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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEREMY SAVOY CORNISH,

APPELLANT

APPELLATE CASE NO. 2022-001536

FINAL BRIEF OF APPELLANT

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QUESTIONS PRESENTED

I.

Whether the trial court reversibly erred by admitting DNA results when it ruled that the State obtained Appellant's first sample in violation of his constitutional rights, yet held the violation was cured under the independent source doctrine when the State obtained a new sample from Appellant through a search warrant shortly before to trial?

II.

Whether the trial court reversibly erred by failing to charge the jury with the defense of alibi where Appellant's statement to police indicated he remained inside his uncle's truck in the parking lot of the Woodland Apartment Complex and never entered the apartment where the homicides occurred?

STATEMENT OF THE CASE

Appellant Jeremy Savoy Cornish was indicted by the Lexington County Grand Jury on August 8, 2022, for three counts of murder and one count of first-degree burglary. R. 1701-1702, 1705-1706, 1709-1710, 1713-1714. The charges stemmed from his purported involvement, along with codefendant Justin Hopkins, in an incident occurring late in the morning of December 17, 2019, at the Woodland Village Apartment complex. R. 448, ll. 1-12; R. 1701-1702, 1705-1706, 1709-1710, 1713-1714.

Appellant's case proceeded to a jury trial before the Honorable Debra R. McCaslin from October 10th through 21st, 2022. R. 1; R. 2. Appellant was represented by Leigh J. Leventis, Jack B. Swerling, and Alissa L. Wilson, while the State was represented by Samuel R. "Rick" Hubbard, III, Suzanne Mayes, and Bruce H. Norton. R. 2.

The jury convicted Appellant on all counts. R. 1522, ll. 7-17. The trial court imposed concurrent sentences of life without parole for each of the three murders, and eighteen (18) years for first-degree burglary. R. 1544, l. 25—R. 1545, l. 5; R. 1703-1704, 1707-1708, 1711-1712, 1715-1716.

STATEMENT OF THE FACTS

On the morning of Tuesday, December 17, 2019, as part of his supervisory duties Appellant picked-up three workers of his uncle's construction crew—Justin Hopkins (Hopkins), Dante, and Quinton—and drove to the job site on McEntire Air Force Base. Due to rainy weather conditions, work for the day was cancelled after about an hour and a half. R. 1185, ll. 7-14; R. 1243, ll. 2-17; R. 1340, ll. 7-12; R. 1541, ll. 23-25.

Appellant left the base with his workers and dropped off Dante and Quinton. While driving to drop-off Hopkins at his apartment in the Landmark Apartments, Appellant first stopped at the Department of Motor Vehicles (DMV). R. 1243, ll. 17-25; R. 1341, ll. 1-5. They then went to Appellant's home in Hopkins where Appellate met with his girlfriend. Appellant took his girlfriend to her parents' house, dropped her off there, and continued back toward Hopkins' apartment. On the way, Hopkins inquired whether Appellant wanted to buy marijuana. As a result, Hopkins guided Appellant to the parking lot of an unfamiliar apartment complex—the Woodland Village Apartments. R. 1244, ln. 14—R. 1245, ln. 10; R. 1344, ll. 14-24; R. 1342, ln. 16—R. 1343, ln. 3.

According to Appellant, Hopkins left the white dually work truck for one of the apartments in the complex. Appellant indicated that he stayed in truck, checked his work email, and was called by a friend. R. 1245, ln. 13—R. 1252, ln. 4. After waiting for some time, Appellant believed Hopkins was taking too long. As a result, he began driving around the apartment complex looking for Hopkins. At approximately 11:00am, Appellant saw Hopkins riding on a bicycle nearby, and quickly drove up to him. Witnesses, including Christy Meneses (Meneses) saw Hopkins get off the bike and into the truck, only to get back out of the truck, lean the bicycle against a nearby tree, and then get back into the truck. The truck then quickly left the

Woodland Village Apartments. R. 748, ln. 13—R. 752, ln. 5; R. 756, ln. 12—R. 757, ln. 8; R. 758, ln. 22—R. 760, ln. 22; R. 1253, ll. 4-19; R. 1330, ln. 20—R. 1331, ln. 8; R. 1368, ln. 19—R. 1369, ln. 21; R. 1373, ll. 2-23.

