STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2014-002206

THE STATE,

Respondent,

v.

KEITH CHRISTOPHER OSBORNE,

Appellant.

FINAL BRIEF OF RESPONDENT

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II. Appellant's appellate challenge to the trial court's admission of photographic still taken from the McDonald's surveillance video footage raised pursuant to Rule 803(6), SCRE, is not preserved for appellate review because he failed to properly raise such grounds during trial. However, even assuming the issue was somehow preserved for appellate review, the trial court did not err in admitting the photographic still evidence because the photograph was not hearsay. Nonetheless, even if the credit card statement constituted hearsay, the trial court properly admitted the statement pursuant to Rule 803(6), SCRE, where Sheumpert had personal knowledge regarding the photographic still. Furthermore, any error was harmless and had no impact on Appellant's case.

STATEMENT OF THE CASE

On October 23, 2013, law enforcement officers with the South Congaree Police Department sought and obtained arrest warrants for Appellant Keith Christopher Osborne stemming from a forcible theft of a handbag from an elderly woman at a Food Lion in South Congaree, South Carolina. During its May 2013 term, the Lexington County Grand Jury indicted Appellant for strong armed robbery and first degree assault and battery. On October 8, 2014, Appellant proceeded to a jury trial before the Honorable Thomas A. Russo. On October 9, 2014, the jury convicted Appellant as indicted. The trial court sentenced Appellant to fifteen years' imprisonment for strong armed robbery and ten years' imprisonment for first degree assault and battery, with the sentences to be served concurrently. Thereafter, Appellant filed a timely notice of appeal.

STATEMENT OF FACTS

On June 12, 2012, Helen Lang and her nephew ran errands and then stopped by the Food Lion grocery store in South Congaree for a few items before going to vote. (R. 63-64). After putting their purchases in the car, Lang, a seventy-four-year-old widow, returned her grocery cart and brought her large purse with her. (R. 64, 146). On her way back to her car, an oversized white truck pulled up next to her at an angle. (R. 64). The truck's driver and passenger were both white males with short brown hair, later identified as Appellant and his friend Joshua Hilton. (R. 67-68, 85, 147). Hilton, the passenger, had a flame tattoo on his arm. (R. 68, 85, 147-48). As the truck neared Lang, Hilton called out from the passenger window and asked her for directions to Red Bank. (R. 64-67, 147). Hilton then leaned out of the truck and snatched Lang's purse from her shoulder, and Appellant quickly began to drive away. (R. 65, 83-84, 147). As he did so, Lang cried out while continuing to hold on to her purse and she fell to the ground and was dragged alongside Appellant's truck for a short distance before she eventually let go of her purse. (R. 65-67, 83-84, 147). Appellant and Hilton fled the scene. (R. 83-86, 151).

Lang, bloody and badly injured, remained on the ground as bystanders came to offer assistance. (R. 68-69, 84-85). Witnesses called 911 to request law enforcement and medical assistance for Lang. (R. 69, 84-86). Lang was transported to Lexington Medical Center by ambulance, where she received treatment for a fractured pelvis, a broken finger, and numerous scrapes and bruises. (R. 68-72). As a result of her injuries, Lang had to use a walker for weeks after the assault and needed prescription pills for pain management. (R. 71-72).

Meanwhile, after fleeing the scene, Appellant and Hilton went to the nearby Manor Drive area. (R. 151). They rooted through Lang's purse, which contained glasses, a cellular phone, and a wallet. (R. 151). Inside the wallet, they found Lang's identification card, forty dollars, and

credit cards, including an AT&T Universal credit card. (R. 74, 151). Appellant and Hilton memorized the pertinent information from Lang's identification card to aid in their use of her credit cards, which they stole from Lang's wallet. (R. 153). Appellant and Hilton threw the purse and remaining items out of the truck onto Manor Drive. (R. 102, 151-53).[1] Appellant and Hilton removed the cellular phone battery before throwing it outside in an attempt to disable any possible GPS tracking. (R. 152). They also changed clothing to avoid detection from law enforcement. (R. 152).

Appellant and Hilton then drove around the area looking for places to use Lang's credit cards without success. (R. 152-53). Frustrated, they drove to Columbia to see if the credit cards would be accepted downtown. (R. 152-53). The two ended up in the Elmwood area near a McDonald's restaurant and gas station. (R. 152-53). They went through the McDonald's drive-thru and purchased approximately fifty dollars' worth of food on Lang's AT&T Universal credit card. (R. 153-54). Appellant and Hilton attempted to use the same credit card at the gas station adjacent to the McDonald's, but the card would not work. (R. 154). They went across the street to another gas station to try Lang's AT&T Universal credit card again. (R. 154). Appellant was able to use the credit card at this gas station and purchased approximately one hundred dollars' worth of gas at the outside pump and approximately sixty-five dollars' worth of cigarettes and beer inside the store. (R. 77, 154-55; State's Ex. No. 7). Hilton tried to exit the truck while Appellant was pumping gas, but Appellant instructed him to remain inside the vehicle for fear they would be caught by law enforcement based on their descriptions. (R. 154-55). Within a week of their robbery and assault of Lang, Appellant and Hilton traded-in the white truck for

[1] Lang's purse and other personal items were later recovered on private property off Manor Road by the landowner. (R. 102, 106-07). Because the property had been exposed to the elements for some time, law enforcement made the decision not to further analyze the items for DNA or fingerprints because of the likely ineffectiveness of any analysis. (R. 107-109).

another vehicle in furtherance of their attempt to avoid detection by law enforcement. (R. 159-60).

