STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
Honorable Jocelyn Newman, Circuit Court Judge
Appellate Case No. 2018-001596

THE STATE,

Respondent,

vs.

JOHN FITZGERALD ANDERSON,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

In June of 2017, Appellant John Fitzgerald Anderson was arrested after crashing his vehicle while unsuccessfully attempting to flee from law enforcement officers at a high rate of speed. In March of 2018, the Greenwood County Grand Jury indicted Appellant for one count of failure to stop for a blue light, one count of driving under suspension, one count of exploitation of a vulnerable adult, one count of receiving stolen goods, and one count of unlawful entry on another's land after notice. In May of 2018, the Greenwood County Grand Jury indicted Appellant for an additional count of exploitation of a vulnerable adult, and the original count of that particular offense was subsequently dismissed. On August 20, 2018, a jury trial was commenced in the Greenwood County Court of General Sessions with the Honorable Jocelyn Newman, circuit court judge, presiding. At the outset of the trial proceedings, Appellant entered guilty pleas to the charges of failure to stop for a blue light and driving under suspension, and the trial judge accepted the guilty pleas while deferring sentencing until the end of trial. Thereafter, the trial proceeded forward, and, at the conclusion of the three-day trial, the jury convicted Appellant of all the remaining indicted offenses. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of ten years for receiving stolen goods, five years for exploitation of a vulnerable adult, three years for failure to stop for a blue light, ninety days for driving under suspension, and thirty days for unlawful entry on another's land after notice. Appellant then filed a timely notice of appeal.

STATEMENT OF FACTS

By November of 2016, Bertha Lee Robinson ("Victim"), an eighty-eight-year-old retired widow living alone in Hodges, South Carolina, was declining in health. (Tr. p. 72; pp. 115-117; p. 257; pp. 264-265). At that time, Victim was experiencing confusion, seemed disoriented, was easily distracted, was suffering from memory issues, was not capable of making her own decisions, and could be easily manipulated. (Tr. p. 117; pp. 257-259; pp. 269-270). Based on her readily-apparent poor mental condition, Victim's physician classified her as a vulnerable adult before ultimately later diagnosing her with dementia and Alzheimer's disease. (Tr. p. 254; pp. 257-259; pp. 262-263; p. 271).

In May of 2017, Victim's nephew, Anthony Gilmore, and niece, Terraine Singletary, came to check on Victim from their out-of-state homes, and, during the visit, they discovered Victim's bank accounts, which had previously contained "a good chunk of change" that had been saved for retirement, had been depleted of their ample funds.[1] (Tr. pp. 114-119; p. 129). Additionally, Gilmore and his sister further discovered other items were missing from Victim's home, including jewelry and a Jaguar key. (Tr. p. 120; pp. 126-127; p. 134). Based on those discoveries, Gilmore filed an incident report with the Greenwood County Sheriff's Office in regard to the missing property, and Investigator Ronnie Powell began an investigation into the matter. (Tr. pp. 69-72; p. 74; pp. 93-94; p. 120).

During the course of the investigation, Gilmore provided information to the investigator identifying Appellant, who lived just across the road from Victim, as a potential suspect, and

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[1] In the months leading up to that point, over $120,000 was withdrawn from Victim's various financial accounts. (Tr. pp. 177-179; pp. 218-222; pp. 276-280). During that time period, Appellant was observed routinely accompanying Victim to the bank and attempting to obtain information about her accounts. (Tr. pp. 183-184; pp. 274-275; p. 287). Around that same time, Appellant was also frequently observed in possession of thousands of dollars in cash. (Tr. pp. 230-232; p. 234; p. 245)

Investigator Powell made contact with Appellant. (Tr. pp. 74-75; p. 110; p. 128). During their conversation, Appellant confirmed he knew where a tractor that was missing from Victim's home could be located, and he ultimately returned it to Victim. (Tr. pp. 75-76; p. 98). After that incident, Investigator Powell directed Appellant to stay away from Victim's property, and Gilmore posted "no trespassing" signs around Victim's home. (Tr. pp. 76-77; p. 98; p. 125; p. 133; p. 147).

A few weeks after that, Gilmore and his sister hired Cindy Adams, who owned a nursing agency, to provide in-home caregiving services for Victim out of concern for Victim's safety and well-being.[2] (Tr. pp. 120-121; p. 129; pp. 143-146). Upon being hired, Adams was advised Appellant was not permitted to be present on Victim's property, and she informed her staff members of that prohibition. (Tr. p. 146). Shortly after that, one of her staff members alerted her Appellant was on Victim's front porch, and Adams personally went to the residence and instructed Appellant he was not allowed to be there. (Tr. p. 146).

Thereafter, on the morning of June 28, 2017, Gilmore observed Appellant at Victim's front door through surveillance equipment he had installed at Victim's home. (Tr. pp. 121-122; p. 137; p. 139). In response, he alerted Adams, and one of Adams's employees went to check on Victim and discovered she was absent from her home. (Tr. pp. 121-122; pp. 150-151). At that point, Adams contacted Investigator Powell to let him know Victim was missing, and the investigator quickly headed to Victim's home in an effort to locate her. (Tr. pp. 77-78; p. 151).

Later that day, Gilmore received an alert a withdrawal of $300 was being made from a checking account Victim had at a bank located in Ware Shoals, South Carolina. (Tr. p. 123; p. 273; pp. 281-283). In response, law enforcement was notified, and Investigator Powell

[2] At that time, Victim's home was a "disaster" due to Victim's deteriorating condition. (Tr. pp. 147-149).

dispatched Deputy Urban Mitchell of the Greenwood County Sheriff's Office to Ware Shoals to see if he could locate Appellant's vehicle in that vicinity. (Tr. p. 79; pp. 208-209). When he arrived there, Deputy Mitchell spotted Appellant's vehicle leaving a gas station, and a high-speed chase ensued when he attempted to stop it. (Tr. pp. 80-81; p. 209). As the chase continued, Investigator Powell joined in the pursuit, and it continued until Appellant crashed his vehicle after one of its wheels fell off. (Tr. pp. 80-81; pp. 209-210).