Appellant drove to KJ's Grocery where he dropped-off Hopkins to get cigarettes and cigars.[1] He then proceeded to Hopkins' nearby apartment. Once Hopkins arrived, Appellant indicated he obtained his portion of marijuana, and left. R. 1253, ln. 19—R. 1256, ln. 18.

However, at 10:59am, police received a 911 call from the Woodland Village Apartments regarding a home invasion. Lexington County Sheriff's Office Deputy Scott Purdy (Dep. Purdy) arrived at 11:03am and encountered Donnovin Haynes (Haynes) outside. After Haynes indicated his friends were shot, deputies kicked-in the locked front door to the first-floor apartment. As they cleared their way through the apartment, they observed Duwan Williams was on the couch bleeding but still breathing, while two others—Branton Booker in the hallway and Sheldon Livingston in a bedroom—were unresponsive. R. 447, ln. 16—R. 448, ln. 12; R. 450, ln. 20—R. 454, ln. 4; R. 457, ln. 10—R. 462, ln. 11. Ultimately, all three of Haynes' roommates succumbed to their gunshot wounds. R. 496, ll. 4-18; R. 497, ll. 2-9; R. 505, ln. 22—R. 506, ln. 14; R. 513, ll. 2-12. Although Haynes hid in his bathroom closet during the incident before escaping though his bedroom window, he indicated hearing at least two voices inside the apartment. R. 562, ln. 18—R. 565, ln. 13; R. 567, ln. 17—R. 570, ln. 24. Police processed the apartment and collected evidence, including swabs for touch DNA.

Officers spoke with Appellant on several occasions, including December 23, 2019, when police asked Appellant to come to the station. While at the sheriff's office, Appellant was interrogated for approximately an hour and a half regarding the case, as well as inconsistencies

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[1] Video surveillance confirmed Appellant and Hopkins arrived at KJ's at approximately 11:10 am. R. 963, ll. 3-4.

with prior statements to police. Appellant was not informed of his rights, or that he was in custody. When the issue of obtaining a sample of Appellant's DNA arose, Appellant stated, "Listen, I—I'd rather be getting a lawyer involved in this here because I don't, you know, need nothing fishy going on." Police responded, "All right." and Appellant said, "You know what I mean?" R. 89, ln. 13—R. 91, ln. 12; R. 105, ll. 17-21; R. 1634, ln. 22—R. 1635, ln. 1. Officers continued to talk with Appellant, and ultimately convinced him to provide a sample of his DNA despite further protestations regarding the absence of his lawyer. R. 1635, ln. 2—R. 1644, ln. 25. Appellant was arrested on December 31, 2019. R. 105, ll. 15-16.

Appellant's DNA swab, along with swabs taken from the incident location, was tested at the South Carolina State Law Enforcement Division (SLED). Results indicated Appellant's DNA was part of a four-contributor mix collected from the bolt lock inside of Haynes' apartment front door. R. 1153, ln. 10—R. 1159, ln. 9. On September 23, 2022, police filled out a search warrant for another DNA swab of Appellant after being made aware of questions regarding the voluntariness surrounding the first sample. R. 81, ln. 16—R. 84, ln. 5. R. 1546-1550. A sample of Appellant's DNA was again obtained and sent to SLED for testing without notifying Appellant's attorneys or seeking a hearing. R. 84, ln. 6—R. 85, ln. 19.

