issue preservation requirements in South Carolina, an issue must be raised in a sufficiently specific manner to call attention to the exact error to the trial court. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005); see State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so **it can be reasonably understood by the trial judge**." (emphasis added)). Importantly, "[a] party need not use the exact name of a legal doctrine in order to preserve it[.]" State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). However, in order for an issue to be preserved for review, "it must be clear that the argument has been presented on that ground." Id. Significantly, "[w]here an objection and the ground therefor is not stated in the record, there is no basis for appellate review." State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991); see State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970) ("It is well settled that an issue which has not been presented to or passed upon by the trial judge will not be considered on appeal.").

In Appellant's case, Appellant contends on appeal the trial judge erred by allowing the solicitor to question him in a manner that allegedly constituted a Doyle violation. Importantly though, in objecting to the solicitor's cross-examination of Appellant during trial, defense counsel did **not** indicate he was objecting based on Doyle and did not allege a violation of Appellant's due process rights or rights under the Fourteenth Amendment, which is the constitutional amendment implicated by a Doyle violation. See Doyle v. Ohio, 426 U.S. 610, 619 (1976) ("We hold that the use for impeachment purposes of petitioners' silence, at the time

of arrest and after receiving Miranda warnings, violated **the Due Process Clause of the Fourteenth Amendment**:" (emphasis added)). Instead, defense counsel specifically identified the **Fifth Amendment** as the basis of his objection without providing any further statement of the grounds upon which he was objecting.[10] See Dunbar, 356 S.C. at 142, 587 S.E.2d at 694 ("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**." (emphasis added)); cf. State v. Stahlnecker, 386 S.C. 609, 617-618, 690 S.E.2d 565, 570 (2010) ("At trial, defense counsel argued Victim's statement to Bracken was inadmissible because application of section 17-23-175 violated the ex post facto laws and his right to confrontation. However, defense counsel did not contend Victim's statement constituted impermissible hearsay, that it was unduly prejudicial because it was inconsistent with Victim's trial testimony, or that the State failed to comply with section 17-23-175. Hence, the only issue preserved on appeal is whether section 17-23-175 violated the ex post facto laws.").

Under those circumstances, defense counsel's trial objection was not sufficiently specific or clear to put the trial judge on notice it was based on an alleged violation of the mandates of Doyle, and the objection's lack of clarity was further enhanced by the fact defense counsel had up to that point specifically argued to the trial judge Appellant had **never** been informed of his rights, which, if true, would have meant any questioning regarding Appellant's silence was unquestionably proper. See Brecht v. Abrahamson, 507 U.S. 619, 628 (1993) ("[T]he Constitution does not prohibit the use for impeachment purposes of a defendant's silence prior to arrest . . . or after arrest if no Miranda warnings are given[.] Such silence is probative and does

[10] Notably, by electing to testify in his own defense, Appellant waived his Fifth Amendment privilege against compulsory self-incrimination. See Brown v. United States, 356 U.S. 148, 155-156 (1958) (recognizing a defendant generally waives his Fifth Amendment privilege against compulsory self-incrimination by electing to testify during trial); see also State v. Taylor, 258 S.C. 369, 375, 188 S.E.2d 850, 853 (1972) ("When appellant elected to testify, he waived his right against self-incrimination, and became subject to cross-examination like any other witness.").

not rest on any implied assurance by law enforcement authorities that it will carry no penalty." (citations omitted)); Fletcher v. Weir, 455 U.S. 603, 607 (1982) ("In the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for a State to permit crossexamination as to postarrest silence when a defendant chooses to take the stand."). Accordingly, in light of fact defense counsel's objection was not sufficiently specific and raised on a ground distinct from the ground implicated by a Doyle violation, Appellant's appellate challenge to the solicitor's cross-examination is not properly preserved for appellate review and cannot now appropriately be considered or addressed on appeal. See Prioleau, 345 S.C. at 411, 548 S.E.2d at 216 (instructing an objection must be sufficiently specific such that it can reasonably be understood by the trial judge); 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."); cf. State v. Thomas, 159 S.C. 76, 83, 156 S.E. 169, 171 (1930) ("Counsel for the defendant interposed with what may be liberally construed as a general objection to the admission of this testimony on the ground of irrelevancy. The objection did not set forth the specific grounds contained in the exception, and these grounds, therefore, cannot be considered."). Appellant's convictions should be affirmed.

