STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WAYNE GARY POLITE

APPELLANT

APPELLANT CASE NO. 2015-001843

FINAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in denying Appellant's request for self-representation violating Appellant's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution?

II. Where the state charged Appellant with obtaining property valued at ten thousand dollars or more by false pretenses, did the trial judge err by failing to instruct the jury on the lesser-included offenses of a lesser value in light of the conflicting evidence on the value of the property?

STATEMENT OF THE CASE

During its December 2014 term, a Charleston County grand jury indicted Appellant for obtaining property in excess of $10,000 by false pretenses (2014-GS-10-7246). R. 265 - 266. The state, represented by Marian Askins and Daniel Cooper, called the case for trial before the Honorable Deadra L. Jefferson and a jury on August 12, 2015. R. 1-2. Luke Malloy and Mary Ford represented Appellant. R. 2. On August 14, 2015, the jury found Appellant guilty as charged. R. 250, lines 2-7. Judge Jefferson sentenced Appellant to seven years' imprisonment. R. 257, lines 18-21. She also found Appellant had violated the terms and conditions of his probation as a result of his conviction. She revoked his probation in full and ordered him to serve the revoked sentence concurrently with the sentence imposed for the instant matter. R. 257, lines 6-16.

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

John Tursi owned East Coast Sports and Imports in North Charleston, South Carolina, where he sold "high-lined cars" "in the subprime market." R. 72, lines 21-25; R. 73, lines 13-16. His customers were "people who have already had credit problems in the past" and he assisted them in getting credit "through banks who specialize in subprime lending." R. 73, lines 21-25; see also R. 116, lines 18-25 (explaining that ninety percent of the customers were "credit risky"). Interests on these loans were typically twenty-five percent. R. 115, lines 16-24.

Appellant was conditionally approved for financing a 2004 BMW X3 through East Coast Sports and Imports on March 10, 2014. R. 264. Oddly, on March 11, 2014, a day *after* the conditional approval of Appellant's financing, Tursi bought the 2004 BMW X3 from Fanelli's Auto for $10,000. R. 85, lines 7-10; R. 258. Tursi then sold the car to Appellant for $13,862 on that same date. R. 75, lines 16-25; R. 76, lines 1-3; R. 79, lines 15-16; R. 261(showing the down payment made on March 11, 2014); R. 262(same); R. 263(the Bill of Sale issued to Appellant by East Coast Sports and Imports dated March 11, 2014). Appellant paid $1500 as a down payment and the remainder would be financed. R. 79, lines 17-24. Tursi's employee, Michelle Miller, completed the paperwork for financing through a third party. R. 79, line 25 – R. 80, line 2; R. 94, line 19 – R. 95, line 8; R. 95, line 16 – R. 100, line 18; R. 100, line 22 – R. 102, line 9.

As part of her responsibilities, Miller contacted Appellant's employer, L&B Snacks. R. 104, lines 12-15. Miller spoke to Priscilla who verified Appellant's employment. R. 104, lines 12-20. Additionally, Miller obtained a copy of Appellant's driver's license, pay stubs, and a reference list. R. 97, line 13 – R. 99, line 23.

After Miller obtained conditional approval from the third party financing company, she permitted Appellant to take possession of the car. R. 80, line 6 – R. 81, line 13; R. 100, lines 10-11; R. 103, lines 1-22; R. 105, lines 1-21. However, when the financing company reviewed the documentation submitted by Miller, the financing company determined there were inaccuracies concerning Appellant's employment, and, as a result, the company refused to fund the loan. R. 81, line 24 – R. 82, line 13.

Tursi and Miller claimed that when the financing company refused to fund the loan, they called Appellant and requested return of the car. R. 82, line 14 – R. 83, line 20; R. 84, lines 14-23; R. 106, lines 7-20; R. 107, lines 9-16. Despite Appellant's alleged initial agreement to return the car, Appellant never did. R. 84, lines 1-2; R. 84, lines 12-13; R. 85, lines 5-6; R. 107, lines 17-18.[1] Miller then began her investigation of Appellant. According to Miller, she determined Appellant did not live at the address he provided. R. 108, lines 7-11. Further, when Miller attempted to interview Appellant's references, she was unable to do so because the individuals at the residences did not know him or the residences were "some kind of boarded house." R. 108, line 15 – R. 109, line 15. Miller contacted the owner of L&B Snacks, Clarence Brown, who stated he did not even know Appellant. R. 109, lines 16-22.[2]

Clarence Brown owned several businesses in Charleston, including L&B Snacks, which serviced vending machines. R. 119, lines 19-24. Brown had known Appellant "since

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[1] Ultimately, the police found the car in a tow lot in Georgia by searching Google for the VIN. The testifying officer claimed the car was abandoned at Magnolia Apartments in Marietta, Georgia. R. 183, line 19 – R. 185, line 8.

[2] Brown testified that he told Miller that he and Appellant were friends, but that Appellant did not work for him. R. 127, lines 2-5.

late '90s to be exact." R. 120, lines 7-11. Brown denied that Appellant had ever worked for him, however. R. 120, lines 18-25. Brown admitted that Appellant had performed "odd jobs" for him, such as working on his computer and getting supplies. R. 123, line 12 – R. 124, line 3. Brown also admitted that Appellant had helped him service vending machines by running a route, but claimed this was only for one day. R. 124, lines 7-14. Brown denied issuing a paycheck to Appellant, and indicated that if he paid Appellant anything, it was just "a few dollars out of [his] pocket." R. 124, lines 20-23.

When the police approached Brown, he admitted that Appellant had "helped [him] out" by doing "a couple of things" and that Brown had paid him "some money out of [his] pocket." R. 127, lines 16-21. However, Brown did not pay Appellant "in the sense of an employee." R. 127, line 21. According to Brown, Appellant "did not work for [him] like that." R. 128, lines 4-6.

