STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Howard P. King, Circuit Court Judge

Appellate Case No: 2012-213144

THE STATE,

Respondent,

v.

DOUGLAS J. MAYES,

Appellant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

ARGUMENTS 9

I. The trial court properly admitted the drugs and the chemist's report into evidence because although the drugs had changed from solid to liquid form while in storage, the testing and chemist's report were done prior to the change in form 9

II. The trial court properly admitted the drug scales and baggies into evidence because even though they were misplaced in the sheriff's department's storage room, no evidence was presented that they were ever out of the custody of the department and because they are non-fungible items, establishment of a strict chain of custody was not required 14

CONCLUSION 17

TABLE OF AUTHORITIES

Cases:

Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957) 10

State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001) 10

State v. Foster, 260 S.C. 511, 197 S.E.2d 280 (1973) 15

State v. Glenn, 328 S.C. 300, 492 S.E.2d 393 (Ct. App. 1997) 14, 15

State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011) 9, 10, 11

State v. Joseph, 328 S.C. 352, 364, 491 S.E.2d 275, 281 (Ct. App. 1997) 10

State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 ..... 11, 12

State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004) 15

State v. Taylor, 360 S.C. 18, 598 S.E.2d 735 (2004) 9

State v. Wells, 336 S.C. 223, 426 S.E.2d 814 (Ct. App. 1992) overruled on other grounds by Burgess v. State, 329 S.C. 88, 495 S.E.2d 445 (1998) 9, 16

STATEMENT OF ISSUES ON APPEAL

I.

The trial court properly admitted the drugs and the chemist's report into evidence because although the drugs had changed from solid to liquid form while in storage, the testing and chemist's report were done prior to the change in form.

II.

The trial court properly admitted the drug scales and baggies into evidence because even though they were misplaced in the sheriff's department's storage room, no evidence was presented that they were ever out of the custody of the department and because they are non-fungible items, establishment of a strict chain of custody was not required.

STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Appellant for trafficking crack cocaine more than twenty-eight grams but less than one hundred grams, possession with intent to distribute (PWID) cocaine, and possession of a weapon during the commission of a violent crime. (R.* Indictments.) On October 1-2, 2012, Appellant proceeded to trial before a jury. Wayne Floyd, Esquire, represented Appellant and Assistant Solicitor Michael Ross represented the State. The jury found Appellant guilty of trafficking, guilty of the lesser included offense of simple possession of cocaine, and not guilty of possession of a weapon. (Tr. 479-80.) The Honorable Howard P. King sentenced him to twenty-five years' imprisonment on the trafficking charge and ten years' imprisonment on the possession charge, to be served concurrently. (Tr. 506-07.)

On October 3, 2012, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

On or about December 1, 2010, the Lexington County Sheriff's Department received an anonymous complaint about possible drug activity at Appellant's home. (Tr. 31, lines 5-17.) After confirming the information provided in the tip through a confidential informant (CI), Agent Eric Kirkland arranged a controlled purchase between the CI and Appellant. (Tr. 31, line 20-Tr. 35, line 23.) After conducting a second controlled purchase, Kirkland obtained a search warrant for Appellant's residence. (Tr. 35, line 24-Tr. 39, line 8.) On February 17, 2011, the Narcotics Enforcement Team (NET) entered Appellant's residence, executed the search warrant, and arrested Appellant on charges of trafficking crack cocaine more than twenty-eight grams but less than one hundred grams, PWID cocaine, and possession of a weapon during the commission of a violent crime. (Tr. 200, lines 9-25; Tr. 256, line 3-Tr. 257, line 20; R.* Indictments.)

Pretrial, Appellant's counsel moved to suppress the drugs, arguing the search warrant was issued upon misleading, incomplete information. (Tr. 29, lines 1-10.) The trial court denied the motion. (Tr. 105-09.) Next, he moved to suppress Appellant's statements, which the trial court also denied. (Tr. 121, line 17-Tr. 122, line 5.) Finally, Appellant's counsel asked the trial court to determine whether he would be required to testify as to what the evidence custodian told him regarding whether the drugs were missing at any point. (Tr. 122, line 9-Tr. 123, line 2.) Counsel moved to withdraw in order to testify as to that issue and the trial court denied counsel's motion. (Tr. 148, line 25-Tr. 150, line 25.)

