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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JIMMY LEE SESSIONS,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

The trial judge committed reversible error by allowing into evidence a pair of tennis shoes alleged to connect Sessions with prints left at the crime scene, as the State failed to establish the provenance of the shoes before December 2008, when they were taken from a bag at the detention center purported to contain Session's personal belongings.

2.

The trial judge committed reversible error by allowing SLED "victimologist" Mike Prodan to testify about the "victiomology, method of operation, motive, things like that," of the murders, as his testimony violated Rule 702, SCRE, *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), and – on point as a case can be, since it involves the same witness— *State v. Tapp*, S.C. Ct. App. Opinion No. 4529, refiled February 18, 2010.

STATEMENT OF THE CASE

On February 2 through 6, 2009, Jimmy Lee Sessions and Christopher Stephens stood trial in Horry County, before Judge Stephen H. John and a jury, on indictments charging Sessions with two counts of murder and one count each of first-degree burglary and armed robbery and Stephens accessory before the fact of the two murders and armed robbery. The State alleged that in June 2006 Sessions, with the assistance of Stephens, had robbed and murdered a mid-level drug dealer, Jamilla Hytower, and her roommate, Monica Wall.

The first trial of these charges in November 2008 ended with the judge declaring a mistrial (and dismissing accessory charges against Christopher Stephens' brother, Marshall, for lack of evidence) after the jury deadlocked. The State's case against Sessions and Stephens depends almost entirely upon the testimony of James Pearl, who claims he opted out of their plan to rob and murder Hytower. R. p. 122, line 22 – R. p. 125, line 18.

On trial, the defense focused upon the unreliability of the State's evidence against Sessions and Stephens and pointed out that several other suspects had motives to murder Hytower and Wall as well. The jury convicted both defendants as charged, and the judge sentenced Sessions to concurrent terms of life imprisonment for the two murders, thirty years for first-degree burglary and thirty years for armed robbery, and Stephens to concurrent terms of forty years on each of the two accessories before the fact of murder and thirty years for accessory before the fact of armed robbery.

ARGUMENT

1.

The trial judge committed reversible error by allowing into evidence a pair of tennis shoes alleged to connect Sessions with prints left at the crime scene, as the State failed to establish the provenance of the shoes before December 2008, when they were taken from a bag at the detention center purported to contain Session's personal belongings.

The person who murdered Jamilla Hytower and Melissa Gomez quite possibly left shoeprints in a bathroom and in the kitchen. R. p. 416, lines 14-19; R. p. 459, line 22- R. p. 460, line 10. The murders occurred in July 2006. Sessions was arrested in Connecticut three months later. R. p. 430, lines 8-19. A private extradition company transported him to Horry County on November 27, 2006. R. p. 434, lines 9-15.

On May 11, 2007, the detention center issued a memo stating that inmates would no longer be allowed to possess their own shoes. R. p. 436, lines 8-10. A captain with the detention center testified:

> The memo instructed the officers to begin on the following Sunday collecting them and placing them in the property bag. ... The officers would have collected them. They put them in a clear plastic bag and then they put them in the inmates' property bag.

R. p. 436, lines 10-17. "[W]e have no way of knowing that these are the ones [Sessions] wore in," she admitted, nor was she present "when they were collected." R. p. 490, lines 12-22. Moreover, "[a]ny officer" at the detention center had access to the room where the inmates' personal belongings were kept. R. p. 438, lines 20-25. The State seized the pair of shoes alleged to belong to Sessions from the property room in December 2008. R. p. 429, line 24 – R. p. 430, line 6.

Defense objected to the admission of the shoes on the ground that "we would need to have somebody to say how they got into this chain and I don't think we have that." R. p. 431, lines 5-22; R. p. 474, lines 22-24; R. p. 486, line 23- R. p. 487, line 3. The judge overruled the objection and the shoes were admitted into evidence. R. p. 487, line 20 – R. p. 489, line 25.

