

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Berkeley County  
Roger M. Young, Sr., Circuit Court Judge  
\_\_\_\_\_

RECEIVED

NOV 28 2017

S.C. SUPREME COURT

THE STATE,

Respondent,

vs.

DONTE SAMAR BROWN,

Petitioner.

Appellate Case No. 2017-000094

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**BRIEF OF RESPONDENT**  
\_\_\_\_\_

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## **STATEMENT OF ISSUES ON APPEAL**

The trial court did not err in admitting GPS records since the records do not constitute hearsay, the foundation was sufficient to establish that the records were admissible as business records, and sufficient foundation was laid to authenticate the records.

## STATEMENT OF THE CASE

Petitioner Brown was indicted for three counts of armed robbery, five counts of kidnapping, attempted murder, criminal conspiracy, possession of a weapon during a violent crime, and burglary in the second degree. These charges all stem from the violent robbery of a Zaxby's restaurant. Brown was tried by jury on May 5-8, 2014, before the Honorable Roger M. Young, Sr. Brown was found guilty of all counts of armed robbery and kidnapping as well as burglary and criminal conspiracy. Brown was found not guilty of attempted murder and possession of a weapon during a violent crime. Judge Young sentenced Brown to an aggregate sentence of sixty years' imprisonment.

Brown appealed the conviction and sentence. The Court of Appeals affirmed in an unpublished Rule 220(b) opinion. State v. Brown, 2016-UP-447 (filed November 2, 2016). The Court of Appeals denied the subsequent petition for rehearing. Brown filed a petition for writ of certiorari, and the State filed its return. This Court granted the petition for writ of certiorari by order dated October 19, 2017.

## STATEMENT OF FACTS

The convictions in this case stem from the robbery of a Zaxby's restaurant around midnight on December 24, 2011, committed by Appellant Brown and his co-defendant, Christopher Wilson. Christopher Wilson was tried separately in a previous trial.

Jeffrey Taylor was the first witness for the State. He was sitting in his car outside Zaxby's where he worked. Taylor just got off duty. He made some phone calls and listened to music in his car. Taylor saw two men wearing black outfits, one of them with a gun, walking toward the back door of the restaurant. Taylor promptly called 911 to tell them Zaxby's was being robbed. ROA. pp. 220-225.

Riley Kemp was a cook at Zaxby's. Kemp was taking trash out to the dumpster behind Zaxby's. While putting trash in the dumpster, Kemp heard footsteps. Two men in dark clothes and ski masks took hold of him and smashed his cell phone. One had a knife and the other had a gun. ROA. p. 232; pp. 238-239.

One of the men checked out a noise from the other side of the dumpster and came back with V.J., a co-worker. The robbers searched V.J. but allowed him to leave. One robber took Kemp's wallet by ripping the pocket of his pants with a knife. ROA. pp. 240-242.

The robbers directed Kemp to let them in the restaurant. Kemp rang the buzzer, and someone let them in the back of the restaurant. The robbers made Kemp and his co-worker, Kevin Lane, lie on the ground. Kemp heard his manager plead, "Don't hurt us." Then Kemp heard a gunshot. Kemp heard the robbers dropping change as they left. Kevin called the police. ROA. pp. 243-245.

Vincent Riley, "V.J.", who also works at Zaxby's, testified. The manager, Linda

Williams, is his mother. Riley was not working at Zaxby's that night but was riding by the restaurant on his bike when he saw his co-worker's car and decided to ask for a ride. He heard voices behind the dumpster and called out his friend's name. Instead, a man came out with a gun. The robbers took his cell phone but gave it back and ordered Riley at gunpoint to take the battery out, which he did. Riley was able to identify the gun in court. Riley was told to leave, and he went home. ROA. p. 252-257. The robbers warned Riley not to "snitch." ROA. p. 260.

Kevin Lane was working at Zaxby's the night of the robbery, and he testified at trial. While carrying dishes into the back of the restaurant, Lane heard the buzzer and opened the door. Lane turned around to see the two robbers approaching, one with a gun. The robbers ordered Lane to the ground. Andre, another co-worker, was also on the ground. The robbers wore black clothes including black masks and also wore gloves. Lane heard what he described as a smacking noise, which he surmised was the gunshot, and then the robbers left. Lane called 911. ROA. pp. 264-268.

