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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Dorchester County
The Honorable Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

POLO K. SALAZAR,

APPELLANT.

Appellate Case No. 2022-001066

INITIAL BRIEF OF RESPONDENT

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II. Whether the trial court reversibly erred by violating Appellant's Sixth and Fourteenth Amendment rights pursuant to *Bruton* where Appellant was prevented from cross-examining Codefendant regarding his video statements to police admitted at trial, and where Appellant was incriminated by these statements through obvious implication when coupled with evidence adduced at trial?

III. Whether the trial court reversibly erred in admitting (a) Appellant's clothing into evidence, as well as (b) subsequent expert testimony regarding GSR on Appellant's clothing, where the State neither proffered testimony from nor identified the person who collected the clothing of Appellant, where no testimony was given for the manner of how it was collected or handled, and where the trace evidence expert indicated transfer of GSR is possible in clothing contacts other items with GSR?

STATEMENT OF THE CASE

Polo Keoki Salazar (hereinafter "Appellant") was indicted for murder (2019-GS-18-0437), first degree burglary (2019-GS-18-0438), possession of a stolen vehicle (2019-GS-18-0439), attempted murder (2019-GS-18-0440), possession of a firearm during the commission of a violent crime (2019-GS-18-0441), armed robbery (2019-GS-18-0042), and the ill-treatment of animals (2019-GS-18-0443). Appellant was tried alongside co-defendant Muanah Fortune (hereinafter "Fortune") who carried the same charges, with exception to the charge of possession of a stolen vehicle. (Tr. p. 25-26). Appellant proceeded to a jury trial before the Honorable Diane S. Goodstein on May 11, 2021 through May 19, 2021. Appellant was represented by attorney Ashley B. Cornwell, Esq. The State was represented by Assistant Solicitors David L. Osborne and Chelsea A. Glover, of the First Judicial Circuit Solicitor's Office.[1] (Tr. p. 1-2).

At the conclusion of the trial, Appellant was found guilty of all indicted charges. Judge Goodstein sentenced Appellant to 40 years for murder, 30 years for attempted murder, 40 years for first degree burglary, and 5 years for ill treatment of animals, and 5 years for possession of a stolen vehicle. These sentences were ordered to be served concurrently. Judge Goodstein then sentenced Appellant to 5 years imprisonment for possession of a firearm during the commission of a violent crime, to be served consecutively to his other sentences. (Tr. p. 1108; 1144-1145). This appeal now follows.

[1] Co-defendant Fortune was represented by attorneys Michelle R. Hubrich, and Pierce L. Wehman of the First Judicial Circuit Public Defender's Office .

STATEMENT OF FACTS

The Crime

In the late-night hours of January 27, 2019, four black males wearing masks forcibly entered the home of roommates Marcus Porter (hereinafter "Mr. Porter") and David Swibaker (hereinafter "Mr. Swibaker") by kicking in their backdoor. (Tr. p. 256; p. 238; p. 394). The men were armed with pistols and instructed Porter and his friend, victim J.B. Weaver (hereinafter "Mr. Weaver"), to get down on the floor. Upon their entry Porter's dog attempted to attack the assailants. Mr. Porter recalls hearing two shots at the dog, but could not be certain which of the men shot his dog. (Tr. p. 262, line 1 through p. 263, line 22). The men then started to demand Mr. Porter give up his marijuana. (Tr. p. 264, line 23 through p. 265, line 2). Mr. Porter testified that he was a small-time dealer at that time, and did not have any weed to give to the assailants. (Tr. p. 256, lines 1-10; p. 270, lines 8-14).

At this point, two of the men stayed with Mr. Porter and Mr. Weaver, while the other two went to another part of the home. Mr. Weaver complied with the demands that he get on the floor. (Tr. p. 265, lines 12-24). Mr. Weaver also tried to diffuse the situation by offering to find them weed elsewhere and by offering the men his wallet. The men took Mr. Weaver's wallet, but were not satisfied. (Tr. p. 266, lines 2-23). Mr. Porter then saw Mr. Weaver inching closer to the men in an effort to thwart them, but his progress was stopped when they saw him and shot him. Mr. Porter added that one of the men also kicked Mr. Weaver in the face, ultimately knocking him unconscious. (Tr. p. 266, line 25 through p. 267, line 15; p. 269, line 1-2).

Mr. Porter was then escorted to the master bedroom by two of the suspects. (Tr. p. 269, line 21 through p. 270, line 3). He then showed them the mason jar where he kept weed to prove to them that he was out. (Tr. p. 270, lines 6-14). They walked him back to the living room, but

tripped him up and he fell facing Mr. Weaver. At this point they threatened to kill people if he did not give up the weed. (Tr. p. 272, lines 11-21).

One of the men then shot Mr. Weaver for a second time while he was on the ground and began to ransack the home. (Tr. p. 273, line 12 through p. 274, line 11). During the commotion, the light-skinned suspect tripped over Mr. Weaver on the floor; Mr. Porter surmised that it must have angered the assailant because he responded by shooting Mr. Weaver six more times. (Tr. p. 276, lines 1-4; p. 987, lines 14-15). Porter attempted to get up and flee through the front door, but was shot in the chest in the effort. He was only shot once, as the assailants were at that time beginning to flee out the backdoor. Porter survived and ran to his neighbor's home to call 911 immediately after the assailants left. (Tr. p. 276, line 20 through p. 277, line 19). On his way to his neighbor's house Mr. Porter heard the assailants jumping the chain-link fence outside his house and then heard a car leave the area.[2] (Tr. p. 277, line 20 through p. 278, line 5). Records show that the 911 call was placed at 12:03:23am. (Tr. p. 627, lines15-20).

