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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of General Sessions

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SC Court of Appeals

The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2016-001302

THE STATE,

Respondent,

v.

JAMES DAMON LANAR WHITE,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

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

WILLIAM W. WILKINS, III.
Solicitor, Thirteenth Judicial Circuit

305 East North Street, Suite 325
Greenville, SC 29601
(864) 467-8282

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial judge properly denied Appellant's motion to suppress evidence where Appellant freely and voluntarily consented to a search of both cell phones by law enforcement. Further, the search of the cell phones was valid where police officers obtained a valid search warrant.

II.

The trial judge did not abuse his broad discretion by admitting photographs found on a cell phone in Appellant's possession depicting cash and his co-defendant holding large amounts of cash on the day after the robbery because those photographs were highly probative, and the evidence's high probative value was not substantially outweighed by any unfair prejudice that could have resulted from its admission.

III.

The trial judge properly denied Appellant's motion for a directed verdict because the evidence and testimony presented during trial, when viewed in a light most favorable to the State as required, could induce a reasonable juror to find Appellant guilty of the charged offenses.

STATEMENT OF THE CASE

Appellant was indicted during the June 2014 term of the Grand Jury for Greenville County for armed robbery, two counts of kidnapping, and conspiracy (2014-GS-23-03815). Appellant proceeded to a trial by jury from June 6-9, 2016, in Greenville, South Carolina. At the conclusion of trial, Appellant was found guilty as indicted. He was sentenced by the Honorable James R. Barber, III, to imprisonment for a term of twelve years for armed robbery, imprisonment for a term of twelve years for each count of kidnapping, and imprisonment for a term of five years for conspiracy, with all sentences running concurrently. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

On January 20, 2014, Aaron Kretzschmar was working as the service manager of an Olive Garden in Greenville, South Carolina. R. pp. 300-01. On that evening, Kretzschmar was the sole manager on duty and was in charge of closing the restaurant for the night. R. p. 301. Kretzschmar locked the doors to the restaurant around 10:00 P.M. when the restaurant closed. R. p. 303. Around 11:00 P.M. Kretzschmar gave Damion Riley, a line cook, permission to leave, leaving Kretzschmar, Appellant, and Terrell Pugh as the only individuals remaining in the restaurant. R. pp. 304-05. Appellant and Pugh worked as dishwashers at the restaurant. R. p. 305. Around twenty minutes after Riley left, Kretzschmar left his office to check on Appellant and Pugh and see when they would be finished with their duties. R. p. 305, R. p. 332. As Kretzschmar was walking towards the dish area, he was struck on the head, which caused him to stumble backwards against a wall. R. p. 307. Kretzschmar testified that his assailant was a black male who pointed a gun at him and instructed him to go to the restaurant's safe. R. p. 307.

Kretzschmar subsequently made his way to the safe in the restaurant's office. R. p. 307. While Kretzschamar opened the safe, the intruder repeatedly struck him and told him to hurry up. R. pp. 307-08. The intruder provided Kretzschmar with a plastic bag in which to place the money. R. pp. 307-08. Kretzschmar testified the safe typically held around thirty-five hundred dollars in cash. R. p. 309. Kretzschmar indicated the safe would be filled with smaller denominations based on the restaurant's need to make change. R. pp. 309-10, R. p. 344. After placing the cash into the plastic bag, the intruder ordered him to put rolls of coins from the safe into the bag. R. p. 310. When Kretzschmar placed the coins into the bag, it began to rip. R. p. 310. Once the bag began to rip, the intruder fled the office with it. R. p. 310. Kretzschamar

immediately closed the door and called 911. R. pp. 310-11. Kretzschmar later noticed the intruder left a trail of money in his wake as he bolted away from the restaurant. R. p. 311.

Near the front of the restaurant, Kretzschmar noticed a few unusual things. R. p. 315. Kretzschmar noticed a white rag propping open the restaurant's front door. R. p. 315. He noted the doors themselves were still locked from when he locked them around 10:00 that evening. R. p. 316. He identified the rag propping open the door as one of the dishtowels that was used by the kitchen staff of the restaurant for cleaning. R. p. 317. He also noticed a brick on the ground and a broken pane on the door. R. p. 315.

When the police arrived, Kretzschmar and the officers checked on Appellant and Pugh. R. p. 331. Kretzschmar stated Appellant and Pugh were still in the dish area. R. p. 332. Kretzschmar described Pugh as "a little bit hurt, possibly from being on the ground and very shaken up." R. p. 332. Kretzschmar noted that on the other hand, Appellant "seemed a lot less shaken up." R. p. 332. Kretzschmar later clarified that Pugh was visibly startled, Appellant was not. R. p. 371. Kretzschmar told law enforcement that the intruder was stocky and "shorter than myself."[1] R. p. 329. Kretzschamar also told the officers that the intruder was wearing a hoodie with a camouflage design. R. p. 329.