The State called Sergeant Billy Laney, who was the first to enter Appellant's residence on February 17, 2011. (Tr. 171, line 20-Tr. 172, line 20.) He testified that he entered the residence screaming, "Sheriff's Department, Sheriff's Department, police

search warrant." (Tr. 174, lines 7-10.) He entered a bedroom and saw an adult female and a toddler in the bed. (Tr. 174, line 25-Tr. 175, line 10.) He then encountered Appellant in the master bathroom, detained him, and began the search. (Tr. 175, line 2-Tr. 176, line 22.) Sgt. Laney looked through some toilet paper rolls and discovered a baggie of an off-white rock-like substance and a pill bottle. (Tr. 177, lines 19-22.) He testified the substance appeared to be crack cocaine. (Tr. 178, lines 1-4.) He identified photographs of the drugs while on the stand. (Tr. 187, lines 15-23.) He testified that he gave all the drug evidence to Agent Paige Barnes Tucker. (Tr. 179, lines 17-22; Tr. 180, lines 6-24; Tr. 192, lines 11-24.)

Agent Dennis Tracy testified that he was the assigned photographer of all the evidence. (Tr. 210, lines 6-18.) He also testified that he was the one who found the digital scales in the kitchen, but he admitted he forgot to photograph them. (Tr. 210, line 19-Tr. 211, line 5; Tr. 216, lines 20-23.) Agent Paige Barnes [Tucker] testified regarding her role as scribe, explaining that she was the one who took the evidence, bagged it, labeled it, and listed it on the search warrant return. (Tr. 223, lines 4-17; Tr. 230, lines 20-25.) She specified which item was brought to her by which law enforcement officer and explained that she turned all items over to Agent Kirkland after processing them. (Tr. 224, lines 12-15; Tr. 226, line 19-Tr. 230, line 13.)

Next, Agent Eric Kirkland testified regarding his role as lead investigator. (Tr. 254, lines 9-11.) He entered the residence after the entry team had given the all-clear, at which time he saw Appellant in handcuffs. (Tr. 256, line 5-Tr. 257, line 12.) Agent Kirkland read Appellant his Miranda warnings. (Tr. 257, lines 17-25.) He testified that a few minutes later, Agent Laney called out for a camera, saying he had found some narcotics. (Tr. 259, lines 4-19.) Kirkland testified that he asked Appellant if he knew

anything about what was back there and that Appellant said, "It's mine. Everything back there is mine." (Tr. 259, lines 21-23.) Kirkland explained that Agent Barnes released the evidence to him and he placed it all in a Best kit and delivered it to the Lexington County Sheriff's Department evidence room. (Tr. 266, lines 1-25.) Kirkland testified that he later checked out the evidence on September 6, 2011, to discuss the case with the solicitor. (Tr. 272, line 16-Tr. 273, line 7.) The drugs had already been tested at that time and were still in rock form, and he returned the evidence in the same condition it was in when he checked it out. (Tr. 273, lines 8-17; Tr. 274, line 15-Tr. 275, line 1.)

Candy Kyzer, an evidence custodian at the Lexington County Sheriff's Department, testified that she received the Best kit from Kirkland, verified the seals were intact, and stored the kit in a temporary drug lab box. (Tr. 302, lines 5-22.) She testified that the drug storage room is not air-conditioned. (Tr. 319, lines 2-3.) On February 22, 2011, she signed out the drug evidence to chemist Emily Homer and Homer returned it on March 29, 2011. (Tr. 302, line 25-Tr. 303, line 23.) Kyzer recalled that on May 15, 2012, solicitor Colleen Dixon came to view the evidence and noticed there was liquid inside the Best kit. (Tr. 305, lines 1-9.) Kyzer notified Homer and signed the drugs back out to Homer on that date. (Tr. 305, lines 19-24.)

