STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Deadra L. Jefferson, Circuit Court Judge

App. Case No.: 2014-002603

STATE OF SOUTH CAROLINA,

Respondent,

V.

XAVIER HEMINGWAY,

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

Did the Court properly find testimony establishing Appellant possessed Xbox 360s and laptops in his trailer to be relevant and admissible where the State established by other evidence that Appellant stole Xbox 360s and laptops, then delivered them into and divvied them with co-conspirators within his trailer?

STATEMENT OF THE CASE

In 2013, the Horry County Grand Jury indicted Appellant, Xavier R. Hemingway, for two counts of burglary in the first degree (2013-GS-26-3422, -3423), two counts of grand larceny in excess of $10,000 (2013-GS-26-4352, -4353), and one count of safecracking (2013-GS-26-4354).

The case in chief began before the Honorable Daedra L. Jefferson on December 2, 2014, in Conway, South Carolina. Scott Joye, Esq. represented Appellant at his jury trial. Senior Assistant Solicitor Brad R. Richardson prosecuted on behalf of the State. Appellant offered no witnesses in his defense, but relied only upon cross-examination and his closing to argue against the credibility of the State's witnesses and the sufficiency of the State's evidence against him. On December 4, 2014, the jury convicted Appellant as charged. Shortly thereafter, Judge Jefferson sentenced Appellant to fifteen years for each count of burglary, five years for each count of the grand larceny, and five years for safecracking, to be served concurrently.

A timely Notice of Appeal was filed and served. This appeal follows.

STATEMENT OF FACTS

This case involves a group of young men who burglarized two houses in rural, northern Horry County, near Green Sea, South Carolina.

On April 5, 2013, Tareek Hemingway, of Tabor City, North Carolina, and three other individuals gathered in Tabor City and traveled to Green Sea to meet with Appellant at his residence. **{R. pp. 112-117}**. When they arrived, Appellant indicated he knew of some houses they could burglarize. **{R. p. 119, l. 13-22}**. Donning ski masks and gloves, the group returned to their car and, following Appellant's direction, arrived at the home of Susan Ford and her two children, who were away for the day to see a movie at Coastal Grand Mall. **{R. pp. 46-53, 120-125}**. Without any particular plan, the group kicked down the door, entered the house, and ransacked the place, ravaging the home while stealing cash, firearms, televisions, Xbox 360s, other game consoles, laptops, and various other valuable items. **{R. pp. 62-72, 124-133}**. After loading up the car, Appellant drove the group back to his trailer, where they deposited the spoils in his bedroom. **{R. pp. 133-136}**.

The car emptied, Appellant drove the group to Shawn and Brandy Causey's home, who were at work and running errands, respectively. **{R. pp. 78-82, 136-138}**. Appellant dropped off Tareek and the others then drove away, to be called by cell when the job was done. **{R. pp. 138-139}**. As with the Ford residence, the men "destroyed" the house and plundered it of firearms, televisions, DVD players, jewelry, clothing, a laptop, and other valuables. **{R. pp. 85-91, 99-102, 139-145}**. The group called Appellant, loaded the car, and again returned to Appellant's trailer to unload their loot and negotiate each person's share, after which they dispersed. **{R. pp. 144-150}**.

In the course of investigating the burglaries, Detective Terry Elliott visited Appellant's residence on April 11, 2013 and searched it with the permission of the owner, Appellant's aunt, Lisa Livingston. **{R. pp. 199-200}**. He found three black Xbox 360s, three laptops, a mini-motorcycle, and two chokes for a 12-gauge shotgun. **{R. pp. 200-203}**. Det. Elliott ran the serial numbers for the electronics through dispatch, but the search returned no hits. **{R. pp. 202-206}**. Not yet provided with any identifying characteristics to distinguish the mass-produced consumer electronics stolen, and unable to contact the victims, Det. Elliott departed without seizing the items at Appellant's residence. **{R. pp. 205-206}**. Once armed with colors and descriptions, Det. Elliott returned to the residence but found that the items were no longer there. **{R. pp. 217-218}.** The detective obtained an arrest warrant for Appellant and found him at the trailer on April 22, 2013. **{R. pp. 216-218}**. Det. Elliott arrested Appellant and, after reading his Miranda rights, questioned him about the burglaries and electronics found at his residence. **{R. pp. 218-223}**. Appellant claimed he knew "nothing about no burglaries", could not remember from whom he got the Xbox 360s, and purchased the laptops from a flea market in Florence, SC. **{R. pp. 223-226}**.

