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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions

The Honorable Allison Renee Lee, Circuit Court Judge

Appellate Case No. 2015-002604

THE STATE,

Respondent,

v.

JERRY LEWIS GARDNER, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

ARGUMENT 11

I. The trial judge properly admitted the sticky note found in the vehicle driven by Appellant during a high-speed chase with police where the note was relevant, the probative value was not substantially outweighed by the risk of unfair prejudice, and the trial judge's redactions removed any inferential references to prior bad acts and thereby eliminated any potential prejudice to Appellant 11

CONCLUSION 16

TABLE OF AUTHORITIES

Cases:

State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) 12

State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006) 11

State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012) 13

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) 15

State v. Dickerson, 341 S.C. 391, 535 S.E.2d 119 (2000) 13

State v. Douglas, 369 S.C. 424, 632 S.E.2d 845 (2006) 12

State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998) 13

State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007) 13

State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001) 14

State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) 11

State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000) 12

State v. Robinson, 238 S.C. 140, 119 S.E.2d 671 (1961) 15

State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985) 15

State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003) 15

State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) 15

State v. Wiles, 383 S.C. 151, 679 S.E.2d 172 (2009) 12

Rules:

Rule 401, SCRE 12

Rule 402, SCRE 12

Rule 403, SCRE 13

Rule 404 (b), SCRE 8, 11

STATEMENT OF ISSUE ON APPEAL

I.

The trial judge properly admitted the sticky note found in the vehicle driven by Appellant during a high-speed chase with police where the note was relevant, the probative value was not substantially outweighed by the risk of unfair prejudice, and the trial judge's redactions removed any inferential references to prior bad acts and thereby eliminated any potential prejudice to Appellant.

STATEMENT OF THE CASE

Appellant was indicted at the July 2015 term of the grand jury for Charleston County for receiving stolen goods (2015-GS-10-04407), failure to stop for a blue light (2015-GS-10-02668), and habitual traffic offender (2015-GS-10-02669), Appellant proceeded to a jury trial before the Honorable Allison Renee Lee, from August 3-5, 2015, in Charleston, South Carolina. At the conclusion of trial, Appellant was found guilty as indicted. He was sentenced by Judge Lee to imprisonment for a term of seven years for receiving stolen goods, five years for failure to stop for a blue light, and five years for the habitual traffic offender charge, with all sentences running concurrently. Defense Counsel filed a motion for a new trial which the judge denied on December 9, 2015. Appellant timely filed a notice of appeal and subsequently filed a Brief of Appellant. This Brief of Respondent follows.

STATEMENT OF FACTS

Factual History

On December 18, 2014, Joshua Snyder was leaving for work when he noticed the rear window of his car had been broken. R. pp. 18-19. Snyder's car was parked at his residence in Ladson, South Carolina. R. p. 17. Snyder noticed that his iPad, two hundred and eight dollars in cash, and a blue Samsonite luggage bag filled with clothing had been stolen from his vehicle. R. p. 19. After discovering the crime, Snyder called 911 and the police arrived on the scene. R. p. 20. After taking down Snyder's information, law enforcement reminded Snyder that his iPad had a tracking feature. R. p. 20.

Around 3:40 P.M., Snyder noticed that his iPad tracker pinged, meaning that the iPad had been turned on. R. p. 21. Snyder's iPad contained a security code which prohibited unauthorized access. R. p. 21. Snyder notified law enforcement, who told him to keep monitoring the tracker. The tracker's signal was subsequently disconnected around twenty or thirty minutes after the iPad tracker indicated the iPad had been turned on. Sometime after 7:00 P.M., the iPad tracker turned back on. R. p. 21. Snyder notified the North Charleston police officer he contacted earlier that the iPad was active again. R. p. 22. Snyder testified the police then began tracking the iPad's movements. R. p. 22.

Officer Jerrid Riley, a patrolman with the North Charleston Police Department, was on duty on December 18, 2014. R. pp. 27-28. Officer Riley received a phone call from another officer with the North Charleston Police Department asking him to go to an address to recover an iPad that was pinging in the area. R. p. 28. While Officer Riley was sitting at an intersection, he received another call informing him that the iPad was pinging at that intersection. R. p. 28. The other officer then stated the iPad tracker signal was moving right onto Dorchester Road. R. p. 28.

