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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENDRICK TREMAIN BLACKWELL,

APPELLANT

APPELLATE CASE NO. 2022-000230

FINAL BRIEF OF APPELLANT

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II. Whether the trial court erred in failing to give Appellant a jury charge on spoliation, where law enforcement officers admittedly failed to comply with their own retention policy regarding body camera video footage, where the state failed to preserve the video footage despite a request by trial counsel, and where the video was unavailable at trial due to the officers' oversight?

STATEMENT OF THE CASE

In January 2022, Appellant was indicted by a Newberry County grand jury for trafficking methamphetamine. R. 396. Represented by Michael V. Laubshire, Appellant proceeded to trial before the Honorable Donald B. Hocker and a jury on February 22, 2022. Margaret Boykin and Taylor Daniel appeared on behalf of the state.

After a three-day trial, the jury found Appellant guilty as indicted. R. 383, ll. 10 – 15. Judge Hocker sentenced Appellant to twelve years' incarceration.

This appeal follows.

ARGUMENT

I. The trial court erred in failing to quash an all-white petit jury, where the venire was constitutionally inadequate and significantly underrepresented African Americans when compared to recent census data from Newberry County.

Standard of review

In criminal cases, this court reviews errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Edwards, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, the court is limited to determining whether the trial court abused its discretion. Id. An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012).

Relevant facts

An all-white jury was selected to serve as fact finders in Appellant's case. Defense counsel immediately brought this matter to the judge's attention following jury selection:

> I believe the issue comes up where we have only two, actually three black jurors in the pool. And two were selected for the jury, both stricken by the State. The alternate ended up being, as a result of the State being out of strikes, they had a motion on that particular juror but that was withdrawn.
>
> …
>
> So it is not fair representation of the population of Newberry. We have twelve white jurors, there are black people that live in Newberry.

R. 75, ll. 1 – 20.

Counsel specifically asked that the jury panel be quashed based on the lack of fair representation and because of the limited number of black jurors to choose from. R. 76, ll. 4 – 7.

Following counsel's motion, the trial judge elicited additional information from the clerk of court. While the clerk researched the applicable data, defense counsel indicated that the most recent census reflected Newberry's population as being 27.47% African American.[1] R. 81, ll. 18 – 20. According to the solicitor, eight out of the forty-two members of the prospective jury panel were African American. The math here would translate to approximately 19%.

The solicitor described this difference of eight percentage points as "very miniscule in the grand scheme of things." R. 82, ll. 16 – 21. In response, defense counsel pointed out how eight percentage is actually meaningful:

> I am aware that we can look at the jury pool and see what they have, twelve white jurors. Two things cause that to happen. First, it was the under representation of the cross section which they are saying eight percent. Saying that is small but it ain't small. This morning if our retirement account went down eight percent that would be significant. Eight percent is actually a lot. And really such a small portion of the population for some 27 percent, it actually isn't large. To have two more excluded giving reasons by the State, that gives us zero. So we know is that we have systematic exclusion whether it be by luck, chance, happenstance, or some other reason, we have a twelve person pool that is all white people which is not cross section at all or even close.

R. 84, ll. 1 – 15.

Following an in-chambers discussion, the trial judge heard testimony from Beth Folk, the elected Clerk of Court for Newberry County. R. 89 – 94. Folk described how juror summons are generated and mailed out. R. 89, l. 18 – R. 90, l. 20. She then provided specific data regarding the panel that was drawn for Appellant's case.

Folk testified that 150 names were drawn. R. 90, l. 122 – 92, l. 19. Out of that total number, forty potential jurors were African American. Id. Of that forty, 33 were excused for various reasons. Id. Additionally, one African American juror was a no-show. Id. This

[1] According to online census figures, the percentage is 29.7%. https://www.census.gov/quickfacts/newberrycountysouthcarolina (last accessed January 5, 2023).