After the crash, Appellant was arrested, and the officers found Victim, who seemed shaken up and disoriented, in the front seat of Appellant's vehicle. (Tr. pp. 81-82). The officers then searched Appellant and his vehicle, and they located $249 in cash in Appellant's pocket and found Victim's Jaguar key along with some of her jewelry concealed inside Appellant's vehicle's first-aid kit. (Tr. pp. 82-86; p. 126; pp. 155-156; pp. 210-211; pp. 215-216).

Subsequent to his arrest, Appellant was indicted for a litany of charges, and he proceeded to trial.[3] (Tr. p. 8; Indictments). At that outset of trial, he entered guilty pleas to charges of failure to stop for a blue light and driving under suspension. (Tr. pp. 8-15). The trial then proceeded forward on the remaining charges, and the jury ultimately convicted Appellant of exploitation of a vulnerable adult, receiving stolen goods, and unlawful entry on another's land after notice. (Tr. p. 16; p. 410). Following the verdict, the trial judge sentenced Appellant to an aggregate ten-year term of imprisonment for his convictions. (Tr. p. 430).

[3] Shortly after the crash, Victim was moved into an assisted living facility, and she was unable to attend or participate in the trial due to her worsening dementia. (Tr. pp. 125-126; p. 152).

ARGUMENT

I.

The trial judge, who otherwise presented jury instructions that correctly conveyed the relevant and applicable South Carolina law to the jury and ensured the jurors would consider all the evidence presented in deciding Appellant's case, properly declined to present the requested jury instruction on evidence of good character because that particular instruction was not supported by the evidence presented and would have constituted a confusing, misleading, and unconstitutional comment on the facts in direct violation of the mandates of the South Carolina Constitution.

Appellant contends the trial judge committed reversible error by declining to instruct the jury in regard to evidence of good character. In support of that contention, Appellant maintains evidence of his good character was elicited during trial and, therefore, he was entitled to the good character jury instruction requested by defense counsel, which would have instructed the jury evidence of good character "may in and of itself create doubt as to guilt." To the contrary, the trial judge, who otherwise completely and accurately instructed the jury on all the applicable law, properly declined to present a jury instruction on good character evidence because no legitimate good character evidence was actually introduced during trial. Furthermore, even if evidence of good character had been introduced, the trial judge's decision not to present the requested jury instruction was nonetheless correct because that particular instruction would have improperly singled out good character evidence and constituted an unconstitutional comment on the facts. Accordingly, the trial judge committed no error when instructing the jury in Appellant's case. Appellant's convictions should be affirmed.

RELEVANT FACTS

During the course of Appellant's trial, Whitni Jones, who was incarcerated at that time but who had previously lived with and been in a romantic relationship with Appellant, testified on behalf of the prosecution. (Tr. p. 226; pp. 228-229; p. 236). Through her testimony, Jones

confirmed she saw Appellant in possession of thousands of dollars in cash when she was living with him, indicated she routinely observed Appellant using Victim's vehicles, and noted she witnessed Appellant return from Victim's home with significant amounts of cash. (Tr. pp. 231-232; p. 234; pp. 245-246; p. 252). Beyond that, Jones also indicated Appellant "seemed like a good person" when they first met several years earlier. (Tr. pp. 228-229). Furthermore, she stated Appellant sometimes brought food to Victim, helped her around her house, and helped her when she got lost.[4] (Tr. pp. 233-234; pp. 250-251).

At the conclusion of the evidentiary phase of the trial, defense counsel—based on Jones's testimony stating "something to the effect of" Appellant being a good person and establishing Appellant brought food to Victim—requested a jury instruction he characterized as "basically" a good character instruction that was derived from the language of State v. Green, 278 S.C. 239, 294 S.E.2d 335 (1982). (Tr. pp. 346-347; p. 351). Specifically, defense counsel indicated he wanted a jury instruction stating: "Evidence of good character and good reputation may in and of itself create doubt as to guilt and should be considered by the jury, along with all other evidence, in determining the guilt or innocence of the defendant."[5] (Tr. pp. 347-348). Defense counsel further asserted the requested instruction was "probably" good law. (Tr. p. 348). In response, the solicitor asserted the "in and of itself" language from Green would constitute an impermissible comment on the facts and further argued the requested charge was not warranted by the evidence presented. (Tr. p. 347; p. 349). Upon considering the matter, the trial judge declined defense counsel's request. (Tr. p. 350). In doing so, the trial judge indicated the

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[4] In addition to that testimony, Victim's nephew also confirmed Appellant occasionally brought what appeared to be food to Victim. (Tr. pp. 190-191).

[5] When asked by the trial judge, defense counsel confirmed that precise instruction was the only instruction he was requesting. (Tr. p. 348).

testimony presented only established Appellant undertook the act of delivering food and did not establish Appellant possessed any specific traits of good character. (Tr. p. 350). In light of that, she found the requested charge was not applicable under the circumstances. (Tr. pp. 350-351).

Thereafter, the trial proceeded forward, and the parties presented their closing arguments to the jury. (Tr. pp. 368-388). During defense counsel's closing argument, defense counsel referenced the testimony establishing Appellant brought food to Victim and helped her on occasion as support for his argument Appellant should be acquitted of the indicted offenses. (Tr. p. 371; p. 384). Conversely, in the solicitor's closing argument, the solicitor focused on the exact same evidence and argued Appellant's acts of helping Victim were the acts of "a wolf in sheep's clothing" used to cunningly swindle his vulnerable victim. (Tr. p. 385).

