STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County
Michael G. Nettles, Circuit Court Judge

THE STATE,

Respondent,

vs.

MICHAEL D. BROOKS,

Appellant.

Appellate Case No. 2015-001384

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

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

E. L. CLEMENTS, III
Solicitor, Twelfth Judicial Circuit

City-County Complex
180 N. Irby St., MSC-Q
Florence, SC 29501
(843) 665-3091

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

ARGUMENTS

I. The trial court did not err in admitting Appellant's unsolicited letter to law enforcement containing admissions of his involvement in the burglary. The letter did not constitute negotiations that are inadmissible under Rule 410 as the investigator to whom the letter was sent was not an attorney and did not hold himself out as having authority to negotiate on behalf of the Solicitor's Office 9

II. The State sufficiently authenticated the jail phone conversation, and Appellant also authenticated the phone conversation when he admitted he made the call during his direct examination 16

CONCLUSION 20

TABLE OF AUTHORITIES

Cases:

Arizona v. Fulminante, 499 U.S. 279 (1991) 19

Bottoson v. State, 443 So.2d 962 (Fla. 1983) 13

Chase v. State, 528 N.E.2d 784 (Ind. 1988) 14

Deep Kell, LLC v. Atl. Private Equity Grp., LLC,
413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015) 17

Peters v. State, 586 P.2d 749 (Ok. Ct. Crim. App. 1978) 13, 14

State v. Anderson, 386 S.C. 120, 687 S.E.2d 35 (2009) 18

State v. Brown, 344 S.C. 70, 543 S.E.2d 552 (2001) 19

State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011) 19

State v. Dennis, 402 S.C. 627, 742 S.E.2d 21 (Ct. App. 2013) 19

State v. Genre, 712 N.W.2d 624 (N.D. 2006) 14

State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) 19

State v. Green, 397 S.C. 268, 724 S.E.2d 664 (2012) 19

State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001) 19

State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006) 15

State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990) 15

State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987) 17

State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013) 19

United States v. Herman, 544 F.2d 791 (5th Cir. 1977) 11

United States v. Jansen, 218 F.Supp.2d 659 (M.D. Penn. 2002) 13

United States v. Keith, 764 F.2d 263 (5th Cir. 1985) 11, 12

United States v. Levy, 578 F.2d 896 (2d Cir. 1978) 12

United States v. Robinson, 582 F.2d 1356 (5th Cir. 1978) 10, 11, 12

Winburn v. Minnesota Mut. Life Ins. Co., 261 S.C. 568, 201 S.E.2d 372 (1973) 11, 12

Rules:

Rule 410, SCRE 9, 10

Rule 901(a), SCRE 17

Fed. R. Evid. 11 11

Fed. R. Evid. 410 ..... 10, 15

STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in admitting Appellant's unsolicited letter to law enforcement containing admissions of his involvement in the burglary. The letter did not constitute negotiations that are inadmissible under Rule 410 as the investigator to whom the letter was sent was not an attorney and did not hold himself out as having authority to negotiate on behalf of the Solicitor's Office.

II.

The State sufficiently authenticated the jail phone conversation, and Appellant also authenticated the phone conversation when he admitted he made the call during his direct examination.

STATEMENT OF THE CASE

Appellant Brooks was indicted for armed robbery, first degree burglary, kidnapping, possession of a weapon during the commission of a violent crime, and possession of a weapon by a person convicted of a violent offense. (2014-GS-21-00813). Brooks was tried by jury before the Honorable Michael G. Nettles on June 15-18, 2015. The jury found Brooks guilty of all charges. Judge Nettles sentenced Brooks to concurrent sentences of thirty years imprisonment for armed robbery, first degree burglary, and kidnapping, and five years imprisonment for the weapons charges.

STATEMENT OF FACTS

Brooks burglarized and robbed Larry and Cara Murphy in their home. It was a cowardly crime – they are both in their seventies. Larry Murphy helped collect $2,100 at a choir performance on Sunday, March 2, 2014, and brought the cash to the bank to make a deposit the next morning, March 3. A video shows Gregory Campbell at the bank at the same time. Tr. pp. 126-31. Campbell was one of Brooks' accomplices.

