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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Horry County
Honorable Michael S. Holt, Circuit Court Judge
Appellate Case No. 2026-000111

THE STATE,

Respondent,

vs.

COREY TYLER BUSCH,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

"Did the Court of Appeals err holding (1) the contested evidence, state's exhibit 31, toboggan hat, and state's exhibit 32, bandana, were non-fungible and (2) the state presented a sufficient chain of custody where the DNA evidence collected from the clothing items was fungible and where the state did not present testimony as to who found and collected the evidence?"[1]

COUNTER-STATEMENT OF ISSUE ON CERTIORARI

Did the Court of Appeals somehow by affirming the trial judge's decision to admit both the toboggan hat and bandana into evidence during trial when: (1) the testimony and evidence presented demonstrated those non-fungible items were, in fact, the same toboggan hat and bandana found along the robber's trail and were in substantially unchanged condition by the time of trial; and (2) even if more had to be shown despite the non-fungible nature of those items, the chain of custody was sufficiently established as far as practicable under the circumstances involved such that there was a reasonable probability the toboggan hat and bandana had not been changed in any important respects since the time they were found?

[1] Earlier, in the brief he submitted to the Court of Appeals, Busch framed the issue a bit differently and as follows: "Whether the trial court erred admitting state's exhibit 31, toboggan and state's 32, bandana where the state failed to establish a sufficient chain of custody?" (App. Br. p. 1).

STATEMENT OF THE CASE

Procedural History

In September of 2019, Petitioner Corey Tyler Busch, an experienced criminal, was arrested following an investigation into an armed robbery that occurred a few days earlier.[2] In December of 2019, the Horry County Grand Jury indicted Busch for armed robbery. On February 13, 2023, a jury trial was commenced in the Horry County Court of General Sessions with the Honorable Michael S. Holt, circuit court judge, presiding. At the conclusion of the four-day trial, the jury convicted Busch as indicted. Following the verdict, the trial judge sentenced Busch to a sixteen-year term of imprisonment. Busch then timely filed and perfected an appeal.

On appeal, the Court of Appeals—following briefing—issued an unpublished opinion in which it unanimously affirmed Busch's conviction and sentence. State v. Busch, Op. No. 2025-UP-328 (S.C. Ct. App. filed Oct. 1, 2025). Thereafter, Busch petitioned the Court of Appeals for rehearing, and the petition was denied. Busch then filed a petition for a writ of certiorari in the Supreme Court.

Factual History

A little before 7:00 a.m. on the morning of September 18, 2019, a man wearing a hooded sweatshirt jacket with the hood pulled over his head and a bandana that was partially covering his face sprang up from behind a bush and emerged from a wooded area adjacent to the parking lot of a Dunkin' Donuts store located in Surfside Beach, South Carolina. (R. pp. 16-18; p. 26; p. 31; p. 195; State's Ex. # 28 (Surveillance Recording)). He proceeded to then duck his head

[2] During the sentencing proceedings, the solicitor recounted Busch's lengthy criminal history, which spanned more than two decades and including several prior robbery convictions. (R. p. 266).

down and hurriedly go into the store. (R. p. 18; State's Ex. # 28). Unfortunately for the people inside, he was not there for coffee or doughnuts. (R. p. 19; pp. 213-216).

Upon entering, the masked man rushed toward the employees at the cash registers while menacingly pointing something tucked inside his sleeve at them. (R. p. 19; pp. 213-216; State's Ex. # 28). As he did so, he shouted out he had a gun, threatened to shoot them, and demanded they hand over the store's cash. (R. p. 19; p. 27; pp. 215-216). In response, one of the frightened employees opened the registers and quickly handed over the money inside, which consisted of approximately $200 in small denominations. (R. pp. 19-20; pp. 216-218; State's Ex. # 28). The masked man grabbed the money and shoved it into his pocket. (R. p. 20; pp. 23-24; p. 217; State's Ex. # 28). He then fled from the store and scurried back into the woods. (R. p. 20; pp. 23-24; p. 217; State's Ex. # 28).

