STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

Appeal from Spartanburg County
Honorable R. Keith Kelly, Circuit Court Judge
Appellate Case No. 2024-001579

STATE OF SOUTH CAROLINA,

Respondent,

vs.

JOHNATHAN OLIN BATCHELOR,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I. The Court of Appeals properly found any error in the limitation of the cross examination of Tiller was harmless due to the minimal value associated with further discrediting Tiller's credibility.

II. The Court of Appeals did not err in declining to exclude the Tiller's testimony because the credibility of an informant fits squarely within the role of the jury.

III. The Court of Appeals properly did not take judicial notice of Tiller's motion for downward departure.

IV. The Court of Appeals properly found the court did not err in denying Petitioner's motion to dismiss because Petitioner failed to establish bad faith and Petitioner was able to obtain evidence of comparable value.

V. The Court of Appeals properly found no abuse of discretion in use of courtroom security.

VI. The Court of Appeals properly found that the evidence of Petitioner's affair was sufficiently probative to not be substantially outweighed by the dangers of unfair prejudice or cumulativeness, because it showed Petitioner's motive in attacking his wife.

VII. The Court of Appeals properly found that the probative value associated with photographs that aided the jury in understanding the crime scene was not substantially outweighed by the danger of unfair prejudice because they included confederate flags.

VIII. The Court of Appeals properly found the trial court did not abuse its discretion by declining Petitioner's proposed voir dire questions.

IX. The Court of Appeals properly found the court did not err in not ordering the disclosure of Victim's health records because they did not contain exculpatory material.

X. The Court of Appeals properly found the trial court did not err in ordering Petitioner receive the maximum sentence because the court is awarded broad discretion, and the sentence was within the applicable guidelines.

STATEMENT OF THE CASE

Petitioner Johnathan Batchelor was charged with attempted murder. Petitioner pled guilty pursuant to Alford, 400 U.S. 25 (1970) before the Honorable J. Derham Cole, circuit court judge. Judge Cole sentenced Petitioner to thirty years' imprisonment suspended to eighteen years' imprisonment and five years' probation.

Petitioner 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 of an improper sentence.[1]

Petitioner was then tried for the same charge, attempted murder on November 1-4, 2021. The jury convicted Petitioner of attempted murder and the presiding judge, the Honorable Keith R. Kelley, sentenced Petitioner to thirty years' imprisonment. Judge Kelley heard Petitioner's post-trial motions on December 8, 2021, and denied the post-trial motions by oral ruling on February 3, 2022. The Court of Appeals affirmed the conviction in Opinion No. 2024-UP-262. Petitioner filed a timely petition for rehearing, which was denied. This return to Petition for Writ of Certiorari follows.

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[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

On January 7th, 2016, Sergeant Kristen Malpass responded to a high priority call on Reidville Road. (R. p. 335). Upon arriving he was led by Petitioner, to his wife Stephanie (Victim) lying face down in the grass on the side of the yard, propping herself up somewhat with her arms. (R. p. 156; 335). Her hair was matted with blood. (R. p. 335). Victim said she felt like she had been shot. (R. p. 353). At that time, she did not identify her assailant. (R. p. 353-354). Holes in her chest were visible, but the amount of blood made it difficult to see if she suffered any facial or head injuries. (R. p. 342-343). EMS arrived after about ten minutes and promptly took Victim away. (R. p. 343). Petitioner and Victim's children were in the house. (R. p. 344).

Victim married Petitioner 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 Petitioner walking hand-in-hand with another woman, both of them giggling. (R. p. 366). Victim drove up and asked what was going on, but Petitioner claimed they were just with other co-workers at lunch. (R. p. 366). Victim chose to not belabor the matter and drove away. (R. p. 366). Later she confronted Petitioner who denied an affair. (R. p. 367). Victim went to grab her phone and leave, but Petitioner took it and threw it across the room. (R. p. 367). When she tried to leave the house, Petitioner blocked the doorway. (R. p. 367). Petitioner pushed her to the ground and Victim then grabbed a gun, but decided not to shoot Petitioner, especially since the children were nearby. (R. p. 367-8). Petitioner insisted the woman was just a friend named Sydney. (R. p. 366-369).