Mr. Porter testified that he was confident that there were four assailants involved in the burglary. (Tr. p. 246). One was in his late 20s, tall with a medium build, and was a lighter-skinned African American. Another was a heavier individual who was only slightly taller than Mr. Porter, who stands at 5'9"; this individual was in his mid-twenties and was wearing purple Nikes with heavy gloves and a coat. He testified that he recalled seeing one of the assailants wearing clothing with camouflage print, and one assailant was wearing black and white Nikes. (Tr. p. 283-285).

[2] This was corroborated by the testimony of Corporal Cramer who recalled finding fresh footprints in the mud near Mr. Porter's residence. (Tr. p. 464). The assistant solicitor used this information and connected it to the fact that the shoes of all four defendants were muddy and dirty. (Tr. p. 1012-1013).

Appellant was apprehended wearing a camouflage jacket of the type referenced by Mr. Porter.[3] (Tr. p. 653-655; p. 616).

Mr. Swibaker was also home at the time of the burglary. When he saw the door busted in, he ran out of fear and initially hid from the assailants. (Tr. p. 587). Though he initially only saw two men before he turned the corner to hide, he likewise testified to seeing a total four masked men during the home invasion. (Tr. p. 594; p. 590). He confirmed the killing of the dog when it attacked, the fact that they drug Mr. Porter to his room demanding drugs, and hearing numerous gunshots and seeing multiple guns during the burglary. (Tr. p. 590; p. 596). The first guy he recalled was wearing white Nike shoes, and was tall and thin framed. The second was shorter but could not describe him with any more detail. (Tr. p. 588-589). Mr. Swibaker was ultimately discovered by the assailants, struck in the head, and ordered to get on the ground as well. (Tr. p. 591-592). He recalled seeing one assailant wearing "colorful" shoes. His testimony at trial suggested they had orange, blue, purple, and black. However, his initial statement to police suggested they were red, white, and blue. (Tr. p. 597).

The Chase

Following the 911 call, officers started responding to the scene to conduct an investigation of the crime. One such officer, Deputy Joshua Scarborough, was in route to the scene when he encountered a black Honda CR-V while driving down Fripp Lane. He saw four people in the vehicle, all black males, and the back left passenger had his eyes wide open, with his jaw dropped, while looking at the Officer Scarborough's vehicle as he drove by. He then saw the driver check the police car in his rear-view mirror and watched as the back seat passengers turned around to

[3] Contrary to Appellant's argument (See Initial Brief of Appellant, p. 16), this is evidence of identification tending to place Appellant "inside the incident location at the time of the offense."

look at him. Officer Scarborough also testified that upon passing the vehicle he was able to see in his mirror that the car had no license plate. (Tr. p. 430-431). Officer Scarborough called in the suspicious vehicle, but at the time was not certain it was related to the crime and chose to proceed on to the scene. The CAD report shows that Officer Scarborough's call-in of the CR-V took place at 12:07:04am – 3 minutes and 41 seconds after the 911 call was placed – and testimony was entered by Detective Davis that the approximate drive time between the scene of the crime and Fripp Lane was slightly under three minutes in duration. (Tr. p. 436; p. 879-880). Upon arriving at the scene and finding sufficient officers onsite, Officer Scarborough and Officer Jesse Kerr drove back out to pursue the CR-V. (Tr. p. 436).

Corporal Jacob Cramer was also in route to the scene of the crime when he heard over the police radio another officer identify a dark colored SUV leaving the area that was possibly involved. Shortly thereafter he passed a dark in color Honda CR-V occupied by four people. (Tr. p. 443, lines 1-21). Corporal Cramer was accompanied by Officer Reynolds. He instructed Officer Reynolds to turn around and pursue the vehicle as it turned onto Highway 78. He noted that in the time it took to turn around the CR-V was able to gain some ground up the highway, resulting in a few moments where he and Officer Reynolds did not have eyes on the vehicle. (Tr. p. 445, line 2 through p. 446, line 14). As they caught up to the CR-V, Corporal Cramer already had their emergency equipment activated and confirmed that this vehicle did not have a license plate. At the time the car was being driven slowly, and Corporal Cramer was using his siren and spotlight to try and get the vehicle to pull over to the shoulder of the road. However, the vehicle responded by accelerating to a high speed. A police chase ensued that lasted for 30 minutes, exceeded speeds of 100 miles per hour, and required the use of stop-sticks to puncture the vehicle's tires to end the chase. Appellant was identified as the driver of the vehicle, Fortune was the front passenger, and

Green and Major were seated in the back. (Tr. p. 446, line 15 through p. 453, line 4). The car had been reported stolen. (Tr. p. 651).