Larry went home after depositing the money. It was around noon when the doorbell rang. Brooks stood at the door and asked if the house needed painting. Larry told him the house did not need paint since the house had vinyl siding and brick. Brooks pulled out a gun and pushed Larry inside the house. Brooks made Larry get on the floor. Tr. p. 133. Larry testified the robber was over six feet tall. Larry is 5'11'' and the robber was taller than him. The robber was a black male with a short haircut, and the robber did not wear a mask or gloves. Tr. pp. 134-35. As explained below, Larry identified Brooks as the gunman.

Cara entered the room and Brooks made her get on the floor also. A second robber came in the house and bound Larry and Cara with duct tape. This second robber was shorter than the gunman. Meanwhile, Brooks demanded to know where the money was kept and demanded Larry tell the robbers where the safe was located. The robbers ransacked the house looking for money and items to steal. After they left, Larry was able to get his hands free, make his way to a drawer, and find a pair of scissors. Larry cut the rest of the duct tape off, and he also cut duct tape off his wife before calling 911. Tr. pp. 136-39. Cara testified one of the robbers told Larry, "Tell me where the money is or I'm going to shoot this bitch." Tr. p. 218, lines 1-2.

Larry testified the robbers took $60-70 from Larry's wallet. Additionally, some of Cara's jewelry was stolen, including a medallion. This medallion was one of a kind because it was made from Larry's class ring. It was melted down and made with a distinctive "C" on it. The medallion was a present for Cara. Larry identified the medallion, State's Exhibit 33. Tr. pp. 149-53..

Eleven days later, Larry was shown a photographic lineup. He selected Brooks' picture, but admitted he was not 100 % certain of the identification. Tr. pp. 154-55. However, on March 14, 2014, when Brooks appeared in court and spoke, Larry was sure it was him because he recognized Brooks' voice. Tr. pp. 156-57. Cara was unable to pick anyone out of the photographic lineups law enforcement showed her, but when she attended a court hearing, she recognized Brooks' voice as one of the robbers' voices. Tr. p. 220.

Megan Barr testified she drove down Marsh Avenue (the area where the burglary occurred) between 11:20 and 11:45 a.m. the day of the burglary and saw an SUV parked at a stop sign. The SUV was a distinctive darker teal color. Tr. pp. 183-85. Tommy Gioldasis testified he lived across the street from the Murphy's and utilized a surveillance system which captured a vehicle on the street. Tr. pp. 187-88. Investigator Justin Head testified Gioldasis allowed him to review the surveillance. Investigator Head observed in the surveillance video a Tahoe/Suburban type of vehicle circling the block in the neighborhood. Tr. pp. 289-90. Campbell's vehicle was a green Chevy Tahoe. Tr. p. 303.

Franklin Jones is a retail jeweler who maintained a positive relationship with law enforcement. Law enforcement asked Jones to keep an eye out for a pendent with a "C." Darlene Heyward, a past customer for Jones, came into the store on March 13, wearing a pendant with a "C"

as described by law enforcement. She sold Jones some jewelry. Jones cleaned the pendant for Heyward. Jones alerted law enforcement. Tr. pp. 190-97.

Darlene Heyward testified she bought the pendant from Tasha McNeil. She wore it to Franklin's shop when she went there to sell some jewelry. Heyward liked the pendant and intended to keep it. She received a call from law enforcement the next day. Tr. pp. 198-200.

LaTasha McNeil testified she lived behind Brooks. Brooks banged on her door late at night. He had a bag of jewelry, including the "C" pendant. Brooks claimed the jewelry belonged to either his girlfriend or wife, and he needed some money. She paid him $150 for the pendant and another item. Later, she visited Heyward and when Heyward saw the pendant, she wanted to buy it. McNeil sold it to her for $150. McNeil testified Brooks visited her with the jewelry on either March 3 or the morning hours of March 4. She identified State's Exhibit 33 as the same medallion Brooks sold her. Tr. pp. 203-11.

When law enforcement sought to serve a warrant for his arrest at his parent's house, Brooks ran into the woods. Tr. pp. 244-46. Brooks later reemerged from the woods and was arrested: he assured the officer the warrant was for child support, although he actually did not have any child support warrants outstanding. Tr. pp. 247-49.

