STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BILLY PHILLIPS,

APPELLANT,

Appellate Case No. 2016-000108

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. ROBERT BOLCHOZ
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MARGARET G. BOYKIN
Assistant Attorney General
S.C. Bar No. 101017
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-6305

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Circuit
P.O. Box 1880
Bluffton, SC 29910
(843) 255-5880

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I. Whether the trial court erred in admitting Appellant's first statement where he was the subject of custodial interrogation and his statements were not made freely and voluntarily because the investigators diluted the *Miranda* warnings, Appellant thought he was required to speak with the police under the terms of his probation, and Appellant was high on marijuana and drunk?

II. Whether the trial court erred in admitting the DNA analyst's expert testimony regarding two items on which Appellant could not be excluded as a contributor where the danger of unfair prejudice, confusion of the issues, and misleading to the jury outweighed any probative value because the results were of such weak statistical significance?

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court abused its discretion in ruling Appellant's first statement was admissible where Appellant was not in custody, and even though not required, proper *Miranda* warnings were given, and the totality of the circumstances demonstrate that Appellant made a knowing, voluntary waiver of his *Miranda* rights?

II. Whether the trial court abused its discretion in admitting the DNA analyst's expert testimony regarding two items on which Appellant could not be excluded as a contributor where the admissible testimony was relevant and the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury?

RESPONDENT'S STATEMENT OF THE CASE

A Jasper County Grand Jury indicted Appellant, Billy Phillips, in September 2014 for the murder of Darius Woods (Indictment Number 2014-GS-27-0312) and in January 2015 for possession of a weapon during the commission of a violent crime (Indictment Number 2014-GS-27-0602).

On January 11, 2016, Appellant's case was called to trial before the Honorable Michael G. Nettles. (R.p. 1). Steven Plexico, Esquire, represented Appellant during the trial. (R.p. 1). Assistant Solicitors Mary C. Jones and Lenore Masser represented the State. (R.p. 1). On January 14, 2016, the jury returned verdicts of guilty on both charges. (R.p. 634, lines 2-11). Judge Nettles sentenced Appellant to incarceration for forty (40) years on the murder conviction and to incarceration for five (5) years on the weapons conviction. (R.p. 640, lines 8-22). The sentences were set to run concurrently. (R.p. 640, lines 8-22).

Appellant filed a timely notice of appeal. (Notice of Appeal).

RESPONDENT'S STATEMENT OF FACTS

On the evening of May 18, 2013, the victim, Darius Woods[1], was shot to death by his own gun at his home in Ridgeland, South Carolina. The State presented evidence at trial that Appellant[2], Billy Phillips, murdered the victim in order to obtain money, drugs, and a PlayStation video game.

Earlier that day, Reginald Green, a good friend of Appellant, was driving to a job interview when he saw Appellant on the victim's porch. (R.p. 248, lines 15-18; p. 249, lines 9-12). When Reginald pulled over to greet the two men, Appellant asked Reginald for a ride to the gas station. (R.p. 248, line 14- p. 249, line 20). While the two men were in the car, Appellant told Reginald that his PlayStation video game had been stolen from the victim's house. (R.p. 250, lines 7-14). Appellant explained that the victim had told him that his house was burglarized and the only thing that was stolen was the PlayStation that Appellant had taken to the victim's house the day before. (R.p. 250, line 7 – p. 251, line 6). Visibly upset and angry at the victim, Appellant exclaimed, "I can't believe he tried to play me like that." (R.p. 251, lines 19-20). Reginald dropped Appellant off at a gas station and did not hear from Appellant until later that night. (R.p. 252, line 21- p. 253, line 16). Between 10:00 to 10:30 p.m., Appellant called Reginald and offered to pay for gas if Reginald would take him to the gas station. (R.p. 253, lines 7-25). Reginald testified at trial that neither he nor Appellant had any money or marijuana earlier that day when they were together. (R.p. 252, lines 3-18; p. 254, lines 4-14). After picking up Appellant, the two men went to a gas station where Appellant paid for Reginald's gas and some cigars and beer. (R.p. 254, line 20- p. 255, line 4). They went back to Reginald's house and

[1] Throughout the trial testimony and Appellant's interviews, the victim is frequently referred to by his nickname "Ace". (R.p. 89, 99, 249-255, 264, 312, 358-59; State's Exhibit 58).

[2] Throughout the trial testimony and Appellants' interviews, Appellant is frequently referred to by his nickname "Dee". (R.p. 32-35, 52; 247-253, 277-283, 276-295, 333, 357; State's Exhibit 58).

smoked marijuana that Appellant had provided. (R.p. 255, lines 8-9). Appellant then began talking about his PlayStation again. (R.p. 255, lines 5-19). Reginald testified that Appellant was very upset and Appellant thought the victim's story was "BS". (R.p. 255, lines 8-19). Around midnight, Reginald dropped Appellant off at the Bank of Walterboro. (R.p. 256, lines 1-4). Reginald testified that Appellant was going to walk from the bank to a house across the street from where the victim lived. (R.p. 256, lines 5-9; p. 259, lines 3-11).

Donte Jenkins testified he went to the victim's house around dusk that evening. (R.p. 265, lines 21-25). Donte observed that a PlayStation was hooked up to a TV in the victim's den. (R.p. 266, line 16 – p. 267, line 1). Between twenty minutes to an hour later, Appellant came to the victim's front door. (R.p. 267, lines 21-23). Donte let Appellant inside the home and the two men walked through the den into the kitchen. (R.p. 268, line 1; p. 269, lines 16-25). Donte, Appellant, and the victim talked for a while in the kitchen and then decided to go outside so the victim could fix the tag light on his car. (R.p. 268, line 23 – p. 269, line 3; p. 270, lines 8-23). Donte left between 9:00 to 9:15 p.m., leaving behind only Appellant and the victim at the house. (R.p. 271, lines 7-15; p. 273, lines 7-10).

Taylor Cowherd testified she called the victim at 9:25 p.m. as she was driving to his house that night. (R.p. 276, lines 8-14). When she arrived, she saw Appellant, dressed in a dark t-shirt, standing on the victim's front porch. (R.p. 277, lines 3-4; p. 278, lines 18-20). Cowherd said to Appellant, "Hey what's up Dee. Is Darius inside?" (R.p. 278, lines 9-10). Appellant responded that he was inside and would be right out. (R.p. 278, line 10). The victim came outside and spoke to Taylor for a few minutes while he worked on his car. (R.p. 279, lines 9-22). Taylor left the house a few minutes later, leaving behind the victim working on his car and Appellant standing on the front porch. (R.p. 279, line 23 – p. 280, line 4).

Wrenshad Anderson testified that he saw Appellant, wearing a blue polo shirt, walking away from the direction of the victim's home sometime after 9:40 p.m. (R.p. 294, line 24- p. 295, line 10). He described Appellant's demeanor as fidgety, as if he was trying to hide something. (R.p. 292, lines 7-10).

Sometime after 10:00 p.m., Shontay McKeithan arrived at the victim's home to purchase marijuana. (R.p. 112, line 4; p. 113, lines 7-11). While sitting in her car, she called the victim's phone but he did not answer. (R.p. 111, lines 24-25). About ten minutes later, Davonte Freeman arrived at the victim's home to buy marijuana. (R.p. 112, lines 2-4; p. 113, lines 5-6; p. 131, lines 4-5). Shontay told Davonte that the victim was not answering his phone. (R.p. 112, lines 5-6). Davonte proceeded to call the victim while Shontay got out of her car and walked to the front door of the house. (R.p. 112, lines 7-8). As she stood in front of the door, she heard the victim's cellphone ringing. (R.p. 112, line 9). They also observed that the victim's car doors were open with the lights turned on. (R.p. 131, lines 15-22). The two became concerned so Davonte walked to the side door and entered the victim's house. (R.p. 112, lines 11-12; p. 113 lines 20-25; p. 132, lines 14-23). Davonte testified that upon entering the house he saw the deceased victim on the floor. (R.p. 133, lines 13-24). He testified the victim was lying on his back with his gun on his stomach and his pants pockets inside out. (R.p. 133, lines 21-22; p. 135, lines 18-23). Davonte became panic-stricken and picked up the gun. (R.p. 136, lines 14-18). Davonte testified that he put the gun back exactly where he found it on the victim. (R.p. 148, lines 11-19). After looking around the house to see if anyone else was inside, Davonte ran outside and told Shontay to call the police. (R.p. 137, lines 17-23). Shontay then called 911. (R.p. 114, line 25). Shontay testified that in the time Devonte entered and left the house she did not hear any gun shots, only the sound of the victim's phone ringing. (R.p. 114, lines 4-10).