Daniel Auman also was working at Zaxby's that night as a dishwasher. He likewise was made to get on the ground by two men wearing black clothes and ski masks, one with a gun. They took his cell phone which he got back when they left. They hit him with the gun. ROA. p. 273-275.

Linda Williams testified she was on duty at Zaxby's when two gunmen came into her office wearing black clothes, hoodies, and masks. They made her stand up from her seat and then lie on the floor. They rifled through her pants and took \$18. They shot her. About \$3,600 to \$3,800 was stolen from Zaxby's. ROA. pp. 277-281. As the robbers were leaving, they argued over the bag of money, and they dropped some of the stolen money. ROA. pp. 286-287.

Melvin Powell and his wife were driving nearby the restaurant when Powell noticed a commotion. His wife was driving and she changed lanes to allow police cars to pass. There was a moment of darkness after the blue lights of the patrol vehicles passed by, and about that time his wife slammed on the brakes to avoid hitting two men in dark clothing running out of the woods. The two men ran down the road in between a fence and some bushes. ROA. pp. 294-295. Powell and his wife stopped at Zaxby's and spoke with police. ROA. pp. 296-297.

Sergeant Scott Cook of the K-9 Unit for the Berkley Sheriff's Department brought Gotcha, his German shepherd, to the scene. After being advised by officers that the two suspects were seen running across 176 and entering the Foxborough subdivision, Sergeant Cook put Gotcha into action. Gotcha followed a scent and led Sergeant Cook to a cul-de-sac where he found some money lying on the ground in front of a house at 310 Swamp Fox Lane. The trail ended in front of 318 Swamp Fox Lane. ROA. pp. 307-315; ROA. pp. 321-323. Sergeant Cook testified they later found money and a mask in the woodline by Zaxby's. ROA. pp. 322-323.

Marteeka Hamilton was in an off-and-on relationship with Petitioner Brown for six years. She received a call from Brown on Dolla's cell phone around midnight on December 23-24. Dolla is co-defendant Christopher Wilson's street name. Brown asked Hamilton to pick them up. She could not right away because she was at a salon, but then she spoke with Brown on the phone and told Brown she could pick them up. Brown said they had another ride, but then said they still needed her to pick them up. Hamilton picked up Brown and Dolla at the entrance of the Foxborough subdivision. A police car was in front of someone's house in the neighborhood. She told them she needed gas money and they gave her \$40. While Hamilton was driving, Dolla talked on the phone about shooting someone and said he did not mean to do it. Brown called

him a stupid motherfucker. Hamilton dropped them off at a mall parking lot between 1:00 a.m. and 2:00 a.m. even though the mall was closed. At first, they wanted her to drop them off at a pawn shop to get another ride. Hamilton spoke with Brown on his own phone several times in the days following the robbery. She saw Brown and Dolla at the Motel Six on Ashley-Phosphate Road. She noticed two or three shopping bags in the room. ROA. pp. 375-385; pp. 388-389.

Cynthia Garrett proved to be a key witness for the State. She had the common sense to not become a part of this robbery and the moral fiber to report Brown and Dolla to the police when Brown disclosed his crime to her. Garrett started dating Brown around November 2011. Brown's parents put him out of the house, so Garrett let Brown stay with her and her three kids. They had a fight, so Garrett told Brown to leave. Brown accused her of "being slick with another guy." ROA. pp. 411-413. Brown moved out about a week before Christmas. Garrett testified Brown would call her using Dolla's phone. ROA. p. 414.

Prior to moving out of the house, Garrett tried to convince Brown to take a job offer, and she offered to drive him back and forth to the job site. But Brown told Garrett he would "rather rob than work" when he decided to decline the job offer. ROA. p. 415, lines 8-18. Brown asked Garrett to let him use her car to commit a "lick," a slang term for a robbery. He was planning on doing the lick with Dolla. Garrett sagely refused. Garrett testified that one time her daughter saw Brown cleaning a gun in the kitchen. Garrett told Brown he needed to get the gun out of the house. ROA. pp. 416-417.

Garrett testified she picked up Brown from the area between Zaxby's and the Hess station sometime before Christmas. Brown was staying across the street with Dolla in a subdivision by Zaxby's. Brown often used Dolla's phone until he got his own phone. Around midnight on

December 23-24, Brown called her on Dolla's phone asking her to pick Brown and Dolla up. Brown tried to entice her to do this by offering to pay her light bill, which was about \$175, and to pay to fix the vent in her car. Garrett sagely declined. ROA. pp. 417-421.

