STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County
Honorable Donald B. Hocker, Circuit Court Judge
Appellate Case No. 2022-000230

THE STATE,

Respondent,

vs.

KENDRICK TREMAIN BLACKWELL,

Appellant.

FINAL BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF ISSUES ON APPEAL

I.

Did the trial judge err by declining to quash the jury in Appellant's case when Appellant failed to meet his burden of establishing Newberry County's jury selection process was systematically excluding black jurors such that they were being unfairly underrepresented on jury panels from which juries were selected?

II.

Did trial judge, who otherwise presented jury instructions that correctly conveyed the relevant and applicable law to the jury, err by declining to present a jury instruction on spoliation of evidence during Appellant's criminal trial when such an instruction: (1) was not consistent with the current and correct South Carolina law applicable to criminal cases; (2) was not supported by the actual evidence presented during trial; and (3) would have constituted an improper and unconstitutional comment on the facts?

STATEMENT OF THE CASE

In January of 2020, Appellant Kendrick Tremain Blackwell was arrested after a search-warrant-based search of his residence resulted in the discovery of drugs and other incriminating items. On January 24, 2022, the Newberry County Grand Jury indicted Appellant for trafficking in methamphetamine. On that same date, Appellant appeared in the Newberry County Court of General Sessions before the Honorable Donald B. Hocker, circuit court judge, for the purpose of pleading guilty to several charges, including trafficking in methamphetamine. However, due to Appellant's hesitancy during the plea hearing, Judge Hocker declined to accept Appellant's guilty plea. A few days later, a jury trial was commenced on the trafficking in methamphetamine charge in the Newberry County Court of General Sessions with Judge Hocker presiding, and the jury selection process was successfully completed without objection. Ultimately though, Judge Hocker granted a continuance before the jury was sworn based on the late disclosure of some information to the defense. Thereafter, on February 22, 2022, a second jury trial was commenced on the trafficking in methamphetamine charge in the Newberry County Court of General Sessions with Judge Hocker again presiding.[1] At the conclusion of the three-day trial, the jury convicted Appellant as indicted. Following the verdict, Judge Hocker sentenced Appellant to a twelve-year term of imprisonment. Appellant then timely filed a notice of appeal.

[1] At the time of Appellant's trial on the trafficking in methamphetamine charge, Appellant had three pending charges of distribution of heroin stemming from separate incidents that occurred between April of 2019 and January of 2020 along with another pending charge of trafficking in methamphetamine related to an incident that occurred just one month before his trial began. (R. pp. 15-16; pp. 388-389).

STATEMENT OF FACTS

On the afternoon of January 30, 2023, multiple officers from the Newberry County Sheriff's Office went to Appellant's mobile home along with several agents from the South Carolina State Law Enforcement Division ("SLED") to execute a search warrant that was obtained as part of a several-months-long narcotics investigation. (R. pp. 15-16; pp. 114-117; pp. 236-237; pp. 242-244). At that time, Appellant was inside the residence along with his cousin, Iyeshia Sims. (R. p. 118; pp. 120-121; pp. 278-279; p. 281).

Upon the officers' arrival at the scene, Appellant and Sims were detained, and the officers proceeded to conduct a search. (R. pp. 120-121; p. 126; pp. 243-244). During the course of that search, the officers discovered eight different bags of suspected narcotics hidden in various locations throughout the residence. (R. pp. 126-128; pp. 138-142; pp. 146-147). Likewise, they found items connected to Appellant, including his bank card and social security card, along with five different digital scales, some razor blades, some plastic baggies, and a residue-covered cutting board. (R. p. 142; p. 145; p. 152; pp. 165-167; pp. 249-250). As a result of what was uncovered, Appellant and Sims were both promptly arrested. (R. pp. 153-154; p. 283).

Subsequent to that, Appellant was indicted for trafficking in methamphetamine, and, after an unsuccessful attempt to plead guilty, he proceeded forward to trial. (R. pp. 7-14; pp. 50-51). During trial, testimony was presented about the search of Appellant's residence that led to the discovery of all his hidden narcotics, and Sims expressly denied any of the drugs belonged to her. (R. pp. 114-237; pp. 242-273; p. 282). In addition to that, Shana Sorrells, a forensic chemist from SLED, testified about her analysis of the suspected drugs found inside Appellant's residence. (R. pp. 287-304). Based on that analysis, she confirmed the discovered substances

constituted at least 28.51 grams of methamphetamine in both pill and powder form.[2] (R. pp. 160-161; p. 300; p. 304). Furthermore, she indicated some of the methamphetamine was mixed with "bath salt," and one of the submitted bags of powder was not a controlled substance but may have been for use as a cutting agent. (R. pp. 298-299; pp. 302-303).

Ultimately, after all that testimony and evidence was presented, the case was submitted to the jury. (R. p. 382). And, after just over thirty minutes of deliberations, the jury convicted Appellant as indicted. (R. p. 382).

