STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas
Carmen T. Mullen, Circuit Court Judge

Magistrate Court Arrest Warrant 2015A0710400456

Intermediate Appellate Case No. 2016-CP-07-1856

Appellate Case No. 2017-001046

BRIAN MACDERMANT ..... APPELLANT,

v.

STATE OF SOUTH CAROLINA ..... RESPONDENT

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General
S.C. Bar No. 8729

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

Post Office Box 1880
Bluffton, South Carolina 29910
(843) 255-5880

ATTORNEYS FOR RESPONDENT

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2. Whether Appellant's argument that the circuit court erred in refusing to reverse his conviction on grounds that the trial court violated his Sixth Amendment right to counsel by denying his motion for a continuance is preserved for appellate review where this argument was not properly raised to or ruled upon by the trial court. Furthermore, even if preserved, whether the circuit court properly concluded Appellant suffered no prejudice and was not denied his right to legal counsel where: (1) Appellant had repeatedly been advised of this right and had repeatedly waived counsel by choosing to proceed *pro se*, and (2) the motion was dilatory and designed to inappropriately delay trial after Appellant had been provided ample opportunity to find and retain counsel or apply for a public defender.

3. Whether Appellant's argument that the circuit court erred in refusing to reverse his conviction on grounds that Victim committed perjury at trial is preserved for appellate review where this claim was waived before the circuit court. Furthermore, even if preserved, whether the circuit court properly affirmed the trial court's decision to leave any determination about the credibility of Victim solely to the jury.

4. Whether Appellant's argument that the circuit court judge should have recused herself from considering his appeal on grounds that she demonstrated bias by asking whether he and Victim had run for office is preserved for appellate review where this argument was neither raised to nor ruled upon by the circuit court, and has been abandoned. Furthermore, even if preserved, whether the circuit court properly heard and ruled upon the Appeal where the Appellate Rules grant judges broad discretion and scope in addressing questions to the parties during oral arguments, and where Appellant failed to demonstrate any bias or prejudice from the circuit court judge's questions.

5. Whether Appellant's argument that the circuit court erred in refusing to reverse his conviction on grounds that the trial court improperly refused to allow him to introduce witness statements at trial is preserved for appellate review where this claim was waived before the trial judge. Furthermore, even if preserved, whether the circuit court properly affirmed the trial court's ruling because the written statements to the police constitute inadmissible hearsay.

STATEMENT OF THE CASE

Appellant Brian J. MacDermant was arrested on November 15, 2015, and charged with Assault and Battery in the Third Degree. (R.p. 15-p.18). On August 16, 2016, Appellant proceeded to a trial by jury before the Honorable Richard A. Brooks, Magistrate Judge. Appellant appeared *pro se* and Respondent (the State) was represented by Sergeant Andrew Rice of the Beaufort County Sheriff's Office. At the conclusion of trial, the jury found Appellant guilty as charged and Judge Brooks sentenced him to thirty (30) days imprisonment suspended upon the payment of a fine plus court costs in the statutory amount of $1,087.50. (R.p.15-p.16).

Appellant appealed his conviction to the Court of Common Pleas. (2016-CP-07-1856). This appeal was filed on August 24, 2016, an on September 23, 2016, Judge Brooks submitted a "Return of Appeal" to the Circuit Court which purportedly included a recording of the proceeding during trial.[1] Appellant's arguments were heard before the Honorable Carmen T. Mullen on April 11, 2017. (R.p.2). In a Form 4C Order filed April 17, 2017, Judge Mullen ruled: "Upon appeal from Magistrate Court's Order, Appellant, Brian MacDermant's appeal is respectfully denied and the decision of the Magistrate is hereby affirmed as no errror of law exists to overturn the Order." (Order filed April 17, 2017).

Appellant timely served and filed a *pro se* Notice of Appeal. By Order filed June 12, 2017, this Court dismissed the appeal due to Appellant's failure to order the transcript in a timely matter; however, the Court reinstated the appeal by Order filed July 19, 2017, because Appellant provided proof the transcript was ordered. Apppellant subsequently submitted a Brief and later submitted a Designation of Matter. This Brief of the Respondent now follows.