Once the robber was gone, the store's employees quickly alerted the police of what had occurred, and officers from the Horry County Police Department rapidly responded to the scene. (R. p. 20; pp. 37-38; p. 66; pp. 134-135). Upon arriving there, the officers spoke with the eyewitnesses, reviewed the surveillance footage, and determined the direction in which the robber fled. (R. pp. 28-31; pp. 174-175). In addition to that, a bloodhound tracking team was dispatched to the scene as quickly as possible. (R. pp. 31-33; pp. 37-38; pp. 53-54).

During the ensuing track that began around 8:15 a.m., the multi-officer tracking team's first dog—a bloodhound named Gabby—followed the robber's scent from the spot in the store's parking lot where he was last seen, through the adjacent wooded area, and along a water-filled ditch or canal in which a hooded sweatshirt, toboggan hat, and bandana consistent with what the robber was wearing had been abandoned. (R. pp. 40-47; pp. 52-53; pp. 63-74; p. 179; State's Ex. # 3 (Aerial Map)). Gabby continued tracking to a nearby porta-john containing sweatpants that

appeared to have also recently been abandoned there, but she became tired and distracted at that location.[3] (R. pp. 42-45; p. 56; pp. 61-63; State's Ex. # 3). As a result, the tracking team's second dog—a hound named Bella—took over. (R. pp. 44-45; p. 56; pp. 61-63). Bella quickly picked up the trail at the toboggan hat the officers had spotted and recovered from the ditch, followed it by the porta-john and a nearby bus stop, went through an old golf course, and stopped outside a particular apartment building at an apartment complex. (R. pp. 44-47; p. 53; p. 56; p. 58; pp. 61-62; pp. 68-69; p. 74; pp. 83-84; State's Ex. # 3).

As the investigation into the incident continued, the officers were able to identify Busch—who lived at the apartment building where Bella finished her track—as a suspect in the robbery, and he was arrested at his apartment within just days of the crime. (R. p. 74; p. 114; p. 137; pp. 184-186; p. 205; pp. 276-277). At the time of his arrest, Busch was in possession of a quantity of cash consistent with what had been taken during the robbery. (R. pp. 185-186; p. 207). Similarly, inside the apartment, officers found a handgun, a pair of shoes consistent with the shoes worn by the robber, and distinctive teal clothing that had recently been washed.[4] (R. p. 180; pp. 187-190; State's Ex. # 25 (Photograph); State's Ex. # 26 (Photograph)). Significantly, on the surveillance footage of the incident, the robber appeared to be wearing the same distinctive teal clothing underneath his hooded sweatshirt. (R. p. 179; State's Ex. # 14 (Surveillance Photograph); State's Ex. # 15 (Surveillance Photograph); State's Ex. # 25; State's Ex. # 28).

[3] As part of their investigation, the officers photographed the sweatpants found abandoned in the porta-john, but they elected not to collect that particular item because it was "covered in other people's feces and urine." (R. pp. 68-69; p. 72; State's Ex. # 8 (Photograph)).

[4] The handgun belonged to Busch's roommate, so the officers decided to only photograph it. (R. pp. 204-205).

Ultimately, Busch was indicted for armed robbery in connection to the Dunkin' Donuts heist, and he elected to proceed forward to trial. (R. p. 2; pp. 274-275). During trial, several employees from the store recounted what occurred during the terrifying incident. (R. pp. 16-27; pp. 211-218). Likewise, Detective Sean Wydra, the lead investigator assigned to the case, and other officers involved in the response to the armed robbery detailed how their investigation led to and culminated in Busch's arrest. (R. pp. 28-33; pp. 37-84; pp. 114-115; pp. 134-138; pp. 174-207). Additionally, Tyler Savinski, a high school student at the time of the incident, recounted he encountered Busch—whom Savinski identified both in the courtroom and in an out-of-court photographic line-up—on the morning of the robbery while waiting at the bus stop located near the store, Busch was wearing the same teal clothing later found in Busch's apartment, and Busch proceeded to give him a handful of $1 bills during that odd early-hour encounter.[5] (R. pp. 104-110; p. 114; p. 269; State's Ex. # 10 (Photographic Line-Up); State's Ex. # 11 (Photograph)). Furthermore, testimony and evidence was presented—without objection—establishing there was an exceedingly high likelihood Busch's DNA was present on the toboggan hat and bandana recovered along the robber's path of flight, and further testimony and evidence was presented demonstrating Busch—based on his phone records—was, in fact, in the vicinity of the Dunkin' Donuts store just before the robbery was committed. (R. pp. 138-141; pp. 155-160; p. 191; pp. 195-198; pp. 200-201; p. 207; State's Ex. # 27 (Cell Data Analysis Map)). Beyond that, the hooded sweatshirt found during the attempt to track the robber was admitted into evidence *without* objection while the toboggan hat and bandana were admitted over defense counsel's objection after Detective Wydra identified them as the ones he had recovered. (R. pp. 74-77; pp. 80-81).