[2] Prior to the SLED analysis, the officers who found Appellant's methamphetamine initially believed some of it was heroin or fentanyl based on its appearance. (R. pp. 140-142; p. 148).

ARGUMENT

I.

The trial judge properly declined to quash the jury in Appellant's case because Appellant failed to meet his burden of establishing Newberry County's jury selection process was systematically excluding black jurors such that they were being unfairly underrepresented on jury panels from which juries were selected.

Relevant Facts

Toward the beginning of Appellant's first trial on his trafficking in methamphetamine charge, a petit jury of 12 jurors and 2 alternates was selected. (R. pp. 17-37). Notably, neither the solicitor nor defense counsel raised any objections to that selected jury, including any based on its racial composition. (R. p. 37). Ultimately though, Appellant's first trial was aborted after the trial judge granted a continuance due to the late disclosure of some information, so that jury was never given an opportunity to decide Appellant's case. (R. pp. 40-44).

A few weeks later, Appellant's second trial began. (R. pp. 50-51). As occurred in the first trial, a petit jury of 12 jurors and 2 alternates was selected from the panel of prospective jurors following the completion of the voir dire process. (R. pp. 51-69).

After the jury was selected, defense counsel raised an objection to the selection process while citing to Batson v. Kentucky, 476 U.S. 79 (1986). (R. pp. 74-75). As support for that objection, defense counsel noted only 3 black prospective jurors were available for selection, 2 were stricken by the solicitor, and 1 was selected as an alternate. (R. p. 75). Based on that, defense counsel asserted the petit jury did not include a "fair representation of the population of Newberry." (R. p. 75). Furthermore, defense counsel contended the solicitor needed to provide race-neutral reasons for his strikes of the 2 black prospective jurors. (R. p. 75).

In response, the solicitor proceeded to provide race-neutral reasons for both strikes, and defense counsel conceded he could not identify any similarly-situated white jurors that were not

stricken by the solicitor. (R. pp. 78-80). Upon considering the matter, the trial judge denied defense counsel's Batson motion. (R. p. 80).

The parties then proceeded to discuss the racial make-up of the jury panel. (R. pp. 81-82). Based on the information provided, the jury panel initially consisted of 42 prospective jurors in total and 8 of those jurors were black, which accounted for approximately 19% of the panel. (R. pp. 81-82). Meanwhile, according to census data provided *by defense counsel*, roughly 27% of Newberry County's residents were black.[3] (R. pp. 81-82).

In light of that information, the solicitor noted the black population was only underrepresented on the jury panel by 8% in Appellant's case, which he contended was not indicative of systematic exclusion. (R. pp. 82-83). Conversely, defense counsel contended systematic exclusion was, in fact, shown purely based on the fact the selected petit jury was comprised entirely of white jurors. (R. p. 84). However, in raising such a contention, defense counsel conceded the jury summons process that was conducted in Newberry County was entirely random. (R. pp. 83-84).

At that point, the trial judge conducted an in limine hearing on the matter and elicited testimony from Newberry County Clerk of Court Beth Folk, who provided general details about the jury selection process in Newberry County along with specific details related to Appellant's case. (R. pp. 89-94). Based on her testimony about the process generally, prospective jurors in

[3] Now, for the first time on appeal, Appellant—relying not on official 2020 census data but on an internet-based "QuickFacts" census estimate that was not presented to the trial judge—contends the percentage of black residents in Newbery County is actually 29.7%. (App. Br. p. 4). He then proceeds to rely on that statistical estimate to support his argument on appeal even though it was neither presented to nor considered by the trial judge. (App. Br. pp. 5-8). For reasons that should be obvious, Appellant's current shift from the position he adopted below and advanced to the trial judge is not proper or permissible on appeal. See State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (recognizing an issue conceded during trial cannot subsequently be argued on appeal); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

Newberry County were randomly and automatically selected by an electronic system from a list of residents complied from voter registration information along with records from the South Carolina Department of Motor Vehicles. (R. pp. 89-90). Meanwhile, based on her testimony regarding Appellant's case specifically, the original jury pool initially included 150 prospective jurors in total. (R. pp. 90-91). Of those 150 individuals, 40 were black, 105 were white, and 5 were Hispanic. (R. pp. 90-91; pp. 93-94). In total, 33 of the black prospective jurors were excused with 11 being excused for non-race-based reasons such an age and place of residence, 21 being excused for failing to respond to the summons, and 1 being excused for failing to appear.[4] (R. pp. 91-92). Of the 105 white prospective jurors, 47 in total were excused, including 21 who did not respond to the summons and 4 who failed to appear. (R. p. 93). Finally, of the 5 Hispanic jurors, all were excused because 3 did not respond and 2 failed to appear. (R. pp. 93-94).