Kyzer testified she received a set of baggies and scales on February 17, 2011. (Tr. 308, lines 8-16.) She signed them in and placed them in a banker box for miscellaneous items in a separate storage room than where the drugs are stored. (Tr. 308, line 8-Tr. 309, line 5.) Kirkland signed them out on September 6, 2011, for approximately two hours, after which Kyzer placed the items back into the box. (Tr. 309, lines 9-25.) In October of 2011, Kyzer received a call to pull all items in the case and was unable to find the baggies and scales. (Tr. 311, lines 9-18.) Deputy Joe Hart located

the items a couple of weeks later. (Tr. 311, line 23-Tr. 313, line 3.) Kyzer testified that the items were within the custody of the Lexington County evidence room the whole time. (Tr. 313, lines 16-24.) She identified the baggies and scales, which were stapled together, in court. (Tr. 310, lines 1-24.)

Beth Harmon, another evidence custodian, testified that she received the Best kit back from Homer on July 31, 2012, and misfiled it. (Tr. 334, lines 15-24.) She noticed on August 3, 2012, that it was misfiled and when she took it out to refile it, it leaked on her due to a crease in the seal that allowed the liquid to seep out. (Tr. 335, lines 6-24.) Harmon notified her supervisor, who contacted the lieutenant of the narcotics division. (Tr. 336, lines 20-23.) They examined the package and heat-sealed it in a K-pack bag. (Tr. 336, lines 23-25.) She testified that she initialed the heat seal, and she was able to confirm her initials, the seal, and the condition of the package when shown State's Exhibit 16. (Tr. 337, lines 12-25.) Harmon testified the drug storage room is not air-conditioned and that she knew of one other case in which crack cocaine had melted in the storage room. (Tr. 338, line 16-Tr. 339, line 13.)

Emily Homer, the chemist at the Lexington County Sheriff's Department, testified she tested the drugs and found crack cocaine and cocaine. (Tr. 348, lines 19-21; Tr. 350, lines 2-10.) She testified regarding her general handling procedures, explaining she has a safe in her lab where she stores evidence she is working on and that only she has access to it. (Tr. 349, line 3-14.) She stated that all the drugs were in solid form when she tested them. (Tr. 351, lines 2-7.) She memorialized her tests into a report, which the State introduced into evidence. (Tr. 351, line 8-Tr. 352, line 8.) Appellant objected to the report and the trial court withheld its ruling. (Tr. 352, lines 10-20.) Homer testified that she was contacted by the solicitor and viewed the drug evidence again, noting it was

slurry—part liquid and part solid. (Tr. 354, line 18-Tr. 355, line 11.) She acknowledged she had seen cases where drugs melted in the storage room before. (Tr. 355, lines 15-17.) She testified the fact that the drugs became liquefied did not affect her report or conclusion in any way. (Tr. 361, lines 13-17.) On cross-examination, Appellant asked her about the very small sample she tested and the fact that she did not test for adulterants. (Tr. 363, line 2-Tr. 365, line 7; Tr. 366, lines 4-20.)

When the State offered the drugs and the chemist's report into evidence, Appellant objected on the ground the report could not come in unless the drugs came in. (Tr. 369, lines 22-Tr. 370, lines 15.) He objected to the drugs on the ground they were not in the same form as they were at the time they came into custody. (Tr. 356, lines 23-Tr. 357, line 16.) The trial court addressed Appellant's objections to both the report and the drugs, noting the testing was conducted prior to the drugs changing form. (Tr. 370, lines 10-21.) The trial court further pointed out that Homer had already testified to the results of her test without objection and that no objection was made to the chain of custody before she testified as to the results of the test. (Tr. 372, lines 7-18.) The trial court ruled the report would be admitted. (Tr. 372, lines 19-21.) The trial court next addressed the drug evidence, allowing extensive arguments from both counsel. (Tr. 372-77.) The trial court admitted the drugs subject to Appellant's objection, noting the objection was not based on chain of custody but rather on the issue that they were not in the same form. (Tr. 377, line 20-Tr. 380, line 2.)

After the State rested, Appellant moved for a directed verdict, arguing the State failed to establish proof of guilt. (Tr. 388, lines 20-25.) The trial court denied the motion. (Tr. 393, lines 4-7.) Appellant then renewed his objection to the admission of the scales and baggies, arguing there was a break in the chain of custody because they

were missing. (Tr. 393, lines 9-16.) The trial court disagreed that they were missing, pointing out there was no evidence they ever left the evidence room. (Tr. 393, lines 17-24.) Furthermore, the trial court noted that because the scales and baggies were non-fungible goods, they could be identified whether they had been missing or not. (Tr. 393, line 25-Tr. 394, line 15.) Appellant then renewed his objection to the admission of the drugs because they were in a different form at trial than when they were seized. (Tr. 395, lines 22-25.) The trial court again denied the directed verdict motion. (Tr. 397, lines 8-18.)