Law enforcement interviewed Brooks on March 17, 2014, and the interview was recorded. Brooks claimed he was innocent and not involved. Brooks claimed he knew the guys who "were involved with whatever this was." (1:45-2:15). The officers assured Brooks that if he **did not do anything**, ("nothing to do with nothing") they would talk to the Solicitor's Office. (4:00-4:15). Brooks claimed to steal the necklace from two guys who told them they just did a lick on a "white

dude." He did not provide names. (4:45-7:00). He confirmed he sold the necklace to a neighbor. (7:00-7:15). Crying, Brooks reluctantly provided the names of the "real" burglars: Campbell and a guy named Terrance or "Boogie." (8:15-9:15). Brooks swore he was not part of the burglary, he did not ride with them; and law enforcement told him that if he did not do it, they did not want him in jail. (10:15 - 10:45). Officers indicated they would try to confirm that Brooks did not have anything to do with the burglary. (12:45-13:00). The officers advised that if they found out he was involved with the burglary after he kept claiming he was uninvolved, they would "nail him to the wall." They asked him again if he was involved in any way. (13:00 – 13:30). Officers were skeptical of Brooks' story and told him they believed he was more involved than he claimed. (16:30 – 17:15). They said they would let him go home if they could confirm the story he told them, while he continued to cry. (20:15-21:15). Officers told Brooks they wanted the guy who committed the crime. They could get him out if he had nothing to do with it. (23:00-23:30). Brooks was advised again that if he did not do it, he would not go to jail. The officers wanted the real people who did it. (31:15-32:15). Of course, the investigation showed Brooks was one of those real people, specifically the gunman, responsible for the violent burglary.

One year later, Brooks sent a letter, dated April 7, 2015, to Investigator Head and Brooks' attorney, Ralph Wilson, Esquire. The letter states the following:

> How are You doing, You (Justin) told me in our interview if I wasn't the one holding the gun then you would have my charges lowered. I do not know how my DNA got on the tape that was used on those people, but I have a feeling you and Bannister did that. I'm ready to end this nightmare and drop the lawsuit. Here [is] my offer you talk to my lawyer and the solicitor. Let me know if Michael is willing to admit to being present and being the one who was ordered to put the duct tape on. That it was Campbell's idea because he was in the bank

> and thought the man was depositing the money. That I went along with him and followed him into the residents [sic]. And I will be willing to testify to this. I'm ready to end this and move on with my life. In order I plead to asseary [sic] saying I was Campbell accomplish [sic]. And I'll plead to anything between 5-10 years. I will do this instead of having "SLED" look into when the items [were] sent off, or still getting my case dismissed for "warrantless unconstitutional arrest" or "bad faith warrants." If I can go ahead and set this meeting up get an agreement from the solicitor. Then I will give my statement against Campbell go ahead and plea. So I can go ahead up the road and can be called back to [trial] when I am needed. Below is my Lawyer's name and phone number. . . .

State's Exhibit 9 (some misspellings corrected).

The redacted copy of the letter focused on Brooks' admission:

> Let them know if Michael is willing to admit to being present and being the one who was ordered to put the duck tape [sic] on. That it was Campbells [sic] idea because he was in the bank and thought the man was depositing the money. That I went along with him and followed him into the residents [sic] and I will be willing to testify to this. I'm ready to end this and move on with my life.

State's Exhibit 10. This letter is the exhibit Brooks claims constituted negotiations under Rule 410, SCRE.

Law enforcement took the duct tape the robbers used to bind the Murphy's. Tr. pp. 376-77; pp. 381-82. Brooks' DNA was found on a piece of this duct tape. It was a one in 18 quadrillion match. Tr. pp. 439-40. Law enforcement's search of Campbell's residence yielded a roll of duct tape stored out of reach behind some bottles. Tr. p. 304.

Brooks testified in his own defense. Brooks claimed Campbell and Terrance drove by his house after they did a lick. Tr. p. 500. Brooks figured they broke into somebody's house. Brooks claimed he stole some of Campbell and Terrance's loot, including the pendant. Tr. p. 501. Brooks

admitted he sold the jewelry to Tasha McNeil. He decided he wanted to get a hotel room because his trailer did not have heat and was getting cold. Tr. pp. 501-02. Brooks also claimed he used the duct tape later seized from Campbell's house while helping Campbell set up speakers. Tr. p. 507.

Brooks explained to the jury the reason he did not tell law enforcement about what happened was he did not want to get his cousin in trouble and he thought he would only be taking the blame for receiving stolen goods. Tr. pp. 509-11.

