STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Howard P. King, Circuit Court Judge

Appellate Case No. 2013-000302

THE STATE .....RESPONDENT

v.

BRANDON WINGARD .....APPELLANT.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General
S.C. Bar No. 68571

MARY FRANCES JOWERS
Assistant Attorney General
S.C. Bar No. 68413

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3996

DOUGLAS A. BARFIELD, JR.
Solicitor, Sixth Judicial Circuit

P.O. Box 607
Lancaster, SC 29721
(803) 283-3855

ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. The trial court did not err in failing to suppress oral statements made by the Defendant because there was no Rule 5 violation.

2. The Defendant was not prejudiced by the trial court's failure to suppress the oral statements.

STATEMENT OF THE CASE

Brandon Wingard (Wingard) was indicted by the grand jury for Fairfield County for Receiving Stolen Goods and for Violation of the Nonferrous Metals Purchase Statute. (Indictments) He was represented by William Frick, Esquire. (Tr. 4-5) Wingard proceeded to trial by jury pursuant to which he was found guilty of Receiving Stolen Goods and Not Guilty of Violation of the Nonferrous Metals Purchase Statute. (Tr. 200-201) He was sentenced by the Honorable Howard P. King to five years imprisonment. (Tr. 213) Wingard timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Willie Pope (Pope) is an electrician who works for The Electric Company, a business owed by Dave Brissey (Brissey). Pope drives a truck; he keeps his tools and materials, as well as the Electric Company's work tools and materials, on the truck. (Tr. 39) On August 8, 2012, Pope left work for the day and arrived at his home. (Tr. 38-39) As was his practice, Pope parked his truck in his driveway when he arrived home from work by 4:30 p.m. He spent the evening inside his home. (Tr. 39-40) The next morning about 6:30 a.m., Pope noticed a drop cord on the ground, and as he was driving to work he noticed that one of his tool bins was open. When he got to work, he looked through his truck and noticed several items were missing, including tools belonging to both himself and Brissey. (Tr. 40-41) The missing tools and materials were reported to law enforcement. (Tr. 41) That afternoon, Investigator Jeff Talbert of the Fairfield County Sheriff's Department contacted Pope. Talbert sent Pope several photographs of materials, and Pope was able to identify items in the photographs as the items that were stolen from his truck. (Tr. 42-43)

On the morning on August 9, 2012, Brandon Wingard (Wingard) contacted the Fairfield County Sheriff's Department seeking a permit to sell copper wire to Mid-Carolina Recycling (Mid-Carolina). Mid-Carolina purchases scrap metal from the public and businesses. Pursuant to S.C. Code Ann. § 16-17-680, Wingard was required to obtain a permit to sell copper, a nonferrous metal, to Mid-Carolina. Wingard obtained a permit and sold materials to Mid-Carolina. (Tr. 78-80)

Also on the morning of August 9, 2012, Investigator Talbert learned that tools were missing from Pope's truck when Chief Lewis told the investigators to be on the lookout for any tools or wire because these items had been stolen from the truck. Later

that morning, a secretary asked if Wingard had a permit to sell copper; the secretary explained that Wingard was on the phone seeking a permit because he was trying to sell copper at Mid-Carolina. (Tr. 88) Upon learning this, Talbert called Curt Richardson at Mid-Carolina and asked him to email a picture of the items that Wingard brought in to sell. (Tr. 88-90) Curt Richardson, vice-president at Mid-Carolina, emailed Talbert photographs of the items Wingard sold. Investigator Jeff Talbert sent the photos to Pope, and he identified materials in the photographs as items that were stolen from his truck. (Tr. 90)

The next day, August 10, 2012, the Sheriff's Department executed a search warrant at Wingard's home. Several officers went to Wingard's home to execute the warrant. Wingard was home, and he let law enforcement in the home. Once officers secured a couch for him to sit on, Wingard sat on the couch and was allowed to smoke cigarettes while Investigator Talbert read him the search warrant. (Tr. 49) While Investigator Talbert was reading the search warrant, Wingard "said that he had gotten the tools from a black guy." (Tr. 99) Investigator Talbert did not stop when Wingard made the statement. When he finished reading the search warrant, he then read Wingard his Miranda rights. After reading Wingard his Miranda rights, Talbert "asked [Wingard] who was the black guy that he got the tools from[.]" (Tr. 101) Wingard responded that "it was a black guy that was a crackhead." (Tr. 102) He further "said something about meeting him in town." (Tr. 102)

