STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Abbeville County
Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKEY SANTOINE HENLEY,

PETITIONER

APPELLATE CASE NO. 2016-000844

APPENDIX

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INDEX

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The State, Respondent.

v.

Rickey Santoine Henley, Appellant.

Appellate Case No. 2016-000844

Appeal From Abbeville County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5694
Heard February 12, 2019 – Filed December 11, 2019

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General William M. Blitch, Jr., and Assistant Attorney General Vann Henry Gunter, Jr., of Columbia, and Solicitor David Matthew Stumbo, of Greenwood, all for Respondent.

MCDONALD, J.: Rickey Santoine Henley appeals his first degree burglary conviction, arguing the circuit court erred by (1) finding his prior larceny acquittal did not bar his retrial for burglary; (2) excluding evidence of the prior larceny acquittal; (3) limiting the admission of a witness's prior trial testimony; and (4) admitting evidence of DNA testing conducted on a cigarette butt found at the crime scene. We affirm.

Facts and Procedural History

On the morning of February 15, 2012, Richard Culbreth drove past the Abbeville County home of Amanda Moss (Victim) and her husband Jamie Moss (Husband) while on the way to visit his mother.[1] Culbreth saw a gray car backed into Victim's carport with the back door open and a black male running from the home's front door to a side door. As Culbreth found this unusual, he turned around and drove back to Victim's house, where he observed the same man standing in the doorway.

After spotting Culbreth, the alleged intruder got into his car, pulled out of Victim's driveway, stopped in front of Culbreth's pickup truck—which was pulling a trailer with a lawn mower—and asked him if he needed any help with lawn care. Culbreth replied he did not need any help, and the man drove away, merging onto Highway 28 North toward Anderson County. Culbreth called 911 and described the car as a dirty, gray, late 1980s or 1990s model Pontiac with the license plate number "HSN 454." Culbreth described the man as having facial hair and testified, "I just remember he had a bandana tied tightly around his head. It went down the back of his neck. Light-skinned from what I could tell. But I do not remember any, you know, marks, facial scars, or anything."

Deputy Patrick Thompson, a detective in the Abbeville County Sheriff's Office (ACSO) property crimes division, responded to Victim's home. While processing the scene, Deputy Thompson noticed a footwear impression on the carpet. Officers recovered a cigarette butt from the intruder's point of entry, which they collected and placed into evidence.[2] The sole item missing from Victim's home was a Dell laptop computer, valued at five hundred dollars, which Victim reported had been on a bench just inside the carport door.[3]

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[1] Culbreth works as the caretaker for Long Cane Cemetery on Beltline Road in Abbeville. He testified he knew Victim through her former employer, Harris Funeral Home.

[2] The DNA profile developed from the cigarette butt matched Henley's DNA profile. Trial testimony established the probability of randomly selecting an unrelated individual with a DNA profile matching the cigarette butt was 1 in 1.5 billion.

[3] Victim's laptop was never recovered.

At trial, Victim identified photographs of the side carport door, which was partially broken off its hinge and appeared to have been tampered with; the doorframe was also damaged. Victim testified a cigarette butt found near her steps did not belong to her or Husband as neither smoked, and the cigarette was not there when she left the home that morning. Victim noted she normally locked the door to the house when she left. Likewise, Husband testified the door was locked and there was no cigarette butt on the steps when he left the house.

Deputy Thompson used Culbreath's description and tag number to search for the suspect vehicle on the South Carolina Law Enforcement Division (SLED) vehicle database. The search revealed a 1997 Pontiac Bonneville owned by Henley and his then girlfriend, Jolene Gray, bearing the license plate number "HSN 544." Based on information he received from the Department of Motor Vehicles, Deputy Thompson went to Henley's Anderson County residence on February 22, 2012. Parked outside, he saw a Pontiac Bonneville matching the description provided by Culbreath with the license plate "HSN 544".

Henley was at the residence and spoke with law enforcement. He admitted he had recently been in Abbeville and acknowledged he had been on Highway 28. Henley recalled speaking to someone in a pickup truck and admitted he smoked Newport cigarettes. Deputy Thompson noticed Henley was wearing boots, the soles of which resembled the impression left on Victim's carpet. Henley was arrested for first degree burglary and larceny on February 23, 2012.[4]

According to Gray, five police officers came to her house a second time when Henley was not there. She stated she saw the officers walking around, and one officer picked something up off of the ground. Regarding Henley's location on the day of the burglary, Gray claimed Henley left their Anderson County apartment between 8:00 a.m. and 9:00 a.m. to go to his mother's house in Beech Island.[5] Gray confirmed Henley owned a pair of boots and smoked Newport cigarettes.

Henley's mother, Ella Johnson, stated that on February 15, 2012, Henley arrived at her home at approximately 10:00 a.m. with leftover shrimp and lobster from his

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[4] Henley has two prior burglary convictions from December 7, 2006, and March 15, 2002.

[5] Beech Island is an unincorporated community in Aiken County.

Valentine's Day dinner with Gray. Johnson testified she and Henley went to Moe's Convenience Store at approximately 2:00 p.m.

Henley's first jury trial began April 8, 2015. Following an *Allen* charge, the jury returned a verdict of not guilty on the larceny charge connected with the burglary at Victim's home. However, the jury hung on the first degree burglary charge, and the circuit court declared a mistrial on April 9, 2015. After the circuit court's denial of Henley's motion to preclude retrial under the Double Jeopardy Clause of the Fifth Amendment, Henley was retried on the burglary charge. The jury found Henley guilty of first degree burglary, and the circuit court sentenced him to twenty-four years' imprisonment.

Law and Analysis

I. Double Jeopardy

Henley argues the circuit court erred by denying his motion to quash the burglary indictment on double jeopardy grounds because (1) it failed to apply the proper test of *Yeager v. United States*, 557 U.S. 110 (2009), and (2) his prior acquittal on the larceny charge relating to the Dell computer necessarily determined he was "not guilty" of burglary as the sole item missing following the burglary was the Dell laptop. We disagree.

At Henley's first trial, the jury acquitted Henley of the larceny of Victim's Dell computer but was unable to reach a unanimous verdict on the first degree burglary charge. Prior to the start of his second trial, Henley moved to quash the burglary indictment, arguing any retrial would violate both the federal and state Double Jeopardy Clauses. Following a pretrial hearing, the circuit court concluded:

> Here's what I think. I understand your argument. I think it's a directed verdict to fact [sic] question as to whether they conclude and get past directed verdict stage. With the intent to commit a crime therein is one of the elements of burglary first and second and third. The State's got that burden of proving with the intent to commit a crime. I don't believe the acquittal of the larceny precludes them from presenting facts which the jury could prove intent to commit a crime therein. They have not had that opportunity yet. So I think your motion should be denied right now, but I feel confident you will

> most likely renew it at the directed verdict stage in a similar-worded argument if the State's failed to prove anything beyond a suggestion of intent to commit a crime therein. So I don't believe jeopardy attaches to the [burglary] charge since it's not a specific crime. The indictment does not get quashed at this point, but the Court will be listening.