[5] According to Savinski, Busch said he gave him the money because "he wishe[d] that someone would have given him money when he was younger." (R. p. 105).

Following the presentation of all the testimony and evidence, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (R. pp. 223-258). The case was then submitted to the jury, and, after under one hour of deliberations, the jury unanimously convicted Busch of armed robbery. (R. p. 260; p. 263).

Following his conviction, Busch appealed, arguing the trial judge erred by admitting the toboggan hat and bandana into evidence during trial because the State purportedly failed to establish a sufficient chain of custody for those items. (App. Br. pp. 1-10). On appeal, the Court of Appeals affirmed. State v. Busch, Op. No. 2025-UP-328 (S.C. Ct. App. filed Oct. 1, 2025). In affirming, the Court of Appeals initially concluded the trial judge did not abuse his discretion by admitting the challenged items because those items constituted non-fungible evidence since they were readily identifiable. Id. Furthermore, notwithstanding the fact the challenged items were non-fungible, the Court of Appeals found the State presented a sufficient chain of custody for the toboggan hat and bandana because testimony was presented establishing those items were in essentially the same condition as they were at the time they were collected. Id.

ARGUMENT

The Court of Appeals correctly affirmed the trial judge's sound decision to admit both the toboggan hat and bandana into evidence during trial because: (1) the testimony and evidence presented demonstrated those non-fungible items were, in fact, the same toboggan hat and bandana found along the robber's trail and were in substantially unchanged condition by the time of trial; and (2) even if more had to be shown despite the non-fungible nature of those items, the chain of custody was sufficiently established as far as practicable under the circumstances involved such that there was a reasonable probability the toboggan hat and bandana had not been changed in any important respects since the time they were found.

On certiorari, Busch contends the Court of Appeals reversibly erred by failing to find the trial judge abused his discretion by admitting into evidence the toboggan hat and bandana that were recovered on the date of the armed robbery. In support of that contention, Busch maintains the State failed to establish a sufficient chain of custody as far as practicable for those items because the person who initially found them neither testified as a witness during trial nor was specifically identified by any other witnesses. Furthermore, expanding upon the arguments presented during trial and in his earlier appellate brief, Busch appears to now be asserting: (1) the toboggan hats and bandanas themselves *might* have been fungible—even though they fundamentally were not—because many people wear those common clothing items and "it is arguable whether toboggan fabric and bandana fabric" are relatively impervious to change; and (2) even if those items were non-fungible, the DNA evidence gleaned from those items—which, notably, was admitted into evidence without objection during trial—was itself fungible. To the extent Busch is now contending the toboggan hat and bandana were fungible items, his argument in that regard is plainly wrong as articles of clothing are, by their very nature, non-fungible.[6]

[6] As support for that newly-advanced argument, Busch does not cite a single case from South Carolina or anywhere else that has held an article of clothing constitutes fungible evidence. (Pet. for Cert. p. 10). Therefore, notwithstanding the fact Busch's argument in that regard is both wrong and not properly preserved for appellate review based on the timing of when it was first made, it has been functionally abandoned based on the conclusory and unsupported manner in

Meanwhile, to the extent Busch is continuing to contend the trial judge erred by allowing two *non-fungible* items to be admitted into evidence based on the State's alleged failure to strictly satisfy chain of custody requirements that are only applicable to *fungible* evidence, that argument—just as both the trial judge and the Court of Appeals wisely recognized—is, for obvious reasons, likewise flawed and incorrect. When considering the evidence and testimony presented during trial, the trial judge did not abuse his discretion or otherwise err by admitting the two challenged non-fungible items of clothing into evidence during trial because those items were properly authenticated, and the Court of Appeals committed no conceivable error by affirming that correct evidentiary ruling on appeal. Busch's petition for a writ of certiorari should be denied.