Officers with the Ridgeland Police Department and Jasper County Sheriff's Office responded to the victim's house and began processing the crime scene. (R.p. 154, lines 10-25). Officer Jason Blessing retrieved the gun off the victim's stomach and secured it in his patrol vehicle. (R.p. 157, lines 19-21; p. 166, line 21 – p. 167, line 18). The victim's gun was then sent to the South Carolina Law Enforcement Division (SLED) for processing. (R.p. 157, line 24 – p. 158, line 7). During the search of the victim's home, officers did not find any money, marijuana, or the PlayStation. (R.p. 367, lines 14-20). However, at trial, multiple witnesses testified that the victim sold marijuana out of his house. (R.p. 119, lines 5-7; p. 142, lines 3-5; p. 261, lines 6-11; p. 273, lines 3-6; p. 314, lines 2-4). Furthermore, the victim's girlfriend testified that the victim often would carry approximately eight hundred dollars in his pants pocket. (R.p. 215, lines 2-13).

During the investigation, Investigator Chris McIntosh, with the Ridgeland Police Department, obtained video surveillance from the gas station where Appellant and Reginald had purchased the gas, cigars, and beer. (R.p. 343, line 11 – p. 344 line 17). The video depicted Appellant entering the gas station at 10:43 p.m. and pulling out from his pocket a "pretty big fold of cash" to pay for his items. (R.p. 345, line 20 - p. 348 line 14). Additionally, Investigator McIntosh conducted a search of Appellant's home and located a dark blue polo shirt that matched the description of the shirt Appellant was wearing earlier in the night. (R.p. 362, lines 15-19).

Dr. Nicholas Batalis, an expert in forensic pathology, performed the autopsy on the victim on May 21, 2013. (R.p. 523, line 20 - p. 524, line 6). Dr. Batalis testified that the victim had been shot twice, once in the neck and once in the back of the head. (R.p. 525, lines 12-14). The wound to the head was a contact shot, meaning that the gun was pressed up against the skin at the time of firing. (R.p. 533, line 18 – p. 534, line 17). Dr. Batalis testified he was able to

recover a bullet and jacket from the gunshot wound to the head. (R.p. 532, lines 10-11). Dr. Batalis concluded that the cause of death was two gunshot wounds and the manner of death was homicide. (R.p. 534, line 18-25).

Michelle Eichenmiller, a firearms expert at SLED, compared the victim's Ruger .38 special revolver to the projectiles recovered from the autopsy. (R.p. 513, line 4 - p. 517, line 25). Eichenmiller testified she was able to determine that the projectiles recovered from the autopsy were indeed fired from the victim's gun. (R.p. 518, line 8 - p. 519, line 4).

Lilly Gallman, a forensic analyst at SLED, performed the DNA analysis of several of items taken from the crime scene and autopsy. (R.p. 435-453). Gallman testified the swab from the victim's gun resulted in a mixed profile containing the DNA of at least three individuals. (R.p. 446, line 23 – p. 447, line 2). Gallman explained that Appellant, Officer Jason Blessing, and the victim could not be excluded as contributors to the mixed DNA sample. (R.p. 447, line 24 – p. 448, line 3). She testified the statistical probability of randomly selecting an unrelated individual who could have contributed to the mixture was one in two hundred. (R.p. 449, lines 9-2). Gallman then testified the swab taken from the right front pocket of the victim's blue jeans resulted in a mixed profile of at least three individuals. (R.p. 450, lines 4-17). She expounded the victim and Appellant could not be excluded as contributors to the mixed DNA sample. (R.p. 450, lines 17-19). Gallman then testified the statistical probability of randomly selecting an unrelated individual who could have contributed to the mixture was one in two. (R.p. 452, line 19 – p. 453, line 1).

Investigators interviewed Appellant twice—and he gave two vastly different stories. Following a thorough *Jackson v. Denno*[3] hearing, both of the Appellant's statements were introduced to the jury at trial. (R.p. 45-53, 55-96). The recorded May 19, 2013 interview was

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

admitted into evidence and played for the jury. (R.p. 373, lines 13-24; State's Exhibit 58). The May 24, 2013 interview was testified to by Officer John Burnett. (R.p. 382-392). During his first statement, Appellant denied being at the victim's house when he was killed. (State's Exhibit 58). In his second statement, Appellant told officers that he was outside in the victim's car when three unknown men went inside the victim's home and killed him. (R.p. 388, line 20 – p. 391, line 5).

ARGUMENT

I. The trial court did not abuse its discretion in ruling Appellant's first statement was admissible where Appellant was given proper *Miranda* warnings, even though they were not required because Appellant was not in custody at the time of his statement, and the totality of the circumstances demonstrate that Appellant made a knowing, voluntary waiver of his *Miranda* rights.

Appellant maintains the trial court erred by admitting his May 19, 2013 statement into evidence. Appellant argues that *Miranda* warnings were required because he was in custody at the time of the statement. Furthermore, Appellant asserts that his statement was not voluntarily made because the officers diluted the importance of the warnings, Appellant believed he was required to speak due to the terms of his probation, and Appellant was intoxicated at the time of the interview. Notwithstanding Appellant's argument to the contrary, Respondent submits that the trial judge did not abuse his discretion in holding that Appellant's statement was admissible. First, Appellant's statement was non-custodial. Second, even if viewed as custodial, Appellant was properly advised of his *Miranda* rights, which he knowingly and voluntarily waived. Finally, even if viewed as error to admit Appellant's statement, it was harmless beyond a reasonable doubt.

How the Issue Was Raised at Trial: Jackson v. Denno[4] Hearing

Investigator Christopher McIntosh, of the Ridgeland Police Department, interviewed Appellant during the early morning hours of May 19, 2013. (R.p. 60, lines 4-24). The recorded interview took place in McIntosh's office at the police department. (R.p. 61, lines 7-8; State's Ex. 58). According to McIntosh, Appellant did not appear to be under the influence of any substances or have any mental defects that impaired his ability to understand his rights. (R.p. 61, lines 9-15). McIntosh testified Appellant was not under arrest at the time of the interview and

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

was free to leave at any time. (R.p. 62, lines 15-18). Furthermore, Appellant was never denied breaks during the interview nor was he threatened or promised leniency in exchange for talking with the police. (R.p. 62, lines 7-14). Before beginning the interview, McIntosh read Appellant his *Miranda* rights from a form provided by the police department. (R.p. 63, lines 1-8, State's Ex. 58). Appellant then waived his rights and said he wished to speak with officers. (R.p. 63, line 25- p. 64, line 2). A few minutes into the interview, McIntosh had to leave to gather paperwork for a search warrant. (R.p. 61, line 22- p. 62, line 4). The two other officers in the interview, SLED Agents David Williams and Shaun Harley, continued the interview with Appellant. (R.p. 62, lines 5-6).

Agent David Williams testified that Appellant was advised he was not under arrest during the questioning at the police station. (R.p. 71, lines 1-7). According to Williams, Appellant was not denied any breaks during the hour and a half interview. (R.p. 70, lines 8-15). Appellant was free to leave at any time and did in fact leave after the interview concluded. (R.p. 71, lines 6-7; p. 72, lines 8-10). After waiving his *Miranda* rights, Appellant voluntarily spoke with Williams regarding the investigation and never asked for an attorney. (R.p. 71, lines 15-25). Even though Appellant admitted to smoking marijuana earlier in the night, Williams observed that Appellant's ability to understand and rationalize was not impaired. (R.p. 69, line 19- p. 70, line 7).

Agent Shaun Harley testified Appellant understood the purpose of the interview was to discuss the murder of Darius Woods. (R.p. 76, lines 6-14). Appellant told Harley that he had smoked some blunts[5] and drank Paul Masson earlier that night. Upon learning that Appellant had smoked marijuana and drank alcohol, Harley asked Appellant several times if he understood the nature of the interview. (R.p. 76, line 24 – p. 77, line 2). Appellant responded that "he

[5] Investigator Hurley explained that a "blunt" is commonly known to contain marijuana for smoking. (R.p. 76, lines 20-21).

understood and he was okay". (R.p. 77, lines 2-3). Indeed, Harley testified that Appellant appeared to understand all of his questions and did not have any visible mental or physical defects. (R.p. 77, lines 19-25). Additionally, Harley testified Appellant gave rational answers to the questions posed by officers. (R.p. 80, lines 14-18).

