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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

TAMMY CAISON MOORER,

APPELLANT.

APPELLATE CASE NO. 2018-001938

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5987

PETITION FOR REHEARING

On June 7, 2023, this Court affirmed Appellant's convictions for kidnapping and conspiracy to kidnap. State v. Tammy Caison Moorer, Op. No. 5987 (S.C. Ct. App. filed June 7, 2023) (Howard Adv. Sh. No. 22 at 21). Appellant filed a petition for rehearing on June 22, 2023 requesting this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court in reaching its decision. On July 5, 2023, this Court denied the petition for rehearing, but revised a portion of Opinion No. 5987 on the issue of the directed verdict. The Court changed one sentence in the opinion from "Tammy sent Victim angry texts about the affair throughout the six weeks preceding Victim's disappearance" to "Tammy sent

Victim *and others* angry texts about the affair during the six weeks preceding Victim's disappearance." State v. Tammy Caison Moorer, Op. No. 5987 (S.C. Ct. App. filed July 5, 2023) (Howard Adv. Sh. No. 26 at 10) (hereinafter, "Opinion") (emphasis added). This modification does not change the fact that there was no direct or substantial circumstantial evidence to support the offenses of kidnapping and conspiracy to kidnap. Out of an abundance of caution, though repetitive out of necessity, pursuant to Rule 221(a), SCACR, Appellant again respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court in reaching its decision.

I. There was no direct or substantial circumstantial evidence to support the offenses of kidnapping and conspiracy to kidnap.

On appeal, Appellant argued the trial judge erred by denying her motion for a directed verdict for the offenses of kidnapping and conspiracy to kidnap since the state failed to present any direct or substantial circumstantial evidence to support the charges and at most the evidence merely raised a suspicion Appellant was involved in Heather Elvis's disappearance. In holding the trial judge properly denied Appellant's motion for a directed verdict, this Court found the state presented evidence Elvis disappeared against her will and substantial circumstantial evidence the Moorers kidnapped Elvis. Respectfully, in reaching this conclusion, this Court misapprehended the evidence the state presented.

South Carolina Code Ann. § 16-3-910 defines kidnapping as: "Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct, or carry away any other person by any means whatsoever without authority of law . . . is guilty of a felony." "Kidnapping is a continuous offense which 'commences when one is wrongfully deprived of freedom and continues until freedom is restored.'" State v. East, 353 S.C. 634, 637, 578 S.E.2d 748, 750 (Ct. App. 2003)

(quoting State v. Tucker, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999)); See State v. Hall, 280 S.C. 74, 310 S.E.2d 429 (1983). "South Carolina's kidnapping statute requires proof of an unlawful act taking one of several alternative forms, including seizure, confinement, inveiglement, decoy, kidnapping, abduction, or carrying away." Id. (citing State v. Owens, 291 S.C. 116, 352 S.E.2d 474 (1987)); See State v. Berntsen, 295 S.C. 52, 54, 367 S.E.2d 152, 153 (1988). The mens rea required for the offense of kidnapping is "knowledge." Tucker, 334 S.C. at 13, 512 S.E.2d at 105 (citing State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994)).

In this case, there was no evidence Heather Elvis was kidnapped—let alone kidnapped by Appellant. There was absolutely no evidence of a struggle at the Peachtree Boat Landing or inside Appellant's truck. In fact, there was no evidence Elvis had ever been inside Appellant's truck or had ever had physical contact with Appellant. The state's case was based solely on the fact that Elvis and Sidney Moorer had an affair months earlier that Appellant discovered, that Elvis was missing, that her last known communication was allegedly with Sidney, and Grant Fredericks' testimony that Appellant and Sidney's truck was the vehicle seen traveling towards and away from the boat landing around the time Elvis went missing. This circumstantial evidence simply is not substantial, and it was no sufficient to survive a directed verdict. At most, it raises a suspicion Sidney and Appellant were involved in Elvis's disappearance.

The evidence established Appellant was home around the timeframe Elvis disappeared. Appellant texted her sister, Ashley Caison, that she was home at 3:10 on the morning of December 18, 2013. Ashley testified she saw Appellant immediately thereafter when she (Ashley) observed the Moorer children, whom she was babysitting, walking home when Appellant and Sidney returned that morning. The cell phone location evidence established that both Appellant's phone and Sidney's phone were home for the rest of the morning.