B. Propriety of the Solicitor's Cross-Examination of Appellant

Ordinarily, when circumstances exist that would naturally lead a defendant to reveal a pertinent fact but the defendant fails to do so, it is proper to question the defendant about his failure to reveal the pertinent fact when an opportunity existed to do otherwise because such a failure can be probative towards issues such as fabrication and credibility. See Jenkins v. Anderson, 447 U.S. 231, 239 (1980) ("Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally

would have been asserted."); see also Brecht, 507 U.S. at 628 (recognizing silence can be probative while noting "if the shooting was an accident, petitioner had every reason – including to clear his name and preserve evidence supporting his version of the events – to offer his account immediately following the shooting"). However, when the defendant's silence follows the giving of Miranda warnings, such silence loses its probative force due to the fact "[s]ilence in the wake of [those] warnings may be nothing more than the [defendant]'s exercise of [those] Miranda rights." Doyle, 426 U.S. at 617. Accordingly, the use of a defendant's post-Miranda silence for impeachment purposes is improper and constitutes a violation of the defendant's due process rights. Id. at 619. "The obvious purpose [of that prohibition] is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions." Edmond v. State, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000); see Wainwright v. Greenfield, 474 U.S. 284, 292 (1986) ("The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony.").

Importantly though, even when Miranda warnings have been given to a defendant, it is **not** improper for a solicitor to cross-examine a defendant who elects to testify during trial about any prior inconsistent statements he may have made. See Anderson v. Charles, 447 U.S. 404, 408 (1980) ("Doyle bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements."); see State v. Simmons, 360 S.C. 33, 39, 599 S.E.2d 448, 451 (2004) ("Doyle does not . . . create a per se rule requiring exclusion from evidence of a defendant's post-arrest, post-Miranda silence in all circumstances."). Critically, "[s]uch

questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent." Anderson, 447 U.S. at 408. In fact, "[a]s to the subject matter of his statements, the defendant has not remained silent at all." Id.; see State v. Kimsey, 320 S.C. 344, 346, 465 S.E.2d 128, 130 (Ct. App. 1995) ("[A] defendant who voluntarily speaks after being given Miranda warnings has not heeded the admonitions of the government and has not in any way relied on governmental assurances, but to the contrary, has chosen not to remain silent.").

In the case sub judice, testimony was presented during an in camera hearing establishing Appellant was informed of his rights at the hospital following the crash, agreed to speak with Detective Garrick, and informed the officer he did not know or remember anything about the incident. Subsequently, during the evidentiary phase of trial, Appellant waived his right to remain silent and elected to testify in his own defense. Thereafter, Appellant readily admitted to the jury he fled from the pursuing law enforcement officers in the getaway vehicle involved in the fatal crash while asserting he only did so because he was acting under duress. See Simmons, 360 S.C. at 40, 599 S.E.2d at 451 ("The underpinnings of Doyle, and the need for its application, are diminished where a defendant waives his right to silence. Here, Simmons did not remain silent 'as to the subject matter of his statements.' "). Thus, through his trial testimony, Appellant asserted to the jury he **remembered** and explicitly **knew** what happened in regard to the incident, which directly contradicted the statements he allegedly made to Detective Garrick at the hospital.

Significantly, because Appellant's prior statements directly contradicted his trial testimony regarding his duress defense, it was entirely appropriate for the solicitor to cross-examine Appellant about that contradiction, including by asking Appellant why he failed to tell

Detective Garrick about how he was acting in duress when he fled from the pursuing officers, and to introduce Detective Garrick's testimony about Appellant's earlier inconsistent post-Miranda statements. See Kimsey, 320 S.C. at 346, 465 S.E.2d at 130 ("When the defendant gives a different version of his involvement in the offense at trial, Doyle does not apply. Cross-examination at that point does not make unfair use of silence, but merely inquires into prior inconsistent statements occasioned by the defendant not remaining silent at all."). Moreover, such questioning did **not** violate Appellant's constitutional rights and did **not** constitute an improper comment on his post-Miranda silence under the circumstances as it merely constituted proper and permissible impeachment with his prior inconsistent statements. Cf. Anderson, 447 U.S. at 408-409 ("We do not believe that the cross-examination in this case can be bifurcated so neatly. The quoted colloquy, taken as a whole, does not refer to the respondent's exercise of his right to remain silent; rather it asks the respondent why, if his trial testimony were true, he didn't tell the officer that he stole the decedent's car from the tire store parking lot instead of telling him that he took it from the street. . . . The questions were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement." (brackets, citation, and internal quotations omitted)). Accordingly, notwithstanding the fact Appellant wholly failed to preserve the issue for appellate review, the trial judge committed no error in permitting the solicitor to cross-examine Appellant in regard to the inconsistencies between his trial testimony and earlier statements to Detective Garrick.[11] See Kimsey, 320 S.C. at 346, 465 S.E.2d at 130