Relevant Facts

During Busch's trial, Officer Mark Johnson of the Horry County Police Department detailed his role in tracking the robber with his bloodhound, Gabby. (R. pp. 37-40). As part of his testimony, he noted one of the other officers who was part of the tracking team yelled out there was clothing in a ditch as they passed by it, he looked and personally saw the clothing in the ditch, and another of the officers recovered it from the ditch after it had been spotted. (R. pp. 42-43; p. 47; p. 49). However, he conceded he was not sure precisely which officer was the one who did so. (R. p. 49).

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which it has now been presented. See Whitehurst v. Town of Sullivan's Island, 446 S.C. 137, 158, 919 S.E.2d 402, 414 (2025) (deeming an argument abandoned on appeal because it was unsupported and undeveloped); State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (finding an argument to be abandoned when it was raised in a conclusory manner); see also State v. Primus, 349 S.C. 576, 583, 564 S.E.2d 103, 107 (2002) (instructing an issue not raised in the appellate brief filed with the Court of Appeals cannot properly be considered if raised for the first time in a petition for rehearing or a petition for a writ of certiorari), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Likewise, Corporal James Green discussed his own role in the tracking attempt and explained he deployed his hound, Bella, when Gabby tired out. (R. pp. 53-58; pp. 61-63). Corporal Green further verified he—like Detective Wydra and the other members of the team—was present when the toboggan hat, bandana, and hooded sweatshirt were found while Gabby was following the robber's scent. (R. pp. 57-59; p. 65).

In addition to that testimony, Detective Wydra discussed his involvement in the attempt to track the doughnut store robber. (R. pp. 66-84). In doing so, Detective Wydra explained he accompanied the tracking team during the tracking attempt and confirmed their group found a bandana, toboggan hat, and hooded sweatshirt in a ditch as the dog was following along the robber's trail.[7] (R. pp. 66-72). He further explained another officer removed the clothing from the soggy ditch, placed it on the ground, and left it there for collection. (R. pp. 74-75). After that occurred, Detective Wydra indicated he collected the clothing. (R. p. 72; pp. 74-75).

Once that foundational testimony had been elicited, the solicitor presented a hooded sweatshirt to the detective, and Detective Wydra confirmed it appeared to be the same one he collected and looked to be in essentially the same condition as it was in when he collected it. (R. pp. 74-75). The solicitor then moved to admit that item into evidence, and it was so admitted after defense counsel expressly confirmed he had "[n]o objection" to its admission. (R. p. 75).

The solicitor then repeated the process again with the bandana, and Detective Wydra once again confirmed the item was the one he collected at the scene and was in essentially the same condition it had been in at the time of its collection. (R. pp. 75-76). As before, the solicitor then moved to admit the bandana into evidence. (R. pp. 76-77). However, this time,

[7] Earlier, Officer Johnson affirmed Detective Wydra was with the tracking team the "whole time" during the tracking attempt. (R. p. 46).

defense counsel objected, and the trial judge swiftly conducted an in camera hearing on the matter in response. (R. pp. 76-77; p. 80).

During that hearing, defense counsel asserted he objected to the bandana and toboggan hat being admitted into evidence. (R. p. 77-79). As support for that objection, defense counsel maintained an "actual" chain of custody had not been established because Detective Wydra was not the one who initially moved the items out of the ditch and "the officer that actually found the clothing at the scene and turned [it] over to Detective Wydra" had not testified or been specifically identified. (R. pp. 77-79). In rebuttal, the solicitor argued the testimony was sufficient to warrant the admission of the items because Detective Wydra was present when the tracking dog tracked to the area where the items were found and collected them from that area after another officer simply removed them from the ditch to allow their collection. (R. pp. 77-79). After considering the arguments of counsel, the trial judge overruled defense counsel's objection, finding the State had "properly identified" the evidence based on what had been presented. (R. p. 79). The bandana and toboggan hat—which, again, Detective Wydra identified as the ones he collected and affirmed were in substantially the same condition as they were in when he collected them—were admitted into evidence over defense counsel's objection. (R. pp. 80-81).

