STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY

Court of General Sessions

The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2016-000844

THE STATE,

Respondent,

v.

RICKEY SANTOINE HENLEY,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

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

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

Post Office Box 516
Greenwood, SC 29648
(864) 942-8800

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Appellant was indicted during the July 2012 term of the Grand Jury for Abbeville County for burglary in the first degree and larceny. Appellant proceeded to a jury trial before the Honorable R. Lawton McIntosh from April 8-9, 2015, in Abbeville, South Carolina. At the conclusion of trial, the jury found Appellant not guilty of larceny; however, the jury remained hung as to the charge of burglary in the first degree. After the jury's verdict, Judge McIntosh declared a mistrial as to the burglary charge.

Appellant was subsequently re-tried for burglary in the first degree from April 4-6, 2016 in Abbeville, South Carolina, before the Honorable Eugene C. Griffith, Jr. and a jury. At the conclusion of trial, Appellant was found guilty of burglary in the first degree. He was sentenced by Judge Griffith to imprisonment for a term of twenty-four years. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Rick Culbreth resided in the same community as Jamie and Amanda Moss in Abbeville, South Carolina. R. pp. 486-87. On February 15, 2012, Culbreth passed the Moss's house on his way home to check on his mother. R. pp. 487-88. As he passed the Moss's home, he noticed a black male running from the front door to a side door and that there was a gray car backed under the carport with the door open. R. pp. 488-89. Recognizing the situation as abnormal, Culbreth turned his vehicle around and went back to the Moss's house. R. pp. 488-89. When he returned to the Moss's home, Culbreth observed the black male standing in the doorway of the house and noted it appeared he had made entry into the home. R. p. 489. Culbreth testified he, "knew in that in my mind that he wasn't supposed to be there." R. p. 490.

After spotting Culbreth, the intruder got into his vehicle and pulled out of the driveway, R. p. 490. The intruder stopped his vehicle in front of Culbreth's white pickup truck, which was pulling a trailer with a lawn mower, and asked him if he needed any help with lawn care, to which Culbreth replied that he did not. R. p. 490. When asked what the intruder looked like, Culbreth stated, "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." R p. 491. The intruder then drove away and merged onto Highway 28 North. R. p. 491. As the intruder drove past, Culbreth looked into his rearview mirror and was able to get a partial license plate number. R. p. 491. After the intruder turned onto Highway 28 North, Culbreth turned into the driveway and called 911. R. p. 491. Culbreth described the car as a Pontiac that was gray in color and seemed to be a late 1980's or 1990's model. R p. 498. The license plate number Culbreth provided to law enforcement was "HSN 454."

Patrick Thompson, a detective in the property crimes division of the Abbeville County Sheriff's Office, was working on February 15, 2012. R. pp. 518-19. Deputy Thompson received a radio call about the apparent burglary at the Moss home and proceeded to the area. R. pp. 519-20. Upon his arrival, Deputy Thompson processed the crime scene. R. p. 520. While processing the scene, Deputy Thompson noticed a footwear impression on the carpet. R. p. 521. Officers also recovered a cigarette butt from the intruder's point of entry. R. p. 521. The cigarette was collected and placed into evidence at the scene. R. p. 524.

Amanda and Jamie Moss both testified at trial. R. pp. 508-17. Mrs. Moss testified that when looking through the home's windows, you can see televisions, speakers, couches, antiques, and pictures. R. p. 509. At trial, Mrs. Moss was shown various photographs which she testified depicted the home's side carport door. R. pp. 511-12. The carport door was partially broken off and appeared to have been tampered with. R. p. 512. The doorframe was also damaged. R. p. 512. Mrs. Moss testified the cigarette found near the steps to the home did not belong to her or her husband, as neither one of them smoked. R. p. 513, 510. Mrs. Moss stated the cigarette was not there when she left the house that morning. R. p. 511. Mrs. Moss noted she normally locked the door to the house when she left. R. p. 514. Mr. Moss also noted the door was locked when he left and there was not a cigarette butt on the steps. R. p. 516.

