THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of General Sessions

R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2023-001586

The State of South Carolina, Respondent,

v.

Diontrae Travon Epps, Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On July 30, 2020, the Sumter County Grand Jury indicted Appellant, Diontrae Travon Epps, for murder and possession of a weapon during the commission of a violent crime. (R. 938 - 939).

On August 14, 2023, Appellant initially proceeded to trial before the Honorable R. Kirk Griffin. (R. 1 – 50). Shaun Kent and Jack Furse represented the Appellant, and Solicitors Ernest Finney and Jason Corbett appeared on behalf of the State. After jury selection, the Trial Court granted the State's motion for continuance based on the issues raised by Defense Counsel regarding the State's failure to disclose exculpatory evidence and failure to timely disclose material evidence. (R. 47, lines 7-20).

On September 25–29, 2023, Appellant again proceeded to trial before Judge Griffin and a different jury. Shaun Kent and Jack Furse represented Appellant, and Solicitors Ernest Finney and Jason Corbett prosecuted the case on behalf of the State. The jury returned guilty verdicts as charged. (R. 902, lines 2-9). The Trial Court sentenced Appellant to life imprisonment for the murder conviction and ordered that "there will be no sentence on the weapons charge." (R. 911, lines 4-10; R. 934 – 937).

On October 9, 2023, Appellant filed a Notice of Appeal. (R. 940 – 941). This appeal follows.

STATEMENT OF THE FACTS

Background

The State's theory of the case: The "Sunoco Shootout" occurred at the "Hop-In" convenience store in downtown Sumter on September 9, 2019, because of animosity created by a Facebook video clip where Appellant purportedly threatened the Decedent. Specifically, the State sought to prove that Appellant fatally shot the Decedent during an altercation in the parking lot of that store. In his defense, Defense Counsel presented expert opinion testimony from Kenneth Kinsey that, based on the evidence, Appellant did not shoot the Decedent and could not be guilty of murdering the Decedent.

First Trial

On August 14, 2023, Appellant initially proceeded to trial before Judge Griffin. (R. 1 – 50). After jury selection, Defense Counsel informed the Trial Court that he had "received a phone call last night from a fellow attorney . . . who provided [Defense Counsel with] some information about potential exculpatory information that may have been garnered from the federal government." (R. 39, lines 10-14).

Defense Counsel stated that he and his associate "received a text message . . . at exactly 1240 telling us that the information that we had - - that I had garnered from this attorney last evening was accurate." (R. 39, lines 19-22). Defense Counsel then instructed his associate "to contact the AUSA who was referenced about potential exculpatory information that was not provided to the Defense." (R. 39, line 23 – 40, line 1). Defense Counsel noted, "it was suggested that the AUSA provided potential exculpatory information to a [former] solicitor concerning a potential self-defense allegation by a witness who is potentially – not potentially was in federal custody." (R. 400, lines 5-9).

Defense Counsel explained, "This information was written and triggered and what is commonly referred to as a 302 or a DA6, which was in information from this witness, was on both of our witness lists", and the "[t]he AUSA said they attempted to give this information to the then solicitor[.]" (R. 40, lines 10-14). Defense Counsel clarified, "I think the quote from the AUSA was the solicitor – then – then assistant solicitor informed them that this information would be hurtful to their case and they did not want to have this information." (R. 40, lines 21-24). Defense Counsel told the Trial Court, "The potential self-defense information was never given over to our office whatsoever." (R. 40, lines 24-25).

Notably, Defense Counsel also put on the record, "*I informed the Court that we still would be willing and ready and wanted to go forward with trial today.*" (R. 41, lines 9-10) (emphasis added). Defense Counsel reiterated, "But long and short to make it very simple, the information given to the Court is that the federal government potentially was in possession of exculpatory information that a then solicitor on this case refused to accept or acknowledge, so that it would not have to be provided to the Defense." (R. 42, lines 1-6).

In response, Solicitor Finney stated, "we feel like a continuance would be the only proper thing to – to do at this point, so that these matters can be investigated" because "[o]bviously the information that was given to the Court today would be of some assistance to [Appellant] and his lawyer, if it pans out." (R. 42, lines 11-15). Specifically, Solicitor Finney asked the Trial Court to grant the motion for continuance to the next term of court. (R. 42, lines 21-24).

Defense Counsel replied to the State's request for a continuance as follows:

> Judge ... we would *not* join in the motion. I've spent the entirety of the weekend preparing for this case. Very little sleep, shall we say. Coming back for (sic) the mountains catching the flight back. So we are ready – ready to go forward on. [Appellant], and I appreciate what the Court's, I mean, the solicitor's concerns are, but *I can assure you we are prepared and ready to go forward.*

(R. 43, lines 2-8) (emphasis added).

Defense Counsel also argued that the State failed to timely disclose a "voluminous" amount of evidence prior to trial. (R. 44, lines 10-17). Defense Counsel further noted that the missing evidence was only discovered because his associate and paralegal went to the Solicitor's Office to review the prosecution's file in preparation for trial. (R. 44, lines 17-25). Defense Counsel noted his concern with the untimely disclosure of evidence:

> [G]iven the new chief administrative order, my concern is that this case was placed on the trial docket and ready to go. And my understanding is it is assumed that all discovery is going to be provided at the time that the case is on the trial docket and called for trial. *That Facebook video was not given until Friday*...We believe that there is some information missing from the video that we wouldn't have had time to go look for. *It is a clip that somebody has clipped portions of it*, so it would probably violate the rule of completeness. It's not an entirety of the video.

(R. 45, line 14 – 46, line 1) (emphasis added).

Notably, Defense Counsel explained why he did not want a continuance: "*[M]y fear is that the State, by asking for a continuance, then come September 25th, can say, Well, we had it provided in plenty of time.*" (R. 46, lines 5-7) (emphasis added).

The Trial Court responded, "Well your – objection and motion with regard to discovery is noted. I'm not going to rule on that motion here today because I think the [continuance] motion is – is the more pressing motion at this time." (R. 46, lines 14-17). The Trial Court ultimately granted the State's motion for continuance:

> [S]ince this issue does involve potentially exculpatory information **and because all we know right now are that there are allegations that** these things were done, I think justice requires this case be continued to afford the parties and (sic) opportunity to investigate these issues to determine whether any of this information is valid. And if so, what are the appropriate steps to take after the investigation is done. So I certainly don't want to continue the case, but I feel that justice

> requires, and it is my obligation as the trial judge to continue this case to the week of September 25th. That should give the parties an adequate amount of time to address these concerns, which have been raised here today.

(R. 47, lines 7-20).

Second Trial

On September 25–29, 2023, Appellant again proceeded to trial before Judge Griffin and a different jury. Pre-trial, Defense Counsel put on the record that he requested via email to keep the original jury that was selected on August 14, 2023, because "[w]e liked the jury that we had" and "thought there was potential for prejudice that we were not allowed to keep the jury since it was not us requesting a continuance." (R. 108, lines 12-19). Defense Counsel noted, "I didn't get a response from the Court or the Solicitor." (R. 108, lines 19-20).