Kretzschmar testified the Olive Garden is equipped with one exterior camera that is trained on a series of parking spots designated for pick-up orders. R. p. 328. Inside the store there is a monitor that shows the camera's view. R. p. 328. Strangely, when Kretzschmar checked, the monitor's screen was blanked out and it said "on hold" as if it was disabled. R. p. 333. Kretzschmar stated the camera's controls are next to the monitor and can only be disabled from inside the store. R. p. 333. Kretzschamar testified that in order to put the camera "on hold," all that needs to be done is to flip a switch on the side of the monitor. R. p. 340. Kretzschmar

[1] Kretzschmar testified he was six feet two inches tall. R. p. 329.

testified he did not notice seeing the monitor on hold previously in the day, and that is something he would have noticed. R. p. 340.

Damion Riley testified that on the evening of the robbery, Appellant told him about a rap concert in which he performed where he made "a couple of bands." R. p. 378. Riley explained that by "bands," Appellant meant large sums of money. R. p. 378. Riley described the conversation as "kind of unusual." R. p. 379. Riley stated he recalled leaving on the evening of the robbery and that the doors of the restaurant closed behind him when he left. R. pp. 381-82. He testified that the employees who are responsible for closing the restaurant are asked to close the door behind them and to pull on the door to make sure it is secure. R. p. 382. Riley noted the penalty for failing to close the door is termination. R. p. 382. He testified that when he left for the evening there was no dishtowel propping open the doorway and that if there had been a dishtowel, he would have removed it. R. p. 383. He also testified he did not know anyone by the name of Gerald Gadsden. R. p. 386.

Grady Pugh testified he recalled the day of the robbery "vividly." R. p. 414. Pugh stated the intruder pointed a gun at him and told him to "get the fuck on the floor." R. p. 454. He recalled the intruder pushing him onto the ground. R. p. 459. He described the intruder as between five foot ten inches and six feet tall. R. p. 458. He also recalled the intruder wearing a camouflage hood. R. p. 456. Pugh testified he did not know an individual named Gerald Gadsden. R. p. 458.

On the day of the robbery, Deputy James Middleton was working as a uniform patrol deputy for the Greenville County Sheriff's Office. R. p. 479. Deputy Middleton responded to the call regarding the armed robbery at the Olive Garden. R. p. 480. Deputy Middleton arrived on the scene at 11:28 P.M. R. p. 481. When Deputy Middleton approached the door of the

restaurant, he noticed coins and bills leading from the front door to the other side of the building. R. p. 482. Deputy Middleton also observed a broken brick lying next to the front door, noting "I could see a broken glass pane form the front door, but there was two panes of glass. I only noticed the front - - one pane of glass was broken, the back pane was still intact. So it didn't break all the way through.[2]" R. p. 482. While in the restaurant, Deputy Middleton observed that the camera was "on hold." R. p. 490. Deputy Middleton recalled Pugh was very nervous and wash shaking, however Appellant was "nonchalant calm about it." R. p. 492.

Sergeant Thomas Motes was working in the robbery division of the Greenville County Sheriff's Department in January of 2014. R. p. 580. Sergeant Motes was one of the officers assigned to the Olive Garden robbery case. R. p. 581. On January 22, 2014, Appellant came to the Greenville Sherriff's Department to provide a written statement about the robbery. R. p. 581. Sergeant Motes clarified Appellant "was there to give a statement as being a victim in this case." R. p. 583. When Appellant arrived, he was escorted from the lobby to Sergeant Motes's office. R. p. 583. Sergeant Motes testified Appellant was adamant that he write out his own statement. R. p. 586. Appellant subsequently provided the investigators with his written statement, writing "I went to work at 6:15. I clock in and started in the dishroom washing dishes. About eleven or so a guy with a hood came to da dishroom and pointed a gun and demanded to get on the floor and lay down. He then stood guard and I heard commotion. He then robbed the store." R. p. 585. After Appellant wrote his statement, Sergeant Motes asked if he could look at Appellant's cell phone. R. p. 586. Appellant agreed and Sergeant Weiner, another officer present for the interview, began filling out a consent to search form. R. p. 586. Appellant also told officers he had another old phone that he had not used in months. R. p. 586. Appellant agreed to let officers

[2] Sergeant David Weiner later opined that someone tried to break the window to make it appear that the robbery was not an inside job, but failed to break through both panes of glass. R. pp. 787-88.

search that phone as well, so Sergeant Weiner added it to the consent to search form. R. p. 586. Appellant then signed the consent to search form. R. p. 586. Sergeant Motes testified that the first phone was a Kyocera model and the phone that Appellant claimed was his old cell phone was a Samsung. R. p. 587. Shortly after taking Appellant's statement, Sergeant Motes experienced a medical issue and had to leave to go to the hospital. R. p. 591.