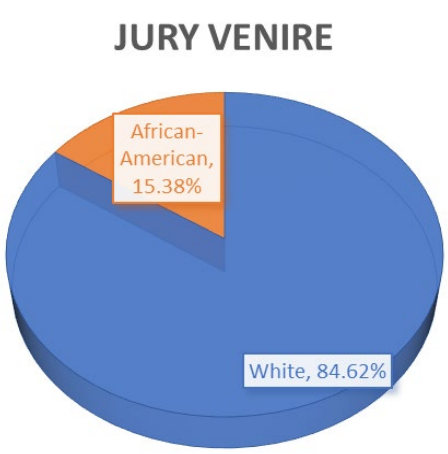
translates to six African American jurors who arrived to the Newberry County Courthouse to serve as a potential juror in Appellant's case.

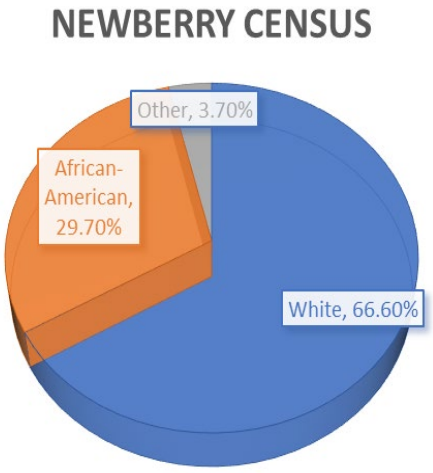
By comparison, 105 of the 150 initial names that were drawn were for white jurors. R. 93, l. 6 – R. 94, l. 7. Forty-seven were excused, twenty-one did not respond, and four did not show up, for a total of 72 white jurors who were not at the courthouse. Therefore, thirty-three white jurors did show up for trial.

Based on this testimony, six African American jurors and thirty-three white jurors arrived to serve on a panel in Appellant's case. In sum, this venire was comprised of thirty-nine individuals. The percentage of African Americans in this venire was approximately 15% (6/39), well below the census figure of 29.7%. Statistics were provided for Hispanic jurors as well. R. 93, l. 22 – R. 94, l. 7. The judge denied Appellant's request. R. 94, ll. 8-24.

Below is a visual representation of this data.

	Initial summons	Excused/no-show	**Venire**
White	105	72	**33**
African-American	40	34	**6**
Hispanic	5	5	**0**
Total	150	111	**39**





Discussion

"The sixth amendment right to a trial by jury has been made applicable to the states via the fourteenth amendment." State v. Warren, 273 S.C. 159, 162, 255 S.E.2d 668, 669 (1979). "The right to trial by jury contemplates a jury drawn from a pool broadly representative of the community and impartial in a specific case." Id. Where a defendant moves to quash a jury venire or challenges the panel or array, the burden is on him to introduce or to offer strong and convincing evidence in support of his motion, and the failure to prove such contentions is fatal. State v. Rogers, 263 S.C. 373, 381, 210 S.E.2d 604, 608 (1974).

The underrepresentation of African–Americans on the venire for Appellant's trial violated his right to due process. The Sixth Amendment and the Due Process Clause of the Fifth Amendment require that a jury be drawn "from a fair cross section of the community." Taylor v. Louisiana, 419 U.S. 522, 527, 95 S.Ct. 692, 696, 42 L.Ed.2d 690 (1975). To establish a *prima facie* violation of the fair cross section requirement:

> the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979); see also State v. Patterson, 324 S.C. 5, 21, 482 S.E.2d 760, 767-68 (1997). In so far as African–Americans constitute a distinctive group in the community, the first requirement of Appellant's case is met. McGinnis v. Johnson, 181 F.3d 686, 689 (5th Cir.1999). With respect to the second requirement the above statistics lay out how the representation was not fair and reasonable in relation to the number of people in the community.

In Duren, supra women were routinely granted exemptions upon request and, therefore, were underrepresented. 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). Women accounted for 54% of the population and only 14.5% of the challenged jury pool. Id. The Supreme Court held the "resulting disproportionate exclusion of women from the jury wheel and at the venire stage was quite obvious due to the system by which juries were selected." Id. at 367, 99 S.Ct. at 670.

