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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ADAM D. LAWLESS,

APPELLANT

APPELLATE CASE NO. 2023-000636

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1.

Appellant's father confessed to this murder to appellant's lawyer on the evening appellant was convicted. Did the trial court err in denying appellant's motion for a new trial based on after-discovered evidence by using an incorrect and impossible-to-meet legal standard to evaluate whether the father's confession could have changed the result if heard by a jury?

2.

Did the trial court err in denying appellant's motion for a new trial based on after-discovered evidence where the jurors admitted discussing appellant's failure to testify during deliberations, in flagrant disregard of the judge's charge and due process?

STATEMENT OF THE CASE

On October 23, 2018, an Anderson County grand jury indicted appellant Adam Don Lawless for the murder of Tabatha Duncan. R. ___ (Indictment). Five years later, on April 10, 2023, appellant was tried in Anderson before the Honorable R. Scott Sprouse and a jury. Tr. 1. Kristen W. Reeves represented the State. Tr. 1. William Norman Epps, III, represented appellant. Tr. 1. The jury convicted appellant on April 14, 2023. Tr. 934-35. Judge Sprouse sentenced appellant to the statutory minimum of thirty years' imprisonment. Tr. 945. Judge Sprouse also exercised his discretion to award appellant full credit for the time he spent on house arrest. Tr. 944-45.

On the evening appellant's trial ended, appellant's father, James Lawless, told trial counsel Epps that he killed Tabatha. R. ___. (Order Denying M. New Trial, 2). On April 18, 2023, Epps filed a Motion for New Trial on After Discovered Evidence along with his affidavit regarding the father's confession. R. ___ (Mot. New Trial). On May 12, 2023, appellant filed an amended Motion for New Trial on After Discovered Evidence that included an allegation of juror misconduct. R. ___ (Am. Mot. New Trial). On May 15, 2023, Judge Sprouse held a hearing on the motion. R. ___ (May 15, 2023, Hearing Tr. 1). Nancy Jo Thomason represented appellant at the hearing. R. ___ (May 15, 2023, Hearing Tr. 4). Judge Sprouse took the matter under advisement. R. ___ (May 15, 2023, Hearing Tr. 42-43). On May 19, 2023, Judge Sprouse entered a written Order denying appellant's motion. R. ___ (Order Denying Mot. New Trial). This appeal follows.

STANDARD OF REVIEW

The trial court's denial of the motion for a new trial is reviewed for abuse of discretion.

State v. Adams, 430 S.C. 420, 845 S.E.2d 217 (Ct. App. 2020).

ARGUMENT

1.

Appellant's father confessed to this murder to appellant's lawyer on the evening appellant was convicted. The trial court erred in denying appellant's motion for a new trial based on after-discovered evidence by using an incorrect and impossible-to-meet legal standard to evaluate whether the father's confession could have changed the result if heard by a jury.

Introduction

A jury needs to hear the confession of James Lawless. Appellant Adam Lawless is the son of James Lawless, but they are not biologically related. Tr. 540. Adam had an alibi for the murder of Tabatha Duncan, his girlfriend. Tabatha was murdered in their home in Iva. It was undisputed that Tabatha's cell phone, which was never found, was in the home and active until 8:55 AM on the day her body was found. Tr. 706. It was undisputed that Adam was on-camera at work in Anderson, nineteen miles away at 7:21 AM, until he left after learning of Tabatha's death at approximately 2:00 PM. Tr. 713-14. A car resembling James and his wife's black SUV was seen in Adam and Tabatha's driveway in Iva by a disinterested witness at approximately 8:15-8:30 AM. Tr. 466-67. James' red Chevy Cavalier was seen by a disinterested witness across the street from the house at approximately 9:40 AM. Tr. 475.

After Adam's conviction, James confessed to trial counsel Norman Epps that he murdered Tabatha. R. ___ (Mot. New Trial, Aff. Epps. 1) James, while his wife, Donna, listened, told Epps details of the murder. R. ___ (Mot. New Trial, Aff. Epps. 1-3). As counsel argued at the hearing on the motion for a new trial, James despicably tried to game the legal system, waiting five years to see if Adam might be acquitted before admitting his crime. May

15, 2023, Hearing Tr. 32-34. Counsel also argued that James might still be lying to protect not Adam, but his wife. May 15, 2023, Hearing Tr. 41.

The trial court found Epps accurately relayed what James told him. R. ____ (Order Denying Mot. New Trial 3). The correct legal standard is that the new evidence “is such that it would probably change the result if a new trial were granted,” but Judge Sprouse held that before he “could conclude that the evidence would have changed the outcome, there must be **no doubt** as to the credibility of the evidence” and denied the motion. R. ____ (Order Denying Mot. New Trial 3-4) (emphasis added). See State v. Spann, 334 S.C. 618, 619, 513 S.E.2d 98, 99 (1999). The court noted that after James retained counsel he gave no statements to law enforcement and did not appear at the hearing. R. ____ (Order Denying Mot. New Trial 3-4). The court also cited the State’s theory that James and Donna were involved in covering up the murder. R. ____ (Order Denying Mot. New Trial 3). But this was a very close case. When she tried to explain the concept of reasonable doubt in her closing, the solicitor admitted, “There are gaps.” Tr. 890. A jury hearing James’ confession, even if only through the testimony of a member of the Bar, would have found reasonable doubt existed and acquitted Adam.

