STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions

The Honorable Roger L. Couch, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2017-000808

THE STATE,

Respondent,

v.

ASHLEY PRICE TINDALL, III.,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

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

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
Charleston, SC 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

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II.

Appellant's argument that the trial judge erred in finding Appellant opened the door to questioning about his character is not preserved for review where Appellant did not contemporaneously object when the solicitor asked the question. Error preservation concerns aside, the trial judge properly allowed the solicitor to inquire as to whether Appellant physically abused his wife where Defense Counsel's presentation of character evidence intended to portray Appellant's family life in a positive light opened the door to such an inquiry; further, any error is harmless where Appellant as not prejudiced in any way by the question because he answered in the negative.

III.

The trial judge properly allowed the solicitor to ask Appellant's wife leading questions where she was a witness identified with an adverse party and was properly identified as a hostile witness. Further, Appellant cannot reasonably claim the trial judge committed reversible error based only on the solicitor's ability to ask leading questions.

STATEMENT OF THE CASE

Appellant was indicted during the September 2016 term of the Grand Jury for Charleston County for assault and battery of a high and aggravated nature (2016-GS-10-05793) and possession of a weapon during the commission of a violent crime (2016-GS-10-05794). Appellant proceeded to a jury trial before the Honorable Roger L. Couch from March 21-23, 2017 in Charleston, South Carolina.[1] At the conclusion of trial, the jury found Appellant guilty as indicted. He was sentenced by Judge Couch to six years' imprisonment for assault and battery of a high and aggravated nature suspended to service of thirty months with three years of probation, five years' imprisonment for possession of a weapon during the commission of a violent crime, with all sentences running concurrently. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

[1] Appellant's jury trial originally began on March 20, 2017, however Judge Couch declared a mistrial due to a redaction error and a new trial began on March 21, 2017.

STATEMENT OF FACTS

On July 4, 2014, Bob Escoffier hosted a barbecue at his house and invited his neighbors. R. pp. 78-79. Mr. Escoffier testified there were around three families at the party and the guests swam in his pool, played pool, and shot fireworks. R. p. 79. During the party, Teresa Escoffier, Mr. Escoffier's wife, heard yelling and turned to see Appellant and his wife, Sara Tindall, yelling at each other. R. p. 101. Appellant and Mrs. Tindall lived next-door to the Escoffiers. R. p. 82, 105. Mrs. Escoffier described Mrs. Tindall as a, "dear, dear friend of mine." R. p. 101. Mrs. Escoffier stated that Mrs. Tindall would regularly come over to the Escoffier residence to socialize, however Appellant never came over to their house to socialize. R. p. 102. After she and Appellant finished yelling at each other, Mrs. Tindall went inside to retrieve a plate of food for Appellant. R. p. 103. Mrs. Escoffier described Appellant as, "very agitated, enraged." R. p. 103. Mr. Escoffier described Appellant as, "real drunk" and "out of control." R. p. 85. Mrs. Escoffier confronted Appellant, telling him to stop yelling at everyone. R. p. 103. Upon hearing Mrs. Escoffier confront him, Appellant turned around and came towards her. R. p. 104. Mr. Escoffier approached, asking what was going on. R. p. 83. Appellant then punched Mr. Escoffier in the face. R. p. 83, 104. After hitting Mr. Escoffier, Appellant stated, "Do you want some of this." R. p. 104. Next, Appellant threatened the Escoffier's daughter, Melissa. R. p. 115. Appellant then pointed at everyone at the party and stated, "I'm coming back, I'm coming back with something for all of you." R. p. 105.

After Appellant's parting threat, Mrs. Escoffier frantically tried to get all of the children inside the house and called 911.[2] R. p. 106. Around five to ten minutes after Appellant walked away, Mr. Escoffier heard screaming over by his pool table. R. p. 88. Mr. Escoffier hurried to the

[2] Mr. Escoffier noted that while he was not sure what Appellant was coming back with, he assumed it wasn't, "popsicles or ice cream." R. pp. 87-88.

sound and encountered two gentlemen carrying his neighbor, Rick Hilding, back toward the Escoffier's house. R. p. 88. Mr. Escoffier observed Hilding was, "covered from head to toe" in blood. R. p. 88. After Rick was dragged underneath an awning, law enforcement arrived very quickly. R. p. 89. EMT also arrived and Hilding was carried away in an ambulance. R. p. 117.

Deputy Jeff Phillips of the Charleston County Sheriff's Office was the lead deputy on the night law enforcement was called to the Escoffier's home. R. pp. 304-05. Deputy Phillips responded to the call, which was classified by dispatch as a disturbance with a weapon. R. p. 306. Mr. Escoffier met law enforcement upon their arrival and directed them to Hilding. R. p. 309. Deputy Phillips testified he was told Appellant already left the scene in his vehicle. R. p. 310. Deputy Phillips and other law enforcement officers obtained written statements from the attendees of the Escoffier's party. R. pp. 313-14. Deputy Phillips testified that around midnight, he received a call informing him Appellant had returned to his residence. R. p. 315. Deputy Phillips stated that when they went to knock on the door of the home, the door actually swung open because it was not completely closed. R. p. 315. Deputy Phillips identified himself as a member of law enforcement and observed Mrs. Tindall standing in a doorway to the left. R. p. 316. Deputy Phillips observed Mrs. Tindall make a motion as if she were telling someone to get down. R. p. 316. Upon being asked where Appellant was, Mrs. Tindall made a "head nod" towards the back bedroom. R. p. 316. Deputy Phillips noted that in his experience, "usually that means that someone is hiding in there and she doesn't want them to know that she's telling us." R. p. 317. Appellant was subsequently located hiding under a bed and was taken into custody. R. p. 318. Deputy Phillips testified Appellant was only charged with respect to his assault of Hilding because Mr. Escoffier refused to press charges against him. R. p. 319.

