STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-001715

THE STATE, ...RESPONDENT

v.

MICHAEL ORLANDO BROWN, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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2. Whether Appellant's claim that the trial court erred in denying his pretrial motion to suppress his incriminating statements to the police on grounds they were obtained in violation of his Fifth Amendment rights to remain silent and to counsel is preserved for appellate review where: (1) the grounds argued in this appeal were never specifically raised to the trial court, and (2) Appellant failed to renew his motion at trial when testimony about the statements was introduced. Additionally, to the extent this Court determines this issue is preserved, whether the trial court properly admitted Appellant's statements where they were made before he unambiguously invoked his Fifth Amendment rights?

3. Whether the trial court properly denied Appellant's motion for a directed verdict and submitted the case to the jury where the State presented direct evidence and substantial circumstantial evidence from which the jury could fairly and logically find that Appellant was guilty of attempted armed robbery.

STATEMENT OF THE CASE

Michael Orlando Brown (Appellant) was indicted at the April 2014 term of the grand jury for Richland County for attempted armed robbery (2014-GS-40-2050). He was represented by assistant public defenders Anastasia L. Walker and Alicia Dye of the Fifth Circuit Public Defender's Office. Respondent (the State) was represented by assistant solicitors K. Luck Campbell, Meghan L. Walker, and Sandra V. Moser of the Fifth Circuit Solicitor's Office. On August 4-5, 2014, Appellant proceeded to trial by jury pursuant to which he was found guilty as charged. He was sentenced by the Honorable James R. Barber to life imprisonment without the possibility of parole pursuant to Section 17-25-45 of the South Carolina Code. Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On the night of January 3, 2013, while a small group of employees was cleaning up the Chuck E. Cheese restaurant in Columbia prior to closing, an armed gunman wearing a bandana over his face and a wig entered the restaurant, grabbed an employee, put a gun to his back, and demanded money before fleeing on foot. Portions of the attempted armed robbery were captured on surveillance video. Shortly thereafter, the police responded to the scene and a K-9 officer was able to track the man's trail away from the building. The dog led the police to a neighboring property where they found a red bandana and a wig matching the description of those used in the attempted armed robbery. These items were tested for DNA and the bandana was connected to Appellant, leading to his arrest. (R.p.66, line 16-p.72, line 14).

Pretrial Motion to Suppress Appellant's Statement: DNA

After voir dire and jury selection, the jury was excused while the trial court addressed several pretrial matters, including holding a Jackson v. Denno[1] hearing to assess the voluntariness of an oral statement Appellant made to the police following his arrest. (R.p.10, line 6-p.26, line 5). Appellant initially said he was challenging the portion of his statement where, when he was asked to provide a sample of his DNA, he allegedly said: "No, I'm not giving it, [because] that will convict me." (R.p.25, lines 11-14).

The State called Richland County Sheriff's Department Investigator Robert Martin to the stand.[2] He testified he interviewed Appellant in his office on March 14,

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[1] Jackson v. Denno, 378 U.S. 368 (1964).

[2] The senior manager who was in charge of operating the Chuck E. Cheese on the night of the attempted armed robbery was Ronnie Lee Kennedy Martin, Jr. (R.p.230, lines 1-25). To avoid confusion, the State

2013, after Appellant was arrested. Martin described an "advice of rights" form he used to advise Appellant of his Miranda[3] rights both orally and in writing. He explained the form listed the standard rights and included individual boxes he could check after covering each of those right with Appellant including: (1) the right to remain silent with the understanding that anything he said could be used against him in court, (2) the right to talk to a lawyer prior to being questioned, (3) the right to have a lawyer present during questioning, (4) the right to an appointed lawyer if he could not afford an attorney, and (5) the right to stop answering questions at any time. Martin testified the form was signed by Appellant and witnessed by Martin and included a section titled "waiver of rights" wherein Appellant acknowledged he read and understood his rights and was willing to talk to the police and answer questions. Martin testified Appellant seemed to understand what he was saying, indicated he was able to read and write, and said he understood the rights he was given. He testified that Appellant was not denied food, water, or use of a bathroom, and understood that at any point he could stop talking. (R.p.24, line 10-p.33, line 10).

Martin next described the questions he asked and the answers Appellant gave after waiving his rights. Martin asked why Appellant's DNA would be left at the scene of the crime and Appellant could not give a valid reason. He testified that at some point during the conversation they began talking about the possibility of Appellant giving a DNA sample but Appellant said no, that it would convict him. Martin explained that Appellant never denied the validity of the DNA evidence and said he was not going to

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will refer to Investigator Robert Martin as "Martin" or Investigator Martin, and senior manager Ronnie Martin as "Ronnie."

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

challenge the DNA because he knew it would be enough to convict him. Martin also testified Appellant asked about possibly of being charged with a lesser charge because the attempted armed robbery carried the possibility of a life sentence; however, Martin explained he could not make deals and any negotiations would be between his attorney and the solicitor. The solicitor asked Martin if he would have stopped the conversation if Appellant told him he wanted to stop talking. Martin testified he did in fact stop the interview when Appellant indicated he did not want to talk about the case anymore. (R.p.33, line 11-p.36, line 8). On cross-examination Martin testified that when he asked Appellant for DNA, Appellant declined until he had spoken to an attorney; however, Martin could not remember exactly when he asked Appellant for the DNA. He testified it was either during or at the end of the conversation. (R.p.36, line 12-p.41, line 15).

The State did not put up any additional witnesses and Appellant did not testify on his own behalf. Instead, Appellant's counsel argued that since Martin was unable to recall exactly when Appellant made the statement about DNA being able to convict him, it may have been made after Appellant invoked his Sixth Amendment right to counsel, and therefore should be excluded. The solicitor responded that Martin unequivocally testified he stopped the conversation as soon as Appellant said he wanted to talk to an attorney. Based on the testimony, the trial judge made a factual finding that Appellant first stated he was not going to give a DNA sample because it would convict him and at some point later said he needed to talk to an attorney, which is when Martin stopped the conversation. The judge expressed concern about admitting testimony about Appellant facing life in prison but the solicitor assured the judge the State would not elicit such testimony. In regard to the DNA, the trial judge held he would not allow any testimony

that Appellant refused to give a DNA sample, but was inclined to allow testimony about the portion of the statement where he said: "I know DNA will convict me." Appellant continued to argue the DNA statement should not come in because Martin's notes are confusing as to when it was made; however, the trial judge ruled that was "a matter of believability" which Appellant could explore on cross-examination. The trial judge reserved making a final ruling until the parties had an opportunity to do additional research over lunch. (R.p.41, line 23-p.47, line 23).