The Trial Court responded, "I'll note that for the record, but I think that issue, certainly, would be a discretionary one for the Court and I just didn't believe keeping that same jury was feasible given the nature of the way the events unfolded last month." (R. 109, lines 1-5).

Motion to Dismiss

Defense Counsel then moved to dismiss the four-year-old murder charge, arguing prosecutorial misconduct. (R. 109, lines 9-11). Defense Counsel provided a list outlining the untimely disclosure of evidence and marked it as Court's Exhibit #4: "Then, Judge, what started this matter is on Friday, August 11th, 2023, you will notice pretty close to 500 things of evidence that we recovered from the solicitor's office. (R. 110, lines 15-21; R. 925 – 933). This Court's exhibit outlined the *significant* amount of discovery provided to Defense Counsel on Friday, August 11, 2023, and the additional evidence that the State disclosed *after the continuance*. (R. 925 – 933).

As outlined in Court's Exhibit #4, Defense Counsel received the following discovery the

Friday before trial on August 14, 2023:

> • 9 – 911 calls • Cad Report • CFS – Unit Response Times • Consent Forms: Barbara Jenkins, C. Rogers, R. Myers • Crime Scene Log • SPD Evidence Chains • SCSO Evidence Processing Reports • SPD Evidence Processing Reports • Recorded Statements: Gabrielle Meyers, Jaquell Myers, Tyrell Billups, Rodney Lewis, Perry Vanburen, Kendall Dow, Rasheen Rich, & Michael Lucas • 201 Acura SW Photos • 229 Altima SW Photos • 155 Buick at Sumer Wrecker Photos • 257 Corolla at John Harris Photos • 107 Impala SW Photos • 166 Snapp Lab Photos • 47 Snapp Lexus at Lex Photos • 687 Snapp Scene Photos • 236 Will Malibu Photos • 195 Snapp Scott Will Truck Photos • 173 Snapp Impound Nissan Photos • 83 Impala at Lec Photos • 84 J. Hansen Photos • 299 Kearny IV Photos • 12 AR Pistol Lab Photos • 297 Scott Will Photos • 13 W McFadden Photos • 4 screenshot photos • 7 Sled Reports • Victim Rogers Autopsy Photos, receipts, and tox • 13 BWC videos • 1 dash cam video • Enhanced hospital videos by SLED • *Facebook Live Video* • Multiview video • Video Tuomey • Scene Diagrams • SPD Automated Fingerprint Identification System (5 pages) • SPD Forensic Laboratory Processing Forms (5 pages) • SPD Crime Scene Investigation and Evidence Processing Forms (9 pages) • SPD Chain of Custody Forms (49 pages) • SPD Property Evidence Log (8 pages) • Willie McFadden 10/12/19 – Supplemental Report • Jeffrey Hansen 9/23/19 - Supplemental Report • Jeffrey Hansen 10/11/19 - Supplemental Report • Austin Michael 9/12/19 - Supplemental Report • West Thomas 9/08/19 - Supplemental Report • West Thomas 9/08/19 – Incident Report • SPD Investigative Notes (2 pages) • SLED Laboratory Forensic Service Request 10/31/19 • SPD Lieutenant's Report 9/09/19 • SPD Lieutenant's Report 9/13/19 •SLED DNA Department • SLED Laboratory Forensic Service Request 10/11/19 • SLED Laboratory Forensic Service Request 10/11/19 (Submission 2) • SLED Laboratory Forensic Service Request 10/22/19 • SLED Evidence Log 12/30/21 • SLED Evidence Log 3/01/22

(R. 925 – 933) (emphasis added).

Defense Counsel referenced his prior argument to the Trial Court that the docket management order issued by our Supreme Court required disclosure of evidence prior to a case being listed on the trial docket. (R. 111, lines 4-7). Defense Counsel also reiterated why he did not want a continuance of the prior trial: "*I didn't want to change anything, the strategy in my case*

and I was afraid that a continuance would do nothing more than hurt [Appellant's] case and I was still prepared to go forward." (R. 114, lines 3-6) (emphasis added).

Defense Counsel explained that he received the following additional discovery *after* the Trial Court granted the State's motion for continuance on August 14, 2023: Tyrell Billups's interview report from the federal Government on August 21; a disc with Billups's interview on August 22; an anonymous tip information on September 1; and a diagram of the Decedent created by the medical examiner on September 18. (R. 115, lines 2-22).

Defense Counsel addressed the prejudice created by the Trial Court's decision to grant a continuance: "[T]he fact that the solicitor's office as recently as the Friday before we are scheduled to go for the first trial was making an argument that there is no self-defense because [Appellant] pulled the gun first and then, possible, can only change that theory after I was forced to put this information hurts [Appellant]." (R. 118, lines 10-15). Defense Counsel further argued, "That's one of the reasons why the prejudice does exist ... *Because if they [the State] now change their strategy and say hey, by the way, we believe that [the Decedent] had a firearm, but that was not what they were going to argue to that jury some time ago.*" (R. 118, lines 16-20) (emphasis added).

In support of the motion to dismiss, Defense Counsel called the following witnesses to testify: Ninth Circuit Public Defender Cameron Blazer, Assistant U.S. Attorney Benjamin Garner, Summer Roberts (his paralegal), and attorney Lewis Warr.

Attorney Cameron Blazer

Ninth Circuit Public Defender Cameron Blazer testified that, while discussing Defense Counsel's preparation for the "Sunoco murder" trial, she informed Counsel that she "had a client [Tyrell Billups] who had given some information about that case." (R. 121, lines 4-12). Circuit Defender Blazer also testified that the Sumter County Sheriff's Department attended one of the

proffer meetings between Mr. Billups and federal law enforcement. (R. 122, lines 19-24). Circuit Defender Blazer further testified that Mr. Billups told the federal investigator that the Decedent pulled a gun on Appellant first (contradicting the State's theory). (R. 124, lines 1-8).

Specifically, Circuit Defender Blazer testified, "my recollection is that [Billups] described, I think it was [Appellant] approaching the person known as Killa Mike [the Decedent] and having some sort of discussion/fisticuffs, and then his description of the event was that Killa Mike pulled a gun", and "I believe what he said is that Killa Mike tried to shoot [Appellant] but his gun jammed." (R. 124, lines 1-8).

Circuit Defender Blazer testified that AUSA Garner called former solicitor, John Meadors, to inform him of her client's statement. (R. 130, lines 8-18). Circuit Defender Blazer also testified that AUSA Garner "called me *immediately after* having spoken to [Solicitor John Meadors] and he was rattled." (R. 130, lines 23-25) (emphasis added). Circuit Defender Blazer further testified that AUSA Garner "conveyed to me concern that he shared with Mr. Meadors." (R. 131, lines 10-11).

