THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY

Court of General Sessions

Honorable R. Markley Dennis, Circuit Court Judge

APPELLATE CASE NO. 2017-002104

THE STATE . . . . . RESPONDENT

v.

SAMUEL LEE BROADWAY. . . . . APPELLANT

INITIAL REPLY BRIEF OF APPELLANT

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I. THE TRIAL COURT'S ERROR IN SUSTAINING THE STATE'S HEARSAY OBJECTION IN THIS CASE IS PROPERLY PRESERVED FOR APPELLATE REVIEW.

The State's brief argues that the trial court's error in sustaining the prosecution's hearsay objection is not preserved for appellate review in this case. (Br. of Resp't 8-9). The cases cited by the State to support this argument are not controlling here. In *State v. Webb*, 697 S.E.2d 662 (2010), the appellant argued that the trial court violated his due process rights by limiting his attorney's cross-examination of one of the State's witnesses. *Id.* at 667. This Court held that the defendant's due process argument was not preserved for review because counsel failed to make that objection during trial. *Id.* The key issue in *Webb*, as is the case in many instances where this Court considers whether error is preserved for review, was whether the trial court had an opportunity to pass on the question that Webb raised on appeal. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been ***raised to and ruled upon*** by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1997)(citing *Creech v. S.C. Wildlife and Marine Resources Dep't*, 491 S.E.2d 571, 328 S.C. 24 (1997))(emphasis added). The trial court in *Webb* never ruled on the question of whether its limitation of Webb's cross-examination violated his due process rights. Conversely, in the present case, the trial court made a clear and unequivocal evidentiary ruling, excluding evidence that it deemed to be hearsay, and Broadway now assigns error to that ruling. The question of whether Ms. Burton's testimony was hearsay was therefore raised to the trial court (numerous times, incidentally), and the court issued a clear and final ruling on the question at hand. Consequently, *Webb* has no bearing on the present case.

Similarly, *State v. Mitchell*, 330 S.C. 189 (1998) has no bearing on the present case. In *Mitchell*, the defense attorney sought to cross-examine a key witness for the State regarding her pending criminal charges. *Id.* at 195. In a colloquy on the first day of trial, the court told the

defense attorney that he could ask the State's witness about whether she had pending charges, but "could not go into those specific charges." *Id.* The attorney acquiesced to the trial court's instruction. *Id.* On appeal, Mitchell argued that the trial court improperly limited his attorney's cross-examination, which deprived him of a fair trial. *Id.* This is a question that was never presented to the trial court, and therefore the Supreme Court held that it was waived for the purposes of appellate review. *Id.* Thus, *Mitchell* is easily distinguishable from the present case, because Mitchell sought to raise issues on appeal that had never been ruled on by the trial court. Here, Broadway assigns error *to the trial court's legal ruling* that appears clearly and unambiguously in the record before this Court. The trial court in this case had the opportunity – numerous times – to consider the question Broadway now puts to this Court, and decided the question adversely to Broadway in each instance. Broadway is entitled to have this Court consider that question in a full and meaningful way.

II. THE CASES RELIED UPON BY THE STATE TO ARGUE THAT BROADWAY'S STATEMENT WAS HEARSAY ARE INAPPOSITE HERE.

The State's brief cites numerous cases in which this Court and the Supreme Court held that certain statements were inadmissible hearsay. (Br. of Resp't 9-12). Each of these cases is distinguishable from the present case, and therefore they have no bearing here.

In *State v. Galloway*, 305 S.C. 258 (1991), Galloway "argue[d] he should have been permitted to testify as to what was said to him in his conversation with [a police officer]." *Id.* at 264. Galloway sought to testify that the police officer in question had attempted to extract a waiver of civil action from Galloway in exchange for dropping Galloway's charges. *Id.* At trial, Galloway was prevented from testifying about the substance of that conversation. *Id.* This Court held that the substance of Galloway's conversation with a police officer was hearsay. *Id.* Here, Broadway did not seek to introduce an out-of-court *conversation* with Ms. Burton. Rather, Broadway sought to admit a verbal request that "conveys no factual substance." (Br. of Appellant 13). As discussed at length in our Brief, Broadway's statement lacked any of the

vicarious factual assertions that give rise to hearsay issues. (Br. of Appellant 13-14). Conversely, *Galloway* was concerned with an entire conversation between the defendant and an officer, during which the officer allegedly sought to make a deal with Galloway in exchange for dismissing his charges. Though the opinion does not provide a detailed account of that conversation, it is impossible to imagine that a conversation of that sort could be as bereft of factual information as Broadway's statement, and therefore the comparison between these two scenarios is unfounded.

