ORIGINAL

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Sumter County
William Jeffrey Young, Circuit Court Judge

THE STATE,

Respondent,

v.

ARSENIO D. COLCLOUGH,

Appellant.

Appellate Case No. 2016-000724

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SHERRIE BUTTERBAUGH
Assistant Attorney General
S.C. Bar No. 101477
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by admitting the DNA evidence involving a hat found at the crime scene, since the risk of contamination of the hat was substantial where the decedent's mother took the hat home, she did not turn it over to the police for a substantial time, and the expert testimony that the DNA on the hat had a one in sixteen probability to "match" appellant was likely to impermissibly confuse the jury under Rule, 403, SCRE?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Did the trial court abuse its discretion in admitting the DNA evidence obtained from a hat found at the crime scene where the evidence was relevant and probative of appellant's connection to the murders, where it was established the evidence was not contaminated, and where it was not unfairly prejudicial as the low probability of inclusion was not unduly emphasized by the parties?

STATEMENT OF THE CASE

A Sumter County grand jury indicted appellant, Arsenio Colclough, for two counts of murder and two counts of possession of a weapon during the commission of a deadly crime. (R.pp.430-31). Appellant proceeded to a jury trial on March 21, 2016, before the Honorable W. Jeffrey Young, and was represented by Lir Patrick Derieg. (R.p.1). Edgar Donnald of the Third Circuit Solicitor's Office represented the State. (R.p.1).

On March 24, 2016, the jury found appellant guilty of all charges. (R.p.409, line 10-p.410, line 2). Judge Young sentenced appellant to two terms of life without parole for the murder convictions, but did not impose sentence for the weapons charges given appellant's life imprisonment. (R.p.427, lines 1-11).

Appellate counsel submitted a brief pursuant to *Anders v. California*, 368 U.S. 738 (1967), raising the issue as set out above. By order filed December 17, 2018, this Court denied the petition to be relieved as counsel and directed the parties to re-brief the issue and any other of arguable merit. Counsel filed a brief of appellant on January 14, 2019.

This brief of respondent follows.

STATEMENT OF FACTS

A mother woke up to a nightmare on April 13, 2013. Someone was banging on her door in the middle of the night to tell her about a shooting at her son's house, so she went over there and found her son and nephew both dead inside. (R.p.112, line 6-p.113, line 17). Janice Chatman (Janice) called police, and returned later that day to clean the home. (R.p.116, lines 1-21). Janice found hats at the scene that she believed belonged to her son which she kept and put them on a hat rack inside her home. (R.p.117, lines 19-24). One was a red hat that Janice said no one disturbed once she took it to her house and she eventually gave to police. (R.p.117, line 25-p.118, line 12; p.121, lines 2-6).

Corie Simon (Simon) was in lock-up with appellant and talked to appellant about his case. (R.p.151, line 12-p.152, line 6). Appellant told Simon about a hat left at the scene that he did not know anything about, "they tried to frame him for it," and appellant "was nowhere to be at the crime scene." (R.p.154, line 12-p.155, line 6). Simon also gave a statement which was read to the jury, without objection. (R.p.316, line 23-p.317, line 15). In it, Simon said appellant admitted killing two people after an argument and appellant told him he sprinkled marijuana on the bodies to make it look like the shooting was drug-related. (R.p.320, lines 1-7; p.320, line 16-p.321, line 9).

The pathologist who performed the autopsies testified Rayshawn Holmes was shot seven times in the chest, back, and arm and Willie Chatman was shot once in the back. (R.p.165, lines 6-16; p.166, lines 4-22). Both men died within minutes. (R.p.167, lines 13-19; p.170, lines 2-10). The bullets came from .9mm and .40 caliber handguns and were likely fired from at least three weapons. (R.p.181, line 18-p.182, line 5; p.186, lines 5-17).

