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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2022-000160

The State, ...Respondent,

v.

Johnathan Olin Batchelor,.....Appellant.

AMENDED
INITIAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

Johnathan Batchelor replies to the State's Brief of Respondent to correct misstatements of facts and misleading arguments. Some of the misstatements of fact occurred in the State's Statement of Facts, which will be addressed prior to replying to each questioned presented.

STATEMENT OF FACTS

The State contends Sergeant Malpass "did not have much chance to talk with Victim alone because Appellant hovered nearby" and "repeated the same questions over and over, interfering with [her] ability to talk with Victim." Brief of Respondent, at 4. This contention is refuted by Officer Malpass' body worn camera video, which is in evidence as Defense Exhibit 1.

The State contends, "Sergeant Malpass noted blood collected inside the garage, pooling on one side of the garage as if something was parked there at the time the blood accumulated." Brief of Respondent, at 4. Mr. Batchelor, however, contested the fact that there was room enough to park a car inside the garage at the time of the crime, as the garage was cluttered at the time of the crime. Tr. 439, State's Exhibit 10, R. *.

The State contends Ms. Batchelor saw her husband "walking hand-in-hand with another woman." Brief of Respondent, at 4-5. This statement misrepresents the trial testimony. Tr. 68 ("I saw Jonathan walking with some woman side by side, just about holding hands with each other").

The State describes the assault that occurred after Ms. Batchelor "opened the garage door and drive inside." Brief of Respondent, at 5. As seen above, whether there was room

to park a car inside the garage was disputed at trial. This account of the events of the crime is evidence of memory issues that formed part of the defense at trial.

The State contends Ms. Batchelor did not know about Mr. Batchelor's "pre-marital affair until after she woke of from the coma." Brief of Respondent, at 6. Ms. Batchelor testified she knew about Mr. Batchelor's pre-marital affairs before they got married. Tr. 95. She claimed she did not know that her father had caught Mr. Batchelor in one of the affairs until after she woke up from the coma. Tr. 96.

The State's brief implies Lieutenant Gary found an unfired hollow point round by the garage that matched the live .38 Hornady rounds found inside the home. Brief of Respondent, at 7. Lieutenant Gary, who was never qualified as an expert, actually testified he found a fired round. Tr. 122. The State further relies on Lieutenant Gary's overstatement about the consistency of the two fired rounds recovered during the investigation. Brief of Respondent, at 10. Whether this fired round was a .38 or a 9mm was contested at trial and relevant to this Court's resolution of Question I, *infra*.

Regarding informant Dustin Tiller's testimony, the State contends Mr. Batchelor told the informant that he "wait[ed] outside" and implies the assault occurred in the driveway. Brief of Respondent, at 9. As seen above, Ms. Batchelor testified she parked inside the garage. The inconsistences between Ms. Batchelor's account of events and Mr. Tiller's testimony illustrates the inherent dangers of relying on jailhouse informants, which is relevant to this Court's resolution of Questions II and III, *infra*.

ARGUMENTS IN REPLY

Question I

Did the trial judge err as a matter of law by denying Johnathan Batchelor's motion to dismiss when law enforcement destroyed the physical evidence in the case without providing Mr. Batchelor with his due process opportunity to independently examine two projectiles to establish that two weapons were used in the assault on his wife, thereby contradicting the State's theory of the case and establishing his actual innocence?

The State acknowledges that "[t]wo bullet fragments were destroyed." Brief of Respondent, at 13. Mr. Batchelor argues these two bullet fragments "possessed an exculpatory value apparent before the evidence was destroyed and [he] cannot obtain other evidence of comparable value by other means." *State v. Cheeseboro*, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001); *see also Arizona v. Youngblood*, 488 U.S. 51 (1988). After acknowledging a hospital employee identified the fragment recovered from Ms. Batchelor as a 9mm, the State argues, "The prosecutor advised the trial court that the analyst determined both fragments were .38s."[1] Brief of Respondent, at 13. The prosecutor actually stated, "It's not a thirty-eight. It's a .38." Tr. 14. The prosecutor then argued "9mms and .38s can also often be used interchangeably"[2] and pointed to the firearms report. *Id*. The

[1] Statements of counsel are not evidence. It is well settled "[a]court cannot consider facts appearing only in argument of counsel." *Shinn v. Kreul*, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) (citing *Gilmore v. Ivey,* 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct.App.1986). *Cf. McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."). The Supreme Court of South Carolina recently reaffirmed this rule in *Owens v. Stirling*, Howard Adv. Sheet. No. 5, (Op. No. 28132) (Jan. 26, 2023), at 19 ("[W]e cannot rely on the arguments of counsel to fill in the record.").

