STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Jasper County
The Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

Respondent,

v.

ANEISHA SHAIRE YOUNG,

Appellant.

Appellate Case No. 2018-000525

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

In October of 2016, a Jasper County Grand Jury indicted Appellant, Aneisha Shaire Young, for murder, attempted murder, and possession of a weapon during the commission of a violent crime. (Indictments.) Young proceeded to a jury trial on March 12, 2018, before the Honorable Carmen T. Mullen and a jury. (Transcript, March 12, 2018.) Young was represented by Assistant Public Defender Steven T. Plexico. (T. p. 1.) Assistant Solicitors Brian Hollen, Patrick Hall, and Lynnor Musser, of the Fourteenth Circuit Solicitor's Office, represented the State. (T. p. 2.)

The jury found Young guilty of murder, attempted murder, and possession of a weapon during the commission of a violent crime. (T. p. 656, lines 2-10.) Judge Mullen sentenced Young to thirty years' imprisonment for murder, a consecutive term of ten years for attempted murder, and a concurrent term of five years for the weapons charge. (T. p. 666, lines 5-20.) This appeal follows.

STATEMENT OF FACTS

On April 30, 2016, first responders to a the 911 call found Wrenshad Anderson and his brother, Devonte Freeman, on the ground behind a fast food restaurant in Jasper County. Freeman had been shot in the back of his head and Anderson was holding Freeman in his arms. (T. p. 151, line 7 – p. 152, line 9.) Freeman was transported to the hospital, and Anderson was interviewed by police. Anderson was upset and indicated to police he thought "Peanut" (Eric Darien) and "Dre" (Keandre Frazier) were the perpetrators. (T. p. 153, line 12 – p. 154, line 15.) Anderson said the men were dressed in all black and he believed they were going back to the Siesta hotel. (T. p. 154, lines 14-20.) Anderson gave investigators the contact numbers for Darien and Frazier and also mentioned Aneisha Young. (T. p. 157, lines 3-9.) In his statement to police, Anderson wrote the following:

> We just left the Siesta weekly rentals. Talking to Mr. Horton, and we was walking to Econo Lodge. When we got close to KFC path, that's when we heard shots. Vonte got into it with Peanut earlier today, and we saw Neisha and her friend. That's when we was ordered to leave. That's when we left walking, and they sneak up behind us and started shooting.

(T. p. 177, lines 13-24.)

Keith Horton was the property manager of the Siesta Hotel and knew Freeman was previously a regular who had rented a room there in the past. (T. p. 238, line 10 – p. 239, line 6.) Horton said he received a call at approximately 11:00 pm informing him that Freeman, who was on trespass notice, was on the property. (T. p. 239, lines 7-18.) Freeman had been asked to leave the property a few weeks before for having a gun on the premises. (T. p. 239, lines 14-23.) Freeman would return to the Siesta to visit cousins who still lived there. (T. p. 240, lines 2-6.) Horton said the call he received about Freeman came from a female calling from a blocked phone. (T. p. 240, lines 12-23.) When he arrived at the Siesta to ask Freeman to leave, Horton

identified Young as one of the people who approached Horton and told him where Freeman was on the property. (T. p. 241, line 5 – p. 242, line 11.) Horton said Freeman was polite, and they talked for an hour or so about Freeman's family and the need for Freeman to stay away from the Siesta. Freeman acknowledged he should not be on the premises and agreed to leave peacefully. (T. p. 242, line 14 – p. 243, line 7.) Horton said Young and two other men left the Siesta in a car just before Freeman and Anderson left the property. (T. p. 243, lines 8-24.)

Wrenshad Anderson said that some time before his brother was killed, he and Eric Darien had a disagreement. (T. p. 274, line 14 – p. 275, line 24.) Similarly, his brother and Young had recently fought over money. Demitria Williams, who was two months pregnant the Freeman's child, recalled an incident a few weeks before the murder in which Young forced her way inside the home of Williams and Freeman when they were living together at the Siesta hotel. (T. p. 220, lines 2-19; p. 221, line 9 – p. 222, line 14; p. 223, lines 12-19.) Young and Freeman began "wrestling and tumbling and whatever" and Williams had to get help from someone to break up the fight. (T. p. 222, lines 14-18.) Young said she was going to kill Freeman. (T. p. 222, lines 19-21.) When Young pushed her way into the home, she was saying "wake up, you pussy, get him up" and then as she rifled through Freeman's pants, saying "that N has some of her money." (T. p. 222, line 22 – p. 223, line 11.)

On the day of the murder, Anderson called his brother and learned Freeman was at the Siesta. (T. p. 276, lines 1-13.) Anderson went to the Siesta and ran into Darien, who flashed a gun at Anderson. (T. p. 276, lines 11-25.) Anderson said he also saw Aniesha Young at the Siesta and found it unusual because that is not where Young usually spent her time. (T. p. 277, line 14 – p. 278, line 2.) Anderson said Young was wearing all black. (T. p. 278, lines 3-6.) Anderson said he planned to stay at the Siesta until his brother was called out to talk to the

property manager and asked to leave. (T. p. 279, line 13 – p. 280, line 19.) Anderson said as he and brother walked off down the path away from the Siesta, they both felt "funny," sensing something felt off about the night. (T. p. 280, lines 19-24.)

Anderson said they heard leaves rustling, and then gunshots, so the men started running down the path. (T. p. 281, lines 13-20.) Anderson saw his brother get hit by the gunfire and fall to the ground. Even after his brother was shot, the shooters continued to fire at the men. (T. p. 282, lines 1-10.) Anderson turned to look in the direction of the shots and saw two figures in all black. (T. p. 290, lines 1-8.) Anderson said he called Darien and Young after the shooting and confronted them, but they said they were in the "country." (T. p. 295, lines 7-24.) Anderson also said Young contacted him repeatedly the next day, denying her involvement. (T. p. 295, lines 18-21.)