A SLED expert in footwear impression examination testified that the tennis shoes taken from the detention center were consistent with the prints found in the kitchen and the bathroom at the crime scene. R. p. 498, lines 19-24; R. p. 505, line 23- R. p. 506, line 20. The Assistant Solicitor exploited this evidence in closing:

> Told you these shoes came off Jimmy Lee Sessions… [T]hey are consistent with a print left where no print should be. … Don't reward him because he was not smart enough to get rid of those shoes.

R. p. 1009, lines 1-20.

State v. Glenn, 328 S.C. 300, 492 S.E.2d 393, 395 (1997), succinctly summarizes the chain-of-custody law:

> Because fungible items such as drugs or blood samples are not readily identifiable and may be easily tampered with, the party offering such items into evidence must establish a chain-of-custody as far as practicable. [Citations omitted.] Where the analyzed substance is passed through several hands, the evidence must not leave it to conjecture as to had it and what was done with it between the taking an analysis. However, the proof of chain-of-custody need not negate all possibility of tampering, but instead must only establish a complete chain of evidence as far as practicable. [Citations omitted.]
>
> While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence – that is evidence that is unique and identifiable – the establishment of a strict chain

> of custody is not required … [i]f the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit nearly on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. On the other hand, if the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering of contamination, the sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimony tracing the "chain-of-custody" of the item with sufficient completeness to render it reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with. [Citations and quotation marks omitted.]

See, also, *State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2006).

In short, the State was unable to account for these tennis shoes until after they were removed from personal-property room in December 2008, one month after the case against Sessions and Stephens ended in a mistrial. No witness testified that those shoes were ever worn by Sessions.

Due to this failure in the chain of custody, the Court should reverse Sessions' convictions and remand for a new trial.

2.

The trial judge committed reversible error by allowing SLED "victimologist" Mike Prodan to testify about the "victiomology, method of operation, motive, things like that," of the murders, as his testimony violated Rule 702, SCRE, *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), and – on point as a case can be, since it involves the same witness— *State v. Tapp*, S.C. Ct. App. Opinion No. 4529, refiled February 18, 2010.

In February 2009, SLED "victimologist" Mike Prodan testified about "victimology, method of operation, motive, things like that" – the Assistant Solicitor's description of his content—in an effort to bolster the State's forensically-troubled prosecution of Sessions and Stephens. On April 9, 2009 the Court of Appeals, in an opinion since withdrawn, found Prodan's testimony about "victimology" to be both irrelevant and unduly prejudicial. *State v. Tapp*.

Shortly afterwards, the Supreme Court decided *State v. White*, 676 S.E.2d 687, which held, "All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's singular gatekeeping function in insuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." The Court of Appeals then granted rehearing in *Tapp*, and in its refiled opinion, found that it was error to qualify Prodan as an expert witness because:

> [W]ithout the guidance of the *White* decision, Tapp was not able to sufficiently develop and pursue theories in 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.

In the present case, the State gave the defense no notice that they intended to call Prodan as an expert witness in victimology. R. p. 572, line 21 – R. p. 573, line 16.

The defense objected to Prodan's testimony on the grounds of relevance and as speculative. R. p. 582, lines 8-18; R. p. 602, lines 6-18. The judge overruled the objections and allowed Prodan to testify. He essentially took the facts as presented by the State and constructed a narrative supporting the State's theory of the case. Prodan's testimony is reproduced in the Record on Appeal at pages 568 through 611. A sense of its content is given by the following exchange:

> Assistant Solicitor: What is the significance of finding no drugs [and] no money in the house of [a] mid-level drug dealer?
>
> Prodan: It's a reasonable conclusion that the motive was... the forcible taking of the money and the drugs and that the individual was willing to kill to do that.

R. p. 605, lines 13-17. The Assistant Solicitor exploited Prodan's testimony in closing to bolster the State's case. R. p. 1010, lines 17-20.

In short, Prodan's testimony violated Rule 702, *State v. White* and –obviously— *State v. Tapp*. For this reason as well, the Court should reverse Sessions' convictions and remand for a new trial.