The Double Jeopardy Clauses of the United States and South Carolina Constitutions protect citizens from being subjected to repetitive conclusive prosecutions and multiple punishments for the same offense. U.S. Const. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ."); S.C. Const, art. I, C ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . ."). "In interpreting the Double Jeopardy clause, [our supreme court] has stated that '[t]he Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense.'" *State v. Brandt*, 393 S.C. 526, 538, 713 S.E.2d 591, 597 (2011) (quoting *Stevenson v. State*, 335 S.C. 193, 198, 516 S.E.2d 434, 436 (1999)). However, "[a] defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy where a single act consists of two 'distinct' offenses." *Id.* (quoting *State v. Moyd*, 321 S.C. 256, 258, 468 S.E.2d 7, 9 (Ct. App. 1996)).

The doctrine of issue preclusion is embodied in the Fifth Amendment's Double Jeopardy Clause. *Ashe v. Swenson*, 397 U.S. 436, 445–46 (1970). Issue preclusion means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. In *Ashe*, the United States Supreme Court explained that "'collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice." *Id.* at 443. In emphasizing the rule of collateral estoppel in criminal cases should be applied with "realism and rationality," the Court advised:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an

> issue other than that which the defendant seeks to foreclose from consideration."

Id. at 444. *Ashe* is not dispositive here as the issue determined there was "simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again." *Id.* at 446.

Yeager v. United States, 557 U.S. 110, 113 (2009), which involved charges of securities fraud and insider trading, is more helpful to our analysis. There, the Supreme Court examined an issue preclusion challenge involving an attempted retrial after the jury acquitted the defendant on the securities fraud counts but could not reach a verdict on his insider trading charges. *Id.* at 115. When the prosecution subsequently sought to retry the defendant on the insider trading counts, the defendant moved to dismiss, arguing the acquittals on securities fraud precluded his retrial for insider trading. *Id.* The district court denied the motion, concluding the question of whether the defendant possessed insider information was not necessarily resolved in the first trial. *Id.* at 116–17. Although *Yeager* is distinguishable from *Ashe* in that *Yeager* involved an acquittal on some counts and a hung jury on others, the Supreme Court explained "the reasoning in *Ashe* is nevertheless controlling because, for double jeopardy purposes, the jury's inability to reach a verdict on the insider trading counts was a nonevent and the acquittals on the fraud counts are entitled to the same effect as Ashe's acquittal." *Id.* at 120. The Supreme Court subsequently found, "if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element." *Id.* at 123.

Here, Henley's acquittal for larceny—the taking of the Dell computer—is not dispositive of whether the State could satisfy the elements necessary for a first degree burglary conviction. In *Yeager*, there could be no insider trading if, as found by the jury, there had been no fraud. But an acquittal for larceny does not foreclose any element necessary for a first degree burglary conviction. *See* S.C. Code Ann. § 16-13-30(A) ("Simple larceny of any article of goods, choses in action, bank bills, bills receivable, chattels, or other article of personalty of which by law larceny may be committed, or of any fixture, part, or product of the soil severed from the soil by an unlawful act, or has a value of two thousand dollars or less, is petit larceny, a misdemeanor, triable in the magistrates court or municipal court. . . ."); S.C. Code Ann. § 16-11-311(A) ("A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to

commit a crime in the dwelling, and either: (1) . . . ; or (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or (3) . . . ."). While larceny is defined as "the felonious taking and carrying away of the goods of another against the owner's will or without his consent," *State v. Moore*, 374 S.C. 468, 477, 649 S.E.2d 84, 88 (Ct. App. 2007), burglary merely requires that "the person enters a dwelling *without consent* and *with intent to commit a crime* in the dwelling." S.C. Code Ann. § 16-11-311(A) (emphasis added). Each of the offenses requires proof of different critical elements. *See Blockburger v. United States*, 284 U.S. 299, 304, (1932) ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

Additionally, we agree with the State that the jury's "not guilty" verdict was not necessarily a finding that Henley was not the individual who entered Victim's home without consent and with intent to commit a crime therein; rather, the prior jury found only that the State failed to prove beyond a reasonable doubt that Henley took the Dell computer. Henley's acquittal on the larceny charge did not preclude the State from presenting facts—that Henley's car was backed into Victim's carport with the back door open, Culbreth witnessed Henley standing in the doorway of Victim's home, and Victim's door and doorframe were damaged—as proof of the first degree burglary charge.

In *State v. Mitchell*, 399 S.C. 410, 422, 731 S.E.2d 889, 896 (Ct. App. 2012), the defendant sought relief from his conviction for burglary in the first degree, contending the intent to steal element could not be proven since the jury found Mitchell not guilty of petit larceny. This court noted Mitchell seemed to be referencing the "inconsistent verdict theory" and stated:

> Mitchell was charged and convicted of first-degree burglary, pursuant to section 16-11-311(A) of the South Carolina Code (2003). The pertinent portion of the statute states: "A person is guilty of burglary in the first degree if the person enters a dwelling without consent and *with intent to commit a crime in the dwelling* . . . ." S.C. Code Ann. § 16-11-311(A)(2003) (emphasis added). Mitchell was identified from photographs on the deer camera in Potts's home. Potts testified that he did not recognize the person in the photographs and had not

> given permission for that person to be in his home. There was testimony Mitchell held a bag and a flashlight in one of the photographs, and the photograph was admitted into evidence. A jury could have inferred that Mitchell intended to commit a crime while in Potts's home, and due to a multitude of scenarios, was unable or decided not to carry out the intended crime.

Id. at 422–23. Like the defendant in *Mitchell*, Henley conflates the intent to commit a crime with the successful commission of the crime. Although the jury in Henley's first trial found the State failed to prove the larceny charge, there was no requirement that the State actually prove he successfully committed a separate crime within Victim's home to prove the burglary charge. *See State v. Peterson*, 336 S.C. 6, 7, 518 S.E.2d 277, 278 (Ct. App. 1999) ("The fact that the jury failed to convict Peterson of the sexual assault charge does not affect the validity of the burglary charge. Indeed, that fact is immaterial."). Because Henley's acquittal for larceny did not settle the critical issue of ultimate fact as to whether he entered Victim's home without consent with the intent to commit a crime, the State was not precluded from retrying him for first degree burglary. Accordingly, we find the circuit court properly declined to quash the indictment and properly denied Henley's motion for a directed verdict.