Following the lunch recess, the trial judge asked if the parties had any additional authority or arguments. Appellant's counsel advised she was concerned about admitting only a portion of Appellant's statement about the DNA evidence because in may be confusing to the jury when it is taken out of context. The trial judge ultimately ruled in accord with his previous inclination, that Martin would be allowed to testify Appellant said "DNA will convict me," but would not be allowed to say that Appellant refused to submit himself to a DNA test. (R.p.57, line 17-p.58, line 11).

Pretrial Motion to Suppress Appellant's Statement: Offer to Plead

After Martin's pretrial testimony, Appellant made an additional motion to suppress any testimony about the portion of his statement where he made an "offer to plead guilty" to a lesser charge. Initially, the trial judge found the State should not go into the fact Appellant offered to plead; however, the solicitor argued the statement should not be suppressed because it was not made during a plea negotiation with her office and instead was an admission of guilt. Appellant responded: "I would still argue it is prejudicial and probative value. I don't think that is a confession, Your Honor." (R.p.49, line 7-p.50, line 23). Following the lunch recess, the trial judge asked if the

parties had any additional authority or arguments. The solicitor noted Appellant was seeking to exclude the statement pursuant to Rule 410(4), SCRE, and argued the rule was not applicable because the statement was not made to a prosecuting attorney and was therefore not a part of a plea negotiation. Appellant's counsel responded that since Appellant was talking to law enforcement and was asking to plead to a lesser charge, the statement was clearly made in an attempt to negotiate a plea and should be suppressed under Rule 410. Appellant made no mention or reference to Rule 403, SCRE, or any other rule of evidence, instead conceding Rule 410 only mentions statements made in the course of discussions with a prosecuting attorney. The trial judge ruled Appellant's statement offering to plead guilty to a lesser charge would be admitted. (R.p.53, line 13-p.57, line 16).

Trial

After the jury was sworn, the trial judge gave preliminary instructions and invited the parties to make opening statements. (R.p.59p.66). The solicitor briefly described the State's theory of the case and outlined the witnesses and other evidence the State expected to present during trial. She did not mention Appellant's statements to Martin. (R.p.66-p.75). Appellant responded by arguing that someone else committed the attempted armed robbery. He did not dispute his DNA was on the bandana found near the scene but argued that, since there were no witnesses able to make a positive identification, the presence of DNA was not sufficient for the State to meet its burden of proof. Appellant explained the jury would hear about statements he made to Investigator Martin, but he asked them to consider those statements in the context in which they were made and to find him not guilty. (R.p.72-p.79).

The State first called Investigator John Robert Sullivan, Jr., of the Richland County Sheriff's Department called to the stand. Sullivan testified he was working patrol duty on the night of January 3, 2013, and responded to a call about a robbery in progress at the Chuck E. Cheese on Burning Tree Road in Richland County. When he arrived at the scene, Sullivan spoke to several employees and learned a black male suspect had entered the restaurant brandishing a handgun. The suspect was described as wearing a wig, a red bandana, and dark clothing. Sullivan testified he was able to watch a security video recording of the incident which showed the suspect running behind the Chuck E. Cheese towards El Toro, another restaurant which was several feet away. He explained the wig, red bandana, dark clothing, and white shoes were visible in the video. Sullivan testified he called a K-9 unit to see if they could track the suspect and that after arriving, the K-9 officer found a wig and a red bandana on the back side of El Toro. The red bandana, the wig, and several photographs of the scene were admitted into evidence without objection. Sullivan testified that the police temporarily detained a man wearing dark colored clothing who was walking by the scene based on the manager's indication that he might be the intruder; however, after further investigation, that man was let go later that night. (R.p.79-p.90).

Next the State called Richland County K-9 officer Stephen Pearrow to the stand. He described being dispatched to the Chuck E. Cheese on January 3, 2013, and the efforts he made to track the scent of the person who tried to commit the robbery. Pearrow testified his dog was able to immediately pick up a scent which led out the door of the Chuck E. Cheese and directly to El Toro, where he discovered a wig and a bandana. The dog continued trying to track the scent but lost it in a small parking lot next to El Toro.

Pearrow said this is likely because this is where the suspect got into a car. He testified he and the dog continued searching the area for a weapon but never found one. (R.p.105-p.119).

The State then called the general manager of the Chuck E. Cheese, Ronald Stewart Jones, Jr., to the stand. He was not present at the time of the crime, but was called out to the restaurant shortly afterwards to take statements from his employees and to play the security camera video recording for the officers. (R.p.121-p.124). Next, Kadeshia Green testified for the State. She was a cashier at Chuck E. Cheese on January 3, 2013, and was working with Kyrie Green to take down the salad bar at the time of the incident.[4] Kadeshia testified that sometime between 9 and 10 that night she saw a man wearing dark clothing, a red bandana, a wig, black shades, and a mustache come into the store and start reaching into his pocket. Because the man did not look familiar, her first instinct was to run. As Kadeshia and Kyrie ran towards the back of the store, she saw the man holding a gun to Kyrie's back. She alerted Ronnie, the on-duty manager, that the man had a gun and as they ran towards the back bathroom of the store she saw the man leave through the front door. (R.p.126-p.134).

