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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

THOMAS ERIC MCDOWELL,

APPELLANT.

Appellate Case No. 2024-000226

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err by excluding evidence of third-party guilt where an ex-boyfriend told the investigating detective he had no memory of the night in question and admitted "the possibility existed that he was involved with the abduction" of the victim.

2. Did the trial court err in denying appellant's motion to dismiss based on the Due Process Clause of the Fourteenth Amendment because the over thirty-five-year delay between the alleged crime and his indictment prejudiced his defense?

3. Were McDowell's rights under the Due Process Clause in article I, section 3 of the South Carolina Constitution violated where the state delayed prosecution of this case for nearly four decades without justification?

RESPONDENT'S COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in excluding Appellant's allegations of third-party guilt when those allegations did not credibly support the purported guilt of the third party?

2. Did the trial court err in finding that Appellant's speculative arguments of prejudice could not support his due process claims?

3. Should this court create a new constitutional rule for pre-indictment delays based on the South Carolina Constitution when Appellant provides no reason to do so and the argument was not preserved?

STATEMENT OF THE CASE

Respondent accepts Appellant's statement of the case for the purposes of this appeal.

STATEMENT OF FACTS

The last person to see then four-year-old Jessica Gutierrez alive was her then six-year-old sister, lying beside her in bed and watching in fear a man wearing what she described as a "magic hat" take Jessica, sling her over his shoulder, and walk out of the room. Almost 38 years later, a Lexington County jury found Thomas Eric McDowell (Appellant) guilty of Jessica's abduction and murder, in addition to burglary of the Gutierrez home.

At Appellant's trial, Becky Gutierrez testified about seeing her sister kidnapped as they slept in a shared bed.[1] On June 5, 1986, Becky said, the children were on summer break and were allowed to stay up late. (R. p. 275, l. 14–p. 276, l. 3). Jessica wanted to sleep with their mother, but she could not that evening because their brother was ill; to try to comfort Jessica, Becky agreed to allow her to sleep next to the fan and away from the wall that their bed was against. (R. p. 276, ll. 7–16).

Debra Gutierrez, the children's mother, said she put her daughters to bed shortly before midnight. (R. p. 311, l. 19). As she went to turn off the light in the kitchen, she thought she saw a lit cigarette outdoors. (R. p. 312, ll. 6–11). She looked outside for several minutes before deciding that there was nothing to see. (R. p. 312, ll. 12–24). She left the front window of the house wedged open with a stick because the mechanism to open the window was broken and she wanted air circulating through the house on the warm night. (R. p. 315, ll. 1–11). It was a window Debra washed virtually every night because it was the "tattletale window"—when the children wanted to complain about each other, they would come to that widow with whatever substance was attached to their hands ending up on the glass. (R. p. 324, ll. 5–20).

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[1] Becky Gutierrez was born in 1979, according to her birth certificate, but her driver's license says she was born in 1978. (R. p. 268, ll. 13–17).

Later that evening, Becky woke up with the feeling that someone was watching her. (R. p. 277, ll. 18–22). Becky was startled and noticed a "figure" standing over their bed. (R. p. 277, l. 21–p. 278, l. 4).[2] Through squinted eyes, she watched as the figure—a man—leaned over, picked up Jessica, put her over his shoulder, and left the room. (R. p. 277, l. 23–p. 278, l. 16). She would never see her sister again. (R. p. 278, l. 16). She felt like she could not scream, because her chest was being weighed down; the only sound she could recall was the pounding of her own heart. (R. p. 280, ll. 7–14). She was too scared to alert her mother. (R. p. 280, ll. 16–22). She recalled that the person who took her sister was a White man with a beard, a mustache, and what she called a "magic hat." (R. p. 281, ll. 8–13). In the hours that followed her mother finding out that her sister was missing, Becky conceded that she might have told police officers that the suspect was a Black man, in part because she wanted the questioning to end. (R. p. 284, l. 18–p. 285, l. 16).