The lead investigator, Lieutenant Daniel Litchfield, located .9 millimeter shell casings at the scene. (T. p. 340, lines 5-10; p. 349, line 23 – p. 350, line 3.) Two days later, Litchfield returned to the scene and found .22 caliber casings approximately eight feet from the .9 millimeter casings he found previously. (T. p. 354, line 19 – p. 355, line 19.) Litchfield said he interviewed some of the people who were at the Siesta the night of the shooting and they confirmed Keandre Frazier was playing cards at the Siesta when the shooting occurred. (T. p. 358, line 21 – p. 359, line 8.) Litchfield obtained search warrants for the phones of Young and Eric Darien. (T. p. 364, line 22 – p. 365, line 5.) Young gave a statement to investigators, but Litchfield could not confirm Young's alibi. (T. p. 364, lines 6-23.)

Text messages sent around the time of the shooting and in the days immediately afterwards incriminated Young in the murder of Freeman. (*See* State's Exhibit 30.) A SLED agent testified Young's cell phone utilized the cell tower nearest to the crime scene between

10:53 pm and 12:34 am the night of the murder. (T. p. 498, lines 1-19.) At 12:54 am, the cell phone used a different tower. (T. p. 499, lines 20-24.) The progression of the towers used indicated movement of the phone, likely on Interstate 95 in a southern direction and contradicted Young's statements to police about her movements on the night of the murder. (T. p. 501, lines 7-17.)

The State also presented testimony from two informants. Marie Powell was incarcerated with Young a few months before the trial. (T. p. 518, line 6 – p. 519, line 11.) Powell knew Davonte Freeman when he lived in the same apartment complex as Powell. (T. p. 520, lines 1-14.) Powell also used to date a man who previously dated Davonte's mother. (T. p. 520, lines 15-24.) Young told Powell about the night of the murder at the Siesta. (T. p. 523, lines 20-24.) Young said Eric Darien had the .9 millimeter handgun and she had the .22 millimeter gun. (T. p. 525, line 14-p. 527, line 11.) Young also asked Powell how much Powell's boyfriend would charge to kill Wrenshad Anderson, the only eyewitness. (T. p. 527, line 16 – p. 528, line 5.) Young also told Powell she planned to talk to the police and tell them Eric Darien killed Freeman. (T. p. 534, line 12- p. 535, line 10.) Young said she was high on Xanax and Molly the night of the murder. (T. p. 536, lines 1-9.) Debbie Spann also testified she knew Young from her time in jail, when Young admitted to Spann she killed Davonte Freeman, who was Spann's cousin. (T. p. 559, lines 9-18.) Young also wanted to kill Wrenshad Anderson because he was the only witness. (T. p. 562, lines 4-10.)

Young did not testify at trial, and the defense did not present evidence. (T. p. 585, lines 20-22; p. 590, lines 7-12.)

I. The State fully complied with the rules of criminal procedure by disclosing the identity of a potential witness against Young. The State did not possess any written statements to turn over to Young and was not required to give Young a synopsis of the witness's testimony. Moreover, the issue is not preserved.

The State sought to introduce evidence from jailhouse informant Debbie Spann that Young confessed to the murder of Davonte Freeman and the attempted murder of Wrenshad Anderson. Young was informed of the witness the week prior to trial but did not inquire about the nature of the testimony. The trial judge, acting within her discretion, found no discovery violation because a synopsis of the witness testimony, as demanded by Young, is not information subject to disclosure prior to trial. Young did not object when Spann took the stand. On appeal, Young argues the failure to inform the defense of the substance of Spann's purported testimony constituted a violation of her due process rights, and the trial judge should have barred Spann from testifying. However, any issue concerning the judge's refusal to exclude the testimony is unpreserved and wholly without merit.

Standard of Review

"The admission or exclusion of evidence is left to the sound discretión of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the conclusions of the trial court are based on an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). 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, 177, 460 S.E.2d 368, 370 (1995).

Under Rule 5, SCRCrimP, the trial judge has discretion to determine what remedy, if any, is necessary to protect a defendant's rights. Rule 5(d)(2), SCRCrimP, states that if a party fails to comply with Rule 5, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing the undisclosed evidence, or it may enter such other order as it deems just under the circumstances. Rule 5(d)(2), SCRCrimP; *State v. Trotter*, 322 S.C. 537, 473 S.E.2d 452 (1996). The remedy, or the determination no remedy is required, will not be reversed absent an abuse of discretion. *See State v. Newell*, 303 S.C. 471, 476, 401 S.E.2d 420, 423 (Ct. App. 1991).

How the Issue Arose at Trial

The morning of the third day of trial, the parties discussed the remaining witnesses to be called by the State, which included two informants. (T. p. 372, lines 2-19.) The solicitor informed the judge that witness Debbie Spann had been located that morning and was served with a subpoena. (T. p. 373, lines 3-8.) The judge noted Spann was included on the witness list earlier, but Spann had not made a written or recorded statement indicating Young confessed the murder to her, so there was nothing to turn over to the defense. (T. p. 373, lines 9-23.) The judge ruled Spann would be allowed to testify and the defense would have the opportunity to cross examine her about bias or prejudice. (T. p. 373, line 23 – p. 374, line 2.)

Defense counsel objected, claiming a due process violation, because although he was aware Spann was a potential witness, he was caught by surprise by her testimony because the State did not give him a synopsis of what Spann would say on the stand. (T. p. 374, line 8 – p. 375, line 11.) The solicitor argued Rule 5, SCRE provided guidance for the specific situation, and he was not required to turn over any statements to the defense before the witness testified, even if he had a written statement. (T. p. 375, line 14 – p. 376, line 13.) Defense counsel

conceded Rule 5(a)(1)(a) did not exactly apply to the situation before the court, but argued *Brady*[1] required the court to exclude the witness. (T. p. 377, line 13 – p. 378, line 8.)