The next time Garrett heard from Brown, Brown offered to take her out for her birthday on December xx. Garrett declined. Then around the beginning of the year, Garrett saw Brown, she wanted to have Dolla cut her son's hair before he went back to school. During this meeting, Brown told her about the robbery and how Dolla shot someone. Brown said they were scoping the scene out for a while. Brown told her they went shopping with the stolen proceeds and bought shoes, clothes, and cell phones. Garrett noticed Brown was wearing new clothes. Brown told her how they dropped some of the money but kept running because the police were coming. Brown told her that his ex-girlfriend picked him and Dolla up. Brown and Dolla then rented a car and went out of town for a while. Brown said he was staying in a hotel. Garrett went to the police because it was the right thing to do. ROA. pp. 422-426.

Captain David Sodeberg participated in the execution of the search warrant at 318 Swamp Fox Lane. Brown was located in the house at the time the search warrant was executed. Law enforcement located a blue Ruger Mark II semi-automatic .22 caliber pistol in a suitcase sitting outside the exterior door to the garage. Law enforcement also seized a knife from the residence. ROA. pp. 478-483.

Investigator Powell was not originally the lead investigator but became the lead investigator after Investigator Mason went on leave a couple days after the robbery and shooting. On December 29 he received a tip. The tipster was Cynthia Garrett. Investigator Powell verified that Brown stayed at Motel Six. Garrett corroborated the approximate amount of money stolen

from Zaxby's. DNA on the ski mask matched Wilson's DNA. During the execution of the search warrant, a social security card of one of the victims of the robbery was found in the drawer in a bedroom at Wilson's house. ROA. pp. 486-494.

Law enforcement obtained cell phone records for Dolla, Brown, Hamilton, and Garrett. ROA. p. 503. Law enforcement also obtained the GPS records for Dolla, who was on probation and wearing an ankle bracelet. The GPS records and phone records indicate the following:

- On 12/23/15, Dolla's phone is used to call to Hamilton at 10:54 p.m. GPS records show that at that time Dolla was at 431B St. James Avenue (Zaxby's is at 433 St. James Avenue). ROA. pp. 508-510. According to Powell's records, 431B is actually in the woods. ROA. p. 522, lines 2-5.
- Dolla's phone records indicate a call to Hamilton at 12:16 a.m. on 12/24/15. Zaxby's was robbed at four minutes after midnight. ROA. pp. 510-511.
- There was a seven-minute gap from 12:01 to 12:08 in the phone records and the Zaxby's robbery lasted roughly two and a half to three minutes. ROA. p. 511. GPS records show that at 12:07 a.m., Dolla was located at Zaxby's. There is a gap in records from 12:07 a.m. until 12:53 a.m. ROA. p. 511, line 21 – p. 512, line 4.
- The records show outbound calls from Dolla's phone to Garrett at 12:20 a.m., 12:21 a.m., and 12:22 a.m. ROA. p. 514, lines 19-21.
- More phone calls were made to Hamilton at 12:22 a.m. and 12:28 a.m. ROA. pp. 512-513. There were several more calls until 12:50 a.m. ROA. p. 513.
- GPS records indicate Dolla was at 310 Swamp Fox Lane at 12:53 a.m. At 12:57

a.m., he was at 318 Swamp Fox Lane. Then Dolla starts progressively moving down St. James Avenue, corresponding to the cell phone records and Hamilton's testimony that she picked the robbers up at about 1:00 a.m. ROA. pp. 513-514.

Melinda Knowland, an employee from Motel Six verified that on December 24, 2011, Brown was registered as a guest. ROA. pp. 553-555.

Sonia Wilson, Christopher "Dolla" Wilson's mother, testified she arrived home to discover a search warrant was executed at her house at 318 Swamp Fox Lane. Christopher Wilson was not at the house when the search warrant was executed. She testified that Ramen noodles were left out on the table and neither she nor her husband eat Ramen noodles. ROA. pp. 557-558. Sonia testified she found Brown inside her house once when her son was not there. ROA. p. 559.

Lanier Daniels was in jail during January 2012 for driving under suspension. Brown was also there. Brown talked about the Zaxby's robbery; he was mad because the other guy shot someone during the robbery. Daniels testified that Brown told him he was arrested while having Ramen noodles at somebody's house. Brown told Daniels he was at the house to get rid of the gun. Brown also told Daniels that his baby-mother picked Brown and his accomplice up after the robbery. ROA. pp. 560-564; p. 567.

