STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

DONTE SAMAR BROWN,

Appellant.

Appellate Case No. 2014-001082

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

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

SCARLET A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, 4th Floor
Charleston, SC 29401

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STATEMENT OF THE CASE

Appellant 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.

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 let him go. 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 Appellant 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 that 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 that 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

I.

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 that 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.

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), which is helpful authority that is 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 inculpating '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.

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

[1] "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).

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.

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 rule 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]ppearance, 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.

Further, any conceivable error 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).

II.

Evidence supports the finding that law enforcement complied with the warrant statute and returned the warrant with a listing of inventory within ten days of the magistrate issuing the search warrant, and Appellant failed to show prejudice from any purported defect in the ministerial requirement of making the return.

Brown claims the trial court should have suppressed evidence seized from the Wilson residence because the State was unable to produce the clocked and signed original return. Instead, a clocked copy and a signed copy of the return were produced that firmly established that law enforcement complied with the statutory requirements of making a return to the search warrant within ten days of execution of the warrant.

Under S.C. Code § 17-13-140, a magistrate may issue a warrant identifying property to be searched when satisfied probable cause exists to issue the warrant upon affidavit sworn before the magistrate. The search warrant "shall be directed to any peace officer having jurisdiction in the county where issued . . . and shall be returnable to the issuing magistrate." Id. The statute further commands the following:

> Any warrant issued hereunder shall be executed and return made only within ten days after it is dated. The officer executing the warrant shall make and deliver a signed inventory of any articles seized by virtue of the warrant, which shall be delivered to the judicial officer to whom the return is to be made, and if a copy of the inventory is demanded by the person from whose person or premises the property is taken, a copy of the inventory shall be delivered to him.

Id.

In the instant case, the State provided a copy of the return indicating that the return was provided to the magistrate on January 6, 2012, the day after the warrant was

issued. It lists the inventory and the officers present during the inventory process. The return is signed by the magistrate and notarized. It is also signed by the law enforcement officer. The copy of the return indicates that the statute was followed. No part of the statute requires the original return be produced for trial. Accordingly, suppression is not required because the statute was followed. Further, the record suggests that the Goose Creek magistrate's office misplaced the return and that law enforcement followed the established procedure, including leaving the magistrate with the original return.

Brown's reliance on State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995) is misplaced. In that case, the prosecution was unable to produce an original copy of the search warrant or return. This Court noted the only copy of the return appearing in the record was unsigned and unsworn. Id. at 118, 459 S.E.2d at 872. The trial judge and the State's witnesses had no clear recollection of whether a return was made to the Clerk of Court. This Court noted: "In the posture in which this record has reached us, there is no evidence that the return was ever made." Id. at 117, 459 S.E.2d at 871.

Unlike Freeman, the copy provided to the Court makes clear that the return was made on January 6, 2012, to the magistrate who signed the return. The return was notarized. Freeman is inapplicable to the present case because the copies of the return demonstrate that law enforcement followed the statutory procedure. See also State v. Corns, 310 S.C. 546, 551-52, 426 S.E.2d 324, 326 (Ct. App. 1992) (finding no error in trial court's failure to suppress marijuana seized where return was not made within ten days and the marijuana was not listed in the return in the absence of a showing of prejudice).

Even assuming the ministerial requirement of the warrant statute was not

followed, there was no prejudice as noted by the trial court. The essence of Brown's argument appears to be that the copies may be difficult to read. However, there was no actual explanation as to how this prejudiced Brown – there were no irregularities to suggest the inventory was not accurate or evidence was missing. See Rule 1003, SCRE ("A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."); Bank of America v. Draper, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013) (citing Rule 1003 in finding a copy of the note was evidence the bank was the holder of the note which supported granting summary judgment in favor of the bank).

In State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007), Weaver complained evidence from the search of Weaver's jeep should have been suppressed. Officers obtained a search warrant for the jeep after it was impounded but before it was searched for blood evidence. "However, the return was never made on the warrant as required by [section 17-13-140]." Id. at 318, 649 S.E.2d at 481. The Supreme Court found probable cause existed to conduct a warrantless search in affirming the conviction but modified this Court's opinion to reiterate that prejudice must be shown for failure to comply with the return requirement and clarify that "the State's failure to comply with the statutory ministerial requirement does not void the warrant and the evidence cannot be excluded on this ground." Id. at 323, 649 S.E.2d at 484.

Likewise, in State v. Mollison, 319 S.C. 41, 47, 459 S.E.2d 88, 92 (Ct. App. 1995), law enforcement failed to make a return of the search warrant yielding drugs from a motel room. This Court noted that the State failed to offer any explanation for the

failure to return the warrant. However, this Court affirmed, noting the "failure to comply with inconsequential ministerial requirements of the statute does not require suppression in the absence of prejudice to the defendant." Id.

In the instant case, suppression of the evidence was not warranted where Brown is unable to show prejudice, assuming that compliance with the return requirement was not shown. However, as demonstrated, law enforcement complied with the warrant statute.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

SCARLET A. WILSON
Solicitor, Ninth Judicial Circuit

BY: _____
DAVID SPENCER

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

ATTORNEYS FOR RESPONDENT

August 6, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Berkeley County
Roger M. Young, Sr., Circuit Court Judge

THE STATE, Respondent,

v.

DONTE SAMAR BROWN , Appellant.

CERTIFICATE OF COUNSEL

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

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

By: _____
DAVID SPENCER
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Tiffany Butler, Esquire, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 6th day of August, 2015.

NORMA BIGBEE
Legal Assistant

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