ARGUMENT

Though Appellant indicates three separate issues in his statement of issues on appeal, all three issues raised are functionally identical and look to whether testimony by Detective Terry Elliott, of the Horry County Police Department, establishing Appellant's possession of Xbox 360s[1] and laptops was sufficiently linked to stolen Xbox 360s and laptops to be relevant and admissible. As established in the following sections, the testimony is undeniably relevant and Appellant failed to show either error or prejudice.

I. TESTIMONY THAT APPELLANT WAS IN POSSESSION OF XBOX 360S AND LAPTOPS COMPARABLE TO THOSE REPORTED STOLEN IS RELEVANT BECAUSE IT TENDS TO MAKE MORE PROBABLE THAT APPELLANT COMMITTED THE BURGLARIES AND LARCENIES ALLEDGED IN THE INDICTMENTS AGAINST HIM

"'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." Rule 401, SCRE. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-27, 606 S.E.2d 508, 518 (Ct. App. 2004). In cases for larceny, "it is not essential that the identification of allegedly stolen property be totally free from doubt in order to be admissible, but rather the uncertainty of the identification of the alleged stolen property goes to the weight of the evidence." People v. Bailey, 552 P.2d 1014, 1018 (Colo. 1976); *see also* Hall v. State, 353 S.E.2d 614 (Ga. Ct. App. 1987); Gibbs v. State, 300 A.2d 4 (Del. 1972). Evidence describing the amount, kind, make, brand, and/or character of

[1] The Microsoft Xbox 360 is a video game and multimedia console. It is typically attached to a television set or monitor to play games and watch live and recorded video programming.

property found and property stolen, or the testimony of an eyewitness to the taking of property, though never recovered, can be sufficient proof of identity. 52B C.J.S. *Larceny* § 173 (2016).

"The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004).

The improper admission of evidence is reversible error only when the admission causes prejudice. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice." State v. Green, 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012); *see also* Keller v. Pearce-Young-Angel Co., 253 S.C. 395, 399-400, 171 S.E.2d 352, 355 (1969)(Affirming lower court ruling where prejudice to Appellant was "not even suggested in argument.")

1. **The Trial Court Correctly Indicated the State Need Only Show That Appellant Took the Electronics to be Testified Upon, Which the State Did Through Testimony of Victims and a Co-Conspirator.**

In a Jackson v. Denno hearing the day of trial, Appellant objected to the introduction of statements he offered to law enforcement after his arrest. **{R. p. 21, l. 1-19}**. After some confusion about the purpose of the hearing, the judge clarified the proceedings and Appellant complained that the State was going to offer the statement as impermissible character evidence of a prior bad act. **{R. pp. 34-42}**. The Court

explained that, under the testimony the State indicated it would introduce, Appellant's statement would be an admissible statement against interest[2]:

> [I]f Tyreek[3] testifies that he and [Appellant] took these items, that they stored them at this trailer and the officer says, we saw them there, and he can sufficiently identify them, irregardless [sic] of the list, Tyreek Hemingway provides the causal link that ties them to your client. And your client's statement says, I bought them someplace else, that's how that they came into my possession. That inculpates him. That leaves for the jury to determine whether he was being truthful or not, which is an inference. People often say I didn't do something when they did in fact do it. So at this point [...] it is not admissible *subject to [Tareek] testifying that he and [Appellant] took these items*. Without that casual link, there is no relevance [...] and it is not inculpatory.

{R. pp. 40-41} (emphasis added). The judge is the first person to bring up relevance. At trial, Tareek testified at length to Appellant's involvement in the burglaries. Among a great many other items of value, they stole Xbox 360s and laptops, and then returned to Appellant's trailer to divide the stolen items among the co-conspirators. **{R. pp. 224-281}**.