Circuit Defender Blazer explained that she had been practicing law for approximately 16-17 years and almost "exclusively criminal defense since 2008." (R. 133, lines 7-12). Circuit Defender Blazer also testified that she believed that Mr. Billups's statement to federal law enforcement was exculpatory and should have been disclosed by the Solicitor's office. (R. 134, lines 1-7). Notably, Circuit Defender Blazer testified, "I meant that by that time, you knew the existence of a 302, a federal report of investigation, that should exist and that as far as I'm concerned was absolutely known to the solicitor, who was then prosecuting the case sometime around May of '22 and that had *in my opinion been withheld intentionally from you.*" (R. 135, lines 9-14; R. 916 – 924) (emphasis added).

On cross-examination, Solicitor Finney had Circuit Defender Blazer review Billups's prior statement to the Sumter Police Department and confirm that the statements are inconsistent. (R. 140, lines 18-24). Circuit Defender Blazer confirmed that Billups' statement to the Sumter Police Department occurred on September 25, 2019, and the statements to the federal investigator occurred on April 21 and May 6, 2022. (R. 141, line 12 – 142, line 21).

When asked on cross-examination whether a continuance is a remedy for when a court becomes aware of non-disclosed exculpatory information, Circuit Defender Blazer responded, "That is the bane of every defense lawyer's existence, is that the general remedy of Brady violations is to give the government more time to be less terrible." (R. 149, lines 5-10).

AUSA Benjamin Garner

AUSA Garner testified that he currently serves "as a deputy criminal chief over the narcotics and violent crime section" of the United States Attorney's Office, and that his "nine-year anniversary was last Thursday." (R. 159, lines 1-9). When asked what information Defense Counsel wanted to address by calling him as a witness, AUSA Garner testified, "Requesting information in connection with a conversation that I had with Mr. Meadors concerning information that was supplied during the course of a federal prosecution of a defendant that I was prosecuting." (R. 161, lines 15-19).

AUSA Garner testified that he prosecuted Mr. Billups, who entered a proffer agreement, and that "someone with Sumter City Police Department was present during, at least, one of the many interviews he met with law enforcement." (R. 163, line 3 – 164, line 3). Based on the proffer interviews, AUSA Garner contacted former Solicitor Meadors and "gave him a summary of the information that Mr. Billups had provided just as it pertained to the Sunoco murder case." (R. 167, lines 6-8). Specifically, AUSA testified that he provided the following information to former

Solicitor Meadors:

> I indicated that based on my review of the information contained in the 302, I believed it could contribute to a self-defense claim and indicated the high nature of that I believed that Mr. Billups indicated that he witnessed the shooting and that the victim had pulled a firearm first and attempted to fire that firearm, at which point, the defendant in the Sunoco murder case discharged his weapon. That was the information that I provided to Mr. Meadors.

(R. 167, lines 11-18).

AUSA Garner testified that Meadors responded by stating, "*Who are you? I thought you were calling to help me and this doesn't help me.*" (R. 167, lines 21-2) (emphasis added). AUSA Garner also testified, "I then offered to provide him with the 302 containing the statement that Billups had provided during the course of his debriefing with law enforcement", and that Meadors "indicated that he would reach out to his investigators." (R. 167, line 22 – 168, line 4). AUSA Garner further testified that he had no further contact with Meadors. (R. 169, lines 1-2).

On re-direct, AUSA Garner clarified Meador's exact response during the phone call about Billups' interview, "*Who are you? I thought you were trying to help me. This doesn't help me, this hurts me.*" (R. 178, lines 10-11) (emphasis added). AUSA Garner also testified that he *immediately* called Circuit Defender Blazer to discuss Meadors' response. (R. 178, lines 13-15).

Defense Counsel recalled Circuit Defender Blazer to testify about her conversation with AUSA Garner that occurred after his phone call with Meadors. Specifically, Circuit Defender Blazer testified that she knew AUSA Garner personally and that he was "rattled" and "[d]istressed about his phone call with Mr. Meadors." (R. 181, line 10 – 183, line 12; R. 184, lines 7-9).

Summer Roberts

Defense Counsel then called his paralegal who is charge with obtaining and organizing the client discovery to testify. (R. 186, lines 2-11). Ms. Roberts testified, "Myself and Jack [Furse]

came up here [to the Solicitor's Office] on Friday before the original trial to go through the solicitor's file to make sure we weren't missing any discovery", and "it was brought to my attention that we were missing a good bit." (R. 186, lines 19-22). Ms. Roberts also identified Court's Exhibit #4 as a document she created listing the dates and evidence received in this case. (R. 187, lines 7-15; R. 925 – 933).

Ms. Roberts testified that the Solicitors acknowledged that they had not disclosed that discovery to the Defense Counsel. (R. 189, lines 22-25). Specifically, Ms. Roberts testified that the State failed to disclose "thousands of photos ... SLED reports, DNA reports", and that they were provided all of that evidence the Friday before the original trial. (R. 190, lines 9-14). Ms. Roberts further testified that the State provided the following discovery *after* the continuance: "We have received ... a body diagram ... Tyrell Billups' 302, a CD with his interview ... anonymous tips ... and a couple of crime scene sketches." (R. 191, lines 3-6).

John Meadors

In response, Solicitor Finney called John Meadors to testify about the allegation of prosecutorial misconduct. (R. 200, line 19). Meadors testified that he worked for the Third Circuit Solicitor's Office for eleven and a half years and left that office on December 19, 2022. (R. 200, line 23 – 201, line 2). Meadors testified he prosecuted the Joquell Myers case that was related to the Hop-in shooting and handled disclosing the evidence to the defense counsel. (R. 201, line 9-18).

Meadors admitted to having a phone call with AUSA Garner about Tyrell Billups but claimed he told AUSA to watch the video of shooting and said he would "get [the statement] through our locals. I'll get it through Mr. McFadden." (R. 203, lines 5-9). Meadors also admitted that he "probably was a little frustrated, quite frankly." (R. 203, lines 6-7). Meadors conceded the

statement should have been disclosed: "Exculpatory, clearly, they were entitled to it, but there was not reason that would have been intentionally withheld." (R. 206, lines 17-19).

Meadors claimed that he talked to investigator McFadden several times about the statement but "*never listened to it, never looked at it*" because "[i]t was not relevant to that trial and the information they provided was inconsistent with what I knew about the case." (R. 204, lines 7-19) (emphasis added). Meadors also claimed, "I asked Danny Caufield with your office and our office to get with Investigator McFadden and get all the interviews there were that had been conducted with the federal authorities." (R. 205, lines 21-24). Meadors maintained that he did not intentionally withhold exculpatory information from Defense Counsel. (R. 207, lines 6-9; 208, lines 1-2).

On cross-examination, Meadors conceded he may have said that Billups' statement hurts his case and was "frustrated a little bit" during the phone call with AUSA Garner. (R. 211, lines 12-15). Meadors also claimed that Billups's statement had been disclosed Joquell Myers' attorneys. (R. 212, lines 10-13).