Ultimately, the jury found Appellant guilty of trafficking crack cocaine, guilty of the lesser included charge of simple possession of cocaine, and not guilty of possession of a weapon during the commission of a violent crime. (Tr. 479-80.) Judge King sentenced him to twenty-five years' imprisonment for the trafficking charge and ten years' imprisonment for the simple possession charge. (Tr. 506-07.)

ARGUMENTS

I.

The trial court properly admitted the drugs and the chemist's report into evidence because although the drugs had changed from solid to liquid form while in storage, the testing and chemist's report were done prior to the change in form.

Appellant argues the trial court erred in admitting the drugs and the chemist's report into evidence when the drugs changed form from solid into liquid such that the State could not provide the evidence as it was seized. Contrary to Appellant's argument, the fact that the drugs had changed from solid to liquid form prior to trial did not prevent the State from making the drug evidence available. The State provided testimony from the officers who found the drugs, the evidence custodian who stored the drugs, and the chemist who tested the drugs as well as the chemist's report. Whether the drugs were in the same form at the time of trial did not affect their admissibility and the trial judge properly denied Appellant's motion to suppress.

"The admission of evidence is addressed to the sound discretion of the trial judge." State v. Taylor, 360 S.C. 18, 23, 598 S.E.2d 735, 737 (2004). "On appeal, the question presented is whether the trial court's decision is controlled by an error of law or is without evidentiary support." Id. "If there is any evidence to support the trial judge's decision, the appellate courts will affirm it." Id. Any defects in the chain of custody would only go to the weight or credibility of the evidence, not to its admissibility. State v. Wells, 336 S.C. 223, 230, 426 S.E.2d 814, 817 (Ct. App. 1992) overruled on other grounds by Burgess v. State, 329 S.C. 88, 495 S.E.2d 445 (1998).

A party offering into evidence fungible items such as drugs must establish a chain of custody as far as practicable. State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753

(2011). "Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis." Id. (citation omitted) (emphasis added). While the proof of chain of custody need not negate all possibility of tampering, it must establish a complete chain of evidence as far as practicable. Id. "The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be." Id. at 95, 708 S.E2d at 755. In Hatcher, the Supreme Court found "[t]he record here indicates the drugs received for testing were in fact, those taken from Hatcher without any alteration, tampering, or substitution." Id.

In State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001), our Supreme Court found no error when the trial judge denied the appellant's motion to suppress the murder weapon and any testimony regarding it because the gun had been destroyed by the police. The police destroyed it following normal procedures for unclaimed weapons because nothing on the gun indicated it was related to Cheeseboro's case. Id. at 537-38, 552 S.E.2d at 306-07. The Supreme Court found Cheeseboro failed to demonstrate any evidence of bad faith, specifically stating, "While there is evidence of a lack of care, there is no evidence of an intentional destruction of relevant evidence in this case." Id. at 539, 552 S.E.2d at 307.

Here, Appellant also did not provide evidence of bad faith. The only evidence ever presented to explain why the drugs had changed from solid to liquid form was that the lack of air conditioning in the evidence room had caused the drugs to melt. (Tr. 319, lines 2-3; Tr. 355, lines 15-17.) While this could possibly be described as a lack of care (although the officers and evidence custodians at the sheriff's department likely have little control over building improvements), it certainly does not rise to the level of bad

faith. Furthermore, the focus for chain of custody is the time between the taking and the analysis. Hatcher, 392 S.C. at 91, 708 S.E.2d at 753. What happens after analysis is of no moment. Witnesses were able to identify the drugs and explain the condition they were in. Ultimately, the fact that the drugs changed form after they had been tested does not affect the results of the testing Homer conducted on the drugs.