Kyrie Green then took the stand to describe the attempted armed robbery from his perspective. He worked as a game room attendant at Chuck E. Cheese and on the night of January 3, 2013, he was helping to clean-up and close down the restaurant. Kyrie explained that although the store did not close until 10 p.m., the customers cleared out pretty early so they were cleaning up around 9:15 or 9:20 p.m. He said there were three other employees in the restaurant besides himself: Kadeshia, Ronnie, and a cook named Anna. Kyrie testified he was at the salad bar when a black man came in wearing a dark

[4] Kadeshia Green and Kyrie Green are not related. (R.p.1436, lines 15-18).

brown wig, a red bandana around his neck, dark clothing, white shoes, and glasses. He said Kadeshia saw the man first, said he had a gun, and ran. When Kyrie turned to look, the man already had the gun out and was coming towards him. Kyrie testified the man got very close, ordered him to turn around, and told him to walk towards the back. He could feel the gun directly in the center of his back. When they encountered Ronnie coming out of the office, the man pushed Kyrie towards the wall and went towards Ronnie. Kyrie testified that the man stopped, looked at him, Kadeshia, and Ronnie and then ran out the front door. He then repeated portions of his testimony while the video recording was played, pointing out particular events as they occurred. Kyrie testified the entire event felt like it took five minutes even though the video showed it took only 25 seconds. He testified that when the man pointed the gun at him, he said "take me to the money." (R.p.140-p.155). On cross-examination Kyrie admitted he initially pointed out another man who was later walking near the scene as the possible robber because he was wearing similar glasses, but he then realized that man was not the person who tried to rob the store. (R.p.155-p.157).

Investigator Martin: Appellant's Statements

Next, the State called lead investigator Robert Martin to the stand. Martin testified the case was assigned to him for follow up investigation after the initial documentation from the crime was complete. He reviewed notes from the reporting officers and statements from the witnesses, made attempts to retrieve video recordings from the store surveillance cameras, and requested that the evidence that had been collected be submitted for DNA testing. When the test results came back with a match to Appellant, he became the focus of the investigation. Martin testified he had Appellant

arrested and brought to the station to talk. Martin described an "advice of rights" form he used to advise Appellant of his Miranda rights both orally and in writing. He first asked some basic background questions to make sure Appellant had graduated high school, was not under the influence of any alcohol or drugs, and was not suffering from lack of food or sleep. Martin explained the form listed the standard rights and included individual boxes he could check after covering each of those right with Appellant including: (1) the right to remain silent with the understanding that anything he said could be used against him in court, (2) the right to talk to a lawyer prior to being questioned, (3) the right to have a lawyer present during questioning, (4) the right to an appointed lawyer if he could not afford an attorney, and (5) the right to stop answering questions at any time until he talked to a lawyer. Martin testified the form was signed by Appellant and witnessed by Martin and included a section titled "waiver of rights" wherein Appellant acknowledged he read and understood his rights, was willing to talk to the police and answer questions, had not been promised anything, and had not been pressured or coerced to talk. Martin testified Appellant seemed to understand what he was saying, indicated he was able to read and write, and said he understood the rights he was given. He testified he did not threaten or pressure Appellant to talk and did not make him any promises. (R.p.162, line 6-p.174, line 14).

Martin next described the conversation he had with Appellant after Appellant waived his rights. He said Appellant wanted to know more about the facts of the case because he was only vaguely familiar with those facts from being read the language in the arrest warrant. Martin testified they discussed DNA and Appellant wanted to know what kind of DNA was found. He testified he just told Appellant it was Appellant's

DNA. Martin testified that at that point, Appellant said he was not going to challenge the DNA and that he wanted to be charged with something lesser if he could. Martin testified Appellant said he knew the DNA would convict him, he wanted a less severe charge, and he wanted to discuss a plea. He testified Appellant clearly stated he wanted to plead guilty. Martin told appellant he was not at liberty to make plea offers and that anything of that nature would be between his attorney and the solicitor. Eventually, Martin terminated the interview after Appellant wanted to make a phone call to his girlfriend. Appellant did not object to Martin's testimony about his statements, either in regard to the comment that DNA would convict him, or his offer to plead guilty to a lesser charge. He did not attempt to renew his pretrial motion to suppress in any fashion, and he failed to advise the trial judge that Martin's trial testimony was subject to his previous objections. (R.p.174, line 15-p.177, line 12).

Martin testified that before the interview ended he questioned Appellant about certain physical characteristics of the robber and the timeline. Appellant told Martin he had been to that Chuck E. Cheese in 2011 or 2012 for a birthday party but denied being there since, and denied being there on the day of the robbery. Martin testified Appellant also denied owning a gun and denied ever wearing a wig, and suggested someone may have been trying to frame him by planting his DNA on something from the scene. Martin clarified that Appellant's call to his girlfriend came during their conversation, before the interview terminated. (R.p.177-p.186). For the remainder of the first day of trial and the beginning of the second day, Appellant cross-examined Martin in regard to particular pieces of evidence and particular aspects of his investigation. (R.p.186-p.229).

Remainder of Evidence

The State next called the manager from Chuck E. Cheese, Ronnie Lee Kennedy Martin, Jr., to the stand. Ronnie was operating the restaurant on January 3, 2013, when the attempted robbery took place. He testified he noticed a suspicious person across the street in the Motel 6 parking lot prior to the incident, but did not think anything of it. He went into his office to do paperwork when Kadeshia suddenly came running in to say they were getting robbed. Ronnie testified they ran out of the kitchen/office area when he got a glimpse of a light skinned black man with an average build holding a black gun. He testified the man was wearing a red bandana, glasses, a dark Hollister fleece, and a wig. As he and Kadeshia headed towards the back bathroom, the man turned and ran out the front door. Ronnie then called the police. (R.p.229-p.238).