As the trial continued, testimony and evidence was presented that traced the subsequent handling and care of the bandana and toboggan hat as follows:

- Upon collecting those items, Detective Wydra secured each one in a separate evidence bag. (R. pp. 82-84).
- Detective Wydra turned the evidence bags over to Detective Ken Marcus, who transported them to the Horry County Police Department. (R. pp. 82-84; pp. 134-137).

- Detective Marcus dropped the bags off in the police department's secure evidence area, which had restricted access and was under constant surveillance, without altering or changing their contents in any way. (R. p. 125; pp. 134-137).

- Sharon Lilly, an evidence clerk at the police department, collected those bags after they were dropped off by Detective Marcus. (R. pp. 127-131). She then—without altering or changing their contents—"repackaged them into another envelope," sealed that package, and stored it in special secure area until it was ready to be transported for analysis. (R. pp. 127-131).

- Lieutenant Peter Cestare collected the sealed package, which contained the toboggan hat and bandana, from the secure area and transported it to SLED without tampering with or altering its contents.[8] (R. pp. 120-125).

- Charlotte Pitts and Jackie Davis, evidence technicians at SLED, received the sealed package and, without breaking its seal, secured it in the agency's evidence control department. (R. pp. 142-149).

- Jasmine Ruiz-Yi, a forensic serologist at SLED, retrieved the sealed package from the evidence control department, confirmed it was "not tampered with in any way," and unsealed it. (R. pp. 142-149). She then proceeded to collect swabs and potential hairs from the toboggan hat and bandana, secured those items in envelopes that were placed inside a sealed pouch, and delivered the sealed pouch to the evidence control department. (R. pp. 145-147). Furthermore, Ruiz-Yi repackaged the toboggan hat and bandana in a secure package and delivered that package to the evidence control department, too. (R. p. 143).

- Doris Yarborough and Lauren Holiday, two more evidence technicians at SLED, secured the sealed package containing the samples collected from the toboggan hat and bandana until it was retrieved by Sara Goodman, an expert DNA analyst, for analysis. (R. pp. 150-155).

- After confirming the package's seal was intact, Goodman unsealed the package and conducted a DNA analysis of that evidence along with buccal swabs collected from Busch. (R. pp. 150-172).

[8] By the time of trial, Lieutenant Cestare was retired. (R. p. 120).

And, notably, all the witnesses involved in that chain of movement for the toboggan hat and bandana testified during trial except for the SLED evidence technicians, who were nevertheless identified by name. (R. pp. 66-84; pp. 120-125; pp. 127-131; pp. 134-138; pp. 142-147; pp. 150-160).

Following the presentation of that testimony and evidence, Goodman revealed the results of her DNA analysis. (R. pp. 154-160). Specifically, she testified—without objection—the DNA profile developed from the bandana was interpreted as originating from a single source, and, based on her analysis, it was approximately 190,000,000,000,000,000,000,000,000,000 more likely for Busch to have been the contributor of that DNA than for an unrelated unidentified individual to have contributed it. (R. pp. 156-158). Goodman further testified—again without objection—the DNA profile developed from the toboggan hat was interpreted as being a mixture from three people, and, based on her analysis, it was approximately 27,000,000,000,000,000,000,000,000,000,000 more likely for Busch to have been one of the contributors of that DNA than for three unrelated unidentified individual to have been the contributors. (R. pp. 158-159). Beyond that, Goodman's DNA analysis report setting out those results was admitted into evidence "[w]ithout objection." (R. p. 160).

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling on appeal, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the trial judge's sound discretion. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence

pursuant to an abuse of discretion standard and gives great deference to the trial court."). Significantly, an appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Patterson, 425 S.C. 500, 507, 823 S.E.2d 217, 221 (Ct. App. 2019) (citation and internal quotations omitted); see United States v. Summers, 666 F.3d 192, 197 (4th Cir. 2011) (instructing an appellate court will not find a trial judge's ruling constituted an abuse of discretion unless it was arbitrary and irrational).