Respectfully submitted,

Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEY FOR APPELLANT

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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Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

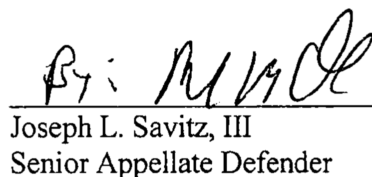
V.

JIMMY LEE SESSIONS,

APPELLANT

CERTIFICATE OF SERVICE

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, Room 519, Columbia, SC 29201, this 29th day of December, 2010.



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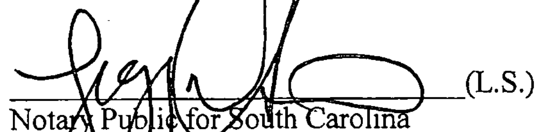
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STATE OF SOUTH CAROLINA IN
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STATEMENT OF ISSUES ON APPEAL

1. The trial judge committed reversible error by allowing into evidence a pair of tennis shoes alleged to connect Sessions with prints left at the crime scene, as the State failed to establish the provenance of the shoes before December 2008, when they were taken from a bag at the detention center purported to contain Sessions' personal belongings.

2. The trial judge committed reversible error by allowing SLED "victimologist" Mike Prodan to testify about the "victimology, method of operation, motive, things like that," of the murders, as his testimony violated Rule 702, SCRE, *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), and - on point as a case can be, since it involves the same witness - *State vs. Tapp*, S.C. Ct. App. Opinion No. 4529, refiled February 18, 2010.

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the trial judge properly allowed the State to introduce **State's Ex. 88**, Sessions' tennis shoes, into evidence because the State established an adequate foundation for their admission, and Sessions' argument about the insufficiency of the chain of evidence goes more to the weight he feels that the jury should have accorded to these non-fungible items and not to their admissibility?

II. Whether Sessions' challenge to the State's expert testimony on crime scene analysis and victimology, given by SLED Agent Michael Prodan, is procedurally barred because his relevancy objection is too general to preserve any issue for appellate review. Alternatively, whether the trial judge abused his discretion by allowing the State to introduce the evidence; or, if there was error, any error was harmless beyond a reasonable doubt?

STATEMENT OF THE CASE

The Horry County Grand Jury indicted Appellant, 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). Stephens was indicted for two counts of accessory before the fact of the two murders and armed robbery. The charges stemmed from the homicides of Jamilla Hightower and Monica Wall. Johnny Gardner, Esquire, represented him on these charges. Bobby G. Frederick and Laura L. Hiller, Esquires represented Stephens. 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 Marshal Stephens were dismissed for lack of evidence.

He received a second jury trial on these charges before the Honorable Stephen H. John on February 2-6, 2009. Stephens was jointly tried with him. The jury found Sessions guilty of all three charges and Stephens guilty of the charges against him.

Sessions received concurrent sentences of life imprisonment for the murders and concurrent thirty year sentences on the other offenses. Sessions received current sentences of forty years imprisonment for the accessory convictions. A timely Notice of Appeal was served and filed y each defendant. This appeal follows.

ARGUMENTS

I. The trial judge properly allowed the State to introduce State's Ex. 88, Sessions' tennis shoes, into evidence because the State established an adequate foundation for their admission, and Sessions' argument about the insufficiency of the chain of evidence goes more to the weight he feels that the jury should have accorded to these non-fungible items and not to their admissibility.

Sessions maintains that the trial judge erroneously allowed the State to introduce his tennis shoes, **States' Ex. 88**, since the State allegedly failed to establish an adequate chain of custody before they were removed from a bag containing his personal belongings at the J. Reuben Long Detention Center. Respondent submits that his argument lacks merit because the State established an adequate foundation for the introduction of the tennis shoes, and that his argument about the supposed inadequacy of the chain of custody goes more to the weight he felt that the jury should have accorded to these non-fungible items and not to their admissibility. Alternatively, any error was harmless beyond a reasonable doubt.