During trial, in the course of the State's direct examination of Lisa Livingston, after Tareek Hemmingway's testimony and immediately prior to the testimony of Det. Elliott, the judge excused the jury. At that time, Appellant again argued against both the introduction of forthcoming testimony by Det. Elliott regarding the Xbox 360s and laptops he observed at Appellant's residence in his April 11 search, and against the introduction of Appellant's statement to law enforcement. **{R. pp. 164-181}**. The Court restated the trail of "bread crumbs" introduced to show the connection between the electronic goods and the theft: (1) the victims testified that their Xbox 360s and laptops were stolen; (2) Appellant's cousin testified that Appellant participated in the burglaries

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[2] Rule 804(b)(4), SCRE

[3] There is some confusion throughout the trial about the proper spelling of Tareek Hemingway's name. "Tyreek" and "Tareek" both refer to the same individual.

and verified that they stole Xbox 360s and laptops; (3) Appellant's cousin testified that they stored the loot at Appellant's trailer; (4) Appellant's aunt, the owner of the trailer, testified that only Appellant lived in the trailer at the time in question and that she gave permission to Det. Elliott to search. **{R. pp. 175-76}**.

Ultimately the colloquy centers on one exchange between the Court and Appellant discussing the difference between the hurdle for relevance and the hurdle for burden of proof[4] when it comes to the issue of sufficiency of identity of stolen goods:

> THE COURT: I don't think to tie [the electronics] to your client [the State has] to have a serial number. [...] I don't think that has anything to do with if they go to Money Man, and somebody says they got a Samsung whatever whatever, and I go and say, you know what, this is my TV because it has a chip in this right corner, or it's my TV because I recognize it. I don't know that that is required to tie this property. There's enough inferences and circumstances to tie him inferentially to this property. I don't think the State – all these things are great arguments you make as to the sufficiency of their burden of proof, but that don't make it inadmissible.
>
> MR. JOYE: Well, I just – I just feel like it's highly prejudicial in this respect, judge, because they didn't – Tareek said basically everybody split up whatever property's there. He doesn't say, [Appellant] got those Xboxes or laptops.
>
> THE COURT: I don't think he has to. *All he has to testify to is that we all stole this property*, we all divvied it up, I went to Tabor City and sold mine, I don't know what they did with theirs. It is a reasonable inference. So that if your client had dominion and control in a trailer that he frequented off and on, and his aunt says the property didn't belong to her, it is a reasonable inference for a jury to draw the conclusion that it belonged to him, or his daddy. Those are the only other two people that we are aware of that frequented that trailer.
>
> Now, if you want to argue to the jury that all those things there are no serial numbers, they don't match, how can you tie this to my client, all those things are really wonderful factual arguments that you would make in a closing argument. But they certainly do not determine by a preponderance of the evidence, which is more likely than not, that it's admissible.

[4] *See generally*, In re Washington, 275 S.C. 409, 272 S.E.2d 34 (1980); State v. Baker, 208 S.C. 195, 37 S.E.2d 525 (1946)

{R. pp. 174-75} (emphasis added). The Court astutely noted that introduction of the evidence would facilitate Appellant's argument to the jury that the State had not sufficiently identified the stolen goods to meet its burden of proof and could ultimately inure to Appellant's benefit. **{TR. pp. 177-78}**.

2. Detective Elliott's Testimony on the Xbox 360s and Laptops was Relevant and Admissible

In determining the relevance of Det. Elliott's testimony regarding the Xbox 360s and laptops found at Appellant's trailer, the Court clearly and consistently required only that the State lay out a chain of larcenous custody—the State did so. The State's showing that Appellant and his cohorts stole the electronics and then took them to Appellant's trailer provided the link necessary to make relevant testimony that law enforcement found goods of kind and count comparable to those stolen in the burglaries at Appellant's trailer. The testimony, so linked, raised one of the final questions of fact for the jury: are the goods observed the goods stolen? The jury, in answering that question, was free to follow the chain of larcenous custody and consider the permissible and perfectly reasonable inference that the Xbox 360s and laptops observed by Det. Elliott were the ones stolen from the Fords and Causeys, an inference only strengthened by the disappearance of the electronics from the property by the time Det. Elliott conducted a second search. Appellant's argument that relevance *requires* testimony of distinguishing characteristics such as minor damages, markings, or obscure production identifiers not only puts the cart before the horse, but dramatically limits the scope of what may constitute evidence sufficient to identify stolen goods, to an extent that would make the discovery of stolen mass-produced consumer goods irrelevant wherever a rightful owner tends to keep their possessions in pristine condition.