[11] Moreover, even assuming arguendo the solicitor's questioning of Appellant constituted an improper comment on his post-Miranda silence, any error was entirely harmless under the unique circumstances of Appellant's case because the testimony elicited by the solicitor's questions had **already** been presented to the jury by Appellant himself. Specifically, before the solicitor asked the question Appellant now contends constituted a Doyle violation, the solicitor asked Appellant if he remembered talking to Detective Garrick at the hospital after the incident. (R. p. 374). In response, Appellant stated: "He came in and I stated I didn't want to talk to him." (R. p. 374). Thus, through that response, Appellant – without objection – communicated to the jury he had an opportunity to reveal his duress defense earlier but specifically chose not to do so. As a result, the solicitor's subsequent question eliciting identical information was entirely cumulative to the information Appellant already presented to the jury, and, as a

("[I]n this case, Kimsey's testimony at trial was inconsistent with the testimony of Kimsey's confession. Thus, the trial court properly permitted the State to cross-examine Kimsey on the inconsistent statements.").

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result, any error that could have potentially resulted from the solicitor's question was entirely harmless under the unique circumstances of Appellant's case. See State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) ("It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence."); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."); see also State v. Truesdale, 285 S.C. 13, 17, 328 S.E.2d 53, 56 (1984) ("When such a violation occurs, the question remains, however, whether it is cause for reversal or is harmless error beyond a reasonable doubt."), rev'd on other grounds by Truesdale v. Aiken, 480 U.S. 527 (1989); State v. Weaver, 361 S.C. 73, 89, 602 S.E.2d 786, 794 (Ct. App. 2004) ("[A]lthough it is improper for the solicitor to indirectly comment on a defendant's failure to testify, such comments do not necessarily mandate reversal of a conviction. Indeed, a criminal defendant is entitled to a fair trial, not a perfect one."); see generally State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding [of harmlessness]; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.").

III.

Appellant's appellate issue with the admission of the in-court identification evidence is not properly preserved for appellate review because the argument Appellant is now raising on appeal was neither raised to nor ruled upon by the trial judge and is markedly different from the argument defense counsel made during trial when objecting to the admission of any identification evidence. However, notwithstanding any issue preservation concerns, the trial judge properly admitted both the out-of-court and in-court identification evidence during Appellant's trial because the out-of-court identification procedure employed in Appellant's case was not unduly suggestive and did not create a substantial likelihood of irreparable misidentification and the in-court identification of Appellant as the robber was not the product of any out-of-court suggestiveness and, instead, was based on the armed robbery victim's observations of Appellant prior to and during the crime.

Appellant contends the trial judge erred in admitting Ruple's in-court identification of Appellant as the man who robbed him. In support of that contention, Appellant maintains the circumstances surrounding the in-court identification were unduly suggestive and the identification process as a whole violated his constitutional rights. Initially, to the extent Appellant is challenging the identification evidence based on the alleged suggestiveness of the circumstances surrounding the in-court identification, that issue and argument is not properly preserved for appellate review because it was never raised to or ruled upon by the trial judge. However, even if Appellant's appellate argument was somehow preserved for appellate review, the trial judge committed no error in admitting either the out-of-court or in-court identification evidence during Appellant's trial because the out-of-court photographic lineup procedure employed in Appellant's case was neither unduly suggestive nor created a substantial likelihood of irreparable misidentification and Ruple's in-court identification of Appellant as the armed robber was based on his own observations of the robber prior to and during the crime as opposed to being based on the out-of-court identification procedure. Accordingly, the trial judge properly allowed for all the identification evidence to be admitted during Appellant's trial and presented to the jury. Appellant's convictions should be affirmed.

