STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2014-002276

THE STATE,

Respondent,

vs.

WENDELL BERNARD WILKINS,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Assistant Attorney General
S.C. Bar No. 100108

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

180 Magnolia Street
Spartanburg, South Carolina 29306
(864) 596-2575

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not abuse its broad discretion by admitting the raw original surveillance footage or the chronological video of the surveillance footage from the Fast Fuel No. 8 store during the attempted armed robbery, where the video footage was either not materially altered or entirely unaltered, was relevant, and was not unduly prejudicial. Furthermore, any error was harmless and had no impact on Appellant's case.

STATEMENT OF THE CASE

In April of 2013, Appellant was arrested in connection with an attempted armed robbery of a Fast Fuel No. 8 convenience store on Cannons Campground Road in Spartanburg County, South Carolina. On August 4, 2013, the Spartanburg County Grand Jury indicted Appellant for attempted armed robbery (2013-GS-42-03879). On April 15, 2014, Appellant proceeded to a jury trial before the Honorable Doyet A. Early, III, but the trial ended in a mistrial. On October 13, 2014, Appellant again proceeded to trial before the Honorable G. Thomas Cooper, Jr. and a jury. On October 14, 2014, the jury convicted Appellant as indicted. Judge Cooper sentenced Appellant to twelve years imprisonment. Thereafter, Appellant filed a timely notice of appeal.

STATEMENT OF FACTS

On the rainy afternoon of April 4, 2013, Salvador Aria Bonifacio was working at the Fast Fuel No. 8 convenience store in Spartanburg County, South Carolina. (Tr. 85-86, Indictment). Bonifacio, who had worked at the store for four years, was enjoying an afternoon snack of coffee and cake when Appellant came into the store. (Tr. 85-86). Appellant was wearing a grey hooded sweatshirt with a distinctive stripe and an orange, hunting style mask. (Tr. 86, 129-30, 154-55, State's Ex. No. 1, 9, 10). Appellant had the hood up and the mask covered his forehead, but his eyes, nose, and checks were exposed. (Tr. 175, State's Ex. No. 9, 10, 14, 16).

Appellant, armed with a small gun, demanded money from Bonifacio. (Tr. 86). When Bonifacio refused, Appellant fired the gun into the cigarette case behind Bonifacio, striking the Newport display. (Tr. 86, 156, State's Ex. No. 3). Appellant then attempted to come across the counter and began sparing with Bonifacio. (Tr. 86). Bonifacio ripped off Appellant's hooded sweatshirt and mask. (Tr. 86-87, 93). Appellant struck Bonifacio in the head with his weapon, causing a deep gash, profuse bleeding, and a permanent scar. (Tr. 86-87, 91, State's Ex. No. 2). Bonifacio hit Appellant's weapon, causing the clip containing its ammunition to release. (Tr. 86).

Appellant fled the store and Bonifacio followed. (Tr. 87). Appellant entered a waiting gold Chevrolet Malibu sedan, which took off through a U-shaped neighborhood behind the store. (Tr. 87-88). Bonifacio, who lived in the neighborhood, ran to the neighborhood's outlet so he could view the car when it exited. (Tr. 86-88). Bonifacio was able to view the car's license plate number (IDH 739) and repeat it to the 911 operator with whom he was on the phone. (Tr. 87, 90).

Bonifacio returned to the store and met with paramedics and law enforcement. (Tr. 87). Bonifacio went to the hospital for wound treatment and was released. (Tr. 91). While at the hospital, he met with two officers and provided a statement. (Tr. 91-92). Bonifacio told law enforcement that the perpetrator was a black man but could not provide a detailed description. (Tr. 92). Bonifacio provided law enforcement with a DNA sample and informed officers the store was equipped with surveillance cameras. (Tr. 92).