After the incident, Lang met with Chief Sheumpert of the South Congaree Police Department. (R. 73, 94, 102). Sheumpert, one of the first responders to Food Lion shortly after the incident, investigated the case and kept Lang updated as a victim's advocate. (R. 73, 92-93, 103-04). Lang brought Sheumpert a statement she received from AT&T Universal to show him how her stolen credit card was used. (R. 74-77, 94; State's Ex. No. 7). The statement listed the purchases made by Appellant and Hilton at McDonald's and the gas station on June 12, 2012; these were the only purchases on the statement, as Lang had not used this credit card in years. (R. 74-77, 94; State's Ex. No. 7).

Based on the information obtained from the credit card statement, Sheumpert was able to identify the specific location of the McDonald's and gas station, and he visited both. (R. 95-96). At the McDonald's location, Sheumpert spoke with a manager who was able to determine the time Appellant and Hilton used Lang's credit card at the restaurant. (R. 95-96). Sheumpert and the manager then reviewed the surveillance footage of the drive-thru, and Sheumpert identified Appellant's vehicle. (R. 95-98). Due to concerns the video footage would be recorded over along with concerns about the inability of the manager to provide a copy of the recording, Sheumpert used his cellular phone to take photographic stills of the video. (R. 97-98, State's Ex. No. 3).

After leaving McDonald's, Sheumpert went to the gas station across the street where Appellant and Hilton made purchases with Lang's credit card. (R. 98-99). Similar to his visit to McDonald's, Sheumpert met with the manager at the gas station, viewed the surveillance footage covering approximately the same time frame as he had determined at McDonald's, and observed Appellant's truck in the footage (R. 99-101). The manager gave Sheumpert a DVD with the

surveillance footage, but upon returning to his office, Sheumpert was unable to view the footage. (R. 99). Worried he would lose the footage, Sheumpert returned to the gas station and used his cellular phone to take photographic stills of the video as he previously did at McDonald's. (R. 99-101, State's Ex. No. 8, 9, 11).

Sheumpert also arranged for Lang to meet with a sketch artist from the South Carolina Law Enforcement Division (SLED) to generate sketches of the suspects. (R. 77-78, 102-03, 119-24, State's Ex. No. 12, 13). Lang met with SLED Senior Agent Deborah Goff, an expert in forensic art, who was able to use Lang's descriptions to generate sketches of both the driver (later identified as Appellant) and the passenger (later identified as Hilton). (R. 77-78, 102-03, 119-24, State's Ex. No. 12, 13). These sketches were released to local media outlets and were viewed by Hilton, causing him great concern because of the accuracy of the drawings. (R. 160). Hilton's wife similarly identified Hilton and Appellant from the sketches, resulting in Hilton confessing to his wife that he and Appellant were the perpetrators. (R. 169-70).

Appellant and Hilton were arrested and indicted for strong arm robbery and first degree assault and battery. Appellant proceeded to a jury trial on October 8, 2014. At the outset of trial, defense counsel stated his intention to object to the introduction of Lang's credit card records based on hearsay, due process, and confrontation grounds. (R. 46-47). The trial court declined to rule on the admissibility of the credit card statement at that time and instructed defense counsel to pose his objection when the State attempted to introduce the credit card statement. (R. 47).[2]

[2] In his brief, Appellant states that the trial court "ruled that the statement could be admitted as a business record under Rule 803(6), SCRE, and that Lang was a 'qualified witness' because 'it's within her knowledge of what happened with her property . . . . It's her statement she can talk about it.' " This is a mischaracterization of the record and Appellant attributes the State's argument for admission as a ruling by the court. The trial court did **not** rule on the admissibility of the credit card statement, but explicitly stated, "We'll deal with that at that time and you can pose your objection. I think it's just depending on the foundation that's laid." (R. 47).

During her testimony, Lang stated she received a statement for the charges on her stolen credit card after the incident. (R. 73-77). Defense counsel objected to this testimony, citing his "prior objection." (R. 73). The trial court overruled the objection and stated it would "allow [Lang] to testify as to what she received once [the State] la[id] [a] foundation." (R. 74). Lang then testified the particular credit card statement was from her AT&T Universal credit card that was in her name. (R. 74). Lang further testified she had not used the credit card "in a couple of years" and it was in her purse when it was stolen. (R. 74). Lang identified the credit card statement, testified she received credit card statements from AT&T Universal regularly, and confirmed the statements have been accurate. (R. 74-75). She further testified she called the credit card company after receiving the bill to confirm the charges. (R. 75). The State sought to move the statement into evidence, and, without any objection from defense counsel, the court stated, "And I note your objection. I'm going to allow it in." (R. 75, State's Ex. No. 7). Notably, defense counsel did not place any argument on the record as to why the statement was inadmissible. Lang testified the billing period of the credit card statement was May 19, 2012, through June 19, 2012, and the only charges were the purchases at McDonald's and the gas station made by Appellant and Hilton on the day of the robbery and assault. (R. 76-77).