A. Issue Preservation

Amongst the requirements for preserving an issue for appeal in South Carolina, the most basic and fundamental requirement is that an issue must be raised to **and** ruled upon by a trial judge before it can be properly presented for appellate review. 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 judge."); see also State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal."). Moreover, even if an issue is raised during trial, an appellant cannot properly raise new arguments in support of that issue on appeal and, instead, is limited solely to raising the arguments presented to the trial judge during trial. See State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (finding an appellate argument to be procedurally barred while instructing a party cannot argue one ground during trial and another ground on appeal); see also Patterson, 324 S.C. at 19, 482 S.E.2d at 767 (recognizing an appellant is limited on appeal solely to the grounds raised at trial); State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974) ("Only matter that has been ruled on below can be reviewed[.]").

In the case at bar, Appellant contends on appeal the circumstances surrounding the in-court identification of him as the armed robber were unduly suggestive and amounted to a single-person show-up arranged by the solicitor and seeks a reversal of his convictions on that basis. However, during trial, defense counsel did not raise such an argument. Instead, defense counsel sought the suppression of any out-of-court and in-court identification evidence based on the allegedly suggestive nature of the photographic lineup procedure conducted in Appellant's case. Significantly, defense counsel did **not** challenge the admissibility of Ruple's in-court

identification of Appellant based on the alleged suggestiveness of the circumstances surrounding that identification and, in fact, did not even renew his general pre-trial objection to the identification evidence when Ruple identified Appellant before the jury as the armed robber. See State v. Atieh, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) ("A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."). Accordingly, because the argument Appellant is raising on appeal was neither presented to nor ruled upon by the trial judge, that argument is procedurally barred and cannot properly be raised or considered for the first time on appeal. See Rogers, 361 S.C. at 183, 603 S.E.2d at 912-913 (explaining an issue must be raised by the appellant in a timely manner with sufficient specificity and ruled upon by the trial judge in order to be preserved for appellate review); see also Bailey, 298 S.C. at 5, 377 S.E.2d at 584 (instructing a party cannot raise one ground at trial and an alternate ground on appeal). Appellant's convictions should be affirmed.

B. Admissibility of the Identification Evidence

When evidence of an eyewitness identification is introduced during a criminal trial, a defendant may be deprived of due process of law if the identification procedure employed in the particular case was unnecessarily suggestive and highly conducive to **irreparable** mistaken identification. Neil v. Biggers, 409 U.S. 188, 196 (1972). In determining the admissibility of identification evidence, a court must conduct a two-prong inquiry into the matter. See id. at 199-200 (outlining the necessary inquiry regarding out-of-court identifications and the factors to be weighed when determining reliability). That inquiry involves first ascertaining whether the identification process was unduly suggestive and then determining whether the out-of-court identification was nevertheless so reliable no substantial likelihood of misidentification existed.

State v. Govan, 372 S.C. 552, 558, 643 S.E.2d 92, 95 (Ct. App. 2007); see State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) ("Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.").

Importantly, even assuming the particular identification procedure used in a case is found to be unduly suggestive, identification evidence may still be admissible if the State can prove by clear and convincing evidence the identification is reliable notwithstanding the suggestiveness of the identification procedure employed. Govan, 372 S.C. at 559, 643 S.E.2d at 95-96. "Reliability is the linchpin in determining the admissibility of identification testimony." State v. Brown, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct. App. 2003). To determine whether the identification is reliable, a court must look to: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the identification. Govan, 372 S.C. at 559, 643 S.E.2d at 96; see also State v. Scipio, 283 S.C. 124, 127, 322 S.E.2d 15, 17 (1984) ("The reliability of an identification is determined by the facts."). "[I]f the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." Perry v. New Hampshire, __ U.S. __, 132 S. Ct. 716, 720 (2012).

Significantly, "[a] conviction based on a suggestive pretrial photographic lineup and a subsequent in-court identification will be set aside only if 'the photographic identification

procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' " State v. Carlson, 363 S.C. 586, 599-600, 611 S.E.2d 283, 290 (2005) (quoting Simmons v. United States, 390 U.S. 377 (1968)); see Brown, 356 S.C. at 504, 589 S.E.2d at 785 ("Suggestiveness alone does not mandate the exclusion of evidence."). Thus, even where a suggestive out-of-court identification procedure is employed, an "in-court identification is admissible if based on information independent of the out-of-court procedure." Carlson, 363 S.C. at 600, 611 S.E.2d at 290. Critically, the exclusion of evidence is a "drastic sanction" and should be "limited to identification testimony which is manifestly suspect." Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983).