Also on the evening of June 5, then-Lt. Clark Rowe of the Lexington County Sheriff's Department was patrolling an area that included softball fields and a landfill. (R. p. 223, l. 9–p. 224, l. 10). Lt. Rowe saw a car's headlights come on near a wooded area ahead of him down a dead-end road. (R. p. 225, l. 12–p. 226, l. 4). Lt. Rowe turned on his blue lights and attempted to keep the vehicle from getting back on the road, but the vehicle escaped. (R. p. 226, ll. 5–19). Lt. Rowe said the vehicle was light in color. (R. p. 228, ll. 5–10).[3]

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[2] There is some dispute about the level of light in the girls' room that night. Becky recalled saying the girls' "night light" was not working that evening. (R. p. 290, ll. 17–21). (The night light was a light on top of the utility pole. (R. p. 308, ll. 4–7)). She recalled moonlight coming in through the window; however, on June 5, the moon was almost new, and it set at 7:09 p.m. (R. p. 281, ll. 1–4; p. 354, ll. 1–5; pp. 874-76). Debra recalled the night light and the moon both lighting the room. (R. p. 335, l. 22–p. 336, l. 8).

[3] Lt. Rowe also testified that the car was a four-door sedan. (R. p. 228, ll. 18–20).

When Debra woke up the next morning around 8:00 a.m., she was astonished to find that two of her three daughters were already awake. (R. p. 316, l. 19–p. 317, l. 1). She made her way to the front of the house, where she noticed that the door was open, the dog (who stayed outside) was in the living room, and the screen and curtains for the broken window had been torn down. (R. p. 317, ll. 7–13). The stick that propped the window open had been knocked out. (R. p. 320, ll. 10–13). She asked where Jessica was; Becky told Debra that the man with the magic hat had taken her away the previous night. (R. p. 317, ll. 14–18). After frantically searching for Jessica, Debra testified that she began shaking Becky and eventually slammed her into the wall as she tried to understand what Becky was telling her. (R. p. 320, l. 22–p. 322, l. 14).

Neither Jessica nor her body would be found.

As the search for Jessica began, some physical evidence was collected from the Gutierrez home. A fingerprint was found on the window through which investigators believed Jessica's abductor entered the home. (R. p. 358, ll. 14–20). A Vantage-brand cigarette butt was found on the ground near that window. (R. p. 368, l. 23–p. 369, l. 15; p. 375, ll. 17–18). An empty package of Vantage cigarettes was found in a tree. (R. p. 369, ll. 18–21). An expert later found the print was a match for Appellant. (R. p. 399, ll. 2–10).

Information came from other sources as well. During the trial, Michael Fowler testified about conversations he had with Appellant when they were both in jail in North Carolina. (R. p. 189, ll. 9–22). During one of their discussions, Fowler said, Appellant confessed to having broken into a house in South Carolina through the house's window, kidnapped a young girl, raped her, and then dismembered her. (R. p. 201, ll. 10–17). Fowler testified that Appellant said he had become enraged at the child when she bit him during oral sex. (R. p. 202, ll. 3–10). After killing the girl,

Appellant then placed the girl's remains in "a little grave" and covered it with a pile of tree limbs. (R. p. 202, l. 15–p. 203 l. 7).

Other testimony at trial helped fill in details developed through the investigations. Steven Keith Brakefield, who was Appellant's cousin, remembered that Appellant nearly always went with an "Urban Cowboy look"—complete with longer hair, a beard, and a cowboy hat. (R. p. 464, ll. 20–25; R. p. 466, ll. 1–5). He also remembered a white car that eventually ended up in the McDowell family. (R. p. 470, ll. 10–12; p. 471, ll. 14–19; p. 476, l. 18–p. 477, l. 7). Brakefield, who was also Debra Gutierrez's cousin on the other side of his family, remembered the first time he saw Appellant shortly after the kidnapping—the hair was shorter, the face clean-shaven, and the cowboy hat absent. (R. p. 472, ll. 9–14; R. p. 474, ll. 16–24).[4] Gina Brakefield Carnaggio, another cousin, remembered that Appellant smoked Vantage cigarettes. (R. p. 499, ll. 10–12). She also recalled the shift in Appellant's appearance. (R. p. 502, l. 10–p. 503, l. 9).

The case drew new attention from time to time. Sergeant David Pritchard testified about taking another look at the cold case beginning in 2006. (R. p. 508, ll. 15–18). He went on to interview what he estimated to be forty to fifty people. (R. p. 510, ll. 10–11).