Rick Hilding's Testimony

Rick Hilding testified that, while he did not know the Escoffiers well, Mr. Escoffier approached him and invited him to a July 4th party he was hosting. R. pp. 214-15. Hilding testified the party was a lot of fun and the attendees were relaxing and shooting pool while the kids were playing. R. p. 215. Hilding testified something happened at the party that suddenly changed the mood. R. p. 215. Hilding stated he was back by the pool table when he heard a huge commotion consisting of screaming and yelling. R. p. 216. Hilding then heard people screaming, "get the kids out of the pool. Get them into the house." R. p. 217. Hilding subsequently went down the nearby easement to check on his dog and see the source of the commotion. R. p. 218. Hilding came upon Appellant and his wife having an argument. R. pp. 220, 222. Hilding stated he overheard, "Just fighting. You should leave. I thought I heard something about, but we made you a plate." R. p. 222. Hilding testified he approached and said, "Whoa, dude, you got to calm down, they've already called 911." R. p. 222. Hilding noted Appellant seemed to be aggravated. R. p. 222. Hilding then observed Appellant raise his hand and saw, "a huge flash of light," and next remembers waking up underneath the awning of the Escoffier's home.[3] R. pp. 223-24. Hilding noted he never touched Appellant. R. p. 222. Hilding was transported to Roper Hospital and was in an extremely high amount of pain. R. p. 225. At the hospital, he required eight staples to his head to stop the bleeding.[4] R. p. 226. Hilding was discharged at 1:30 AM on July 5, 2014. R. p. 229. He subsequently passed out the next afternoon due to blood loss and had to return to the hospital. R. pp. 229-30. Hilding testified that when he originally returned from the hospital, Mrs. Tindall and her brother came to his house and Mrs. Tindall hugged him and kissed him on the cheek. R. pp. 230-31.

[3] Hilding testified he did not know for sure what object Appellant struck him with. R. p. 239.

[4] Dr. Jon Carter, the emergency room physician, testified Hilding had a 4 centimeter laceration to his head and that the injury was consistent with being hit with a blunt object. R. pp. 247-48. Dr. Carter noted this type of injury could be fatal under certain circumstances. R. pp. 249-50.

Chris Hilding's Testimony

Chris Hilding is Rick Hilding's son. R. p. 184. Chris attended the July 4th party at the Escoffier's home with his father. R. p. 186. Chris testified that at one point during the party, there was a commotion at the other side of the house. R. p. 190. Chris noted the mood of the party quickly went from mellow to serious. R. p. 191. Chris heard someone say something about someone getting violent. R. p. 191. Chris stated that a group of people from the party then moved towards the commotion. R. p. 192. Chris observed Appellant and his wife having a heated argument. R. p. 194. Chris noticed Appellant was the more aggressive party. R. p. 195. Chris saw his father approach Appellant and his wife and try to calm them down. R. p. 196. Christ testified his father stated, "Hey, let's just say everybody, let's just calm down." R. p. 197. Chris then watched as Appellant took a swing at his father and he fell to the ground. R. p. 196. Chris could not see what Appellant struck his father with. R. p. 198. Two other people then dragged Rick Hilding from underneath Appellant's truck because he could have been run over if Appellant moved the vehicle forward. R. p. 200.

Dana Bradwell's Testimony

Dana Bradwell also attended the Escoffier's party. R. p. 264. Bradwell testified the party was originally a really good time; however that all changed when Appellant showed up and was aggressive with his wife. R. p. 265-66. Bradwell stated Appellant did not like the fact that his wife was at the party and was "very aggressive." R. p. 266. Bradwell observed Appellant punch Mr. Escoffier. R. p. 267. Bradwell testified Appellant, "said he was going to get something for all of us and he would be back with his gun." R. p. 268. Bradwell subsequently heard yelling and heard the sound of metal hitting someone's head. R. p. 269. Bradwell ran towards the commotion and saw Rick Hilding lying at the foot of Appellant's truck door. R. p. 270. Bradwell

immediately noticed Hilding was covered in blood. R. p. 270. Bradwell testified Appellant then leaned over in his truck and she could see he was holding a gun. R. p. 270. Bradwell then observed Appellant point the gun at her brother's face. R. p. 270. Bradwell described the gun as, "just a black gun like most metal black guns." R. p. 272. Appellant then began to drive off. R. p. 272. Bradwell's brother quickly grabbed Hilding and picked him up from where he was lying unconscious in front of the car's tires. R. p. 272.

