STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Robin B. Stillwell, Circuit Court Judge

Appellate Case No. 2019-001456

THE STATE, ...RESPONDENT

v.

WILLIAM SHANE FORDHAM BROWN,.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

I. In this trial where a co-defendant pled guilty earlier but when called as a witness by the State at Appellant's trial asserted his Fifth Amendment right to remain silent, did the trial judge err in allowing the State to call the co-defendant's attorney as a witness and admitting a letter in evidence the attorney received from his client during the course of representation before the co-defendant pled guilty, when the attorney for the co-defendant asserted that the letter was privileged communication with his client?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE ON APPEAL

I. If preserved for appellate review, did the trial court err when it allowed a co-defendant's legal counsel to provide limited testimony that he received a letter, State's Exhibit 46, from that co-defendant, where the co-defendant did not write the letter, and where the co-defendant's counsel turned the letter over to the State months earlier, thus waiving any privilege attaching to its contents?

STATEMENT OF THE CASE

In a multi-count indictment true billed in September 2018, the Greenville County Grand Jury indicted Appellant William Shane Fordham Brown for the December 8, 2016 murder of Clinton Pearson; for the first degree burglary of Clinton Pearson and/or James Moss; for the attempted armed robbery of Clinton Pearson and/or James Moss; for possession of a weapon during the commission of a violent crime; and for conspiracy with Connell Shauntaveis Wells, Jr. and/or Curtis Babb to commit murder and/or burglary and/or armed robbery. (R. pp. 824-27).

From August 12 through 16, 2019, Appellant proceeded to a jury trial before the Honorable Robin B. Stillwell. (R. p. 1). The State jointly tried Appellant with Curtis Babb, one of the co-defendants named in the conspiracy portion of the indictment. (R. p. 1). Scott D. Robinson, Esquire, represented Appellant at trial. Assistant Thirteenth Circuit Solicitors Elizabeth Gary and Katryna B. Owens prosecuted the case. (R. p. 1).

The jury convicted Appellant as indicted. (R. p. 810, lines 18-24). On August 16, 2019, Judge Stillwell sentenced Appellant to concurrent terms of: 40 years for murder; 40 years for first degree burglary; 20 years for attempted armed robbery; five years for possession of a weapon during the commission of a violent crime; and five years for conspiracy. (R. p. 820, lines 7-23; R. pp. 828-32).

This appeal follows with notice timely served on August 25, 2019. (R. p. 833).

STATEMENT OF FACTS

James Moss lived on "a dead-end street down there next to the railroad tracks" in Greenville. (R. p. 99, lines 3-8). Moss rented out space in the house to help with his own costs. (R. p. 99, lines 12-17). Sometime after 1:00 in the morning on December 8, 2016, Clinton Pearson was asleep on Moss' sofa when someone kicked in the door. (R. p. 100, line 2 – p. 101, line 5).

From his own bedroom, Moss awoke to the noise and heard an intruder say, "Mother----, you got my money?" (R. p. 101, lines 3-10). Moss did not know how many suspects there were in total, but he remembered hearing multiple voices. (R. p. 111, lines 24-25; R. p. 114, lines 5-8). Moss heard "two voices . . . outside" the house, and heard and saw one other person enter the house. (R. p. 102, lines 20-22; R. p. 108, lines 7-13; R. p. 114, lines 5-10). Moss peeked "around the corner" and was able to "barely" view the "first person come in shooting." (R. p. 102, lines 9-11; R. p. 106, lines 2-22). Moss described the intruder as "about five-foot something," wearing a hood, and holding "a little small gun" in his hand. (R. p. 103, lines 10-17; R. p. 114, lines 16-18). Moss hid in his closet in the back room. (R. p. 101, lines 13-15; R. p. 102, lines 9-13). Moss testified that "[a]fter a while, they kicked the door next to [him] and they shot in there about three times." (R. p. 102, lines 12-14).

Moss emerged from his hiding place when the "commotion" died down. (R. p. 102, lines 14-15). After Moss called the police, he drove up the road to Poinsett Highway and met with Greenville County Deputy Judson Belding. (R. p. 103, line 22 – p. 104, line 8; R. p. 118, lines 2-5). Speaking to Belding, Moss described the intruder he saw as a short, young, dark-skinned black male. (R. p. 107, lines 10-17; R. p. 112, lines 16-20; R. p. 126, lines 11-13). Moss told Belding "there was a friend of his roommate asleep on the couch when he went to bed. And that

he was woken up by the front door being kicked in. He heard someone say, [']Where is my money?['] And then he heard gunshots." (R. p. 126, lines 4-8). Moss told Belding "he hid in his closet," and that "while looking back towards the doorway of his room, he observed a male . . . go into the room of his roommate. After this, when he felt it was safe to do so, he quickly went out the back, got into his vehicle and called 911 for help." (R. p. 126, lines 9-15).

Greenville County Deputy Joshua Shaw responded to the house and located the victim on the floor inside the front entryway. (R. p. 133, lines 1-7). He was nonresponsive and had been covered with "a black cloth" that appeared to match the curtain hanging in that room. (R. p. 133, lines 7-10). Forensic pathologist Dr. Michael Ward conducted an autopsy on the victim later that morning. (R. p. 179, lines 9-18). Dr. Ward noted three gunshot wounds to the chest, each fatal or potentially fatal on its own. (R. p. 178, line 24 – p. 179, line 1; R. p. 180, lines 8-23; R. p. 182, line 18 – p. 183, line 6; R. p. 184, lines 5-14). Dr. Ward also testified that each of the three gunshots traveled in an upward direction. (R. p. 186, lines 11-13). The victim was five-foot-eleven. (R. p. 186, lines 21-22).

Dustin Kretschmar, a forensic technician with Greenville Public Safety, responded to the house and began processing the property for evidence. (R. p. 148, lines 3-25). Kretschmar collected a total of three .40 caliber shell casings from the scene. (R. p. 157 lines 1-7). He documented damage to the doorknob area of the front door. (R. p. 158, lines 13-18). He documented gunshot holes in the front window and fragments of plexiglass on the interior of the windowsill. (R. p. 159, lines 12-16). The bullet holes appeared to have been fired from the outside in. (R. p. 159, lines 12-17). He also documented a small cut to one of the victim's fingers and a cell phone in one of his hands. (R. p. 159, lines 3-6). Kretschmar documented additional damage to the doorknob and door frame of the rear bedroom door. (R. p. 160, lines 7-8).

Also during the early morning hours of December 8, 2016, Greenville City Police Officer Ryan Weeks responded to a reported gunshot victim at an apartment complex on Shemwood Lane in Greenville. (R. p. 189, lines 15-22). He arrived at Apartment 29-C at 5:14 that morning. (R. p. 190, line 22). Inside the apartment, Weeks located a male, Connell Wells, on the sofa with a bloody wrap around his knee. (R. p. 191, lines 1-9; R. p. 197, lines 11-15). Weeks also located a female, Kia Sims, mopping up the kitchen. (R. p. 191, lines 11-16). Weeks called EMS to the scene to tend to Wells' knee. (R. p. 197, lines 15-17). Weeks observed a large injury to Wells' right knee which appeared to be a gunshot wound. (R. p. 197, lines 17-20). Weeks witnessed shotgun pellets fall from the bloody bandaging as EMS removed it from the wound. (R. p. 198, lines 7-10). Weeks also witnessed a piece of plastic shotgun wadding fall from the bandage. (R. p. 198, lines 10-12). Weeks documented a red Crown Victoria parked in front of the apartment. (R. p. 202, lines 5-10). The car was registered to Connell Wells. (R. p. 202, lines 12-16). Weeks observed "a large amount of what appeared to be blood in the back seat of the vehicle." (R. p. 204, lines 16-17). [1]

Greenville County Investigator Christopher McCalmont contacted Wells at the hospital several hours later, after Wells came out of surgery and his anesthesia had worn off. (R. p. 239, line 12 – p. 240, line 7). McCalmont spoke with Wells on three occasions: December 8 in the hospital, December 9, and again on December 22. (R. p. 282, line 11 – p. 283, line 8). On December 9, 2016, McCalmont also executed a search warrant on Apartment 29-C, during which time McCalmont spoke to the female residents of the apartment, including Sims. (R. p. 284, lines

[1] Prior to this trial, Wells pled guilty to murder. When called to testify at trial, Wells invoked the Fifth Amendment. He did testify that his nickname was "Lukeman" at the time of his arrest, not "Butta" as counsel suggested. (R. p. 224, line 6 – p. 227, line 18).

2-11; R. p. 286, line 15 – p. 287, line 11). McCalmont learned that Appellant William Shane Fordham Brown lived at Apartment 29-C. (R. p. 287, lines 12-22).

Fingerprints collected from the red Crown Victoria parked outside of Apartment 29-C matched Connell Wells and Appellant Brown. (R. p. 289, lines 5-19). Greenville County Sergeant Dar Shaw processed the Crown Victoria for evidence on December 8. (R. p. 334, lines 15-17). Inside the car, Shaw located "a stocking mask," "a boot," and what "looked like blood in different areas of the vehicle, on the outside as well as on the inside." (R. p. 336, lines 1-4). Shaw better described the mask as "a brown stocking mask with eyeholes" which he located and collected from the rear passenger floorboard. (R. p. 340, lines 15-16). Shaw collected "a black hooded sweatshirt" from the rear passenger floorboard as well. (R. p. 338, line 25 – p. 339, line 1). Shaw collected "a black hoodie with a red bandanna in the pocket," a cell phone, and "a black gym bag" from the front passenger seat. (R. p. 340, lines 16-18; R. p. 343, lines 19-24). From the trunk, Shaw collected "a red bandanna with two pair of gloves wrapped inside." (R. p. 346, lines 3-11).

As a result of his investigation, McCalmont developed Appellant Brown, Connell Wells, and Curtis Babb, Jr. as suspects in the shooting that took place at the home of James Moss. (R. p. 290, lines 17-23). Law enforcement located Appellant Brown in Baltimore, Maryland, and apprehended him there on January 17, 2017. (R. p. 310, line 20 – p. 311 line 2).

Damean Wideman testified at Appellant Brown's trial. Wideman testified he lived at the apartment complex on Shemwood Lane and knew Brown "[f]rom the neighborhood." (R. p. 355, lines 10-25; R. p. 358, lines 17-22). Wideman called Brown "Little nephew," but he also knew him as "Deuce." (R. p. 358, lines 23-25; R. p. 359, lines 7-10). They are not related by blood. (R. p. 359, lines 17-21). Wideman identified Brown in the courtroom. (R. p. 361, lines 2-14). At an

earlier date, Wideman told officers that he had known Deuce and his family for about two years. (State's Ex. 39 at 35:10 to 35:28). Wideman identified a photograph of Deuce for officers at that time. (R. p. 412, line 16 – p. 413, line 7; State's Ex. 39 at 37:50 to 38:06 and at 39:57 to 40:40).

At trial, Wideman testified because he had been arrested at a traffic stop a few days after the shooting. (R. p. 400, lines 15-18). He told his arresting officer "that he was afraid of a gentleman, Mr. Babb, that lived in Shemwood[.] He said he had heard on the street that Mr. Babb was involved in" the shooting at Moss' house. (R. p. 400, lines 20-25). Wideman went on to speak to a handful of officers that day. (R. p. 363, lines 7-24; State's Ex. 39). He told them he had been "threatened by several people in the neighborhood" including Babb. (R. p. 364, lines 15-24). Wideman told officers that Babb made the threat to "kill" Wideman because Babb learned Wideman "was spreading rumors on him." (R. p. 368, lines 1-8; R. p. 404, lines 13-19). Wideman provided an audio-recorded statement. (State's Ex. 39). In the statement, he repeatedly stated he was concerned about the threats he was receiving from Babb, whom Wideman at one point referred to as "one of your guys in one of your homicides." (State's Ex. 39 at 4:00 to 5:15).

Wideman spent several minutes in his statement revealing that "the night of the crime" Babb told him that he had "a lick" and asked Wideman for gloves to carry it out. When Wideman inquired further, Babb reportedly said, "Deuce got a lick set up for [them]." Wideman stated that Babb, Deuce, and "the guy that's in the hospital"[2] met up at the Shemwood Apartments to get "suited up" in black clothing and gloves. (State's Ex. 39 at 9:50 to 13:00). Wideman said the three men intended to rob someone of "supposedly a half a brick of cocaine in the house." (State's Ex. 29 at 13:00 to 13:05). Wideman reported that when the three men got to

[2] Wideman presumably referred to Connell Wells, who had by that time undergone surgery for the shotgun wound to his knee.

the house they planned to kick in the door and tell the people inside "don't move just like a regular robbery," but "when they got there, Deuce shot through the window," then Babb "went in and kicked the door open and they guy was laying there dead and they pulled him off the couch." (State's Ex. 39 at 13:05 to 18:15; *id.* at 25:00 to 25:35).

Wideman said that people saw the three men return to the apartments with the black gym bag and then saw the incident reported on the news. Wideman stated that the three men talked about what happened "all day" after that, and that "everybody knew what they were fixin' to do" anyway. (State's Ex. 39 at 18:15 to 20:00). Wideman denied most of the details from his prior statement when he testified at trial, instead maintaining the information consisted of "rumors." (R. p. 383, lines 22-25; *see* R. p. 368, line 1 – p. 369, line 10).

The parties stipulated at trial that Appellant Brown was known as "Deuce" and the court instructed the jury that "Deuce" was Brown's nickname. (R. p. 528, lines 10-22). Lieutenant Robert Pendergrass with the Greenville County Detention Center testified that a keyword search in the jailhouse email system for Appellant Brown's records containing the keyword "Deuce" returned forty-seven pages of results. (R. p. 524, lines 1-16). These results included an email Appellant Brown sent to one Andre Wagner on February 28, 2019. (R. p. 522, line 16 – p. 523, line 17). In that email, Appellant Brown instructed Wagner to quickly get in touch with Damean Wideman and tell him "not to show up at trial and to shut the f--- up." (R. p. 841). The email specifically refers to "Butta" as the person scheduled for trial. (R. p. 841). Earlier at Appellant Brown's trial, Wideman testified that he knew Connell Wells as "Butta." (R. p. 361, lines 15-22).

State's expert Jack Jamieson, SLED's document examiner, testified that Appellant Brown prepared State's Exhibit 23, a handwritten letter which states in part:

. . . but they know you were talkin about me bcuz you pointed me out in a lineup.

> But you need 2 rerace[*sic*] my name . . . anyways you need 2 replace my name with someone else. 4 example, you remember that N--- "D" with the light blue maxima, Kandice's sister's baby daddy? Well that N---- all up in our case [redaction] basically bragging saying he caught a body, SMH, I got something 4 his b---- a--. But "D' real name is "Damean Wideman." Since he wanna snitch put his b---- a-- in it instead of me. Or remember that N---- you was beefing with that sold you that "hot" revolver? We don't have 2 say his name but why not say his name? Why tell on your right hand man? . . . The evidence says u don't have any blood @ the crime scene!! SMH, u told 4 nothing. U need to talk to your lawyer, the investigators, & the Solicitor & tell them I ain't have nothing 2 do with it. If they ask u y u put my name in it just say bcus I called 911 (Ambulance) instead of driving you out of town to a far away hospital bcus I thought u would die B4 we made it. Just be like you were mad @ me 4 calling the police. I got my whole motion so I know every loophole in our case. I even know how 2 make sure u don't get charged with murder and get off. . . . Either way I'm gettin off eventually because the only evidence against me are your statements. That's it. It's up 2 you now N----. Wat u gonna do??? Not 2 Late 2 fix this s--- b4 it gets real ugly & u know wat I mean bra. I mean wat would you do if I snitched on you? Ion[*sic*] want my people 2 take it there though but you leaving me no choice bra. Hit me Back ASAP!!! . . .

(R. p. 580, line 17 – p. 581, line 8; R. pp. 836-37).[3]

Chris Shipman, an attorney who previously represented Connell Wells, testified that Wells gave him this letter during the course of his legal representation. Shipman passed a copy along to the State at that time. (R. p. 537, line 17 – p. 539, line 12).

Appellant Brown presented Nakia Sims at trial. (R. p. 660, lines 3-13). Sims lived with Appellant Brown at Apartment 29-C in December 2016. (R. p. 660, line 22 – p. 709, line 24). Sims testified that she saw Brown asleep in his bedroom around midnight on the night of the incident. (R. p. 664, lines 1-15). Sometime after that, Sims awoke to a banging at the door downstairs. (R. p. 665, line 20 – p. 666, line 9). When she left her bedroom to investigate she testified she ran into Appellant Brown at the staircase. (R. p. 666, lines 10-25). Sims went on to

[3] The letter concludes with the phrase "*Lawyer name John Abdalla*" (R. p. 837). The parties stipulated and the jury was instructed "that at one time during the pendency of this case, Ms. Brown was represented by Attorney John Abdalla." (R. p. 607, lines 6-10).

testify about the arrival of Wells with his bloody knee and Appellant Brown's calling an ambulance. (R. p. 668, line 1 – p. 669, line 25). Sims testified that, to her knowledge, Appellant Brown was at their apartment the entire time, but she did not recall what time Wells arrived. (R. p. 671, lines 11-23). She never saw Appellant Brown leave or run down the hill away from their apartment. (R. p. 675, lines 12-19).

In reply, the State called Investigator McCalmont back to the stand. (R. p. 680, lines 3-6). McCalmont testified that when he executed the search warrant on Apartment 29-C the next day, Sims agreed to speak with him and told him that "Deuce and Connell show[ed] up at her apartment together" the night that Wells sustained the knee injury. (R. p. 682, lines 21-24).

STANDARD OF REVIEW

"Whether a communication is privileged is for the trial judge to decide in the light of a preliminary inquiry into all of the facts and circumstances; and this determination by the trial judge is conclusive in the absence of an abuse of discretion." *State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Douglas*, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006).

ARGUMENT

If preserved for appellate review, the trial court did not err when it allowed Connell Wells' legal counsel to provide limited testimony that he received a letter, State's Exhibit 46, from Wells. Wells did not write the letter, and counsel provided the State with a copy of the letter to facilitate Well's plea negotiations and to prevent a threat. By turning the letter over to the State for that purpose, Wells waived any attorney-client privilege attaching to the letter's contents.

Background

Co-defendant Connell Wells pled guilty to this murder prior to Appellant Brown's trial. (R. p. 224, lines 8-18). When the State called Wells to testify against Brown, Wells pled the Fifth. (R. p. 224, lines 19-24). The State later wished to introduce a letter Wells received and submitted to the State prior to reaching his plea agreement. (R. p. 531, lines 7-11). In order to authenticate that letter, the State called Wells' former legal counsel, Chris Shipman, who delivered this limited testimony:

(1) he used to represent Wells;

(2) he received some documents from Wells during the course of this representation;

(3) he received State's Exhibit 46, a letter, in this timeframe;

(4) he delivered a copy of State's Exhibit 46 to the State and retained the original;

(5) he could not reveal who gave Wells the letter marked State's Exhibit 46;

(6) he could not reveal how he received the letter marked State's Exhibit 46.

(R. p. 537, line 17 – p. 540, line 14).[4]

The State thereafter presented a document analyst from SLED who testified that he examined a redacted copy of this letter, State's Exhibit 23, and compared it to additional samples of Appellant Brown's writing. (R. p. 579, line 6 – p. 580, line 16; R. pp. 836-37; *compare* R. pp. 838-40). With "[a] hundred percent certainty," the analyst opined he had "no doubt" that Appellant Brown wrote the letter. (R. p. 580, line 17 – p. 581, line 8).

In the letter, Brown asks Wells to distance the author's name from the crime. Brown asserts in the letter that Wells' "statements" are the "only evidence against" Brown and puts the onus on Wells to fix that. (R. pp. 836-40; *see infra* at p. 9). The State categorized the letter as the functional equivalent of a confession by Brown. (R. p. 600, lines 7-9).

After Shipman testified, the State brought to the court's attention that markings on the back of the original letter, State's Exhibit 46, associated it with Appellant Brown. (R. p. 557, line 20 – p. 558, line 1). The backside of the letter bore the defendant's name. (R. p. 586, lines 7-25). Prior to this time, the State had only ever seen a copy of the document, and the copy did not include this marking. (R. p. 558, lines 10-12). The State asked for guidance "as to how to proceed with the back of State's Exhibit 46" when it referred to it during closing and when it came time for the jury to view the evidence during deliberations. (R. p. 558, lines 6-10).

The trial court examined the exhibit and later agreed that "the least confusing way to handle this issue is to admit State's 46, but not allow the jury to review it outside the Court's

[4] Shipman also testified he received State's Exhibit 22 from Wells during the course of his representation and that he delivered that document to Investigator McCalmont. (R. p. 537, line 24 – p. 538, line 12). State's Exhibit 22 is not subject to the issue on appeal.

supervision" since a redaction could not be made to the original. (R. p. 585, line 12 – p. 587, line 11). The court also ruled that the State could refer to the backside of the letter during its closing argument. (R. p. 587, lines 11-13).

At closing, the State discussed the letter, its connection to the case, and its expert's opinion that Appellant Brown wrote the letter. (R. p. 745, line 5 – p. 746, line 21). The State concluded this portion of its closing by arguing:

> With respect to this letter, you should also in evaluating whether this letter came from Mr. Brown consider that it's written on the back of paperwork with Mr. Brown's name on it. Who else would have paperwork with Mr. Brown's name on it if it's not his? This letter was written by him. And it was designed to do exactly what you saw play out in this courtroom, witnesses come in here and feel threatened and pressured and intimidated to change their story that they told police back in 2016 because they're absolutely terrified of the consequences of having to testify against these two Defendants. That's the undercurrent of this entire trial. . . .

(R. p. 746, lines 4-21).

Assertion of Attorney-Client Privilege, and Concession of Waiver

Prior to his testimony, Shipman alerted the court that he believed that his testimony would be precluded by the Fifth Amendment or by the Rules of Professional Conduct due to his prior representation of Connell Wells, who had himself earlier invoked the Fifth Amendment. (R. p. 531, lines 3-22). Shipman asserted: "I believe that since he's pleaded the Fifth that I can't then go behind his back, so to speak, and kind of do a wrap around his right to remain silent in this case. . . . I don't believe I can ethically do it. I believe I'm covered by his Fifth Amendment assertion as well. (R. p. 531, lines 3-22). Appellant Brown joined in on Shipman's contention. (R. p. 533, lines 2-6).

The court rejected Shipman's attempt to invoke the Fifth Amendment. (R. p. 533, lines 15-23). As the court pointed out, Wells did not make any representations in the letter, and he no

longer had any criminal charges pending before the court. (R. p. 533, lines 15-23). No one disputed that Wells himself did not pen the letter. (*See* R. p. 531, lines 23-25).

Next, Shipman asserted that attorney-client privilege precluded him from testifying about the letter. Under Shipman's theory, the letter was confidential because he discussed it with Wells in a private conversation at the jail. (R. p. 534, lines 3-10). Shipman opined that the letter should be "broadly covered by the confidentiality restrictions," as Shipman would "have to breach [his] duty to [his] client in order to honor the subpoena" and testify at Appellant Brown's trial. (R. p. 534, lines 18-21).

Ultimately, Shipman conceded that Wells waived the confidentiality of the contents of the letter when counsel provided it to the State for use in plea negotiations. (R. p. 534, line 25 – p. 535, line 1). Shortly after he received the letter, Shipman gave a copy "to the State for purposes of plea bargaining and also to prevent a threat" to his client. (R. p. 534, lines 12-17). However, Shipman maintained that he could not testify about the conditions in which he received and turned over the letter, as that would cause him to waive the confidential discussions he had with Wells prior to producing the letter to the State. (R. p. 535, lines 1-4). Shipman indicated he would tailor his answers to avoid even the implication of conversation with his client. (R. p. 537, lines 1-4).

Ruling

The Court agreed with Shipman, restricting counsel from asking "any questions that bear upon conversations that [he] may have had or any confidential discussions" Shipman had with Wells. (R. p. 535, lines 5-24). The court correctly emphasized that Shipman's testimony should be limited to his authentication of the original document so as to avoid any breach of Shipman's confidential attorney-client communications with Wells. (R. p. 535, lines 5-24).

I. Brown's assignment of error is not preserved for appellate review.

Appellant Brown argues that the court erred by admitting State's Exhibits 46 and 23 into evidence because the attorney-client privilege between co-defendant Wells and his legal counsel precluded the letter's admission. (Br. of App. p. 8). However, counsel for Appellant Brown did not object to the introduction of either Exhibit 23 or 46 at the time they were admitted into evidence. (R. p. 585, line 12 – p. 587, line 13; R. p. 583, lines 3-10).

"At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). "[A]n issue cannot be raised for the first time on appeal." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (internal citation omitted), *abrogated on other grounds by Repko v. Cnty. of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018).

Though the Court is "mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner," an appellant who has not properly raised an issue to the lower court should not benefit from that issue's consideration on appeal. *Id.* at 470, 719 S.E.2d at 644-45; *see I'on, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (issue preservation rules are "meant to enable the lower court to rule properly after it was considered all relevant facts, law, and arguments"). This is particularly true when an appellant fails to raise a contemporaneous objection to the introduction of a particular piece of evidence. *See State v. Johnson*, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). "A

party cannot complain of an error which his own conduct induced." *State v. Carlson*, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005).

Prior to the receipt of Shipman's testimony authenticating the letter, Appellant Brown's counsel joined in co-counsel Babb's objection, which posed that "the Fifth Amendment"—not attorney-client privilege—barred Shipman from testifying. (R. p. 533, line 6). Counsel's stated opposition is divisible from the attorney-client issue later posed by Shipman and reiterated on appeal. (*See* R. p. 534, lines 2-10). A party does not preserve an issue by joining in on one argument below and raising another on appeal. *State v. Benton*, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000); *Johnson*, 363 S.C. at 58-59, 609 S.E.2d at 523 ("Because the objection was clearly based on remoteness and not the use of the moral turpitude standard, we hold that the issue regarding the use of the moral turpitude standard is not preserved for appellate review."); *see also State v. Bonilla*, 429 S.C. 253, 273, 838 S.E.2d 1, 11 (Ct. App. 2019) (finding, in a criminal case, that "a direct appeal is not the proper mechanism by which to adjudicate" whether a client gave his counsel informed consent to pursue a particular course of conduct).

Counsel's stated opposition is also divisible from the document's later admission into evidence, which occurred without objection. When additional evidence is taken between an initial ruling and the later introduction of the challenged evidentiary item, counsel "must make a contemporaneous objection when the evidence is introduced" in order to properly preserve the issue. *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). Long after Shipman had testified to authenticate the document, the State moved to admit State's 46.[5] The court

[5] The State also asked to restrict State's 46 from going back to the jury during deliberations because the court had earlier redacted some of the letter's contents in order to avoid improperly implicating co-defendant Babb during he and Brown's joint trial. (R. p. 585, line 12 – p. 587, line 9; R. p. 22, line 1 – p. 27, line 8; *compare* R. pp. 836-37).

agreed and admitted the letter. (R. p. 587, lines 10-13; *compare* R. p. 537, line 17 – p. 540, line 14). Counsel did not object to the introduction of State's Exhibit 46 at this time. (R. p. 585, line 12 – p. 587, line 13; R. p. 606, lines 22-23). Appellant Brown's counsel only stated, "I'm not really sure what that – other than his name and so forth, I don't know what else would be admissible there honestly. The rest of it is just –." (R. p. 586, lines 16-19). "[A] party is not required to use the exact name of a legal doctrine in order to preserve the issue," but they must raise the issue in a manner "sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." *Herron*, 395 S.C. at 466, 719 S.E.2d at 642 (citing *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733). Because counsel did not lodge any articulable objection to the State's later motion to introduce State's Exhibit 46, the issue is procedurally barred. *Forrester*, 343 S.C. at 642-43, 541 S.E.2d at 840; *Herron*, 395 S.C. at 466, 719 S.E.2d at 642.

Appellant's Brown's counsel also did not object when the State moved Exhibit 23, the redacted copy of the letter, into evidence during the testimony of its document analyst Jack Jamieson. (R. p. 582, line 18 – p. 583, line 10). A party must make a contemporaneous and specific objection to preserve an evidentiary issue for appellate review, and the failure to do so bars the issue from consideration on appeal. *Johnson*, 363 S.C. at 58-59, 609 S.E.2d at 523 (discussing contemporaneous objection rule).

The record simply reflects counsel did not lodge an articulable objection to the State's motion to admit the letter as evidence, rendering the issue procedurally barred.

II. The court properly admitted the letter because Wells waived any privilege regarding its contents when his counsel turned a copy of the letter over to the State for use in Wells' plea negotiations, and because Wells' assertion of the Fifth Amendment does insulate his legal counsel from authenticating a document his client did not compose.

In limine, Shipman conceded that the document at issue was not a communication that Wells himself penned, and that the document was not penned in furtherance of the attorney-client relationship between Shipman and Wells. (R. p. 534, lines 6-8). Shipman also conceded to the court that Wells waived attorney-client privilege as to the letter's contents because Wells agreed to submit a copy of the letter to the State "for purposes of plea bargaining and also to prevent a threat." (R. p. 534, lines 12-14; R. p. 534, line 25 – p. 535, line 1; *see* R. p. 532, lines 18-21). As delineated above, Shipman tailored his testimony to do no more than authenticate the document it provided to the State. (R. p. 537, line 17 – p. 540, line 7). The State was later permitted to introduce the original document, State's Exhibit 46, and a redacted copy of the document, State's Exhibit 23, into evidence. (R. p. 583, lines 9-10; R. p. 606, lines 22-23). The attorney-client privilege did not shield either version of the letter from admission at trial.

"The attorney-client privilege protects against disclosure of confidential communications by a client to his attorney." *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 293, 692 S.E.2d 526, 529 (2010) (internal quotation and citation omitted). "By assuring confidentiality, the privilege encourages clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108, 130 S.Ct. 599, 606 (2009) (citation omitted). The privilege applies:

> (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7)

> from disclosure by himself or by the legal adviser, (8) except the protection be waived.

State v. Doster, 276 S.C. 647, 651, 284 S.E.2d 218, 219-20 (1981) (citation omitted).

"This privilege belongs to the client and not the attorney, and may be waived by the client. . . . In general, the burden of establishing the privilege rests upon the party asserting it." *State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980). "Although a client may waive his attorney-client privilege, the waiver must be distinct and unequivocal. Merely taking the witness stand does not constitute waiver of the privilege." *State v. Hitopoulus*, 279 S.C. 549, 551, 309 S.E.2d 747, 749 (1983) (citing *State v. James,* 34 S.C. 49, 12 S.E. 657 (1891)). However, a client may waive the privilege by producing documents to opposing counsel. *Floyd v. Floyd*, 365 S.C. 56, 88, 615 S.E.2d 465, 482 (Ct. App. 2005), *overturned by* 2008 S.C. Acts 211, § 1 (adding S.C. Code Ann. § 62–1–110, providing communications between a lawyer and a fiduciary are subject to the attorney-client privilege unless waived by the fiduciary, even if fiduciary funds were used to compensate the lawyer).

This record demonstrates Wells waived the privilege as to the contents of the letter because his attorney furnished the letter to the State "for purposes of plea bargaining and also to prevent a threat." (R. p. 534, lines 12-14). Shipman conceded this before the court, (R. p. 534, line 22 – p. 535, line 1), the State indicated it received the copy of the letter months before Appellant Brown's trial, (R. p. 532, lines 18-21), and Wells pled guilty sometime prior to Appellant Brown's trial. (R. p. 224, lines 8-18). When the record indicates that the party asserting the attorney-client privilege "produced the letters he now asserts are protected," the privilege has been waived. *Floyd v. Floyd*, 365 S.C. at 91, 615 S.E.2d at 484; *see State v. Bonilla*, 429 S.C. at 276, 838 S.E.2d 13 (where the record indicates that the client gave informed

consent to produce privileged information to the State, the appellate court should not disturb the trial court's finding); *see* Rule 1.6, RPC, Rule 407, SCACR ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is . . . to prevent reasonably certain death or substantial bodily harm"); *see also State v. Thompson*, 329 S.C. 72, 77, 495 S.E.2d 437, 439 (1998) (declining to find that a criminal defendant impliedly waived the privilege when his attorney disclosed statements in order to negotiate a plea agreement, finding that it was "more reasonable" that the defendant expected counsel to rely on a psychiatrist's report rather than the privileged statements).

Moreover, while the State brought to the court's attention that it did not receive a copy of the back of the letter until it viewed the original at the trial, that information is not covered by the privilege. "[I]nformation—in and of itself—does not become privileged merely because it was communicated to an attorney." *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 168, 829 S.E.2d 707, 712 (2019). The attorney-client privilege only protects confidential communications. *Cloniger v. Cloniger*, 261 S.C. 603, 193 S.E.2d 647 (1973). Again, Wells did not write the letter, and no party asserted that the letter constituted a communication between Wells and his legal counsel. Because the letter itself was not a confidential communication between attorney and client, its contents were simply not covered by the privilege.

For this same reason, Wells' earlier assertion of the Fifth Amendment does not bar admission of the letter subsequent to Shipman's authentication of the document. Appellant argues that the State circumvented Wells' assertion of his right to remain silent when it called Shipman to authenticate the letter Wells received. (Br. of App. at 9). However, one party's assertion of the Fifth Amendment does not excuse that party's legal counsel from producing

evidence not otherwise protected by the attorney-client privilege. *Fisher v. United States*, 425 U.S. 391, 402, 96 S.Ct. 1569, 1576 (1976) (holding "that compelled production of documents from an attorney does not implicate whatever Fifth Amendment privilege the [client] might have enjoyed from being compelled to produce them himself"). "The Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of physical or moral compulsion exerted on the person asserting the privilege." *Id.* at 397, 96 S.Ct. at 1574 (internal quotation omitted). Citing *Hale v. Henkel*, 201 U.S. 43, 69-70, 26 S.Ct. 370, 377 (1906), the *Fisher* Court reiterated that "the privilege 'was never intended to permit (a person) to plead the fact that some third person might be incriminated by his testimony, . . . the amendment is limited to a person who shall be compelled in any criminal case to be a witness against himself.'" *Id.* at 398, 96 S.Ct. at 1574.

Here, "the documents sought were obtainable without personal compulsion of the accused," such that the Fifth Amendment could not apply to their authentication through Wells' counsel. *Id.* at 398-99, 96 S.Ct. at 1574-75. Shipman's authentication of the letter in no way compelled Wells to make an incriminating, testimonial communication because Wells did not write the letter—Wells merely received it. *Schmerber v. California*, 384 U.S. 757, 764, 86 S.Ct. 1826, 1832 (1966) ("The distinction which was emerged, often expressed in different ways, is . . . that compulsion which makes a suspect or accused the source of real or physical evidence does not violate [the Fifth Amendment]."); *see United States v. Sweets*, 526 F.3d 122, 127 (4th Cir. 2007) (the Fifth Amendment protection excludes "a myriad of compelled acts that, while leading to the discovery of incriminating evidence, do not themselves make an incriminating factual assertion").

Accordingly, the trial court did not err when it concluded Wells' "Fifth Amendment

privileges don't attach to the letter." (R. p. 532, lines 2-3). Nor did the court err in admitting the contents of the letter and restricting Shipman from testifying about any communications he engaged in with Wells. (R. p. 534, line 22 – p. 535, line 1). Neither the Fifth Amendment right against self-incrimination nor the attorney-client privilege apply to the contents of the letter that Wells did not write, and that his legal counsel provided to the State prior to Wells' plea.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits that this Court should affirm Appellant Brown's convictions for the December 8, 2016 murder, first degree burglary, attempted armed robbery, possession of a weapon during the commission of a violent crime, and conspiracy.

Respectfully submitted,

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March 29, 2021
Columbia, South Carolina

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Robin B. Stillwell, Circuit Court Judge

Appellate Case No. 2019-001456

THE STATE, ...RESPONDENT

v.

WILLIAM SHANE FORDHAM BROWN,.....APPELLANT.

CERTIFICATE OF COMPLIANCE

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

This 29th day of March, 2021.

s/Caroline Scrantom
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CERTIFICATE OF SERVICE

I, Brandy Rankin, as an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Final Brief of Respondent, Certificate of Compliance, and Certificate of Service have been forwarded to Appellant's counsel, Kathrine Hudgins Esq., at khudgins@sccid.sc.gov, via email today, March 29, 2021, and to her assistant Chris Stock at cstock@sccid.sc.gov.

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

This 29th day of March, 2021.

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