Brooks confirmed he made a phone call after his interview on March 17. Tr. p. 512, lines 14-17. **This is the phone call that Brooks alleges in his brief was not properly authenticated by the State.** Brooks complained they were not playing **all** the phone conversation. Tr. p. 512, lines 19-21. Brooks complained the prosecution should have played a subsequent phone conversation he alleged existed, which apparently would have provided an innocent explanation for the phone call. Tr. p. 513, lines 8-17. Brooks admitted though that in this phone call, he is telling his friend to pass a message to Campbell to keep his mouth shut. Tr. p. 513, line 18 – p. 514, line 2.

ARGUMENT

I.

The trial court did not err in admitting Appellant's unsolicited letter to law enforcement containing admissions of his involvement in the burglary. The letter did not constitute negotiations that are inadmissible under Rule 410 as the investigator to whom the letter was sent was not an attorney and did not hold himself out as having authority to negotiate on behalf of the Solicitor's Office.

Brooks argues his letter to Investigator Head and his attorney, in which Brooks advised that he was willing to testify he participated in the burglary and that Campbell was the gunman, was inadmissible under Rule 410, SCRE, as a plea offer. Brooks did not make his "offer" to a government attorney as required by the rule, and Investigator Head never suggested he could negotiate on behalf of the Solicitor's Office. The letter, unsolicited by law enforcement or the prosecution, does not fall under the prohibitions of Rule 410.

During an in camera hearing on the letter's admissibility, Investigator Head noted he received the letter more than a year after he last interviewed Brooks. The last interview occurred in March 2014, and the letter was sent to Investigator Head in April 2015. Tr. pp. 269-70. Investigator Head testified about the 2014 statements as follows:

> He asked multiple times for promises for – in fact one of the times he wanted us to let him go. Matter of fact, I believe multiple times he wanted us to let him go, immediately. I explained to him multiple times that I could not make him any promises, but that as I do for a lot of defendants, if he does cooperate, I would be more than willing to speak on his behalf to the Solicitor's office **and let them make any agreements with you.**

Tr. p. 270, lines 18-25 (emphasis added). Investigator Head noted he made Brooks' cooperation, "in

the loose sense," known to the prosecution. Investigator Head advised the Solicitor's Office that Brooks provided the names of the codefendants. Investigator Head made clear, "I explained that to [the Solicitor's Office] and whatever happened next is their decision." Tr. p. 272, lines 19-24.

Under Rule 410, SCRE,

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (1) a plea of guilty which was later withdrawn;
>
> (2) a plea of nolo contendre;
>
> (3) any statement made in the course of any court proceedings regarding either of the foregoing pleas; or
>
> (4) any statement made in the course of plea discussions **with an attorney** for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

(Emphasis added).

In the instant case, Brooks' letter was not written or made in the course of any plea or other court proceeding, eliminating paragraphs (1) through (3). Further, the letter does not constitute a discussion with an attorney.

The rule is similar to Fed. R. Evid 410. The federal rule was analyzed carefully in United States v. Robinson, 582 F.2d 1356 (5th Cir. 1978). Robinson explored the reach of this rule, noting at the outset:

> Plea negotiations are inadmissible, but surely not every discussion between an accused and agents for the government is a plea negotiation. Suppressing evidence of such negotiations serves the policy of insuring a free dialogue only when the accused and the

> government actually engage in plea negotiations; discussion in advance of the time for pleading with a view to an agreement whereby the defendant will enter a plea in the hope of receiving certain charge or sentence concessions.

Id. at 1365 (citations and internal quotation marks omitted).

The Fifth Circuit subsequently explored the effect of an amendment to Fed. R. Evid. 11(e)(6)(D), which mirrored Rule 410's requirement that the negotiations be with a government attorney. United States v. Keith, 764 F.2d 263 (5th Cir. 1985). The defendant met with his attorney and a DEA agent after he agreed to cooperate with an investigation into phenylacetone manufacturing and distribution. The DEA agent promised he would make the defendant's cooperation known to the United States Attorney and would recommend to the judge that Keith not be prosecuted for the offenses discussed at the conference. The Fifth Circuit noted the record was devoid of any inference that the DEA agents indicated they were authorized to make a binding plea negotiation in exchange for cooperation. The DEA agents told the defendant he needed to tell the truth about any other type of criminal involvement. The defendant then disclosed his involvement with methaqualone, previously unknown by the government. Id. at 264.