[2] The State failed to produce any evidence to corroborate the argument that 9mms and .38s are interchangeable. As seen in footnote 1, *supra*, "[a]court cannot consider facts appearing only in argument of counsel." *Kreul*, 311 S.C. at 102, 427 S.E.2d at 700. Expert testimony would be necessary to support this assertion. *See* Rule 702, SCRE.

firearms report described the bullet fragments as "38/9mm fired bullet specimen[s]" and ultimately opined the bullet fragments "bear similar but insufficient microscopic marks to permit a positive identification to each other." R. *.[3]

The State did establish that the bullets were fired from the same weapon. Nor did the State establish the bullets were the same caliber. That the bullets might be different calibers fired from different weapons is readily apparent from the firearms report. Additional, independent examination of the bullet fragments might reveal these bullet fragments came from different firearms, supporting the defense theory that two people participated in the assault of Ms. Batchelor. *Compare* Tr. 440-47 (defense counsel arguing a "real possibility" that two people other than Mr. Batchelor committed this crime) *with* Tr. 448 (prosecutor arguing "there's absolutely no evidence" two other people committed this crime). Independent examination of the two bullet fragments would have resolved this controversy. Mr. Batchelor, accordingly, satisfies the requirements of *Cheeseboro*, and this Court should reverse the trial court and dismiss the charge.

[3] The State assigns significance the bullet fragments are consistent with Hornady ammunition and "[l]ive .38 Hornady rounds were recovered from the [Batchelor] house." Brief of Respondent, at 7; R. *. Mr. Batchelor does not contest the live rounds found in his house. Rather, he points to the need for further examination of the recovered bullet fragments. Hornady manufactures ammunition in multiple calibers. https://www.hornady.com/bullets/handgun/#!/ (last viewed April 7, 2023). The Firearms examiner did not match the bullet fragments to the live ammunition recovered from the house.

Question II

Did the trial court err by failing to exclude the testimony of Dustin Tiller, a jailhouse informant, serving a federal court sentence for conspiracy to traffic methamphetamine, when the trial judge operated under the mistaken impression that the court lacked the authority to evaluate the reliability of the informant's testimony?

The State acknowledges jailhouse informant Dustin Tiller "obviously testified with the hope of a benefit – a downward departure." Brief of Respondent, at 16; *id*, at 17 (acknowledging Tiller hoped for a downward departure).

Regarding how this question arose at trial, the State focuses on the informant's testimony and ignores the role of Mr. Batchelor's prosecutor in Mr. Tiller's federal sentence. Brief of Respondent, at 16-17. The State ignores the fact that Assistant Solicitor Jennifer Wells appeared at the informant's federal sentencing hearing. The trial court ultimately limited Mr. Batchelor's cross-examination about the prosecutor's role in the informant's current federal sentence and the informant's hopes that the prosecutor will appear at his re-sentencing hearing.

Regarding the ultimate legal question, the State relies on Rule 601(a), SCRE, regarding competency of witnesses to testify. Brief of Respondent, at 17-18. Johnathon Batchelor, however, relies on the well-established gatekeeping role of trial courts. Brief of Appellant, at 17-18.

The State next argues the trial courts' gatekeeping role for third party guilt and admissibility of Rule 404(b), SCRE evidence do not involve reliability or credibility determinations. Brief of Respondent, at 19-20. This argument is facially wrong. Regarding third party guilt, the trial judge must consider the reliability of the evidence, the Supreme Court of the United States held:

> While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

Holmes v. South Carolina, 547 U.S. 319, 326 (2006); *see id*., at 331 ("by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt"). A trial court, accordingly, must weigh the evidence before ruling on the admissibility evidence of of third-party guilt.