Sheumpert also testified at Appellant's trial. He described going to the McDonald's location where Appellant and Hilton used Lang's credit card and viewing the surveillance footage of the purchase with the store manager. (R. 95-97). Sheumpert testified he used his cellular phone to take photographic stills of the video due to concerns the video footage would be recorded over and an inability of the manager to provide a copy of the video. (R. 97-98, State's Ex. No. 3). Sheumpert identified State's Exhibit No. 3 as one of the photographs he took of the surveillance footage and described what was occurring in the picture. (R. 97-98). Following this

testimony, the State sought to move the still photograph into evidence. (R. 98). The court asked defense counsel if he had any objection and counsel responded, "It's the same as stated on the record." (R. 98). However, defense counsel had **not** made any prior argument on the admissibility of the photographic stills, including during his pre-trial objection which pertained exclusively to the admission of Lang's credit card statement. (R. 46-47).[3] The court allowed the photographic stills from the McDonald's surveillance into evidence. (R. 98).

Sheumpert also described the similar procedure he used at the gas station to obtain photographic stills from the station's surveillance system. (R. 98-101). Sheumpert identified State's Exhibits No. 8, 9, and 11 as photographic stills of the surveillance footage and described why he took pictures of those particular images. (R. 98-101). The State did not offer these three photographic stills into evidence through Sheumpert. However, the State did attempt to move the images into evidence through Sheila Derrick, the current manager of the gas station. (R. 126-29). Defense counsel objected, citing a lack of proper foundation. (R. 129). The court excused the jury and expressed concern that Derrick was not employed at the store in 2012 when the video was recorded. (R. 129-30). The State countered Derrick was familiar with the store's surveillance system that was in place in 2012, thereby satisfying the business exception to the hearsay rule pursuant to Rule 803(6), SCRE. (R. 130-31). Defense counsel responded Derrick was not present when Sheumpert took the photographic stills, the original footage had been destroyed, and there was no evidence that the current surveillance system Derrick was familiar with was identical to the system in place in 2012. (R. 131-32). The court ultimately sustained defense counsel's objection to the photographic stills from the gas station, noting Derrick did not work at the store

[3] Contrary to Appellant's appellate argument that defense counsel objected to the admission of the photographic stills, defense counsel informed the trial court he was provided with the photographic stills and did not have any objections or move otherwise to prevent admission of them during trial. (R. 46).

in 2012 and was not certain the current surveillance system was in place in 2012 when it recorded Appellant and Hilton. (R. 133-35).

However, the State successfully moved the photographic stills from the gas station into evidence during Hilton's testimony after he identified himself and Appellant in the photographs. (R. 156-59). The photographic stills from outside the gas station were entered into evidence after defense counsel expressly stated he had "**no objection**" to admission. (R. 156-58, State's Ex. No. 8, 11). During his testimony, Hilton recounted how Appellant planned the robbery and selected Lang as the target. (R. 143-46). Hilton detailed the robbery and the immediate aftermath, including discarding Lang's belongings except her credit cards, the numerous attempts to use Lang's credit card, and the eventual successful use of the credit card at McDonald's and a gas station. (R. 147-58). Hilton also described the pair's attempts to avoid detection, including trading-in Appellant's truck for a different vehicle approximately one week later. (R. 159-60). Hilton testified he thought he and Appellant would be caught after seeing the suspects' sketches online because they looked so much like Appellant and him. (R. 160). Hilton's wife also testified that Hilton confided he and Appellant robbed Lang. (R. 169-70).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Decisions to admit or exclude evidence rest in the sound discretion of the trial court and will only be reversed on appeal for an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "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).

ARGUMENT

I. The trial court did not err in admitting Lang's credit card statement into evidence because the statement was not hearsay. However, even if the credit card statement constituted hearsay, the trial court properly admitted the statement pursuant to Rule 803(6), SCRE, where Lang testified as to her personal knowledge of the statement's accuracy and her history with this AT&T Universal credit card. Furthermore, any error was harmless and had no impact on Appellant's case.

Appellant argues the trial court committed reversible error and violated the rule against hearsay by admitting into evidence Lang's credit card statement from AT&T Universal (State's Ex. No. 7). Appellant maintains the State did not satisfy the requirements for admission pursuant to Rule 803(6), SCRE, or S.C. Code Ann. § 19-5-510, as Lang was not a qualified witness with knowledge as to how the credit card statement was generated or issued. However, the trial court did not abuse its broad discretion by admitting Lang's credit card statement into evidence, where Lang testified as to her personal knowledge of the statement's accuracy and her history with this AT&T Universal credit card. Furthermore, any purported error was harmless and had no impact on Appellant's case. Appellant's convictions should be affirmed.

A. Propriety of the Trial Court's Admission of Lang's Credit Card Statement

As an initial matter, the trial court did not err in admitting Lang's credit card statement into evidence because it does not constitute hearsay as the "declarant" was not a person. Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "A 'declarant' is **a person** who makes a statement." Rule 801(b), SCRE (emphasis added). "The general rule is that hearsay is not admissible." State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007); see Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute."). The basis for excluding hearsay evidence is that such evidence denies the adverse party an opportunity to **cross-examine**

the declarant of the hearsay statement. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 150-151 (1985) (emphasis added); see State v. James, 255 S.C. 365, 370, 179 S.E.2d 41, 43 (1971) ("The hearsay rule signifies a rule rejecting assertions offered testimonially which have not been in some way subjected to the test of cross-examination."). In State v. Williams, this Court discussed the importance of the rationale underlying the rules and exceptions to hearsay in criminal proceedings:

> The right of an accused to be confronted by the witnesses against him is perhaps the most important constitutional right provided to people who are not guilty. The right to a trial, standing alone, is fairly meaningless if a conviction can be obtained based only on a prosecution witness reciting a statement allegedly made outside of court. Unfortunately, there is no way the right of confrontation can be accorded people who are not guilty to the exclusion of those who may be guilty. This is because, under our system of justice, no one is guilty until he has been tried and proven guilty. In other words, the right of confrontation cannot be accorded to anyone unless it is accorded to everyone. This is a price we pay for living in the United States of America. Many people feel it is a small price.