Appellant testified at the *Jackson v. Denno* hearing and admitted to smoking marijuana and drinking alcohol the night of the murder. (R.p. 84, line 20 – p. 86, line 1). He claimed that he spoke to officers because he was under the influence. (R.p. 86, lines 6-9). However, on cross examination Appellant admitted that he had been arrested numerous times on unrelated charges and thus was aware of police procedures. (R.p. 88, line 15 – p. 89, line 4). Moreover, Appellant conceded that he talked to the officers voluntarily and understood the nature of their questions. (R.p. 90, lines 12-19).

The Trial Court's Finding of Admissibility

The trial judge reviewed the recorded interview and heard arguments from both the State and defense regarding the statement's admissibility. Following defense counsel's argument the statement should be excluded because Appellant was too intoxicated to rationally exercise his rights, the trial court ruled Appellant's statement on May 19, 2013 was admissible. Specifically, the court held:

> "With regard to the issue of whether or not he was in custody, clearly, he was not in custody because he was released and free to go after he voluntarily gave an interview, however, in the event, given the facts of the case, if it was inferred that he was in custody, they gave *Miranda* warnings and he waived them.
>
> I've had an opportunity to review the Defendant's demeanor on the video and it appears to me as he was walking in that he was not unsteady on his feet, he did not have slurred speech. He appeared to listen to the questions and gave very rational answers. I noticed on the video that he had sort of a stammer, which caused me some pause, but as he testified from the witness stand, he had that very same stammer. His demeanor seemed to be exactly the same on the witness stand as it did on the video. The video will speak for itself and it is there for appellate review. My observation is that he was not intoxicated.

> With regard to the voluntariness, clearly, he's not of tender years. Once again, he's an older gentleman. No one has said exactly how old he is, but he's not of tender age. He's served some time in federal prison. He's had a number of criminal convictions. Throughout those criminal procedures he's spoken with law enforcement. He's indicated that was indeed the case. I think it's particularly important to note that in order to say that the statement was involuntary because he was intoxicated, he seemed to indicate that it was the drugs that allowed him to speak with law enforcement, that is not his testimony at all. The reason why he did it was that his probation required that he do that. He did have the wherewithal, the presence of mind to ask for his probation agent. He had a very rational discussion with regard to that.
>
> With regard to the issue of intoxication and how that affects voluntariness, I'm going to make a ruling on that. Ultimately, it is a factual question for the jury and he will be allowed to present any arguments consistent with involuntariness, consistent with intoxication. He can do that with or without his testimony during trial. There's been no testimony about any low intelligence. The interview was only an hour-and-a-half, which I found reasonable. I understand he was not denied access to food or breaks. It's clear the officers have testified and I've seen on the video that he was given his *Miranda* warnings and he waived those. There were no threats given. He was free to leave because he was, indeed, not arrested. In the event that he were to make the determination that he was under arrest, even though he left thereafter, he waived his *Miranda* rights. I believe that based on what I've heard and based on the officer's testimony and what I've seen on the video, he was given his *Miranda* rights, he understood his *Miranda* rights, and he waived the *Miranda* rights and I specifically find that the statement was freely and voluntarily given. However, once again, that's a question of law that's been put before me. I find that it is admissible, however those issues are questions of fact that can be presented to the jury and I will give you wide latitude in that regard."

(R.p. 93, line 12 - p. 95, line 17).

Standard of Review

The admission or exclusion of evidence rests on the sound discretion of the trial judge and will not be reversed absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the conclusions of the trial court are based on 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, 177, 460 S.E.2d 368, 370 (1995); *see also State v. Navy*, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010) (stating appellate courts must uphold the trial court's findings regarding whether a defendant was in custody when statements were made if the trial judge's ruling is supported by the record).

In criminal cases, the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); *State v. Butler*, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). The conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless the conclusion was so manifestly erroneous as to show an abuse of discretion. *State v. Livingston*, 223 S.C. 1, 6; 73 S.E.2d 850, 852 (1952); *see also State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990).The standard of review is limited to determining whether the trial court's ruling is supported by **any evidence**. *State v. Breeze*, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008) (emphasis added); *See also State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001) ("On review, we are limited to determining whether the trial judge abused his discretion....This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence.").

Discussion

Appellant Not in Custody

The State may not use statements stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Accordingly, *Miranda's* requirements are only triggered when an individual is subjected to "custodial interrogation". *Id.*

"Custodial interrogation" involves questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *State v. Williams*, 405 S.C. 263, 272, 747 S.E.2d 194, 199 (Ct. App. 2013). A person is "in custody" when his freedom has been restricted. *Id.* Whether a person is "in custody" is determined by an examination of the totality of the circumstances, such as the location, purpose, and length of the interrogation, and whether the suspect was free to leave the place of questioning. *State v. Navy*, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010). "To determine whether a suspect was in custody for the purposes of *Miranda*, the [United States] Supreme Court has asked whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Williams,* 405 S.C. at 273, 747 S.E. at 199 (citing *Maryland v. Shatzer*, 559 U.S. 98, 112 (2010).

Furthermore, the mere fact that an interview takes place at a police station and by the initiation of officers does not render it a custodial interrogation. *Williams*, 405 S.C. at 275, 747 S.E.2d at 200; *see also Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) ("[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect."). "Rather, the fact a defendant voluntarily agreed to accompany investigators to their office and answer questions without being placed under arrest indicates a non-custodial situation." *State v. Doby,* 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979). Additionally, the fact that *Miranda* warnings are given does not convert a noncustodial situation into a custodial one. *Id.*

"Appellate review of whether a person is in custody is confined to a determination of whether the ruling by the trial judge is supported by the record." *State v. Evans*, 354 S.C. 579,

583, 582 S.E.2d 407, 409 (2003). Here, the trial court properly held and the record clearly supports that Appellant was not in custody or its functional equivalent during the May 19, 2013 interview. The record demonstrates that Appellant voluntarily came to police department to talk with law enforcement. Investigator McIntosh testified at trial, "He came of his own accord. He was given a ride by Officer Long, who encountered him at the Green and Main Street intersection." (R.p. 328, lines 23-25). Moreover, Appellant was asked at the *Jackson v. Denno* hearing, "So, you were there voluntarily." Appellant responded, "**Yes**."(R.p. 90, lines 12-13). Furthermore, Appellant was not under arrest at the time of the questioning. At the *Jackson v. Denno* hearing, the officers who participated in the interview testified that Appellant was not under arrest. (R.p. 62, lines 15-18; p. 71, lines 1-7). In fact, Appellant was not arrested for the murder of Darius Woods until April or May of 2014. (R.p. 233, lines 19-21). Also, Appellant knew that he was not under arrest at the time of the interview. While reading Appellant his *Miranda* rights, Investigator McIntosh informed Appellant he was not "in trouble or under arrest or anything". (State's Ex. 58 at 00:45). The interview lasted only an hour and a half. (R.p. 70, lines 8-10). Appellant was free to leave at any time and did in fact leave after the interview concluded. (R.p. 71, lines 6-7; p. 72, lines 8-10). Appellant was informed about the nature of the interview and he voluntarily agreed to discuss the matter with officers. (R.p. 76, lines 6-14). From a review of the recorded interview, it appears that Appellant was not handcuffed or shackled. (State's Ex. 58). Thus, Appellant's freedom of movement had not been restricted. *State v. Caulder*, 287 S.C. 507, 515, 339 S.E.2d 876,881 (Ct. App. 1986). Based upon the aforementioned reasons, a reasonable person would not have believed he was in custody during the interview. The record supports the trial court's ruling that Appellant was not in custody because he voluntarily participated in the interview and he was not "deprived of his freedom of

action in any significant way". *Williams*, 405 S.C. at 272, 747 S.E.2d 199. Therefore, Appellant was not in custody and *Miranda* did not apply.

Under the Totality of the Circumstances, Appellant Made a Knowing and Voluntary Waiver of His *Miranda* Rights.