A. How the issue arose at trial.

1. The crime scene.

Officer John Iannone, of the City of Myrtle Beach Police Department's Crime Scene Unit, processed the crime scene: the Myrtle Beach, South Carolina resident of Jamilla Hightower and Monica Walls. Jamilla was found face-down in her bedroom. She had pillowcase over her head with a single gunshot wound to the head. Monica was found in the bathroom adjacent to her bedroom in an identical manner. The primary differences were that Monica was nude, that she had defecated in her bedroom and that there was some feces on the bathroom floor. **R. pp. 390-417**. *See also* **R. pp. 370-404**.

In Monica's bathroom, Officer Iannone found "fecal matter" on the floor and footprints that

appeared to have been left by someone stepping in it. He photographed what he had found. **State's Ex. 82**. He photographed it again after he had applied black magnetic power on the floor. **State's Exs. 63-64; State's Exs. 77-81; State's Exs. 83-84**. He then lifted the prints by using "gel lifts." **R. pp. 416-21**.

2. Hearing on admissibility of Sessions' shoes.

The trial judge held an *in camera* hearing on the admissibility of Sessions' tennis shoes immediately after Officer Iannone's testimony. The State proffered that Capt. Susan Safford would testify that **State's Ex. 88**, the tennis shoes, were taken from him sometime after he arrived at the Detention Center and that they were placed in a bag containing his personal belongings. When she received a search warrant, in December 2008, she retrieved the shoes from a bag containing Sessions' personal property. **R. p. 429**.

Sessions objected on the grounds of relevance. "I believe these shoes were taken last month, or maybe even in December, for this crime that occurred two and a half years ago. I don't see any direct probative correlation to these shoes." **R. p. 430, ll. 3-7**. The trial judge ascertained from the State that Sessions had been arrested three months after the crime (in September 2006) in Connecticut. He remained in custody until he was transported to South Carolina. The shoes came with him and were later seized. **R. p. 430, ll. 8-24**.

Sessions argued that his objection was "even clearer now, because we don't have any Connecticut folks here. . .to testify about that." **R. p. 431, ll. 4-7**. The trial judge found that a defendant's shoes, unlike blood, semen or other similar articles, were "not such that they can be destroyed or diminished"; and that Sessions' chain of custody argument was something he could advance on cross-examination but did not bar their introduction. **R. p. 431, ll. 11-19**. Sessions,

however, asserted that someone needed to testify as to how the shoes got into the chain of evidence, which was not present. **R. p. 431, ll. 20-23.**

Capt. Susan Safford then testified *in camera* that she is employed at the J. Reuben Long Detention Center. Her responsibilities include overseeing operations at that facility. Also, she has access to the inmates' personal property. Under Detention Center policy, officers confiscate "any items [that inmates] are not allowed to have in the back of the facility" at booking. The property is then placed into a hanging bag on a conveyor system, much like one would see in a laundromat. Each bag is unique to the defendant and the room where these bags are kept is locked. Although Detention Center staff have access to the room, the defendants do not. If an inmate wishes to release an item of personal property, they have to execute a property release form.[1] **R. pp. 433-37.**

An extradition company brought Sessions to the Detention Center on November 26, 2006. His shoes were not confiscated at that time because they were not deemed contraband. However, a memorandum was issued on May 11, 2007 stating that inmates were no longer able to wear their personal shoes. So officers began collecting inmates' shoes the following Sunday. Sessions' shoes would have been seized at that time, placed into a clear plastic bag and placed into his personal property bag. Based upon an inquiry from the Solicitor's Office, she later pulled up the bag number assigned to Sessions, she retrieved **State's Ex. 88** (the tennis shoes) from his personal property bag; and she gave the tennis shoes to an investigator from the Solicitor's Office. **R. pp. 434-39.**

Sessions elicited on cross-examination that the May 11th memorandum was issued because

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[1] Officers thereafter check the identification of the person who retrieves the property and that passes must be signed for it.