After speaking with Culbreth, Deputy Thompson searched for a suspect vehicle. R. p. 521. Deputy Thompson searched a SLED vehicle database based on the tag description provided by Culbreth. R. p. 522. The search returned a 1997 Pontiac owned by Appellant and Jolene Gray with the license plate number "HSN 544." R. p. 522. Based on information he received from the Department of Motor Vehicles, Deputy Thompson went to Appellant's address in Anderson County on February 22, 2012. R. p. 524. Upon arriving at the apartment, Deputy Thompson

noticed a Pontiac Bonneville with the license plate "HSN 544" parked outside. R. p. 528. Deputy Thompson noted this license plate number was close to the description provided by Culbreth and that, "I believe he stated it was HSN 454 or HSM 454, but we knew it was, there was a possibility it could be off, because he was reading it from his rearview mirror." R. p. 528. Appellant was at the residence and spoke with law enforcement. R. p. 529. Appellant admitted he had been in Abbeville recently and further acknowledged he had been on Highway 28. R. pp. 530-31. Appellant also recalled speaking to someone in a truck. R. p. 531. Appellant also admitted he smoked cigarettes. R p. 532. Specifically, Appellant admitted he smoked Newports, which was the type of cigarettes found at the Moss's home. R. pp. 532-33. Deputy Thompson also noticed Appellant was wearing boots, the soles of which resembled the impression left on the Moss's carpet. R. p. 532. Appellant was subsequently placed under arrest. R. p. 533.

Maryanne Boehm works for SLED in the DNA casework department. R. p. 570. Boehm received the Newport cigarette butt for testing on March 29, 2012. R. p. 573. The DNA profile developed from the cigarette butt matched the DNA profile of Appellant. The probability of randomly selecting an unrelated individual with a DNA profile matching the cigarette butt is 1 in 1.5 billion. R. p. 580.

ARGUMENT

I.

The trial judge properly denied Appellant's motion to quash the indictment based on the Double Jeopardy Clause of the Fifth Amendment where Appellant's second trial was not barred by issue preclusion because his acquittal for larceny did not necessarily decide a critical issue of ultimate fact as to whether Appellant committed burglary in the first degree.

Relevant Facts

As noted in Respondent's Statement of the Case, at Appellant's first trial, he was acquitted of larceny and the jury hung on the burglary charge. R. p. 348. At the beginning of Appellant's second trial, Appellant filed a motion to quash the indictment based on Double Jeopardy. R. p. 352-61 (Defendant's Motion to Quash). During a pre-trial hearing, Defense Counsel argued:

> So it's our position, Your Honor, that under the Supreme Court case of Yeager that because of this overlap in facts that jeopardy attaches because he was acquitted of full larceny that there is, in order to prove their case at all for a burglary, they need to reference some sort of crime and the only one they can reference is larceny. He's been acquitted of that larceny. So it's our position that under Yeager and Ashe that the issue preclusion analysis offered there and done under the double jeopardy clause of the Fifth Amendment would prevent the State from prosecuting him again on this case.

R. p. 392. In response, the solicitor argued:

> While [Defense Counsel] does note that the warrant identifies that petty larceny, we would note that the indictment does not identify that a petty larceny was committed inside. It merely restates the elements of burglary in that Mr. Henley entered with the intent to commit a crime therein. We didn't say there was larceny in the indictment. And to quote Yeager, because a jury speaks only through its verdict, it's failure to reach a verdict cannot by negative implications yield a piece of information that helps out together the trial puzzle. Such conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return. Your Honor, we will certainly concede that the not guilty on the larceny puts us in a much tougher spot with regard to proving the burglary. But again we would note the elements of burglary of Code 16-11-311 (a). A person who is guilty of burglary in the first degree if a person enters a dwelling without consent and with

intent to commit a crime in the dwelling. It doesn't say enters without consent and commits a larceny. . . . Mr. Brown and I have pretty much resigned ourselves to the fact that any mention of that lap top will be gone from this trial. But to say that Yeager precludes us from going forward on this case because of double jeopardy is to just read Yeager too broad.

R. pp. 392-93. The solicitor also referred the trial judge to State v. Peterson, 336 S.C. 6, 518 S.E.2d 277 (Ct. App. 1999), and continued:

> But it is an assault with intent to commit CSC, along with a burglary case. The Defendant in the assault with intent to commit CSC was found not guilty of the assault with intent to commit CSC but found guilty of the burglary first degree. Defendant appealed and the Court reasoned basically the same reason that there is no requirement that the Defendant has to be found guilty of the underlying crime. Once again to sum it up, Your Honor, the elements of burglary do not require us to prove the underlying larceny. They merely require the State to prove that there is an intent to commit a crime in the dwelling.

R. p. 394. The trial judge ruled:

> Here's what I think. I understand your argument. I think it's a directed verdict to fact 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 burden (sic) charge since it's not a specific crime. The indictment does not get quashed at this point, but the Court will be listening.

R. pp. 399-400.

Discussion

Appellant contends the trial judge erred in denying appellant's motion to quash the indictment based on Double Jeopardy. Specifically, Appellant avers the trial judge erred in not applying the test set forth in Yeager v. United States, 557 U.S. 110 (2009), to determine whether the State was collaterally estopped from re-prosecuting Appellant for burglary in the first degree.