Friday: Tabatha Gets Adam’s Mother Fired

Adam’s mother, Donna Lawless, worked at Liberty Tax. Tr. 252. Donna’s boss at Liberty Tax described her as “very, very smart,” but said “she loved drama.”¹ Tr. 252. On Friday, March 9, 2018, Tabatha went to Liberty Tax and spoke to the manager, Rebecca Inman.

¹ As this Court reviews the trial record and routine objections made by the defense, it should keep in mind that with knowledge of James’ confession, the defense strategy would have been significantly different. For example, the defense made several objections to the manager’s testimony based on relevance and hearsay. Tr. 252-61. An excellent example is the defense objected when the State asked the manager how James appeared on the phone. Tr. 259-60. In a new trial, the defense would want evidence of the tax return conflict between Donna, James, and Tabatha before the jury. But at this trial, the defense objections made it look like the defense was trying to hide this evidence from the jury.

Tr. 251-54. Tabatha asked for a copy of her tax return. Tr. 255. The manager could not find a return in their system for Tabatha, so she called Donna. Tr. 255-56.

The manager learned that Donna had not filed Tabatha's return through Liberty Tax. Tr. 255-57. The manager saw that Tabatha was "Worried. Scared," that Donna would be mad at her. Tr. 256-57. Tabatha had good reason to worry because Liberty Tax immediately fired Donna for doing a return outside of Liberty Tax. Tr. 257-58. The manager testified that after learning about Tabatha's murder, she asked herself, "If she'll die over this, what'll happen to me?" Tr. 260-61. The trial court struck this comment after the defense objection to this comment as "absolutely rank speculation." Tr. 261. In a new trial focusing on James (and possibly Donna), the defense would not have objected and had this evidence stricken.

On cross-examination, defense counsel focused on the fact that Adam never contacted Liberty Tax. Tr. 261-62. Liberty Tax requested an investigation by SLED and the manager said that Donna had potentially lost her freedom as well as her job. Tr. 266. Defense counsel tried to discredit the manager on this point. Tr. 266-67. Again, with knowledge of James' confession, the defense strategy here would have been very different. The defense would have wanted to show that Donna knew she was in trouble with the police which increases James' motive for the murder.

Tabatha's sister Tealisa Evans, was the State's first witness. Tr. 84. She identified the people in Tabatha's family, including her two children, B (boy, five years old at the time of the murder) and F (girl, two years old at the time of the murder). B, a child by Tabatha's ex-husband, lived with Tabatha's parents. Tr. 85-86. F, Adam and Tabatha's child, lived with them in Iva. Tr. 86. Adam's son W (who was six or seven at the time of the murder), by a woman

named Kayla Riggins, lived with Adam and Tabatha in their small, three bedroom, one bath house in Iva. Tr. 86-87. State's Ex. 1 (photo of house).

Evans described the relationship between her family and Adam's family as non-existent because Adam's family was "controlling" and they tried to "brainwash my sister." Tr. 88. This testimony drew an objection from the defense that likely would not be made at a new trial. Tr. 88. When the solicitor asked Evans whether "something specific was going on between [Tabatha] and Donna" a few days before the murder, the defense again objected. Tr. 89. Evans testified that Tabatha received a letter from the IRS stating that Donna had filed her taxes and Tabatha received the wrong amount as a refund. Tr. 89-90. The defense objected twice during this testimony. Tr. 89-90. Donna had written Tabatha a check for her refund. Tr. 92.

The solicitor asked whether the police were called and the defense objected. Tr. 92-93. Judge Sprouse excused the jury and required a proffer. Tr. 93. During the proffer, Evans testified that Adam's sister, Angelica Lawless, and James went to see Tabatha that afternoon after Donna was fired. Tr. 93-99. Angelica choked Tabatha and tried to take F away from her. Tr. 93-99. The police were called to the scene. Tr. 93-99. Evans got to the scene after the police and Tabatha was upset. Tr. 93-99. After the proffer, the defense objected to the details of the what happened before Evans arrived based on hearsay and Judge Sprouse sustained this part of the objection. Tr. 97-99. The judge allowed Evans to testify that the police were there because of an incident, but the details were not admissible. Tr. 99.

Tabatha planned to stay at her mother's that night, but ended up staying at her house. Tr. 102. Evans heard Tabatha and Adam arguing and cursing over the phone. Tr. 102. Evans gave Tabatha some Rubbermaid containers to pack her stuff so she could move out of Adam's house.

Tr. 103. The defense objected when Evans testified that Tabatha planned to go to the bank on Monday about the check Donna wrote for her tax refund. Tr. 106.