II. Larceny Acquittal

Henley argues the circuit court erred by excluding evidence of his acquittal on the larceny charge where the State maintained its theory that the burglar's intention in entering Victim's home was to steal. We disagree.

At Henley's second trial, he sought to introduce the self-authenticating copy of the larceny indictment from his first trial, arguing it was exculpatory information. Conversely, the State argued the evidence was wholly irrelevant and had no bearing on the jury's determination of Henley's burglary charge. The circuit court ruled:

> I don't believe this is allowed. I think it would confuse the jury. It does mention the same date, the same victim, and a piece of [personalty]. To some extent[,] it opens the door to a whole slew of issues. But it seems to me this would confuse the jury more than help the jury in

> their findings of fact as to his guilt or innocence on this charge.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *See State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* "To warrant reversal, an error must result in prejudice to the appealing party." *State v. Black*, 400 S.C. 10, 16–17, 732 S.E.2d 880, 884 (2012).

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, 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." Rule 403, SCRE. "The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case." *State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). "'Probative' means '[t]ending to prove or disprove.'" *State v. Gray*, 408 S.C. 601, 609–10, 759 S.E.2d 160, 165 (Ct. App. 2014) (quoting *Probative Value*, Black's Law Dictionary (9th ed. 2009)). "'Probative value' is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. '[T]he more essential the evidence, the greater its probative value.'" *Id.* (quoting *United States v. Stout*, 509 F.3d 796, 804 (6th Cir. 2007)).

Here, Henley's acquittal on the larceny charge was irrelevant; it did not make the existence of any fact of consequence in the proceeding more or less probable with respect to the elements of first degree burglary. *See* Rule 401, SCRE (defining relevance). While the State was required to prove Henley entered Victim's home without her consent and with the intent to commit a crime, there was no requirement that the State prove Henley entered Victim's home without consent and successfully committed the crime of taking Victim's Dell computer.

Henley further argues the circuit court failed to conduct the necessary Rule 403 balancing analysis; however, our review of the record reveals the circuit court made an express finding that the evidence "would confuse the jury more than help the jury in their findings of fact as to his guilt or innocence on this charge." Thus, we find the circuit court properly applied Rule 403 in excluding evidence of the larceny acquittal. Even assuming, arguendo, that the evidence was relevant, the circuit court did not abuse its discretion in determining that any probative value was substantially outweighed by the danger of unfair prejudice and misleading the jury. The evidence of Henley's prior acquittal had little to no probative value as it did not prove or disprove any element necessary to the first degree burglary charge; yet, admission of the evidence would have likely led to jury confusion because it would have invited the jury to speculate about what occurred at the first trial. *See* Rule 403, SCRE (explaining that 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 . . . ."). Therefore, we affirm the circuit court's exclusion of evidence of the larceny indictment and resulting "not guilty" verdict from Henley's earlier trial.

III. Jolene Gray's Testimony

Henley argues the circuit court erred by limiting the admission of Jolene Gray's testimony from the first trial where Gray was unavailable to the defense during the second trial and her testimony provided evidence that the police had an opportunity to obtain a cigarette smoked by Henley from outside of his own home. We disagree.

On cross-examination during Henley's first trial, Gray claimed law enforcement returned to the residence she shared with Henley on a second occasion when he was not present. On re-direct, Gray testified:

> The second time they came, it was five of them, I think. One was at the back, four in the front. My son was living with me at the time. [Henley's] car [was] there. My car there and my son's car. They was walking around the grounds, you know, picking up. What they were picking up, I have no idea. But they was walking around. Yes.

In the first trial, Henley referenced Gray's testimony during his closing argument in support of the defense theory that the State's DNA evidence was not credible because of poor investigative protocols, noting:

> You also remember Officer Thompson isn't really sure what other officers were there. And that's another thing that's not good enough. He doesn't know which officers were there. An officer he says was there doesn't remember being there. But [Gray] said that one of the times the officers came to talk to [Henley], there were some cars parked out and she saw the officers picking stuff up. [Gray] didn't know what they were picking up. It may seem crazy, crazy for us to ask you to draw an inference they were picking up a cigarette butt. But what is equally crazy, is that we've got all this lost evidence in this case and we know it's lost. You would think, you know, that things like this don't happen, but they really do. And the State acknowledges that these things happen. So it's really not that far of a stretch to say, well, maybe, maybe they picked something up that day. Because we don't know where that cigarette butt was until March 29th of 2012. And, again, you heard from the SLED agent all the care that they take. And that they had that cigarette butt from March 29th until sometime in August of 2012. They tested it in August. They sent it back to the agency in 2012. But yet she doesn't return her actual analysis until January 2013.

At the retrial, Henley moved to admit Gray's testimony from the first trial. Defense Counsel stated:

> Ms. Gray was the client, my client's girlfriend. She had some testimony, we have been unable to locate her. I can have our investigator come up and we can have her testify as to all of the efforts that she made to try to locate Ms. Gray. But we would ask under Rule 804(b)(1), [SCRE,] which is the hearsay exception where declarant is unavailable[,] to introduce Ms. Gray's testimony from the previous trial.

The State replied, "Judge, I really don't have an objection to it. If we were in the same boat, I'd be asking the same thing." The circuit court granted Henley's motion. Thereafter, the State informed the circuit court, "And, Judge, we are going

to probably try to ask our investigator if he can find Ms. Jolene Gray just to see if there is a reason why she's not showing, though." The court replied, "Okay. If you can find her, get her." Defense Counsel indicated she was "fine with that."

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

> Judge, it's my understanding that there are two potential defense witnesses that are not here . . . . one is Jolene Gray; is a former girlfriend of [Henley] . . . . We did, after yesterday, it was brought to our attention, we were able to contact her through our office, our investigator contacted her and she said she's in Anderson. She's never received a subpoena. Judge, I understand that [Henley] just wants to read in a prior transcript of her testimony. Your Honor, my, you know, we're not going to oppose that, but in my cross from a prior hearing, I'm only going to read a portion of it. And then I put on the record, I think, and once I stop at that one portion, that would, the reading of redirect from the Defense would be outside the scope of our cross.

Henley responded:

> Your Honor, the redirect portion goes to the officers coming out a second time, searching the home and not finding anything, leaving, searching the premises. The witness says that perhaps someone picked up something off the ground and we would want all of that testimony to come in to show that no items were collected, a doo-rag, burglary tools from the home since Mr. Henley did live there. It's our position that the entire testimony should come in.

