STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of General Sessions

The Honorable Letitia H. Verdin, Circuit Court Judge

RECEIVED
APR 09 2018
SC Court of Appeals

Appellate Case No. 2016-002335

THE STATE,

Respondent,

v.

JOSEPH AUSTIN CARPENTER,

Appellant.

INITIAL BRIEF OF RESPONDENT

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I.

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II.

The trial judge did not abuse her discretion in submitting a copy of the written jury charge to the jury at the jury's request during deliberations.

STATEMENT OF THE CASE

Appellant was indicted during the April 2015 term of the Grand Jury for Greenville County for attempted murder and criminal domestic violence of a high and aggravated nature. Appellant proceeded to a trial by jury from November 8-9, 2016, in Greenville, South Carolina. At the conclusion of trial, Appellant was found guilty of attempted murder and not guilty of criminal domestic violence of a high and aggravated nature. He was sentenced by the Honorable Letitia H. Verdin to imprisonment for a term of eight years. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Background Facts

Joanie Sanders shared a residence in Travelers Rest, South Carolina, with her boyfriend, Appellant. Tr. p. 139. Ms. Sanders and Appellant had been in a relationship since 1993 and had shared the residence in Travelers Rest since 1997. Tr. p. 139. Ms. Sanders described their relationship as, "not good." Tr. p. 139. Ms. Sanders testified she recalled an incident that occurred at her home in September of 2014.[1] Ms. Sanders stated that on the morning of September 28th, Appellant woke her up and told her that her, "old daddy was knocking at the door." Tr. pp. 141-42. Ms. Sanders testified her father, Billy Sanders, came over every Sunday to take her to church. Tr. p. 151. Ms. Sanders told her father that she overslept and would be ready for church in ten minutes. Tr. pp. 142-43. While Ms. Sanders was trying to get ready for church, Appellant followed her around the house and told her that if she went with her father, there would be a problem and she would need to pack a bag. Tr. p. 143.

Upon hearing yelling inside the house, Mr. Sanders entered the home from the front porch. Tr. pp. 143-44. Mr. Sanders asked Appellant what was wrong. Tr. p. 144. Appellant replied, "you got a gun, Bill?" Tr. p. 144. After Mr. Sanders responded that he did not have a gun, Appellant grabbed a wooden mask referred to as a "booger mask." Tr. pp. 144-46. Ms. Sanders testified the mask had horns and, "looks really scary." Tr. p. 146. Sanders stated Appellant put the mask over his face and directed a curse toward Mr. Sanders in a language she did not understand. Sanders emphasized, "he acted like he was cursing my father." Tr. p. 146. After being "cursed" by Appellant, Mr. Sanders replied, "I have God on my side." Tr. p. 146. Appellant then swung the mask and smashed a nearby potted plant. Tr. p. 152.

[1] Deputy John McCloud's testimony clarified the incident occurred on September 28, 2014. Tr. p. 93.

Mr. Sanders subsequently walked out of the house. Tr. p. 154. Ms. Sanders begged Appellant to go back to bed but he refused. Tr. p. 154. Appellant eventually told Ms. Sanders to go with her father, Tr. p. 155. Ms. Sanders got into the car with Mr. Sanders but realized she did not have her cell phone, so she re-entered the house to look for it. Tr. p. 155. When Ms. Sanders re-entered the home, Appellant grabbed her purse out of her hand and dumped it on the ground. Tr. p. 156. Ms. Sanders stated she grabbed her purse and ran out of the door and Appellant ran after her. Tr. p. 156-57. Mr. Sanders was standing outside of his truck when Ms. Sanders ran back outside. Tr. p. 157. Ms. Sanders immediately jumped in Mr. Sanders' truck. Tr. p. 157. Ms. Sanders heard Appellant note, "oh, you've got a bat, Bill." Tr. p. 157.[2] Ms. Sanders described Appellant's tone as "agitated." Tr. p. 157. Ms. Sanders testified Appellant then slammed into her father so hard that it knocked him from the driveway to a fence around ten feet away. Tr. p. 158. The two men then struggled for the baseball bat. Tr. p. 158. Ms. Sanders jumped out of the car and tried to get Appellant to let go of the bat and go back inside the home. Tr. p. 158-59. Appellant then kicked Mr. Sanders in the head four or five times. Tr. p. 159.