"[a] lot of contraband was coming [into the Detention Center] inside shoes."[2] He also established that some inmates traded their shoes in the jail, but there was no evidence that Sessions' shoes had been traded. **R. pp. 437-38.**

Following additional cross-examination by Stephens, Stephens argued that the shoes could not be admitted because the State could not establish that the shoes were, in fact, Sessions' shoes. **R. pp. 440-41.** However, the trial judge found that Sessions had been transported by the transportation company to the jail in November. Then, in May 2006, there was a "change in policy," and Sessions' shoes were seized. The Detention Center then kept the shoes "until they [were] given over according to the Subpoena, so they are the Defendant's shoes, they were seized from him." While he noted that the defendants "have a lot of questions y'all can ask on cross-examination," he found that "there is no question they are the defendant's shoes, and they were seized from him." **R. p. 441, ll. 6-19.**

Stephens then argued that the shoes were irrelevant. However, the trial judge found that the shoes were relevant and that there "probative value outweighs any prejudice to the defendant." Also, he found that the matters raised by Stephens could be addressed on cross-examination. **R. p. 441, l. 20 - p. 442, l. 9.**

Finally, Gardner argued that the prejudicial effect out-weighted the probative value of the shoes because to cross-examine Officer Safford about the matters raised *in camera*, he would have to elicit that he had been incarcerated in Connecticut and he would have to establish that he was "in prison." The trial judge disagreed and, again, found that "the probative value of the evidence out-

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[2] She explained that it is difficult to property search shoes. "With inserts and soles and things." Therefore, the decision was made to no longer permit inmate's to wear their own shoes. **R. pp. 437-38.**

weighs any prejudice to [Sessions]." So, he allowed the State to admit the tennis shoes. **R. p. 442, l. 11 - p. 443, l. 3.**

Despite this ruling, the trial judge offered to restrict the State from eliciting prejudicial matters if Sessions wanted him to do so. Defense counsel and Sessions were permitted to discuss this but the *in camera* hearing concluded without any further discussion of Sessions' desire in this regard. **R. pp. 443-44.**

3. Additional testimony before the judge.

Officer Bobby Jordan, who is employed by Myrtle Beach Police Department's Crime Scene Unit, then testified about his involvement in the case. On June 10, 2006, at which time he recovered a projectile, pursuant to a search warrant from underneath the shower stall of Monica's bathroom. **R. pp. 445-49.** Det. Vincent Dorio also testified about his involvement in the case. **R. pp. 451-55.**

Then, Investigator Carol Allen, who was the shift supervisor over the Myrtle Beach Police Department's Crime Scene Unit in June 2006, testified that she had processed the kitchen floor of the residence on June 9, 2006. At that time, she dusted the kitchen floor, using two different types of powders, in an effort to develop possible prints. She was able to observe "two partial" shoe prints (*see* **State's Ex. 52**) and, using "pro lifts" **(State's Exs. 53-54)** she lifted each of the prints that she saw. **R. pp. 458-62.**

4. Capt. Safford's testimony.

Capt. Safford was the next witness. Immediately before her testimony, Sessions' counsel informed the trial judge that Sessions "wants to raise the shoe issue, so I won't be able to stipulate that the shoes come in." The trial judge instructed the State to establish "as complete a foundation as you can" because, although the trial judge anticipated ruling that they were admissible, he

expressly stated that he would hear any further arguments that Sessions had against their admissibility. He also instructed the defense that if there was any objection when the State sought to admit the shoes, he would send the jury out and he would hear any additional objection. **R. pp. 474-75.**

Capt. Safford then testified in the presence of the jury. Her testimony before the jury was almost identical to her earlier, *in camera* testimony. When the State offered the tennis shoes into evidence as **State's Ex. 88,** both defendants objected. The trial judge permitted both defendants to cross-examine Capt. Safford before he ruled on their objections. **R. pp. 476-72.**

Sessions' cross-examination established that Capt. Safford did not personally collect the tennis shoes and that she did not have personal knowledge about the their collection. The May 2007 memorandum addressing inmate footwear "was prompted to reduce contraband coming into the facility." Although she did not have any knowledge of inmates within the Detention Center selling shoes, she was aware that inmates traded their shoes. She was unable to determine whether the shoes collected from Sessions were the shoes that he had when he first arrived at the Detention Center. **R. pp. 482-84.**