As for Det. Elliott's testimony regarding Appellant's statements to law enforcement, where Appellant's possession of the Xbox 360s and laptops is established as admissible, whether on the principle that Appellant specifically let it in[5] or that it was relevant, the question is raised of whether they were, in fact, the electronics stolen. Indeed, whether or not the electronics found were the electronics stolen forms part of the ultimate question presented to the jury: whether or not Appellant was guilty of the burglaries and larcenies charged. Appellant's voluntary statements to law enforcement, and testimony thereon by Det. Elliott, help to answer that question, one way or the other. Thus, Appellant's statements and testimony thereon were relevant and admissible.

Appellant cites to State v. McConnell, 290 S.C. 278, 350 S.E.2d 179 (1986) to argue that objects with no relationship to the crime alleged cannot be admitted into evidence. In McConnell, the State introduced evidence of .22 caliber and .25 caliber slugs and bullets found in the walls, ducts, and other parts of defendant's apartment building even though the victim was shot and killed by a .357 caliber bullet. The Court held that there was no evidence to connect these mismatched calibers to the crime prosecuted and remanded for a new trial. Id. This matter, however, deals with neither mismatched caliber bullets nor any other demonstrably unrelated objects, but rather evidence of possession of mass-produced consumer electronics of a like, kind, and number comparable to those stolen. The State introduced evidence that Xbox 360s and laptops were stolen, evidence of their transport, and then evidence of their presence at the place to which they were transported. Whether or not those particular Xbox 360s and laptops were the ones stolen is a question of fact for the jury.

[5] See Section I.3 below.

Appellant also makes passing reference to the rule that possession of recently stolen property creates a presumption of fact that the one found in possession is a thief. State v. Roof, 196 S.C. 204, 12 S.E.2d 705 (1941). Neither the rule nor standards in support thereof are relevant—the jury was never instructed to consider that presumption and thus cannot be said to have relied upon it. **{R. pp. 297-315}**.

3. Appellant Specifically Permitted Detective Elliott's Testimony and Alleges No Prejudice

Where a party to a case withdraws an objection at trial, that party cannot subsequently appeal on the basis of that objection. Ligon v. Norris, 371 S.C. 625, 640 S.E.2d 467 (Ct. App. 2006). Furthermore, where a defendant objects to testimony offered on State's direct examination, and where defendant subsequently cross-examines that witness on the same subject matter of the objection without specifically reserving the objection, defendant's original objection is waived. State v. Quillien, 263 S.C. 87, 95, 207 S.E.2d 814, 818 (1974). Appellant's objection to Det. Elliott's testimony about finding Xbox 360's and laptops at Appellant's trailer was expressly waived in a bench conference, summarized at the end of State's direct examination of the Detective, and when he cross-examined the Detective on the same subject matter. **{R. pp. 201-02, 227, 237, 253}.**

Finally, Appellant fails to so much as allege prejudice, let alone prove any prejudice arose from the error alleged. The word prejudice does not appear in Appellant's brief. Appellant makes no effort to argue that the introduction of the evidence in question had any impact on the jury's verdict. Appellant fails to request any particular form of relief. As such, Appellant has failed to meet his burden of proving *both* error and resulting prejudice. No basis for reversal is offered or even exists.

The trial court, in holding that the Xbox 360s and laptops were of a like and kind similar enough to those stolen and sufficiently connected to those stolen to be testified upon and submitted to the jury as a question of fact, was correct and was acting well within its sound discretion. As such, Appellant's convictions and sentences should be affirmed.

CONCLUSION

For the foregoing reasons, Appellant's convictions and sentences should be affirmed.

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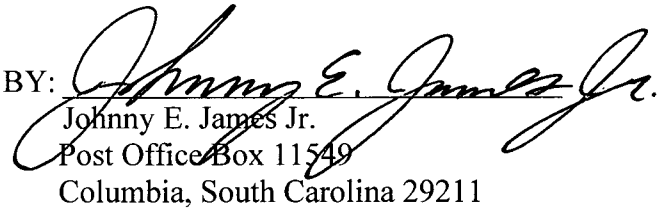
BY: 
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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CERTIFICATE OF SERVICE

I, Anne Mueller, certify that I have served the Final Brief of Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to the counsel for the Appellant as follows:

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I further certify that all parties required by Rule to be served have been served.
This 6th day of July, 2016.

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