Officer Riley then initiated a traffic stop of the only vehicle at the intersection that turned onto Dorchester Road. R. p. 28. Despite Officer Riley's activation of his lights and siren, the vehicle did not pull over and continued traveling forward. R. p. 28. The vehicle Officer Riley was pursuing was a gold Ford Explorer.[1] R. p. 31. Eventually the Charleston County Sheriff's Office took over the pursuit from Officer Riley. R. p. 29.

Donald Stanley is a Lieutenant with the Charleston County Sheriff's Office. R. p. 33. Lieutenant Stanley was on patrol when he overheard Officer Riley say he was in pursuit of a vehicle that refused to stop. R. p. 34. Lieutenant Stanley joined the chase to back up Officer Riley. R. p. 35. Eventually, Officer Riley broke off his pursuit due to a jurisdictional agreement and Lieutenant Stanley assumed the pursuit of the vehicle. R. p. 35. The chase of the vehicle lasted sixteen minutes where Lieutenant Stanley pursued the vehicle throughout the West Ashley area until the pursuit ended on Locksley Drive. R. p. 35. Lieutenant Stanley testified that during the chase the driver and passenger attempted to bail out of the car on multiple occasions[2]. R. p. 35. Eventually, the gold Explorer reached a dead end at the end of Locksley Drive and the driver bailed out of the driver's side of the vehicle and fled towards the Saint Andrews Garden apartments. R. p. 36. Lieutenant Stanley described the driver as around six feet tall, thin, and wearing all black clothing with a black hoodie. R. p. 37. Lieutenant Stanley stated the passenger of the vehicle bailed out of the right side of the vehicle and ran to the right where he subsequently lost sight of him. R. p. 37.

[1] At trial, Tonya Mazyck testified she was the owner of the gold Ford Explorer. Supp. R. p. 1. Mayzck stated she gave the Ford Explorer to her cousin, Shannrika Gregg. Supp. R. p. 2. Mayzyck testified Shannrika Gregg was in possession of the Ford Explorer in December of 2014 and that Gregg and Appellant dated. Supp. R. p. 2.

[2] Lieutenant Stanley testified that one of the places the occupants of the vehicle tried to bail out was near Orange Grove Road, which is where Appellant's girlfriend resided at the time. R. p. 36. Lieutenant Stanley also believed the occupants tried to bail out of the vehicle near Balsam Street, which is where Appellant lived at the time. R. p. 39.

Michael Baker, a patrol officer for the City of Charleston Police Department, was called in to assist in the apprehension of the suspects who had fled from the stopped Explorer on Locksley Drive. R. p. 70. Officer Baker positioned himself at the sole entrance and exit to the Saint Andrews Garden apartment complex. R. p. 70. Officer Baker was observing vehicles leaving the apartment complex to see if he could locate the suspect trying to flee the scene. R. p. 70. The suspect was described to Officer Baker as a black male with black pants and a black hoodie. R. p. 72. Shortly after taking up his position, Officer Baker observed a red pickup truck with two black males exiting the apartment complex. R. p. 73. Officer Baker noticed the passenger of the truck matched the description of the suspect. R. p. 73. Officer Baker waved for the truck to stop. As he approached the vehicle, Officer Baker called for backup and asked the driver to put the vehicle in park. R. p. 73. The passenger of the vehicle told the driver to "go" at which point the driver continued driving. R. p. 73. Officer Baker and another officer who arrived as backup then began calling for the driver to stop. After the vehicle traveled about ten feet, the driver stopped the vehicle and the driver and passenger were pulled out of the car by law enforcement. R. p. 73.

Officer Austin Rissanen of the Charleston County Sheriff's Office also responded to the conclusion of the high speed chase. R. p. 87. Officer Rissanen testified that law enforcement set up a perimeter around the Saint Andrews Garden apartments because suspects who flee from the police commonly call someone to pick them up. R. p. 88. Officer Rissanen was notified via radio when Officer Baker stopped the red pickup truck. R. p. 89. As he approached the vehicle, Officer Rissanen noticed the passenger was wearing the clothes described in the description of the suspect. R. p. 89. When Officer Rissanen first spoke with the driver of the vehicle, the driver told him he did not know the passenger and that the passenger flagged him down while he was

driving around the apartment complex and asked for a ride. R. p. 90. When Officer Rissanen looked at the driver and passenger's identification cards, he noticed that they had the same name, at which point the driver admitted he was the passenger's father. The driver of the vehicle was Jerry Gardner, Sr. and the passenger was Jerry Gardner Jr., the appellant in this case. While speaking with Appellant and his father, Office Rissanen noticed Appellant was sweating profusely and his hands were shaking uncontrollably. R. p. 90. Appellant's father told Officer Rissanen he received as frantic phone call from Appellant where Appellant told him he was running from law enforcement and that he needed him to come pick him up. R. p. 91. Law enforcement then took Appellant into custody. R. p. 91. While Officer Rissanen was filling out paperwork with Appellant at the police station, he and Appellant began to conversate. R. p. 93. Officer Rissanen stated:

> I never mentioned what kind of car was involved in the pursuit; I never mentioned the car. I just asked him would his fingerprints would be on the car. He then stated yes, they would be that the car belongs to his girlfriend; completely being unaware of which car I was talking about because I never mentioned what car was in question. After speaking about his fingerprints being on the car I then asked him would your fingerprints be on the iPad that was in the car? I never mentioned to him that we were investigating a stolen iPad; I just mentioned that there was an iPad in the car. Immediately he knew exactly what iPad I was talking about and stated that his fingerprints would be on the iPad and he directly associated himself with this iPad. . . . He also made statements stating that he purchased the iPad from an unknown subject so that we could not charge him for a burglary charge but we only could charge him for receiving stolen goods.

R. pp. 94-95.

During examination of the vehicle by Anita Moore, a crime scene technician with the North Charleston Police Department, a sticky note was located on the center console of the vehicle. R. pp. 129, 139. The sticky note found by Moore had the Department of Probation, Parole, and Pardon Services letterhead at the top and read, "Agent Grissett Return Date Jan. 13, 2015." R. p. 247 (State's Exhibit 48).

Admission of the Redacted Note from Appellant's Probation Agent

Prior to trial, while discussing various motions to suppress, Defense Counsel noted:

> And Your Honor there is sort of another issue that does along with this one which is that the document itself I believe that the State intends to call a witness from I believe she works with Parole to testify to the fact that she gave that document to Jerry. And of course on the same basis we would object to that testimony because of course that would put the jury on notice that Mr. Gardner was on parole. I think that the real issue here and I believe that the State intends to show with this piece of evidence is that there is a document bearing Jerry Gardner's name on it and I believe that that redacted copy of the photo that Your Honor has just seen is sufficient to show that. And so I don't think any testimony alongside that document is necessary.

R. p. 8. The Solicitor replied:

> Your Honor, if I could also clarify. There is actually – I think we're getting it confused. There are two sets of documents. This document here [indicates] was actually on the passenger seat so we think that's relevant to show that he was the driver and he put it on the passenger seat. There's also a sticky note that is on the center console of the car and the sticky note says Agent Grissett return January 13th. We just want Agent Grissett to come in. We're not going to ask her who she works for but we think it's relevant that she gave him that note on December 9th which is nine days before this car accident. . . . So we're not going to ask him about being on probation; just did she give him this note and when did she give it to them. If they will stipulate that he had the note on December 9, 2014, we'd be fine with that as well.

R. p. 9. Defense Counsel responded, "Again, Your Honor we would object to her being identified as Agent. I just think that having this piece of testimony in and this witness coming in will identify Mr. Gardener as a parolee. The prejudice of that is in my opinion way too significant to have her testify at all." R. p. 10. The Solicitor clarified:

> Part of the defense in this case is he wasn't in the car so it's important for us to exclude or include documents belonging to him that are in the car and the note is one of those documents that is in hand's reach of whoever would be operating the cat. And without having her come in and say I gave this to Jerry Gardner it's unclear who the note would belong to and that would go into their defense of it was somebody else who was driving the car or in the vehicle.

R. p. 11.

The trial judge found:

> I do think its relevant information. And I do understand the concern about the prejudice and so either we can redact it or if it's very clear that the person will not testify as to where they are employed. The only thing I guess to redacting the note is to redact the agent part of it but I think it should be clear there is no reference to the Department of Probation, Pardon, and Parole Services which are Parole, Pardon and whatever; Triple P. I do think its relevant to at least show that was given directly to him to more clearly establish and I think that's relevant and reasonable under the circumstances by the State in light of potential defenses. So I think it should be allowed to be discussed.