Following the parties' closing arguments, the trial judge instructed the jury on the applicable law. (Tr. pp. 388-401). In doing so, the trial judge explained the jurors were the exclusive judges of the facts, indicated the State had the burden of proving Appellant's guilt for the indicted offenses beyond a reasonable doubt, noted a criminal defendant in South Carolina was never required to prove his innocence, thoroughly defined reasonable doubt, explained Appellant was presumed to be innocent, discussed witness credibility and criminal intent, and advised the jurors their verdict had to be unanimous. (Tr. pp. 388-401). Furthermore, the trial directly instructed the jurors they should weigh and consider "all" the evidence presented in determining whether Appellant's guilt had been established beyond a reasonable doubt. (Tr. p. 393). However, consistent with her earlier ruling, the trial judge did not present any instruction to the jury singling out or discussing good character evidence.[6] (Tr. pp. 388-401).

[6] At the conclusion of the trial judge's jury charge, defense counsel renewed his objection to the trial judge failure to give the requested jury instruction on good character evidence, and the trial judge once again declined to present that instruction. (Tr. pp. 402-403).

Subsequently, at the conclusion of trial, the jury convicted Appellant of all the indicted offenses. (Tr. p. 401). Following the verdict, the trial judge sentenced Appellant to an aggregate term of imprisonment of ten years. (Tr. p. 430). In doing so, the trial judge noted Appellant would not have been able to get money from his elderly victim if he had not had a relationship with her, which could have explained why he did the things he did for her. (Tr. p. 428).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal, an appellate court reviewing a trial judge's jury charge must view the charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); see Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation in analyzing whether the defendant's due process rights have been violated."). When reviewing a jury charge, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal."); see also State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied."). Moreover, an appellate court will only reverse a trial judge's decision regarding jury instructions when that decision constitutes an abuse of discretion resulting in actual prejudice. See Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ("An appellate court will not reverse the trial court's decision regarding

jury instructions unless the trial court abused its discretion."); Rauch v. Zayas, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985) ("[A]n alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial.").

ANALYSIS

The purpose of a trial judge's jury instructions is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). To carry out that purpose, a trial judge is required to charge the jury on the current and correct South Carolina law applicable to the case based on the evidence presented. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003); see State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (explaining a trial judge is required to instruct the jury on sound principles of law that are applicable to the case based on the evidence presented). In doing so, the trial judge is only required to instruct the jury on the substance of the law and does *not* have to use any particular verbiage. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). However, a trial judge in South Carolina is constitutionally prohibited from making any comments that could be construed as offering an opinion on the facts of the case. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); see also State v. Smith, 288 S.C. 329, 331, 342 S.E.2d 600, 601 (1986) ("The trial judge must refrain from all comment which tends to indicate his opinion as to the weight or sufficiency of the evidence, the credibility of the witnesses, the guilt of the accused or as to controverted facts."). Importantly, so long as the trial judge's jury instructions are substantially correct, adequately cover the applicable law, and do not run afoul of the constitutional prohibition against comments on the facts, those instructions are considered to be appropriate and not erroneous. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460,

464 (Ct. App. 2003) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law."); see also State v. Deas, 202 S.C. 9, 14, 23 S.E.2d 820, 822 (1943) ("Of course, under our Constitution and practice the jury are the sole judges of the facts in criminal trials and it is error for the Judge to communicate his views of them to the jury.").

In the case sub judice, the trial judge, through her jury instructions, identified the correct burden of proof for the jury, accurately explained the burden of proof rested solely on the State, thoroughly defined the concept of reasonable doubt, and correctly conveyed Appellant was presumed to be innocent and had no burden whatsoever to prove anything during his trial. Furthermore, the trial judge specifically advised the jurors they had to consider *all* the evidence, which would have necessarily included the evidence related to Appellant's actions towards Victim, such as his acts of delivering food to her, along with Jones's testimony indicating Appellant "seemed" like a good person when they first met years earlier. Viewing those jury instructions together as a whole, the trial judge's jury instructions correctly conveyed the relevant and applicable South Carolina law to the jurors and afforded the jurors the appropriate test for resolving the issues raised by the evidence in Appellant's case. See Sheppard, 357 S.C. at 665, 594 S.E.2d at 472-473 ("A jury charge is correct if it contains the correct definition of the law when read as a whole."); see also Burkhart, 350 S.C. at 263, 565 S.E.2d at 304 ("Failure to give requested jury instructions in not prejudicial error where the instructions given afford the proper test for determining the issues."). As a result, the trial judge's jury instructions were sufficient to not warrant reversal.

In arguing to the contrary, Appellant contends the instructions presented were not sufficient because they did not contain a specific charge on evidence of good character. In

support of that request, Appellant maintains evidence of good character was presented through Jones's testimony, and, based on that, the trial judge should have granted defense counsel's request for an instruction derived from the Green decision. See State v. Lee-Grigg, 387 S.C. 310, 317, 692 S.E.2d 895, 898 (2010) (" '[W]here requested and there is evidence of good character, a defendant is entitled to an instruction to the effect that evidence of good character and good reputation may in and of itself create a doubt as to guilt and should be considered by the jury, along with all the other evidence, in determining the guilt or innocence of the defendant.' " (quoting State v. Green, 278 S.C. 239, 240, 294 S.E.2d 335, 335 (1982))).