Over the course of the police chase Officer Reynolds informed Corporal Cramer that the suspects had tossed out a wallet from the car window. (Tr. p. 450, line 2 through p. 451, line 15). Soon after, Corporal Cramer witnessed a blue clothing item and an orange clothing item still tumbling down the roadway. These items were collected after the chase ended and identified as an orange ski mask, blue coveralls, and a wallet belonging to victim J.B. Weaver.[4] [5] (Tr. p. 452, lines 2-9; p. 456-457; p. 460-461). Additionally, a pocketknife and broken lighter were found inside the pocket of the blue coveralls. (Tr. p. 719-721; p. 795).

The investigation did not turn up any firearms near the scene of the crime. Corporal Cramer surmised that the suspects may have dumped other items out the window on the portions of Highway 78 they drove before Corporal Cramer and Officer Reynolds were able to catch up to them. They took a k-9 unit to that section of highway to investigate further and were able to locate four pistols on the shoulder of the road of 504 and Highway 78. (Tr. p. 464, line 1 through 465, line 8). These included a 9 millimeter Taurus pistol (State's Exhibit 13), a .38 caliber Smith & Wesson revolver (State's Exhibit 14), a .38 caliber Jimenez pistol (State's Exhibit 15), and a 9 millimeter Springfield pistol (State's Exhibit 16). (Tr. p. 465; p. 726-729).

The Investigation

Law enforcement's investigation demonstrated that Mr. Swibaker introduced a man named Jaquavious Washington (aka "Q") to Mr. Porter for the purpose of selling drugs. The investigation revealed that Marcus Porter had sold drugs in the past to an individual named "Little brh", whom

[4] Often referred to as a jumpsuit during trial.
[5] There was no objection from either defendant as to the admission of the Mr. Weaver's wallet and driver's license.

he also knew as "Q" and that this individual had called recently asking Mr. Porter to front him some drugs. Mr. Porter also identified Jaquavious Washington by his photograph at trial. (Tr. p. 601; p. 391-392; p. 398-401; p. 378).

Upon being taken in for booking, Detective Davis had an opportunity to question Fortune about the crime with Captain Kenneth Driscoll in attendance. (Tr. p. 885). The interview was video recorded and Fortune initially denied having anything to do with the crime; he pitched a story that he was in the area to visit with his friend and cousin, Jaquavious Washington. (Tr. p. 886-891). Detective Davis had not mentioned this name to Fortune prior, and at the time of the interview Detective Davis did not yet know of Washington's connection to both Mr. Porter and Mr. Swibaker. (Tr. p. 891, lines 4-19). Fortune's initial story was that after visiting with Jaquavious he was told he could not stay the night and went out to find a ride home. As a result, he went to a nearby gas station in the hopes of finding a ride home. Detective Davis testified that according to Fortune he happened to find three other individuals who lived in his Seabrook area who agreed to give him a ride. (Tr. p. 894, lines 5-11). Detective ended the first interview after approximately an hour. (Tr. p. 897).

Clips of this interview were admitted and published during trial. During this first interview, Mr. Fortune did not respond to any of the questions asked of him concerning the crime. Nor did he provide any information on who was in the car when he was picked up. (See State's Ex. 191, clips 1a, 2a, 3a).

Shortly thereafter Detective Davis was in the booking area when he and Fortune made eye contact. He again asked Fortune if he was sure he did not want to talk to him. According to Detective Davis, Fortune responded "If I talk, they're going to kill me." Detective Davis invited Fortune back for a second interview lasting 40-45 minutes. (Tr. p. 897, lines 23-24; p. 899, lines

1-9). Detective Davis testified that Mr. Fortune was still hesitant to disclose the truth. He continued to deny having a gun, but soon conceded that he was in possession of the Taurus 9 millimeter and described it as being silver and black. The brand and description of the 9 millimeter gun was not mentioned to Fortune prior to this statement; such information was not even known by Detective Davis and Captain Driscoll at the time of the interview. He further testified that Mr. Fortune claimed the gun had not been fired, which appeared corroborative to the fact that it was found loaded to full magazine capacity. (Tr. 899, line 19 through 901, line 21). Detective Davis testified that Mr. Fortune ultimately confessed that he was there when the victims' door was kicked in, that he was last to enter the home, and that he ran to the back room while the others were yelling for people to get on the ground. (Tr. p. 903, lines 1-10).

Clips from the second interview were admitted and published during trial. In the first clip, Mr. Fortune responded that he got picked up at the Sonoco, but did not have a gun with him at the time. He further responded that it was a big blur, and could not remember how he got to the Victim's house, or whose idea it was to go there. (State's Ex. 191, Clip 1b). In the second clip, Mr. Fortune confessed that he found the silver and black Taurus 9mm in the car that picked him up, but that it had never been shot. He denied overturning the mattress in the back bedroom and claimed he did not have anything covering his face. (State's Ex. 191, 2b).

In clip 3b, Mr. Fortune confirmed that he did not search anywhere other than the one room, that he was looking for "What they told me to get" which he then responded was "Anything I could find." (State's Ex. 191, 3b). In clip 4b, he left the home emptyhanded, threw the gun out the car before the chase began. (State's Ex. 191, 4b).