Here, we do not know why African American jurors were excluded. Based on the statistics provided by the clerk of court, thirty-four out of forty African American jurors were excused or did not show (85%). By contrast, 72 out of 105 white jurors were excused or did not show (68%). There is a meaningful, statistical difference between the percentage of African American jurors who appeared at the courthouse for jury duty. As such, the third requirement is satisfied. See Avery v. State of Ga, 345 U.S. 559, 562, 73 S.Ct. 891, 893, 97 L.Ed. 1244 ("The venire from which the trial jury for Avery was selected numbered 60. All were white. These facts establish a prima facie case of discrimination which the record does not rebut.) (Justice Reed, concurring); see id. ("The mind of justice, not merely its eyes, would have to be blind to attribute such an occurrence to mere fortuity.") (Justice Frankfurter, concurring).

Judge Hocker's ruling was predicated on an incorrect reading of the law:

> Based upon … these numbers I think we have to look at the percentage of blacks insofar as jury summons being sent out compared with the black population of Newberry County, is almost identical, 27 percent. And the same, it appears that the percentages are very similar, not to say the prorate or based upon the number of the black summons sent out and the number excused or did not respond in comparison with whites as far as excused or did not respond, well it seems like the same number for the white and black did not respond. But so far as being excused percentage wise it would look like there was a consistency there. I don't find that there has been enough presented to the Court to make a finding of systematic exclusion of black jurors, unless, Mr. Laubshire, you have anything else to present to the Court, [then] I am going to deny your motion to quash the

> panel. I recognize that it is, well, it is somewhat uncommon for there to be an all white jury.

R. 94, l. 8 – 25.

Based on the above ruling, the trial judge mistakenly analyzed the percentage of summons *sent* to potential jurors, not the racial makeup of the venire that arrived at the courthouse.

"The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." Duncan v. Louisiana, 391 U.S. 145, 155-56, 88 S.Ct. 1444, 1450-1451, 20 L.Ed.2d 491 (1968). "This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." Taylor v. Louisiana, 419 U.S. 522, 530, 95 S.Ct. 692, 698, 42 L.Ed.2d 690 (1975). "Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." Id.

The trial judge erred in denying the motion to quash, where all of the requirements were met.

II. The trial court erred in failing to give Appellant a jury charge on spoliation, where law enforcement officers admittedly failed to comply with their own retention policy regarding body camera video footage, where the state failed to preserve the video footage despite a request by trial counsel, and where the video was unavailable at trial due to the officers' oversight.

Standard of Review

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005). "The requesting party must have been prejudiced by the trial court's failure to give the instruction in order to warrant reversal on appeal." Id. at 195–96, 624 S.E.2d at 445.

Relevant facts

Michael Stribble, an officer with the Newberry County Sheriff's Office, executed a search warrant on January 30, 2022. R. 115, l. 2 – R. 116, l. 10. Approximately six officers accompanied him. R. 117, ll. 11 – 17. Appellant was at the mobile home at the time. R. 117, l. 2 – R. 118, l. 20. Stribble testified Appellant rented the mobile home but did not own it. R. 121 ll. 17 – 22. Suspected drug evidence was located inside the mobile home. R. 128, ll. 1 – 9; R. 138, ll. 18 – 25.

During cross-examination of Stribble, defense counsel elicited testimony regarding the bodycam footage. Stribble responded:

> I would assume that it purged on its own. In other words, so if the body worn cameras is not tagged at all then we, it purges itself. The system purges itself within 30 days. If it is marked no court then it is [deleted] 30 days from the recording. If it is marked Magistrate Court it is held for nine months. So in this particular case it was tagged right, it was marked Circuit Court. As you can tell, it has been January 20th of 2020 since this has, this case happened. And it purged

> on its own July 30, 2021, over 18 months. So … without us trying to go in there and manually download it ourselves it[']s gone. So we don't have it to show you guys or show anyone in this case because it has purged itself. **And, you know, it is our fault**. Ultimately it is my fault that it wasn't saved, that it wasn't downloaded properly, I guess you could say.