Importantly though, the trial judge committed no error by declining to present a jury instruction on good character evidence because no legitimate good character evidence was actually introduced that would have warranted such an instruction. Notably, during trial, Jones—a witness for the prosecution—did *not* testify Appellant had a reputation for good character, opine Appellant actually possessed good character, or suggest Appellant exhibited any specific traits of good character, and she was *not* testifying as a good character witness on his behalf. See Rule 404(a)(1), SCRE (permitting a criminal defendant to offer "[e]vidence of a pertinent trait of character" as good character evidence); Rule 405(a), SCRE ("In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made *by testimony as to reputation or by testimony in the form of an opinion.* On cross-examination, inquiry is allowable into relevant specific instances of conduct." (emphasis added)). To the contrary, Jones merely stated Appellant "seemed" like a good person when they first met without referencing his current reputation or offering a specific opinion on his character, and she then proceeded to recount her observations of him in possession of thousands of dollars in cash during the time period in which Victim's bank accounts were being emptied of the money they

contained. See State v. Braxton, 343 S.C. 629, 635, n. 1, 541 S.E.2d 833, 836 (2001) (recognizing South Carolina's evidentiary rules permit a criminal defendant to introduce evidence regarding a pertinent character *trait* as character evidence). Aside from that, the testimony regarding Appellant's seemingly helpful acts towards Victim, which—as noted by both the solicitor and the trial judge—could have reasonably been construed under the circumstances as acts used by Appellant to enable him to take advantage of his vulnerable victim as opposed to acts of pure kindness, did not constitute evidence of Appellant's good character since it related to Appellant's specific actions and *not* to his reputation or character traits. See United States v. Benedetto, 571 F.2d 1246, 1249-1250 (2nd Cir. 1978) ("[C]haracter evidence has long been admissible only in the form of reputation and not in the form of a recitation of good or bad acts."); cf. Lee-Grigg, 387 S.C. at 317, 692 S.E.2d at 898 (finding a jury instruction on good character evidence was warranted where "[c]haracter evidence of Lee-Grigg's *reputation for honesty and trustworthiness* was admitted" (emphasis added)). Accordingly, since no legitimate evidence of good character was actually introduced during trial, the trial judge properly found a jury instruction on good character evidence was not warranted by the evidence presented in Appellant's case. See State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835-836 (1989) ("The law to be charged to the jury is to be determined by the evidence presented at trial. . . . Providing instructions to the jury which do not fit the facts of the case may tend to confuse the jury.").

Moreover, even if Jones's testimony somehow could have been construed as evidence of good character sufficient to warrant a jury instruction on the matter, the trial judge nonetheless properly declined to give a jury instruction on good character evidence because the particular good character jury instruction from the Green decision that was the *only* good character charge

requested by defense counsel constituted an impermissible comment on the facts. See State v. Hartley, 307 S.C. 239, 240-241, 414 S.E.2d 182, 183-184 (Ct. App. 1992) (rejecting a contention the trial judge erred by refusing to give a requested charge where that requested charge would have constituted an impermissible comment on the facts). Specifically, the requested good character jury instruction from Green would have singled out just one type of evidence presented during the trial—good character evidence offered in a criminal defendant's defense—and addressed the *weight* of that singled-out evidence by stating such evidence in and of itself may create a doubt as the defendant's guilt.[7] See Green, 278 S.C. at 240, 294 S.E.2d at 335 ("[W]here requested and there is evidence of good character, a defendant is entitled to an instruction to the effect that evidence of good character and good reputation may in and of itself create a doubt as to guilt and should be considered by the jury, along with all the other evidence, in determining the guilt or innocence of the defendant."). Significantly, by emphasizing a defendant's good character evidence to the jury and directly addressing the potential weight of the evidence, such a jury instruction could have been construed as expressing an opinion on that specific type of evidence to the jury and, as a result, would have constituted an impermissible and unconstitutional comment on the facts. Cf. State v. Stukes, 416 S.C. 493, 499, 787 S.E.2d 480, 483 (2016) ("By addressing the veracity of a victim's testimony in its instruction, the trial court emphasizes the weight of that evidence in the eyes of the jury."); State v. Cheeks, 401 S.C. 322, 328-329, 737 S.E.2d 480, 484 (2013) ("[C]harging a jury that 'actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use' unduly emphasizes that evidence, and deprives the jury of its prerogative both to draw inferences and to

[7] On appeal, Appellant appears to readily concede the requested jury instruction would have constituted a comment on the weight of the evidence as he contends in his appellate brief "a trial court should instruct the jury as to the weight they may place on [good character] evidence" in seeking a reversal of the trial judge's jury charging decision. (App. Br. p. 7).

weigh evidence."); Hartley, 307 S.C. at 241, 414 S.E.2d at 184 ("[T]he trial judge was requested, in effect, to charge that particular evidence (i.e., evidence of lack of motive) is entitled to receive weight or consideration. The requested charge is *clearly* a charge on a fact that the jury was to determine." (emphasis added)). Furthermore, such an instruction would have had a high potential to confuse the jury based on the fact it would have indicated good character evidence *in and of itself* could create a doubt as to guilt, which was a determination solely for the jurors acting as fact-finders to make and which could have led jurors to improperly consider that evidence in isolation while ignoring the other evidence presented during trial.[8] See State v.