Appellant's case proceeded to trial October 10, 2022. During pre-trial motions, the defense sought suppression of the DNA evidence as fruit of the poisonous tree, and that the first unlawful search was not salvaged by the independent source doctrine. R. 17, ln. 15—R. 18, ln. 22; R. 372, ln. 9—R. 378, ln. 12; R. 413, ln. 3—R. 414, ln. 6; R. 1551-1556. After weighing the facts and circumstances surrounding the collection of Appellant's DNA on December 23, 2019, based upon the evidence presented testimony, the recording of Appellant's interrogation on December 23, 2019, as well as a transcript of the interrogation, the trial court determined in its

written order that Appellant was interrogated while under custodial circumstances without being warned of his rights and after he asked for his lawyer. As such, Appellant's statement and DNA should be suppressed. R. 407, ln. 19—R. 412, ln. 2; R. 1565-1566; R. 1569-1699. However, the trial court further ruled that the defect was cured pursuant to the independent source doctrine. As such, the DNA evidence was admitted over objection. R. 407, ln. 19—R. 412, ln. 2; R. 1133, ll. 2-13; R. 1566-1568.

During the jury charge conference, Appellant sought an alibi instruction. The request was based upon Appellant's statements to police that he was inside of his truck on his cell phone located by the parking lot entrance of the Woodland Village Apartment complex while Haynes was going inside of an apartment at the complex ostensibly to purchase marijuana. R. 1222, ll. 1-4; R. 1225, ll. 1-12; R. 1245, ln. 13—R. 1252, ln. 4; R. 1362, ll. 1-13; R. 1404, ll. 15-23; R. 1415, ln. 10—R. 1416, ln. 9. The trial court denied Appellant's request as follows:

> I think it's confusing. His own statement puts him in the complex at the time of the murder. Now whether they believe he went in the apartment is up to the jury to decide, but his own statement puts him there.
>
> I think under the circumstances a mere presence charge is probably more appropriate because the defendant's conceded he was in the parking lot. So I'm going to charge mere presence and not the alibi. I just don't—there's no question he has absolutely no burden whatsoever to prove, it's the State's burden.

R. 1376, ln. 16—R. 1377, ln. 1; R. 1514, ln. 19—R. 1515, ln. 22.

Appellant was found guilty and sentenced to life without parole. This appeal follows.

ARGUMENTS

I. The trial court reversibly erred by admitting DNA results when it ruled that the State obtained Appellant's first sample in violation of his constitutional rights, yet held the violation was cured under the independent source doctrine when the State obtained a new sample from Appellant through a search warrant shortly before to trial.

The trial court's initial ruling that Appellant's rights were violated by the government was correct and supported by evidence. After being interrogated by police under circumstances amounting to custody, Appellant invoked his right to counsel—yet police continued speaking with Appellant without informing him of his Miranda[2] rights and collected his DNA. As such, after examining the totality of the circumstances, the trial court held the search in violation of Appellant's right to counsel, and any "consent" was not voluntary. R. 1557-1568. However, contrary to the trial court's ruling, the State's subsequent efforts to reobtain Appellant's DNA through a search warrant mere weeks prior to Appellant's trial were fruit of the poisonous tree. R. 1557-1568. Accordingly, Appellant's DNA should have been suppressed.

"[A]ppellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis." State v. Frazier, 437 S.C. 625, 633, 879, S.E.2d 762, 766 (2022). The trial court's factual findings are reviewed for any evidentiary support, while the ultimate legal conclusion is a question of law subject to *de novo* review. Id. 437 S.C. at 634, 879, S.E.2d at 766.

"It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973). One such exception is a "search conducted pursuant to a valid consent." Id. 412 U.S. at 222, 93 S.Ct. at 2045, 36 L.Ed.2d 854.

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[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1964).

"But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force." Id. 412 U.S. at 228, 93 S.Ct. at 2048, 36 L.Ed.2d 854. If consent is involuntarily given, then it is invalid and the search unreasonable. Id. 412 U.S. at 233, 93 S.Ct. at 2051, 36 L.Ed.2d 854. As such, even "when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." Id. 412 U.S. at 248, 93 S.Ct. at 2059, 36 L.Ed. 2d 854.