Brown supplied his employees with t-shirts, and Appellant had one. R. 142, lines 15-18; R. 204, lines 2-3; R. 204, lines 7-8. Brown admitted that he paid his employees in cash. R. 147, lines 9-10. In fact, Brown did not issue paychecks to any of his employees. R. 148, lines 4-7.

Brown's girlfriend and employee, Priscilla Patterson, initially claimed Appellant wanted her to say he had worked at L&B for six months, that he "helped here and there," and that he was paid in cash for odd jobs. R. 154, line 16 – R. 155, lines 2. When she was confronted with an inconsistent statement, she claimed Appellant asked her to say he worked for seven years and made $700 per week. R. 156, line 15 – R. 157, line 5. Patterson testified that when she received the call from Miller, she said Appellant had "been doing little odd jobs for Clarence, fixing computers, the copier, the scanner. He was good at

computers." R. 157, line 16 – R. 158, line 3. Patterson had seen Appellant doing work for Brown, including helping with the vending machines. R. 165 lines 2-15. Patterson considered Appellant a subcontractor – someone who performed odd jobs and was paid in cash. R. 165, lines 16-24.

According to Appellant's girlfriend, Ruth Love, Appellant worked for L&B Snacks. Tr. 261, lines 21-23. She often dropped him off at work. R. 203, line 24 – R. 204, line 1. She recalled that Appellant "did a lot of paperwork, did a lot of errands" for L&B Snacks and that he was good friends and coworkers with Brown. R.204, lines 3-11. Appellant refilled the soda machines as well. R. 204, lines 12-21.

ARGUMENT

I. In violation of Appellant's right to self-representation pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution, the trial judge erred by denying Appellant's request to represent himself.

Relevant facts

Prior to the trial, Appellant moved to relieve trial counsel. R. 6, lines 5-8. To support his request, Appellant explained that he had requested trial counsel subpoena certain witnesses, and trial counsel had failed to do so. R. 6, lines 10-12; R. 7, lines 7-12. The judge responded that trial counsel would make "the decision about who gets called as a witness," not Appellant. R. 7, lines 13-23. When Appellant said he did not want trial counsel as his advocate, the judge wanted to know why. R. 10, lines 1-3. Appellant explained he did not "have confidence in him" and as a result, there were "certain things" Appellant could not share with him. R. 10, lines 4-5; see also, R. 27, line 25 – R. 28, line 6. Thereafter, the judge asked why Appellant had not hired someone, and Appellant explained he had been in jail, which made hiring someone difficult, but that he had been working on it. R. 10, lines 9-16.

When Appellant invoked his constitutional right to self-representation, the judge agreed he had a right to self-representation. R. 11, lines 3-6. Thereafter, the following colloquy occurred:

> THE DEFENDANT: I don't want him as my lawyer.
>
> THE COURT: Then here are your options, either [trial counsel] represents you or you represent yourself.
>
> THE DEFENDANT: I'll represent myself.

THE COURT:	I don't think that's such a good idea.
THE DEFENDANT:	At the moment - - I think you're right because I don't have a law library. I don't have case laws in front of me.
THE COURT:	I'm not going to delay the case for that.
THE DEFENDANT:	I don't want him as my lawyer.
THE COURT:	Well, your only option then is to hire someone, and this case has been pending at least for over a year, and if you desire to do that, you should have already hired someone.

R. 11, line 9 – R. 12, line 2. Appellant continued to express his desire to relieve trial counsel noting he "would rather jump off that little small bridge in West Ashley than allow him to represent" Appellant. R. 12, line 23 – R. 13, line 2. Additionally, Appellant had filed complaints against trial counsel alleging violations of the Rules of Professional Conduct. R. 14, lines 14-18.

When Appellant persisted that he did not want to be represented by trial counsel, the judge informed him that his options were to permit trial counsel to represent him or to hire someone. R. 15, lines 1-6. The judge failed to tell him he had the option of representing himself pursuant to the state and federal constitutions. To the options presented, Appellant said he would hire someone. R. 15, line 7. The judge responded that he "would had to have hired them before today, before it was put on the trial roster." R. 15, lines 8-10. Thus, hiring someone was not really an option for Appellant at this point.

Nevertheless, Appellant persevered in his request to relieve trial counsel. R. 15, lines 11-19; R. 15, lines 23-24; R. 19, lines 17-19. When the judge ordered Appellant to provide trial counsel with the names of potential character witnesses, Appellant again

informed the judge that he did not want trial counsel as his representative. R. 21, line 22 – R. 22, line 4. The judge responded:

> I've already made the decision, sir, that your motion is denied. You've not provided the Court with any information that would amount to him being ineffective or his inability to be prepared to go forward in trial, and you have not made any efforts, at least that you have been able to provide the Court with independent corroboration, that you have made any attempts to obtain new counsel, and at this point your actions appear to the Court to be dilatory in nature.

R. 22, lines 5-15.

After additional discussion among the participants regarding witnesses and theories, the judge explained that she had "not heard any bases to relieve" trial counsel and had "not heard anything that amounts to ineffective assistance of counsel." R. 31, lines 18-23. She further stated that in light of the case pending for a year, Appellant had ample time to retain a lawyer. R. 31, line 24 – R. 32, line 2. As a result, she denied Appellant's motion to relieve trial counsel. R. 32, lines 2-3.

Appellant responded that he wanted to do his best to fight for his rights. R. 34, line 24- R. 35, line 1. All he wanted was "a fair chance and a fair opportunity." R. 35, lines 1-2. While trial counsel "might be a great lawyer for someone else," he was not the right lawyer for Appellant. R. 35, lines 3-6. To Appellant's continued request, the judge responded that Appellant had not provided "any independent information ... that would justify ... relieving an attorney who is prepared and ready to go forward." R. 35, lines 7-11. When Appellant tried to argue his point further, the judge instructed him, "There is no further argument once the Court has ruled." R. 36, lines 2-9. Despite Appellant's continued refusal to accept the judge's ruling, the judge instructed Appellant that trial counsel was "going to be representing him." R. 37, lines 5-6.

