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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable R. Keith Kelly, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

vs.

JOHNATHAN OLIN BATCHELOR,

Appellant.

Appellate Case No. 2022-000160

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in denying the motion to dismiss the case because of destroyed evidence where the evidence was not destroyed in bad faith and did not contain readily apparent exculpatory value.

II.

The trial court did not err in declining to rule on the credibility of an inmate informant and thus intrude on the jury's role in determining the credibility of witnesses.

III.

The trial court did not err in declining to allow Appellant to inquire as to the content of the informant's communications with his attorney and in declining to allow Appellant to cross-examine the informant for the downward departure in exchange for his assistance leading to Appellant's plea because it would open the door to the fact that Appellant previously pled to attempted murder.

IV.

The trial court did not abuse its discretion in finding that security in the courtroom was not excessive.

V.

Appellant fails to explain why exhibits that are cumulative to other evidence of Appellant's affair for which Appellant did not object was prejudicial. On the other hand, the exhibits were probative of Appellant's motive to kill his wife so he could replace her with his new girlfriend.

VI.

The trial court did not err in allowing photographs to be admitted that carried probative value

and happened to have a confederate flag visible in the photograph.

VII.

The trial court did not abuse its discretion by declining Appellant's proposed voir dire questions for the jury.

VIII.

The trial court did not abuse its discretion in not disclosing mental health records the trial court placed under seal since the only useful information was that Victim told the therapist that Appellant hit her with a blunt force instrument and shot her.

IX.

The Solicitor prosecuted Appellant for the same charge for which he received post-conviction relief and the sentence was left within the discretion of the trial court which assured Appellant he was not being punished for exercising his right to trial so there is no merit to the allegation that Appellant was subject to retaliation by the prosecution for invoking his right to pursue post-conviction relief.

STATEMENT OF THE CASE

Appellant Batchelor was charged with attempted murder. Appellant pled guilty under North Carolina v. Alford, 400 U.S. 25 (1970) before the Honorable J. Derham Cole. Judge Cole sentenced Appellant to thirty years' imprisonment suspended to eighteen years' imprisonment and five years' probation.

Appellant filed an application for post-conviction relief (PCR). The Attorney General's Office consented to relief granted by the Honorable Grace Gilchrist Knie by order dated April 18, 2018, on the basis that the sentence was illegal.[1]

Appellant was tried for the same charge, attempted murder on November 1-4, 2021 (the jury was selected on October 25). The jury convicted Appellant of attempted murder and the presiding judge, the Honorable Keith R. Kelley, sentenced Appellant to thirty years' imprisonment. Judge Kelley heard Appellant's post-trial motions on December 8, 2021, and denied the post-trial motions by oral ruling on February 3, 2022.

[1] See S.C. Code § 16-3-29 (A person convicted of attempted murder may be imprisoned no more than thirty years. "A sentence imposed pursuant to this section may not be suspended nor may probation be granted.").

STATEMENT OF FACTS

Sergeant Kristen Malpass responded to a high priority call on Reidville Road. Upon arriving he was led by a male, Appellant Batchelor, to Batchelor's wife Stephanie (Victim) lying face down in the grass on the side of the yard, propping herself up somewhat with her arms. Her hair was matted with blood. R. p. 335. Sergeant Malpass engaged her in some conversation, she knew her birthday, she said she did not know what happened. R. p. 341. Victim said she felt like she was shot. But she did not identify her assailant. R. pp. 353-354. Holes in her chest were visible, but too much blood made it difficult to see if she suffered any facial or head injuries. R. pp. 342-343. Sergeant Malpass explained she did not have much chance to talk with Victim alone because Appellant hovered nearby. Appellant repeated the same questions over and over, interfering with Sergeant Malpass's ability to talk with Victim. EMS arrived after about ten minutes and promptly took Victim away. R. p. 343. Appellant and Victim's children were asleep in the house. R. p. 344.

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. R. p. 347. Sergeant Malpass further observed blood on the ramp in the garage leading to the house door, smeared as if something was dragged down the ramp. R. pp. 347-348. Contents of a purse were poured out by the purse. R. p. 349.

Victim testified she married Appellant in 2012, and they had two children, ages one and three years' old at the time. R. p. 364. A day or two before the shooting, Victim was driving with her two children in the back seat when she saw Appellant walking hand-in-hand with another woman, both of them giggling. Victim drove up and asked what was going on, but Appellant claimed they were just with other co-workers at lunch. Victim chose to not belabor the matter and drove away. But later she confronted Appellant who continued to deny any affair. Victim went to grab her phone and

leave, but Appellant took it and threw it across the room. When she tried to leave the house, Appellant blocked the driveway. Appellant pushed her to the ground and Victim then grabbed a gun, but decided not to shoot Appellant, especially since the children were nearby. The woman Appellant insisted was just a friend was named Sydney. R. pp. 366-369.

Victim ultimately decided to not leave Appellant, so Victim went to work the next day at Kay's Jewelers. As was not unusual, she made a bank deposit with a co-worker, and then drove home, talking with Appellant as she usually did while she drove home. Appellant told her he put the children to sleep, he kept asking where she was in the route home. R. p. 370.

When she arrived home, she opened the garage door and drove into the garage. She finished a song on the radio, and grabbed her purse and cell phone to bring inside when Appellant grabbed her and pulled her out the car door. She attempted to make her way up the ramp, but was struck from behind with something, and she saw Appellant holding an orange baseball bat. He kept hitting her with that baseball bat, and then pulled out a gun and fired. R. p. 376. The next thing Victim remembered was lying face up on the ramp as Appellant held her feet, then dragged her down the ramp and to the side of the house. Appellant left her on the ground shivering, then reappeared with the gun and pulled the trigger. The next memory after the gun discharging is waking up with a stranger standing over her. R. p. 377:2-9. She lost consciousness again and her next memory is waking up in a room with lights and her stepmother was with her. R. p. 378. Victim was scared Appellant was close by, so she did not tell anyone he was the shooter, because if Appellant already shot her, what would stop him from shooting the person talking with her. R. p. 378. She was put into a medically induced coma for a week. R. p. 379. Afterwards, she did not tell law enforcement when they came to interview her because she did not want to believe Appellant shot her. But the next time, when law enforcement asked her for a description of the shooter, she told them Appellant

was the shooter. R. p. 381. Victim testified that nothing from her purse was taken. R. p. 382.

On cross-examination, Appellant's counsel elicited testimony that Appellant had an affair with another woman before Appellant and Victim married and that Victim's father caught Appellant having the affair. Victim clarified she did not know about the pre-marital affair until after she woke up from the coma. R. p. 394.

Victim also explained she always realized Appellant was the assailant and did not have any memory issues as to the identity of her assailant. She explained she just realized that "I couldn't not tell the truth." She realized she could not live with the man who tried to kill her. R. p. 399.