Willie McFadden

Solicitor Finney then called Investigator Willie McFadden of the Sumter Police Department who had the "lead role in the Hop-In shooting investigation" to testify. (R. 217, lines 6-14). Investigator McFadden testified that he did *not* know Tyrell Billups made statements to the federal law enforcement until the previous month (i.e., the original trial date). (R. 218, lines 9-24). Investigator McFadden admitted that he learned Michael Roberson from his team attended and recorded Billups' interview in May of 2022. (R. 219, lines 4-13).

Despite his immediate prior testimony, Investigator McFadden claimed that Billups' interview had been disclosed to Joquell Myers' attorneys. (R. 219, lines 18-25). Investigator

McFadden conceded that he did not know whether Billups' interview had been provided to Defense Counsel. (R. 219, line 25 – 220, line 1). Investigator McFadden acknowledged that he had been working with Assistant Solicitor Jason Corbett for the past several months on Appellant's trial. (R. 220, lines 22-25).

On cross-examination, Investigator McFadden admitted that former Solicitor Meadors spoke to him about the recorded interview but did not request that he obtain a copy of the 302 report. (R. 222, lines 1-18). However, Investigator McFadden maintained that he was "advised by another detective that the federal government was looking at this case" and not by Meadors. (R. 224, lines 1-24). Investigator McFadden maintained that he provided the Tyrell Billups recorded interview to the Solicitor's Office and "they provided everything to Joquell Myers' attorney." (R. 225, lines 1-10).

Lewis Warr

Defense Counsel also requested to call attorney Lewis Warr who represented Joquell Myers after the Trial Court took the matter under advisement. (R. 238, lines 11-25).

In response, Solicitor Finney stated, "The situation as I understand it is that once the records were produced by law enforcement, given to our investigator, they were given to Mr. Meadors and he hand delivered them to a trailer at the Warr Law Firm on a weekend, like, a Saturday, he thinks and told Mr. Warr that the disc would be there for him to pick up." (R. 239, lines 13-18).

Attorney Warr testified that he is aware of Tyrell Billups and that he reviewed his discovery file for Joquell Myers. (R. 241, lines 3-21). Attorney Warr also testified, "*We do not have any recording of any interview with the federal government that Mr. Billups gave*" and "[t]he only interview we were provided in discovery was from the September of 2019 with Sergeant Culick at the Sumter Police Department." (R. 241, line 24 – 242, line 3) (emphasis added). Notably,

Attorney Warr explained that he did a thorough search of the file:

> I scoured my files. I looked at every single disc that was provided, every download on the computer and looked at every single video and interview from that trial and there was no interviews from any time later than – I think 2020 ...The only interview I have with Tyrell Billups was that 2019 interview.

(R. 242, lines 5-10).

On cross-examination, attorney Warr acknowledged that he received discs from former Solicitor Meadors but "*2022 interview is not on those discs.*" (R. 244, lines 1-23) (emphasis added). Attorney Warr further testified that he had never heard of the 2022 interview. (R. 244, lines 24-25).

On re-direct, attorney Warr testified that Appellant's conduct was an issue during Joquell Myers' trial: "The State used the theory of mutual combat and [Appellant] and [the Decedent's] altercation precipitated that combat that they alleged gave rise to mutual combat." (R. 249, lines 3-6). Attorney Warr also testified that the suppressed discovery would have been favorable to Myers and made it clear that he never received "the Billups discovery from 2022." (R. 249, lines 9-25).

Arguments

Defense Counsel argued, "Your Honor, we are here on a motion to dismiss the State's case based on Brady violations and prosecutorial misconduct." (R. 229, lines 7-9). Defense Counsel cited *State v. Gibson*, 334 S.C. 515, 514 S.E.2d 320 (1999) and argued that Appellant presented evidence satisfying all four elements to prove a discovery violation. (R. 229, line 9 – 233, line 5). Specifically, Defense Counsel argued that the undisclosed evidence was favorable to Appellant, in the possession of or known to the prosecution, suppressed by the prosecution, and material to guilt or punishment of Appellant.

Notably, Defense Counsel argued "*the only remedy that provides any sort of benefit*" to Appellant is a dismissal and is "*the only remedy that provides any sort of sanction whatsoever ... to deter this type of behavior in the future, Your Honor, is a dismissal.*" (R. 232, lines 15 – 233, line 2) (emphasis added)

Solicitor Finney previously argued, "My understanding is [Appellant] has to prove – there has to be a bad faith showing that the State intentionally and willfully withheld information or that the police withheld information for a case to be dismissed." (R. 195, lines 19-25). Solicitor Finney also noted that Meadors "was no longer in the [Solicitor's] office by December of '22, just a short time after the first defendant was convicted." (R. 196, lines 13-15). Solicitor Finney cited *State v. Reaves,* 414 S.C. 118, 777 S.E.2d 213 (2015) in support of his argument to deny the motion to dismiss.

Solicitor Finney acknowledged that Solicitor Corbett "did assist on the first Hop-In case" and "took over the lead [when] Meadors left." (R. 197, lines 6-7). Solicitor Finney maintained that Appellant had not been prejudiced by the continuance and failure to disclose exculpatory evidence because "Mr. Kent will have had everything for a substantial amount of time." (R. 197, lines 14-17).

Solicitor Finney argued, "[Defense Counsel] in the beginning that he would have gone to trial in August without this evidence, so having it labeled as favorable when he didn't need it to proceed to trial is now a sham argument. (R. 233, lines 11-15). Notably, Solicitor Finney admitted, "*Yes, we may have been negligent in turning things over* because we have multiple defendants in this case and we were operating under an order that required us to do either the speedy trial first or the oldest case first and that's why we've been trying to push it out." (R. 235, lines 5-9) (emphasis added).

Solicitor Finney maintained whether evidence is material is "going to be up to a jury to decide" and "materiality of it has nothing to do with whether we turned it over or not." (R. 235, lines 13-22). Solicitor Finney also claimed, "We think that the motion for prosecutorial misconduct failed because Mr. Meadors was a valued employee ... and as far as we know, he's never had problems with turning over evidence[.]" (R. 235, line 25 – 236, line 3). Solicitor Finney further noted, "we are doing the best we can to push this stuff out", and "we understand that we don't always make A's, but we do very well in getting it out in a timely fashion." (R. 236, lines 15-17).

Trial Court's Ruling

The Trial Court found that the evidence was favorable to Appellant, known to the State, ultimately provided to Defense Counsel, and not material because Defense Counsel discovered the information in time to adequately use it at trial. (R. 253, line 6 – 254, line 21). The Trial Court cited *State v. Kennerly*, 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998), aff'd, 337 S.C. 617, 524 S.E.2d 837 (1999) to support its ruling.

The Trial Court noted his assessment of the State's disclosure of evidence:

> Obviously, in this case, the discovery process was messy and the records that were kept when discovery was produced were potentially – I guess one could view them as deficient, but ultimately, the Defense has the information.
>
> And I understand it got the information on the eve of the first time this case was called for trial and that the Defense was in a unique position given how the evidence was discovered, but, ultimately, they have the evidence and they could use – they can do with that evidence whatever they see fit.
>
> So, [Defense Counsel], I'm going to respectfully deny your motion to dismiss because the materiality prong of the four-part test has not been met when applying the facts of this situation under the framework of State v. Durant and State v. Kennerly.