The circuit court observed, "Well, now, we don't know whether something was picked up off the ground or not. That's unknown. She's speculating." Ultimately, the court ruled:

> All right. I think I'm going to grant [the State's] motion to limit [its] cross-examination to where [it] wants to stop. But I do not believe that will limit you or . . . ,

> whichever one closes, in saying nothing was taken or recovered from the house or you'd have seen it here today. I think y'all could say something along those lines in your closing argument and you can summarize it, had they gone and found something in that search, certainly it would be here. It's not here.

Rule 804(b)(1), SCRE, provides for the admission of former testimony where the declarant is unavailable as a witness. Specifically, it allows the admission of "[t]estimony given as a witness at another hearing of the same or a different proceeding . . . , if the party against whom the testimony is now offered . . . , had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." *Id.* One of the situations in which a declarant is deemed "unavailable" for purposes of the rule is when the declarant "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means." Rule 804(a)(5), SCRE.

Henley represented that his investigator had been unable to locate Gray in order to serve a subpoena, but that if the State could find Gray and procure her attendance, he had no objection. Although the State was able to contact Gray at her Anderson County residence, the relevant inquiry is whether Henley was able to procure Gray's attendance by process or other reasonable means. The State confirmed Henley's statement that Gray had not been served with a subpoena. While the State again represented that it did not oppose the reading of the testimony, the solicitor argued Henley should only be permitted to read the portion of his redirect examination responsive to the cross, consequently excluding the redirect testimony Henley sought to procure. Notably, the State did not argue any evidentiary basis for excluding Gray's testimony, and it did not object to her testimony on redirect during Henley's first trial. However, because Rule 804(a)(5) requires the declarant's unavailability despite "process or other reasonable means," we believe Gray's testimony was inadmissible hearsay. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal."). Our review of the record reveals the circuit court ruled as much without specifically citing Rule 804(a)(5).

Nevertheless, we are concerned that instead of excluding all of Gray's testimony from the prior trial, the circuit court allowed the State to select the portions of her former testimony to be read, while excluding the portion Henley sought to present. However, we do not find this error prejudiced Henley. *See e.g.*, *State v. Adams*, 354 S.C. 361, 381, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A]n insubstantial error

not affecting the result of the trial is harmless where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" (quoting *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989), *cert. denied*, (2004)). Culbreth testified he witnessed a black male at Victim's home around 11:30 a.m. on February 15, 2012; he accurately described Henley's Pontiac sedan, was able to provide law enforcement with a partial plate number matching Henley's license plate, and recounted an interaction with the intruder. Henley admitted to law enforcement that he had recently been in Abbeville and acknowledged he had been on Highway 28. Henley also recalled speaking to someone, presumably Culbreth, driving a pickup truck in Abbeville. Finally, Victim testified the door to her home was intact when she left for work that morning and damaged when she returned home. Thus, to the extent the circuit court erred in allowing the State to pick and choose portions of Gray's prior testimony after agreeing to admit it, we find such error was harmless.

IV. DNA Testing

Henley argues the circuit court erred in denying his motion to exclude evidence of DNA testing conducted on the cigarette butt found at the crime scene because the State could not present a complete chain of custody and the cigarette butt was not available for comparison to the crime scene photograph at trial. Henley further asserts the State's negligence in the destruction of the cigarette butt constituted bad faith. We disagree.

During his direct examination at Henley's second trial, Deputy Thompson explained the procedure for preserving evidence of the cigarette butt found at Victim's residence:

> The cigarette you would document it by photograph and place. And then a DNA article, which is what it's been collected for, fresh gloves, we put it into a paper bag and not seal it in any kind of plastic that would destroy the evidence for lack of oxygen. And it would be submitted into a clean new bag.

Deputy Thompson testified he picked the cigarette butt up, placed it into the evidence bag, and sealed it with tape. No other officers handled the cigarette butt prior to his arrival at the crime scene. Deputy Thompson explained that after collecting the evidence, the next step is to take the evidence to the law enforcement

center where it is either placed in a secure drop-box or handed directly to Chief Marion Johnson, who was the evidence custodian at the time.

Chief Johnson was employed as the Chief Deputy of the Abbeville County Sheriff's Office (ACSO) from 1989 to 2013. He was also the ACSO's evidence custodian. Chief Johnson testified that after Deputy Thompson collected and secured the cigarette butt, it was turned over to him. Chief Johnson logged in the evidence and put it in the evidence locker. On March 29, 2012, Chief Johnson gave the cigarette butt to Investigator Ryan Abernathy, who transported it to SLED. Before sending the bag to SLED, Chief Johnson confirmed the bag had not been tampered with. Investigator Abernathy later transported the cigarette butt back to ACSO from SLED.

Maryanne Boehm, who is employed in the DNA casework department at SLED, received the Newport cigarette butt for testing from Investigator Abernathy on March 29, 2012. Regarding procedure, Boehm testified:

> So the cigarette butt is placed into a heat-sealed SLED pouch that is sealed and dated and initialed by the submitted investigator. It is then put on a secure shelf in the evidence vault. Not many people have access to this. Just the forensic technicians in evidence control and administration are the only ones who have access to this evidence storage location. Then, when I was assigned the case, I retrieved the evidence through an evidence technician, Amy Stevens. She retrieved the evidence, and then handed it to me and I took it into my custody at that time.

Boehm subsequently performed a DNA analysis on the cigarette butt in August 2012. Upon being shown the photograph of the cigarette butt collected at Victim's home, Boehm testified it was consistent with the cigarette butt she tested. She explained the DNA profile developed from the cigarette butt matched Henley's DNA profile. After the positive result, Boehm issued a report of her findings in January 2013, and returned the evidence back to SLED's evidence control unit.

The following colloquy ensued between the State and Boehm:

> Q: Now, Ms. Boehm, I showed you a picture of the cigarette butt, but I didn't actually show you the butt that

> you tested in the package today. Does that change the fact of your DNA outcome, your results?
>
> A: No, sir.
>
> Q: So you seeing that here today does not change your interpretation or the results?
>
> A: No, sir, not at all.
>
> Q: And you're saying today that on the day it was submitted to you[,] you did your testing, that the integrity of the bag was intact?
>
> A: Yes, sir.
>
> Q: There was no tampering with it at all?
>
> A: That's correct.