Conspiracy to kidnap is defined in S.C. Code Ann. § 16-3-920 as: "If two or more persons enter into an agreement, confederation, or conspiracy to violate the provisions of Section 16-3-910 [the statute defining the offense of kidnapping] and any such persons do any overt act towards carrying out such unlawful agreement, confederation, or conspiracy each such person shall be guilty of a felony." The state presented *zero* evidence, direct or circumstantial, of any agreement, confederation, or conspiracy between Appellant and Sidney to kidnap Elvis. The evidence is simply not there.

Respectfully, this Court should grant rehearing, hold the trial judge erred by finding there was substantial circumstantial evidence to submit the case to the jury, and direct a verdict of acquittal as to both offenses.

II. Erroneous Admission of Sexually Explicit Text Messages and Messages Referencing Drug Use in Violation of Rule 404, SCRE, and Rule 403, SCRE.

Appellant argued on appeal that the trial judge abused his discretion by admitting evidence of text messages allegedly sent and received by Appellant that were both sexually explicit and contained references to drug use since the testimony constituted inadmissible bad character evidence where Appellant had not put her character at issue, in violation of Rule 404, SCRE, and the probative value of the evidence was also substantially outweighed by its unfair prejudice in violation of Rule 403, SCRE.

This Court held that although the messages referencing drug use constituted prior bad act evidence, they were relevant and logically pertinent to the state's attempt to discount Appellant's testimony that she and Sidney were trying to get pregnant at the time of Elvis's disappearance and that Sidney went to Walmart to purchase a pregnancy test for Appellant, not for Elvis. Opinion at 19-20. This Court further determined the messages concerning marijuana use were

probative as to the state's theory of Appellant's motive. The Court emphasized the state's evidence that Elvis was possibly pregnant with Sidney's child at the time of her disappearance and its theory that Tammy and Sidney lured Elvis to the Peachtree Boat Landing in order to take a pregnancy test. Opinion at 20. Finally, while noting the evidence of Appellant's drug use was prejudicial, this Court held the prejudicial effect of the text messages did not outweigh their probative value as to the state's theory of motive. Opinion at 20.

"In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue." State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718 (1998) (citing Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989)); See Rule 404(a), SCRE. "In a similar vein, evidence of other crimes or bad acts is generally inadmissible to prove the crime charged unless the evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity." Id. (citing State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983) and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)); See Rule 404(b), SCRE. "Both rules are grounded on the policy that character evidence is not admissible 'for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged.'" Id. at 6, 501 S.E.2d at 718-719 (quoting State v. Peake, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990)).

"The evidence of the prior bad acts must be clear and convincing to be admissible." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) (citing State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996)). "The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused." Id. (citing Adams, 322 S.C. 114, 470 S.E.2d 366; State v. Smith, 309 S.C. 442, 424 S.E.2d 496 (1992); State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998)). "Further, even though the evidence is clear and

convincing and falls within a Lyle[1] exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." Id. (citing Rule 403, SCRE, and Adams, 322 S.C. 114, 470 S.E.2d 366).

This Court properly recognized that evidence of Appellant's drug use constituted prior bad act evidence. See Opinion at 20. In holding the trial judge properly admitted the evidence, the only exception to Rule 404(b) this Court relied on was motive. Respectfully, whether Appellant used marijuana in the weeks preceding Elvis's disappearance had absolutely no logical relevance to a material fact at issue nor was it probative as to Appellant's alleged motive. The state's only argument related to the admissibility of the messages referencing drug use, which the trial judge and this Court erroneously accepted, was that the messages were proof Appellant was not pregnant or trying to become pregnant, thereby refuting Appellant's statements that Sidney purchased the pregnancy test during the early morning hours of December 18, 2013 for Appellant and not for Elvis as the state theorized. However, just because a woman used or possessed marijuana does not mean she is not pregnant or trying to become pregnant, a fact the judge at trial recognized. See R. 1301, l. 19 – 1302, l. 11. Many women continue to drink alcohol or ingest drugs, as has always been the case, before they discover they are pregnant or even after they know they are pregnant. Therefore, the messages concerning Appellant's drug use had no probative value. Moreover, even if the messages did have probative value as this Court concluded, it was outweighed by the unfair prejudice to Appellant as the evidence reflected poorly on Appellant's character and demonstrated she had a criminal propensity.