The execution of the search warrant took one to two hours. During this time, Wingard remained on the couch and was allowed to smoke. (Tr. 51) During the search, Investigator Jeff Westfall first looked in the hallway and other areas for missing tools and

materials. He looked in the closet and explained as follows: "When I opened up the closet and I seen (sic) the items in the closet I took a picture or photograph [of] the items in the closest. As I go to remove the items from the closet Mr. Wingard stated that all of the items – some of the items in the closet belonged to him, not all of them were stolen." (Tr. 135) Later during the search, after law enforcement came inside from searching outside the house, "Mr. Wingard made a statement that the items out in the shed belonged to him, that they weren't stolen either." (Tr. 136)

Pope and Brissey came to the Sheriff's Deparment and identified numerous items as having been taken from Pope's truck. Many of the items had markings indicating they belonged to Brissey or The Electric Company. (Tr. 124) Numerous items were identified including the following: a hammer drill, bits, socket set, hole saw, screw driver set, Fluke meter, Brady label machine, cordless drill and battery, classic spool, fishing rods, and fish tackle. (Tr. 102-103)

On November 27, 2012, Wingard was indicted by the Grand Jury for Fairfield Count on one count of Violation of Nonferrous Metals Purchase Statute and one count of Receiving Stolen Goods $2,000 or Less, Third Offense Property Crime. (Indictments)

Wingard asked for discovery pursuant to Rule 5. The discovery materials provided to him included the incident report which had Wingard's statement that he "got the tools from a black guy." (Tr. 68)

The day prior to trial, the Solicitor learned of additional statements as he was preparing for trial. The additional statements were about Wingard obtaining the tools from a crackhead whom he met in town and about the drills in the closet not being stolen, as well as the drills outside not being stolen. (Tr. 68-69, 72)

The Solicitor advised the trial court that within fifteen or twenty minutes of finishing the meeting where he learned of these statements, he contacted counsel for the Defendant and informed him of the statements. (Tr. 71) The Solicitor explained as follows: "I didn't know that these were statements Mr. Wingard made and as soon as I became aware of them I let Mr. Frick [counsel for Wingard] know." (Tr. 71) Wingard moved to suppress the statements pursuant to *Jackson v. Denno* and pursuant to a Rule 5 violation. Following the hearing, the Judge stated, "I don't think that there's any Rule 5 violation. I think that as soon as the State learned of the details about the additional statements being made spontaneously that was revealed and I find that there is no Rule 5 violation." (Tr. 73-74)

Following a jury trial, Wingard was found guilty of Receiving Stolen Goods $2,000 or Less, Third Offense Property Crime. He was found not guilty of Violation of Nonferrous Metals Purchase Statute. (Tr. 200-201) Wingard was sentenced to five years imprisonment, with credit for time served. (Tr. 213)

STANDARD OF REVIEW

The standard of review in this case is an abuse of discretion standard. *State v. Lawton*, 382 S.C. 122, 675 S.E.2d 454 (Ct. App. 2009); s*ee State v. Landon*, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006) (holding a violation of the rule governing the disclosure of evidence in criminal cases is not reversible error unless prejudice is shown); *State v. Colf*, 337 S.C. 622, 625, 525 S.E.2d 246, 248-49 (2000) (stating an appellate court shall not reverse a trial court's ruling on admissibility of evidence or the scope of cross-examination absent a showing of abuse of discretion and prejudice).

ARGUMENT

I. The trial court did not err in failing to suppress oral statements made by the Defendant because there was no Rule 5 violation.

Wingard argues that the trial court erred in not suppressing inculpatory oral statements he made. Wingard contends that the statements should have been suppressed because they were made in response to interrogation by law enforcement and were not disclosed in a timely manner. Appellant's argument is without merit as there was no Rule 5 violation.