In clip 5b, Mr. Fortune informed the officers that the door was kicked in, but he could not recall who did so. He walked to the backroom, and could not recall if anyone was with him. He

informed the officers that he was not aware of who was and was not injured, and was not aware of a third victim in the home. He claimed to simply look around, not knowing what to do. Mr. Fortune denied wearing gloves or a mask, but agreed that he pulled his hood tight around his face. (State's Ex. 191, 5b). In clip 6b, Mr. Fortune informed officers he found the gun on the front seat when he got into the car; he touched it and placed it under the seat on the floorboard. He could not remember how far they parked away from the home, but said that it was a couple minutes' walk. He confirmed that he got mud on him. He could not remember or did not answer additional questions about where the car was parked, aside from not remembering parking on the road. (State's Ex. 191, 6b).

A total of (7) fired shell casings were found at the scene of the murder (State's Exhibit 17). All of these casings were of the same brand ammunition found in the Springfield 9 millimeter: FC Luger and Blazer. (Tr. p. 728-729). Based on ballistics analysis, they were all determined to have been fired by the Springfield 9 millimeter recovered by police. (Tr. p. 421, line 10 through p. 422, line 15). Another three (3) fired shell casings were found still inside the cylinder of the Smith & Wesson revolver.[6] Police recovered two (2) fired projectiles at the scene of the crime, and three (3) more from Mr. Weaver's autopsy. Based upon the ballistics analysis, one of the projectiles from the scene was determined to have been fired from the .38 Smith & Wesson revolver.[7] (Tr. p. 419, lines 10-24). Two of the projectiles recovered from the autopsy were also determined to have been fired by the .38 Smith & Wesson revolver. (Tr. p. 422, lines 16-24).

A Gucci bag found inside the Honda CR-V contained four (4) live rounds of .380 ammunition that matched the brand of ammunition found in the Jimenez pistol: Hornady and Tulammo. (Tr. p. 736, lines 16-25). Also in the Gucci bag, was Appellant's ID. Three wrist

[6] As these fired casings were all still in the firearm, ballistics analysis was not conducted.
[7] The other fired projectile in State's Exhibit 18 recovered from the scene was too damaged for conclusive analysis.

watches were found in the vehicle; Mr. Porter was able to identify two of them as his property. (Tr. p. 299-302; p. 735; p. 737-738). Also found in the vehicle was the other matching orange and black glove and a knit cap. (Tr. p. 745). Law enforcement also confiscated each of the defendant's articles of clothing, including their shoes. Of note, Appellant was arrested wearing a camouflage print jacket and Nikes (Tr. p. 459), Devonte Major was wearing purple shoes (Tr. p. 633), and Fortune was wearing colorful shoes that the State argued at trial matched the description offered by Mr. Swibaker. (Tr. p. 1013). [8]

Certain items recovered by law enforcement were sent for GSR testing and DNA testing by SLED.[9] The results of these tests were set forth by "likelihood ratio" comparisons of the given defendant (if any) contributing to the DNA mixture (if any, and only up to a maximum of four contributors) versus the DNA mixture being comprised of up to four unidentified and unrelated individuals.

- Major's jacket, Appellant's camo hoodie, Fortune's American Eagle hooded sweatshirt, Green's Chaps jacket, and Green's North Face jacket all tested positive for gunshot residue. (Tr. p. 857-862);
- The DNA analysis from the orange ski mask recovered from the road demonstrated it was 370 trillion time more likely that Devonte Major and three unidentified individuals contributed to the DNA mixture found on the mask, as opposed to four unidentified contributors. (Tr. p. 839);

[8] Mr. Porter testified to seeing one culprit wearing camouflage clothing (Tr. p. 285), one culprit was wearing black and white Nikes (Tr. p. 284), and another culprit had on purple Nikes (Tr. p. 285).

[9] The one DNA likelihood ratio comparing Fortune to unidentified contributors was voluntarily excluded by the assistant solicitor due to a typographical error on the report that might have impacted the numerical comparisons. (Tr. p. 827).

- The DNA analysis from the pocketknife found inside the tossed blue jumpsuit was 340 septillion times more likely to be J.B. Weaver and an unidentified contributor, as opposed to two unidentified contributors. (Tr. p. 841);
- The DNA analysis of scrapings from the inside of the black and orange glove was 260 sextillion times more likely to be Appellant and three unidentified contributors, as opposed to four unidentified contributors. (Tr. p. 841).
- The DNA analysis of scrapings from the inside of the other black and orange glove was 12 octillion times more likely to be Appellant and three unidentified contributors, as opposed to four unidentified contributors. A hair found in the glove was 440 sextillion times more likely to be Appellant as the sole contributor, as opposed to an unidentified contributor. (Tr. p. 845);
- DNA analysis from two cuttings from the gloves were determined to be 1.2 octillion times more likely to include J.B. Weaver and one unidentified contributor, as opposed to two unidentified contributors. (Tr. p. 846).
- The DNA analysis of the knit hat was 1.4 septillion times more likely to be Appellant and three unidentified contributors, as opposed to four unidentified contributors. (Tr. p. 844).