The trial judge asked counsel why he did not inquire into the substance of Spann's testimony the previous week when he was notified she might be called as a witness, and counsel did not offer an explanation. (T. p. 378, lines 9-18.) The Court suggested counsel take the time to talk to Spann before she testified to prepare himself for her testimony to "cure" any prejudice from the lack of notice to the defense. (T. p. 379, lines 2-9.) In response to the judge's suggestion, counsel said, "[A]bsolutely." (T. p. 379, lines 2-7.)

When Spann took the stand to testify, Young did not object, nor did she object when Spann testified Young "admitted that she killed my cousin Davonte Freeman." (T. p. 558, line 13 – p. 559, line 15.)

Argument

As an initial matter, the trial judge's refusal to exclude the testimony of Debbie Spann is not preserved for this Court's review. The judge ruled the testimony would be admissible, and then offered time for Young to question the witness to cure any prejudice she might suffer from the late notice of the witness's testimony. When the witness did testify after the presentation of five additional witnesses, Young did not renew her objection.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App.2006). South Carolina law is clear that a party must make a contemporaneous objection

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

that is ruled upon by the trial judge to preserve an issue for appellate review. *State v. Johnson,* 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). This rule also applies to constitutional arguments. *See State v. Owens*, 378 S.C. 636, 638, 664 S.E.2d 80, 81 (2008) (finding constitutional claims not preserved for review without a contemporaneous objection at trial); *State v. Sheppard*, 391 S.C. 415, 420–21, 706 S.E.2d 16, 19 (2011) (finding defendant did not properly preserve for appellate review when defendant made no contemporaneous objection and instead began cross-examining a witness). Young was afforded an opportunity to talk to the witness and prepare for the cross-examination before the witness took the stand. Presented with the opportunity to "cure" any prejudice, Young accepted with the phrase "absolutely." When Young failed to object when Spann was called to the stand, she waived her prior objection. *See Doe v. S.B.M.*, 327 S.C. 352, 356, 488 S.E.2d 878, 880 (Ct. App. 1997) ("The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object.") This issue is not preserved.

Nevertheless, even if Young had properly preserved this issue with the trial court, her argument is without merit. There is no right to discovery in a criminal case. *State v. Smart*, 274 S.C. 303, 306, 262 S.E.2d 911, 913 (1980). "'Pretrial discovery in favor of defendants in criminal cases is not required by due process, and when the court permits discovery in advance of the trial, it is not acting under constitutional compulsion, but to promote ascertainment of the truth. Neither the provision of a state constitution that in criminal prosecutions every man has a right 'to examine the witnesses for and against him on oath,' nor the due process clause of the Fourteenth Amendment, was held to give an accused the right to take pretrial depositions for discovery purposes.'" *State v. Flood*, 257 S.C. 141, 145, 184 S.E.2d 549, 551–52 (1971) (citing 23 Am.Jur. Depositions and Discovery s 312 (1965)). Young's argument, that her due process

rights were violated when the State failed inform her of the substance of Spann's testimony, or provide a synopsis, is not supported by case law.

Further, Young cannot show the State violated any provision of criminal procedure.[2] At trial, Young argued, "I asked for a synopsis of any statement they're going to use against my client, and they could have provided me with a synopsis, which is in Rule 5, and they failed — and by Rule 5, they failed to do that." (T. p. 375, lines 7-11.) Young appears to argue the State should have turned over any prepared documents related to this witness prior to trial. However, Rule 5, SCRCrimP, does not contain such a requirement. Indeed, the rule specifically excludes such disclosure.

Rule 5 requires the State to turn over, upon request of the defendant, statements made by the defendant, the defendant's prior record, documents and tangible items, and reports of examinations and tests. *See* SCRCrimP 5(a)(1)(A-D). In contrast, Rule 5 (a)(2) provides the following:

> Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), **this rule does not authorize the discovery** or inspection **of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution** or other prosecution agents in connection with the investigation or prosecution of the case, or of statements made by prosecution witnesses or prospective prosecution witnesses provided that **after a prosecution witness has testified** on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any **statement of the witness in the possession of the prosecution** which relates to the subject matter as to which the witness has testified; and provided further that the court may upon a sufficient showing require the production of any statement of any prospective witness prior to the time such witness testifies.

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[2] As for Young's claim the practice of providing a synopsis of witness testimony is the common course of dealings in Jasper County, there is no testimony on the record supporting that contention, only a generalized statement from counsel. (IBOA p. 13.)

(emphasis added). According to the provisions of the rule, the State is not required to turn over any document, or synopsis of testimony, prepared by the solicitor in preparation for trial. It is unclear from the record whether the solicitor had prepared such an internal document, but the Rule is clear that he was not required to turn it over to the defense prior to trial, even if he had. Moreover, the record is clear that the State possessed no written statement from Spann (T. p. 373, lines 20-23.) Even if there was a statement, the State would only have to turn over the statement **after** Spann testified.

In sum, there is no constitutional obligation or procedural rule by which the State is required to write and deliver to Young a synopsis of a witness testimony. Young's due process rights were not compromised, and the State complied with Rule 5, SCRCrimP. Moreover, Young was notified of Spann's potential appearance and was given time to speak to the witness prior to her testimony to prepare a cross-examination. Young has not offered how the cross-examination testimony would have presented differently if she had known about Spann's testimony well before the start of trial. Thus, Young cannot show prejudice from the State's refusal to provide her with a synopsis of Spann's testimony. There was no violation of the rules, but even so, a violation of Rule 5 is not reversible unless prejudice is shown. *State v. Landon*, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006).