On January 7, 2016, Lieutenant William Gary was called in to assist in the investigation. He tried to talk to Victim at hospital and had not yet gone into surgery, but Lieutenant Gary was unable to gain much information with all going on. Victim said she did not know anything. R. pp. 402-403. Lieutenant Gary went to the house and Appellant was there, but Appellant soon left for the hospital. R. pp. 403-404.

Inspecting the crime scene, Lieutenant Gary noticed things that were counterintuitive to a burglary or robbery. The contents of the purse were poured out, but the valuables were not taken. Then observing the blood smear stains down the ramp, it made little sense that the robber would take the time to drag Victim out of the garage. R. pp. 412-414; p. 419. There was a zip tie down at the end of the driveway. Strangely, there was white powder on Appellant's truck. R. pp. 417-418.

Lieutenant Gary testified he found a hollow point round by the garage that he recognized as being Hornady ammunition. Live Hornady .38 rounds were recovered from the house. R. pp. 420-421. Victim's gun never recovered. R. pp. 455-456. Appellant informed Lieutenant Gary that Victim normally kept her 38 in either her purse of the glove compartment in her car. R. pp. 455-456.

Lieutenant Gary interviewed Appellant and asked for consent to search Victim's phone.

Appellant said he was not aware of Victim having any affairs. Appellant said "somebody" told Appellant that the assailant had the same build as Appellant. He forewarned Lieutenant Gary there would be an argument between Appellant and Victim over an engagement ring being lost on the phone. Appellant also said he was not always honest with Victim. In Lieutenant Gary's mind, Appellant became a suspect after the conversation. Lieutenant Gary obtained and executed search warrants on the phone and the residence. R. pp. 423-425.

When executing the search warrant, there was a mini-van in the garage. When they approached, they saw Appellant putting a shirt on and walking down the hallway. They asked Appellant if anyone else was in the house, and he disclosed Sydney was present. Knocking on the bedroom door, Sydney said through the door she needed to put some pants on. She had a men's shirt on, but Lieutenant Gary needed to hand her a pair of shorts. R. pp. 428-429.

Deputy David Hogsed went to the location where Victim's car was found. It was about a mile and a half from their house. The vehicle was still running and in gear on the side of the road. It was stuck on a berm. R. p. 506; p. 509; pp. 516-517. A fire deputy turned the vehicle off. A report of the vehicle was received at 10:18 p.m. There was blood on the seat and on the vehicle. Law enforcement collected samples of the blood for DNA analysis. R. pp. 509-512. A fingerprint found in the vehicle belonged to a patrolman. R. p. 514.

Lindsey McGraw, then with the Sheriff's Department, examined Victim's phone, Appellant's two phones, and his girlfriend's phone. R. pp. 533-534. Sydney is listed as "Sydney" on one phone, but as "Crown Vic" on Appellant's other phone. Victim phone number is listed as "Little Wifey" in Appellant's contacts. R. pp. 534-535. One of the text messages from Appellant to Sydney asks if she wants to go with him back in the hospital to see Victim. Sydney declines. R. p. 552. Sydney posits that it would be inappropriate given her relationship with Appellant, but Appellant replied it

was fine because only Sydney and Appellant knew about their affair. R. pp. 552-553.

Dustin Tiller was serving a federal sentence at the Yazoo facility in Mississippi, but was brought to Spartanburg to testify. Tiller pled guilty to conspiracy to traffic methamphetamine in federal court pursuant to a plea agreement he signed on March 16, 2017. Because of his prior drug offenses, Tiller could have received a life sentence for his federal charges. R. pp. 566-571. Charges were also dismissed pursuant to the plea agreement. Sentencing was at the sole discretion of the federal judge (Judge Childs). Under the terms of the agreement, Tiller was required to provide truthful information and truthful testimony. Tiller is required to disclose all knowledge he has of criminal activity. Failure to be truthful would nullify the agreement. R. pp. 572-575. Tiller received a 220 month sentence from Judge Childs. R. p. 578.

Tiller met Appellant while they were both at the Spartanburg Detention Center. They met during a Bible study program Tiller taught. Appellant started talking about his case with Tiller. Tiller tried to comfort Appellant by telling him if he was innocent he did not have anything to worry about. Appellant then told Tiller he shot his wife. Appellant confided that Tiller was the first person he ever told this to. Appellant felt a weight was lifted off him. R. pp. 579- 582. He explained he was on the phone with his wife until she got close to the house, and he hid in wait outside. When she pulled in, he shot her, then left to hide the gun. Appellant used Victim's own gun on her. Appellant thought she was dead but returned to find her still alive. R. p. 584. Appellant then changed his clothes. He put white powder on his own vehicle to make it look like a drug robbery. Tiller did not understand that logic. R. p. 585.

Appellant wanted to kill his wife because they were arguing and he fell in love with another woman, a redhead. Appellant and the redhead each had two kids so they would get together at Appellant's house and have play dates where the children played and Appellant and the redhead had

sex. R. p. 586.

Dr. Brian Thurston, a trauma surgeon, treated Victim on January 7, 2016. Victim suffered multiple gunshot wounds, including to the face and head. She also suffered face and head fractures. Victim's condition deteriorated as they treated her. Dr. Thurston was not optimistic about her survival when he performed brain surgery. R. pp. 620-622. Victim spent a week on life support in the ICU. Her progress surprised Dr. Thurston. R. pp. 628-630.

The defense called Sergeant Walsh, who admitted he spoke to Victim at the hospital on January 18, 2016, and she denied Appellant shot her. R. p. 643. She also told him she parked the car in the driveway. R. p. 643. On cross-examination, Sergeant Walsh explained that Victim appeared to recall the incident well, but when asked who did it, her body language changed. R. p. 647.

The defense also recalled Investigator Gary, who testified that it was a firefighter who shut the car off. He also explained two projectiles were recovered during the investigation. One from the garage and one from the Victim's body. Both bore markings consistent with Hornady ammunition, but insufficient marks remained to determine if they matched each other. R. pp. 649-652.

Appellant testified on his own behalf. Appellant claimed he did not shoot his wife. Still on direct examination, he admitted he lied about not having an affair. R. pp. 653-654. Appellant admitted he knew Dustin Tiller and talked with him about a number of things, but insisted he did not talk about his own charges. R. p. 655.

When defense counsel asked how Appellant met Victim, Appellant explained, "I was actually seeing another woman at the time, and I just had a child with that woman while seeing a woman before that. And the one, married, that I was seeing when I met Stephanie is who introduced me and her." R. p. 657:17-20. A little while after they were introduced by the married woman,

Appellant and Victim started dating. Appellant testified Victim was aware of the affairs. He explained, "She was aware that while I was with Sarah, I had an affair with Mary and ended up with a child from the relationship." R. p. 657:25-658:2.

Defense counsel asked Appellant if Victim's father ever caught Appellant having an affair on Victim, Appellant explained, "I was at Lowe's with a female named Tasha, and her father and her stepmother pulled up while we were having an affair in the truck. While we were together in the truck." R. p. 659:8-10.