The next day Victim went to work and called Petitioner while she drove home. (R. p. 370). Petitioner told her he put the children to sleep and kept tabs on her location as she drove

home. (R. p. 370.) When she arrived, she drove into the garage. (R. p. 375). She finished listening to a song, grabbed her things to bring inside when Petitioner grabbed her and pulled her out the car door. (R. p. 375). She attempted to make her way up the ramp, but was struck from behind with something. (R. p. 376). After being knocked down she saw Petitioner holding an orange baseball bat. (R. p. 376). He repeatedly hit 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 Petitioner held her feet and dragged her down the ramp and to the side of the house. (R. p. 378). She lost consciousness again and her next memory was waking up in a room with lights. (R. p. 378). Victim was scared Petitioner was close by, and at that time did not identify Petitioner as her attacker. (R. p. 378). She was put into a medically induced coma for a week. (R. p. 379). When law enforcement asked Victim for a description of the shooter, she identified Petitioner as the shooter. (R. p. 381). Victim testified that nothing from her purse was taken. (R. p. 382).

On cross-examination, Petitioner's counsel elicited testimony that Petitioner had an affair with another woman before Petitioner and Victim married and that Victim's father caught Petitioner having the affair. (R. p. 397). Victim clarified she did not know about the pre-marital affair until after she woke up from the coma. (R. p. 394)

Inspecting the crime scene, Lieutenant Gary noticed that the contents of Victim's purse were poured out, but the valuables were not taken. (R. p. 413-4). When observing the blood smear stains down the ramp, he noted it made little sense that the robber would take the time to drag Victim out of the garage. (R. p. 412-414; p. 419). There was a zip tie down at the end of the driveway. (R. p. 417-8). Strangely, there was white powder on Petitioner's truck. (R. p. 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. p. 420-421). Victim's gun was never recovered. (R. p. 455-456). Petitioner informed Lieutenant Gary that Victim normally kept her 38 in her purse or the glove compartment in her car. (R. p. 455-456).

When executing the search warrant, there was a mini van in the garage. (R. p. 426). When they approached, they saw Petitioner putting a shirt on and walking down the hallway. (R. p. 428). They asked Petitioner if anyone else was in the house, and he disclosed Sydney, the woman with which he was having an affair, was present. (R. p. 428). Knocking on the bedroom door, Sydney said through the door she needed to put some pants on. (R. p. 428). She had a men's shirt on, and Lieutenant Gary handed her a pair of shorts. (R. p. 428-429).

Deputy David Hogsed went to the location where Victim's car was found. (R. p. 509). It was about a mile and a half from their house. (R. p. 506). The vehicle was stuck on a berm and still running. (R. p. 509; 516-17). Lindsey McGraw, then with the Sheriff's Department, examined Victim's phone, Petitioner's two phones, and his girlfriend's phone. (R. p. 533-534). Sydney was listed as "Sydney" on one phone, but as "Crown Vic" on Petitioner's other phone. (R. p. 534-535). Victim's phone number is listed as "Little Wifey" in Petitioner's contacts. (R. p. 534-535). One of the text messages from Petitioner to Sydney asked if she wanted to go with him to the hospital to see Victim. (R. p. 552). Sydney declined. (R. p. 552). Sydney posits that it would be inappropriate given her relationship with Petitioner, but Petitioner replied it was fine because only Sydney and Petitioner knew of the affair. (R. p. 552-553). When inviting Sydney to go back with him to see Victim in the hospital, Petitioner added, "I could kiss you on the way,

LOL, yes?" (R. p. 682).

Dustin Tiller was serving a federal sentence at the Yazoo facility in Mississippi but was brought to Spartanburg to testify. (R. p. 566). Tiller pled guilty to conspiracy to traffic methamphetamine in federal court pursuant to a plea agreement he signed on March 16, 2017. (R. p. 566-71). Because of his prior drug offenses, Tiller could have received a life sentence for his federal charges. (R. p. 566-71). Sentencing was at the sole discretion of the federal judge. (R. p. 566-71). Under the terms of the agreement, Tiller was required to provide truthful information and truthful testimony. (R. p. 572-75). Tiller was required to disclose all knowledge he has of criminal activity. Failure to be truthful would nullify his deal. (R. p. 572-75). Tiller received a 220-month sentence. (R. p. 578).