The Fifth Circuit rejected the defendant's arguments under Fed. R. Evid. 11 and 410, noting the purpose of revision to Rule 11 was to make clear only negotiations with an attorney for the government were excluded, legislatively overruling previous federal decisions like United States v. Herman, 544 F.2d 791 (5th Cir. 1977) (finding defendant's "offer" to postal inspectors to plead robbery and produce gun if authorities dropped murder charge was within ambit of rule as it existed at the time). Keith, at 265 (noting Herman was superseded by amendment to rules of evidence). The Fifth Circuit concluded negotiations made to the DEA agents and not a prosecuting attorney were not

protected under the federal rules. The Fifth Circuit rejected the claim of any exceptional circumstance requiring exclusion, summarizing its test from Robertson that the discussions will be admissible unless "the accused 'exhibited an actual subjective expectation to negotiate a plea at the time of the discussion' *and* the 'expectation was reasonable given the totality of objective circumstances.'" Keith, at 266 (emphasis in the original) (quoting Robertson, at 1366).

Prior to the aforementioned amendment to the federal rules of evidence, the Second Circuit found an unconditional statement made by a defendant did not need to be excluded. United States v. Levy, 578 F.2d 896 (2d Cir. 1978). The Second Circuit's logic would soon be rendered redundant in some respects by the rule changes noted in Keith. Nonetheless, the analysis is highly applicable since, in the instant case, Brooks unilaterally attempted to initiate a bargain. The Second Circuit expressed concern that absent the requirement of a contemporaneous request for concession from the government, the defendant would effectively be empowered to retroactively grant himself use immunity for a confession neither law enforcement nor the prosecutor had a chance to reject. Id. at 901. The Second Circuit observed the defendant's decision "to offer his cooperation was spontaneous . . . ." Id. Note the instant case likewise involves a spontaneous offer from Brooks made over a year after he last had contact with law enforcement. The Second Circuit concluded: "No fault can be found with allowing in evidence his volunteered desire to cooperate in the future, since it was evidence of his consciousness that he was in serious difficulty with the law and needed to do something to extricate himself." Id.

A United States District Court noted the following:

> The weight of authority has held that while Rule 410 does not command that a statement to a police officer will never fall within its

> purview, statements made to law enforcement officials are excluded from Rule 410's exclusionary principle unless the law enforcement officer is acting with express authority from a government attorney.

United States v. Jansen, 218 F.Supp.2d 659, 668 (M.D. Penn. 2002) (finding that statement made after trooper advised that he would make the magistrate, judge, and district attorney aware of Jansen's cooperation was not excludable under Fed. R. Evid. 410) (citation and internal quotation marks omitted) *overruled on other grounds* Jansen v. United States, 369 F.3d 237 (3d Cir. 2004).

The Florida Supreme Court found a statute similar to Rule 410 did not require exclusion of written statements by the defendant confessing to murder and seeking leniency that the defendant provided to clergy. The defendant asked the ministers to deliver the statements to the district attorney. Bottoson v. State, 443 So.2d 962, 965 (Fla. 1983). The Florida Supreme Court explained, "[W]e do not believe that unsolicited, unilateral statements are under the aegis of this evidentiary statute." Id. The court concluded, "In this case, appellant's expectation that he was involved in a plea negotiation was not reasonable. The ministers were not agents for the state nor did they pretend to be." Id.

In Peters v. State, 586 P.2d 749 (Ok. Ct. Crim. App. 1978), a defendant held in jail following an arrest for robbery asked to speak to a deputy, his childhood friend. The defendant told the deputy he would be willing to take a year in jail and tell law enforcement where he hid the stolen goods and asked that his offer be relayed to the district attorney. The deputy told him he would relay the offer, but told the defendant he should not have made the statement because the deputy may have to testify about the conversation. Id. at 751. The Oklahoma court rejected a claim that the statement should be construed as part of plea negotiations, finding, "There was no plea negotiation in progress to

require the exclusion of any admission." Id. at 753.

In Chase v. State, 528 N.E.2d 784, 785 (Ind. 1988), the defendant contacted law enforcement after his girlfriend was arrested for selling methamphetamine and told them she was his courier and offered his biggest drug connection in exchange for her release. The Indiana Supreme Court rejected the argument that this statement was made in the course of plea negotiations. In so finding, the court found the following:

> The plea bargaining process does not start until persons having the authority to make a binding agreement have agreed to negotiate. There must be an agreement, a meeting of the minds, after the leveling of a felony or misdemeanor charge, to enter into plea negotiations. A unilateral offer of evidence to induce a party to negotiate is not protected.