At the time of Chief Johnson's retirement in May 2013, all evidence obtained in Henley's case was still in the evidence room. Sometime after the evidence was returned from SLED to ACSO, it was either destroyed or misplaced. Prior to trial, Henley moved to suppress any testimony or mention of the cigarette butt. Ultimately, the circuit court ruled:

> I don't think it's suppressed, though. Now, on that, I'm going to leave it more or less a motion in limine, because the summary by both of y'all as to the facts, because a summary of facts is not sworn testimony. If we get in trial and I hear something different, I may change my mind . . . . It seems more to be a motion in limine and that's how I'm ruling on it. Assuming everything comes in as y'all outlined it; that will be my findings. It will be a careless or negligent losing of the evidence but will be admitted; the DNA result will be. Assuming the foundation for all the others can be met, but if the testimony doesn't support what y'all have outlined, then I may change my ruling and you can renew that motion

> and suppress. That make sense? I think that's the best way to handle it.

Henley contends the State's negligence in maintaining the evidence constitutes bad faith. He also asserts the State presented an insufficient chain of custody because the physical cigarette was not available for comparison to the crime scene photograph at trial. We disagree. Initially, we note Henley failed to present any evidence of bad faith on the part of law enforcement in losing the cigarette butt. Moreover, the State presented a clear and complete chain of custody of the cigarette butt from the time of collection through the item's testing by SLED and its subsequent return to ACSO.

As a threshold matter, we question whether this argument is preserved for review because Henley failed to renew his objection to the admission of this evidence during Boehm's testimony. In its ruling, the circuit court explained it was making a ruling in limine, and that its ruling was subject to change. Thus, it was incumbent upon Henley to contemporaneously object in order to get a final ruling and preserve the issue for appellate review. *See State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review.").

Still, even if this argument were properly preserved, we find it to be without merit. "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." *California v. Trombetta*, 467 U.S. 479, 485 (1984). While the fundamental fairness standard requires criminal defendants to be given a meaningful opportunity to present a complete defense, to set forth a due process violation, a criminal defendant "must demonstrate either that the state destroyed evidence in bad faith, or that the state destroyed evidence that possessed an exculpatory value that is apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means." *State v. Mabe*, 306 S.C. 355, 358–59, 412 S.E.2d 386, 388 (1991); *see also State v. Cheeseboro*, 346 S.C. 526, 538–39, 552 S.E.2d 300, 307 (2001) (affirming circuit court's denial of defendant's motions to suppress and to dismiss indictments where there was no bad faith in destruction of gun, bullets were still available to the defense, and "there was no prejudice to the defense because the gun was incriminating rather than exculpatory"); *State v. Reaves*, 414 S.C. 118, 129, 777 S.E.2d 213, 218 (2015) (finding that although multiple pieces of evidence were collected at the crime scene but missing at the time of trial, the errors made did "not indicate bad faith as is required to dismiss an indictment under the federal constitutional test").

Here, Henley is unable to make the showing of bad faith required to support exclusion of the DNA evidence. While the State admittedly lost the cigarette butt before trial, the only evidence presented was that it was returned from SLED to ACSO and then was either destroyed or misplaced following Chief Johnson's retirement. Bad faith cannot be inferred simply because the evidence was lost. *See State v. Breeze*, 379 S.C. 538, 546, 665 S.E.2d 247, 251 (Ct. App. 2008) ("The foregoing demonstrates the State's actions were not in bad faith but rather an inadvertent mistake.").

Furthermore, while the DNA test result was certainly critical evidence, the presence of the cigarette butt itself would have done nothing to change the report generated from SLED's processing of that evidence. The presence of the physical cigarette for comparison would have contributed nothing of value, as Henley would have undoubtedly noted the cigarette was a nondescript item without any significant or distinguishing markings. Finally, as this evidence was inculpatory rather than exculpatory, the presence of the physical cigarette would have been more damaging to Henley's defense than its absence.[6]

As to Henley's argument concerning the chain of custody, the absence of the cigarette butt at trial did not render the chain of custody incomplete. Although the whereabouts of the cigarette butt were accounted for from the time of its collection on February 15, 2012, through the time it was returned to ACSO after the SLED testing, we acknowledge there was no testimony regarding the date on which the cigarette was initially logged into the evidence locker at ACSO. *But see State v. Hatcher*, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011) ("The ultimate goal of chain of custody requirement's is simply to ensure that the item is what it is purported to be."). Notably, "[c]ourts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts." *Hatcher*, 392 S.C. at 94, 708 S.E.2d at 754. We find the chain of custody of the cigarette butt from the time of collection through testing was sufficient, and the circuit court properly exercised its discretion in admitting evidence of the DNA collection and test results.

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[6] Instead, the fact that the evidence was lost provided Henley with considerable ammunition with which to criticize the State's investigation. *See Reaves*, 414 S.C. at 128, 777 S.E.2d at 218 ("Further, to the extent Reaves was disadvantaged by the State's loss of evidence, Reaves' attorney was allowed to forcefully cross-examine the police officers on the deficiencies in their investigation.").

Conclusion

For the foregoing reasons, Henley's conviction is

AFFIRMED.

LOCKEMY, C.J. and SHORT, J., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

RICKEY SANTOINE HENLEY,

APPELLANT

APPELLATE CASE NO. 2016-000844

Appeal from Abbeville County

Eugene C. Griffith, Circuit Court Judge

Opinion No. 5694

PETITION FOR REHEARING

On December 11, 2019, this Court affirmed Appellant's conviction for burglary in a published opinion. State v. Henley, Op. No. 5694 (S.C. Ct. App. filed Dec. 11, 2019). Pursuant to Rule 221(a), SCACR, Appellant now files this Petition for rehearing due to the significant points overlooked and/or misapprehended by this Court.

Appellant's conviction violates Double Jeopardy.

On July 27, 2012, the Abbeville County grand jury returned indictments against Appellant for larceny and burglary. On April 8-9, 2015, Appellant proceeded to trial on both offenses before the Honorable R. Lawton McIntosh and a jury. The jury returned a verdict of **not guilty on**

larceny. However, the jury **hung on the count of first-degree burglary**, and Judge McIntosh declared a mistrial.

Following denial of the defense's motion to preclude retrial under the Double Jeopardy Clause of the Fifth Amendment, on April 4-6, 2016, Appellant faced re-trial for the offense of first-degree burglary before the Honorable Eugene C. Griffith, Jr., and a jury. The jury returned a verdict of guilty, and Judge Griffith sentenced Appellant to twenty-four years incarceration.

