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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
R. Kieth Kelly, Circuit Court Judge

Appellate Case No. 2024-001579

The State, ...Respondent,

v.

Johnathan Olin Batchelor,.....Petitioner.

APPENDIX VOLUME III of III

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sentence for a defendant who faces the same charges as a witness against him.”). Because of the trial court’s restrictions, Mr. Batchelor was “unable to cross-examine [Mr. Tiller] about the details of any understanding with the State that his cooperation would be communicated to the court.” *Dean*, 427 S.C. at 106, 828 S.E.2d at 251.

This Court should reverse the trial court, order a new trial, and allow Mr. Batchelor to fully cross-examine Mr. Tiller.

Question IV

Did the trial court err as a matter of law by ordering a uniformed deputy, wearing body armor, and visibly carrying two sets of handcuffs, to escort Johnathan Batchelor to the witness stand, stand next to Mr. Batchelor during his testimony, and escort Mr. Batchelor back to the defense table, without conducting a hearing required by the Fourteenth Amendment to determine whether these unusual and enhanced security measures were necessary under the specific circumstances of this case and specific characteristics of Mr. Batchelor?

Early in the trial, outside the presence of the jurors, Mr. Batchelor expressed concern about “more and more law enforcement” officers coming into the courtroom, noting “at one point we had three [officers] sitting by us and nobody sitting on the other side of the room” with “two more officers” sitting in the back of the courtroom,” not including Investigator Gary who was present as a witness. Mr. Batchelor wanted to avoid “a show of force in the Courtroom” and was concerned about prejudice, similar to what occurred in *Deck v. Missouri*, 544 U.S. 622 (2005), if the jurors “believe all these officers are here just for him.” R. 440-43.

Unbeknownst to Mr. Batchelor and undersigned counsel, the trial court decided that a uniformed law enforcement—the same officer that escorted Dustin Tiller to the witness stand—noticeably wearing body armor, carrying a firearm, and two pairs of handcuffs, to shadow Mr. Batchelor to the witness stand, stand over his shoulder during Mr. Batchelor’s

testimony, and shadow Mr. Batchelor back to the defense table.¹⁰ R. 693. This show of force was “plainly visible” to the jurors. *State v. Heyward*, 432 S.C. 296, 326, 852 S.E.2d 452, 467 (Ct. App. 2020). If fact, the trial court took up a separate matter of law outside the presence of the jurors during Mr. Batchelor’s direct examination. The jurors walked within just a few feet of Mr. Batchelor and his guard when leaving and returning to the courtroom. R. 666-75. Prior to authorizing this show of force, this Court did not convene a hearing pursuant to *Deck v. Missouri*, 544 U.S. 622 (2005) (shackling in instant case was not shown to be specifically justified by circumstances, and thus offended due process).¹¹

Outside the presence of the jurors, pursuant to *Deck*, Mr. Batchelor moved “for a mistrial based on the excessive show of force during [his] testimony.” Trial counsel explained:

At the beginning of [Mr. Batchelor’s testimony], I didn’t realize that the officer walked over and was standing over his shoulder during Mr. Batchelor’s testimony. I didn’t see that until later and at some points it looked like he was perhaps just standing by the door, but then what I did observe just a minute ago was him walking back in front of the jury next to Mr. Batchelor. And I don’t know, but Mr. Batchelor says that there’s, like, excessive number or two handcuffs coming out of the back of the officer’s uniform with one of them already being opened. I wasn’t in position with the way they were walking to observe that, but the jurors probably would have been. And so I’d like the Court to inquire into that a little bit more.

¹⁰ This procedure appears to be a regular custom in Spartanburg. One purpose of the law enforcement officer standing next to an accused when he testifies is to guard the door to the hallway leading to judges’ chambers. R. 693. It appears Spartanburg follows this procedure rather than a less restrictive procedure of having a law enforcement officer guard the door from inside the hallway outside the notice of the jurors. In addition to this stated reasons, Mr. Batchelor notes Spartanburg County’s “policy” of shackling all criminal defendants when jurors return a verdict, which would have occurred in this case but for Mr. Batchelor’s objection based on *Deck*. R. 770.

¹¹ Although *Deck* involved shackling, the same due process concerns apply to the use of force in Mr. Batchelor’s case.

R. 392-93.

The trial judge explained how the court instructed the officer to guard Mr. Batchelor:

Well, I saw it and I'm the one that nodded for the officer to go over there because this door leads into judge's chambers area. And the officer looked at me and I nodded for him to go, that's exactly what he did, I wanted him to stand tight there by the door.

R. 393.

Trial counsel explained that while the court and counsel “were back in chambers reviewing” Defendant’s Ex. 1, “the officers were sitting in the jury box, and nobody was standing by the door.”¹² Counsel reminded the trial court about his earlier concerns about *Deck* and observed the trial court should have convened a hearing “so that [Mr. Batchelor] could have an opportunity to be heard and [the trial court] would have had to make certain findings under *Deck*.” Mr. Batchelor argued it was “too late” to cure the prejudice. R. 693-95.

The law enforcement officer guarding Mr. Batchelor confirmed he was carrying two sets of handcuffs—one as part of his uniform and the other for “when we have them¹³ in the jail chains.” R. 395.

Mr. Batchelor once again complained about the number of law enforcement officers in the courtroom. In addition to the uniformed officer assigned to Mr. Batchelor, a uniformed officer is assigned to the trial judge, whether in chambers or in the courtroom.

¹² The officer was standing in front of the door leading the chambers. This same door leads to the jury room. The officer had to move out of the way when the jurors were excused for the courtroom for the trial court to handle the matter of law. R. 668-75.

¹³ “Them” refers to Mr. Batchelor and Dustin Tiller. The same officer escorted Mr. Tiller, who was restrained in full body shackles, into the courtroom and stood next to Mr. Tiller during Mr. Tiller’s testimony in front of the jurors.

The trial judge confirmed that there were “four uniformed officers in the Courtroom.” The trial judge denied the motion. R. 695-96

Mr. Batchelor moved for a new trial based on the excessive show of force. He argued the State wanted the trial judge to read *Deck* “very narrowly,” instead of considering “due process” regarding “what kind of security is visible [] to the jurors in the courtroom.” He argued a “less restrictive, less obvious means could have been fashioned to accomplish the same security concerns,” such as using restraints underneath clothing that are not visible to the jurors. An officer could have guarded the door to chambers from inside the hallway and outside the presence of the jurors. R. 132-33, 872-73.

“The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment.” *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (citing *Drope v. Missouri*, 420 U.S. 162, 172 (1975)). “The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.” *Id.* “To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.” *Id.* (citing *In re Winship*, 397 U.S. 358, 364 (1970)). “Courts have, with few exceptions, determined that an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system.” *Id.* at 504. “This is a recognition that the constant reminder of the accused’s condition implicit in such distinctive, identifiable attire may affect a juror’s judgment.” *Id.* *Estelle* held, “[T]he State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in

identifiable prison clothes.” *Id.* at 512. Likewise, under ordinary circumstances, a trial court cannot force a defendant to stand trial wearing visible shackles. *Deck*; *Illinois v. Allen*, 397 U.S. 337 (1970).

Although the Constitution “permits a judge” discretion to employ extra security measures, the trial court must “take account of special circumstances, including security concerns” to accommodate “the important need to protect the courtroom and its occupants;” provided that “any such determination must be case specific” and “should reflect particular concerns . . . related to the defendant on trial.” *Deck*, at 633. Here, the trial judge did not make a “case specific” or defendant specific determination. Had the trial judge undertaken such an inquiry, then he would have made the same determination that he made prior to the announcement of the jurors’ verdict when courtroom security brought Mr. Batchelor into the courtroom in “full body chains.” Under Spartanburg County policy, “once a verdict is being passed down,” defendants in custody “go into full restraints.” Pursuant to *Deck*, Mr. Batchelor objected, and the trial court required law enforcement to remove the restraints. R. 770.

Heyward, supra, explained the burden of proof for a *Deck* violation.

Where a court, without adequate justification, orders the defendant to wear shackles *that will be seen by the jury*, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained.

432 S.C. at 325, 852 S.E.2d at 467 (cleaned up) (citing *Deck* 544 U.S. at 635). Because the State cannot prove beyond a reasonable doubt that this show of force did not contribute to

the jurors' verdict, this Court should reverse the trial court and order a new trial.¹⁴ The unusual security measures used by the trial court during Mr. Batchelor's testimony was a "constant reminder of [Mr. Batchelor's] condition" of incarceration with the unfair danger of "affect[ing] a juror's judgment." *Estelle*, at 504.

Question V

Did the trial judge err as a matter of law by not limiting the State's presentation of evidence about Johnathan Batchelor's extra-material affair with Sydney Allen, when the probative value of this excessive amount of cumulative evidence was substantially outweighed by the danger of unfair prejudice, confused the issues, mislead the jurors and created an unfair risk that the jurors would decide the case based on evidence other than proof of the elements of the crime?

In his pre-trial brief, Johnathan Batchelor moved the trial court "to exclude evidence of his marital infidelity as improper character evidence" pursuant to Rule 404(a) and (b), SCRE. R. 32. The trial judge convened a hearing on this motion. Mr. Batchelor pointed out "the discovery is full of evidence and witness statements about marital infidelity," which Mr. Batchelor is not disputing "from a factual standpoint." The State argued why this evidence was relevant and necessary "to make this case make sense to the jury." Acknowledging the weakness of the State's case, the Solicitor represented "the state would struggle to try this case without being able to just talk about the fact that Mr. Batchelor was having an affair when this shooting happened." Mr. Batchelor and the prosecutor agreed this case "shouldn't be tried as a family court case." The trial judge took the motion under advisement. R. 248-56. Prior to opening statements, the trial judge ruled the State would be allowed to present evidence "about an extra material affair." R. 310.

¹⁴ Before the trial judge ruled on the post-trial motions, via WebEx, Mr. Batchelor requested to "resume in the courtroom of the trial" to reenact and photograph the positioning of the officer in relation to Mr. Batchelor on the witness stand. The trial judge denied this request. R. 886.

Based on the trial court's ruling, Mr. Batchelor made a strategic decision to acknowledge the extra marital affair during his opening statement. R. 328-29.

Stephanie Batchelor was the first witness to testify about marital infidelity. About two weeks before the incident date, Stephanie took the children to the Chick-fil-A on the Ashville Highway. As she pulled through the drive-thru line, Stephanie "saw Johnathan walking with some woman named Sydney, just about holding hands with each other, laughing and giggling." Stephanie pulled beside then, rolled down the window, and asked what they were doing. Johnathan explained they had lunch with a group of friends from work and he was giving her a ride back to work. Stephanie and Johnathan discussed this situation at home. Johnathan stated nothing improper was occurring. R. 291-94. Based on the trial judge's prior ruling (R. 310) and having acknowledged the affair during opening statements (R. 253-54), Mr. Batchelor did not object to this testimony. Before they got married, Stephanie was aware that Johnathan had affairs and that her father had caught Johnathan having an affair while they were married. R. 393-94.

On January 27, 2016, law enforcement served a search warrant at the Batchelor's home. Johnathan's red pick-up truck was parked in the driveway, and Sydney Allen's minivan was parked inside the garage. Sydney Allen was inside the home. R. 425-30. Mr. Batchelor did not object to this testimony.

The State called Spartanburg County Sheriff's Office electronic forensics investigator Lindsey McGraw to testify about his examination of two cellphones belonging to Johnathan Batchelor and one cellphone belonging to Sydney Allen. The State entered multiple exhibits to detail the extra-marital relationship between Johnathan and Sydney. R.528-58. When the State moved to enter the entire cellphone extractions (State's Exhibits

60 to 63, Mr. Batchelor requested a sidebar where the State represented the jurors would not be looking through the entire data. R. 531, 532, 559. Mr. Batchelor did not object to State's Exhibit 52 because the three phone calls on that exhibit were "from the night of the incident." Mr. Batchelor did object to State's Exhibits 53 through 59 under Rule 403, SCRE. Mr. Batchelor reminded the trial court about the pre-trial motion to exclude evidence of the affair under Rules 404(b) and 403, SCRE, including the trial court's assurance there would be "certain limitations" on the evidence to prevent the trial from turning into a "character trial" or "Family Court hearing." Mr. Batchelor reminded the trial court that he "already acknowledged the affair" and "had not contested it at any point" during the trial. Mr. Batchelor accordingly sought to limit the State's evidence at State's Exhibit 52 because State's Exhibits 53 through 59 are "over the top" and turned the trial into "a Family Court type hearing that we were trying to avoid." The trial judge overruled the objection. R. 545, 549-50, 554-63.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. Even though evidence is admissible, the quantity of evidence can be prejudicial. *See, e.g., State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007) ("The amount of evidence regarding the specifics of the [separate] burglary was unnecessary."); *State v. James*, 355 S.C. 25, 583 S.E.2d 745 (2003) (Pursuant to statute providing that person is guilty of burglary in the first degree if person enters dwelling without consent and with intent to commit crime in the dwelling and the burglary is committed by person with prior record of two or more convictions

for burglary, probative value of all seven of defendant's prior burglary convictions was outweighed by the very great potential for prejudice to defendant).

State v. Alexander is an example of when relevant evidence should be excluded when the danger of unfair prejudice substantially outweighs the probative value of the evidence and defining "[u]nfair prejudice" as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (internal quotations omitted) (citing Fed. R. Evid. 403 advisory committee's note). Although decided prior to our State adopting Rule 403, SCRE, *Alexander* is often cited when interpreting Rule 403. *E.g. State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999) (reversing murder conviction).

Here, the trial court should have limited the State's presentation about the extra material affair. Mr. Batchelor did not contest this fact. Nor did he contest the fact that he initially lied to law enforcement about having the affair. The State's presentation of evidence far exceeded what was necessary to for a full presentation of its case. Here, the probative value of this excessive amount of cumulative evidence about the extra-marital affair was substantially outweighed by the danger of unfair prejudice by suggesting a decision on an improper and emotional basis. This evidence confused the issues, mislead the jurors, and created an unfair risk that the jurors would decide this case based on evidence of the affair and not proof of the elements of the crime. *See Alexander, supra*. This Court, accordingly, should reverse the trial court and order a new trial where the State's evidence about the extramarital affair will be limited.

Question VI

Did the trial judge err as a matter of law by not excluding photographs (State's Exhibits No. 31 and 38) that included the image of confederate flags when the probative value of the confederate flags was substantially outweighed by the danger of unfair prejudice to Johnathan Batchelor?

At trial, the State moved to introduce photographs taken during the search of the Batchelor residence on January 27, 2016. R. 425-38. Pursuant to Rule 403, SCRE, Mr. Batchelor objected to State's Exhibits 31 and 38 because they showed multiple confederate flags. State's Exhibit 31 is a photograph of the inside of Mr. Batchelor's truck showing a confederate flag sitting on the center console. State's Exhibit 38 is a photograph of the inside of Mr. Batchelor's workshop. A clock with a confederate flag is visible in the center of this photographs. To the left of the clock, a confederate flag is visible hanging from a hook on the wall. The trial court overruled the objection at sidebar and later on during the trial outside the presence of the jurors. R. 430, 433, 440-43.

As seen above, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. In this case, the State and Johnathan Batchelor selected diverse jurors consisting of three black males, two black females, four white males, two white females, and one mixed race male.¹⁵ R. 223. Thus, there is a danger of unfair prejudice to Mr. Batchelor that one or more of these jurors would decide this case bases on emotions generated from seeing these confederate flags. *See Alexander, supra*. See also *State v. Langley*, 334 S.C. 643, 648, 515 S.E.2d 98, 100 (1999)

¹⁵ The alternates included a black female and a white male. R. 223.

(“the victim's photograph [was] not relevant to proving the guilt of appellant” and should have been excluded); *State v. Livingston*, 327 S.C. 17, 20, 488 S.E.2d 313, 314 (1997) (“a photograph should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate facts”); *State v. Owens*, 427 S.C. 325, 334, 831 S.E.2d 126, 130 (Ct. App. 2019), (“What little relevance the photograph had was vastly outweighed by its danger of unfair prejudice.”) affirmed by *State v. Owens*, 433 S.C. 482, 860 S.E.2d 357 (2021).

Here, evidence of the confederate had no probative value. The danger of unfair prejudice, therefore, substantially outweighs the probative value of these photographs. The trial court could have avoided the issue by redacting the photographs, as the trial judge did in other instances. *Compare* State’s Exhibit 16 *with* Court Exhibit 3 (R. 360-63). Additionally, the State had photographs of Mr. Batchelor’s workshop that did not depict confederate flags. *E.g.*, State’s Exhibit 37, R. 819. This Court, accordingly, should reverse the trial court and order a new trial where the evidence of the confederate flags will be excluded.

Question VII

Did the trial court err—contrary to Sixth Amendment of the United States Constitution, Article I, Section 14 of the South Carolina Constitution, and S.C. Code Ann. § 14-7-1020—by not asking Johnathon Batchelor’s request for voir dire numbers four and six inquiring whether there was anything about evidence of serious bodily injuries or hearing profanity that might cause the jurors not to be fair and impartial, when, as anticipated prior to trial, the jurors heard received evidence about serious bodily injuries and profanity?

Prior to selecting jurors, Mr. Batchelor submitted his Request for Voir Dire. R. 41-46. At a sidebar during jury selection, Mr. Batchelor expressly requested the trial court ask

questions three, four, five, and six.¹⁶ R. 43-44. The trial court asked questions three and five but not four and six. Request number four asked:

You will hear testimony and may see evidence of serious bodily injuries. Is there anything about the nature of serious bodily injuries that would so affect you that you would not be able to remain fair and impartial? If so, please come forward and explain.

R. 43. The trial court erred by not asking the potential jurors this question. As anticipated, the jurors heard evidence that Stephanie Batchelor suffered multiple gunshot wounds to her head and chest. *See, e.g.*, R. 616-30 They also viewed photographs and videotape of her injuries. State's Exhibits 3, 4, and 5. Dr. Brian Thurston testified the chest wounds were life threatening. He further testified he head wound was so life threatening that he and the other medical providers did not expect Ms. Batchelor to survive. This testimony allowed the Solicitor to argue to the jurors that "it is a miracle" that Ms. Batchelor survived. R. 616-30.

Request number six asked:

You may see and hear audiotape and videotape that uses profanity. Is there anything about the nature of profanity that would so affect you that you would not be able to remain fair and impartial? If so, please come forward and explain.