SLED Agent Kenneth Whitler (retired at the time of trial) testified the cartridge case submitted to him was fired by the gun submitted to him. ROA. pp. 568-570; p. 575. Daniel Demers was qualified as an expert in forensic testing of DNA. He testified that DNA found on the recovered ski mask matched Christopher Wilson's DNA. ROA. pp. 605-606.

## ARGUMENT

**The trial court did not err in admitting GPS records since the records do not constitute hearsay, the foundation was sufficient to establish that the records were admissible as business records, and sufficient foundation was laid to authenticate the records.**

Brown complains the trial court erred in admitting the report showing GPS tracking data because it did not meet the business records exception to hearsay and was not properly authenticated. However, the report was not hearsay because it is not an out-of-court statement made by a **declarant** as defined by our rules of evidence and further, the report was properly authenticated. Additionally, the report would meet the business records exception even if it was considered hearsay.

### **GPS records are not hearsay and satisfy the requirements for a business record**

The GPS records are not hearsay because the “declarant” was not a person. “‘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. Hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. Rule 802, SCRE; State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001), *cert. dismissed* 353 S.C. 538, 579 S.E.2d 318 (2003). “A ‘statement’ is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” Rule 801(a), SCRE. “A ‘declarant’ is a **person** who makes a statement.” Rule 801(b), SCRE (emphasis added).

The glaring omission in Brown’s analysis of this issue is the threshold question of whether the “declarant” is a person. The declarant in this case is not a person; it is an ankle bracelet. The conversation, an electronic transmission sent to satellites, is used to determine

from where the bracelet speaks. Therefore Rule 801, SCRE, does not apply – there is no hearsay to contend with.

The trial court cited Commonwealth v. Thissell, 910 N.E.2d 943 (Mass. App. Ct. 2009) *aff'd* 928 N.E.2d 932 (Mass. 2010), which is helpful authority loudly absent from Brown’s brief. In Thissell, the appellant was on probation and required to wear a GPS device on his ankle. Transmissions from the ankle device went to the Massachusetts probation control center in Boston. Id. at 944. The appellant objected to GPS documents that showed his locations when he twice allowed his ankle device to be submerged into water and also when he entered an exclusion zone in violation of a no-contact condition of his probation. Id. at 945.

The Thissell court relied on Commonwealth v. Whitlock, 906 N.E.2d 995 (Mass. App. Ct. 2009), a case concerning the use of ArcView, a computerized map, to measure the distance between the location of a drug sale and a school zone in a prosecution for distribution of a controlled substance in a school zone. Thissell quoted Whitlock for the proposition that “[b]y its very nature, calculation of distance, or of weight, volume, speed, and the like, is impossible without use of a tool that had been calibrated to show a relevant unit of measure, e.g., a rule, a tape measure, a wheel, a scale, or, at a more sophisticated level, a radar gun, a breathalyzer, or a blood test. When employed to measure something, none of those tools make a ‘statement.’” Thissell, 910 N.E.2d at 946 (quoting Whitlock, 906 N.E.2d at 1000). The court concluded that because the GPS maps and logs were generated by a GPS device, not a person, the maps and logs generated by the GPS were not hearsay. Thissell, 910 N.E.2d at 946.

The Fourth Circuit has found that machine-generated reports are not hearsay. In United States v. Washington, 498 F.3d 225 (4th Cir. 2007), the Fourth Circuit analyzed whether

toxicology data generated by lab machines, which indicated the defendant's blood contained alcohol and phencyclidine (PCP), was hearsay. The Fourth Circuit determined it was not hearsay because the data was not a statement made by a person as defined by Rule 801, FRE: "In short, the inculpatory 'statement' – that Washington's blood sample contained PCP and alcohol – was made by the machine on printed sheets, which were given to [the expert witness]." *Id.* at 230. "Only a *person* may be a declarant and make a statement. Accordingly, nothing 'said' by a machine . . . is hearsay." *Id.* at 231 (citations and internal quotation marks omitted, emphasis in the original). In the instant case, the GPS coordinates were recorded in real time and the data compilation was machine-generated. The GPS records are not hearsay.

