STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
The Honorable Jocelyn J. Newman, Circuit Court Judge

Appellate Case No. 2017-002559

THE STATE,

Respondent,

v.

DARIUS WALKER,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge properly refused to admit a letter allegedly from Latrell Strong when the body of the letter was not properly authenticated and when the letter was hearsay and did not meet the requirements for an exception to hearsay under Rule 804(b)(3) SCRE? And furthermore if the trial judge did err in refusing to admit the letter, whether any error was harmless because of the overwhelming evidence presented against Appellant at trial?

STATEMENT OF THE CASE

In December 2015, the Richland County Grand Jury indicted Appellant for first degree burglary, grand larceny of greater than $2,000 but less than $10,000, and possession of a stolen vehicle. On October 16-18, 2017, a jury trial was held in the Richland County Court of General Sessions with the Honorable Jocelyn J. Newman presiding. Appellant was represented by Aimee Zmroczek, Esq. Respondent (the State) was represented by Assistant Solicitors Richard Cathcart and Jeremiah Shellenberg of the Fifth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant of all three charges. Following the verdict, the trial judge sentenced Appellant to thirty-six years' imprisonment for first degree burglary, five years' imprisonment for grand larceny of greater than $2,000 but less than $10,000, and thirty days' imprisonment for possession of a stolen vehicle. Each of the sentences ran consecutively to each other resulting in an aggregate sentence of forty-one years and thirty days imprisonment[1]. Appellant then timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

[1] Although the trial judge unambiguously orally sentenced Appellant to consecutive sentences, the sentencing sheets indicate that the sentence was to run concurrently. (R. 404, 424-26). See Tant v. S.C. Department of Corrections, 408 S.C. 334, 759 S.E.2d 389 (2014) (holding when oral and written sentences are both ambiguous, the ambiguity must be construed in a defendant's favor); Boan v. State, 388 S.C. 272, 695 S.E.2d 850 (2010) (holding a judge's oral pronouncement of sentence controls over a conflicting written sentencing order)

STATEMENT OF FACTS

On July 21, 2015 at approximately one o'clock PM, Julie Rieger drove past her next door neighbor Christopher Johnson's (Victim) house in a golf cart with her six year old daughter on the way to the Rockbridge Country Club pool in Forest Acres. (R. 33-34). As she drove past the house, Rieger saw a car parked in Victim's driveway that she had never seen before. Rieger also saw two black males walking onto Victim's "stoop." (R. 38). The two males knocked on the door and began looking around them. (R. 38). Rieger thought the situation seemed weird and it "raised the hairs on the back of her neck." (R. 38, lines 19-20). Once she had passed the house, Rieger called her husband and told him to call the Forest Acres Police Department to check out the situation. (R. 39). After the phone call with her husband, Rieger drove back by Johnsons' home and noticed that the two males were no longer standing on the "stoop." Also, the gate on the left-hand side of the house, which led to the backyard, was open. (R. 40). The same unusual vehicle was still parked in the driveway. (R. 40).

Rieger called another neighbor, Sally Metts, shortly after seeing the gate left open to the backyard of Victim's house. Metts lived next door to Victim. Rieger asked Metts to go to the back room of her house and see if she could view what was going on in Victim's backyard. (R. 42). Metts went to her backyard and observed "two black males coming out of the back of [Victim's] house with a large TV." (R. 64, lines 18-19). Metts went back inside her house and went to another window where she watched the two males come around the house with the TV. (R. 65). She saw the two men load the TV into the backseat of the car parked in the driveway. According to Metts, as the two men were entering the car, they had "a foot in and the police car pulled up, and they turned and looked at him and bolted through [Victim's] backyard." (R. 68, lines 2-5).

Officer Baxter arrived on the scene and saw two black males entering a vehicle who proceed to run as soon as they saw him. (R. 91). Baxter notified other law enforcement in the area of the direction the two men ran in and then checked the license plate of the vehicle. Law enforcement searched for the license plate in the DMV and NCIC databases and discovered the vehicle was stolen. (R. 93, 111). The two men were eventually apprehended in the surrounding neighborhood with the assistance of a K-9 unit. Both men initially provided false names and dates of birth to law enforcement, but were later identified by their fingerprints as Appellant and his co-defendant Latrell Strong. (R. 144-45).

Law enforcement found multiple flat screen TVs, a laptop, an iPad, some other cell phones, and other electronic accessories in the backseat of the stolen vehicle in Victim's driveway. Victim confirmed that each of the items belonged to him. (R. 169). Law enforcement tested for DNA inside the stolen car and found Appellant's DNA on the steering wheel, gearshift, and several drink bottles. (R. 241). Strong's DNA was found on several of the electronics in the backseat, however Appellant's DNA was not found on any of the electronics. (R. 241). Metts and Rieger were both shown photo lineups to identify the black males they saw at Victim's house. Rieger was able to identify Strong in the first lineup but chose another male instead of Appellant in the second lineup. (R. 52). Metts was unable to identify anyone in either lineup. (R. 76).