Ms. Sanders tried to stop Appellant, hitting him on the head and trying to pry his fingers off the bat. Tr. p. 160. Ms. Sanders testified her attempt to stop Appellant was unsuccessful and that he bit her fingers when she tried to pry the bat away from him. Tr. p. 160. Eventually Appellant knocked Mr. Sanders through a fence at the edge of the property. Tr. p. 160. Ms. Sanders then began screaming for help. Tr. p. 161.

Lieutenant Mike Sexton of the North Greenville Fire Department was cooking eggs at his home when his wife told him there was a man on the ground across the street and someone was kneeling on top of him. Tr. p. 77. Lieutenant Sexton then heard someone yelling for help. Tr. p. 77. Lieutenant Sexton testified as part of his training as a first responder, he has specialized

[2] After hearing, Appellant's statement, Ms. Sanders noticed her father was holding a baseball bat. Tr. p. 158.

medical training. Tr. p. 76. Lieutenant Sexton proceeded across the street to try to help Mr. Sanders. Tr. p. 78. When Lieutenant Sexton arrived, Mr. Sanders was drifting in and out of consciousness. Tr. p. 78. Mr. Sanders also began vomiting. Tr. p. 79. Lieutenant Sexton instructed his wife to call 911. Tr. p. 78. Lieutenant Sexton later heard Appellant go back into his home and slam the door. Tr. p. 80.

Maureen Phend, Ms. Sanders' next-door neighbor went outside because her dogs were barking. Tr. p. 63. Once outside, Phend observed Mr. Sanders on the ground with Lieutenant Sexton and Ms. Sanders standing over him. Tr. p. 64. Phend noticed Mr. Sanders was non-responsive; however, his head was twitching. Tr. p. 66. Phend testified she heard Appellant making threatening comments as she walked towards the fray. Tr. p. 65. Phend heard Appellant say, "I'm gonna kick your ass." Tr. p. 67.

Deputy John McCloud works for the Greenville County Sheriff's Office. Tr. p. 92. Deputy McCloud responded to the call in this case. Tr. p. 93. When Deputy McCloud arrived, he immediately went to the location where Mr. Sanders was on the ground. Tr. p. 94. Deputy McCloud also noted Ms. Sanders was bleeding from her left hand. Tr. p. 95, Ms. Sanders identified Appellant as the party that injured her and her father. Tr. p. 95. Deputy McCloud attempted to make contact with Appellant at his residence; however, Appellant locked the door to the home and refused to come to the door. Tr. p. 96. As deputies were attempting to force entry into the home, Appellant finally came to the door. Tr. p. 97. Deputy McCloud described Appellant as, "extremely agitated and extremely uncooperative." Tr. p. 98. During his initial contact with law enforcement, Appellant stated, "just shoot me already." Tr. p. 98. Officers then took Appellant directly to the detention center, as he did not require any medical attention. Tr. p. 99-100.

Dr. Derek Watson, a trauma surgeon with the Greenville Health System (GHS), treated Mr. Sanders. Tr. p. 56-57. Dr. Watson testified Mr. Sanders exhibited decreased mental status which is indicative of a head injury. Tr. p. 58. A CT scan confirmed that Mr. Sanders had a cerebral hemorrhage in the central portion of his brain and the hemorrhage was leaking into the ventricles of the brain. Tr. p. 58. Dr. Watson testified that this type of injury is not easy to inflict and requires significant force. Tr. p. 58. Dr. Watson treated Mr. Sanders with IV solutions to limit swelling and medications to limit seizures and keep his blood pressure under control. Tr. p. 59. Mr. Sanders remained in the intensive care unit at GHS for around ten days before being transferred to the long-term acute care unit at North Greenville Hospital. Tr. p. 128. Mr. Sanders ultimately passed away from an unrelated heart attack he suffered seven weeks after he was beaten by Appellant. Tr. p. 124, 61.