Sergeant David Weiner, the supervisor of the violent crimes unit, took over the case after Sergeant Motes had to leave for medical reasons. R. p. 591, 702. When interviewing Appellant, Sergeant Weiner asked him about his discussion with Damion Riley immediately prior to the robbery where he told Riley he made a large sum of money rapping in Charleston. R. p. 711. Appellant told Sergeant Weiner, "that he had earned seven thousand, five hundred dollars rapping in Charleston from door sales or ticket sales from people entering." R. pp. 711-12. During a break in the interview, Sergeant Weiner contacted the event promoter. R. p. 712. Upon being informed by Sergeant Weiner that he spoke with the event promoter, Appellant changed his story and told him, that he earned seven thousand, five hundred dollars from other rappers paying him, not from the door ticket sales." R. p. 713. When asked about the seventy-five hundred dollars he allegedly earned through the concert, Appellant told Sergeant Weiner that he spent it all on women and booze at the clubs. R. p. 713. When asked specifically where he spent the money, Appellant stated he did not recall. R. p. 713. Sergeant Weiner testified that by discussing the rap concert with Damion Riley immediately before the robbery, he believed Appellant was trying to set the stage for him coming into a large sum of money. R. p. 714.

Investigator James Perry works in the computer forensics division of the Greenville County Sheriff's Office. R. p. 627. Investigator Perry performed analysis on the two phones Appellant gave investigators and was able to capture data and images from the phones. R. pp.

631-32. A series of photographs depicting cash and an individual wearing a camouflage hoodie holding a large amount of cash were found on the Samsung phone. R. p. 674. The photographs on the phone were taken on January 21, 2014 between 2:26 P.M. and 2:31 P.M. . R. p. 674, 687.

Sergeant Motes was eventually able to identify the individual in the photograph as Gerald Gadsden. R. p. 609. Sergeant Motes looked through the contact list on the phone and notice the name "Jr. G." R. p. 611. "Jr. G" is Appellant's stage name. R. p. 611. Sergeant Motes eventually called a contact in the phone named "ma." R. pp. 611-12. The individual Sergeant Motes called identified herself as Crystal Gadsden. R. p. 612. Sergeant Motes described the individual in the photograph, and Ms. Gadsden replied that he was describing her son, Gerald Gadsden. R. p. 612. Sergeant Motes asked Ms. Gadsden to have Gerald call him so he could talk to him about the incident. R. p. 613. Sergeant Motes subsequently checked the South Carolina Department of Motor Vehicles database for Gerald Gadsden's driver's license photo and was able to confirm that the individual in the license photograph was the same individual in the photograph found on the phone. R. p. 612. The SCDMV website also listed Gadsden as being five foot eleven and weighing two hundred-forty pounds. R. p. 614.

On January 25, 2017, Sergeant Weiner received a phone call from Appellant. R. p. 770. During his conversation with Appellant, Sergeant Weiner told him there were pictures on the phone of an individual holding a large amount of cash and wearing a camouflage jacket. R. p. 771. Sergeant Weiner told Appellant he was able to identify the man as Gerald Gadsden. R. p. 771. Appellant responded that he did not know Gerald Gadsden. R. p. 771.

On January 27, 2014, Sergeant Motes searched Appellant's residence. R. p. 615. Inside Appellant's residence, Sergeant Motes located a pair of pants with Gerald Gadsden's debit card

in one of the pockets. R. p. 616. Later that day, Sergeant Motes received a call from Gerald Gadsden. R. p. 617. Sergeant Motes asked Gadsden about his cell phone and he replied that he lost the cell phone on January 15th at a club in North Charleston called Club Sho Tyme. R. p. 618. Sergeant Motes asked Gadsden about the Olive Garden robbery and he replied, "what are you talking about?" Sergeant Motes responded, "you know exactly what I'm talking about," and Gadsden did not respond. R. pp. 618-19. Gadsden told Sergeant Motes he would call him back. R. p. 619. Sergeant Motes asked Gadsden for his cell phone number; however Gadsden did not reply and terminated the phone call. R. p. 619.

When reviewing a report compiled regarding the content of the Kyocera cell phone belonging to Appellant, Sergeant Weiner noticed there were nineteen lines of contact between Appellant and Gadsden from October 21, 2013 and when Appellant gave his phone to the investigators on January 22, 2014. R. p. 757. All nineteen of those communications were deleted from the phone. R. p. 757. Specifically, on the morning after the Olive Garden was robbed, there were five separate instances of contact between Appellant and Gadsden. R. p. 758. During the calls made by Appellant the morning after the robbery, he dialed *67 to conceal the fact that he was calling. R. p. 758. Sergeant Weiner testified that the call would show up as "blocked" or "private number." R. p. 758. Sergeant Weiner testified that after the robbery, Gadsden was the first person Appellant called. R. p. 759. On the morning that Appellant originally came to the Greenville Sheriff's Department to be interviewed, Appellant sent a text message to an individual that contained Gadsden's full name, date of birth, and social security number. R. p. 761.