Moreover, "[i]n order to make effective the fundamental constitutional guarantees of sanctity of the home and inviobility of the person," the United States Supreme Court has held "that evidence seized during an unlawful search could not constitute proof against the victim of the search." Wong Sun v. United States, 371 U.S. 471, 484, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963). This "exclusionary prohibition extends as well to the indirect as the direct products of such invasions." Id. 371 U.S. at 485, 83 S.Ct. at 416, 9 L.Ed.2d 441 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920)). Accordingly, "[t]he exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search, and of testimony concerning knowledge acquired during an unlawful search." Murray v. United States, 487 U.S. 533, 536-37, 108 S.Ct.. 2529, 2533, 101 L.Ed.2d 472 (1988) (internal citations omitted).

In the case at bar, after weighing the evidence presented through testimony, the recording of Appellant's interrogation on December 23, 2019, as well as a transcript of the interrogation, the trial court correctly determined not only that Appellant was in custody, but also that Appellant's consent to search—i.e. provide a sample of his DNA—to law enforcement was not

voluntarily given. R. 1564-1566. As to whether he was in custody, the court applied the factors from State v. Lowery, 436 S.C. 349, 358, 872 S.E.2d 197, 201-02 (Ct. App. 2022) (quoting State v. Williams, 405 S.C. 263, 276-77, 747 S.E.2d 194, 201 (Ct. App. 2013)) as follows:

> (1) Though [Appellant] came in voluntarily, contact was initiated by police, notably after a prior traffic stop. (2) The line of questioning clearly indicates that [Appellant] was a suspect. (3) The interview took place at the Sheriff's Department. (4) The officers did not inform [Appellant] that he was under arrest or in custody. (5) The officers also did not inform [Appellant] that he could terminate the interview and leave at any time. It is unclear if [Appellant] was aware of such freedom. (6) There were no physical restrictions ono [Appellant's] freedom of movement during the interview. (7) The interrogation lasted for an hour and a half. (8) Two officers participated. (9) The officers did, generally dominate and control the course of the interrogation. (10) The officers stated some facts creating suspicion. (11) The officers were not aggressive, confrontational, or accusatory. (12) The officers did use interrogation techniques to pressure the [Appellant]. And (13) the [Appellant] was not arrested at the end of interrogation,

R. 1564-1565. Based on the facts presented, the trial judge determined eight (8) of the factors militated in favor of finding that Appellant was in custody when he was being interrogated. As such, all communications needed to end as soon as Appellant requested his lawyer. R. 156.[3] Additionally, even if not in custody, the trial court still found that, based upon the facts present, Appellant's consent "was not voluntary, and the sample was therefore obtained in violation of [Appellant's] Fourth Amendment rights and should be suppressed barring an exception to the exclusionary rule." R. 1566. Because the trial court's rulings on this portion of the matter are supported by evidence in the record, it must be upheld. See, e.g., State v. Frazier, 437 S.C. 625, 634, 879, S.E.2d 762, 766 (2022) ("[A]ppellate review of a motion to suppress based on the

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[3] See, e.g., Smith v. Illinois, 469 U.S. 91, 98, 105 S.Ct. 490, 494, 83 L.Ed.2d 488 (1984) ("Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease.").

Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion—in this case whether reasonable suspicion exists—is a question of law subject to de novo review."). Thus, Appellant's DNA was properly suppressed.

However, the court erred as a matter of law by subsequently determining the State cured the taint of its unlawful search through the independent source doctrine. "The question to be resolved when it is claimed that evidence subsequently obtained is "tainted" or is "fruit" of a prior illegality is whether the challenged evidence was come at by exploitation of [the initial] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Segura v. United States, 468 U.S. 796, 804–05, 104 S.Ct. 3380, 3385, 82 L.Ed.2d 599 (1984) (internal quotes omitted). As Justice Holmes explained in Silverthorne Lumber Co. v. United States, "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." Id. 251 U.S. at 392, 40 S.Ct. at 183, 64 L.Ed. 319. Thus, "[i]f knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." Id. 251 U.S. at 392, 40 S.Ct. at 183, 64 L.Ed. 319.