[8] Demonstrating the confusing nature of the requested instruction, it would not have even been entirely true or accurate had it been given. As an example of its inaccurate and misleading nature, take, for instance, a hypothetical situation in which the State's evidence conclusively and irrefutably established the defendant was guilty of the charged crime and the defendant was, in fact, guilty as charged. In such a situation, could evidence of the defendant's good character in and of itself establish a doubt as to the defendant's guilt? The answer necessarily must be no since the defendant's guilt in that hypothetical situation is both known and proven to an absolute certainty. See State v. Graham, 636 A.2d 852, 858 (Conn. App. Ct. 1994) ("Since a person of previous good character may commit a crime, proof of good character is not a defense to a criminal charge. . . . If the facts establish beyond a reasonable doubt that the accused committed the charged crime, then evidence of good character is 'no longer of any weight.' " (citations omitted)). Thus, evidence of the defendant's good character in such a situation could not logically or lawfully create a doubt as to guilt, which means a good character instruction indicating it could create such a doubt could only serve to confuse the jurors and potentially mislead them into believing jury nullification was appropriate regardless of a defendant's guilt so long as the defendant possessed good character. See Ducett v. State, 65 So. 351, 352 (Ala. 1914) (holding the trial judge committed no error by refusing to instruct the jury "proof of defendant's general good character, taken in connection with the other evidence in the case, may be sufficient to generate a reasonable doubt of the defendant's guilt, requiring his acquittal" because such a charge could have potentially been misinterpreted by the jury to mean "good character alone may be a sufficient reason for acquittal, though the evidence upon the whole showed his guilt beyond a reasonable doubt"); see also United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1984) ("A jury has no more '*right*' to find a 'guilty' defendant 'not guilty' than it has to find a 'not guilty' defendant 'guilty,' and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law. Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power. Any arguably salutary functions served by *inexplicable* jury acquittals would be lost if that prerogative were frequently exercised; indeed, calling attention to that power could encourage the substitution of individual standards for openly developed community rules."). Accordingly,

Pauling, 264 S.C. 275, 278, 214 S.E.2d 326, 327 (1975) ("It is . . . well settled that the weight and sufficiency of the evidence is for the jury. It is the province of that body to weigh the evidence and decide on its sufficiency in reaching a verdict."); State v. Battle, 408 S.C. 109, 119, 757 S.E.2d 737, 742 (Ct. App. 2014) ("The task of determining the weight of the evidence lies within the exclusive province of the jury."); cf. State v. Cheeks, 408 S.C. 198, 200, 758 S.E.2d 715, 716 (2014) (finding a "strong evidence" jury instruction to be improper where it "unduly emphasized the evidence" and "deprived the jury of its prerogative to draw inferences and to weigh evidence"). Under such circumstances, the trial judge properly declined to give the requested instruction because it would have constituted an impermissible and unconstitutional comment on the facts. See Pantovich v. State, Op. No. 27915 (S.C. Sup. Ct. filed Aug. 7, 2019) (Shearouse Adv. Sheet No. 32 at 43, 47) ("The State asks us to hold the 'good character alone' charge is . . . impermissible because it is an unconstitutional comment on the facts. . . . [W]e agree that this charge is improper[.]").

For all those reasons, the trial judge, who otherwise presented instructions that fully provided the jurors with all the relevant law needed for them to be able to properly decide Appellant's case, correctly declined to present a jury instruction that was not supported by the evidence presented and that would have singled out good character evidence alone since such an instruction would have constituted a confusing, problematic, impermissible, unsupported, and unconstitutional comment on the facts. See State v. Holmes, 277 S.C. 232, 234, 285 S.E.2d 353, 354 (1981) (recognizing a trial judge does not have to use any particular language when instructing the jury on the law so long as the instructions given adequately cover the relevant and

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an instruction indicating good character evidence "in and of itself" can create a doubt as to guilt necessarily must constitute an improper comment on the facts and cannot be constitutionally permissible in our state. See Stukes, 416 S.C. at 499, 787 S.E.2d at 483 ("[I]t is not within the province of the court to express an opinion to the jury on its view of the facts.").

applicable law); State v. Thorne, 237 S.C. 248, 251, 116 S.E.2d 854, 855 (1960) ("The Judge must be careful to avoid expressing, or even intimating, any opinion, as to the facts, and if he does so, whether intentionally or unintentionally, a new trial must be granted. Under our Constitution the jury is the exclusive judge of the facts, and the true meaning and real object is that the jury must be left to form its own judgment, unbiased by any expressions, or even intimations, of opinion by the Judge."); see also Michelson v. United States, 335 U.S. 469, 474, n. 5 (1948) ("A judge of long trial and appellate experience has uttered a warning which, in the opinion of the writer, we might well have heeded in determining whether to grant certiorari here: '* * * evidence of good character is to be used like any other, once it gets before the jury, and the less they are told about the grounds for its admission, or what they shall do with it, the more likely they are to use it sensibly. The subject seems to gather mist which discussion serves only to thicken, and which we can scarcely hope to dissipate by anything further we can add.' " (citation omitted)); cf. State v. Edwards, 127 S.C. 116, __, 120 S.E. 490, 491 (1923) (finding the trial judge correctly refused to instruct the jury the absence of a motive may be sufficient to raise a reasonable doubt because such an instruction would have constituted an impermissible comment on the facts). Appellant's convictions should be affirmed.

II.

The trial judge properly admitted the investigator's testimony about the incident report that led to his investigation into Appellant's case because that testimony was not offered for the truth of the matter asserted and, thus, did not constitute inadmissible hearsay. However, even assuming the investigator's testimony somehow constituted inadmissible hearsay, any possible error in its admission was entirely harmless because the testimony was cumulative in nature and could not have been reasonably construed by the jury as evidence establishing the truth of the matter asserted.