In 2020–21, the FBI renewed its own interest in the investigation. Jackie Hamelryck, a Crimes Against Children Coordinator for the FBI in Columbia, submitted Jessica's case to FBI headquarters to be considered as part of a program to help solve long-lasting child abduction cases. (R. p. 579, ll. 4–5; R. p. 580, l. 14–p. 581, l. 10). In all, the FBI would call on the resources of thirteen of its offices in seven states to help in the investigation. (R. p. 593, l. 14–p. 594, l. 5). The FBI started the case with 166 leads. (R. p. 597, ll. 1–3). The FBI also developed an animation

[4] According to Appellant's counsel, Steven Brakefield was not interviewed until the most recent investigation. (R. p. 607, ll. 13–18).

showing that, given certain assumptions, there was no reason to believe that Appellant could not fit through the window. (R. p. 452, ll. 14–18).

At Appellant's trial, the State moved to exclude McDowell's attempt to blame another man (the Third Party) for the crime. (R. p. 11, ll. 6–8). The State argued that there was virtually no substantive evidence of the Third Party's involvement, and that Appellant's case rested on conjecture and suspicion. (R. p. 12, ll. 4–17). Appellant countered that the Third Party had been interviewed by law enforcement, that one law enforcement officer regarded the Third Party as lacking remorse, and that the same officer said the Third Party "did indicate that the possibility existed that he was involved with the abduction." (R. p. 13, l. 21–p. 14, l. 6). Appellant also argued that the Third Party had allegedly lived with the family until shortly before the kidnapping; was extremely jealous of Jessica's mother, Debra Gutierrez, whom he was dating; and had referred to Jessica as "Little Debbie" because of the similarities between Jessica and her mother. (R. p. 14, l. 18–p. 16, l. 4). Additionally, Appellant found it significant that there is no evidence that the Gutierrez's dog barked that night; that the Third Party had a picture of the Gutierrez family in his home that he took down after Jessica disappeared; and that a diaper was found in the Third Party's trash can that appeared neither old nor used. (R. p. 16, ll. 8–21; p. 821). Appellant further argued that it was suspicious that when the Third Party was informed that his ex-girlfriend's four-year-old child had disappeared, he wanted to know about how her kidnapper had gotten into the house and whether law enforcement had found anything. (R. p. 17, ll. 2–7).[5]

[5] Appellant also noted purported weaknesses in the State's case. For example, Appellant noted that Jessica's sister had at one point said the person who took Jessica was a Black man. (R. p. 20, ll. 8–20). How this would support introducing evidence of the Third Party is not clear, because like Appellant, the Third Party is White. (R. p. 20, l. 21–p. 21, l. 2).

The next day, the trial court allowed Appellant to proffer evidence to support his attempt to link the Third Party to Jessica's abduction. Detective David Pritchard testified about some of the reports and observations of a deceased detective who led the initial investigation into the kidnapping. (R. p. 130, ll. 14–25). Pritchard testified that the one of the records said that when the Third Party "was intoxicated of dope . . . he developed another personality, that he also became violent, not only physically, but verbally as well." (R. p. 131, ll. 19–24). The report also indicated that the Third Party could not remember the night that Jessica was taken. (R. p. 131, ll. 23–25). Additionally, it explained that the Third Party had taken down a picture including Jessica because he did not want to remember the missing child. (R. p. 132, ll. 7–15). On cross-examination by the State, Pritchard testified that no physical evidence developed in the investigation linked the Third Party to the disappearance. (R. p. 133, ll. 7–11).

Additionally, Debra Gutierrez testified. Debra disputed that the Third Party had "moved into" the Gutierrez house, though she conceded he sometimes spent the night. (R. p. 137, l. 19–p. 138, l. 5). She also testified that the Third Party was not particularly interested in her children during their relationship. (R. p. 138, ll. 10–12). However, she conceded that she previously told law enforcement that the Third Party would whisper in Jessica's ear and that Jessica had divulged the "secret" that the Third Party told Jessica he wanted to take her for a ride on a truck. (R. p. 139, l. 11–p. 140, l. 20). She also disputed the details of the Third Party's use of the term "Little Debbie" to refer to Jessica, suggesting she had misstated some of the details when she gave a written statement to police.[6] (R. p. 140, l. 23–p. 142, l. 11). Debra also said she did not recall her written statement that she had tried to call the Third Party around the time when Jessica was taken, but he did not pick up his phone. (R. p. 148, l. 25–p. 149, l. 23).