Stephens again elicited that shoes had been used in the jail as a form of currency when traded. Also, all of the Officers at the Detention Center have access to the property room. **R. pp. 484-85.**

The State, on re-direct, elicited that her duties include making sure that standard operating procedures are followed. Officers were instructed to bag the shoes, place the defendant's name on the bag and place the bag in the defendant's personal property bag in the evidence room. The State also elicited that the defendants do not have access to the property room. **R. pp. 485-86.** Finally, Sessions, again, established that Capt. Safford did not personally take the shoes from Sessions. **R.**

p. 486.

5. **Further *in camera* arguments and the trial judge's ruling.**

Sessions then renewed his earlier objection *in camera*. Stephens joined in the objection and added that there was not a sufficient foundation to establish that the shoes were Sessions because the shoes were traded as a form of currency. **R. p. 487.**

The trial judge found that an adequate foundation had been established because the evidence supported the inference that Sessions was in possession of the shoes and that the shoes were his. Thus, the threshold requirement for admitting the tennis shoes had been met. **R. p. 487, l. 19 - p. 488, l. 1.**

In his further findings, he again found that the shoes were non-fungible items, unlike blood, semen or other bodily fluids; that the chain of custody requirements for non-fungible items was not as strict as it is for fungible items; and that the State had "shown a proper chain of custody in this particular case." Likewise, he again found that the defendants' arguments raised issues that were proper for cross-examination but that they did not bar the admission of the tennis shoes. Additionally, he found that "the shoes themselves are certainly relevant to the issues at hand, any prejudice to the defendants is more than out-weighed by the probative value regarding this particular piece and type of evidence, and therefore I am going to allow the shoes into evidence." **R. p. 488, ll. 2-17.**

However, he stressed that his ruling did not prevent the defendants from fully exploring all issues on cross-examination. He then indicated that he would tell the jury that he had allowed **State's Ex. 88** into evidence, and that Sessions would be permitted to continue with this cross-examination. **R. p. 488, l. 18 - p. 489, l. 7.** This procedure was followed when the jury was brought

back into the courtroom.

6. Expert testimony regarding State's Ex. 88.

S.L.E.D. Agent Thomas Darnell is assigned to the Forensic Service Laboratory, where he is the Supervisor of the Latent-Print Department. He was qualified, without objection, as an expert in the area of footwear impressions. **R. pp. 494-96.**

In connection with this case, he received the gel lifters (**State's Exs. 57-62**) taken from the bathroom and the taped lifts (**State's Exs. 53-54**) that were taken from the kitchen. He was also given five pairs of shoes and asked to compare the shoes to the questioned impressions.[3] He concluded that the heal of Sessions' left shoe was consistent with the gel lift from Monica's bathroom floor that was introduced as **State's Ex. 61**. "In other words, it corresponded in physical design, size and shape with the left shoe of **State's 88**." He also compared the other shoes that had been submitted with **State's Ex. 61**, but they were not consistent with the unknown impression. **R. pp. 496-504; 508-09.**

Another gel lift from the bathroom was too "partial to render any sort of conclusion." One of the taped lifts from the kitchen corresponded to four of the pairs of shoes that had been submitted - including **State's Ex. 88** - because all four pairs "had the same outsole design." He added that this lift "was extremely partial, which means that all I could say about that particular impression was that . . . it corresponded in physical design and I couldn't go any further, such as the size or shape or anything such as that, just because of the amount of impression was so limited." **R. pp. 504-09; 513.**

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[3] In addition to **State's Ex. 88**, he received four pairs of shoes belonging to Antwann Higgins, **State's Ex. 17** and **State's Exs. 85-87**, for comparison. **R. pp. 331-32; 422; 503.**

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). 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. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003); *State v. Martin*, 347 S.C. 522, 533, 556 S.E.2d 706, 712 (Ct. App. 2001).