The State acknowledges that a trial court must exclude Rule 404(b) testimony if the witness's testimony is not "clear and convincing." Brief of Respondent, at 20. "Clear and convincing evidence is more than a mere preponderance, but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal. *State v. Simmons*, 384 S.C. 145, 159, 682 S.E.2d 19, 26 (Ct. App. 2009) (citing *State v. Fletcher,* 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008). A trial court, accordingly, must weigh the evidence of other bad acts.

The State does not acknowledge trial courts' gatekeeping role in the admissibility of expert testimony that requires a reliability determination. *Compare* Brief of Appellant, at 17-18 (citing *Watson v. Ford Motor Co.,* 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010), *with* Brief of Respondent, at 16-20.

In addition, to the examples identified in Mr. Batchelor's opening brief, trial courts must determine the reliability of child witnesses in a criminal sexual conduct with a minor case. *See, e.g., State v. Adams*, 430 S.C. 420, 428, 845 S.E.2d 217, 221 (Ct. App. 2020)

("We conclude the reliability concerns Adams raises based on [*State v. Michaels*, 136 N.J. 299, 642 A.2d 1372 (1994)] were satisfied here by the witness competency standard and within the framework of § 17-23-175, which in essence requires a pre-trial taint hearing.").

Trial courts routinely weigh evidence when determining admissibility. Although the admissibility of jailhouse informant testimony might be an issue of first impression in South Carolina, the well-established gatekeeping function of trial courts can oversee the admissibility of jailhouse informant testimony. Here, the trial court judge believed he lacked this discretion.[4] "A failure to exercise discretion amounts to an abuse of that discretion." *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (citing *Samples v. Mitchell,* 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997)). This Court should reverse the trial court, exclude Dustin Tiller's testimony, and order a new trial.

Question III

Did the trial court err by limiting Johnathan Batchelor's cross-examination of Dustin Tiller—in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution—by prohibiting Mr. Batchelor from questioning Mr. Tiller about his conversation with his plea counsel after waiving the attorney-client privilege by testifying about those conversations, prohibiting Mr. Batchelor from questioning Mr. Tiller about the Solicitor speaking in favor of Mr. Tiller at his federal court sentencing hearing, and limiting Mr. Batchelor's questioning of Mr. Tiller regarding the twenty-month reduction in his federal that he already received for his cooperation in Mr. Batchelor's prosecution?

Johnathon Batchelor alleges the trial court limited his right to confront jailhouse informant Dustin Tiller in three specific ways: (1) prohibiting him from questioning Mr. Tiller about his conversation with his plea counsel after waiving the attorney-client

[4] Responding to Question III, the State takes a different position than it argues in Question II: "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." Brief of Respondent, at 21 (citing *State v. Saltz*, 346 S.C. 114, 551 S.E.2nd 240 (2011). Here, the trial judge believed he did not have this discretion.

privilege by testifying about those conversations, (2) prohibiting him from questioning Mr. Tiller about the Solicitor speaking in favor of Mr. Tiller at his federal court sentencing hearing, and (3) limiting his questioning of Mr. Tiller regarding the twenty-month reduction in his federal that he already received for his cooperation in Mr. Batchelor's prosecution. Brief of Appellant, at 18-21. The State mischaracterizes Mr. Tiller's testimony about his conversations with counsel, ignores the prosecutor's participation in Mr. Tiller's federal sentencing hearing, and overstates the consequences of Mr. Batchelor's proposed cross-examination. Brief of Respondent, at 21-24.