Appellant testified he put the children to bed at 8:30 p.m. the night Victim was shot, and Victim called Appellant when she was making the deposit at the bank at 9:23 p.m. He agreed with the records showing they talked for thirteen minutes. R. pp. 662-663. According to Appellant, when she was about to pull in the driveway, he went in the shower. R. p. 663. Appellant discovered Victim after the shower when he opened the door and saw blood on the ramp. He heard Victim calling her and he ran to her, then called 911. R. p. 664.

The prosecution on cross-examination asked Appellant about the fact that he took a 45 minute shower, revisited that Appellant was with Sydney while Victim was in ICU; and Sydney was visiting Appellant earlier in the day when Victim was shot. R. pp. 681-683. When inviting Sydney to go back with him to see Victim in the hospital, Appellant added, "I could kiss you on the way, LOL, yes?" R. p. 682:15-25.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). This Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000).

ARGUMENT

I.

The trial court did not err in denying the motion to dismiss the case because of destroyed evidence where the evidence was not destroyed in bad faith and did not contain readily apparent exculpatory value.

Two bullet fragments were destroyed after the direct appeal time expired from Appellant's Alford plea. Without authority, Appellant argues law enforcement was required to wait until the time to file a post-conviction relief application expired, and Appellant further relies on a statute under which even a cursory reading reveals does not apply to a person convicted of attempted murder. A hospital employee apparently identified the fragment recovered from Victim's body as a 9mm. R. p. 234:16-24. The fragment from the garage was a .38. On this basis Appellant claims an ambiguity without regards to the law enforcement expert that examined both fragments recovered. The prosecutor advised the trial court that the analyst determined both fragments were .38s. R. 237:5-15. The trial court did not err because law enforcement was not required to follow the rules Appellant now makes up and law enforcement did not destroy the evidence in bad faith. Further, the trial court did not err in finding the evidence did not possess readily apparent exculpatory value.

The State does not have an absolute duty to preserve potentially useful evidence, and a defendant must demonstrate either: 1) the State destroyed evidence in bad faith; or 2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. State v. Moses, 390 S.C. 502, 520, 702 S.E.2d 395, 404 (Ct. App. 2010) (citing State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991)). The bad faith requirement limits the extent of the State's obligation to preserve evidence to reasonable bounds, and confines it to cases in which the police conduct indicates the evidence could form a

basis for exonerating the defendant. Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (explaining its reluctance to impose "on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution."); Moses, 702 S.E.2d at 403; United States v. Agurs, 427 U.S. 97, 109-10 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.").

To prove law enforcement destroyed the evidence in bad faith, Appellant relies on a statute that requires the preservation of evidence following conviction for an enumerated list of offenses that does not include attempted murder. S.C. Code § 17-28-320. Nonetheless, law enforcement should have saved the evidence anyway argues Appellant. Under the canon of construction "expressio unius est exclusio alterius" the expression or inclusion of one thing "implies the exclusion of another, or of the alternative." German Evangelical Lutheran Church v. City of Charleston, 352 S.C. 600, 576 S.E.2d 150 (2003) (citation omitted). "In interpreting a statute, '[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" State v. Gordon, 414 S.C. 94, 98, 777 S.E.2d 376, 378 (2015). Although penal statutes are strictly construed in favor of the defendant, the court must interpret the statute according to its literal meaning. State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 623 (2011). In the present case, Appellant desperately relies on a statute that does not enumerate the offense for which he was convicted. He asks this Court to include it anyway, in other words to act as a super legislature. Accordingly, Appellant failed to show that the bullets were destroyed in bad faith.

Further, Appellant failed to show the destroyed bullets carried readily apparent exculpatory value. If a defendant's purpose is to exploit any exculpatory potential of missing evidence, to meet

the standard of constitutional materiality he must make some showing the item possessed exculpatory value that was apparent before it was lost by the State. State v. Adams, 304 S.C. 304, 403 S.E.2d 678, 680 (Ct. App. 1991). Speculation by a defendant that the evidence would be exculpatory is insufficient. Id. at 305, 403 S.E.2d at 680. In the present case, the bullets were compared and were consistent with Hornady ammunition, the ammunition found in the house. It is speculative at best that a different ballistics expert would reach a different conclusion regardless of the comments of a hospital employee on the type of bullet recovered. The trial court in its ruling noted that the ballistics report was provided to the trial court and it reviewed the report and found that Appellant failed to demonstrate the bullet fragments have any exculpatory value that was apparent before it was destroyed. R. p. 309.

II.

The trial court did not err in declining to rule on the credibility of an inmate informant and thus intrude on the jury's role in determining the credibility of witnesses.

Appellant argues the trial court erred in declining to suppress informant Tiller's testimony for no other reason than in Appellant's view his testimony was not credible. The trial court does not have a legal basis to suppress witnesses like a jailhouse informant since the credibility of a witness is for the jury to determine. The informant obviously testified with the hope of a benefit – a downward departure – but the jury was capable of giving as much or as little weight to the testimony and the jury was free to discount it altogether as with any other fact witness.

How the issue arose

At defense counsel's request, Dustin Tiller testified in camera so defense counsel could seek to suppress his testimony. At the time of trial, Tiller was serving a federal sentence at a federal penitentiary for conspiracy to traffic methamphetamine. He was represented at trial by James Bannister, Esquire. An unredacted plea agreement was introduced as Court's Exhibit 4. The plea agreement was with the federal prosecutor. Because of Tiller's prior drug offenses, he was facing life imprisonment for his original drug charges. Several charges were dismissed in exchange for substantial assistance and the federal prosecutor removed the prior offenses for enhancement purposes that allowed Tiller to be able to receive less than a life sentence. However, the sentence remained up to the federal district court judge. Tiller noted that part of the agreement included the clause that his proffer could be used against him if he lied while providing information to the government or testified. Following the federal prosecutor filing a motion for a downward departure, Tiller was sentenced to 220 months imprisonment, or eighteen years and four months. R. pp. 464-476. Tiller confirmed no promises were made to him that his testimony in the instant case would

secure a downward departure, but he agreed he was hoping for one. R. pp. 475-477.

Tiller testified he knew Appellant from the time he was at the Spartanburg Detention Center. The two were housed in separate cells, but Appellant attended the Bible study group Tiller held and later they talked after Appellant found Tiller doing legal research for his own case in the institution's law library. R. pp. 477-478. Appellant started talking about his own case and eventually, Appellant confided to Tiller that he shot his own wife because of an affair Appellant was having with a red-headed woman. R. pp. 478-480. Tiller testified Appellant told him several details, including that he threw powder on his truck to make the shooting look like a possible drug deal gone bad and that Appellant drove Victim's car to a bridge nearby to make it look like a carjacking. R. pp. 479-482.

Following Appellant's cross-examination and the prosecutor's redirect examination, Appellant's defense counsel moved to suppress Tiller's testimony based on Appellant's argument that the circumstances of the present case were inconsistent with the Innocence Project's recommendations of when to use a jailhouse informant as a witness. R. pp. 495-502.