[1] Although Appellant appears to have heard at least portions of this recording based on quotations in his Brief and statements made during the appeal, the State has been unable to obtain a copy of the recording despite contacting both the Clerk of the Magistrate Court and the Clerk of the Circuit Court.

STATEMENT OF FACTS

On November 4, 2015 Appellant repeatedly shoved Thomas Klein (Victim), and threatened to throw him to the ground. On November 15, 2015, Appellant was arrested for Assault and Battery in the Third Degree. (R.p.15-R.p.18). Appellant had a bond hearing on that same day, during which he was advised of his right to legal counsel. (R.p.15-R.p.16) Appellant signed a *Faretta* warning form waiving his right to counsel and choosing to proceed *pro se*. (R.p.15-R.p.16; 28) On January 13, 2016, when he filed a Jury Trial Request Form, Appellant was again notified of his right to counsel and of his responsibility to notify the court as whether or not he had obtained counsel. (R.p.15-R.p.16) Appellant was sugsequently summoned by mail to appear for a status conference and to attend a Jury Trial Roster Meeting to be held on April 21, 2016. (R.p.15-R.p.16). At that meeting, Appellant requested a continuance which was granted by the court. (R.p.15-R.p.16) Appellant was later summoned to another status conference and roster hearing to be held on June 27, 2016; however, Appellant failed to appear as summoned and the court scheduled a jury trial date for August 16, 2016 at 1:00 p.m. *Id.* Appellant received notice of trial on August 15, 2016. (R.p.20-R.p.23).

Appellant's case was called for trial on August 16, 2016, before the Honorable Richard A. Brooks. (R.p.15-R.p.16). The State was represented by Sergeant Andrew Rice of the Beaufort County Sheriff's Office and Appellant appeared *pro se*. (R.p.15-R.p.16) Prior to trial, the trial judge, Sergeant Rice, and Appellant had a pretrial conference. (Brief of Appellant, p.2). During this conference, Appellant allegedly moved for a continuance on the ground that he needed more time to hire an attorney. (R.p.15-R.p.16) This motion was denied. *Id.* Following this meeting Appellant's trial commenced. Over the course of the trial Sergeant Rice, Victim, and Appellant testified. (R.p.15-R.p.16). After hearing testimony and reviewing the evidence, the jury found Appellant guilty of Assault and Battery in the Third Degree. (R.p.15-R.p.16)

Judge Brooks then sentenced Appellant to thirty days in jail, suspended upon the payment of a fine plus court costs. (R.p.15-R.p.16) This amount totaled $1,087.50. (R.p.15-R.p.16)

On August 24, 2016 Appellant appealed the conviction and sentence to the Court of Common Pleas. (R.p. 20). On September 23, 2016, Judge Brooks submitted a written "Return of Appeal" to the Circuit Court which described the lower court proceedings, the issues raised, and his rulings. (R.p.15-R.p.16). This intermediate appeal was heard by the Honorable Carmen T. Mullen on April 11, 2017. (R.p.2). After hearing oral arguments, reviewing the Return of Appeal, and reviewing the filings of Appellant and the Respondent, Judge Mullen took the matter under advisement. On April 17, 2017, she issued a written order denying the appeal and affirming Appellant's conviction and sentence. (Order filed April 17, 2017). Appellant filed a timely notice of appeal dated on April 26, 2017.

ARGUMENT

I.

Appellant's arguments 1 and 2, that the circuit court erred in refusing to reverse his conviction on grounds that the trial court violated his Fifth and Fourteenth Amendment rights to due process by failing to address an interjection from Victim's wife during Victim's testimony at trial, are not preserved for appellate review because these arguments were neither raised to nor ruled upon by the trial court. Furthermore, even if preserved, the circuit court properly concluded Appellant suffered no prejudice from the interjection and therefore any possible error was harmless.