"This doctrine applies when a 'search pursuant to [a] warrant was in fact a genuinely independent source of the information and tangible evidence' that would otherwise be subject to exclusion because they were found during an earlier unlawful search." United States v. Hill, 776 F.3d 243, 251 (4th Cir. 2015) (quoting Murray, 487 U.S. at 542, 108 S.Ct. 2529). To determine whether the search warrant was "genuinely independent," a two-prong test is applied. Id. Specifically, "the unlawful search must not have affected (1) the officer's decision to seek the

warrant, or (2) the magistrate judge's decision to issue it." Id. (internal quotations and alterations omitted).

In the present case, although probable cause may have been present on the face of the search warrant, the warrant was not "genuinely independent" as it fails the first prong of the test. The officer's decision to seek the search warrant was specifically and directly tied to the illegality of the unlawful search. First, as Sergeant Creech admitted, he obtained the warrant at the direction of the prosecutor after being made aware of questions regarding the voluntariness surrounding the first sample. R. 81, ln. 16—R. 84, ln. 5. R. 1546-1550. Second, the officer would not have even sought the warrant if he believed the DNA was of no evidentiary value to the case. By the time the State sought a search warrant for Appellant's DNA, it was well over two years since the first swab was illegally obtained and tested, the results of which provided the only evidence in the entire case potentially placing Appellant inside the apartment.[4] As such, the State's knowledge of the unlawfully seized evidence and its importance in its case undoubtedly drove its decision to seek the warrant 17 days prior to trial. In other words, the unlawful search—and the fruits already gleaned therefrom—affected the officer's decision to seek the warrant. Accordingly, the trial court erred by finding the independent source doctrine cured the defects of the original unlawful search; rather, the DNA tests results remained fruits of the poisonous tree.

The trial court's reliance upon State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009) is likewise misplaced.[5] The relevant portion of Simmons dealt with the defendant's palm print being unlawfully taken before trial, and then at trial the court held an impromptu

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[4] As the DNA expert conceded, he could not testify whether DNA came to be present at a given location was by primary, secondary, or tertiary means. R. 1172, ln. 15—R. 1176, ln. 8.

[5] Although the trial court made known its concerns regarding the policy implications in relying on Simmons,

Schmerber[6] hearing upon motion of the State. Id. 384 S.C. 145, 175, 682 S.E.2d 19, 35 (Ct. App. 2009). Specifically, the Simmons Court did not resort to or apply the two-pronged test for the independent source doctrine under Hill at all. Rather, the Court simply performed a probable cause analysis Second, Simmons had the benefit of a full hearing regarding the Schmerber factors, whereas the State in the present case simply got a judge to sign a warrant, went to the jail roughly two weeks prior to trial and without notice to Appellant's counsel took what they wanted because their case hinged upon it. R. 394, ll. 16-19. Further, it was less intrusive to search the area in Simmons—a palm print—than in Appellant's case—the inside of his face. In other words, the facts and legal issue and analysis provided in Simmons are unique and not on all fours with the factual and legal circumstances of Appellant's case. As such, the trial court erred in deeming the case controlling over Appellant's issue.

Appellant was also prejudiced by the trial court's erroneous ruling, as it was the sole evidence circumstantially placing Appellant inside the apartment in Woodland Village Apartments and cut directly at the heart of Appellant's defense. As the Solicitor unequivocally stated in his argument to the trial court, "If your honor is to suppress this DNA evidence, it would significantly—in fact, substantially impair the prosecution of this case. We would not be able to establish our case. Despite all of the other PC we have, we have a duty now to disprove alibi."[7] R. 394, ll. 16-21.