Discussion

A criminal defendant "has the constitutional right to represent himself under both the federal and state constitutions." State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) (citing State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010)); see also State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010)(explaining "[a]n accused may waive the right to counsel and proceed pro se" and "[t]he request to proceed pro se must be clearly asserted by the defendant prior to trial").[3] "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Faretta v. California, 422 U.S. 806, 819 (1975). "That right must be preserved even if the court believes that the defendant will benefit from the advice of counsel." State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999)(citing United States v. Singleton, 107 F.3d 1091 (4th Cir. 1997)). In fact, even if the decision to proceed *pro se* is to the defendant's detriment, the decision "must be honored out of that respect for the individual which is the lifeblood of the law." Faretta, 422 U.S. at 834; see also State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997). "So long as the defendant makes his request prior to trial, the *only* proper inquiry is that mandated by Faretta." Barnes, 407 S.C. at 35, 753 S.E.2d at 550 (emphasis added).

"When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." Faretta, 422 U.S. at 835. Thus, the decision to proceed *pro se* must be made knowingly, intelligently,

[3] The South Carolina Constitution explicitly provides for the right of self-representation: "Any person charged with an offense shall enjoy the right … to be fully heard in his defense by himself or by his counsel or by both." S.C. Const. Art. I, § 14.

and voluntarily. Id. "The ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice, but the defendant's understanding." Brewer, 328 S.C. at 119, 492 S.E.2d at 98 (citing Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992)). "A determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed *pro se* does not justify a denial of the right to self-representation; the only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to counsel." Id. "A decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one." Id. at 120, 492 S.E.2d at 99.

"Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel." Barnes, 407 S.C. at 36, 753 S.E.2d at 550; see also State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977) (explaining "it is the responsibility of the trial judge to determine whether there is or is not an intelligent and competent waiver"). "Faretta requires that a defendant 'be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open.'" Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) (quoting Faretta, 422 U.S. at 835). "To establish a valid waiver of counsel, Faretta requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation." Prince v. State, 301 S.C. 422, 423-424, 392 S.E.2d 462, 463 (1990).

According to the South Carolina Supreme Court, "a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred." Id. The trial

judge must "make a meaningful inquiry into [a defendant's] background to determine whether [the defendant] had sufficient experience or knowledge to waive counsel." Watts v. State, 347 S.C. 399, 403, 556 S.E.2d 368, 371 (2001). However, "[t]he ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is the defendant's understanding." State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998). The United States Supreme Court held that when a defendant requests to proceed *pro se*, "a judge must investigate as long and as thoroughly as the circumstances of the case before him demand." Von Moltke v. Gillies, 332 U.S. 708, 723-724 (1948). "To be valid such a waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." Id. at 724. Thus, a judge must make "a penetrating and comprehensive examination of all the circumstances." Id.

"The judicial inquiry and educative effort concerning the importance of legal representation that must necessarily precede any knowing and intelligent waiver of counsel cannot be cursory or by-the-way in nature." United States v. Belanger, 936 F.2d 916, 918 (7th Cir. 1991). At a minimum, a court must inform a defendant "of the crimes with which he was charged, the nature of those charges, and the possible sentences they carry." Id. Also, "a defendant should be made aware of the 'difficulties he would encounter in acting as his own counsel.'" Id. at 919 (quoting United States v. Moya-Gomez, 860 F.2d 706, 733 (7th Cir. 1988)).

Appellant's request was clear and timely. See Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999)(declining "to hold that a motion to proceed *pro se* made on the day of trial,

but before the commencement of trial proceedings, is either timely or untimely as a matter of law" and recognizing the "variety of reasons which might excuse a last minute request by a defendant to proceed *pro se*"). Just as in Fuller, Appellant's request to proceed *pro se* "was made in an atmosphere of his escalating dissatisfaction with his attorney" and Appellant "complained to the trial court that his counsel had been ineffective in preparing for trial." See id. at 242, 523 S.E.2d at 171. Appellant's "purpose in making the request was not to delay or stall the proceedings, but rather to address his growing concerns about his attorney." See id.

The inquiry that followed Appellant's request, however, had little do to with the *only* inquiry that mattered – whether Appellant was making a knowing and voluntary decision to waive his right to counsel. Instead, the judge focused on whether trial counsel had provided ineffective assistance during the investigative phase of the case. Although the judge agreed with Appellant that he had a constitutional right to self-representation and advised Appellant that waiving counsel was not "such a good idea," the judge did little else to ensure Appellant could make an intelligent and voluntary waiver. Rather, the judge turned her attention to Appellant's complaints against trial counsel and his efforts and ability to retain private counsel. The trial judge's error is clear in her ruling that she had "not heard any bases to relieve" trial counsel and had "not heard anything that amounts to ineffective assistance of counsel." R. 31, lines 18-23; see also R. 35, lines 7-11 (where the trial judge held Appellant had not provided "any independent information" to "justify" "relieving an attorney who is prepared and ready to go forward"). Appellant was under no obligation to present a basis to relieve counsel or to present evidence of ineffective assistance in order to exercise his constitutional right to self-representation. The trial judge erred and violated Appellant's

constitutional rights pursuant to the federal and state constitutions to represent himself in criminal proceedings.