Harmless error

Lastly, the admission of Spann's testimony was harmless because it was merely cumulative to Marie Powell's testimony, which was also entered into evidence without a contemporaneous objection. *See State v. Haselden*, 353 S.C. 190, 577 S.E.2d 445 (2003) (recognizing admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); *State v. Schumpert,* 312 S.C. 502, 435 S.E.2d 859 (1993) (finding

any error in admission of evidence cumulative to other un-objected to evidence is harmless); *State v. Johnson*, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (instructing admission of improper evidence is harmless where it is merely cumulative to other evidence). There were two jailhouse informants. Young objected to Spann's testimony, but not Marie Powell's. Not only has Young failed to show prejudice from her lack of foreknowledge about Spann's testimony, she cannot show prejudice from the substance of the testimony to the jury when the jury heard similar evidence from Powell. This unpreserved issue is without merit.

II. The trial judge did not abuse her discretion in admitting text messages attributable to Young as an admission by a party opponent when Young claimed the cell phone number in an interview with police, provided her email address in one of the texts, and made incriminating statements about her involvement in the murder of the victim. The prejudicial impact of the texts was not argued to and ruled upon by the trial court and is not preserved for review.

The trial judge properly admitted text messages sent from and received by Young's cell phone in the hours immediately before and in the two days following the shooting. On appeal, Young suggests the texts were untrustworthy because the custodian could not identify the subscriber of the targeted phone and argues the texts were unduly prejudicial. At trial, however, the judge was sufficiently satisfied that the State authenticated Young's possession of the targeted cell phone, despite the lack of subscriber information, because Young identified her phone number to police in an interview and provided her email in one of the texts. The court concluded, therefore, that the messages from Young's phone were not hearsay but statements by a party opponent. Moreover, the messages were relevant and probative of Young's involvement in the murder of Freeman. Young's claim the vulgarity of the texts were prejudicial was not presented to the trial court, but, regardless, the claim lacks merit.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Washington*, 379 S.C. 120, 123, 665 S.E.2d 602, 604 (2008). "A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion." *Id.* at 123–24, 665 S.E.2d at 604. "The improper admission of hearsay is reversible error only when the admission causes prejudice." *State v. Weston*, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006).

How the Issue Arose at Trial

In pretrial motions, Young sought to exclude text messages sent by Young, as well as her cell phone location data. (T. p. 65, lines 5-10.) The solicitor told the court there were a number of text messages and phone calls he sought to use against Young to prove she lied to police when she claimed not to know Eric Darien. (T. p. 66, lines 16-25.) The solicitor also told the court additional text messages were evidence of flight because she discussed going to North Carolina. (T. p. 67, lines 4-16.)

Counsel for Young claimed to have only received the copies of the messages the previous week, but when challenged by the solicitor, said he would need to check his files to determine when he received the documents. (T. p. 68, lines 10-20.) Counsel claimed to be unaware of the text messages concerning Young traveling to North Carolina, arguing "It would take days to sit down and figure out whose phone number is what and go through all this. So I mean, he said he had a small number of messages he was going to put in. I expected to get them." (T. p. 69, lines 8-12.) The solicitor offered to hand up the particular texts he sought to use, but informed the

judge he had turned over all the messages to the defense, saying, "I gave him everything. It's not my job to narrow everything down and organize the documents for him." (T. p. 69, lines 18-20.) The court asked to have a copy made of the text messages of interest and gave a copy to defense counsel. (T. p. 71, lines 7-18.) The judge did not rule on the messages at that time.

Later, following SLED Eric Grabski's proffer of testimony regarding his cell phone tower analysis, Young asked for "a formal ruling on the text messages." (T. p. 399, lines 9-10.) Counsel then moved to have the cell phone data excluded pursuant to Rule 702, SCRE. (T. p. 399, lines 11-17.) The solicitor told the court Verizon representative Karen Milbrodt would be testifying about the text messages, saying Milbrodt would give the cell phone numbers sent and received, the date, the time, and the **content** of the messages. (T. p. 399, line 23 – p. 400, line 6.) The solicitor acknowledged Milbrodt could not and would not testify about identity of the sender of the text messages. (T. p. 400, lines 3-10.) The court again deferred its ruling on the motion. (T. p. 400, lines 20-25.)

When she took the stand, Karen Milbrodt testified about how Verizon Wireless keeps records of phone call logs. (T. p. 442, line 18 – p. 443, line 21.) Milbrodt identified the phone records of targeted telephone number 803-842-3731. (T. p. 445, lines 2-6.) Milbrodt said there was no subscriber information to identify the user of that particular phone number, likely because the phone was contracted through a reseller. (T. p. 447, lines 11-23.) Milbrodt testified the text message content log associated with that number was provided to law enforcement, had not been altered in any way, and were kept in Verizon's ordinary course of business. (T. p. 450, line 21 – p. 451, line 13; State's Ex. 30.)

Young objected, arguing the records were not created by the business, but by an unknown third party. (T. p. 451, lines 16-20.) Young further objected to the relevance and undue prejudice

of the text messages, but did not identify which messages she believed were unduly prejudicial or irrelevant and did not elaborate on the objection. (T. p. 452, lines 10-12.) The court noted that the phone number associated with the records had been identified by Young as her number in a video statement already admitted through a pervious witness, so the texts were admissible as a party admission. (T. p. 453, lines 1-10.)