R. 43-44. The trial court erred by not asking this question. During the trial, it became necessary for Mr. Bachelor to introduce the 911 call and portions of the videotape from

¹⁶ Mr. Batchelor also complained about the trial court qualifying Juror No. 78, who informed the trial court that might have difficulty hearing during the trial. R. 246-48. The trial judge ultimately made accommodations for the juror. R. 310-14. *See e.g., Bryant v. Stirling*, No. CV 1:13-2665-BHH, 2019 WL 1253235, at *1 (D.S.C. Mar. 19, 2019), *aff'd in part, rev'd in part and remanded sub nom. Bryant v. Stephan*, 998 F.3d 128 (4th Cir. 2021), *opinion vacated on reh'g en banc*, 17 F.4th 513 (4th Cir. 2021), and *order reinstated*, No. CV 1:13-2665-BHH, 2021 WL 5332407 (D.S.C. Nov. 15, 2021), and *aff'd sub nom. Bryant v. Stephan*, 17 F.4th 513 (4th Cir. 2021).

Deputy Malpass' body worn camera. R. 677; Defendant's Exhibit 1. The jurors accordingly heard audiotape and videotape that contained profanity.

Mr. Batchelor moved the trial court to order a new trial based on inadequate *voir dire*. R. 128-29, 869. The trial court denied this motion. R. 886-87.

Pursuant to the Sixth Amendment of the United States Constitution, Article I, Section 14 of the South Carolina Constitution, and S.C. Code Ann. § 14-7-1020, Johnathan Batchelor requested that the potential jurors be placed on their oath and asked questions to determine whether any potential juror "has any interest in the cause, has expressed or formed any opinion, or is sensible to any bias or prejudice." R. 42-43. Courts have long recognized the tricky nature of analyzing jurors' bias. *See Smith v. Phillips*, 455 U.S. 209, 221-2 (1982) (O'Connor, J., concurring) (recognizing that jurors may be incapable of acknowledging their own bias); *Crawford v. United States*, 212 U.S. 183, 196 (1909) ("Bias or prejudice is . . . an elusive condition of the mind . . . and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence"); *United States v. Burr*, 25 F. Cas. 49, 50 (D.Va.1807) (a person under the influence of personal prejudice "is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony" for such person may declare that "notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him").

Mr. Batchelor requested the trial court's *voir dire* be guided by *Skilling v. United States*, 561 U.S. 358 (2010), where the District Court's *voir dire* included questions to determine whether the prospective jurors had formed any opinions about the accused and

issues involved in the case. R. 42-43. The Court in *Skilling* individually questioned all jurors providing affirmative responses and allowed counsel for the parties to ask follow up questions.

Because of the trial court failed to ask requests for *voir dire* numbers four and six, there is a real possibility that one or more of the jurors could not remain fair and impartial because of serious injuries and hearing profanity. This Court, accordingly, should reverse the trial court and order a new trial.

Question VIII

Did the trial court err—in violation of the Sixth Amendment to the United States Constitution, Article I, Section 14 of the South Carolina Constitution, and statutory law, by not ordering disclosure of counseling records of Stephanie Batchelor when Johnathan Batchelor moved for disclosure of these records in order to be able to confront and cross-examine Ms. Batchelor?

Jonathon Batchelor moved the trial court for an order requiring disclosure of the following medical and mental health records of Stephanie Batchelor to include:

1. All records from the Spartanburg Regional hospitalization related to the charges in this case, regarding the consultation with the psychiatrist(s);
2. All records, since January 1, 2016, from psychiatrist, psychologists, therapists, counselors, or other mental health professions; and
3. All records, since January 1, 2016, from any medical provider that prescribed medication that has potential side-effects related to memory.

R. *. The motion noted that medical records of Ms. Batchelor, produced by the State, regarding the incident that gave rise to this case, demonstrate that she suffered a traumatic brain injury, appeared to have memory loss issues, and might have been prescribed medication that could have an effect on her memory. He argued this information is material to Mr. Batchelor's defense to develop evidence at trial related to the Ms. Batchelor's ability

to remember to underlying incident and, potentially, to respond the State’s explanation of the victim’s prior inconsistent statements. R *.

The trial judge conducted an in camera review of some of the records¹⁷ pursuant to *State v. Blackwell*, 420 S.C. 127, 801 S.E.2d 713, 726 (2017). The trial judge denied the motion. The trial judge placed a copy of the mental health records, under seal, in the court records as Court Exhibit No. 1.¹⁸ R. 308.

The trial judge erred by not disclosing these records. Normally, medical and mental health records are protected by federal law but can be by court order. Additionally, our General Assembly expressly provides for discovery of mental health information under these circumstances:

A provider shall reveal confidences when required by statutory law or by court order for good cause shown to the extent that the patient’s care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding.

S.C. Code Ann. § 19-11-95(D)(1). Although state law generally protects the confidentiality of mental health records, S.C. Code Ann. § 44-22-100, the right to confront a witness “may supersede a witness’s rights or statutory privilege.” *Blackwell*, 420 S.C. 127, 151, 801 S.E.2d 713, 726 (2017). *See also* U.S. Const. Am. VI and XIV; S.C. Const. Art. I, § 14. Under *Blackwell*, this Court “should conduct a hearing with the parties” to determine whether the witness’ legal representative “consents to the disclosure of the privileged records.” 420 S.C. at 801 S.E.2d at 727-28. If consent is withheld, then this Court “should

¹⁷ The trial judge never obtained the records requested in requests numbers one and three.

¹⁸ Mr. Batchelor designated Court Exhibit No. 1 as part of the Record on Appeal and will request an order from this Court for the exhibit to be transported to this Court for review.

review the contents of the records to determine whether disclosure is necessary for the conduct of proceedings before the court and that failure to make the disclosure is contrary to public interest.” *Id.* (internal quotations omitted).

This Court should “assess the importance of the witness to the prosecution’s case and whether the records contain exculpatory evidence, including, *but not limited to*, evidence relevant to the witness’s credibility.” *Id.* (emphasis supplied by court). This Court should reverse the trial court, disclose the records, and order a new trial.

Question IX

Did the trial court err by imposing a sentence of thirty years imprisonment, which is the maximum sentence allowed for attempted murder, when both the Solicitor and the Court of General Sessions previously agreed that a sentence of eighteen years in the Department of Corrections was sufficient, when the sentence imposed following trial punished Johnathan Batchelor for exercising his rights to seek post-conviction relief and a jury trial?

As seen in the Statement of the Case above, Mr. Batchelor previously entered an *Alford*¹⁹ plea to attempted murder, and the Court of General Sessions sentenced him to the recommended sentence of eighteen years imprisonment. R. 144-70. Mr. Batchelor’s conviction and sentence were vacated in post-conviction relief. *Batchelor v. State*, Case No. 2018-CP-42-04276. R. 1-2.

Prior to sentencing, trial counsel pointed out that eighteen years was the active portion of Mr. Batchelor’s sentence that was vacated by the grant of post-conviction relief. Mr. Batchelor argued that “a sentence beyond what was previously imposed [would be] punishing him for exercising his right to post-conviction relief in this case, unless there is some new evidence.” He further argued there is no new evidence in this case. The State

¹⁹ *North Carolina v. Alford*, 400 U.S. 25 (1970).

opposed the motion. The trial judge denied the motion and sentenced Mr. Batchelor to the maximum sentence of thirty-years imprisonment. R. 776-81.

Mr. Batchelor moved the trial court to reconsider the sentence and to impose and sentence not to exceed eighteen years. R. 134-35, 865-84. The trial court denied the motion.

As our Supreme Court observed:

In the landmark decision of *North Carolina v. Pearce*,^[20] the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment prevented a trial court from penalizing a defendant for choosing to exercise his right to appeal. In order for the presumption of prosecutorial retaliation (or the “*Pearce* presumption”) to apply, Petitioner must show there is a “reasonable likelihood” that retaliation was a motive behind bringing the additional charges. *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); *State v. Fletcher*, 322 S.C. 256, 471 S.E.2d 702 (Ct.App.1996). Where no such “reasonable likelihood” exists, the defendant has the burden to prove actual retaliation. *Alabama v. Smith*, 490 U.S. at 800, 109 S.Ct. at 2205. In the instant case, there is a “reasonable likelihood” retaliation was a motive, and therefore Petitioner was entitled to the presumption.

Patrick v. State, 349 S.C. 203, 209, 562 S.E.2d 609, 612 (2002).

Here, “there is a ‘reasonable likelihood’ retaliation was a motive, and therefore Petitioner was entitled to the presumption.” *Id.* In bond hearings in this case, the State noted its displeasure that the Attorney General’s office consented to the PCR court granting Mr. Batchelor a new trial. R. 22-29. Two post-PCR court orders denying bond reference Mr. Batchelor’s prior *Alford* plea. R. 140-43. The State did not present any evidence that was not available to it prior to the *Alford* plea.

²⁰ *North Carolina v. Pearce*, 395 U.S. 711 (1969), modified by *Alabama v. Smith*, 490 U.S. 794 (1989).

This Court, accordingly, should reverse the trial court and remand this case for a resentencing hearing with instructions for the trial court to impose a sentence not to exceed eighteen years.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court and dismiss the charge. Alternatively, this Court should reverse the trial court and order a new trial.

Respectfully Submitted,

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September 6, 2023
Greenwood, South Carolina

RECEIVED

Sep 06 2023

SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2022-000160

The State, ...Respondent,

v.

Johnathan Olin Batchelor, ...Appellant.

Rule 211(b), SCACR Certification

I certify this Brief complies with Rule 211(b), SCACR.

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Certificate of Service

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable R. Keith Kelly, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

vs.

JOHNATHAN OLIN BATCHELOR,

Appellant.

Appellate Case No. 2022-000160

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in denying the motion to dismiss the case because of destroyed evidence where the evidence was not destroyed in bad faith and did not contain readily apparent exculpatory value.

II.

The trial court did not err in declining to rule on the credibility of an inmate informant and thus intrude on the jury's role in determining the credibility of witnesses.

III.

The trial court did not err in declining to allow Appellant to inquire as to the content of the informant's communications with his attorney and in declining to allow Appellant to cross-examine the informant for the downward departure in exchange for his assistance leading to Appellant's plea because it would open the door to the fact that Appellant previously pled to attempted murder.

IV.

The trial court did not abuse its discretion in finding that security in the courtroom was not excessive.

V.

Appellant fails to explain why exhibits that are cumulative to other evidence of Appellant's affair for which Appellant did not object was prejudicial. On the other hand, the exhibits were probative of Appellant's motive to kill his wife so he could replace her with his new girlfriend.

VI.

The trial court did not err in allowing photographs to be admitted that carried probative value

and happened to have a confederate flag visible in the photograph.

VII.

The trial court did not abuse its discretion by declining Appellant's proposed voir dire questions for the jury.

VIII.

The trial court did not abuse its discretion in not disclosing mental health records the trial court placed under seal since the only useful information was that Victim told the therapist that Appellant hit her with a blunt force instrument and shot her.

IX.

The Solicitor prosecuted Appellant for the same charge for which he received post-conviction relief and the sentence was left within the discretion of the trial court which assured Appellant he was not being punished for exercising his right to trial so there is no merit to the allegation that Appellant was subject to retaliation by the prosecution for invoking his right to pursue post-conviction relief.

STATEMENT OF THE CASE

Appellant Batchelor was charged with attempted murder. Appellant pled guilty under North Carolina v. Alford, 400 U.S. 25 (1970) before the Honorable J. Derham Cole. Judge Cole sentenced Appellant to thirty years' imprisonment suspended to eighteen years' imprisonment and five years' probation.

Appellant filed an application for post-conviction relief (PCR). The Attorney General's Office consented to relief granted by the Honorable Grace Gilchrist Knie by order dated April 18, 2018, on the basis that the sentence was illegal.¹

Appellant was tried for the same charge, attempted murder on November 1-4, 2021 (the jury was selected on October 25). The jury convicted Appellant of attempted murder and the presiding judge, the Honorable Keith R. Kelley, sentenced Appellant to thirty years' imprisonment. Judge Kelley heard Appellant's post-trial motions on December 8, 2021, and denied the post-trial motions by oral ruling on February 3, 2022.

¹ See S.C. Code § 16-3-29 (A person convicted of attempted murder may be imprisoned no more than thirty years. "A sentence imposed pursuant to this section may not be suspended nor may probation be granted.").

STATEMENT OF FACTS

Sergeant Kristen Malpass responded to a high priority call on Reidville Road. Upon arriving he was led by a male, Appellant Batchelor, to Batchelor's wife Stephanie (Victim) lying face down in the grass on the side of the yard, propping herself up somewhat with her arms. Her hair was matted with blood. R. p. 335. Sergeant Malpass engaged her in some conversation, she knew her birthday, she said she did not know what happened. R. p. 341. Victim said she felt like she was shot. But she did not identify her assailant. R. pp. 353-354. Holes in her chest were visible, but too much blood made it difficult to see if she suffered any facial or head injuries. R. pp. 342-343. Sergeant Malpass explained she did not have much chance to talk with Victim alone because Appellant hovered nearby. Appellant repeated the same questions over and over, interfering with Sergeant Malpass's ability to talk with Victim. EMS arrived after about ten minutes and promptly took Victim away. R. p. 343. Appellant and Victim's children were asleep in the house. R. p. 344.

Sergeant Malpass noted blood collected inside the garage, pooling on one side of the garage as if something was parked there at the time the blood accumulated. R. p. 347. Sergeant Malpass further observed blood on the ramp in the garage leading to the house door, smeared as if something was dragged down the ramp. R. pp. 347-348. Contents of a purse were poured out by the purse. R. p. 349.

Victim testified she married Appellant in 2012, and they had two children, ages one and three years' old at the time. R. p. 364. A day or two before the shooting, Victim was driving with her two children in the back seat when she saw Appellant walking hand-in-hand with another woman, both of them giggling. Victim drove up and asked what was going on, but Appellant claimed they were just with other co-workers at lunch. Victim chose to not belabor the matter and drove away. But later she confronted Appellant who continued to deny any affair. Victim went to grab her phone and

leave, but Appellant took it and threw it across the room. When she tried to leave the house, Appellant blocked the driveway. Appellant pushed her to the ground and Victim then grabbed a gun, but decided not to shoot Appellant, especially since the children were nearby. The woman Appellant insisted was just a friend was named Sydney. R. pp. 366-369.

Victim ultimately decided to not leave Appellant, so Victim went to work the next day at Kay's Jewelers. As was not unusual, she made a bank deposit with a co-worker, and then drove home, talking with Appellant as she usually did while she drove home. Appellant told her he put the children to sleep, he kept asking where she was in the route home. R. p. 370.

When she arrived home, she opened the garage door and drove into the garage. She finished a song on the radio, and grabbed her purse and cell phone to bring inside when Appellant grabbed her and pulled her out the car door. She attempted to make her way up the ramp, but was struck from behind with something, and she saw Appellant holding an orange baseball bat. He kept hitting her with that baseball bat, and then pulled out a gun and fired. R. p. 376. The next thing Victim remembered was lying face up on the ramp as Appellant held her feet, then dragged her down the ramp and to the side of the house. Appellant left her on the ground shivering, then reappeared with the gun and pulled the trigger. The next memory after the gun discharging is waking up with a stranger standing over her. R. p. 377:2-9. She lost consciousness again and her next memory is waking up in a room with lights and her stepmother was with her. R. p. 378. Victim was scared Appellant was close by, so she did not tell anyone he was the shooter, because if Appellant already shot her, what would stop him from shooting the person talking with her. R. p. 378. She was put into a medically induced coma for a week. R. p. 379. Afterwards, she did not tell law enforcement when they came to interview her because she did not want to believe Appellant shot her. But the next time, when law enforcement asked her for a description of the shooter, she told them Appellant

was the shooter. R. p. 381. Victim testified that nothing from her purse was taken. R. p. 382.

On cross-examination, Appellant's counsel elicited testimony that Appellant had an affair with another woman before Appellant and Victim married and that Victim's father caught Appellant having the affair. Victim clarified she did not know about the pre-marital affair until after she woke up from the coma. R. p. 394.

Victim also explained she always realized Appellant was the assailant and did not have any memory issues as to the identity of her assailant. She explained she just realized that "I couldn't not tell the truth." She realized she could not live with the man who tried to kill her. R. p. 399.

On January 7, 2016, Lieutenant William Gary was called in to assist in the investigation. He tried to talk to Victim at hospital and had not yet gone into surgery, but Lieutenant Gary was unable to gain much information with all going on. Victim said she did not know anything. R. pp. 402-403. Lieutenant Gary went to the house and Appellant was there, but Appellant soon left for the hospital. R. pp. 403-404.

Inspecting the crime scene, Lieutenant Gary noticed things that were counterintuitive to a burglary or robbery. The contents of the purse were poured out, but the valuables were not taken. Then observing the blood smear stains down the ramp, it made little sense that the robber would take the time to drag Victim out of the garage. R. pp. 412-414; p. 419. There was a zip tie down at the end of the driveway. Strangely, there was white powder on Appellant's truck. R. pp. 417-418.

Lieutenant Gary testified he found a hollow point round by the garage that he recognized as being Hornady ammunition. Live Hornady .38 rounds were recovered from the house. R. pp. 420-421. Victim's gun never recovered. R. pp. 455-456. Appellant informed Lieutenant Gary that Victim normally kept her 38 in either her purse or the glove compartment in her car. R. pp. 455-456.

Lieutenant Gary interviewed Appellant and asked for consent to search Victim's phone.

Appellant said he was not aware of Victim having any affairs. Appellant said “somebody” told Appellant that the assailant had the same build as Appellant. He forewarned Lieutenant Gary there would be an argument between Appellant and Victim over an engagement ring being lost on the phone. Appellant also said he was not always honest with Victim. In Lieutenant Gary’s mind, Appellant became a suspect after the conversation. Lieutenant Gary obtained and executed search warrants on the phone and the residence. R. pp. 423-425.

When executing the search warrant, there was a mini-van in the garage. When they approached, they saw Appellant putting a shirt on and walking down the hallway. They asked Appellant if anyone else was in the house, and he disclosed Sydney was present. Knocking on the bedroom door, Sydney said through the door she needed to put some pants on. She had a men’s shirt on, but Lieutenant Gary needed to hand her a pair of shorts. R. pp. 428-429.

Deputy David Hogsed went to the location where Victim’s car was found. It was about a mile and a half from their house. The vehicle was still running and in gear on the side of the road. It was stuck on a berm. R. p. 506; p. 509; pp. 516-517. A fire deputy turned the vehicle off. A report of the vehicle was received at 10:18 p.m. There was blood on the seat and on the vehicle. Law enforcement collected samples of the blood for DNA analysis. R. pp. 509-512. A fingerprint found in the vehicle belonged to a patrolman. R. p. 514.