Tiller met Petitioner while they were both at the Spartanburg Detention Center. (R. p. 579). The two met during a Bible study program Tiller taught. (R. p. 580). Petitioner started talking about his case with Tiller. (R. p. 580-2). Petitioner told Tiller he shot his wife. (R. p. 582). Petitioner confided that Tiller was the first person he ever told this to. (R. p. 582). He explained he was on the phone with his wife until she got close to the house, and he hid in wait outside. (R. p. 582-3). When she pulled in, he shot her, then left to hide the gun. (R. p. 582-4). Petitioner used Victim's own gun on her. (R. p. 582-4). Petitioner thought she was dead but returned to find her still alive. (R. p. 584). Petitioner then changed his clothes. (R. p. 585). He put white powder on his own vehicle to make it look like a drug robbery. (R. p. 585).

Dr. Brian Thurston, a trauma surgeon, treated Victim on January 7, 2016. (R. p. 619). Victim suffered multiple gunshot wounds, including to the face and head. (R. p. 619-20). She also suffered face and head fractures. (R. p. 620-1). Victim's condition deteriorated as they

treated her. (R. p. 619-25). Dr. Thurston was not optimistic about her survival when he performed brain surgery. (R. p. 619-25). Victim spent a week on life support in the ICU. (R. p. 379-80). Her recovery surprised Dr. Thurston. (R. p. 628-630).

The defense also recalled Investigator Gary, who testified that it was a firefighter who shut the car off. (R. p. 649-50). He also explained two projectiles were recovered during the investigation. (R. p. 650). One from the garage and one from the Victim's body. (R. p. 650-1). Both bore markings consistent with Hornady ammunition, but insufficient marks remained to determine if they matched each other. (R. p. 649-652).

Petitioner testified on his own behalf and claimed he did not shoot his wife. (R. p. 653). Still on direct examination, he admitted he lied about not having an affair. (R. p. 653-654). Petitioner 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). Petitioner testified Victim was aware of the affairs. (R. p. 657). 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). Petitioner explained that Victim's father once caught Petitioner having an affair in a Lowe's parking lot. (R. p. 659).

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

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 Court of Appeals properly found any error in the limitation of the cross examination of Tiller was harmless due to the minimal value associated with further discrediting Tiller's credibility.

Petitioner claims the trial court erred in not allowing Petitioner to highlight that the federal prosecutor reduced the recommendation from 240 months to 220 months imprisonment for Tiller's assistance. The trial court did not allow this because it would open the door to the reason for the downward departure at that point in time which was Petitioner's prior guilty plea. Petitioner 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." Further, Petitioner was able to elicit the fact that Tiller participated in the hopes that his sentence would be further reduced. The Court of Appeals found error but deemed it harmless. Here, the trial court acted within its discretion and handled a sensitive situation in a sensible manner.[2] Even so, any error is harmless.

There is no definitive rule of law governing harmless error, rather the prejudicial character of the error is determined from its relationship to the entire case. Id. When examining

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[2] 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 trial court did not err in limiting that the twenty-month departure was related to Tiller's cooperation in securing Petitioner's plea, because the court had to balance the evidence of potential bias with the potential danger of exposing Petitioner's prior plea. While the court did limit the cross examination to protect Petitioner from unfairly prejudicial evidence, Petitioner was able to effectively cross examine Tiller on his motivations and potential bias. See State v. Jenkins, 322 S.C. 360, 474 S.E.2d 812, 814 (Ct. App. 1996)("the trial court has broad discretion in determining the general range and extent of cross-examination").

harmless error courts may consider "the factual guilt or innocence of the defendant in light of the untainted evidence in the record" and "whether the error at trial influenced the jury and thus contaminated its verdict." Harry T. Edwards, To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated? 70 N.Y.U. L. Rev. 1167 (1995).

Counsel stated, "I have to get far enough so that these jurors know that, you know, this is kind of like how he paid his debt to the drug cartel, he does whatever it takes, you know." (R. p. 598). Counsel was effective in eliciting such testimony. On cross-examination, Petitioner 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). Petitioner elicited testimony from Tiller that he provided information about both inmates and correction officers to the federal authorities. Tiller also provided information against an individual named Josh Peace in another federal case. (R. p. 593-594). Petitioner 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). Also, Petitioner was able to elicit from Tiller that he received an additional downward departure from 240 months to 220 months for assistance "in a case." (R. p. 605-606).

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).