Analysis

Generally speaking, evidence must be authenticated before it can be admitted. State v. Aragon, 354 S.C. 334, 336, 579 S.E.2d 626, 627 (Ct. App. 2003); see Rule 901(a), SCRE ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). And, importantly, "[t]he 'chain of custody' rule is but a variation of the principle that real evidence must be authenticated prior to its admission into evidence." United States v. Howard-Arias, 679 F.2d 363, 366 (4th Cir. 1982). Like the general authentication requirement itself, that rule's "ultimate goal" is "simply to ensure that the item is what it is purported to be." State v. Hatcher, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011); see Howard-Arias, 679 F.2d at 366 ("The purpose of this threshold requirement is to establish that the item to be introduced, i.e., marijuana, is what it purports to be, i.e., marijuana seized from the 'Don

Frank.' "). Resultantly, "[c]ourts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts." Hatcher, 392 S.C. at 94, 708 S.E.2d at 754.

Pursuant to our state's practical and no-longer-inflexible chain of custody requirements, "the establishment of a strict chain of custody is not required" when a party seeks the admission of non-fungible evidence during trial. State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005); see State v. Glenn, 328 S.C. 300, 305, 492 S.E.2d 393, 395 (Ct. App. 1997) ("[W]here 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[.]"). Non-fungible evidence is "evidence that is unique and identifiable[.]" Freiburger, 366 S.C. at 134, 620 S.E.2d at 741. "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 134, 620 S.E.2d at 741-742; see United States v. Cardenas, 864 F.2d 1528, 1531 (10th Cir. 1989) ("If the proffered evidence is unique, readily identifiable and relatively resistant to change, the foundation need only consist of testimony that the evidence is what its proponent claims."); cf. Felton v. State, 657 S.E.2d 850, 853 (Ga. 2008) (recognizing a bandana was a non-fungible item); Harper v. State, 304 S.E.2d 693, 695 (Ga. 1983) (recognizing a hat was a non-fungible item); State v. Rogers, 361 S.C. 178, 186, 603 S.E.2d 910, 914 (Ct. App. 2004) (concluding a purse was a non-fungible item); Glenn, 328 S.C. at 305, 492 S.E.2d at 395 (finding a porcelain fragment was a non-fungible item).

Meanwhile, when a party seeks the admission of fungible evidence like drugs or a blood sample during trial, a complete chain of custody must be established *as far as practicable*. State v. Governor, 362 S.C. 609, 612, 608 S.E.2d 474, 475 (Ct. App. 2005); see Hatcher, 392 S.C. at 95, 708 S.E.2d at 755 ("The State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable."). However, the proof of the chain of custody need *not* exclude every possibility of tampering. State v. Smith, 326 S.C. 39, 41, 482 S.E.2d 777, 778 (1997). Instead, to satisfy the requirements for establishing a sufficient chain of custody, the evidence and testimony presented during trial must simply *reasonably* identify who was in possession of the fungible item and what was done with it between its seizure and analysis. State v. Johnson, 318 S.C. 194, 196, 456 S.E.2d 442, 443 (Ct. App. 1995); see Hatcher, 392 S.C. at 95, 708 S.E.2d at 755 ("[W]e have consistently held that the chain of custody need be established only as far as practicable, and we reiterate that every person handling the evidence need not be identified in all cases."); State v. Taylor, 360 S.C. 18, 27, 598 S.E.2d 735, 739 (Ct. App. 2004) (en banc) (explaining the testimony of each person in a chain of custody is not required under all circumstances so long as the identities of the individuals who handled the evidence and the manner of handling are *reasonably* demonstrated). Ultimately, if consideration of the following factors—the nature of the evidence, the details surrounding its preservation and custody, and the likelihood intermeddlers tampered with it—leads to a conclusion there is a "reasonable probability the article has not been changed in important respects," the fungible evidence can properly be admitted. Hatcher, 362 S.C. at 94-95, 708 S.E.2d at 754-755; see State v. Pulley, 423 S.C. 371, 379, 815 S.E.2d 461, 465 (2018) (explaining "a perfect chain of custody is not required" even for fungible evidence).