Appellant contends the trial judge committed reversible error by admitting into evidence Investigator Powell's testimony regarding information contained in the incident report filed by Gilmore that led to the investigation into the matter. In support of that contention, Appellant maintains the investigator's testimony, which simply relayed the fact Gilmore reported a variety of items were missing from Victim's possession, constituted hearsay because it was offered for the truth of the matter asserted and resulted in improper prejudice by corroborating Gilmore's subsequent trial testimony. To the contrary, Investigator Powell's testimony was not offered for the truth of the matter asserted and, therefore, it did not constitute inadmissible hearsay. However, even if it somehow did, its admission resulted in no improper prejudice to Appellant because the testimony made clear to the jury Investigator Powell did not personally know whether the information contained in the incident report was, in fact, true and because the testimony was cumulative in nature. Under those circumstances, the trial judge properly admitted Investigator Powell's testimony, and any possible error in the admission of that testimony was entirely harmless. Accordingly, there is no proper basis upon which to reverse the trial judge's evidentiary ruling on appeal. Appellant's convictions should be affirmed.

RELEVANT FACTS

During the evidentiary phase of trial, Investigator Powell testified—without objection—Gilmore filed an incident report indicating some of Victim's money was possibly missing when

explaining why he began an investigation into the matter.[9] (Tr. pp. 71-72). Investigator Powell further noted Gilmore additionally reported a Jaguar key, jewelry, and coins were also missing. (Tr. p. 72). At that point, defense counsel objected on hearsay and confrontation grounds, and the trial judge overruled the objection. (Tr. pp. 72-73). Thereafter, Investigator Powell continued with his testimony and specifically explained he personally had no idea if the information reported by Gilmore was accurate. (Tr. pp. 73-74). Investigator Powell then indicated he identified Appellant as a potential suspect based on information he received from Gilmore, defense counsel once again objected on hearsay and confrontation grounds, and the trial judge again overruled the objection. (Tr. p. 74). Following the trial judge's ruling, Investigator Powell's testimony continued forward, and he noted he found and secured a Jaguar key and jewelry concealed inside Appellant's vehicle's first-aid kit after Appellant's unsuccessful attempt to flee from law enforcement. (Tr. pp. 80-81; pp. 82-86). Investigator Powell then again stated miscellaneous jewelry had been reported as stolen, defense counsel again objected on hearsay and confrontation grounds, and the trial judge once again overruled the objection. (Tr. p. 85). After that, Investigator Powell went on to explain the items he found in Appellant's vehicle were only suspected to be have been stolen and he had no idea personally if the items actually belonged to Victim. (Tr. pp. 100-101). He further made clear he did not have a specific description of the missing jewelry and had only assumed the jewelry he found was possibly related to the stolen jewelry report. (Tr. p. 102).

In addition to Investigator Powell's testimony, Gilmore testified on behalf of the State and specifically confirmed he alerted the Greenwood County Sheriff's Office of the money and other items, including the Jaguar key and jewelry, missing from Victim's home and bank

[9] As explained by Investigator Powell, the initial incident report was taken by another officer. (Tr. p. 93; p. 96).

accounts. (Tr. pp. 118-119; pp. 126-127; p. 134). He further identified the Jaguar key recovered from Appellant's vehicle as Victim's, but he indicated he was personally unsure if the recovered jewelry belonged to Victim. (Tr. p. 126; p. 132). Likewise, Adams testified for the prosecution, confirmed the Jaguar key found by law enforcement was Victim's, and—after some initial hesitancy—stated the recovered jewelry also belonged to Victim. (Tr. pp. 155-156). Beyond that, Deputy Mitchell testified—without objection—a bag containing Victim's belongings was found in Appellant's vehicle after Appellant crashed during his attempted flight. (Tr. pp. 209-210). However, similar to Investigator Powell, Deputy Mitchell indicated he personally had no knowledge as to whether the items found in the vehicle were actually stolen. (Tr. pp. 213-214).

At the conclusion of trial, the jury convicted Appellant as indicted. (Tr. p. 410). Following the verdict, defense counsel moved for a new trial, including on the basis improper hearsay testimony had been introduced through Investigator Powell's testimony. (Tr. pp. 413-414). However, the trial judge denied the motion. (Tr. p. 414). In doing so, the trial judge explained she did not believe Investigator Powell's testimony about the items reported stolen constituted hearsay because it was not offered to establish the items were, in fact, stolen but instead was offered purely to explain why the officer proceeded in the manner he did after Gilmore filed an incident report. (Tr. pp. 414-415). The trial judge then sentenced Appellant to an aggregate ten-year term of imprisonment. (Tr. p. 430).

STANDARD OF REVIEW

When reviewing an evidentiary ruling, the appellate court must give great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews

a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."). Significantly, an appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("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."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); see also United States v. Summers, 666 F.3d 192, 197 (4th Cir. 2011) (instructing an appellate court will not find a trial judge's evidentiary ruling constituted an abuse of discretion unless it was arbitrary and irrational).

ANALYSIS

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 (emphasis added); see Rhodes v. State, 349 S.C. 25, 31, 561 S.E.2d 606, 609 (2002) ("The rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted."). Meanwhile, an out-of-court statement of another does not constitute hearsay when it is offered for a purpose *other than* the purpose of establishing the truth of the matter asserted. See State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994) ("Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted."); State v. Vick, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct. App. 2009) ("It is well settled that evidence is not hearsay unless offered to prove the truth of the matter asserted.").

Generally speaking, hearsay evidence is not admissible absent an applicable exception to the prohibition against hearsay. State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007); see Rule 802, 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."). The rationale for excluding hearsay evidence is such evidence denies the adverse party an opportunity to cross-examine the declarant of the hearsay statement. State v. Mitchell, 286 S.E.2d 572, 573, 336 S.E.2d 150, 150-151 (1985); see State v. James, 255 S.C. 365, 370, 179 S.E.2d 41, 43 (1971) ("The hearsay rule signifies a rule rejecting assertions offered testimonially which have not been in some way subjected to the test of cross-examination."). Importantly though, even when improper hearsay evidence is admitted, any error in the admission of that evidence is subject to a harmless error analysis and only warrants reversal if it results in actual prejudice. State v. Weston, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006).