Additionally, this Court concluded Appellant's "internet searches for 'Cougar Life' and her sexual text messages to a younger male were character evidence and, because the recipient

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[1] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)

may have been underage, prior bad act evidence." Opinion at 20. However, the Court held the evidence was "logically pertinent to show" Appellant's motive for kidnapping Elvis, her anger at Sidney for the affair, her desire for revenge against Sidney, and to prove she had control over Sidney's phone, which was used to lure Elvis to the Landing. Opinion at 20. In short, the messages were evidence of Appellant's motive and identity as one of the kidnappers, which this Court found were material issues of fact in the case. Opinion at 20.

While this Court asserted the sexually explicit messages showed Appellant had control over Sidney's phone, the sexually graphic messages published to the jury did little to support this conclusion. Further, there was certainly less prejudicial evidence the state could and *did* use to establish this allegation if that was the state's real intent. While it appeared the messages to the possibly underage male were sent by a female and not Sidney, the state offered no proof they were sent by Appellant. Moreover, the state introduced evidence that Appellant's children were texting Appellant on Sidney's phone. For example, Will Lynch, the state's witness through whom the messages were admitted, read a message received by Sidney's phone on November 6, 2013 that read, "*Mom*, are you on Instagram *on Dad's phone*? . . . Liking my pictures and videos?" R. 1318, ll. 10-18 (emphasis added). The child then asked, "Can I have it then when you get home?" A text from Sidney's phone responded, "No, it's for Christmas." The child then said, "*Mom*, please." R. 1318, ll. 19-23 (emphasis added). There are subsequent messages of a similar nature, which Lynch read into the record, that suggested Appellant was using Sidney's phone to exchange messages with one of her children. See R. 1318, l. 24 – 1319, l. 9. Lynch also described text messages sent from Appellant's phone on December 8, 2013 to three different people that state her "battery is dying" and instructing them to "text [her] other phone (843) 385-3175." This was Sidney's number. R. 1298, l. 12 – 1299, l. 3.

This Court also concluded the sexually explicit text messages were relevant to show Appellant's anger at Sidney for the affair and her desire for revenge against Sidney. Even if it were true that Appellant was angry at Sidney and sought revenge, it does not logically follow that Appellant and Sidney conspired to kidnap Elvis and subsequently did kidnap Elvis. Consequently, the probative value of the sexually explicit messages, if any, was minimal. Instead, the evidence made Appellant appear to be a bad person which was its real import and intent.

On the other hand, the unfair prejudice to Appellant was tremendous as the evidence was extremely damning to her character. Appellant testified in her own defense and her character and credibility were crucial. The state introduced the evidence to not only to attack Appellant's character and demonstrate that she was a bad person, but also to show Appellant had the propensity to conspire to kidnap and did kidnap Elvis. The evidence should have been excluded.

Lastly, this Court held that even if the trial judge erred in admitting the text messages, the error was harmless given Appellant's statements during police interviews and her testimony that she and Sidney had an open relationship. Opinion at 20. Respectfully, it is difficult to comprehend the logic of how evidence Appellant and Sidney had an open relationship made the error in admitting Appellant's sexually graphic text messages to a possibly underage boy harmless. "The key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (quoting State v. Charping, 313 S.C. 147, 157, 437 S.E.2d 88, 94 (1993)) (internal quotation marks omitted); See Chapman v. California, 386 U.S. 18, 24 (1967). Our state's jurisprudence requires this Court "not to question whether the State proved its case beyond a reasonable doubt, but

whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." Id. at 389-90, 728 S.E.2d at 94 (citing State v. Mizzell, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) (harmless error jurisprudence requires that the error not contribute to the verdict obtained)). The state's evidence against Appellant was extremely weak. It conceded there was no direct evidence of her guilt and that its case was entirely circumstantial. Because of the lack of evidence against Appellant, the state attempted throughout the course of the trial to paint Appellant as a bad person who had the criminal propensity to conspire to and kidnap Elvis. The sexually explicit messages were very damning to Appellant's character and credibility, which was crucial, particularly given that Appellant testified before the jury. It is impossible to reliably conclude beyond a reasonable doubt that this erroneously admitted evidence did not contribute to the verdict.

Respectfully, this Court should grant rehearing, hold the trial judge abused his discretion by admitting this extremely prejudicial bad act and bad character evidence, reverse Appellant's convictions, and remand for a new trial.