In the case sub judice, the issue on certiorari centers on whether the trial judge correctly admitted a toboggan hat and bandana into evidence during trial despite Busch's claim a chain of custody had purportedly not been sufficiently established. Just as the Court of Appeals wisely recognized, there are multiple reasons why the trial judge committed no error whatsoever by admitting those items.

Most significantly, the toboggan hat and bandana—the actual subjects of Busch's trial objections and *earlier*[9] appellate chain-of-custody-based challenge—were properly admitted into evidence during trial because they were fundamentally *not* fungible items. Instead, they were distinct articles of clothing that were fairly unique, readily identifiable, and relatively impervious to change. As a result, those items constituted non-fungible evidence and, therefore, could properly be admitted *without* the establishment of a strict change of custody so long as testimony was presented identifying the items as the ones in question and confirming they were in substantially unchanged condition. State v. Pope, 410 S.C. 214, 227, 763 S.E.2d 814, 821 (Ct. App. 2014); see People v. Wilson, 86 N.E.3d 1231, 1239 (Ill. App. Ct. 2017) ("[A]rticles of clothing are not fungible or susceptible to tampering."); People v. Roblee, 920 N.Y.S.2d 467, 469 (N.Y. App. Div. 2011) (instructing "items of clothing are nonfungible"); cf. Pace v. State, 524 S.E.2d 490, 504 (Ga. 1999) ("The State did not need to prove a chain of custody for Ms. Britt's sweat pants and a pillow that were admitted into evidence because they are non-fungible items that can be recognized by observation. Witnesses identified these items as evidence found at the crime scenes and this testimony is sufficient to authorize the jury to consider them." (citations omitted)). And, critically, the testimony and evidence presented during trial met those

[9] Again, as previously noted, the DNA analysis results were admitted into evidence during trial "*[w]ithout* objection," and Busch did not specifically argue the DNA evidence should have been excluded in his brief to the Court of Appeals. (R. p. 160; App. Br. pp. 1-10) (emphasis added).

basic foundational requirements as Detective Wydra verified the toboggan hat and bandana offered into evidence were, in fact, what they were claimed to be—the same ones he recovered from the robber's trail after they were found in the water-filled ditch. In light of that, the trial judge correctly admitted those non-fungible items into evidence during trial since an adequate foundation for their admission was indeed established. Cf. People v. Morris, 997 N.E.2d 847, 865 (Ill. App. Ct. 2013) ("Since the composition of the pants and boots were not easily subject to change, and several witnesses identified the items through unique characteristics, the State did not need to establish a chain of custody. The State laid a sufficient foundation for the exhibits, and the trial court did not err when it admitted the pants and boots into evidence at trial.").

Meanwhile, to the extent Busch is *now* contending the toboggan hat and bandana were somehow fungible because his DNA was ultimately found to be present on them, such an incorrect argument should likewise be rejected for several reasons. First, since defense counsel did not raise any objections to the DNA evidence during trial and, instead, specifically confirmed he had no objection to that evidence when the DNA analysis results were introduced, any appellate challenge to the DNA evidence collected from the toboggan hat and bandana—which constituted separate and distinct evidence from those clothing items themselves—was patently not properly preserved for appellate review under well-established South Carolina law. See 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 Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) ("When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review."); cf. State v. Dicapua, 373 S.C. 452, 455,

646 S.E.2d 150, 152 (Ct. App. 2007) ("Dicapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue Dicapua had with the videotape."). Second, even if those glaring issue preservation problems could somehow be ignored, the fact the toboggan hat and bandana may have had fungible evidence on them in no way converted those items into fungible items themselves. Cf. Lucas v. State, 413 N.E.2d 578, 581-582 (Ind. 1980) (concluding the fact clothing had blood on it did *not* convert that clothing from non-fungible evidence into fungible evidence). Instead, such a fact would merely have been something to be considered when evaluating the sufficiency of the chain of custody established concerning the fungible evidence *collected from* those clothing items, which would have been an entirely separate evidentiary issue and, again, was *not* one raised to or ruled upon by the trial judge during Busch's trial. Cf. Morris, 997 N.E.2d at 865 ("While a sample of blood in itself may require a sufficient chain of custody for admissibility, the blood in the instant case was contained on unique articles of clothing that were identified by several witnesses at trial. *Once the blood samples were recovered from the clothing*, then *they* were subject to the chain-of-custody procedures used for samples of biological material. However, the defense never raised a challenge to the chain of custody of the blood after the samples were removed from the clothing." (emphasis added)).