The trial court declined to make a credibility finding as to Tiller's testimony as the trial court would be usurping the role of the jury. R. p. 502:3-18.

The trial court did not err in declining to usurp the jury's role of judging the credibility of witnesses.

Rule 601(a), SCRE, provides the general rule that, "Every person is competent to be a witness except as otherwise provided for by statute or these rules." Rule 601(b), SCRE, states, "A person is disqualified to be a witness if the court determines that (1) the proposed witness is incapable of expressing himself concerning the matter as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth." The conduct of a criminal trial

is left largely to the sound discretion of the trial judge, who will not be reversed absent a prejudicial abuse of discretion. State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007); see State v. Heath, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958) ("Necessarily the conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had."); see also Rule 611(a), SCRE.

"Under South Carolina law, the competency of a witness is to be determined by the trial court, **whereas the credibility of a witness is exclusively for the jury to decide**." State v. Reyes, 432 S.C. 394, 401, 853 S.E.2d 334, 338 (2020) (emphasis added) (citing State v. Pitts, 256 S.C. 420, 182 S.E.2d 738 (1971) ("We have held in a number of cases that the weight to be given to a testimony of an accomplice is for the fact finding body and if the uncorroborated evidence satisfies the jury of the defendant's guilty beyond a reasonable doubt, an conviction is warranted.) (citation omitted)). Appellant conflates the gatekeeping function, exclusive to determining the admissibility of expert testimony with the present case. See Rule 702, SCRE; Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010) (The trial court must take care in its undertaking of the gatekeeper function without infringing on the jury's duty as a factfinder, the gatekeeper role merely requires the trial court "decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law.").

Appellant also makes a meek comparison to the standard of admissibility for evidence of third party guilt. But Appellant misapprehends the function of the trial judge in this scenario. The trial judge's role is not to determine the credibility of the proffered evidence of third party guilt, but only to determine if the evidence, taken as true, is inconsistent with the defendant's guilt. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (Evidence offered by a defendant of the commission of the crime by another person is limited to facts inconsistent with defendant's guilt) *abrogated on*

other grounds by State v. Wright, 91 S.C. 436, 706 S.E.2d 324 (2011); State v. Tony Orlando Singleton, Op. No. 5961 (S.C. Ct. App. filed Jan. 18, 2023) (finding in a CSC with a minor case that it was proper for the trial court "in refusing to instruct the jury on third-party guilt. Singleton relies on evidence that others had sexual intercourse with Victim, but that evidence is not a fact that is inconsistent with Singleton's guilt or raises a reasonable inference or presumption as to his innocence. Even if Singleton was not the father of Victim's unborn child, evidence that someone else impregnated Victim would not preclude Singleton from being guilty of first-degree criminal sexual conduct with a minor; Singleton could have also had sexual intercourse with Victim without impregnating her. Therefore, we affirm as to this issue.").

Appellant also makes a comparison to the common law threshold for extrinsic acts. To be admissible, the extrinsic bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, to help establish this logical relationship, evidence of the prior bad act must be clear and convincing. State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000); State v. Lyle, 125 S.C. 406, 118 S.E.803, 807 (1923) ("But the dangerous tendency and misleading probative force of this class of evidence require[s] that its admission should be subjected by the courts to rigid scrutiny."). However, the direct testimony of the victim of the extrinsic evidence may clear this hurdle. State v. Ford, 334 S.C. 444, 453, 513 S.E.2d 385, 389 (Ct. App. 1999) (finding the clear and convincing standard was met because the victim testified from direct knowledge that the defendants robbed and attempted to rob him and his testimony was partially corroborated by a detective). In this setting, the clear and convincing standard is part of the gauge in assuring probative value of the extrinsic acts as opposed to the danger of mere propensity value of acts with questionable merit.

Appellant attempts these analogies, flawed as they are, because Appellant offers no citation

to case law holding the trial judge is tasked with determining an informant's credibility. Such a rule would cut two ways: Presumably if possible, the trial judge could also screen potential defense witnesses, such as defendant's family members, for credibility. Notably, Rule 104, SCRE, discusses resolution of preliminary questions of admissibility (Rule 104(a), SCRE) and addresses when preliminary matters should be conducted outside the hearing of the jury (Rule 104(c), SCRE), but the rule is modified by its last paragraph: "This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility." (Rule 104(e), SCRE).

Accordingly, the trial court did not err in declining Appellant's invitation to usurp the jury's duty to determine the credibility of witnesses.

III.

The trial court did not err in declining to allow Appellant to inquire as to the content of the informant's communications with his attorney and in declining to allow Appellant to cross-examine the informant for the downward departure in exchange for his assistance leading to Appellant's plea because it would open the door to the fact that Appellant previously pled to attempted murder.

Appellant intertwines a couple of issues in the third issue. Appellant complains Tiller's attorney-client privilege was waived when the prosecution asked if his attorney explained the plea agreement to him. Note the prosecution never asked what the attorney's advice or explanation of the agreement was. Second, Appellant complains the trial court erred in not allowing Appellant to expose that the federal prosecutor reduced the recommendation from 240 months to 220 months imprisonment for his assistance. The trial court did not allow this because this would open the door to the reason for the downward departure at that point in time which was Appellant pled to attempted murder and so it appeared the case was final. Appellant was allowed to examine Tiller on the fact that, contrary to his recollection on direct examination, the federal prosecutor changed the recommendation from 240 months to 220 months for assistance in "a case."

The admission or exclusion of evidence is left to the sound discretions of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240, 244 (2001). The right to present a defense is not unlimited, but must "bow to accommodate other legitimate interests in the criminal trial process." Rock v. Arkansas, 483 U.S. 44, 55 (1987). While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence regardless of its admissibility under the rules of evidence. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586, 594 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

First, contrary to Appellant's claim, Tiller did not validly waive his right to the attorney-client privilege. "The attorney-client privilege belongs solely to the client and can only be waived by the client. . . . Although a client may waive his attorney-client privilege, the waiver must be distinct and unequivocal." State v. Thompson, 329 S.C. 72, 495 S.E.2d 437 (1998) (citations and internal quotation marks omitted). "Where an implied waiver is claimed, caution must be exercised, for waiver will not be implied from doubtful acts." Id. (quoting 28 Am.Jur.2d Estoppel and Waiver § 160 (1966)); see also State v. Bonilla, 429 S.C. 253, 275-76, 838 S.E.2d 1, 12 (Ct. App. 2019) (finding that to establish implied consent from the defendant for his attorney to disclose information to the state, there must be consent by the client and consultation by counsel: "That is, the client can provide valid consent only if there has been appropriate 'consultation' with his or her attorney. . . . [W]e require that a criminal defendant's decision be made on the basis of legal guidance and with full cautionary explanation.") (citations and internal quotation marks omitted).

In the present case, the prosecutor did not elicit testimony concerning the substance of Tiller's attorney's advice to Tiller. Further, Appellant's subterfuge in seeking on cross-examination to trick Tiller into waiving his privilege does not count as a "distinct and unequivocal" waiver. Thompson. Therefore, the trial court did not err.