Appellant argues his acquittal on the larceny charge during his first trial was a finding that he was not the person who stole the laptop; therefore, the jury's finding Appellant did not steal the laptop precluded the State's theory of the case for the burglary charge that Appellant entered the Moss's home with the intent to commit a crime. Appellant concludes, "[Appellant's] re-trial for first-degree burglary was barred by the Double Jeopardy Clause because the State was precluded from relitigating the issues that were necessarily decided by the jury's prior acquittal on larceny." Br. of App. p. 17. This argument lacks merit. Appellant's acquittal of larceny did not necessarily decide whether Appellant committed burglary in the first degree. An acquittal on larceny is not tantamount to a finding that Appellant did not enter the Moss's home without consent and with the intent to commit a crime in the dwelling. Appellant's re-trial for burglary in the first degree was thus not barred by issue preclusion.

"Simple larceny of any article of goods, choses in action, bank bills, bills receivable, chattels, or other article of personality of which by law larceny may be committed. . . . [with] a value of two thousand dollars or less, is petit larceny." S.C. Code Ann. § 16-13-30(A). By comparison, "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. . . . 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." S.C. Code Ann. §16-11-311(A)(2).

Through their Double Jeopardy Clauses, the United States Constitution and the South Carolina Constitution offer protection to citizens from being subjected to double jeopardy for the same offense. See U.S. Const. amend. V ("No person shall be . . . subject from the same offense 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 . . . ."). The guarantee

against double jeopardy offers three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 48 (Ct. App. 2003).

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). The issue-preclusion principle 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 Court explained "'collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice." Id. at 443. The Court advised:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. 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. The Supreme Court later examined an issue preclusion challenge involving an attempted re-trial after the defendant was acquitted on some counts and the jury hung on other counts in Yeager v. United States, 557 U.S. 110 (2009). In Yeager, the defendant was indicted for securities fraud and insider trading. Id. at 113. The jury acquitted the defendant on the securities fraud counts; however the jury remained hung on the insider trading charges. Id. at 115. The prosecution subsequently sought to re-try the defendant on the insider trading counts, which prompted the defendant to move to dismiss all counts on the ground that the acquittals on the fraud counts precluded the prosecution from re-trying him 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. Despite the fact that Yeager's case was distinguishable from Ashe in that Yeager involved an acquittal on some counts and a mistrial on others, the Supreme Court applied Ashe's reasoning to Yeager's case, noting, "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.

In the current case, Appellant's acquittal on the larceny charges was not dispositive as to whether Appellant committed burglary in the first degree. As a threshold matter, the State takes issue with Appellant's characterization of Appellant's acquittal for larceny as "a finding that [Appellant] was not the person who stole the laptop" and that the State was thus precluded from re-litigating Appellant's identity as the intruder. Br. of App. p. 17. The jury's not-guilty verdict was not necessarily a finding that Appellant was not the individual who broke into the Moss's home, rather, it was the jury finding the State failed to prove beyond a reasonable doubt that Appellant committed the crime of larceny. This is an important distinction, as the State's failure to prove the larceny charge beyond a reasonable doubt did not preclude the possibility that the State would be able to prove Appellant committed burglary in the first degree. In Yeager there could be no insider trading if, as found by the jury, there had been no fraud. Here, there could be burglary without larceny.

In State v. Mitchell, 399 S.C. 410, 422, 731 S.E.2d 889, 896 (Ct. App. 2012), Mitchell sought a new trial on his conviction for burglary in the first degree, contending all of the elements were not met because the intent to steal element was not proven since the jury found Mitchell not guilty of petit larceny. The Court noted that 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 Mitchell, Appellant erroneously conflates the intent to commit a crime with the actual commission of a crime. Although the jury in Appellant's first trial found the State failed to prove the larceny charge, there was no requirement that the State actually prove Appellant committed a separate crime within the home in order to prove the burglary charge. See State v. Peterson, 336 S.C. 6, 7, 518 S.E.2d 277, 278 (Ct. App. 1999) (in a case where defendant was found guilty of first-degree burglary and not guilty of first-degree assault with intent to commit criminal sexual conduct, the Court of Appeals held, "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."). Since the larceny charge does not play a determinative role in the State's ability to prove burglary in the first degree, the jury's not guilty verdict as to the larceny charge does not represent a decision on a critical issue of ultimate fact. As noted by the solicitor at trial, if the State was required to prove a larceny occurred within the home, the State

may find itself in dire straits under the Yeager framework. However, seeing as Appellant's acquittal for larceny did not settle the critical issue of ultimate fact as to whether he committed a breaking and entering with the intent to commit a crime within the home, the State was not precluded from retrying Appellant for burglary in the first degree. The case was properly presented to the jury. Appellant's conviction and sentence should be affirmed.

II.