Daniel Moore's Testimony

Daniel Moore, Dana Bradwell's brother, heard yelling while he was watching his children swimming in the Escoffier's pool. R. p. 282, p. 284. Moore was walking down the stairs when Appellant approached him and stated, "do you want some too." R. p. 284. Moore held his hands up and told him, "I am cool." R. p. 284. Moore subsequently heard Appellant say he was coming back and he had something for all of them. R. p. 286. Moore interpreted that to mean Appellant was going to get his gun. R. p. 286. Moore later saw Appellant step out of his truck with a gun. R. p. 289. Moore observed Rick Hilding approach Appellant with his hands up and watched him tell Appellant, "Hey man, you know, I just want to talk to you, let's, you know, calm this down, let's calm this down or whatever." R. p. 289. Moore noted Hilding didn't seem aggravated. R. p. 289. Appellant then made physical contact with Hilding and hit him in the head with the butt of his gun. R. p. 290. Hilding staggered to the ground. R. p. 290-91. Appellant then turned around and pointed his gun at Moore. R. p. 292. Moore told Appellant to calm down and that the situation was getting out of hand, which prompted Appellant to get in his truck to leave. R. p. 292. Moore immediately moved to grab Hilding from out of the truck's path because Appellant would have run over him if no one moved him. R. p. 292.

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); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "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); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Pagan, 369 S.C. at 208, 631 S.E.2d at 265; State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (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, 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).

ARGUMENT

I.

The trial judge properly admitted the 911 call placed by Teresa Escoffier where the audiotape provided a contemporaneous account of the assault and was thus part of the res gestae; further, all statements in the call amounting to hearsay fell within recognized exceptions to the hearsay rule, the call did not contain any inadmissible character evidence, and the evidence's significant probative value was not substantially outweighed by the danger of unfair prejudice or confusion of the issues.

Relevant Facts

Prior to trial, the solicitor made a motion *in limine* to admit Teresa Escoffier's 911 call that was placed moments before Appellant assaulted Rick Hilding and continued until after the assault. R. 1 p. 6. The solicitor explained that the prior altercation where Appellant assaulted Bob Escoffier and subsequent 911 call were admissible under the theory of *res gestae* as a necessary predicate to explaining the full context of what occurred in the case. R. 1. p. 6. In response, Defense Counsel argued:

> It's our position, we would concede that the prior incident was close enough in time and basically provides the context for which the next incident takes place. I don't think there's any argument that in order to fully understand the situation, there should be some mention of that incident. However, we would seek to limit the specifics of that incident. . . . the State does not always need to go into the specifics of prior acts, alleged prior bad acts, and that's because those prior bad acts can be extremely prejudicial to the Defendant, and they can tend to confuse the jury as to which situation we're talking about. So, for those reasons, Your Honor, we would concede that.

R. 1 p. 10. Defense Counsel later argued, "That's why I believe that the 911 call is not only extremely confusing, there are multiple voices calling out different things in the background making allegations. But, you know, this person is not a witness to the assault we are here on." R. 1 p. 14. The solicitor replied, "The 911 call is incredibly important because it corroborates how

quickly the initial incident with Escoffier happened, the Escoffier incident occurred, to then the assault in this case. Without it, a jury cannot have a full picture of what we're dealing with here." R. 1 p. 15. The trial judge ruled:

> All right. And as the evidence has been described to me, if presented that way at trial, it would be my finding that the res gestae exception would apply in this case. Because of the continuous nature of the event, it appears the closeness in space - - they were all in the same area, neighborhood, I'd say, and then on the street in front of the houses - - I do find that it also would serve to identify the Defendant because he was involved with an argument with his wife on the premises and on the street. And it happened so quickly, I mean, from what I've been described to me. So, if that's the way the evidence bears out, then I'm not going to exclude it. I'll allow it.

R. 1. p. 16. The trial judge further noted, "I do find that the probative value you get with those factors would outweigh the prejudicial effect." R. 1. p. 16. At trial, the State subsequently moved to admit the recording of the 911 call. R. p. 106. Defense Counsel propounded, "I'm going to be objecting to. . . . the entirety of the tape as hearsay, and then specific references as hearsay. I'm going to be objecting to portions of the tape on the grounds of admissible character evidence. I'm going to be objecting to portions of the tape and the tape in its entirety as prejudicial and confusing to the jury." R. pp. 107-08. Defense Counsel averred Escoffier did not perceive the incident she was calling about. R. p. 111. The solicitor noted Theresa Escoffier's statements came in under either the present sense impression, excited utterance, or then existing mental, emotional, or physical condition, exceptions to the hearsay rule. R. pp. 109-11. After the solicitor argued the applicability of the various hearsay exceptions, the trial judge noted the present sense impression exception, "doesn't say how someone perceived the event. How do you perceive it? In other words, you could hear things." R. p. 112. The trial judge continued, "Hear people talking in the yard. Then he says, well, that's hearsay, double hearsay. I don't believe she's quoting, she

stating her belief of what's occurring. That's not hearsay, that's her belief. A statement of her then existing emotional or mental condition." R. p. 113. The trial judge ruled:

> I'm going to let it in under one of the - - those three exceptions, and as a regularly kept record. Certainly, you could cross-examine her on the strength of her beliefs or impressions when it happened. Or her beliefs - - now, I do find that the probative value outweighs its prejudicial value. So - - and, of course, because I believe it does describe the excitement, the upset, the concern that she apparently experienced with this incident. So, I find it probative on all of those issues. And she identifies who was involved and where they were, and the risk they posed. So I find that this probative value outweighs the prejudicial value.