Investigator Matt Hutchins of the Spartanburg County Sheriff's Office responded to the 911 dispatch of the attempted armed robbery and used the license plate number provided by Bonifacio to track down the vehicle Appellant used to flee the scene. (Tr. 111-12). Hutchins determined the vehicle was registered to Enterprise Rent-a-Car. (Tr. 111-12). Hutchins contacted Enterprise Rent-a-Car and learned the vehicle was rented to Trishaunda Rookard at 15 Robingate Court in Spartanburg. (Tr. 112). Hutchinson and fellow sheriff's deputy Sergeant Bryant went to 15 Robingate Court and met with Rookard's brother. (Tr. 112). Hutchins eventually located the vehicle in the parking lot of an Enterprise Rent-a-Car location on Asheville Highway. (Tr. 112, State's Ex. No. 5, 6). Law enforcement processed the car, including searching the interior thoroughly, dusting for fingerprints, and photographing the car. (Tr. 145-46). Several pieces of mail addressed to Appellant were found in the vehicle's glovebox. (Tr. 147-48, State's Ex. No. 17-18).

Hutchins spoke with Rookard, who gave a written statement and provided consent to search her home. (Tr. 113-14). Rookard told law enforcement she was romantically involved with Appellant and they had a child together. (Tr. 125). Rookard told law enforcement she rented a gold Chevrolet Malibu from Enterprise Rent-a-Car and had allowed Appellant to borrow it. (Tr. 126). On the day of the robbery, she left the keys in

the car so her brother could return it to Enterprise Rent-a-Car while she accompanied her mother to Charleston. (Tr. 126-27). She later received a call from Appellant asking to borrow the rental car to run an errand and she obliged. (Tr. 127). She never saw the car again. (Tr. 127). Rookard watched the surveillance footage from the attempted armed robbery and told law enforcement the perpetrator looked similar to Appellant, but noted the perpetrator appeared to have a "bald head" unlike Appellant. (Tr. 128-29). She also told law enforcement she and Appellant had purchased the grey hooded sweatshirt together at Wal-Mart. (Tr. 129-30).

Rookard also provided law enforcement with Appellant's cell phone. (Tr. 114, 129-30). Computer Forensics Investigator Lindsey McGraw of the Spartanburg County Sheriff's Office examined Appellant's cell phone. (Tr. 116-17). She extracted data from the phone, including contacts, text messages, and pictures. (Tr. 117-18, State's Ex. No. 12-13).

Investigator William Gary of the Spartanburg County Sheriff's Office recovered the store's surveillance footage from the store's owner, Ari Patel. (Tr. 94, 98-99). The store was equipped with either fifteen or sixteen motion sensitive cameras[1] that only record when movement is detected in each camera's specific location. (Tr. 93, 99-101, 105). Because the cameras were motion sensitive, there was often a delay of a few seconds between the two cameras where it appeared the perpetrator was in two locations at the same time momentarily. (Tr. 100-02). Gary retrieved the stored footage from a computer in the store's office and uploaded the information onto a USB drive. (Tr. 99-100). He later burned the footage onto a disc that was logged into evidence. (Tr. 100.

[1] Bonifacio and Gary both testified they were unclear whether there were fifteen or sixteen cameras in the store. (Tr. 93, 99-101, 105). Gary testified that there were either only fifteen cameras (labeled Camera 1-14 and Camera 16, without a Camera 15) or that Camera 15 was an office view that did not pick up any footage from the attempted armed robbery. (Tr. 105).

State's Ex. No. 16). Gary then used the videos from all fifteen motion-sensitive cameras to create a sequential video of the incident. (Tr. 100-04, State's Ex. No. 14).

Law enforcement also spoke to Rachel Wells, who was in a sexual relationship with Appellant at the time of the attempted armed robbery. (Tr. 135-36). Wells viewed the security footage and identified Appellant as the perpetrator based on "the structure of his face when he took the mask off." (Tr. 136).

Appellant was arrested and indicted for attempted armed robbery. (Indictment). Law enforcement received a sample of Appellant's DNA, which was compared to cuttings from the mask collected from the scene. Appellant could not be excluded as a contributor to DNA found on the mask at a probability of randomly selecting an unrelated individual who could have contributed to the mixture of approximately 1 in 42. (Tr. 163).