Following the presentation of that testimony, the trial judge noted the original jury pool's composition was largely consistent with the relevant population statistics for Newberry County. (R. p. 94). The trial judge further concluded what had been presented did not support a finding of systematic racial exclusion in the jury selection process. (R. p. 94). Therefore, the trial judge denied the motion to quash the jury "unless" defense counsel had anything more to present on the matter. (R. pp. 94-95). Defense counsel responded: "Thank you, Your Honor." (R. p. 95). Subsequent to that, nothing further was presented to support defense counsel's challenge to the

[4] In his appellate brief, Appellant contends—purportedly based on Folk's testimony—only 6 black prospective jurors were part of the jury panel because "33 were excused for various reasons" *and* 1 more "was a no-show." (App. Br. pp. 4-5). However, refuting that contention, Folk explained 33 of the 40 summoned black jurors were excused in total before offering a breakdown of the excused jurors that *included* the "no show" amongst the 33 excused jurors. (R. pp. 90-91). Thus, Appellant's factual contention concerning the number of black jurors in the jury panel was incorrect and, resultantly, his statistical analysis based on that incorrect information was fundamentally flawed. (App. Br. pp. 3-8).

jury selection process, the trial proceeded forward, and Appellant was convicted as indicted by the jury as selected. (R. p. 95; p. 99; p. 383).

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). As a result, an appellate court is bound by the trial judge's factual findings—including those regarding whether systematic racial discrimination occurred in the jury selection process—unless they are clearly erroneous. State v. Ravenell, 387 S.C. 449, 454, 692 S.E.2d 554, 557 (Ct. App. 2010); see Patton v. Mississippi, 332 U.S. 463, 466 (1947) ("Whether there has been systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case."); Thomas v. Texas, 212 U.S. 278, 281 (1909) (explaining the matter of whether racial discrimination in the jury selection process occurred "was a question of fact"); cf. Hernandez v. New York, 500 U.S. 352, 367 (1991) ("Whether a prosecutor intended to discriminate on the basis of race in challenging potential jurors is . . . a question of historical fact.").

Argument

In every criminal case tried in South Carolina, a defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). Significantly, that right "contemplates a jury drawn from a pool broadly representative of the community and impartial in a specific case." State v. Warren, 273 S.C. 159, 162, 255 S.E.2d 668, 669 (1979). Accordingly, it is constitutionally required for petit juries to "be drawn from a source fairly representative of the community[.]" Taylor v. Louisiana, 419 U.S. 522, 538 (1975).

As a result of that requirement, "the jury wheels, pools of names, panels, or venires from which juries are drawn much not systematically exclude distinctive groups in the community and

thereby fail to be reasonably representative thereof." Id. Importantly though, the fair cross-section requirement does *not* mean—and has never meant—petit juries must actually "reflect the composition of the community at large." Lockhart v. McCree, 476 U.S. 162, 173 (1986); see also Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999) ("[T]his Court has held that a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury.").

In order to establish a prima facie violation of the fair cross-section requirement, a defendant bears the burden of showing: (1) the group excluded is a "distinctive" group in the community; (2) the representation of the group in venire*s* from which jur*ies* are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) the underrepresentation results from a systematic exclusion of the group in the jury selection process. Duren v. Missouri, 439 U.S. 357, 364 (1979); State v. Patterson, 324 S.C. 5, 21, 482 S.E.2d 760, 767-768 (1997). Significantly, for that burden to be met, the defendant "must offer strong and convincing evidence" in support of his challenge to the fairness of the jury selection process. State v. Hill, 394 S.C. 280, 288, 715 S.E.2d 368, 373 (Ct. App. 2011), overruled on other grounds by State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). If—and only if—that burden is satisfied, the responsibility shifts to the State to show the attainment of a fair cross section in the jury selection process is incompatible with a significant state interest. Duren, 439 U.S. at 368.

In the case sub judice, Appellant contends the trial judge reversibly erred by failing to quash the jury in his case. As support for that contention, Appellant—while relying on his own statistics and calculations that differ from what was actually presented to the trial judge—maintains the jury panel from which his all-white petit jury was selected was constitutionally

inadequate because black prospective jurors were purportedly significantly underrepresented when recent census data from Newberry County was taken into consideration. Appellant further maintains he demonstrated everything necessary to require the quashing of the jury, including systematic exclusion, based purely on the percentage of black prospective jurors available for selection from the jury panel in his individual case.

However, just as the trial judge accurately recognized, what was presented in Appellant's case was categorically not sufficient to demonstrate black jurors were being systematically excluded from the jury selection process in Newberry County. Instead, to the contrary, the only testimony presented on the matter came from the Newberry County Clerk of Court, who confirmed the routine selection process employed was conducted randomly and electronically *without* any consideration whatsoever given to race from a list of prospective jurors that was undeniably representative of the community. See S.C. Code Ann. § 14-7-130 (instructing the jury list for each county must be comprised of county residents who either hold a valid driver's license, have a state-issued identification card, or are registered to vote); S.C. Code Ann. § 14-7-140 (sanctioning the use of a computer to randomly select available jurors for service); see also State v. Hyman, 276 S.C. 559, 564, 281 S.E.2d 209, 212 (1981) ("[V]oter registration lists are the most representative source of a community."), overruled on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). In light of that unrefuted evidence, the trial judge simply did not have any grounds upon which to conclude any systematic exclusion of black jurors was—or had been proven to be—occurring in Newberry County's jury selection process. Cf. State v. Stallings, 253 S.C. 451, 456, 171 S.E.2d 588, 590 (1969) (concluding Stallings failed to meet his burden of proving racial discrimination in the jury selection process because the testimony presented "affirmatively show[ed] that there ha[d] been no discrimination