Additionally, Appellant was not prejudiced. The question Appellant wanted to ask was if Tiller asked his lawyer about Judge Childs. R. p. 592:3-18. Given that Tiller did not have any control over which judge would be his sentencing judge in federal court, it is difficult to imagine the answer to this question bore any importance. "An error without prejudice does not warrant reversal." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005).

Second, the trial court did not err in limiting that the twenty-month departure was related to Tiller's cooperation in securing Appellant's plea, because it would be unfair for the prosecution to

not be allowed to explain that the impetus for that recommendation from the federal prosecutor was Appellant's plea. "It would do well for defense counsel to remember that the people of the State as well as the defendant are entitled to a fair trial." State v. Stewart, 283 S.C. 104, 110, 320 S.E.2d 447, 450 (1984). Appellant misleadingly claims that he was not allowed to examine the circumstances of how Tiller was able to avoid a mandatory life sentence, but even a cursory reading of his cross-examination shows that is clearly not the case.

On cross-examination, Appellant elicited testimony from Tiller that while in prison, an individual named Perez, who was part of the drug cartel Tiller was involved with, sought to collect Tiller's debt to Perez. So Tiller started a drug operation from prison, which led to the charges for the sentence that he was currently serving. R. p. 591. Appellant elicited testimony from Tiller that he provided information about both inmates and corrections officers to the federal authorities. Tiller also provided information against an individual named Josh Peace in another federal case. R. pp. 593-594. Appellant elicited testimony from Tiller that this assistance led to Tiller avoiding a mandatory life sentence and that he received a downward departure to eighteen years. R. p. 595. Then Tiller agreed that his involvement in the instant case was put on record at the sentencing hearing with the advisement that Tiller would be back before Judge Childs for an additional downward departure. R. p. 595:9-24. Then Appellant was allowed to elicit from Tiller that he received an additional downward departure from 240 months to 220 months for assistance "in a case." R. p. 605:3-606:1.

Importantly, Tiller agreed he was hoping for another downward departure and that the prosecutor in the instant case would put in a good word with the U.S. Attorney so the U.S. Attorney will file a motion for a downward departure and Tiller could go before Judge Childs for a further reduction below the current eighteen year sentence. R. p. 606:2-19.

Appellant was allowed to show Tiller's cooperation in providing substantial assistance against inmates and corrections' officers, as well as in other cases which is the assistance that allowed him to avoid a life sentence. On the other hand, his assistance at the time of trial in the present case involves a lesser benefit of an additional 20 months and Tiller was crystal clear he was hoping for further benefit for his testimony at trial. The trial court did not err, nor was Appellant prejudiced by the slight limitation in his cross-examination.

IV.

The trial court did not abuse its discretion in finding that security in the courtroom was not excessive.

Appellant argues the trial court erred in not granting a new trial on the basis of excessive courtroom security. Appellant relies on his version of events at trial rather than the trial court's actual factual findings. Further, Appellant relies on a completely wrong legal analysis of determining if courtroom security is excessive.

"A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons." State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989) *cited in* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial). "The granting of a mistrial motion is an extreme measure to be taken only where an incident is so grievous that its prejudicial effect can be removed in no other way." State v. Dempsey, 340 S.C. 565, 570, 532 S.E.2d 306, 309 (Ct. App. 2000).

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. State v. Tucker, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995). Inexplicably, Appellant relies almost entirely on cases discussing the use of visible shackles, which is not an issue in this case. In Deck v. Missouri, 544 U.S. 622, 624 (2005), the United States Supreme Court held routine use of visible restraints violates due process and may be used only if "justified by an essential state interest" such as security. Appellant cites Deck multiple times even though this is not a shackles issue.

Although absent from Appellant's brief, South Carolina has examined issues related to use of

extra courtroom security personnel. State v. Gore, 257 S.C. 330, 185 S.E.2d 826 (1971) (finding counsel's objection to courtroom security, in which thirty-six officers were present, twenty-four of whom were uniformed, was not excessive. Gore was jointly tried with his codefendant, both already serving life sentences for murder, and a witness was also serving a life sentence for murder. Solicitor also received information about a possible rescue attempt) *abrogated on other grounds by* State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). In Gore, the Supreme Court explained:

> In State v. Greene, 255 S.C. 548, 180 S.E.2d 179 (1971), we held that there was not error in failing to exclude security guards from the courtroom. In such matters the trial judge must be allowed a wide discretion. On the shoulders of the judge rests the responsibility to see that both defendants and the State have a fair trial. The only trial recognized by our system of jurisprudence is a fair trial. There can be no fair trial unless it is orderly. In determining how much security is warranted the judge must act upon such information as is brought to his attention. He is not expected to have hindsight. If he permits such security as appears reasonably necessary to secure orderly proceedings and to assure that the accused persons do not escape, his ruling should not be reversed. At the same time more security than appears to be reasonably necessary should not be allowed.

Id. at 334, 185 S.E.2d at 828.

In the present case, Appellant complained that an officer walked over near Appellant as he testified.[2] Appellant told his counsel that the officer had two pairs of handcuffs, one pair was open. R. pp. 692-693. The trial court noted: "Well I saw it and I'm the one that nodded for the officer to go over there because this door leads into the Judge's chambers area. And the officer looked at me and I nodded for him to go, that's exactly what he did, I wanted him to stand right there by that door." R. p. 693:7-11. Appellant also complained about where the deputy sat while the jury was out and argued Deck (a case about visible shackles) compels a judge to have a hearing about the level of

[2] Appellant admits this same officer also guarded Tiller during his testimony. Br. of App. p. 15, fn. 8.

security in the courtroom. R. p. 693-694. The prosecution disputed as to whether the two sets of cuffs were visible to the jury. R. pp. 694-695. The officer explained why he kept two pairs of handcuffs: "The first set is my normal set, it's part of my uniform. The second set's the open set for when we have them in the jail chains. This isn't mine, this is from the jail." R. p. 695:20-23. After being confronted with that answer, Appellant's counsel added a complaint that there were other officers in the courtroom during the week. R. pp. 695-696. The trial court explained the following for the record:

> Well, we'll put it on the record that there's a deputy who testified, Sergeant Walsh previously, and he remained in the Courtroom. And there's a, Deputy Shay is back at the back there for the backdoor in a uniform, and my officer is in uniform, and the officer from the jail. So there are four uniformed officers in the Courtroom, so the Court finds that's not an excessive show of force, but you're on the record.

R. p. 696:12-19.

The trial court subsequently ruled as follows on Appellant's post-trial motion:

> As to the show of force, there was no show of force. Approximately five uniformed officers were in the courtroom; one of whom was summoned by defense Counsel and he testified.
>
> There was no shackling of this Defendant whatsoever. The officer who accommodated the Defendant to and from the witness stand was wearing a standard issued uniform from the Sheriff's Office. **He was not wearing body armor nor was he armed with multiple firearms or a long gun.**[3] He simply accompanied the Defendant to and from the witness stand, never touching him.
>
> I will call our attention to Holbrook . . . v. Flynn, 106 [S.Ct.] 1340. That's a 1986 case where there were four uniformed state troopers, two deputy Sheriff's, six committing squad officers present and the presence of those officers did not brand the Defendant with the unmistakable mark of guilt. It was not inherently prejudicial to the Defendant likewise here, again, there was no show of force.