When conducting a harmless error analysis, an appellate court must ordinarily review the record as a whole to ascertain the impact of an error once one has been discovered. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006); see State v. Northcutt, 372 S.C. 207, 217, 641 S.E.2d 873, 878 (2007) ("Determining the trial judge committed error is the first step of our analysis. Next we must determine whether the error was harmless."); see also United States v. Hasting, 461 U.S. 499, 509 (1983) ("[I]t is the duty of a reviewing court to consider the trial record *as a whole* and to ignore errors that are harmless, including most constitutional violations[.]" (emphasis added)). The harmlessness of an error generally depends on its materiality in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of

the error must be determined from its relationship to the entire case."). Significantly, after reviewing the entire record, the appellate court will typically not set aside a judgment based on insubstantial errors not affecting the result, and errors are generally deemed harmless when they do not contribute to the verdict. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991); see State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008) ("Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.").

In the case at bar, the trial judge committed no error by overruling defense counsel's objections to Investigator Powell's testimony regarding the allegations made in the incident report filed by Gilmore because the investigator's testimony in that regard was *not* admitted for the truth of the matter asserted and, thus, did not constitute hearsay. See Vick, 384 S.C. at 199, 682 S.E.2d at 280 (instructing it is "well settled" testimony does not constitute hearsay unless offered for the truth of the matter asserted). Critically, in Appellant's case, Investigator Powell's testimony about the reported allegations was merely offered to explain why he began investigating the matter and believed the items found in and seized from Appellant's vehicle after the crash were potentially significant. See Brown, 317 S.C. at 63, 451 S.E.2d at 894 ("[A]n out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken."); cf. State v. Thompson, 352 S.C. 552, 559, 575 S.E.2d 77, 81 (Ct. App. 2003) ("[T]he officers' testimony regarding statements made by the bystander were not entered for their truth but rather to explain and outline the officers' investigation and their reasons for going to the Thompsons' home. Thus, the evidence was not hearsay and was properly before the trial court."). Critically, Investigator Powell's testimony was *not* presented to establish the items that had been reported as stolen were, in fact, stolen, and he directly confirmed through his testimony he did not have any personal knowledge as to

whether the recovered items were actually Victim's property. See Garrett v. State, 288 S.E.2d 592, 593-594 (Ga. Ct. App. 1982) (holding testimony indicating an officer found property reported as stolen in Garrett's possession was not hearsay because "[t]he officer did not testify [the goods] were 'stolen' and his testimony was not admitted to prove they were" but, instead, "[t]he officer testified from direct observation and by way of explaining his conduct and as a circumstance of the arrest that he seized goods which were in [Garrett]'s possession that had been *reported* as stolen"); cf. Rhodes, 349 S.C. at 31, 561 S.E.2d at 609 ("[I]t was repeatedly made clear during trial that the information Thompson had heard was 'from the street,' i.e., a 'rumor.' It was not offered to prove that petitioner had committed the crimes, but rather to explain Cook's identification of petitioner in the yearbook." (footnote omitted)). Therefore, because the investigator's testimony was not offered to prove the recovered items were truly stolen, it did not constitute inadmissible hearsay, and the trial judge properly declined to exclude it on hearsay grounds. See State v. Drew, 360 So. 2d 500, 511 (La. 1978) (holding testimony indicating a car had been reported as stolen was not hearsay because it was not offered for the truth of the matter asserted but, instead, "was offered to show probable cause for an initial arrest of [Drew] for automobile theft and to prove only that such a report had been made, thereby prompting the officers to arrest [Drew]").

In arguing to contrary, Appellant contends—without explanation—Investigator Powell's testimony about Gilmore's report to law enforcement was "offered as proof of the matter asserted" and, thus, constituted inadmissible hearsay. Notwithstanding the fact Investigator Powell's testimony was not, in fact, offered for the truth of the matter asserted for all the previously-articulated reasons, the admission of that evidence was nonetheless entirely harmless under the circumstances *even if* it could somehow be construed as hearsay evidence. Initially,

the challenged testimony from Investigator Powell could not have been misconstrued by the jury as actual evidence the items recovered from Appellant's vehicle were stolen because Investigator Powell made clear through his testimony he was merely relaying what had been reported to him and did not have any personal knowledge as to the ownership of the property, which eliminated the testimony's potential to be viewed in a manner improperly prejudicial to Appellant. Cf. State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (finding the improper admission of hearsay evidence to be harmless where the hearsay evidence was impeached by the jury's exposure to the fact the evidence was not based on any first-hand knowledge). Moreover, to the extent Investigator Powell generally recounted the details of the allegations made by Gilmore, Gilmore *also* testified during trial and specifically confirmed he reported the Jaguar key and jewelry as stolen when he initially made the report about the missing property, which rendered the challenged testimony wholly cumulative in nature.[10] See State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) ("It is well settled that the admission of improper evidence is

[10] Relying on Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), and a two-justice plurality in State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), Appellant maintains the admission of Investigator Powell's testimony was not harmless despite the fact it was unquestionably cumulative in nature. (App. Br. pp. 10-12). Significantly though, in the Jennings case, a majority of the Supreme Court abandoned the precise rule from Jolly Appellant now seeks to rely upon in his case to establish the alleged error in the admission of the challenged testimony was not harmless. See State v. Jennings, 394 S.C. 473, 482, 716 S.E.2d 91, 95 (2011) (Kittredge, J., concurring) ("I concur in result, but agree with Chief Justice Toal that the apparent categorical rule emanating from Jolly v. State and its progeny precluding a finding of harmless error goes too far. In my judgment, it may be a rare occurrence for the State to prove harmless error beyond a reasonable doubt in these circumstances. But these determinations are necessarily context dependent, and a categorical rule is at odds with longstanding harmless error jurisprudence." (citations omitted)); see also Jennings, 394 S.C. at 483, 716 S.E.2d at 95 (Toal, C.J., dissenting) ("I believe we should take this opportunity to overrule Jolly. In my opinion, these cases create a rule of per se prejudice when testimony is cumulative to the victim's testimony. Such a rule is contrary to the traditional analysis of improperly admitted hearsay testimony, which requires a finding of prejudice."). Therefore, to the extent the rule from Jolly could have even been applicable based on the circumstances of Appellant's case, Appellant's appellate contentions in regard to the claimed harmfulness of the alleged error in his case are not valid.