The State argues the prosecutor merely asked Mr. Tiller whether his federal criminal defense lawyer, Jim Bannister, "explained the plea agreement to him." Brief of Respondent, at 21. The State ignores the cross-examination. During the proffer of Mr. Tiller's testimony, the prosecutor extensively questioned Mr. Tiller about his review of the plea agreement with Mr. Bannister. Tr. 170 ("When you singed this agreement with Mr. Bannister, did he go through the entire thing with you?"); Tr. 171 ("And did Mr. Bannister explain [paragraph 3 of the plea agreement] to you?"); Tr. 172 ("[D]id Mr. Bannister explain paragraph 5 to you?"); 174 ("[D]id Mr. Bannister go through paragraph 7 with you?"); and Tr. 178 ("So Mr. Bannister talked to you about all this, [when] you entered this agreement."). On cross-examination during the proffer, Mr. Tiller testified he and Mr. Banister discussed how providing information about people outside of his federal case might reduce his sentence. Tr. 188-90. Mr. Tiller further testified that he and Mr. Bannister discussed seeking an additional downward departure following his testimony in Mr. Batchelor's case, although he claimed they never discussed the amount of time that might be taken off the sentence. Mr. Tiller also testified he did not have a "number" in his mind

regarding reduction in time. Tr. 192-95. The jurors should have considered the credibility of this testimony. These "voluntary disclosure[s]" by Mr. Tiller "waive[d[the attorney-client privilege not only as to the specific communication disclosed, but also to all communications between" him and Mr. Bannister "on the same subject." *Floyd v. Floyd*, 365 S.C. 56, 90, 615 S.E.2d 465, 483 (Ct. App. 2005).

The State ignores the role Mr. Batchelor's prosecutor played and might still play in reducing Mr. Tiller's federal sentence. Mr. Tiller met with Ms. Wells on two occasions. Mr. Banister attended the first meeting. Tr. 178-79, 188-89. Mr. Tiller also testified about Ms. Wells appearing at his sentencing hearing. Tr. 190; *see also* R. * (Tiller federal plea agreement and sentencing hearing). Mr. Batchelor, the prosecutor, and the trial judge knew that Mr. Tiller's cooperation in Mr. Batchelor's prosecution resulted in an additional twenty-month reduction in Mr. Tiller's federal sentence. The jurors should have known this information so they would understand Mr. Tiller's participation in Mr. Batchelor's trial might further reduce his federal sentence.

"Included in the Confrontation Clause protection is the right to cross-examine any State's witness as to possible sentences faced when there exists a substantial possibility the witness would give biased testimony in an effort to have the solicitor highlight to a future court how the witness cooperated in the instant case." *State v. Gillian*, 360 S.C. 433, 454, 602 S.E.2d 62, 73 (Ct. App. 2004) (internal quotations omitted) *affirmed as modified on other grounds*, 373 S.C. 601, 646 S.E.2d 872 (2007). This Court should reverse the trial court, exclude the testimony of Dustin Tiller, and order a new trial. Alternatively, this Court should allow full cross-examination of Dustin Tiller.

Question IV

Did the trial court err as a matter of law by ordering a uniformed deputy, wearing body armor, and visibly carrying two sets of handcuffs, to escort Johnathan Batchelor to the witness stand, stand next to Mr. Batchelor during his testimony, and escort Mr. Batchelor back to the defense table, without conducting a hearing required by the Fourteenth Amendment to determine whether these unusual and enhanced security measures were necessary under the specific circumstances of this case and specific characteristics of Mr. Batchelor?

Johnathon Batchelor argues the trial judge should have convened a hearing before ordering a uniformed courtroom deputy to stand next to Mr. Batchelor during his testimony. Brief of Appellant, at 21-26. The State reframes this question as, "The trial court did not abuse its discretion in finding that security in the courtroom was not excessive." Brief of Respondent, at 25. By reframing the issue, the State understates the significance of the trial judge's failure to convene a hearing prior to ordering a uniformed deputy to guard Mr. Batchelor during his testimony.

The State argues, "The trial judge is the best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and prevention of other crimes." Brief of Respondent, at 25 (citing *State v. Tucker*, 320 S.C. 206, 464 S.E.2d 105 (1995)). Mr. Batchelor does not dispute the role of the trial judge in overseeing courtroom security. The State, however, overlooks the limitations due process places on the trial judge's discretion. Under *Deck v. Missouri,*544 U.S. 622 (2005), the trial judge was obligated to convene a hearing and make findings of fact before instructing the uniformed deputy to shadow Mr. Batchelor during his testimony.[5] During that hearing, the trial judge was obligated to consider less restrictive

[5] The State also argues Mr. Batchelor "complained about where the deputy sat while the jury was outside the courtroom." Brief of Respondent, at 27. The State is mistaken. Mr. Batchelor pointed out where the deputy sat with the jurors were outside the

security measures. Here, Mr. Batchelor identified "a less restrictive procedure of having a law enforcement officer guard the door [to Chambers] from inside the hallway outside the notice of the jurors." Brief of Appellant, at 22, n. 10.