Lieutenant Melissa Addison (Addison) interviewed appellant and his cousin, John

Colclough (John). (R.p.219, lines 2-4; p.226, line 18-p.228, line 16). Appellant told Addison his cousin John bought a gun from a pawn shop and John later told Addison he and appellant shared the weapon. (R.p.229, line 7-p.230, line 7; p.245, line 18-p.246, line 4). John said appellant told him he wanted to use the gun to commit a robbery.[1] (R.p.246, lines 14-22). About three o'clock the next morning, appellant came back and John told Addison appellant was nervous and jumpy when he returned, and John said he heard about the murders a few days later. (R.p.246, line 24-p.247, line 11). John asked appellant about the crimes and appellant said he shot Willie Chatman in the back and his friend, Jwain Francis, shot Rayshawn Holmes. (R.p.247, line 11-p.248, line 1). Appellant gave the gun back to John. (R.p.303, line 21-p.304, line 2).

Addison also interviewed Christopher Robinson (Robinson).[2] (R.p.230, line 13-p.232, line 21). Appellant told him a different version of the deadly shooting. Robinson was an inmate who refused to testify at trial, but whose statement was played for the jury, without objection. (R.p.143, line 19-p.145, line 16; p.232, line 23-p.234, line 25). Appellant told Robinson he shot Rayhawn while his co-defendant shot Willie. (R.p.256, lines 6-14). Robinson also indicated he looked through some of appellant's discovery materials. (R.p.237, line 23-p.238, line 3).

The jury found appellant guilty of two counts of murder and two counts of possession of a weapon. (R.pp.409-10). The judge sentenced appellant to two terms of life without parole for the murder convictions, but did not impose sentence for the weapons charges given appellant's life imprisonment. (R.p.427).

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[1] John was incarcerated on unrelated charges and refused to testify at trial. (R.p.139, line 16-p.143, line 13).

[2] Robinson was also incarcerated on unrelated charges and refused to testify at trial, telling the court he "don't want nothing to do with it." (R.p.144, line 14-p.146, line 20; p.149, lines 2-16).

The trial court properly admitted the DNA evidence obtained from the red hat because the evidence was relevant and probative of appellant's connection to the murders, and it was not unfairly prejudicial as the low probability of inclusion was not unduly emphasized by the parties.

The trial court did not abuse its discretion in admitting the DNA evidence obtained from the red hat found at the crime scene. The evidence was relevant and probative of appellant's connection to the double murder, the evidence developed during the pre-trial hearing established a low risk of contamination, and the admissibility was properly challenged through attacks on its relevancy and prejudice. Moreover, any error was harmless beyond a reasonable doubt given the low probability of inclusion was not unduly emphasized by the parties and was not unfairly prejudicial to appellant.

How the Issue Was Raised

Prior to trial, defense counsel made a motion to suppress DNA evidence found on a red hat discovered at the crime scene. (R.p.52, lines 9-11). Crime scene investigators photographed the hat near the victims after the shooting and the State believed appellant left it, but it was not processed or taken by law enforcement. (R.p.52, lines 13-22). Instead, Janice Chatman (Janice), Rashawn Holmes's mother, took the hat when she returned to clean the house believing it was her son's. (R.p.52, line 22-p.53, line 7). The State argued the hat and DNA were admissible because it was not fungible, Janice could identify it as the hat she found at the crime scene and the one she turned over to law enforcement, which was then sent to SLED for analysis. (R.p.53, lines 7-11). Testing indicated appellant and two others could not "be excluded as donors of the DNA found on the hat" and the likelihood of someone other than appellant contributing to the mixture was one in sixteen. (R.p.53, lines 11-16).

Defense counsel objected to the introduction of the DNA evidence because the chain of

custody could not be established and the hat was in possession of people who were related to appellant so it was "much more likely that DNA can exclude [appellant] if that DNA is from somebody related to him." (R.p.54, lines 4-16).

The trial judge allowed the State to call witnesses prior to ruling on the motion. (R.p.55, lines 5-14).