R. p. 113.

Discussion

Appellant asserts the trial judge erred in admitting the recording of the 911 call placed by Mrs. Escoffier because it contained inadmissible hearsay, constituted inadmissible character evidence, and the evidence's probative value was substantially outweighed by the danger of unfair prejudice and confusing the issues. First, any statements in the 911 call that constitute hearsay each squarely fit within at least one exception to the hearsay rule. Second, the State did not admit evidence of Appellant's character for the purpose of proving action in conformity therewith on this occasion. Finally, the evidence's significant probative value was not substantially outweighed by the risk of unfair prejudice or confusing the jury.

A. Hearsay

Appellant contends the statements in the 911 call constitute inadmissible hearsay because there are no applicable hearsay exceptions. On the contrary, all of the statements in the audio recording fit squarely within one of a number of recognized hearsay exceptions.[5] Each one of Escoffier's statements in the 911 call that constitute hearsay fit within at least one hearsay

[5] A number of the statements in the recording do not constitute hearsay at all, as they were not offered for the truth of the matter asserted.

exception. Furthermore, some of the statements could arguably involve multiple layers of hearsay, of which a proper exception applies at each level.

Hearsay is defined as "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 not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. "A statement that is admissible because it is 'not hearsay' under Rule 801(d), SCRE, or because it falls within an exception in Rule 803, SCRE, may be used substantively, i.e., to prove the truth of the matter asserted." State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (2009)

Business Records Exception

First, the recording itself was admissible under the business records exception. Rule 803(6), SCRE, provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted b, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Rule 803(6) thus allowed for the admission of the tape itself, as well as many of the individual statements made by Mrs. Escoffier contained within the tape. Appellant contends, "The 911 call was replete with subjective opinions and speculation rather than objective facts, and it lacked the trustworthiness that serves as the basis for the admission of such records." Br. of App. p. 15. Appellant's argument ignores the fact that any 911 call may contain statements that, while based on objective facts, involve some speculation on the part of the caller. This does not render the

call inadmissible as containing subjective opinions and judgments. To the extent that Appellant claims some of Mrs. Escoffier's statements are not covered by the business records exception because they are based on subjective opinions, these statements are all covered by other hearsay exceptions and would nevertheless still be admissible.

Present Sense Impression

Rule 803(1), SCRE provides that, "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter," is not excluded by the hearsay rule. "There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event." State v. Hendricks, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014). The exception is modeled after the Federal Rules of Evidence. See Rule 803 cmt., SCRE. The Note provided by the Advisory Committee to the 1972 proposed rules explains the inclusion of the present sense impression exception: "The underlying theory of Exception [paragraph] (1) is that substantial contemporaneity of event and statement negates the likelihood of deliberate or conscious misrepresentation." Rule 803 cmt., FRE.

Appellant contends the present sense impression is inapplicable to his case because Mrs. Escoffier did not personally observe some of the events she was relaying to the 911 dispatcher. Appellant avers Mrs. Escoffier thus did not perceive the event as required by Rule 803(1). Appellant's argument erroneously presupposes that the only way to perceive the event is visually. While Mrs. Escoffier did visually perceive some of the events she described in the 911 call, she auditorily perceived other events that were happening while she was on the phone.

Allowing Mrs. Escoffier's statements into evidence as a present sense impression is fully consistent with the rationale behind Rule 803(1), as she is contemporaneously describing the hectic scene as the events were unfolding, thus negating the likelihood of deliberate or conscious misrepresentation. Even if Mrs. Escoffier was basing her statements on things other people were saying at the scene of the assault instead of her perceptions, this would simply constitute hearsay within hearsay and would have been admissible regardless. See Rule 805, SCRE ("Hearsay within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."). While the State contends Mrs. Escoffier's statements themselves fit the present sense impression exception without involving any additional layers of hearsay, to the extent that the current situation could arguably be construed as hearsay within hearsay, the statements of the people who described what was going on to Mrs. Escoffier while she was on the phone uncontestably perceived the events themselves, simply making this a case of present sense impression or excited utterance within present sense impression. Mrs. Escoffier's statements in the 911 call were thus admissible as a present sense impression, or, at a minimum, as a present sense impression of other present sense impressions.

Excited Utterance

"The rules of evidence define excited utterance as a 'statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.'" State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007) (quoting Rule 803(2), SCRE). An excited utterance: (1) must relate to a startling event or condition; (2) must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. State v. Sims, 348 S.C. 16, 21, 558

S.E.2d 518, 521 (2002). The excited utterance exception is based on the underlying rationale that. "the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999).

Appellant contends Mrs. Escoffier's statements in the 911 call were not based on firsthand information because she did not personally observe the events and the evidence should be barred as a result. On the contrary, Mrs. Escoffier was present at the scene and was very much under the stress of excitement caused by Appellant's conduct at her home and beyond. During the 911 call, Mrs. Escoffier was almost hysterical as she frantically described the events that were unfolding to law enforcement. Mrs. Escoffier gave law enforcement a live look at the scene of the crime as events were unfolding. This falls within the policy reasons underlying the exception, as Mrs. Escoffier could not fabricate the stressful, dangerous events she was describing as they happened. To the extent that it could be argued some of the statements fell outside the exception with respect to Mrs. Escoffier, these statements, as above, would simply constitute hearsay within hearsay and would still be admissible because each person that told Mrs. Escoffier about the events unfolding would still fall under either the excited utterance or present sense impression exceptions.