Sergeant Weiner testified he deduced Appellant was involved in the robbery by weighing the following factors:

So I knew that the towel had been placed there by somebody that was inside the business, of course, it being a towel from the Oliver Garden itself. Based on the statements from the three individuals inside, Mr. Kretzschmar said he'd been punched in the face and shoved around in the office, Mr. Pugh had been pushed to the floor, [Appellant] made no indication that he'd been assaulted at all. I'd also received numerous stories from [Appellant] regarding his source of income that he described to Mr. Riley whether they be from door sales, from rappers paying him, of course, the information gleaned from the phone. I also had [Appellant] in possession of Mr. Gadsden's phone in his pocket when he came to our interview. And he tried to cover up the fact that it was Mr. Gadsden's phone by claiming that it was his own and that it was inoperable and had not been used for several months when. In fact, it was current and working properly. I also had the pictures of Mr. Gadsden shortly after the robbery wearing a jacket, a rain jacket described by the - - similar to - - described by the victims and witnesses as well as him holding large amounts of ones and five dollar bills, which was confirmed by Mr. Kretzschmar's - - the probable denominations that were stolen that night. And also [Appellant] denying that he had any knowledge of who Mr. Gadsden was when, in fact, I had a text the day he came to speak to me listing his full name, first name, middle name, last name, social security number, date of birth. I also had the search warrant at his residence that revealed the MasterCard that belonged to Mr. Gadsden at [Appellant's] residence. I also noted that Mr. Gadsden himself fits the physical description provided by the victims and witnesses as far as height and weight. I believe that's what I used, sir. There was one other item also - - that came into play with this case, which was the ruling out Mr. Riley by the video system in that he clocked out at 11:18 and the video system was still functioning at 11:22 pm and was turned off after 11:22 because I had an image after Mr. Riley had left the restaurant.

R. pp. 772-74.

ARGUMENT

I.

The trial judge properly denied Appellant's motion to suppress evidence where Appellant freely and voluntarily consented to a search of both cell phones by law enforcement. Further, the search of the cell phones was valid where police officers obtained a valid search warrant.

Relevant Facts

Appellant made a pre-trial motion to suppress the evidence found on the cell phones in Appellant's possession. R. pp. 4-14. The trial judge held a hearing on the motion to suppress on April 11, 2016 in Greenville, South Carolina. Hearing R. pp. 1-141. In support of his motion to suppress, Appellant contended: 1) his consent to the search of the cell phones was involuntary, and 2) the search warrants obtained by law enforcement were constitutionally deficient.

At the hearing, Sergeant Motes testified Appellant's interview at the law enforcement center occurred in his office. Hearing R. p. 56. Sergeant Motes testified Victim was being treated as a victim witness of the crime and was not placed in handcuffs and was not threatened in any way. Hearing R. p. 56. Sergeant Motes stated that after Appellant provided investigators with his written statement about the robbery, Appellant was asked whether he had a telephone. Hearing R. p. 61. Sergeant Motes asked Appellant whether he could look at his cell phone and Appellant replied, "sure." Hearing R. p. 61. Sergeant Weiner then prepared a consent to search form. Hearing R. p. 61. Appellant then produced the Kyocera phone and stated that was his phone. Hearing R. p. 61. Sergeant Motes then asked Appellant whether he had anything else on his person and Appellant produced another cell phone and stated, "This is my old phone that I haven't used in a while."[3] Hearing R. p. 63. Sergeant Motes then asked Appellant, "Is it okay if

[3] Sergeant Motes testified he asked Appellant whether there was anything else on his person because Appellant agreed to take a polygraph test and investigators wanted to make sure nothing else was on his person before he entered the area where the test was administered. Hearing R. p. 64.

we use - - look at this phone as well?" Hearing R. p. 63. Appellant replied, "sure." Hearing R. p. 63. Sergeant Motes then added the second phone to the consent to search form. Hearing R. p. 63. Appellant subsequently signed a consent form. Sergeant Motes testified Appellant signed the consent form without displaying any reluctance whatsoever. Hearing R. p. 65.

Sergeant Weiner testified that when Appellant was brought down to the investigator's office, Appellant acted in a defensive manner. Hearing R. p. 109. Prior to Appellant's arrival at the police department, Sergeant Weiner looked up Appellant's DMV report and noticed that his driver's license was suspended.[4] Hearing R. p. 121. Sergeant Weiner testified that when Appellant began acting defensively:

> And so I just asked him, I said - - I wanted to kind of get the tone of how the rest of the day was going to go. I said, "Mr. White, how did you get here today?" And he told me he caught a ride. And I said, "Now, come on. You know we've got cameras up there." And he said, "All right, I drove." There was no threat of arrest, there was no insinuation he could be arrested. Driving under suspension is the absolute least of my worries. I'm not even a hundred percent sure I even said anything to him that his license was suspended. I just asked him, "How did you get here?" I just wanted to see if he was going to be truthful with us today with one question.

Hearing R. p. 109. Sergeant Weiner elaborated he wanted, "Just to get a feel for who he is and - - and what his intentions are while he's in our office. And to me, he displayed that he was there to lie." Hearing R. pp. 109-10.

Sergeant Weiner testified that Appellant was eventually arrested for driving under suspension because:

> It became apparent after the polygraph, after calling that promoter, that Mr. White was being very untruthful, and I felt very convinced that he was involved with the inside portion of this armed robbery. And my hope was to - - we had a probable cause charge for driving under suspension to put him in jail, and then that would allow us the time without him fleeing or going somewhere for us to make this robbery case. But it took us a lot longer to actually make the case.

[4] Sergeant Weiner testified he looked up the DMV report so he would know what Appellant looked like. Hearing R. p. 121.

Hearing R. p. 118.