Janice testified she found the bodies of her son and nephew following their murders. (R.p.56, lines 2-23). She found a lot of hats when she cleaned the house and took them to her own home. (R.p.57, lines 5-13). An investigator mentioned a red had to Janice and she said she found one on the floor at the scene that she had in her house hanging on a hat rack in her son's old room. (R.p.57, line 14-p.58, line 4; p.60, line 14-p.61, line 1). Janice testified there was blood spatter and marijuana residue on the hat when she found it, and she did not recall her son wearing a red hat. (R.p.59, line 23-p.60, line 13).

On cross-examination, Janice testified none of her family was related to appellant, and he had never been in her home. (R.p.62, lines 18-21; p.64, lines 6-13). Janice said Rayshawn's room was very secure and no one went inside except her, Rayshawn's father, or Rayshawn's young son and the hats were hard to reach because they were "hanging way up in the ceiling." (R.p.62, line 22-p.63, line 2). The room was not kept locked, but few people visited Janice and it was not possible for anyone to sneak in without her knowledge because her bedroom was nearby and she would notice. (R.p.63, line 3-p.64, line 3).

Catherine Leisy (Leisy), a DNA analyst with SLED, testified she received a cutting and swab taken from the red hat. (R.p.65, line 2-p.66, line 23; p.67, lines 14-25). Leisy stated DNA from the cutting matched the victim, Rayshawn, and "the probability of randomly selecting an unrelated individual who could have [a] DNA profile matching this item is approximately one in

three hundred and twenty quadrillion." (R.p.69, lines 6-18). The DNA from the swab was a mixture of profiles from at least three individuals. (R.p.70, lines 4-15; p.71, lines 6-14). Specifically, the major contributor was Rayshawn while the minor contributors were a mixture of at least two people. (R.p.71, lines 6-14). Leisy testified appellant could not "be excluded as a possible minor contributor to this mixture and the possibility of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in sixteen." (R.p.72, lines 4-24).

When asked, Leisy stated "could not be excluded" simply meant, when comparing appellant's DNA to the DNA developed from the hat, there was "enough consistency" that it was possible "he could have contributed" to the profile. (R.p.73, lines 7-20). Leisy also acknowledged a one in sixteen probability was not the same level of certainty as a one in three hundred quadrillion probability, which was considered an identification. (R.p.73, line 21-p.74, line 7). Leisy testified there would be differences in DNA between appellant and anyone related to him, unless the person was an identical twin, and it was not always possible to tell if two people were related, just by comparing their DNA profiles. (R.p.76, lines 8-17; p.76, line 24-p.77, line 7).

Following the presentation of witnesses, the State argued the testimony demonstrated a connection between the victim and appellant, and the probability testified to by Leisy went to the weight of the evidence and not its admissibility. (R.p.77, line 23-p.78, line 11). The State further asserted there would be testimony at trial from at least one other witness that appellant admitted to the murder and mentioned he was worried about the fact that he left a hat at the scene. (R.p.78, line 22-p.79, line 7).

Defense counsel reiterated his argument the DNA should not be admitted because law

enforcement was not in possession of the hat for several months. (R.p.78, lines 13-15). The trial court responded that fact "doesn't bother me as much as I initially thought it would, because we have testimony now that says she took it, you know, up to his room and in her house the whole time." (R.p.78, lines 16-20). However, the court decided to wait to rule on the motion until trial to see what other evidence was presented because there remained a possibility "it may just confuse the jury." (R.p.79, lines 8-18). The court further cautioned the State not to mention the DNA evidence in the opening statement or until he ruled. (R.p.79, lines 16-19).

Janice's testimony at trial was substantially similar to that given during the pre-trial hearing. She stated she found the red hat while she was cleaning the home, she took it to her house, and no one disturbed it once she hung on the hat rack in the ceiling. (R.pp.117-18). Janice stated very few people had access to the hat and it was in her possession until she gave it to law enforcement in November. (R.pp.121-22). Janice again testified appellant was not related to her son, Rashawn, but they had been friends growing up. (R.pp.119-20). Further, appellant never had access to the room or hat following the murder. (R.pp.122-23).