The State argues Mr. Batchelor "admits this same officer also guarded Tiller during his testimony." Brief of Respondent, at 26, n. 2 (citing Brief of Appellant, at 15, n. 8). The fact that the same officer that guarded Mr. Tiller also guarded Mr. Batchelor enhances rather than mitigates the prejudice. Dustin Tiller is a notorious drug trafficker with ties drug cartels outside of South Carolina. That Mr. Batchelor received the same enhanced security treatment Mr. Tiller singled to the jurors that Mr. Batchelor is just as dangerous as Mr. Tiller. The State argues, "[I]t seems unlikely that a jury, with limited knowledge of what 'normal' security is present in a courtroom, would generate a belief that security in the courtroom was enhanced beyond what would be expected." This State is wrong. The State acknowledges that Mr. Batchelor and Mr. Tiller were the only two witnesses that received this enhanced security during Mr. Batchelor's jury trial. The State underestimates the observance and intellect of the jurors by suggesting the jurors would not notice that Mr. Batchelor was treated differently than other witnesses, except for the federal prisoner.

Finally, the State argues Mr. Batchelor errs by relying on *Deck* rather than cases involving the presence of extra law enforcement in the courtroom. Brief of Respondent, at 26. The State misunderstands Mr. Batchelor's argument. Mr. Batchelor argues, "Although *Deck* involved shackling, the same due process concerns apply to the use of force in Mr.

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courtroom when trial judge and lawyers were in Chambers. The trial judge justified the enhanced security measures because the door next to the witness stand leads to chambers. Mr. Batchelor included this information in his opening brief so this Court would be aware that the deputy was not guarding the door while the trial judge was actually in Chambers.

Batchelor's case." Brief of Appellant, at 22, n. 11. *Deck* traced the due process considerations of restraining an accused to "Blackstone's ancient English rule" allowing shackles "in extreme and exceptional cases, where the safe custody of the prisoner and the peace of the tribunal imperatively demand, the manacles may be retained." 544 U.S. at 626-27 (internal quotations omitted). The Supreme Court further looked to its precedent leading up to *Deck*: *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986) (noting "it is possible that the sight of a security force within the courtroom might under certain conditions create the impression in the minds of the jury that the defendant is dangerous or untrustworthy" and adopting "a case-by-case approach" when extra courtroom security officers are present in the courtroom); *Estelle v. Williams*, 425 U.S. 501, 512 (1976) ("the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes"); *Illinois v. Allen*, 397 U.S. 337, 343 (1970) ("a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom"). The *Deck* line of cases, accordingly, applies to situations other than shackling.

Because the trial court unilaterally implemented security measures that created the appearance that Mr. Batchelor was dangerous and untrustworthy, this Court should reverse the trial court and order a new trial without the enhanced security during Mr. Batchelor's testimony.

Question V

Did the trial judge err as a matter of law by not limiting the State's presentation of evidence about Johnathan Batchelor's extra-material affair with Sydney Allen, when the probative value of this excessive amount of cumulative evidence was substantially outweighed by the danger of unfair prejudice, confused the issues, mislead the jurors an created an unfair risk that the jurors would decide the case based on evidence other than proof of the elements of the crime?

Mr. Batchelor argues the trial judge erred when he failed to exclude—as he had promised—excessive evidence of his extramarital affair with Sydney Allen. Brief of Appellant, at 26-29; *see also* Tr. 30 (10/29/2021). The State argues, "The introduction of inadmissible evidence is harmless when the evidence is merely cumulative to other evidence presented without objection." Brief of Respondent, at 31 (citing *State v. Kirton,* 381 S.C. 7,37-38,671 S.E.2d 107,122-23 (Ct. App. 2008)). The State misses the point. In his brief, Mr. Batchelor does not argue that evidence of the affair with Ms. Allen was not relevant. Rather, he argues the trial court allowed excessive, cumulative evidence of this affair. "[W]here credibility is the ultimate issue in a case, improper corroboration evidence that is merely cumulative to the victim's testimony is not harmless." *State v. Jennings*, 394 S.C. 473, 479, 716 S.E.2d 91, 94 (2011). The evidence of the affair presented at trial far exceeded what was necessary for a fair presentation of the State's case. The State never addressed this argument in its brief.