harmless where it is merely cumulative to other evidence."); see also State v. Huggins, 275 S.C. 229, 231, 269 S.E.2d 334, 335 (1980) (finding any error in the admission of a hearsay statement to be harmless where the declarant of the statement testified at trial and was available for cross-examination); cf. State v. Davis, 420 S.C. 50, 68, 800 S.E.2d 138, 147 (Ct. App. 2017) (finding an error involving the admission of hearsay evidence in a manner that violated Davis's confrontation rights was harmless where the State "presented cumulative testimony"); State v. Kirby, 325 S.C. 390, 397, 481 S.E.2d 150, 153 (Ct. App. 1996) (finding any possible error in the addition of hearsay evidence was harmless beyond a reasonable doubt where the challenged testimony was merely cumulative to other unchallenged testimony). Therefore, even assuming Investigator Powell's testimony about the incident report filed by Gilmore was somehow improper, any error in the admission of that testimony was entirely harmless and could have had no impact on the outcome of Appellant's case. See State v. Wyatt, 317 S.C. 370, 372, 453 S.E.2d 890, 891 (1995) (recognizing an error must be prejudicial to warrant reversal on appeal).

Since Investigator Powell's testimony was not hearsay and could not have resulted in any improper prejudice to Appellant due to its substantive and cumulative nature, there is no proper basis upon which to reverse the trial judge's evidentiary ruling on appeal. See Brown, 317 S.C. at 63, 451 S.E.2d at 894 (recognizing testimony offered purely to explain why a law enforcement investigation was initiated does not constitute hearsay); see also State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."); State v. Oglesby, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009) ("[T]he admission of improper evidence is deemed harmless if it is merely cumulative to other evidence."). Appellant's convictions should be affirmed.

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

September 18, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

Appeal from Greenwood County
Honorable Jocelyn Newman, Circuit Court Judge
Appellate Case No. 2018-001596

THE STATE,

Respondent,

vs.

JOHN FITZGERALD ANDERSON,

Appellant.

PROOF OF SERVICE

I, Mark R. Farthing, certify I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

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I further certify all parties required by Rule to be served have been served.
This 18th day of September, 2019.

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September 18, 2019

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Mount Pleasant, SC 29464

RE: State v. John Fitzgerald Anderson – Appellate Case No. 2018-001596

Dear Ms. Young:

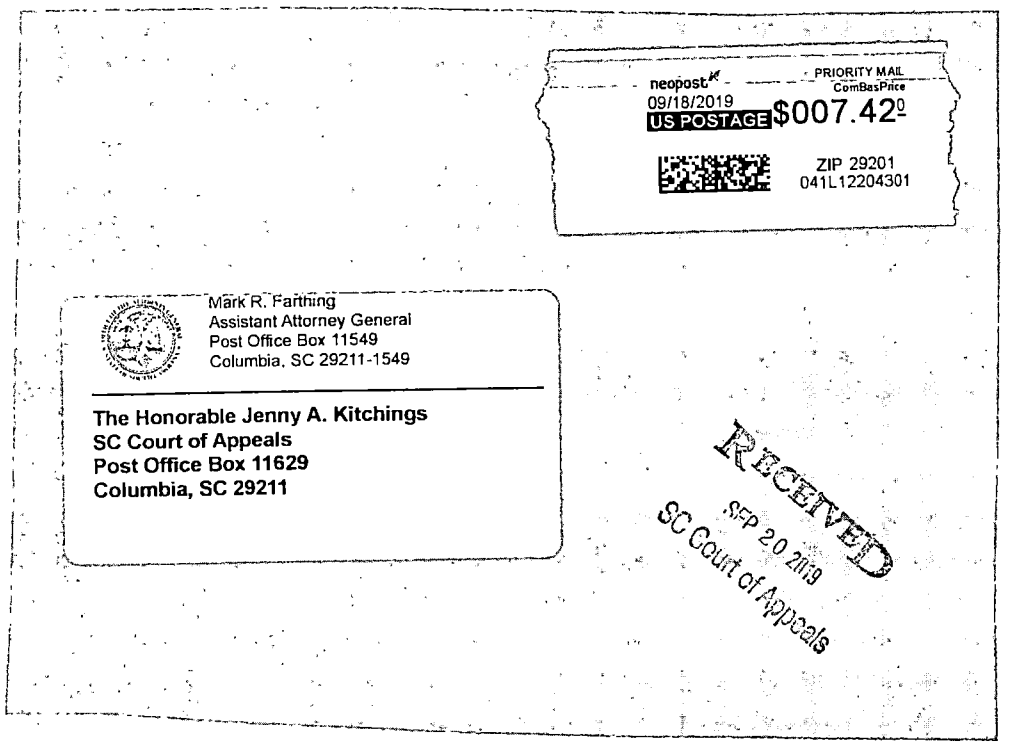
I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mark R. Farthing
Senior Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Honorable Jenny A. Kitchings (original enclosed)
Robert M. Dudek, Esquire
Victim Advocacy Division



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