Additionally, Appellant argues he suffered prejudice from the drugs melting because he was unable to have an independent evaluation done. However, the drugs were not discovered to have melted until May of 2012. Appellant's case had been called for trial in October of 2011 and was continued because of the misplaced scales and baggies. Notably, Appellant did not request the drugs so that he could have an independent evaluation done in preparation for the original October 2011 trial date. Additionally, at trial, Appellant did not argue that he was unable to test the drugs. His only argument regarding prejudice was that in October 2011, he was told the drugs had been misplaced but at the time of the trial, he was told they were never misplaced. (Tr. 144, lines 2-9; Tr. 146, lines 5-7.)

State v. Mabe, 306 S.C. 355, 412 S.E.2d 386, is instructive in this situation. Initially, Mabe pled guilty to trafficking in cocaine, but he was granted post-conviction relief and received a trial. Mabe, 306 S.C. at 357, 412 S.E.2d at 387. Prior to the trial, he requested an independent analysis of the drugs under Rule 6(d), SCRCrimP. Id. at 357, 412 S.E.2d at 387-88. However, the sheriff's department had already destroyed the cocaine according to its routine procedures. Id. at 357, 412 S.E.2d at 388. Mabe moved to suppress the SLED report of the analysis of the cocaine, and the trial judge granted his motion. Id. The State appealed, and the Supreme Court reversed the trial court's decision. The Court stated:

> When a chemist or analyst signs a report of chemical analysis, he certifies that he properly tested the materials delivered to him under SLED procedures, that the procedures are legally reliable and that the material is or contains the substances stated. . . . Included in the opportunity to present a complete defense is a defendant's privilege to request and obtain material evidence from the state for testing. The question becomes whether the right to independent testing is absolute so that due process is violated when evidence is destroyed before a defendant has the opportunity to conduct an independent analysis.
>
> The state does not possess an absolute duty to preserve potentially useful evidence which could be subjected to tests which might exonerate a defendant. A defendant must demonstrate either that the state destroyed evidence in bad faith, or that the state destroyed evidence that possessed an exculpatory value that is apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means.

Id. at 358-59, 412 S.E.2d at 388. The Court noted the cocaine had no apparent exculpatory value but pointed out that Mabe could "attack the accuracy of the chemical analyst's methodology and equipment, or introduce any other evidence which might contradict the report of chemical analysis." Id. at 359, 412 S.E.2d at 389.

Here the drugs were not deliberately destroyed in accordance with procedure, but the change in form of the evidence (due to lack of air conditioning) was not the result of bad faith. Similarly to Mabe, the drugs had already been tested and memorialized in the chemist's report. Thus, just as in Mabe, they had no exculpatory value. In this case, there is the added fact that Appellant never attempted to have the drugs tested before the first time the trial was to be called. Although the circumstances between Mabe and this case are quite different, the underlying issue of destruction of evidence after testing does apply here. Like in Mabe, Appellant was able to attack the chemist's report in other ways, such as methodology and equipment. Indeed, he asked her on cross-examination

about the very small sample she tested and the fact that she did not test for adulterants. (Tr. 363, line 2-Tr. 365, line 7; Tr. 366, lines 4-20.)

In sum, the trial court properly admitted both the drugs and the chemist's report into evidence. The fact the drugs melted after being tested by the chemist, the results of which were memorialized in a written report, does not affect the admissibility of the evidence. Accordingly, the trial court did not err in denying Appellant's motion to suppress the drugs and overruling his objection to the chemist's report.

II.

The trial court properly admitted the drug scales and baggies into evidence because even though they were misplaced in the sheriff's department's storage room, no evidence was presented that they were ever out of the custody of the department and because they are non-fungible items, establishment of a strict chain of custody was not required.

Appellant argues the trial court erred in admitting the drug scales and baggies into evidence because there was no clear chain of custody due to the fact they were missing for two weeks. However, the trial court correctly admitted the evidence because there was no evidence the items ever left the evidence room, and the scales and baggies were non-fungible goods that could be identified whether they had been missing or not. Therefore, the trial court's ruling was proper and should be affirmed.

"While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence—that is, evidence that is unique and identifiable—the establishment of a strict chain of custody is not required[.]" State v. Glenn, 328 S.C. 300, 305, 492 S.E.2d 393, 395 (Ct. App. 1997). "If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition." Id. at 305-06, 492 S.E.2d at 395 (citations omitted).