Lindsey McGraw, then with the Sheriff’s Department, examined Victim’s phone, Appellant’s two phones, and his girlfriend’s phone. R. pp. 533-534. Sydney is listed as “Sydney” on one phone, but as “Crown Vic” on Appellant’s other phone. Victim phone number is listed as “Little Wifey” in Appellant’s contacts. R. pp. 534-535. One of the text messages from Appellant to Sydney asks if she wants to go with him back in the hospital to see Victim. Sydney declines. R. p. 552. Sydney posits that it would be inappropriate given her relationship with Appellant, but Appellant replied it

was fine because only Sydney and Appellant knew about their affair. R. pp. 552-553.

Dustin Tiller was serving a federal sentence at the Yazoo facility in Mississippi, but was brought to Spartanburg to testify. Tiller pled guilty to conspiracy to traffic methamphetamine in federal court pursuant to a plea agreement he signed on March 16, 2017. Because of his prior drug offenses, Tiller could have received a life sentence for his federal charges. R. pp. 566-571. Charges were also dismissed pursuant to the plea agreement. Sentencing was at the sole discretion of the federal judge (Judge Childs). Under the terms of the agreement, Tiller was required to provide truthful information and truthful testimony. Tiller is required to disclose all knowledge he has of criminal activity. Failure to be truthful would nullify the agreement. R. pp. 572-575. Tiller received a 220 month sentence from Judge Childs. R. p. 578.

Tiller met Appellant while they were both at the Spartanburg Detention Center. They met during a Bible study program Tiller taught. Appellant started talking about his case with Tiller. Tiller tried to comfort Appellant by telling him if he was innocent he did not have anything to worry about. Appellant then told Tiller he shot his wife. Appellant confided that Tiller was the first person he ever told this to. Appellant felt a weight was lifted off him. R. pp. 579- 582. He explained he was on the phone with his wife until she got close to the house, and he hid in wait outside. When she pulled in, he shot her, then left to hide the gun. Appellant used Victim's own gun on her. Appellant thought she was dead but returned to find her still alive. R. p. 584. Appellant then changed his clothes. He put white powder on his own vehicle to make it look like a drug robbery. Tiller did not understand that logic. R. p. 585.

Appellant wanted to kill his wife because they were arguing and he fell in love with another woman, a redhead. Appellant and the redhead each had two kids so they would get together at Appellant's house and have play dates where the children played and Appellant and the redhead had

sex. R. p. 586.

Dr. Brian Thurston, a trauma surgeon, treated Victim on January 7, 2016. Victim suffered multiple gunshot wounds, including to the face and head. She also suffered face and head fractures. Victim's condition deteriorated as they treated her. Dr. Thurston was not optimistic about her survival when he performed brain surgery. R. pp. 620-622. Victim spent a week on life support in the ICU. Her progress surprised Dr. Thurston. R. pp. 628-630.

The defense called Sergeant Walsh, who admitted he spoke to Victim at the hospital on January 18, 2016, and she denied Appellant shot her. R. p. 643. She also told him she parked the car in the driveway. R. p. 643. On cross-examination, Sergeant Walsh explained that Victim appeared to recall the incident well, but when asked who did it, her body language changed. R. p. 647.

The defense also recalled Investigator Gary, who testified that it was a firefighter who shut the car off. He also explained two projectiles were recovered during the investigation. One from the garage and one from the Victim's body. Both bore markings consistent with Hornady ammunition, but insufficient marks remained to determine if they matched each other. R. pp. 649-652.

Appellant testified on his own behalf. Appellant claimed he did not shoot his wife. Still on direct examination, he admitted he lied about not having an affair. R. pp. 653-654. Appellant admitted he knew Dustin Tiller and talked with him about a number of things, but insisted he did not talk about his own charges. R. p. 655.

When defense counsel asked how Appellant met Victim, Appellant explained, "I was actually seeing another woman at the time, and I just had a child with that woman while seeing a woman before that. And the one, married, that I was seeing when I met Stephanie is who introduced me and her." R. p. 657:17-20. A little while after they were introduced by the married woman,

Appellant and Victim started dating. Appellant testified Victim was aware of the affairs. He explained, “She was aware that while I was with Sarah, I had an affair with Mary and ended up with a child from the relationship.” R. p. 657:25-658:2.

Defense counsel asked Appellant if Victim’s father ever caught Appellant having an affair on Victim, Appellant explained, “I was at Lowe’s with a female named Tasha, and her father and her stepmother pulled up while we were having an affair in the truck. While we were together in the truck.” R. p. 659:8-10.

Appellant testified he put the children to bed at 8:30 p.m. the night Victim was shot, and Victim called Appellant when she was making the deposit at the bank at 9:23 p.m. He agreed with the records showing they talked for thirteen minutes. R. pp. 662-663. According to Appellant, when she was about to pull in the driveway, he went in the shower. R. p. 663. Appellant discovered Victim after the shower when he opened the door and saw blood on the ramp. He heard Victim calling her and he ran to her, then called 911. R. p. 664.

The prosecution on cross-examination asked Appellant about the fact that he took a 45 minute shower, revisited that Appellant was with Sydney while Victim was in ICU; and Sydney was visiting Appellant earlier in the day when Victim was shot. R. pp. 681-683. When inviting Sydney to go back with him to see Victim in the hospital, Appellant added, “I could kiss you on the way, LOL, yes?” R. p. 682:15-25.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). This Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000).

ARGUMENT

I.

The trial court did not err in denying the motion to dismiss the case because of destroyed evidence where the evidence was not destroyed in bad faith and did not contain readily apparent exculpatory value.

Two bullet fragments were destroyed after the direct appeal time expired from Appellant's Alford plea. Without authority, Appellant argues law enforcement was required to wait until the time to file a post-conviction relief application expired, and Appellant further relies on a statute under which even a cursory reading reveals does not apply to a person convicted of attempted murder. A hospital employee apparently identified the fragment recovered from Victim's body as a 9mm. R. p. 234:16-24. The fragment from the garage was a .38. On this basis Appellant claims an ambiguity without regards to the law enforcement expert that examined both fragments recovered. The prosecutor advised the trial court that the analyst determined both fragments were .38s. R. 237:5-15. The trial court did not err because law enforcement was not required to follow the rules Appellant now makes up and law enforcement did not destroy the evidence in bad faith. Further, the trial court did not err in finding the evidence did not possess readily apparent exculpatory value.

The State does not have an absolute duty to preserve potentially useful evidence, and a defendant must demonstrate either: 1) the State destroyed evidence in bad faith; or 2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. State v. Moses, 390 S.C. 502, 520, 702 S.E.2d 395, 404 (Ct. App. 2010) (citing State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991)). The bad faith requirement limits the extent of the State's obligation to preserve evidence to reasonable bounds, and confines it to cases in which the police conduct indicates the evidence could form a

basis for exonerating the defendant. Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (explaining its reluctance to impose “on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution.”); Moses, 702 S.E.2d at 403; United States v. Agurs, 427 U.S. 97, 109-10 (1976) (“The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the constitutional sense.”).

To prove law enforcement destroyed the evidence in bad faith, Appellant relies on a statute that requires the preservation of evidence following conviction for an enumerated list of offenses that does not include attempted murder. S.C. Code § 17-28-320. Nonetheless, law enforcement should have saved the evidence anyway argues Appellant. Under the canon of construction “*expressio unius est exclusio alterius*” the expression or inclusion of one thing “implies the exclusion of another, or of the alternative.” German Evangelical Lutheran Church v. City of Charleston, 352 S.C. 600, 576 S.E.2d 150 (2003) (citation omitted). “In interpreting a statute, ‘[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.’” State v. Gordon, 414 S.C. 94, 98, 777 S.E.2d 376, 378 (2015). Although penal statutes are strictly construed in favor of the defendant, the court must interpret the statute according to its literal meaning. State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 623 (2011). In the present case, Appellant desperately relies on a statute that does not enumerate the offense for which he was convicted. He asks this Court to include it anyway, in other words to act as a super legislature. Accordingly, Appellant failed to show that the bullets were destroyed in bad faith.

Further, Appellant failed to show the destroyed bullets carried readily apparent exculpatory value. If a defendant’s purpose is to exploit any exculpatory potential of missing evidence, to meet

the standard of constitutional materiality he must make some showing the item possessed exculpatory value that was apparent before it was lost by the State. State v. Adams, 304 S.C. 304, 403 S.E.2d 678, 680 (Ct. App. 1991). Speculation by a defendant that the evidence would be exculpatory is insufficient. Id. at 305, 403 S.E.2d at 680. In the present case, the bullets were compared and were consistent with Hornady ammunition, the ammunition found in the house. It is speculative at best that a different ballistics expert would reach a different conclusion regardless of the comments of a hospital employee on the type of bullet recovered. The trial court in its ruling noted that the ballistics report was provided to the trial court and it reviewed the report and found that Appellant failed to demonstrate the bullet fragments have any exculpatory value that was apparent before it was destroyed. R. p. 309.

II.

The trial court did not err in declining to rule on the credibility of an inmate informant and thus intrude on the jury's role in determining the credibility of witnesses.

Appellant argues the trial court erred in declining to suppress informant Tiller's testimony for no other reason than in Appellant's view his testimony was not credible. The trial court does not have a legal basis to suppress witnesses like a jailhouse informant since the credibility of a witness is for the jury to determine. The informant obviously testified with the hope of a benefit – a downward departure – but the jury was capable of giving as much or as little weight to the testimony and the jury was free to discount it altogether as with any other fact witness.

How the issue arose

At defense counsel's request, Dustin Tiller testified in camera so defense counsel could seek to suppress his testimony. At the time of trial, Tiller was serving a federal sentence at a federal penitentiary for conspiracy to traffic methamphetamine. He was represented at trial by James Bannister, Esquire. An unredacted plea agreement was introduced as Court's Exhibit 4. The plea agreement was with the federal prosecutor. Because of Tiller's prior drug offenses, he was facing life imprisonment for his original drug charges. Several charges were dismissed in exchange for substantial assistance and the federal prosecutor removed the prior offenses for enhancement purposes that allowed Tiller to be able to receive less than a life sentence. However, the sentence remained up to the federal district court judge. Tiller noted that part of the agreement included the clause that his proffer could be used against him if he lied while providing information to the government or testified. Following the federal prosecutor filing a motion for a downward departure, Tiller was sentenced to 220 months imprisonment, or eighteen years and four months. R. pp. 464-476. Tiller confirmed no promises were made to him that his testimony in the instant case would

secure a downward departure, but he agreed he was hoping for one. R. pp. 475-477.

Tiller testified he knew Appellant from the time he was at the Spartanburg Detention Center. The two were housed in separate cells, but Appellant attended the Bible study group Tiller held and later they talked after Appellant found Tiller doing legal research for his own case in the institution's law library. R. pp. 477-478. Appellant started talking about his own case and eventually, Appellant confided to Tiller that he shot his own wife because of an affair Appellant was having with a red-headed woman. R. pp. 478-480. Tiller testified Appellant told him several details, including that he threw powder on his truck to make the shooting look like a possible drug deal gone bad and that Appellant drove Victim's car to a bridge nearby to make it look like a carjacking. R. pp. 479-482.

Following Appellant's cross-examination and the prosecutor's redirect examination, Appellant's defense counsel moved to suppress Tiller's testimony based on Appellant's argument that the circumstances of the present case were inconsistent with the Innocence Project's recommendations of when to use a jailhouse informant as a witness. R. pp. 495-502.

The trial court declined to make a credibility finding as to Tiller's testimony as the trial court would be usurping the role of the jury. R. p. 502:3-18.

The trial court did not err in declining to usurp the jury's role of judging the credibility of witnesses.

Rule 601(a), SCRE, provides the general rule that, "Every person is competent to be a witness except as otherwise provided for by statute or these rules." Rule 601(b), SCRE, states, "A person is disqualified to be a witness if the court determines that (1) the proposed witness is incapable of expressing himself concerning the matter as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth." The conduct of a criminal trial

is left largely to the sound discretion of the trial judge, who will not be reversed absent a prejudicial abuse of discretion. State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007); see State v. Heath, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958) (“Necessarily the conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had.”); see also Rule 611(a), SCRE.

“Under South Carolina law, the competency of a witness is to be determined by the trial court, **whereas the credibility of a witness is exclusively for the jury to decide.**” State v. Reyes, 432 S.C. 394, 401, 853 S.E.2d 334, 338 (2020) (emphasis added) (citing State v. Pitts, 256 S.C. 420, 182 S.E.2d 738 (1971) (“We have held in a number of cases that the weight to be given to a testimony of an accomplice is for the fact finding body and if the uncorroborated evidence satisfies the jury of the defendant’s guilty beyond a reasonable doubt, an conviction is warranted.”) (citation omitted)). Appellant conflates the gatekeeping function, exclusive to determining the admissibility of expert testimony with the present case. See Rule 702, SCRE; Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010) (The trial court must take care in its undertaking of the gatekeeper function without infringing on the jury’s duty as a factfinder, the gatekeeper role merely requires the trial court “decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law.”).

Appellant also makes a meek comparison to the standard of admissibility for evidence of third party guilt. But Appellant misapprehends the function of the trial judge in this scenario. The trial judge’s role is not to determine the credibility of the proffered evidence of third party guilt, but only to determine if the evidence, taken as true, is inconsistent with the defendant’s guilt. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (Evidence offered by a defendant of the commission of the crime by another person is limited to facts inconsistent with defendant’s guilt) *abrogated on*

other grounds by State v. Wright, 91 S.C. 436, 706 S.E.2d 324 (2011); *State v. Tony Orlando Singleton*, Op. No. 5961 (S.C. Ct. App. filed Jan. 18, 2023) (finding in a CSC with a minor case that it was proper for the trial court “in refusing to instruct the jury on third-party guilt. Singleton relies on evidence that others had sexual intercourse with Victim, but that evidence is not a fact that is inconsistent with Singleton’s guilt or raises a reasonable inference or presumption as to his innocence. Even if Singleton was not the father of Victim’s unborn child, evidence that someone else impregnated Victim would not preclude Singleton from being guilty of first-degree criminal sexual conduct with a minor; Singleton could have also had sexual intercourse with Victim without impregnating her. Therefore, we affirm as to this issue.”).

Appellant also makes a comparison to the common law threshold for extrinsic acts. To be admissible, the extrinsic bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, to help establish this logical relationship, evidence of the prior bad act must be clear and convincing. *State v. Beck*, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000); *State v. Lyle*, 125 S.C. 406, 118 S.E.803, 807 (1923) (“But the dangerous tendency and misleading probative force of this class of evidence require[s] that its admission should be subjected by the courts to rigid scrutiny.”). However, the direct testimony of the victim of the extrinsic evidence may clear this hurdle. *State v. Ford*, 334 S.C. 444, 453, 513 S.E.2d 385, 389 (Ct. App. 1999) (finding the clear and convincing standard was met because the victim testified from direct knowledge that the defendants robbed and attempted to rob him and his testimony was partially corroborated by a detective). In this setting, the clear and convincing standard is part of the gauge in assuring probative value of the extrinsic acts as opposed to the danger of mere propensity value of acts with questionable merit.

Appellant attempts these analogies, flawed as they are, because Appellant offers no citation

to case law holding the trial judge is tasked with determining an informant's credibility. Such a rule would cut two ways: Presumably if possible, the trial judge could also screen potential defense witnesses, such as defendant's family members, for credibility. Notably, Rule 104, SCRE, discusses resolution of preliminary questions of admissibility (Rule 104(a), SCRE) and addresses when preliminary matters should be conducted outside the hearing of the jury (Rule 104(c), SCRE), but the rule is modified by its last paragraph: "This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility." (Rule 104(e), SCRE).

Accordingly, the trial court did not err in declining Appellant's invitation to usurp the jury's duty to determine the credibility of witnesses.

III.

The trial court did not err in declining to allow Appellant to inquire as to the content of the informant's communications with his attorney and in declining to allow Appellant to cross-examine the informant for the downward departure in exchange for his assistance leading to Appellant's plea because it would open the door to the fact that Appellant previously pled to attempted murder.

Appellant intertwines a couple of issues in the third issue. Appellant complains Tiller's attorney-client privilege was waived when the prosecution asked if his attorney explained the plea agreement to him. Note the prosecution never asked what the attorney's advice or explanation of the agreement was. Second, Appellant complains the trial court erred in not allowing Appellant to expose that the federal prosecutor reduced the recommendation from 240 months to 220 months imprisonment for his assistance. The trial court did not allow this because this would open the door to the reason for the downward departure at that point in time which was Appellant pled to attempted murder and so it appeared the case was final. Appellant was allowed to examine Tiller on the fact that, contrary to his recollection on direct examination, the federal prosecutor changed the recommendation from 240 months to 220 months for assistance in "a case."

The admission or exclusion of evidence is left to the sound discretions of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240, 244 (2001). The right to present a defense is not unlimited, but must "bow to accommodate other legitimate interests in the criminal trial process." Rock v. Arkansas, 483 U.S. 44, 55 (1987). While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence regardless of its admissibility under the rules of evidence. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586, 594 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

First, contrary to Appellant's claim, Tiller did not validly waive his right to the attorney-client privilege. "The attorney-client privilege belongs solely to the client and can only be waived by the client. . . . Although a client may waive his attorney-client privilege, the waiver must be distinct and unequivocal." State v. Thompson, 329 S.C. 72, 495 S.E.2d 437 (1998) (citations and internal quotation marks omitted). "Where an implied waiver is claimed, caution must be exercised, for waiver will not be implied from doubtful acts." Id. (quoting 28 Am.Jur.2d Estoppel and Waiver § 160 (1966)); see also State v. Bonilla, 429 S.C. 253, 275-76, 838 S.E.2d 1, 12 (Ct. App. 2019) (finding that to establish implied consent from the defendant for his attorney to disclose information to the state, there must be consent by the client and consultation by counsel: "That is, the client can provide valid consent only if there has been appropriate 'consultation' with his or her attorney. . . . [W]e require that a criminal defendant's decision be made on the basis of legal guidance and with full cautionary explanation.") (citations and internal quotation marks omitted).

In the present case, the prosecutor did not elicit testimony concerning the substance of Tiller's attorney's advice to Tiller. Further, Appellant's subterfuge in seeking on cross-examination to trick Tiller into waiving his privilege does not count as a "distinct and unequivocal" waiver. Thompson. Therefore, the trial court did not err.