The trial judge properly denied the defense's request to admit evidence of Appellant's acquittal on the larceny charge from his first trial where such evidence was irrelevant and the evidence's probative value was substantially outweighed by the risk of unfair prejudice and misleading the jury.

Relevant Facts

At trial, Defense Counsel sought to introduce the self-authenticating copy of the larceny indictment from Appellant's first trial. R. p. 612. Defense Counsel argued:

> I think it's exculpatory information and it is important for the jury to consider. One of the things that the state has to prove is the intent to commit a crime therein. We are permitted to put up a defense, Your Honor. [Appellant] is certainly entitled to his constitutional right to defend himself and part of our defense is in talking to the jury about that crime of intent to commit a crime that he was acquitted of. It's exculpatory and I think it's important for the jury to know. I don't think it brings up any sort of reference as to any prior trial on this particular charge. . . .

R. p. 613. The solicitor noted the evidence was wholly irrelevant and had no bearing on the jury's mission to determine Appellant's guilt or innocence on the burglary charge. R. p. 612, 614. The trial judge found, "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 personality. . . 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." R. p. 614.

Discussion

Appellant asserts the trial court erred in denying Defense Counsel's motion to admit evidence of his acquittal on the prior larceny charge. Specifically, Appellant avers the evidence was relevant to attack the State's theory that he had an intent to commit a crime within the residence, and that the trial judge never made the requisite finding that the probative value of the evidence was substantially outweighed by the risk of unfair prejudice. This argument lacks merit, as the acquittal for larceny was wholly irrelevant in Appellant's subsequent prosecution for burglary in the first degree. Further, the admission of any such evidence would be exceptionally improper, as whatever probative value the evidence had was substantially outweighed by unfair prejudice. Such evidence is effectively reverse-propensity evidence and suggests a decision on an improper basis, as it essentially invites a jury to find a criminal defendant not guilty simply because another jury has acquitted the defendant of other charges stemming from the same nucleus of fact.

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). An appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary

matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

All relevant evidence is admissible, and only relevant evidence should be admitted at trial. Douglas, 369 S.C. at 430, 632 S.E.2d at 848; see Rule 402, 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."). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE ("'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.").

However, even if relevant, evidence must be excluded from trial if its probative value is **substantially outweighed** by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). The determination of the probative

value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev'd on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000).

In the present case, the evidence of Appellant's acquittal on the larceny charge was completely irrelevant, as it did not make the existence of any fact of consequence in the proceeding more or less probable. The fact that Appellant was acquitted of larceny in an earlier proceeding does not have any bearing whatsoever on the State's burden to prove the elements of burglary in the first degree beyond a reasonable doubt. There was no evidentiary link whatsoever presented at trial that would make the larceny acquittal a relevant issue. While the State was required to prove Appellant entered the Moss's home with intent to commit a crime, the fact that Appellant was found not guilty of larceny did not make that fact more or less likely. As was discussed in Respondent's Issue I, there is no requirement that the State prove a crime actually occurred within the home and certainly no requirement that the crime the burglar intended to commit was larceny.

While Appellant argues the trial judge did not conduct a Rule 403 analysis, the trial judge made an express finding that the evidence would "confuse the jury." This is clearly an acknowledgment that Rule 403 was a consideration as to why he was excluding the evidence. Even assuming, *arguendo*, that the evidence was somehow relevant, any probative value was

substantially outweighed by the danger of unfair prejudice and misleading the jury. The evidence of the prior acquittal had little to no probative value, as it did not prove or disprove any fact relevant to the case. Whether Appellant committed a larceny was not essential to the State's burden to prove Appellant committed burglary in the first degree. The evidence had an exceptionally high risk of unfair prejudice, as it would lead to confusion of the issue and inevitably mislead the jury. The admission of the indictment for larceny would invite the jury to speculate about what occurred at the first proceeding and would suggest a decision on an improper basis. The admission of the prior acquittal would effectively allow Appellant to present reverse-propensity evidence. See Rule 404 (b), SCRE (Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.). By presenting evidence that Appellant was acquitted of a larceny charge stemming from the same incident, Appellant would be impliedly imploring the jury to find him not guilty of burglary simply because the earlier jury had found him not guilty of larceny. This would inevitably suggest a decision on an improper basis, as the jury would concern themselves with the results of the other proceeding instead of the facts presented to them throughout trial. The evidence of Appellant's prior conviction was thus irrelevant and the evidence's probative value was substantially outweighed by unfair prejudice. See West v. State, 228 Ga.App. 713, 492 S.E.2d 576 (Ga. Ct. App. 1997) (finding evidence of defendant's prior acquittals had no probative value in trial for perjury based on statements he made during prior trial for child molestation, because evidence of the acquittals was neither relevant nor material to any issue in the case). Appellant's conviction and sentence should be affirmed.