R. p. 12.

During trial, the Solicitor asked the trial judge how the State should go about admitting the evidence of the sticky note found in the car. R. p. 106. After Defense Counsel renewed his objection to the admission of the note, arguing the evidence was not relevant, the trial judge noted, "Well I'll tell you the issue I have with it only because it's obviously probation and or parole department. And so that leaves an inference that he's had some prior contact or there is some - - some part of his past which required him to come into contact. . . ." R. p. 108. The Solicitor noted the evidence was important because, "The whole argument was that he wasn't in the car and hasn't been in the car. That's what the whole defense has been presenting." R. p. 108. The Solicitor stated, "It's the only piece of evidence that we have establishing him really a document that has a time date on there close to the event so we believe that's highly probative." R. p. 108. The Solicitor further argued the sticky note was admissible pursuant to Rule 404 (b), SCRE, because the evidence is being offered to show Appellant's identity.

After hearing the in camera testimony of Jokira Grissett, Appellant's probation agent, the trial judge ruled:

> I think the evidence is relevant, it's clearly relevant. And under 404 I think it relates to the issue of identification. It provides some relevant evidence to indicate that the defendant may have been in the car at the time that these crimes occurred on December the 18th And by establishing that there may have been some

> evidence of - - information that belonged to him in that vehicle so it places him in the vehicle. Whether it places him in the vehicle on the 18th or not that's up to jury argument and obviously that's still going to be up to the jury to make that decision. But it at least provides some evidence to show that he had access to the car at one particular time or that there was information in the car that could be attributed to him. I think that if - - I don't have any problem with asking her a couple of questions like leading questions without going into detail as to where she works or anything alone those lines is to ask her did she have occasion to meet with him on December - - an occasion to meet with the defendant in December. And you can ask her what date was that. Did you provide this note to him and have her identify the note and then be done with it. I think that that - - it doesn't say that he was being supervised. It doesn't say that he was - - the reasons why she met with him, she met with him on that date. The only time she ever saw him or met with him was on December the 9th. She met with him and gave him the note and for him to return. And it doesn't say she is supervising him. . . . All evidence at some point may be prejudicial because the prejudice outweighs the probative value. And if presented in that manner I would say no. If we go into he is being supervised by the department I think that creates some additional questions. But to say I met with him and she's not in uniform. She doesn't have to say where she works I can leave it at that.

R. pp. 122-23. With respect to redaction, the trial judge stated:

> What I would suggest is to make a copy of that note and to redact the top part that says probation in the Department of Probation or whatever. You can redact the agent part - - it says Agent Grissett. You can take out - - you can redact the top part and you can redact the agent part and then introduce the copy and have the copy that is discussed in court and prepared for the jury. I think that would get us past any inference or reference about prior bad acts at this particular point as long as the defendant is not planning on testifying it won't come out anyway. That will be the best way to solve it. And any questions that you met with him on this date and you gave him this note to come back and talk to you and that will be the end of it.

R. p. 128. The sticky note was subsequently redacted to exclude the Department of Probation, Parole, and Pardon Services text and the word "agent." The redacted note read, "Grissett Return Date Jan. 13, 2015." R. p. 248 (State's Exhibit No. 49).

During trial, Jokira Grissett's trial testimony consisted only of the following colloquy with the Solicitor:

> Q: Good afternoon. On December 9, 2014, did you meet with Jerry Gardner, Jr.?
>
> A: Yes, sir.

Q: I'm going to show you what has been marked as State's exhibit 49. Pursuant to your meeting did you give him that note?

A: Yes, sir.

Q: It's already been admitted into evidence as State's exhibit 49 and the return date of January 13th and you gave it to him on December 9th?

A: Yes, sir.

Q: No further questions.

R. pp. 150-51.

ARGUMENT

I.

The trial judge properly admitted the sticky note found in the vehicle driven by Appellant during a high-speed chase with police where the note was relevant, the probative value was not substantially outweighed by the risk of unfair prejudice, and the trial judge's redactions removed any inferential references to prior bad acts and thereby eliminated any potential prejudice to Appellant.

Appellant contends, "The trial court erred in admitting pursuant to Rule 404 (b), SCRE, the redacted 'sticky note' from Appellant's Probation Agent Grissett with his next appointment time that was found in the car Appellant was allegedly driving during the car chase because it related to identity which was the primary issue." Br. of Appellant p. 9. Specifically, Appellant asserts the note was not properly admitted pursuant to Rule 404(b), SCRE, because it was not a bad act. Appellant further avers the redacted note should not have been admitted into evidence because it was more prejudicial than probative. These arguments lack merit, as the trial judge properly admitted the evidence on relevancy grounds and found the evidence's probative value was not substantially outweighed by the risk of unfair prejudice. Furthermore, the trial judge's suggested redactions of the note removed any inferential references to prior bad acts and eliminated any potential prejudice to Appellant.