Finally, even assuming a sufficient chain of custody was somehow necessary before the trial judge could properly admit the toboggan hat and bandana into evidence, what was presented during Busch's trial did, in fact, establish one as far as practicable. Specifically, the testimony of Detective Wydra, Officer Johnson, and Corporal Green collectively established the toboggan hat

and bandana—along with the unobjected-to hooded sweatshirt—were spotted in the ditch during the tracking attempt, were removed from it by one of the officers accompanying them, and were then simply placed on the ground by that unidentified-by-name fellow officer so they could be collected, which Detective Wydra subsequently did. See Hatcher, 392 S.C. at 95, 708 S.E.2d at 755 (explaining the proponent of fungible evidence "need not establish the identity of every person handling fungible items in all circumstances"). And, significantly, nothing whatsoever was presented suggesting any tampering or intermeddling occurred—or even could have occurred in a manner that would have resulted in DNA from Busch, who was not yet even a suspect, getting onto the items—during the period between when the clothing items were first spotted in the ditch to the point when the detective collected them from the ground nearby. See Rogers, 361 S.C. at 187, 603 S.E.2d at 915 ("South Carolina law does not require testimony as to the exclusion of any possibility of tampering."); cf. Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960) ("In the absence of any evidence to the contrary, the trial judge was entitled to assume that this official would not tamper with the sack and can or their contents. Where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and courts presume that they have properly discharged their official duties."); Jones v. State, 218 N.E.3d 3, 11 (Ind. Ct. App. 2023) ("Despite his claims to the contrary, Jones can only assert the possibility that the robe was tampered with in the approximately one-hour period before Captain Hall took possession of it. This is not enough to exclude evidence on chain-of-custody grounds."). Considering those circumstances coupled with the fact an indisputably-unbroken chain of custody was established from that point going forward, a sufficient chain of custody was established for the toboggan hat and bandana such that there was a reasonable probability those two items had not been changed in any important

respects since the time they were found, and, therefore, the trial judge did not abuse his broad discretion by admitting those items into evidence even assuming the establishment of a chain of custody had been required. See Hatcher, 392 S.C. at 94-95, 708 S.E.2d at 754-755 ("The trial judge's exercise of discretion must be reviewed in the light of the following factors: the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence." (citations, ellipses, and internal quotations omitted)).

Accordingly, for all those reasons, the trial judge correctly admitted the properly-authenticated toboggan hat and bandana into evidence during trial, and the Court of Appeals committed no conceivable error by affirming that sound exercise of discretion on appeal.[10] See State v. Brockmeyer, 406 S.C. 324, 353, 751 S.E.2d 645, 661 (2013) (explaining a trial judge's authentication rulings "are readily sustainable" on appeal when there is evidence establishing the admitted items were, in fact, what they were purported to be). Busch's petition for a writ of certiorari should be denied.

[10] Moreover, even assuming the trial judge somehow erred by admitting the toboggan hat and bandana into evidence, any error in that regard would have been entirely harmless in light of the *other* evidence and testimony presented during trial that conclusively linked Busch to the doughnut store robbery. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (explaining "[w]hether an error in the admission of evidence is harmless generally depends upon its materiality in relation to the case as a whole" and recognizing the erroneous admission of evidence will be harmless when its impact is minimal in the context of the entire record); see also State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result."); cf. State v. Brown, 424 S.C. 479, 493, 818 S.E.2d 735, 743 (2018) (finding the trial judge's error in admitting GPS records that were not properly authenticated was harmless due to the other evidence of guilt presented). That fact constitutes an additional compelling reason for Busch's petition for a writ of certiorari to be rejected.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the petition for a writ of certiorari should be denied.

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