Additionally, Appellant was not prejudiced. The question Appellant wanted to ask was if Tiller asked his lawyer about Judge Childs. R. p. 592:3-18. Given that Tiller did not have any control over which judge would be his sentencing judge in federal court, it is difficult to imagine the answer to this question bore any importance. "An error without prejudice does not warrant reversal." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005).

Second, the trial court did not err in limiting that the twenty-month departure was related to Tiller's cooperation in securing Appellant's plea, because it would be unfair for the prosecution to

not be allowed to explain that the impetus for that recommendation from the federal prosecutor was Appellant's plea. "It would do well for defense counsel to remember that the people of the State as well as the defendant are entitled to a fair trial." State v. Stewart, 283 S.C. 104, 110, 320 S.E.2d 447, 450 (1984). Appellant misleadingly claims that he was not allowed to examine the circumstances of how Tiller was able to avoid a mandatory life sentence, but even a cursory reading of his cross-examination shows that is clearly not the case.

On cross-examination, Appellant elicited testimony from Tiller that while in prison, an individual named Perez, who was part of the drug cartel Tiller was involved with, sought to collect Tiller's debt to Perez. So Tiller started a drug operation from prison, which led to the charges for the sentence that he was currently serving. R. p. 591. Appellant elicited testimony from Tiller that he provided information about both inmates and corrections officers to the federal authorities. Tiller also provided information against an individual named Josh Peace in another federal case. R. pp. 593-594. Appellant elicited testimony from Tiller that this assistance led to Tiller avoiding a mandatory life sentence and that he received a downward departure to eighteen years. R. p. 595. Then Tiller agreed that his involvement in the instant case was put on record at the sentencing hearing with the advisement that Tiller would be back before Judge Childs for an additional downward departure. R. p. 595:9-24. Then Appellant was allowed to elicit from Tiller that he received an additional downward departure from 240 months to 220 months for assistance "in a case." R. p. 605:3-606:1.

Importantly, Tiller agreed he was hoping for another downward departure and that the prosecutor in the instant case would put in a good word with the U.S. Attorney so the U.S. Attorney will file a motion for a downward departure and Tiller could go before Judge Childs for a further reduction below the current eighteen year sentence. R. p. 606:2-19.

Appellant was allowed to show Tiller's cooperation in providing substantial assistance against inmates and corrections' officers, as well as in other cases which is the assistance that allowed him to avoid a life sentence. On the other hand, his assistance at the time of trial in the present case involves a lesser benefit of an additional 20 months and Tiller was crystal clear he was hoping for further benefit for his testimony at trial. The trial court did not err, nor was Appellant prejudiced by the slight limitation in his cross-examination.

IV.

The trial court did not abuse its discretion in finding that security in the courtroom was not excessive.

Appellant argues the trial court erred in not granting a new trial on the basis of excessive courtroom security. Appellant relies on his version of events at trial rather than the trial court's actual factual findings. Further, Appellant relies on a completely wrong legal analysis of determining if courtroom security is excessive.

"A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons." State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989) *cited in* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial). "The granting of a mistrial motion is an extreme measure to be taken only where an incident is so grievous that its prejudicial effect can be removed in no other way." State v. Dempsey, 340 S.C. 565, 570, 532 S.E.2d 306, 309 (Ct. App. 2000).

The trial judge is the best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and prevention of other crimes. State v. Tucker, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995). Inexplicably, Appellant relies almost entirely on cases discussing the use of visible shackles, which is not an issue in this case. In Deck v. Missouri, 544 U.S. 622, 624 (2005), the United States Supreme Court held routine use of visible restraints violates due process and may be used only if "justified by an essential state interest" such as security. Appellant cites Deck multiple times even though this is not a shackles issue.

Although absent from Appellant's brief, South Carolina has examined issues related to use of

extra courtroom security personnel. State v. Gore, 257 S.C. 330, 185 S.E.2d 826 (1971) (finding counsel's objection to courtroom security, in which thirty-six officers were present, twenty-four of whom were uniformed, was not excessive. Gore was jointly tried with his codefendant, both already serving life sentences for murder, and a witness was also serving a life sentence for murder. Solicitor also received information about a possible rescue attempt) *abrogated on other grounds by State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991). In Gore, the Supreme Court explained:

In State v. Greene, 255 S.C. 548, 180 S.E.2d 179 (1971), we held that there was not error in failing to exclude security guards from the courtroom. In such matters the trial judge must be allowed a wide discretion. On the shoulders of the judge rests the responsibility to see that both defendants and the State have a fair trial. The only trial recognized by our system of jurisprudence is a fair trial. There can be no fair trial unless it is orderly. In determining how much security is warranted the judge must act upon such information as is brought to his attention. He is not expected to have hindsight. If he permits such security as appears reasonably necessary to secure orderly proceedings and to assure that the accused persons do not escape, his ruling should not be reversed. At the same time more security than appears to be reasonably necessary should not be allowed.

Id. at 334, 185 S.E.2d at 828.

In the present case, Appellant complained that an officer walked over near Appellant as he testified.² Appellant told his counsel that the officer had two pairs of handcuffs, one pair was open. R. pp. 692-693. The trial court noted: "Well I saw it and I'm the one that nodded for the officer to go over there because this door leads into the Judge's chambers area. And the officer looked at me and I nodded for him to go, that's exactly what he did, I wanted him to stand right there by that door." R. p. 693:7-11. Appellant also complained about where the deputy sat while the jury was out and argued Deck (a case about visible shackles) compels a judge to have a hearing about the level of

² Appellant admits this same officer also guarded Tiller during his testimony. Br. of App. p. 15, fn. 8.

security in the courtroom. R. p. 693-694. The prosecution disputed as to whether the two sets of cuffs were visible to the jury. R. pp. 694-695. The officer explained why he kept two pairs of handcuffs: “The first set is my normal set, it’s part of my uniform. The second set’s the open set for when we have them in the jail chains. This isn’t mine, this is from the jail.” R. p. 695:20-23. After being confronted with that answer, Appellant’s counsel added a complaint that there were other officers in the courtroom during the week. R. pp. 695-696. The trial court explained the following for the record:

Well, we’ll put it on the record that there’s a deputy who testified, Sergeant Walsh previously, and he remained in the Courtroom. And there’s a, Deputy Shay is back at the back there for the backdoor in a uniform, and my officer is in uniform, and the officer from the jail. So there are four uniformed officers in the Courtroom, so the Court finds that’s not an excessive show of force, but you’re on the record.

R. p. 696:12-19.

The trial court subsequently ruled as follows on Appellant’s post-trial motion:

As to the show of force, there was no show of force. Approximately five uniformed officers were in the courtroom; one of whom was summoned by defense Counsel and he testified.

There was no shackling of this Defendant whatsoever. The officer who accommodated the Defendant to and from the witness stand was wearing a standard issued uniform from the Sheriff’s Office. **He was not wearing body armor nor was he armed with multiple firearms or a long gun.**³ He simply accompanied the Defendant to and from the witness stand, never touching him.

I will call our attention to *Holbrook . . . v. Flynn*, 106 [S.Ct.] 1340. That’s a 1986 case where there were four uniformed state troopers, two deputy Sheriff’s, six committing squad officers present and the presence of those officers did not brand the Defendant with the unmistakable mark of guilt. It was not inherently prejudicial to the Defendant likewise here, again, there was no show of force.

R. p. 888:8-889:1.

³ Therefore, the trial court disagreed with Appellant’s claim that the officer was wearing body

In the present case, the record reflects that appropriate security was provided. Further, it seems unlikely that a jury, with limited knowledge of what “normal” security is present in a courtroom, would generate a belief that the security in the courtroom was enhanced beyond what would be expected. Regardless, the record fails to reflect that the trial court abused its discretion given the level of security was limited, purposeful, and not demonstrably excessive.

armor as claimed in Appellant’s brief. See Br. of App. p. 21.

V.

Appellant fails to explain why exhibits that are cumulative to other evidence of Appellant's affair for which Appellant did not object was prejudicial. On the other hand, the exhibits were probative of Appellant's motive to kill his wife so he could replace her with his new girlfriend.

The prosecution presented testimony and exhibits that outlined the affair Appellant engaged in with Sydney. Much of this evidence was contemporaneous to the shooting, including evidence that Victim discovered the affair and Appellant was mad at her for confronting him about his affair. As Appellant admits in his brief, he did not object to an abundance of evidence and testimony regarding Appellant's affair with Sydney. He complains that State's exhibits 53-59, extractions from cell phones, should not have been admitted into evidence under Rule 403 because this was too much evidence. Appellant does not explain why those exhibits were prejudicial to him.

"The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). Error without prejudice does not warrant reversal. State v. McWee, 322 S.C. 387, 393, 472 S.E.2d 235, 239 (1996). Reversal of a circuit court's ruling on the admission or exclusion of evidence requires prejudice to the defendant. State v. Liverman, 386 S.C. 223, 233-34, 687 S.E.2d 70, 75 (Ct. App. 2009).

In the present case, the relevance is obvious. Evidence of the affair and Victim's discovery of the affair was probative of Appellant's motive. "[T]he prosecution is permitted to prove the accused's motive to identify the accused as the perpetrator of the charged crime." Mitchell v. State,

865 P.2d 591, 596-97 (Wyo. 1993). “While intent accompanies the actus reus, the motive comes into play before the actus reus. The motive is a cause, and the actus reus is the effect.” *Id.* at 597 (quoting Edward J. Imwinkelried, Uncharged Misconduct Evidence (1992 & Supp. 1993)). “That the defendant had a motive for that particular crime increases the inference of the defendant’s identity. . . . It is ideal if the defendant is the only person with such a motive. . . . The courts assume that motive has strong probative value because a motive naturally leads to action.” *Id.* (quoting Imwinkelried).

Not only was evidence proving the existence of the affair probative, but also evidence showing the nature of the affair, the kind of relationship between Appellant and Sydney became important. For instance, Sydney texted, in part, on January 7: “I can’t wait to be able to call you mine and not have to share you with anyone. I can’t wait to be your fiancé and then your wife. I can’t wait to be yours and wake up every morning to your face and your smile. I can’t wait to come home to you and our kids together as one family.” R. p. 685:7-12. Appellant replied that he could not wait either. R. p. 685:17-21.

The exhibits Appellant complains about are also probative and not unduly prejudicial. The trial court explained, in relevant part, the following in its ruling:

I know the Defense wants to draw the line at number 52, but 53 through 59 are some pictures, . . . , but they’re pictures of them hugging and kissing and professing feelings for each other and they are limited, very limited, there are not that many of them. Not that many documents, not that many pictures, I think it’s five pictures, maybe, and three of them, I think, are the same picture or one that was turned sideways on the screen, or it may have been taken three times, I don’t know that that works, but nonetheless, they’re limited pictures, but it does show affection with each other. So this Court will find that there’s relevant evidence and it goes to motive.

R. p. 562:13-24. Appellant does not explain why the pictures are unduly prejudicial.

On the other hand, on direct examination Appellant testified, seemingly bragged, about multiple affairs – meanwhile the prosecution focused on just the one affair with Sydney. Therefore, the prejudicial effect of the exhibits is questionable since Appellant was too willing to provide more extensive evidence of his womanizing.

Further, as Appellant acknowledges, these exhibits are merely cumulative to other evidence of the affair between Appellant and Sydney. The introduction of inadmissible evidence is harmless when the evidence is merely cumulative to other evidence presented without objection. State v. Kirton, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122-23 (Ct. App. 2008). Accordingly, the trial court did not err.

VI.

The trial court did not err in allowing photographs to be admitted that carried probative value and happened to have a confederate flag visible in the photograph.

Appellant complains that two photographs introduced by the prosecution that incidentally contained a confederate flag in one picture and a confederate flag console cover in another were admitted in error and prejudicial. The trial court has great discretion in balancing the probative and prejudicial value of evidence, and in this case, exercised that discretion appropriately. The photographs were probative of the steps law enforcement took in executing the search warrant on Appellant and Victim's home. State's Exhibit 31 in particular showed an empty holster and a magazine which is highly probative in a case involving a shooting. State's Exhibit 38 shows a shop filled with clutter that happens to include an unfurled flag (stored, not displayed), and the photograph was probative to show the steps in law enforcement's investigation of the crime, including the execution of the search warrant on the house.

State's Exhibit 31 shows an empty holster where it was found in the front seat of Appellant's truck. It was collected into evidence. R. p. 431:1-22. Additionally, there was a magazine in the bottom left corner of the picture in the passenger side of the seat. R. p. 434:18-23. State's Exhibit 38 showed the inside of Appellant's shop, where tools were kept. R. p. 436. Appellant objected during sidebars and put his objection on the record on the basis that a confederate flag is in both pictures. R. p. 440:5-10.

The prosecutor explained the relevance of the photographs, "Judge, as I stated at sidebar, these are just documenting the residence as, well, the vehicle and the shop as it appeared on that day to the investigators, the State can't help that that was part of those photos, so and you know, I mean, I don't think that it's obvious in either photo that it's there unless you're really looking for it, so." R.

p. 440:12-17. The trial court overruled the objection. R. p. 440:20-23. In State's Exhibit 38, the picture itself, the flag is not unfurled and it is not on display, but stored with numerous other items in a disorganized storeroom. The prejudicial effect is limited while the probative value of the photograph is to show the steps law enforcement took in their investigation. The flag was not discussed in testimony or during closing argument by the prosecution.

The relevance, materiality and admissibility of photographic evidence is within the sound discretion of the trial court. State v. Kelly, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). The trial court does not abuse its discretion if the photographs serve to corroborate testimony. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997). "To constitute unfair prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" Kelly, 319 S.C. at 178, 460 S.E.2d at 370-71 (citation omitted).

For instance, in Kelly, the Supreme Court described the photographs it found admissible as follows:

[T]wo photographs are of the victim's nude body lying on the living room floor with her face and body visible swollen from the beating. Additionally, the photographs show blood smeared on the walls and floor. The video shows the entire crime scene. These photographs and video were relevant to establish the crime scene.

Kelly, 319 S.C. at 178, 460 S.E.2d at 370 (citation omitted).

In the present case, State's Exhibit 31, which showed an empty holster and a magazine was relevant since the present case was the investigation of a shooting. State's Exhibit 38 is relevant because it shows part of law enforcement's thorough search of the premises when executing the search warrant. In contrast, the prejudicial value is limited – the prosecution never referred to the flag or elicited testimony about the flag. It is simply absurd to believe the jury's focus would be on those items that are never discussed instead of focusing on the evidence presented concerning a

violent crime. Therefore, the trial court did not abuse its discretion.

VII.

The trial court did not abuse its discretion by declining Appellant's proposed voir dire questions for the jury.

Appellant proposed two voir dire questions that the trial court declined to ask the jury panel:

(1) a question as to whether the nature of profanity would affect the prospective juror to the extent the juror could not remain fair and impartial, and (2) "You will hear testimony and may see evidence of serious bodily injuries. Is there anything about the nature of serious bodily injuries that would so affect you that you would not be able to remain fair and impartial?" The substance of the latter question was covered in voir dire, as shown below. As to the issue of course language, the trial court did not abuse its discretion in declining to pose the question to the jury panel and Appellant was not prejudiced as the jury was sufficiently put on notice of the nature of the case they would be hearing.

Voir dire examination and the post-trial motion

During voir dire, the trial court advised the jury panel that Appellant was charged with attempted murder. R. pp. 196-197. The trial court then posed the following inquiry:

This case involves allegations of a violent crime. Is there any juror who has personal experience or association that would prevent him or her from rendering a fair and impartial verdict? If so, please stand. I guess asked a different way, is there a member of this jury panel who has been the subject of, been the victim of, a violent crime? If so, please stand.

R. p. 210:8-14. Later the trial court inquired: "It is expected that testimony in this case will be about a person being shot at her home. Would hearing that testimony so affect you that you would not be able to remain fair and impartial in this case? If so, please stand." R. p. 212:6-10. The trial court concluded voir dire by asking, "Is there a member of this jury panel who knows of any reason why he or she should not try this case, you should not sit on this jury, please stand." R. p. 212:18-20.

Appellant claims the issue was discussed at a side-bar during jury selection on October 25,

2021. The issue was one of many raised in Appellant's post-trial motion heard on December 8, 2021. The trial court ruled on the motion at a hearing convened on February 3, 2022 as follows:

The motion in front of me is for a new trial based on several different issues that were raised; the first one being inadequate voir dire. This Court was careful to ask questions proposed by both the State and the defense. And This Court admits not every question proposed by either of the parties was asked. One final question was asked, whether or not there was any juror for any reason why he or she should not serve as a juror in this particular case. That question was intended to be all encompassing and to ensure the Defendant had a fair and impartial jury.

The jury was aware of the nature of the case and the potential jurors were given an opportunity to express any concerns they had.

R. p. 886:24-887:11.

The trial court did not abuse its discretion in declining to ask the two questions requested by Appellant.

While parties may request areas for inquiry, the manner of voir dire examination is left to the sound discretion of the trial judge. State v. Wise, 359 S.C. 14, 23, 596 S.E.2d 475, 479 (2004); State v. Britt, 237 S.C. 293, 311, 117 S.E.2d 379, 388 (1960). ("[T]he scope and limits of interrogation of a juror on voir dire is within the sound discretion of the trial Judge and it is for him to determine the character of the questions proposed and when the examination shall cease.") *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

As show above, the trial court informed the jury panel the charge was attempted murder, the case involves allegations of a violent crime, and it was expected there would be testimony about a person shot in their home. Accordingly, the trial court's voir dire provided substantially the same inquiry and warnings about the violent nature of the case.

Appellant cites no cases requiring the jury panel to be forewarned of course language or other indelicacies. Appellant claims the trial court was compelled to ask Appellant's proposed questions

under the State and Federal constitutions, but offers no case law supporting the proposition that not warning the jury panel about course language was a constitutional issue. In sum, Appellant is asking this Court to reverse the trial court on Appellant's belief that the proposed question was a good idea.

The cases cited by Appellant offer no substantive support for his argument. In Smith v. Phillips, 455 U.S. 209, 212-13 (1982), for which Appellant relies on Justice Connor's concurring opinion, the issue concerned the procedure in reviewing prosecutorial misconduct. One of the jurors applied to be an investigator with the district attorney's office during trial, and the two prosecutors decided not to disclose this information to the judge or defense attorney.

In Crawford v. United States, 212 U.S. 183, 196 (1909), the Court examined whether the judge erred in not striking for cause the operator of a drug store that contained the post-office. He was "technically" a clerk for the post office. The charge was the defendants defrauded the United States. Analysis was not under the federal constitution, but instead under the District of Columbia code of laws and Maryland common law. Id. at 195. The Court concluded that he was not a competent juror even if "he should swear he would not be influenced by his relations to one of the parties" Id. at 197.