In Appellant's case, the out-of-court identification procedure employed by Detective Garrick was in no way unduly suggestive. Regarding that procedure, the detective prepared a lineup containing photographs of six highly-similar individuals, including Appellant, and showed the lineup to Ruple without doing or saying anything to him that would have suggested he should select a particular individual out of the six depicted. See State v. Turner, 373 S.C. 121, 128, 644 S.E.2d 693, 697 (2007) (finding a photographic lineup not to be unduly suggestive where Turner did not stand out in comparison to the other individuals depicted in the lineup); see also Simmons, 390 U.S. at 383 (characterizing an identification procedure through which a witness is shown pictures of a number of individuals without being informed which one is the suspect as "the most correct" photographic identification procedure). Then, after Ruple determined the robber was either Appellant or another individual and ultimately selected the other individual with a limited degree of certainty, Detective Garrick showed Ruple an identical copy of the lineup and asked him to simply mark the same photograph he had previously marked so the officer would have an extra copy of the lineup for his file. Under those circumstances, the

identification procedure employed in Appellant's case was not suggestive and certainly not unduly suggestive, which was best evidenced by the fact Ruple did **not** single out Appellant as the robber from the lineup. See State v. Patterson, 337 S.C. 215, 230, 522 S.E.2d 845, 852 (Ct. App. 1999) (finding "no evidence whatsoever of suggestiveness" existed where no testimony or other evidence was presented suggesting the officer who showed the photographic lineup to the victim in Patterson's case expressly or implicitly suggested which photograph was of a suspect and where the photographs included in the lineup did not stand out from one another, were of comparable size and composition, and contained subjects that were similar to one another in regard to appearance, age, and physical characteristics); see also State v. Pierre, 284 So. 2d 886, 888 (La. 1973) ("[The victim]'s initial incorrect identification at the line-up is a matter which addresses itself to the weight of the testimony rather than to its admissibility. . . . The record does not show that the police attempted in any way to influence his judgment. To the contrary, the misidentification indicates an absence of prejudicial conduct on the part of those conducting or participating in the line-up." (citations omitted)). Accordingly, the trial judge correctly determined the out-of-court identification evidence was not unduly suggestive.

Likewise, notwithstanding the lack of suggestiveness in regard to the out-of-court identification procedure employed, the out-of-court identification evidence, despite the fact Ruple was not able to conclusively identify Appellant as the robber, was sufficiently reliable such that it did not create a substantial likelihood of irreparable misidentification under the totality of the circumstance of Appellant's case. Looking to the relevant facts establishing the reliability of the identification evidence, Ruple had an excellent opportunity to view the robber as he was able to observe him from only a few feet away in both a lit parking lot and inside a bar over the course of more than an hour and while he engaged in a conversation with him. Cf.

Turner, 373 S.C. at 128, 644 S.E.2d at 697 (finding identification evidence to be reliable where the victim had an ample opportunity to view her assailant at the time of the crime and had a "full facial view of him while he asked her questions"). Additionally, Ruple's attention was naturally focused on the robber due to the fact they spoke with one another prior to the crime and was likely heightened when the robber later pointed a firearm at him during the course of the robbery. See Govan, 372 at 560, 643 S.E.2d at 96 (recognizing a victim's attention would have been heightened during an armed robbery); State v. Blassingame, 338 S.C. 240, 252, 525 S.E.2d 535, 541-542 (Ct. App. 1999) ("A person in fear of his life presumably has a more acute degree of attention to his surroundings than a mere passerby."). Similarly, Ruple provided a detailed physical description of the robber's hair, clothing, and firearm that was fully consistent with Appellant's hair, clothing, and firearm in every respect except in regard to the jacket Appellant was alleged to have been wearing at the time of the crime. Cf. State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct. App. 1993) (finding identification evidence to be reliable even though the victim described the robber as wearing a ski jacket and cap and Johnson was not wearing a jacket or hat when he was apprehended). Furthermore, the photographic lineup was shown to Ruple just three days after the robbery occurred, meaning only a brief period of time elapsed between the crime and the identification procedure. Significantly, the only factor negatively impacting the reliability of the identification evidence was Ruple's inability to conclusively decide between Appellant's photograph and the strikingly-similar photograph of the individual Ruple ultimately tentatively selected. See Commonwealth v. Beverly, 377 Pa. Super. 438, 441, 547 A.2d 766, 768 (Pa. Super. Ct. 1988) ("Prior failures to identify, **and even misidentifications**, do not affect the admissibility of later, independently based identifications." (emphasis added)). However, Ruple explained his lack of certainty was **not** due