III. Erroneous Admission of Grant Fredericks' Expert Testimony in Violation of Rule 702, SCRE

On appeal, Appellant argued the trial judge abused his discretion by qualifying Grant Fredericks as an expert in forensic video analysis and by allowing Fredericks to testify that Appellant's truck was the vehicle seen on surveillance footage driving toward and away from the Peachtree Boat Landing where Elvis was allegedly kidnapped—to the exclusion of all other vehicles—when his conclusions were not shown to be reliable. In its published opinion, this Court held the trial judge was "well within" his discretion in admitting Fredericks' identification testimony as a reliable expert opinion. Opinion at 23. The Court found Fredericks' opinion

satisfied the Jones[2] factors and met the reliability standard of Rule 702, SCRE. The Court emphasized that "Fredericks' expertise was based on his vast experience with forensic video analysis, as well as the facts that his report and conclusion in this case had been peer reviewed by another certified forensic video examiner and his headlight spread analysis was a peer reviewed technique." Opinion at 23. Lastly, this Court determined that the reliability of the reverse projection methodology was demonstrated by Fredericks' own experience. Opinion at 23.

The admission of expert testimony is governed by Rule 702, SCRE, which provides:

> 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.

"[I]n executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony." Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). "First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." Id. (citing State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009)). "Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Id. (citing Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997)). "Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable." Id. (citing State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999)).

While Fredericks may have been qualified to give an opinion as to the class of the unknown vehicle seen in the surveillance footage, his overall conclusion that the unknown

[2] State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979).

vehicle was the Moorers' truck to the exclusion of all other vehicles based on the premise of the uniqueness of headlight spread pattern was simply not reliable and not based on science. He claimed *in his experience* no two vehicles have the same headlight spread pattern but he only tested one other Ford F-150 Limited, respectfully a fact this Court ignored. As Bruce Koenig asserted during the pretrial hearing, this assertion was not a "scientific principle." R. 110, ll. 7-11. Despite what this Court determined, no research in the forensic field or peer reviewed articles support the uniqueness of headlight spread pattern to each vehicle. R. 111, l. 13 – 112, l. 2; R. 113, ll. 1-5; R. 116, ll. 14-18. While headlight spread pattern analysis was an accepted scientific method to determine the class of a vehicle, it was not accepted "for uniqueness." R. 117, ll. 17-23. Consequently, the trial judge should have limited Fredericks' opinion and only permitted him to testify that the unknown vehicle was consistent with the class or make and model of the Moorers' truck.

This Court should grant rehearing and hold the trial judge abused his discretion by qualifying Fredericks as an expert in forensic video analysis and allowing him to testify about the "uniqueness" of the Moorers' truck to the exclusion of every other vehicle. Given the importance of this inadmissible opinion to the state's case, this Court should respectfully reverse Appellant's convictions and remand for a new trial.

IV. Erroneous Exclusion of Appellant's Witnesses Due to Alleged Violation of Sequestration Order

Appellant argued the trial judge abused his discretion by excluding the testimony of Appellant's children and her mother because the witnesses allegedly violated the sequestration order by watching the live feed of the trial. Appellant emphasized that the witnesses denied they watched the feed, there was no evidence their testimony was tainted, and such an extreme

sanction violated Appellant's due process right to present a complete defense. This Court held the trial judge was within his discretion to exclude their testimony. The Court noted that the judge conducted an evidentiary hearing and found credible evidence existed that the witnesses violated the sequestration order. Opinion at 26. Additionally, the witnesses were previously told they were not allowed to have access to a device which could connect to the internet, but did it anyway. Opinion at 26. Given these circumstances, this Court found no error in the trial judge's decision to exclude the witnesses' testimony. Opinion at 26. For the same reasons, this Court "rejected" Appellant's argument that the exclusion of her witnesses "infringed her right to present a complete defense, thereby violating her right to due process," emphasizing that the right to present a defense is not unlimited. Opinion at 26.