Finally, the State called DNA analyst John Barron of the Richland County Sheriff's Department to the stand. After hearing about Barron's education and training the trial court qualified him as an expert in DNA analysis without objection. Barron explained the basic science behind DNA including how it is deposited on objects, and how it is collected, tested and identified. He testified the lab received a wig, a bandana, and buccal swabs from both Appellant and an individual named Michael Roscoe for testing. Barron testified there was no human DNA on the wig but there was DNA on the bandana from which he could develop a DNA profile. He testified there was a mixture of DNA on the bandana and described the difference between a major contributor and a minor contributor when there is such a mixture. Barron testified the major contributor of DNA on the bandana was "easily discernible" and contributed nine to ten times as much DNA as the minor contributor. The DNA from the minor contributor was in sufficient

quantity to develop a profile that could be compared to a known sample but not to the entire DNA database. The bandana also contained DNA from a third contributor but it was such a small amount it was insufficient to develop a profile for any kind of comparison. Barron testified the major contributor was a match to Appellant. He explained that the population of the world is approximately 7 billion (7,000,000,000) and that, based on a statistical analysis, the major contributor's DNA was 9 sextillion (9,000,000,000,000,000,000,000) times more likely to be the DNA of Appellant versus a random individual. Barron opined that within all reasonable scientific certainty, the DNA on the bandana belonged to Appellant. He testified the major contributor in this case would have come in very strong contact with the bandana and noted that Michael Roscoe was excluded as either the major or minor contributor. (R.p.246-p.265). On redirect, Barron testified that in his scientific opinion, Appellant's DNA was on the bandana. (R.p.269-p.271).

Motion for Directed Verdict

At the close of Barron's testimony, the jury exited the courtroom and the solicitor advised the trial court the State had no further witnesses. Appellant then told the trial court he would not being putting up any evidence in defense. Because the jury was already out, the trial court allowed Appellant to move for a directed verdict and argue his motion before the State rested on the record. Appellant argued that even when taken in the light most favorable to the State, the State failed to provide a basis for the jury to find him guilty beyond a reasonable doubt. He contended the circumstantial evidence presented did not rise to the level of substantial circumstantial evidence required to submit the case to the jury, and that since there was no physical evidence placing him

directly at the scene and no eyewitness identification, the evidence only raised a mere suspicion of guilt. (R.p.272, line 22-p.275, line 20). The solicitor responded that the State had presented direct and substantial circumstantial evidence which warranted sending the case to the jury. (R.p.275, line 21-p.276, line 21).

The trial judge denied Appellant's motion after finding the State had presented both substantial circumstantial evidence and direct evidence of Appellant's guilt. The trial court found the presence of Appellant's DNA on the bandana which was discovered when the K-9 unit tracked a scent directly from the scene of the crime to the adjoining property constituted substantial circumstantial evidence of guilt. The trial court also found Appellant's statements to Investigator Martin constituted direct evidence of guilt in the form of a confession. (R.p.277, line 12-p.279, line 1). Appellant was then sworn and questioned in regard to his decision not to testify, and when the jury returned, both the State and the defense rested. (R.p.279-p.287).

Closing Arguments, Jury Charge, & Verdict

In the State's closing argument, the solicitor went through all of the evidence that had been presented but primarily focused on the presence of Appellant's DNA on the red bandana located by the tracking dog. She described Appellant's offer to plead guilty as direct evidence of guilt and mentioned it several times during her close. The solicitor also referenced Appellant's statement that the DNA was enough to convict him. (R.p.287-p.307). Appellant's closing argument focused on his theory of defense: that the person who wore a wig and bandana while robbing the Chuck E. Cheese was someone other than Appellant. He argued the inadequacy of the police investigation, the lack of

eyewitness identification, and the omissions in Investigator Martin's report all should lead the jury to conclude that he was an innocent man. (R.p.307-p.321).

The trial judge charged the jury on the presumption of innocence, the State's burden of proof, reasonable doubt, and direct and circumstantial evidence. He also charged the jurors on their roles as the finders of fact and as the sole judges of the credibility of witnesses, including expert witnesses. The judge charged the jury in regard to its ultimate duty to determine whether Appellant made the statement he allegedly made to the police and whether that statement was made voluntarily. He charged the jury that Appellant's decision not to testify could not be considered in any way and explained their duty to accept and apply the law as charged. Finally, the trial judge charged the elements of the crime and described the verdict form. Neither party took exception to the jury charge. (R.p.321, line 4-p.335). After deliberating for approximately two hours, the jury asked to rehear portions of the testimony. Upon hearing the requested testimony and further deliberations, the jury found Appellant guilty of attempted armed robbery. (R.p.335-p.340). Appellant renewed all objections and motions previously overruled or denied and moved for new trial on grounds that it was an unusually short deliberation time. The trial court denied all motions and sentenced Appellant to life imprisonment without the possibility of parole pursuant to Section 17-25-45 of the South Carolina Code. (R.p.345-p.348).

ARGUMENT

I.

Appellant's claim that the trial court erred in denying his pretrial motion to suppress his statement offering to plead guilty is not preserved for appellate review because: (1) the Rule 403, SCRE, grounds argued in this appeal were never specifically raised to the trial court, and (2) Appellant failed to renew his motion at trial when testimony about the statement was introduced. Additionally, to the extent this Court determines this issue is preserved, the trial court properly admitted Appellant's offer to plead guilty where the probative value significantly outweighed any allegedly improper prejudicial effect.

Appellant argues the trial court erred in admitting his statement to the police offering to plead guilty to a lesser offense because the probative value of the statement was outweighed by the unduly prejudicial effect under Rule 403, SCRE.[5] He acknowledges the statement did not constitute an inadmissible prior plea negotiation pursuant to Rule 410, SCRE; however, he maintains it nevertheless constituted an "informal plea discussion" and therefore should still have been excluded under Rule 403. Appellant contends that "a policy of allowing such indefinite statements or inquiries to be used against a defendant offends the presumption of innocence and requirement that the State bear the burden of proving its case beyond a reasonable doubt." (Brief of Appellant, p.20-p.21). He argues "the policy considerations in favor of plea agreements and common sense weigh in favor of exclusion under Rule 403." (Brief of Appellant, p.24). The State disagrees and submits Appellant's argument should be denied and dismissed on several grounds.

[5] Rule 403 gives the trial court discretion to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE (emphasis added). The threshold articulated by Appellant in this appeal does not appear in the Rules.

First, the argument is not preserved for appellate review. By failing to specifically challenge admission of the offer to plead guilty under Rule 403, Appellant failed to preserve his Rule 403 argument for appeal. Similarly, by failing to raise a contemporaneous objection when the statement was actually introduced into evidence at trial, Appellant waived his right to pursue this argument on appeal. In any event, the trial court properly admitted Appellant's statement offering to plead guilty because the probative value significantly outweighed any allegedly improper prejudicial effect. For all of these reasons, Appellant's Rule 403 argument should be denied and dismissed with prejudice, and Appellant's conviction should be affirmed.