As detailed above, Corie Simon (Simon) testified he and appellant were in lock-up together, and appellant told him about the hat left at the scene, but said it was not his. (R.pp.151-52; pp.154-55). Following Simon's testimony, the trial court revisited the ruling on the suppression motion. The State again argued the DNA evidence should be admitted because appellant discussed the hat with Simon, but said it did not belong to him, and Leisy could show a connection between appellant and the hat. (R.p.159, line 23-p.160, line 15). Defense counsel argued the admission violated Rule 403, SCRE, particularly because the hat had been out of law enforcement custody for seven months. (R.p.160, lines 17-23).

The trial court admitted the DNA evidence, finding: "There was some testimony that he

said the hat wasn't his. And it is, it's an area that's going to be ripe for you on cross examination, but I think that they've got enough to allow it in and the jury can do with it what it wants to." (R.p.160, line 24-p.161, line 4).

The red hat was admitted into evidence over defense counsel's objection. (R.p.194, line 18-p.195, line 2). Leisy testified similarly to the pre-trial hearing, as well. She stated her analysis determined DNA from the cutting of the hat "matched the DNA profile of Rayshawn Holmes," and "the probability of randomly selecting an unrelated individual who could have contributed a DNA profile matching this item is approximately one in three hundred and twenty quadrillion." (R.p.202, line 13-p.203, line 8; p.206, line 10-p.207, line 2). Leisy testified the swab from the red hat was a mixture of three people, the DNA profile developed from the major contributor matched the victim, Rayshawn, and appellant "cannot be excluded as a possible minor contributor to this mixture and that the probability of randomly selecting an unrelated individual having a DNA profile that could have contributed to this mixture is approximately one in sixteen." (R.p.207, lines 3-25). Leisy's report was admitted without objection from defense counsel. (R.p.209, lines 14-21). Leisy also acknowledged a one in sixteen probability made it more likely to find someone other than appellant who could have contributed to the mixture than a one in three hundred and twenty quadrillion probability. (R.p.210, lines 4-23).

The jury also heard the statements from two other people that appellant admitted his involvement in the murder. (R.pp.232-34; pp.247-48; p.256).

Both parties referenced the DNA evidence in their closing arguments. The solicitor acknowledged a one in sixteen probability was not as strong a probability as a "quintillion," but argued not only was appellant a possible contributor to the DNA mixture, but he was the only person who also admitted to three people that he was at the murder scene. (R.p.350, line 1-

p.351, line 24). Defense counsel minimized the DNA evidence by telling the jury it was meaningless because "one out [of] sixteen people on the planet [] also could have contributed to that red hat" and was not worth making part of the State's case, particularly given the SLED DNA analyst could not say the DNA matched appellant and the number of unknown profiles in the mixture. (R.p.355, lines 11-25; p.376, lines 9-15; p.378, line 21-p.379, line 18). Counsel wondered further why the State failed to compare the DNA from the hat to John Colclough's DNA, given his connection to the gun, arguing "[t]he man who they said had the gun and used it five weeks after this murder, they didn't even bother to run his DNA." (R.p.363, line 1-p.364, line 15). Defense counsel also questioned the chain of custody because law enforcement did not think the hat had "any value to it" on the night of the crime, and did not pick it up for seven months. (R.p.359, line 23-p.360, line 15). Finally, counsel urged the jury to carefully consider the DNA evidence because it was the only physical evidence purportedly linking appellant to the crime, and given the low probability of inclusion, it was not enough to convict appellant beyond a reasonable doubt of a double murder. (R.p.388, line 24-p.390, line 4).

Analysis

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). "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 trial court's rulings either lack evidentiary support or are controlled by an error of law. *Id.* "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." *State v. Kelley*, 319 S.C. 173, 176, 460

S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

Evidence Was Relevant and Probative of Appellant's Connection to the Murders

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Additionally, under Rule 402, SCRE, all relevant evidence is generally admissible. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Rule 403, SCRE. "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.' . . . If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *State v. Hamilton*, 344 S.C. 344, 357-58, 543 S.E.2d 586, 593-94 (Ct. App. 2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) (citing federal courts in explaining the "great deference" given to a trial judge's decision admitting evidence following a Rule 403 analysis).

"Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." *State v. Dennis*, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013). "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Cheeseboro*, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001). All evidence is

meant to be prejudicial; it is only *unfair* prejudice which must be scrutinized under Rule 403. *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (citing *United States v. Rodriguez–Estrada*, 877 F.2d 153, 156 (1st Cir.1989)).

Appellant's argument on appeal is effectively an argument of unfair prejudice based on Rule 403, SCRE. Appellant contends the DNA evidence was highly prejudicial without being very probative. He bases the argument on two assertions: (1) the evidence was not reliable "given the lack of evidence preservation for at least six months while the hats were in possession of the decedent's mother," and (2) the DNA analyst's opinion the DNA "on the hat had a one in sixteen chance of appellant being a minor contributor had the very real likelihood of confusing the jury." (BOA, pp.9-10).[3] However, the DNA evidence from the red hat was relative and probative as it provided an additional connection between appellant and the murders, following his confessions to at least three people that he committed the crime. The trial court did not abuse its discretion in admitting the DNA evidence.

Testimony during the pre-trial hearing and at trial established the DNA found on the hat was reliable and was not contaminated. Further, the record developed shows the evidence was not unfairly prejudicial. Janice Chatman (Janice), the mother of one of the victims, found the red hat as she cleaned the home. (R.pp.56-57; pp.117-18). Janice took the hat and she put it on a hat rack in her house, one that was hanging from the ceiling so it was hard to reach, and it was in her sole possession until she gave it to law enforcement in November. (R.pp.57-58; pp.60-61; pp.121-22). During cross-examination, defense counsel attacked the reliability of the evidence, specifically seeking to determine whether the DNA was contaminated. *See State v. Ford*, 301

[3] While defense counsel initially made mention of the chain of custody during the pre-trial hearing, the argument against admission focused on unfair prejudice. (R.p.54; p.160). Accordingly, the issue on appeal similarly focuses on Rule 403, SCRE.

S.C. 485, 490, 392 S.E.2d 781, 784 (1990) (explaining admissibility of DNA evidence remains subject to traditional attack, such as contamination of the sample or chain of custody questions because they relate to the weight of the evidence). Counsel elicited details from Janice about who entered the room with the hat, if the room was kept locked, and whether appellant had ever been inside Janice's home. (R.pp.62-64; pp.119-20; pp.122-23). Janice testified the room was "very secure," very few people entered it and only people she knew, she would have noticed if someone tried to go in without her knowledge because her own bedroom was nearby, and appellant had never been in her home.

Catherine Leisy (Leisy), a DNA analyst with SLED, testified DNA from a swab was a mixture of profiles from at least three individuals. (R.pp.70-71). Specifically, appellant could not "be excluded as a possible minor contributor" and "the possibility of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in sixteen." (R.pp.71-72; p.207). Leisy stated "could not be excluded" simply meant, when comparing appellant's DNA to the DNA developed from the hat, there was "enough consistency" that it was possible "he could have contributed" to the profile. (R.p.73). During cross-examination, defense counsel again attacked the reliability of the evidence, attempting to undermine the certainty of the probability of appellant being a contributor. *See State v. Ramsey*, 345 S.C. 607, 614-15, 550 S.E.2d 294, 298 (2001) (citing *Ford*, 301, S.C. at 490, 392 S.E.2d at 784) (holding DNA evidence may be admitted in the same manner as other scientific evidence, but the admissibility may be challenged through attacks on its relevancy or prejudice which go to the weight). Leisy acknowledged a one in sixteen probability was not a high level of certainty, particularly when compared to a one in three hundred quadrillion probability, which was scientifically considered an identification. (R.pp.73-74; p.210).

Further demonstrating the lack of prejudice to appellant, defense counsel minimized the DNA evidence during closing argument, telling the jury it was meaningless because "one out [of] sixteen people on the planet [] also could have contributed to that red hat" which the DNA analyst could not say was a match. (R.pp.355; p.376; pp.378-79). Counsel also urged the jury to carefully weigh the DNA evidence because it was the only physical evidence purportedly linking appellant to the crime and the low probability of inclusion was not enough to convict appellant beyond a reasonable doubt. (R.pp.359-60; pp.388-90).