The remaining case concerns the effect of pre-trial publicity for the prosecution of Colonel Aaron Burr. United States v. Burr, 25 F.Cas. 49, 50 (D.Va. 1807) and whether prospective jurors already formed an opinion about the case. Pre-trial publicity is not an issue in the instant case.

In the penultimate paragraph, Appellant makes mention that he asked the trial court for each prospective juror be individually questioned, relying on Skilling v. United States, 561 U.S. 358 (2010). This seems to be merely a superfluous paragraph and not an earnestly raised issue by Appellant. Nonetheless, even Skilling advises, "No hard-and-fast formula dictates the necessary depth or breadth of voir dire." Id. at 386. "Jury selection, we have repeatedly emphasized, is

‘particularly within the province of the trial judge.’” Id. (citation omitted).

In the present case, Appellant lacks any earnest authority to suggest that failure for forewarn the jury and inquire about their level of squeamishness over course language rose to constitutional levels or amounted to an abuse of discretion. The jury was advised that the charge was attempted murder, it was a violent crime, and it involved a woman being shot in her own home. The trial court asked a similar question as to marital infidelity for which there was evidence presented in this case. R. p. 212. Accordingly, the trial court did not err in not asking the additional questions as the trial court correctly observed the jury was put on notice of the nature of the case.

VIII.

The trial court did not abuse its discretion in not disclosing mental health records the trial court placed under seal since the only useful information was that Victim told the therapist that Appellant hit her with a blunt force instrument and shot her.

Appellant complains that the trial court erred in not disclosing therapist records. The records are under seal. Neither party knows what are in the records. The records were received by the trial court which reviewed the records. R. p. 269. The trial court explained, "I have advised both the state and defense that there was nothing useful in those records." R. p. 269:20-21. The trial court explained some of the content of the records: "She doesn't know what the future is going to look like. She's scared. She doesn't know the legal process." R. p. 270:2-4.

The trial court further explains:

But there's nothing in there about her identifying any other person. She identifies her husband as the person who harmed her starting out with a – the first session, a blunt force object. She doesn't say what it was. And then shot. And she refers to him throughout as her husband and then later as her ex-husband or former husband.

And there's one note in there that she was getting ready to go to court about the divorce. . . . She does not identify anyone else. She does not say that she doesn't know who harmed her. Again, she identifies the defendant.

R. p. 270:2-21. The judge informed the parties that he was sealing the records. R. p. 272:13-14.

Respondent is unable to review the records since they are under seal but tends to trust the veracity of the trial court and believes the trial court appropriately examined the records and exercised its discretion to determine no useful information was contained in the records. Note Victim explained that she knew and always remembered that Appellant was the shooter and that the reason she did not identify him as the shooter initially to law enforcement was she scared and she was processing and coming to grips with the idea that her husband shot her and that she could not

return home to him. Based on the trial court's representation, the records do not appear to assist Appellant as he hopes. Further, the record reflects the trial court appropriately followed the procedure set out in State v. Blackwell, 420 S.C. 127, 801 S.E.2d 713, 726 (2017) by reviewing the record to assess whether the therapy records contained any information affecting Victim's credibility.

IX.

The Solicitor prosecuted Appellant for the same charge for which he received post-conviction relief and the sentence was left within the discretion of the trial court which assured Appellant he was not being punished for exercising his right to trial so there is no merit to the allegation that Appellant was subject to retaliation by the prosecution for invoking his right to pursue post-conviction relief.

Appellant argues his sentence was unlawful and without proof, asserts the prosecution was retaliating against Appellant for Appellant obtaining post-conviction relief for his prior plea conviction and for Appellant exercising his right to trial. The prosecution proceeded on the same charge for which Appellant originally pled and the sentence was wholly within the trial court's discretion. Therefore, the trial court did not err nor was there opportunity for the prosecution to retaliate.

The prosecution explained what changed since the time of the plea:

Stephanie is physically much stronger, she was very frail at the time this case was ready for trial. And the State, I mean, in discussions with the family made some really tough decisions about trying to resolve this case. But, and in resolving it when it gave this Defendant a great benefit that he did not want.

R. p. 779:24-780:10.

The trial court explained that it does not punish anyone for exercising their right to trial. But the trial court also explained, "[W]e are back at ground zero, and this Court is not bound by anything that happened previously." R. p. 780:12-21. In denying Appellant's post-trial motion to reconsider the sentence, the trial court ruled:

As to the reconsideration of the sentence, there was no retaliation for going to trial. No matter what comments the State made, this Court independently issued the sentence. The Court is not bound by the State's request nor is the Court bound by the victim's request. This Court fashioned the appropriate sentence and imposed a legal

sentence on this Defendant who was convicted by a jury of his peers.

R. p. 889:2-12.

The facts of the case clearly warrant the maximum sentence for attempted murder. The evidence reflected Appellant lay in wait to attack and shoot his wife. He dragged her down the ramp and left her in the yard. He attempted to stage the scene to hide his crime. His wife was the victim of this assault for no other reason than she caught him in an affair and he decided he wanted to replace Victim with his new girlfriend. While Victim was in the hospital, Appellant made the most of the opportunity to continue his affair as evidenced by law enforcement finding Sydney naked at Appellant's house when they executed the search warrant. He even invited Sydney to go back and see Victim in the hospital after he himself was the one that put Victim there, with a text that ended with "LOL" – hardly appropriate when your wife is in the hospital with a potentially lethal gunshot wound. The malice is extant in the record.

The trial court has broad discretion in giving sentences within the statutory limits. Brooks v. State, 325 S.C. 269, 271-72, 481 S.E.2d 712, 713 (1997). "A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against a defendant." Id., at 272, 481 S.E.2d at 713. "[T]his court has no jurisdiction to review a sentence, provided it is within the limits provided by statute for the discretion of the trial court, and is not the result of prejudice, oppression or corrupt motive." State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976).

"It is a due process violation to punish a person for exercising a protected statutory or constitutional right." State v. Blakely, 402 S.C. 650, 657-58, 742 S.E.2d 29, 33 (Ct. App. 2013) (citations and internal quotations omitted). "However, punishment of the offender is recognized as a proper motivation for a sentencing trial judge or a prosecutor." Id. at 658, 742 S.E.2d at 33 (citations

and internal quotations omitted). Notably, the “initial decision by the prosecutor should not freeze future conduct, because the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.” Id. (citation and internal quotation marks omitted).

This Court observed the following:

Only certain limited circumstances pose a realistic likelihood of vindictiveness by a prosecutor and, therefore, warrant the application of a presumption of vindictiveness. . . . The inquiry is not focused solely on the presence or absence of actual vindictive motive, but includes whether the action taken, which exposes the accused to an increased punishment, poses such a reasonable likelihood of vindictiveness as to require a presumption of vindictiveness.

Id. (citations and internal quotation marks omitted, cleaned up).

In the present case, no corrupt motive was shown. First, this case does not present a situation where the prosecution brought additional charges or retried the defendant for a greater charge. Appellant was tried precisely for the charge he originally pled to. Second, the prosecution explained the circumstances in which at the time of the plea Victim was “frail.” Considerations about Victim’s capacity to testify effectively in front of her assailant and the ability to save Victim from the trauma of a trial obviously were implicated in the decision to offer Appellant the favorable plea bargain. But those considerations were not a factor anymore because Victim was stronger and in a better position to testify by the time of trial. Therefore, there was a change from the time of the plea to the time of trial. Finally, the sentence was out of the State’s hands. It was up to the trial court, and the trial court was fully aware of the history of the case. Having heard the gruesome facts of the case, it is hardly surprising the trial court determined the maximum sentence was warranted. The trial court did not abuse its discretion in sentencing Appellant.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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September 6, 2023

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable R. Keith Kelly, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

vs.

JOHNATHAN OLIN BATCHELOR,

Appellant.

Appellate Case No. 2022-000160

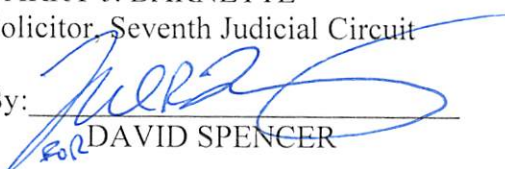
CERTIFICATE OF COUNSEL

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

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Spartanburg County
The Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No: 2022-000160

STATE OF SOUTH CAROLINA,

Respondent,

v.

JOHNATHAN OLIN BATCHELOR,

Appellant.

PROOF OF SERVICE

I, Grace Sommer, certify that I have served the Final Brief of Respondent on E. Charles Grose, Jr., Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 6th day of September, 2023.



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Good Morning Mr. Grose,

Attached please find the Final Brief of Respondent in The State v. Johnathan Olin Batchelor (2022-000160). This document will be filed today with the Court of Appeals via the AIS OneDrive System.

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Thank you,

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2022-000160

The State, ...Respondent,

v.

Johnathan Olin Batchelor, ...Appellant.

**AMENDED
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INTRODUCTION

Johnathan Batchelor replies to the State's Brief of Respondent to correct misstatements of facts and misleading arguments. Some of the misstatements of fact occurred in the State's Statement of Facts, which will be addressed prior to replying to each questioned presented.

STATEMENT OF FACTS

The State contends Sergeant Malpass "did not have much chance to talk with Victim alone because Appellant hovered nearby" and "repeated the same questions over and over, interfering with [her] ability to talk with Victim." Brief of Respondent, at 4. This contention is refuted by Officer Malpass' body worn camera video, which is in evidence as Defense Exhibit 1.

The State contends, "Sergeant Malpass noted blood collected inside the garage, pooling on one side of the garage as if something was parked there at the time the blood accumulated." Brief of Respondent, at 4. Mr. Batchelor, however, contested the fact that there was room enough to park a car inside the garage at the time of the crime, as the garage was cluttered at the time of the crime. R. 737, State's Exhibit 10, R. 806.

The State contends Ms. Batchelor saw her husband "walking hand-in-hand with another woman." Brief of Respondent, at 4-5. This statement misrepresents the trial testimony. R. 366 ("I saw Jonathan walking with some woman side by side, just about holding hands with each other").

The State describes the assault that occurred after Ms. Batchelor "opened the garage door and drive inside." Brief of Respondent, at 5. As seen above, whether there was room

to park a car inside the garage was disputed at trial. This account of the events of the crime is evidence of memory issues that formed part of the defense at trial.

The State contends Ms. Batchelor did not know about Mr. Batchelor's "pre-marital affair until after she woke of from the coma." Brief of Respondent, at 6. Ms. Batchelor testified she knew about Mr. Batchelor's pre-marital affairs before they got married. R. 393. She claimed she did not know that her father had caught Mr. Batchelor in one of the affairs until after she woke up from the coma. R. 394

The State's brief implies Lieutenant Gary found an unfired hollow point round by the garage that matched the live .38 Hornady rounds found inside the home. Brief of Respondent, at 7. Lieutenant Gary, who was never qualified as an expert, actually testified he found a fired round. R. 420. The State further relies on Lieutenant Gary's overstatement about the consistency of the two fired rounds recovered during the investigation. Brief of Respondent, at 10. Whether this fired round was a .38 or a 9mm was contested at trial and relevant to this Court's resolution of Question I, *infra*.

Regarding informant Dustin Tiller's testimony, the State contends Mr. Batchelor told the informant that he "wait[ed] outside" and implies the assault occurred in the driveway. Brief of Respondent, at 9. As seen above, Ms. Batchelor testified she parked inside the garage. The inconsistencies between Ms. Batchelor's account of events and Mr. Tiller's testimony illustrates the inherent dangers of relying on jailhouse informants, which is relevant to this Court's resolution of Questions II and III, *infra*.

ARGUMENTS IN REPLY

Question I

Did the trial judge err as a matter of law by denying Johnathan Batchelor's motion to dismiss when law enforcement destroyed the physical evidence in the case without providing Mr. Batchelor with his due process opportunity to independently examine two projectiles to establish that two weapons were used in the assault on his wife, thereby contradicting the State's theory of the case and establishing his actual innocence?

The State acknowledges that “[t]wo bullet fragments were destroyed.” Brief of Respondent, at 13. Mr. Batchelor argues these two bullet fragments “possessed an exculpatory value apparent before the evidence was destroyed and [he] cannot obtain other evidence of comparable value by other means.” *State v. Cheeseboro*, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001); *see also Arizona v. Youngblood*, 488 U.S. 51 (1988). After acknowledging a hospital employee identified the fragment recovered from Ms. Batchelor as a 9mm, the State argues, “The prosecutor advised the trial court that the analyst determined both fragments were .38s.”¹ Brief of Respondent, at 13. The prosecutor actually stated, “It’s not a thirty-eight. It’s a .38.” R. 313. The prosecutor then argued “9mms and .38s can also often be used interchangeably”² and pointed to the firearms report. *Id.* The

¹ Statements of counsel are not evidence. It is well settled “[a] court cannot consider facts appearing only in argument of counsel.” *Shinn v. Kreul*, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) (citing *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct.App.1986). *Cf. McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473, 475 (1933) (“This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.”). The Supreme Court of South Carolina recently reaffirmed this rule in *Owens v. Stirling*, Howard Adv. Sheet. No. 5, (Op. No. 28132) (Jan. 26, 2023), at 19 (“[W]e cannot rely on the arguments of counsel to fill in the record.”).

² The State failed to produce any evidence to corroborate the argument that 9mms and .38s are interchangeable. As seen in footnote 1, *supra*, “[a] court cannot consider facts appearing only in argument of counsel.” *Kreul*, 311 S.C. at 102, 427 S.E.2d at 700. Expert testimony would be necessary to support this assertion. *See* Rule 702, SCRE.

firearms report described the bullet fragments as “38/9mm fired bullet specimen[s]” and ultimately opined the bullet fragments “bear similar but insufficient microscopic marks to permit a positive identification to each other.” R. 137-38.³

The State did establish that the bullets were fired from the same weapon. Nor did the State establish the bullets were the same caliber. That the bullets might be different calibers fired from different weapons is readily apparent from the firearms report. Additional, independent examination of the bullet fragments might reveal these bullet fragments came from different firearms, supporting the defense theory that two people participated in the assault of Ms. Batchelor. *Compare* R. 738-45 (defense counsel arguing a “real possibility” that two people other than Mr. Batchelor committed this crime) *with* R. 746 (prosecutor arguing “there’s absolutely no evidence” two other people committed this crime). Independent examination of the two bullet fragments would have resolved this controversy. Mr. Batchelor, accordingly, satisfies the requirements of *Cheeseboro*, and this Court should reverse the trial court and dismiss the charge.

³ The State assigns significance the bullet fragments are consistent with Hornady ammunition and “[l]ive .38 Hornady rounds were recovered from the [Batchelor] house.” Brief of Respondent, at 7; R. 137-38. Mr. Batchelor does not contest the live rounds found in his house. Rather, he points to the need for further examination of the recovered bullet fragments. Hornady manufactures ammunition in multiple calibers. <https://www.hornady.com/bullets/handgun/#/> (last viewed April 7, 2023). The Firearms examiner did not match the bullet fragments to the live ammunition recovered from the house.

Question II

Did the trial court err by failing to exclude the testimony of Dustin Tiller, a jailhouse informant, serving a federal court sentence for conspiracy to traffic methamphetamine, when the trial judge operated under the mistaken impression that the court lacked the authority to evaluate the reliability of the informant's testimony?

The State acknowledges jailhouse informant Dustin Tiller “obviously testified with the hope of a benefit – a downward departure.” Brief of Respondent, at 16; *id.*, at 17 (acknowledging Tiller hoped for a downward departure).

Regarding how this question arose at trial, the State focuses on the informant's testimony and ignores the role of Mr. Batchelor's prosecutor in Mr. Tiller's federal sentence. Brief of Respondent, at 16-17. The State ignores the fact that Assistant Solicitor Jennifer Wells appeared at the informant's federal sentencing hearing. The trial court ultimately limited Mr. Batchelor's cross-examination about the prosecutor's role in the informant's current federal sentence and the informant's hopes that the prosecutor will appear at his re-sentencing hearing.

Regarding the ultimate legal question, the State relies on Rule 601(a), SCRE, regarding competency of witnesses to testify. Brief of Respondent, at 17-18. Johnathon Batchelor, however, relies on the well-established gatekeeping role of trial courts. Brief of Appellant, at 17-18.

The State next argues the trial courts' gatekeeping role for third party guilt and admissibility of Rule 404(b), SCRE evidence do not involve reliability or credibility determinations. Brief of Respondent, at 19-20. This argument is facially wrong. Regarding third party guilt, the trial judge must consider the reliability of the evidence, the Supreme Court of the United States held:

While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

Holmes v. South Carolina, 547 U.S. 319, 326 (2006); *see id.*, at 331 (“by evaluating the strength of only one party’s evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt”). A trial court, accordingly, must weigh the evidence before ruling on the admissibility evidence of of third-party guilt.

The State acknowledges that a trial court must exclude Rule 404(b) testimony if the witness’s testimony is not “clear and convincing.” Brief of Respondent, at 20. “Clear and convincing evidence is more than a mere preponderance, but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal. *State v. Simmons*, 384 S.C. 145, 159, 682 S.E.2d 19, 26 (Ct. App. 2009) (citing *State v. Fletcher*, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008)). A trial court, accordingly, must weigh the evidence of other bad acts.

The State does not acknowledge trial courts’ gatekeeping role in the admissibility of expert testimony that requires a reliability determination. *Compare* Brief of Appellant, at 17-18 (citing *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010), *with* Brief of Respondent, at 16-20.

In addition, to the examples identified in Mr. Batchelor’s opening brief, trial courts must determine the reliability of child witnesses in a criminal sexual conduct with a minor case. *See, e.g., State v. Adams*, 430 S.C. 420, 428, 845 S.E.2d 217, 221 (Ct. App. 2020)

(“We conclude the reliability concerns Adams raises based on [*State v. Michaels*, 136 N.J. 299, 642 A.2d 1372 (1994)] were satisfied here by the witness competency standard and within the framework of § 17-23-175, which in essence requires a pre-trial taint hearing.”).

Trial courts routinely weigh evidence when determining admissibility. Although the admissibility of jailhouse informant testimony might be an issue of first impression in South Carolina, the well-established gatekeeping function of trial courts can oversee the admissibility of jailhouse informant testimony. Here, the trial court judge believed he lacked this discretion.⁴ “A failure to exercise discretion amounts to an abuse of that discretion.” *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (citing *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997)). This Court should reverse the trial court, exclude Dustin Tiller’s testimony, and order a new trial.