Assuming for sake of argument Appellant was in custody, the record supports the trial court's finding that *Miranda* warnings were properly given and waived. The Supreme Court has long recognized that one may waive one's constitutional rights upon proper warnings:

> ... we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Miranda v. Arizona, 384 U.S. 436, 478-479 (1966). However, establishing whether a defendant received the *Miranda* warnings is only one part of the process to determine the correctness of the waiver – the inquiry is divided into two separate parts:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Moran v. Burbine, 475 U.S. 412, 421 (1986); *See also Miranda*, 384 U.S. at 445 ("The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.").

"In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession." *State v. Moses*, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct.App. 2010). Factors to consider include "background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep." *Id,* 390 S.C. at 513-514, 702 S.E.2d at 401. Other courts have also specifically considered and noted prior interaction with law enforcement and exposure to one's constitutional rights as points supportive of knowledge and understanding. *See, for example, United States v. Pruden*, 398 F.3d 241, 246 (3rd Cir. 2005) ("Pruden was familiar with his rights, having been involved in the justice system on numerous previous occasions."); *United States v. Robinson*, 404 F.3d 850, 861 (4th Cir. 2005) ("Robinson had, on two prior occasions, been read his Miranda rights and waived them."). Again, no one point is dispositive: "Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." *Moran v. Burbine*, 475 U.S. at 421.

Diluted Warnings

Appellant claims his waiver of rights was not voluntary because the investigators diluted the *Miranda* warnings. Specifically, Appellant argues that Investigator McIntosh's statements "this don't mean you are in trouble or under arrest or anything" and "the State makes us do it"

undermined Appellant's *Miranda* warnings and portrayed them as "mere formality". However, a review of the recorded interview clearly shows that Investigator McIntosh properly conveyed Appellant's *Miranda* rights to him. Moments after arriving at the police station, the following took place between Appellant and Investigator McIntosh:

> **McIntosh**: Let me read you something...real quick...before we talk.
>
> **McIntosh:** You know what we want to talk to you about?
>
> **Appellant:** Yeah about what happened at Ace house.
>
> **McIntosh:** OK. Before we talk about that I want to read you this ok?
>
> **McIntosh:** You have the right to remain silent. This don't mean you are in trouble or under arrest or anything ok but before we talk to anybody about anything any possible witnesses we have to read this, State makes us do it ok.
>
> You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights and not answer any questions nor make any statements. Do you understand each of these rights?
>
> **Appellant:** Uh huh.
>
> **McIntosh:** OK. Having these rights in mind do you wish to talk to us now?
>
> **Appellant:** Yeah go ahead.

(State's Ex. 58 at 00:17-01:15).

It is sufficient if the warnings reasonably convey to a suspect his rights as required by *Miranda*. *State v. Easler*, 471 S.E.2d 745, 749 (S.C. App. 1996), aff'd as modified, 489 S.E.2d 617 (S.C. 1997). A "talismanic incantation" is not required. *California v. Prysock*, 453 U.S. 355, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981). Courts in various jurisdictions have found statements similar to Investigator McIntosh's to be proper and in no way diminutive to the importance of a

suspect's *Miranda* rights. The Supreme Court of Colorado held that an officer's statement to a suspect that advising someone of their *Miranda* rights was "pretty standard in these types of cases" in no way diminished the significance of the waiver nor reduced the recitation to a mere formality. *People v. Thames*, 344 P.3d 891, 898 (Colo. 2015). Moreover, the Court found such a statement "highlighted the importance of these rights and that they should be taken seriously". *Id.*

In *Malloch v. State*, 980 N.E.2d 887, 899 (2012), before reading the suspect his *Miranda* rights, the detective stated, "Okay, just to let you know, you're not under arrest, you came here voluntarily, but since we're here at the Sheriff's Department I have to read you this form in here." The Indiana Court of Appeals held the statement was not an improper characterization of *Miranda* warnings and the detective was simply informing the suspect of his rights even though he was not under arrest. *Id.* at 900.

The California Supreme Court reached a similar conclusion in *People v. Musselwhite*, 954 P.2d 475 (Cal. 1998). In that case, prior to reading the suspect his *Miranda* rights, the detective stated, "what we'd like to do is just go ahead and advise you of your rights before we even get started and that way, that there's no problem with any of it." *Id.* at 487. The Supreme Court held the detective's statement did not trivialize the importance of the *Miranda* warnings, but, in fact, "was an accurate statement of the office of the constitutionality derived *Miranda* warning". *Id.*

Contrary to Appellant's argument, *State v. Powell*, 282 P.3d 845 (Or. 2012) is not analogous to the case at hand. *Powell* dealt with an initial, coerced confession and a second confession after the suspect had been given *Miranda* warnings. Under that scenario, the court explained the second statement must be excluded unless the improper coercion that compelled

the first set of statements had been dispelled before the second set of statements were made. The Court held the officer's comments that *Miranda* warnings were "just a matter of housekeeping" and "a formality" negated the dispelling effect that the warnings may have had. Since the coercive effect of the prior inducement was not dispelled, the second statement was not admissible. Appellant's case is not one of a prior coerced confession. Proper *Miranda* warnings were given to Appellant at the onset of the first interview. Additionally, Investigator McIntosh never used the term "formality" to refer to Appellant's rights. Investigator McIntosh simply explained to Appellant that he was not under arrest, and, out of abundance of caution, he was going to inform Appellant of his constitutional rights. Furthermore, Appellant testified at the *Jackson v. Denno* hearing that he was familiar with police procedures as he had been arrested numerous times. (R.p. 88, line 15 – p. 89, line 4). Respondent submits Appellant was fully aware of the meaning and importance of his Miranda rights as he had been read his rights in prior police encounters.

Appellant's *Miranda* warnings were not diluted or undermined by Investigator McIntosh's statements in any way. Indeed, Investigator McIntosh's challenged statements further highlighted the importance of Appellant's rights. *People v. Thames*, 344 P.3d at 898. Appellant's *Miranda* rights were reasonably and effectively conveyed to him. *State v. Easler*, 471 S.E.2d at 749. Therefore, Appellant made a knowing and voluntary waiver of his rights.

Condition of Probation

Appellant next argues his statements on May 19, 2013 were involuntarily made because he believed he was required to speak with investigators due to the conditions of his probation. Appellant's argument is without merit as he was not "compelled" to speak with investigators nor was he threatened with a revocation of his probation if he failed to do so.

The Fifth Amendment to the United States Constitution provides, in relevant part, that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fifth Amendment does not operate as a blanket prohibition against the taking of any and all statements made by criminal defendants to law enforcement officials. *State v. Hook*, 559 S.E.2d 856, 860 (S.C. App. 2001), *aff'd as modified*, 590 S.E.2d 25 (S.C. 2003). Volunteered statements, whether exculpatory or inculpatory, stemming from custodial interrogation or spontaneously offered up, are not barred by the Fifth Amendment. *State v. Kennedy,* 325 S.C. 295, 307, 479 S.E.2d 838, 844 (Ct.App.1996) (citing *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). "The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *United States v. Monia,* 317 U.S. 424, 427, 63 S.Ct. 409, 410, 87 L.Ed. 376 (1943) (footnote omitted). Therefore, if a witness "makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself." *Garner v. United States,* 424 U.S. 648, 654, 96 S.Ct. 1178, 1182, 47 L.Ed.2d 370 (1976). In considering whether a statement was compelled or voluntarily given, the court must determine the existence or nonexistence of coercive police activity. *State v. Linnen,* 278 S.C. 175, 293 S.E.2d 851 (1982)(statements were given freely and voluntarily, and were therefore admissible, even though interrogating officers encouraged the statements, where officers were not coercive or threatening and statements were not procured by improper influence).

Appellant cites to *Minnesota v. Murphy,* 465 U.S. 420 (1984) to argue his statements were involuntary because he felt he was required to speak with investigators as a condition of his

probation. In addressing a probationer's Fifth Amendment right against self-incrimination, the United States Supreme Court held:

> A state may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

Id. at 425.