[6] It is not entirely clear when the statement was written.

The trial court ruled that Appellant's attempt to implicate the Third Party was "merely speculative" and would be excluded. (R. p. 160, ll. 1–3). The trial court explained that there was no physical evidence of the Third Party's involvement, that the detective's comments about the Third Party's state of mind were "speculative," and that the Third Party said he had no specific memory of the night of Jessica's disappearance. (R. p. 160, l. 1–l. 21). The trial court also held that the case against the Third Party was not inconsistent with Appellant's guilt. (R. p. 161, ll. 15–21). The trial court also explained that another statement given by Debra in March 2008 and underscored by the defense—in which Debra said the Third Party had moved into her home and had been asked to leave days before Jessica's abduction—did not change its ruling. (R. p. 162, l. 1–p. 163, l. 16).

In another pretrial motion, Appellant moved to dismiss the charges against him because the delay in bringing the charges violated his "due process rights under the Fifth Amendment." (R. pp. 792-94). Appellant argued that while the State had developed additional information (that was presented through testimony at trial), the majority of the State's evidence was known to investigators by 1987. (R. p. 45, ll. 3–11). Appellant additionally argued that local solicitors had not brought charge in the case over the years. (R. p. 48, l. 7–p. 49, l. 18). The Attorney General's Office reviewed the case in 2014 and 2021, deciding to bring charges after the latter investigation, which involved renewed efforts by the FBI. (R. p. 49, l. 20–p. 50, l. 4). Appellant contended that because both solicitors and the Attorney General's Office represent the State, the change in prosecuting authorities was irrelevant. (R. p. 50, ll. 20–25). Appellant argued he was prejudiced by the delay because, among other reasons, the Gutierrez home no longer existed at that location, the original lead investigator had passed away, and that Appellant's mother was no longer alive to

offer a potential alibi. (R. p. 51, l. 1–p. 55, l. 21). The trial court denied the motion. (R. p. 69, l. 21–p. 70, l. 2).

After the trial, the jury deliberated for about an hour and forty minutes. (R. p. 711, l. 22–p. 712, l. 4). The jury unanimously found Appellant guilty of murder, burglary, and kidnapping. (R. p. 714, ll. 1–8). The trial court sentenced Appellant to two life sentences, to run concurrently. (R. p. 730, ll. 9–12). This appeal followed.

STANDARD OF REVIEW

This Court reviews evidentiary rulings for an abuse of discretion. *See State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532, 534 (1941) ("[O]rdinarily the conduct of a trial, including the admission and rejection of proffered testimony, is largely within the sound discretion of the trial Judge and his exercise of such will not be disturbed by this Court on appeal unless it can be shown that there has been an abuse of discretion."). That requires a finding that the court made an error of law that prejudiced the appellant. *Id.* Recent decisions by our courts have suggested that due process violations are evaluated as mixed questions of law and fact. *See State v. Miller*, 441 S.C. 106, 119, 893 S.E.2d 306, 313 (2023).

ARGUMENT

I. The trial court properly excluded evidence of third-party guilt when the Appellant produced only speculation and suspicion that another individual might have been involved and the evidence did not exclude the possibility of his own guilt.

Appellant argues that the trial court erred by not allowing him to present a case against the Third Party based on speculation and innuendo. To the contrary, even if the trial court's ruling had shut down all discussion of the Third Party—and it did not—the ruling would not have constituted error.

First, a pair of factual clarifications.

One: Another person confessing to a crime could be relevant evidence for the jury's consideration—but that is not what happened here. The Third Party's statement that he could have been involved in the disappearance was a metaphysical could, not an admission of guilt. Indeed, the Third Party seemed eager to help, even considering the evidence that Appellant sought to introduce. The Third Party told an investigator "he understood why he was being questioned." (R. p. 817). When asked if he had something to do with Jessica's abduction, the Third Party said "he wished he knew who did." *Id.* Appellant seizes on 14 words from the police report he attached to his motion to dismiss: "Sus did indicate that the possibility existed that he was involved with the adbuction [sic]." (R. p. 825). This is hardly a confession; in fact, it is statement of uncontestable fact. The possibility existed that any number of individuals could have been involved in Jessica's disappearance; not all of them could be dragged before the jury as possible suspects.