STANDARD OF REVIEW

"In South Carolina, criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right." *State v. Kelsey*, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (1998). "Motions for a severance and separate trial are addressed to the discretion of the trial court." *Id.* "Absent a showing of an abuse of discretion, this Court will not disturb the trial court's ruling on appeal." *Id.* "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a

reliable judgment about a co-defendant's guilt." *Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001). "An appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial." *Id.*

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Pagan,* 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009) "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice." *State v. White*, 372 S.C. 364, 373, 642 S.E.2d 607, 611 (Ct. App. 2007)(citing *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 623 S.E.2d 373 (2005). "To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." *Id.* (citing *Fields v. Regional Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

ARGUMENT

I. The trial court did not err in denying Appellant's motion to sever.

Appellant rests his argument for severance on the same grounds as his second issue presented: that severance was needed in light of an alleged *Bruton* issue posed by the introduction of Mr. Fortune's video confession evidence. However, as there was no *Bruton* violation (*Infra*), nor a serious risk of such given the contents of Mr. Fortune's confession, the trial court did not err

in denying Appellant's motion to sever.

There is no right to separate trials of defendants, and a ruling on a motion to sever is addressed to the sound discretion of the court. *State v. Harris*, 351 S.C. 643, 652, 572 S.E.2d 267, 272 (2002); *State v. Kelsey*, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (1998). "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt. *Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001). Here, there was no serious risk presented and the trial court was within its discretion to deny the motion for severance after reviewing the video clips, hearing the testimony of the detective, and hearing the arguments of counsel concerning Fortune's confession. (Pre-trial Hearing Tr., p. 107; 111-112; 140; 156-174).

First, Appellant argued that "were you there when your buddy shot the guy?" implicates *Bruton*. (Pre-trial Hearing Tr. p. 159). However, that was a question asked by the officer, and Fortune did not respond. Questions are not evidence and *Bruton* cannot be implicated by the phrasing of an unanswered question. Similarly, Appellant's next argument focused on the officer's statement that "They're going to jail". This was again the commentary *of the officer,* and again Fortune did not respond. (Pre-Trial Hearing Tr. p. 160; State's Ex. 191, 2b). Such is not evidence, and as the solicitor noted, Appellant would not be impeded in cross-examining of Detective Davis. (Pre-Trial Hearing Tr. p. 164-165). Lastly, Appellant argued to the court that the use of nonspecific plural pronouns, such as "you all" or "they" would implicate *Bruton*. However, those words do nothing more than demonstrate that multiple individuals participated in the crime, and in the case of "you all", it is again the word choice of the officer, not Fortune. Such words do not implicate Appellant, nor any other co-defendant. (Pre-trial Hearing Tr., p. 160). After hearing the recorded clips of Fortune's confession the trial court found "no indication whatsoever" of a *Bruton*

implication. (Pre-trial Hearing Tr., p. 156). The court continued to hear arguments and ultimately took the matter under advisement so as to further research the matter, and at the start of trial denied the motion. (Pre-trial Hearing Tr. p. 172; Tr. p. 20).

Fortune's confession does nothing more than refer to the other participants of the crime as a collective and unidentified "they". He does nothing to articulate who "they" are, or whether "they" includes all of the other *presumed* three participants in the crime. Moreover, while the victims were of the opinion that four people committed the crime, nothing within Fortune's confession limits the number of participants to four. Lastly, Appellant argued that because the other three individuals from the crime were, to varying extents, identified by the surviving victim's, such inculpates Appellant as the fourth participant by way of Fortune's confession. (See Initial Brief of Appellant, p. 14-15). This is flawed reasoning. Nothing about Fortune's confession identifies any of these individuals, and nothing about the identification evidence of other participants constitutes evidence against Appellant.

What leads to the inculpation and conviction of Appellant is simple: 1) he was driving the getaway car that carried the three other named co-defendants away from the scene just 3 minutes and 41 seconds after the 911 call was placed; 2) all four guns were tossed out the window just prior to police catching up to the vehicle; 3) he was driving and chose to flee arrest from the pursuing police; 4) additional items were tossed during the chase which belonged to the victims; and 5) additional items tossed during the chase contained, by likelihood ratio, Victim Weaver's DNA and Appellant's DNA. Even Appellant's ID was in the bag alongside ammunition matching one of the guns from the crime. Even if the jury could have been convinced that Appellant was not an active participant from the scene of the crime, the jury was instructed on accomplice liability and his instigation of a 30 minute police chase as a getaway driver mere minutes after the shooting makes

a "mere presence" defense exceedingly unlikely, when coupled with the other facts against him.

Appellant failed to demonstrate that a joint trial posed serious risk to his trial rights or to the jury making a reliable judgement as to Appellant's guilt. Furthermore, in consideration of the evidence admitted against Appellant at trial, Appellant fails to demonstrate a basis for reversal as there is no reasonable probability that the Appellant would have obtained a more favorable result at a separate trial. It was well within the discretion of the court to deny the motion to sever, and the motion was indeed properly denied. (Tr. p. 20).

II. Fortune's confession to police did not implicate *Bruton*, as it did not name or explicitly reference any other participant in the crime, nor did his confession provided any inferential details as to the identity of his co-defendants. His confession was limited solely to the use of the word "they", demonstrating only the existence of multiple other participants.