Issue Preservation

Appellant's Rule 403 argument is not preserved for appellate review for two reasons. First, it is not preserved because it was not specifically raised to and ruled upon by the trial court. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). The South Carolina Rules of Evidence provide that:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, **and** . . . [i]n case the ruling is one admitting evidence, **a timely objection or motion to strike appears of record, stating the specific ground of objection**, if the specific ground was not apparent from the context.

Rule 103, SCRE (emphasis added). This rule is generally in accord with prior South Carolina law which requires a contemporaneous objection with specific grounds to preserve an error for review. State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) ("An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error."); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) (finding that a contemporaneous objection is required to preserve an issue for

appellate review); State v. Bailey, 253 S.C. 304, 170 S.E.2d 376 (1969) (holding that specific grounds are required and that a general objection preserves nothing).

Here, the only objection Appellant initially raised in regard to his statement offering to plead guilty was that it should be inadmissible because it was made as part of a plea negotiation. Although Appellant's counsel made the confusing comment that: "I would still argue it is prejudicial and probative value," she never specifically moved to exclude the testimony pursuant to Rule 403, SCRE, and she never claimed the probative value was "substantially outweighed by the danger of unfair prejudice" as set forth in the Rule. Appellant certainly never made a policy argument that admission of the statement would offend the presumption of innocence, the State's burden of proof, or common sense. As a result, the trial court was not given an opportunity to make a ruling on the main thrust of the argument Appellant is now presenting on appeal. Because the claims now being argued in this appeal were neither raised to nor ruled upon by the trial court with sufficient specificity, they are not preserved for review. Rule 103, SCRE; Byers, supra; Hoffman, supra.

Second, Appellant's Rule 403 argument is not preserved because Appellant failed to renew his pretrial objection when the State actually elicited testimony about that statement during trial. Generally, a motion in limine seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially prejudicial evidence to the jury, and a ruling on such a motion is preliminary and subject to change based on developments during trial. State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999). A ruling on a motion in limine does not constitute a final ruling on the admissibility of evidence. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). Therefore, an objection must be

made at the time the evidence is introduced during trial in order to preserve the issue for appellate review. State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993). "However, where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection." State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (emphasis added); see State v. Wiles, 383 S.C. 151, 156-57, 679 S.E.2d 172, 175 (2009) ("This exception is based on the fact that when the trial court's ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection.").

Here, five witnesses testified on behalf of the State between the trial court's ruling and the time Investigator Martin was called to the stand. (R.p.79-p.157). The State proceeded to elicit detailed trial testimony from Martin regarding Appellant's statement, including his offer to plead guilty. Martin described Appellant's arrest, the administration of Miranda rights, Appellant's knowing and voluntary waiver of those rights, and his statement offering to plead guilty. Appellant did not object to any of this testimony during the trial and did not ask the court to note or otherwise address his pretrial objections. (R.p.174-p.177). Although Appellant later attempted to renew all objections and motions after the verdict was rendered (R.p.345-p.348), this objection was too late to sufficiently preserve his pretrial challenge to admissibility of his statement for appellate review. Schumpert, supra. Thus, for both of these reasons Appellant failed to preserve his Rule 403 argument for appeal, and his conviction should be affirmed.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Manning, 400 S.C. 257, 264, 734 S.E.2d 314, 317 (Ct. App. 2012). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant. State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006); State v. Rice, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007). An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support. State v. Irick, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003). To the extent this Court finds Appellant's Rule 403 argument was sufficiently preserved, it is nevertheless without merit.

Law / Analysis

Appellant's offer to plead guilty was clearly relevant to prove his identity, particularly in light of his defense that someone else committed the attempted armed robbery. Indeed, as found by the trial judge, the statement constituted direct evidence of guilt in the form of a confession. As direct evidence, the statement's probative value significantly outweighed any danger of unfair prejudice. In fact, the only prejudice to Appellant came from the legitimate probative force of that evidence. It was the same

prejudice suffered by any defendant who freely, voluntarily and knowingly confesses to a crime. Thus, the trial court properly refused to exclude it under Rule 403, SCRE.

Relevance

As a general rule, all relevant evidence is admissible. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); Rule 402, SCRE. Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In the Matter of Care and Treament of Corley, 353 S.C. 451, 577 S.E.2d 451 (2003); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002); Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Here, the identity of the individual who committed the attempted armed robbery was of consequence to the jury's determination of guilt or innocence at trial, particularly where Appellant presented a defense that he did not commit the crime. (R.p.72-p.79; p.307-p.321). Appellant's offer to plead guilty to a lesser offense had a tendency to make the determination of the identity of the attempted armed robber more probable than it would be without the testimony; therefore Appellant's statement was relevant. Rule 401, SCRE.

Rule 403, SCRE: Probative Value

"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." Rule 403, SCRE; State v. Cooley, 342 S.C. 63, 536 S.E.2d 666 (2000). "To show prejudice, there must be a reasonable probability that

the jury's verdict was influenced by the challenged evidence." State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012). Further, Rule 403, SCRE, requires "unfair prejudice" before the evidence will be excluded. "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 a decision on an improper basis." Id. at 529, 732 S.E.2d at 229. A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). The appellate courts review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. Id. at 358, 543 S.E.2d at 593. See Aleksey, 343 S.C. at 35, 538 S.E.2d at 256 (finding the trial judge is given broad discretion in ruling on questions concerning relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Here, the undue prejudice Appellant appears to posit is that his unsolicited offer to plead guilty might make the jurors believe he was guilty. Indeed it might. In fact, this is precisely why the statement is probative. Appellant relies on a host of policy considerations which support the inadmissibility of statements made in true plea negotiations with a prosecuting attorney; however, all of those considerations are currently incorporated into Rule 410, SCRE, which only excludes statements "made in

the course of plea discussions with an attorney for the prosecuting authority." Appellant argues these "policy considerations in favor of plea agreements and common sense weigh in favor of exclusion under Rule 403, SCRE." (Brief of Appellant, p.24). The State submits just the opposite is true. Limiting the rule to discussions made with prosecuting attorneys demonstrates a clear legislative policy NOT to exclude confessions made to law enforcement officers or others who are not prosecuting attorneys, even when the defendant claims to be trying to negotiate a plea when he confesses. To the extent our Legislature wishes to expand the underlying policy considerations so that they cover any and all offers to plead guilty, including those to law enforcement officers, it can do so through legislative action. Otherwise, our current rules of evidence do not support suppression of this highly relevant evidence in Appellant's case. As a result, the unfair prejudice claimed by Appellant simply does not exist. Instead, the probative value of the offer to plead guilty supports the trial court allowing it into evidence.