The State called Tabatha's family court attorney, Joshua Raffini, to testify about the ramifications of Donna's actions. Tr. 268-77. Before Friday, Adam and Tabatha reached a tentative agreement about the custody of F. Tr. 268-77. If neither Adam or Tabatha were able to parent F, then they agreed James and Donna should take custody of F. Tr. 272. Late Friday afternoon, Tabatha called her lawyer and the tentative agreement was no longer going to work. Tr. 275-76. In her closing argument discussing the lawyer's testimony about James and Donna getting custody of F, the solicitor said, "That was going to be part of the new agreement up until that week right before March 9th. Mr. Raffini told you that Tabatha in no way wanted that clause to be in that agreement going forward." Tr. 864-65.

The State admitted text messages retrieved from Adam's phone that he willingly surrendered to the police on the day of the murder. Tr. 630-31. Tr. 662. Tr. 744-45. (State's Ex. 34, 35, 36). Multiple text messages between Adam and "Mama's old Cell" are in State's Ex. 36. At 1:56 PM, Donna wrote Adam, "She had her Mom calling over here yelling and hollering at your dad you know that he cannot take that. Yes you are in it because you are the one that got the money. So I guess you be a man and stand up because she is the one that agreed to it." R. ___ (State's Ex. 36). At 4:20 PM, Donna wrote, "The police let them in your house your dad fought for you but he [sic] told him only you can stop them. Your dad has been cussed at collared at and all not doing it you have to go get [F] and bring her to us. He told dad to leave." R. ___ (State's Ex. 36).

Friday evening, Donna continued to text Adam about the tax situation. R. ___ (State's Ex. 38). Defense counsel objected based on relevance when the State read these messages to the

jury, but the defense already assented when the State entered the text messages into evidence. R. 752-53. At 7:26 PM, Donna texted, “She needs to fix my job or I will call IRS on her and claiming [B] will win. She was not living there. She was living with you. Two can play that backstabbing game.” R. ___ (State’s Ex. 38). Donna’s texts about her tax job and Tabatha continued that night and started again Saturday morning. R. 754-55.

Saturday and Sunday: Adam and Tabatha’s Relationship(s)

As Adam and Tabatha’s relationship deteriorated over the weekend, their relationships with other paramours improved. On Saturday, Adam and Tabatha exchanged some texts that were angry and some that were not. R. ___ (State’s Ex. 38). They argued about whether Adam wanted Tabatha to leave the house. R. ___ (State’s Ex. 38). But that afternoon Tabatha texted Adam that she was cooking pork chops, rice, mashed potatoes, and corn for his dinner. R. ___ (State’s Ex. 38).

Donna continued to text Adam on Saturday about the tax situation. R. ___ (State’s Ex. 38). She forwarded Adam texts she sent to Liberty Tax trying to explain she did nothing wrong. R. ___ (State’s Ex. 38). Adam texted Donna at 10:21, “She still hasn’t shut up.” R. ___ (State’s Ex. 38). Donna tried to persuade Adam to spend the night at their house or at Adam’s sister’s, but Adam said he was going to stay at his house. R. ___ (State’s Ex. 38). Donna’s texts to Adam began again at 9:55 AM on Sunday morning. R. ___ (State’s Ex. 38).

On Sunday afternoon, Adam picked up his friend, Aaron Kenyon, to hang out. Tr. 183-84. Kenyon was nineteen and worked at Denny’s. Tr. 183. When Adam picked up Kenyon, they drove to Kayla Riggins’ house so Adam could pick up his son, W. Tr. 185. Kenyon waited in the car for 30-45 minutes while Adam had sex with Riggins in the house. Tr. 185. Adam told Kenyon not to tell Tabatha. Tr. 185. Adam and Kenyon went back to Adam’s house and played

video games with W. Tr. 201-02. Adam and Riggins continued to text each other until nearly 11:30 PM on Sunday night. R. ____ (State's Ex. 38). Many of these texts are sexual and appear to be accompanied by explicit photographs. R. ____ (State's Ex. 38).

Meanwhile, in another part of the small house, Tabatha was exchanging sexual messages with a man named Jeremy Gunnells. Tr. 292-94. They made plans to see each other on Monday. Tr. 293. Tabatha and Gunnells communicated via text, Snapchat, and Facebook Messenger. Tr. 290. The messages late Sunday night and early Monday morning were detailed and included plans to "Suck on each other." Tr. 298-99. Gunnells testified they texted each other until "Midnight, 1:00 a.m. Somewhere in there." Tr. 294.