On appeal, Appellant argued his acquittal for larceny precluded his second trial for burglary in the first degree. Misapprehending Yeager v. United States, 557 U.S. 110 (2009), this Court held Appellant's "acquittal for larceny – the taking of the Dell computer – [was] not dispositive of whether the state could satisfy the elements necessary for a first-degree burglary conviction." Instead of employing the analysis from Yeager, this Court used Blockburger v. United States, 284 U.S. 299 (1932), to hold that "[e]ach of the offenses require[d] proof of different critical elements." According to this Court, "[b]ecause Henley's acquittal for larceny did not settle the critical issue of ultimate fact as to whether he entered Victim's home without consent with the intent to commit a crime, the state was not precluded from retrying him for first degree burglary." This holding misapprehends controlling Supreme Court law.

In Yeager v. United States, 557 U.S. 110, 112 (2009), the United States Supreme Court held that an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts does not affect the acquittals' preclusive force under the Double Jeopardy Clause. The Yeager case involved the criminal prosecution of one of the Enron executives, who was charged with 126 counts of federal securities offenses, which the Court grouped into two general categories – the "fraud counts" and the "insider trader counts" – for ease of reference. 557 U.S. at 112-14. The jury acquitted Yeager on the fraud counts but did not reach

a verdict on the insider trading counts. Id. at 114-15. At the re-trial, the government sought a new indictment that charged only Yeager, rather than several other previous co-defendants, and further refined the charges against him. Id. at 115.

Yeager moved the trial court to dismiss the indictments based on issue preclusion and the Double Jeopardy Clause, on the basis that the insider trading counts necessarily required a factual finding that was decided in his favor by virtue of the acquittal on the fraud charges. 557 U.S. at 115-16. Yeager was convicted after the trial court denied his motion, reasoning that "the question whether Yeager possessed insider information was not necessarily resolved in the first trial and could be litigated anew in a second prosecution." Id.

"A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it." Id. at 122. Thus, "[e]ven if the verdict is based upon an egregiously erroneous foundation, its finality is unassailable." Id. (internal quotations and citations omitted). The Yeager Court wrote:

> **To decipher what a jury has necessarily decided, we held that courts should examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.**

Id. at 119-20 (internal quotation omitted) (emphasis added). In applying these principles to Yeager, the Court ruled that "if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element." Id. at 123.

Here, both this Court and the trial judge erred in failing to apply the test set forth in Yeager to determine whether the state was collaterally estopped from re-prosecuting Appellant for first-

degree burglary following his acquittal for larceny related to the same incident. As noted by the Court in Abney v. United States, 431 U.S. 651, 659-60 (1977):

> [T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction. **Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him.**

(internal citations omitted) (emphasis added). While Double Jeopardy does not bar retrial where a mistrial was declared out of "manifest necessity" due to a jury's inability to reach a decision, the Yeager Court made clear that the inquiry regarding a bar to retrial does not end there. 557 U.S. at 118. Rather; the trial court must determine whether the interest in preserving the finality of the jury's judgment on the decided count bars a retrial on the undecided count because "the jury's acquittals unquestionably terminated petitioner's jeopardy with respect to the issues finally decided in those counts." Id.

In making this determination, this Court's focus should have been on the evidence and arguments presented at the first trial as mandated by Yeager, not on whether the two offenses had the same elements.[1] Undertaking the proper analysis requires holding Appellant's second trial violated Double Jeopardy.

At Appellant's first trial for first-degree burglary and larceny the solicitor averred in his opening statement that Moss's door was kicked down and "[s]he had personal property taken."

[1] The trial court's failure to conduct the requisite analysis is illustrated by its failure to take the copies of the first trial transcript offered by defense counsel. R. 400, ll. 2-21. Thus, the trial judge erred as a matter of law in failing to determine what facts were necessarily decided in the first action and how those facts bore on the defense's argument of preclusion under the double jeopardy protection.

104, ll. 10-11. He said: "Mr. Henley has two indictments pending against him. One of them is for larceny; the other if for burglary in the first degree." R. 106, l. 24 – 107, l. 1. After reciting the elements of larceny and alleging that Henley took the personal property of Amanda Moss, he discussed the elements and anticipated proof of burglary. R. 107, ll. 1-16. He said:

> The elements of burglary are entry into a dwelling without the owner or the occupant's consent with the intent to commit a crime therein. **And in this case, our theory is that Mr. Henley went into Ms. Moss' home, did so without consent, took personal property. And that was the crime he intended to commit.**
>
> As to the burglary case, as to the burglary indictment rather, this is a charge of burglary first. And an additional element is that the person charged with burglary has been convicted of two prior burglaries. And there will be evidence about those two prior burglaries.

R. 107, ll. 6-16.

The testimony that developed during the trial indicated that when police arrived and found the side door to the Moss's home was open, and the sole item missing was Ms. Moss's Dell laptop, valued at five hundred dollars, that had been on a bench just in side of the door. R. 136, l. 1 – 137, l. 9; R. 192, ll. 15-19. The laptop was never recovered. R. 231, ll. 17-19.

In his closing argument, the solicitor again recited the elements of burglary and larceny in tandem. He said:

> Mr. Henley [is] charged with burglary in the first degree. He [is] also charged with larceny. So what is it we have to prove to you to be a burglar first degree? **Burglary is breaking and entering the dwelling of another with the intent to commit a crime inside that house, or inside that dwelling. In this case the dwelling of Amanda Moss and the intent to commit a crime in breaking and entering that dwelling. In this case, he's charged with larceny.** Larceny is the taking and carrying away the goods of another with the intent to permanently deprive that person of those goods. In this case, a laptop .. So those are the-- that's the law of the case. The burglary, going back to burglary first, to make it a burglary first is two prior convictions. And we'll deal with that a little bit later, but that makes it a burglary first.

R. 287, l. 21 – 288, l. 11 (emphasis added). In the latter portion of his closing, the solicitor argued Appellant kicked open the door and "went walking through **to go get that laptop**." R. 308, ll. 6-12

(emphasis added). He argued that Henley made a stop on his way to see his mother in Beech Island and "swung by Ms. Moss's house and decided he wanted to take advantage of what she had inside while she was at work. **What did he take? A laptop.**" R. 309, ll. 13-17 (emphasis added).

There was no dispute at Henley's first trial that the Moss' home was broken into and that her laptop was stolen. Rather, the focus was on the identity of the perpetrator. Thus, the acquittal on larceny was a finding that Henley was not the person who stole the laptop. This impacted the retrial in several ways. First, the state was precluded from re-litigating Henley's identity as the intruder. Second, the state was precluded from arguing that the stolen laptop was evidence of Henley's "intent to commit a crime therein." Relatedly, the prior jury's finding that Henley did not steal precluded the state's continuing theory that the criminal intent was to steal. As such, Henley's retrial for first-degree burglary was barred by the Double Jeopardy Clause because the state was precluded from re-litigating the issues that were necessarily decided by the jury's prior acquittal on larceny.