When looking at the consent form signed by Appellant, Weiner noted that a portion of the consent form was written in a different ink and in different handwriting because part of the form was written by him and part was written by Sergeant Motes. Hearing R. p. 117. Weiner was concerned that the consent form would be susceptible to a defense argument that investigators added information to the form after the fact. Hearing R. p. 117. Sergeant Weiner then instructed Investigator Matthew Owens to get a search warrant because he didn't "like the way this consent form looks, it being in different ink and different handwriting." Hearing R. p. 117. Investigator Owens subsequently obtained a search warrant for the Samsung flip phone Appellant claimed was his "old phone." Hearing R. p. 94, R. pp. 38-41.

Discussion

Appellant contends the trial judge erred in denying his motion to suppress the evidence obtained in the search of the cell phones in his possession. Specifically, Appellant argues he did not voluntarily give consent to search the cellphones in his possession because law enforcement asked Appellant whether he was driving under suspension at the time he arrived at the law enforcement center. On the contrary, Appellant's consent to search the cell phones was obtained voluntarily. While Sergeant Weiner asked Appellant whether he drove himself to the interview, that question was designed to ascertain whether Appellant was going to be truthful with investigators and was not accompanied with any threats or insinuations that Appellant could be arrested. Furthermore, the police later obtained a valid search warrant for the cell phones, thus rendering Appellant's prior consent moot.

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. For purposes of the Fourth Amendment, a search occurs when "an expectation of

privacy that society is prepared to consider reasonable is infringed." United States v. Jacobsen, 466 U.S. 109, 113 (1984). Generally speaking, any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The well-settled rule is warrantless searches are unreasonable per se unless they fall under an exception to the Fourth Amendment's warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). However, "warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement." Kentucky v. King, 563 U.S. 452, 462 (2011).

South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) the search incident to lawful arrest exception; (2) the hot pursuit exception; (3) the stop and frisk exception; (4) the automobile exception; (5) the plain view exception; (6) the consent exception; and (7) the abandonment exception. State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012). Pursuant to the various accepted exceptions to the warrant requirement, a warrantless search or seizure will generally withstand constitutional scrutiny so long as the circumstances establish the existence of an exception along with the existence of probable cause. State v. Bultron, 318 S.C. 323, 331-332, 457 S.E.2d 616, 621 (Ct. App. 1995).

One of the recognized exceptions to the warrant requirement is the consent exception. See Birchfield v. North Dakota, __ U.S. __, 136 S. Ct. 2160, 2185 (2016) ("It is well established that a search is reasonable when the subject consents[.]"). Pursuant to the consent exception, an officer can validly conduct a warrantless search of a constitutionally-protected area when he or she receives consent from an individual with authority or apparent authority to grant such consent and the consent is provided freely and voluntarily. See State v. Adams, 377 S.C. 334,

339, 659 S.E.2d 272, 275 (Ct. App. 2008) (holding warrantless searches and seizures are constitutionally permissible when conducted under the authority of **voluntary** consent); see also State v. Laux, 344 S.C. 374, 377, 544 S.E.2d 276, 277 (2001) (recognizing consent may be valid if the person granting consent reasonably appeared to have the apparent authority to grant the consent). Factors to consider when determining whether consent was validly provided include the characteristics of the individual providing consent, which include the individual's age, maturity, education, intelligence, and experience, and the conditions under which the consent was granted, which include the conduct of the officer asking for consent, the number of officers present, and the duration of the encounter. United States v. Boone, 245 F.3d 352, 361-362 (4th Cir. 2001). The State bears the burden of establishing the voluntariness of consent, and the issue of whether consent was freely and voluntarily given is a question of fact to be determined from the totality of the circumstances. State v. Pichardo, 367 S.C. 84, 105, 623 S.E.2d 840, 851 (Ct. App. 2005)

In Appellant's case, the evidence presented during the suppression hearing established that, under the totality of the circumstances, Appellant's consent was freely and voluntarily given. While Appellant presented no testimony or evidence that the consent was anything but voluntary, the State presented significant evidence that Appellant's consent was voluntarily given. Sergeant Weiner testified he looked up Appellant's DMV record for the simple reason of verifying his appearance. When Appellant arrived at the police station, Sergeant Weiner simply asked him whether he drove himself to the interview in order to deduce whether Appellant was going to be forthcoming and honest with investigators. Investigators did not make any threats, either express or implied, that they would arrest Appellant for driving under suspension if he refused to consent to the search of the cell phones in his possession. Appellant did not express

any reservations whatsoever in consenting to the search of the cell phones. Instead, Sergeant Motes offered unrebutted testimony that Appellant signed the consent to search form without any reluctance. While Appellant contends the officer's mention of the fact that he drove himself to the police station led him to believe he did not have the right to refuse consent, the record is devoid of any such impression on Appellant's part. Further, there is no evidence in the record that Appellant even knew his license had been suspended. Appellant did not testify at the suppression hearing, nor did he testify at trial. Instead, the only evidence before the court firmly established that Appellant's consent was freely and voluntarily given.