In issues 1 and 2, Appellant claims the Circuit Court erred in refusing to reverse his conviction on grounds that he was not given a fair trial, in violation of his Fifth and Fourteenth Amendment rights to due process, because the trial court did not address or admonish the Victim's wife when she stood up in the courtroom and corrected Victim during Victim's testimony at trial. These arguments are not preserved for appellate review because they were neither raised to nor ruled upon by the trial court. Furthermore, even if preserved, the circuit court properly denied relief where Appellant suffered no prejudice from the interjection, and therefore any possible error during trial was harmless.

According to Appellant, at trial, Victim was called to the stand by the State. On cross-examination, Appellant attempted to impeach Victim by questioning him about whether any guests were verbally invited to a party thrown by Victim and his wife, rather than by written invitation, knowing that Victim had verbally invited at least one guest known to Appellant.

> Appellant: Did you have Dale Owen's [witness known to Appellant as having been invited by oral communication] name on the email list?
>
> Victim: Um, I'd need to look at the list again. My wife, again my wife, did the list.
>
> ...

Appellant: So some people was anybody at this people that was verbally invited?

Victim: Not that I'm aware of. Maybe last minute, maybe Mr. Ashmore.

Victim's Wife [from gallery]: He's on the list.

Victim: He's on the list, ok. Again, I was not responsible for the list of attendees.

. . .

Appellant: Give me a minute, your Honor, please. Um.

(Brief of Appellant, p.3-p.4). Appellant complains that the trial court did not address or admonish the Victim's wife when she stood up in the courtroom and corrected Victim from the gallery. During his appeal to the circuit court, Appellant acknowledged he did not object or move for a mistrial at trial due to this incident. (R.p.8).

Issue Preservation

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." *Id.* at 142, 587 S.E.2d at 694 (2003). "An issue that was not preserved for review should not be addressed by the Court of Appeals . . ." *Id.* Here, Appellant, failed to appropriately address these matters at trial through objection, requesting a corrective or limiting instruction from the trial court, or moving for a mistrial. As such, Appellant failed to preserve these issues for appeal and they should not be considered by this court. Furthermore, these issues are not identified or ruled upon in the trial court's written return, which similarly renders them unpreserved. (Return of Appeal). Even if these claims had

been preserved for review, the circuit court properly affirmed because Appellant failed to display or demonstrate how he was prejudiced by the inaction of the trial court.

Discussion / Analysis

Trial judges have wide latitude in exercising control of their courtrooms. Thus, under the circumstances posited by Appellant, it would have been entirely appropriate for the trial court to admonish Victim's wife or to issue a corrective instruction to jurors, especially when Appellant was proceeding *pro se*. However, it was likewise appropriate for the trial judge to simply let an incident like this pass without drawing further attention to the interruption, particularly where it could not have been prejudicial to Appellant's case. For this same reason, any possible error was harmless. It is clear from Appellant's own filings that he was unskilled in the cross examinations of witnesses, but he had specific facts he was trying to elicit from Victim, including that some witnesses were not on the written list of invitees to the party. Victim could not recall the information provided, and his memory was refreshed by his wife, whom Victim had just moments before testified was the one who had formed the list. Such information is not prejudicial to Appellant's case; if anything it was helpful based upon the line of Appellant' questioning and allowed him to elicit useful information. Appellant failed to demonstrate any prejudice from the trial court's inactions, making any such error harmless. This Court should therefore affirm the decision of the circuit court to affirm Appellant's conviction and sentence.

II.

Appellant's argument that the circuit court erred in refusing to reverse his conviction on grounds that the trial court violated his Sixth Amendment right to counsel by denying his motion for a continuance is not preserved for appellate review because this argument was not properly raised to or ruled upon by the trial court. Furthermore, even if preserved, the circuit court properly concluded Appellant suffered no prejudice and was not denied his right to legal counsel where: (1) Appellant had repeatedly been advised of this right and had repeatedly waived counsel by choosing to proceed *pro se*, and (2) the motion was dilatory and designed to inappropriately delay trial after Appellant had been provided ample opportunity to find and retain counsel or apply for a public defender.