Evidence of Appellant's acquittal on the larceny charge was admissible.

This Court held Appellant's acquittal on the larceny charge was irrelevant because "it did not make the existence of any fact of consequence in the proceeding more or less probable with respect to the elements of first-degree burglary." According to this Court, the state was required to prove Appellant entered Moss's home without her consent and with the intent to commit a crime, but "there was no requirement that the state prove [Appellant] entered Victim's home without consent and successfully committed the crime of taking Victim's Dell computer." Next, this Court held that assuming the evidence was relevant, the trial judge "did not abuse [his] discretion in determining that any probative value was substantially outweighed by the danger of unfair prejudice and misleading the jury." In this Court's view, Appellant's "prior acquittal had

little to no probative value as it did not prove or disprove any element necessary to the first degree burglary charge; yet admission of the evidence would have likely led to jury confusion because it would have invited the jury to speculate about what occurred at the first trial." This Court misapprehended the relevant case law and Appellant's constitutional rights when arriving at this conclusion.

South Carolina addressed the admissibility of a prior acquittal in State v. Houston, 17 S.C.L. 300 (S.C. App. L. & Eq. 1829). Houston was indicted for uttering and publishing a forged note, purporting to be the promissory note of C. B. Atwood, knowing the same to be forged. 17 S.C.L. at 300. In the prior term, Houston was acquitted on a similar indictment for uttering another forged note. Id. At the second trial, the judge permitted admission of evidence that the note on which the first indictment was based was a forgery. Id. Both notes were in Houston's handwriting and he was convicted on the Atwood forgery. Id. The Houston Court ruled that the defendant's prior "acquittal on the note, which was produced in evidence, cannot affect the principle, **although it may weaken the force of the evidence.**" Id. at 303 (emphasis added). The Court noted that there was evidence that the prior acquittal may have been the result of a defect in the original indictment or the absence of witnesses. Id. The Court wrote: "It does not follow, that because a man is acquitted, he is innocent: the legal consequence is, that he cannot be tried again. But still he may have been guilty, and this guilt may be sh[o]wn in a collateral matter." *Id.* Thus, Houston recognized the relevance of facts related to a prior acquittal to a subsequent trial for a separate offense.

Similarly here, the trial judge's denial of the motion to quash the indictment under Double Jeopardy did not render the prior acquittal on larceny irrelevant to the current proceedings. Rather, the defense properly sought its admission to attack the state's theory that Appellant had any intent

to commit a crime inside of the residence, specifically to steal. Notably, the solicitor repeatedly argued in his closing that the crime that the intruder sought to commit was theft – saying "I'll submit to you his intent was to go in there and clean them out;" that Appellant stopped "to see what they had good in there;" and that "[h]e thought he'd get a little treasure trove." R. 640, ll. 16-19; R. 646, l. 20 – 647, l. 1. Any confusion or speculation that concerned the trial judge or solicitor could have been cured with a simple limiting instruction by the trial court rather than exclusion of the evidence or through the solicitor's argument regarding the weight to be given to prior acquittal. Further, the trial judge never made the requisite finding that the probative value of the evidence *was substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury. See R. 614, l. 22 – 615, l. 5; R. 616, ll. 13-15. As this Court has noted, "[a]ll evidence is meant to be prejudicial; it is only *unfair* prejudice which must be scrutinized under Rule 403." State v. Gray, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014).

The trial judge's limitation on the admission of Jolene Gray's prior testimony was not harmless beyond a reasonable doubt.

At Appellant's first trial, Jolene Gray, his girlfriend at the time of the incident, testified on redirect examination that five law enforcement officers came to their apartment complex a second time after they had spoken with Appellant. She said that they were walking around and picked something up off of the ground, though she was unsure what they picked up. R. 261, ll. 14-25. In the closing argument at the first trial, defense counsel argued:

> Jolene said that one of the times the officers came to talk to Rickey, there were some cars parked out and she saw the officers picking stuff up. She didn't know what they were picking up. It may seem crazy, crazy for us to ask you to draw an inference they were picking up a cigarette butt. But what is equally crazy, is that we've got all this lost evidence in this case and we know it's lost. You would think, you know, that things like this don't happen, but they really do. And the State

> acknowledges that these things happen. So it's really not that far of a stretch to say, well, maybe, maybe they picked something up that day. Because we don't know where that cigarette butt was until March 29th of 2012.

R. 302, ll. 6-18.

At the second trial, during its pre-trial motions, the defense moved to admit the sworn testimony from the first trial of defense witnesses Jolene Gray and Officer Michael Belcher pursuant to Rule 804(b)(1). Defense counsel explained her investigator had been unable to locate Gray in order to secure her presence at the retrial. Counsel offered to call her investigator to testify regarding her attempts to located Gray; however, the solicitor said that he did not have any objection to admission of the prior testimony. R. 461, l. 12 – R. 462, l. 9.

After the trial judge granted the defense's motion to admit the former trial testimony, the solicitor said: "And, Judge, we are going to probably try to ask our investigator if he can find Ms. Jolene Gray just to see if there is a reason why she's not showing, though." R. 463, l. 20 – R. 464, l. 2. Judge Griffith responded: "Okay. If you can find her, get her." R. 464, l. 3. The solicitor said: "Yes sir. We'll do that;" and defense counsel said that was fine with her. R. 464, ll. 4-6.

The next day, with respect to Jolene Gray, the solicitor said:

> Judge, the other one is Jolene Gray; is a former girlfriend of the Defendant in this case. It's my understanding that she is not here today. We did, after yesterday, it was brought to our attention, we were able to contact her through our office, our investigator contacted her and she said she's in Anderson. She's never received a subpoena. Judge, I understand that the Defense just wants to read in a prior transcript of her testimony. **Your Honor, my, you know, we're not going to oppose that, but in my cross from a prior hearing, I'm only going to read a portion of it. And then I put on the record, I think, and once I stop at that one portion, that would, the reading of redirect from the Defense would be outside the scope of our cross.**

R. 594, l. 20 – R. 595, l. 8. (emphasis added). The Judge asked defense counsel to explain why the redirect testimony was necessary. R. 595, ll. 11-20. The following exchange occurred:

DEFENSE COUNSEL PATEL: Your Honor, the redirect portion goes to the officers coming out a second time, searching the home and not finding anything, leaving, searching the premises. The witness says that perhaps someone picked up something off the ground and we would want all of that testimony to come in to show that no items were collected, a doo-rag, burglary tools from the home since Mr. Henley did live there. It's our position that the entire testimony should come in. And, Your Honor, we, our office being multiple--

THE COURT: Well, now, we don't know whether something was picked up off the ground or not. That's unknown. She's speculating.