Here, the investigator's never stated or implied that Appellant was in jeopardy of having his probation revoked if he invoked his Fifth Amendment right against self-incrimination. Furthermore, Appellant was not required to appear at the police station as a condition of his probation. Appellant voluntarily agreed to speak with investigators and was free to leave at any time. Even if Appellant subjectively believed that he was required to speak with investigators regarding matters unrelated to his probation, that belief would be unreasonable. *Murphy* noted that even if Murphy did harbor a belief that his probation might be revoked for exercising the Fifth Amendment privilege, his belief would not have been reasonable in light of the many decisions that have made clear that the State could not constitutionally carry out a threat to revoke probation for legitimately exercising the Fifth Amendment privilege. *Id.* Therefore, in the case at hand, Appellant's status as a probationer has no bearing on the voluntariness of his statements. Thus, as Appellant did not invoke his Fifth Amendment right against self-incrimination and investigators did not coerce or compel him to speak with them, his statements were voluntarily made.

Intoxication

Appellant claims his intoxication precluded his knowing waiver of rights. Appellant's argument is without merit. Intoxication is one factor to be considered by the trial court in determining voluntariness and validity of a waiver of *Miranda* rights. However, the influence of intoxicants alone does not invalidate a knowing, intelligent, and voluntary waiver.

Evidence of possible intoxication alone is insufficient to require a statement to be excluded. "Proof of accused's intoxication short of rendering him unconscious of what he is saying, does not require, in every case, that statements he made while in that condition be excluded from evidence." *State v. Collins,* 266 S.C. 566, 573, 225 S.E.2d 189, 193 (1976).

In *State v. Saxon,* 261 S.C. 523, 201 S.E.2d 114 (1973), the Supreme Court found the following:

> The fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words. Therefore, proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that he did not realize what he was saying.

Id., 261 S.C. at 529, 201 S.E.2d at 117. Evidence of intoxication will only go to the weight and credibility of the confession, but does not require the confession be excluded from evidence. *Id.* A defendant must be impaired to a substantial degree to overcome his ability to knowingly and intelligently waive his privilege against self-incrimination. The mere fact of drug or alcohol use does not preclude a finding of a knowing and voluntary waiver of rights. *See United States v. Phillips*, 506 F.3d 685 (8th Cir. 2007) (waiver was voluntary despite defendant's claimed intoxication from four ecstasy pills and a cup of brandy).

In the instant case, all three investigators who conducted the interview on May 19, 2013, testified Appellant did not appear under the influence of any intoxicants. (R.p. 61, lines 9-15; p. 69, lines 19-23; p. 77, lines 19-25). Investigator Williams testified he would not have questioned Appellant if he felt Appellant was under the influence or lacked the ability to understand. (R.p.

232, lines 16-19). Even though Appellant admitted to the investigators he had smoked marijuana and drank alcohol earlier that night, the investigators testified Appellant's ability to understand and rationalize was not impaired. (R.p. 69, line 19- p. 70, line 7). In fact, upon asking Appellant if he understood the nature of the questioning, Appellant responded that "he understood and he was okay". (R.p. 77, lines 2-3). Moreover, Appellant testified that he talked to the officers voluntarily and understood the nature of their questions. (R.p. 90, lines 12-19). Additionally, in ruling that Appellant was not intoxicated, the trial judge compared Appellant's demeanor on the witness stand to that in the interview and found Appellant's demeanor had not changed. (R.p. 93, line 18 – p. 94, line 3). The trial judge also found Appellant appeared to listen to the questions posed to him and respond with rational answers. (R.p. 93, lines 21-22).

Therefore, the recorded interview and witness testimony established that Appellant, if impaired at all, was not impaired to such a degree that his statements were rendered involuntary at the time they were made. Accordingly, Appellant's claim of intoxication is without support and the trial judge did not err in declining to exclude Appellant's statements due to alleged intoxication.

Other Factors Considered

The trial judge properly considered the totality of the circumstances in determining whether the State met its burden of proving Appellant's confessions were knowingly and voluntarily given. In addition to considering Appellant's alleged intoxication, the trial judge also analyzed other factors in determining Appellant's waiver was voluntary. First, as to background and experience, Appellant testified at the *Jackson v. Denno* hearing that he was familiar with police procedures as he had been arrested numerous times. (R.p. 88, line 15 – p. 89, line 4); *See United States v. Pruden*, 398 F.3d at 246. Second, the trial judge opined that Appellant was "not

of tender years" and was "an older gentleman". (R.p. 94, lines 4-6). Third, Appellant's interview lasted only one hour and a half. (R.p. 72, lines 6-7). Fourth, regarding promises or threats made by police, no such conduct was present in Appellant's case. (R.p. 62, lines 7-14). Lastly, Appellant was never denied breaks and was free to leave at any time. (R.p. 70, lines 8-15).

Accordingly, Respondent submits under the totality of circumstances Appellant's waiver of his *Miranda* rights was clearly voluntary.

Harmless Error

Even assuming *arguendo*, Appellant was in custody and his statement was admitted in violation of *Miranda*, its admission was harmless beyond a reasonable doubt. *Arizona v. Fulminante*. 499 U.S. 279, 310, 111 S.Ct. 1246 (1991) (holding error in admission of involuntary confession is subject to harmless error analysis). In *State v. Easler*, our Supreme Court intimated that any error in the failure to suppress a statement allegedly taken in violation of *Miranda* is subject to a harmless error analysis. 327 S.C. 121, 129, 489 S.E.2d 617, 621–22 (1997); *see also State v. Newell*, 303 S.C. 471, 477, 401 S.E.2d 420, 424 (Ct.App.1991) (finding failure to suppress evidence for *Miranda* violation harmless where record contained overwhelming evidence of guilt); *State v. Lynch*, 375 S.C. 628, 636, 654 S.E.2d 292, 296 (Ct.App.2007) ("The failure to suppress evidence for possible *Miranda* violations is harmless if the record contains sufficient evidence to prove guilt beyond a reasonable doubt.")

Here, considering the entire record on appeal, any error in admitting Appellant's statements to investigators on May 19, 2013, was harmless beyond a reasonable doubt. Through the testimony of Taylor Cowherd and Shontay McKeithan, the State established that the victim was killed sometime between 9:25 p.m. and 10:00 p.m. on May 18, 2013. (R.p. 112, line 4; p. 113, lines 7-11; p. 276, lines 8-14). Cowherd's testimony placed Appellant alone with the victim

within the timeframe of the murder. (R.p. 280 lines 1-2). The State established through the testimony of Reginald Green that Appellant was upset with the victim for lying to him about the Playstation video game. (R.p. 250, line 7 – p. 251, line 20). Also through Reginald, the State was able to establish that Appellant did not have any money or drugs on him earlier in the afternoon. (R.p. 252, lines 3-18; p. 254, lines 4-14). However, through Reginald's testimony and video surveillance, the State was able to prove that Appellant possessed a large amount of money and marijuana after the victim was murdered. (R.p. 255, lines 8-9; p. 345, line 20 - p. 348 line 14). Donte Jenkins testified that he observed a Playstation at the victim's home the night of the murder. (R.p. 266, line 16 – p. 267, line 1). However, officers testified that no such Playstation was located during the search of the victim's home. (R.p. 367, lines 14-20). Donte also testified he left the victim's house between 9:00 to 9:15 p.m., leaving behind only Appellant and the victim at the house. (R.p. 271, lines 7-15; p. 273, lines 7-10). Wrenshad Anderson testified he observed Appellant walking down the street the night of the murder acting strange, as if he was trying to hide something. (R.p. 292, lines 7-10). Investigator McIntosh presented evidence of surveillance footage from a local gas station that showed Appellant carrying a large sum of money a short time after the victim was killed. (R.p. 345, line 20 - p. 348 line 14). Witnesses testified the victim carried a large amount of money in his pocket. (R.p. 215, lines 2-13). Officers testified no money was found on the victim or in his house. (R.p. 367, lines 14-20). The State was able to establish the victim was killed by his own gun. (R.p. 518, line 8 - p. 519, line 4). Appellant admitted to handling this weapon the night of the murder. (State's Ex. 58). The State established through DNA testing that Appellant could not be excluded as a contributor to the DNA found on the victim's gun and pants pocket. (R.p. 447, line 25 – p. 448, line 3; p. 450, lines 17-19).

The State's case against Appellant was compelling. Even excluding Appellant's statement to police, the record supports the jury's verdict of murder beyond of reasonable doubt. Hence, while Respondent submits the trial court's ruling was not error, any alleged error would be harmless beyond a reasonable doubt.