Appellant contends the cirucuit court erred in refusing to reverse his conviction on grounds that the trial court violated his Sixth Amendment right to counsel by denying his motion for a continuance to give him more time to attempt to secure legal representation. However, as Appellant admittedly failed to make any such motion for a continuance on the record, the issue is unpreserved for appeal and should be dismissed by this court. *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693. Furthermore, Appellant waived this issue on appeal by failing to specifically argue it on appeal to the circuit court.

According to Appellant, the parties participated in a pretrial conference after jury selection on August 16, 2017. This conference was off of the record as it was supposed to deal exclusively with housekeeping matters. Appellant claimed that he raised his motion for a continuance at this pretrial conference, and that it was denied by the trial judge. However, as Appellant did not make his motion on the record, this issue is not preserved for appellate review. Furthermore, on appeal to the circuit court, Appellant never argued a violation of his Sixth Amendment right to counsel or complained about the trial court denying his alleged motion for a continuance. There was a brief mention of Appellant appearing *pro se* and his failure to apply for a public defender (R.p.8-p.9), but the only issue Appellant actually argued on appeal was the challenge to the interjection from Victim's wife during trial, which was addressed in issue I

above. (R.p.5-p.7). Because these issues are not preserved, this Court should affirm the ruling of the circuit court and decline to address the alleged violation of the Sixth Amendment and the denial of a motion for a continuance in this appeal. In any event, even if these issues were preserved, they are without merit.

In South Carolina "[t]he grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record. *State v. Hill*, 409 S.C. 50, 59, 760 S.E.2d 802, 807 (2014); *State v. Morris*, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008). "A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions." *State v. Barnes*, 407 S.C. 27, 35–36, 753 S.E.2d 545, 550 (2014). "Recognizing that it may be to the defendant's detriment to be allowed to proceed *pro se,* his knowing, intelligent, and voluntary decision 'must be honored out of that respect for the individual which is the lifeblood of the law.'" *Barnes*, 407 S.C. at 36, 753 S.E.2d at 550, *citing Faretta v. California,* 422 U.S. 806 (1975). "So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by *Faretta."* *Barnes,* 407 S.C. at 35, 753 S.E.2d at 550. "Under *Faretta,* the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel. *Barnes,* 407 S.C. at 35, 753 S.E.2d at 550.

Appellant claims that he was not provided notice of the need for counsel and that he was subsequently denied due process by being denied the right to have or seek legal counsel. Evidence in the record refutes this claim. Appellant was notified of his right to legal counsel on November 15, 2015. (R.p. 15-R.p.16). Appellant initially waived his right to counsel and chose to proceed *pro se*. Appellant signed a *Faretta* warning form to that effect. (R.p.15-R.p.16; 28)

Appellant claims that he did not know that he needed counsel as he did not know that he was going to trial on the charge for which he was arrested. (R.p.9). Appellant argued he could not afford private counsel; however, Appellant acknowldged he never applied for a public defender as a result. (R.p.9). Further, Appellant claims he had only six days' notice to attempt to find legal counsel after he was told by the Beaufort Clerk of Court that trial would be August 16, 2016. But Appellant signed a Jury Trial Request Form on January 13, 2016 which provided all parties notice that the case was destined for trial as Appellant was the one requesting said trial. (R.p.15-R.p.16). Appellant was then properly summoned, and admits to receiving the summons noticing him that his trial was scheduled for August 16, 2016. Appellant admits receiving a certified letter and signing for such on August 7, 2016. (Brief of Appellant, p.3).