Appellant states: "it is not difficult to understand why Brown would have inquired about the possibility of a plea or stated that he intended to plead guilty at the time of his interrogation despite being innocent of the attempted armed robbery." He goes on to argue: "This cannot amount to a confession, as it is not evidence of consciousness of guilt." (Brief of Appellant, p.25). While these may be perfectly legitimate arguments to make to the jury regarding the weight of the evidence, they do not justify exclusion of relevant evidence from the jury's consideration. Appellant has shown no abuse of discretion and no exceptional circumstances to warrant reversing the trial court's discretionary ruling to admit his offer to plead guilty into evidence. Douglas, supra; Irick, supra. Appellant's conviction should be affirmed.

II.

Appellant's claim that the trial court erred in denying his pretrial motion to suppress his incriminating statements to the police on grounds they were obtained in violation of his Fifth Amendment rights to remain silent and to counsel is not preserved for appellate review because: (1) the grounds argued in this appeal were never specifically raised to the trial court, and (2) Appellant failed to renew his motion at trial when testimony about the statements was introduced. Additionally, to the extent this Court determines this issue is preserved, the trial court properly admitted Appellant's statements where they were made before he unambiguously invoked his Fifth Amendment rights.

Appellant argues the trial court erred in admitting his statements to the police that "DNA will convict me" and that he wanted to plead guilty, because those statements were made after he had invoked his Fifth Amendment rights against self-incrimination and to counsel. He argues that because Investigator Martin was unable to provide a precise timeline of the interview, his testimony did not support the trial judge's finding that Appellant made the incriminating statements prior to the assertion of his constitutional rights. (Brief of Appellant, p.28). The State disagrees and submits Appellant's argument should be denied and dismissed on several grounds.

Issue Preservation

Appellant's Fifth Amendment argument it is not preserved for appellate review because it was not specifically raised to and ruled upon by the trial court. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). At the suppression hearing, Appellant's counsel argued that since Martin was unable to recall exactly when Appellant made the statement about DNA being able to convict him, it may have been made after Appellant "essentially invoked his Sixth Amendment Right to Counsel," and therefore should be excluded. Counsel said she was concerned the statement was made "outside

the parameters of Miranda," but she never specifically mentioned the Fifth Amendment, Appellant's privilege against self-incrimination, or Appellant's right to remain silent. (R.p.41, line 23-p.47, line 23). Even after being given additional time to conduct research Appellant's counsel did not say anything to the trial court about the Fifth Amendment. (R.p.57, line 17-p.58, line 11). As a result, the trial court was not given an opportunity to make a ruling on the main thrust of the argument Appellant is now presenting on appeal. Because the claims now being argued in this appeal were neither raised to nor ruled upon by the trial court with sufficient specificity, they are not preserved for review. Rule 103, SCRE; Byers, supra; Hoffman, supra.

Appellant's Fifth Amendment argument is also not preserved because he failed to renew his pretrial objection during trial. As noted above, five witnesses testified on behalf of the State between the trial court's ruling on Appellant's pretrial motion to suppress and the time Investigator Martin was called to the stand. (R.p.79-p.157). The State then elicited trial testimony from Martin regarding Appellant's statement that DNA would convict him and his offer to plead guilty. Appellant did not object to any of this testimony during the trial and did not ask the court to note or otherwise address his pretrial objections. (R.p.174-p.177). Thus, as with Issue I above, this argument is not preserved.

In an attempt to excuse his failure to preserve this issue for appeal, Appellant argues that the intervening witnesses were not relevant to the suppression of the statements and therefore they presented no new basis for seeking suppression or for the trial court changing its ruling. He contends this means no further objection was necessary and would have been futile, thereby qualifying him for the narrow exception to

our rules of error preservation described above. The State disagrees. The intervening witnesses set the stage for Appellant making his incriminating statements to Investigator Martin because they explained exactly how the police discovered the red bandana which contained Appellant's DNA. From the victims' descriptions of the perpetrator, to the dog tracking a scent away from the scene, to the discovery of the red bandana nearby, these witnesses provided the trial judge with extensive background information and context regarding Appellant making the incriminating statements. Indeed, it was the DNA match on the red bandana which led to Appellant's arrest and which colored his entire post-arrest interview with Martin. Thus, contrary to Appellant's assertion, a contemporaneous objection was crucial to preserve his motion to suppress under the circumstances of this case. The analysis proposed by Appellant would result in the exception swallowing the rule, thereby eliminating the long established requirement for renewing an objection at trial once the trial court had made an adverse pretrial evidentiary ruling. Where five fact witnesses have testified for the State, the trial court's ruling was not made "immediately prior to the introduction of the evidence in question." Appellant's argument is not preserved for appellate review. Schumpert, supra.

Law / Analysis

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Manning, 400 S.C. 257, 264, 734 S.E.2d 314, 317 (Ct. App. 2012). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.

The Fifth Amendment to the United States Constitution provides: "No person shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const.

amemd. V. The Fifth Amendment's right against self-incrimination was made applicable to the individual states through the Fourteenth Amendment. U.S. Const. amend. XIV; Malloy v. Hogan, 378 U.S. 1, 6 (1964). In interpreting the Fifth Amendment, the United States Supreme Court has held that the prosecution may not use statements stemming from the custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards. Miranda, 384 U.S. at 444. These safeguards are intended to prevent government officials from using the coercive nature of confinement to extract confessions that would not otherwise be given. Arizona v. Mauro, 481 U.S. 520, 529-30 (1987). "The main purpose of Miranda is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel." Berghuis v. Thompkins, 560 U.S. 370, 383 (2010). Both of these rights protect the privilege against compulsory self-incrimination by requiring an interrogation to cease when either right is invoked. Id. at 381. To invoke either the right to counsel or the right to remain silent a suspect must do so "unambiguously." Id. at 381-82; State v. Moses, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (Ct. App. 2010).