Then Existing Mental, Emotional, or Physical Condition

Rule 803(3), SCRE, provides, "A statement of the then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory of belief to prove the fact remembered or believed unless is relates to the execution, revocation, identification, or terms of declarant's will" is not excluded by the hearsay rule. Mrs. Escoffier's statements regarding being fearful are admissible under this section. While Appellant is correct in noting the reason for the declarant's

state of mind is not admissible pursuant to this section, the reason for Mrs. Escoffier's state of mind was admissible pursuant to either present sense impression, excited utterance, or the business records exception.

Any Error in Admitting Hearsay is Harmless

Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). Mrs. Escoffier, Mr. Escoffier, Rick Hilding, Chris Hilding, Dana Bradwell, and Daniel Moore all testified in a manner wholly cumulative to the information in the 911 call. While the 911 call supplied critical context regarding what was occurring in the scene, the substance of Mrs. Escoffier's call all came in through State's witnesses at trial as well. As such, any error in the earlier introduction of the 911 recording proves harmless because it was cumulative.

B. Character Evidence

Appellant contends the 911 recording contained statements constituting inadmissible character evidence. Specifically, Appellant avers Mrs. Escoffier's statements that, "he has a gun," and "he has all kinds of guns; he's crazy," constituted propensity evidence. See State's Exhibit 7 (911 Call). This argument lacks merit. The 911 call was introduced for the purpose of showing the *res gestae* and providing the full context of the events on the evening of Appellant's attack.

Rule 404(a), SCRE, states, "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." [6] The single, isolated statement in the 911 call that Appellant was crazy and owned "all kinds of guns" was not introduced to show Appellant's propensity to act in that manner. Rather, the 911

[6] The Rule goes on to provide several exceptions to the general prohibition on character evidence generally. See Rule 404(a)(1) to (a)(3), SCRE.

tape was necessary to provide an accurate portrayal of the hysteria at scene at the time Appellant assaulted Hilding and Mr. Escoffier. The 911 tape was thus not introduced for the purpose of proving Appellant acted in conformity with a particular character trait.

C. The 911 Tape's Probative Value Was Not Substantially Outweighed by Unfair Prejudice

Finally, Appellant argues any admissible portions of the 911 call should have been excluded because the probative value of its content was outweighed by the danger of unfair prejudice and confusion of the issues. Even if relevant, evidence must be excluded from trial if its probative value is **substantially outweighed** by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE ("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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev'd on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Meanwhile, unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); see Old Chief v. United States, 519 U.S. 172, 181 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.").

However, unfair prejudice does **not** mean damage to a defendant's case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true because all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant, and it is only unfair prejudice that must be avoided. Id.

When ruling on the comparative probative value and potential prejudicial effect of evidence, trial judges have "particularly wide discretion[.]" Collins, 398 S.C. at 209, 727 S.E.2d at 757. As a result, a trial judge's ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Hamilton, 344 S.C. 344, 358, 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). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Id. at 358, 543 S.E.2d at 594.

In Appellant's case, the trial judge did not abuse his broad discretion by admitting the recording of Mrs. Escoffier's 911 call. As was noted by the solicitor, the recording provided the jury a clear picture of the underlying events in this case and gave them the full context of the situation, thus giving the evidence an exceptionally high probative value. The recording was admissible as part of the res gestae, as it provided an account of the underlying conflict between Appellant and the attendees of the Escoffier's party and provided a live account of Appellant's assault. Any prejudice to Appellant stems from the evidence's substantial probative value and

did not suggest a decision on an improper basis. While Appellant claims the tape was prejudicial because some of Mrs. Escoffier statements were "speculative," that speculation was readily apparent to the jury and Defense Counsel had the ability to cross-examine Mrs. Escoffier regarding some of her statements being speculative or without foundation. Further, the live testimony of all of the witnesses from the party provided a clear narrative to the jury as to what exactly happened. The trial judge therefore properly concluded the evidence's probative value was not substantially outweighed by the risk of unfair prejudice.

D. Harmless Error

In any event, even assuming the trial judge erred in admitting the 911 tape, Appellant did not suffer the requisite prejudice to require a new trial. Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). An error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008); see also State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) ("Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict."). Any error with respect to the admission of the 911 call was harmless because it could not have reasonably affected the verdict. The recording, while enormously helpful with providing context of the dispute and providing a contemporaneous account of the assault, was not a critical piece of the State's evidence. The State presented the same testimony through Mr. and Mrs. Escoffier, Rick and Chris Hilding, Dana Bradwell, and Daniel Moore. Since the same information was presented to the jury through the questioning of the aforementioned witnesses, Appellant could not reasonably have been prejudiced by the

admission of the 911 recording which presented the same allegations against Appellant. Appellant's convictions and sentences should be affirmed.

II.

Appellant's argument that the trial judge erred in finding Appellant opened the door to questioning about his character is not preserved for review where Appellant did not contemporaneously object when the solicitor asked the question. Error preservation concerns aside, the trial judge properly allowed the solicitor to inquire as to whether Appellant physically abused his wife where Defense Counsel's presentation of character evidence intended to portray Appellant's family life in a positive light opened the door to such an inquiry; further, any error is harmless where Appellant as not prejudiced in any way by the question because he answered in the negative.