II. <u>Where the state charged Appellant with obtaining property valued at ten thousand dollars or more by false pretenses, the trial judge erred by failing to instruct the jury on the lesser-included offenses of a lesser value in light of the conflicting evidence on the value of the property.</u>

Relevant facts

With the assistance of East Coast Sports and Imports, Appellant received conditional approval for financing of the 2004 BMW on March 10, 2014. R. 264. On March 11, 2014, Tursi, the owner of East Coast Sports and Imports, bought a 2004 BMW X3 from Fanelli's Auto for $10,000. R. 85, lines 7-10; R. 258. On that same day, Tursi sold the car to Appellant for $13,862. R. 75, lines 16-25; R. 76, lines 1-3; R. 79, lines 15-16. R. 261; R. 262; R. 263. Appellant paid $1500 as a down payment and the remainder would be financed. R. 79, lines 17-24. Tursi's employee, Michelle Miller, completed the paperwork for financing through a third party, Pelican. R. 79, line 25 – R. 80, line 2; R. 94, line 19 – R. 95, line 8; R. 95, line 16 – R. 100, line 18; R. 100, line 22 – R. 102, line 9.

Miller obtained conditional approval from Pelican and allowed Appellant to take possession of the car. R. 80, line 6 – R. 81, line 13; R. 100, lines 10-11; R. 103, lines 1-22; R. 105, lines 1-21. According to the conditional approval documentation, the car was a clean trade-in valued at $8,875.00. R. 264. When Pelican reviewed the documentation submitted by Miller, however, Pelican determined there were inaccuracies concerning Appellant's employment, and, as a result, the company refused to fund the loan. R. 81, line 24 – R. 83, line 13.

According to Tursi and Miller, when Pelican refused to fund the loan, the two called Appellant and requested he return the car. R. 82, line 14 – R. 83, line 20; R. 84, lines 14-23;

R. 106, lines 7-20; R. 107, lines 9-16. Appellant never returned the car to the dealership, however. R. 84, lines 1-2; R. 84, lines 12-13; R. 85, lines 5-6; R. 107, lines 17-18. As a result, the state alleged Appellant "by false pretense or representation, did obtain a 2004 BMW X3 with a value in excess of Ten Thousand Dollars from East Coast Sports and Imports, with the intent to cheat and defraud East Coast Sports & Imports of said property" "in violation of Section 16-13-240 of the South Carolina Code of Laws (1976) as amended." R. 265 - 266.

The state called Appellant's girlfriend, Ruth Love, to testify regarding her recorded telephone conversations with Appellant after he was arrested. During those recorded conversations, the two discussed a BMW. R. 198, lines 4-9; State's Exhibit #14. The two discussed a car sitting in Atlanta. Love wanted to sell it, but Appellant asked her to wait. Love and Appellant agreed they would only get $800 for the car if they "junked" it. State's Exhibit #14. Love testified that she was referring to a green two-door BMW that Appellant had given her, not the car at issue in the case. R. 203, lines 7-11.

When Appellant moved for a directed verdict based on the failure of the state to present evidence that value of the property was greater than $10,000 as indicated in the indictment and the statutory section cited. R. 206, lines 1-7. The state argued Tursi's testimony that he purchased the car for $10,000 and then sold it to Appellant for $14,000 was sufficient to establish the value to meet the elements of the statute. R. 206, lines 9-14. Further, the state argued "[t]he value of the vehicle is what someone would pay for an item in the open market, the fair market value." R. 206, lines 14-16. The judge ruled that the state had "more than established that the fair market value of the vehicle was at least $10,000, but on the open market was being sold for more than $10,000." R. 207, lines 2-5.

The judge further explained that "[f]air market value is established by what a seller ... offers property for and what a willing buyer will pay for the property, and the bill of sale establishes that Mr. Tursi paid $10,000 for the car." R. 207, lines 6-10. Thus, she concluded the statutory elements were met. R. 207, lines 10-11.

During the charge conference, Appellant requested "something regarding the dollar amount controversy." R. 218, lines 20-21. The judge responded, "That's a penalty provision. It's not for the jury to decide." R. 218, lines 23-24. The judge continued that "[t]he only instructions that are regarding money in the statute deals with penalty and you would never instruct penalty to the jury. That's not within their province." R. 219, lines 4-7. Appellant clarified that he was requesting the jury be instructed as to the lesser-included offense, which would be based upon the lesser value. R. 219, lines 8-9.

The judge responded,

> The only way they can find him guilty is that the state establishes - - the only way they will be able to meet the elements of the offense, if he's found guilty by virtue of that, they would have proven that it was $10,000, or more. And that's the only evidence in the record as to the value of the car. There is no other testimony in the record regarding the value of the chattel.

R. 219, lines 14-22. Appellant noted the testimony that the car was an "older model." R. 220, lines 23-24. The judge responded there had been "no testimony as to Blue Book value." R. 220, lines 9-10. The judge ruled that "[t]he only evidence in the record that's uncontroverted is that the value of the car was $10,000." Thus, she refused to charge the jury as to the lesser-included offense. R. 220, lines 12-19.

During closing argument, the prosecutor told the jury that the state had to prove the value of the car was $10,000 or more. R. 229, lines 13-15. According to the prosecutor, the state had done so through the "only two pieces of evidence about the value of the car": (1)

State's Exhibit #1, the purchase document showing Tursi bought the car for $10,000, and (2) the evidence that Appellant was willing to buy the car for "$13,800, so odd dollars." R. 229, lines 13-22. The prosecutor claimed the value of the car was based on its "fair market value," which was "what a willing buyer is willing to pay for something." R. 229, line 24 – R. 230, line 2. Further, the prosecutor told the jury that Appellant could not argue "now that it's not $10,000 because that's what he was going to pay for it, fair market value." R. 230, lines 2-4.

Additionally, the prosecutor argued that Love had lied to the jurors when she said the car discussed during the recorded conversations was not the car at issue in the case. R. 227, lines 12-14. The prosecutor argued Love had "every reason to get on the stand and lie. He's her future. She doesn't want him in trouble, she's in love with him. She has ever[y] reason to lie because they were talking about the car, they were busted. It was on the audio and she had to get up there and lie and explain it away." R. 227, lines 15-21. The prosecutor acknowledged the two discussed "trying to sell the car for $800, for junk, for scrap value." R. 227, lines 24-25. The prosecutor hypothesized that the two were considering selling the car for scrap "there is no title to the car. There are no tags on the car." R. 228, lines 1-5. She acknowledged that Appellant and Love valued the car at $800. R. 228, lines 10-11.