Here, Martin testified he stopped the interview with Appellant as soon as Appellant indicated he did not want to talk about the case anymore. (R.p.33, line 11-p.36, line 8). Although Martin's testimony regarding the timing of: (1) Appellant saying the DNA from the scene would convict him, (2) Appellant asking to plead guilty to a lesser offense, (3) Martin requesting a DNA sample, and (4) Appellant declining that request until he had spoken to an attorney was not precise, Martin never wavered from his testimony that he terminated the interview when Appellant unambiguously invoked his right to remain silent by saying he did not want to talk anymore. Appellant did not

offer any evidence to the contrary. Based on the testimony, the trial judge made a factual finding that Appellant first stated he was not going to give a DNA sample because it would convict him and at some point later said he needed to talk to an attorney, which is when Martin stopped the conversation. (R.p.41, line 23-p.47, line 23). This factual finding by the trial court was not clearly erroneous based on the testimony; therefore, it is binding on this Court. Baccus, supra. Pursuant to this factual finding, Appellant made the two incriminating statements first and then invoked his right to end the questioning, at which point Martin immediately stopped the custodial interrogation. Therefore, Appellant's privilege against self-incrimination was fully protected and the trial court properly denied Appellant's motion to suppress.

Even if this Court finds the trial court's factual finding about the particular sequence of events was erroneous, and that Appellant made the two incriminating statements only AFTER he refused to provide a DNA sample, the trial court's decision to deny the motion to suppress was nevertheless proper. Appellant's refusal to provide a DNA sample was not an "unambiguous" invocation of his right to counsel in regard to anything other than whether he would provide the DNA sample. Indeed, Appellant did not say he wanted to cut off all questioning until he had spoken to an attorney. Instead, Appellant self-limited the invocation of his right to counsel by merely saying he would not provide a DNA sample until he had spoken to an attorney, but contined to make verbal statements to Martin. Martin unequivocally and undisputedly stopped the interview when Appellant finally indicated he did not want to talk about the case anymore. (R.p.33, line 11-p.36, line 8). The trial court found, and Appellant does not contest, that Appellant knowingly and voluntarily waived his Miranda rights before

Martin initiated the custodial interrogation. Thus, unless and until Appellant unambiguously invoked his Fifth Amendment rights, his statements were admissible. Appellant's refusal to provide a DNA sample until he had spoken with an attorney was not an unambiguous and all-encompassing invocation of these rights, particularly where Appellant continued to participate in the conversation with Martin. Furthermore, the knowing and voluntary nature of the continued conversation is evident given Appellant's subsequent decision to unambiguously invoke his right to remain silent when he told Martin he wanted to stop talking. Even as he made the incriminating statements Appellant knew he had the right to end the interrogation, yet he chose to keep talking. The trial court properly ruled Martin would be allowed to testify Appellant said "DNA will convict me," but would not be allowed to say that Appellant refused to submit himself to a DNA test, because this was the only portion of Appellant's "statement" that was placed off limits by Appellant's self-limited invocation of his rights. (R.p.57, line 17-p.58, line 11). Appellant's conviction should be affirmed.

III.

The trial court properly denied Appellant's motion for a directed verdict and submitted the case to the jury where the State presented direct evidence and substantial circumstantial evidence from which the jury could fairly and logically find that Appellant was guilty of attempted armed robbery.

Appellant argues the trial court erred in denying his motion for a directed verdict because there was no direct evidence of his guilt and the circumstantial evidence against him was not substantial. He notes the only physical evidence linking him to the crime was his DNA on the bandana found across the parking lot from the scene, but further notes the DNA from at least two other unknown persons was also found on that bandana. Appellant argues the incriminating statements he made to the police do not constitute direct evidence because the jurors "had to engage in a two-step analysis of whether they could infer guilt from those statements." The State submits Appellant's arguments are entirely without merit. As found by the trial judge, the evidence presented at trial constituted a combination of direct and circumstantial evidence from which the jury could find Appellant committed attempted armed robbery; therefore, the motion for a directed verdict was properly denied.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Liverman, 398 S.C. 130, 137, 727 S.E.2d 422, 425 (2012); State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct

evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. Weston, 367 S.C. at 292-93, 625 S.E.2d at 648; State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 477-78 (2004); State v. Condrey, 49 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002). The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling or if the ruling is based on an error of law. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002); State v. Dantonio, 376 S.C. 594, 603, 658 S.E.2d 337, 342 (Ct. App. 2008). When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. Butler, 407 S.C. at 381, 755 S.E.2d at 460 (2014); Gaster, 349 S.C. at 555, 564 S.E.2d at 92.

Discussion / Analysis

The trial court found the State presented both substantial circumstantial evidence and direct evidence of Appellant's guilt. First, the trial court found the presence of Appellant's DNA on the bandana which was discovered when the K-9 unit tracked a scent directly from the scene of the crime to the adjoining property constituted substantial circumstantial evidence of guilt. The trial court also found Appellant's statements to Investigator Martin constituted direct evidence of guilt in the form of a confession. (R.p.277, line 12-p.279, line 1). These findings and the trial court's resulting decision to deny the motion for a directed verdict were entirely appropriate. Based on the trial testimony and evidence, a finder of fact could reasonably conclude Appellant was the person who committed the attempted armed robbery of the Chuck E. Cheese on January 3, 2013, and was therefore guilty of the convicted offense. This case did not present a

complete failure of evidence requiring the grant of a directed verdict motion. State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) ("[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law."). Appellant's arguments to the contrary merely go to the weight of the evidence against him rather than its sufficiency to submit the charge to the jury. Based on the existence of substantial evidence establishing the identity element of the convicted offenses, the trial court properly denied the directed verdict motion and the issue of Appellant's guilt was properly left to the jury. Therefore, Appellant's convictions and sentences should be affirmed.