III.

The trial judge did not err by limiting the admission of Jolene Gray's testimony from Appellant's first trial where the testimony was not admissible under Rule 804(b)(1), SCRE, and Appellant was not prejudiced by the exclusion of a limited portion of the testimony.

Relevant Facts

During Appellant's first trial, his girlfriend, Jolene Gray, asserted during cross-examination by the solicitor that law enforcement came to the residence she shared with Appellant on a second occasion. R. p. 260. 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. [Appellant's] car be 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.

R. p. 261. Defense Counsel referenced Gray's testimony during her closing argument in support 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 Jolene said that one of the times the officers came to talk to [Appellant], 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. 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.

R. p. 302.

During Appellant's subsequent re-trial for burglary in the first degree, Defense Counsel indicated he had a motion to admit former testimony from a previous trial. R. p. 461. 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." R. pp. 461-462. Defense Counsel continued, "But we would ask under Rule 804 (b)(1), which is the hearsay exception where declarant is unavailable to introduce Ms. Gray's testimony from the previous trial." R. p. 462. The solicitor 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." R. p. 462. The trial judge granted Defense Counsel's motion, stating, "motion granted." R. p. 463. The solicitor subsequently told the trial judge, "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. pp. 463-64. The trial judge replied, "Okay. If you can find her, get her." R. p. 464. Defense Counsel indicated her agreement by stating, "I'm fine with that." R. p. 464.

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. . . . 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. pp. 594-95. Defense Counsel 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 [Appellant] did live there. It's our position that the entire testimony should come in.

R. pp. 595-96. The Court observed, "Well, now, we don't know whether something was picked up off the ground or not. That's unknown. She's speculating." R. p. 596. Defense Counsel replied, "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." R. p. 596. The solicitor noted:

> 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 [Appellant], 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.

R. p. 596. The trial judge found:

> 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.

R. p. 596-97.

During her closing argument, Defense Counsel noted:

> What else would a search warrant maybe have helped Officer Thompson with? Well, you heard Rick Culbreth say the individual was wearing a doo-rag and he wrote that a few days later on the lineup. A search warrant maybe would have produced that doo-rag. What about burglary tools? Why not get a search warrant for the car or the house or something like that to look for burglary tools?

R. p. 627. Defense Counsel later argued Officer Thompson, "could have gotten a search warrant. He could have gotten a comparison of the boots. He could have tried to find burglary tools or a doo-rag." R. p. 629-30.

Discussion

Appellant contends the trial judge erred in limiting the presentation of Jolene Gray's testimony from Appellant's first trial. Appellant asserts Gray's testimony provided evidence that the police had an opportunity to obtain a cigarette butt smoked by Appellant from outside of his home, as well as other corroborating evidence like a doo-rag or burglary tools. This argument lacks merit. Jolene Gray's testimony was not admissible pursuant to Rule 804(b)(1), as Defense Counsel did not even subpoena Gray to attempt to secure her appearance at trial. Further, Appellant was not prejudiced by the exclusion of a portion of Gray's testimony where he was still able to effectively argue that the State did not seek a search warrant and seek to find corroborating evidence at Appellant's home.

Rule 804(b)(1) of the South Carolina Rules of Evidence provides that the prior testimony of a witness is not excluded by the rule against hearsay if the declarant is unavailable as a witness. Rule 804(b)(1), SCRE. Specifically, the rule allows:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Rule 804(b)(1), SCRE. Rule 804(a) provides the various scenarios in which a declarant is deemed to be "unavailable." The only pertinent scenario in Appellant's case is Rule 801(a)(5), which provides that a witness is unavailable for hearsay purposes if the witness, "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means." Rule 801(a)(5), SCRE.

In Appellant case, he is unable to meet the prerequisites of Rule 804 with respect to Jolene Gray's testimony. Appellant notes, "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." Br. of App. p. 26. However, this Court can find the testimony inadmissible on hearsay grounds despite the fact that the solicitor did not make the argument below. 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."). While Defense Counsel asserted that her investigator made efforts to locate Gray, the solicitor apparently had no difficulty locating Gray during trial. Critically, Gray told the solicitor that she was never even subpoenaed for the trial. Rule 801(a)(5) provides that for a witness to be unavailable, the proponent of the statement must seek the declarant's statement through service of process or through "other reasonable means." Appellant utterly failed to make such a showing where Gray was never subpoenaed and the assertion that Gray was unobtainable was directly rebutted by the solicitor's ability to locate Gray overnight in the middle of trial. Gray's prior testimony was thus inadmissible under Rule 804, SCRE, as inadmissible hearsay.