During closing argument, Appellant noted the car was ten years old when it was sold to Appellant. R. 234, lines 3-4. Further, Appellant explained that simply because Tursi testified that he paid $10,000 for the car did not mean the car was "worth that much." R. 234, lines 4-5. In other words, Appellant encouraged the jurors to use their common sense in valuing the car.

The judge charged the jury only as to the provision of the statute concerning obtaining property with a value of ten thousand dollars or more. Specifically, the judge instructed the jury that the state must prove "beyond a reasonable doubt that the value of the property was $10,000, or more." R. 246, lines 16-18. There were no other instructions concerning the value of the car.

Discussion

The statute under which Appellant was charged provided for three levels concerning valuation of the property obtained by false pretenses. The first level, and the one provided for in the indictment, concerned property valued at ten thousand dollars or more. S.C. Code Ann. § 16-13-240(1). The second level provided for property valued at "more than two thousand dollars but less than ten thousand dollars." S.C. Code Ann. § 16-13-240(2). Finally, the third level dealt with property valued at two thousand dollars or less. S.C. Code Ann. § 16-13-240(3).

Corresponding with the varying valuations, the statute provided for varying punishments. For example, a person convicted of obtaining property valued at ten thousand dollars or more by false pretenses could be sentenced up to ten years. S.C. Code Ann. § 16-13-240(1). A person convicted of obtaining property valued between two thousand dollars and $9,999 could be imprisoned not more than five years. S.C. Code Ann. § 16-13-240(2). And, finally, a person convicted of obtaining property valued less than two thousand dollars was subject to a fine or up to thirty days' imprisonment. S.C. Code Ann. § 16-13-240(3). Thus, this case presents the following questions: (1) whether the lesser valuations in the statute constitute lesser-included offenses and (2) whether there was any evidence to warrant charging the jury on the lesser-included

offenses. Both questions must be answered in the affirmative after a review of the case law and the statute coupled with the evidence presented.

Lesser-included offenses

Appellant has been unable to find a case in South Carolina stating that the differing valuations in the obtaining property by false pretenses statute render the lesser-values to be lesser-included offenses of the greater value. However, application of the "same elements" test and analogizing the statute to similar statutes renders the finding that the lesser-values are lesser-included offense inevitable.

Typically, "[t]he test for determining when an offense is a lesser included offense of another is whether the greater of the two offenses includes all the elements of the lesser offense." State v. Primus, 349 S.C. 576, 579-580, 564 S.E.2d 103, 105 (2002), overruled on other grounds by State v. Gentry, 363 S.C. 93, 106, 610 S.E.2d 494, 501 (2005)(citing State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000)). "If the lesser offense includes an element which is not included in the greater offense, then the lesser offense is not included in the greater offense." Id. at 580, 564 S.E.2d at 105 (citing Hope v. State, 328 S.C. 78, 492 S.E.2d 76 (1997)); see also Rutledge v. United States, 517 U.S. 292, 297 (noting the Court has "often concluded that two different statutes define the 'same offense,' typically because one is a lesser included offense of the other"). Perhaps the best analogous criminal provisions are the offenses relating to larceny. "Grand larceny is a felony which includes all the elements of the lesser offense of petit larceny except that grand larceny involves the theft of goods valued at fifty dollars or more." State v. Smith, 274 S.C. 622, 623, 266 S.E.2d 422, 423 (1980).

Applying the "same elements" test to the instant offenses reveals the greater offense of obtaining property valued at $10,000 or greater includes all of the elements of the lesser offenses. The only difference among the statutory provisions is the value of the property. Thus, the greater offense encompasses all of the elements of the lesser offenses contained within the same statutory provision. The analogous criminal provisions for grand larceny and petit larceny support this conclusion.

Additionally, consideration of the legislative intent requires viewing the lesser valuation offenses to be lesser-included offense of the greater valuation. The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (citations omitted). Where the statute's language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. Id. (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

The structure of the obtaining property by false pretenses reveals the legislative intent for the offenses to be construed as lesser and greater offenses. The legislature placed all of the provisions within one statute and made clear the elements were the same

except for the monetary value of the property. The monetary value of the property, while an element of the crime, serves to determine the proper sentence.

Jury charge to a lesser-included – Any evidence

A jury charge to a lesser-included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law mandates a jury instruction on a lesser-included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), "[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts."

As an initial matter, the judge's ruling that the valuation portions of the statute were not matters for the jury's consideration was an error of law. It is clearly established that any question of fact that increases the penalty for a crime must be determined by a jury. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Thus, to the extent the judge relied upon her misapprehension that the property values contained within the statutory provisions were "not within [the jury's] province" in making her decision not to charge the jury concerning the lesser-included offenses, her ruling was an error of law.

There were at least two pieces of evidence before the jury to support an instruction on the lesser-included offense based on the car's value. First, the recorded telephone conversations between Appellant and Love supported valuation of $800 for the car. Although Love testified the car that was the topic of the conversation was not the car at issue in the case, the state argued to the jury that Love lied in her testimony and that the car that was discussed by Love and Appellant was the car sold to him by East Coast Sports and Imports. Thus, a reasonable inference from the evidence was that the car discussed by Love and Appellant during the recorded conversation was the 2004 BMW X3 purchased from East Coast Sports and Imports.

Second, the document showing conditional approval of the financing agreement, which was an exhibit admitted by the state, indicated the financing company valued the car at $8,875.00 as a "clean trade-in." R. 264. The term "clean trade-in" is a common term used in the sale of used cars meaning the value of the car if in good condition. Thus, the value of the car according to the financing company was below the $10,000 threshold of the greater offense. The state should not be permitted to present evidence of a lesser value – in the form of the exhibit from the financing company and the recorded telephone conversations – and then run from such evidence when it does not support the state's theory.