In sum, Appellant's May 19, 2013 statement was properly admitted. Appellant was not in custody at the time of the interview and thus *Miranda* warnings were not needed. However, out of an abundance of caution, investigators properly advised Appellant of his *Miranda* rights. Under the totality of circumstances, Appellant's waiver of his *Miranda* rights was voluntarily and knowingly made. Additionally, even if the admission of the statement was to be viewed as error, it would be harmless as there was overwhelming evidence of Appellant's guilt. Therefore, the trial court did not abuse its discretion in ruling Appellant's May 19, 2013 statement was admissible. Consequently, this issue is without merit and must be dismissed.

II. The trial court did not abuse its discretion in admitting the DNA analyst's expert testimony regarding two items on which Appellant could not be excluded as a contributor because the admissible testimony was relevant and the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury.

Appellant contends the trial court erred in admitting the DNA analyst's expert testimony regarding two items of evidence on which Appellant could not be excluded as a contributor. Specifically, Appellant asserts the DNA results were of such "weak statistical significance" that the danger of unfair prejudice, confusion of the issues, and misleading the jury outweighed the probative value of the expert's testimony. Appellant's argument is without merit. Not only was the expert testimony relevant, its probative value was not substantially outweighed by the danger of unfair prejudice, confusion, or misleading. Additionally, the admissible statistical values associated with the two challenged samples were factors for the jury to weigh and consider. Accordingly, the trial judge did not abuse his discretion in admitting the DNA analyst's expert testimony. This issue must be dismissed.

Relevant Facts and Proceedings

Motion to Suppress DNA Evidence

Before jury selection, Appellant made a motion to suppress the DNA evidence found on the victim's clothing and gun. (R.p. 37, line 17-p. 38, line 17). Appellant argued the evidence was not relevant and improperly shifted the burden of proof from the State to Appellant. (R.p. 38, lines 9-17). Specifically, Appellant claimed it was burden shifting because he could not overcome the negative implications from evidence and testimony that indicated Appellant could not be excluded as a contributor to the DNA mixtures but other people could be excluded. (R.p. 43, lines 1-6). Appellant argued the low probabilities associated with the DNA results rendered the introduction of the evidence meaningless. (R.p. 43, lines 19-25).

In response, the State argued the DNA evidence was admissible and did not improperly shift the burden of proof. (R.p. 41, line 21 - p. 42, line 3). The State asserted Appellant would be able to cross-examine the DNA analyst regarding her testing and probability determination. (R.p. 41, lines 24-25; p. 44, lines 3-11, 18-20). The State maintained that while the probabilities were not high, the numbers were still relevant. (R.p. 42, lines 1-3; p. 44, lines 7-11). Additionally, the State argued the probabilities that Appellant could not be excluded from the DNA mixtures were purely factual issues for the jury to consider and thus would be admissible evidence. (R.p. 41, lines 16-18; p. 44, lines 18-20).

In denying Appellant's motion to suppress the evidence, the trial judge held the statistical probabilities relating to the DNA samples were factual issues for the jury. (R.p. 43, lines 7-12; p. 44, lines 21-24). Accordingly, the judge found the probabilities went to the weight of the evidence, not its admissibility. *Id.*

During the forensic analyst's testimony at trial, Appellant renewed his objection to the testimony regarding the DNA evidence. (R.p. 438, lines 7-8). The trial judge noted that Appellant was protected for the record. (R.p. 438, line 9). When the State sought to introduce the DNA samples into evidence, Appellant again renewed his objection. (R.p. 441, line 23 – p. 442, line 3). The judge overruled the objection and allowed the evidence to be admitted. (R.p. 442, lines 4-5).

DNA Testimony at Trial

Lilly Gallman, a forensic DNA analyst with SLED, testified at trial. (R.p. 435-478). Gallman testified that she had been employed at SLED for twenty-six years and had attended numerous courses concerning DNA and genetics. (R.p. 435, lines 11-25). After Gallman explained that she had testified as an expert in DNA analysis over sixty times in court, the State offered Gallman as an expert in DNA analysis. (R.p. 436, lines 3-8). Appellant posed no

objections or further questions regarding Gallman's qualification. (R.p. 436, lines 16-18). Thereafter, the trial judge gave the following instruction to the jury:

> "Madam Forelady, ladies and gentlemen of the jury, ordinarily when witnesses testify, lay witnesses, they're only allowed to testify as to things they saw, heard, and felt. There's an exception to that rule when an individual is qualified as an expert because of their education and training in a certain field of study, and if I rule that they are indeed an expert, they're not only allowed to testify as to things they saw, heard and felt, but they will be able to render opinions in their field of study. Just by virtue of the fact that a person is an expert doesn't mean that you have to believe their testimony. It's evidence for you to consider and give it the weight you think it deserves and evaluate it like all other evidence."

(R.p. 436, line 19 – p. 437, line 6) (emphasis added).

Gallman testified that she received a number of items of evidence regarding Appellant's case, which she analyzed, including: swabs from the floor and wall of the victim's home, swabs from the victim's pants pockets, and swabs from the handle of the murder weapon. (R.p. 439, line 1 – p. 440, line 24). Additionally, she received and analyzed known DNA samples from the following people: Shontay McKeithan, Davonte Freeman, Jason Blessing, James Orr, Appellant, and the victim. (R.p. 445, line 24 – p. 446, line 12). Gallman explained her process was to first develop a DNA profile from the crime scene evidence then compare that profile to the known DNA standards. (R.p. 445, lines 7-9). Gallman testified that she was able to develop full profiles of all the known DNA standards that she tested. (R.p. 445, line 24 – p. 446, line 13).

Of particular relevance to the current allegation, Gallman testified she analyzed a swab from the handgun and developed a DNA profile that was a mixture of at least three individuals. (R.p. 446, line 14 – p. 447, line 2). Gallman then explained her next step in the process as follows:

> "The next process, once I develop a DNA profile from the evidence and then from the standard, I compare the DNA profile from the standards for the individuals that I had the evidence to, to tell whether this person could be included or excluded from the sample."

(R.p. 447, lines 15-19). She testified that from the mixture of at least three individuals, Jason Blessing, Appellant, and the victim could not be excluded as contributors. (R.p. 447, line 24 – p. 448, line 3). Gallman explained the amount of DNA of each individual person in the sample was even, meaning no person was considered a major contributor. (R.p. 448, lines 20-25). In describing the statistic associated with the gun sample, Gallman testified:

> Once I do the comparison, which is the very first step to determine whether the person can be included or excluded from a mixture, we are required to generate, give a statistical value to that particular mixture. We are required to tell you how often you would see this mixture in a population. So the next statement that's on my report is that the probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in two hundred. All the information is there, but based on our protocol some of the areas, out of the sixteen, could not be used to generate a statistic or give you a statistical value. So based on the information that I could use to generate a statistic, the value is **one in two hundred**.

(R.p. 449, lines 4-17) (emphasis added). Gallman testified the individuals that were completely excluded as contributors to the DNA mixture on the gun were: Shontay McKeithan, Davonte Freeman, Kevin Smith, Rhett Long, and James Orr. (R.p. 451, lines 17-19).

Next, Gallman testified about a swab taken from the victim's right front pocket of his blue jeans. (R.p. 450, lines 4-10). Her finding was a mixed sample containing the DNA of at least three individuals, in which Appellant and the victim could not be excluded as contributors. (R.p. 450, lines 15-19). Gallman testified the probability of randomly selecting an unrelated individual who could have contributed to the mixture was approximately **one in two**. (R.p. 452, line 19 – p. 453, line 1). She testified the individuals that were completely excluded as contributors to the DNA mixture on the pants pocket were: Shontay McKeithan, Davonte Freeman, Kevin Smith, Jason Bless, Rhett Long, and James Orr. (R.p. 452, lines 7-9).

During rigorous cross-examination, Gallman explained her statistics are based on databases that are generated from different populations and she uses the most conservative. (R.p.

455, lines 1-3). When asked about the amount of Appellant's DNA in the mixture from the gun and how she determined the statistic associated with the mixture, Gallman explained:

> "[H]is DNA is at all sixteen areas from the chromosomes, but due to the fact that there are areas that I could not use to generate the frequency of that and to give you a statistical value, I had to put them out. I can only use – excuse me. I don't want to tell you wrong. I believe I could only use five out of sixteen. Let me make sure, now. I'm sorry. I could use – I could only use ten out of the sixteen to generate that particular number for item 1.1."