Since this Court granted Brown's writ, the California Court of Appeals held that GPS data is not hearsay, finding, "The computer-generated report of GPS data generated by defendant's ankle monitor did not consist of statements of a person as defined by the Evidence Code, and did not constitute hearsay as statutorily defined." *People v. Rodriguez*, 224 Cal.Rptr.3d 295, 314 (Cal. Ct. App. 2017). "The ankle monitor automatically sent signals of defendant's location to the GPS, which automatically generated the computer data about defendant's location at the specific dates and times, so that there was no statement being made by a person regarding the data information so recorded." *Id.* (internal quotation marks omitted).

Should machines be deemed people, the testimony is admissible as a business record. Under S.C. Code section 19-5-510<sup>1</sup> and Rule 803(6), SCRE, certain records kept in the ordinary

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<sup>1</sup> "A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." S.C. Code Ann. § 19-5-510 (1985).

course of business may fall within the exception to the hearsay rule. However, foundation must be established that (1) the record is prepared at or near the event recorded, (2) the record must be prepared in the regular course of business, (3) a custodian or qualified witness must identify the record and its method of preparation, and (4) the court must find the record trustworthy. Additionally, Rule 803(6) requires that the record be prepared by or from information transmitted by a person with knowledge. Before the business record may be entered into evidence, the foundation must be laid showing the record complies with these principles. State v. Sarvis, 317 S.C. 102, 450 S.E.2d 606 (Ct. App. 1994). “The purpose of this mandate is to aid in establishing that the record was honestly and fairly kept.” S.C. Nat’l Bank v. Jones, 302 S.C. 154, 155, 394 S.E.2d 323, 324 (1990).

The Thissel court found that even if the GPS evidence constituted hearsay, it was admissible as a business record. Thissel, 910 N.E.2d at 946 (“It can be inferred that the documents were made in good faith and in the ordinary course of business of the probation department whose duty it was to supervise the defendant’s probation, including the monitoring of his location by means of the GPS device.”).

The second case the trial court relied on was State v. Jackson, 748 S.E.2d 50 (N.C. Ct. App. 2013). In that case, the sergeant supervising the police department’s electronic monitoring unit testified the defendant wore an Omni-Link 210 ankle device. The device was manufactured by Omni-Link Systems. The device operated by using GPS signals and cell phone triangulations to track the location of the device at least every four minutes. This tracking data was then uploaded from the device to a secure server where it was stored. The sergeant testified that he can view the data stored on the secured server via a web service and can produce reports based

on the data and routinely does so in the normal course of business. Id. at 54.

The North Carolina Court of Appeals found the data stored on the secured server was a data compilation and the exhibits used at trial were merely extractions of that data. Id. at 55. The North Carolina Court of Appeals found the sergeant's testimony established a sufficient foundation of trustworthiness for the tracking evidence to be admitted as a business record. Id. at 56.

In the instant case, the report utilized was compiled by Steward Powell, an agent with the South Carolina Department of Probation, Parole, and Pardon (DPPP). Agent Powell testified he supervises offenders sentenced by the court. Agent Powell testified his duties include the use of the GPS monitoring systems. Agent Powell testified that the GPS monitor "is affixed to the offender, and their movements are tracked wherever they go." ROA. p. 468, lines 5-7. Agent Powell further explained:

The State has a GOC, general operations center, in Columbia. These offenders are tracked, 24 hours a day, seven days a week so they're always monitored. Us field agents – and what I mean is someone like me at a local office, we can log on to our computers and see in real time where these offenders are.

ROA. p. 458, lines 15-20.

The information is recorded by a third party vendor that supplies the software and hardware. ROA. p. 468. As in Jackson, the vendor is Omni-Link. ROA. p. 478, lines 1-2. Agent Powell testified the information is very accurate, and the agents use the information in court all the time. ROA. pp. 468-469. The information is kept in the regular course of business. Agent Powell further testified that the agents are sent for training for interpreting the GPS equipment. ROA. p. 469.

Agent Powell identified State's Exhibit No. 32 as the archived GPS data for Christopher Wilson. This report was forwarded to the police by fellow agent Gross, who was no longer with the agency but at the time was the agent who primarily worked with the GPS system. Agent Powell verified there were no alterations, deletions, or subtractions from the records. ROA. pp. 469-471. On cross-examination, Agent Powell verified the exhibit was a record that "belong[s] to us, we use those every day in the course of our daily activities." ROA. p. 476, lines 9-11.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

In the instant case, (1) the GPS data was recorded in real time, (2) the GPS data was prepared in the regular course of business, (3) the method of preparation was explained by Agent Powell, and (4) Agent Powell testified that the data was very accurate. Accordingly, the trial court's ruling has evidentiary support and the trial court's admission of the GPS records does not amount to an abuse of discretion.