"Whether a witness should be exempted from a sequestration order is within the trial court's discretion." State v. Washington, 424 S.C. 374, 409, 818 S.E.2d 459, 477 (Ct. App. 2018) (quoting State v. Singleton, 395 S.C. 6, 15-16, 716 S.E.2d 332, 337 (Ct. App. 2011)) (internal quotation marks omitted); See State v. Tisdale, 338 S.C. 607, 616, 527 S.E.2d 389, 394 (Ct. App. 2000). "The decision whether to waive a sequestration order for witnesses present during the trial rests in the sound discretion of the trial judge." State v. Huckabee, 388 S.C. 232, 240, 694 S.E.2d 781, 785 (Ct. App. 2010) (quoting State v. Saltz, 346 S.C. 114, 126, 551 S.E.2d 240, 247 (2001)). "The purpose of the exclusion rule is, of course, to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at the trial; and if a witness violates the order he may be disciplined by the court." Huckabee, 388 S.C. at 241, 694 S.E.2d at 785 (quoting United States v. Leggett, 326 F.2d 613, 613-614 (4th Cir. 1964)).

Where a sequestration order has been issued, its violation does not automatically result in disqualification of the witness to testify. In fact, our appellate courts have frequently approved

allowing testimony from witnesses who had been sequestered but were in the courtroom during the testimony of one or more other witnesses. See, e.g., State v. Saltz, 346 S.C. 114, 126, 551 S.E.2d 240, 247 (2001); State v. Huckabee, 388 S.C. 232, 241-43, 694 S.E.2d 781, 785-86 (Ct. App. 2010); State v. Simmons, 384 S.C. 145, 173-74, 682 S.E.2d 19, 33-34 (Ct. App. 2009); State v. Fulton, 333 S.C. 359, 375, 509 S.E.2d 819, 827 (Ct. App. 1998).

In this case, even if there was a violation of the sequestration order, it was minor. The proffered testimony established that Deputy Pike observed a laptop computer streaming the live feed in the room with the excluded witnesses when she escorted Appellant to the room after court recessed for lunch on Monday, October 15, 2018. Only two witnesses testified that morning. These witnesses were Dennis Hart (R. 999, l. 11 – 1013, l. 18) and Jill Domogauer (R. 1014, l. 8 – 1093, l. 19). Therefore, *at most*, the excluded witnesses heard the testimony of these two state witnesses.

Hart was the kitchen manager at the Tilted Kilt in 2013 at the same time Elvis was a hostess. R. 999, l. 20 – 1000, l. 5. Hart testified that he hired Sidney Moorer as a maintenance man because the restaurant had numerous "plumping issues." He would call Sidney as needed. R. 1001, ll. 2-23. Hart was aware of the relationship between Sidney and Elvis. R. 1001, l. 24 – 1002, l. 11. After the relationship ended, Hart called Sidney to see if he was available to perform some plumbing maintenance for the restaurant. R. 1002, ll. 12-20. Hart claimed Appellant barged "into the conversation and proceeded to tell me how Heather was causing problems for her and her family and spreading rumors that she was pregnant by her husband [Sidney], and she also asked me to fire her because Sidney was not allowed to work for me anymore if Heather was working there." R. 1002, l. 23 – 1003, l. 9. Hart testified that he never saw Sidney at the Tilted Kilt again after that conversation. R. 1003, ll. 13-15. Lastly, Hart maintained that he had

never met Appellant and that Appellant had never come to work with Sidney before at the Tilted Kilt. R. 1005, l. 11 – 1006, l. 4; R. 1011, l. 25 – 1012, l. 8.

Jill Domogauer, a crime scene investigator with the Horry County Police Department, testified about her search of Elvis's car on December 20, 2013 while the vehicle was parked at the Elvis family residence and her search of Elvis's apartment on that same day. See R. 1015, l. 19 – 1038, l. 23. Domogauer likewise testified about her role in the search of the Moorers' house in February 2014. R. 1039, ll. 3-5. She identified numerous electronic devices she seized from the home, including cell phones, iPads, and a computer tower. See R. 1039, l. 6 – 1055, l. 5.

It is difficult to see how Hart or Domogauer's testimony could have tainted or shaped the testimony of the excluded witnesses. Christian Moorer, Nikki Moorer, and Polly Caison were going to testify about Appellant's alibi -- a critical matter -- and other matters that are unknown since the trial judge refused to allow Appellant to proffer their testimony.

The Fourth Circuit Court of Appeals has referred to the "exclusion of a defense witness" as "an extreme remedy" because it "impinges upon the right to present a defense." United States v. Rhynes, 218 F.3d 310 (4th Cir. 2000) (citing United States v. Cropp, 127 F.3d 354, 363 (4th Cir. 1997)). In Rhynes, while the court found the defense did not violate the sequestration order, it held that even if it had, the court still would have held the exclusion of the defense witness "constituted reversible error." 218 F.3d at 320.