by race in the selection of juries in Charleston County"); Moorer v. State, 244 S.C. 102, 108, 135 S.E.2d 713, 716 (1964) (concluding Moorer did not meet his burden of showing systematic exclusion of black jurors because "[t]he testimony of all the witnesses rather than sustaining [Moorer]'s allegations, affirmatively show[ed] there ha[d] been no discrimination by race in the selection of juries in Dorchester County").

Meanwhile, in attempting to support his claim of discrimination in the jury selection process, defense counsel did *not* present any testimony—expert or otherwise—identifying any particular aspect or feature of the selection process employed that was racially discriminatory in nature or result. See State v. Mong, 988 N.W.2d 305, 311 (Iowa 2023) ("To prove systematic exclusion, Mong was required to produce evidence that any alleged underrepresentation resulted from a particular feature (or features) of the jury selection system. Proof that underrepresentation resulted from a particular feature or features of the jury selection system will almost always require expert testimony to (1) identify the precise point of the juror summoning and qualification process in which members of distinctive groups were excluded from the jury pool and (2) offer a plausible explanation of how the operation of the jury system resulted in their exclusion." (citations and internal quotations omitted)). Likewise, defense counsel did not present any historical evidence to support a conclusion the underrepresentation he contended occurred in his case was occurring regularly or systematically from jury panel to jury panel in Newberry County. Cf. Duren, 439 U.S. at 366 (concluding Duren demonstrated systematic exclusion of female jurors by demonstrating the underrepresentation occurred "not just occasionally but in every weekly venire for a period of nearly a year"); State v. Waitus, 224 S.C. 12, 21-22, 77 S.E.2d 256, 260-261 (1953) (concluding both the petit jury and indictment should have been quashed because the unrebutted evidence presented demonstrated no black jurors were

seated on a grand or petit jury in Marion County for a period of at least twelve years and no black jurors were seated on a Georgetown County grand jury for a period of at least five years).

Instead, defense counsel—despite being presented with an opportunity to present more—rested on the fact the specific petit jury selected in Appellant's case was comprised entirely of white jurors (aside from one alternate) coupled with the fact the specific jury panel from which that petit juror was selected contained a slightly lower percentage of black prospective jurors than the percentage of black residents that lived in the community. However, such information standing alone was insufficient as a matter of law to satisfy Appellant's burden of demonstrating black jurors were being *systematically* excluded from the jury selection process in Newberry County. See Akins v. Texas, 325 U.S. 398, 403-404 (1945) ("Purposeful discrimination is *not* sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. . . . The mere fact of inequality in the number selected does not in itself show discrimination." (emphasis added)); see also Taylor, 419 U.S. at 538 (emphasizing no requirement exists for petit juries to "mirror the community and reflect the various distinctive groups in the population"); cf. Mong, 988 N.W.2d at 312 ("Even on appeal, Mong does not identify the precise feature or features in the jury-selection process that allegedly resulted in systematic exclusion. Instead, he argues the alleged disparity between African-Americans in the jury pool and general population is sufficient, in and of itself, to establish systematic exclusion. We disagree. Mong's failure to present evidence defeats his fair-cross-section claim."); Patterson, 342 S.C. at 21, 482 S.E.2d at 768 (concluding Patterson failed to meet his burden of showing a system of exclusion when the record did not reveal why any black jurors were excluded in his case even though Patterson did establish black prospective jurors were underrepresented on the jury panel by several percentage points); State v. Fleeks, 523

P.3d 220, 235 (Wash. Ct. App. 2023) ("It is not systematic exclusion on the part of King County if properly summonsed jurors fail to respond.").

Accordingly, just as the trial judge correctly concluded, Appellant failed to meet his burden of demonstrating the jury selection process in Newberry County was racially discriminatory or otherwise constitutionally flawed, and the only evidence actually presented during trial showed the exact opposite was true. See Moorer, 244 S.C. at 110, 135 S.E.2d at 716 ("Discrimination in the selection of a jury must be proved; it cannot be presumed."); cf. State v. George, 331 S.C. 342, 349-350, 503 S.E.2d 168, 172-173 (1998) (concluding any prima facie showing of systematic exclusion in the jury selection that could have theoretically existed was rebutted by evidence and testimony showing Horry County "use[d] race neutral selection criteria and procedures" and a system that "attempts to make the selection process as neutral and random as possible"); Waitus, 224 S.C. at 20, 77 S.E.2d at 259 (explaining the mere absence of black jurors from a particular petit jury "is insufficient, in and of itself, to show discrimination against the defendant in the selection of the jury"). Therefore, the trial judge committed no error by declining to quash the jury in Appellant's case, and there is no legitimate basis upon which that sound ruling could properly be disturbed on appeal. See State v. Rogers, 263 S.C. 373, 381, 210 S.E.2d 604, 608 (1974) ("The burden is upon one challenging the [jury] array, as the moving party, to introduce or offer strong and convincing evidence in support of his motion, and the failure to prove such contentions is fatal."). Appellant's conviction should be affirmed.