Prior to Appellant's trial, he moved to exclude both the raw surveillance footage (States Exhibit No. 16) and the sequentially-compiled video (State's Exhibit No 14). Appellant argued the sequentially-compiled video should be excluded because it was "confusing" because it showed the perpetrator in two different locations at the same time. (Tr. 6-8). Appellant argued the original, raw surveillance footage should be suppressed because there was no footage from camera 15. (Tr. 10-11). Importantly, Appellant expressly stated that he was not challenging the authenticity of the video footage.[2] (Tr. 7). In response, the State presented Gary, who descried how he recovered the raw surveillance footage and made the compiled video. (Tr. 17-35). Gary testified he did not alter the original footage in any way and he only took the cameras in motion when

[2] On appeal, Appellant is making a contradictory argument, arguing that the video should not have been admitted because Bonifacio "did not know anything about the security system and how it operated" and the store owner who knew about the system failed to testify. As discussed below, this argument is without merit.

creating State's Exhibit No. 14 but did not alter the footage. (Tr. 17-35). The trial court denied Appellant's motion as to both videos and each was shown to the jury during trial.

ARGUMENT

I. The trial court did not abuse its broad discretion by admitting the raw original surveillance footage or the chronological video of the surveillance footage from the Fast Fuel No. 8 store during the attempted armed robbery, where the video footage was either not materially altered or entirely unaltered, was relevant, and was not unduly prejudicial. Furthermore, any error was harmless and had no impact on Appellant's case.

Appellant contends the trial court erred in admitting the raw original surveillance footage and the chronological video of the surveillance footage from the Fast Fuel No. 8 store during the attempted armed robbery. In support of this, Appellant maintains State's Exhibit No. 14 was not prepared until after Appellant's first trial ended in a mistrial and "the State changed the evidence." However, Appellant fails to state how State's Exhibit No. 14 was materially altered. Appellant also asserts State's Exhibit No. 16 should not have been admitted because footage from camera 15 was not included and the video was confusing. Furthermore, Appellant appears to argue the trial court should not have admitted either video based on authenticity concerns, arguing Bonifacio "did not know anything about the security system and how it operated" and the store owner who knew about the system failed to testify. In support of these arguments, Appellant cites to cases where the Supreme Court found the admission of prior bad acts or prior convictions were unduly prejudicial.

Contrary to Appellant's contentions, the videos were either materially unaltered or entirely unaltered, wer highly probative of the identity of the perpetrator of the attempted armed robbery, and the resulting probative value of the videos outweighed any potential prejudicial effect that could have resulted from them. Moreover, Appellant expressly conceded the video footage's authenticity below. (Tr. 7). As a result, the trial

court did not abuse its broad discretion in admitting either video. Appellant's conviction should be affirmed.

STANDARD OF REVIEW

Trial courts are entitled to great deference when ruling on evidentiary matters, and a trial court's decision to admit or exclude evidence will not be reversed on appeal absent a prejudicial abuse of discretion. State v. Groome, 274 S.C.189, 190-191, 262 S.E.2d 31, 32 (1980). Moreover, trial courts have "particularly wide discretion" in ruling on the comparative probative value and potential prejudicial effect of evidence. State v. Collins, 398 S.C. 197, 209, 727 S.E.2d 751, 757 (Ct. App. 2012). A trial court's ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-594 (Ct. App. 2001) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Id. at 358, 543 S.E.2d at 594.

ANALYSIS

Pursuant to South Carolina's rules of evidence, evidence must be excluded from trial if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. Collins, 398 S.C. at 202, 727 S.E.2d at 754. Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000). Significantly though, unfair prejudice does **not** mean damage to a defendant's case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true because all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant. Id. It is only unfair prejudice that must be avoided. Id.

In the present case, the trial court committed no error in admitting the chronologically-compiled video (State's Exhibit No. 14), as the video footage was not materially altered. Investigator William Gary testified he created State's Exhibit No. 14 from the raw video footage to allow the viewer (in this case, the jury) to observe the attempted armed robbery in one continuous video rather than looking at fifteen different screens at once with the perpetrator moving between the various screens as motion was detected. (Tr. 102-03). When asked if he had altered or amended any of the images from the raw footage, he replied:

> No, not at all. I didn't, again, I didn't zoom in, I didn't do anything with the color or the brightness, the con -- the contrast, anything like that and when it exports it, uh, I told it to put the time and date on the bottom left corner where you'll see when it switches from camera to camera the time might back up a few seconds because some of it's a little bit of an overlap in going from camera to camera but that's the only difference really between the two is that it's this one continuous video file, uh, with a little bit of overlap in time for different cameras on.