The solicitor said the purpose of offering a limited portion of the texts was to show Young was lying when she claimed to police that she was not texting Eric Darien. (T. p. 454, lines 10-21.) The text messages also gave rise to the inference Young was directly involved in the murder because of her responses to some of the texts. The solicitor sought to introduce the following texts sent from or received by the cell phone Young identified as her own:

Received by Young's phone at 9:55 pm on April 29: *Yo call me asap*

Received by Young's phone at 9:58 pm on April 29: *Come on sis*

Sent from Young's phone at 12:31 am on April 30: *shawty's trippin. what's da move?*

Sent from Young's phone at 2:02 am on April 30: *You good bro?*

Received by Young's phone at 2:06 am on April 30: *Yea*

Received by Young's phone at 12:32 pm on April 30: *I see you hitting niggas what that fire welcome to the family fool*

Received by Young's phone at 12:33 pm on April 30: *Wit*

Sent from Young's phone at 12:33 pm on April 30: *Already....delete this text NOW*

Sent from Young's phone at 2:24 pm on April 30: *Who told u?*

Received by Young's phone at 7:57 am on May 1: *Mimi just hmu talking bout u told her I did that shit ... smh*

Sent from Young's phone at 8:20 pm on May 1: N*ot around kuzzo.*

Received by Young's phone at 9:26 pm on May 1: *Wyd*

Sent from Young's phone at 9:30 pm on May 1: *on my way to nc.*

Received by Young's phone at 9:30 on May 1: *Why?*

Sent from Young's phone at 9:31 pm on May 1: *chillout fo uh minute.*

Sent from Young's phone at 5:51 pm on May 1: *mane I aint gone lie bruh I been hiding out they tryna pin me to uh "M" !!! Rs delete this*

Received by Young's phone at 9:53 pm on May 2: *What's your email?*

Sent from Young's phone at 9:53 pm on May 2: *aneishay@gmail.com*

(State's Exhibit 30.)

The court ruled the texts were admissible as an admission by a defendant. (T. p. 465, lines 6-24.) When the jury returned, the text messages were entered into evidence, subject to Young's objection. (T. p. 468, lines 1-4.) Milbrodt read the texts into the record. She also testified she had no subscriber information about who sent any of the texts. (T. p. 469, line 12 – p. 476, line 4.)

Argument

On appeal, Young does not dispute the relevance of the messages, but instead claims the messages were untrustworthy and unduly prejudicial. Young argues the judge reasoned "that because she believed appellant wrote the text messages automatically making the text messages admissible flies in the face of the judge's duty to weigh any probative value of the text messages against their unfair prejudice." (IBOA p. 18.) However, the record reveals a different presentation of the argument at trial. When given an opportunity to argue her objection, Young said the following:

> All right, your Honor. I think they indicate an absolute, a lack -- there's an absolute lack of trustworthiness under 803(6), your Honor. I just don't understand. And furthermore, I don't see how they are -- what someone's opinion, as far as there's 2615 about I see you hitting N's what with that fire welcome to the family fool. I mean, that is – there's no purpose in that, and I would have to be able to cross-examine it; and this is obviously some kind of hearsay on hearsay or whatever. I mean, there's just no basis, no basis to find there's any trustworthiness that's related to this statement, your Honor. And my client's response, as she's already remembers, her testimony is, she's already been called by Wrenshad Anderson and harassed and accused, apparently, and she's going already, delete this, I don't want to – I don't want to hear it. And that was one of the other statements was, you know, I'm just tired of people, you know, like, you know, shaking my head, meaning I'm disgusted. That's what – that's what her responses are. And I just – I just – nobody knows whose phone Eric Darien was using that night, because apparently, he used a lot of phones. And there's nobody – my client said during her statement, which they introduced, that she had lost her phone, and she said she had broken it several days after this, in frustration over being accused. So they haven't established that phone was in my client's possession on that night of the 29th through the 30th.

(T. p. 463, line 10 – p. 464, line 12.) Young then continued to argue the texts could have multiple explanations other than incriminating Young in the murder. (T. p. 464, line 15 – p. 465, line 5.) In response to that argument, the judge specifically ruled:

> Okay. I can tell you that, based on everything I've heard, and in looking at the totality of it, and reading it into context, I think it comes in, particularly the part where we have from this number 2615 to her number, to Ms. Young's number, I see you hitting the N's what that fire welcome to the family. That person then says Witness back to her. She, back to that person, again says, already....delete this text NOW. But most importantly, back from her right after that was, who told u. So I think the jury can hear that. I think they can infer whatever they want from that. She could have absolutely said they're lying on me. And it isn't that it's not admissible because it's evidence of flight; it's her statement. Whatever she said as her statement's coming in. I mean, that's an admission by a defendant. Anything she says is coming in. So I think for the whole thing in context for what the jury wants to surmise from it, they can.

(T. p. 465, lines 6-24.)

As noted above, Young argued the text messages were not admissible because the subscriber information could not be ascertained from the Verizon records custodian. Young also

argued the text messages could be interpreted with multiple meanings. When given the opportunity to explain her objection, Young did not elaborate to the trial judge her argument that the text messages were unfairly prejudicial because one contained a racial slur and another contained a vulgar word. (*Compare* T. p. 463, line 10 – p. 464, line 12, with IBOA p. 16.) Further, contrary to Young's assertion, the trial court did not rule that because she believed Young sent the texts, the texts were "automatically" admissible. Instead, the judge responded to Young's apparent authentication argument, as well as the argument the texts were subject to interpretation. The judge rightfully determined the texts were relevant to the murder ("I can tell you that, based on everything I've heard, and in looking at the totality of it, and reading it into context, I think it comes in") and were not hearsay ("I mean, that's an admission by a defendant") . The judge did not make a specific ruling on the prejudicial impact of the racial slur and the vulgar word because Young did not make that argument to the judge at trial.

Though Young failed to argue the specifics of her prejudicial impact claim at trial, the judge properly admitted the texts as statements of Young because they were relevant admissions and were not unduly prejudicial. "'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. "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, SCRE. Evidence must be authenticated before it can be admitted. *State v. Aragon*, 354 S.C. 334, 336, 579 S.E.2d 626, 627 (Ct. App. 2003). "'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 the evidence is authentic.'" *Deep Keel, LLC v.*

Atl. Private Equity Grp., LLC, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (quoting *United States v. Hassan*, 742 F.3d 104, 132 (4th Cir. 2014)).