Furthermore, Tursi testified that he had purchased the car for $10,000, which was the very lowest valuation of the greater offense. Thus, it would not be unreasonable for a jury to believe that Tursi had paid too much for the car – even just one dollar too much. This would be especially unsurprising to a juror who recognized that Tursi had sold the car to Appellant even before Tursi owned the car. In other words, Tursi knew how much

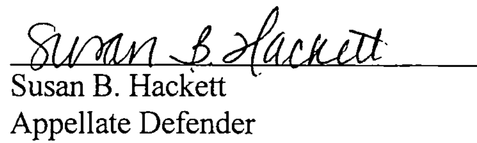
he would make from the car, and it would not be unreasonable for him to be willing to pay a few dollars more for the car in light of his promised profit margin. This reasoning coupled with trial counsel's argument to the jury that the value of the car was probably less than $10,000 based upon one of the most important factors for valuation of cars known to all jurors – the age. The BMW at issue was ten years old at the time of the sale and its value was likely much less than the $10,000 claimed by the state.

Relying upon her misapprehension of the law concerning the jury's "province," the trial judge ignored evidence in the record supporting charging the jury on the lesser-included values of the property. Not only could the jury use its common sense to determine the car was valued at less than $10,000, which was the price paid by the car dealer on the date after he sold it to Appellant, the jury could have relied upon the evidence that the financing company valued the car at less than $10,000 and the conversation between Appellant and Love that the car was worth only $800. This evidence required charging the jury on the lesser-included offenses.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

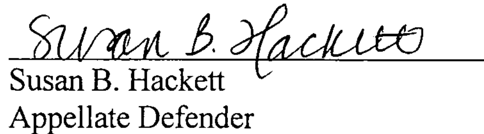
ATTORNEY FOR APPELLANT

This 25th day of July, 2016.

CERTIFICATE OF COUNSEL

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

July 25, 2016



Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

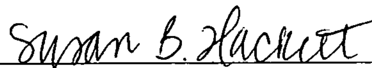
V.

WAYNE GARY POLITE

APPELLANT

CERTIFICATE OF SERVICE

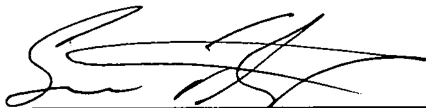
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 25th day of July, 2016.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of July, 2016.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Notary Public for South Carolina
My Commission Expires: October 30, 2022.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case Tracking No. 2015-001843

The State, Respondent,

vs.

Wayne Gary Polite, Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

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

SCARLETT WILSON
Solicitor, Ninth Judicial Circuit

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court properly refused to allow Appellant to represent himself when he admitted he was unable to do so and agreed it was not in his best interest.

II. The trial court did not err in refusing to charge the lesser included offenses because no evidence established any valuation less than $10,000. Further, any error in refusing to charge the lesser valuation is harmless because the jury clearly found beyond a reasonable doubt the value of the vehicle was $10,000 or more or he would have been acquitted.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court properly refused to allow Appellant to represent himself when he admitted he was unable to do so and agreed it was not in his best interest.

Appellant contends the trial court erred in refusing to allow him to represent himself after he moved to recuse trial counsel. Appellant clearly indicated he did not desire to represent himself at trial, and as a result, the trial court did not err in denying his motion to recuse counsel or refusing to allow Appellant to proceed *pro se*.

A defendant has a constitutional right to self-representation under the Sixth and Fourteenth Amendments. Faretta v. California, 422 U.S. 806, 807 (1975). "However, the right of self-representation is not absolute." State v. Samuel, 414 S.C. 206, 211, 777 S.E.2d 398, 401 (Ct. App. 2015) (citing United States v. Frazier–El, 204 F.3d 553, 559 (4th Cir. 2000)). "A defendant's assertion of his right to self-representation must be: '(1) clear and unequivocal; (2) knowing, intelligent and voluntary; and (3) timely.'" Id. at 212, 777 S.E.2d at 401 (quoting Frazier–El, 204 F.3d at 558). So important is the right to counsel that the Supreme Court has instructed courts to "indulge in every reasonable presumption against [its] waiver." Brewer v. Williams, 430 U.S. 387, 404 (1977).

Significantly, a request to proceed *pro se* must be clearly articulated and unequivocal. See State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010) (stating "[t]he request to proceed pro se must be clearly asserted"); see also Raulerson v. Wainwright, 469 U.S. 966, 970–71 (1984) (Marshall, J., dissenting from denial of cert.) ("If a request [for self-representation] is ambiguous, the trial judge need not respond, because there has been no clear indication of a desire to waive a right to counsel."). Because of the importance of the right to counsel, "[a]n assertion of the right of self-representation therefore must be (1) clear and unequivocal." United

States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000) (citing Faretta, 422 U.S. at 835, 95 S.Ct. 2525; United States v. Lorick, 753 F.2d 1295, 1298 (4th Cir.1985)).