II.

The trial judge, who otherwise presented jury instructions that correctly conveyed the relevant and applicable law to the jury, properly declined to present a jury instruction on spoliation of evidence during Appellant's criminal trial because such an instruction: (1) was not consistent with the current and correct South Carolina law applicable to criminal cases; (2) was not supported by the actual evidence presented during trial; and (3) would have constituted an improper and unconstitutional comment on the facts.

Relevant Facts

From the outset of Appellant's case, defense counsel—through his opening statement remarks—raised the issue of the quality of law enforcement's investigation to the jury. (R. pp. 110-114). As part of his remarks, defense counsel argued the investigation had been handled poorly and advised the jurors to pay attention to the "irregularities and deficiencies in the investigation." (R. p. 113).

As the trial proceeded forward, defense counsel elicited testimony establishing a crime scene log was not prepared, not all of the officers at Appellant's residence personally prepared incident reports, and it was unclear precisely how many officers in total were present at the scene. (R. p. 175; p. 177; p. 179). Likewise, defense counsel elicited testimony establishing the recordings from the officers' body cameras were automatically, mistakenly, and inadvertently purged from the sheriff's office's storage system because they were not downloaded within eighteen months despite defense counsel making a request for all the evidence in Appellant's case prior to that point. (R. pp. 181-182; p. 273). Furthermore, defense counsel elicited testimony indicating no attempt was made to collect fingerprints in Appellant's case due to the uncleanliness of Appellant's residence. (R. p. 207).

In addition to that, testimony was presented indicating the COVID-19 pandemic contributed to the loss of the body camera recordings, which were unwaveringly identified as having been unintentionally purged. (R. pp. 256-257). Additionally, testimony was presented

indicating body cameras were typically not used to record the entirety of warrant-based searches like the one conducted in Appellant's case and, therefore, nothing would have been captured by the officers' body cameras that was not already covered by the numerous photographs admitted in evidence. (R. p. 259; p. 262; State's Exs. # 6-31 (Photographs)). Furthermore, testimony was presented indicating attempts were made to recover the recordings once their loss had been discovered but those attempts ultimately proved to be unsuccessful. (R. p. 267).

Based on that testimony and evidence, defense counsel requested a jury charge on spoliation of evidence at the conclusion of the evidentiary phase of trial. (R. p. 314). As support for that request, defense counsel asserted Appellant would "gain a lot by" a spoliation charge and maintained it was warranted due to the officers' failure to preserve the body cam recordings, which he asserted constituted bad faith on their part. (R. pp. 316-317). Conversely, the solicitor contended the requested spoliation charge was inappropriate and should not be given. (R. pp. 315-316). In objecting to the charge, the solicitor maintained it was not warranted under the facts presented since no bad faith was actually established, it would be confusing to the jury, and it would constitute an impermissible comment on the facts. (R. pp. 315-316; pp. 323-324). Moreover, even without the charge, the solicitor noted defense counsel would be free to argue the matter to the jury. (R. pp. 315-316).

Ultimately, after considering the arguments of counsel, the trial judge declined to instruct the jury on spoliation of evidence. (R. pp. 323-324). In so ruling, the trial judge indicated there necessarily had to be some showing of bad faith or exculpatory value before such a charge would be warranted but no such showing had been made in Appellant's case. (R. pp. 323-324).

Following that, the parties presented their closing arguments to the jury. (R. pp. 335-371). As part of his closing argument, the solicitor contended the loss of the body cam

recordings was entirely unintentional, the global pandemic contributed to that unintentional loss, and the photographic evidence that had been presented was sufficient to accomplish the same thing the recordings would have accomplished. (R. pp. 351-354). Contrarily, as part of his closing argument, defense counsel focused heavily on his perceived flaws with law enforcement's investigation in Appellant's case, which he characterized as having been executed "horribly." (R. p. 356). Likewise, he noted no crime scene log was available because the officers did not maintain one and no body camera recordings were available from any of the officers. (R. pp. 360-362). Based on the absence of the recordings, defense counsel alleged the officers could have planted the drugs at Appellant's residence, he further maintained police improprieties across the nation were why body cameras were now necessary, and he referenced the killing of Walter Scott by a police officer in Charleston as an example of what a recording could bring to light. (R. pp. 363-364). Beyond that, defense counsel asked the jurors to put themselves "fully in [Appellant's] spot" when deciding the case, alleged they should find Appellant not guilty to punish the officers for not preserving the recordings to ensure they "paid the price" for it, and alleged the solicitor should have dismissed the case himself based on the loss of the recordings. (R. pp. 368-369).