The DNA evidence was relevant because it provided an additional connection between appellant and the crime scene following his confessions to his involvement in the murders. Corie Simon (Simon) testified he and appellant were in lock-up together, and appellant told him about the hat left at the scene, although he said it was not his. (R.pp.151-52; pp.154-55). Simon also gave a statement to police in which he said appellant told him he killed two people after an argument. (R.pp.320-22). The jury also heard statements from two other people that appellant admitted he shot one of the victims.[4] (R.pp.232-34; pp.247-48; p.256). The DNA evidence was connected with the incident, relevant, competent, and the prejudicial effect was not far outweighed by its probative value.

In sum, because appellant admitted to several people he was involved in the murders,

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[4] Appellant argues in a footnote the statement from Christopher Robinson (Robinson) and interview from John Colclough were admitted at trial after they both refused to testify, violating *Crawford v. Washington*, 541 U.S. 36 (2004). (BOA p.7 n.1). However, defense counsel did not object when any statement was read to the jury, when John's interview was testified to at trial, or when Robinson's video statement was played for the jury. (R.p.231, lines 13-18; pp.244-45; p.317, lines 8-13). Accordingly, any contention the admissions violated *Crawford* is not preserved for this Court's review as it was not raised to or ruled on by the trial court. *See State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004) (explaining for an issue to be preserved for appellate review, it must have been: (1) raised to and ruled upon by the trial court; (2) raised by appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity).

Janice testified she took the hat from the crime scene and it was secure on a hat rack in her home where it was unlikely to be contaminated, defense counsel attacked the reliability of the evidence, and appellant could not be excluded as a possible DNA contributor on the item, the evidence certainly met the requirement of relevance, "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Therefore, the trial court properly admitted the evidence.

Harmless Error

Any possible error in admitting the evidence was harmless beyond a reasonable doubt. Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. *State v. Fletcher*, 379 S.C. 17, 25, 663 S.E.2d 480, 484 (2008). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. *State v. Haselden*, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). "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).

The record shows the red hat found at the crime scene and subsequent DNA analysis could not have been unfairly prejudicial or contributed to the verdict. The jury heard appellant could not be excluded as a possible minor contributor to the DNA mixture from the swab, but Leisy acknowledged a one in sixteen probability was not an identification or a "match." (R.p.207; p.210). Moreover, in closing arguments, the solicitor acknowledged the low probability and defense counsel emphasized the lack of prejudice. The solicitor stated a one in sixteen probability was not as strong a probability as a "quintillion," while defense counsel

reminded the jury the probability meant many others could have contributed to the DNA mixture, including John Colclough, and argued there was little value to the DNA. (R.pp.350-51; pp.355; p.376; pp.378-79).

In light of the record demonstrating the evidence was not unfairly prejudicial and not unduly emphasized, it is unlikely the jury relied solely on the DNA to convict appellant. Therefore, while respondent submits the trial court's ruling was not an abuse of discretion, any alleged error was harmless beyond a reasonable doubt.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted this Court should affirm appellant's convictions and sentences, and let stand the decision of the trial court as to the DNA issue.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SHERRIE BUTTERBAUGH
Assistant Attorney General

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

BY: _____
SHERRIE BUTTERBAUGH

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

May 15, 2019.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Sumter County
William Jeffrey Young, Circuit Court Judge

THE STATE,

Respondent,

v.

ARSENIO D. COLCLOUGH,

Appellant.

Appellate Case No. 2016-000724

CERTIFICATE OF SERVICE

I, Sherrie Butterbaugh, counsel for the Respondent, certify that I have served the within Brief of Respondent and Designation of Matter on Appellant by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record: Robert M. Dudek, Esquire, SCCID/Division of Appellate Defense, 1330 Lady Street – Suite 401, Columbia, SC 29201.

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

This 15th day of May, 2019.

SHERRIE BUTTERBAUGH

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT