

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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S.C. Supreme Court

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Appeal from Horry County

Steven H. John, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

CHRISTOPHER M. STEPHENS,

APPELLANT

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FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by admitting the hearsay testimony of James Pearl that decedent Jamilla Hightower was screaming at appellant in anger about the money he owed her for drugs since this hearsay testimony was highly prejudicial because it strongly implied an alleged motive for killing the drug dealing decedent?

2.

Whether the trial court committed reversible error by allowing SLED “victimologist” Mike Prodan to testify about the “victimology, method of operation, motive, things like that,” of the murders, since such testimony was speculative, irrelevant, and inadmissible “expert” testimony under State v. Tapp, 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2009)?

## STATEMENT OF THE CASE

Appellant was indicted by the Horry County Grand Jury for two counts of accessory before the fact of murder and one count of accessory before the fact of armed robbery. R. p. 1059. Appellant's co-defendant, Jimmy Lee Sessions, was indicted for two counts of murder, burglary in the first degree and armed robbery. R. p. 1051.

Their joint cases were called to trial on February 2, 2009, before the Honorable Stephen H. John and a jury. Bobby Frederick and Laura Hiller represented appellant. Johnny Gardner represented co-defendant Sessions. Bradley Coy Richardson and Donna Elder were the assistant solicitors. R. 1.

At the conclusion of the trial on February 6, 2009, the jury found appellant guilty of two counts of accessory before the fact of murder and one count of accessory before the fact of armed robbery. R. 1032, ll. 7-25. Co-defendant Sessions was found guilty of two counts of murder, burglary in the first degree and armed robbery. R. 1032, l. 13 – 1024, l. 25.

The judge sentenced appellant to sentences totaling forty years. Co-defendant Sessions was sentenced to life imprisonment. R. 1047, l. 9-1048, l. 13.

This appeal follows.

## ARGUMENT

1.

The court erred by admitting the hearsay testimony of James Pearl that decedent Jamilla Hightower was screaming at appellant about the money he owed her for drugs since this hearsay testimony was highly prejudicial because it strongly implied an alleged motive for killing the drug dealing decedent.

### **Relevant Facts**

The state's star witness was James Pearl. Pearl admitted he was a cocaine addict and that he smoked marijuana the night before appellant's trial. R. 161, l. 17 – 165, l. 25. Pearl he knew Jamilla Hightower and Monica Wall. Hightower was a major drug dealer and she shared a house with Wall. R. 117, ll. 9-10. Pearl said he also knew appellant and co-defendant Sessions. R. 117, ll. 20-22.

Pearl testified that he learned that the decedents had been killed when he received a call from Hightower's cousin on a Friday. R. 118, ll. 5-21. Pearl said he saw Hightower on Wednesday, two days before, while he was conversing with appellant and co-defendant Sessions. Over defense counsel Frederick's repeated hearsay objections Pearl testified that Hightower was screaming at appellant about the money he owed her. Defense counsel made clear he understood the witness could repeat what appellant said but that he continued to object to the hearsay testimony about what Hightower was allegedly said to appellant. The judge continued to allow the solicitor to pursue this line of hearsay question and answer. Pearl said the decedent was yelling "about drug money that was owed [her by appellant]." R. 120, l. 6 – 123, l. 5.

### **Other testimony**

Pearl claimed appellant said after Hightower left that he could not rob her because she knew him. Pearl maintained that Sessions then offered that he could rob Hightower. Pearl said he told both men he did not want anything to do with a robbery and he left. R. 123, l. 6 – 124, l. 21.

Pearl's claim was that appellant and co-defendant Sessions planned to rob and kill Hightower and steal her money and drugs. R. 124, l. 20 – 127, l. 14. Pearl maintained he later snorted cocaine with co-defendant Sessions and that the cocaine tasted like cucumbers. Pearl said that cocaine that tasted like cucumbers was "Jamilla's" signature cocaine. R. 126, l. 22 – 127, l. 14.

Pearl testified Hightower was major drug dealer and that he once saw her purchase two kilos of cocaine. Pearl also maintained that a purchaser had to call Hightower in advance to set up a drug buy: "You just couldn't go to her house and show up without calling." R. 131, ll. 13-25. As will be seen infra, witness Prodan worked this into his "profile" presentation that was strongly objected to defense counsel in this case, and was the subject of reversal in State v. Tapp, 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2009).

On cross-examination Pearl acknowledged his prior criminal convictions and admitted that he had pending charges of second offense possession of cocaine and threatening a public official. Pearl acknowledged that he hoped the state would assist him with these charges. R. 149, ll. 9-12; 162, l. 6 – 163, l.3; and 168, l. 22 – 169, l. 8.

## **Discussion**

Hearsay is a statement, other than one made by the declarant, while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. See Rule 801(c), SCRE. See, also, State v. Saltz, 346 S.C. 114, 551 S.E.2<sup>nd</sup> 240 (2001).

Here, the state elicited Pearl's hearsay testimony that decedent Hightower was yelling at appellant about the money appellant owed her for drugs. This was inadmissible hearsay.

It was highly prejudicial hearsay because it was calculated to provide an alleged motive for the murder: That appellant elicited the help of co-defendant Sessions to rob and kill decedent Hightower. This would simultaneously relieve him of the drug debt, and also have Hightower fill the need for a victim of a robbery the men wanted to commit to obtain money. See State v. Caulder, 287 S.C. 507, 339 S.E.2d 876 (Ct.App. 1986). Appellant should be granted a new trial based upon the admission of this prejudicial hearsay evidence. State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006).

The trial court committed reversible error by allowing SLED “victimologist” Mike Prodan to testify about the “victimology, method of operation, motive, things like that,” of the murders, since such testimony was speculative, irrelevant, and inadmissible “expert” testimony under State v. Tapp, 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2009).

### **Relevant Facts**

Without any prior notice, the state called SLED agent Michael Prodan as a witness. R. 568 ll. 5-18. Prodan testified that he had worked in California, and he said he had been qualified as a “behavioral science expert” in the best. Prodan stated he had no “formal training, but self-initiated education involving keeping abreast of the literature involving homicide and sexual assault, and violent crime in general, and involving the literature and the texts that are available, not only to law enforcement but to the general public.” R. 569, l. 12 – 571, l. 24.

When the solicitor went to offer Prodan “as an expert in the field of crime scene interpretation and analysis”, the jury was removed from the courtroom while the defense attorneys put their considerable objections to Prodan being qualified as an expert on the record. R. 571, l. 14 – 572, l. 22. Defense Counsel Gardner said the defense was taken completely by surprise by this testimony and said: “It’s a shock to me. It’s a surprise to me, and I would just put that on the record.” R. 572, l. 14 – 573, l. 5.

Defense Counsel Frederick expanded on that objection noting that despite the voluminous discovery all he was aware of was that Prodan and other SLED “profilers”

suggested “that they put an informant in Christopher Stephens’s cell. This was before he was charged. They – and that’s it, judge.” R. 573, ll. 6-19.

Prodan then testified in camera that he had not written any report on his work during this investigation. R. 575, ll. 16-22; 578, l. 3 – 579, l. 9; 580, l. 12 – 581, l. 8. Both defense attorneys objected to Prodan being qualified to give an opinion as an expert. R. 582, l. 17 – 585, l. 22. The objections included that Prodan’s testimony in this regard was not relevant and that it was pure speculation. R. 602, ll. 4-18. The judge ruled he was going to qualify Prodan “in the areas of behavioral science, violent crimes, methodology, motive behavior.” R. 585, l. 11 – 586, l. 3; 602, ll. 6-18.

As in State v. Tapp, supra, Prodan said he asked for background information on the victim or victims. Prodan testified he tried to ascertain whether the victim was a high risk individual because of their life style. Prodan opined that some people who were “low risk” because they were not involved “in criminal enterprises, they are not selling drugs, they are not involved in sexual affairs or promiscuity or prostitution.” R. 576, l. 4 – 588, l. 4.

Prodan also told the jurors there were “moderate risk life styles.” These included people working in a convenience store and a cab driver. R. 588, l. 17 – 589, l. 12.

The solicitor asked Prodan about the decedent’s “risk level.” Prodan opined decedent Hightower was probably a moderate risk because of her drug sales. “It was not – it doesn’t give rise to the level of multi-national cartels, but it’s not a college student selling five dollar baggies of marijuana to their dorm mates either, so it has to kind of fall in the middle.” Prodan said the other decedent had an “exceedingly low risk” life style besides her living with decedent Hightower. R. 589, l. 16 – 590, l. 5.

Prodan opined that there is a misconception perpetuated by the media that violent crimes just happen and are random events. “Our experience and our training indicate that is not the case. There is a motive for murder. There are victims who are selected by the offender for that reason.” R. 590, ll. 6-21.

Prodan said he had to ask himself how the person got into the house in this case since there was no forced entry. Prodan then stated his “background information” indicated that Hightower only sold drugs “if there was previous notification.” R. 595, l. 1 – 596, l. 14.

Prodan offered there was no evidence either of the decedents were a “victim of blunt-forced trauma.” Prodan opined that both decedents were able to be controlled by the murderer, and he noted the fact decedent Wall was found nude. “The question you ask yourself is, while the individual is having Ms. Wall disrobe, what’s Ms. Hightower doing.” Defense counsel Frederick objected that this testimony was pure speculation. R. 597, l. 14 – 598, l. 21. As Prodan continued, the defense made further relevance and speculation objections that were overruled. R. 602, ll. 4-18.

Prodan again opined that there was always a motive for murder and that the concept of murder without motive was a media myth. R. 608, l. 11 – 609, l. 8.

In his closing argument, the solicitor noted Prodan’s testimony and argued that appellant and co-defendant Sessions planned the crime carefully and that one decedent was shot with a pillow over her head “because as Mike Prodan said, it’s a lot easier to shoot that pillow than to shoot Jamilla Hightower.” R. 1010, l. 5 – 1011, l. 5.

## **Discussion**

In State v. Tapp, 397 S.C. 159, 691 S.E.2d 165 (Ct. App. 2009), this Court in its substituted re-filed opinion held it was error to qualify Prodan as an expert witness. This Court noted the intervening case of State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), wherein the Supreme Court overruled State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (1997) inasmuch as it held that only scientific expert testimony must pass a threshold reliability determination by the trial court prior to its admission into evidence.

This Court in Tapp noted that the holding of White was that all expert testimony must satisfy Rule 702, SCRE, must pass the trial court's gate keeping function. This insures that the proposed expert testimony meets a threshold level of reliability, regardless of whether it is scientific or unscientific.

The White Court stated that simply ruling a challenge to expert testimony went to its weight and not its admissibility was an improper delegation of responsibility. The Court held the trial judge had to serve the gate keeping function of insuring that expert testimony and evidence were reliable before it was heard by the jury.

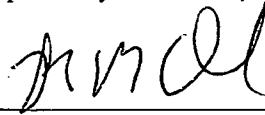
This Court in Tapp specifically rejected the state's position that Prodan's credentials, his education and experience, and his ability to rule out scenarios of whom or why the crime transpired made his testimony admissible. This Court also rejected the relative success of "victimology" or profiling as an investigative tool made Prodan's "expert" testimony admissible.

Against the evidentiary backdrop of State v. Council, 335 S.C. 1, 23, 515 S.E.2d 508, 519 (1999) and State v. White, supra, it is apparent that appellant's conviction based upon Prodan's inadmissible testimony must be reversed.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed and this case remanded to the Horry County Court of General Sessions for a new trial.

Respectfully submitted,



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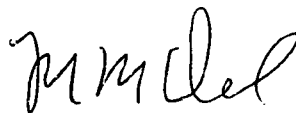
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This 29th day of December, 2010

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



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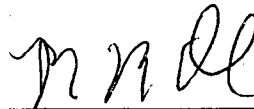
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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Suite 501, Columbia, S.C. 29201, this 29th day of December, 2010.

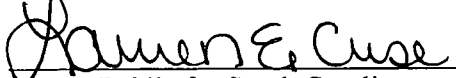


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SUBSCRIBED AND SWORN TO before me  
this 29th day of December, 2010.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: August 23, 2014

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## STATEMENT OF ISSUES ON APPEAL

[1.] Whether the trial court erred by admitting the hearsay testimony of James Pearl that decedent Jamilla Hightower was screaming in anger about the money he owed her for drugs since this hearsay testimony was highly prejudicial because it implied an alleged motive for killing the drug-dealing decedent?

[2.] Whether the trial court committed reversible error by allowing SLED “victimologist” Mike Prodan to testify about the “victimology, method of operation, motive, things like that,” of the murders, since such testimony was speculative, irrelevant, and inadmissible “expert” testimony under *State vs. Tapp*, 387 S.C. 159, 691 S.E.2d 166 (Ct. App. 2009)?

## COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether Stephens’ challenge to the State’s expert testimony on crime scene analysis and victimology, given by SLED Agent Michael Prodan, is procedurally barred because he failed to raise the same argument in the trial court. Alternatively, Respondent submits that the trial judge did not abuse his discretion by allowing the State to introduce the evidence. Respondent further submits that, if there was error, any error was harmless beyond a reasonable doubt?

II. Whether the trial judge properly allowed the State to introduce James Pearl’s testimony about a conversation between Stephens and the victim because any statements by Stephens were admissible as admissions and as statements by a co-conspirator in furtherance of a conspiracy to

rob and murder Jamilla. Further, his silence in the face of her statements were adoptive admissions by him of the debt that he owed her for drugs. Whether the conversation was likewise admissible to show bad blood between Stephens and Jamilla? Alternatively, whether any error was harmless beyond a reasonable doubt?

## STATEMENT OF THE CASE

The Horry County Grand Jury indicted Appellant, Christopher M. Stephens (Stephens) at the July 2007 term of court for two counts of accessory before the fact of the two murders and armed robbery. (07-GS-26-2974 through -2976). The Grand Jury indicted his co-defendant, Jimmy Lee Sessions, (Sessions) at the July 2007 term of court for murder (07-GS-26-2962), burglary in the first degree (07-GS-26-2968) and armed robbery (07-GS-26-2961). These charges stemmed from the homicides of Jamilla Hightower and Monica Wall. Bobby G. Frederick and Laura L. Hiller, Esquires represented Stephens. Johnny Gardner, Esquire, represented Sessions. Assistant Solicitors Bradley Coy Richardson and Donna Elder, of the Fifteenth Circuit Solicitor's Office, prosecuted the case.

A November 2008 trial on the charges ended in a mistrial. Charges against Marshall Stephens were dismissed for lack of evidence.

Stephens received a second jury trial on these charges before the Honorable Stephen H. John on February 2-6, 2009. Sessions was jointly tried with him. The jury found Stephens and Sessions guilty of all of the indicted charges. Stephens received current sentences of forty years imprisonment for the accessory convictions. Sessions received concurrent sentences of life imprisonment for the murders and concurrent thirty year sentences on the other offenses. A timely Notice of Appeal was served and filed by each defendant. This appeal follows.<sup>1</sup>

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<sup>1</sup> Sessions currently has an appeal pending from his convictions, as well.

## ARGUMENTS

I. The trial judge properly allowed the State to introduce James Pearl's testimony about a conversation between Stephens and the victim because any statements by Stephens were admissible as admissions and as statements by a co-conspirator in furtherance of a conspiracy to rob and murder Jamilla. Further, his silence in the face of her statements were adoptive admissions by him of the debt that he owed her for drugs. *See* Rule 801(d)(2)(B), SCRE. Likewise, the conversation was also admissible to show bad blood between Stephens and Jamilla. Alternatively, any error was harmless beyond a reasonable doubt.

Sessions maintains that the trial judge erroneously allowed the State to introduce the testimony of James Pearl of a conversation between Jamilla Hightower and Stephens, in which "decedent Jamilla Hightower was screaming in anger about the money he owed her for drugs because this testimony was highly prejudicial hearsay. Respondent submits that his argument lacks merit and that the trial judge properly allowed the State to introduce Mr. Pearl's testimony because any statements by Stephens were admissible as admissions and as statements by a co-conspirator in furtherance of a conspiracy to rob and murder Jamilla. Further, his silence in the face of her statements were adoptive admissions by him of the debt that he owed her for drugs. *See* Rule 801(d)(2)(B), SCRE. Likewise, the conversation was also admissible to show bad blood between Stephens and Jamilla. Alternatively, any error was harmless beyond a reasonable doubt.

A. **How the issue arose at trial.**

James Pearl testified that he knew both victims and purchased drugs regularly from Jamilla. Sessions and Stephens came by Mr. Pearl's residence on Wednesday June 8<sup>th</sup>. This was slightThey were in a blue Jeep Grand Cherokee that Sessions was driving. All three men were broke and, after Pearl got into the vehicle, his friends began talking about committing some robberies. While they were talking, Jamilla came up to the vehicle and got into a verbal argument with Stephens over drug money that he owed her. She was angry when she left. **R. pp. 119-22.**

Stephens' argument on appeal centers around the following exchange::

Q. Did Jamilla ever come up to that car?

A. Yes Ma'am.

Q. Were you present?

A. Yes Ma'am.

**MR. FREDERICK:** And Judge, we are going to object to any hearsay, as far as testimony from him about what Jamilla Hightower said.

**THE COURT:** I'll be glad to hear any objection as to any hearsay. I haven't heard anything yet.

Go ahead.

**Ms. Elder:** Thank you, Your Honor.

Q. Did she talk to anybody in the vehicle?

**MR. FREDERICK:** Judge, we object to the hearsay. [The] question elicits a hearsay response.

**THE COURT:** No sir, it does not. There is no hearsay at the present time. I'll be glad to hear from you if you wish to make an objection as to hearsay when any comes up.

Q. Did she talk to anybody in the vehicle?

A. Yes Ma'am.

Q. Did anybody in the vehicle talk to her?

A. Yes Ma'am.

Q. Who?

A. She was talking - - it was basically over money. It was - - she was screaming about money, and - - -

Q. Before we get to that, who was talking with her?

A. Well, she - - -

**MR. FREDERICK:** Judge, still objecting to the hearsay. Now he is testifying as to hearsay.

**THE COURT:** No sir.

You may proceed, Solicitor.

**Ms. Elder:.** Thank you, Your Honor.

Q. Who was talking with her?

A. Chris.

Q. Chris Stephens?

A. Yes Ma'am.

Q. And what was Chris Stephens saying to her?

A. Basically she was screaming on Chris about the money that he owed her.

Q. And what was he saying?

A. He was - - he told her at first, I'm going to pay you, and then he laughed it off, you know, and then he was like, I ain't going to pay the -- I ain't going to pay this girl, you know what I mean, so she was mad, and she told him, I want my money or - - -

**MR. FREDERICK:** Judge, I've got no problem with him saying what Christopher said, because those are statements that are admissible outside of the hearsay rule, but I'm asking the Court to not allow the witness to testify as to what other people said, including Jamilla Hightower.

**THE COURT:** No sir. I'm going to allow it. Thank you.

Q. Continue, Mr. Pearl.

A. It was about -- it was about drug money that was owed, so she was mad, very upset, and after that she left.

R. p. 120, l. 16-p. 122, l. 19.

Immediately after Jamilla left, Stephens and Sessions resumed their discussion about Robbing her. Stephens said that he could not rob her because she knew him. However, Sessions indicated that he could rob her. Pearl did not want any part of their plan and he exited the car at that point in the conversation.<sup>2</sup> R. pp. 122-24.

**B. Discussion.**

“The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal.” *Gambell v. Int’l. Paper Realty Corp.*, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996). To warrant reversal, an Appellant “must show both the error of the ruling and resulting prejudice.” *Recco Paper & Label Co. v. Barfield*, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994); *State v. Hamilton*, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001). “An error without prejudice does not warrant reversal.” *State v. King*, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct.App.2005). *See also State v. Vick*, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct.App. 2009) (“The improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice”).

Contrary to Sessions’ argument, which seeks to obfuscate the issue before the Court by derisively referring to the victim and Mr. Pearl but ignoring his own complicity in the murders of two individuals, the statements at issue are not hearsay. First, any statements by Stephens are admissible as admissions by him under Rule 801(d)(2), SCRE. His statements are also admissible as statements by a co-conspirator in furtherance of the conspiracy to rob and murder

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<sup>2</sup> They had wanted him to act as a “doorman,” to help them gain entry into Jamilla’s residence. R. pp. 123-24.

Jamilla Hightower. *See* Rule 801(d)(2)(E), SCRE.<sup>3</sup>

Nor was Pearl's testimony that Jamilla was screaming at Stephens because he owed her money for drugs hearsay. Under Rule 801(d)(2)(B) SCRE, "[a] statement is not hearsay if ... the statement is offered against a party and is ... a statement of which the party has manifested an adoption or belief in its truth." This rule is consistent with prior South Carolina law.<sup>4</sup> In *State v. McIntosh*, 94 S.C. 439, \_\_\_, 78 S.E. 327, 329 (1913), the Supreme Court explained the rule as follows:

Statements made in the presence of a party are generally admissible, if he remains silent, when they are made, and the circumstances are such that he can speak and naturally would or ought to respond to them. In such circumstances, his silence may afford ground for inferring that he acquiesces in the truth of the statements. But, where the situation is such that it would be improper for him to respond, statements made to him or in his presence are inadmissible. So, also, if he positively and unequivocally denies the truth of such statements, ... they are inadmissible.

*See also State v. Sharpe*, 239 S.C. at 271, 122 S.E.2d at 629 ("This Court has held that statements in the presence of the accused by a third person are admissible as evidence when such accused remains silent and does not deny such statements"); *State v. Nolan*, 318 S.C. 253, 257-58, 456 S.E.2d 926, 928-29 (Ct.App. 1999) (statement made by police officer, who died before

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<sup>3</sup> "While hearsay testimony generally is not admissible, an exception is allowed when a statement is offered against a party and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Rule 801(d)(2)(E), SCRE. When a statement meets these requirements, it is considered non-hearsay." *State v. Sims*, 387 S.C. 557, 564, 694 S.E.2d 9, 13 (2010). Unlike the factual scenario in *Sims*, Stephens cannot seriously contend that his statements to Jamilla, in which he feigned an agreement to pay her money that he owed her and thereby provided he and Sessions with a possible manner for entry into her residence that would not otherwise exist, were not in furtherance of the conspiracy to rob and murder her.

<sup>4</sup> *See* Comments to Rule 801(d)(2)(B) (citing *State v. Sharpe*, 239 S.C. 258, 122 S.E.2d 622 (1961), *rev'd on other grounds*, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)); *State v. Knoten*, 347 S.C. 296, 312, 555 S.E.2d 391, 399 (2001).

the trial, that he had stopped vehicle being driven by drug defendant because it was weaving, was admissible over hearsay objection to establish probable cause for stop of vehicle where there were independent *indicia* of reliability since testifying officer had seen vehicle weave as it approached him after it had been initially stopped, and officer making initial stop had told testifying officer in presence of defendant that defendant had been stopped for weaving and defendant did not contradict statement).

In the present case, Jamilla accused Stephens of owing her money for drugs. This was the reason that she was mad at him. He did not deny this accusation, even though the circumstances surrounding the conversation demonstrated that he could speak and naturally would or should have denied it if it was untrue. Rather than deny her accusation, Stephens admitted that he owed her money and he ostensibly agreed to repay it. He only revealed his actual intent when she left his presence and he resumed the conspiratorial conversation with Stephens about their plan to rob and murder her.<sup>5</sup>

Further, the statements by her were admissible because, “[i]n homicide cases, evidence that the accused and the decedent had previous difficulty is admissible. The evidence is admissible to show the animus of the parties and to aid the jury in deciding who was the probable aggressor.” *State v. Cooley*, 342 S.C. 63, 68-69, 536 S.E.2d 666, 669 (2000) (quoting *State v. Taylor*, 333 S.C. 159, 168, 508 S.E.2d 870, 874 (1998)). As in *Cooley*, there is no contention that

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<sup>5</sup> Additionally, Respondent would note that the Stephens’ conversation with Jamilla reflected that she had sold drugs to him. This statement was admissible under Rule 804(b)(3), SCRE, since it was “[a] statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.”

Jamilla was the aggressor. However, this evidence was still “relevant to proving the ‘animus of the parties.’ ” *Cooley*, 342 S.C. at 69, 536 S.E.2d at 669. It might also be viewed as providing the motive for selecting her to rob and murder, as opposed to some other drug dealer. *See State v. Sweat*, 362 S.C. 117, 606 S.E.2d 508 (Ct.App. 2004).

Further, Sessions various statements to Jamilla were admissible. Thus, the jury properly heard him tell Jamilla, a drug dealer, that he would pay the money that he owed her. Her statements, by and large, simply gave context to Stephens’ statements and were admissible for this purpose. *See United States v. Wills*, 346 F.3d 476, 490 (4<sup>th</sup> Cir. 2003) (witness statements made in conversation with defendant properly admitted to show context of incriminating admissions); *United States v. McDowell*, 918 F.2d 1004, 1007 (1<sup>st</sup> Cir. 1990) (“McDowell's own statements could, of course, be used against him; his part of the conversations was plainly not hearsay. Nor can a defendant, having made admissions, keep from the jury other segments of the discussion reasonably required to place those admissions into context.”).

More importantly and even if the Court does not find that her declarations were properly admissible on this theory, any error in admitting this evidence was harmless and non-prejudicial beyond a reasonable doubt, since it could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) (“Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial”); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (“When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result”). Again, the jury properly heard him tell Jamilla, a drug dealer, that he would pay the money that he owed her.

Also, the State had established overwhelming evidence of guilt, separate and apart from either the evidence of which he now complains or Agent Prodar's testimony. In light of this evidence, discussed in **Argument II**, *infra*, any error was non-prejudicial and harmless beyond a reasonable doubt. *See Bailey*, 298 S.C. at 5, 377 S.E.2d at 584. As a result, any error "could not reasonably have affected the result of the trial." *See Sherard*, 303 S.C. at 175, 399 S.E.2d at 596.

**II. Stephens' challenge to the State's expert testimony on crime scene analysis and victimology, given by SLED Agent Michael Prodan, is procedurally barred because he failed to raise the same argument in the trial court. Alternatively, Respondent submits that the trial judge did not abuse his discretion by allowing the State to introduce the evidence. Respondent further submits that, if there was error, any error was harmless beyond a reasonable doubt.**

Relying upon a panel decision of the Court in *State v. Tapp*, 387 S.C. 159, 691 S.E.2d 165 (2010), cert pending, Stephens maintains that the trial judge abused his discretion by allowing the State to present expert testimony on crime scene analysis and victimology through SLED Agent Michael Prodan. Respondent submits that his challenge to Agent Prodan's testimony is procedurally barred because he failed to raise the same argument in the trial court. Alternatively, Respondent submits that the trial judge did not abuse his discretion by allowing the State to introduce the evidence. Respondent further submits that, if there was error, any error was harmless beyond a reasonable doubt.

**A. How issue developed at trial.**

Agent Prodan testified that he has been employed at SLED for ten years and that he was the Supervisor of the Behavioral Sciences Unit. Prior to that time, he was "the lead agent and the supervisor of the Violent Crime Analysis Unit" of the California Attorney General's Office. Both at SLED and with the California Attorney General's Office, his job responsibilities involved "crime scene analyses, consultation on violent crime, investigative techniques and strategies, threat assessment, interviews and interrogation, and what is generally referred to in the media as psychological profiling." **R. pp. 568-69.**

Agent Prodan also listed the extensive nature of his prior employment and his educational

and other experience in the field:

First started in violent crime training, of course, with the Las Angeles County Sheriff's Department and Police Academy in Violent Crime Investigation, but as a agent for the California Department of Justice, Bureau of Investigation, was a specialized six months program, with the advanced training center in the California Criminalistic Institute, involving crime scene analyses and criminalistic, if you would, that include courses in firearms trajectory, blood spatter interpretation, and forensic pathology.

During that time I was selected and spent a one-year Fellowship at the F.B.I. Academy in Quantico, Virginia, at the National Center for the Analyses of Violent Crime. That one year Fellowship also included courses at the Armed Forces Institute of Pathology on basic and advanced Forensic Pathology courses in Psychiatry in the Law, in the University of Virginia at Charlottesville. There were also courses at the Clark Institute of the Psychology of Aggression in Ottawa, Ontario, Canada.

There has been training over a varied of time involving the California Homicide Investigators Association, California Sexual Assault Investigators' Association, the Association of Threat Assessment Professionals.

*See R. pp. 569-70.*

Agent Prodan described his educational training as “ongoing” and he explained that, “more often than not,” it involved in-service training . . . with the International Criminal Investigative Analyst Fellowship, certain training programs with the Federal Bureau of Investigation, yearly training and updates with the Association of the Threat Assessment Professionals.”He likewise engages in “self-initiated education,” by “keeping abreast of the literature involving homicide and sexual assault, and violent crime in general, and involving the literature and the texts that are available” to law enforcement and the general public. **R. pp. 570-71.**

Agent Prodan is a “member of the International Criminal Investigative Analyst Fellowship, which is . . . a worldwide organization that standardizes and provides training on

criminal investigative analyses profiling.” He is also “a member of the Association of Threat Assessment Professionals,” and he had previously been a member of the “California Homicide Investigators Association, and California Sexual Assault Investigators' Association.” **R. p. 570.** Agent Prodan has “been brought in on cases by law enforcement . . . many times” and he has been qualified as a crime scene analyst in a number of courts. **R. p. 571.**

Both defendants objected when the State offered him as an expert in “Crime Scene Interpretation and Analyses” (**R. pp. 571-72**), and the trial judge heard their arguments *in camera*. Outside of the jury’s presence, both defendants initially complained because the State had not disclosed that Agent Prodan would be giving the testimony at issue and because there was no report. The State, however, responded by pointing to items where the testimony was disclosed. **R. pp. 572-75.**

Agent Prodan then testified that the Assistant Solicitor had met with him about two weeks earlier, and she provided him with copies of the crime scene photographs and the autopsy report; and she asked him to testify “[t]o the materials pertaining to how the crime occurred.” However, he had not kept notes, and he had not issued a report to law enforcement or the Solicitor’s Office. He also had not generated any report, except for his “case notes” that were merely bullet points “to keep my thoughts on track.” Even these were only generated a week before his testimony. **R. pp. 575-81.**

Once the trial judge had ascertained that Agent Prodan’s notes had been provided to the defense, he asked the State to briefly summarize to the proffered testimony. **R. pp. 581-82.** The Assistant Solicitor explained that:

the process of my direct-examination of Agent Prodan is going to be, show him

some of the State's exhibits, . . . ask him if he has had an opportunity to review them, based on his expert opinion, what do these crime scene photos tell us in reference to victimology, method of operation, motive, things like that, Your Honor. It has nothing to do specifically with the Defendants. He has not reviewed the Defendants, he has not talked with the Defendants, he has not got the Defendants' statements.

**R. p. 582.**

The defendants stated their objections to the proffered testimony. Sessions' sole objection was relevance, **R. p. 582, l. 18**, while Stephens asked that he be able to view the notes to prepare for cross-examination and again argued that there had been a discovery violation. **R. p. 582, l. 21-p. 583, l. 3**. However, the trial judge found that there had not been a *Brady v. Maryland*, 373 U.S. 83 (1963) violation. He further noted that he had the notes that Agent Prodan had made provided to the defendants, and he noted that the examination would proceed after a break. **R. p. 583, ll. 12-25**. *See also R. pp. 584-85*.

When the jury returned, the trial judge explained that he was "going to allow the witness to -- and is going to qualify the witness to give his opinion in the areas of Behavioral Science, Violent Crime, Methodology, Motive Behavior." **R. p. 585, l. 23-p. 586, l. 1**.

In front of the jury, Agent Prodan explained that, upon receiving a request for assistance from a law enforcement agency, he first asks for background information about the victim or victims. "It is referred to in certain literatures. . . as a Victimology, the study of the victim." The initial question he tries to answer is why the victim was selected to be a victim of a violent crime. This requires him to assess the degree of risk the person had to be a victim - whether the level of risk is low, moderate or high. In making this assessment, "we insist that the agency does not give

us any information about any suspects that they may have developed . . . because we don't want to have any contamination . . . on suspect information as to what actually happened during the commission of the violent crime." **R. pp. 586-87.**

Agent Prodan explained that an individual's risk level is based upon the individual's circumstances. So, high risk victims are persons whose lifestyles put them "at a high risk of becoming a violent crime victim. He included persons who are "involved in criminal organizations and enterprises, criminal gangs," as well as persons who traffic in narcotics or are sexually promiscuous within this category. These are persons who "put themselves in a position" to be "more susceptible of becoming victims of violence than anyone else. Low risk victims are those persons who are not involved in sexual affairs or prostitution, and who are not involved in criminal enterprises or drug selling. Both experience and research reflect that "the lower the risk of a victim, the more likely it is that a person[ ] - - is a victim because of a person[al] cause." **R. pp. 586-88.**

In between low and high risk victims are the "moderate risk victims." Those persons do not live a very risky lifestyle, but certain circumstances in their lives increases their risk of being a victim. He included convenience store clerks and cab drivers in this category, as well as persons who are "dabbling in criminal enterprises." **R. p. 588.**

In this case, the background information he received was that one victim, Jamilla, "was involved in some reasonably moderate illicit drug sales." Selling illegal drugs is risky by its very nature because people will often try to steal from the person. The crime scene photographs confirmed that Jamilla had considered herself to be at risk because she had "availed herself" of a shotgun to provide her with physical protection. **R. pp. 588-89.**

Agent Prodan assessed Jamilla's risk level as moderate because of her drug trafficking. With the exception of living with Jamilla, he assessed Monica's risk level as low. **R. pp. 589-90.**

The next step in his process is "to look at how the crime occurred" and ascertain the motive for the murders.<sup>6</sup> Here, the murders occurred in Jamilla's residence, which is where law enforcement learned that she would primarily engage in her drug transactions. Also the killer brought a weapon, which demonstrated some "pre-planning" by the perpetrator. Further, "[t]he victims were killed with what we typically see in a quote, unquote, drug related murder, a small to medium caliber handgun." Nor did the perpetrator make any effort to move or otherwise "interact with" the victims' bodies after killing them, and there was a minimal effort to destroy or conceal any physical evidence that was present,<sup>7</sup> other than taking the murder weapon. **R. pp. 590-92.**

Based on these factors, Agent Prodan opined that this was "a primarily drug-related murder, and the motive for drug-related murders have to do with the discipline of the individual" perpetrator. Sometimes, it is either to eliminate a competitor or to retaliate against a victim who owes the person money but cannot repay it. Also, drug dealers may be targeted for robbery of their drugs and money because drug dealers typically do not report robberies to the police. **R. pp. 592-93; 600-01.**<sup>8</sup>

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<sup>6</sup> It is his expert opinion, based upon experience and research, that there is always a motive for violent crimes, such as murder; and that any contrary belief misunderstands violent crimes. **R. p. 590.**

<sup>7</sup> For example, the crime scene reports did not reflect that the victims' bodies had been washed or that any effort was made to wipe for prints. **R. p. 592.**

<sup>8</sup> Agent Prodan opined that two other possible motives for drug-related murders were inapplicable in this case: the killing of an informant or a neighborhood anti-drug advocate. **R. p. 603.**

Next, Agent Prodan studied how the crimes occurred, both pre-offense and offense behavior. Before the crime, someone had to devise a plan: they had to select a particular place to rob and a particular time to rob it; they had to bring a weapon and ammunition; and they had to develop a plan to gain entry into the residence where the murder occurred. The manner in which the murders occurred shows that the plan for the murders originated outside of the residence. **R. pp. 593-95.**

Once inside the residence, the perpetrator has to gain control over the victim, which can be done by (1) the perpetrator's "mere presence;" (2) a verbal threat; (3) physical force; or (4) a weapon. In this case, neither the autopsy reports nor the crime scene photographs suggested that either Jamilla or Monica was the victim of blunt force trauma, such as defensive injuries or facial injuries. There was also no evidence of a struggle in the house or that either victim was physically restrained or "bound." Moreover, based on photographs of Jamilla in her bedroom (**State's Exs. 2 and 5**), "it appears, . . . most likely, that she was ordered to lie flat on the floor, the individual put a pillow over her head, and then fired one shot through the pillow at relatively close range into her head." **R. pp. 595-99.**

There were two possible reasons for using a pillow case in this fashion. First, it is easier, emotionally, to depersonalize the victim and shoot a pillow rather a person's head. Second, it would reduce the amount of recoil and prevent "any blow-back of blood" onto the perpetrator or his weapon. Again, this suggestion pre-planning. **R. pp. 599-600.** From his review of the crime scene photographs and autopsy reports, Agent Prodan did not see any evidence that either victim resisted. This suggested to Agent Prodan that the killer had gone into the residence with the belief that the victims would not cooperate and were potentially armed. This would explain why

the perpetrator killed the victims - *i.e.*, the motive for the killings. **R. pp. 600-02; 604-05.**

Stephens finally renewed his objection on the ground that the testimony would not be relevant when the Assistant Solicitor asked Agent Prodan to look at a series of photographs that were previously introduced as **State's Exs. 4, 10, 32, 40-41, and 49-51.** He stated his objection as follows: "Just for the record, I'm going to renew our objection. . . . I don't see where this will assist the jury in the facts of this case." This objection was overruled, as was his added argument, "speculation as well." **R. p. 602.**

Agent Prodan was then permitted to opine as to the manner in which Monica was murdered. He explained that, based on **State's Exs. 10 and 49,** she had been killed in a manner similar to Jamilla. Because there was some feces in Monica's bedroom, it appeared that she had been moved from her bedroom to the bathroom. She was moved there to kill her because she was a potential witness. **R. pp. 602-04.**

**B. Discussion.**

- 1. Stephens' belated relevancy objection does not preserve any issue for appellate review concerning testimony that was only objected to on the basis that the State had committed a discovery violation.**

As shown, Stephens' only initial objection was that the State had committed a discovery violation. He also later claimed that one brief portion of Agent Prodan's testimony was not relevant and that it was speculative. **R. pp. 573; 582-83; 602.** On appeal, he has not challenged the trial judge's ruling that there was no *Brady* violation. Therefore, that argument has been abandoned. *State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981) (an issue not argued in the appellant's brief is deemed abandoned). In arguing the trial court, Sessions did not advance anything close to the argument that he now raises on appeal.

On appeal, he relies upon *Tapp*. In *Tapp*, the Court of Appeals agreed with Tapp's challenge to the qualification of Agent Prodan as an expert witness and it reversed Tapp's convictions and sentence based upon the Supreme Court's decision in *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), based upon its finding that the record was insufficient "for this court to determine whether Prodan should have been qualified [to testify] under *White*." *Tapp*, 387 S.C. at 164-69, 691 S.E.2d at 167, 169 -170.<sup>9</sup>

However, Sessions did not raise any type of challenge to the foundational requirements for this testimony or to Agent Prodan's expertise in the trial court. His only objection was that a small portion of Agent Prodan's testimony would not assist the jury any was speculative. This did not preserve any objection to the portions of Prodan's previously-admitted testimony to which no objection was taken and it did not preserve the current argument. Thus, his argument on appeal is procedurally barred. *See State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one theory in support of his objection or motion at trial and raise a different theory on appeal); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently *specific* manner that it brings attention to the exact error); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"); *State v. Holmes*, 320 S.C. 259, 266, 464 S.E.2d 334 (1995) (appellant's general objection to introduction of wallet during the guilt phase that it had no relevance did not preserve motion

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<sup>9</sup> Specifically, the Court of Appeals in *Tapp* was concerned about the absence of findings by the trial judge of the foundational requirements under *White* that "(1) the expert has the requisite qualifications, experience, and/or credentials; (2) the methodology by which the evidence is obtained is reliable; and (3) the evidence will assist the trier of fact." *Tapp*, 387 S.C. at 164-69, 691 S.E.2d at 167-70.

for a new trial, after the verdict in the sentencing phase, based on prejudice arising from various items contained in the wallet).<sup>10</sup> Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Therefore, this Court should affirm based on the application of this well-settled and fundamental procedural bar. Application of the bar is particularly appropriate since Prodan’s testimony was relevant to the issues before the jury.

**2. Alternatively, the trial judge properly admitted the testimony.**

Even if this Court finds that the issue was not procedurally barred, Respondent alternatively submits that reversal still is not required. As demonstrated, the only objection preserved by Stephens, as to any portion was relevancy. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. It cannot be seriously contended that Agent Prodan’s expertise in the areas of victimology any crime scene analysis met this criteria, as more fully discussed, *infra*.

Nor does *Tapp* require a different result. “A trial court’s decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).” *White*, 382 S.C. at 269, 676 S.E.2d at 686. *See also*

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<sup>10</sup> *See also State v. Torrence*, 305 S.C. 45, 60-71, 406 S.E.2d 315, 324-29 (1991) (Toal, J., concurring in result and joining Justice Chandler’s concurrence in result) (abolishing the doctrine of *in favorem vitae* review in capital cases and requiring contemporaneous objection or motion to preserve issue for appellate review); *State v. Vanderbilt*, 287 S.C. 597, 340 S.E.2d 543 (1986) (“Issues not properly preserved at trial may not be raised for the first time on appeal. To the extent that *State v. Griffin*, [129 S.C. 200, 124 S.E. 81 (1924)], may be inconsistent with this result it is overruled”).

Rule 702, SCRE (“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise”); *Mizell v. Glover*, 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002) (“A trial court’s ruling to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion”).<sup>11</sup> In *White*, the Court overruled *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 112 (Ct.App.1997) “to the extent it suggests that only scientific expert testimony must pass a threshold reliability determination by the trial court prior to its admission in evidence,” *White* 382 S.C. at 273, 676 SE2d at 688.

The Court held that nonscientific expert testimony, such as that in the present case, “must satisfy Rule 702;” and that in discharging his gatekeeping role, a trial judge “must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to ‘weight, not admissibility’ may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.” *White* 382 S.C. at 274, 676 SE2d at 689.

With respect to the reliability requirement, the Court in *White* recognized that the *Council* factors for determining the reliability of scientific evidence “serve no useful analytical purpose when evaluating nonscientific expert testimony.” *Id* at 274, 676 SE2d at 688. Also, because many

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<sup>11</sup> As the California Supreme Court in *People v. Prince*, 40 Cal.4th 1179, 1222, 156 P.3d 1015, 1047, 57 Cal.Rptr.3d 543, 580 (2007), “experts may testify even when jurors are not ‘wholly ignorant’ about the subject of the testimony. ... ‘If that [total ignorance] were the test, little expert opinion testimony would ever be heard.’” (Citations omitted).

different Rule 702 qualification and reliability challenges could arise with respect to nonscientific expert evidence, the Court in *White* did not offer a bright-line approach to generally apply to these cases. *Id.* at 274, 676 SE2d at 688-89.

The State does not dispute that *White*'s holding is that "[a]ll expert testimony must satisfy the Rule 702[, SCRE,] criteria, and that this includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *White*, 382 S.C. at 270, 676 S.E.2d at 686. However, the Court of Appeals erred by reversing under *White* in *Tapp* because the record in that case, like here, is sufficient for either this Court, or the trial judge on remand, to make the determination of whether the prosecution established that "(1) the expert has the requisite qualifications, experience, and/or credentials; (2) the methodology by which the evidence is obtained is reliable; and (3) the evidence will assist the trier of fact," as required by Rule 702 and *White*. See *Tapp*, 387 S.C. at \_\_\_, 691 S.E.2d at 169 (citing *White*, 382 S.C. at 274, 676 S.E.2d at 689).

In the course of reversing in *Tapp*, the Court of Appeals found that:

the State highlights: (1) Prodan's credentials, education and experience, (2) his ability to rule out various scenarios of how or why the crime transpired, and (3) the process's relative success as an investigative tool to law enforcement. While these arguments are relevant, we find they go to the other *White* elements, (i.e., the expert's credentials, education, or experience and the ability of the expert to assist the trier of fact) rather than the element of reliability. See [*White*, 387 S.C.] at 274, 676 S.E.2d at 689 (indicating that under Rule 702 the State must establish: (1) the expert has the requisite qualifications, experience, and/or credentials; (2) the methodology by which the evidence is obtained is reliable; and (3) the evidence will assist the trier of fact).

*Tapp*, 387 S.C. at 167, 691 S.E.2d at 169. In reaching this conclusion, the Court in *Tapp* ignored that Agent Prodan's testimony was sufficient to meet all three of the elements for its introduction

under *White*.

The same is true in the present case. Agent Prodan provided the trial judge with the extensive nature of his prior employment and his educational and other experience in the field, as thoroughly discussed. In addition to other educational and practical training, he has taken courses in the areas of Psychiatry and the Law and Abnormal Criminal Behavior; courses on psychology; and he “was the lead agent and the supervisor of the Violent Crime Analysis Unit” of the California Attorney General’s Office. His *in camera* testimony also demonstrated the reliability of the proffered evidence, even though this was not challenged by the defense, in any fashion, in the trial court.

His *in camera* testimony also demonstrated the reliability of the proffered evidence. He explained what crime scene analysis and victimology are. Likewise, his testimony supports the conclusion of the general acceptance of crime scene analysis and victimology.

Further, his opinions helped the jury understand certain characteristics of the crime scene, and he clearly stated the reasons for the opinions he expressed. Rather than pure speculation on his part, a review of his testimony reflects that his conclusions were based upon evidence presented to him about both of the victims and the crime scene, as well as his extensive training and experience. Most jurors have a very limited exposure to real criminal activity.

Prodan's testimony was helpful to the jury in that it provided meaning to some of the evidence presented to the jury.<sup>12</sup> Likewise, through application of his expertise to the evidence

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<sup>12</sup> For example, the jury could look at the pictures of the crime scene and perhaps see that how the victims’ bodies were left and how the crime scene looked. However, Agent Prodan was able to provide meaning and context that went beyond that ordinarily known to lay people, *i.e.*, that the manner in which they were found and the fact Jamilla had a weapon, and information provided as to how she conducted her drug illegal business suggested a drug-related robbery and pre-planning by the perpetrator

about the crime scene and the victims, he was able to rule out certain possible motives for the homicides. Additionally, this testimony was anticipatory in nature: the State merely sought to negate possible attacks by Sessions and Stephens on the supposed weakness of the evidence presented by the State that was largely premised upon individuals who used drugs and often were in prison themselves.<sup>13</sup>

The victimology evidence was likewise relevant. From the victimology training, the information from about the manner in which Jamilla dealt drugs, and the information provided to him about the crime scene (the photographs and autopsy reports), Agent Prodan was also able to explain how and why perpetrators may pick a victim; and how a perpetrator may have been able to gain access to Jamilla's residence.

Further and similar to *White*, the trial judge instructed jurors on **R. p. 1017, ll. 5-15**, the trial judge charged the jury that “[t]he Rules of Evidence do not ordinarily allow witnesses to give their opinion. Now in this case I qualified several witnesses to give their opinions. They are sometimes called expert witnesses, but -- and that's basically someone who, by reason of their education, experience, has become knowledgeable in some kind of art or science or profession, and they can give an opinion when asked. This doesn't give them any special status. You consider that evidence and that opinion just like all the other evidence in the case. You weigh all the evidence in the case, and you find the evidence which convinces you of it's truth.”

Further, the Court in *Tapp* found that it was “not convinced that the process's relative  

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to avoid resistance by a victim who may well be armed.

<sup>13</sup> It is an unfortunate reality that “prosecutors have often realized, ‘to try the devil, you have to go to hell to get your witnesses.’ ” *State v. Allen* 360 N.C. 297, 308, 626 S.E.2d 271, 281 (2006).

success as an 'investigative tool' renders it *per se* reliable in the context of qualifying an expert" and analogizing Prodan's testimony to polygraph evidence. This finding overlooked that Prodan's testimony in the areas of crime scene analysis and victimology is virtually identical to the expert testimony in behavioral profiling that warranted a new trial for the capital inmate in *State v. Spann*, 334 S.C. 618, 621-622, 513 S.E.2d 98, 100 (1999). In *Spann*, the defendant moved for a new trial based upon after-discovered evidence that he contended was relevant to his guilt or innocence and required a new trial. *Id.* This Court agreed, over the State's contrary position; and it reversed and remanded for a new trial. In pertinent part, this Court reasoned in *Spann* as follows:

At the new trial hearing appellant presented the testimony of three expert witnesses: a forensic pathologist (Dr. Spitz); a forensic psychiatrist (Dr. Tanay); and an expert in crime scene analysis and criminal personality profiling (Mr. Ressler). Dr. Spitz testified that all three women were strangled in a unique way, a method he had never before observed in forty-three years of practice. He testified to other factual similarities between the crimes, and opined that one perpetrator was responsible for all three murders. Dr. Tanay testified the three murders were committed by a single individual, a sexual sadistic murderer. He testified to the psychiatric characteristics of these types of killers, and opined based upon his examination of appellant that it was "impossible" that appellant had committed these offenses. Dr. Tanay also testified that sexual sadistic killers are almost always psychiatrically disturbed white males. Appellant is a black man with no history of psychiatric problems; Johnny Hullett is a white male with a long psychiatric history. Finally, Mr. Ressler profiled the killer of these three women as a white male in his mid-20's to mid-30's with a history of mental illness, who was either single or had a dysfunctional marriage, a person with bizarre fantasies, a history of childhood abuse, and knowledge of the area. Appellant does not fit this profile.

The circuit court judge found the expert testimony "thought-provoking" and "intriguing", and specifically found that Mr. Ressler's testimony "raise[d] a reasonable inference as to [appellant's] innocence." The judge rejected the testimony of all three experts as grounds for the granting of a new trial, however, finding the evidence and science upon which their opinions were based was all in existence at the time of appellant's trial, and thus could have been discovered by

his attorneys with the exercise of due diligence. We disagree. In order for the attorneys to have pursued these types of experts, they would first have needed to recognize the similarities between the crimes, similarities not apparent at the time even to the experts (*i.e.* law enforcement investigators and the pathologist) involved in all three cases. We hold that the due diligence standard imposed upon trial attorneys cannot fairly be said to be this high.

We find the circuit court judge committed an error of law, under the unusual facts of this case, in holding the newly discovered expert evidence could have been discovered by the exercise of due diligence. *State v. Prince*, [316 S.C. 57, 447 S.E.2d 177 (1993)]; *State v. Parker*, 249 S.C. 139, 153 S.E.2d 183 (1967). Accordingly, we reverse and remand for a new trial.

*Spann*, 334 S.C. at 621-22, 513 S.E.2d at 100. Prodan's testimony is not substantively different than the testimony upon which Spann's new trial was predicated. To the contrary, it evolved out of precisely the same field of expertise at issue in *Spann*.<sup>14</sup>

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<sup>14</sup> The purposes for which this type of expert testimony are offered, and indeed admitted, appear to be expanding. See Donald Q. Cochran, *Alabama v. Clarence Simmons: FBI "Profiler" Testimony to Establish an Essential Element of Capital Murder*, 23 Law & Psychol. Rev. 69 (1999). Everyone is familiar with the old saying, "what is sauce for the goose is sauce for the gander." Basic principles of fairness call for the prosecution to be able to introduce virtually identical evidence under the same evidentiary rules. Moreover, reversal in this case may have overlooked that Prodan's testimony is likewise very similar to the expert testimony concerning Munchausen Syndrome by Proxy (MSBP) - that the State's medical experts defined as a form of child abuse, in which the perpetrator harms a child in order to garner sympathy and attention for herself - that this Court found was properly admitted to show motive in *State v. Cutro*, 365 S.C. 366, 376-77, 618 S.E.2d 890, 895 (2005). Further, the Court of Appeals in *Tapp* found that:

without the guidance of the *White* decision, Tapp was not able to sufficiently develop and pursue theories upon which to challenge Prodan's qualification; nor was the trial court given the opportunity to address the issue. We find that given the deficient nature of the record on this issue it would be imprudent of this court to attempt to fashion a test or rule for the qualification of a crime scene analyst or victimologist. Rather, justice demands this burden first be placed upon the trial court after allowing the parties to fully develop the issue.

*Tapp*, 387 S.C. at \_\_\_, 691 S.E.2d 170. This finding ignores that a similar argument was available to Tapp under *State v. Jones*, 273 S.C. 723, 259 SE2d 120 (1979), such as raised by him on appeal. The same is true in this case. Sessions could have but did not raise this argument.

Yet, assuming that *Tapp* is correct, then the most appropriate remedy for the absence of findings in accordance with *White* is either for the reviewing Court to apply the correct analysis or for the Court to

3. **Any error in admitting Prodan's testimony was harmless beyond a reasonable doubt.**

Even if the Court finds that the record is insufficient either for it to make the required findings consistent with *White* or to remand the case for the trial judge to make those findings, reversal of this case is still not required because any error in admitting Agent Prodan's testimony was harmless and non-prejudicial beyond a reasonable doubt, since it could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). Although Agent Prodan's testimony was both relevant and probative of Stephens' guilt, his guilt was conclusively proven by other evidence.

The prosecution's case was that the killings occurred close to midnight on Thursday June 9, 2006. This was when Jamilla and Monica's neighbor, Teresa Greene, heard several "pops" that sounded like fire crackers. **R. pp. 298-301.**

Monica was a drug dealer who sold cocaine and marijuana. **R. p. 131; 182-84.** Anyone wishing to buy drugs from her had to telephone a request first and then go to her residence to get the drugs. She kept some marijuana and cocaine that had already been bagged in the kitchen, and

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make a limited remand, under *White*, for the trial judge to determine whether Prodan's testimony satisfies the threshold burden for admissibility, as oppose to the expense of a retrial. This is especially true given (1) the post-trial change in the law; (2) the extensive *in camera* hearing and development of the record, as to the admissibility of the evidence; and (4) that a finding by either this Court or the trial judge that the evidence was admissible under *White* would avoid the unnecessary expense of a retrial, where the evidence is ultimately determined to have been properly admitted.

she kept larger amounts of drugs in her bedroom She did not allow anyone into the bedroom. **R.**

**pp. 131-37.**

In addition to SLED Agent Prodan's testimony, the State's other evidence showed that:

- Sessions and Stephens came by the residence of James Pearl, who also knew both victims and purchased drugs regularly from Jamilla, on Wednesday June 8<sup>th</sup>. They were in a blue Jeep Grand Cherokee that Sessions was driving. All three men were broke and, after Pearl got into the vehicle, his friends began talking about committing some robberies. While they were talking, Jamilla came up to the vehicle and got into a verbal argument with Stephens over drug money that he owed her. She was angry when she left. **R. pp. 119-22.**
- Sessions and Stephens then discussed robbing Jamilla. Stephens said that “[h]e He couldn't rob her because she knew him, but Jimmy Lee was like, I can rob her though, . . . she don't know me.” Because they knew that Jamilla would not voluntarily give them drugs or money, they said that they were “[g]oing to have to lay her down” or kill her. They asked Pearl to be the “door man,” but he refused to get involved and he got out of the vehicle. Pearl did not think that his friends knew that Monica was there. **R. pp. 122-24; 142.**
- Pearl, who learned about the murders on Friday June 10<sup>th</sup>, testified that Sessions called him later that night and invited Pearl to “come chill” with Sessions. When Pearl reached Sessions' location, he and Sessions “had a little fling” with a girl who was there named “Poo.” He and Sessions then went into the bathroom. Sessions had a “dinner plat[e] full” of cocaine and he allowed Pearl to snort some, using a drinking straw. Pearl surmised that the cocaine was Jamilla's based on its unique smell. While they used the drugs, Sessions told Pearl that he had killed Jamilla and Monica. Sessions also had some high-quality marijuana and the two friends smoked a “cigar of it. At some point, Sessions also showed Pearl a black semi-automatic weapon. However, Pearl was unsure whether it was a 9 mm. or a .40 caliber. **R. pp. 125-28.**
- When describing what he had done, Sessions told Pearl that “when he was in the house, and he was leaving out, he heard the shower go off, and . . . and the bathroom door opened up and [Monica] was standing there looking him in his face, so he said he rushed in the bathroom, put it - and shot her, and left her in the tub. **R. p. 129.**
- Sessions called Pearl on Saturday and he asked Pearl to send him a \$100.00 moneygram. While Pearl said that he would do so, he never sent it. **R. p. 130.**

- Pearl later had a telephone conversation with Stephens, in which Stephens accused him of sending the police to Connecticut after Sessions. Pearl denied doing this. **R. pp. 130-31.** Pearl did not initially come forward because he was afraid of Sessions and Stephens. **R. pp. 141-42.**
- Jamilla's first cousin, Rodney Turner, Jr., was at the house on Wednesday, June 8<sup>th</sup>. The house was neat at that time, **R. pp. 185-86**, but it was messy and articles were disturbed when police arrived on Friday the 10<sup>th</sup>.
- While Turner was there, Stephens came to the house between 9:30 and 10:00 p.m. on Wednesday. Stephens had come in a truck or SUV. "He had on all black when he came to the house. He was in the living room area." Also, he was "nervous, looking around." Stephens and Jamilla went outside briefly. When Jamilla returned, she was alone and she was mad. **R. pp. 186-87.**
- Shortly, thereafter, Turner drove Jamilla to another residence where she "re-up[ped]" her supply of cocaine. Afterwards, Turner drove her home. **R. pp. 187-88.**
- Turner had never seen Sessions at Jamilla's residence, but she had spoken about him. Apparently, the friendship between Sessions and Jamilla soured because of drug business disputes. **R. pp. 188-89.**
- Sometime between 9:00 and 10:30 p. pm. on Thursday June 9<sup>th</sup>, Matthew Junior Campbell saw Sessions outside of the apartment complex where Campbell lives. Sessions was dressed in black clothing and he had on a black hoodie. Also, he had a gun "[o]n his side." Sessions told Campbell that "he's got to get him a lick, a robbery . . . because he's got to get out of town because he's hot." Sessions then left the complex with another person on foot. The apartment complex is within walking distance of the crime scene. **R. pp. 238-41.**
- Christy Regina Peal, James Pearl's cousin, testified that on Thursday the 9<sup>th</sup>, she was at the residence that she shared with Mildred Brown and her sister-in-law "partying and playing cards" all day. James Pearl and Phonetia Hightower (Jamilla's cousin) were also present. She had smoked a cigar full of marijuana that day. Mildred, James Pearl and Phonetia were using cocaine, while James and Mildred were drinking. At some point, Christy, Mildred and Phonetia left the residence and, at Jamilla's prior request, went to Jamilla's residence. Christy then drove Jamilla to a local Super 8 motel. When Jamilla came out of the motel, Christy drove her home. Jamilla paid her \$ 40.00 for the ride. After that, Christy and the other women went home. **R. pp. 265-76; 280.**

- At some point, Sessions came to the residence . He was dressed in black clothing, including a black hoodie, and he was wearing gloves. Phonetia left with him. **R. pp. 276-82.**
- Christy saw Phonetia later that morning and Phonetia told her that Jamilla and Monica were dead. She did not take Phonetia seriously because Phonetia often lies. However, Christy went to Jamilla's house around 1:00 p.m. or so; and Jamilla did not respond to either a telephone call or the door bell. **R. pp. 282-85; 287.**
- Antwann Higgins was another first cousin of Jamilla and they had briefly lived together at the residence where the murders occurred, along with Higgins' girlfriend, Melissa Gomez. Higgins and Melissa moved to another location when he and Jamilla argued over the fact he "had raised my hand at Melissa. Yet, they were not having any difficulties at the time of the murders. **R. pp. 303-08.** Higgins and Melissa discovered the bodies at roughly 6 p.m. on Friday, June 10<sup>th</sup>. They went next door and had a neighbor call -911. **R. pp. 309-10; 313-20; 358-64.**
- Higgins denied ever stepping into Monica's bathroom and he voluntarily submitted to gunshot residue testing. The police searched his residence, and the took the four pairs of shoes. Police also found two weapons: a .32 caliber handgun and a .25 caliber handgun. **R. pp. 324-25; 327-31.** None of the items seized connected him to the murders.
- Craig Burris, who was incarcerated while awaiting trial for an unrelated murder, was in the Jet Age "social club" one night shortly after the murders. He saw Sessions there, and Sessions invited him to get high with him at the residence of an individual named "LeeLee," in Myrtle Beach area. When Burris arrived at the residence, "LeeLee was there with his girlfriend, and Stephens was present. **R. pp. 531-35.**
- While there, Burris snorted cocaine and smoked marijuana that Sessions provided. Sessions also gave him "about a gram or two" of cocaine. Sessions and he had often shared drugs with one another, but this was the most cocaine that Session had ever given to him. Sessions acted as if he was celebrating and he told Burris that he "just . . . hit a lick, just like a robbery or something." Burris saw Sessions and Stephens talk, but their conversations were private. **R. pp. 535-39.**
- Expert testimony established that cartridge casings found at the scene (**State's Exs. 55-56**) were fired by the same firearm. The two projectiles - one recovered from the floor of the shower in the bathroom and the other removed from Jamilla's head at autopsy - were also fired by a single firearm. The projectiles

“were most consistent with bullets that are loaded into some [.40 caliber] Smith and Weston . . . cartridges.” **R. pp. 616-19.**

Thus, the State had established overwhelming evidence of guilt, separate and apart from Agent Prodan’s testimony. *See Bailey*, 298 S.C. at 5, 377 S.E.2d at 584.

Additionally, Agent Prodan’s testimony, although expert in nature, did not identify Sessions, Stephens or any specific individual as the perpetrator. Rather, Prodan was not given any information about the defendants; he did not attempt to develop a profile of either man; and he did not express any opinion about either defendant’s guilt or innocence. Thus, much like the testimony of the prosecution’s experts concerning MSBP in *Cutro* or the evidence in *Spann*, his focus was solely upon the crime scene and the victim. Thus, any error “could not reasonably have affected the result of the trial.” *See Sherard*, 303 S.C. at 175, 399 S.E.2d at 596.

**CONCLUSION**

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

Respectfully submitted,

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December 29, 2010.

**STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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**Appeal from Horry County  
The Honorable Steven H. John, Circuit Court Judge**

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**THE STATE,**

**RESPONDENT,**

**V.**

**CHRISTOPHER M. STEPHENS,**

**APPELLANT.**

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**CERTIFICATE OF SERVICE**

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I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record, Robert M. Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady St., Ste. #401, Columbia, South Carolina 29201.

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

This 29<sup>th</sup> day of December, 2010.

  
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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Horry County  
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THE STATE,

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APPELLANT.

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CERTIFICATE OF COMPLIANCE

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 29<sup>th</sup> day of December, 2010.



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