Question III

Did the trial court err by limiting Johnathan Batchelor’s cross-examination of Dustin Tiller—in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution—by prohibiting Mr. Batchelor from questioning Mr. Tiller about his conversation with his plea counsel after waiving the attorney-client privilege by testifying about those conversations, prohibiting Mr. Batchelor from questioning Mr. Tiller about the Solicitor speaking in favor of Mr. Tiller at his federal court sentencing hearing, and limiting Mr. Batchelor’s questioning of Mr. Tiller regarding the twenty-month reduction in his federal that he already received for his cooperation in Mr. Batchelor’s prosecution?

Johnathon Batchelor alleges the trial court limited his right to confront jailhouse informant Dustin Tiller in three specific ways: (1) prohibiting him from questioning Mr. Tiller about his conversation with his plea counsel after waiving the attorney-client

⁴ Responding to Question III, the State takes a different position than it argues in Question II: “The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.” Brief of Respondent, at 21 (citing *State v. Saltz*, 346 S.C. 114, 551 S.E.2nd 240 (2011)). Here, the trial judge believed he did not have this discretion.

privilege by testifying about those conversations, (2) prohibiting him from questioning Mr. Tiller about the Solicitor speaking in favor of Mr. Tiller at his federal court sentencing hearing, and (3) limiting his questioning of Mr. Tiller regarding the twenty-month reduction in his federal that he already received for his cooperation in Mr. Batchelor's prosecution. Brief of Appellant, at 18-21. The State mischaracterizes Mr. Tiller's testimony about his conversations with counsel, ignores the prosecutor's participation in Mr. Tiller's federal sentencing hearing, and overstates the consequences of Mr. Batchelor's proposed cross-examination. Brief of Respondent, at 21-24.

The State argues the prosecutor merely asked Mr. Tiller whether his federal criminal defense lawyer, Jim Bannister, "explained the plea agreement to him." Brief of Respondent, at 21. The State ignores the cross-examination. During the proffer of Mr. Tiller's testimony, the prosecutor extensively questioned Mr. Tiller about his review of the plea agreement with Mr. Bannister. R. 468 ("When you signed this agreement with Mr. Bannister, did he go through the entire thing with you?"); R. 469 ("And did Mr. Bannister explain [paragraph 3 of the plea agreement] to you?"); R. 470 ("[D]id Mr. Bannister explain paragraph 5 to you?"); R. 472 ("[D]id Mr. Bannister go through paragraph 7 with you?"); and R. 476 ("So Mr. Bannister talked to you about all this, [when] you entered this agreement.")). On cross-examination during the proffer, Mr. Tiller testified he and Mr. Bannister discussed how providing information about people outside of his federal case might reduce his sentence. R. 486-88. Mr. Tiller further testified that he and Mr. Bannister discussed seeking an additional downward departure following his testimony in Mr. Batchelor's case, although he claimed they never discussed the amount of time that might be taken off the sentence. Mr. Tiller also testified he did not have a "number" in his mind

regarding reduction in time. R. 476-93. The jurors should have considered the credibility of this testimony. These “voluntary disclosure[s]” by Mr. Tiller “waive[d] the attorney-client privilege not only as to the specific communication disclosed, but also to all communications between” him and Mr. Bannister “on the same subject.” *Floyd v. Floyd*, 365 S.C. 56, 90, 615 S.E.2d 465, 483 (Ct. App. 2005).

The State ignores the role Mr. Batchelor’s prosecutor played and might still play in reducing Mr. Tiller’s federal sentence. Mr. Tiller met with Ms. Wells on two occasions. Mr. Banister attended the first meeting. R. 476-77, 486-87. Mr. Tiller also testified about Ms. Wells appearing at his sentencing hearing. R. 488; *see also* R. 70-74 (Tiller federal plea agreement and sentencing hearing). Mr. Batchelor, the prosecutor, and the trial judge knew that Mr. Tiller’s cooperation in Mr. Batchelor’s prosecution resulted in an additional twenty-month reduction in Mr. Tiller’s federal sentence. The jurors should have known this information so they would understand Mr. Tiller’s participation in Mr. Batchelor’s trial might further reduce his federal sentence.

“Included in the Confrontation Clause protection is the right to cross-examine any State’s witness as to possible sentences faced when there exists a substantial possibility the witness would give biased testimony in an effort to have the solicitor highlight to a future court how the witness cooperated in the instant case.” *State v. Gillian*, 360 S.C. 433, 454, 602 S.E.2d 62, 73 (Ct. App. 2004) (internal quotations omitted) *affirmed as modified on other grounds*, 373 S.C. 601, 646 S.E.2d 872 (2007). This Court should reverse the trial court, exclude the testimony of Dustin Tiller, and order a new trial. Alternatively, this Court should allow full cross-examination of Dustin Tiller.

Question IV

Did the trial court err as a matter of law by ordering a uniformed deputy, wearing body armor, and visibly carrying two sets of handcuffs, to escort Johnathan Batchelor to the witness stand, stand next to Mr. Batchelor during his testimony, and escort Mr. Batchelor back to the defense table, without conducting a hearing required by the Fourteenth Amendment to determine whether these unusual and enhanced security measures were necessary under the specific circumstances of this case and specific characteristics of Mr. Batchelor?

Johnathon Batchelor argues the trial judge should have convened a hearing before ordering a uniformed courtroom deputy to stand next to Mr. Batchelor during his testimony. Brief of Appellant, at 21-26. The State reframes this question as, “The trial court did not abuse its discretion in finding that security in the courtroom was not excessive.” Brief of Respondent, at 25. By reframing the issue, the State understates the significance of the trial judge’s failure to convene a hearing prior to ordering a uniformed deputy to guard Mr. Batchelor during his testimony.

The State argues, “The trial judge is the best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and prevention of other crimes.” Brief of Respondent, at 25 (citing *State v. Tucker*, 320 S.C. 206, 464 S.E.2d 105 (1995)). Mr. Batchelor does not dispute the role of the trial judge in overseeing courtroom security. The State, however, overlooks the limitations due process places on the trial judge’s discretion. Under *Deck v. Missouri*, 544 U.S. 622 (2005), the trial judge was obligated to convene a hearing and make findings of fact before instructing the uniformed deputy to shadow Mr. Batchelor during his testimony.⁵ During that hearing, the trial judge was obligated to consider less restrictive

⁵ The State also argues Mr. Batchelor “complained about where the deputy sat while the jury was outside the courtroom.” Brief of Respondent, at 27. The State is mistaken. Mr. Batchelor pointed out where the deputy sat with the jurors were outside the

security measures. Here, Mr. Batchelor identified “a less restrictive procedure of having a law enforcement officer guard the door [to Chambers] from inside the hallway outside the notice of the jurors.” Brief of Appellant, at 22, n. 10.

The State argues Mr. Batchelor “admits this same officer also guarded Tiller during his testimony.” Brief of Respondent, at 26, n. 2 (citing Brief of Appellant, at 15, n. 8). The fact that the same officer that guarded Mr. Tiller also guarded Mr. Batchelor enhances rather than mitigates the prejudice. Dustin Tiller is a notorious drug trafficker with ties drug cartels outside of South Carolina. That Mr. Batchelor received the same enhanced security treatment Mr. Tiller singled to the jurors that Mr. Batchelor is just as dangerous as Mr. Tiller. The State argues, “[I]t seems unlikely that a jury, with limited knowledge of what ‘normal’ security is present in a courtroom, would generate a belief that security in the courtroom was enhanced beyond what would be expected.” This State is wrong. The State acknowledges that Mr. Batchelor and Mr. Tiller were the only two witnesses that received this enhanced security during Mr. Batchelor’s jury trial. The State underestimates the observance and intellect of the jurors by suggesting the jurors would not notice that Mr. Batchelor was treated differently than other witnesses, except for the federal prisoner.

Finally, the State argues Mr. Batchelor errs by relying on *Deck* rather than cases involving the presence of extra law enforcement in the courtroom. Brief of Respondent, at 26. The State misunderstands Mr. Batchelor’s argument. Mr. Batchelor argues, “Although *Deck* involved shackling, the same due process concerns apply to the use of force in Mr.

courtroom when trial judge and lawyers were in Chambers. The trial judge justified the enhanced security measures because the door next to the witness stand leads to chambers. Mr. Batchelor included this information in his opening brief so this Court would be aware that the deputy was not guarding the door while the trial judge was actually in Chambers.

Batchelor's case." Brief of Appellant, at 22, n. 11. *Deck* traced the due process considerations of restraining an accused to "Blackstone's ancient English rule" allowing shackles "in extreme and exceptional cases, where the safe custody of the prisoner and the peace of the tribunal imperatively demand, the manacles may be retained." 544 U.S. at 626-27 (internal quotations omitted). The Supreme Court further looked to its precedent leading up to *Deck*: *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986) (noting "it is possible that the sight of a security force within the courtroom might under certain conditions create the impression in the minds of the jury that the defendant is dangerous or untrustworthy" and adopting "a case-by-case approach" when extra courtroom security officers are present in the courtroom); *Estelle v. Williams*, 425 U.S. 501, 512 (1976) ("the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes"); *Illinois v. Allen*, 397 U.S. 337, 343 (1970) ("a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom"). The *Deck* line of cases, accordingly, applies to situations other than shackling.

Because the trial court unilaterally implemented security measures that created the appearance that Mr. Batchelor was dangerous and untrustworthy, this Court should reverse the trial court and order a new trial without the enhanced security during Mr. Batchelor's testimony.

Question V

Did the trial judge err as a matter of law by not limiting the State’s presentation of evidence about Johnathan Batchelor’s extra-material affair with Sydney Allen, when the probative value of this excessive amount of cumulative evidence was substantially outweighed by the danger of unfair prejudice, confused the issues, mislead the jurors and created an unfair risk that the jurors would decide the case based on evidence other than proof of the elements of the crime?

Mr. Batchelor argues the trial judge erred when he failed to exclude—as he had promised—excessive evidence of his extramarital affair with Sydney Allen. Brief of Appellant, at 26-29; *see also* R. 253 (10/29/2021). The State argues, “The introduction of inadmissible evidence is harmless when the evidence is merely cumulative to other evidence presented without objection.” Brief of Respondent, at 31 (citing *State v. Kirton*, 381 S.C. 7,37-38,671 S.E.2d 107,122-23 (Ct. App. 2008)). The State misses the point. In his brief, Mr. Batchelor does not argue that evidence of the affair with Ms. Allen was not relevant. Rather, he argues the trial court allowed excessive, cumulative evidence of this affair. “[W]here credibility is the ultimate issue in a case, improper corroboration evidence that is merely cumulative to the victim’s testimony is not harmless.” *State v. Jennings*, 394 S.C. 473, 479, 716 S.E.2d 91, 94 (2011). The evidence of the affair presented at trial far exceeded what was necessary for a fair presentation of the State’s case. The State never addressed this argument in its brief.

The State also misleads this Court regarding the trial testimony. First, the State contends Mr. Batchelor was mad at his then wife “for confronting him about the affair” with Ms. Allen. Brief of Respondent, at 29. Although Ms. Batchelor provided testimony to this effect, this fact was disputed at trial. Mr. Batchelor did not testify he was mad about being confronted about this affair. Compare R. 366-69 (Ms. Batchelor’s testimony) with R. 657-59 (Mr. Batchelor testifying about the affairs). Second, the State argues Mr.

Batchelor “testified, seemingly bragged, about multiple affairs—meanwhile the prosecution focused on just the one affair with Sydney” Allen. Brief of Respondent, at 31. The record does not demonstrate that Mr. Batchelor was bragging. The State focused on this one affair because that affair suited its purposes at trial. Mr. Batchelor testified about the multiple affairs to provide context to the role his extra material affairs played in his relationship with Ms. Batchelor, both before and during their marriage. R. 657-69.

Because the trial court allowed the State to present evidence of the affair that far exceeded what was necessary for a full presentation of its case, this Court should reverse the trial court and order a new trial with limitations on the amount of evidence that can be presented about the extra-marital affair with Ms. Allen.

Question VI

Did the trial judge err as a matter of law by not excluding photographs (State’s Exhibits No. 31 and 38) that included the image of confederate flags when the probative value of the confederate flags was substantially outweighed by the danger of unfair prejudice to Johnathan Batchelor?

Mr. Batchelor argues the trial judge should have excluded two photographs that showed images of the confederate flag. Brief of Appellant, at 30-31. The State argues these photographs were “probative to show the steps in law enforcement’s investigation of the crime, including execution of the search warrant.” Brief of Appellant at 32-34. This Court must reject these arguments.

The State argues, “State’s exhibit 31 in particular showed an empty holster and a magazine clip which is highly probative in a case involving a shooting.” Brief of Respondent, at 31. The State’s brief never explains why the gun holster was probative in the context of this case. There is no magazine clip in this photograph. Rather, there is magazine about cars shown in the photograph. The State, accordingly, misleads this Court.

Assuming *arguendo* the relevance of the gun holster and magazine about cars, the trial court should have redacted the confederate flag from the exhibit. Simply cropping off the top photograph just below the confederate flag would have allowed the State to present the same evidence it claims is probative.

The State argues, “State’s exhibit 38 shows a shop filled with clutter that happens to include an unfurled flag (stored not displayed), and the photograph was probative to show . . . the execution of the search warrant.” Brief of Respondent, at 32. The State’s description of the photograph is not accurate. Although the entire confederate flag is not visible, the flag is obviously displayed, not stored. The State fails to acknowledge the confederate flag clock slightly right of center at the top of the photograph. Once again, simply cropping the photograph would have removed the confederate flags from the exhibit while still showing the “shop filled with clutter.” As seen, the State had other photographs of the shop that did not show the confederate flags. *E.g.* State’s Exhibit 37. That law enforcement did not find any evidence of a crime in the shop (R. 436) further undermines the State’s argument about the probative nature of State’s Ex. 38.

The State never addressed Mr. Batchelor’s argument that the trial court could have redacted these photographs. Brief of Appellant, at 31. This Court should reverse the trial court, exclude or redact the photographs, and order a new trial.

Question VII

Did the trial court err—contrary to Sixth Amendment of the United States Constitution, Article I, Section 14 of the South Carolina Constitution, and S.C. Code Ann. § 14-7-1020—by not asking Johnathon Batchelor’s request for voir dire numbers four and six inquiring whether there was anything about evidence of serious bodily injuries or hearing profanity that might cause the jurors not to be fair and impartial, when, as anticipated prior to trial, the jurors heard received evidence about serious bodily injuries and profanity?

Mr. Batchelor argues the trial court erred by not asking two of his requests for voir dire. Brief of Appellant, at 31-34. The State argues the trial judge did not abuse his discretion in excluding these questions. Brief of Respondent, at 35-38. Mr. Batchelor agrees the trial court has discretion in conducting voir dire; however, the trial court’s discretion is limited by the Sixth Amendment of the United States Constitution, Article I, Section 14 of the South Carolina Constitution, and S.C. Code Ann. § 14-7-1020. Because of the trial court failed to ask requests for *voir dire* numbers four and six, there is a real possibility that one or more of the jurors could not remain fair and impartial because of serious injuries and hearing profanity. This Court should reverse the trial court and order a new trial.

Question VIII

Did the trial court err—in violation of the Sixth Amendment to the United States Constitution, Article I, Section 14 of the South Carolina Constitution, and statutory law, by not ordering disclosure of counseling records of Stephanie Batchelor when Johnathon Batchelor moved for disclosure of these records in order to be able to confront and cross-examine Ms. Batchelor?

Mr. Batchelor argues the trial court erred by not ordering disclosure of certain medical and mental health records of Stephanie Batchelor. Brief of Appellant, at 34-36. The State points out, “Neither party knows what re in the records.” Brief of Respondent, at 39. To resolve the question, this Court should conduct an *in-camera* review of the

records as contemplated by *State v. Blackwell*, 420 S.C. 127, 801 S.E.2d 713, 726 (2017).

If this Court concludes the records contain exculpatory evidence, then this Court should reverse the trial court, disclose all the records, and order a new trial.

Question IX

Did the trial court err by imposing a sentence of thirty years imprisonment, which is the maximum sentence allowed for attempted murder, when both the Solicitor and the Court of General Sessions previously agreed that a sentence of eighteen years in the Department of Corrections was sufficient, when the sentence imposed following trial punished Johnathan Batchelor for exercising his rights to seek post-conviction relief and a jury trial?

Mr. Batchelor contends the trial court punished him for exercising his rights to post-conviction relief and a jury trial. Brief of Appellant, at 36-38. The State argues, “The facts of this case clearly warrant the maximum sentence for attempted murder.” Brief of Respondent, at 42. The State is wrong. If correct, then the State never would have agreed that an eighteen-year sentence was appropriate, and the prior judge would not have accepted the guilty plea. An accused does not have a constitutional right to a guilty plea; nor is a trial court required to accept a guilty plea. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S. Ct. 837, 846, 51 L. Ed. 2d 30 (1977) (“there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial”); *State v. Kerr*, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998) (trial court was not required to accept alleged plea agreement between defendant and state); *State v. Easler*, 322 S.C. 333, 359, 471 S.E.2d 745, 760 (Ct. App. 1996) (“no constitutional impediment exists in a trial judge's refusal to accept a defendant's guilty plea since the result of his refusal is that the accused is subject to a trial by an impartial jury, which is a constitutional guarantee.” (citing U.S. Const. art. III, § 2; S.C. Const. art. I, § 14)), *affirmed as modified, State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (1997).

The State argues, “In the present case, no corrupt motive was shown.” Brief of Respondent, at 43. The State ignores the prior bond hearings where the prosecutor referenced the vacation of Mr. Batchelor’s guilty plea. R. *. The State also ignores the prior bond orders that reference the vacation of the guilty plea. R. 140-43.

This Court should reverse the trial court and remand this case for a resentencing hearing with instructions for the trial court to impose a sentence not to exceed eighteen years.

CONCLUSION

For the reasons set for in the Brief of Appellant and this Reply Brief, this Court should reverse the trial court and dismiss the charge. Alternatively, this Court should reverse the trial court and order a new trial or new sentencing hearing.

Respectfully Submitted,

By s/E. Charles Grose, Jr.

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September 6, 2023
Greenwood, South Carolina

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2022-000160

The State, ...Respondent,

v.

Johnathan Olin Batchelor, ...Appellant.

Rule 211(b), SCACR Certification

I certify this Brief complies with Rule 211(b), SCACR.

By s/E. Charles Grose, Jr.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
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Appellate Case No. 2022-000160

The State, ...Respondent,

v.