Two: Despite the trial court's ruling, the jury did hear about the Third Party. Appellant drew testimony about the Third Party's living situation from Becky, (R. p. 287, ll. 5–11), and Debra (R. p. 343, l. 24–p. 345, l. 20). In fact, jurors heard Appellant's counsel intimate that the Third

Party could have been involved; during closing arguments, counsel said that "[t]he dog would have known [the Third Party], the man who had moved out just a few days before, but had lived there since January of the same year." (R. p. 675, ll. 10–12). Counsel also raised the potential inconsistencies in Debra's statement about the Third Party, and the fact that the Third Party did not answer his phone during Debra's alleged call to him the night of Jessica's disappearance. (R. p. 676, ll. 5–16; R. p. 677, ll. 6–8).

But assume for a moment that the jury had never heard the name of the Third Party. Even so, Appellant cannot satisfy the South Carolina test for admitting evidence of third-party guilt. Evidence of third-party guilt is admissible under *Gregory* and Rule 403, SCRE, when it supports a credible belief that the third party is guilty of the crime; it is inadmissible under Rule 403, SCRE, if it does not.

Appellant and the State agree that the starting point is *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941). And the State agrees that what the trial court in *Gregory* excluded was evidence of other crimes by other individuals. But the appellant in *Gregory* argued, not entirely unlike Appellant in this case, that the evidence he was trying to admit raised the inference that someone else had embezzled the money he had embezzled. *See Gregory*, 16 S.E.2d at 534 ("But appellant earnestly contends that this and other rejected testimony *tended to prove another guilty of the commission of the crime with which he was charged* and because the State relied upon circumstantial evidence, it was admissible." (emphasis added)). The lack of connection between the two crimes was why, in that instance, the evidence was inadmissible—it could just as well have been inadmissible if the other alleged thieves had been charged with the embezzlement for which Gregory was being tried. *See* Rule 404(b), SCRE; *State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807 (1923) (discussing "the familiar and salutary general rule, universally recognized and firmly

established in all English–speaking countries, that evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged"). In other words, that evidence was not just inadmissible because it was about other crimes; it was inadmissible because it did not go far enough to demonstrate that those other individuals were credible suspects in the embezzlement for which Gregory was on trial.

Further, the State has no quarrel with Appellant's contention that Rule 403, SCRE, is at least a useful framework for considering *Gregory* issues. *See* Rule 403, SCRE ("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."). That raises the question of how to perform that balancing test in the particular context of a *Gregory* argument. After all, any allegation by an Appellant that someone else committed the crime could be relevant, regardless of how farfetched or speculative it is. But a defendant must provide something tangible to support his allegations, something that credibly indicates a third party has committed the crime. *See* 29 Am. Jur. 2d *Evidence* § 582 (May 2025 update) ("Evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime, and without this link, such evidence is irrelevant and cannot be admitted.").

Here, Appellant's showing about third-party guilt did not amount to enough for the jury to hear those allegations. Appellant essentially showed that the Third Party might have been a jealous boyfriend to Debra Gutierrez; that he might have said some questionable things to Jessica; and that

he acknowledged the existential possibility that he was involved in Jessica's disappearance. If that is enough to stand up to the strictures of Rule 403, it is hard to imagine what would not.

Appellant also argues that the trial court misapplied *Holmes* because it implied that the strength of the State's case made Appellant's case for third-party guilt unreasonable. The trial court did nothing of the sort. *See Holmes v. South Carolina*, 547 U.S. 319, 330, 126 S. Ct. 1727, 1734, 164 L. Ed. 2d 503 (2006) ("Just because the prosecution's evidence, *if credited,* would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case.").

When read in context, the trial court's ruling was not based on the notion that because the State's case was so strong, the evidence of third-party guilt could not be introduced. It was based on the realization that the evidence of third-party guilt was so weak that the evidence of the third-party guilt could not be introduced. *See Holmes*, 547 U.S. at 331, 126 S. Ct. at 1735 ("The point is that, 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." (emphasis added)).