State v. Williams, 285 S.C. 544, 556, 331 S.E.2d 354, 361 (Ct. App. 1985).

In the present case, Appellant's analysis of this issue has a glaring but crucial omission—the threshold question of whether the "declarant" is a person. Here, the declarant is not a person, but rather, an automatic, machine-generated aggregation of electronic transactions compiled based on the activity of a particular credit card between multiple computers without any human involvement. Credit card statements are not hearsay because they are **not** out-of-court statements made by a person, and therefore, do not carry the usual perils associated with hearsay statements, such as a faulty memory, mistaken perceptions, or untrustworthiness that could plague a declarant. Because the "declarant" is not a person but a computerized process, there is no declarant for an adverse party to cross-examine. Lang's credit card statement was not hearsay.

The Fourth Circuit has found that machine-generated reports are not hearsay. In United States v. Washington, 498 F.3d 225 (4th Cir. 2007), the Fourth Circuit analyzed whether toxicology data generated by lab machines, which indicated the defendant's blood contained alcohol and phencyclidine (PCP), was hearsay. The Fourth Circuit determined it was not hearsay because the data was not a statement made by a person as defined by Rule 801, FRE: "In short, the inculpating 'statement'—that Washington's blood sample contained PCP and alcohol—was made by the machine on printed sheets, which were given to [the expert witness]." Id. at 230. "Only a *person* may be a declarant and make a statement. Accordingly, nothing 'said' by a machine . . . is hearsay." Id. at 231 (citations and internal quotation marks omitted). Other courts have similarly held that computer-generated documents are nonhearsay. See State v. Houston, 679 N.E.2d 1244, 1249 (Ill. App. 1997) (holding telephone billing records were nonhearsay because "the bulk of the billing data was generated instantaneously by the computer when telephone calls were placed from defendant's accounts. . . . not entered by a human declarant."); State v. Holowko, 486 N.E.2d 877, 879 (Ill. 1985) (holding "trap" or "line tracer" records are nonhearsay because they were generated solely by the electrical and mechanical operations of the computer and telephone equipment and they are "not dependent upon the observations and reporting of a human declarant"); State v. Armstead, 432 So. 2d 837, 840 (La. 1983) (telephone trace records are not hearsay because they are merely a print-out of computer-generated record of the computerized process). Numerous courts have also determined breathalyzer machine reports are nonhearsay due to the lack of a declarant. See State v. Tomlinson, 159 Idaho 112, 124, 357 P.3d 238, 250 (Ct. App. 2015) (holding a breathalyzer machine cannot provide hearsay because it is not a declarant and does not provide a statement as defined in the rules); Cranston v. State, 936 N.E.2d 342 (Ind. Ct. App. 2010) (holding evidence ticket from breath testing device was not

hearsay); People v. Dinardo, 290 Mich. App. 280, 801 N.W.2d 73 (2010) (holding a breath-test machine report, showing breath-test procedures and defendant's specific blood alcohol level, was not hearsay because the machine that generated report without input of any human analyst was not a declarant capable of making a statement). In the instant case, Lang's credit card statement was a machine-generated data compilation and, therefore, was not hearsay.

However, should the credit card statement be deemed hearsay, the statement was nevertheless admissible pursuant to Rule 803(6), SCRE, or S.C. Code Ann. § 19-5-510. Prior to the promulgation of the South Carolina Rules of Evidence, South Carolina adopted S.C. Code Ann. § 19-5-510, the Uniform Business Record as Evidence Act, which provides:

> A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

State v. Rice, 375 S.C. 302, 330–32, 652 S.E.2d 409, 423–24 (Ct. App. 2007) overruled on other grounds by State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011) (citing S.C. Code Ann. § 19-5-510 (1985)).

Rule 803(6), SCRE, adopted in 1995 and modeled after § 19-5-510 and the Federal Rules of Evidence, allows for the admission of records of regularly conducted activity that would otherwise be excluded by the rule against hearsay. Rule 803(6), SCRE, provides that memorandum, reports, records, etc. in any form of acts, events, conditions, or diagnoses, are admissible as longs as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the

mode of preparation of the record; and (5) found to be trustworthy by the court. Ex parte Dep't of Health & Envtl. Control, 350 S.C. 243, 249-50, 565 S.E.2d 293, 297 (2002), citing Rule 803(6), SCRE; S.C. Code Ann. § 19-5-510.

Both § 19-5-510 and Rule 803(6), SCRE, require evidence about the manner the manner in which it is prepared or the source of its information. Rice, 375 S.C. at 331, 652 S.E.2d at 424 (internal citations omitted). Additionally, the business record entries must have been made at or near the time of the act to which they relate in order to aid in establishing the record was honestly and fairly kept. South Carolina Nat'l Bank v. Jones, 302 S.C. 154, 155, 394 S.E.2d 323, 324 (1990).