Johnathan Olin Batchelor,.....Appellant.

Certificate of Service

I certify that I served this pleading on the State of South Carolina, by email, using counsel's primary email address listed in the Attorney Information System (AIS), as reflected below, on the date reflected below:

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September 6, 2023

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Sep 06 2023

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *State of South Carolina v. Johnathon Olin Batchelor*
Appellate Case No. 2022-000160

Dear Ms. Kitchings:

Pursuant to Rule 208(b)(7), Mr. Batchelor calls this Court's attention to *Reese v. State*, S.C.Ct.App. No. 6024 (filed September 6, 2023) (Appellate Case No. 2019-000141), which is relevant to Question IV in the Final Brief of Appellant.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,

s/E. Charles Grose, Jr.
E. Charles Grose, Jr.

cc: Mr. Johnathon Batchelor
David Spencer, Jr., Esquire (via email only)
Mark Farthing, Esquire (via email only)

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Johnathan Olin Batchelor, Appellant.

Appellate Case No. 2022-000160

Appeal From Spartanburg County
R. Keith Kelly, Circuit Court Judge

Unpublished Opinion No. 2024-UP-262
Heard May 7, 2024 – Filed July 17, 2024

AFFIRMED

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood,
for Appellant.

Attorney General Alan McCrory Wilson, Senior
Assistant Attorney General Mark Reynolds Farthing, and
Assistant Attorney General Andrew Douglas Powell, all
of Columbia; and Solicitor Barry Joe Barnette, of
Spartanburg, all for Respondent.

PER CURIAM: Johnathan Batchelor appeals his conviction for attempted murder
of his wife (Victim) and his sentence of thirty years' imprisonment. We affirm.

1. Appellant argues that the trial court erred in denying his motion to dismiss when law enforcement destroyed two projectiles without providing him the opportunity to individually examine the evidence. We disagree. "Pursuant to the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." *State v. Hutton*, 358 S.C. 622, 631, 595 S.E.2d 876, 881 (Ct. App. 2004). "This standard requires criminal defendants be afforded a meaningful opportunity to present a complete defense." *Id.* "The State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant." *State v. Cheeseboro*, 346 S.C. 526, 538, 552 S.E.2d 300, 307 (2001). "To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means." *Id.* at 538-39, 552 S.E.2d at 307. "The weight of federal authority . . . has adopted the view that the extraordinary remedy of dismissal should only be granted when the authorities act intentionally and in bad faith [to destroy evidence]." *State v. Reaves*, 414 S.C. 118, 128, 777 S.E.2d 213, 218 (2015). In addition, "[e]xculpatory evidence is evidence which creates a reasonable doubt about the defendant's guilt." *Hutton*, 358 S.C. at 632, 595 S.E.2d at 882. "[W]e consider dismissal of criminal charges a drastic remedy which should rarely be invoked as a sanction for the State's failure to preserve evidence." *Id.* at 633, 595 S.E.2d at 882. Appellant did not demonstrate any evidence of bad faith. The Spartanburg County Sheriff's Office (SCSO) believed the case was resolved prior to their destruction of the evidence because the SCSO destroyed the two bullet fragments after the direct appeal time expired from Appellant's *Alford*¹ plea. In addition, Appellant could obtain evidence of comparable value. The defense was provided with a report detailing the specific features of each projectile and had the opportunity to examine the individual who examined the firearm evidence. Therefore, we find Appellant did not establish a due process violation.

Appellant also argues that the SCSO had a duty to preserve the projectiles based upon section 17-28-320 of the South Carolina Code (2014). We disagree. Section 17-28-320(A) requires "[a] custodian of evidence must preserve all physical evidence and biological material related to the conviction or adjudication of a person for" certain offenses. Attempted murder is not listed as one of the offenses. *See* S.C. Code Ann. § 17-28-320 ("(1) murder (Section 16-3-10); (2) killing by poison (Section 16-3-30); (3) killing by stabbing or thrusting (Section 16-3-40); (4) voluntary manslaughter (Section 16-3-50); (5) homicide by child abuse (Section

¹ *North Carolina v. Alford*, 400 U.S. 25 (1970).

16-3-85(A)(1)); (6) aiding and abetting a homicide by child abuse (Section 16-3-85(A)(2)); (7) lynching in the first degree (Section 16-3-210); (8) killing in a duel (Section 16-3-430) . . ."). "In interpreting a statute, '[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" *State v. Gordon*, 414 S.C. 94, 98, 777 S.E.2d 376, 378 (2015) (quoting *Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007)). "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' The maxim should be used to accomplish legislative intent, not defeat it." *State v. Leopard*, 349 S.C. 467, 472-73, 563 S.E.2d 342, 345 (Ct. App. 2002) (quoting *S.C. Dep't of Consumer Affairs v. Rent-A-Center, Inc.*, 345 S.C. 251, 256, 547 S.E.2d 881, 883-84 (Ct. App. 2001)). Section 17-28-320 of the South Carolina Code does not include attempted murder; therefore, the statute does not impose a duty on the custodian in this case.

2. Appellant argues the trial court erred by failing to exclude jail informant Dustin Tiller's testimony. He contends the trial court mistakenly found it lacked the authority to evaluate the credibility of Tiller's testimony. We disagree. "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion." *State v. Reyes*, 432 S.C. 394, 401, 853 S.E.2d 334, 337 (2020) (quoting *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007)). "A failure to exercise discretion amounts to an abuse of that discretion." *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (quoting *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997)). However, in the present case, the trial court did not have the discretion to evaluate Tiller's credibility and exclude his testimony based on a lack of credibility. "Under South Carolina law, the competency of a witness is to be determined by the trial court, whereas the credibility of a witness is exclusively for the jury to decide." *Reyes*, 432 S.C. at 401, 853 S.E.2d at 338. Appellant asserts the trial court overlooked its gatekeeping function, but the cases

he relies upon involve (1) third party guilt;² (2) expert testimony;³ and (3) prior bad acts.⁴ Tiller was a fact witness whose testimony the State presented to prove Appellant's guilt; therefore, these cases are not applicable to the present issue. We hold the trial court did not err in allowing Tiller to testify.

3. Appellant argues the trial court erred by limiting his cross-examination of Tiller regarding (1) Tiller's conversation with his plea counsel; (2) the solicitor speaking in Tiller's favor at his federal sentencing hearing; and (3) the twenty-month reduction in Tiller's federal sentence he received for his cooperation with Appellant's prosecution. Appellant contends these limitations violated his rights under the Sixth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution. First, we hold the trial court did not abuse its discretion by finding Tiller did not waive his attorney-client privilege with his direct testimony; therefore, the trial court did not abuse its discretion in limiting Appellant's cross-examination of Tiller regarding his communications with his plea counsel. *See State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980) ("Whether a communication is privileged is for the trial judge to decide in the light of a preliminary inquiry into all of the facts and circumstances; and this determination by the trial judge is conclusive in the absence of an abuse of discretion."). On direct, although Tiller acknowledged that his plea counsel reviewed the plea agreement with him before he signed it, that he understood what it meant, and he explained what he thought the agreement meant, Tiller never said what his plea counsel actually told him. Next, while the trial court may have erred in its other limitations of Appellant's cross-examination of Tiller, these errors do not warrant reversal. *See State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) ("A violation of the defendant's Sixth Amendment right to confront the

² *State v. Cope*, 405 S.C. 317, 341, 748 S.E.2d 194, 206 (2013) ("[E]vidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded."), *overruled on other grounds by State v. Wallace*, 440 S.C. 537, 892 S.E.2d 310 (2023).

³ *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (stating that in considering the admissibility of expert testimony, "the trial court must evaluate the substance of the testimony and determine whether it is reliable").

⁴ *State v. Tutton*, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003) ("To be admissible, a prior bad act must first be established by clear and convincing evidence.").

witness is not *per se* reversible error' if the 'error was harmless beyond a reasonable doubt.'" (quoting *State v. Graham*, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994)); *State v. Whitner*, 380 S.C. 513, 518, 670 S.E.2d 655, 658 (Ct. App. 2008) ("No definite rule of law governs finding an error harmless; 'rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.'" (quoting *State v. Reeves*, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990)); *id.* ("Generally, an appellate court will not set aside a conviction because of an insubstantial error not affecting the result.")). Appellant thoroughly cross-examined Tiller about the charges Tiller faced, his agreement to provide information about crimes, the benefits he had received from providing information, and his anticipation that his testimony at Appellant's trial would result in the solicitor speaking on his behalf and a further reduction of his sentence. Therefore, Appellant was able to accomplish his primary objective by demonstrating Tiller's possible bias. See *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 31-32, 609 S.E.2d 506, 512 (2005) ("When evidence is erroneously excluded by the trial court, the appellate court usually engages in the following analysis to determine whether prejudice has occurred. First, the court considers, *inter alia*, whether the error may be deemed harmless because equivalent or cumulative evidence or testimony was offered; the aggrieved party still managed to accomplish his primary objective, such as eliciting testimony about an issue or effectively cross-examining a witness" (footnotes omitted)), *overruled on other grounds by State v. Wallace*, 440 S.C. 537, 892 S.E.2d 310 (2023).

4. Appellant argues the trial court erred in allowing excessive security in the courtroom without conducting a hearing to determine whether these unusual and enhanced security measures were necessary under this case's specific circumstances and Appellant's specific characteristics. We disagree. First, Appellant did not object to the deputy shadowing him until after he finished his testimony and he never requested a hearing; instead he asserted it was too late for a hearing and requested a mistrial. Thus, he is barred from raising this issue on appeal because he failed to raise it at his first opportunity to do so at trial. See *State v. Aldret*, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999) (holding our courts "have routinely held that a party must object at the first opportunity to preserve an issue for review"); *id.* ("A contemporaneous objection is required to preserve an issue for appellate review."). Next, we hold the trial court did not abuse its discretion in denying the motion for a mistrial and finding the security measures taken were warranted and the number of law enforcement officers in the courtroom was not excessive. See *City of Columbia v. Wilson*, 324 S.C. 459, 464, 478 S.E.2d 88, 90 (Ct. App. 1996) ("The grant or denial of a motion for mistrial lies within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of

discretion."); *id.* ("A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for only very plain and obvious reasons."); *id.* ("The burden is on the movant to demonstrate error and resulting prejudice in order to justify a mistrial."); *State v. Shelton*, 270 S.C. 577, 580, 243 S.E.2d 455, 457 (1978) ("A trial [court] has the inherent power to preserve order in [its] court and to see that justice is not obstructed by any person or persons."); *id.* ("[It] has the authority to take such measures as appear reasonably necessary to secure orderly proceedings and to preserve the security of those participating in the trial or lawfully attending the proceedings."); *State v. Tucker*, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995) ("The trial [court] is the best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and prevention of other crimes."); *Shelton*, 270 S.C. at 581, 243 S.E.2d at 457 ("What security measures are warranted to preserve the security of the trial must be determined by the [trial court] under the facts and circumstances in each case, and the exercise of this power is subject to review only to determine the reasonable necessity for the security taken."); *State v. Gore*, 257 S.C. 330, 333-34, 185 S.E.2d 826, 828 (1971) (explaining "more security than appears to be reasonably necessary should not be allowed" and finding that the trial court did not abuse its discretion when approximately thirty-six officers were in the courtroom or on the premises), *abrogated on other grounds by State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991).

5. Appellant argues the trial court erred in admitting cumulative photographs and text messages related to Appellant's extramarital affair. He asserts the danger of unfair prejudice substantially outweighed the probative value of the evidence. We disagree. "It is well settled that evidence should be excluded when its probative value is outweighed by its prejudicial effect." *State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). "A trial [court] has considerable latitude in ruling on the admissibility of evidence and [its] rulings will not be disturbed absent a showing of probable prejudice." *Id.* "The determination of the relevancy and materiality of a photograph is left to the sound discretion of the trial [court]." *Id.* The photographs and messages were admitted to help the jury see Appellant's potential motive for the attempted murder. The messages all related to events that happened in the days following Victim's admission into the hospital. Therefore, the trial court did not err in admitting the photographs and text messages as their probative value outweighed the risk of prejudice.

6. Appellant argues the trial court erred in admitting photographs that included the confederate flag. He asserts the danger of unfair prejudice substantially outweighed the probative value of the photographs. We disagree. The photographs were admitted to help the jury visualize the scene of law enforcement's search and the objects they took into evidence. The State did nothing to emphasize the flag images. We hold the trial court did not err in admitting the photographs as their probative value outweighed the risk of prejudice from the confederate flag objects in the background of the photographs. *See Kelley*, 319 S.C. at 177, 460 S.E.2d at 370 ("It is well settled that evidence should be excluded when its probative value is outweighed by its prejudicial effect."); *id.* ("A trial [court] has considerable latitude in ruling on the admissibility of evidence and [its] rulings will not be disturbed absent a showing of probable prejudice."); *id.* ("The determination of the relevancy and materiality of a photograph is left to the sound discretion of the trial [court].").

7. Appellant argues the trial court erred in failing to ask two of his voir dire requests. We disagree. We hold the trial court did not abuse its discretion in finding its voir dire sufficiently ensured Appellant had a fair and impartial jury; the omission of these two voir dire questions did not render the trial fundamentally unfair. *State v. Wise*, 359 S.C. 14, 23, 596 S.E.2d 475, 479 (2004) ("The scope of voir dire and the manner in which it is conducted are generally left to the sound discretion of the trial court."); *State v. Stanko*, 376 S.C. 571, 576, 658 S.E.2d 94, 96 (2008) ("To constitute reversible error, a limitation on questioning must render the trial fundamentally unfair."); *State v. Coaxum*, 410 S.C. 320, 327, 764 S.E.2d 242, 245 (2014) ("To protect both parties' right to an impartial jury, the trial court must conduct voir dire of the prospective jurors to determin[e] whether the jurors are aware of any bias or prejudice against a party, as well as to 'elicit such facts as will enable [the parties] intelligently to exercise their right of peremptory challenge.'" (second alteration in original) (quoting *State v. Woods*, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001))).

8. Appellant argues the trial court erred in failing to order the disclosure of Victim's counseling records, which he would have used to confront and cross-examine her. We disagree. *See State v. Blackwell*, 420 S.C. 127, 153-54, 801 S.E.2d 713, 727 (2017) (adopting a "procedure that effectuates the legislative mandates of section 44-22-100 of the South Carolina Code [2018] and the constitutional protections of the Confrontation Clause."); § 44-22-100(A)(2) (providing mental health records must be kept confidential and not disclosed unless "a court directs that disclosure is necessary for the conduct of proceedings before the court and that failure to make the disclosure is contrary to public interest");

Blackwell, 420 S.C. at 154-55, 801 S.E.2d at 727 (stating that if the witness does not consent to the disclosure of privileged records, "the [trial court] alone should review the contents of the records to determine whether 'disclosure is necessary for the conduct of proceedings before the court and that failure to make the disclosure is contrary to public interest.'" (quoting. § 44-22-100(A)(2)); *id.* ("In making this determination, the [trial court] should assess the importance of the witness to the prosecution's case and whether the records contain exculpatory evidence, including, *but not limited to*, evidence relevant to the witness's credibility.")). Having reviewed the sealed records, we find the trial court accurately summarized Victim's therapy records and the records do not contain any exculpatory evidence or any evidence relevant to Victim's credibility.

9. Appellant argues the trial court erred in sentencing him to the maximum sentence for attempted murder, thirty years, when the State had previously agreed to a sentence of eighteen years, which the court accepted when he entered his *Alford* plea.⁵ He asserts this sentence following his trial punished him for exercising his rights to seek post-conviction relief (PCR) and a jury trial. We disagree. The trial court "is allowed broad discretion in sentencing within statutory limits." *Garrett v. State*, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995). "Absent partiality, prejudice, oppression, or corrupt motive, [the appellate court] lacks jurisdiction to disturb a sentence that is within the limit prescribed by statute." *State v. Barton*, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997). "A sentencing [court] may NOT improperly consider a defendant's decision to proceed with a jury trial." *State v. Follin*, 352 S.C. 235, 257, 573 S.E.2d 812, 824 (Ct. App. 2002). Similarly, a trial court may not penalize a defendant for choosing to exercise his right to appeal or obtain PCR. *Patrick v. State*, 349 S.C. 203, 209-10, 562 S.E.2d 609, 612 (2002). A presumption of prosecutorial retaliation arises when the defendant shows there was a reasonable likelihood that retaliation was a motive behind bringing additional charges. *Id.* at 209, 562 S.E.2d at 612. "Where no such 'reasonable likelihood' exists, the defendant has the burden to prove actual retaliation." *Id.* Furthermore, "punishment of the offender is recognized as a proper motivation for a sentencing trial [court] or a prosecutor." *State v. Blakely*, 402 S.C. 650, 658, 742 S.E.2d 29, 33 (Ct. App. 2013) (quoting *State v. Fletcher*, 322 S.C. 256, 260, 471 S.E.2d 702, 704 (Ct. App. 1996). Here, the State did not bring any additional charges against Appellant and Appellant's sentence falls within the statutorily-prescribed sentencing limits. In denying the motion to

⁵ Appellant's sentence from his *Alford* plea was thirty years' imprisonment, suspended upon the service of eighteen years' imprisonment, and five years' probation.

reconsider the sentence, the trial court explained the sentence it imposed was not in retaliation for Appellant going to trial and that it had "fashioned the appropriate sentence and imposed a legal sentence on this Defendant who was convicted by a jury of his peers." We hold the trial court did not abuse its discretion in sentencing Appellant to thirty years' imprisonment and denying his motion to reconsider the sentence.

AFFIRMED.

THOMAS, MCDONALD, and VERDIN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Aug 16 2024

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
R. Kieth Kelly, Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2022-000160

The State, ...Respondent

v.

Johnathan Olin Batchelor, ...Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Johnathan Batchelor petitions this Court to rehear this matter, withdraw the opinion dated July 17, 2024, and issue an opinion reversing the trial court. This Court overlooked or misapprehended the matters set forth below.

Failure to Take Judicial Notice of Court Records

The opening paragraph of Question II of Mr. Batchelor's Initial Reply Brief stated:

The State acknowledges jailhouse informant Dustin Tiller "obviously testified with the hope of a benefit – a downward departure." Brief of Respondent, at 16; *id.*, at 17 (acknowledging Tiller hoped for a downward departure). It appears the informant's hope for a downward departure will become a reality. On March 10, 2022, the United States attorney filed a motion "to seal a forthcoming document related to sentencing." *United States v. Tiller*, Case No. 6:16-cr-00707-JMC, ECF No. 1310. The Court granted the motion on the same day. *Id.*, ECF No. 1311. On March 11, 2022, the Government filed a sealed motion, which remains pending at the time of this initial reply brief. *Id.*, ECF No. 1312. One day, Mr. Batchelor and the state judicial system will know the outcome of the sealed motion—*i.e.* whether Dustin Tiller receives an additional downward departure for his assistance in the prosecution of Mr. Batchelor.