DEFENSE COUNSEL BOLEN: She says that she saw, so it was her, you know, what she saw at that moment, but she saw several officers, I think she says near her car.

MR. BROWN: And, Judge, one thing to go farther, she never said who those officers were associated with. So that's, that just is, we had our officer testify that he went up there twice. The first time he was not there. The second time he talked to Mr. Henley, and then there was no other times that he went up there. And I, and looking over the transcript again from my cross, that redirect would be out of the scope of that cross.

THE COURT: All right. I think I'm going to grant his motion to limit his cross-examination to where he wants to stop. But I do not believe that will limit you Or Ms. Bolen, whichever one closes, in saying nothing was taken or recovered from the house or you'd have seen it here today. I think y'all could say something along those Lines in your closing argument and you can summarize it
had they gone and found something in that search, certainly it would be here. It's not here.

MS. PATEL: Yes, Your Honor.

THE COURT: By me, the recross or redirect from you does not prohibit you from arguing what you choose.

MS. PATEL: Yes, Your Honor.

THE COURT: All right. So let's, we'll limit it to tell your witness, well, once you stop, she'll quit reading.

MR. BROWN: Yes, sir. I'll stop reading.

R. 595, l. 21 – R. 597, l. 10. The defense called Jolene Gray as a witness and a portion of her testimony was read into the record. R. 599, l. – R. 600, l. 1. 13; R. 676.

Rule 804(b)(1), SCRE, provides for the admission of former testimony where the declarant is unavailable as a witness. Specifically, it allows the admission of "[t]estimony given as a witness at another hearing of the same or a different proceeding . . ., if the party against whom the testimony is now offered . . . , had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Rule 804(b)(1), SCRE. One of the situations in which a declarant is deemed "unavailable" for purposes of the Rule is when the declarant "is absent from the hearing ***and the proponent of a statement has been unable to procure the declarant's attendance*** . . . by process or other reasonable means." Rule 804(a)(5), SCRE (emphasis added).

In the present case, defense counsel represented that their investigator had been able to locate Jolene Gray in order to serve a subpoena, but that if the solicitor could find her and procure her attendance, she was fine with that. R. 461, l. 12 – R. 102, l. 6. Though the solicitor was able to contact Gray, the relevant inquiry is whether the proponent of the evidence has been able to procure the declarant's attendance by process of other reasonable means. The solicitor confirmed that Gray had not been served a subpoena. R. 594, l. 20 – 595, l. 1; Rule 804(a)(5), SCRE. While the solicitor again represented that he did not oppose the reading of the testimony, he then sought to qualify that by arguing that he should be permitted to read only a portion of his redirect examination, consequently excluding the redirect testimony. R. 595, ll. 1-8. Notably, the solicitor did not argue that there was any evidentiary basis for excluding Gray's testimony and no objections to her redirect were made at the first trial. See R. 261, ll. 14-25.

This Court held that Gray's testimony was inadmissible hearsay in accordance with Rule 804(a)(5), SCRE, because she was not served with a subpoena. This Court neglected to consider the remaining portion of the rule, which provides the declarant is unavailable if the proponent of the statement has been unable to procure her attendance by process "or other reasonable means."

Defense counsel offered to call her investigator to detail the "other reasonable means" undertaken by the defense to secure Gray's attendance; however, this presentation was rendered unnecessary when the state conceded Gray's unavailability. This Court's holding that Gray's prior testimony was hearsay is error in light of the state's concession making the development of the record in this regard unnecessary.

This Court expressed "concern" that the trial judge permitted the state to select portions of Gray's testimony to be read and excluded portions Appellant sought to present. Appellant requests this Court hold the trial judge committed error in allowing the state to cherry pick portions of Gray's testimony to be presented to the jury and disallow the portions Appellant desired.

Although this Court showed concern over the trial judge's handling of the prior testimony, this Court found the error was not prejudicial to Appellant. Appellant respectfully requests this Court hold the error was not harmless beyond a reasonable doubt. The real reason for the state's request is apparent from the record – he wanted to exclude the defense's evidence regarding law enforcement's opportunity to obtain a cigarette butt with Appellant's DNA from his yard. This testimony was essentially to the defense's attack on the reliability of the DNA analysis on the cigarette butt, which was lost along with the Sheriff's Department's chain of custody log. Additionally, Gray's testimony revealed another opportunity for law enforcement to look for corroborating evidence, such as the missing laptop, doo-rag, or burglary tools, which they failed to do. R. 595, l. 21 – 596, l. 10.

The solicitor's attempt to exclude the evidence that he rightly perceived as detrimental to the state's case at the first trial raises double jeopardy concerns, as the United States Supreme Court ruled that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment,

expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Yeager v. United States, 557 U.S. 110, 117-18 (2009) (quoting Green v. United States, 355 U.S. 184, 187–188 (1957)). It is reminiscent of Ashe v. Swenson, 397 U.S. 436, 440 (1970), where the state "refined its case at the second trial by declining to call one of the participants in the poker game whose identification testimony at the first trial had been conspicuously negative." There, the Court noted the state's concession in its brief that "[n]o doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial." 397 U.S. at 447. The Court held that "this is precisely what the constitutional guarantee [against double jeopardy] forbids." Id.

Juxtaposing the evidence presented at the first trial with the evidence presented at the second trial along with the outcomes of those trials also demonstrates how the error was not harmless beyond a reasonable doubt. The state's evidence was almost identical in each trial. The defense too presented almost the identical evidence in the second trial as it had the first. The greatest difference between the two trials was the exclusion of the portion of Gray's testimony in which she described law enforcement showing up at her home and picking up items off the ground. At the first trial, Gray's testimony combined with the other evidence showing the police conducted a poor investigation – lost evidence, lost chain of custody – resulted in the jury acquitting Appellant of larceny and being unable to render a verdict on the burglary count. Speculation is unnecessary here to determine what effect the erroneous ruling had on the jury's verdict because the first trial demonstrates the absence of Gray's testimony was substantial.

Appellant respectfully requests this Court rehear the matter pursuant to Rule 221(a), SCACR.

Respectfully Submitted,

SUSAN B. HACKETT
Appellate Defender

This 27th day of December, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKEY SANTOINE HENLEY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Rickey Santoine Henley, #290970, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 27th day of December, 2019.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 27th day of December, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022

The South Carolina Court of Appeals

The State, Respondent.

v.

Rickey Santoine Henley, Appellant.

Appellate Case No. 2016-000844

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C.J.

J.

A.J.

Columbia, South Carolina

cc:
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FILED

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William M. Blitch, Jr., Esquire