Testimony Concerning Appellant's Religious Beliefs

During cross-examination, the solicitor asked Appellant about text messages he sent Ms. Sanders while he was inside the home refusing to let the police inside. Tr. p. 250-51. In the text messages, Appellant alleged he was merely defending himself from Mr. Sanders. Tr. p. 251. Appellant texted Ms. Sanders that he left the house and was at a location he referred to as, "the cursed old Indian cemetery." Tr. p. 251. Appellant sent Ms. Sanders a text message stating that if law enforcement broke the door to the house down, they better be ready to face Tsul Kalu. Tr. pp. 252-53. Appellant explained Tsul Kalu is the Cherokee Lord of the Hunt. Tr. p. 253. The solicitor then asked, "what are the powers of Tsul Kalu that the authorities should be afraid of Tsul Kalu?" Tr. p. 253. Defense Counsel objected, stating only, "I'm going to object to that, Your Honor." Tr. p. 253. The trial judge ruled, "I'm going to allow you to go into this just briefly to lay a little foundation for the jury. That's it. All right." Tr. p. 253. The solicitor continued,

asking Appellant, "That was the only question I was asking is, why - - why should - - what are the powers that are - - why should they be afraid of Tsul Kalu is all I'm saying. That's all I'm asking." Tr. p. 254. Appellant replied:

> If - - it had to do with me feeling like I was violated. Someone had attacked me in my own home with a bat. I was defending myself. I was very agitated, you know, very upset. A lot of drama, conflict went on. Joanie is well aware of who Tsul Kalu is. She is now professing all this Christianity and going to church, but she knew what all that was. I'm a Cherokee. Tsul Kalu is sacred to the Cherokee. The masks are sacred to the Cherokee and actually used for healing and not used for aggression or evil.

Tr. p. 254. The solicitor then asked, "So [Appellant], please understand. I am not attacking or downgrading any of your religious beliefs. That's none of my business. I'm just asking you questions about what happened that day. Do you deny that you took a Tsul Kalu mask and broke some pottery in the house?" Appellant acknowledged he put the mask over his face and said something to Mr. Sanders in Tsalagi,[3] but denied using the mask to break pottery in the home. Tr. pp. 254-55. Appellant noted that Mr. Sanders expressed to him on a previous occasion that he thought the masks in Appellant's home were sacrilegious and a form of idolatry. Tr. p. 255. The solicitor produced a mask and asked Appellant whether that was the mask in question. Tr. p. 257. Appellate acknowledged that the mask the solicitor showed him was a mask he made, but it was not the mask he put in front of his face when he spoke to Mr. Sanders. Tr. p. 257-58. Appellant claims the words he spoke while wearing the mask were in effect a prayer for Mr. Sanders. Tr. p. 257, 259.

[3] Tsalagi is the formal name of the Cherokee language. Tr. p. 255.

ARGUMENT

I.

Appellant's argument is not preserved for appellate review where he failed to state the specific nature of his objection. Preservation concerns aside, the trial judge did not abuse her broad discretion in allowing Appellant to testify about specific facets of Cherokee religion that were relevant to the case and the admission of such testimony did not violate Rule 403, SCRE, or Rule 610, SCRE.

Appellant contends the State improperly made an issue of Appellant's religious beliefs. Appellant seems to acknowledge the evidence was relevant but contends it was unduly prejudicial. Further, Appellant avers the solicitor's general questioning about Cherokee religion violated Rule 610, SCRE, alleging it amounted to evidence impairing his credibility. These arguments are unpreserved and completely lack merit. The limited background testimony about Tsul Kalu, a Cherokee deity, was highly probative where Appellant sent text messages referencing Tsul Kalu and was accused of using a Tsul Kalu mask in a threatening and violent manner and this probative value was not substantially outweighed by the risk of unfair prejudice. Also, the State elicited the testimony about Appellant's religion only to provide explanatory context to his statements, not to attack his character or credibility.

As a threshold matter, Appellant's arguments are not preserved for appellate review. While Appellant offered an objection, he failed to state the specific ground on which he was objecting and did not provide any argument explaining the nature of his objection. He did not reference Rule 403 or Rule 610. An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error. State v. Byars, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011); see also State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (objection must be entered on a specific ground at trial to preserve an appeal). Appellant's failure to make a specific objection at trial precludes appellate review.