R. p. 888:8-889:1.

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[3] Therefore, the trial court disagreed with Appellant's claim that the officer was wearing body

In the present case, the record reflects that appropriate security was provided. Further, it seems unlikely that a jury, with limited knowledge of what "normal" security is present in a courtroom, would generate a belief that the security in the courtroom was enhanced beyond what would be expected. Regardless, the record fails to reflect that the trial court abused its discretion given the level of security was limited, purposeful, and not demonstrably excessive.

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armor as claimed in Appellant's brief. See Br. of App. p. 21.

V.

Appellant fails to explain why exhibits that are cumulative to other evidence of Appellant's affair for which Appellant did not object was prejudicial. On the other hand, the exhibits were probative of Appellant's motive to kill his wife so he could replace her with his new girlfriend.

The prosecution presented testimony and exhibits that outlined the affair Appellant engaged in with Sydney. Much of this evidence was contemporaneous to the shooting, including evidence that Victim discovered the affair and Appellant was mad at her for confronting him about his affair. As Appellant admits in his brief, he did not object to an abundance of evidence and testimony regarding Appellant's affair with Sydney. He complains that State's exhibits 53-59, extractions from cell phones, should not have been admitted into evidence under Rule 403 because this was too much evidence. Appellant does not explain why those exhibits were prejudicial to him.

"The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). Error without prejudice does not warrant reversal. State v. McWee, 322 S.C. 387, 393, 472 S.E.2d 235, 239 (1996). Reversal of a circuit court's ruling on the admission or exclusion of evidence requires prejudice to the defendant. State v. Liverman, 386 S.C. 223, 233-34, 687 S.E.2d 70, 75 (Ct. App. 2009).

In the present case, the relevance is obvious. Evidence of the affair and Victim's discovery of the affair was probative of Appellant's motive. "[T]he prosecution is permitted to prove the accused's motive to identify the accused as the perpetrator of the charged crime." Mitchell v. State,

865 P.2d 591, 596-97 (Wyo. 1993). "While intent accompanies the actus reus, the motive comes into play before the actus reus. The motive is a cause, and the actus reus is the effect." Id. at 597 (quoting Edward J. Imwinkelried, Uncharged Misconduct Evidence (1992 & Supp. 1993)). "That the defendant had a motive for that particular crime increases the inference of the defendant's identity. . . . It is ideal if the defendant is the only person with such a motive. . . . The courts assume that motive has strong probative value because a motive naturally leads to action." Id. (quoting Imwinkelried).

Not only was evidence proving the existence of the affair probative, but also evidence showing the nature of the affair, the kind of relationship between Appellant and Sydney became important. For instance, Sydney texted, in part, on January 7: "I can't wait to be able to call you mine and not have to share you with anyone. I can't wait to be your fiancé and then your wife. I can't wait to be yours and wake up every morning to your face and your smile. I can't wait to come home to you and our kids together as one family." R. p. 685:7-12. Appellant replied that he could not wait either. R. p. 685:17-21.

The exhibits Appellant complains about are also probative and not unduly prejudicial. The trial court explained, in relevant part, the following in its ruling:

> I know the Defense wants to draw the line at number 52, but 53 through 59 are some pictures, . . . , but they're pictures of them hugging and kissing and professing feelings for each other and they are limited, very limited, there are not that many of them. Not that many documents, not that many pictures, I think it's five pictures, maybe, and three of them, I think, are the same picture or one that was turned sideways on the screen, or it may have been taken three times, I don't know that that works, but nonetheless, they're limited pictures, but it does show affection with each other. So this Court will find that there's relevant evidence and it goes to motive.

R. p. 562:13-24. Appellant does not explain why the pictures are unduly prejudicial.

On the other hand, on direct examination Appellant testified, seemingly bragged, about multiple affairs – meanwhile the prosecution focused on just the one affair with Sydney. Therefore, the prejudicial effect of the exhibits is questionable since Appellant was too willing to provide more extensive evidence of his womanizing.

Further, as Appellant acknowledges, these exhibits are merely cumulative to other evidence of the affair between Appellant and Sydney. The introduction of inadmissible evidence is harmless when the evidence is merely cumulative to other evidence presented without objection. State v. Kirton, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122-23 (Ct. App. 2008). Accordingly, the trial court did not err.

VI.

The trial court did not err in allowing photographs to be admitted that carried probative value and happened to have a confederate flag visible in the photograph.

Appellant complains that two photographs introduced by the prosecution that incidentally contained a confederate flag in one picture and a confederate flag console cover in another were admitted in error and prejudicial. The trial court has great discretion in balancing the probative and prejudicial value of evidence, and in this case, exercised that discretion appropriately. The photographs were probative of the steps law enforcement took in executing the search warrant on Appellant and Victim's home. State's Exhibit 31 in particular showed an empty holster and a magazine which is highly probative in a case involving a shooting. 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 steps in law enforcement's investigation of the crime, including the execution of the search warrant on the house.

State's Exhibit 31 shows an empty holster where it was found in the front seat of Appellant's truck. It was collected into evidence. R. p. 431:1-22. Additionally, there was a magazine in the bottom left corner of the picture in the passenger side of the seat. R. p. 434:18-23. State's Exhibit 38 showed the inside of Appellant's shop, where tools were kept. R. p. 436. Appellant objected during sidebars and put his objection on the record on the basis that a confederate flag is in both pictures. R. p. 440:5-10.

The prosecutor explained the relevance of the photographs, "Judge, as I stated at sidebar, these are just documenting the residence as, well, the vehicle and the shop as it appeared on that day to the investigators, the State can't help that that was part of those photos, so and you know, I mean, I don't think that it's obvious in either photo that it's there unless you're really looking for it, so." R.

p. 440:12-17. The trial court overruled the objection. R. p. 440:20-23. In State's Exhibit 38, the picture itself, the flag is not unfurled and it is not on display, but stored with numerous other items in a disorganized storeroom. The prejudicial effect is limited while the probative value of the photograph is to show the steps law enforcement took in their investigation. The flag was not discussed in testimony or during closing argument by the prosecution.

The relevance, materiality and admissibility of photographic evidence is within the sound discretion of the trial court. State v. Kelly, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). The trial court does not abuse its discretion if the photographs serve to corroborate testimony. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997). "To constitute unfair prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" Kelly, 319 S.C. at 178, 460 S.E.2d at 370-71 (citation omitted).

For instance, in Kelly, the Supreme Court described the photographs it found admissible as follows:

> [T]wo photographs are of the victim's nude body lying on the living room floor with her face and body visible swollen from the beating. Additionally, the photographs show blood smeared on the walls and floor. The video shows the entire crime scene. These photographs and video were relevant to establish the crime scene.