> As far as prosecutorial misconduct, . . . I think negligent was the word used by Mr. Finney yesterday. And I'm not casting any aspersions on anybody. I think negligent is a word that would adequately describe this. I think sloppy is likely another ...
>
> So I don't think this rises to the level of a due process violation, which would require dismissal of this charge, so I will respectfully deny the motion to dismiss and I will note your objection for the record, [Defense Counsel].

(R. 254, line 22 – 256, line 3).

Defense Counsel then requested that the Trial Court issue credibility findings, and the Trial Court responded, "I'll say there's obvious discrepancies in Mr. Meadors' memory of these transactions and Mr. Warr's memory of these transactions . . . I don't think there's been conclusive proof – at least, not in my mind conclusive proof that one side was more credible than the other." (R. 256, lines 4-16). The Trial Court noted, "[T]he State conceded that the items that Ms. Blazer and AUSA Garner testified to occurred." (R. 256, lines 23-24).

The Trial Court also addressed Meadors' response to AUSA Garner during their phone call, "I mean, it sounded like an off-handed comment that, perhaps, Mr. Meadors in hindsight would have rather not made", and "I'm not going to step out on the limb saying I believe this witness was being untruthful." (R. 257, lines 9-11, lines 21-22).

Facebook Video Clip

Pre-trial, the State called the Decedent's girlfriend, Arkell Eaglin, to authenticate a video clip supposedly posted on Facebook that she saw one month before the fatal shooting. (R. 275, line 13 – 277, line 3; R. 283, lines 1-25; State's Exhibit #1). Ms. Eaglin identified Appellant as the man singing in the video. (R. 282, lines 7-9). Ms. Eaglin claimed that several people sent her the video on Facebook approximately one month before the fatal shooting. (R. 283, lines 1-25).

On cross-examination, Ms. Eaglin acknowledged that she did not see the video when it was

originally posted live on Facebook. (R. 285, lines 22-24). Ms. Eaglin also acknowledged that she did *not* record the video, did *not* know who created the video, and did *not* have any personal knowledge of the people in the video. (R. 286, line 15; R. 288, lines 3-11). Ms. Eaglin further disclosed that this was only a clip of the original video and was *not* the full video. (R. 287, lines 3-16).

The State then called Investigator Willie McFadden of the Sumter Police Department to identify the individuals in the Facebook video clip. (R. 290, lines 1-25). Investigator McFadden maintained that Appellant acknowledged the existence of the Facebook video clip. (R. 292, line 14 – 293, line 8; R. 913 – 915). Investigator McFadden also testified, "The video was sent to me by family." (R. 293, lines 12-13).

On cross-examination, Defense Counsel impeached Investigator McFadden with his prior testimony at Joquell Myers' trial. (R. 294, line 6 – 298, line 21). Specifically, Investigator McFadden conceded that he previously testified that the video was sent to him anonymously, but is now claiming, "it could have been sent anonymously through a family member." (R. 294, lines 19-23). Notably, Investigator McFadden admitted that he does *not* know who sent the Facebook video clip, that he did *not* send a subpoena to Facebook, and has *not* contacted Facebook about the video. (R. 298, lines 8-21).

The State argued that the "video is contemporaneous to the act that [Appellant] is charged with in the indictment" because "the video was seen by Ms. Eaglin and she testified as to [the Decedent] within 30 days of his death." (R. 299, lines 18-22). That State also argued, "[t]hese threads, we think, are basis of motive to show [Appellant's] mental status and his feelings towards [the Decedent]." (R. 300, lines 5-7). The State further argued that the relevance of the other portions of the video are unknown. (R. 300, lines 16-21).

In response, Defense Counsel argued that the State failed to timely disclose the Facebook video clip prior to the original trial date on August 14, 2023:

> Your Honor, when we started this back on August 14th when we were supposed to have the trial, I was very specific that this video was going to come up and I wanted the Court to hold the date in issue from that date to this date for this specific reason. That's the first part of the argument of what I gave you. We have a discovery disclosure order in South Carolina and the discovery disclosure order gives the solicitor's office specific detail of when there's supposed to be (undiscernible) videos.
>
> In this unique situation, [the State] supposed to disclose enough of the case to be placed on the trial docket for it to be ready for trial. ... That was the first part of our argument of what I have to you, Your Honor, and what I asked for back on August 14.
>
> The lateness of the disclosure of the video by the solicitor's office violates the disclosure order and one of the reasons why, this situation is why the State of South Carolina has taken over cases from the solicitor's office. Once you put that case on the docket, you are attesting to the Court as well as to the defense we have properly given you all the discovery so you can properly prepare your case. They didn't do it. That was my argument. I said I want this ruling set back on that date on August 14th so they can't come in – which they keep saying throughout this last two days, oh, he had 30 days, what's the big deal? The big deal is there's an order that specifically says you can't do that.

(R. 301, line 19 – 302, line 23).

Defense Counsel also argued that the State cannot authenticate the Facebook video clip:

> So then we go one step further, the video can't be authenticated. It just can't. ...
>
> The reason that I ask and I don't understand why they believe calling Ms. Eaglin allows them to authenticate the video.... The Court has said a condition precedent to introducing video evidence, phone evidence, phone information is authentication. A person with independent knowledge of something what they propose it to be must testify and say this is what I think it is, meaning I have personal knowledge of the people in the video, I have personal knowledge of people who shot the video, ... Eaglin cannot be the person to authenticate because one, wasn't there when it was made, knows

> absolutely nobody in the video and when shown the video by an outside source, didn't see it herself, she can't authenticate the video of it herself. ... If she is allowed to authenticate it, [the State] can call anyone from out in the street, show them a the video and say did you see it, okay, ago ahead and authenticate.

(R. 302, line 24 – 304, line 10).

Defense Counsel further argued that the State must show the full video based on the rule of completeness:

> Your Honor, the rule of completeness becomes very important. Rule 106 of the Rules of Evidence, we're entitled to a complete presentation of what happened. You can't just take a snippet of some, a small piece of it and say all right, Shawn, this is what you have to argue with. They have a right to contact Facebook. They have a right to get Facebook subpoenaed. They have this information. Simply, as far as I'm concerned, opens up the ability to then contact and get the full video....
>
> Nobody in the video will be called to testify, nobody. So now we have a confrontation clause problem and a possible hearsay problem.

(R. 304, line 12 – 305, line 13).

Defense Counsel argued that the Facebook video creates a "confrontation clause problem", unfair prejudice to Appellant due to "gang signs and activity", and a temporal issue due to the video being viewed at least thirty days prior to the shooting and no testimony of when the video was recorded. (R. 306, line 2 – 307, line 12).

Solicitor Finney responded that the Facebook video clip illustrates motive and malice and is an issue for the jury's consideration. (R. 307, lines 16-18).