Appellant's Testimony was Admissible under Rule 403, SCRE

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 her broad discretion by allowing Appellant's testimony about Tsul Kalu. Appellant testified that, while locked inside his home and refusing to answer the door when law enforcement was knocking, he texted Ms. Sanders that law enforcement better be ready to face Tsul Kalu if they entered the home. Appellant also was accused of putting a wooden Tsul Kalu mask over his face and "cursing" Mr. Sanders. Since the name Tsul Kalu came up at trial, it was of vital importance for the jury to understand who the deity was and why Appellant would invoke his name when being hostile towards Mr. Sanders and law enforcement. Without the explanatory context, the jury would be confused concerning who Tsul Kalu was and why Appellant mentioned him in a text message threatening law enforcement. The colloquy with Appellant about his religious briefs was exceptionally brief, and the solicitor expressly noted she was not downgrading Appellant's religion, thus limiting any

minimal prejudice that could stem from the testimony. The evidence's significant probative value was therefore not substantially outweighed by the risk of unfair prejudice.

Rule 610, SCRE

Similarly, Appellant's arguments that the solicitor's questioning constituted improper impeachment and an attack on Appellant's character similarly lack merit. Rule 610, SCRE, provides, "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced." While no argument concerning Rule 610 was raised below, it is inapplicable in Appellant's case. The limited background testimony about Tsul Kalu was not introduced for impeachment or to impugn Appellant's character. The solicitor expressly noted she was not criticizing or attacking Appellant's religious beliefs, but instead was seeking explanatory context for why Appellant referenced Tsul Kalu when discussing law enforcement and why Appellant used a Tsul Kalu mask in his confrontation with Mr. Sanders. The testimony was intended to educate the jury about who Tsul Kalu was and give context to Appellant's threats. Appellant's argument therefore lacks merit. Appellant's conviction and sentence should be affirmed.

II.

The trial judge did not abuse her discretion in submitting a copy of the written jury charge to the jury at the jury's request during deliberations.

Relevant Facts

After the trial judge charged the jury on the law in the case, she asked the solicitor and Defense Counsel about sending the written charge back with the jury. Tr. p. 315. Defense Counsel indicated he objected to sending the charge back. Tr. p. 317. The trial judge replied, "I only do it if both sides consent." Tr. p. 317. The trial judge continued, "I don't do it unless both

sides consent. I will tell you this, the very - - the last time I didn't send it back - - now, I'm not predicting anything - - the very first question I got was can we have your charge on the law in written form." Tr. p. 319. After beginning deliberations, the jury asked for the written definition of all of Appellant's charges. Tr. pp. 321-23. The jury also asked a question pertaining to the domestic violence charge. Tr. p. 322. Defense Counsel again objected, stating, "Your Honor, I think it's up to you, but obviously I'm object - - I object to them being handed the written version of it." Tr. p. 321. The trial judge ruled, "And now that they've asked for it, I'll send it back. Tr. p. 321. The trial judge told the jury, "I am now going to give you my written instructions as a whole. It does have the domestic violence section in there. So if you feel, Madame Foreperson, that that satisfies your question about it, all I can explain to you is what is the law in this state and I've given you what the particular statute is." The trial judge continued:

> And you want the written definition of all charges. I'm going to give you my written charge that I read to you. I was required by law to read it to you as I did, but I'm going to give you my written charge. Let me give you some instructions on how to handle it. You may not consider part of the charge and ignore other parts of the charge. You must take it as a whole. Don't let it get you distracted from your duties of discussing this case and discussing your understanding of the facts in this case.

Tr. pp. 323-24.