Thereafter, the trial judge instructed the jury on the applicable law. (R. pp. 372-381). As part of his instructions, the trial judge instructed the jurors the State bore the burden of proving Appellant's guilt beyond a reasonable doubt, explained the presumption of innocence, indicated the jurors' exclusive duty was to judge the facts and decide the weight and value of the evidence, discussed the differences between direct and circumstantial evidence, addressed how witness credibility was evaluated, and confirmed the jury's verdict must be a unanimous one. (R. pp.

372-377). However, consistent with his earlier ruling, the trial judge did not present any explicit jury instructions on spoliation of evidence. (R. pp. 372-381).

Standard of Review

When reviewing a trial judge's jury charge on appeal, an appellate court must view the charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); see Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation in analyzing whether the defendant's due process rights have been violated."). Significantly, an appellate court will only reverse a trial judge's decision regarding jury instructions when that decision constitutes an abuse of discretion resulting in actual prejudice. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000); see United States v. Valas, 822 F.3d 228, 239 (5th Cir. 2016) ("This court reviews for abuse of discretion a district court's denial of a spoliation jury instruction.").

Argument

The purpose of a trial judge's jury instructions is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). To carry out that purpose, a trial judge is required to charge the jury on the *current and correct* South Carolina law applicable to the case *based on the evidence presented*. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003); see State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (explaining a trial judge is required to instruct the jury on sound principles of law that are applicable to the case based on the evidence presented). In doing so, the trial judge is only required to instruct the jury on the substance of the law and does *not* have to use any particular verbiage. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). However, a trial

judge in a South Carolina state court—unlike a trial judge in a federal court or some other state court—is constitutionally prohibited by our state constitution from making any comments that could be construed as offering an opinion on the facts of the case. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); compare Quercia v. United States, 289 U.S. 466, 469 (1933) ("In a trial by jury *in a federal court*, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination." (emphasis added and citations omitted)), with State v. Smith, 288 S.C. 329, 331, 342 S.E.2d 600, 601 (1986) ("The trial judge must refrain from all comment which tends to indicate his opinion as to the weight or sufficiency of the evidence, the credibility of the witnesses, the guilt of the accused or as to controverted facts."). Importantly, so long as the trial judge's jury instructions are substantially correct, adequately cover the applicable law, and do not run afoul of our state's constitutional prohibition against comments on the facts, those instructions are considered to be appropriate and not erroneous. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law."); see also State v. Deas, 202 S.C. 9, 14, 23 S.E.2d 820, 822 (1943) ("Of course, under our Constitution and practice the jury are the

sole judges of the facts in criminal trials and it is error for the Judge to communicate his views of them to the jury.").

In the case at bar, Appellant—while candidly acknowledging adverse inference jury instructions have historically been limited to civil cases in South Carolina—contends the trial judge reversibly erred by declining to present a spoliation of evidence jury instruction during his criminal trial. In so contending, Appellant maintains such an instruction should now be found to be appropriate in criminal cases since it has already been found to be proper in civil cases in our state. Furthermore, Appellant maintains: (1) such an instruction was warranted in his case due to the officers' failure—based on an "oversight"—to preserve the body camera recordings in manner consistent with their own retention policy; and (2) the absence of such instruction was—without further explanation—somehow prejudicial to him.

Initially though, spoliation of evidence jury instructions have—just as Appellant has acknowledged on appeal—historically been limited solely to civil cases in South Carolina and have *not* yet been approved and adopted for use in criminal cases in our state. See State v. Reaves, 414 S.C. 118, 128 n. 5, 777 S.E.2d 213, 218 n. 5 (2015) ("*Heretofore*, an adverse inference charge based on missing evidence, sometimes referred to as a spoliation of evidence charge, *has been limited to civil cases in South Carolina*." (emphasis added)). Because such instructions have heretofore been limited to civil cases and civil cases alone, the trial judge's decision to refuse to give such an instruction during Appellant's criminal trial was entirely proper as it was fully consistent with the current and correct South Carolina law that was applicable at that time. See Brandt, 393 S.C. at 549, 713 S.E.2d at 603 ("The trial court is required to charge only the current and correct law of South Carolina." (citation, brackets, and internal quotations omitted)).