Further, the State emphasized Appellant's DNA on the apartment door lock during its closing argument to the jury more than once to place Appellant inside as one of at least two intruders. R. 1438, ll. 1-8; R. 1442, ll. 22, ln. 23—R. 1444, ln. 3. It was the State's key evidence

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6 Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

7 Notably, the State later successfully argued to the court during the jury charge conference that the defense of alibi did not apply, thus partially negating its own argument against suppression. R. 1402, ln. 1—R. 1406, ln. 6; R. 1414, ln. 5-24; R. 1416, ln. 10—R. 1417, ln. 1.

in placing Appellant as one of at least two intruders committing the offenses, regardless of the fact that even the DNA expert could not testify whether DNA came to be present at a given location by primary, secondary, or tertiary means. R. 1172, ln. 15—R. 1176, ln. 8. While there was testimony that two voices were heard inside the apartment during the break-in, Appellant was not identified as one of the assailants—either by face or voice. R. 577, ll. 16-22; R. 586, ll. 13-16. In fact, no witness even saw Appellant entering or leaving the apartment; rather, they saw the truck driven by Appellant arrive and pick-up his fleeing codefendant. R. 1328, ln. 3—R. 1332, ln. 13; R. 1334, ln. 11—R. 1336, ln. 19; R. 1388, ll. 1-3.

Moreover, the State's insistence that two firearms were used in the incident—a 9mm and a .38 special—fails to place Appellant inside the apartment either. First, no guns used in the homicides were recovered. R. 1315, ln. 6—R. 1316, ln. 23. Second, it was Haynes, not Appellant, who was associated with any firearms in the case—including a 9mm Glock, and one Taurus revolver that could shoot either the .38 special or .357 magnum ammunition which could have been used in the three homicides. R. 909, ln. 1—R. 914, ln. 17; R. 983, ln. ln. 4—R. 986, ln. 24; R. 1069, ln. 5—R. 1070, ln. 17; R. 1073, ln. 17—R. 1078, ln. 23; R. 1079, ln. 17—R. 1080, ln. 6; R. 1083, ln. 2—R. 1085, ln. 7; R. 1348, ln. 7—R. 1349, ln. 20; R. 1378, ln. 9—R. 1379, ln. 25. Thus, the only evidence placing Appellant inside the apartment where three individuals were shot and killed was his DNA mixture combined with three other contributors that could have been placed there by secondary or tertiary means. R. 1169, ll. 8-14.

Finally, the State utilized Appellant's DNA mixture to argue that he acted with malice as well. Specifically, the State forcefully argued as follows:

> [B]ut here's what you really know about [Appellant], why you know he's a cold-blooded, coldhearted killer. Second in, locked that lock. Ain't anybody getting in here, no help is coming, and everybody in here is gonna die. His DNA. He turned an

> apartment, a home, into a kill box. Nobody's going home. Nobody's going anywhere. He's killing them all.

R. 1442, ll. 22, ln. 23—R. 1444, ln. 3. Thus, Appellant was prejudiced.

II. The trial court reversibly erred by failing to charge the jury with the defense of alibi where Appellant's statement to police indicated he remained inside his uncle's truck in the parking lot of the Woodland Apartment Complex and never entered the apartment where the homicides occurred.

Appellant was entitled to an alibi jury instruction, yet the trial court refused to do so. Evidence was adduced through the State's own witnesses which, if believed, placed Appellant sitting in his truck in the parking lot while using his cell phone at the same time the burglary and homicides occurred inside one of many apartments of the Woodland Village Apartment complex.[8] Thus, Appellant was not at the scene of the crime—inside the apartment—when the offenses occurred.