Similarly, the State's comparison to *State v. Brockmeyer*, 751 S.E.2d 645 (2013) is unfounded in the present case. In *Brockmeyer*, the defendant argued that it was error for the trial court to allow the State to present a photograph depicting the murder weapon and the victim's pellet gun side by side with the caption, "Wills[1] gun on left my gun on righ[t]." *Id.* at 662. The Supreme Court agreed that the caption was inadmissible hearsay. *Id.* However, the caption on the photograph is readily distinguishable from the testimony offered in the present case. The caption in *Brockmeyer* unambiguously identified the murder weapon as belonging to the defendant – in other words, the caption included a very obvious factual assertion about the owner of the gun. The caption was hearsay, therefore, because it contained a clear factual assertion, and the evidence was offered to prove that fact. This scenario is clearly distinguishable from the present case, where Broadway's statement made no factual claims whatsoever.

The State's brief cites *Deep Kell, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58 (2015), acknowledging that certain conduct with legal significance can fall outside the purview of the hearsay rule. (Br. of Resp't 10-11). The State concludes, however, that "this hearsay exception[2] does not apply so broadly as to apply to all statements that may have legal

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[1] The defendant's full name is William Brockmeyer. *Id.* at 649.

[2] Appellant respectfully takes exception to the State's characterization of this concept as a "hearsay exception." As this Court noted in *Deep Kell*, there is a clear and important distinction between *exceptions* to the hearsay rule, and statements that are *not hearsay* to begin with. "However, the master's reliance on a hearsay exception was unnecessary because the loan documents were not hearsay in the first place." *Id.* at 69.

ramifications or carry mitigating or exculpatory connotations." (Br. of Resp't 11). Broadway does not advocate for so broad an exception, and resolving this case in Broadway's favor does not require this Court to acknowledge such a broad exception. Rather, Broadway merely urges this Court to find that in cases where the law creates a legal duty to act in a certain way, and criminalizes conduct that falls short of such a duty, it is imperative that the defendant be permitted to present evidence of compliance or attempted compliance with the law. Not only is this "conduct with legal significance" as discussed in our Brief (Brief of Appellant 15-16), it is the key question that the jury was tasked with resolving in this case – "did Broadway comply with the requirements of S.C. Code §56-5-1210, including his duty to notify the police?" Broadway does not urge this Court to hold that "all statements that may have legal ramifications" are non-hearsay. Rather, Broadway urges the Court to hold that where, as here, the central question regarding guilt or innocence hinges on compliance with a statutory duty, the defendant must be permitted to present non-hearsay evidence of compliance.

CONCLUSION

For the reasons stated herein, and previously enumerated in the Brief of Appellant, this Court should reverse the judgment of the circuit court, and vacate Broadway's conviction and sentence.

Respectfully submitted,

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April 27, 2018.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the enclosed Initial Reply Brief of Appellant in the above-referenced case has been served upon David Spencer at P.O. Box 11549, Columbia SC 29211-1549.

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April 27, 2018.

THE LAW OFFICE OF
Christopher W. Adams
A PROFESSIONAL CORPORATION

April 27, 2018

Jenny A. Kitchings
SC Court of Appeals
PO Box 11629
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RE: Rule 208 Initial Reply Brief of Appellant
State v. Samuel Lee Broadway (Appellate Case No. 2017-002104)

Dear Ms. Kitchings:

Enclosed please find our Initial Reply Brief of Appellant in the above-referenced case. I have served one copy of the enclosed document on all parties via U.S. Mail, as required by Rule 208(a)(3).

Sincerely,

Christopher R. Geel
Attorney for Appellant

cc: David Spencer, Esq. (w/ enclosure)

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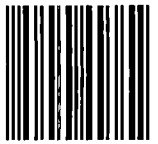

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