The State also misleads this Court regarding the trial testimony. First, the State contends Mr. Batchelor was mad at his then wife "for confronting him about the affair" with Ms. Allen. Brief of Respondent, at 29. Although Ms. Batchelor provided testimony to this effect, this fact was disputed at trail. Mr. Batchelor did not testify he was mad about being confronted about this affair. Compare Tr. 68-71 (Ms. Batchelor's testimony) with Tr. 359-61 (Mr. Batchelor testifying about the affairs). Second, the State argues Mr.

Batchelor "testified, seemingly bragged, about multiple affairs—meanwhile the prosecution focused on just the one affair with Sydney" Allen. Brief of Respondent, at 31. The record does not demonstrate that Mr. Batchelor was bragging. The State focused on this one affair because that affair suited its purposes at trial. Mr. Batchelor testified about the multiple affairs to provide context to the role his extra material affairs played in his relationship with Ms. Batchelor, both before and during their marriage. Tr. 359-61.

Because the trial court allowed the State to present evidence of the affair that far exceeded what was necessary for a full presentation of its case, this Court should reverse the trial court and order a new trial with limitations on the amount of evidence that can be presented about the extra-marital affair with Ms. Allen.

Question VI

Did the trial judge err as a matter of law by not excluding photographs (State's Exhibits No. 31 and 38) that included the image of confederate flags when the probative value of the confederate flags was substantially outweighed by the danger of unfair prejudice to Johnathan Batchelor?

Mr. Batchelor argues the trial judge should have excluded two photographs that showed images of the confederate flag. Brief of Appellant, at 30-31. The State argues these photographs were "probative to show the steps in law enforcement's investigation of the crime, including execution of the search warrant." Brief of Appellant at 32-34. This Court must reject these arguments.

The State argues, "State's exhibit 31 in particular showed an empty holster and a magazine clip which is highly probative in a case involving a shooting." Brief of Respondent, at 31. The State's brief never explains why the gun holster was probative in the context of this case. There is no magazine clip in this photograph. Rather, there is magazine about cars shown in the photograph. The State, accordingly, misleads this Court.

Assuming *arguendo* the relevance of the gun holster and magazine about cars, the trial court should have redacted the confederate flag from the exhibit. Simply cropping off the top photograph just below the confederate flag would have allowed the State to present the same evidence it claims is probative.

The State argues, "State's exhibit 38 shows a shop filled with clutter that happens to include an unfurled flag (stored not displayed), and the photograph was probative to show . . . the execution of the search warrant." Brief of Respondent, at 32. The State's description of the photograph is not accurate. Although the entire confederate flag is not visible, the flag is obviously displayed, not stored. The State fails to acknowledge the confederate flag clock slightly right of center at the top of the photograph. Once again, simply cropping the photograph would have removed the confederate flags from the exhibit while still showing the "shop filled with clutter." As seen, the State had other photographs of the shop that did not show the confederate flags. *E.g.* State's Exhibit 37. That law enforcement did not find any evidence of a crime in the shop (Tr. 138) further undermines the State's argument about the probative nature of State's Ex. 38.

The State never addressed Mr. Batchelor's argument that the trial court could have redacted these photographs. Brief of Appellant, at 31. This Court should reverse the trial court, exclude or redact the photographs, and order a new trial.

Question VII

Did the trial court err—contrary to Sixth Amendment of the United States Constitution, Article I, Section 14 of the South Carolina Constitution, and S.C. Code Ann. § 14-7-1020—by not asking Johnathon Batchelor's request for voir dire numbers four and six inquiring whether there was anything about evidence of serious bodily injuries or hearing profanity that might cause the jurors not to be fair and impartial, when, as anticipated prior to trial, the jurors heard received evidence about serious bodily injuries and profanity?