Defense counsel cross-examined Gunnells aggressively about his activities on Monday. Tr. 298-303. Gunnells sold a truck to a man on Facebook Monday morning. Tr. 298-303. SLED did not come to speak with Gunnells until a month after Tabatha's murder. Tr. 298-303. Gunnells drove a black Nissan Titan truck. Tr. 298-303. Defense counsel asked Gunnells what SLED did to verify his sale of another vehicle on Monday and he replied SLED talked to his grandmother. Tr. 298-303. Defense counsel's theory in closing was that an unidentified man killed Tabatha—a theory bolstered by SLED's discovery of unidentified male DNA under Tabatha's fingernails. Tr. 891-917. Tr. 590-91. Defense counsel specifically alluded to Tabatha's planned meeting with Gunnells in closing. Tr. 893-94. Gunnells testified he voluntarily gave a DNA sample to the police and let them download his phone. Tr. 295-96. Had defense counsel known that James murdered Tabatha, his closing argument and strategy during his cross-examination of Gunnells would have been completely different.

The State's theory during its closing argument was that Adam caught Tabatha sexting with Gunnells in F's bedroom. Tr. 866. The police found blood, Tabatha's fingernail, and

Tabatha's nose ring on a cot in F's bedroom. Tr. 866. Tr. 389. (State's Ex. 1). The solicitor speculated that Tabatha suffered these injuries when Adam ripped the phone from her hand, and then killed her later that night after continued argument. Tr. 866-67. The State's theory of jealousy rests on dubious ground given that Adam had sex with Riggins that afternoon and was sexting Riggins that night. The text messages indicate that both Adam and Tabatha were both well into their post-relationship romantic planning.

Monday: James Finds Tabatha's Body and Adam's Alibi

On Monday morning at 7:02 AM, Adam texted Donna that he guessed his parents did not have his daughter that day because Tabatha was not going to work. R. ____ (State's Ex. 36). He told Donna he believed Tabatha was "going and doing shit behind our back today and she might be going to start trouble." R. ____ (State's Ex. 36). At 7:39 AM, he texted Riggins, "Morning beautiful." R. ____ (State's Ex. 36).

Kenyon testified that he and Adam left for Adam's job at Meineke at "6:00, 6:30" that morning. Tr. 204. Video from a Mexican restaurant in Iva near the house captured Adam driving to work at 6:50 AM. Tr. 644-45. Adam's boss at Meineke testified that Meineke's cameras showed Adam opening the store at 7:30 AM and remaining there all day with Kenyon until he was called back to Iva when Tabatha's body was found. Tr. 350-51. (Def. Ex. 7). Adam acted normal, laughed, and joked with everyone. Tr. 352. The lead investigator confirmed he watched the Meineke video and it showed Adam arrive in the parking lot at 7:21 AM. Tr. 713-14. The investigator confirmed Adam stayed at Meineke all day. Tr. 714-15.

Tabatha's sister, Evans, testified that Tabatha usually woke up between 6:00 and 8:00 AM. Tr. 107. When Evans woke up at 10:00, she called her mother to see if she had heard from

Tabatha. Tr. 107. Evans and Tabatha's mother called Tabatha multiple times that morning with no answer. Tr. 108-09.

Around noon, Evans went to the house to check on Tabatha. Tr. 109. Tr. 135. She knocked on the front door and on F's window with no answer. Tr. 109. Tabatha's car was in the driveway. Tr. 110. She did not go to the back door. Tr. 111. Evans went to the police in Iva and asked them to do a wellness check. Tr. 110-111. An officer went to the house and knocked loudly on the door at approximately 12:30 PM. Tr. 135. He heard nothing inside the house. Tr. 135. He did not go to the back of the house. Tr. 136. The officer left when Evans said she would check F's daycare. Tr. 137.

Tabatha's mother ("Mama Petty Bettys" in the cell records) and Adam exchanged text messages beginning at 12:03 PM on Monday. R. ___ (State's Ex. 36). Tabatha's mother wrote Adam, "I don't know why tab is not answering her phone & you took house phone off the hook but if I don't hear from her in 5 minutes I'm calling cops." R. ___ (State's Ex. 36). Adam wrote back: "Im at work", "Call the cops i dont give a shit", and "I dont take house phones to work and she was with her daughter lastnight sleeping so i don't have a ckue why she aint answering." R. ___ (State's Ex. 36). Tabatha's mother wrote back that she was not trying to be smart, she just wanted to talk to her daughter. R. ___ (State's Ex. 36). Adam replied, "I haven't spoke to her since yesterday." R. ___ (State's Ex. 36). Tabatha's mother reminded Adam that he spoke to Tabatha after she went to the store and Adam replied that Tabatha went to sleep in F's room and he did not speak to her after that. R. ___ (State's Ex. 36). Two minutes after Adam sent that text, Donna texted Adam, "We are at Wal-Mart in GA I will go over there and tell her to call her mom soon as I get home." R. ___ (State's Ex. 36).

Tabatha's sister returned to the house in Iva about 1:50 PM. Tr. 118. She saw Donna in the yard holding F and James sitting on the porch. Tr. 118. Donna said she did not know what was going on, put F in a car, and left. Tr. 118-19. The front door had broken glass. Tr. 118-19. James looked like "he was having a seizure." Tr. 119.