A person is guilty of attempted armed robbery if the person has a specific intent to commit armed robbery. State v. Thompson, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007). Armed robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear. State v. Frazier, 386 S.C. 526, 532, 689 S.E.2d 610, 613 (2010); S.C. Code Ann. § 16-11-330(A) (2003). Robbery is the crime of larceny accomplished with force, and armed robbery occurs when a person commits robbery while armed with a deadly weapon. Id. at 532, 689 S.E.2d at 613-14.

Appellant initially focuses on the lack of physical evidence linking him to the crime by equating the discovery of his DNA on the bandana to a series of cases concerning fingerprint evidence. He argues that in both instances, the evidence was insufficient to prove identity because there was a failure to connect the placement of the fingerprint to the time the crime was committed. Appellant contends the DNA evidence

in his case only proves his skin was in contact with the bandana at some point in time, but not that he was the person seen wearing the bandana in the surveillance video. He claims the jury could have only guessed his DNA was actually left on the bandana during the commission of a crime. (Brief of Appellant, p.35-p.42). However, Appellant fails to appreciate the qualitative difference between the fingerprint evidence in the cases cited and the DNA evidence here. DNA expert John Barron testified that within all reasonable scientific certainty Appellant was the major contributor of DNA on the bandana. The DNA was "easily discernible" and Appellant contributed nine to ten times as much DNA as the minor contributor, which means he had been in "very strong contact" with the bandana. (R.p.243-p.265). The bandana was discovered by the tracking dog immediately after the commission of the crime; therefore, the temporal weakness posited by Appellant simply does not exist. The DNA evidence standing alone provided strong circumstantial evidence of guilt and was sufficient to survive the motion for a directed verdict.

But the DNA evidence did not stand alone. Appellant also admitted his guilt to Investigator Martin, saying that he was not going to challenge the DNA evidence, that the DNA evidence would convict him, and that he wanted to plead guilty. (R.p.175-p.176; p.224, lines 22-25). The State submits these incriminating statements, which were properly admitted by the trial judge, constitute direct evidence of guilt when considered together. Appellant disagrees and argues the statements constitute only circumstantial evidence because evaluation of those statements "requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded." He argues that even if the jurors believed Martin's testimony regarding

Appellant's statements, "they then had to engage in the two-step analysis of whether they could infer guilt from those statements, and if so, if there was any reasonable explanation other than guilt." Appellant contends that when considered in context, there were reasonable explanations for Appellant's statements other than that he was guilty, and therefore they merely constitute circumstantial evidence of guilt. (Brief of Appellant, p.43).

The State submits Appellant has unnecessarily complicated the analysis. Under his theory, even a direct confession of: "I am guilty because I committed the crime" would not constitute direct evidence because there might be a reasonable alternative explanation for why a person would make such a direct confession. This is not an entirely accurate statement of the law in South Carolina.

As explained recently by this Court:

> Direct evidence "is based on personal knowledge or observation and ..., if true, proves a fact without inference or presumption." Black's Law Dictionary 636 (9th ed.2009) (emphasis added). The presentation of direct evidence "immediately establishes the main fact to be proved." State v. Salisbury, 343 S.C. 520, 524 n. 1, 541 S.E.2d 247, 249 n. 1 (2001). Circumstantial evidence, on the other hand, is proof of a chain of facts and circumstances from which the existence of a separate fact may be inferred. State v. Cherry, 361 S.C. 588, 596, 606 S.E.2d 475, 479 (2004). Circumstantial evidence is "based on inference and not on personal knowledge or observation," Black's Law Dictionary 636 (9th ed.2009), and establishes "collateral facts from which the main fact may be inferred." Salisbury, 343 S.C. at 524 n. 1, 541 S.E.2d at 249 n. 1."

State v. Rogers, 405 S.C. 554, 563, 748 S.E.2d 265, 270 (Ct. App. 2013). Here, Martin's specific trial testimony was as follows: [Appellant] said that he wasn't going to challenge the DNA. He was looking to - - he wanted to be charged with something lesser if he could. He knew the DNA would convict him. He knew that - - he stated that he knew that - - he wanted a less severe charge, and he wanted to discuss a plea." (R.p.175,

line 25-p.176, line 5). The solicitor followed-up to clarify what Appellant actually said and Martin testified: "He did say he wanted to plead guilty." (R.p.176, lines 10-12). The State submits that for the jury to conclude from these statements that Appellant committed the attempted armed robbery, it must only have found Martin's testimony credible, with no further inference. While not as strong as a direct confession of guilt, Appellant's statements taken as a whole, if true, can prove his guilt without presumption or inference. Thus, those statements are direct evidence and support the denial of the motion for a directed verdict. Furthermore, to the extent this Court finds Appellant's statements constitute only circumstantial evidence they nevertheless constitute substantial circumstantial evidence, particularly when considered in light of the DNA match and other circumstantial evidence presented at trial.

When viewed in a light most favorable to the State, there was ample evidence for the jury to reasonably conclude Appellant committed attempted armed robbery. Therefore, the evidence was sufficient, as a matter of law, to submit the case to the jury. See State v. Brown, 205 S.C. 514, 520, 32 S.E.2d 825, 827 (1945) ("Where there is any evidence, however slight, on which the jury may justifiably find the existence or the non-existence of material facts in issue, or if the evidence is of such character that different conclusions as to such facts reasonably may be drawn therefrom, the issues should be submitted to the jury."). The trial judge committed no error in denying Appellant's motion for a directed verdict and Appellant's conviction should be affirmed.

CONCLUSION

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

Respectfully submitted,

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Columbia, South Carolina
November 30, 2015

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-001715

THE STATE,.....RESPONDENT

v.

MICHAEL ORLANDO BROWN, ...APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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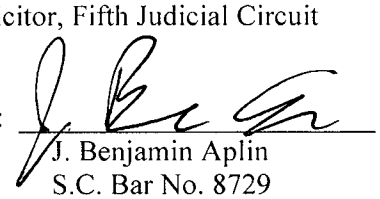
BY: 
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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated November 30, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served. This 30th day of November, 2015.

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