At trial, Appellant admitted to being guilty of possessing a stolen vehicle, but he denied burglarizing Victim's home or committing grand larceny. (R. 353). Appellant contended that he was an accessory after the fact. Appellant argued that Strong and possibly another party were responsible for the burglary and that he was only there to pick up Strong. (R. 356). Appellant had five prior burglary convictions, but only two prior convictions were admitted into evidence to

prove Appellant was guilty of first degree burglary. (R. 252). During Appellant's case in chief, Appellant attempted to introduce a letter allegedly written by Strong that was addressed to trial counsel's law firm. The letter reads:

> I Latrell Strong is writeing this letter on the behalf of the defendant Darius Walker witch is my co-defendant of a burglary 2nd that he knew nothing about until after the fact. The burglary was my (Latrell Strong) doing. I simply called the defendant Darius Walker for a ride. When he came to pick me up I still did not say anything about what I had done until the police car pulled up to the residence. By then it was fare to late. I am just writeing this letter to own up to my actions like a man and put all this behind me. If you would like to get in contact with me the address to where I am being held is on the front of this letter. Thanks……

(R. 296, 407).

The letter attempts to exculpate Appellant from the crime of burglary and asserts that Appellant came to the residence to pick up Strong. When Appellant attempted to admit the letter by calling Strong as a witness, Strong exercised his Fifth Amendment right against self-incrimination. (R. 259-61). Appellant then proffered testimony to authenticate the letter and envelope. Three witnesses were called to testify *in camera* to establish Strong's jail identification number, the dates Strong was confined in jail, the receipt of the letter by trial counsel's office, and to attempt to authenticate Strong's signature on the letter. (R. 273-92).

The trial judge ruled that Appellant had not sufficiently authenticated the letter and excluded it from evidence. (R. 298). In making her ruling, the trial judge expressed concern that Appellant had only authenticated the signature on the letter but not the body of the letter itself. Without a witness who saw Strong write the letter or a sample of his handwriting to compare the printed portion of the letter to, Appellant was unable to sufficiently authenticate the letter. (R. 298). At the conclusion of trial, Appellant was convicted of each charge.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 219 (2006). Trial courts have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial court's ruling on evidentiary matters absent a clear abuse of that discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "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. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006).

ARGUMENT

I.

The trial judge properly refused to admit a letter allegedly from Latrell Strong because the body of the letter was not properly authenticated and because the letter was hearsay and did not meet the requirements for an exception to hearsay under Rule 804(b)(3) SCRE. Even if the trial judge erred in excluding the letter from evidence, any error was harmless because of the overwhelming evidence presented against Appellant at trial.

Appellant contends the trial judge abused her discretion by refusing to admit a letter into evidence allegedly written by Appellant's codefendant, Latrell Strong. Appellant argues the letter was properly authenticated and was admissible as an exception to the rule against hearsay under Rule 804(b)(3) SCRE. Appellant's argument is without merit. The trial judge correctly excluded the letter because Appellant did not authenticate the body of the letter or otherwise prove that the letter was what it purported to be. Additionally, even if Appellant had properly authenticated the letter, the letter was still inadmissible as hearsay because corroborating circumstances did not clearly indicate the trustworthiness of the statements contained in the letter. Furthermore, even if the trial judge erred in excluding the letter, any error was harmless because of the overwhelming evidence presented against Appellant at trial. Appellant's convictions and sentences should be affirmed.

Authentication

Appellant initially argues the letter was properly authenticated because the signature on the letter could be compared to other known examples of Strong's signature. Additionally, Appellant argued other distinctive elements of the letter and the envelope in which it was contained such as the presence of Strong's inmate number and a stamp from the local jail contributed to the letter's authenticity. However, the trial judge correctly refused to admit the

letter because Appellant failed to offer any evidence to authenticate the body of the letter and only attempted to authenticate Strong's signature.

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901, SCRE. Evidence must be authenticated before it can be admitted State v. Aragon, 354 S.C. 334, 336, 579 S.E.2d 626, 627 (Ct. App. 2003). "'The burden to authenticate . . . is not high', and requires only that the proponent 'offer a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.'" Deep Keel, LLC v. Atl. Private Equity Grp., LLC, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (quoting United States v. Hassan, 742 F.3d 104, 132 (4th Cir. 2014)).