Contrary to Sessions' argument, the State was not required to establish a strict chain of custody for **State's Ex. 88** because tennis shoes are non-fungible. As the Supreme Court has explained,

> While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence-that is, evidence that is unique and identifiable-the establishment of a strict chain of custody is not required: If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. *State v. Glenn*, 328 S.C. 300, 305-306, 492 S.E.2d 393, 395 (Ct.App.1997).

State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741-742 (2005) ("Given the serial number and markings on the gun, and the fact that a gun is a non-fungible item, we find the chain of custody

established by the state in this case was sufficient."). The Court of Appeals reached the same result in *State v. Glenn*, 328 S.C. 300, 305-06, 492 S.E.2d 393, 395 (Ct. App. 1997):

> If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. On the other hand, if the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering or contamination, sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimony tracing the "chain of custody" of the item with sufficient completeness to render it reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with.

(quoting John W. Strong, 2 *McCormick on Evidence* § 212 at 527 (4th ed. 1992)). *See also State v. Rogers*, 361 S.C. 178, 186-187, 603 S.E.2d 910, 914-15 (Ct.App. 2004).

Here, the State established a sufficient foundation to permit introduction of Sessions' tennis shoes through Capt. Safford's testimony. As discussed, she testified that Sessions would have had his shoes when hee was received on November 27, 2006. His shoes would have been taken from him after the May 11, 2007 memorandum made inmates' shoes contraband. Consistent with Detention Center policy, the shoes then would have been placed into a clear plastic bag, and placed into his personal property bag. The shoes remained there until Capt. Safford retrieved them at the request of the Solicitor's Office. **R. pp. 434-39**.

Further, each inmate's personal property bag is given a number that is unique to the inmate, and the property room is locked. Although Detention Center officers can access the property room, the inmates cannot. **R. pp. 434-39**. Moreover, there was no evidence presented that Sessions had traded his shoes that he was wearing when he was received at the Detention Center from the

transportation company or that he had acquired **State's Ex. 88** through trade, or otherwise, after he arrived at the Detention Center.

As a result, a extremely strong, reasonable inference from her testimony is that **State's Ex. 88** are Sessions' tennis shoes. Thus, the State satisfied the requirements of *Freiburger* and *Glenn*. Also, Agent Darnell's expert testimony makes **State's Ex. 88** probative of Sessions' guilt because the shoe print was left in Monica's fecal matter that, inferably was excreted at or near the time of her death.[4] Because Sessions has abandoned his Rule 403, SCRE, argument on appeal, by not raising it on appeal, *see 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), the trial judge's ruling must be affirmed.

Finally, and to the extent that the Court finds that the trial judge erroneously allowed the prosecution to introduce **State's Ex. 88,** Respondent submits that the ruling 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 **State's Ex. 88** was both relevant and probative of Sessions' 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,

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[4] As noted, Monica was found nude. Although not previously discussed, the State presented evidence that there was feces in Monica's bedroom. **R. pp. 376-79; 393-94.** Thus, a reasonable inference is that she defecated, at or near her death, out of fear.

2006, since 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 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, discussed in **Argument II**, *infra*, 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 8th. 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 voluntarilty 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 10th, 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 8th. 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 10th.

- While Turner was there, Stephens came to the house between 9:30 an 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 Thurday June 9th, 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 9th, 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 10th. 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 either the evidence connecting Sessions to the shoe print or Agent Prodan's testimony. *See Bailey*, 298 S.C. at 5, 377 S.E.2d at 584. Moreover, Sessions presented testimony from his own expert in footwear identification, Donald Girndt. Girndt did not dispute Agent Darnell's findings, except as to the partial shoe print in the bathroom that Agent Darnell had opined was not sufficient for comparison purposes. Girndt opined that this print was inconsistent with **State's Ex. 88. R. pp. 666-73.** Particularly in light of Girndt's testimony, 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. Sessions' challenge to the State's expert testimony on crime scene analysis and victimology, given by SLED Agent Michael Prodan, is procedurally barred because his relevancy objection is too general to preserve any issue for appellate review. 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, Sessions 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 Sessions' challenge to Agent Prodan's testimony is procedurally barred because his relevancy objection is too general to preserve any issue for appellate review. 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 it is a low, moderate or high risk of being a victim. 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 then 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.[5] Here, the murders occurred in Jamilla's residence, which is where law enforcement