Additionally, the State presented overwhelming evidence of guilt. See State v. Reyes, 432 S.C. 394, 406, 853 S.E.2d 334, 340 (2020) ("[i]n determining whether error is harmless beyond a reasonable doubt, we often look to whether the defendant's guilt has been conclusively proven ... such that no other rational conclusion can be reached"). Victim testified that Petitioner hit her in the head and shot her. (R. p. 376). Text records establish Petitioner's desire to replace Victim with Sydney. (R. p. 685). The crime scene was not consistent with a robbery, as the contents of Victim's purse were not taken. (R. p. 413-4).

Petitioner was able 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. Additionally, 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 Petitioner prejudiced by the slight limitation in his cross-examination.

II. The Court of Appeals did not err in declining to exclude Tiller's testimony because the credibility of an informant fits squarely within the role of the jury.

Petitioner argues the trial court erred in declining to suppress informant Tiller's testimony for no other reason than in Petitioner's view his testimony was not credible. The trial court does not have a legal basis to suppress witnesses like a jailhouse informant. 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.

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)). Petitioner 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.").

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

III. The Court of Appeals properly did not take judicial notice of Tiller's motion for downward departure.

Petitioner's Supplemental Designation of Matter designated two items: (1) the [Federal] Government's Motion to Seal Forthcoming Document in United States v. Tiller; and (2) the docket sheet in United States v. Tiller. These documents were not entered into evidence at trial, were not presented to the trial court, and did not even exist at the time of trial (the docket sheet would not have contained items that were filed subsequent to Appellant's trial). Because these designated documents and the references to them in the initial reply brief all are matter not presented to the trial court, the Court of Appeals properly granted the State's motion to strike. Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal"); Rule 208 (b)(4), SCACR ("The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal.").

IV. The Court of Appeals properly found the court did not err in denying Petitioner's motion to dismiss because Petitioner failed to establish bad faith and Petitioner was able to obtain evidence of comparable value.

The Court of Appeals properly found no error because Petitioner did not establish bad faith or a readily apparent exculpatory value. Two bullet fragments were destroyed after the direct appeal time expired from Petitioner's Alford plea. Petitioner claims law enforcement was required to wait until the post-conviction relief application deadline to destroy the fragments. The Court of Appeals properly noted that § 17-28-320 does not require the preservation for the

crime of attempted murder. The trial court did not err because the ammunition was consistent with that found in the home, the findings were made available to Petitioner in the report, and Petitioner failed to establish bad faith.

The State does not have an absolute duty to preserve potentially useful evidence. 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). 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.").

To prove law enforcement destroyed the evidence in bad faith, Petitioner 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. "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). Accordingly, Petitioner failed to show that the bullets were destroyed in bad faith.

Further, Petitioner failed to show the destroyed bullets carried readily apparent exculpatory value. Petitioner alleges exculpatory value on the basis that a hospital employee

identified the fragment recovered from Victim's body as a 9mm while fragment from the garage were .38 caliber. (R. p. 234). The firearm report listed the fragments as "38/9mm" and stated the items "bear similar but insufficient microscopic marks to permit a positive identification with each other." (R. p. 138). To meet the standard of constitutional materiality Petitioner 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 Petitioner failed to demonstrate the bullet fragments have any exculpatory value that was apparent before it was destroyed. (R. p. 309).

V. The Court of Appeals properly found no abuse of discretion in the use of courtroom security.

Petitioner argues the trial court erred in not declaring a mistrial on the basis of excessive courtroom security. First, the issue is not preserved for review because Petitioner failed to make an objection at the time the measure was enacted. Even if the issue is preserved for review the trial court properly exercised its discretion in courtroom security.

In our state, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's

Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004).

Here, Petitioner's objection was not raised during his testimony, but rather at the conclusion. (R. p. 653; 692). At the conclusion of Batchelor's testimony Counsel explained that "[a]t the beginning of it, I didn't realize that the officer walked over and was standing over his shoulder during testimony" and "I did observe just a minute ago was him walking back in front of the jury next to Mr. Batchelor." (R. p. 692). Petitioner failed to make a contemporaneous objection and thus the issue is not preserved for appellate review. See Turner v. Med. Univ. of S.C., 430 S.C. 569, 590, 846 S.E.2d 1, 12 (Ct. App. 2020) (noting that a "contemporaneous objection is required to preserve issues for appellate review").

Next, "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). "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, Petitioner 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.

In the present case, Petitioner complained that an officer walked over near Petitioner as he testified. Petitioner told counsel that the officer had two pairs of handcuffs, one pair was open. (R. p. 692-93). 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). Petitioner 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 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. p. 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). After being confronted with that answer, Petitioner's counsel added a complaint that there were other officers in the courtroom during the week. (R. p. 695-96). 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).