In the present case, defense counsel stated his intention to object to introduction of Lang's credit card records based on hearsay, due process, and confrontation grounds at the outset of trial. (Tr. 46-47). Specifically, defense counsel stated, "However, reviewing that and thinking about it, these bank records that the victim was told by her credit card company that the card was used and they've got a copy of her statement from the credit card company, I would object to any testimony as hearsay from the credit card company that the card was used and without the custodian to lay the foundation for a business record, I don't think they can admit that or have her testimony. That would be hearsay." (Tr. 46). The State replied, "Your Honor, as far as her credit card statement, she's going to talk about the information received on it and what she did with that and confirm whether or not it had been used. It's within her knowledge of what happened with her property, I think she can talk about it. It's her statement she received in the mail, she can talk about it." (Tr. 46). When questioned by the trial court as to whether the State intended to introduce the credit card statement, the prosecuting assistant solicitor replied she was going to attempt to lay the foundation for admission through Lang. (Tr. 47). The trial court did

not rule on the admissibility of the credit card statement at that time and instructed defense counsel to pose his objection when the State attempted to introduce the credit card statement. (Tr. 47).

During her testimony, Lang stated she received a bill from her credit card company. (Tr. 73). Defense counsel objected to this testimony, citing his "prior objection." (Tr. 73). The trial court overruled the objection and stated it would "allow [Lang] to testify as to what she received once [the State] la[id] [a] foundation." (Tr. 74). Lang then testified the particular credit card statement was from her AT&T Universal credit card that was in her name. (Tr. 74). Lang further testified she had not used the credit card "in a couple of years" and it was in her purse when it was stolen. (Tr. 74). Lang testified she received credit card statements from AT&T Universal regularly and confirmed the statements she has received from AT&T Universal have been accurate. (Tr. 74-75). Lang then identified the particular statement she received following the theft of her purse and credit card in June of 2012. (Tr. 75). She further testified she called the credit card company immediately after receiving the bill to verify the charges. (Tr. 75). The State sought to move the statement into evidence and without any objection from defense counsel, the court stated, "And I note your objection. I'm going to allow it in." (Tr. 75, State's Ex. No. 7).

Following the admission of the credit card statement, Lang testified the billing period of the credit card statement was May 19, 2012, through June 19, 2012. (Tr. 77). Lang testified the only charges listed on the statement were made on June 12, 2012—the day her purse was stolen. (Tr. 76). She further testified the June 12, 2012, purchases were a $33.95 charge at McDonald's and $65.25 and $100.00 charges at a gas station, and she reiterated she did not make those charges. (Tr. 76-77).

Appellant complains the trial court erred in allowing the credit card statement into evidence because there was no evidence that Lang had knowledge of how the credit card statement was created in the course of the credit card company's normal course of business or that Lang possessed information in regard to whether the credit card statement was generated by a person with the requisite knowledge. However, the trial court properly allowed the credit card statement into evidence because Lang had the requisite knowledge to ensure the records were accurate, thereby satisfying both § 19–5–510 and Rule 803(6), SCRE. Lang testified she had this particular AT&T Universal credit card for an extended period of time and routinely and regularly received billing statements from AT&T Universal. More importantly, Lang testified these statements were consistently accurate, reflecting her actual use of the card. Furthermore, Lang testified that upon receiving the statement with the three unauthorized charges, she called AT&T Universal and confirmed the charges were indeed made on June 12, 2012 with her stolen card.

Based on the foregoing, although Lang was not an employee of AT&T Universal, she nonetheless had requisite knowledge regarding her card's use and accuracy of the credit card statement to render her a qualified witness pursuant to § 19–5–510 and Rule 803(6), SCRE. See Twelfth RMA Partners, L.P. v. Nat'l Safe Corp., 335 S.C. 635, 642, 518 S.E.2d 44, 48 (Ct. App. 1999) (holding if a witness's testimony conveys information from a person "with knowledge" at the time the records were created, the witness may be deemed qualified to testify despite not being the custodian "at or near the time" the records were made); see also Midfirst Bank, SSB v. C.W. Haynes & Co., 893 F. Supp. 1304, 1310 (D.S.C. 1994) ("Business records of an entity are admissible even though another entity made the records, and the rule does not require an employee of the entity that prepared the record to lay the foundation."), aff'd, 87 F.3d 1308 (4th Cir. 1996). Therefore, based on her history with and knowledge of the credit card statements

from AT&T Universal, Lang was a qualified witness under the business records exception and the trial court did not err in admitting the credit card statement into evidence. Id. at 1311 (internal citations omitted) ("The phrase 'other qualified witness' should be broadly interpreted.").

B. Harmlessness of Any Purported Error in Admission of Lang's Credit Card Statement

However, even if improper hearsay evidence is admitted, any error in the admission of the hearsay evidence is subject to a harmless error analysis and only warrants reversal if it results in actual prejudice. State v. Weston, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006). "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." State v. Byers, 392 S.C. 438, 447–48, 710 S.E.2d 55, 60 (2011) (citing State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). Where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached," an insubstantial error that does not affect the result of the trial is considered harmless. Id. "A harmless error analysis is contextual and specific to the circumstances of the case: 'No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.'" Byers, 392 S.C. at 448, 710 S.E.2d at 60 (citing State v. Reeves, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990)). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

In the present case, any error in the admission of Lang's credit card statement was harmless as it was merely cumulative to other properly admitted evidence and therefore, had no impact on the outcome of Appellant's case. The pertinent information from Lang's credit card

statement, such as when and where Appellant and Hilton used the stolen credit card, was cumulative to and corroborated by other sources. See State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (finding an admission of improper evidence is considered harmless when it is merely cumulative to other properly admitted evidence). Hilton testified extensively as to where he and Appellant used the credit card following the theft. As a cooperating witness, Hilton could have (and likely would have absent the credit card records) provided those locations to law enforcement prior to trial, allowing for further investigation and confirmation of their use of the card through the locations' surveillance system. Therefore, the challenged evidence was inconsequential when considered in relation to the other evidence presented during trial. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (erroneous admission of evidence is harmless beyond a reasonable doubt if its impact is minimal in the context of the entire record).