"A charge on the defense of alibi is not required when an accused person merely denies committing the criminal act. Alibi means elsewhere, and the charge should be given when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission." State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980). "The failure to give an alibi charge, where the defendant claims to be at another place, is reversible error." Riddle v. State, 308 S.C. 361, 363, 418 S.E.2d 308, 309 (1992) (citing State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980)); see also State v. Fair, 209 S.C. 439, 445, 40 S.E.2d 634, 637 (1946) ("It is error to refuse a requested charge on an issue raised by the indictment and the evidence presented at trial.").

Moreover, "[a]libi is not an affirmative defense imposing upon the accused the burden of its proof. It does not require testimony of the accused or of witnesses produced by him. It may be established as well by the testimony of witnesses for the prosecution." State v. Mayfield, 235 S.C. 11, 25, 109 S.E.2d 716, 724 (1959). Further, "[a]n alibi charge places no burden on a

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[8] R. 1222, ll. 1-4; R. 1225, ll. 1-12; R. 1455, ln. 13—R. 1252, ln. 4; R. 1402, 1-13; R. 1404, ll. 15-23; R. 1415, ln. 10—R. 1416, ln. 9; R. 1416, ln. 16—R. 1417, ln. 1; R. 1514, ln. 19—R. 1515, ln. 22.

criminal defendant but emphasizes that it is the State's burden to prove the defendant was present and participated in the crime." Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (citing State v. Bealin, 201 S.C. 490, 23 S.E.2d 746 (1943)). Importantly, "[a]n alibi charge is considered especially crucial when the evidence is entirely circumstantial as in this case." Id.

In the present case, Appellant established evidence supporting an alibi charge. Specifically, Appellant told authorities that he was inside his truck, on his cell phone, located by the parking lot entrance of the Woodland Village Apartment complex while Haynes was going inside an apartment at the complex, ostensibly to purchase marijuana. State's Ex. #206, aerial photograph; State's Ex. #209, aerial photograph. This evidence was made part of the record through the State's witnesses. R. 1222, ll. 1-4; R. 1225, ll. 1-12; R. 1245, ln. 13—R. 1252, ln. 4. It makes no difference that the alibi itself originated from Appellant's statement. See, e.g., State v. Corn, 215 S.C. 166, 173–74, 54 S.E.2d 559, 561–62 (1949) (reversing when an alibi charge was refused where the defendant testified accounting for his whereabouts "sufficient to tend to establish an alibi."). Rather, what is critical is that evidence in the record existed placing Appellant at a location away from the crime scene—inside of Haynes' apartment—at the time the crimes occurred. R. 1700.

Further, it is supported by the fact that none of the State's witnesses ever placed Appellant going into the scene of the crime—the apartment where three people were shot and killed—or committing the criminal acts, or coming out of the scene of the crime. Instead, the witnesses only indicated they saw a truck similar to the one driven by Appellant arrive and pick-up his fleeing codefendant. R. 577. ll. 16-22; R. 1328, ln. 3—R. 1332, ln. 13; R. 1334, ln. 11—R. 1336, ln. 19; R. 1388, ll. 1-3.

Moreover, it made no difference that Appellant was in his truck located in the parking lot of a apartment complex instead of a house or apartment itself. What matters is that Appellant was not at the scene where and when the incident actually occurred such that he could not have committed the crimes. See Robbins, 275 S.C. at 375, 271 S.E.2d at 320 ("Alibi means elsewhere, and the charge should be given when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission."). As previously indicated, the offenses here occurred in an apartment at the Woodlands Village Apartments—not in the parking lot, where Appellant's alibi squarely places him. State's Ex. #206, aerial photograph; State's Ex. #209, aerial photograph. As such, the trial court's determination that Appellant's statements placed him at the scene is wrong as a matter of fact, and invaded the province of the jury by substituting its belief of what constituted the "scene" rather than having the jury decide the matter based on the facts presented.