The same police officer who performed the earlier well check was dispatched to the house. Tr. 137. He described James as leaning on a post on the porch with his eyes open, but was completely unresponsive. Tr. 139. The State put up an EMT who testified that she thought James was faking a seizure. Tr. 323-24. She described James as "not being cooperative" because he was not answering questions, but responded to the painful physical stimulus of a sternum rub. Tr. 324-25. A true seizure patient would not respond to a sternum rub. Tr. 324. The EMT did not take James to the hospital. Tr. 324-25. James "eventually answered" all of the EMT's questions. Tr. 325.

The police officer went into the house and found Tabatha's dead body on the floor of the laundry room. Tr. 141. He saw lots of blood and a steak knife at the entrance to the laundry room. Tr. 141-42. The EMT confirmed Tabatha was dead, describing her skin as "gray and cold." Tr. 321. The weather that day was cold and rainy. Tr. 163-64. The State's pathologist would not even entertain estimating Tabatha's time of death. Tr. 608-09.

The Iva police called Anderson County's forensics, but SLED ended up taking over the investigation. Tr. 162-63. The Iva officer stayed at the house until SLED released the crime scene at 10:00 PM that night. Tr. 160-61. The officer described Adam as upset and crying when he got to the house. Tr. 164-65.

Tabatha's murder was violent. Tr. 601-11. State's Ex. 1. She had a severe blow to the head that likely rendered her temporarily unconscious. Tr. 606. She had multiple injuries to her

face and hands and her neck was cut, although that wound was not fatal. Tr. 601-08. State's Ex. 1. She died from at least seven stab wounds to her back that damaged her lungs. Tr. 601-08. The pathologist said the stab wounds were consistent with a steak knife. Tr. 608. He agreed Tabatha was "dressed as she was about to start her day." Tr. 611.

The wounds on Tabatha's hands and arms were defensive wounds. Tr. 613. The pathologist said she fought her attacker. Tr. 613. The doctor said the police should be looking for a suspect with injuries. Tr. 615. The steak knives found at the scene had no guard on them. State's Ex. 1.

Adam had no injuries. Tr. 448-49. The police photographed Adam that day. Tr. 448-49. Defendant's Ex. 1. The took close-up photographs of Adam's hands. Defendant's Ex. 1. Adam's hands—the hands of an auto mechanic—were pristine. Defendant's Ex. 1.

Adam cooperated with the police. Tr. 661-62. He voluntary gave a recorded statement to the police. Tr. 661-62. The State did not seek to introduce Adam's statement at trial. Judge Sprouse sustained the State's objection when defense counsel asked the lead investigator whether Adam "adamantly denied any involvement in the murder of Tabatha Duncan." Tr. 662.

Aaron Kenyon Recants a Statement Obtained through Divine Intervention

The State likely does not survive directed verdict in this case without a statement Aaron Kenyon gave the lead investigator, SLED Agent Drew Ledbetter. The police talked to the nineteen-year old Kenyon on the day of the murder and Kenyon denied that he or Adam had anything to do with Tabatha's murder. Tr. 680. Tr. 183. Two days after the murder, on March 14, Ledbetter talked to Kenyon and he denied any involvement. Tr. 678, 680. The next day, Ledbetter obtained a statement from Kenyon implicating Adam in Tabatha's murder during a four-hour interrogation. Tr. 680-90.

Agent Ledbetter told Kenyon that God sent him to Kenyon. Tr. 682. After admitting he told Kenyon he was sent by God, later in his cross-examination, Ledbetter returned to this subject. Tr. 690. He said, “I was not trying to use that. You can look at many other cases I’ve done. And, you know, I’ve talked to people on witness and offender side of things. And, you know, right or wrong, that’s—that’s me.” Tr. 690.

Agent Ledbetter had background information from Kenyon’s mother about Kenyon’s father. Tr. 682-83. Defense counsel asked Ledbetter if he had information that Kenyon’s father beat his mother and Ledbetter hedged in his answer. Tr. 683. Ledbetter admitted telling Kenyon, “Because I look at you, I see a guy who got the shaft from his daddy.” Tr. 683. He told Kenyon he was being manipulated and coerced. Tr. 683. He continuously told Kenyon he “was not a monster.” Tr. 683. This murder investigation was Ledbetter’s first violent crime assignment after he came to SLED from the Highway Patrol. Tr. 655-56.

Kenyon’s testimony was bizarre. On direct, Kenyon said Adam “was my best friend.” Tr. 182. On Sunday, he and Adam smoked pot and played video games. Tr. 186. Adam and Tabatha had “little altercations,” but she went to the store to get bread. Tr. 186-87. She threw the money in Adam’s lap when she got back from the store. Tr. 187. Adam and Tabatha’s six year old son, W, went to bed around 8:00 or 9:00 PM. Tr. 189. W and F had their own rooms, but Tabatha had a cot in F’s room. State’s Ex. 1. After W went to bed, Adam was on his phone and Kenyon continued playing video games. Tr. 189.