Here, Appellant failed to produce evidence that the body of the letter was actually written by Strong. Appellant attempted to authenticate the letter by proffering testimony from three witnesses during an *in camera* hearing. First, Appellant called Christina Metze who worked as the paralegal for Appellant's trial counsel. Metze testified that she received a letter that was allegedly from Strong which bore his inmate number and a stamp from the Alvin S. Glenn detention center. However, Metze admitted that she had never received any written communication from Strong before and could not identify his handwriting. (R. 275-76). Additionally, Metze admitted that Strong's inmate number was public information that anyone could look up. (R. 276-77). Washava Moyd of Alvin S. Glenn detention center confirmed Strong's inmate number and the dates of his incarceration. Moyd also admitted that inmate numbers were publicly accessible information on the jail's website and that any of the jails 850 inmates were capable of sending such a letter. (R. 281-84). John Carwell testified that he observed Strong write his signature in cursive on an Advice of Rights Form and a DNA Consent

to Search Form prior to the trial. (R. 286). However, Carwell never saw Strong write in print. (R. 289). In fact, the only time Carwell witnessed Strong write anything was when he observed Strong write his entire name in cursive on the two forms. (R. 289, 405-06). Carwell could not even say that the signature on Defense Exhibit #20 was Strong's handwriting. (R. 291).

Appellant failed to provide sufficient evidence to support a finding that Defense Exhibit #20 was what Appellant claimed it to be. Appellant did not produce any evidence to show that the printed body of the letter was written by Strong. Appellant merely attempted to authenticate the signature on Defense Exhibit #20 as belonging to Strong, but even the signature on Defense Exhibit #20 is dissimilar to the known signatures on Defense Exhibits #18 and #19. In Defense Exhibit's #18 and #19, Strong wrote out his full name as "Latrell Strong." (R. 405-06). However, on Defense Exhibit #20 the signature reads "L. Strong." Even if Appellant had properly authenticated Strong's signature, Appellant still failed to authenticate the printed section of the letter. This was a critical deficiency in Appellant's authentication attempt, because there was no way for the trial judge or the jury to know whether Strong had actually written the letter, or whether he signed a blank sheet of paper that someone else subsequently filled in. Indeed the trial judge recognized this problem when making her ruling on the admissibility of the letter:

> The problem is the signature and the letter appear to be in different handwriting. And the court has heard no testimony from any witness regarding the printed portion of this letter and any attempt to authenticate the printed portion of the letter. That is the same print or appears to be the same print that is on the envelope, and I do see that there is an Alvin S. Glenn stamp on the back of the envelope. But I think the requirement is more than just authentication of the signature but the contents of the letter because for all anybody knows, his signature is on a blank piece of paper and somebody fills it and mails it from the jail.
>
> You may have satisfied your burden if someone else had seen him write this letter, if he had given a written statement to the police, or something else that authenticates the substance of the letter because the court has to be satisfied that this document is what it purports to be. And based on the totality of the

> circumstances, the court cannot make that finding. Therefore, the document is not sufficiently authenticated and is not admissible.

(R. 298, lines 3-22).

The other authenticating characteristics cited by Appellant also fail to prove that Strong wrote the letter. Indeed, as Moyd and Metze admitted on cross examination, Strong's inmate number was publicly available information and could have been obtained and used to send the letter by any of the 850 inmates at Alvin S. Glenn Detention Center. Without any authentication of the printed portion of the letter or any other evidence proving that the letter was what Appellant claimed it to be, the trial judge did not abuse her discretion in refusing to admit Defense Exhibit #20 into evidence. Appellant's convictions and sentences should be affirmed.

Hearsay

Appellant next contends the letter is admissible as an exception to the rule against hearsay under Rule 804(b)(3) SCRE. Appellant's argument is without merit. Even if Appellant properly authenticated the body of the letter, Defense Exhibit #20 was still properly excluded from evidence because Appellant was unable to establish corroborating circumstances to indicate the trustworthiness of the statement made in Defense Exhibit #20.

"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. A declarant is unavailable as a witness when "exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of declarant's statement." Rule 804(a)(1) SCRE. When a declarant is unavailable, their statements may be admissible if the statement at issue is against the declarant's interest. Rule 804(b)(3) SCRE provides:

> **Statement Against Interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by

> the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Out-of-court statements against penal interest made by an unavailable declarant are admissible at trial. State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992). However, "A defendant seeking to offer a statement pursuant to this exception bears the 'formidable burden' of establishing that corroborating circumstances clearly indicate the trustworthiness of the statement." State v. Wannamaker, 346 S.C. 495, 501, 552 S.E.2d 284, 287 (2001). "Whether a statement has been sufficiently corroborated is a question 'left to the discretion of the trial judge 'after considering the totality of the circumstances under which a declaration against penal interest was made.'" Wannamaker, 346 S.C. at 501, 552 S.E.2d 2 at 287 (quoting State v. Kinloch, 338 S.C., 385, 391 n.5, 526 S.E.2d 705, 208, n.5 (1996)). "The rule does not require that the information within the statement be clearly corroborated, it means only that there be corroborating circumstances which clearly indicate the trustworthiness of the statement itself, i.e., that the statement was actually made." Kinloch, 338 S.C. at 388, 468 S.E.2d at 644.