### **Authentication**

Brown complains the records were not properly authenticated. However, the GPS records are authenticated by Powell's testimony. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. "The burden to authenticate is not high and requires only that the proponent offer a satisfactory foundation from which the jury could reasonably find that that evidence is authentic." Deep

Kell, LLC v. Atl. Private Equity Grp., LLC, 413 S.C. 58, 64-65, 773 S.E.2d 607, 610 (Ct. App. 2015) (internal quotation marks and alterations omitted). Rule 901 provides non-exclusive examples of how the authentication requirement may be satisfied. Rule 901(b), SCRE. Paragraph seven of subsection (b) provides the following means of authentication:

*Public Records or Reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

Rule 901(b)(7), SCRE.

Under S.C. Code § 23-3-540(P), which defines “active electronic monitoring device,” DPPP is required to monitor offenders and the device utilized is required to actively monitor and record “a person’s location at least once every minute twenty-four hours a day . . .” Therefore, the record of the device’s movements is a public record authorized by law. Cf. State v. Anderson, 386 S.C. 120, 130-31, 687 S.E.2d 35, 40 (2009) (noting that fingerprint records of every person arrested were submitted to SLED and maintained by SLED pursuant to statute, and the fingerprints are stored in AFIS for every ten-print card in South Carolina; therefore, Anderson’s fingerprint card was authenticated as a public record pursuant to Rule 901(b)(7), SCRE).

Additionally, Agent Powell testified as to how the global positions are captured and recorded. Agent Powell testified that reports of an offender’s movements are accessible and may be generated by all the agents. Agent Powell testified that the information is very accurate. See Rule 901(b)(9), SCRE (providing for authentication based on “[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate

result.”). Agent Powell further identified the report as a report of Christopher Wilson’s movements during the relevant time frame. See Rule 901(b)(1), SCRE (providing for authentication by a witness with knowledge “that a matter is what it is claimed to be.”). Agent Powell was able to identify the report from its appearance, contents, and other distinctive characteristics. Rule 901(b)(4), SCRE (providing for authentication by testimony about the distinctive “[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances”). Accordingly, the report was authenticated by a person with knowledge and by its distinctive characteristics based on Agent Powell’s testimony. The GPS report was properly authenticated.

**False information in Brown’s brief**

Brown makes several claims in his brief that are simply unsupported by the record. First, Brown claims the following: “Agent Powell admitted that another probation agent, Agent Gross, actually accessed the computer program to create the GPS records because Powell did not know how to use the computer. R. 471, l. 2 – 474, l. 23.” Agent Powell never testified he did not know how to use a computer. Brown fails to explain the basis of this assertion and the portion of the record Brown cites does not back up this claim.

Second, Brown incorrectly claims Agent Powell could not explain numbers in the GPS spreadsheets. See Br. of App. p. 16. However, that claim is false as the testimony Brown references were answers to questions about a document not in the record. Here is the full context of the cross-examination testimony referenced:

Q: This is part of the discovery provided to us, the solicitor’s office provided to us, through the police officer, Officer Powell. I was going to show you this page here, and you’ve got four columns and it has a bunch of numbers, 32.99, 88.1 and a 12. You testified

you're very familiar with these reports and they're accurate. Can you tell me what that means?

A: I testified to the numbers that we submitted. Those numbers, I do not know. I'm a field agent, not a statistician or a person of science.

Q: But you pulled these numbers off. You pulled these pages off as part of what you gave me.

A: I did not pull those pages off. As I testified earlier, Agent Gross pulled those pages off.

Q: But it is accurate, correct?

A: We stand by what our department's agents do, that is correct.

Q: And you said you had been trained in this, correct?

A: That is correct.

Q: And in training it – we're looking at the accuracy, 8, 12, 6 – what does that mean?

A: You know, **I don't see a column on there.** I don't really know what those numbers mean without a column. It could be anything, and I don't want to speculate without knowing for sure, but **there's no columns on that sheet.**

ROA. p. 474, line 7 – p. 475, line 7 (emphasis added).