Initial Reply Brief of Appellant, at 5 (footnote omitted). Contemporaneously with filing the reply brief, Mr. Batchelor designated the following to be included in the record on appeal:

1. Government's Motion to Seal Forthcoming Document in *United States v. Tiller*, Case No. 6:16-cr-00707-JMC, ECF No. 1310; and
2. Docket sheet in *United States v. Tiller*, Case No. 6:16-cr-00707-JMC, as pertains to Dustin Tiller.

The State moved to strike the reference to Mr. Tiller's apparent efforts to be resentenced, and this Court granted the motion. As set forth in the Response in Opposition to the Motion to Strike, this Court overlooked its inherent authority to take judicial notice of these documents. *See, e.g., Wise v. Wise*, 394 S.C. 591, 716 S.E.2d 117 (Ct. App. 2011) (the appellate panel could take judicial notice of claimant's prior civil action against employer); *State v. Arnold*, 361 S.C. 386, 390, n. 3, 605 S.E.2d 529, 531, n. 3 (2004) (taking judicial notice of distance between locations); *State v. Hunter*, 82 S.C. 153, 63 S.E. 685 (1909) (a trial court should take judicial notice of the remittitur from the Supreme Court); *S.C. Dep't of Soc. Servs. v. Janice C.*, 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009) ("a court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records") (quoting *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984)); *State v. Johnson*, 213 S.C. 241, 49 S.E.2d 6 (1948) (Supreme Court may take judicial notice of general order signed by presiding judge at conclusion of terms of courts of general sessions) *overruled on other grounds by State v. Jackson*, 301 S.C. 49, 389 S.E.2d 654 (1990).

Significantly, "[o]n March 31, 2022, [Mr. Tiller's] sentence was reduced from 220 months to Time Served based on a motion pursuant to Federal Rule of Criminal Procedure 35(b)." *United States v. Tiller*, Case No. 6:16-cr-00707-TMC, ECF No. 1522 (Ex. A). It

appears this reduction in sentence was sealed. Mr. Batchelor discovered the reduction of sentence when the United States Probation Officer petitioned the District Court revoke Mr. Tiller's probation. *Id.*

This Court should grant this petition for rehearing and take judicial notice of Dustin Tiller's resentencing.

Question I

Did the trial judge err as a matter of law by denying Johnathan Batchelor's motion to dismiss when the law enforcement destroyed the physical evidence in the case without providing Mr. Batchelor with his due process opportunity to independently examine two projectiles to establish that two weapons were used in the assault on his wife, thereby contradicting the State's theory of the case and establishing his actual innocence?

This Court held:

Appellant did not demonstrate any evidence of bad faith. The Spartanburg County Sheriff's Office (SCSO) believed the case was resolved prior to their destruction of the evidence because the SCSO destroyed the two bullet fragments after the direct appeal time expired from Appellant's Alford plea. In addition, Appellant could obtain evidence of comparable value. The defense was provided with a report detailing the specific features of each projectile and had the opportunity to examine the individual who examined the firearm evidence. Therefore, we find Appellant did not establish a due process violation.

Slip Opinion, at 3 (footnote omitted).

This Court overlooked Mr. Batchelor's argument that any "evidence retention policy" that does not respect the "well-known statutes of limitations" for filing a PCR application and a federal petition for writ of habeas corpus "is a bad faith policy."

This Court also overstated the information contained in the ballistics' report. The report does not contain enough information for an independent expert to form an opinion. Mr. Batchelor was prejudiced by not having the opportunity to conduct an independent examination.

Question II

Did the trial court err by failing to exclude the testimony of Dustin Tiller, a jailhouse informant, serving a federal court sentence for conspiracy to traffic methamphetamine, when the trial judge operated under the mistaken impression that the court lacked the authority to evaluate the reliability of the informant's testimony?

This Court held, “[T]he trial court did not have the discretion to evaluate Tiller’s credibility and exclude his testimony based on a lack of credibility.” Slip Opinion, at 4. This holding overlooks the larger due process concerns surrounding testimony of jailhouse informants. A wealth of research documents due process concerns surrounding jailhouse informant testimony that results in wrongful convictions. *See, e.g.*, Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (2008); Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 107, 112 (2006); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. Cin. L. Rev. 645 (2004); Ian Weinstein, *Regulating the Market for Snitches*, 47 Buff. L. Rev. 563, 577 (1999).

This Court acknowledged but dismissed other instances where trial courts have to determine the reliability of evidence before admitting that evidence for jurors to determine the weight and credibility of the evidence. *See, e.g.*, *State v. Cope*, 405 S.C. 317, 341, 748 S.E.2d 194, 206 (2013) (“[E]vidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded.”); *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (“[T]he trial court must evaluate the substance of the [expert] testimony and determine whether it is reliable.”); *State v. Tutton*, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003) (“To be admissible, a prior bad act must first be established by clear and convincing evidence.”).

This Court also held, “Tiller was a fact witness whose testimony the State presented to prove Appellant's guilt; therefore, these cases [cited in the previous paragraph] are not applicable to the present issue.” Slip Opinion, at 2. This holding is inconsistent with this Court’s holding in *State v. Adams*, 430 S.C. 420, 428, 845 S.E.2d 217, 221 (Ct. App. 2020) (“reliability concerns Adams raises . . . were satisfied here by the witness competency standard and within the framework of § 17-23-175, which in essence requires a pre-trial taint hearing”).

Question III

Did the trial court err by limiting Johnathan Batchelor’s cross-examination of Dustin Tiller—in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution—by prohibiting Mr. Batchelor from questioning Mr. Tiller about his conversation with his plea counsel after waiving the attorney-client privilege by testifying about those conversations, prohibiting Mr. Batchelor from questioning Mr. Tiller about the Solicitor speaking in favor of Mr. Tiller at his federal court sentencing hearing, and limiting Mr. Batchelor’s questioning of Mr. Tiller regarding the twenty-month reduction in his federal that he already received for his cooperation in Mr. Batchelor’s prosecution?

This Court incorrectly held, “On direct, although Tiller acknowledged that his plea counsel reviewed the plea agreement with him before he signed it, that he understood what it meant, and he explained what he thought the agreement meant, *Tiller never said what his plea counsel actually told him.*” Slip Opinion, at 5 (emphasis added). This Court overlooked the cross-examining during the proffer of Mr. Tiller’s proposed testimony, where he testified about the advice he received from his attorney:

Q Did you and Jim Bannister talk about how it would be helpful if you could provide information against people that weren’t in your own case?

A It, it came up when I told him that, you know, I might have some information about a murder weapon. And he said well, if you have information then it could help you.

Q Okay. Well, when did that come up between you and Jim Bannister?

A When, after the conversation with me and Batchelor.

Q Did you and Jim Bannister talk about how it would be helpful if you could provide information against people that weren't in your own case?

A It, it came up when I told him that, you know, I might have some information about a murder weapon. And he said well, if you have information then it could help you.

Q Okay. Well, when did that come up between you and Jim Bannister?

A When, after the conversation with me and Batchelor.

R. 486-87. Mr. Tiller, accordingly, waived his attorney client privilege. *See, e.g., Floyd v. Floyd*, 365 S.C. 56, 90, 615 S.E.2d 465, 483 (Ct. App. 2005) (“Any voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed, but also to all communications between the same attorney and the same client on the same subject.”).

This Court also held, “[W]hile the trial court may have erred in its other limitations of Appellant's cross-examination of Tiller, these errors do not warrant reversal.” Slip Opinion, at 5. This Court reasoned Mr. Batchelor “thoroughly cross-examined Tiller about the charges Tiller faced, his agreement to provide information about crimes, the benefits he had received from providing information, and his anticipation that his testimony at Appellant's trial would result in the solicitor speaking on his behalf and a further reduction of his sentence” and “was able to accomplish his primary objective by demonstrating Tiller's possible bias.” *Id.*, at 6. During the cross-examination during the proffer, Mr. Batchelor wanted to know what sentence Mr. Tiller hoped he would get in exchange for his cooperation in this case. Mr. Tiller evaded answering that questions. *See, e.g., R. 491-93*. As seen above, we know now that Mr. Tiller hoped for a time served sentence.

Mr. Batchelor should have been allowed to question Mr. Tiller about the 20-month sentence reduction he already received for his cooperation in this case, the Solicitor's participation in that sentence reduction hearing, and his hope to get out of federal prison in consideration of his testifying in Mr. Batchelor's case. *See, e.g., State v. Sims*, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002) ("Because of the number of charges pending against [the witness] and the severity of the potential sentences, we find the evidence was probative on the issue of bias and should have been admitted."); *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) ("We believe the defendant's Sixth Amendment right to effective cross-examination in this case outweighs the right of the State to shield the jury from knowledge of the possible sentence for a defendant who faces the same charges as a witness against him.").

Question IV

Did the trial court err as a matter of law by ordering a uniformed deputy, wearing body armor, and visibly carrying two sets of handcuffs, to escort Johnathan Batchelor to the witness stand, stand next to Mr. Batchelor during his testimony, and escort Mr. Batchelor back to the defense table, without conducting a hearing required by the Fourteenth Amendment to determine whether these unusual and enhanced security measures were necessary under the specific circumstances of this case and specific characteristics of Mr. Batchelor?

This Court's opinion misstates the question presented by referring to "the number of law enforcement officers in the courtroom was not excessive." Slip Opinion, at 6. The question presented is directed at the trial judge's decision to have a uniformed law enforcement shadow Mr. Batchelor while he testified, without first conducting a hearing to determine whether this extreme security measure was warranted. *Deck v. Missouri*, 544 U.S. 622 (2005). Once this Court focuses on the precise question presented, the need to reverse becomes apparent.

This Court’s opinion also stated the issue was not preserved for appeal, even though the State never raised error preservation at trial, during the new trial motion hearing, or on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court.” *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). *See State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) (“[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court.”). These requirements are satisfied regarding this question on appeal.

Question V

Did the trial judge err as a matter of law by not limiting the State’s presentation of evidence about Johnathan Batchelor’s extra-material affair with Sydney Allen, when the probative value of this excessive amount of cumulative evidence was substantially outweighed by the danger of unfair prejudice, confused the issues, mislead the jurors and created an unfair risk that the jurors would decide the case based on evidence other than proof of the elements of the crime?

This Court merely held, “[T]he trial court did not err in admitting the photographs and text messages as their probative value outweighed the risk of prejudice.” Slip Opinion, at 7. In doing so, this Court did not address Mr. Batchelor’s full argument. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE. Even though evidence is admissible, the quantity of evidence can be prejudicial. *See, e.g., State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007) (“The amount of evidence regarding the specifics of the [separate] burglary was unnecessary.”); *State v. James*, 355 S.C. 25, 583 S.E.2d 745 (2003) (Pursuant to statute providing that person is guilty of burglary in the first degree if person enters dwelling

without consent and with intent to commit crime in the dwelling and the burglary is committed by person with prior record of two or more convictions for burglary, probative value of all seven of defendant's prior burglary convictions was outweighed by the very great potential for prejudice to defendant). This Court never addressed the excessive amount of evidence the trial court allowed the State to introduce.

Question VI

Did the trial judge err as a matter of law by not excluding photographs (State's Exhibits No. 31 and 38) that included the image of confederate flags when the probative value of the confederate flags was substantially outweighed by the danger of unfair prejudice to Johnathan Batchelor?

This Court held:

Appellant argues the trial court erred in admitting photographs that included the confederate flag. He asserts the danger of unfair prejudice substantially outweighed the probative value of the photographs. We disagree. The photographs were admitted to help the jury visualize the scene of law enforcement's search and the objects they took into evidence. The State did nothing to emphasize the flag images. We hold the trial court did not err in admitting the photographs as their probative value outweighed the risk of prejudice from the confederate flag objects in the background of the photographs.

Slip Opinion, at 8. This cursory analysis overlooks the fact that *no* evidence was collected from Mr. Batchelor's workshop. *See* State Ex. 38. Nor does it consider that the photograph from Mr. Batchelor's truck should have been cropped, allowing the same evidence to be presented in a non-prejudicial manner. *See* State's Ex. 31.

Question VII

Did the trial court err—contrary to Sixth Amendment of the United States Constitution, Article I, Section 14 of the South Carolina Constitution, and S.C. Code Ann. § 14-7-1020—by not asking Johnathon Batchelor's request for voir dire numbers four and six inquiring whether there was anything about evidence of serious bodily injuries or hearing profanity that might cause the jurors not to be fair and impartial, when, as anticipated prior to trial, the jurors heard received evidence about serious bodily injuries and profanity?

This Court held, “[T]rial court did not abuse its discretion in finding its voir dire sufficiently ensured Appellant had a fair and impartial jury.” Slip Opinion, at 8. The two cases primarily relied upon by the Court—*State v. Wise*, 359 S.C. 14, 596 S.E.2d 475 (2004) and *State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94(2008)—are capital cases where the trial judge and counsel for the parties conduct extensive voir dire. The other two cases relied upon by the Court—*State v. Coaxum*, 410 S.C. 320, 327, 764 S.E.2d 242, 245 (2014) and *State v. Woods*, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001)—involve jurors concealing information during voir dire. These cases taken together illustrate the necessity for trial courts to ask voir dire questions to elicit bias of jurors. *See Smith v. Phillips*, 455 U.S. 209, 221-2 (1982) (O’Connor, J., concurring) (recognizing that jurors may be incapable of acknowledging their own bias); *Crawford v. United States*, 212 U.S. 183, 196 (1909) (“Bias or prejudice is . . . an elusive condition of the mind . . . and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence”); *United States v. Burr*, 25 F. Cas. 49, 50 (D.Va.1807) (a person under the influence of personal prejudice “is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony” for such person may declare that “notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him”).

Question VIII

Did the trial court err—in violation of the Sixth Amendment to the United States Constitution, Article I, Section 14 of the South Carolina Constitution, and statutory law, by not ordering disclosure of counseling records of Stephanie Batchelor when Johnathan Batchelor moved for disclosure of these records in order to be able to confront and cross-examine Ms. Batchelor?

This Court held, “Having reviewed the sealed records, we find the trial court accurately summarized Victim's therapy records and the records do not contain any exculpatory evidence or any evidence relevant to Victim's credibility.” Slip Opinion, at 9. Without having reviewed the records, Mr. Batchelor is not in a position to respond to this holding. Nonetheless, in order to preserve this issue for pestilential review by the Supreme Court, Mr. Batchelor respectfully request this Court reconsider this holding.

Question IX

Did the trial court err by imposing a sentence of thirty years imprisonment, which is the maximum sentence allowed for attempted murder, when both the Solicitor and the Court of General Sessions previously agreed that a sentence of eighteen years in the Department of Corrections was sufficient, when the sentence imposed following trial punished Johnathan Batchelor for exercising his rights to seek post-conviction relief and a jury trial?

This Court held, “[T]he trial court did not abuse its discretion in sentencing Appellant to thirty years' imprisonment and denying his motion to reconsider the sentence.” Slip Opinion, at 10. In reaching this conclusion, this Court reasoned “the State did not bring any additional charges against Appellant and Appellant's sentence falls within the statutorily-prescribed sentencing limits.” *Id.*, at 9. As our Supreme Court observed:

In the landmark decision of *North Carolina v. Pearce*,^[1] the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment prevented a trial court from penalizing a defendant for choosing to exercise his right to appeal. In order for the presumption of prosecutorial retaliation (or the “*Pearce* presumption”) to apply, Petitioner must show there is a “reasonable likelihood” that retaliation was a motive behind bringing the additional charges. *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); *State v. Fletcher*, 322 S.C. 256, 471 S.E.2d 702 (Ct.App.1996). Where no such “reasonable likelihood” exists, the defendant has the burden to prove actual retaliation. *Alabama v. Smith*, 490 U.S. at 800, 109 S.Ct. at 2205. In the instant case, there is a

¹ *North Carolina v. Pearce*, 395 U.S. 711 (1969), modified by *Alabama v. Smith*, 490 U.S. 794 (1989).

“reasonable likelihood” retaliation was a motive, and therefore Petitioner was entitled to the presumption.

Patrick v. State, 349 S.C. 203, 209, 562 S.E.2d 609, 612 (2002).

Here, “there is a ‘reasonable likelihood’ retaliation was a motive, and therefore Petitioner was entitled to the presumption.” *Id.* In bond hearings in this case, the State noted its displeasure that the Attorney General’s office consented to the PCR court granting Mr. Batchelor a new trial. R. 22-29. Two post-PCR court orders denying bond reference Mr. Batchelor’s prior *Alford* plea. R. 140-43. The State did not present any evidence that was not available to it prior to the *Alford* plea.

CONCLUSION

For the reasons set forth in the Final Brief of Appellant, Final Reply Brief of Appellant, and this petition, this Court should rehear this matter, withdraw the opinion dates July 17, 2024, and reverse the trial court.

IT IS SO MOVED.

Respectfully Submitted,

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August 16, 2024
Greenwood, South Carolina

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Aug 16 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
R. Kieth Kelly, Circuit Court Judge

Appellate Case No. 2022-000160

The State, ...Respondent

v.

Johnathan Olin Batchelor, ...Appellant.

Certificate of Service

I certify that I served this pleading on the State of South Carolina, by email, using counsel's primary email address listed in the Attorney Information System (AIS), as reflected below, on the date reflected below:

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August 16, 2024
Greenwood, South Carolina

The South Carolina Court of Appeals

The State, Respondent,

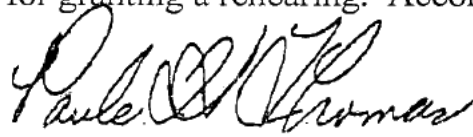
v.

Johnathan Olin Batchelor, Appellant.

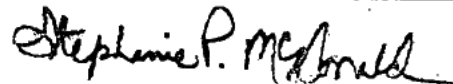
Appellate Case No. 2022-000160

ORDER

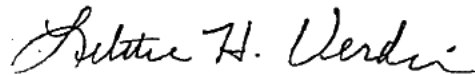
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


Paul W. Thomas

J.


Stephanie P. McDonald

J.


Robert H. Verdin

A.J.

Columbia, South Carolina

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FILED
Aug 21 2024