Appellant's comparison of the current case to Bumper v. North Carolina, 391 U.S. 543 (1968), is inapposite. In Bumper, law enforcement officers went to the home of the defendant's grandmother and informed her they had a warrant to search the home. Id. at 546. The defendant's grandmother subsequently let officers enter the home, where they found a rifle used in the crime. Id. During the suppression hearing, the prosecutor argued that the State did not rely upon a valid warrant for the search, but instead on the consent of the defendant's grandmother. Id. The United States Supreme Court found the consent to not be valid, finding, "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." Id. at 551. The factual circumstances of Bumper are immediately distinguishable from Appellant's case. While Appellant contends the two cases are alike because consent to search was induced by deceptive law enforcement practices, this argument fails to recognize the key distinctions between Bumper and Appellant's case. The law enforcement officers in Bumper deliberately deceived the homeowner by saying they had a search warrant. There was no such deception in Appellant's

case. Instead, Sergeant Weiner asked Appellant whether he drove himself to the interview because he wanted to ascertain whether Appellant was trustworthy. Sergeant Weiner's question was not coercive in nature, nor was it designed to trick Appellant into thinking law enforcement would gain access to his cell phone regardless of whether he consented. It defies reason to assume Appellant handed over evidence implicating him in an armed robbery simply because he feared being charged with driving under suspension, especially where there is no evidence of this alleged fear.

Finally, even if the trial judge somehow erred in finding Appellant's consent to search was voluntarily given, this court should affirm the judgment below because law enforcement obtained a valid warrant. While the trial judge's ruling focused on Appellant's voluntary consent, this Court can affirm the trial judge's ruling on any ground appearing in the record. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). As a precautionary matter, law enforcement obtained a search warrant for the cell phones at issue. That search warrant was based on sufficient probable cause. Because law enforcement obtained a valid search warrant, the incriminating photographs on the phones would have been inevitably discovered and later admitted at trial, regardless of whether Appellant gave consent. See Nix v. Williams, 467 U.S. 431, 447 (1984) (("Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, if the government can prove that the evidence would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage and the defendant has suffered no prejudice. Indeed, suppression of the evidence

would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct."). Therefore, application of the exclusionary rule to Appellant's case would not further the rule's deterrent rationale and would serve no practical effect based on the circumstances of this case where, regardless of Appellant's consent to search, the evidence would have inevitably discovered through the search warrant obtained by law enforcement. See Fitzpatrick v. State, 900 So. 2d 495, 514 (Fla. 2005) ("In this case, the police had initiated an investigation of Fitzpatrick prior to requesting a blood sample. The record reveals that the police considered Fitzpatrick a suspect prior to requesting a blood sample from him based on evidence that Fitzpatrick was the last person to be seen with Romines alive leaving Howard's house at approximately midnight – three hours before she was found. Based on this evidence, requesting a blood sample from Fitzpatrick or obtaining it through a warrant would have been a normal investigative measure that would have occurred regardless of any police impropriety. Therefore, even if Fitzpatrick's consent to the taking of his blood was involuntary, the error is harmless because the police had probable cause for a warrant requiring a blood sample, and the blood sample would have been inevitably obtained."). Thus, under the circumstances, the discovery of the incriminating photographs on the cellphones in Appellant's possession was plainly inevitable, regardless of whether Appellant consented to the search, as law enforcement also obtained a search warrant. Appellant's conviction and sentence should be affirmed.

II.

The trial judge did not abuse his broad discretion by admitting photographs found on a cell phone in Appellant's possession depicting cash and his co-defendant holding large amounts of cash on the day after the robbery because those photographs were highly probative, and the evidence's high probative value was not substantially outweighed by any unfair prejudice that could have resulted from its admission.

Appellant contends the trial judge erred in admitting various photographs taken the day after the robbery depicting cash and Appellant's co-defendant Gerald Gadsden holding cash. Appellant asserts that the pictures were not relevant to the case and the evidence's prejudicial effect substantially outweighed their unfair prejudice. To the contrary, the various photographs depicting cash and Gadsden holding cash were exceptionally relevant and the evidence's considerable probative value was not substantially outweighed by the risk of unfair prejudice.

Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster,. 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court.")

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). Meanwhile, 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); see Old Chief v. United States, 519 U.S. 172, 181 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."). However, 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, and it is only unfair prejudice that must be avoided. Id.

When ruling on the comparative probative value and potential prejudicial effect of evidence, trial judges have "particularly wide discretion[.]" Collins, 398 S.C. at 209, 727 S.E.2d at 757. As a result, 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 Appellant's case, the trial judge did not abuse his broad discretion by admitting the various photographs depicting cash and Gadsden holding a large amount of cash. The photographs were relevant in the case because: (1) the facts and circumstances of the case led investigators to believe the robbery was an inside job; (2) the photographs were on one of two cell phones possessed by Appellant, an employee at the restaurant; (3) the photographs were taken mere hours after the robbery; (4) the photographs depicted a considerable quantity of cash in smaller denominations and Kretzschmar earlier testified the safe typically held smaller denominations of cash; and (5) Gadsden matched the physical description of the robber and the clothing he was wearing in the photograph matched the victims' descriptions of the robber's

clothing. Evidence of photographs taken the day after the robbery found on a cell phone in the possession of an Olive Garden employee depicting his friend, who he denied knowing, holding a large amount of cash while wearing clothing matching that worn by the suspect, as well as other pictures depicting a substantial amount of cash, is undoubtedly relevant, as it makes a fact that is of consequence more or less probable than it would be without the evidence.