First, no testimony was presented that the scales and baggies were ever out of the evidence storage warehouse. Kyzer testified she received a set of baggies and scales on February 17, 2011. (Tr. 308, lines 8-16.) She signed them in and placed them in a banker box for miscellaneous items in a separate storage room than where the drugs are

stored. (Tr. 308, line 8-Tr. 309, line 5.) Kirkland signed them out on September 6, 2011, for approximately two hours, after which Kyzer placed the items back into the box. (Tr. 309, lines 9-25.) In October of 2011, Kyzer received a call to pull all items in the case and was unable to find the baggies and scales. (Tr. 311, lines 9-18.) Deputy Joe Hart located the items a couple of weeks later. (Tr. 311, line 23-Tr. 313, line 3.) Kyzer testified that the items were within the custody of the Lexington County evidence room the whole time. (Tr. 313, lines 16-24; Tr. 329, lines 5-10.) She identified the baggies and scales, which were stapled together, in court. (Tr. 310, lines 1-24.)

Second, even if the items were missing, the trial court properly admitted them within its broad discretion based on the testimony that they were the items in question. Glenn, 328 S.C. at 305, 492 S.E.2d at 395. The trial court correctly pointed out that they are non-fungible items and, thus, are not required to have a strict chain of custody. The fact that the items were identified in court as being the same resolves any issue that they may have been changed or tampered with in any way. The trial court was correct in its analysis of how non-fungible items can easily be identified at any time and, thus, are treated differently from fungible items when it comes to chain of custody. Appellant admitted he agreed that fungible and non-fungible items have different rules; his only argument was that the scales and baggies were not identifiable because they did not have serial numbers. However, as long as the item is unique and identifiable, there is no requirement that it have a serial number. See State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004) (finding a purse was a non-fungible piece of evidence and chain of custody was not required for its admission); State v. Glenn, 328 S.C. 300, 492 S.E.2d 393 (Ct. App. 1997) (finding a porcelain fragment was unique and readily identifiable and, thus, fell under the rule for non-fungible evidence); State v. Foster, 260 S.C. 511, 197

S.E.2d 280 (1973) (affirming the admission of tools that were identified by police through markings and were properly connected to the defendants and the crime); State v. Wells, 336 S.C. 223, 230, 426 S.E.2d 814, 817 (Ct. App. 1992) overruled on other grounds by Burgess v. State, 329 S.C. 88, 495 S.E.2d 445 (1998) (affirming the admission of clothes seized from the defendant's home that were allegedly worn during the crime, even though the officer who seized the clothes could not testify about the handling of the clothes in the evidence room.).

Because the scales and baggies were non-fungible, easily identifiable items that were in fact identified at trial by the evidence custodian, the trial court properly admitted them into evidence despite the fact evidence was provided that they were misplaced for approximately two weeks in the evidence warehouse. Its decision was within its broad discretion and should be affirmed.

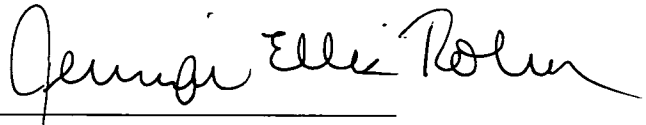
CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

BY: 
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ATTORNEYS FOR RESPONDENT

September 20, 2013

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THE STATE,

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v.

DOUGLAS J. MAYES,

Appellant.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

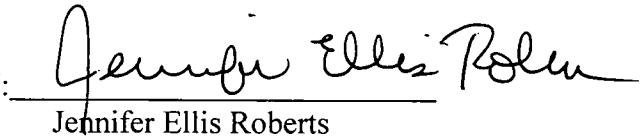
Trial transcript pages 29, 105-09, 121-26, 148-50, 187, 192, 200, 216, 230, 266, 272-75, 319, 352-55, 363-66, 480.

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

BY: 
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ATTORNEYS FOR RESPONDENT

September 20, 2013

STATE OF SOUTH CAROLINA

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Appeal from Lexington County
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Appellate Case No: 2012-213144

THE STATE,

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Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 20th day of September, 2013.

Angela Bennett

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