Here, the record supports the Court of Appeals determination that appropriate security was provided. The court noted that the officer was not wearing body armor, was not armed with multiple firearms, and was not armed with a long gun. (R. p. 888). The Court of Appeals properly found the issue not preserved for review and the security to be within the court's discretion.

VI. The Court of Appeals properly found that the evidence of Petitioner's affair was sufficiently probative to not be substantially outweighed by the dangers of unfair prejudice or cumulativeness, because it showed Petitioner's motive in attacking his wife.

The prosecution presented testimony and exhibits that outlined the affair Petitioner engaged in with Sydney. As the Court of Appeals noted much of this evidence was related to events that happened in the days following Victim's hospital stay. The photographs contain probative value because they establish Petitioner's affair and the motive that resulted from that relationship.

"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).

In the present case, the relevance is obvious. Evidence of the affair and Victim's discovery of the affair was probative of Petitioner'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).

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 Petitioner 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). Petitioner replied that he could not wait either. (R. p. 685). The Court of Appeals correctly found that the danger of unfair prejudice did not substantially outweigh the probative value.

VII. The Court of Appeals properly found that the probative value associated with photographs that aided the jury in understanding the crime scene was not substantially outweighed by the danger of unfair prejudice because they included confederate flags.

Petitioner 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 Court of Appeals properly noted that the photographs were admitted to help the jury visualize the scene of law enforcement's search and the objects taken into evidence. State's Exhibit 31 in particular showed an empty holster and 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.

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's Exhibit 31 shows an empty holster where it was found in the front seat of Petitioner's truck. It was collected into evidence. (R. p. 431). State's Exhibit 38 showed the inside of Petitioner's shop, where tools were kept. (R. p. 436).

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). The trial court overruled the objection. (R. p. 440). 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.

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 Court of Appeals properly found the trial court did not abuse its discretion.

VIII. The Court of Appeals properly found the trial court did not abuse its discretion by declining Petitioner's proposed voir dire questions.

Petitioner 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 to the issue of course language, the trial court did not abuse its discretion, and Petitioner was not prejudiced because the jury was sufficiently put on notice of the nature of the case.

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). The trial court informed the jury panel the charge was attempted murder, the case involved 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.

The jury was advised that the case 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 imploring Petitioner's requested verbiage and the Court of Appeals properly found the refusal to ask such questions did not render the trial fundamentally unfair.

IX. The Court of Appeals properly found the court did not err in not ordering the disclosure of Victim's health records because they did not contain exculpatory material.

Petitioner contends that the trial court and Court of Appeals erred in its characterization of Victim's medical records and refusal to order the disclosure of such records. The records are under seal. Neither party knows what are in the records. The records were reviewed by both the trial court and the Court of Appeals. (R. p. 269). The Court of Appeals noted "the trial court accurately summarized Victim's therapy records." The trial court explained, "I have advised both the state and defense that there was nothing useful in those records." (R. p. 269). 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).

The trial court noted:

> 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). The judge informed the parties that he was sealing the records. (R. p. 272).

The trial court and Court of Appeals correctly reviewed the medical records and found nothing useful to Petitioner.

X. The Court of Appeals properly found the trial court did not err in ordering Petitioner receive the maximum sentence because the court is awarded broad discretion, and the sentence was within the applicable guidelines.

Petitioner argues his sentence was unlawful and without proof, asserts the prosecution was retaliating against Petitioner for Petitioner obtaining post-conviction relief for his prior plea conviction and for Petitioner exercising his right to trial. The Court of Appeals properly noted that the court did not abuse its discretion because the State did not bring additional charges, and the sentence was within the statutorily prescribed guidelines.

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. The State explained that the victim was very frail at the time of the initial plea, which made potentially prosecuting the case at that point more difficult. Fortunately, Victim's condition improved allowing her to testify. (R. p. 779).

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).

Lastly, the court's decision is understandable given the disturbing facts. The evidence reflected Petitioner waited to attack and shoot her in an attempt to replace his wife with his mistress. He dragged his wife down a ramp, left her in the yard, and attempted to stage the scene to hide his crime. Accordingly, this Petition for Writ of Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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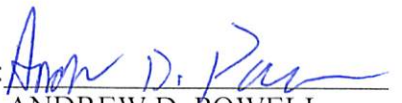
BY: 
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