Id. at 786. Rejecting the defendant's arguments for exclusion, the court concluded, "What occurred was a unilateral decision to volunteer incriminating statements in an attempt to induce plea negotiations between the State of Indiana and appellant's girlfriend . . . ." Id. See also State v. Genre, 712 N.W.2d 624, 634-35 (N.D. 2006) (finding any belief by drug defendant that he was in plea negotiations with law enforcement was not reasonable where law enforcement was only allowing defendant to go home that night because he provided some information and was considering working with law enforcement, subsequent meeting with county attorney was also not a plea negotiation where only a general discussion occurred about not charging defendant if he made some controlled buys, and defendant did not agree to work for law enforcement until a later date and never made any controlled buys. Court noted: "An offer to cooperate is not the same as an offer to plead guilty.").

In the instant case, law enforcement never negotiated with Brooks or promised leniency. Law

enforcement merely sought information from Brooks and advised him if he was not involved in the burglary, they would not seek to have him prosecuted for a crime he did not commit. They promised to "nail him to the wall" if he was lying to them about his involvement. Law enforcement never portrayed or indicated they were acting as agents or negotiating on behalf of the solicitor's office. Accordingly, Brooks attempt to initiate plea bargaining by incriminating himself does not establish his letter constitutes plea negotiations with an attorney for the prosecuting authority. Brooks' admissions are not protected by Rule 410.

Accordingly, the trial court did not abuse its discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (noting a trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary support).

Further, any error was harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt. Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). In the instant case, Brooks admitted possession of a stolen necklace. His claim to steal it from the burglars is undermined by: (1) the DNA evidence on the duct tape used to tape his victims, (2) Larry's eyewitness identification, (3) Cara's voice identification, and (4) his call to the jail advising his cousin and co-defendant not to talk. After all, the reason Brooks sent the letter a year later was because he knew the overwhelming evidence would convict him if he went to trial.

II.

The State sufficiently authenticated the jail phone conversation, and Appellant also authenticated the phone conversation when he admitted he made the call during his direct examination.

Brooks claims the trial court erred in admitting a phone conversation he made to a friend, asking the friend to pass on a message to Campbell telling him not to talk. The State laid a sufficient foundation to admit the phone conversation, but any failure on the State's part to lay a sufficient foundation was cured by Brooks when he admitted making the phone call when he testified. Accordingly, the phone call is undeniably what the State purported it to be.

At trial, Investigator Head testified as follows:

> Q: Okay. Now, did you have contact with Chris Neil at the Florence County Sheriff's Office in regards to any phone calls?
>
> A: I never spoke to Mr. Neil but I did listen to phone conversations. I have access to the Florence County – **all** law enforcement can listen **to all jail conversations** between inmates to outgoing individuals, family and friends and such and such. **They're all recorded.**
>
> Q: And you did that?
>
> A: Yes, sir. I listened to them.
>
> Q: Did you have an opportunity to listen to a phone conversation on March 17th, 2014, that Mr. Brooks had made to another individual?
>
> A: Yes, sir. I did. It was, I believe, a few hours after we interviewed Mr. Brooks that he had a phone conversation.

Tr. p. 306, line 24 – p. 307, line 13 (emphasis added). Counsel interposed an objection and after an off record bench conference, the State elicited further testimony. Investigator Head testified that Brooks' phone conversation was made from the Florence County Detention Center. Counsel

objected based on foundation, and the recording was introduced as State's Exhibit 5 over Counsel's objection. Tr. pp. 307-08. Investigator Head said he listened to the conversation and it gave him concern about what Brooks previously told him. Tr. p. 308, lines 12-14. Investigator Head further interviewed Brooks on March 19 and March 27. Tr. pp. 308-09.

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. The rule provides non-exclusive examples of how the authentication requirement may be satisfied. Rule 901(b), SCRE. "The burden to authenticate is not high and requires only that the proponent offer a satisfactory foundation from which the jury could reasonably find that that evidence is authentic." Deep Kell, LLC v. Atl. Private Equity Grp., LLC, 413 S.C. 58, 64-65, 773 S.E.2d 607, 610 (Ct. App. 2015) (internal quotation marks and alterations omitted). Direct proof is not required. Instead, evidence may be authenticated through indirect or circumstantial evidence. Winburn v. Minnesota Mut. Life Ins. Co., 261 S.C. 568, 576-577, 201 S.E.2d 372, 376 (1973). Once the threshold requirement of authentication is met, the evidence may properly be admitted during trial. State v. Rich, 293 S.C. 172, 173, 359 S.E.2d 281, 282 (1987).

