STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County
Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

Respondent,

vs.

CLIFTON EUGENE SMITH,

Appellant.

Appellant Case No. 2019-001975

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

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

DAVID R. WAGNER
Solicitor, Tenth Judicial Circuit

Post Office Box 8002
Anderson, SC 29622
(864) 260-4046

ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by refusing to allow Appellant to impeach the complainant with his prior convictions for possession of methamphetamine, first and second offense, failure to stop for a blue light, the use of communication facility in commission of a felony involving controlled substance, and fleeing or attempting to elude a police officer since such convictions were extremely probative of the complainant's credibility and admissible pursuant to Rule 609, SCRE, and State v. Robinson, 426 S.C. 579, 828 S.E.2d 203 (2019).

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

The trial court properly found, after considering the Colf factors and State v. Robinson, 426 S.C. 579, 828 S.E.2d 203 (2019), that the limited impeachment value of the convictions evidence was substantially outweighed by the danger of unfair prejudice; and therefore, the trial court did not err in declining to allow Appellant to impeach the victim with three prior drug offenses, a failure to stop for a blue light conviction, and a Georgia conviction for fleeing or attempting to elude a police officer that is not an offense carrying in excess of a year of imprisonment.

STATEMENT OF THE CASE

Appellant was indicted for assault and battery of a high and aggravated nature, and the jury found him guilty as charged following trial on November 18-19, 2019. The Honorable R. Lawton McIntosh sentenced Appellant to fifteen years' imprisonment.

STATEMENT OF FACTS

Varia Galbreath let Appellant stay at her house over the weekend during Christmas so he could go to his probation meeting on Monday. They had dated on and off, and he had stayed at her house on other occasions. Her thirty year-old son, Michael Reid, was also staying at the house at the time. Galbreath gave Appellant a couple of pocket knives as a Christmas present. The three went over to Galbreath's daughter's house the day after Christmas where the family exchanged gifts and ate pizza. Galbreath testified Appellant grabbed one of the two pocket knives when they were leaving for her daughter's. R. pp. 35-37.

At the Christmas party, the daughter gave her guests presents, including a gift to Appellant of some mini-bottles of liquor. The family enjoyed the pizza, Appellant also enjoyed the mini-bottles of liquor, and soon he started acting up, becoming loud and boisterous. Reid became upset by Appellant's behavior and went outside to wait in the car. Galbreath herself cursed out loud, in the presence of the children, and decided the three should just leave after her daughter's remonstrations. R. pp. 36-37.

On the drive home, Reid sat in the back seat, and Appellant in the passenger seat, while Galbreath drove. Reid and Appellant argued, and Reid slapped Appellant. Galbreath stopped the vehicle and told them to "stop, just stop." Galbreath testified the altercation stopped and she

continued driving. She drove down a hill and around some curves. Then Appellant suddenly "whirl[ed]" around in his seat. She thought he was hitting Reid and she stopped the car again. As Reid got out of the car, he said, "You cut me." Reid paced and then said to call somebody. She called her daughter, then she called 911. Reid said he needed something to drink and he felt cold. He laid down in the road. R. pp. 37-40.

EMS and law enforcement came and assisted Reid while Galbreath stayed behind with her car that now was a crime scene. R. pp. 41-42. Appellant put the knife on the trunk of the car when law enforcement came. Galbreath testified it was the same knife she gave him as a Christmas present. R. p. 41. This testimony would contradict Appellant's claim with the police that Reid had the knife and Appellant took it from him. See R. pp. 87-88.

Reid testified he became irritated at the party because of Appellant's behavior and the strain it caused for his mother. Reid testified Appellant was the only one drinking at the family dinner. Reid decided to wait in the car. Eventually, all three left the party. During the car ride home, Reid complained to Appellant about Appellant mooching, not working, and not handling his liquor. Appellant retorted, "Well, you do drugs." In response, Reid struck him and told him to shut his mouth. R. pp. 63-65. Galbreath stopped the car until they stopped arguing, and she then continued driving while Reid focused on his phone because he was trying to find somewhere he could be dropped off. The peace was broken when Appellant turned around and Reid thought Appellant was slapping him. Meanwhile, Galbreath was pulling on Appellant's shirt to try and get him to turn around. Reid exited the car and realized he was bleeding and had been cut. He described the numerous cuts about his body and limbs. He lost use of his hand for about four months. He had to

have surgery to repair nerves and tendons. R. pp. 65-71. Reid explained he was not fighting or antagonizing Appellant when Appellant turned around and cut him. He explained there was a definite break in time between the time he slapped Appellant and when Appellant turned around and cut him. R. p. 73; p. 81.

Nicholas Santangelo was previously a firefighter, but now was training to be a police officer. He was at a Christmas party with other firefighters and on the way home from the party with a friend when they observed a car with hazards on and something large in the road – as it turns out, Reid. Santangelo's friend, a trained medic, attended to Reid, while Santangelo tried to calm Appellant down, who was standing by the back of the car and was clearly agitated. Appellant declared, "He got what he deserved" over and over. Santangelo asked Appellant if he had a knife and then asked Appellant to put the knife on the trunk of the car. Appellant complied. Santangelo observed Reid suffered from multiple lacerations. R. pp. 12-17. Based on his emergency training, Santangelo opined that but for the attention he and his friend provided Reid that night, Reid could have died from his injuries. R. pp. 24-25. Deputy Crooks seized the knife that Appellant left on the car and noted it had blood on it. R. p. 29.

Sergeant Clay Sheriff of the Oconee County Sheriff's Office responded to the scene. Appellant was already in custody and Reid was attended to by emergency personnel. Appellant was agitated, intoxicated, and boisterous. He smelled of alcohol. Appellant admitted he "did it" and exclaimed he would do it again. He later claimed Reid had the knife and he took it from Reid and stabbed him. Appellant said Reid ought to die. He later asked Sergeant Sheriff, "Did I get him good?" Appellant had lacerations on his fingers, but Sergeant Sheriff did not see lacerations

anywhere else. R. pp. 85-89.

Deputy Nicole Lecroy had prior medical training as a volunteer first-responder and previous employment in the surgical department at the hospital in Oconee. She testified she transported Appellant to the hospital since he did not have any life threatening injuries, and then later to jail. The EMTs bandaged Appellant's fingers at the scene. The bandages were later replaced with butterfly stitches – what Deputy Lecroy agreed were essentially fancy Band-Aids. R. pp. 94-97.

ARGUMENT

The trial court properly found, after considering the Colf factors and State v. Robinson, 426 S.C. 579, 828 S.E.2d 203 (2019), that the limited impeachment value of the convictions evidence was substantially outweighed by the danger of unfair prejudice; and therefore, the trial court did not err in declining to allow Appellant to impeach the victim with three prior drug offenses, a failure to stop for a blue light conviction, and a Georgia conviction for fleeing or attempting to elude a police officer that is not an offense carrying in excess of a year of imprisonment.

Appellant argues the trial court erred in declining to allow Appellant to impeach Reid with his convictions pursuant to Rule 609(a)(1), SCRE. In declining to do so, the trial court examined the Supreme Court's recent decision in State v. Robinson, 426 S.C. 579, 828 S.E.2d 203 (2019) and analyzed the Colf factors to find the probative value of the convictions evidence was substantially outweighed by the danger of prejudice. The trial court did not err.

How the issue was raised below

Immediately prior to when Reid, the victim, testified, defense counsel advised the trial court he was planning to impeach Reid with two possession of methamphetamine convictions. In response, the trial court advised the parties as follows:

> Well, let me do this. Have y'all looked at the case of the State v. Robinson? Have you seen that? It was issued in May of this year, and it goes back and it breaks down 609(a)(1), (a)(2), and then 609(b). And if you're looking at methamphetamine second offense – this is assuming the State doesn't disagree that that's the charge obviously, it's punishable by more than a year.
>
> And the way they broke it down, if it's a witness as opposed to being the accused, and it's for a crime punishable by more than a year, then it may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, undue delay, waste of time, and cumulative evidence.

> The State has the burden to establish its inadmissibility, and then the Colf, C-o-l-f, factors have to be considered as well, and that is the impeachment value of the prior crimes, the point in time of the conviction, and the witness' subsequent history, similarity between the past crime and the crime charged – that's more for the defendant – import of the defendant's testimony – again that's for the defendant – or the accused[,] and centrality of credibility is an issue.
>
> * * *
>
> So with those factors and those elements being said, Mr. Alderman, I'll be glad to hear from you.

R. p. 49, line 12 – p. 50, line 17.

In response, the prosecutor advised it was not clear that one of the convictions was Reid's, noting the second offense possession conviction did not show up on the NCIC report the prosecutor ran that day, and the prosecutor further argued:

> And, in addition, Judge, pointing to those other factors that you pointed out, we think that it would be inadmissible because it tends to confuse the issue. There's been no factual allegation that, specifically in this case, methamphetamine on his prior record was any factor or had anything to do with the events of that night, and at the same time, just saying methamphetamine tends to prejudice that individual. It's kind of a hot button issue, particularly in this county Judge, and I think that it's more prejudicial than it could possibly be probative.

R. p. 51, lines 4-14.

Defense counsel, in turn argued the convictions were relevant because Appellant was going to testify that the argument was about drugs and argued it was probative as to the truthfulness of Reid's statement. R. p. 51, lines 17-24. As it turned out, Appellant never did testify, so half of defense counsel's argument would subsequently prove not valid. This left only the question of whether the methamphetamine convictions were probative as to the truthfulness of Reid's testimony under Rule 609(a)(1).

The trial court observed that crimes of dishonesty are admitted without regard to the penalty or the balance between probative and prejudicial effects. However, he observed possession of methamphetamine does not necessarily involve dishonesty. He noted the question would be whether the offenses were admissible under Rule 609(a)(1). In response to the trial court's question, defense counsel confirmed that there was no evidence Reid was using narcotics on the night in question. R. pp. 52-53. The trial court then ruled as follows:

> I'm not going to allow you to do that [defense counsel] in all candor. I think it's just unduly prejudicial to the State in this matter. Doesn't have any probative value to this case or the issues in this case. Credibility is a big issue in this case; however, because a swearing contest between the victim and his mom and defendant about what actually occurred in that car, nobody knows but them. It's close to the point in time, it's April. **Impeachment value, you know, doesn't – I don't think it has a whole lot of value except for what we all know is that it will – from a jury standpoint, they are going to think whoever has this charge, is a bad person.**

R. p. 53, line 19 – p. 54, line 6.

After this ruling, Defense counsel next brought up that Reid also had a 2018 conviction for failure to stop for a blue light. He noted it carried more than one year as a ground for admissibility,[1] but also argued "there could be some dishonesty involved in that . . . ." R. p. 54, lines 16-22. However, defense counsel admitted he was unaware of any cases that claimed failure to stop for a blue light was a crime of dishonesty. After further discussion where all parties agreed to a lack of authority regarding failure to stop for a blue light, the trial court declined to allow impeachment with that conviction as well. R. pp. 54-55.

[1] The offense is punishable by up to three years' imprisonment. S.C. Code § 56-5-750.

Defense counsel brought up a charge called "use of communication facility in commission of a felony involving controlled substances." Defense counsel agreed it was using a phone to buy or sell drugs. The trial court ruled the same, finding the offenses were all interrelated. R. p. 56.

Defense counsel then brought up another Georgia conviction from 2017: fleeing or attempting to elude a police officer. Defense counsel argued that the offense "does carry dishonesty with it." R. p. 57, lines 5-12. The prosecutor countered that he did not know the penalty for the Georgia offense. R. p. 57, lines 13-14. Defense counsel never asserted the offense carries a year or more imprisonment. In fact, the offense carries a maximum twelve months' imprisonment, and therefore is not a qualifying offense under Rule 609(a)(1). See Ga. Code § 40-6-395. This is undoubtedly why defense counsel never attempted to move the conviction in under this section of the rule and only argued that it was a crime of dishonesty. The trial court found that it was not a crime of dishonesty. R. pp. 57-58. On appeal, Appellant is not arguing any of the charges constitute a crime of dishonesty.

Standard of review: Rule 609 and Rule 403 analysis

Under Rule 609(a)(1), SCRE, a witness other than the accused shall be impeached with a prior conviction if it is a felony punishable by more than one year or death, subject to Rule 403, SCRE. Thus admission of testimony is subject to the trial court's Rule 403 analysis. Under Rule 403 analysis, the prior conviction should be admitted unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Pagan, 369 S.C. 201, 210, 631 S.E.2d 262,

266 (2006). A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App.2004). Determination of relevancy is largely within the discretion of the trial court and will not be reversed absent an abuse of that discretion. State v. Sweat, 362 S.C. 117, 127, 606 S.E.2d 508, 513 (Ct. App. 2004). "A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Stephens, 398 S.C. 314, 320, 728 S.E.2d 68, 71 (Ct. App. 2012).

The Supreme Court in Robinson made clear that for the analysis, the Colf factors should be employed. The factors include:

1) The impeachment value of the crime.

2) The point in time of the conviction and the witness's subsequent history.

3) The similarity between the past crime and the charged crime.

4) The importance of the defendant's testimony.

5) The centrality of the credibility issue.

Robinson, 426 S.C. at 594, 828 S.E.2d at 211 (citing State v. Colf, 337 S.C. 622, 625-26, 525 S.E.2d 246, 247-48 (2000)).

The Supreme Court in Robinson explained:

> [I]f the witness is someone other than the accused and has a prior conviction of a crime punishable by death or imprisonment for more than one year, the trial court must balance the Colf factors and determine whether, under Rule 403, the probative value of the

> conviction is substantially outweighed by the danger of unfair prejudice and/or other relevant considerations set forth in Rule 403. The burden of establishing inadmissibility of the conviction is upon the opponent of the evidence.

Robinson, 426 S.C. at 595, 828 S.E.2d at 211.

> In any given case involving the same indicted charges, two different trial courts could examine the same prior conviction(s), evaluate the same five Colf factors, and perhaps reach opposite conclusions as to the admissibility of the prior convictions. In such an instance, it is conceivable that under our standard of review, both trial courts would be affirmed. This is the nature of our standard of review in Rule 609(a)(1) cases when a trial court weighs the probative value of a prior conviction against its prejudicial effect.

Robinson, 426 S.C. at 607, 828 S.E.2d at 217.

Convictions must carry in excess of a year imprisonment

Reid's convictions consisted of Georgia convictions in 2017 for possession of methamphetamine and "use of a communication facility in commission of a felony involving a controlled substance," a Georgia conviction in 2017 for fleeing or attempting to elude a police officer; a 2018 South Carolina conviction for failure to stop for a blue light; and a 2019 South Carolina conviction for possession of methamphetamine, second offense. Appellant agrees none of these convictions constitute crimes of dishonesty. Br. of App. p. 12. The Georgia fleeing conviction is disqualified from consideration under Rule 609(a)(1) because the maximum sentence is only twelve months and Rule 609(a)(1) only allows convictions that are punishable by death or "imprisonment in excess of one year." See Ga. Code § 40-6-395.

Impeachment value of the crimes

The first prong of the Colf analysis is the impeachment value of the crime:

> The starting point in the analysis is the degree to which the prior convictions have probative value, meaning the tendency to prove the issue at hand – the witness's propensity for truthfulness, or credibility. . . . The tendency to impact credibility . . . determines the impeachment value of the prior conviction. Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility, of the witness. . . . The purpose of the impeachment is not to show the witness is a bad person but rather to show background facts which impact the witness's credibility.

Robinson, 426 S.C. at 597-98, 828 S.E.2d at 212-13.

The Second Circuit examined the relative impeachment value of various crimes in United States v. Estrada, 430 F.3d 606 (2d Cir. 2005). The Second Circuit noted the distinction between crimes that reflect adversely on a person's integrity, like deceit, fraud, or theft, and crimes that are acts of violence, "which may result from a short temper, a combative nature, extreme provocation, or other causes, [and] generally have little or no direct bearing on honesty and veracity." Id. at 617 (citation and internal quotation marks omitted). The Court cited several secondary sources that also provided more factors for analysis of the probative value of prior convictions, providing a parenthetical quote: "[C]rimes of impulse or carelessness have little probative value since they say little about the propensity to engage in calculated law-breaking like perjury." Id. at 618 (quoting 28 WRIGHT & GOLD § 6134 at 233). Another hornbook was cited for the observation: "[C]rimes requiring planning or preparation bear more strongly on veracity than violence alone . . . because planning indicates deliberate and injurious violation of basic standards rather than impulse or anger, and usually it involves some element of deceiving the victim." Id. (quoting MUELLER & KIRKPATRICK § 6.31 at 563).

Speaking to determining the legislative intent behind the federal rules of evidence, the

Second Circuit quoted another circuit with the view,

> More likely, Congress anticipated that crimes of stealth (e.g., smuggling, burglary), while not quite crimes of dishonesty or false statement do reflect lack of credibility and should be admitted unless significantly prejudicial . . . We thus find gradations among Rule 609(a)(1) crimes, in terms of their bearing on truthfulness, to lie at the heart of the Rule 403 analysis that district courts must undertake when determining whether to admit for impeachment purposes evidence of a witness's convictions, including their statutory names, under Rule 609(a)(1).

Id. at 618-19 (citations and some internal quotation marks omitted).

In the instant case, three of the five charges are drug charges – two possession convictions and an offense that apparently punishes using a phone to commit a drug offense. These charges obviously have little impeachment value. "Violations of narcotics laws are generally not probative of truthfulness. Furthermore, a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative for truthfulness. . . ." Robinson, 426 S.C. at 596, 828 S.E.2d at 211-12 (quoting State v. Bryant, 369 S.C. 511, 517, 633 S.E.2d 152, 155-156 (2006)).

The remaining two charges are failure to stop for a blue light and an attempt to elude law enforcement. Of course, as explained above, the fleeing conviction from Georgia does not qualify for admission under Rule 609(a)(1) because it carries only twelve months' imprisonment. Applying an analysis suggested by Estrada shows modest impeachment value with the existence of elements that weigh against the impeachment value to be gained from the fact of these convictions. Admittedly, these convictions may offer some impeachment value because they show disrespect for law enforcement; however, neither of the two convictions represent dishonest conduct, and neither of the offenses generally result from planning. Instead, each offense could represent impulsive actions

occurring when confronted by law enforcement. Neither offense represents stealth – instead these convictions represent conduct occurring from the lack, or possibly failure, of stealth. These offense are clearly not crimes of dishonesty and further, are not examples of crimes necessarily indicating a lack of credibility by the offender. Therefore, a trial judge could reasonably find limited impeachment value from the fact of conviction for the two offenses that would ultimately be outweighed by the other factors for consideration, including the potential for prejudice.

In addition to the impeachment value of the convictions, the remaining Colf factors should be considered:

(2) Point in time: The offenses were recent, 2017-19, and admission certainly was not precluded based on age of the offenses. See Robinson, 426 S.C. at 214, 828 S.E.2d at 600 (closeness in time of prior offenses and charged offense revealed "a pattern of behavior that legitimately evoked questions of Robinson's credibility"). (3) As to the similarity to the convictions to the charged crime, this factor may not seem to come into play because Reid was not charged with a crime: he was just the victim, and the crime was ABHAN. However, this factor of the analysis does suggest related potential prejudice because the evidence was that Appellant accused Reid of using drugs and some, possibly all, the prior convictions were drug-related – meaning the convictions evidence becomes prejudicial extrinsic evidence of Appellant's allegation against Reid, even though it is agreed there was no evidence Reid was using drugs on the night of the slashing. See Robinson, 426 S.C. at 214, 828 S.E.2d at 600 (evidence of similar acts "inevitably suggests" the propensity to commit the crime charged and even a limiting instruction does not completely negate the risk). (4) The fourth factor, importance of the defendant's testimony, is not relevant because the defendant did not testify. The

importance of Reid's testimony is not insignificant, but his testimony was corroborated by Galbreath's testimony, the abundant evidence of his injuries, and the lack of injuries to Appellant. (5) The last factor, centrality of the credibility issue, is limited as identity was not at issue. To be sure, there was a statement from the defendant vaguely suggesting self-defense, but Appellant did not testify and so the evidence was essentially uncontroverted. Further, Reid's testimony was cumulative to Galbreath's testimony, except for an important fact that was only testified to by Galbreath: Galbreath impeached Appellant's claim that he took the knife from Victim because she testified that the knife Appellant used to slash Reid was the same knife she gave Appellant for Christmas, and she testified Appellant brought the knife with him to the Christmas party. The nature and extent of the injuries were adequately addressed by testimony from multiple witnesses, and evidence of Appellant's boisterous demeanor afterwards and his remorseless statements that night were established by witnesses other than Reid. It is fair to say the State's case was strong enough to easily convict Appellant regardless of whether Reid testified. See Robinson, 426 S.C. at 216, 828 S.E.2d at 603 (finding trial court did not err in analyzing this factor and finding Robinson's testimony was largely cumulative: "Though Robinson communicated a couple of additional points, his testimony was largely cumulative to that of other witnesses.").

The convictions in the instant case deliver only limited impeachment value, and the trial court did not err in determining the probative value was substantially outweighed by the danger of prejudice. If the convictions evidence was admitted, it is likely the jury would conclude that Reid, the victim, was a bad person because he does methamphetamine and runs from police. Additionally, because of testimony that Appellant accused Reid of using drugs, drug-related convictions evidence

created a danger of confusing the issues at trial. The jury might even have engaged in speculation as to whether Reid was using drugs at the time of the incident. The jury was likely to miss the probative use, limited as it was. Wright & Miller discussed the potential prejudice of conviction evidence:

> Conviction evidence can induce a decision on an improper basis in three ways. First, where the witness is a party or is associated with a party, conviction evidence may induce the jury to conclude the party is a bad person. If the jury then decides the case based on its dislike of the party, the evidence has an unfairly prejudicial effect. Second, where the witness is a party, the jury may use the conviction evidence to draw an inference about how the party acted in connection with the events now in question. Where the evidence is inadmissible for that purpose under Rule 404(a), the evidence again has an unfairly prejudicial effect. Finally, even if the jury uses conviction evidence only for the proper purpose of drawing an inference about the witness's credibility, the jury may overweigh the evidence for that purpose.

(Victor J. Gold) Wright & Miller, 28 Federal Practice and Procedure § 6134 (2d ed.).

In the instant case, although a prosecution witness and not a party, Reid was the victim in this case and the jury needed to determine his interactions with Appellant. The crimes, involving drugs and avoidance of law enforcement could confuse the issues in the present case and lead the jury to make an impermissible inference how Reid acted based on these convictions. Moreover, the inherent danger of admitting the convictions evidence is the likelihood the jury would draw a negative conclusion about Reid's character and allow these conclusions to influence its verdict. See State v. Stewart, 283 S.C. 104, 110, 320 S.E.2d 447, 450 (1984) ("It would do well for defense counsel to remember that the people of the State as well as the defendant are entitled to a fair trial."). Additionally, the jury, despite corroborative testimony from Galbreath and the numerous lacerations

Reid suffered, could overweigh the limited impeachment value Appellant's convictions presented. Further, any error possible error was harmless beyond a reasonable doubt. State v. Mitchell, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998) (noting the Constitution requires a criminal defendant to receive a fair trial, not a perfect one). Accordingly, the trial court did not err in declining to allow Appellant to introduce Reid's convictions.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

DAVID R. WAGNER
Solicitor, Tenth Judicial Circuit

BY: _____
DAVID SPENCER

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

ATTORNEYS FOR RESPONDENT

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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."

[Signature Block appears on following page]

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

DAVID R. WAGNER
Solicitor, Tenth Judicial Circuit

By: _____
DAVID SPENCER

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

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