The record that defense counsel presented to Agent Powell was not State's Exhibit No. 32, the GPS records being challenged on appeal. Instead it was a different document that is not in the record. Note that the numbers 32.99, 88.1 and 12 do not appear in State's Exhibit No. 32. Accordingly, Agent Powell's testimony concerned an unknown document with unlabeled columns and he did not know what that uncited record represented which was fine since it was not part of the documents being authenticated. It is unfair to impugn Agent Powell with this unseen document and it is a misleading argument to present.

Brown also incorrectly claims that Agent Powell was handed the documents from another agent. However, Agent Powell noted that Agent Gross provided the information to Investigator Powell. ROA. p. 471, lines 2-10; p. 475, line 17 – p. 476, line 4. Brown claims Agent Powell did not testify about how the information was stored, however, Agent Brown testified that the offenders are monitored twenty-four hours a day by the State’s general operations center, and a third-party vendor, Omni-Link records and archives the information. ROA. p. 458, p. 468, p. 478. This information is kept in the regular course of business and agents are trained to interpret the GPS equipment. ROA. 469.

In Rodriguez, the California Court of Appeals noted “It is settled computer systems that *automatically record* data in real time, especially on government-maintained computers, are presumed to be accurate. Thus, a witness with the *general knowledge* of an automated system may testify to his or her use of the system and that he or she has downloaded the computer information to produce the recording. No elaborate showing of the accuracy of the recorded data is required.” Rodriguez, 224 Cal.Rptr.3d at 309 (internal quotation marks omitted, emphasis in the original).

Further, the California Court of Appeals rejected the argument that a representative from the vendor was necessary to testify about the operation of the hardware and software producing the GPS data and report, noting its case law that rejected the requirement of an expert who could perform the programming, or inspect and maintain the hardware, in order to authenticate computer-generated records. Id. at 310.

In the instant case, Agent Powell provided sufficient information about how the data was generated, stored, and used by agents. He testified that the reports were accurate and relied on

routinely in the course of the agency's business. Therefore, Agent Powell's testimony easily met the minimal standards for authenticating records.

**Overwhelming evidence of guilt**

Further, any conceivable error in admitting the GPS records was harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt. "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). Note Brown failed in his brief to explain why error would not be harmless in light of the overwhelming evidence of guilt.

The GPS records were highly probative, yet unnecessary in light of the abundant evidence of guilt. A ski mask found discarded in the woods by Zaxby's contained Chris Wilson's DNA and dogs tracked the trail from the robbery to the front of Wilson's house. Law enforcement found dropped money in close proximity to Wilson's house. The weapon found at Wilson's house when the search warrant was executed was the gun used in the robbery based on ballistics testing. Brown was found at Wilson's when the search warrant was executed and told Lanier Daniels he was at Wilson's to dispose of the weapon. Further, Brown told both Garrett and Lanier Daniels about the robbery. In addition, Hamilton testified she picked Brown and Wilson up from Wilson's neighborhood and Brown was mad at Wilson for shooting someone. Cell phone records also corroborate Hamilton and Garrett's testimony that Brown called them on Wilson's phone around the time of the robbery. Even without GPS records, evidence of guilt was overwhelming beyond a reasonable doubt.

**CONCLUSION**

For all of the foregoing reasons, the conviction and sentence should be affirmed.

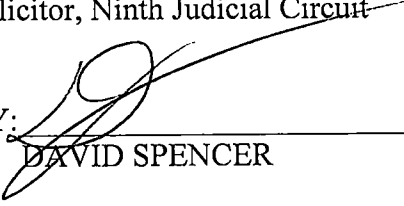
Respectfully submitted,

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November 28, 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Berkeley County  
The Honorable Robert M. Young, Sr., Circuit Court Judge

Appellate Case No: 2017-000094

**RECEIVED**

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S.C. SUPREME COURT

THE STATE,

Respondent,

v.

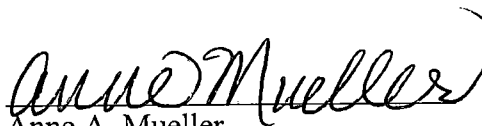
DONTE SAMAR BROWN,

Appellant.

**PROOF OF SERVICE**

I, Anne Mueller, certify that I have served the within Brief of Respondent on Appellant by delivering two copies of the same to Robert M. Dudek, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.  
This 28<sup>th</sup> day of November, 2017.



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