In light of the inconsequential nature of the challenged evidence when viewed in relation to the other evidence presented during trial conclusively establishing Appellant's guilt, any error in the admission of challenged evidence was entirely harmless and had no impact on the ultimate outcome of Appellant's trial. See State v. Garner, 389 S.C. 61, 68, 697 S.E.2d 615, 618 (Ct. App. 2010) ("An insubstantial error is harmless when guilt is proven by competent evidence such that no other rational decision could be reached or when the evidence is merely cumulative of other evidence."). Even assuming the trial court abused its discretion in admitting the challenged evidence, Appellant's conviction should not be reversed based on such an insignificant error. See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result."). Appellant's conviction should be affirmed.

II. Appellant's appellate challenge to the trial court's admission of photographic still taken from the McDonald's surveillance video footage raised pursuant to Rule 803(6), SCRE, is not preserved for appellate review because he failed to properly raise such grounds during trial. However, even assuming the issue was somehow preserved for appellate review, the trial court did not err in admitting the photographic still evidence because the photograph was not hearsay. Nonetheless, even if the credit card statement constituted hearsay, the trial court properly admitted the statement pursuant to Rule 803(6), SCRE, where Sheumpert had personal knowledge regarding the photographic still. Furthermore, any error was harmless and had no impact on Appellant's case.

Appellant argues the trial court committed reversible error and violated the rule against hearsay by admitting into evidence the photographic still taken by Sheumpert from the McDonald's surveillance video footage (State's Ex. No. 3). Appellant maintains the State did not satisfy the requirements for admission pursuant to Rule 803(6), SCRE, or S.C. Code Ann. § 19-5-510, as Sheumpert was not a qualified witness with knowledge as to how the underlying surveillance footage was generated or stored. Additionally, Appellant asserts the State failed to provide a proper chain of custody for admission.

Initially, Appellant's appellate arguments are not preserved for this Court's review because he failed to state any grounds to support his objection at any time during trial. However, notwithstanding any preservation concerns, the trial court did not abuse its broad discretion by admitting the photographic still from the McDonald's surveillance video into evidence where Sheumpert testified as to his personal knowledge of the surveillance system conveyed by someone who was familiar with the system. Furthermore, any purported error was harmless and had no impact on Appellant's case. Appellant's convictions should be affirmed.

A. Issue Preservation

As an initial matter, Appellant's argument the trial court erred in admitting the photographic still taken by Sheumpert from the McDonald's surveillance video footage into evidence is not preserved for appellate review because Appellant failed to state **any** ground to

support his objection during trial. In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and argument." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). It is well established that asserted errors not presented to the lower court cannot be raised for the first time on appeal. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005).

In the present case, Appellant contends on appeal the trial court erred in admitting into evidence the photographic still taken by Sheumpert from the surveillance footage at McDonald's into evidence because the State did not satisfy the requirements for admission pursuant to Rule 803(6), SCRE, or S.C. Code Ann. § 19-5-510. Specifically, Appellant argues Sheumpert was not a qualified witness with knowledge as to how the underlying surveillance footage was generated or stored. Additionally, Appellant asserts the State failed to provide a proper chain of custody for admission. However, defense counsel **never** presented any of these arguments to the trial court. Instead, when the trial court asked defense counsel if he had any objection after the State sought to admit State's Ex. No. 3 into evidence, defense counsel replied "It's the same as stated on the record." (Tr. 98). However, defense counsel had **not** made any prior argument against the

admissibility of the photographic stills from McDonald's or the gas station. Cf. State v. Patterson, 324 S.C. 5, 16, 482 S.E.2d 760, 766 (1967) ("No grounds were stated for the objection and the trial judge overruled it. [A] general objection which does not specify the particular ground on which the objection is based is insufficient to preserve a question for review.' " (brackets in original and citation omitted)). To the contrary, defense counsel informed the trial court the State had provided him with the photographic stills from both locations and he did not have any objections or move otherwise to prevent admission of them during trial. (Tr. 46-47). Additionally, defense counsel's only prior objection or motion to suppress dealt solely with the admission of Lang's credit card statement—not any of the photographic stills. (Tr. 46-47). Because defense counsel failed to make any argument as to why the photographic still from McDonald's was not admissible, his arguments raised for the first time on appeal are not preserved for appellate review. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but **it must be clear that the argument has been presented on that ground**." (emphasis added)); State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991) ("Where an objection and the ground therefor is not stated in the record, there is no basis for appellate review.").

Because defense counsel did not raise the issue Appellant is now raising on appeal to the trial court, Appellant's appellate issue cannot properly be considered or addressed for the first time on appeal. See State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal."); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). As a result, Appellant's

challenge to the photographic still from the McDonald's surveillance footage was not properly preserved for appellate review and should be rejected on issue preservation grounds. See State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) ("The rule is well established that if asserted errors are not presented to the lower court, the question cannot be raised for the first time on appeal."); cf. State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000) (holding Benton's challenge to the trial judge's refusal to give a requested charge was not preserved for appellate review where Benton "argued one ground in support of a circumstantial evidence charge at trial (State only presented circumstantial evidence of intent) and argues another ground in support of the charge on appeal (palm print is circumstantial evidence).").