to his inability to identify the robber and, instead, was due to the fact the photographs shown to him lacked color. Cf. State v. Washington, 323 S.C. 106, 112, 473 S.E.2d 479, 482 (1996) ("Because the jury had the opportunity to observe the witness and attach the credibility it deemed proper to his testimony, including the certainty or uncertainty of his identification, **the identification is not unreliable**." (emphasis added)). Therefore, under the totality of the circumstances, the out-of-court identification procedure was reliable and did not create a substantial likelihood of irreparable misidentification.

Because the out-of-court identification procedure employed in Appellant's case was not unduly suggestive and did not create a substantial likelihood of irreparable misidentification, Ruple's subsequent in-court identification of Appellant could not be considered to be the product of a suggestive identification procedure arranged by law enforcement and, instead, was based on the observations made by Ruple prior to and during the armed robbery. See Carlson, 363 S.C. at 600, 611 S.E.2d at 290 ("The in-court identification is admissible if based on information independent of the out-of-court procedure."); see also Patterson, 337 S.C. at 231, 522 S.E.2d at 853 (holding the trial judge properly admitted evidence of an out-of-court identification and allowed an in-court identification to be made where the out-of-court identification procedure used was not suggestive and was reliable under the totality of the circumstances). As a result, Ruple's in-court identification of Appellant as the perpetrator of the crime, which he indicated he was able to make with absolute certainty, was wholly admissible during trial, and any issues in regard to the strength, reliability, and credibility of that identification were matters for the jury to consider and resolve. See State v. Lewis, 363 S.C. 37, 42-43, 609 S.E.2d 515, 518 (2005) ("The United States Supreme Court has not extended its exclusionary rule to in-court identification procedures that are suggestive because of the trial setting. . . . [W]e conclude Neil v. Biggers

does not apply to first-time in-court identification because the judge is present and can adequately address relevant problems; the jury is physically present to witness the identification, rather than merely hearing testimony about it; and cross-examination offers defendants an adequate safeguard or remedy against suggestive examinations."); see also Perry, 132 S. Ct. at 728 ("[T]he jury, not the judge, traditionally determines the reliability of evidence."); West v. State, 218 Ga. App. 341, 341, 461 S.E.2d 300, 301 (Ga. Ct. App. 1995) ("The fact that the victim failed to identify [West] in a prior photo spread or photo line-up raises merely an issue of the weight to be given the identification by the jury and does not per se render the subsequent in-court identification inadmissible. . . . In-court constitutional safeguards and trial procedures provide adequate protection to an appellant for testing and impeaching the accuracy of an in-court identification[.]"); People v. Rodriguez, 134 Ill. App. 3d 582, 589, 480 N.E.2d 1147, 1151 (Ill. App. Ct. 1985) ("[S]uggestiveness at trial, absent the taint of extra-judicial suggestiveness, does not offend due process because the trial itself affords the defendant adequate protection. . . . We emphasize, too, that the jury is capable of observing and weighing the suggestiveness of an in-court identification, if that identification is unaffected by extra-judicial suggestiveness." (citations omitted)); cf. Jackson v. State, Ga. App. 500, 502-503, 782 S.E.2d 287, 290 (Ga. Ct. App. 2016) (rejecting a challenge to the admissibility of in-court identification evidence based on the fact the witness who made the in-court identification of Jackson incorrectly identified someone other than Jackson as his attacker during a photographic lineup procedure conducted shortly after the crime and instructing a challenge to in-court identification evidence must be made through cross-examination).

Accordingly, for all the foregoing reasons, the trial judge did not abuse his broad discretion in admitting either the out-of-court or in-court identification evidence during

Appellant's trial, and the admission of that evidence did not violate Appellant's constitutional rights.[12] See Govan, 372 S.C. at 556, 643 S.E.2d at 94 ("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."); cf. Manson v. Brathwaite, 432 U.S. 98, 116 (1977) ("[W]e cannot say that under all of the circumstances of this case there is a 'very substantial likelihood of irreparable misidentification.' Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." (citation omitted)). Appellant's convictions should be affirmed.