Relevant Facts

In his opening statement, Defense Counsel stated, "Now, I'm not here to tell you that Ashley Tindall is going to win husband of the year, but he's a family man. He lives for his wife and kids. He's a grandfather. And you'll hear form his wife, Sara, about their relationship. . . . She'll tell you that she loves her husband. R. p. 71. During cross-examination of Mrs. Tindall, Defense Counsel asked a series of questions intended to paint an idyllic view of her and Appellant's marriage, asking:

> Defense Counsel: Tell me a little but about your everyday routine when you get up in the morning.
>
> S. Tindall: When I get up in the morning?
>
> Defense Counsel: Yes.
>
> S. Tindall: I get up, get dressed, get ready for work, go to work.
>
> Defense Counsel: And around what time is that?
>
> S. Tindall: I have to be to work at seven in the morning so I get up about 5:45 to get ready.
>
> Defense Counsel: You up by yourself?

S. Tindall: No. My husband gets up with me.

Defense Counsel: Why does he do?

S. Tindall: He just gets up, watches a little bit of the news, waits for me to leave and walks me to the door.

Defense Counsel: He walks you to the door?

S. Tindall: Yeah, every morning.

Defense Counsel: Sees you off to work?

S. Tindall: Yes, sir.

R. p. 159. Similarly, Defense Counsel subsequently asked:

Defense Counsel: So, let's jump back to just a typical day. Removing ourselves from the 4th of July got just a moment. You generally eat dinner together as a family?

S. Tindall: Yes, sir.

Defense Counsel: And do you generally prepare dinner as a family?

S. Tindall: Yes, sir. We usually either cook together, or he'll cook.

Defense Counsel: And do you sit down and eat dinner together as a family?

S. Tindall: Yes, sir.

Defense Counsel: So, that's something that's a normal part of your day?

S. Tindall: Yes, sir.

Defense Counsel: Back to the 4th of July. You mention that you had an agreement to have dinner at eight?

S. Tindall: To be home at eight.

Defense Counsel: To cook dinner?

S. Tindall: To have - - he was going to take me out to dinner.

R. pp. 160-61.

After the State closed its case-in-chief, the solicitor stated:

> I think that this is probably an appropriate time to bring up something else that has come up during this trial. Normally, I think this is just in an abundance of caution, we have already had one mistrial and we certainly don't want to ask a question to have another. But I do have to point out, during –Defense Counsel's] opening he brought character in. Which is fine, I'm not suggesting that he introduced character evidence at that point, but he certainly set the stage and that caught my ear. And during his cross, which basically was his witness since he had spoken to Ms. Tindall before, he not only opened a door, he ran right through it. And he did it over and over again. I even objected to the leading. And I know that it was not appropriate to try to signal to him, but he kept asking these questions. And some of the ones that I got was the defendant walks Sara to the door every morning, the defendant sees her off to work, the defendant eats dinner with her as a family. They prepare dinner together, they sit down together as a family, you love him, he loves you. All of that is nothing more than character evidence to show that he is a good father and a good husband. He opened that door. If Mr. Tindall takes the stand, I think that we should be able to ask him, you have hit Ms. Tindall before haven't you. That goes directly to show that he's not such a good father and good husband like [Defense Counsel] is stating.

R. pp. 351-52. The solicitor clarified, "we are not seeking to introduce extrinsic evidence to prove. He can deny it and I think that we are stuck with it." R. pp. 352-53. Defense Counsel countered that the evidence was intended to show that July 4th was a normal day for Appellant and his wife. R. p. 353. Defense Counsel alleged the testimony was to show that the Tindalls have a routine, not to show any specific character trait. R. p. 355. The trial judge replied, "walking her to the door, what does that have to do with the routine about eating?" R. p. 355. The trial judge ruled, "I'll probably allow you to cross-examine him about that issue. It seems to me that the door has been opened." R. p. 356.

During Defense Counsel's direct examination of Appellant, he asked, "So, tell me about a normal day for you then." Appellant described making his wife breakfast and stated, "So I try to get up and try to help her, just get her off to work and all. I'll see her to the door every morning, give her a kiss goodbye and tell her I love her. Tell her to please be safe while driving, you know." R. pp. 406-07. Defense Counsel then asked Appellant what happened in the evenings at

home and Appellant gushed, "We just like to sit down and relax and maybe take in a little bit of television. Just enjoy each other's company, you know. And just sit and be with each other." R. p. 408.

Subsequently, during cross-examination of Appellant, the solicitor asked appellant, "Okay. You talked about how you're a good and loving husband, isn't that right?" R. p. 432. Appellant replied, "Yes, it is." R. p. 432." The solicitor continued, "And that you've never hit Sara before, ever." R. p. 432. Appellant replied, "Absolutely not." R. p. 432." The solicitor then asked, "And you've never yelled at her; is that right?" Appellant responded, "I'm not saying we've never yelled at each other. We are a married couple, we've been married for 32 years, and just like any other couple, we do have our little problems here and there." R. p. 433. Defense Counsel did not contemporaneously object to any of these questions. See R. pp. 432-33.