R. 181, l. 17 – R. 182, l. 8 (emphasis added).

Counsel further cross-examined Stribble on his office's policy, which was violated by the failure to retain the footage. R. 182, l. 16 – 25. Notably, counsel requested the footage **five months after the search warrant was executed**, **before it was deleted**. R. 183, l. 1 – R. 184, l. 3. Stribble agreed with counsel that Appellant must "pay the price for [him] not preserving the evidence in this case." R. 184, ll. 11 – 13.

Robert Dennis, another employee with the Newberry County Sheriff's Office, testified next. R. 242. His description of the county's retention policy for bodycam footage mirrored Stribble's. R. 255, l. 22 – R. 256, l. 19.

Dennis partially blamed the court system and Chief Justice Beatty for his department's failure to retain this footage:

> One of the things that happened in this particular case that we learned about from other cases, COVID interrupted court. So therefore, we were thinking about our body cam video, but we were not thinking about our body cam video. Because Chief Justice Beatty pretty much reorchestrated court where we were not having court. So it kind of slipped up on us knowing about the 18 months and then whenever this case come up for notice, that we were either going to trial and start producing information from it, that is when we learned that we had several cases that had purged. It is unintentional oversight not only on our part but also the court system too.

R. 256, l. 21 – R. 257, l. 8.

After the state rested, the trial judge had an informal charge conference with the attorneys. R. 313, l. 10 – R. 324, l. 4. The judge heard argument from both sides about the

permissibility of the adverse inference charge. The state, citing Reaves, opposed the charge. R. 315, ll. 1 – 12. Defense counsel argued in favor of the instruction:

> I think we can suppose that Mr. Blackwell stands to gain a lot by this charge, probably gain a lot by the evidence based on vigorous argument by the State to keep this spoliation charge out on front of the jury. As I discussed with Your Honor, off the record, it is pretty apparent that there is some value here because there is testimony to show that no one can account for seven of the officers on the scene and no one can account for what they were doing. And even the Major who claims he is the Lieutenant's Supervisor won't even vouch for their integrity to the officers he is not in control of. And he was outside, not even watching his own officers. So the video being destroyed, as far as their bad faith, that goes right to the fact of the timeline. The timeline begins in January. They made the body cameras, they knew they had the body cameras, we request the body cameras four months later. They had 14 months to get these cameras, to get these body cameras and secure them. And they didn't do that, they knew we wanted it, they knew we needed it and they didn't take any steps to preserve these items. So we have to be able to, since we can't get into the police department and look at their records, we are just guessing. And if this is going to be the case where we have to guess, the tie has to go to the runner, Mr. Blackwell, because he has no control over this.

R. 316, l. 15 – R. 318, l. 13.

Defense counsel provided citations to State v. Brown, 363 S.C. 258, 607 S.E.2d 93 (Ct. App. 2004), State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001), and State v. Jackson, 302 S.C. 313, 396 S.E.2d 101 (1990). R. 318, ll. 15 – 24.

In Jackson, the appellant was prosecuted for driving under the influence after the charges had been dismissed and the video destroyed. Id. at 314, 396 S.E.2d at 101. The Court held the videotape "was clearly 'material.' " and reversed his conviction. Id. at 316, 396 S.E.2d at 315.

Interestingly, defense counsel also references another trial wherein an attorney made an argument to a different trial court judge who took the position that South Carolina law does not prevent a spoliation charge in a criminal case. R. 319, ll. 16 – 24. Counsel posited:

> The charge is the law, it is the law of South Carolina, it is a proper charge and I believe should go to the jury. And there is no reason why, there is no case that I found that says specifically that it can't be used in a criminal case. And they are

> very specific when they say these things and they know we have in civil, if they meant that they would have wrote it. And certainly to a civil case and the penalties and ramification are much less in a civil case than it is in a criminal case. Most certainly would be able to use a spoliation charge in a criminal case.