[12] Moreover, even assuming the admission of the identification evidence was somehow improper, its admission was entirely harmless because the other evidence presented during trial, which included Carlisle's and Johnson's identifications of Appellant as the armed robber, testimony establishing Appellant was the only individual in the getaway car who matched the description of the armed robber, testimony establishing Appellant was in possession of the weapon used in the armed robbery when he was taken to the hospital, and testimony establishing Ruple's stolen property was recovered from the vehicle Appellant crashed while fleeing from officers, overwhelmingly established Appellant was, in fact, the armed robber. See State v. Thompson, 276 S.C. 616, 621, 281 S.E.2d 216, 219 (1981) ("[Thompson]'s accomplice testified, subject to cross examination, against [Thompson] at trial and identified him in court. In light of the accomplice's damaging testimony and other corroborative evidence linking [Thompson] to the crime, the improper in-court identification by the clerk was merely cumulative to independent and overwhelming evidence of guilt."); see also State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result."); cf. State v. Jenkins, 412 S.C. 643, 652, 773 S.E.2d 906, 910 (2015) ("Notwithstanding the DNA evidence, there was abundant, independent evidence in the record from which the jury could have found [Jenkins] guilty.").

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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August 29, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
AUG 29 2016
SC Court of Appeals

Appeal from Lexington County
Honorable Thomas A. Russo, Circuit Court Judge
Appellate Case No. 2015-000323

THE STATE,

Respondent,

vs.

RAPHAEL LAMARR PONTOO,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies 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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ATTORNEYS FOR RESPONDENT

August 29, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Raphael Pontoo, Appellant.

Appellate Case No. 2015-000323

Appeal From Lexington County
Thomas A. Russo, Circuit Court Judge

Unpublished Opinion No. 2017-UP-467
Heard November 14, 2017 – Filed December 28, 2017

AFFIRMED

Donald L. McCune, Jr., of Savage Law Firm, of Charleston; and Chief Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark R. Farthing, both of Columbia; and Solicitor Samuel R. Hubbard, III, of Lexington, for Respondent.

PER CURIAM: Appellant Raphael Pontoo appeals his convictions of armed robbery and failure to stop for a blue light resulting in death, for which he received

a cumulative sentence of thirty years' imprisonment. Pontoo argues the circuit court erred by (1) giving jury instructions that shifted the burden of proof, (2) allowing the State to impeach him with his silence, and (3) permitting an in-court identification process that did not comport with due process. We affirm.

1. The circuit court correctly instructed the jury on the affirmative defense of duress, and the instructions were consistent with the relevant and applicable South Carolina law. *See State v. New*, 371 S.C. 523, 527, 640 S.E.2d 871, 873 (2007) ("Generally, affirmative defenses must be established by a preponderance of the evidence."); *id.* (finding the burden is on the defendant "to prove his defense of duress by a preponderance of the evidence"); *State v. Attardo*, 263 S.C. 546, 551, 211 S.E.2d 868, 870 (1975) (recognizing the burden of proof is on the party asserting an affirmative defense); *see also Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472–73 (2004) (recognizing a jury charge is correct if it correctly defines the applicable law when read as a whole).

Additionally, Pontoo's argument that the circuit court failed to charge the current and correct law for the offense of Failure to Stop for a Blue Light—specifically, that an element, "in the absence of mitigating circumstances," was omitted from the jury instruction—is not preserved because Pontoo did not raise the argument to the circuit court. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court]. Issues not raised and ruled upon in the [circuit] court will not be considered on appeal.").

2. The circuit court properly permitted the State to impeach Pontoo with his inconsistent statement and pre-arrest silence because Pontoo was not in custody when he was interviewed at the hospital. *See State v. McIntosh*, 358 S.C. 432, 443, 595 S.E.2d 484, 490 (2004) ("The State may point out a defendant's silence prior to arrest, or his silence after arrest but prior to the giving of *Miranda*[1] warnings, in order to impeach the defendant's testimony at trial.").