(Tr. 102-03). Therefore, Appellant's argument that "the State changed the evidence" is wholly without merit, as the video footage was not materially altered in any way.

Similarly, the trial court properly admitted State's Exhibit No. 16 as the video footage was entirely unaltered. Investigator Gary testified he recovered the raw surveillance footage from the GeoVision computer system that records the footage and he burned the footage onto a UBS drive. (Tr. 99). He testified he then put all of the raw footage onto a recordable disc, which he then logged into evidence. (Tr. 99). He testified he did not alter or amend any of the footage. (Tr. 99-100). When questioned as to why there were images from cameras 1-14 and camera 16, but not camera 15, Gary testified he was unsure if there was not a camera 15 or if he had not recovered the data from camera 15 because it was a video that did not capture the attempted armed robbery, such as an office view. (Tr. 104-05). Bonifacio testified similarly that he was unsure if the store was equipped with fifteen or sixteen cameras. (Tr. 93-94). Bonifacio also testified the video was unaltered and an accurate description of what happened that day. (Tr. 89-90).

Gary testified the cameras are motion sensitive, causing a slight delay when the motion switches from camera to camera. (Tr. 101-03). He testified this can give a false appearance that the perpetrator is in two places at the same time for a few seconds. (Tr.

101-02). Gary created State's Exhibit No. 14 to alleviate this problem. (Tr. 101-03). Both the raw original surveillance footage (State's Exhibit No. 16) and the chronologically-compiled video (State's Exhibit No. 14) were played for the jury.

Regarding the comparative probative value and potential prejudice effect of the evidence, the probative value of both videos far outweighed any potential for undue prejudice that could have resulted from their admission. Critically, the videos were highly probative of the critical issue in dispute (the identity of the perpetrator) and was extremely important to the jury's determination if Appellant was the perpetrator. Both Trishaunda (Rookard) Bennett and Rachel Wells identified Appellant as the perpetrator, either during trial or previously to law enforcement, based on the surveillance footage. These videos were particular important in establishing Appellant was, in fact, the person depicted in the surveillance footage. Furthermore, neither video was unduly prejudicial because any resulting prejudice stemmed from the legitimate probative force of the evidence in establishing Appellant's guilt for the indicted offense. See Mitchell, 399 S.C. at 420, 731 S.E.2d at 895 ("We also find the probative value of his testimony was not outweighed by the prejudicial effect based upon Mitchell's argument that Lt. McClurkin was a police officer."); see also Gilchrist, 329 S.C. at 630, 496 S.E.2d at 429 ("The prejudice Gilchrist seeks to escape is the prejudicial impact any criminal defendant faces when the State produces relevant evidence that implicates guilt of a crime charged. Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." (citations and internal quotations omitted)). As a result, the probative value of the introduction of State's Exhibit No. 14 greatly outweighed any potential prejudicial effect. See Dickerson, 341 S.C. at 400, 535 S.E.2d

at 123 ("Unfair prejudice means an undue tendency to suggest decision on an improper basis.").

Furthermore, Appellant's contentions that the videos should not have been admitted based on authenticity grounds are without merit. Appellant expressly waived this argument when he conceded it below. See State v. O'Neal, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) (recognizing a previously-raised objection can be waived). During his motion to suppress the videos, the trial court explicitly asked Appellant if he was challenging the authenticity of the video footage, to which Appellant replied that there was "no doubt" that the video footage came from "surveillance of . . . multiple cameras at the store" and he was "satisfied" with the video's authenticity. (Tr. 7). Therefore, Appellant's reliance on Washington v. State, 406 Md. 642, 961 A.2d 1110 (Md. 2008) is unpersuasive and misguided as this argument was waived below. Therefore, Appellant's appellate claims to the contrary are not preserved. Additionally, the videos were properly authenticated by Bonifacio, who testified that the surveillance footage was an accurate depiction of what happened during that day. (Tr. 89-90).See Rule 901, SCRE (videotape may be authenticated by testimony of a witness with knowledge that the matter is what is claimed to be).