The Trial Court found the State had authenticated the video based on Ms. Eaglin's testimony that she received the video on Facebook, and Investigator McFadden identified the people in the video, and Appellant made a statement referencing the video. (R. 309, line 13 – 310, line 10). The Trial Court also found that Appellant's statement in the video constituted as an

admission by a party opponent under Rule 801(d)(2) of the South Carolina Rules of Evidence. (R. 310, lines 11-13). The Trial Court further found that the rule of completeness does not apply because the State is not in possession of the complete original video. (R. 311, lines 7-18).

Notably, the Trial Court provided the following ruling on the State's untimely disclosure of the video clip:

> I understand that [Defense Counsel] – I note that he requested that – the first time this case was called in August, I believe August 14th, that he made a motion regarding the late disclosure of this evidence at that time, but I think all things considered, the analysis is the same.
>
> So that's a long way of me saying that I think the video has been authenticated. It is admissible in my mind and I will note your objection for the record.

(R. 312, lines 1-9).

At trial, Defense Counsel objected to the State seeking to admit the Facebook video clip in evidence as State's Exhibit #1 during Ms. Eaglin's testimony. (R. 629, lines 19-25). The Trial Court admitted the video clip over counsel's objection. (R. 630, lines 2-6).

ARGUMENT

I. THE TRIAL COURT ERRED BY GRANTING THE STATE'S MOTION FOR CONTINUANCE TO INVESTIGATE THE STATE'S FAILURE TO DISCLOSE EXCULPATORY EVIDENCE AND BY DENYING APPELLANT'S MOTION TO DISMISS WHEN THE RESULTING UNFAIR PREJUDICE DENIED HIS RIGHT TO A FAIR TRIAL.

Standard of Review

"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)). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Id.* at 401, 853 S.E.2d at 338 (quoting *Bryant*, 372 S.C. at 312, 642 S.E.2d at 586).

Law

Generally, a motion for continuance should be made at the time the underlying reason for such becomes known. *See State v. Greuling*, 257 S.C. 515, 520, 186 S.E.2d 706, 708 (1972) (finding no merit to the argument the trial judge erred in refusing to entertain the motion for continuance when the motion was made after the trial had begun and upon grounds which existed prior to trial); *State v. Leonard*, 287 S.C. 462, 473, 339 S.E.2d 159, 165 (Ct. App. 1986), *rev'd on other grounds*, 292 S.C. 133, 355 S.E.2d 270 (1987) ("[A] motion for continuance based on grounds which exist prior to trial ordinarily must be made before the jury is sworn."). "Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." *State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002).

"A *Brady* claim is based upon the requirement of due process," and a *Brady* violation occurs when: "(1) the evidence was favorable to the accused, (2) it was in the possession of or

known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999) (citing *Kyles v. Whitley*, 514 U.S. 419, 432-42 (1995)); *see Brady v. Maryland*, 373 U.S. 83 (1963). In *Gibson*, our Supreme Court noted whether the prosecutor's failure to reveal evidence pursuant to *Brady* is due to negligence or an intentional act is *irrelevant* because a court may find a *Brady* violation *regardless of the good or bad faith of the prosecutor*. *Gibson*, 334 at 528, 514 S.E.2d at 326-27. (emphasis added).

There are three distinct categories of *Brady* violations identified by the United States Supreme Court in *United States v. Agurs*, 427 U.S. 97 (1976). Those categories are (1) cases that include nondisclosed evidence of perjured testimony about which the prosecutor knew or should have known, (2) cases in which the defendant specifically requested the nondisclosed evidence, and (3) cases in which the defendant made no request or only a general request for *Brady* material. *Id.* at 103-107.

"In specific request and general or no-request situations, favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonably probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. . . . A reasonable probability of a different result is accordingly shown when the Government's evidentiary suppression undermines confidence in the outcome of the trial." *Gibson*, 334 S.C. at 525, 514 S.E.2d at 325 (quoting *Kyles*, 514 U.S. at 433-34) (internal quotes omitted). The court must consider the suppressed evidence collectively, not on an item-by-item basis. *Id.*

Brady and its progeny place the burden upon the prosecutor to know all the relevant facts of a case to decide what information to disclose as exculpatory or impeachment evidence. *See*

Kyles, 514 U.S. 419 (finding a prosecutor can establish procedures and regulations to carry the State's burden of disclosure and to ensure communication of all relevant information on each case to every lawyer who deals with it). Notably, "the overriding theme of the *Brady* cases is the emphasis the Supreme Court has placed on the prosecutor's responsibility for fair play." *Gibson*, 334 S.C. at 526, 514 S.E.2d at 325.

The *Gibson* Court reiterated and emphasized the prior holdings of the United States Supreme Court cases addressing this issue: "In close cases, the prudent prosecutor will resolve doubtful questions in favor of disclosure. This is as it should be. Such disclosures will serve to justify trust in the prosecutor as the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Id.*, 334 S.C. at 526, 514 S.E.2d at 325. (citations and quotations omitted).

"A *Brady* violation is one type of prosecutorial misconduct. It is misconduct of a different type than, for instance, an attempt to introduce inadmissible evidence, tamper with the jury, or some other inappropriate action." *Gibson*, 334 S.C. at 528, 514 S.E.2d at 326 (citations omitted). "It does not matter whether the prosecutor's misconduct in failing to reveal *Brady* evidence is due to negligence or an intentional act because a court may find a *Brady* violation irrespective of the good faith or bad faith of the prosecutor." *Id.* "*Brady* is based on a sense of fairness, and a belief that society gains when a defendant is accorded a fair trial. The focus is not on the misconduct of the Prosecutor, but on the fairness of the procedure." *Id.* at 528, 514 S.E.2d at 326-27 (citations omitted).

Our Supreme Court's General Sessions Docket Management Order provides, in relevant part:

> (2) Discovery; General.
>
> (A) *Timely and complete production and supplementation of discovery material* in accordance with Rule 5 of the South Carolina Rules of Criminal Procedure (SCRCrimP) and Brady v. Maryland, 373 U.S. 83 (1963), and its progeny *is paramount.*
>
> The prosecuting solicitor *shall regularly monitor all files* to ensure prompt, complete, and good faith production of discovery and Brady material.
>
> (B) As noted below in paragraph (b)(1)(F), the Solicitor *shall not list any case on the proposed trial docket* in which production of discovery and available Brady material is not complete at the time the proposed docket is presented to the CJAP *and the Clerk of Court.*
>
> (b) Trial Docket.
>
> (1) General.
>
> (F) The Solicitor shall not list any case on the proposed trial docket that the Solicitor does not reasonably expect to be ready for trial during the term of court. *The Solicitor shall not list any case in which the State (the Solicitor and law enforcement) has not complied with Rule 5 and Brady at the time the proposed trial docket is transmitted to the CJAP and the Clerk of Court.* As used in this Order, the term "discovery" is defined as any material subject to 11 discovery under Rule 5, SCRCrimP. See Paragraph (a)(2)(A).6

General Sessions Docket Management Order (S.C. Sup. Ct. dated May 24, 2023) (emphasis added).