Regardless of whether Gray's prior testimony was properly admissible under Rule 804(b)(1), SCRE, Appellant suffered no prejudice from the exclusion of a limited portion of Gray's prior testimony. An appellate court will not reverse based on the erroneous admission or exclusion of evidence unless prejudice has been shown. State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998). Accordingly, appellate courts will decline to set aside convictions for insubstantial errors which could not reasonably have affected the result. State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006). As to the assertion that Gray's testimony provided evidence that the police had opportunity to obtain a cigarette smoked by Appellant from outside

of the home, it is unclear whether Appellant is alleging law enforcement used a second cigarette found at Appellant's home to fabricate DNA evidence or whether Appellant is asseverating the collection of another cigarette would have somehow altered the positive DNA result with respect to the cigarette found at the Moss's home. Regardless, Appellant was not prejudiced by the evidence's exclusion where the chain of custody for the cigarette established that law enforcement collected a cigarette from the Moss's home, sent it to SLED for testing, and the test returned a positive result as to Appellant's DNA. The collection of a second cigarette at Appellant's home by law enforcement would have done nothing to change this result. As to the assertion that Gray's testimony was necessary to support the defense argument that law enforcement neglected to obtain a search warrant and search Appellant's home for corroborating evidence such as a doo-rag or burglary tools, Appellant was not prejudiced by the evidence's exclusion where that theory was still presented to the jury. As noted by the trial judge in his ruling, Defense Counsel had the opportunity to, and did, emphasize multiple times during closing argument that law enforcement declined to search Appellant's home for a doo-rag, burglary tools, or other corroborating evidence. Appellant thus suffered no prejudice from the exclusion of the testimony. Appellant's conviction and sentence should be affirmed.

IV.

Appellant's argument is not preserved for appellate review where he failed to object to the admission of the evidence at trial. Error preservation concerns notwithstanding, the trial judge properly denied Appellant's motion to exclude the evidence regarding DNA testing performed on the cigarette butt found at the Moss's home that tested positive for Appellant's DNA where there was no presentation that the evidence was lost in bad faith and the State completed a complete chain of custody from the cigarette's collection through the testing of the cigarette by SLED and subsequent return of the evidence to the Abbeville County Sheriff's Office.

Relevant Facts

During his direct examination, Deputy Thompson testified the cigarette butt found at the Moss's residence was collected and turned into evidence. Deputy Thompson described the procedure employed, testifying:

> 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.

R. p. 525. The evidence bag was then sealed with tamper-proof tape. R. p. 525. Deputy Thompson testified he picked the cigarette butt up, placed it into the evidence bag, and sealed it with tape. R. pp. 525-26. Deputy Thompson stated no other officers handled the cigarette butt prior to his arrival at the crime scene. R. p. 525. Deputy Thompson testified that after collecting the evidence, the next step is to take the evidence to the law enforcement center whether it is either put into a secure drop-box or is handed directly to Chief Marion Johnson, who was the evidence custodian at the time. R. p. 526.

Chief Johnson was employed as the Chief Deputy of the Abbeville County Sheriff's Office from 1989 to 2013. R. p. 548. Chief Johnson was also the department's evidence custodian. R. p. 549. Chief Johnson testified that after Deputy Thompson collected and sealed the cigarette butt, it was turned over to him. R. p. 551. After receiving the cigarette butt, Chief

Johnson logged the evidence in and put it in the evidence locker. R. p. 551. On March 29, 2012, Chief Johnson gave the cigarette butt to Investigator Ryan Abernathy, who transported it to SLED. R. pp. 551-52, 562-63. Before sending the bag to SLED, Chief Johnson confirmed the bag had not been tampered with. R. p. 560. Investigator Abernathy subsequently transported the cigarette butt back to the Abbeville County Sheriff's Office from SLED on August 10, 2012. R. pp. 552-53, 563.

Maryanne Boehm is employed in the DNA casework department at SLED. R. p. 570. Boehm received a Newport cigarette butt for testing in Appellant's case. R. p. 573. Boehm testified the cigarette butt was transported from the Abbeville County Sheriff's Office on March 29, 2012, by Investigator Abernathy. R. p. 573. When Abernathy arrived, the evidence was submitted to Doris Yarbrough, a forensic technician. Boehm testified that once the evidence was received:

> 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.

R. pp. 573-74. Boehm testified that the evidence bag had not been tampered with or damaged in any way. R. p. 574. Boehm subsequently performed DNA analysis on the cigarette butt. R. p. 575. Boehm was shown the photograph of the cigarette butt collected at the Moss's home and testified that it was consistent with the cigarette butt she tested. R. p. 576. As noted in Respondent's Statement of Facts, the DNA profile developed from the cigarette butt matched the DNA profile of Appellant. R. p. 580. After the positive result, Boehm issued a report based on her findings and returned the evidence back to SLED's evidence control unit. R. p. 581. The

solicitor asked Boehm, "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?" Boehm replied, "No, sir." Boehm testified the absence of the cigarette at trial did not change her interpretation of the evidence or the test's results. R. p. 581-82.