R. 321, ll. 14 – 25.

The state referenced State v. Breeze, 379 S.C. 538, 775 S.E.2d 347 (Ct. App. 2008) and defense counsel handed up State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). The trial judge then issued his ruling:

> Well, you know this is a close case. And, again, touched on a little bit back in-chambers and I hated to and was not intentional at all to mislead you, Mr. Laubshire, concerning that that was definitely going to be a charge. As I normally do, a thought comes to mind, I throw it in and discuss it and may pull it back out. So I hated to mislead you in any way, that was not the intent of the Court. It is a close case, probably we need some Appellate guidance, sometime along the line. I am going to, based upon the cases that the State has offered, I reviewed your cases as well, I am going to not charge spoliation. And I think there has to be some element of bad faith, some element of exculpatory value in that. And as I observed back in-chambers, while in some cases, video certainly is a whole lot better than say, photographs. I think in this case, while I am not suggesting that the photographs are any better than the video but in this case I think the photographs do a fairly good job of what maybe the video would have also shown. So looking at the whole picture on this I am going to not charge spoliation of evidence. And, again, probably a pretty good issue that our Appellate Courts need to take a look at.

R. 323, l. 7 – R. 324, l. 4.

Counsel renewed his motion after the jury was charged. R. 382, ll. 1 – 12.

Discussion

"The trial judge is required to charge only the current and correct law of South Carolina." State v. Jenkins, 408 S.C. 560, 569, 759 S.E.2d 759, 764 (Ct. App. 2014) (quoting State v. Brown, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004)).

Our Supreme Court has upheld a jury charge which advised that "when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost

or destroyed by that party would have been adverse to that party." Kershaw County Bd. Of Educ. V. U.S. Gypsum Co., 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990). In Stokes v. Spartanburg Regional Medical Center, the following charge was requested:

> I charge you that when a party fails to preserve material evidence for trial, it is for you to determine whether the party has offered a satisfactory explanation for that failure. If you find the explanation unsatisfactory, you are permitted—but not required—to draw the inference that the evidence would have been unfavorable to the party's claim.

368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006).

This Court held "[w]e believe this language reflects the law of South Carolina and should have been charged based on the evidence presented in this case." Id. Additionally, this Court held the failure to charge was prejudicial to the Appellant. Id.

The undersigned recognizes "[a]dverse inference charges are rarely permitted in criminal cases. State v. McBride, 416 S.C. 379, 389, 786 S.E.2d 435, 440 (Ct. App. 2016), citing State v. Reaves, 414 S.C. 118, 128 n. 5, 777 S.E.2d 213, 218 n. 5 (2015) (noting "adverse inference charge[s] based on missing evidence … ha[ve] been limited to civil cases in South Carolina"). Additionally, McBride referenced State v. Batson, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (1973) wherein the Court expressed "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).

In a concurrence, Judge Helene White from the Sixth Circuit Court of Appeals disagreed with the majority's conclusion that a criminal defendant must show bad-faith conduct by the government to justify even the mildest of spoliation sanctions—a permissive adverse inference instruction. U.S. v. Braswell, 704 F. App'x. 528, 545 (6th Cir. 2017). Similarly, South Carolina's standard of adverse inferences being rarely permitted in criminal cases should be questioned.

In Batson, the appellant sought an adverse jury instruction after officers used SLED "informers" to accomplish an undercover drug purchase. 261 S.C. 128, 198 S.E.2d 517 (1973). An undercover SLED agent, Donnie Gilreath, worked with the two female "informers." Id. at 133, 198 S.E.2d at 519. SLED "picked up temporary informers in every work they worked" and therefore Gilreath did not know the full names of the female "informers." Id. The female "informers" did not testify at trial. As such, "[a]t the conclusion of the trial, the trial judge was requested to charge the jury on behalf of the appellant that where the State had witnesses only to it and under its peculiar control and did not produce them, that their testimony would be presumed to be against the State." Id. at 137-37, 198 S.E.2d at 521. The trial judge elected not to charge the jury with the adverse inference, concluding "to do so would defeat the entire purpose of the privilege of the State to withhold the identity of undercover agents or informers."[2] Id.