As an initial matter, the State notes that Wingard made several statements, two of which are the subject of this appeal. Wingard's statements include the following: (1) Wingard's statement while he was being read the search warrant that he "had gotten the tools from a black guy[;]" (Tr. 99) (2) Wingard's statement in response to Talbert's question that "it was a black guy that was a crackhead[;]" (Tr. 102) (3) Wingard's statement that he meant met the man "in town[;]" (Tr. 102) (4) Wingard's statement that the tools in the closet were not stolen; (Tr. 135) and (5) Wingard's statement that the

tools in the shed "weren't stolen either." (Tr. 136) The statements which are the subject of this appeal are Wingard's statements that the man was a "crackhead" whom he met "in town."[1]

The statements in question were made by Wingard after Talbert read him the search warrant. (Tr. 99-102) At the time, Wingard was sitting on the couch in his own living room with access to cigarettes. He had been handcuffed. Talbert explained that as he (Talbert) read Wingard the search warrant "He said that he had gotten the tools from a black guy." (Tr. 98-99) Talbert continued reading the search warrant, and then read Wingard his Miranda rights. Once Talbert finished reading Wingard his Miranda warnings, he asked Wingard "who was the black guy that he got the tools from?" (Tr. 101) Wingard responded by saying "it was a black guy that was a crackhead." (Tr. 102) Wingard further "said something about meeting him in town." (Tr. 102) Wingard argues these statements should have been suppressed because they were not disclosed pursuant Rule 5, SCRCrimP. (Tr. 69) The admission of this evidence was not a Rule 5 violation.

Rule 5(a)(1)(A) provides as follows:

> Upon request by a defendant, the prosecution shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution; the substance of any oral statement which the prosecution intends to offer in evidence at the trial made by the defendant whether before

[1] Wingard's argument that the Court erred in not suppressing the statement that he met the man "in town" is not preserved for appellate review because it was not raised to or ruled upon by the trial court. Although the Solicitor mentioned the "in town" statement during his argument and Pope mentioned it during the evidentiary hearing, the Defendant did not address the admissibility of this statement to the trial court and its admissibility was not ruled upon by the trial court. (Tr. 48, 72-73) "It is well settled that issues not raised and ruled on in the trial court will not be considered on appeal." *State v. Bonner*, 400 S.C. 561, 735 S.E.2d 525 (Ct. App. 2012) (citing *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) and *State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005)).

> or after arrest in response to interrogation by any person then known to the defendant to be a prosecution agent.

Rule 5(a)(1)(A), SCRCrimP.

In the instant case, it is undisputed that the day before trial, the Solicitor notified counsel for the Defendant of the statements that Wingard believed that the man was a "crackhead" whom he met "in town." (Tr. 68-69) On this day, the Solicitor learned of additional statements as he was preparing for trial. Within 15 or 20 minutes of finishing the meeting where he learned of these statements, the Solicitor contacted counsel for the Defendant and informed him of the statements. (Tr. 68-69, 72)

The prosecutor could not have disclosed the statements prior to the day before trial because he was unaware of them. Further, as soon as he became aware of the statements, he contacted counsel for Wingard and notified him of the statements. (Tr. 71-72) Because the prosecutor turned over the evidence as soon as he became aware of it, and Wingard learned of the statement the day prior to trial and had time to prepare, there was no basis for the statements to be excluded and the trial court did not err. *See State v. Newell*, 303 S.C. 471, 401 S.E.2d 420 (Ct. App. 1991) (no error in trial court's denying Motion to Suppress where evidence was not disclosed prior to trial but solicitor maintained an open file policy and trial judge recessed the trial and gave Defendant's counsel opportunity to talk with the witness about late-disclosed statements); *State v. Patterson*, 290 S.C. 523, 351 S.E.2d 853 (1986) (subsequent history omitted) (the State's failure to produce tape of interview with a prosecution witness until the morning of jury selection did not warrant a dismissal or a mistrial where the court allowed defense counsel to listen to the tape before the witness took the stand for direct examination and the court delayed cross-examination until the next day); *see also State v. Ramos*, 492

N.W.2d 557 (Minn. App. 1992) (trial court did not err in denying motion for a new trial where the prosecutor was unaware of the information until the victim testified about it on cross-examination, and there is no evidence that the prosecutor intentionally obstructed attempts by the defense to obtain the information or exploited the effects of its nondisclosure); *People v. Ingram*, 415 N.E.2d 569 (Ill. App. 1980) (finding late disclosure of defendant's statements did not deny him a fair trial where prosecutor made discovery of statement the day before trial).