Additionally, Rule 5(c), SCRCrimP, provides a continuing duty to disclose: "If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material."

Discussion

In this case, the Trial Court erroneously granted the State's motion for continuance to Appellant's detriment. (R. 47, lines 7-20). The Trial Court allowed the State to use the continuance as a shield and sword against Appellant by being able to admit a "voluminous" amount of untimely disclosed evidence at the subsequent trial (e.g., the Facebook video clip, medical diagram, and the list outlined in Court's Exhibit #4). (R. 253, line 6 – 254, line 21). *See General Sessions Docket Management Order* (S.C. Sup. Ct. dated May 24, 2023) (emphasis added); *see* Rule 5(c), SCRCrimP; *Cf. State v. Price*, 441 S.C. 423, 895 S.E2d 633 (James, J., dissenting) (noting "[w]e should not permit the State to resort to the judicial branch for relief from the State's own poor choices, as embarrassing as they may be for the State."); *Cf. State v. Rowell*, Op. No. 28215 (S.C. Sup. Ct. refiled on September 18, 2024) (noting "[t]he nature of the fox's disguise matters little to the chicken.").

Defense Counsel repeatedly expressed his willingness to proceed with the original trial and his concern about the resulting prejudice created by a continuance. (R. 43, lines 2-8; R. 45, line 14 – 46, line 1; R. 46, lines 5-7; R. 110, lines 15-21; R. 115, lines 2-22; R. 925 – 933). Specifically, Defense Counsel stated, "I informed the Court that we still would be willing and ready and wanted to go forward with trial today." (R. 41, lines 9-10). Defense Counsel also explained why he did not want a continuance: "[M]y fear is that the State, by asking for a continuance, then come September 25th, can say, Well, we had it provided in plenty of time." (R. 46, lines 5-7).

Defense Counsel reiterated why he did not want a continuance of the prior trial: "I didn't want to change anything, the strategy in my case and I was afraid that a continuance would do nothing more than hurt [Appellant's] case and I was still prepared to go forward." (R. 114, lines 3-6). Defense Counsel argued, "That's one of the reasons why the prejudice does exist ... Because

if they [the State] now change their strategy and say hey, by the way, we believe that [the Decedent] had a firearm, but that was not what they were going to argue to that jury some time ago." (R. 118, lines 16-20).

It is unequivocal that Defense Counsel explained that he was prepared for trial and only raised this issue to the Trial Court out of an obligation as an officer of the court. Defense Counsel noted that proceeding with the trial would not have affected Appellant's right to a fair trial based on the defense theory of the case. The State's admission of its negligence in disclosing evidence to Appellant proves that a *Brady* violation occurred due to prosecutorial misconduct, and the unnecessary continuance rewarded that misconduct. (R. 235, lines 5-9). *See Gibson*, 334 S.C. at 528, 514 S.E.2d at 326 (citations omitted) (finding "[i]t does not matter whether the prosecutor's misconduct in failing to reveal *Brady* evidence is due to negligence or an intentional act because a court may find a *Brady* violation irrespective of the good faith or bad faith of the prosecutor.").

The Trial Court erroneously denied Appellant's motion to dismiss despite it being the best remedy to correct the prior mistake of granting the continuance. (R. 254, line 22 – 256, line 3). Therefore, the Trial Court erred by granting the State's motion for continuance to investigate the State's failure to disclose exculpatory evidence and by denying Appellant's motion to dismiss when the resulting unfair prejudice denied his right to a fair trial. *See* U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3, 14; Rule 5(d)(2), SCRCrimP ("Failure to Comply With a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or *it may enter such other order as it deems just under the circumstances*.") (emphasis added).

II. THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS THE FACEBOOK VIDEO CLIP OF APPELLANT PURPORTEDLY THREATENING THE DECEDENT BECAUSE THE UNTIMELY DISCLOSURE BY THE STATE RESULTED IN UNFAIR PREJUDICE DENYING APPELLANT'S RIGHT TO A FAIR TRIAL.

Standard of Review

"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)). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Id.* at 401, 853 S.E.2d at 338 (quoting *Bryant*, 372 S.C. at 312, 642 S.E.2d at 586).

Law

Rule 5(c) of the South Carolina Rules of Criminal Procedure provides, "If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material." Notably, Rule 5(d)(2), SCRCrimP, provides: "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or *prohibit the party from introducing evidence not disclosed*, or it may enter such other order as it deems just under the circumstances." (emphasis added).

Our Supreme Court's General Sessions Docket Management Order provides, in relevant part: "Timely and complete production and supplementation of discovery material in accordance with Rule 5 of the South Carolina Rules of Criminal Procedure (SCRCrimP) and *Brady v.*

Maryland, 373 U.S. 83 (1963), and its progeny is paramount." *General Sessions Docket Management Order* (S.C. Sup. Ct. dated May 24, 2023) (emphasis added)

Discussion

In this case, as the gatekeeper, the Trial Court failed to suppress the untimely disclosed evidence and failed to sanction the State for the egregious nature of the discovery violations. (State's Exhibit #1; R. 925 – 933). *See* Rule 5(d)(2), SCRCrimP. At the original trial date, Defense Counsel noted his concern with the untimely disclosure of this highly prejudicial evidence:

> [G]iven the new chief administrative order, my concern is that this case was placed on the trial docket and ready to go. And my understanding is it is assumed that all discovery is going to be provided at the time that the case is on the trial docket and called for trial. *That Facebook video was not given until Friday*...We believe that there is some information missing from the video that we wouldn't have had time to go look for. *It is a clip that somebody has clipped portions of it*, so it would probably violate the rule of completeness. It's not an entirety of the video.

(R. 45, line 14 – 46, line 1) (emphasis added).

Defense Counsel subsequently argued that the State failed to timely disclose the Facebook video clip prior to the original trial date on August 14, 2023:

> Your Honor, when we started this back on August 14th when we were supposed to have the trial, I was very specific that this video was going to come up and I wanted the Court to hold the date in issue from that date to this date for this specific reason. That's the first part of the argument of what I gave you. We have a discovery disclosure order in South Carolina and the discovery disclosure order gives the solicitor's office specific detail of when there's supposed to be (undiscernible) videos.
>
> In this unique situation, [the State] supposed to disclose enough of the case to be placed on the trial docket for it to be ready for trial. ... That was the first part of our argument of what I have to you, Your Honor, and what I asked for back on August 14.
>
> The lateness of the disclosure of the video by the solicitor's office violates the disclosure order and one of the reasons why, this

> situation is why the State of South Carolina has taken over cases from the solicitor's office. Once you put that case on the docket, you are attesting to the Court as well as to the defense we have properly given you all the discovery so you can properly prepare your case. They didn't do it. That was my argument. I said I want this ruling set back on that date on August 14th so they can't come in – which they keep saying throughout this last two days, oh, he had 30 days, what's the big deal? The big deal is there's an order that specifically says you can't do that.