Discussion

Appellant argues the trial judge erred in concluding Defense Counsel "opened the door" to a question by the solicitor regarding his character. Specifically, Appellant avers the trial judge erroneously found the evidence presented portraying Appellant as the quintessential family man allowed the solicitor to inquire whether he ever physically assaulted his wife. As a threshold matter, Appellant's argument is not preserved for appellate review where Defense Counsel failed to offer a contemporaneous objection to the evidence he now seeks to challenge on appeal. Error preservation concerns aside, the trial judge properly found Appellant "opened the door" to a question by the solicitor about his conduct towards his wife within the home. Finally, any alleged error is harmless where the question and answer did not prejudice Appellant in any way.

Initially, Appellant's argument is not preserved for appellate review. An *in limine* ruling is not final and contemporaneous objection is required to preserved an issue for appeal. State v.

Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). "Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011). See also State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("[M]aking a motion *in limine* to exclude evidence. . . . does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced."). The trial judge made an *in limine* ruling that he would **probably** allow the solicitor to cross-examine Appellant regarding whether he ever abused his wife. It was thus incumbent upon Defense Counsel to offer a contemporaneous objection when the solicitor asked the question and Defense Counsel failed to do so. Appellant's argument is therefore not preserved for appellate review.[7]

Error preservation concerns notwithstanding, the trial judge properly allowed the solicitor to inquire as to whether Appellant previously abused his wife. As was previously discussed infra, Rule 404(a), SCRE provides:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) *Character of Accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
>
> (2) *Character of Victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) *Character of Witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

[7] Appellant further cites the fact that the solicitor asked Sara Tindall's brother, John Sager, who co-habited with Appellant and his sister, "So, potentially Mr. Tindall could have been beating up your sister and you'd have no idea," as improper character evidence. R. p. 400. Defense Counsel did not offer any objection to this question either.

Defense Counsel began bolstering Appellant's character as a doting husband from opening statements through the presentation of both parties' cases. Since the linchpin of the conflict in this case involved a marital dispute between Appellant and his wife, his character as a husband was of critical importance. After Defense Counsel let Appellant and Mrs. Tindall both bolster their relationship and Appellant's character as a husband and family member, the solicitor was well within his rights to inquire as to whether Appellant had ever struck Mrs. Tindall during a dispute or whether their disputes simply involved yelling at each other. The trial judge thus did not abuse his discretion by allowing the solicitor to probe Appellant's less savory conduct towards his wife.

Finally, any alleged error in allowing the solicitor to ask Appellant the question was harmless. An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result. State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006). "The erroneous admission of character evidence is harmless beyond a reasonable doubt if its impact is minimal in the context of the entire record." State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 555 (2001). The solicitor asked Appellant a single question about whether he had ever hit his wife. Appellant responded, "absolutely not." Appellant cannot reasonably claim prejudice for an isolated question that did not implicate him in any prior bad acts or negative character attributes. Appellant's conviction and sentence should be affirmed.

III.

The trial judge properly allowed the solicitor to ask Appellant's wife leading questions where she was a witness identified with an adverse party and was properly identified as a hostile witness. Further, Appellant cannot reasonably claim the trial judge committed reversible error based only on the solicitor's ability to ask leading questions.

Relevant Facts

On the evening of the incident, Deputy Phillips took statements from everyone, including Sara Tindall. R. pp. 313-14. Sara Tindall subsequently made a second statement inconsistent with the first, claiming she was drunk when she made her first statement. R. p. 140. Tindall wrote the second statement in the presence of her husband, who was not present when she gave her first statement to law enforcement. R. pp. 149-50.

Ray Haupt, an investigator with the Ninth Circuit Solicitor's Office, was asked to located Sara Tindall as part of the preparation of Appellant's case for trial. R. p. 259. Investigator Haupt located Mrs. Tindall at the Waffle House on John's Island where she is employed. R. p. 260. Investigator Haupt described his encounter with Mrs. Tindall as, "At first she didn't really say anything. It seemed like she wanted to talk to me. And then she said, no, that she didn't believe that [Appellant] would like that." R. p. 260. Investigator Haupt then gave Mrs. Tindall a copy of her subpoena, provided his contact information, and told her they could do a phone conference or meet at the Solicitor's Office. R. p. 261. Mrs. Tindall again replied that Appellant would not like that. R. p. 261. Investigator Haupt later called Mrs. Tindall; however, Appellant answered the phone and Mrs. Tindall declined to return Investigator Haupt's phone call. R. p. 262.

During the direct examination of Mrs. Tindall, she denied saying Appellant would not like her talking to investigators. R. p. 131. The solicitor then asked to treat Mrs. Tindall as a hostile witness pursuant to Rule 611(c),SCRE. R. p. 132. Defense Counsel objected, stating, "I

don't see how she's displayed herself as a hostile witness at this point, Your Honor." R. p. 132. The trial judge ruled, "Well, it has to do with her position in the case and whether or not she's been willing to talk to them up to this point in time. So I'll make that designation. That'll allow this attorney to ask what is called leading questions, when a witness has been declared to be hostile." R. p. 132. The trial judge later clarified his ruling as to hostility, stating:

> I do want to put one thing on the record regarding the last witness, Mrs. Tindall. She was offered by the defense after they began to examine her as a hostile witness. I did not require them at that time to make a proffer to indicate that she was - - her testimony was either a surprise or would indicate actual harm. But after having heard her testimony, her testimony was that she had refused to talk to the State between the time of the giving of her statements and the time of her testimony. Her testimony was at odds with and varied from her statements. So my finding would have been that there would be surprise and actual harm. It doesn't affect the ruling, and my ruling would have been the same had I taken a proffer at that time. So, I just wanted to put that on the record that I see the result would have been the same.