Wingard contends that the investigator's knowledge of the "crackhead" and "in town" statement should be imputed to the prosecutor. In exercising his due diligence, however, the prosecutor only learned of the statements in connection with his trial preparation, and he could not have been expected to learn every detail of the case far in advance. As soon as he was aware of the statements, he disclosed them. Because the prosecutor exercised reasonable care and due diligence, the investigator's knowledge cannot be imputed to the prosecutor.

Even if the State failed to comply with Rule 5, which the State strongly denies, the trial judge offered the proper remedy. Rule 5(d)(2), SCRCrimP, states that if a party fails to comply with Rule 5, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing the undisclosed evidence, or it may enter such other order as it deems just under the circumstances. Rule 5(d)(2), SCRCrimP; *State v. Trotter*, 322 S.C. 537, 473 S.E.2d 452 (1996). The trial court's ruling did not prohibit Wingard from cross-examining the witnesses regarding the statements and was a proper remedy even if there was a violation.

Further, Wingard did not seek additional time or a continuance of the trial to review and study the "crackhead" and "in town" statements. Accordingly, there was no reversible error. *See State v. Lunford*, 318 S.C. 241, 456 S.E.2d 918 (Ct. App. 1995) (finding no reversible error where defense counsel did not seek additional time to study materials and prepare for further cross-examination); *State v. Davis*, 309 S.C. 56, 419 S.E.2d 820 (Ct. App. 1992) (finding no abuse of discretion in trial court's denial of motion to suppress following late disclosure where defendant was permitted to view and copy the State's file and Defendant never requested a recess in order to review the file); *State v. Patterson*, 290 S.C. 523, 351 S.E.2d 853 (1986) (subsequent history omitted) (the state's failure to produce discovery material consisting of a taped interview with the prosecution witness until the morning jury selection began did not warrant a dismissal or a mistrial where the trial court allowed defense counsel to listen to the tape before the witness took the witness stand and the trial court delayed cross-examination until the next day); *Gorham v. Wainwright*, 588 F.2d 178 (5th Cir.1979) (denying the defendant's mistrial motion and holding the defendant was not prejudiced by the prosecution's failure to turn over certain reports prior to trial because, although defense counsel requested and received a ten minute recess to review the new evidence, he did not request a continuance); 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 19.5, at 545–46 (1984) (a defendant's failure to request a continuance when a disclosure of exculpatory evidence is first made at trial "is often viewed as automatically negating any claim of actual prejudice.").

II. The Defendant was not prejudiced by the trial court's failure to suppress the oral statements.

Assuming the trial court erred in failing to suppress the oral statements, which the States strongly denies, the admission of the statements did not affect the outcome of trial and any error was not prejudicial. "'To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof.'" *State v. Kirton*, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008) (quoting *State v. White*, 372 S.C. 364, 374, 642 S.E.2d 607, 611 (Ct. App. 2007)). "'Error is harmless when it could not reasonably have affected the result of the trial.'" *Id.* (quoting *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)).

Wingard concedes that the statement that he met the man "in town" was not prejudicial, but contends the statement that the man was a "crackhead" was prejudicial. Because there was significant evidence to support the jury's finding of guilty, the "crackhead" statement was not prejudicial and any error was harmless.

Wingard made several statements from which the jury could have found him guilty, including his statement that the tools in the closet were not stolen and his statement that the tools in the shed "weren't stolen either." (Tr. 135-136) As Investigator Westfall explained, these statements could be seen as a "kind of admission." (Tr. 140) The statements suggest that Wingard was aware that some of the items were stolen, and he was informing law enforcement that even though some of the items were stolen, they were not all stolen.

Both Pope and Brissey identified the tools and materials that Wingard sold to Mid-Carolina as the tools that had been stolen from Pope's truck that belonged to them.