Kenyon told the solicitor Tabatha and Adam argued after the children went to bed. Tr. 189-90. He went outside because he did could not stand it when they argued. Tr. 190. He said he heard Tabatha scream in a way that made his stomach drop. Tr. 191. He did not hear anything else. Tr. 191. He guessed he was outside “from five minutes to an hour.” Tr. 191.

The solicitor asked what Kenyon saw when he came back inside and he replied, "I don't recall." Tr. 192. Adam looked normal. Tr. 192. Kenyon denied being able to see in the laundry room. Tr. 192.

The solicitor then confronted Kenyon with the statement he gave Agent Ledbetter on March 15. Tr. 193-200. The solicitor asked if, in the statement, Kenyon said that he saw "Tabatha's feet and blood." Tr. 194. Kenyon replied, "Pretty sure if it's in the statement, it's there." Tr. 195. He heard the scream. Tr. 195. He went inside to check on the kids. Tr. 195. He did not see Tabatha. Tr. 195. His answer to the very next question of whether it looked like Tabatha was laying on the cot in F's room was, "Yep." Tr. 195-96. He went to bed. Tr. 195-96.

He got up the next morning and saw Tabatha's feet and blood. Tr. 196. He said he took "the kids" (plural) to the car. Tr. 196. Then he said Adam said to leave F because Tabatha was going to take care of F. Tr. 196. He saw Adam holding a knife with a silver handle in the kitchen. Tr. 197. He acknowledged giving other statements protecting Adam and said his "heart" changed. Tr. 199. Kenyon was charged with accessory after the fact. Tr. 200.

On cross-examination, Kenyon initially tentatively stood by his statement to Agent Ledbetter. Tr. 201-234. He said he was "not a hundred percent sure" whether Tabatha was still in F's bedroom when he and Adam left for Meineke. Tr. 205. He admitted repeatedly denying to SLED that Adam had anything to do with the murder. Tr. 212-216.

Kenyon claimed the stomach-dropping scream did not wake up the children. Tr. 222. When asked if he saw anything when he went into the kitchen in the middle of the night, he said no. Tr. 230. The kitchen had a large blood spot and a knife on the floor when it was photographed by the police. State's Ex. 1. Kenyon admitted he told his mother that he told the police what they wanted to hear so he could get out on bond. Tr. 233.

In a bizarre twist, Kenyon's testimony completely changed when defense counsel confronted him with a letter he wrote Adam. Tr. 234. R. ___ Def. Ex. 6. Kenyon first said he was not a hundred percent sure he had written Adam a letter. Tr. 234. The solicitor objected and said she had never seen the letter. Tr. 234. The judge sent the jury out while defense counsel made a copy for the solicitor. Tr. 234-35.

When the jury returned, Kenyon admitted writing Adam the letter. Tr. 235. Defense counsel handed the letter to Kenyon and asked him to read it. Tr. 235. Kenyon said, "The handwriting is kind of scribbled. I don't think I can read it." Tr. 235. As the Court will see when it reads this letter, the handwriting is very legible. R. ___ Def. Ex. 6. Defense counsel confirmed the letter was in Kenyon's handwriting. Tr. 235. Kenyon said he could not read it. Tr. 236. Kenyon said he would not even try to read it. Tr. 236. Defense counsel read the letter to Kenyon and he confirmed every part of it. Tr. 236-241.

The letter begins, "They kept saying that they weren't gonna stop unless I wrote what they wanted to." R. ___ Def. Ex. 6. He plaintively apologizes to Adam, says he'd "never had to go without seeing you" and that "I can't even smile anymore." R. ___ Def. Ex. 6. "I'm sorry I got scared when they kept saying they were gonna ruin my life if I didn't say what they wanted." R. ___ Def. Ex. 6.

After having to sit through defense counsel read this letter, Kenyon admitted that, through his attorney, he recanted the statement he gave Agent Ledbetter. Tr. 242. Defense counsel told Kenyon that if he was going to implicate Adam to the jury, that meant he left the two-year old F in the house. Tr. 243. Defense counsel pressed and said, "That didn't happen, did it?" Tr. 243. Kenyon replied, "No." Tr. 243.

He then admitted telling his mother that even though Adam and Tabatha fought, that Adam did not have “the goddamn balls to put his hands on Tabatha.” Tr. 244. Kenyon told the jury he had no doubt Tabatha could beat up Adam. Tr. 245. Defense counsel’s last questions to Kenyon were:

Q. Court grant me a minute. The truth is, you got no idea what happened to Tabatha?

A. No.

Q. Is that right?

A. That’s right.

Tr. 246.

James’ Confession

Defense counsel Norman Epps’ Affidavit attached to the motion for a new trial is the best description of James’ confession to Tabatha’s murder. R. ___ (Def. Mot. New Trial). The jury found Adam guilty about 2:40 PM. R. ___ (Def. Mot. New Trial). When Epps got back to his office at 3:50 PM, James and Donna were in his parking lot. R. ___ (Def. Mot. New Trial). They came into Epps’ office and Donna said, “Are you going to tell him?” R. ___ (Def. Mot. New Trial). James then told Epps how he murdered Tabatha. R. ___ (Def. Mot. New Trial).