Appellant had approximately nine months from signing his *Faretta* Warning Form to his trial. In that nine month period of time Appellant reinforced his decision to the courts that he wished to proceed *pro se* by filing documents on his own behalf, specifically the Jury Trial Request Form. Appellant obviously had notice he was going to trial at this point, as he requested the jury trial. Even assuming that Appellant was unaware of exactly what his rights were under *Faretta* when he first chose to proceed *pro se*, seven months elapsed from the date Appellant requested a trial and the trial date. Appellant then had nine more days between notice of his actual trial date and the trial itself. Appellant does not deny that in that nine day period he did not apply for a public defender or contact the courts to determine the process for appointment of counsel. Appellant repeatedly failed to seek counsel and chose to proceed *pro se* over a course of nine months until after a jury was impaneled and his trial was mere minutes from

commencing.[2] Appellant properly and competently waived his right to counsel, proceeded *pro se* for nine months, and only requested a continuance of trial to seek counsel after a jury had been selected and the court and State were ready to begin the trial. The trial judge was well within his discretion to deny a motion for a continuance that would impact the trial, especially when such a motion is served minutes before trial and Appellant had nine months to secure counsel. This Court should affirm the holding of the circuit court affirming Appellant's conviction and sentence.

[2] Appellant claims he filed a handwritten Motion for Continuance on August 10, 2016 as he had only been provided six days' notice of trial based upon his receipt of notification of trial on August 7, 2016. (Brief of Appellant, p.3). However, Appellant does not provide any service of process showing the State was served with the motion or a file stamped copy showing the court's receipt of such a motion. Further, he is unable to demonstrate which judge heard this motion, and does not have a copy of a ruling from the court showing the denial of such motion. Without any evidence of this motion the State is unable to address this point and it is not preserved for appellate review.

III.

Appellant's argument that the circuit court erred in refusing to reverse his conviction on grounds that Victim committed perjury at trial is not preserved for appellate review because this claim was waived before the circuit court. Furthermore, even if preserved, the circuit court properly affirmed the trial court's decision to leave any determination about the credibility of Victim solely to the jury.

Appellant claims the circuit court erred in failing to reverse his conviction on grounds Victim commited perjury at trial. Appellant failed to preserve this argument for appellate review because, on appeal to the circuit court, Appellant specifically waived it. Althgouh he briefly mentiones his belief that the State came at him "with perjury, exaggerations, and lies," he told the circuit court he was "not here to quivel [sic] about the perjury" and focused his entire argument on his complaint about Victim's wife. (R.p.5-R.p.6). Because this issue is not preserved, this Court should affirm the ruling of the circuit court and decline to address the alleged violation of based on the allegations of perjury. In any event, even if this issue was preserved, it is without merit.

Appellant appears to allege he was denied due process of law because the trial judge did not issue a directed verdict motion when the Victim gave perjured testimony. However, the trial judge charged the jury in regard to its role as the sole judge of the credibility a witness's statements (R.p.15-R.p.16). In South Carolina the jury, as the finder of fact, makes the determination as to the truthfulness and credibility of witnesses, not the court. A court has no ability to overturn a jury's findings or substitute the bench's judgment for that of the jury when there exists competent evidence to support and sustain a jury verdict. Here there was ample evidence to sustain the jury's findings, and Appellant does not show any evidence to the contrary. For these reasons this court should affirm the findings and judgement of the courts below.

IV.

Appellant's argument that the circuit court judge should have recused herself from considering his appeal on grounds that she demonstrated bias by asking whether he and Victim had run for office is not preserved for appellate review because this argument was neither raised to nor ruled upon by the circuit court, and because it has been abandoned. Furthermore, even if preserved, the circuit court properly heard and ruled on the appeal where the Appellate Rules grant judges broad discretion and scope in addressing questions to the parties during oral arguments, and where Appellant failed to demonstrate any bias or prejudice from the circuit court judge's questions.

Appellant contends the circuit court asked questions that were inappropriate when the case was on appeal and that in doing so, the judge displayed impermissible bias. Appellant further contends that this prejudice demonstrated partiality against him and that Judge Mullen should not have heard the appeal. Appellant did not raise an objection or otherwise bring his concerns to the attention of the circuit court; therefore, this issue is not preserved for appeal. Also, it is without merit.

During the course of the April 11, 2017, hearing before the circuit court, the following exchange took place:

> The Court: Were you all running for something - - were you running for a position or - -
>
> Appellant: No, Your Honor. I was not.
>
> The Court: Okay. Was the person that testified against you running for a position?
>
> Appellant: They are a - - what do you call it - - an elected official. Yes, Your Honor.
>
> The Court: Okay. All right. I'm going to take this under advisement and I'll issue an order, but thank you both. I appreciate it.
>
> Appellant: Okay. Thank you, Your Honor.