Appellant's argument boils down to the suggestion that *Bruton* is implicated even if a codefendant's confession demonstrates nothing more than the existence of other participants to the crime, absent any reference to the precise number of participants, their exact identity, their roles in the crime, their genders, or any other identifying facts. Appellant's arguments then rely upon the strength of the state's case as to the evidence of guilt against him in an attempt to suggest that because the other evidence lends itself to the guilt of Appellant, that Mr. Fortune's confession constitutes an "obvious implication" of Appellant. Such reasoning is in error and Appellant has failed to properly apply *Bruton* and its progeny.

Under federal law, violation of the Confrontation Clause has evolved considerably. Under *Bruton*, the Supreme Court found that a defendant's Sixth Amendment right of confrontation is violated "when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial." *Richardson v. Marsh*, 481 U.S. 200, 207, 107 S. Ct. 1702, 1707, 95 L. Ed. 2d 176 (1987) (citing *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)).

The Court took up *Richardson* in order to address whether a redacted confession is permissible so as not to identify the defendant's existence, and to draw a line between *Bruton's* narrow exception for "facially incriminating" confessions, and confessions that merely became incriminating due to required "linkage" of other record evidence. The Court held that such was permissible, but offered no opinion on factual scenarios where defendant's name has been replaced "with a symbol or neutral pronoun." In *Gray*, the Court took up that precise issue, noting that the original co-defendant confession directly implicated defendant at trial, but was redacted to remove the name and replace it with the word "deleted" or a blank space. The Court found that such a solution still implicated the *Bruton* rule, given the conspicuous alterations at play that lend themselves to the jury likely easily deducing why the redaction were made in the first place. *Gray v. Maryland*, 523 U.S. 185, 194-195, 118 S. Ct. 1151, 1156, 140 L. Ed. 2d 294 (1998). It distinguished this ruling from *Richardson*, conceding that the scope of *Bruton* does not encompass "those statements that incriminate inferentially", when the "kind of" incriminating inference comes "only when linked with evidence introduced later at trial." *Id.* at 196. Most recently, the Court found that less conspicuous redactions and the use of neutral references to some "other person" was permissible. *Samia v. United States*, 599 U.S. 635, 653, 143 S. Ct. 2004, 2017, 216 L. Ed. 2d 597 (2023).

Our State's Supreme Court has deviated somewhat from federal law, and arguably taken a more stringent tack, albeit without the guidance of *Samia*. In *McDonald*, the court found that the "another person" style of redaction permitted by the trial court still violated *Bruton*, under the circumstances, because it was used for two other male participants in the crime, in a joint trial for all three defendants. *State v. McDonald*, 412 S.C. 133, 141, 771 S.E.2d 840, 844 (2015).

However, this case is distinguishable from *McDonald*, and falls well short of federal rulings establishing the parameters for the narrow application of *Bruton* and its progeny. First, the

confession heard by the jury was not one where redaction and replacement of Fortune's words was necessary. The clips of his confession that had any relevance to the actions of others was persistently referenced as "they" with no identification as to who "they" might mean. Additionally, unlike *McDonald*, the jury was not presented with a trial where all of the co-defendants were tried together.[10] Here, the four co-defendants were split between two trials and Fortune did not attest to any specific number of participants in his reference to "they", his trial contained only one co-defendant, and the facts clearly demonstrated to the jury that no less that four people were involved in this crime. Under the gamut of both federal and state controlling precedent applying *Bruton*, no case has held that *Bruton* applies under circumstances similar to this case.

Appellant raises dispute over the following assertions:

1) "Were you there when your buddies shot [. . .] this guy?";
2) The Detective's articulation of Fortune's story that he was picked up from the Sunoco "by three other people" for a ride home;
3) The Detective's commentary that "They're going to jail. They're not going to hurt you from there.";
4) Fortune's pre-confession comment: "If I talk, they're going to kill me", which was testified to by Detective Davis;
5) Use of the word "they" in relation to:
    a. "Stuff they just told me to get"
    b. "I found it in the car. They had it."; and
6) The testimony that Fortune did not inculpate Jaquavious Washington, or place Jaquavious

[10] *McDonald* also presents a written confession bearing visible redaction, as opposed to the video confession presented in the case at hand.

Washington in the car that night.

Each of these assertions relies upon arguments that lack coherency in relation to *Bruton* challenges. First, the use of the term "buddies" is a phrase used only by Detective Davis in the form of a question, and Appellant never responded to the question or to the Detective's word choice. As stated above, questions are not evidence. Similarly, under number the third assertion, the Detective's commentary that "They're going to jail. They're not going to hurt you from there" is likewise not a confession from Fortune that identifies someone else as being guilty of a crime, it is a statement from the officer. The second assertion only provides an articulation of how many people *the officer* believed were in the car, but such is not borne out in Fortune's confession. Moreover, at that point, no crime had been committed and Fortune provided no details which would permit someone to assume that the group immediately left the Sunoco and headed to victims' home; additional stops could have been made, different people could have come and gone.