The aforementioned factors regarding the photographs give the evidence an exceptionally high probative value. The facts and circumstances around the obtaining of the pictures are fraught with striking connections between Gadsden and the robbery at the Olive Garden. The photographs were thus highly probative to the issue of whether Appellant and Gadsden orchestrated a scheme where Appellant would leave the usually locked door to the restaurant propped so Gadsden could enter the premises and rob it. The only prejudice in the case is from the legitimate probative force of the evidence. While Appellant argues, "several of the photographs showed Gadsden, a young black male, holding a stack of currency. These photographs were unnecessarily inflammatory in a trial which involved stolen cash and a black suspect." Appellant's argument inadvertently recognizes the evidence's significant probative value, as the evidence's probative value does rest in the fact that Gadsden matched the physical description of the robber, was wearing the same clothing as the robber, displayed a large amount of currency consistent with the money stolen from the Olive Garden safe, and the picture was taken the day after the robbery. Any prejudice to Appellant, thus, stems from the evidence's substantial probative value and does not suggest a decision on an improper basis. Appellant's convictions and sentences should be affirmed.

III.

The trial judge properly denied Appellant's motion for a directed verdict because the evidence and testimony presented during trial, when viewed in a light most favorable to the State as required, could induce a reasonable juror to find Appellant guilty of the charged offenses.

Relevant Facts

At the conclusion of the State's case, Appellant moved for a directed verdict, arguing:

> There's no evidence before this Court that ties my client, [Appellant], to the robbery. In fact, he went down and he cooperated with the police officers. There's nothing else past that. There's no statement, there's no - - there's nothing that ties him except for - - giving the statement the benefit of the doubt, there's a picture of an individual holding some money. And I don't think that's enough to send it to the jury on kidnapping or armed robbery or conspiracy.

R. p. 872. The trial judge subsequently denied Appellant's motion. R. p. 874.

Discussion

Appellant asserts the trial court erred in denying his motion for directed verdict because the State failed to present direct or substantial circumstantial evidence tending to prove his guilt. Specifically, Appellant avers that the State merely produced evidence that Appellant's behavior was suspicious. Appellant notes, "It is entirely possible that Gadsden, if he did indeed rob the Olive Garden, robbed it without Appellant as an accomplice," Brief of Appellant p. 14. Appellant's argument ignores the substantial circumstantial evidence establishing that the robbery of the Olive Garden was an inside job and that Appellant was involved. This Court should affirm the trial judge's ruling because the evidence and testimony presented during Appellant's trial was sufficient to establish Appellant's guilt for all elements of the charged offenses.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315

(2002). The task of the trial court is to simply determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016). The United States Supreme Court has noted:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, **and to draw reasonable inferences from basic facts to ultimate facts**.

Jackson v. Virginia, 443 U.S. 307, 319 (1979) (second emphasis added) *quoted with approval in* State v. Pearson, 415 S.C. 463, 471 n.2, 783 S.E.2d 802, 806 n.2 (2016).

If there is **any** direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004). The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986); see also Crawford v. United States, 375 F.2d 332, 334 (D.C. Cir. 1967) ("It is not the function of appellate judges to weigh the evidence and decide that if they had doubts other reasonable persons were compelled to have the same doubts. If that were the test the jury of twelve would be relegated to the very low grade function of secondary fact finders.").

In Bennett, 415 S.C. 232, 781 S.E.2d 352, the South Carolina Supreme Court considered a case where the State contended this Court erred in reversing the trial judge's denial of directed

verdict by weighing the evidence and considering alternative hypotheses. In examining the decision of this Court, the Supreme Court concluded this Court erroneously weighed the evidence and reversed Bennett's conviction based on its belief that there was a plausible alternative theory inconsistent with Bennett's guilt. Id. at 236. The Supreme Court clarified that analysis was, "contrary to our jurisprudence and misapprehends the court's role in making this determination." Id. In reversing this Court, the Supreme Court concluded that, in examining the evidence in the light most favorable to the State, the evidence, "could induce a reasonable juror to find Bennett guilty." Id. at 237.

In the current case, Appellant points out perceived weaknesses in the State's case and urges this Court to consider alternative hypotheses in order to find the State's evidence insufficient. However, as discussed in Bennett, there is no requirement that the State present evidence sufficient to exclude every other hypotheses of Appellant's guilt. The evidence presented at Appellant's trial was sufficient to induce a reasonable juror to find Appellant guilty.