Kelly, 319 S.C. at 178, 460 S.E.2d at 370 (citation omitted).

In the present case, State's Exhibit 31, which showed an empty holster and a magazine was relevant since the present case was the investigation of a shooting. State's Exhibit 38 is relevant because it shows part of law enforcement's thorough search of the premises when executing the search warrant. In contrast, the prejudicial value is limited – the prosecution never referred to the flag or elicited testimony about the flag. It is simply absurd to believe the jury's focus would be on those items that are never discussed instead of focusing on the evidence presented concerning a

violent crime. Therefore, the trial court did not abuse its discretion.

VII.

The trial court did not abuse its discretion by declining Appellant's proposed voir dire questions for the jury.

Appellant proposed two voir dire questions that the trial court declined to ask the jury panel: (1) a question as to whether the nature of profanity would affect the prospective juror to the extent the juror could not remain fair and impartial, and (2) "You will hear testimony and may see evidence of serious bodily injuries. Is there anything about the nature of serious bodily injuries that would so affect you that you would not be able to remain fair and impartial?" The substance of the latter question was covered in voir dire, as shown below. As to the issue of course language, the trial court did not abuse its discretion in declining to pose the question to the jury panel and Appellant was not prejudiced as the jury was sufficiently put on notice of the nature of the case they would be hearing.

Voir dire examination and the post-trial motion

During voir dire, the trial court advised the jury panel that Appellant was charged with attempted murder. R. pp. 196-197. The trial court then posed the following inquiry:

> This case involves allegations of a violent crime. Is there any juror who has personal experience or association that would prevent him or her from rendering a fair and impartial verdict? If so, please stand. I guess asked a different way, is there a member of this jury panel who has been the subject of, been the victim of, a violent crime? If so, please stand.

R. p. 210:8-14. Later the trial court inquired: "It is expected that testimony in this case will be about a person being shot at her home. Would hearing that testimony so affect you that you would not be able to remain fair and impartial in this case? If so, please stand." R. p. 212:6-10. The trial court concluded voir dire by asking, "Is there a member of this jury panel who knows of any reason why he or she should not try this case, you should not sit on this jury, please stand." R. p. 212:18-20.

Appellant claims the issue was discussed at a side-bar during jury selection on October 25,

2021. The issue was one of many raised in Appellant's post-trial motion heard on December 8, 2021. The trial court ruled on the motion at a hearing convened on February 3, 2022 as follows:

> The motion in front of me is for a new trial based on several different issues that were raised; the first one being inadequate voir dire. This Court was careful to ask questions proposed by both the State and the defense. And This Court admits not every question proposed by either of the parties was asked. One final question was asked, whether or not there was any juror for any reason why he or she should not serve as a juror in this particular case. That question was intended to be all encompassing and to ensure the Defendant had a fair and impartial jury.
>
> The jury was aware of the nature of the case and the potential jurors were given an opportunity to express any concerns they had.

R. p. 886:24-887:11.

The trial court did not abuse its discretion in declining to ask the two questions requested by Appellant.

While parties may request areas for inquiry, the manner of voir dire examination is left to the sound discretion of the trial judge. State v. Wise, 359 S.C. 14, 23, 596 S.E.2d 475, 479 (2004); State v. Britt, 237 S.C. 293, 311, 117 S.E.2d 379, 388 (1960). ("[T]he scope and limits of interrogation of a juror on voir dire is within the sound discretion of the trial Judge and it is for him to determine the character of the questions proposed and when the examination shall cease.") *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

As show above, the trial court informed the jury panel the charge was attempted murder, the case involves allegations of a violent crime, and it was expected there would be testimony about a person shot in their home. Accordingly, the trial court's voir dire provided substantially the same inquiry and warnings about the violent nature of the case.

Appellant cites no cases requiring the jury panel to be forewarned of course language or other indelicacies. Appellant claims the trial court was compelled to ask Appellant's proposed questions

under the State and Federal constitutions, but offers no case law supporting the proposition that not warning the jury panel about course language was a constitutional issue. In sum, Appellant is asking this Court to reverse the trial court on Appellant's belief that the proposed question was a good idea.

The cases cited by Appellant offer no substantive support for his argument. In Smith v. Phillips, 455 U.S. 209, 212-13 (1982), for which Appellant relies on Justice Connor's concurring opinion, the issue concerned the procedure in reviewing prosecutorial misconduct. One of the jurors applied to be an investigator with the district attorney's office during trial, and the two prosecutors decided not to disclose this information to the judge or defense attorney.

In Crawford v. United States, 212 U.S. 183, 196 (1909), the Court examined whether the judge erred in not striking for cause the operator of a drug store that contained the post-office. He was "technically" a clerk for the post office. The charge was the defendants defrauded the United States. Analysis was not under the federal constitution, but instead under the District of Columbia code of laws and Maryland common law. Id. at 195. The Court concluded that he was not a competent juror even if "he should swear he would not be influenced by his relations to one of the parties . . . ." Id. at 197.

The remaining case concerns the effect of pre-trial publicity for the prosecution of Colonel Aaron Burr. United States v. Burr, 25 F.Cas. 49, 50 (D.Va. 1807) and whether prospective jurors already formed an opinion about the case. Pre-trial publicity is not an issue in the instant case.

In the penultimate paragraph, Appellant makes mention that he asked the trial court for each prospective juror be individually questioned, relying on Skilling v. United States, 561 U.S. 358 (2010). This seems to be merely a superfluous paragraph and not an earnestly raised issue by Appellant. Nonetheless, even Skilling advises, "No hard-and-fast formula dictates the necessary depth or breadth of voir dire." Id. at 386. "Jury selection, we have repeatedly emphasized, is

'particularly within the province of the trial judge.'" Id. (citation omitted).

In the present case, Appellant lacks any earnest authority to suggest that failure for forewarn the jury and inquire about their level of squeamishness over course language rose to constitutional levels or amounted to an abuse of discretion. The jury was advised that the charge was attempted murder, it was a violent crime, and it involved a woman being shot in her own home. The trial court asked a similar question as to marital infidelity for which there was evidence presented in this case. R. p. 212. Accordingly, the trial court did not err in not asking the additional questions as the trial court correctly observed the jury was put on notice of the nature of the case.

VIII.

The trial court did not abuse its discretion in not disclosing mental health records the trial court placed under seal since the only useful information was that Victim told the therapist that Appellant hit her with a blunt force instrument and shot her.

Appellant complains that the trial court erred in not disclosing therapist records. The records are under seal. Neither party knows what are in the records. The records were received by the trial court which reviewed the records. R. p. 269. The trial court explained, "I have advised both the state and defense that there was nothing useful in those records." R. p. 269:20-21. The trial court explained some of the content of the records: "She doesn't know what the future is going to look like. She's scared. She doesn't know the legal process." R. p. 270:2-4.