R. p. 183.

Discussion

Appellant claims the trial judge erred in granting the State's request to treat Sara Tindall as a hostile witness. Appellant acknowledges the State would regardless have been able to impeach Mrs. Tindall with her prior inconsistent statement pursuant to Rule 607, SCRE; however, the trial judge's allowance of leading questions amounted to a prejudicial abuse of discretion. This argument lacks merit. The trial judge was well within his discretion to allow the solicitor to treat Mrs. Tindall as a hostile witness under Rule 611, SCRE, after it became readily apparent Mrs. Tindall had been inconsistent in her version of events and uncooperative with the State throughout the investigation. The cases cited by Appellant were decided prior to the adoption of the South Carolina Rules of Evidence and are thus not dispositive of the issue. Furthermore, any alleged error is harmless, as the trial judge's simple allowance of permitting

the solicitor to lead the witness could not have resulted in sufficient prejudice to Appellant to warrant a reversal.

Rule 611(a), SCRE, provides, "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Rule 611(c), SCRE, adds:

> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

The solicitor's request to ask Mrs. Tindall leading questions satisfied two of the criteria in Rule 611 (c), SCRE. At a minimum, the solicitor would have been permitted to conduct interrogation by leading questions because Mrs. Tindall was "a witness identified with an adverse party." The trial judge was also correct in finding that Mrs. Tindall fit the criteria of a hostile witness and would thus be allowed to ask leading questions. Our courts have held, "a witness may not be declared hostile except upon a showing of both actual surprise and harm." State v. Bendoly, 273 S.C. 47, 254 S.E.2d 287 (1979).[8]

As Appellant's wife, Mrs. Tindall undoubtedly was a "witness identified with an adverse party." Despite Appellant's hostile actions toward her, Mrs. Tindall remained loyal to Appellant and was committed to keeping him out of prison. These actions included changing her statement

[8] It is noteworthy that all of the cases cited by Appellant were decided prior to the adoption of the South Carolina Rules of Evidence. See Rule 1103(b), SCRE ("These rules shall become effective September 3, 1995."). The holdings of these cases supported the premise that a party cannot impeach its own witness except when the witness proves hostile or recalcitrant. The holdings of these cases have thus been superseded by the South Carolina Rules of Evidence. See State v. Byram, 326 S.C. 107, 115, 485 S.E.2d 360, 364 n.7 (1997) ("Under Rule 607, SCRE, which became effective approximately six months after appellant's trial, a party may attack the credibility of its own witness."). See also State v. Anderson, 304 S.C. 551, 406 S.E.2d 152 (1991), *superseded by statute as stated in* State v. Byrum, 326 S.C. 107, 485 S.E.2d 360 (1997).

to law enforcement under the watchful eye of Appellant and refusing to speak with investigators out of fear or reverence to Appellant. While Mrs. Tindall was called by the State, her posture in the case was actually that of a witness adverse to the State's interest. The State would therefore be allowed to ask her leading questions pursuant to Rule 611(c).

Further, the trial judge correctly found Mrs. Tindall met the criteria of a hostile witness. Mrs. Tindall made multiple contradictory statements during the investigation and later refused to speak with investigators. As was correctly noted by the trial judge, her testimony varied from her statements. Despite the fact that she was called by the State, the solicitor knew Mrs. Tindall would not be a cooperative witness for the State. The State moved to treat Mrs. Tindall as a hostile witness because she immediately denied telling Investigator Haupt that Appellant would not like her talking to them. This put her testimony directly at odds with that of other State's witnesses. After Mrs. Tindall's denial of that small fact, it became clear to the solicitor that Mrs. Tindall was going to do everything in her power to protect Appellant and the solicitor properly concluded she should be treated as a hostile witness.

Finally, any error in the trial judge's allowance of leading question was harmless. Error is harmless where it could not reasonably have affected the result at trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). Leading questions could in no way garner the requisite prejudice to warrant a reversal in this case.[9] Any error in the trial judge's allowance of leading questions would thus be an insubstantial error that had no bearing on the result at trial. Appellant's convictions and sentences should be affirmed.

[9] It is telling that our State has had no published cases on this issue in recent years. Once the South Carolina Rules of Evidence were adopted and allowed impeachment of a party's own witness, the merit of raising the issue of hostility on appeal evaporated, as there is no reversible error in allowing a party to ask leading questions.

CONCLUSION

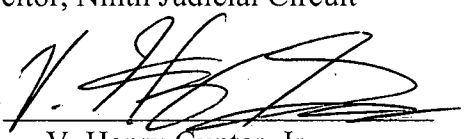
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: 
V. Henry Gunter, Jr.
Bar # 102259

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

ATTORNEYS FOR RESPONDENT

August 2, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions

The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2017-000808

THE STATE,

Respondent,

v.

ASHLEY PRICE TINDALL, III.,

Appellant.

CERTIFCATE OF COUNSEL

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

ALAN WILSON

Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: _____
V. HENRY GUNTER, JR.
S.C. Bar No. 102259

Office of the Attorney General
Post Office Box 11549

Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

August 2, 2018