The closest thing that Appellant can come up with that might seem at first glance to contradict *Holmes* comes by seizing an individual phrase out of a slightly jumbled paragraph:

> I'm just gonna find that there is no evidence inconsistent with -- that's been presented with Mr. McDowell's guilt in this case. I believe what the State's relying on is a fingerprint on a window and I don't know what else, but I'm gonna find that I think it's conjecture and not allow it. I'm gonna exclude it.

Despite the exact wording of the trial court's ruling, it was evident that the trial court was considering the appropriate factors—whether the evidence was conjecture, and for that reason too weak to be useful to the jury.

Because the trial court properly found that Appellant's evidence was insufficient to make it meaningful for the jury's consideration, it was properly excluded. Because counsel was able to insert slices of the issue into the jury's considerations despite that ruling, any prejudice was minimal. This Court should affirm Appellant's convictions.

II. The trial court properly found that the allegations of prejudice from the pre-indictment delay in this case were insufficient to find a due process violation, and that even if they were not, the State's justifications for the delay were sufficient.

Appellant argues that the trial court erred in finding that his due process rights were not violated by the time that passed between the alleged crime and his indictment. Appellant is incorrect.

Drawing on federal precedent, our supreme court laid out the test for whether a pre-indictment delay violates the Due Process Clause in *State v. Brazell*, 325 S.C. 65, 480 S.E.2d 64 (1997). Under that test, the defendant must demonstrate how his ability to defend himself from the charges was prejudiced by the delay. *Id.* at 72, 480 S.E.2d at 68. Then, upon that showing, a trial court must balance that prejudice against the reasons or justifications for the delay in prosecution. *Id.* at 72, 480 S.E.2d at 68–69. Defendant cannot make the first showing, and even if he does, the balance in this case weighs in the State's favor.

The *Brazell* court laid out a test particularly for two of Appellant's contentions here, stating precisely what is required for the unavailability of witnesses to constitute prejudice.

> When the claimed prejudice is the unavailability of a witness, courts require that the defendant identify the witness he would have called; demonstrate, with specificity, the expected content of that witness' testimony; establish that he made serious attempts to locate the witness; and finally, show that the information the witness would have provided was not available from other sources.

Brazell, 325 S.C. at 73, 480 S.E.2d at 69.

Appellant's speculative arguments about the testimony his mother might have provided falls short on at least two fronts. First, Appellant did not specifically show that his mother would have provided an alibi for him. All Appellant has argued is that there is a theoretical possibility that his mother could provide an alibi defense—as trial counsel put it, that "she could potentially even be an alibi witness for him," but "*[w]e don't know* because we can't talk to her." (R. p. 55, ll. 14–16) (emphasis added).[7] In fact, in his brief before this Court, Appellant suggests that even he does not remember whether he needed to pick up his mother at work that night. For similar reasons, Appellant cannot satisfy the requirement that he demonstrate that he could not have found the information elsewhere. He arguably has just as much knowledge of when he picked his mother up from work as she would have.

Similarly, Appellant's other potential evidence is vague on what it would have shown. Appellant's trial counsel cross-examined the FBI on precisely the issue of whether their estimates of the size of the window were accurate; having the actual home could just as easily have shown conclusively that those measurements were correct, which would have cut against Appellant. The possibility of getting useful information from the lead investigator is almost pure speculation.

Even if Appellant could somehow show prejudice, he cannot show that the trial court erred in balancing the reasons for the delay against the possibility of prejudice to Appellant. In his brief, Appellant focuses almost exclusively on the discrete pieces of evidence that the State developed in subsequent investigations. Two weeks of focused attention from the FBI was not available to the State until 2021; the benefits of that are considerable. Furthermore, Appellant seems to argue that the State must produce a high-impact investigatory discovery, one that unquestionably

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[7] Trial counsel even speculated—without any elaboration—that Appellant's mother might have been able to explain why blood was found in a vehicle. (R. p. 55, ll. 22–23).

switched the case from "do not prosecute" to "prosecute." But that is not how prosecutorial decision-making works. *See United States v. Lovasco*, 431 U.S. 783, 793, 97 S. Ct. 2044, 2050, 52 L. Ed. 2d 752 (1977) ("The determination of when the evidence available to the prosecution is sufficient to obtain a conviction is seldom clear-cut, and reasonable persons often will reach conflicting conclusions.").