Moreover, exclusion of Appellant's witnesses eviscerated her ability to present a complete defense. See State v. Burgess, 391 S.C. 15, 21, 703 S.E.2d 512, 515 (Ct. App. 2010) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)) ("The United States Constitution guarantees a criminal defendant the right 'to present a complete defense.'"); see also S.C. Const. art. I, § 14 (2009) ("Any person charged with an offense shall enjoy the right ... to be fully heard

in his defense...."); S.C. Code Ann. § 17-2-60 (2003) ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor...."). Christian, Nikki, Caison, and Polly were crucial witnesses for the defense. Without their testimony, Appellant was unable to refute much of the state's evidence. The extent of the prejudice is difficult to articulate since the trial judge erroneously refused to allow Appellant to proffer the testimony of these witnesses. Nonetheless, it was undisputed that they were Appellant's alibi witnesses. The refusal to allow a proffer of their testimony was further error as this Court correctly held.

Respectfully, this Court should grant rehearing, hold the trial judge abused his discretion by excluding Appellant's witnesses based on a minor alleged violation of the sequestration order, and remand this case for a new trial.

V. Erroneous Exclusion of Alibi Testimony Due to Appellant's Alleged Violation of Rule 5(e)(1), SCRCrimP.

Lastly, in a footnote, this Court held the trial judge's exclusion of alibi testimony from Appellant's mother, children, and sister after finding Appellant did not give adequate notice of an alibi defense to the state pursuant to Rule 5(e)(1), SCRCrimP, was not prejudicial because (1) Appellant's sister testified she saw Appellant arrive at her home at 3:10 a.m.; (2) Appellant's mother and children were excluded from testifying for violating the sequestration order; and (3) the state did not need to prove Appellant was at the Landing when Elvis disappeared to prove Appellant lured Elvis to the Landing or conspired with Sidney to lure Elvis to the Landing. Opinion at 25. However, this Court did not address whether the trial judge abused his discretion by excluding the alibi testimony due to Appellant's alleged failure to comply with notice requirements of Rule 5(e)(1), SCRCrimP. Appellant respectfully requests this Court grant

rehearing and hold the judge abused his discretion by excluding this evidence and that Appellant was prejudiced by the erroneous exclusion.

Rule 5(e) states in relevant part: "(1) Notice of Alibi By Defendant. Upon written request of the prosecution stating the date and place at which the alleged offense occurred, the defendant shall serve within ten days, or at such time as the court may direct, upon the prosecution a written notice of his intention to offer an alibi defense. The notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and address of the witnesses upon whom he intends to rely to establish such alibi." If either party fails to comply with the requirements of Rule 5(e), the trial judge "may exclude the testimony of any undisclosed witness offered by either party." Rule 5(e)(4), SCRCrimP.

Appellant notified the state ten days before trial that she intended to call her children as alibi witnesses as required by Rule 5(e). Seven days before the trial started, Appellant specifically informed the state that she intended to call Christian Moorer, Nikki Moorer, Ashley Caison, and Polly Caison as alibi witnesses and provided their contact information. The state was undisputedly aware of these witnesses before trial and was in no way prejudiced by the alleged late disclosure. Polly Caison, Appellant's mother, and Ashley Caison, Appellant's sister had lived in the same residence since the investigation began. Consequently, the state was obviously aware of where to contact them. Moreover, the state had previously interviewed all of these witnesses during its investigation and had them under subpoena for the trial.

There was also adequate time for the state to interview these witnesses before the defense presented its case. See R. 1691, ll. 8-17 (where the trial judge acknowledged "the purpose behind the rule of notifying the State of an alibi defense is so that the State can investigate the witnesses who claim that she [Appellant] was somewhere else."). The state had an entire week

before the trial even started. Pretrial matters and the state's presentation of its case in chief lasted eight days plus a weekend. There is no doubt that during this seventeen day period, someone from the state could have re-interviewed these witnesses if needed.