Discussion

Appellant asserts the trial judge erred in submitting the written jury charge to the jury. This argument lacks merit. The trial judge properly exercised her discretion and submitted the Court's instructions to the jury in writing where the jury specifically requested a portion of the charge in writing thus rendering the written charge enormously helpful to the jury in applying the law as charged to the facts of the case. Further, Appellant has failed to show the trial judge's decision to submit the written instructions to the jury prejudiced him in any way.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). A trial court may, in its discretion, submit its instructions on the law to the jury in writing. State v. Turner, 373 S.C. 121, 129, 644 S.E.2d 693, 697 (2007). A trial court should use this practice sparingly and only when it will aid the jury and not prejudice the defendant. State v. Covert, 382 S.C. 205, 210, 675 S.E.2d 740, 743 (2009). See also Turner, 373 S.C. at 129, 644 S.E.2d at 697-98 ("While the written submission of the jury instructions could aid a jury in properly applying the law to the facts before it, this practice should be carefully exercised by the bench."). Notably, it is never appropriate to give only part of the charge to the jury. State v. Lemire, 406 S.C. 558, 566, 753 S.E.2d 247, 251 (Ct. App. 2013).

In Appellant's case, the trial judge properly exercised her discretion in submitting the written charge to the jury. The jury requested the written definition of all charges, as well as a question related to the charge on domestic violence. The submission of the full written instructions to the jury clearly aided in their deliberations, as the jury specifically requested them as part of their deliberation. The trial judge correctly recognized she could not submit only a portion of the written jury charge and gave the jury the charge in its entirety. While the trial judge initially deferred to Counsel on whether the written charge should be submitted to the jury, it later became necessary for her to carefully exercise her discretion and submit the instructions to the jury where the jury required them in order to thoroughly deliberate. Significantly, the trial judge instructed the jury that they should consider the charge as a whole and not let it distract them from their duties of discussing the case and applying the law to the factual scenario before them. This instruction ensured the jury would use the written instructions for their requested

purpose, as an aid for them to correctly apply the facts to the law in the case. Appellant did not argue this instruction was insufficient in any way.

Further, Appellant was not prejudiced by the submission of the written instructions to the jury. Appellant alleges the prejudice was evident because the jury reached a split verdict; however this argument lacks both substance and logic. The fact that the jury found Appellant guilty of one charge and not guilty of another had no bearing on whether the jury correctly applied the law to the facts of the case.[4] The jury, in carefully deliberating, requested the written charge to aid them in their deliberations. To allow the jury to have all available tools before it in reaching a decision is not prejudicial to the defendant. Also, the trial judge carefully admonished the jury to consider the charge as a whole and not let the written charge distract them from their duties as jurors. See State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them."). Appellant was thus not prejudiced in the slightest from the trial judge's decision to submit the instructions on the law to the jury in writing. Appellant's conviction and sentence should be affirmed.

[4] While Appellant also alleges a variation in the verbal and written charges confused the jury, the fact that the trial judge used the written charge to remedy an incorrect definition of the term "household member" from the verbal charge had no bearing on Appellant's conviction for attempted murder, as that instruction dealt only with the CDVHAN charge, a charge for which he was found not guilty. See Tr. pp. 325-46, p. 329-30.

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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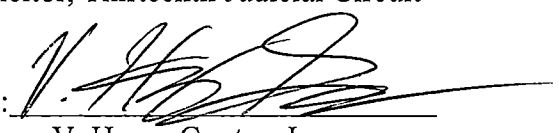
Solicitor, Thirteenth Judicial Circuit

BY: 
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April 9, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

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The Honorable Letitia H. Verdin, Circuit Court Judge

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THE STATE,

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Appellant.

PROOF OF SERVICE

I, Destiny Blue, certify that I have served the Initial Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: J. Falkner Wilkes, Esquire, 114 Whitsett Street, Greenville, South Carolina 29601.

I further certify that all parties required by Rule to be served have been served.
This 9th day of April, 2018.

Destiny Blue

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ALAN WILSON
ATTORNEY GENERAL

April 9, 2018

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APR 09 2018
SC Court of Appeals

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: The State v. Joseph Austin Carpenter
Appellate Case No: 2016-002335

Dear Ms. Kitchings:

Enclosed please find the original copy of the Initial Brief of Respondent and Designation of Matter along with proof of service in the above-referenced case.

Sincerely,

V. Henry Gunter
Assistant Attorney General
S.C. Bar No: 102259

VHR/db
Enclosures

cc: J. Falkner Wilkes, Esquire
Victim Advocacy Division