Chief Johnson retired from the Abbeville County Sheriff's Office in May of 2013. R. p. 553. At the time of his retirement, all the evidence obtained in Appellant's case was still in the evidence room. R. p. 554. Sometime after the evidence was returned to the sheriff's office, it went missing. R. p. 555. Prior to trial, Appellant made a motion to suppress any testimony or mention of the cigarette butt. R. p. 440. Defense Counsel made an exceptionally detailed argument based on various criticisms of the chain of custody and asserting the admission would violate Appellant's rights under the Due Process Clause of the Fourteenth Amendment. See RA. pp. 441-454. The trial judge 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.

R. p. 455.

Discussion

Appellant asserts the trial judge erred in denying the defense's motion to exclude evidence regarding the DNA testing performed on the cigarette butt found at the Moss's home that tested positive for Appellant's DNA. Appellant makes this argument on two separate

grounds. First, Appellant contends the State's negligence in maintaining the evidence constitutes bad faith. Second, Appellant avers the State presented an insufficient chain of custody because the physical cigarette was not available for comparison to the crime scene photograph at trial. These arguments lack merit. Appellant failed to present any evidence of bad faith on the part of law enforcement in losing the cigarette butt. Further, 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 subsequent return to the Abbeville County Sheriff's Office.

As a threshold matter, Appellant's argument is not preserved for appellate review because he failed to object to the evidence's admission at trial. The trial judge indicated he was making a ruling *in limine*, and that his ruling was subject to change. It was then incumbent upon Defense Counsel to contemporaneously object in order to get a final ruling and preserve the issue for appellate review. An *in limine* ruling is not final and a contemporaneous objection is required to preserved an issue for appeal. State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). A pre-trial ruling on the admission of evidence is not considered final and a party must renew his objection at the time the evidence is admitted. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). Appellant failed to offer a contemporaneous objection at the time the evidence concerning DNA testing of the cigarette butt was admitted. The issue is thus not preserved for review by this Court.

Error preservation concerns notwithstanding, Appellant's argument wholly fails on the merits. "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). The fundamental fairness standard requires criminal defendants to be given a meaningful opportunity to present a complete defense. Id.; see State v. Harris, 311 S.C.

162, 167, 427 S.E.2d 909, 912 (Ct. App. 1993) ("Due process requires that a criminal defendant be given a reasonable opportunity to present a complete defense."). However, "[t]he State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant." State v. Cheeseboro, 346 S.C. 526, 538, 552 S.E.2d 300, 307 (2001). In order to warrant suppression based on the loss or destruction of evidence, the defendant must show either: (1) the State destroyed the evidence in bad faith; or (2) the State destroyed evidence possessing an exculpatory value apparent before the evidence was destroyed and no other evidence of comparable value can be obtained by other means. State v. Mabe, 306 S.C. 355, 358-359, 412 S.E.2d 386, 388 (1991). "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." Trombetta, 467 U.S. at 488. Critically, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Agurs, 427 U.S. 97, 109-110 (1976); see Arizona v. Youngblood, 488 U.S. 51, 57 (1988) ("[W]e think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.").

In State v. Reaves, 414 S.C. 118, 777 S.E.2d 213 (2015), the South Carolina Supreme Court dealt with a case where multiple pieces of evidence were collected at the crime scene but were missing at the time of trial. On appeal, Reaves argued the evidence lost by police in the investigation of his case effectively deprived him of his fundamental right to a fair trial under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Id. at 125. Reaves made no allegation the police acted intentionally, however he asserted the police's

actions in failing to preserve the evidence were so egregious and negligent that it constituted bad faith. Id. at 127. The Supreme Court disagreed, noting, "Although the record is replete with indications the police investigation was deeply flawed, the record also contains no indications these flaws were the product of more than mere negligence." Id. at 129. The Supreme Court ruled, "Accordingly, although we acknowledge there are deeply troubling aspects of the investigation in this case, the errors made by the police do not indicate bad faith as is required to dismiss an indictment under the federal constitutional test." Id. at 129.