(R.p. 460, line 21 – p. 461, line 4)(emphasis added). Gallman then testified her conclusion that there were at least three individuals in the gun mixture was based on the evidence, not in the amount of people that she could exclude as contributors. (R.p. 461, lines 14-19).

On re-direct examination, Gallman testified that the vast majority of Appellant's numbers matched the sample taken from the right front pants pocket. (R.p. 477, lines 12-16). She expounded, "In order for me to say that someone is not excluded, the vast majority of their information has to be in that sample." (R.p. 478, lines 1-3).

Standard of Review

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the conclusions of the trial court are based on an error of law or lack evidentiary support. *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, 177, 460 S.E.2d 368, 370 (1995). The standard of review is limited to determining whether the trial court's ruling is supported by any evidence. *State v. Breeze*, 379 S.C. at 543, 665 S.E.2d at 250. Likewise, the decision as to whether to admit or exclude expert testimony rests within the trial judge's sound discretion and

will not be reversed on appeal absent a prejudicial abuse of that discretion. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); *see State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion.").

Discussion

Appellant argues the expert testimony regarding the DNA results should have been excluded under S.C. Rule of Evidence 403. Particularly, Appellant contends the probative value of the weak statistical DNA results are outweighed by the danger of unfair prejudice, confusion of the issues, and misleading to the jury. However, Respondent submits the testimony was relevant to the issue of Appellant's guilt and it was not unfairly prejudicial, confusing, or misleading.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice. *State v. Holder*, 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009); *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the jury." Rule 403, SCRE; *see also State v. Cooley*, 342 S.C. 63, 69, 536 S.E.2d 666, 669 (2000) (although evidence is relevant, it should be excluded where danger of unfair prejudice substantially outweighs its probative value). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Tynes*, 402 S.C.211 740 S.E.2d 512 (Ct. App. 2013); *see also State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "All evidence is

meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403]." *State v. Lee*, 399 S.C. 521, at 529, 732 S.E.2d 225, at 229 (Ct. App. 2012) (quotation marks and citations omitted).

A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. *State v. Horton*, 359 S.C. 555, 598 S.E.2d 279 (Ct. App. 2004); *State v. Adams*, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). The appellate court will review a trial judge's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. *State v. Hamilton*, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001); *State v. McLeod*, 362 S.C 73, 606 S.E.2d 215 (Ct. App. 2004). Rule 403's prohibition against evidence that is prejudicial or misleading to the jury directly relates to the limitations on the admissibility of DNA evidence.

In South Carolina, DNA evidence may be admitted in judicial proceedings in the same manner as other scientific evidence, such as fingerprint analysis and blood tests. *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990). In order for the evidence to be admissible, the trial judge must find the scientific evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. *State v. Ramsey*, 345 S.C. 607, 614, 550 S.E.2d 294, 298 (S.C. 2001). Further, even if the evidence is admissible, the trial judge must determine if its probative value is outweighed by its prejudicial effect under Rule 403. Once the evidence is admitted under these standards, the jury may give it such weight as it deems appropriate. *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999).

Likewise, population frequency statistics for DNA test results are admissible. *State v. Register,* 323 S.C. 471, 481, 476 S.E.2d 153, 159 (1996); *State v. Dinkins,* 319 S.C. 415, 418,

462 S.E.2d 59, 60 (1995). In explaining why DNA probability statistics are admissible, the *Dinkins* Court stated:

> "'[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'" *Daubert*, 509 U.S. at ----, 113 S.Ct. at 2798. In this case, the DNA population frequency statistics assist the jury in determining whether appellant was the attacker. The jury should be allowed to make its own determination as to whether it believes the statistics are reliable. The jury is free to believe or disbelieve the experts and the statistics. Therefore, we hold DNA population frequency statistics are admissible."

319 S.C. at 418, 462 S.E.2d at 60. The Court concluded that DNA population frequency statistics, as with DNA test results, are subject to attack for relevancy and prejudice. *Id.*

Numerous jurisdictions have found statistical probabilities of nonexlusion DNA evidence, even if low, are admissible and relevant. *See e.g. People v. Smith*, 978 N.E.2d 324 (Ill. App. 1st Dist. 2012) (holding that DNA expert testimony that the probability of inclusion for the partial profile on the gun was **1 out of 11** and so defendant could not be excluded from a group of 600 million people as possible contributors to the DNA mixture was properly admitted and the weight of this testimony was a matter for the jury to decide)(emphasis added); *United States v. McCluskey*, 954 F.Supp.2d 1224, 1273 (D.N.M.2013) (holding that nonexclusion DNA matches with random match probabilities of 1:9268, **1:21, 1:12** admissible and not substantially outweighed by any prejudicial effects)(emphasis added); *State v. Brochu*, 183 Vt. 269, 949 A.2d 1035, 1048–49 (2008) (upheld admission of **1 in 12** match probability where probative value was not outweighed by prejudicial effect)(emphasis added).

The United States Supreme Court in *McDaniel v. Brown,* 558 U.S. 120 (2010) found that DNA statistical probabilities were powerful pieces of inculpatory evidence for a jury to consider. In that case, the State's evidence at Brown's trial reflected essentially "a **1 in 6,500** chance that one brother would match," while the habeas defense expert whittled the figure to as low as "**1 in**

66." *Id.* at 132 (emphasis added). The Supreme Court found "[e]ven under [the habeas defense expert's] odds, a rational jury could consider the DNA evidence to be powerful evidence of guilt." *Id.*

Likewise, the United States District Court for the District of Columbia explained that nonexclusion DNA evidence "remains probative, and helps to corroborate other evidence and support the Government's case as to the identity of the relevant perpetrators." *United States v. Morrow*, 374 F.Supp.2d 51, 65 (D.D.C.2005). In *Morrow*, the court found admissible DNA evidence "ranging from a **1:12** probability of selecting an unrelated individual in the relevant population to a **1:1** probability of selecting an unrelated individual." *Id.* at 62 (emphasis added). The Court emphasized, "[E]xclusion of conclusions based on sound methodology is not the proper course; rather, '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burdens of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'" *Id.* at 64 (quoting *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Similarly, the Massachusetts Supreme Court has held that low statistical DNA evidence is admissible and relevant. *Commonwealth v. O'Laughlin,* 446 Mass. 188 (2006). In *O'Laughlin*, the Court considered whether DNA evidence was admissible in which "**one in two** of any randomly selected individuals could have been the contributor". *Id.* at 208 (emphasis added). The Court held the DNA evidence was admissible and the probative value of the evidence was for the jury to decide. *Id.* The Court noted, "Evidence is not rendered prejudicial merely because it is inconclusive [and] it is for the jury to determine the probative value to be accorded relevant evidence." *Id.*

Furthermore, while not specifically addressing the issue at hand, the South Carolina Supreme Court has found similar DNA statistical probabilities relevant and probative. *State v. Primus*, 349 S.C. 576, 587, 564 S.E.2d 103, 109 (2002), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 106, 610 S.E.2d 494, 501 (2005). In referring to a statistical probability of **1 in 174**, the Court stated, "[w]hile this probability is not nearly as definitive as that which has been offered in other trials, it is nonetheless highly persuasive, especially when combined with other evidence of [the defendant's] guilt." *Id.* at 588 (emphasis added).