Beyond that, spoliation of evidence is—by its very definition—the *intentional* destruction, mutilation, alteration, or concealment of evidence by someone. See Black's Law Dictionary 1531 (9th ed. 2009) (defining "spoliation" as "[t]he intentional destruction, mutilation, alteration, or concealment of evidence, usu. a document" and noting "[i]f proved, spoliation may be used to establish the evidence was unfavorable to the party responsible"). Without some intentional conduct on the part of a party in possession of evidence, the logical adverse inference that could potentially flow from the evidence's spoliation is not supported. See United States v. Laurent, 607 F.3d 895, 902 (1st Cir. 2010) ("In general, the instruction usually makes sense only where the evidence permits a finding of bad faith destruction; ordinarily, *negligent* destruction would not support the logical inference that the evidence was favorable to the defendant."). For that reason, many of the limited jurisdictions that do, in fact, permit spoliation of evidence jury instructions in criminal cases *only* do so when evidence of bad faith or intentional conduct has been presented. Compare Valas, 822 F.3d at 239 ("To receive a spoliation jury instruction, the party seeking the instruction must demonstrate bad faith or bad conduct by the other party."); United States v. Fries, 781 F.3d 1137, 1152 (9th Cir. 2015) ("To warrant a missing evidence instruction, a criminal defendant must establish that evidence was lost or destroyed in bad faith, and he suffered prejudice as a result."); State v. Hamilton, 822 S.E.2d 548, 555 (N.C. Ct. App. 2018) (explaining a jury instruction on lost evidence is not appropriate unless the defendant establishes the police destroyed the evidence in bad faith and the missing evidence possessed an exculpatory value that was apparent before it was lost); with Doyal v. State, 653 S.E.2d 52, 57 (Ga. Ct. App. 2007) (reiterating Georgia appellate courts have repeatedly held a spoliation of evidence jury instruction is *not* appropriate in a criminal case).

Here, just as the trial judge recognized, the evidence and testimony presented during trial did *not* support a conclusion the body camera recordings were lost as the result of any bad faith on the part of the officers. To the contrary, what was presented showed the recordings were automatically, mistakenly, and inadvertently purged from an electronic storage system due to—at worst—a negligent "oversight" on the part of the officers that resulted from a combination of various non-intent-based factors, including challenges caused by a global pandemic and the newness of the state's body camera requirements. As a result, no true spoliation of evidence occurred in Appellant's case in light of the absence of any intentional conduct on the part of the officers, and, therefore, a jury instruction on spoliation of evidence was not warranted because it was not actually supported by the evidence presented. See State v. Funchess, 267 S.C. 427, 430, 229 S.E.2d 331, 332 (1976) (explaining the *presence* of evidence "determines whether [an issue] should be submitted to the jury and the mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice" (citation and internal quotations omitted)); Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438-439 (2011) (recognizing speculation based on the possibility "the jury may believe some of the evidence and disbelieve other evidence" is not sufficient to warrant a jury instruction); cf. State v. Yusuf, 512 P.3d 915, 925 (Wash. Ct. App. 2022) ("Whether the State acted in bad faith is a question of fact that a defendant must establish. A defendant must put forward specific, nonconclusory factual allegations that establish improper motive. Here, it is undisputed that the trial court found no evidence before this court that the police acted in bad faith. Because he has not shown the State acted in bad faith and violated his due process right to discovery, Yusuf fails to demonstrate the trial court abused its discretion by not providing a missing evidence instruction as a remedy for a discovery violation." (footnotes and internal quotations omitted)).

Moreover, even assuming a spoliation of jury instruction had somehow been factually warranted under the circumstances involved, such an instruction *still* would not have been proper in Appellant's case because it would have constituted an impermissible and unconstitutional comment on the facts. Demonstrating that fact, a spoliation instruction advising the jury of an adverse inference that could potentially be drawn from the evidence would unmistakably have been a charge addressed to the facts. See Harris v. State, 182 A.3d 821, 842 (Md. 2018) (explaining jury instructions concerning inferences to be drawn from evidence or a lack of evidence constitute instructions as to facts and factual inferences and, thus, are not normally required in a criminal trial and do not have to be given by the trial judge even when requested and supported by the evidence). And, unlike in federal and some other state jurisdictions, courts in South Carolina are simply *not* constitutionally permitted to instruct juries on the facts, including on drawing adverse inferences from guilty conduct such as flight. See State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980) ("The charge on flight oftentimes has the potential for creating more problems than solutions. While we no longer sanction this charge by the judge, we recognize that evidence of flight remains proper. We also recognize that it is oftentimes appropriate for counsel to argue to the jury the inferences growing out of flight. However, we believe that the 'law of flight' in a judge's charge places undue emphasis upon that part of circumstantial evidence and it should not be charged hereafter."); see also State v. Cheeks, 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013) ("[I]t is well-settled that while evidence that a criminal defendant evaded arrest or absconded from the jurisdiction may be admissible as evidence of guilt, and may be argued to the jury as such, it is improper to charge the jury on this evidentiary inference because such a charge places 'undue emphasis' on that piece of circumstantial evidence."). Thus, just as it would have been impermissible pursuant to well-