The Tenth Circuit Court of Appeals explained the reasoning for requiring a clear and unequivocal request from a defendant before allowing the defendant to waive his right to counsel:

> A defendant's waiver of his right to representation and his concomitant election to represent himself must be "clearly and unequivocally" asserted. United States v. Bennett, 539 F.2d 45, 50 (10th Cir.), *cert. denied*, 429 U.S. 925, 97 S.Ct. 327, 50 L.Ed.2d 293 (1976). The reason that a defendant must make an "unequivocal" demand for self-representation is that otherwise "convicted criminals would be given a ready tool with which to upset adverse verdicts after trials at which they had been represented by counsel." Meeks v. Craven, 482 F.2d 465, 467 (9th Cir.1973), cited with approval by this court in United States v. Bennett, at 51.
>
> It follows that if a defendant in a criminal proceeding makes an equivocal demand on the question of self-representation, he has a potential ground for appellate reversal no matter how the district court rules. If the district court denies defendant's equivocal demand to represent himself, the defendant, on appeal, will argue that his constitutional right to self-representation has been denied. And if the district court grants defendant's demand for self-representation, the defendant, on appeal, will argue that his waiver of his right to counsel was not intelligent, knowing and unequivocal. All of which is a form of the "cat and mouse" game mentioned in United States v. Padilla, 819 F.2d 952, 959 (10th Cir.1987) and in United States v. Gipson, 693 F.2d 109, 112 (10th Cir.1982), *cert. denied*, 459 U.S. 1216, 103 S.Ct. 1218, 75 L.Ed.2d 455 (1983).

United States v. Treff, 924 F.2d 975, 978-79 (10th Cir. 1991). The Fourth Circuit Court of Appeals has also explained:

> This requirement that a defendant invoke his self-representation right clearly and unequivocally also serves an additional purpose. A trial court evaluating a defendant's request to represent himself must "traverse ... a thin line" between improperly allowing the defendant to proceed pro se, thereby violating his right to counsel,

> and improperly having the defendant proceed with counsel, thereby violating his right to self-representation. A skillful defendant could manipulate this dilemma to create reversible error. The requirement that a defendant invoke his self-representation right clearly and unequivocally greatly aids the trial court in resolving this dilemma by allowing the court safely to presume that the defendant should proceed with counsel absent an unmistakable expression by the defendant that so to proceed is contrary to his wishes.

Fields v. Murray, 49 F.3d 1024, 1029 (4th Cir. 1995) (internal citation omitted); see also, United States v. Ductan, 800 F.3d 642, 650 (4th Cir. 2015) (Since our *en banc* decision in Fields, we have consistently held that as between counsel and self-representation, counsel is the "default position" unless and until a defendant explicitly asserts his desire to proceed *pro se*.").

In the present case, Appellant never clearly, explicitly, or unequivocally asked to proceed pro se. Instead, he acknowledged his inability to represent himself and proceed without counsel. The following portion of the colloquy between Appellant and the trial court is instructive:

The Defendant:	I don't want him as my lawyer.
The Court:	Then here are your options, either Mr. Malloy represents you or you represent yourself.
The Defendant:	I'll represent myself.
The Court:	I don't think that's such a good idea.
The Defendant:	**At the moment - - I think you're right** because I don't have a law library. I don't have case law in front of me.

(T.11; R. 11) (emphasis added). Recognizing the defendant was not really seeking to represent himself but continued to insist he did not want trial counsel to represent him, the trial court explained Appellant's only recourse was to hire someone. (T.11-12; R. 11-12). Contrary to asserting his right to proceed *pro se*, Appellant responded by indicating: "Well, I have someone

working on it, but the person hasn't come to see me. One of them is Smiley, and a few other people that I inquired of. They're supposed to come visit me this week, but they haven't come to see me yet." (T.12; R.12). The remainder of the discussion regarding relieving trial counsel focused on substituting counsel with someone hired by Appellant and he never again mentioned proceeding *pro se*. Appellant never clearly, explicitly, and unequivocally sought to represent himself, and instead immediately withdrew the possibility at the mere hint of difficulty by the trial court.

Appellant also seems to indicate the trial court failed to properly warn him of the dangers pursuant to Faretta. However, because he never made an unequivocal request, no warning was necessary. Further, the trial court did not have to give a full warning because as soon as she indicated it would not be a good idea for Appellant, he withdrew his request to proceed pro se. Therefore, the requirement of a warning to allow a defendant to proceed with his eyes open appears to have opened Appellant's eyes to the folly of proceeding pro se.

II. The trial court did not err in refusing to charge the lesser included offenses because no evidence established any valuation less than $10,000. Additionally, much of the argument presented on appeal was never presented to the trial court and, therefore, is not preserved for review on appeal. Further, any error in refusing to charge the lesser valuation is harmless because the jury clearly found beyond a reasonable doubt the value of the vehicle was $10,000 or more or he would have been acquitted.

Appellant maintains the trial court erred in failing to charge lesser included offenses for obtaining property based on false pretenses based on the value of the property obtained, arguing there was evidence to support both lower value charges. The argument as raised in Appellant's brief is not preserved for review on appeal because the arguments were not presented to the trial court. In addition, the issue was waived by trial counsel. Further, the trial court properly determined the only evidence regarding fair market value indicated a value of $10,000 or more and, therefore, provided the correct charge to the jury. Finally, any error is harmless in light of the jury's determination the value of the property was above $10,000.

Preservation

Initially, the issue as argued by appellate counsel is not preserved for review on appeal. Appellant maintains in his brief the trial court erred by only charging section 16-13-240(1) and not subsections (2) and (3) of the South Carolina Code. He references figures arguing they demonstrate the need for the lesser included charges. However, none of these figures or arguments in favor of the lesser included offenses were provided to the trial court. Instead, trial counsel based his request solely on the testimony of Mr. Tursi, one of the State's witnesses. In arguing for the lesser included offenses, counsel indicated: "I think there was testimony regarding the older model vehicle. He bought it for $10,000, he adjusted that threshold . . . ." When the court questioned counsel, indicating there was no testimony about an adjustment to the

value of the vehicle, counsel indicated: "That would have been John Tursi. He testified he bought it for $10,000." Counsel appears to be arguing that because there is testimony the vehicle was purchased for $10,000 then he should have received a charge on subsection (2) of the statute. He never makes an argument based on the figures in the Conditional Approval (State's Exhibit 13; R. 264) or the recorded phone call between Appellant and his girlfriend (State's Exhibit 14). As a result, none of the argument presented on appeal is preserved for review on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal.").