The Supreme Court's holding explored civil and criminal cases that had allowed the adverse inference jury instruction:

> In quite a number of civil cases we have stated and/or applied the rule that if a party, without explanation, fails to produce the testimony of an available, material witness who is within some degree of control of the party, it may be inferred that the testimony of such witness, if presented, would be adverse to the party who failed to call the witness. Such rule has also been recognized in several criminal cases but no criminal case has been called to our attention wherein such rule has actually been applied.

Id. at 137, 198 S.E.2d at 521.

The Court then referenced Davis v. Sparks, 235 S.C. 325, 111 S.E.2d 545 (1959) for a holding that disfavors adverse inferences when dealing with missing *witnesses*. Id. The Batson Court then remarked how it has repeatedly held in criminal cases that the state is not required to

[2] No such privilege extends to the bodycam footage in the matter *sub judice*.

produce all available witnesses, thus supporting the holding from Davis v. Sparks. Id. at 137, 198 S.E.2d at 522. This notion is readily distinguishable from a case where law enforcement officers failed to retain bodycam footage that was discoverable and should have been produced.

The ultimate conclusion, and the holding cited by McBride, supra, was both vague and inapplicable to the matter at bar: "Upon review of our own decisions, as well as authorities from other jurisdictions, we 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 behalf of either the State or the defense is not warranted except under most unusual circumstances." Id. at 138, 198 S.E.2d at 522. To the extent this holding has morphed to encompass adverse inferences as a whole, its original intent was rather limited.

The adverse inference discussion in State v. Reaves was also only tangential. 414 S.C. 118, 777 S.E.2d 213 (2015). Our Supreme Court noted how law enforcement's investigation was rather shoddy:

> Over the course of the trial, it became clear there were serious problems with the investigation into Applewhite's death. The crime scene had not been properly sealed, and the crime scene log of people entering and exiting the area was not accurately maintained. A number of pieces of physical evidence—including two hats, a credit card bearing the name of William A. Bellamy, three cell phones, and a Bluetooth headset—were collected at the scene but not tested. Three gold chains, which Wilson testified were snatched off Reaves' neck by Applewhite moments before the shooting, were collected at the scene but were missing at the time of trial. Further, Applewhite's clothing, which was collected by police from the hospital, was also lost or destroyed. Additionally, five witness statements, written by McGill, Lane, Graves, and two other people, were purportedly taken by police officers at the scene that night but were unaccounted for at trial.

Id. at 123-24, 777 S.E.2d at 215-16 (footnote omitted).

The first issue addressed in Reaves revolved around his right to a fair trial. Reaves argued the lower court erred in denying his motion to dismiss the indictment because the evidence lost by police effectively deprived him of a fair trial. Id. at 125, 777 S.E.2d at 216.

The Court's analysis of this issue revolved around police bad faith. The Court suggested the police's oversights were nothing more than mere negligence and declined to reverse on this issue. Id. at 128, 777 S.E.2d at 218. The Court pointed out how Reaves' attorney was able to cross-examine the officers *and* he received an adverse inference instruction:

> Further, to the extent Reaves was disadvantaged by the State's loss of evidence, Reaves' attorney was allowed to forcefully cross-examine the police officers on the deficiencies in their investigation. Additionally, the trial court instructed the jury "[w]hen evidence is lost or destroyed by a party you may infer that the evidence which was lost or destroyed by that party would have been adverse to that party."

Id.

The permissibility of adverse instructions was only referenced in a footnote:

> Although we note a similar jury charge was issued by the trial court in Youngblood, the propriety of this charge under state evidence law **is not before the Court**. 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.

Id. at 128 n. 5, 777 S.E.2d at 218 n. 5 (emphasis added and internal citations omitted).