Here, Appellant failed to produce corroborating evidence to indicate the trustworthiness of the statement allegedly made by Strong in Defense Exhibit #20. Appellant not only failed to show that the statement made in Defense Exhibit #20 was trustworthy, but he failed to show that the statement was even made by Strong.

The statement in Defense Exhibit #20 claims that Appellant merely arrived to pick up Strong and that Appellant knew nothing of Strong's illegal activity until law enforcement arrived. (R. 407). However, this statement is contradicted by all the evidence presented at trial. Two eyewitnesses testified that two black males were in the process of loading a TV into the

backseat of a car which was parked in Victim's driveway. Officer Baxter saw two individuals on either side of the car loading the TV inside when he arrived. (R. 102). Sally Metts likewise testified to seeing two men in the process of loading a TV into the backseat when police arrived. (R. 67-68). Similarly, a third eyewitness, Julie Rieger, attested to seeing an unknown car parked in Victim's driveway and two black males acting suspiciously. (R. 37-38). No eyewitness testimony corroborates the statement made in Defense Exhibit #20. No witness testified they saw a car pull up and pick up a single black male. Each eyewitness described a parked car and two black males either looking around the house or actively loading stolen material in the car, which contradicts the claims made in Defense Exhibit #20. Finally, and perhaps foremost, the statement lacks trustworthiness because it does not make any logical sense. Defense Exhibit #20 claims that Appellant was completely unware that a crime had taken place when he picked up Strong. For this statement to be true, Strong would have to load the entire backseat of the car with electronics without Appellant noticing or Appellant had to believe there was nothing strange about being asked to pick up a friend from a random house who just happened to be carrying several TV's with him. The statement contained in Defense Exhibit #20 is not trustworthy.

Even if the statement made in Defense Exhibit #20 was trustworthy, Appellant failed to present any corroborating circumstances to indicate the statement was made by Strong. The signature on the letter and the body of the letter are written in two different styles of handwriting: one in print and one in cursive. No attempt was made to authenticate the printed portion of the letter as being written by Strong. The trial judge was rightfully concerned that: "For all anybody knows, his signature is on a blank piece of paper and somebody fills it and mails it from the jail." (R.298, lines 12-14). No evidence was presented for the trial judge to determine whether Strong actually wrote the body of the letter. Furthermore, information on the envelope, such as Strong's

inmate number, is publicly accessible information that any of the approximately 850 inmates at the jail could have discovered and wrote on the envelope. (R. 294). No witnesses testified that they actually saw Strong write and sign the letter in question, and Appellant did not produce testimony from any expert witnesses to verify Strong's handwriting. Appellant failed to introduce sufficient corroborating evidence that the letter was written by Strong. The trial judge properly acted within her discretion in excluding Defense Exhibit #20 because there was insufficient corroboration to meet the exception to the rule against hearsay under Rule 804(b)(3) SCRE. Appellant's convictions and sentences should be affirmed.

Harmless Error

Even if this Court determines the trial judge erred by not admitting Defense Exhibit #20 into evidence, any error is harmless because of the overwhelming evidence presented against Appellant at trial.

"Whether an error is harmless depends on the circumstances of the particular case." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). "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." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." Thompson, 352 S.C. at 562, 575 S.E.2d at 83. "Error is harmless when it could not reasonably have affected the result of the trial." Mitchell, 286 S.C. at 573, 336 S.E.2d at 151 (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

The evidence presented against Appellant at trial was overwhelming. Appellant was apprehended in the vicinity of Victim's house after being chased by police. Appellant was caught

in the backyard of a nearby house in close proximity to Strong who had been tracked by a K-9 to that location. (R. 142, 153, 156, 196). Appellant was out of breath and sweating when law enforcement found him. (R. 145). Appellant's DNA was also on the steering wheel and gearshift of the stolen car as well as on several drink bottles inside the vehicle. (R. 241). Even if Defense Exhibit #20 had been admitted into evidence, it is unlikely the jury would have found the letter to be credible. The statements made in the letter are contradicted by each eyewitness who testified at trial. Furthermore, the claims made in the letter do not make logical sense. For the jury to find the letter credible, they would have to believe that Appellant arrived in a stolen vehicle to pick up Strong and either didn't notice Strong loading stolen electronics into the car or didn't think there was anything out of the ordinary in doing so. Because the jury was unlikely to find the letter credible and the evidence against Appellant was overwhelming, any error by the trial judge in refusing to admit Defense Exhibit #20 was harmless. Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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March 22, 2019

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CERTIFICATE OF COUNSEL

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

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