James said he went to the house that morning to check on F. R. ___ (Def. Mot. New Trial). Tabatha’s keys were in the door and he let himself in. R. ___ (Def. Mot. New Trial). He and Tabatha began arguing in F’s bedroom and had an altercation. R. ___ (Def. Mot. New Trial). The fight moved into the kitchen and Tabatha grabbed a knife. R. ___ (Def. Mot. New Trial).

James said after they struggled over the knife, he believed he “blacked out.” R. ___ (Def. Mot. New Trial). He saw Tabatha’s body covered in blood on the laundry room floor. R. ___

(Def. Mot. New Trial). He tried to clean the scene, gave F a sippy cup, and went home. R. ____
(Def. Mot. New Trial). He cleaned himself outside in his hot tub. R. ____ (Def. Mot. New Trial).
He stashed the bloody clothes and Tabatha's cell phone in his boat. R. ____ (Def. Mot. New
Trial). He eventually threw the cell phone in Lake Russell. R. ____ (Def. Mot. New Trial).

Donna said that James made disturbing comments in his sleep. R. ____ (Def. Mot. New
Trial). She confronted him and he admitted his crime. R. ____ (Def. Mot. New Trial). They both
thought Adam would not be convicted because he was innocent. R. ____ (Def. Mot. New Trial).
James said he was willing to talk to an attorney and confess to the authorities. R. ____ (Def. Mot.
New Trial).

That never happened. After retaining a lawyer, James never went to the police and did
not come to the hearing on Adam's motion for a new trial. R. ____ Order Denying New Trial.
Judge Sprouse also noted that no officers ever went to speak to James. R. ____ Order Denying
New Trial.

Donna sent Epps a disturbing email the night James confessed asking him to "take care of
Adam." R. ____ (Def. Mot. New Trial). Epps "received notification at 7:27 pm on Saturday,
April 15, 2023, that Donna Lawless had been hospitalized and intubated, from a possible
overdose. She is currently in ICU at an Anderson Area hospital and undergoing tests." R. ____
(Def. Mot. New Trial).

The Trial Court Erred in Denying the Motion for a New Trial

The trial court not only used the wrong standard to evaluate Adam's new trial motion, it
used a standard that would almost impossible for any defendant to meet. The court cited the
correct test in deciding a motion for a new trial based on after-discovered evidence from State v.

Spann, 334 S.C. 618, 513 S.E.2d 98 (1999). The appellant must show the after-discovered evidence:

- (1) is such that it would probably change the result if a new trial were granted;
- (2) has been discovered since the trial;
- (3) could not in the exercise of due diligence have been discovered prior to the trial;
- (4) is material; and
- (5) is not merely cumulative or impeaching.

Spann at 619-20, 513 S.E.2d at 99. Only the first element of this test is at issue in this appeal. R. ___ Order Denying New Trial. Judge Sprouse found the evidence was material “if credible.” R. ___ Order Denying New Trial.

Despite quoting the test from Spann that the evidence must “probably change the result if a new trial were granted,” the trial court used as its legal test, “In any event, before the Court could conclude that the evidence would have changed the outcome, there must be no doubt as to the credibility of the evidence.” R. ___ Order Denying New Trial. The trial judge superimposed an impossible-to-meet credibility standard on top of prong one of the Spann test. While a trial court does make credibility findings when dealing with after-discovered evidence based on witness testimony, there is no requirement that the credibility of the witness be beyond all doubt. See State v. Parker, 249 S.C. 139, 141-42, 153 S.E.2d 183, 184 (1967). It must be sufficiently credible that it would “probably change the result of the trial.”

Given this shaky case, James’ confession meets that standard. The State argued that its theory of the case was that James and Donna were involved in covering up Adam’s crime and James’ confession did not change anything. Judge Sprouse discredited James because he did not

talk to the police after retaining counsel. No competent defense attorney would encourage his client to confess.

Judge Sprouse then properly noted that in a new trial, it would be James “word against that of Epps.” The court found Epps accurately relayed what James told him. A jury hearing Epps’ testimony about James confession would have found reasonable doubt and acquitted Adam. Like Judge Sprouse, a jury would believe Epps about James’ confession.

This case does not involve the usual recantation of a witness after the trial ended.² See Parker at 141-42, 153 S.E.2d at 184 (noting that recanted testimony is unfavored). James did not testify. With the typical witness recantation, the jury has already assessed the credibility of the witness. No jury has ever heard James’ confession or Epps’ account of the confession.