Much like the aforementioned cases, the statistical nonexclusion probabilities associated with Appellant's case are certainly relevant and the probative value is not outweighed by any prejudicial effect. Not only does the evidence validate the State's theory that Appellant murdered the victim; it also corroborates the testimony from multiple witnesses that place Appellant at the scene of the crime. *Morrow*, 374 F.Supp.2d at 65 (DNA evidence "remains probative, and helps to corroborate other evidence and support the Government's case as to the identity of the relevant perpetrators."). Furthermore, the DNA sample taken from the gun supports Appellant's own statement that he held the gun on the day the victim was killed. (State's Ex. 58). Moreover, the statistical numbers of **one in two hundred** and **one in two** were not confusing or misleading to the jury because Gallman adequately explained their significance. (R.p. 449, lines 4-17; p. 455, lines 1-3; p. 460, line 21 – p. 461, line 4). Additionally, Appellant was given ample opportunity during cross-examination and closing argument to challenge and rebut the DNA evidence. (R.pp. 453-476; 583-608). In fact, Appellant used cross-examination of Gallman to introduce testimony about DNA that was not attributable to a known standard. From that testimony, Appellant was able to insinuate that someone other than Appellant could have committed the murder. *Daubert*, 113 S.Ct. at 2798 ("[V]igorous cross-examination, presentation of contrary evidence, and careful

instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."). Moreover, the jury was adequately informed by the trial judge that an expert's opinion testimony should be given the weight they see fit. Thus, the statistical numbers associated with the two samples were probative factors to be considered by the jury in weighing all of the evidence and testimony at trial. *See O'Laughlin,* 446 Mass. At 208 ("Evidence is not rendered prejudicial merely because it is inconclusive [and] it is for the jury to determine the probative value to be accorded relevant evidence."); *Smith*, 978 N.E.2d at 346. Accordingly, the trial judge correctly held the statistical probabilities relating to the DNA samples were factual issues for the jury. (R.p. 43, lines 7-12; p. 44, lines 21-24). Therefore, the trial court did not abuse its discretion in admitting the DNA analyst's expert testimony regarding two items on which Appellant could not be excluded as a contributor.

In addition to arguing the testimony should be excluded as unfairly prejudicial, Appellant asserts the Assistant Solicitor overstated the evidence in her closing argument. As an initial matter, Appellant's challenge to the Assistant Solicitor's closing argument is wholly unpreserved for appellate review. An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review. *See State v. Walker*, 366 S.C. 643, 660, 623 S.E.2d 122, 130 (Ct.App.2005). "Arguments not raised to or ruled upon by the trial court are not preserved for appellate review." *State v. Carlson*, 363 S.C. 586, 597, 611 S.E.2d 283, 288 (Ct.App.2005). Appellant posed no objections during or after the Assistant Solicitor's closing argument. Therefore, Appellant's challenge to portions of the closing argument is procedurally barred from review. Regardless, Appellant's argument is without merit.

In presenting a closing argument to the jury, a solicitor—and any other party—must confine the argument to the evidence in the record and the inferences to be drawn from that

evidence. *State v. Tubbs*, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999). However, the solicitor is unquestionably permitted in a closing argument to state and discuss the State's version of the testimony, to comment on the weight given to such testimony, and to point out the matters that the jury should and should not consider in arriving at a verdict. *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); *see State v. Durden*, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) ("'[The prosecuting attorney] may argue with reference to any matters which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.'" (citations omitted)); *Randall v. State,* 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004) ("A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony.").

Here, the Assistant Solicitor's statements during her closing argument regarding Appellant's DNA being found on the gun and pants pocket were reasonable inferences from all of the evidence presented at trial. Numerous witnesses placed Appellant at the scene of the crime within the time frame that the victim was murdered. After the victim was killed, Appellant was captured on video surveillance carrying a large sum of money that he did not have earlier that day. Moreover, Appellant himself admitted to being at the victim's house on the incident date. Additionally, Appellant admitted to holding the victim's gun the day the victim was murdered. Furthermore, Gallman testified the samples from the gun and right front pocket of the victim's pants contained all sixteen numbers from Appellant's DNA profile. (R.p. 449, lines 12-15; p. 460, line 21; p. 477, lines 12-16). Therefore, when taking the totality of the evidence into consideration, the Assistant Solicitor's remarks were reasonable inferences from the evidence and within the permissible bounds of fair argument.

Additionally, even if the Assistant Solicitor's remarks were to be viewed as improper, there would be no error because the trial judge properly explained the significance of closing arguments to the jury. Before the parties gave their closing arguments, the trial judge instructed the jury that closing arguments should not be considered as evidence. Specifically, the trial judge stated:

> "However, this is closing argument and these presentations would be truly argumentative in nature because at this point in time, you have heard all of the evidence and these very fine lawyers will have an opportunity to point to the evidence that supports their relative positions. What they have to say is not evidence."

(R.p. 555, line 23 – p. 556, line 3)(emphasis added). Thus, the jury was well aware that the State's closing argument was not evidence of the case, but rather represented the State's theory of the case based on reasonable inferences from the evidence introduced at trial.

Harmless Error

Even if this Court were to find an abuse of discretion, any error in admitting the DNA expert testimony was harmless beyond a reasonable doubt because the jury considered substantial corroborating evidence properly admitted at trial. *See State v. Livingston*, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984) (holding an error admitting evidence is harmless beyond a reasonable doubt where guilt is proven by other competent evidence, such that the error could not have reasonably affected the verdict); *see also State v. Baccus*, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006) ("When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside a conviction for insubstantial errors not affecting the result:"). In *Baccus*, the Supreme Court found the trial court's error in admitting the DNA to be harmless. 367 S.C. at 56, 625 S.E.2d at 224. As the court indicated, however, the other evidence in the case conclusively proved the defendant guilty.

> The State presented the testimony of [the victim's friend] who overheard Appellant tell the victim he was going to kill her and who overheard a pop and clicking sound. Additionally, the State presented evidence that Appellant's fingerprints matched fingerprints on the window sill of the broken window in the victim's bedroom. Also, [a DNA analyst] testified the blood sample collected from Appellant on the night of his arrest matched the blood found on the swabs and cuttings from the door, blind, and sheet in the victim's house. Therefore, the blood evidence drawn pursuant to the court order which should have been excluded was cumulative.

367 S.C. at 55, 625 S.E.2d at 223–24.

Here, Respondent submits any error was harmless. DNA evidence is not generally dispositive in any case; rather, one must look at the whole of the evidence and the particulars of the case. The South Carolina Supreme Court has noted that "the presence or absence of DNA evidence does not taint the remainder of the evidence in the record, nor does it overwhelm the jury's ability to make credibility determinations and decide whether a defendant is guilty." *State v. Jenkins*, 412 S.C. 643, 773 S.E.2d 906 (2015). In the case at hand, the evidence was not crucial to the State's case in the sense that it was not the only evidence placing Appellant at the scene and identifying him as the perpetrator. Testimony from Taylor Cowherd, Donte Jenkins, and Wrenshad Anderson placed Appellant at the crime scene within the timeframe of the murder. (R.p. 271, lines 7-15; p. 273, lines 7-10; p. 280, lines 1-1; p. 292, lines 7-10). The State established Appellant's motive through the testimony of Reginald Green by showing that Appellant was upset with the victim for lying to him about the Playstation video game. (R.p. 250, line 7 – p. 251, line 20). Also, the State was able to establish that Appellant did not have any money or drugs earlier in the afternoon but possessed money and drugs after the victim was killed. (R.p. 252, lines 3-18; p. 254, lines 4-14; p. 255, lines 8-9; p. 345, line 20 - p. 348 line 14). Investigator McIntosh presented evidence of surveillance footage from a local gas station that showed Appellant carrying a large sum of money a short time after the victim was killed. (R.p.

345, line 20 - p. 348 line 14). Furthermore, Appellant admitted to handling the gun that was used to kill the victim. (State's Ex. 58). Thus, when viewing the record as a whole, the additional DNA evidence Appellant would have excluded is merely cumulative.

Accordingly, while Respondent submits the trial judge did not abuse his discretion in admitting Gallman's testimony regarding two DNA samples from which Appellant could not be excluded as a contributor, any alleged error was harmless beyond a reasonable doubt.

CONCLUSION

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

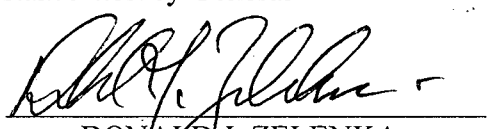
Respectfully submitted,

ALAN WILSON
Attorney General

J. ROBERT BOLCHOZ
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MARGARET G. BOYKIN
Assistant Attorney General

BY: 
DONALD J. ZELENKA
SC Bar No. 5758

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-6305

ATTORNEY FOR RESPONDENT

April 21, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BILLY PHILLIPS,

APPELLANT,

Appellate Case No. 2016-000108

CERTIFICATE OF COMPLIANCE

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

DONALD J. ZELENKA
Deputy Attorney General

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CERTIFICATE OF SERVICE

I, Donald J. Zelenka, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record:

Laura Ruth Baer, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

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

This 21st day of April, 2017.

DONALD J. ZELENKA
Deputy Attorney General
S.C. Bar No. 5758