The trial court further explains:

> But there's nothing in there about her identifying any other person. She identifies her husband as the person who harmed her starting out with a – the first session, a blunt force object. She doesn't say what it was. And then shot. And she refers to him throughout as her husband and then later as her ex-husband or former husband.
>
> And there's one note in there that she was getting ready to go to court about the divorce. . . . She does not identify anyone else. She does not say that she doesn't know who harmed her. Again, she identifies the defendant.

R. p. 270:2-21. The judge informed the parties that he was sealing the records. R. p. 272:13-14.

Respondent is unable to review the records since they are under seal but tends to trust the veracity of the trial court and believes the trial court appropriately examined the records and exercised its discretion to determine no useful information was contained in the records. Note Victim explained that she knew and always remembered that Appellant was the shooter and that the reason she did not identify him as the shooter initially to law enforcement was she scared and she was processing and coming to grips with the idea that her husband shot her and that she could not

return home to him. Based on the trial court's representation, the records do not appear to assist Appellant as he hopes. Further, the record reflects the trial court appropriately followed the procedure set out in State v. Blackwell, 420 S.C. 127, 801 S.E.2d 713, 726 (2017) by reviewing the record to assess whether the therapy records contained any information affecting Victim's credibility.

IX.

The Solicitor prosecuted Appellant for the same charge for which he received post-conviction relief and the sentence was left within the discretion of the trial court which assured Appellant he was not being punished for exercising his right to trial so there is no merit to the allegation that Appellant was subject to retaliation by the prosecution for invoking his right to pursue post-conviction relief.

Appellant argues his sentence was unlawful and without proof, asserts the prosecution was retaliating against Appellant for Appellant obtaining post-conviction relief for his prior plea conviction and for Appellant exercising his right to trial. The prosecution proceeded on the same charge for which Appellant originally pled and the sentence was wholly within the trial court's discretion. Therefore, the trial court did not err nor was there opportunity for the prosecution to retaliate.

The prosecution explained what changed since the time of the plea:

> Stephanie is physically much stronger, she was very frail at the time this case was ready for trial. And the State, I mean, in discussions with the family made some really tough decisions about trying to resolve this case. But, and in resolving it when it gave this Defendant a great benefit that he did not want.

R. p. 779:24-780:10.

The trial court explained that it does not punish anyone for exercising their right to trial. But the trial court also explained, "[W]e are back at ground zero, and this Court is not bound by anything that happened previously." R. p. 780:12-21. In denying Appellant's post-trial motion to reconsider the sentence, the trial court ruled:

> As to the reconsideration of the sentence, there was no retaliation for going to trial. No matter what comments the State made, this Court independently issued the sentence. The Court is not bound by the State's request nor is the Court bound by the victim's request. This Court fashioned the appropriate sentence and imposed a legal

sentence on this Defendant who was convicted by a jury of his peers.

R. p. 889:2-12.

The facts of the case clearly warrant the maximum sentence for attempted murder. The evidence reflected Appellant lay in wait to attack and shoot his wife. He dragged her down the ramp and left her in the yard. He attempted to stage the scene to hide his crime. His wife was the victim of this assault for no other reason than she caught him in an affair and he decided he wanted to replace Victim with his new girlfriend. While Victim was in the hospital, Appellant made the most of the opportunity to continue his affair as evidenced by law enforcement finding Sydney naked at Appellant's house when they executed the search warrant. He even invited Sydney to go back and see Victim in the hospital after he himself was the one that put Victim there, with a text that ended with "LOL" – hardly appropriate when your wife is in the hospital with a potentially lethal gunshot wound. The malice is extant in the record.

The trial court has broad discretion in giving sentences within the statutory limits. Brooks v. State, 325 S.C. 269, 271-72, 481 S.E.2d 712, 713 (1997). "A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against a defendant." Id., at 272, 481 S.E.2d at 713. "[T]his court has no jurisdiction to review a sentence, provided it is within the limits provided by statute for the discretion of the trial court, and is not the result of prejudice, oppression or corrupt motive." State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976).

"It is a due process violation to punish a person for exercising a protected statutory or constitutional right." State v. Blakely, 402 S.C. 650, 657-58, 742 S.E.2d 29, 33 (Ct. App. 2013) (citations and internal quotations omitted). "However, punishment of the offender is recognized as a proper motivation for a sentencing trial judge or a prosecutor." Id. at 658, 742 S.E.2d at 33 (citations

and internal quotations omitted). Notably, the "initial decision by the prosecutor should not freeze future conduct, because the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution." Id. (citation and internal quotation marks omitted).

This Court observed the following:

> Only certain limited circumstances pose a realistic likelihood of vindictiveness by a prosecutor and, therefore, warrant the application of a presumption of vindictiveness. . . . The inquiry is not focused solely on the presence or absence of actual vindictive motive, but includes whether the action taken, which exposes the accused to an increased punishment, poses such a reasonable likelihood of vindictiveness as to require a presumption of vindictiveness.

Id. (citations and internal quotation marks omitted, cleaned up).

In the present case, no corrupt motive was shown. First, this case does not present a situation where the prosecution brought additional charges or retried the defendant for a greater charge. Appellant was tried precisely for the charge he originally pled to. Second, the prosecution explained the circumstances in which at the time of the plea Victim was "frail." Considerations about Victim's capacity to testify effectively in front of her assailant and the ability to save Victim from the trauma of a trial obviously were implicated in the decision to offer Appellant the favorable plea bargain. But those considerations were not a factor anymore because Victim was stronger and in a better position to testify by the time of trial. Therefore, there was a change from the time of the plea to the time of trial. Finally, the sentence was out of the State's hands. It was up to the trial court, and the trial court was fully aware of the history of the case. Having heard the gruesome facts of the case, it is hardly surprising the trial court determined the maximum sentence was warranted. The trial court did not abuse its discretion in sentencing Appellant.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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September 6, 2023

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable R. Keith Kelly, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

vs.

JOHNATHAN OLIN BATCHELOR,

Appellant.

Appellate Case No. 2022-000160

CERTIFICATE OF COUNSEL

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

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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA

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Appeal From Spartanburg County
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Appellate Case No: 2022-000160

STATE OF SOUTH CAROLINA,

Respondent,

v.

JOHNATHAN OLIN BATCHELOR,

Appellant.

PROOF OF SERVICE

I, Grace Sommer, certify that I have served the Final Brief of Respondent on E. Charles Grose, Jr., Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 6th day of September, 2023.

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From: Grace Sommer
Sent: Wednesday, September 6, 2023 10:58 AM
To: charles@groselawfirm.com
Cc: David Spencer
Subject: The State v. Johnathan Olin Batchelor (2022-000160)
Attachments: BATCHELOR Johnathan - FBOR (03380483xD2C78).PDF

Good Morning Mr. Grose,

Attached please find the Final Brief of Respondent in The State v. Johnathan Olin Batchelor (2022-000160). This document will be filed today with the Court of Appeals via the AIS OneDrive System.

If you will, please confirm receipt of this email.

Thank you,

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