(R. 301, line 19 – 302, line 23).

Appellant incorporates by reference the arguments raised in the previous issue as if fully set forth verbatim. This unjust and unfairly prejudicial behavior will continue until the State suffers the appropriate consequences for their actions instead of benefiting from its admitted negligent actions. Therefore, the Trial Court erred in refusing to suppress the Facebook video clip of Appellant purportedly threatening the Decedent because the untimely disclosure by the State resulted in unfair prejudice denying Appellant's right to a fair trial. *See* U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3, 14; Rule 5(d)(2), SCRCrimP ("If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule,the court may ... prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.").

III. THE TRIAL COURT ERRED BY ADMITTING A FACEBOOK VIDEO CLIP OF APPELLANT PURPORTEDLY THREATENING THE DECEDENT BECAUSE THE STATE'S WITNESS DID NOT HAVE SUFFICIENT KNOWLEDGE TO AUTHENTICATE THE VIDEO.

Standard of Review

"Decisions regarding the admissibility of evidence . . . are within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." *State v. Sweet*, 374 S.C. 1, 4-5, 647 S.E.2d 202, 204 (2007). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*, 374 S.C. at 5, 647 S.E.2d at 204-05.

Law

"[E]vidence must be authenticated or identified in order to be admissible." *State v. Brown*, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018). A witness with knowledge may authenticate evidence by testifying that "a matter is what it is claimed to be." Rule 901(b)(1), SCRE. "The authentication standard is not high, and a party need not rule out any possibility the evidence is not authentic." *State v. Green*, 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019) (citation omitted), aff'd as modified, 432 S.C. 97, 851 S.E.2d 440 (2020). "The trial judge acts as the authentication gatekeeper, and a party may open the gate by laying a foundation from which a reasonable juror could find the evidence is what the party claims." *Id.* Notably, Rule 901(b), SCRE, lists ten non-exclusive methods of authentication."

Discussion

In this case, the Trial Court erroneously found that the State authenticated the Facebook video clip when the Decedent's girlfriend conceded that she did not create the video, did not know when the video was recorded, did not receive the video from the person who created it, did not know the individuals in the video, and agreed that it was not the complete video recording. (R.

285 – 288). *See* Rule 901(b), SCRE. Investigator McFadden's testimony that he knows the individuals in the video and his claim that Appellant allegedly acknowledged the video is insufficient for authentication (particularly where the investigator did not record the alleged statement) because he also does not know who recorded the video or when it was recorded.

The testimony presented by the State does not satisfy any of the ten non-exclusive methods of authentication. The significance of the Facebook video clip and danger of unfair prejudice to Appellant cannot be understated because the State argued that this is a key piece of evidence that establishes motive and proves the existence of malice. (R. 307, lines 16-18). Therefore, the Trial Court erred by admitting a Facebook video clip of Appellant purportedly threatening the Decedent because the State's witness did not have sufficient knowledge to authenticate the video. *See* Rule 901, SCRE.

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IV. THE TRIAL COURT ERRED BY ADMITTING A FACEBOOK VIDEO CLIP OF APPELLANT PURPORTEDLY THREATENING THE DECEDENT BECAUSE OF THE INHERENT UNFAIR PREJUDICE IN THE MISLEADING IMPRESSION CREATED BY TAKING APPELLANT'S STATEMENT OUT OF CONTEXT.

Standard of Review

"Decisions regarding the admissibility of evidence . . . are within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." *State v. Sweet*, 374 S.C. 1, 4-5, 647 S.E.2d 202, 204 (2007). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*, 374 S.C. at 5, 647 S.E.2d at 204-05.

Law

Rule 106 of the South Carolina Rules of Evidence states, "When a ... recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other ... recorded statement which ought in fairness to be considered contemporaneously with it." Our Supreme Court has explained that Rule 106 is based on the rule of completeness and attempts to avoid the unfairness inherent in the misleading impression created by taking matters out of context. *State v. Cabrera–Pena*, 361 S.C. 372, 379, 605 S.E.2d 522, 525 (2004).

Rule 106, SCRE, stands for the proposition that when a part of a recorded statement is introduced, the opposing party may require the admission of other portions to ensure the partial statements are not taken out of context. *See Cabrera–Pena*, 361 S.C. at 379, 605 S.E.2d at 525. However, only that portion of the remainder of any statement which explains or clarifies the previously admitted portion should be allowed into evidence. *Id.* Rule 106, SCRE, seeks to avoid the unfairness inherent in the misleading impression created by taking a conversation out of

context. *Id.*

Discussion

In this case, the Trial Court erroneously allowed the State to play a small portion of a significantly larger video where Appellant purportedly threatens the Decedent. (R. 287, lines 3-16). Rule 106 strikes at the heart of why this video clip should not have been admitted because Appellant is unable to prevent the partial statements from being taken out of context. *See Cabrera–Pena*, 361 S.C. at 379, 605 S.E.2d at 525. The significance of the Facebook video clip and danger of unfair prejudice to Appellant cannot be understated because the State argued that this is a key piece of evidence that establishes motive and proves the existence of malice. (R. 307, lines 16-18). Therefore, the Trial Court err by admitting a Facebook video clip of Appellant purportedly threatening the Decedent because of the inherent unfair prejudice in the misleading impression created by taking Appellant's statement out of context. *See* Rule 106, SCRE.

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CONCLUSION

Based on the foregoing reasons, Appellant Diontrae Travon Epps respectfully requests that this Court reverse his convictions and sentences and remand this case to the Sumter County Court of General Sessions for a new trial.

Respectfully submitted,

s/ Dayne Phillips 

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May 2, 2025

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of General Sessions

R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2023-001586

The State of South Carolina,

Respondent,

v.

Diontrae Travon Epps,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned Counsel certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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May 5, 2025

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of General Sessions

R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2023-001586

The State of South Carolina, Respondent,

v.

Diontrae Travon Epps, Appellant.

CERTIFICATE OF SERVICE

The undersigned Counsel certifies that a true copy of the Final Brief of Appellant has been served upon **Melody Brown, Esquire,** at S.C. Attorney General's Office, PO Box 11549, Columbia, SC 29211, on **May 5, 2025.**

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SUBSCRIBED AND SWORN TO before me
this 5th day of May, 2025.

Courtney Powers (L.S.)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.

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May 5, 2025

The Honorable Jenny Kitchings
Clerk of Court, SC Court of Appeal
P.O. Box 11629
Columbia, SC 29211

Re: **State of South Carolina v. Diontrae Travon Epps**
FINAL BRIEF OF APPELLANT
Appellate Case No.: **2023-001586**

Dear Ms. Kitchings:

I have emailed the Final Brief of Appellant to the Court of Appeals for filing today in the above-referenced case. I have also submitted the brief to Columbia Printing who is preparing the one additional bound copy as requested and will be delivered directly to the Court.

Thank you for your assistance with filing these documents.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

s/ Dayne C. Phillips

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