Additionally, Appellant waived any challenge to the jury instructions. When the trial court completed giving her instructions, she asked if there were any exceptions to the charge by the defense. Appellant's counsel responded: "Not from the defense." As a result, he waived any objection to the charge. See State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) ("Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, 'None.' By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal.").

Merits

On the merits, the trial court properly charged the jury on the applicable law based on the testimony and evidence presented. Further, Appellant received the charge he asked for and argued the evidence demanded. Finally, to the extent this Court finds error, it is entirely harmless and the failure to charge the lesser included could not have impacted the verdict.

South Carolina Code section 16-13-240 provides for three different offenses based on the value of the property obtained under false pretenses:

> A person who by false pretense or representation obtains the signature of a person to a written instrument or obtains from

> another person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud a person of that property is guilty of a:
>
> (1) felony and, upon conviction, must be fined not more than five hundred dollars and imprisoned not more than ten years if the value of the property is **ten thousand dollars or more**;
>
> (2) felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than five years if the value of the property is more than two thousand dollars but less than ten thousand dollars
>
> (3) misdemeanor triable in magistrates court or municipal court, notwithstanding the provisions of Sections 22-3-540, 22-3-545, 22-3-550, and 14-25-65, if the value of the property is two thousand dollars or less. Upon conviction, the person must be fined not more than one thousand dollars, or imprisoned not more than thirty days.

S.C. Code Ann. § 16-13-240 (Supp. 2014) (emphasis added).

First, Appellant's counsel maintained he was entitled to a lesser included charge because the testimony by Mr. Tursi indicated the car was valued at $10,000. However, a value of $10,000 would still covered by subsection (1) which indicates a value of "ten thousand dollars or more." As a result, he received the only charge he was entitled to receive based on the lowest valuation he presented to the trial court.

On appeal, Appellant for the first time argues other valuations for the vehicle were presented to the jury. He maintains a valuation of $800 was presented to the jury through the recorded testimony of Appellant and his girlfriend. (State's Exhibit 14). Additionally, he maintains the Conditional Approval contains a valuation of $8,875 for the vehicle.

The testimony regarding the $800 valuation belies its applicability to the current vehicle in question, and further does not demonstrate a valid valuation for consideration under section 16-13-240. Appellant's girlfriend testified the vehicle being discussed was not the 2004 BMW X3 which is the subject of the charges against Appellant for obtaining property by false

pretenses. Instead, she testified the discussions involved a green two-door BMW that Appellant gave her. (T.261; R. 203).

Further, the proper consideration of value is the fair market value of the property. See e.g., State v. Clamp, 225 S.C. 41, 45, 80 S.E.2d 512, 513 (1954) (in prosecution for receiving stolen goods with value over $20, the Court explained to determine the value of the property it would not be sentimental value, but instead "the true test [of the stolen property's value] was its commercial value."). South Carolina defines fair market value as "that price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell and both being fully informed of all uses to which the property is adopted and for which it is capable of being used." Hous. Auth. of City of Charleston v. Olasov, 282 S.C. 603, 608, 320 S.E.2d 478, 481 (Ct. App. 1984); see also, Mazloom v. Mazloom, 382 S.C. 307, 321, 675 S.E.2d 746, 753 (Ct. App. 2009) (recognizing the following definitions of "fair market value": (1) "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's length transaction"; (2) "the price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell").

In this instance, the discussion of $800 in the recorded conversation involved the possible scrap value of the vehicle. Additionally, it was not supported by anything but the conjecture and speculation of Appellant that he could only get $800 for scrap. Finally, because the vehicle clearly still had value as a drivable vehicle, its scrap value does not represent its fair market value. The scrap value of the vehicle certainly has nothing to do with its fair market value and a lesser included charge based on scrap value was not appropriate.

Additionally, the $8,875 is listed on the Conditional Approval as the "Clean Trade-In" value as determined by Pelican Auto Finance. There is nothing in the record to support how that

value was derived or what it means. As the trial court explained, there has been no testimony regarding Blue Book value for the vehicle. (T.279; R. 220). The only valuation explained and placed in the record was the value Mr. Tursi paid another dealer—$10,000—and the value Appellant agreed as a willing buyer to purchase the vehicle from Mr. Tursi as a willing seller—$13,862. (T.117; State's Exhibit 11; R. 263).

The only evidence presented to the jury placed the fair market value of the vehicle at either $10,000 or $13,862. As a result, the trial court did not err in refusing to charge the jury on subsections (2) and (3) of section 16-13-240, which would have required a showing the fair market value was below $10,000.

Finally, any error is harmless. In order to convict Appellant of the crime charged—obtaining property based on false pretenses with a value of $10,000 or more—the jury had to find the property had a value over $10,000. As a result, the jury could not have concluded the same property had a value under $10,000. Therefore, any error in failing to provide the lesser included offenses to the jury did not alter the jury's verdict. See State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) ("When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." (internal quotation marks omitted)).

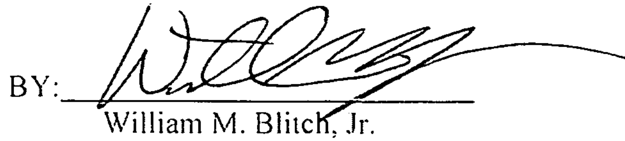
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608



BY:______________________
William M. Blitch, Jr.

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

ATTORNEYS FOR RESPONDENT

July 15, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case Tracking No. 2015-001843

The State, Respondent,

vs.

Wayne Gary Polite, Appellant.

CERTIFICATE OF COUNSEL

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

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

BY: ______________________
William M. Blitch, Jr.

Office of the Attorney General
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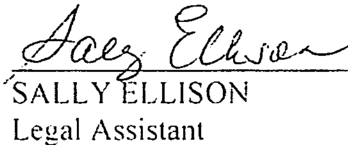
PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 15th day of July, 2016.



SALLY ELLISON
Legal Assistant

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