This Court, in, State v. Breeze, 379 S.C. 538, 665 S.E.2d 247 (Ct. App. 2008), relied on State v. Simmons, 267 S.C. 479, 482, 229 S.E.2d 597, 598 (1976) for the following holding: "Even greater caution should be exercised by the courts in permitting an adverse inference comment in criminal proceedings than in civil proceedings." Critically, in Simmons, it was **the state** who commented during closing argument on the failure of the appellant to produce his wife as a witness, "from which it is conceded he drew an adverse inference against appellant as to his guilt." 267 S.C. 479, 482, 229 S.E.2d 597, 598. The appellant did not testify nor did he introduce any evidence. Id. Moreover, the appellant's wife was not a compellable witness. Id. Therefore, under those circumstances, our Supreme Court held "it was error for the trial judge to permit the adverse inference comment." Id. The language quoted in Breeze was a cautionary

warning against trampling on an appellant's rights, as seen by the Court's reference to a secondary source:

> The rule applicable to a party who fails to call witnesses exclusively in his control does not apply to a defendant who introduces no evidence at all…

29 AM. JUR. 2d Evidence, Section 180 at page 227.

As such, there is no direct prohibition against charging the jury on an adverse inference spoliation instruction, particularly when the charge is sought by the defense attorney after the state failed to preserve evidence.

Lastly, in State v. McBride, this Court summarily concluded that McBride was not entitled to an adverse inference charge. 416 S.C. 379, 389-90, 786 S.E.2d 435, 440 (Ct. App. 2016). Accordingly, the seemingly concrete holding that criminal defendants are not entitled to adverse inference spoliation instructions is unsupported by South Carolina jurisprudence. If the instruction is allowed in civil cases, it should certainly be permitted in criminal cases.

Other jurisdictions do not limit the availability of this instruction to civil matters. "A 'spoliation' instruction, allowing an adverse inference, is commonly appropriate in both civil and criminal cases where there is evidence from which a reasonable jury might conclude that evidence favorable to one side was destroyed by the other." United States v. Laurent, 607 F.3d 895, 902 (1st Cir. 2010); 4 L. Sand et al., Modern Federal Jury Instructions § 75.01 (instruction 75-7), at 75-16 to -18 (2010). The burden is upon the party seeking the instruction to establish such evidence. Id., § 75.01, at 75-18; United States v. Lopez-Lopez, 282 F.3d 1, 18 (1st Cir. 2002) ("[A] defendant is not entitled to an instruction on a defense when the evidence in the record does not support that defense."), cert. denied, 536 U.S. 949, 122 S.Ct. 2642, 153 L.Ed.2d 821 (2002).

In State v. Richardson, the Superior Court of New Jersey reversed a possession of heroin conviction where the state failed to preserve booking room videotape, despite the defendant's request, where the evidence warranted an adverse inference instruction. 452 N.J. Super. 124, 132, 171 A.3d 1270, 1274 (App. Div. 2017). The opinion detailed officers' failure to preserve the recording:

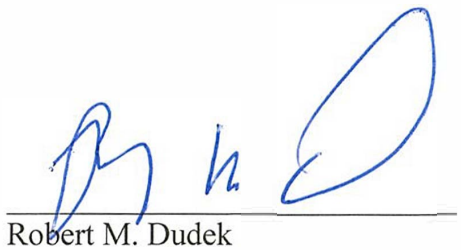
> The arresting officer testified that he took no steps to preserve the recording. He claimed he only requested preservation of tapes to record incidents he did not see; therefore, there was no reason for him to request the tape's preservation. Yet, the sergeant testified officers could request the preservation of takes "for almost any reason," and often did. He added that officers typically requested videos of incidents they did observe, noting that officers preserved tapes to refresh their recollection at trial. As the arresting officer did not request the video, it was erased thirty days after defendant's arrest.

Id. at 130, 171 A.3d at 1273.

In the current case, a spoliation charge was correct based upon law at the time of Appellant's trial, and the trial court's reasoning for not instructing the jury was erroneous and prejudiced Appellant.

CONCLUSION

Based on the foregoing, Appellant respectfully requests this Court reverse and remand for a new trial.



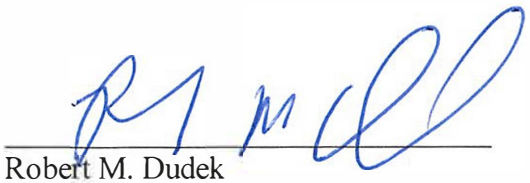
Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of October, 2023.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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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October 12, 2023.