The evidence supports the circuit court's finding that Pontoo was not in custody when he was questioned at the hospital because the questioning was purely investigative, thus not warranting *Miranda* warnings. *See State v. Doby*, 273 S.C. 704, 707, 258 S.E.2d 896, 899 (1979) ("*Miranda* applies 'only where there has been such a restriction on a person's freedom as to render him "in custody"'" (quoting *State v. Neely*, 271 S.C. 33, 41–42, 244 S.E.2d 522, 527 (1978))); *State v.*

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Morgan, 282 S.C. 409, 411, 319 S.E.2d 335, 336 (1984) ("*Miranda* warnings are not required if the defendant is not in custody or significantly deprived of his freedom."); *id*. at 411–12, 319 S.E.2d at 336–37 (holding *Miranda* warnings are not required when statements are made in response to routine investigation); *State v. Lynch*, 375 S.C. 628, 633, 654 S.E.2d 292, 295 (Ct. App. 2007) ("*Miranda* rights attach only if the suspect is subject to custodial interrogation." (footnote omitted)); *State v. Simmons*, 329 S.C. 154, 157, 494 S.E.2d 460, 462 (Ct. App. 1997) ("The mere giving of *Miranda* warnings does not convert an otherwise non-custodial situation into a 'custodial interrogation.'"); *see also United States v. Jamison*, 509 F.3d 623, 633 (4th Cir. 2007) (holding a defendant was not in custody, such that the privilege against self-incrimination would attach, when police questioned him in the hospital emergency room).

Additionally, Pontoo's argument that his cross-examination and impeachment by the State constituted a *Doyle*[2] violation is not preserved because Pontoo did not raise the argument to the circuit court. *See State v. Morris*, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991) ("Whe[n] an objection and the ground therefor is not stated in the record, there is no basis for appellate review.").

Even if the argument was preserved, the argument is meritless because *Doyle* is not applicable to the facts of this case. *Doyle* prohibits a prosecutor from impeaching and cross-examining a defendant about his failure to tell his exculpatory story to police *after receiving Miranda warnings at the time of his arrest*. *See Doyle*, 426 U.S. at 619 ("We hold that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment."). Our supreme court has held the State commenting on a defendant's *post-arrest* silence is a violation of due process. *See McIntosh*, 358 S.C. at 444, 595 S.E.2d at 490. However, Pontoo was not arrested or in custody; instead, he was given *Miranda* warnings out of an abundance of caution, and his pre-arrest, but post-*Miranda* silence was used against him. We find *Doyle* does not apply in light of the South Carolina cases that have found *Miranda* and its protections inapplicable when a defendant is given *Miranda* warnings but not subjected to custodial interrogation. *See, e.g.*, *Simmons*, 329 S.C. at 157, 494 S.E.2d at 462 (finding field sobriety tests admissible even though the State failed to show the defendant, who had been given *Miranda* warnings, waived *Miranda* rights because the tests were administered pursuant to a routine traffic stop, which did not constitute detainment sufficient to rise to the level of custodial interrogation, and therefore, the defendant was not

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[2] *Doyle v. Ohio*, 426 U.S. 610 (1976).

entitled to *Miranda* warnings at all); *Doby*, 273 S.C. at 707–08, 258 S.E.2d at 898–99 (1979) (finding the principles of *Miranda* were inapplicable at the time the defendant waived his rights because he was not placed under arrest prior to or while giving his confession).

3. Pontoo's argument the circuit court erred in allowing the in-court identification of him—specifically, arguing the *Neil v. Biggers*[3] hearing was unduly suggestive—is not preserved because Pontoo did not raise this specific argument to the trial court. *See State v. Patterson*, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); *State v. Thomason*, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

Although not preserved, the circuit court did not abuse its discretion in permitting the in-court identification of Pontoo at the *Neil v. Biggers* hearing. Pontoo's argument the hearing was unduly suggestive because the first time he was positively identified was when he was sitting at the defense table is without merit. *See State v. Lewis*, 363 S.C. 37, 42, 609 S.E.2d 515, 518 (2005) ("The United States Supreme Court has not extended its exclusionary rule to in-court identification procedures that are suggestive because of the trial setting."); *id*. at 43, 609 S.E.2d at 518 ("[W]e conclude *Neil v. Biggers* does not apply to a first-time in-court identification because the judge is present and can adequately address relevant problems; the jury is physically present to witness the identification, rather than merely hearing testimony about it; and cross-examination offers defendants an adequate safeguard or remedy against suggestive examinations.").

AFFIRMED.

SHORT, KONDUROS, and GEATHERS, JJ., concur.

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[3] *Neil v. Biggers*, 409 U.S. 188 (1972).