Viewing the evidence in the light most favorable to the State, the following substantial circumstantial evidence of Appellant's guilt was presented:

1. Appellant's unusual statements to Damion Riley on the evening of the robbery that he "made a couple of bands" at a rap concert.
2. A dishtowel from **inside** the Olive Garden restaurant was used to prop open the locked door to the restaurant which allowed the robber to enter the premises.
3. There was a brick thrown at the glass door to the restaurant in order to mask the fact that the robber was able to enter through the already propped-open door. Significantly, the brick did not penetrate both panes of glass and it was impossible for the intruder to have gained entrance by reaching through the unbroken pane of glass.
4. The cameras of the restaurant were placed on hold sometime after Damion Riley exited the restaurant but before the robber made his approach.
5. Appellant was one of only three employees working at the time of the robbery and the only one that the intruder did not strike in any way.
6. Appellant exhibited a strangely calm demeanor after the robbery, while Terrell Pugh was very shaken.

7. Appellant made inconsistent statements concerning his alleged newfound wealth from a rap concert. Appellant initially claimed he made $7,500 at a rap concert in North Charleston from ticket sales; however, after Investigator Weiner spoke to the event promoter, Appellant changed his story and made the highly improbable claim that other performers at the rap concert paid him $7,500 for the privilege of performing. Appellant also claimed that the money had been already spent on "women and booze," however he was unable to provide any details about where he was and whom he was with when he disposed of such a significant sum of money. Sergeant Weiner testified that the statements regarding the revenue from the rap concert were significant because they represented an attempt by Appellant to preemptively explain coming into a large sum of money.
8. Appellant claimed he did not know Gerald Gadsden, however a search of Appellant's phone revealed substantial communications between the two men, including five instance of communication the morning after the Olive Garden was robbed.[5] On the morning of Appellant's interview with the Greenville County Sheriff's Department, he sent a text message to an individual containing Gadsden's full name, date of birth, and social security number.
9. When Appellant consented to the search of the two cell phones in his possession, he claimed the Samsung phone was an old phone of his. However law enforcement later determined the phone actually belonged to Gerald Gadsden, the individual Appellant claimed not to know.
10. A search of Gadsden's phone, which, again, was in Appellant's possession, revealed a number of pictures of cash and pictures of Gadsden holding a large amount of cash. Significantly, the pictures were taken the afternoon after the robbery and Gadsden was wearing clothing matching the description of the robber. The cash in the photographs was in smaller denominations, which was consistent with the money stolen from the Olive Garden safe.

Viewing all of this evidence together with the natural and logical inferences to be drawn from it, the jury could rationally conclude Appellant was guilty of each element of the indicted offenses. The theory of guilt presented by the State's evidence could induce a reasonable juror to conclude that Appellant and Gadsden conspired to rob the Olive Garden where Appellant worked, Appellant propped open the door to the restaurant with a dishtowel, Appellant placed the restaurant's sole camera on hold, Gadsden attempted to mask the method of his entry by breaking one of the door's glass panes, however he failed, then Gadsden managed to steal thousands of dollars from the restaurant's safe prior to fleeing. Appellant's strangely calm

5 Tellingly, Appellant dialed *67 when placing the calls to Gadsden after the robbery in an attempt to conceal his identity.

demeanor after the robbery and subsequent misstatements to investigators concerning the second phone in his possession and whether he knew Gerald Gadsden also provided the jury evidence of conduct by Appellant tending to show consciousness of his guilt. See State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011) (South Carolina courts have historically and consistently recognized "any guilty act or conduct on the part of the accused is admissible as some evidence of consciousness of guilt" and is a circumstance that should be submitted for the jury to consider).

The aforementioned evidence represents significant circumstantial evidence showing Appellant and Gadsden's guilt of the charged offenses. Contrary to what is required before a directed verdict should be granted, Appellant's case did not present a complete failure of evidence of his guilt. See State v. Brown, 205 S.C. 514, 520, 32 S.E.2d 825, 827 (1945) ("Where there is any evidence, however slight, on which the jury may justifiably find the existence or the non-existence of material facts in issue, or if the evidence is of such character that different conclusions as to such facts reasonably may be drawn therefrom, the issues should be submitted to the jury."). Instead, considerable evidence of Appellant's guilt for each of the indicted offenses was presented and his motion for a directed verdict was properly denied. 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,

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY:
V. Henry Gunter, Jr.
Bar # 102259

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

ATTORNEYS FOR RESPONDENT

November 21, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
The Honorable James R. Barber, III, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Appellate Case No. 2016-001302

THE STATE, ...RESPONDENT

v.

JAMES DAMON LANAR WHITE, ...APPELLANT.

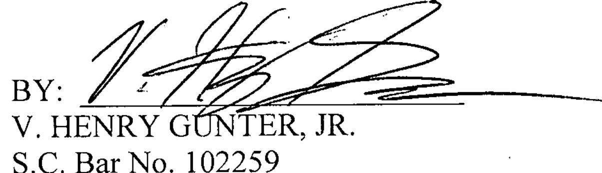
CERTIFICATE OF COUNSEL

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

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

WILLIAM W. WILKINS, III.
Solicitor, Thirteenth Judicial Circuit



BY: ______________________
V. HENRY GUNTER, JR.
S.C. Bar No. 102259

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

(803) 734-3727

ATTORNEYS FOR RESPONDENT

November 21, 2017