The State demonstrated credible reasons that the further investigations helped provide the confidence necessary to move forward with the prosecution. Balancing those reasons against Appellant's arguments that his mother might have provided an alibi, that having access to the crime scene might have proven beneficial, and that the former lead detective might have said something that benefited him, there is no due process violation here. This Court should affirm Appellant's convictions.

III. Appellant has not provided a reason for this Court to create a new test under the South Carolina Constitution for his pre-indictment delays.

Finally, Appellant argues that this Court should find that the South Carolina Constitution's standards for due process in regard to pre-indictment delays should be set higher than those provided by the United States Constitution. While Appellant is correct that this state's courts could choose to do so, he does not provide a compelling reason why they should.

As an initial matter, and contrary to Applicant's, this issue is not preserved for appellate review. Appellant does not point to any place in which he argued at the trial court level that South Carolina's standard should be more accommodating than the federal standard, because he cannot. Our courts' unwillingness to turn issue preservation issues into a gotcha game does not mean that the game has no rules at all. Rather, as our supreme court recently observed, issue preservation is meant to avoid appeals based on implicit and unspoken assumptions.

> One primary purpose of our issue preservation rules is to "give the trial court a fair opportunity to rule." A trial court's opportunity to rule necessarily includes both parties being aware of the nature of the objection such that they may present their best arguments addressing *that* objection. This then serves another purpose of our rules—"meaningful appellate review."

State v. Morales, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023) (citations omitted) (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)). Invoking South Carolina's constitutional standard did not implicitly raise the issue of whether that standard should be judged by different guidelines than the federal rule. Instead, by invoking both at the same time, the most logical reading of Appellant's argument was that because the standard for both is the same, the same facts violated both. Appellant cannot credibly argue that every time a litigant argues on multiple factors or elements, that litigant should be understood to be challenging the applicability of each factor or element under the South Carolina Constitution. Under that construction, every time multiple elements or factors are involved in a legal test, an appellant could launch a free-ranging argument that any one of the elements simply should not apply in South Carolina. That makes legal arguments a guessing game—another kind of game that our preservation rules seek to avoid.

Even here, it is not clear what rule Appellant is asking this court to adopt—or if he has a particular rule in mind at all. He assures this court that the right he seeks is not "expansive"—just that it was certainly violated here. Could the State, under the relief Appellant is seeking, have "changed its mind" (his characterization) in 1996? Or 2008? Or 2014? Without consideration of prejudice, the rule becomes a subjective rumination on how long a delay can last before it has lasted too long.

In *Lovasco*, the United States Supreme Court pointed out the dangers of that kind of unconstrained and subjective review. It could complicate prosecutions with multiple suspects,

incentivize prosecutors more likely to charge borderline cases too soon, and hamper the exercise of prosecutorial discretion. *See Lovasco*, 431 U.S. at 792–795, 97 S. Ct. at 2050–51. The Court warned that:

> the Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. Judges are not free, in defining "due process," to impose on law enforcement officials our "personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function."

Id. at 783, 790, 97 S. Ct. at 2049 (quoting *Rochin v. California*, 342 U.S. 165, 170, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952)).

Appellant asks this Court to find a new Constitutional standard following an argument that was not preserved. Instead, this Court should affirm Appellant's convictions.

CONCLUSION

Appellant has not shown any errors by the trial court. The trial court properly excluded spurious evidence of third-party guilt and properly found that Appellant's Due Process rights were not violated by this prosecution. This Court should affirm Appellant's convictions.

Respectfully Submitted,

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July 16, 2025.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

THOMAS ERIC MCDOWELL,

APPELLANT.

Appellate Case No. 2024-000226

PROOF OF SERVICE

I, **Donna D'Alessio**, an employee of the Respondent and legal assistant to R. Brandon Larrabee, of counsel for the Respondent, hereby certify that pursuant to Rule 262(c)(3), SCACR, and the Supreme Court Order of April 24, 2024, the Final Brief of Respondent, along with Proof of Service has been forwarded to Appellant's counsel, Jordan Wayburn, Esq., via email today, July 16, 2025 to jwayburn@sccid.sc.gov, and to his assistant at cstock@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 16th day of July, 2025.

s/ Donna D'Alessio

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