Appellant's argument the trial court erred in admitting the photographic still taken by Sheumpert from the McDonald's surveillance video footage into evidence is not preserved for appellate review. Appellant's conviction should be affirmed.

B. Propriety of the Trial Court's Admission of the Photographic Still from the McDonald's Surveillance Footage

Notwithstanding any preservation concerns, the trial court did not abuse its broad discretion by admitting the photographic still from the McDonald's surveillance video into evidence because the photographic still was nonhearsay. Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "A 'declarant' is **a person** who makes a statement." Rule 801(b), SCRE (emphasis added). Hearsay is generally not admissible. Ladner, 373 S.C. at 116, 644 S.E.2d at 691; see Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute.").

In the present case, similar to the credit card statement analysis, Appellant fails to meet the threshold question of whether the "declarant" is a person. Here, once again, the declarant is not a person, but rather, a photograph taken from surveillance footage. It is not an out-of-court statement made by a person, and therefore, is not hearsay.

Additionally, a surveillance system is not a person, but rather, "a tool to aid perception, much like binoculars, a telescope, or glasses." Holmes v. United States, 92 A.3d 328, 331 (D.C. 2014). Because a surveillance system is a tool used for observation, an adverse party can challenge its reliability during cross-examination. Id. The Holmes court noted that other courts have reached the same conclusion when considering whether evidence generated by a surveillance system is hearsay. Id. As the surveillance system is not a statement offered for the truth of the matter asserted, but rather a tool for observation, the photographic still taken from the McDonald's statement was not hearsay.

However, should the photographic still taken from the surveillance system be deemed hearsay, the still was nevertheless admissible pursuant to Rule 803(6), SCRE, or S.C. Code Ann. § 19-5-510. Rule 803(6), SCRE, allows for the admission of records of regularly conducted activity that would otherwise be excluded by the rule against hearsay. Rule 803(6), SCRE, provides that memorandum, reports, records, etc. in any form, of acts, events, conditions, or diagnoses, are admissible as long as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court. Ex parte Dep't of Health & Envtl. Control, 350 S.C. at 249-50, 565 S.E.2d at 297 (internal citations omitted).

Additionally, S.C. Code Ann. § 19-5-510, the Uniform Business Record as Evidence Act, provides, "A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

Both § 19-5-510 and Rule 803(6), SCRE, require evidence about the manner the manner in which it is prepared or the source of its information. Rice, 375 S.C. at 331, 652 S.E.2d at 424 (internal citations omitted). Additionally, the business record entries must have been made at or near the time of the act to which they relate to in order to aid in establishing that the record was honestly and fairly kept. South Carolina Nat'l Bank v. Jones, 302 S.C. 154, 155, 394 S.E.2d 323, 324 (1990).

In the present case, Sheumpert described going to the McDonald's location where Appellant and Hilton used Lang's credit card and meeting with a member of the management team. (Tr. 95-96). Based on the amount charged to Lang's credit card, the manager was able to determine the approximate time Appellant and Hilton came to the restaurant and purchased food. (Tr. 96). Once a time frame was established, Sheumpert and the manager viewed surveillance footage for the corresponding time and located an oversized white truck matching the description of the suspects' vehicle using the drive-thru to purchase food. (Tr. 96-97). Sheumpert then used his cellular phone to take photographic stills of the video due to concerns the video footage would be recorded over and an inability of the manager to provide a copy of the video. (Tr. 97-98, State's Ex. No. 3).

During trial, Sheumpert identified State's Exhibit No. 3 as one of the photographs he took of the surveillance footage and described what was occurring in the picture. (Tr. 97-98). Following this testimony, the State sought to move the still photograph into evidence. (Tr. 98). The court asked defense counsel if he had any objection and counsel replied, "It's the same as stated on the record." (Tr. 98). However, defense counsel had **not** made any prior argument to the admissibility of the photographic stills, including during his pre-trial objection exclusively based on the admission of the credit card statement. (Tr. 46-47). The court allowed the photographic still from the McDonald's surveillance into evidence. (Tr. 98).

Appellant complains the trial court erred in admitting the photographic still from the McDonald's surveillance footage into evidence because the State did not satisfy the requirements for admission pursuant to Rule 803(6), SCRE, or S.C. Code Ann. § 19-5-510, as Sheumpert was not a qualified witness with knowledge as to how the underlying surveillance footage was generated or stored. Additionally, Appellant asserts the State failed to provide a proper chain of custody for admission. However, the trial court properly admitted the photographic still from the McDonald's surveillance footage into evidence because Sheumpert had the requisite knowledge to ensure the records were accurate, thereby satisfying both § 19–5–510 and Rule 803(6), SCRE. Sheumpert described speaking with the manager at McDonald's who was familiar with the surveillance system and the constraints of the system, such as the automatic deletion feature after a certain amount of time. Sheumpert, with the assistance of the McDonald's manager, was able to pinpoint the precise time Appellant and Hilton would likely be visible on the surveillance footage and were able to obtain the video from the corresponding time showing Appellant and Hilton at the drive-thru. Additionally, demonstrating the reliability of the surveillance footage and photographic still image that Sheumpert took, is reliable, the McDonald's manager obtained

it by using the corresponding date and time from Lang's credit card receipt and the internal purchase database at the restaurant. Furthermore, any purported errors in the chain of custody of the photographic still is without merit, as Sheumpert personally took the photograph on his cellular phone and testified as to the procedure used to obtain the photograph.