The evidence at the trial corroborates James’ confession. James’ DNA was found on the steak knife. Tr. 550. James’ DNA was found on the bedsheet on F’s room where Tabatha’s fingernail and nose ring were ripped out. Tr. 557-58. The botched cleaning of the crime scene matches a theory of James trying to conceal the crime from Adam and Donna. A car resembling James and his wife’s black SUV was seen in Adam and Tabatha’s driveway in Iva by a disinterested witness at approximately 8:15-8:30 AM. Tr. 466-67. James’ red Chevy Cavalier was seen by a disinterested witness across the street from the house at approximately 9:40 AM. Tr. 475. The State’s cell phone expert admitted that activity on Tabatha’s phone after Adam left and before the Lawless’s car was seen in the driveway could have been initiated by Tabatha. Tr. 835-36. A geofence the State obtained from Google confirmed Tabatha’s phone was in the Iva house after Adam left for work. Tr. 704-06. While the State will argue this evidence only

² The State’s star witness, Kenyon, recanted during the trial, not after.

supports a cover-up theory, this case is so close and so messy that a jury needs to hear James' confession and sort out this evidence.

The court rightly points out that James' confession could be an attempt to manipulate the system. The court is correct on this point, but it does not mean that Adam is complicit in manipulating the system. James' despicable conduct offends everyone involved in our justice system. But Adam cannot be punished for this manipulation until a jury decides whether he is complicit.

And as pointed out in the factual recitation, the defense strategy would be completely different in a new trial. Epps was forced to point the finger at unknown assailants and impeach the investigation by the police. In a new trial, Adam would be free to point to James as the killer. The fight between Donna, James, and Tabatha gives James more of a motive to kill Tabatha than Adam, who had already resumed a sexual relationship with Kayla Riggins. James' wife was facing a potential criminal investigation because of the tax filing. Donna's texts with Adam show their primary concern was her job. Adam's concern that evening seemed to be sexting with Riggins, smoking pot, and playing video games. In this highly unusual case replete with reasonable doubt, the trial court erred in denying the motion for a new trial and denying Adam the ability to have a jury fairly assess his guilt in light of James' confession. This Court must reverse.

2.

The trial court erred in denying appellant's motion for a new trial based on after-discovered evidence where the jurors admitted discussing appellant's failure to testify during deliberations, in flagrant disregard of the judge's charge and due process.

The second ground in Adam's new trial motion was based on a jury foreman's affidavit admitting they discussed Adam's failure to testify. The foreman wrote, "After the prosecution and the defense settled, it really shocked me and the other jurors that the defense did not call any one to the stand for questions. I as a juror would have like to have seen Adam, the Coroner and Adam's parents called to the stand which could have provided a time of death as well more questions asked about the parent's involvement in the case. **During deliberations this was something every juror would have like to have seen and, in my opinion, could have affected the way the verdict could have gone.**" R. ___ Def. Amended Mot. New Trial (emphasis added).

Judge Sprouse said the statements were "concerning," but did not amount to rise to the level of juror misconduct. R. ___ Order Denying New Trial. The court also construed the juror's statements as critical of the defense strategy instead of faulting Adam for not testifying. R. ___ Order Denying New Trial.

First, the judge's point about the criticism of defense strategy bolsters Issue One on appeal. As argued above, the defense strategy was completely handicapped by the lack of the ability to present James' confession. Second, the foreman's statement that every juror wanted to hear Adam's testimony cannot be construed in any way but that the jury ignored the court's instruction not to hold Adam's exercise of constitutional right not to testify against him.

In Shumpert v. State, 378 S.C. 62, 661 S.E.2d 369 (2008), the Court discussed a similar issue. In PCR, the defendant attempted to admit the affidavit of a juror. The juror's affidavit stated jurors said during deliberations that if the defendant was not guilty, he would have testified. Id. The PCR judge refused to admit the affidavit into evidence.

The precise legal issue before the Court in Shumpert was whether the PCR judge erred in refusing to admit the affidavit. Id. Here, the judge considered the affidavit, but made the wrong legal conclusion. The Shumpert Court noted that admitting evidence concerning juror deliberations was highly restricted, but left the door open to admit evidence when required by fundamental fairness. Id. The Court said its decision to uphold the PCR court's refusal to admit the affidavit should not be interpreted as suggesting that all evidence about jurors improperly considering a defendant's right to testify does not implicate fundamental fairness.

Unlike Shumpert, the trial judge agreed to consider the foreman's affidavit. The fundamental fairness question is therefore squarely before this Court that was not present in Shumpert. The foreman's affidavit said **every** juror wanted to see Adam testify. The foreman's affidavit said if Adam had testified, it could have changed the verdict. The trial judge did not find the foreman's statement not credible. The court misconstrued the affidavit and improperly held the parts of the affidavit that did not show misconduct outweighed the portion that did. The jurors flagrantly disobeyed the instruction not to consider Adam's failure to testify. This case meets the narrow window described in Shumpert and shows that Adam's right to fundamental fairness was violated. The unusual facts and closeness of this case also weigh heavily in favor of appellant receiving a new trial untainted by juror misconduct. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand this case for a new trial.

s/David Alexander

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of April, 2024.