(R.p.13). Appellant failed to object to Judge Mullen's questions or otherwise address his concerns about such questions to the court. He did not make a motion to recuse. Consequently, Appellant failed to give the court an opportunity to clarify its intent in asking the questions by either agreeing with Appellant and striking the questions from the record, or overruling Appellant's objection with an explanation for its decision. As such, this issue is not preserved for evaluation or decision by this court and this court should dismiss this claim from further consideration. *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693. Even if preserved, the claim of judicial bias is entirely without meit.

Appellant alleges prejudice simply from the circuit court judge inquiring whether the Appellant and Victim had both run for some kind of office. Appellant cites no authority for such a proposition, thus this issue should be deemed abandoned and should not be considered by this court. *Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) ("It is a well-established precedent in this State that when a party's brief fails to set forth a substantive legal argument for an issue or provide supporting citations to authority supporting a proposition, such issue is considered to be abandoned on appeal by the appellate courts. "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."). Even if not abandoned, the argument is without merit.

Judge Mullen did not commit reversible error in asking the questions or failing to recuse herself both because judges are permitted broad judicial discretion in questioning litigants during oral arguments, and because the judge's questions did not violate the South Carolina Judicial Canons. "A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned." *State v. Cheatham,* 349 S.C. 101, 111, 561 S.E.2d 618, 624 (Ct. App.2002). "Under Canon 3(E)(1)(a) [of Rule 501, SCACR), a judge should

disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice against a party." *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004). ". . . [T]he South Carolina Supreme Court has stated that the movant or petitioner must show some evidence of the bias or prejudice of the judge." *Simpson v. Simpson*, 377 S.C. 519, 524, 660 S.E.2d 274, 277 (Ct. App. 2008). "Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." *State v. Howard*, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009). "It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias." *Id. Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004); *Mallett v. Mallett,* 323 S.C. 141, 473 S.E.2d 804 (Ct. App.1996). "Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature." *State v. Howard*, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009). "The fact a judge ultimately rules against a litigant is not proof of prejudice by the judge, even if it is later held the judge committed error in his rulings." *Srivastava v. Srivastava*, 411 S.C. 481, 500, 769 S.E.2d 442, 452–53 (Ct. App. 2015); *Reading v. Ball,* 291 S.C. 492, 495, 354 S.E.2d 397, 399 (Ct.App.1987).

Judges are permitted broad discretion in the scope of the questioning during oral arguments. In the instant case, Appellant alleges prejudice by the court in its inquiries as to whether Victim and Appellant had run for office. However, Appellant fails to specify or demonstrates any prejudice or bias by the court, other than the fact that his conviction was not overturned on appeal. The circuit court judge was within her rights to ask the questions that she did, and the court's actions are not reversible error. This court should affirm Appellant's conviction and the findings of the courts below.

V.

Appellan's argument that the circuit court erred in refusing to reverse his conviction on grounds that the trial court improperly refused to allow him to introduce witness statements at trial is not preserved for appellate review because this claim was waived before the trial judge. Furthermore, even if preserved, the circuit court properly affirmed the trial court's ruling because the written statements to the police constitute inadmissible hearsay.

Appellant claims the circuit court erred in refusing to reverse his conviction on grounds that he was denied a fair trial when the trial judge refused to allow him to introduce witness statements at trial. Appellant, however, ultimately agreed with the trial court that the affidavits were not admissible and thereby waived this issue for purposes of appeal. The circuit court properly affirmed.