In the instant case, the trial judge could consider the police interview with Young, in which she identifies the targeted cell phone number as her own, as well as the substance of the texts, in which the sender identifies her email address as aneishay@gmail.com. Although Young does not challenge the "authentication" of the texts, she does argue the texts are "untrustworthy" in an effort to convince the Court the statements were not sufficiently authenticated as statements from a defendant. However, when considering the corroborating information provided directly by Young and by the texts, themselves, the State produced more than enough evidence to support the trial judge's finding the texts from the targeted number were not hearsay and were admissible pursuant to 801(d)(2).[3]

As for the admissibility of the incoming messages, "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. The incoming text messages to Young's phone came from unknown individuals. However, they were properly admitted because they were not offered for the truth of the matter asserted. The incoming messages were not offered to show the sender had any knowledge of Young's role in the murder. Rather, the messages were offered to

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[3] Rule 801, SCRE, reads: d) Statements Which Are Not Hearsay. A statement is not hearsay if ... (2) **Admission by Party-Opponent.** The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

give context to Young's outgoing messages. The outgoing messages would not have made any sense to the jury if they were presented out of context. (T. p. 461, lines 2-10.) The outgoing messages only make sense when considered in conjunction with the incoming messages. Because the incoming messages were not offered for the truth of the matter asserted, they were not hearsay and thus the trial judge did not err by admitting them into evidence.

Next, "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. The text messages were clearly relevant and highly probative of Young's role in the murder because she discussed the murder with others and she did not dispute her involvement in the crime when confronted. But to be admissible, the probative value of the messages must be balanced against the "danger of unfair prejudice" to Young. "'Unfair prejudice means an undue tendency to suggest a decision on an improper basis.'" *State v. Stephens*, 398 S.C. 314, 728 S.E.2d 68, 71-72 (Ct. App. 2012) (quoting *State v. Lyles*, 379 S.C. 328, 665 S.E.2d 201, 206 (Ct.App.2008)). "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, 496 S.E.2d 424, 429 (Ct.App.1998) (quoting *United States v. Rodriguez–Estrada*, 877 F.2d 153, 156 (1st Cir.1989). In determining whether the danger of unfair prejudice outweighs the probative value of evidence, the court must consider the entire record, and the determination will turn on the facts of each case. *Lyles*, 665 S.E.2d at 206.

Young claims the messages were unduly prejudicial and argues, on appeal, the text messages suggested a verdict on the improper basis "that appellant was an uncouth lowlife not deserving of the benefit of the doubt." (IBOA, p. 18.) Young attributes this unfavorable impression to the jury based upon a racial term and one vulgar word, both used in texts by other unknown people and sent to Young. However, Young did not make this argument to the trial

court, and therefore, it is not preserved for appellate review. An argument not raised and ruled on by the trial court is not preserved for appeal. *State v. Nichols*, 325 S.C. 111, 481 S.E.2d 118, 120 (1997) (specific ground for objection must be raised at trial to preserve issue for appeal). A party cannot argue one ground at trial and a different ground on appeal. *State v. Beekman*, 405 S.C. 225, 746 S.E.2d 483, 489 (Ct. App. 2013). More importantly, Young cannot argue the trial court committed an error of law by refusing to exercise her discretionary authority to rule on a Rule 403, SCRE analysis when Young did not raise that objection to the court.

Even still, the particular text messages at issue were not sent by Young, so any inference from the use of the terms is not attributable to her. Moreover, as Young argued at trial, the use of the racial term and the vulgarity are subject to interpretation. While Young suggests the use of the terms makes her an "uncouth lowlife," the assumption the jury would interpret them in that manner is tenuous, at best. Young's reliance on *State v. King*, 427 S.C. 47, 810 S.E.2d 18 (2018), is misplaced. In *King*, the Court held the introduction of a fifteen-minute recording "riddled with profanity, racial slurs, and impermissible references to King's prior bad acts" was improper. *King*, at 69, 810 S.E.2d at 30. The texts in the instant case were limited in number, were not "riddled" with profanity and slurs, and do not refer to any other impermissible prior bad acts of Young. In short, the texts by Young are substantially more probative than prejudicial, are relevant to the element of identity, and are admissible under Rule 801(d)(2).

Finally, as the trial court noted, the jury, as the finder of fact, could interpret the messages in any manner it found credible. Young's argument the messages were subject to multiple meanings does not mean the messages lacked probative value, were untrustworthy, or were confusing. The trial judge, in her role as gatekeeper, properly admitted the messages into

evidence so that the jury could make that determination. The trial court committed no error and this unpreserved issue is without merit.

III. The trial judge did not abuse her discretion in qualifying SLED Agent Eric Grabski as an expert in cell tower location information when the witness received extensive training from the FBI, the state, and private industries in the field of cellular signal analysis and performed this analysis as part of his job, and his testimony was limited to tower signal information, not the physical location of the phone.