Pope explained that the tools "had my name, the company name, they were my tools, our tools." (Tr. 43) Pope knew they were the tools that had been stolen because they had markings "all over the place" with either his name, the company's name, or "2000." (Tr. 45) Brissey identified numerous items that were stolen, including a Hilti gun, an electric hammer drill, flashlight and charger, a carbon steel hole saw kit, a Greenlee knockout cutter, and two lightbulb testers. (Tr. 122-123)

Also, Wingard called the Sheriff's Department to obtain a permit to sell the products on the morning after they were stolen, which was the same morning they were sold to Mid-Carolina. (Tr. 82-83) A jury could infer from this that Wingard obtained the materials that morning and then went straight to Mid-Carolina to sell them.

In addition to the items sold to Mid-Carolina, some of the stolen items were in Wingard's home including the Hilti hammer drill and bits in a red case, a Kolbalt socket set, Klein hole saws, the Brady label machine, Klein ten piece screw driver set, Fluke meter in black case, and Greenlee LT100 tester, Milwaukee cordless drill, Milwaukee battery chargers, and plastic spool. (Tr. 131-134) The items found in the home were in various locations, including the bedroom closet, hallway closet, a bedroom, garbage can, and the living room closet. (Tr. 142) Pope and Brissey identified these items as being stolen from the truck. (Tr. 138-139) These items that were in Wingard's home had identifying marks such as Pope's name or the company name. (Tr. 43)

The overwhelming evidence of Wingard's guilt indicates that any error was therefore not prejudicial because there was significant evidence from which the jury could have found Wingard guilty.

In addition, Wingard argues that the statement was prejudicial because it relates to drug use. However, the cases he cites refer to a Defendant's drug use, not the drug use of third parties. In the present case, the only reference to drug use was Wingard's statement that he obtained the goods from someone he referred to as a "crackhead." There was no evidence or testimony that Wingard himself used drugs. Accordingly, there was no prejudice in this case because there was no evidence of Wingard's drug use.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

MARY FRANCES JOWERS
Assistant Attorney General

DOUGLAS A. BARFIELD, JR.
Solicitor, Sixth Judicial Circuit

BY: Mary Frances Jowers
Mary Frances Jowers
S.C. Bar No. 68413

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3996

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
April 9, 2014

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APPEAL FROM FAIRFIELD COUNTY
Howard P. King, Circuit Court Judge

Appellate Case No. 2013-000302

THE STATE .....RESPONDENT

v.

BRANDON WINGARD .....APPELLANT.

DESIGNATION OF MATTER

Respondent proposes the following matter to be included in the Record on Appeal:

(1) Indictment for Violation of Nonferrous Metals Purchase Statute
(2) Indictment for Receiving Stolen Goods $2,000 or Less Third Offense Property Crime
(3) Verdict Form on Charge of Violation of Nonferrous Metals Purchase Statute
(4) Verdict Form on Charge of Receiving Stolen Goods $2,000 or Less Third Offense Property Crime
(5) Entire Trial Transcript, pages 1-214

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

DAVID SPENCER
Senior Assistant Attorney General

MARY FRANCES JOWERS
Assistant Attorney General

DOUGLAS A. BARFIELD, JR.
Solicitor, Sixth Judicial Circuit

BY: Mary Frances Jowers
Mary Frances Jowers
S.C. Bar No. 68413

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3996

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
April 8, 2014

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APPEAL FROM FAIRFIELD COUNTY
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THE STATE .....RESPONDENT

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BRANDON WINGARD .....APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter*, both dated April 8, 2014, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Robert M. Dudek, Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

Perry B. DeLoach, Jr.
The Law Offices of Perry B. DeLoach, Jr., LLC
1225 South Church St.
Greenville, SC 29605

I further certified that all parties required by Rule to be served have been served. This 8th, day of April, 2014.

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SC Court of Appeals

Angela Bennett
Administrative Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

April 8, 2014

Robert M. Dudek, Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

Perry B. DeLoach, Jr.
The Law Offices of Perry B. DeLoach, Jr., LLC
1225 South Church St.
Greenville, SC 29605

Re: The State v. Brandon Wingard
Appellate Case No. 2013-000302

Dear Counsel:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mary Frances Jowers

Mary Frances Jowers
Assistant Attorney General
S.C. Bar No. 68413

JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services