established South Carolina for the trial judge to instruct the jury on the potential significance of flight evidence if Appellant had attempted to flee when the officers came to his residence to execute the search warrant, a jury instruction on the potential significance of the officers' conduct in failing to preserve the body camera recordings was likewise impermissible because it would have impermissibly singled out and commented upon that evidence. See Grant, 275 S.C. at 408, 272 S.E.2d at 171 (recognizing "it is oftentimes appropriate for counsel to argue to the jury the inferences growing out of flight" but finding a jury charge on flight evidence to be inappropriate); cf. State v. Burdette, 427 S.C. 490, 502-503, 832 S.E.2d 575, 582 (2019) ("When the trial court tells the jury it may use evidence of the use of a deadly weapon to establish the existence of malice, a critical element of the charge of murder, the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury. Even telling the jury that it is to give evidence of the use of a deadly weapon only the weight the jury determines it should be given does not remove the taint of the trial court's injection of its commentary upon that evidence. Such an instruction is no different than an instruction that the jury may use evidence of flight as evidence of guilt. A jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted."); State v. Stukes, 416 S.C. 493, 499, 787 S.E.2d 480, 483 (2016) ("By addressing the veracity of a victim's testimony in its instruction, the trial court emphasizes the weight of that evidence in the eyes of the jury."). As a result, the trial judge—consistent with existing South Carolina law—properly declined to present a spoliation of evidence jury instruction because such an instruction would have been improper in Appellant's criminal case and would have constituted an unconstitutional comment on the facts. S.C. Const. art. V, § 21; Reaves, 414 S.C.

at 128 n. 5, 777 S.E.2d at 218 n. 5; see State v. McBride, 416 S.C. 379, 389, 786 S.E.2d 435, 440 (Ct. App. 2016) ("Adverse inference charges are rarely permitted in criminal cases."); see also Cheeks, 401 S.C. at 328, 737 S.E.2d at 484 ("It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts."); cf. State v. Batson, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (1973) ("[W]e entertain grave doubt as to the propriety, in a criminal case, of the rule of an adverse inference from the failure to produce a material witness. Certainly, a charge of this proposition to a jury on a behalf of either the State or the defense is not warranted except under most unusual circumstances[.]").

Accordingly, because the requested instruction on spoliation of evidence was neither warranted based on the evidence presented nor a proper or constitutional jury instruction in a criminal case pursuant to current and correct South Carolina law, the trial judge wisely and properly declined to give such an instruction in Appellant's case. See State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835-836 (1989) ("The law to be charged to the jury is to be determined by the evidence presented at trial. . . . Providing instructions to the jury which do not fit the facts of the case may tend to confuse the jury."); State v. Thorne, 237 S.C. 248, 251, 116 S.E.2d 854, 855 (1960) ("The Judge must be careful to avoid expressing, or even intimating, any opinion, as to the facts, and if he does so, whether intentionally or unintentionally, a new trial must be granted. Under our Constitution the jury is the exclusive judge of the facts, and the true meaning and real object is that the jury must be left to form its own judgment, unbiased by any expressions, or even intimations, of opinion by the Judge."); cf. State v. Hartley, 307 S.C. 239, 240-241, 414 S.E.2d 182, 183-184 (Ct. App. 1992) (rejecting a contention the trial judge erred by refusing to give a requested charge where that requested charge would have constituted an impermissible comment on the facts). And, by declining to do so, the trial judge avoided unfairly endorsing

defense counsel's arguments by making them for him while at the same time in no way preventing defense counsel—who vigorously argued to the jury it should punish the officers by acquitting Appellant based on their failure to preserve the body camera recordings—from arguing to the jury the adverse inferences he believed should be drawn from the recordings' loss, which helped to ensure Appellant suffered no actual prejudice from the absence of the requested jury instruction. See Burdette, 427 S.C. at 503, 832 S.E.2d at 583 (reiterating "[i]t is axiomatic that some matters appropriate for jury argument are not proper for charging" (citations and internal quotations omitted)); see also United States v. Paradies, 98 F.3d 1266, 1287 (11th Cir. 1996) (holding the trial judge properly rejected a proposed jury instruction that was partisan in nature and would have placed the defense's "desired factual findings into the mouth of the court" (citations and internal quotations omitted)); United States v. Barham, 595 F.2d 231, 245 (5th Cir. 1979) (finding the trial judge correctly rejected a requested jury instruction proposed by defense counsel because the instruction was "more in the nature of a jury argument than a charge" and noting such an argument "was for defense counsel to make, not the Judge"); cf. United States v. Artero, 121 F.3d 1256, 1260 (9th Cir. 1997) (rejecting Artero's suggestion the trial judge erred by refusing to present an adverse inference jury instruction based on the government's poor handling of evidence and noting "the defense was free to argue as its requested instruction would have suggested, that the sloppy chain of custody evidence on the gas tank left open the possibility that the jury had been shown the wrong gas tank, one not from Artero's vehicle"); State v. Stewart, 433 S.C. 382, 391, 858 S.E.2d 808, 813 (2021) ("The inference is a valid one for the jury to draw, and the trial attorneys may argue to the jury whether the inference should be drawn. The *jury instruction* explaining the inference, however, is improper." (citation and footnote omitted)). Appellant's conviction should be affirmed.

CONCLUSION

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

Respectfully submitted,

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County
Honorable Donald B. Hocker, Circuit Court Judge
Appellate Case No. 2022-000230

THE STATE,

Respondent,

vs.

KENDRICK TREMAIN BLACKWELL,

Appellant.

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 South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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