SLED Agent Eric Grabski was qualified, for the first time in court in South Carolina, as an expert[4] in cell phone tower location information. Despite his first time qualification, the agent was immensely knowledgeable based on his training and experience with SLED. Further, Grabski limited his testimony to the towers utilized by the targeted cell phone and explained how

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[4] Arguably, this particular type of evidence does not require expert qualification of the witness. This Court has previously affirmed a case pursuant to Rule 220(c), SCACR, in which the appellant asserted that his murder and armed robbery convictions should be reversed because the trial court allegedly erred in permitting two witnesses to testify regarding cell phone location data without qualifying them as experts. *See State v. McDonald*, 2017-UP-285, 2017 WL 4791156, at *1 (S.C. Ct. App. July 12, 2017). Other jurisdictions have likewise consistently found testimony that simply describes the information in a cell phone record, such as that given by Grabski, is proper lay testimony. *See Collins v. State*, 172 So. 3d 724, 743 (Miss. 2015) (holding that testimony that merely informs the jury as to the location of cell phone towers is proper lay testimony when it is based upon the personal observations of the witness); *Perez v. State*, 980 So. 2d 1126, 1131-32 (Fla. 3d Dist. Ct. App. 2008) (finding a cellular company's records custodian was not required to be qualified as an expert to testify regarding geographic coverage of a typical cell tower and factually explain the contents of phone records); *United States v. Baker*, 496 Fed. App'x 201, 204 (3d Cir. 2012) (finding a federal agent's testimony as to his use of computer mapping software to create map of defendant's general location from cell phone records did not involve expert testimony); *United States v. Evans*, 892 F. Supp. 2d 949, 953 (N.D.Ill. 2012) (finding creation of a map plotting cell towers utilized by a defendant's phone does not require specialized knowledge and is admissible through lay opinion testimony); *Burnside v. State*, 352 P.3d 627, 636 (Nev. 2015) (holding the State was not required to notice as an expert witness a detective who made a map of cell phone sites that handled calls from cell phones registered to the defendant).

and when a signal might be received by a particular tower. He did not attempt to pinpoint the location of the phone in relation to those towers. Grabski's qualifications allowed him to present reliable information to assist the jury in their assessment of Young's credibility. The trial judge committed no error.

Standard of Review

"The qualification of a witness as an expert is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion." *Id.* "An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion that is without evidentiary support." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). While an expert's qualification generally goes to weight of his testimony and not its admissibility, the trial court acts as a gatekeeper in vetting its reliability and deeming the testimony admissible. *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012).

How the Issue Arose at Trial

At the beginning of the third day of trial, the State proffered the testimony of SLED Agent Eric Grabski to determine his qualification as an expert witness. (T. p. 379, lines 11-15.) Grabski described his employment with SLED and his extensive training. The agent also explained how cell towers function, as well as the limitations of the data received from the carrier about the cell tower and signal. (T. p. 380, line 2 – p. 389, line 2.) The solicitor explained to the court that he sought to introduce the cell records to show Young's phone was on the move at certain times during the night of the murder, not to put the phone near the scene of the crime. (T. p. 390, line 7 – p. 391, line 11.)

Under questioning by the defense, Grabski testified the cell signal ordinarily pings off the closest tower, but other factors affect which tower is the "most appealing." (T. p. 392, lines 9-17.) Grabski estimated he received approximately 120 hours of training related to the analysis of historical cell site location data. (T. p. 393, line 24 – p. 394, lines 2.) He acknowledged his analysis was dependent on the system operating normally. (T. p. 394, line 14 – p. 396, line 2.)

The judge confirmed Grabski would not be testifying about the estimated distance between the cell tower and the cell phone, but only the particular cell tower that responded to the cell signal. The Court then ruled:

> [T]he science is good in this. I've admitted it in many cases. There's always a question of, if you've got one signal versus if you've got a triangulation, the strength. Typically, the argument is whether or not how close you can place that phone to the incident location, but that's not what he's trying to do here. What my understanding is, is that he is trying to use this to show her movement from Hilton Head to Ridgeland, and then back to Hilton Head, which the science of what he's talking about is good, and he can say that.

(T. p. 398, lines 13-23.) The court went on to say, "But the science, I think, is fine. I think to the extent he's testifying, he's certainly is not going too far. I find you qualified, certainly, to testify to it, so I don't have a concern about that." (T. p. 399, lines 3-7.)

When Eric Grabski took the stand to testify, the solicitor reviewed his qualifications before the jury. Young then questioned Grabski about his knowledge of the engineers who created the data collection, as well as procedures and technology involved in the cell towers' collection of that data. (T. p. 483, line 18 – p. 487, line 2.) Young objected again to his qualification as an expert, and the court overruled the objection. (T. p. 487, lines 3-12.) Grabski proceeded to testify about the general area in which the cell phone could have been located, based upon the cell tower that received the cell signal. (T. p. 490, line 16 – p. 492, line 19.)

Grabski began his analysis of the target cell phone beginning April 29, 2016 at 9:54 pm and ending April 30, 2016, at 4:00 pm. (T. p. 493, lines 2-11.)

Grabski testified Young's cell phone utilized the cell tower nearest to the crime scene between 10:53 pm and 12:34 am the night of the murder. (T. p. 498, lines 1-19.) At 12:54 am, the cell phone used a different tower. (T. p. 499, lines 20-24.) Grabski said the progression of the towers used indicated movement of the phone. (T. p. 501, lines 7-17.) Grabski acknowledged he could not identify exactly where the phone was located in relation to any tower, who used the phone, or who the phone belonged to. (T. p. 504, lines 3-15.)

Argument

Young argues Grabski was not qualified to be an expert in cell phone location data analysis because Grabski "admitted the program and method of his cell phone analysis had never been peer reviewed, and that he had never been qualified as an expert in state court in this area before ... ." (IBOA p. 20.) However, neither the peer review of his work, nor his previous qualification is a factor the court must consider in determining whether Grabski was qualified to give opinion testimony at trial.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *State v. Simpson*, 425 S.C. 522, 535–36, 823 S.E.2d 229, 236 (Ct. App. 2019), reh'g denied (Feb. 21, 2019) (citing Rule 702, SCRE). Before a witness is qualified as an expert, the trial court must find (1) the expert's testimony will assist the trier of fact, (2) the expert possesses the requisite knowledge, skill, experience, training, or education, and (3) the expert's testimony is reliable. *State v. Martin*, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011).