[5] 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.**

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,[6] 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.**[7]

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

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[6] For example, the crime scene reports did not reflect that the victims' bodies and had been washed or that any effort was made to wipe for prints. **R. p. 592.**

[7] 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.**

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. p. 600-02; 604-05.**

Over *Stephens* renewed objection to lack of relevancy, Agent Prodan was 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. Sessions' relevancy objection does not preserve issue for appellate review.

As shown, Sessions' only objections were that the State had committed a discovery violation

and that the testimony was not relevant. **R. pp. 572-73; 579; 582.** On appeal, he has not challenged the trial judge's ruling that there was no *Brady* violation. Therefore, that argument has been abandoned. *Sullivan, supra.*

In arguing that Prodan's proffered testimony was not relevant, Sessions merely stated, "[n]ow the objection is relevance." **R. p. 582, l. 18.** He did not argue either how or why the proffered testimony was supposedly irrelevant. He also 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.[8]

Here, 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.[9] His only objection was the unspecified lack of relevancy.[10] Thus, his argument on appeal is procedurally barred. *See State v.*

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[8] 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.

[9] This is hardly surprising, in light of the fact that Sessions had his own expert in the area of crime scene analysis, Mr. Girndt. *See* **R. p. 665.**

[10] He suggests that he objected to Prodan's testimony as speculative. However, that was part of *Stephens*' objection and he cannot avail himself of that objection because he did not join in it. *E.g.*, *State v. Carriker*, 269 S.C. 553, 555, 238 S.E.2d 678, 678 (1977) (holding that the appellant's assertion of error

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 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 for a new trial, after the verdict in the sentencing phase, based on prejudice arising from various items contained in the wallet).[11] 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.

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was not preserved because "appellant's counsel made no objection ... at trial. While appellant's co-defendant did object, the appellant may not utilize the objection of another defendant to gain review"); *State v. Brannon*, 347 S.C. 85, 89, 552 S.E.2d 773, 775 (Ct.App.2001) (trial judge's failure to suppress evidence not preserved where appellant did not join in co-defendant's motion to suppress); *State v. Nichols*, 325 S.C. 111, 123, 481 S.E.2d 118, 124 (1997) ("Finally, the remaining issues raised by appellant are not preserved for review since appellant failed to object during trial or join in his co-defendant's objections.").

[11] *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").

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 Sessions 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* 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").[12] 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,

[12] 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).

"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 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.[13] Likewise, through application of his expertise to the evidence 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.[14]

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,

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

[14] 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).

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 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*.[15]

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[15] 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 & Psychdl. 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. Morever, 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 he 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.

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 and the Court of Appeals' decision in *Tapp* must be reversed because any error in admitting Agent Prodan's testimony was harmless and non-prejudicial beyond a reasonable doubt for the reasons set forth in **Argument I,** *supra*. 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.

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 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.

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

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

THE STATE,

RESPONDENT,

V.

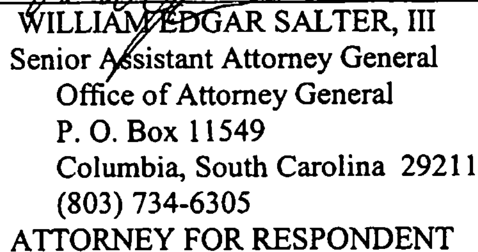
JIMMY LEE SESSIONS,

APPELLANT.

CERTIFICATE OF COMPLIANCE

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 29th day of December, 2010.



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APPELLANT.

CERTIFICATE OF SERVICE

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, Joseph L. Savitz, 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 29th day of December, 2010.

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