The fourth assertion does not identify any individual by name, gender, or description. Number four does not even indicate that the people he fears he is upsetting are responsible for a crime. Even if it is assumed that he is referencing the other participants arrested from the car, it does not establish what actions any of those individuals took – leaving Appellant's supposed mere presence as a driver defense intact. Under the fifth assertion, Mr. Fortune's use of the term "they" does not provide any form of identification from which the jury can infer identity, and unlike *McDonald,* not all co-defendants are present for the same trial. "They" could just as easily relate to only Green and Major, or to someone else entirely. Lastly, under assertion number six, Appellant's reliance upon the lack of inculpation of Mr. Washington is particularly odd, since Fortune did not inculpate *anyone* by name and no witness testified to the contrary. Appellant raised Mr. Washington as part of a third-party defense, and nothing about Fortune's confession negates

such an argument – it is simply not convincing in the face of the other evidence.

There is nothing about Fortune's confession that lends itself to the inculpation of other co-defendants. What does lead to Appellant's inculpation is the manner in which he and his co-defendant's were all arrested, the timeframe separating their fleeing the scene from the time of the crime, the monumental amount of incriminating evidence they tossed out of the car along the way, the DNA results taken from that evidence, and the mutual corroboration of the circumstantial evidence, forensics, and physical evidence recovered. *Knowing all of the facts presented*, can a jury infer that the four fleeing individuals were the four participants in the crime, and that Fortune's use of the term "they" refers to these individuals? Of course, but it is not a consequence of the confession. The distinction here is best summed up by the Supreme Court in *Gray*: the inference in question is dependent upon the "kind of" inference needed, and not the "simple fact of" inference being needed. *Id.*, at 196. Here, the confession did not refer directly to Appellant or any co-defendant, the inference only arose "when linked with evidence introduced later at trial". And like *Gray*, the proper evaluation of whether the confession violations *Bruton* by way of inference, is where the confession "obviously refer[s] directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Id.* Had Fortune's confession been the first evidence admitted, the jury would have no ability to infer whether Appellant was part of the "they" that Mr. Fortune referenced, they would only know that multiple participants committed the crime in question. This bolsters the argument that it is the overwhelming evidence and circumstances of the arrest, not the confession itself, that permit an inference by the jury.[11]

[11] Even if admission of the confession were to be found a violation of *Bruton*, the evidence against Appellant is overwhelming. He was driving the getaway car, chose to flee from police for 30 minutes, had his ID in the same bag as some of the culprit's ammunition, had his DNA on multiple

III. The trial court did not err in admitting Appellant's jacket as it constitutes a nonfungible piece of evidence admitted for the purpose of corroborating identification testimony offered by Mr. Porter.

Appellant argues that Appellant's jacket[12] (State's Exhibit 194) was lacking a complete chain of custody and that consequently the trial court erred in admitting the evidence. Appellant argues further that the court erred in permitting testimony as to the GSR test results in connection with the jacket. Appellant's first argument fails to properly consider the nonfungible nature of the jacket, and his argument veers away from addressing simply whether the item is what it purports to be, and seeks to argue that the "condition" of the item cannot be said to have remained the same from the time it was obtained until its introduction at trial. Such an argument is both unconvincing and irrelevant, as the initial introduction of the jacket was for purposes of corroborating the identification testimony offered by Mr. Porter. Appellant's second argument, if preserved[13], does

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items tossed from the car during the chase, and other items tossed from the car either carried the DNA of the deceased victim or belonged to the surviving victims.

[12] Is also referred to in the record as a camouflaged hoodie (See Tr. p. 616) and as a camo sweatshirt (See Tr. p. 459).

[13] It does not appear from the record that Appellant properly challenged the admission of the GSR evidence. First, the State called Jamie Hall who offered chain of custody and collection practices testimony for GSR forensic analysis. However, no evidence was admitted during this stage of trial, and witness Hall did not offer any testimony as to the GSR results. (Tr. p. 612-622). Next, the State introduced Appellant's jacket (Ex. 194) and it was admitted into trial through the testimony of Officer Phillip Moy, who identified it as the clothing worn by Appellant. (Tr. p. 653). Appellant objected to the admission of the jacket, arguing that the witness was not the individual who collected it. It was not until page 806 of the transcript, that Fortune's counsel made a motion for mistrial on the basis of chain of custody. Appellant joined in that motion, but no GSR evidence or testimony concerning his jacket had been offered. (Tr. p. 806-813). And, that motion was ultimately not ruled upon by the court, nor was a ruling sought by defense counsel after the lunch break. The motion appears to be simply abandoned. GSR testimony was addressed by witness Nicole Hardin, and at the time in which Appellant's jacket was brought to the witness's attention, Appellant raised objection "based on the testimony that Mrs. Hardin just gave" which dealt with environmental elements impact on the GSR trace evidence. The objection was conducted off-the-record, and no clarification is given as to the basis of Appellant's objection. (Tr. p. 853-863; p. 859). There does not appear to be any contemporaneous objection and ruling, on the record, by the trial court as to the admissibility of GSR results in light of a chain of custody objection concerning the collection of Appellant's jacket. The law is clear and voluminous that in order to preserve an

present a gap in the chain of custody of the jacket, but otherwise relies entirely on speculation of tampering or tainted treatment of the evidence. Regardless, any error by the trial court in admitting the GSR results is harmless in the face of the other overwhelming evidence presented against Appellant and in light of the cross-examination conducted by defense counsel. The totality of the record demonstrates that there is no meritorious basis to overturn the convictions or sentences of Appellant in this case.

a. Admission of the camo jacket was proper.