Mr. Batchelor argues the trial court erred by not asking two of his requests for voir dire. Brief of Appellant, at 31-34. The State argues the trial judge did not abuse his discretion in excluding these questions. Brief of Respondent, at 35-38. Mr. Batchelor agrees the trial court has discretion in conducting voir dire; however, the trial court's discretion is limited by the Sixth Amendment of the United States Constitution, Article I, Section 14 of the South Carolina Constitution, and S.C. Code Ann. § 14-7-1020. Because of the trial court failed to ask requests for *voir dire* numbers four and six, there is a real possibility that one or more of the jurors could not remain fair and impartial because of serious injuries and hearing profanity. This Court should reverse the trial court and order a new trial.

Question VIII

Did the trial court err—in violation of the Sixth Amendment to the United States Construction, Article I, Section 14 of the South Carolina Constitution, and statutory law, by not ordering disclose of counseling records of Stephanie Batchelor when Johnathan Batchelor moved for disclosure of these records in order to be able to confront and cross-examine Ms. Batchelor?

Mr. Batchelor argues the trial court erred by not ordering disclosure of certain medical and mental health records of Stephanie Batchelor. Brief of Appellant, at 34-36. The State points out, "Neither party knows what re in the records." Brief of Respondent, at 39. To resolve the question, this this Court should conduct an *in-camera* review of the

records as contemplated by *State v. Blackwell*, 420 S.C. 127, 801 S.E.2d 713, 726 (2017). If this Court concludes the records contain exculpatory evidence, then this Court should reverse the trial court, disclose all the records, and order a new trial.

Question IX

Did the trial court err by imposing a sentence of thirty years imprisonment, which is the maximum sentence allowed for attempted murder, when both the Solicitor and the Court of General Sessions previously agreed that a sentence of eighteen years in the Department of Corrections was sufficient, when the sentence imposed following trial punished Johnathan Batchelor for exercising his rights to seek post-conviction relief and a jury trial?

Mr. Batchelor contends the trial court punished him for exercising his rights to post-conviction relief and a jury trial. Brief of Appellant, at 36-38. The State argues, "The facts of this case clearly warrant the maximum sentence for attempted murder." Brief of Respondent, at 42. The State is wrong. If correct, then the State never would have agreed that an eighteen-year sentence was appropriate, and the prior judge would not have accepted the guilty plea. An accused does not have a constitutional right to a guilty plea; nor is a trial court required to accept a guilty plea. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S. Ct. 837, 846, 51 L. Ed. 2d 30 (1977) ("there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial"); *State v. Kerr*, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998) (trial court was not required to accept alleged plea agreement between defendant and state); *State v. Easler*, 322 S.C. 333, 359, 471 S.E.2d 745, 760 (Ct. App. 1996) ("no constitutional impediment exists in a trial judge's refusal to accept a defendant's guilty plea since the result of his refusal is that the accused is subject to a trial by an impartial jury, which is a constitutional guarantee." (citing U.S. Const. art. III, § 2; S.C. Const. art. I, § 14)), *affirmed as modified, State v. Easler,* 327 S.C. 121, 489 S.E.2d 617 (1997).

The State argues, "In the present case, no corrupt motive was shown." Brief of Respondent, at 43. The State ignores the prior bond hearings where the prosecutor referenced the vacation of Mr. Batchelor's guilty plea. R. *. The State also ignores the prior bond orders that reference the vacation of the guilty plea. R. *.

This Court should reverse the trial court and remand this case for a resentencing hearing with instructions for the trial court to impose a sentence not to exceed eighteen years.

CONCLUSION

For the reasons set for in the Brief of Appellant and this Reply Brief, this Court should reverse the trial court and dismiss the charge. Alternatively, this Court should reverse the trial court and order a new trial or new sentencing hearing.

Respectfully Submitted,

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APPEAL FROM SPARTANBURG COUNTY
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Johnathan Olin Batchelor,.....Appellant.

Certificate of Service

I certify that I served this pleading on the State of South Carolina, by email, using counsel's primary email address listed in the Attorney Information System (AIS), as reflected below, on the date reflected below:

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