Appellant's reliance on State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999) and State v. James, 355 S.C. 25, 583 S.E.2d 745 (2003) are misplaced, as neither case is analogous to the present case. In King, the Supreme Court held the admission of "other bad acts" testimony concerning thefts under a res gestae theory was reversible error because the thefts were too remote in time. In James, the Supreme Court held the probative value of all seven of defendant's prior burglary convictions was outweighed by the very great potential for prejudice to defendant, regardless of trial judge's limiting

instructions, and thus, trial court erred in admitting evidence of all seven of defendant's prior burglary convictions. In the present case, the State did not introduce, nor did it seek to introduce, and testimony or other evidence of Appellant's prior convictions or bad character. Furthermore, there is no logically way the raw surveillance footage of the attempted armed robbery can be construed as prior bad acts. Neither King nor James is relevant or controlling in Appellant's case.

Because the introduction of both videos satisfied all the requirements of South Carolina's evidentiary rules, the trial court did not abuse his broad discretion in admitting the videos. 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."); Lyles, 379 S.C. at 339-340, 665 S.E.2d at 207 (recognizing that a trial judge's ruling on the comparative probative value and potential prejudicial effect of evidence should be afforded great deference on appeal and should only be reversed in exceptional circumstances).

HARMLESS ERROR

Moreover, even assuming that the trial court somehow erred in admitting the videos, any error was entirely harmless in light of the fact that it was cumulative to other testimony and evidence establishing Appellant as the perpetrator. See State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) ("It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence."); see also State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) ("[An appellate court] will not set aside a conviction due to insubstantial errors not affecting the result."). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C.

41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). An admission of improper evidence is considered harmless when it is merely cumulative to other properly admitted evidence. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). "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." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

Here, any error in the admission of the videos was harmless, merely cumulative to other evidence, and not prejudicial. State's Exhibit No. 14 was cumulative to and corroborated by other evidence indicating that Appellant was the perpetrator, such as: the testimony regarding Wells' identification of Appellant based on the raw surveillance footage (both in-court and out-of-court), Rookard's testimony that Appellant looked similar to the perpetrator and owned the same gray striped sweatshirt the perpetrator wore, Rookard's testimony that she allowed Appellant to borrow the vehicle used to flee the scene during the time of the attempted armed robbery, the presence of Appellant's mail in the glovebox of the vehicle, and the evidence establishing Appellant could not be excluded as a contributor to a DNA mixture on the orange mask the perpetrator was wearing. See State v. Simmons, 308 S.C. 80, 83, 417 S.E.2d 92, 94 (1992) ("We note that, under certain circumstances, if the identification is corroborated by either circumstantial or direct evidence, then the harmless error rule might be applicable."). Because the challenged evidence was cumulative to other properly-admitted evidence,

any error in the admission of the videos was completely harmless and could not have affected the result at trial. See State v. Singleton, 395 S.C. 6, 14-15, 716 S.E.2d 332, 336 (Ct. App. 2001) (finding harmless error in the admission of identification testimony where two co-conspirators testified against Singleton and identified him as a participant in the robbery). Appellant's conviction 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

MEGAN HARRIGAN JAMESON
Assistant Attorney General
S.C. Bar No. 100108

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

180 Magnolia Street
Spartanburg, South Carolina 29306
(864) 596-2575

BY: Megan Harrigan Jameson
Megan Harrigan Jameson

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

ATTORNEYS FOR RESPONDENT

11/17, 2015

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2014-002276

THE STATE,

Respondent,

vs.

WENDELL BERNARD WILKINS,

Appellant.

PROOF OF SERVICE

I, Megan Harrigan Jameson, 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
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 17th day of November, 2015.

Megan Harrigan Jameson

Megan Harrigan Jameson
Assistant Attorney General
S.C. Bar No. 100108

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

ALAN WILSON
ATTORNEY GENERAL

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Lanelle Cantey Durant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Wendell Bernard Wilkins – Appellate Case No. 2014-002276

Dear Ms. Durant:

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

Sincerely,

Megan Harrigan Jameson

Megan Harrigan Jameson
Assistant Attorney General
S.C. Bar No. 100108

MHJ/

Enclosures

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