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for a prejudicial abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("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."). An abuse of discretion occurs when the trial judge's conclusions either lack

evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Firstly, the trial judge correctly found the note was relevant and the note's probative value was not substantially outweighed by the risk of unfair prejudice. The main defense presented at trial was that Appellant was not the individual in the car that fled from police. This defense made any evidence connecting Appellant with the vehicle around the time of the robbery exceptionally relevant. Agent Grissett testified she met with Appellant on December 9, 2014 and the note she gave Appellant contained his subsequent appointment date, January 13, 2015. The note's presence on the vehicle's center console was relevant towards establishing Appellant's identity through his apparent use and control of the car.

All relevant evidence is admissible, and only relevant evidence should be admitted at trial. State v. Douglas, 369 S.C. 424, 430, 632 S.E.2d 845, 848 (2006); see Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible."). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

However, even if relevant, evidence must be excluded from trial if its probative value is **substantially outweighed** by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158,

679 S.E.2d 172, 176 (2009); see Rule 403, SCRE ("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 the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev'd on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000). Significantly though, unfair prejudice does **not** mean damage to a defendant's case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true because all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant. Id. It is only unfair prejudice that must be avoided. Id.

Trial judges have "particularly wide discretion" in ruling on the comparative probative value and potential prejudicial effect of evidence. Collins, 398 S.C. at 209, 727 S.E.2d at 757. A trial judge's ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the

matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-94 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Id. at 358, 543 S.E.2d at 594.

In the present case, the sticky note had substantial probative value as it provided a key link between Appellant and the gold Ford Explorer around the time of the robbery where the defense in the case was that another party was behind the wheel of the car. The trial judge's redaction of prejudicial details on the note eliminated the risk of **any** unfair prejudice to Appellant. The only conceivable prejudice to Appellant stemmed from the evidence's legitimate probative force. The evidence's significant probative value, therefore, was not substantially outweighed by the risk of unfair prejudice.

Secondly, the State agrees with Appellant's contention that the sticky note itself was not a bad act. However, the note was properly admitted under relevancy grounds due to the probative nature of the note and its ability to connect Appellant with the gold Explorer in the chase with police. The bulk of the trial judge's ruling focused on the evidence's admission under relevancy grounds. Furthermore, the trial judge expressly stated the redactions to the note removed any inferential connection to a prior bad act. Appellant suffered **no** prejudice whatsoever where the note was properly admitted under relevancy grounds, the note was redacted to remove any reference to Appellant's probationary status, and Agent Grissett did not testify to anything that could lead to an inference by the jury that Appellant committed any prior bad acts. The redactions, therefore, ensured the jury was presented with absolutely no evidence that made any reference whatsoever to Appellant's probationary status or prior bad acts. Even if there had been

some vague reference at trial to Appellant's probationary status, Appellant still would not be prejudiced to the point that reversal would be required. See State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) (finding no prejudice resulted from the admission of testimony establishing that law enforcement already had Council's fingerprints on record at the time of his arrest for the charged offense); State v. Singleton, 284 S.C. 388, 392, 326 S.E.2d 153, 156 (1985) (finding an arresting officer's vague references to prior crimes in the jury's presence did not warrant the granting of a mistrial), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Robinson, 238 S.C. 140, 150-51, 119 S.E.2d 671, 676 (1961) (finding testimony by a witness that Robinson told him that he was on the way to the "probition office" did not create an inference that Robinson had been convicted of another crime), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) ("[A] vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes."). Appellant's convictions and sentences should be affirmed.

CONCLUSION

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

Respectfully submitted,

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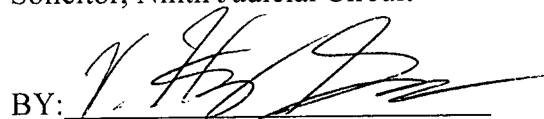

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November 8, 2016

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APPEAL FROM CHARLESTON COUNTY
The Honorable Allison Renee Lee, Circuit Court Judge

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v.

JERRY LEWIS GARDNER, JR...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."

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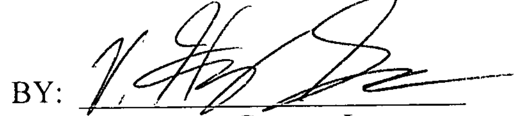
BY: 
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