Finally, Appellant was prejudiced by the trial court's refusal to charge the defense of alibi. First and foremost, "[a]n alibi charge is considered especially crucial when the evidence is entirely circumstantial as in this case." Roseboro, 317 S.C. at 294, 454 S.E.2d at 313. As indicated above, the State's case against Appellant as a participant in the crimes occurring inside the apartment was entirely circumstantial.[9] Thus, it was "especially crucial" for the trial court to charge the defense of alibi in the case. Id.

Additionally, Appellant's entire defense was predicated upon being in another place—his truck in the parking lot—at the time of the offense. Yet, instead of charging alibi—literally, that

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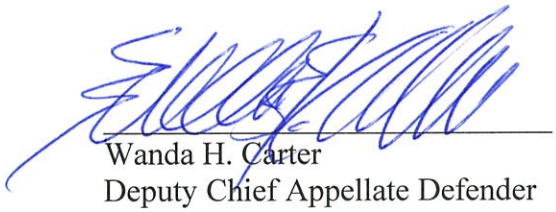
[9] R. 577. Ll. 16-22; R. 909, ln. 1—R. 914, ln. 17; R. 983, ln. ln. 4—R. 986, ln. 24; R. 1069, ln. 5—R. 1099, ln. 17; R. 1073, ln. 17—R. 1078, ln. 23; R. 1079, ln. 17—R. 1080, ln. 6; R. 1083, ln. 2—R. 1085, ln. 7; R. 1328, ln. 3—R. 1332, ln. 13; R. 1334, ln. 11—R. 1336, ln. 19; R. 1348, ln. 7—R. 1349, ln. 20; R. 1418, ln. 9—R. 1379, ln. 25; R. 1388, ll. 1-3; R. 1402, ln. 1—R. 1406, ln. 6; R. 1414, ln. 5-24; R. 1416, ln. 10—R. 1417, ln. 1.

the defendant was elsewhere—the trial court instead charged mere presence. In other words, the trial court effectively reduced the legal defense of Appellant to arguing he was actually at the scene of the offense but was "merely present" as three people were shot to death. This instruction served as poor ersatz in light of the evidence in the record supporting Appellant's alibi. and the law of alibi itself. In sum, the "mere presence" instruction was insufficient to meet the facts of the case and served instead to undercut Appellant's defense that he was *not at the scene of the crime at all.* Accordingly, Appellant was prejudiced by the trial court's refusal to charge the defense of alibi. See Riddle, 308 S.C. at 363, 418 S.E.2d at 309 (citing Robbins, 275 S.C. at 271 S.E.2d at 319) ("The failure to give an alibi charge, where the defendant claims to be at another place, is reversible error.").

CONCLUSION

Accordingly, Appellant Jeremy Savoy Cornish respectfully requests reversal of his convictions, and remand of his case for a new trial.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of July, 2024.

CERTIFICATE OF COUNSEL

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

July 31, 2024.

Wanda H. Carter
Deputy Chief Appellate Defender

S.C. Commission on Indigent Defense
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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

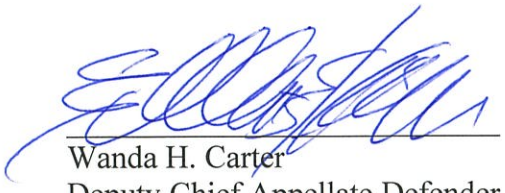
JEREMY SAVOY CORNISH,

APPELLANT

APPELLATE CASE NO. 2022-001536

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Tommy Evans, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 31st day of July, 2024.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

Leverett, Scott

From: Leverett, Scott
Sent: Wednesday, July 31, 2024 2:50 PM
To: tommyevansjr@scag.gov
Cc: SC - RANKIN BRANDY; Carter, Wanda
Subject: 2022-001536 - Cornish, Jeremy - Final Brief of Appellant
Attachments: 2022-001536 - Cornish, Jeremy - Final Brief of Appellant.pdf

Dear Mr. Evans,

Attached please find a copy of the Final Brief of Appellant in the above referenced case that is being filed today with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Wanda H. Carter
Appellate Defense