The jacket is non-fungible evidence that under South Carolina law does not require a complete chain of custody to establish that the item is what it purports to be, and the alleged gaps in the chain of custody are simply potential witnesses who did not testify, as opposed to an argument that the jacket in question is not actually the jacket worn by Appellant.

Non-fungible evidence does not carry a strict chain-of-custody requirement for admission, so long as they are shown to be what they purport to be. *State v. Hatcher*, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011) ("The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be.").

> While the chain of custody requirement is strict where fungible evidence is involved, *where the issue is the admissibility of non-fungible evidence—that is, evidence that is unique and identifiable—the establishment of a strict chain of custody is not required*: If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance

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issue for appeal it must be raised to and ruled upon by the lower court. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 780 (2004); *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."). Such is lacking here, and the issue cannot be reached on appeal.

> of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition.

State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741–42 (2005) (citing *State v. Glenn,* 328 S.C. 300, 305–306, 492 S.E.2d 393, 395 (Ct.App.1997)(emphasis added). Physical objects such as clothing are non-fungible evidence. See *State v. Glenn*, 328 S.C. 300, 305–306, 492 S.E.2d 393, 395 (Ct.App.1997) (identifying a woman's purse as non-fungible evidence).

Indeed, the arguments raised on appeal do not even attempt to argue that the evidence in question is not in fact Appellant's clothing. Appellant has merely raised a question as to "the condition" of the jacket while providing no argument or discussion as to why "the condition" of the jacket is relevant. Strictly considering the item itself, the jacket is non-fungible evidence because it is not easily alterable or replaceable, and its admission at that point had no forensic purpose. It was identified by Officer Moy as being Appellant's clothing at the time of the arrest and that he learned that Mr. Porter had seen this type of hoodie worn by one of the assailants during the robbery. (Tr. p. 655). It is merely identity evidence. Given the record, there is no argument that the jacket is not the item it purports to be and a challenge to its admission by Appellant is without merit.

b. Any error by the trial court in admitting the GSR testimony is harmless in light of the overwhelming evidence against Appellant.

After the Appellant's camo jacket was admitted for purposes of identity corroborative to Mr. Porter's testimony, the State sought to introduce the results of the GSR testing performed on the jacket. It was then articulated to the jury that the jacket contained gunshot residue particles.

Unlike the introduction of the jacket itself, GSR would constitute fungible evidence. While the chain is complete for the GSR *analysis*, it is arguably incomplete for lack of testimony as to the collection of the source garment from which the GSR was collected.

> Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts. *United States v. De Larosa*, 450 F.2d 1057, 1068 (3d Cir.1971). "The trial judge's exercise of discretion must be reviewed in the light of the following factors: '... the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.' " *Id.* (citation omitted). "If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence." *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir.1960).

State v. Hatcher, 392 S.C. 86, 93, 708 S.E.2d 750, 753–55 (2011). The State does not contest that the officer who initially collected Appellant's jacket did not testify. However, the evidence presented shows that the evidence was properly and individually sealed when transported to SLED for GSR sampling and testing. (Tr. p. 612-613; 619; 621). Appellant is surmising tainted evidence absent any demonstration in the record that such occurred.

Regardless, if the admission of the GSR evidence was in error, the harmless nature of this evidence is apparent in light of the overwhelming evidence of guilt against Appellant. As discussed above, Appellant was identified as the driver of the vehicle (Tr. p. 452), and he clearly, dangerously, and for an extended period of time, fled from pursuing police. All of which took place mere minutes after the 911 call reporting the murder and robbery was placed. In addition, Appellant's ID was found with ammunition linked to the crime, all four guns from the crime were tossed from the car while Appellant drove, his DNA was on items tossed from his fleeing vehicle,

and DNA evidence and property of the victims were also tossed from the car.[14] As the jury was charged with accomplice liability, Appellant is at a minimum guilty as serving as the getaway driver for this robbery. In light of the above evidence and Mr. Porter identifying the clothing of one of the assailants that correlates to Appellant's jacket, he is even more likely one of the four assailants at the crime scene.

Moreover, any potential harm the GSR testimony might have presented was allayed by the extensive cross-examination conducted by defense counsel geared toward showing how the GSR may not be definitive evidence of someone's presence at the crime. Witness Hardin was cross-examined extensively on the various manners in which GSR could be found on a garment or item, but not be the result of being a present at the scene of the crime. These included such matters as the manner in which the individual item was handled by law enforcement, whether gloves were used or not, whether gloves were changed in between touching different items, whether multiple items were kept separate, whether transfer of particles could result from sitting in a car seat, or whether the owner of the item could have come in contact with GSR while hunting on a prior occasion unrelated to the crime. (Tr. p. 863-869).

"To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." *State v. White*, 372 S.C. 364, 373, 642 S.E.2d 607, 611 (Ct. App. 2007) (citing *Fields v. Regional Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). Appellant has failed to show prejudice resulting from this issue. In light of the overwhelming evidence of guilt the GSR testimony regarding the jacket was of little to no consequence and does not satisfy the resulting prejudice standard for reversible error.

[14] Based on upon likelihood ratio.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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