Because there was absolutely no prejudice to the state as a result of the supposed late disclose, the trial judge abused his discretion by excluding Appellant's four alibi witnesses from testifying in her defense. See State v. Kerr, 330 S.C. 132, 150, 498 S.E.2d 212, 221 (Ct. App. 1998) (Assuming the state did fail to properly produce photographs pursuant to Rule 5, SCRCrimP, the trial judge did not abuse his discretion by admitting the photographs when there was no prejudice to the appellant).

Excluding alibi testimony from Appellant's mother, children, and sister also violated Appellant's due process right to present a complete defense. "The United States Constitution guarantees a criminal defendant the right 'to present a complete defense.'" State v. Burgess, 391 S.C. 15, 21, 703 S.E.2d 512, 515 (Ct. App. 2010) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)). "This right is also guaranteed by our State constitution: 'Any person charged with an offense shall enjoy the right ... to be fully heard in his defense....'" Burgess, 391 S.C. at 21-22, 703 S.E.2d 512, 515-516 (quoting S.C. Const. art. I, § 14 (2009)); See S.C. Code Ann. § 17-2-60 (2003) ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor...."); State v. Lyles, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008). Furthermore, in Chambers v. Mississippi, 410 U.S. 284, 302 (1973), the United States Supreme Court emphasized that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." See Burgess, 391 S.C. at 22, 703 S.E.2d at 516.

The solicitor acknowledged at trial that the judge excluded Appellant's alibi witnesses "for procedural reasons." R. 1690, l. 19 – 1691, l. 5. However, as defense counsel argued

below, Appellant had a fundamental right to present a defense "beyond the specific rule." R. 160, ll. 1-13. The trial judge's exclusion of Appellant's alibi witnesses because she only provided the state with their contact information seven days before trial instead of ten eviscerated her defense and violated her constitutional and statutory right to present witnesses in her favor. The exclusion of these witnesses as a sanction was disproportionate to the supposed violation and the purpose of the rule.

Respectfully, this Court should grant rehearing and hold the trial judge abused his discretion by excluding the alibi testimony of Christian Moorer, Nikki Moorer, Polly Caison, and Ashley Caison based on the alleged violation of Rule 5(e), SCRCrimP, and Appellant's right to present a complete defense. Additionally, this Court should hold Appellant was prejudiced by the erroneous exclusion. Despite the trial judge's improper refusal to allow Appellant to proffer the testimony of her alibi witnesses, the prejudicial effect of the exclusion of their testimony is obvious. These witnesses would have testified that Appellant was home during the timeframe of the alleged kidnapping and about her actions during that time period. While Appellant's sister testified Appellant and Sidney returned home at 3:10 a.m. on the morning Elvis disappeared, the state's theory was that Elvis was kidnapped from the Landing sometime between 3:41 a.m. and approximately 3:46 a.m., given Elvis's cell phone data and the surveillance footage of a vehicle traveling toward and away from the location of the Landing. Since Appellant's house was a short drive from the Landing, Ashley Caison's testimony that Appellant arrived home at 3:10 a.m. did not cure the prejudice Appellant suffered by the erroneous exclusion of the alibi testimony.

Based on the foregoing, Petitioner respectfully requests this Court rehear her case pursuant to Rule 221(a), SCACR, due to the significant legal and factual points overlooked and/or misapprehended by this Court in affirming Appellant's convictions.

Respectfully Submitted,

LARA M. CAUDY
Appellate Defender

ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

This 19th day of July, 2023.

RECEIVED
Jul 19 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TAMMY CAISON MOORER,

APPELLANT.

APPELLATE CASE NO. 2018-001938

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above referenced case has been served upon David Spencer, Esquire, at the primary email address listed in the Attorney Information System (AIS), this 19th day of July, 2023.

Lara M Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

From: Warren, Kaylynn
To: David Spencer
Cc: Dudek, Robert; Caudy, Lara; Bryant, Hannah; Anne Mueller
Subject: 2018-001938 The State v. Tammy Caison Moorer
Date: Wednesday, July 19, 2023 9:14:00 AM
Attachments: 2018-001938 The State v. Tammy Caison Moorer Petition for Rehearing and COS.pdf
Tammy Moorer PFR AG Cover Letter.pdf

Good Morning,

Attached for service in the above-referenced case is the Petition for Rehearing which will be filed today, July 19, 2023, with the Court of Appeals via OneDrive.

Respectfully,
Kaylynn

Kaylynn Warren
Administrative Assistant
South Carolina Commssion on Indigent Defense
Division of Appellate Defense
(803) 734-1330