Further, to present expert testimony, a party must show the witness possesses through either study or experience the knowledge or skill in a business, profession, or science making him or her better qualified than the jury to form an opinion on the particular subject in question. *Hall v. Clarendon Outdoor Advertising, Inc.*, 311 S.C. 185, 428 S.E.2d 1 (Ct. App. 1993).

The trial court heard the following information about Grabski's qualifications and his analysis of the data during the proffer: Grabski was assigned for the last two years to the surveillance and intelligence unit, in which the main goal is to pursue violent fugitives. His team specializes in the analysis of historical cellular phone data. Grabski said the unit typically obtains the cell phone data from the provider, then maps the location data for up to thirty days before the target incident in an effort to corroborate the information. Grabski had performed this analysis in about 200 cases. Grabski was trained by the FBI's Cellular Analysis Survey Team and received additional training from the private sector about the technology involved in cell phone towers. Grabski also received extensive training for pen register track and trace techniques. Grabski explained how cell towers function and described how a cell signal might be received by a tower, including various factors that affect the signal strength. Grabski said the unit obtains the data from the carrier and then references specific information about each cell tower from a database maintained by the Department of Justice. Grabski said the maps he prepares show only a tower and a sector that receives the cell signal; it does not attempt to pinpoint the exact location of a given cell phone. Grabski said that in his experience, although the tower and sector information is accurate, the estimated longitude and latitude of the signaling cell phone is not reliable. Grabski said the tower that receives the signal in any particular cell phone transaction will depend on many factors, but generally the responding tower is the "path of least resistance." (T. p. 380, line 2 – p. 389, line 2.)

Considering Grabski's extensive training from the FBI and private industry, the trial judge did not abuse her discretion in qualifying Agent Grabski as an expert and allowing him to testify about the cell towers utilized by Young's phone. Regardless of whether Grabski had been qualified before as an expert in cell tower information analysis, the record supports the judge's finding. Grabski's explanation of how a particular cell tower might receive a signal from a cell phone, as well as his plotting of the cell towers utilized by Young's phone on the night of the murder, certainly assisted the jury in its determination of whether Young's statements to police were credible. Grabski's training from the FBI, the private sector, and as part of his everyday experience in the surveillance and intelligence unit at SLED gave him the requisite education, experience, and skill to analyze and present the information to the jury. Grabski was certainly better qualified than the jury to interpret the data returned by the cell phone carrier about this phone.

Lastly, the testimony was reliable, particularly given Grabski's limitation on how the data could be interpreted. In other words, Grabski did not attempt to oversell the value of the data. Grabksi said the longitude and latitude data from the cell carrier was often untrustworthy in his experience. (T. p. 387, line 16 – p. 388, line 2.) Therefore, while he could definitively say the cell phone utilized a particular cell tower at a given time, he would not testify where the phone was located when it utilized a particular tower. (T. p. 388, lines 4-13.) Moreover, Young's contention Grabski could not provide reliable testimony because "he merely accepted what the computer told him," despite the possibility of computer "bugs and flaws" (IBOA p. 22), misses the mark. Experts are not required to testify to the precise reliability of the underlying data, as opposed to the reliability of the underlying science, generally. *See State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009); *State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001)

(holding scientific evidence is admissible under 2, SCRE, if the trial court determines the underlying science is reliable after applying the factors set forth in *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979)). Several courts have rejected challenges to the reliability of cell phone mapping technology, with some finding that it is so well accepted in both science and law that a hearing on its admissibility is unnecessary. *See, e.g., Jackson v. Allstate Ins. Co.*, 785 F.3d 1193, 1204 n. 5 (8th Cir. 2015) (rejecting a challenge to the reliability of cell phone mapping technology); *United States v. Lewisbey*, 843 F.3d 653, 659 (7th Cir. 2016) ("Using call records and cell towers to determine the general location of a phone at specific times is a well-accepted, reliable methodology")

In short, the jury was entitled to reasonably infer, based on Grabski's narrow testimony, that the targeted phone was moving in the hours after the murder. The trial court, in qualifying Grabski as an expert after confirming the limits of his testimony,[5] did not err.

CONCLUSION

Young has shown no error in the State's disclosure of information, the trial court's admission of evidence, or in the court's qualification of an expert. For all of the foregoing reasons, it is respectfully submitted that the appeal must be dismissed and the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

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[5] T. p. 398, lines 4-23.

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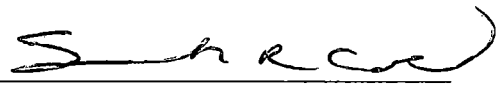
BY: 
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June 5, 2019.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Jasper County
The Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

Respondent,

v.

ANEISHA SHAIRE YOUNG,

Appellant.

Appellate Case No. 2018-000525

PROOF OF SERVICE

I, Susannah Cole, counsel for Respondent, certify that I have served the within Brief of Respondent on Appellant by depositing two (2) copies of the same via U.S. postal service, postage paid, first class, and addressed to the attorney of record at:

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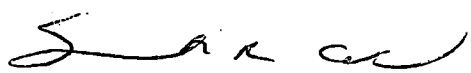
I further certify that all parties required by Rule to be served have been served.

This 5th day of June, 2019.



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JUN 05 2019
SC Court of Appeals

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June 5, 2019

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Post Office Box 11629
Columbia, South Carolina 29211

Re: *The State v. Aneisha Shaire Young*
Appeal from Jasper County
Appellate Case No. 2018-000525

Dear Ms. Kitchings:

Enclosed for filing please find the original Initial Brief of Respondent and Designation of Matter, together with Proof of Service in the above-referenced case. If you should have any questions, please feel free to contact me.

Sincerely,

Susannah R. Cole
Assistant Attorney General

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JUN 05 2019
SC Court of Appeals

SRC/bbr
Enclosures
cc: Robert M. Dudek, Chief Appellate Defender (w/two copies of encls.)
The Honorable Isaac McDuffie Stone, III, Solicitor 14th Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)