At Appellant's trial, Appellant sought to introduce a statement Victim made to law enforcement on the night of the assault, as well as a statement from a witness to the assault. The trial court denied this motion, ruling that "affidavits in lieu of personal appearance by witnesses who live in the area and could have been summoned are hearsay and not admissible as evidence." ((R.p.15-R.p.16); Brief of Appellant, p.5). Rather than offering further argument, Appellant simply clarified with the trial judge why the affidavits were inadmissible. (Brief of Appellant, p.5). He stated "I'm very stressed. This is a difficult process yes your Honor. *Ok, thank you. It's not admissible. That's the answer. Thank you so much.*" *Id.* (emphasis added). Thus, Appellant appears to have waived this issue by agreeing with the trial court and its ruling. For this reason alone, this court should not consider this claim as it was waived at trial, and therefore is not preserved for review on appeal. In any event, even if preserved the issue is without merit because the trial court properly excluded the statements as inadmissible hearsay.

"In criminal cases, the appellate court sits to review errors of law only." *State v. Collins,*

409 S.C. 524, 529–30, 763 S.E.2d 22, 25 (2014), *citing State v. Baccus,* 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Mercer*, 381 S.C. 149, 160, 672 S.E.2d 556, 561 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Id.* "This Court is bound by the trial court's factual findings unless they are clearly erroneous." *State v. Collins*, 409 S.C. 524, 529–30, 763 S.E.2d 22, 25 (2014).

At trial, Appellant sought to introduce the statement of Victim made to law enforcement on the night Victim was assaulted by Appellant. This motion was made even though Victim was available and present at the trial as a witness for the State, with the sole purpose of being present to testify. He also sought to introduce the statement of a witness who was was not present at trial. The trial judge denied this motion, ruling that "affidavits in lieu of personal appearance by witnesses who live in the area and could have been summoned are hearsay and not admissible as evidence." (R.p.15-R.p.16); Brief of Appellant, p.5). This ruling was correct, and in keeping with the South Carolina Rules of Evidence (SCRE).

Rule 801 of the SCRE states that "'Hearsay'" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. An out of court statement is not hearsay if it is used to impeach a witness who is sworn and testifying under oath. "A statement is not hearsay if . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony." Rule 801(d)(1)(A), SCRE.

It is not in dispute that the affidavit made to the police by Victim was an out of court statement. Further, it is not in dispute that Appellant sought to admit this out of court statement for the truth of the matter asserted rather than appropriately questioning and cross-examining the witness while he was on the stand. Had Appellant sought to use the statement to demonstrate inconsistencies with Victim's trial testimony, Appellant may have been allowed to impeach Victim. *See* Rule 801(d)(1)(A), SCRE. However, simply introducing the statement as Appellant sought to do at trial was improper. The trial court correctly ruled that Victim's affidavit was inadmissible hearsay, and the ruling was properly affirmed by the circuit court.

CONCLUSION

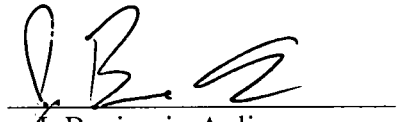
For all of the foregoing reasons, the State respectfully requests that the decision of the circuit court and Appellant's underlying conviction and sentence be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

BY: 
J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
April 12, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas
Carmen T. Mullen, Circuit Court Judge

Magistrate Court Arrest Warrant 2015A0710400456

Intermediate Appellate Case No. 2016-CP-07-1856

Appellate Case No. 2017-001046

THE STATE OF SOUTH CAROLINA.....RESPONDENT,

v.

BRIAN J. MACDERMANT.....APPELLANT.

Certificate of Counsel

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

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

BY: _____
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BRIAN J. MACDERMANT.....APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Legal Coordinator, hereby certify that I have served the within *Final Brief of Respondent* dated April 12, 2018, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Brian MacDermant, *pro se*
1007 11th Street
Port Royal, South Carolina 29935

I further certified that all parties required by Rule to be served have been served. This 12th day of April, 2018.

Angela Bennett
Legal Coordinator

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

April 12, 2018

Brian MacDermant, *pro se*
1007 11th Street
Port Royal, South Carolina 29935

Re: State v. Brian J. MacDermant
Appellate Case No. 2017-001046

Dear Mr. MacDermant:

I am enclosing two (2) copies of the *Final Brief of Respondent* in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original & 14 copies enclosed)
Victim Advocacy Division