In Appellant's case, as in Reaves, Appellant is unable to make any showing concerning bad faith. While the State admittedly lost the cigarette butt sometime before trial, the only evidence presented was that the evidence was returned to the Abbeville County Sheriff's Office and was lost sometime after Chief Graham's retirement. Appellant failed to present any evidence concerning bad faith on the part of law enforcement. The actions of law enforcement in losing the evidence were at the most mere negligence, and it cannot be inferred that law enforcement acted in bad faith 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."); Jean v. Collins, 221 F.3d 656, 663 (4th Cir. 2000) (instructing bad faith in the context of the loss or destruction of evidence "requires that the officer have intentionally withheld the evidence for the purpose of depriving the plaintiff of the use of that evidence during his criminal trial"); United States v. Vera, 61 F.App'x. 330, 331 (9th Cir. 2003) ("An officer does not act in bad faith unless he or she acts with the purpose of depriving the defendant of the potentially exculpatory evidence. Although the property officer may have acted negligently or even recklessly in destroying the chemical samples, there is no evidence that the officer acted in bad faith by deliberately destroying the evidence to deprive [the

defendant] of access to relevant evidence."). Appellant attempts to distinguish Reaves by arguing, "Here, the missing evidence is of far greater importance, as it relates directly to the admissibility of the state's DNA evidence and there was evidence at the first trial that the police went to [Appellant's] residence and picked something off the ground." Br. of App. p. 30. Appellant's argument wholly ignores the underlying reasoning of Reaves, where, regardless of the evidence's importance, there was absolutely no proof of bad faith on the part of law enforcement. Furthermore, the State disagrees with Appellant's characterization of the cigarette butt as critical evidence. The DNA test result was certainly critical evidence; however, the presence of the cigarette butt itself at trial would have done nothing to change that evidence. The presence of the physical cigarette for comparison would have contributed nothing of value, as Defense Counsel would have undoubtedly pointed out that the cigarette was a non-descript item without any telling markings, therefore it was impossible to tell whether that was the same one as the cigarette butt in the photograph taken at the Moss's home. The State would also note that the presence of the physical cigarette would have contributed nothing to Appellant's defense, as it was inculpatory evidence, rather than exculpatory. See Breeze, 379 S.C. at 546, 665 S.E.2d at 252 ("Here, the destroyed evidence [the appellant] complains of was inculpatory rather than exculpatory.").

As to Appellant's argument concerning the chain of custody, the absence of the cigarette butt at trial did not render the chain of custody incomplete. The whereabouts of the cigarette butt were fully accounted for from the time of collection through the evidence's return to the Abbeville County Sheriff's Office after the testing by SLED was completed. "The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be." State v. Hatcher, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011); see United States v. Howard-

Arias, 679 F.2d 363, 366 (4th Cir. 1982) ("The purpose of this threshold requirement is to establish that the item to be introduced, i.e., marijuana, is what it purports to be, i.e., marijuana seized from the 'Don Frank.'"). 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. The proof of the chain of custody need **not** exclude every possibility of tampering. State v. Smith, 326 S.C. 39, 41, 482 S.E.2d 777, 778 (1997); see State v. Rogers, 361 S.C. 178, 187, 603 S.E.2d 910, 915 (Ct. App. 2004) ("South Carolina law does not require testimony as to the exclusion of any possibility of tampering."). The State did not seek to introduce the cigarette butt at trial. Nevertheless, the State presented the chain of custody, traveling from Deputy Thompson's initial collection and sealing of the evidence with tamper-proof tape through the evidence's testing by SLED. There is no requirement that the physical item tested for DNA be present at trial for the results to be admissible. While Appellant attaches importance to Boehm's testimony where she noted she could not definitively say the cigarette she tested was the same as the one in the photograph taken by Deputy Thompson, her response would have been the same if the physical cigarette butt was present at trial, as she could not definitively say the generic cigarette butt in front of her was the same cigarette she tested. Critically, Boehm testified the presence of the physical cigarette butt at trial would have done nothing to change her conclusions regarding the DNA match. Further, Appellant was not disadvantaged by the absence of the cigarette butt at trial. In actuality, Appellant was advantaged by the fact that the evidence was lost, as it provided him 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."). The chain of custody of the cigarette butt from collection through testing was therefore clearly sufficient. Appellant's conviction and sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

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

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

ATTORNEYS FOR RESPONDENT

August 21, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2016-000844

THE STATE, ...RESPONDENT

v.

RICKY SANTOINE HENLEY, ...APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

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

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

August 21, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

Appellate Case No: 2016-000844

THE STATE,

Respondent,

v.

RICKEY SANTOINE HENLEY,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record Laura R. Baer, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

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

This 21st day of August, 2017.

Anne Mueller

Anne A. Mueller
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

August 21, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29201

Re: The State v. Rickey Santoine Henley
Appellate Case No: 2016-000844

Dear Ms. Kitchings:

Enclosed please find an original and nine (9) copies of the Final Brief of Respondent, including proof of service, in the above-referenced case.

Sincerely,

V. Henry Gunter, Jr.
Senior Assistant Attorney General
S.C. Bar No: 102259

VHG/aam
Enclosures

cc: Laura R. Baer (with two copies)
Ms. Trisha Allen