Based on the foregoing, although Sheumpert was not an employee of McDonald's, he nonetheless had the requisite knowledge regarding the restaurant's surveillance equipment to render him a qualified witness pursuant to § 19–5–510 and Rule 803(6), SCRE. See Twelfth RMA Partners, L.P. v. Nat'l Safe Corp., 335 S.C. 635, 642, 518 S.E.2d 44, 48 (Ct. App. 1999) (holding if a witness's testimony conveys information from a person "with knowledge" at the time the records were created, the witness may be deemed qualified to testify despite not being the custodian "at or near the time" the records were made); see also Midfirst Bank, SSB v. C.W. Haynes & Co., 893 F. Supp. 1304, 1310 (D.S.C. 1994) ("Business records of an entity are admissible even though another entity made the records, and the rule does not require an employee of the entity that prepared the record to lay the foundation."), aff'd, 87 F.3d 1308 (4th Cir. 1996). Therefore, based on the knowledge imparted on him by the manager of McDonald's who was familiar with the store's particular surveillance system, Sheumpert was a qualified witness under the business records exception and the trial court did not err in admitting the photographic still of the surveillance footage from McDonald's into evidence. Id. at 1311 ("The phrase 'other qualified witness' should be broadly interpreted.").

Furthermore, Appellant's attempts to argue the admission of the photographic still from the McDonald's surveillance video should have been suppressed because the similar photographic stills from the gas station were suppressed is without merit, as those photographic stills were properly admitted into evidence during Hilton's testimony after he identified himself

and Appellant in the photographs. (Tr. 156-59). It is implausible that Hilton would not have similarly identified himself and Appellant in the photographic still from McDonald's, thereby leading to their admission had the trial court not allowed the photographic still into evidence during Sheumpert's testimony. The trial court did not err in admitting State's Ex. No. 3 into evidence. Appellant's conviction should be affirmed.

C. Harmlessness of Any Purported Error in of the Photographic Still from the McDonald's Surveillance Footage

However, even if improper hearsay evidence is admitted, any error in the admission of the hearsay evidence is subject to a harmless error analysis and only warrants reversal if it results in actual prejudice. Weston, 367 S.C. at 288, 625 S.E.2d at 646. "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." Byers, 392 S.C. at 447-48, 710 S.E.2d at 60 (citing Pagan, 369 S.C. at 212, 631 S.E.2d at 267). Where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached," an insubstantial error that does not affect the result of the trial is considered harmless. Id. "A harmless error analysis is contextual and specific to the circumstances of the case: 'No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.'" Byers, 392 S.C. at 448, 710 S.E.2d at 60, (citing Reeves, 301 S.C. at 193-94, 391 S.E.2d at 243). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." Bailey, 298 S.C. at 5, 377 S.E.2d at 584.

In the present case, any error in the admission of the photographic still from McDonald's was harmless as it was merely cumulative to other properly admitted evidence and therefore, had

no impact on the outcome of Appellant's case. Hilton testified he and Appellant used the credit card at this particular McDonald's location in downtown Columbia, thereby making the photographic still cumulative to Hilton's testimony. See Blackburn, 271 S.C. at 329, 247 S.E.2d at 337 (finding an admission of improper evidence is considered harmless when it is merely cumulative to other properly admitted evidence). Furthermore, the credit card statement listed the purchase from this particular McDonald's location shortly after the robbery. Additionally, the sketches generated by the SLED forensic artist bore striking similarity to Appellant and Hilton, causing Hilton great concern following the robbery. Therefore, the challenged evidence was inconsequential when considered in relation to the other evidence presented during trial. See Haselden, 353 S.C. at 196, 577 S.E.2d at 448 (erroneous admission of evidence is harmless beyond a reasonable doubt if its impact is minimal in the context of the entire record).

Additionally, as Appellant notes on appeal, "the identity of the individual in the truck cannot be determined based on the photograph." (BOR 17). As the identity of the driver cannot be determined from the photograph, it is improbable that admission of this photographic still had a determinative outcome on Appellant's case. In light of the inconsequential nature of the challenged evidence when viewed in relation to the other evidence presented during trial conclusively establishing Appellant's guilt, any error in the admission of challenged evidence was entirely harmless and had no impact on the ultimate outcome of Appellant's trial. See Garner, 389 S.C. at 68, 697 S.E.2d at 618 ("An insubstantial error is harmless when guilt is proven by competent evidence such that no other rational decision could be reached or when the evidence is merely cumulative of other evidence."). Even assuming the trial court abused its discretion in admitting the challenged evidence, Appellant's conviction should not be reversed based on such an insignificant error. See Bryant, 369 S.C. at 518, 633 S.E.2d at 156 (2006)

("[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result.").

Moreover, as noted previously, the photographic still would have been properly admitted through the testimony of Hilton had the trial court not allowed it into evidence during Sheumpert's testimony. On appeal, Appellant repeatedly ignores the admission of the photographic stills from the gas station in an attempt to bolster his argument, but the record is clear—all the photographic stills from the gas station were admitted into evidence. (Tr. 156-58, State's Ex. No. 8, 9, 11).Moreover, the photographic still from outside the gas station was admitted into evidence after defense counsel expressly stated he had "**no objection**" to admission. (Tr. 156-58, State's Ex. No. 8). Appellant's conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment and conviction of the lower court.

Respectfully submitted,

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Oct. 20, 2016

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2014-002206

THE STATE,

Respondent,

v.

KEITH CHRISTOPHER OSBORNE,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCAR, 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 Findings."

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