In the instant case, the State provided sufficient foundation for a jury to reasonably find the recording is authentic. First, Investigator Head, who interviewed Brooks on March 17, the day of the phone call, listened to the recording himself before he subsequently interviewed Brooks on the 19th and the 27th. Even if Investigator Head did not explicitly identify Brooks' voice during his testimony, the jury still could reasonably believe he was a witness with knowledge based on the fact he interviewed Brooks several times around the time the recording was made and also listened to the

recording itself. Investigator Head specifically testified the recording was from the Florence County jail and he identified Brooks as a participant in the conversation. Investigator Head testified he had access to phone calls from the jail. He verified he listened to Brooks' phone call on the 17th and testified it occurred only a few hours after he interviewed Brooks. Additionally, Brooks testified and his interview with law enforcement on March 17 was admitted into evidence. Therefore, the jury could compare the voice on the jail recording to Brooks' testimony and his statements during the March 17 interview. The recording itself provides further authentication. See Rule 901(3) (allowing authentication by comparison "by the trier of fact" with authenticated "specimens." The automated operator informs the recipient of the call that an inmate is calling from the Florence County Jail, and Brooks identifies himself as "Michael Brooks." State's Exhibit 5. Further, even if the foundation provided did not implicate any of the enumerated methods for authentication found in Rule 901, the testimony as a whole satisfied the foundation requirement on a more generalized basis. See State v. Anderson, 386 S.C. 120, 130, 687 S.E.2d 35, 41 (2009).

Finally, any concerns about defects in the foundation of the phone call were alleviated by Brooks' own testimony about the phone call. Brooks confirmed on direct examination that he made a phone call after his interview on March 17. Tr. p. 512, lines 14-17. Brooks complained the prosecution was not playing all the phone conversation. Tr. p. 512, lines 19-21. Brooks complained the prosecution should have played a subsequent phone conversation he alleged existed. Tr. p. 513, lines 8-17. Brooks remonstrated, "They trying to take one little thing and play a little part of it but not playing everything." Tr. p. 513, lines 14-17. Just to be clear, Brooks explained what happened on the phone call admitted into evidence: "Well, when I first called Ron, I had free sixty-minute calls

– free sixty second phone calls. And I told him I said Ron, listen to me man. Call my cousin and tell my cousin and them not to say nothing. Then the phone went off." Tr. p. 513, line 18 – p. 514, line 2.

Accordingly, Brooks was not prejudiced by any alleged deficiency in the State's foundation since he confirmed the authenticity of the phone conversation before the jury. The harmless error doctrine preserves the central purpose of a criminal trial, which is to decide the factual question of a defendant's guilt or innocence. State v. Rivera, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013) (citing Arizona v. Fulminante, 499 U.S. 279, 306-08 (1991)). "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). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "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." State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (internal quotation marks omitted). Further, when other properly admitted testimony reveals essentially the same information, the jury's exposure to improper evidence is harmless. State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 554-55 (2001). In the instant case, the phone call was what it purported to be, based on Brooks' own admissions. Accordingly, Brooks did not suffer prejudice from the phone call's admission into

evidence.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

E. L. CLEMENTS, III
Solicitor, Twelfth Judicial Circuit

BY: _____
DAVID SPENCER

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

ATTORNEYS FOR RESPONDENT

October 26, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Florence County
The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No: 2015-001384

THE STATE,

Respondent,

v.

MICHAEL D. BROOKS,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Initial Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record Kathrine H. Hudgins, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.

This 26th day of October, 2016.

Anne Mueller

Anne A. Mueller
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

October 26, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29201

Re: The State v. Michael D. Brooks
Appellate Case No: 2015-001384

Dear Ms. Kitchings:

Enclosed please find an original and one copy of the Initial Brief of Respondent, including proof of service, in the above-referenced case.

Sincerely,

David Spencer
Assistant Attorney General
S.C. Bar No:

DS/aam
Enclosures

cc: Kathrine H. Hudgins (with two copies)
Ms. Trisha Allen