Kathy Schillaci

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Sent: Tuesday, July 01, 2014 4:23 PM
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Subject: State v. Prather
Attachments: State v Robert Prather.pdf final 2.pdf

Attached is an Order being filed denying the motion for new trial in the above matter.
Judge Newman

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
	)	Case No: 2012-GS-32-2619, 2621
STATE,	)	
v.	)	**ORDER DENYING DEFENDANT'S MOTION FOR A NEW TRIAL**
ROBERT JARED PRATHER,	)	
DEFENDANT.	)	

This matter comes before the Court by way of a timely filed Motion for a New Trial pursuant to Rule 29(a) of the South Carolina Rules of Criminal Procedure. The State called this case for trial on November 26, 2012 before this Court. Deputy Solicitors Rick Hubbard and Shawn Graham appeared on behalf of the State at trial. Wayne Floyd, Esquire, represented the Defendant at trial. Additionally, Wayne Floyd, Esquire, and Joseph McCulloch, Jr., jointly represent the Defendant on this post-trial matter.

Procedural History

The Defendant is incarcerated in the South Carolina Department of Corrections (SCDC) pursuant to the Lexington County Clerk of Court's Order of Commitment. On April 22, 2005, West Columbia Police Department arrested the Defendant. The Defendant filed a Motion for a Speedy Trial and a Motion for Bond on January 13, 2006. On May 4, 2006, the Honorable Edward B. Cottingham set a bond in the sum of $75,000 for the Defendant, and the Defendant was released on bond.

The Lexington County Grand Jury indicted the Defendant at the September 2008 term for Murder (2008-GS-32-2926), Burglary First Degree (2008-GS-32-2930), Armed Robbery (2008-GS-32-2929), Possession of a Firearm or Knife during the Commission of a Violent Crime (2008-GS-32-2928), and Filing a False Police Report Alleging the Commission of a Felony

(2008-GS-32-2927). The State called these indictments for trial on October 26, 2009, and the Honorable R. Knox McMahon declared a mistrial on October 30, 2009, due to a hung jury.

Subsequently, the Lexington County Grand Jury indicted the Defendant at the October 2012 term for Murder (2012-GS-32-02619), Armed Robbery (2012-GS-32-02621), and Burglary First Degree (2012-GS-32-02622). The Defendant filed a Motion to Dismiss for Violation of Speedy Trial Right on November 20, 2012 with the Lexington County Clerk of Court.

The State called the Defendant for trial on November 26, 2012. On November 28, 2012, this Court directed a verdict at the close of the State's case as to the Burglary First Degree indictment. On November 29, 2012, the jury convicted the Defendant of Murder and the lesser-included charge of Robbery. This Court sentenced the Defendant to 30 years on the Murder conviction and 10 years on the Robbery conviction, both to run concurrently. On December 7, 2012, the Defendant filed this Motion for a New Trial with the Lexington County Clerk of Court and supported it with a Memorandum filed January 18, 2013. The Court held a hearing on the Motion on February 7, 2013.

Facts

On April 22, 2005, the Defendant killed Gerald Michael Stewart, the Victim, in the home of the Victim located at 1737 Decree Avenue in the City of West Columbia, South Carolina in Lexington County. This occurred when the Defendant returned to the residence and found the Co-Defendant, Joshua B. Phillips, wearing only his underwear. The Defendant, along with his Co-Defendant, then beat the Victim, who was intoxicated, about his head and body and smothered him, a combination of which resulted in the death of the Victim. The word "rapist" was then carved on the lower back of the Victim.

Prior to leaving the residence, the Defendant and Co-Defendant took property belonging to the Victim including the Victim's wallet, collectible coins, and a 75th Anniversary Coca-Cola box set. The two then went to Lexington Medical Center and reported that the Victim sexually assaulted the Co-Defendant.

Issues

1. **The Defendant argues that the Court abused its discretion by admitting into evidence the misspelling of the word "rapist" written by the Co-Defendant arguing that:**
   a. the word was a hearsay statement;
   b. the word was a testimonial statement subject to the Confrontation Clause of the United States Constitution; and
   c. the word was inadmissible under Rule 403 of the South Carolina Rules of Evidence (SCRE).
2. **The Defendant argues that the Court abused its discretion by allowing Agent Paul LaRosa to testify as a reply witness arguing that:**
   a. the State violated *Brady* and Rule 5 of the South Carolina Rules of Criminal Procedure (SCRCrimP) by failing to disclose to the Defendant its intention of offering Agent LaRosa as an expert witness, which resulted in the State improperly "sandbagging" the Defendant; and
   b. Agent LaRosa was not sufficiently qualified to give his opinion as a "crime scene analyst" and his testimony was non-scientific, unreliable, speculative, and highly prejudicial.
3. **The Defendant argues that the Court erred in denying three of his motions:**
   a. Motion for Speedy Trial;
   b. Motion for Suppression of the fruits of the Search Warrant; and
   c. Motion for Directed Verdict on Murder as there was no competent evidence to justify a guilty verdict.

Standard

"Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence." Rule 29(a), SCRCrimP. The grant or refusal of a new trial motion is within the trial court's discretion. *See State v. Simmons*, 279 S.C. 165, 303 S.E.2d 857 (1983).

A trial court's denial of a new trial motion will not be disturbed on review absent a showing of an abuse of discretion that results in prejudice to a defendant. *See State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998); *Simmons*, 279 S.C. 165, 303 S.E.2d 857.

Findings

1. **The Court did not abuse its discretion by admitting into evidence the misspelling of the word "rapist" written by the Co-Defendant.**

At trial, the Defendant objected to the admissibility of the misspelling of the word "rapist" and the Court held an *in camera* hearing. The Defendant raised the same issues regarding the word as raised in this Motion. After hearing arguments from both parties, the Court ruled that two exhibits (State's Exhibits 24 and 25) of the Co-Defendant's misspelling of the word "rapist" were admissible. The Court finds that it did not abuse its discretion by allowing into evidence the two exhibits of the misspelling of the word "rapist" by the Co-Defendant as the word was not a hearsay statement and it was not a testimonial statement subject to the Confrontation Clause of the Constitution. In addition, the Court did not abuse its discretion by allowing Captain Mark Jones to testify as to his observation of the Co-Defendant writing the word.

During the *in camera* hearing, the State offered to the Court a six-page statement written by the Co-Defendant describing the death of the Victim. Captain Jones observed the Co-Defendant write this statement. Captain Jones did not direct the Co-Defendant to write the statement nor did he dictate anything to the Co-Defendant for him to write. On page three of the statement, the Co-Defendant describes how the Defendant carved the word "rapist" on the Victim's back. In describing this event, the Co-Defendant wrote the word "rapist" twice. However, he misspelled the word on both occasions, spelling the word "r-a-p-e-i-s-t." The State viewed the misspelling as significant because the word carved on the Victim's back was spelled

correctly "r-a-p-i-s-t." The statement included other misspellings as well. For example, on page three, the Co-Defendant spelled "torturing" as "t-o-r-c-h-e-r-i-n-g" and "pretense" as "p-r-e-t-i-n-c-e."

Notably, the State did not introduce the six-page statement written by the Co-Defendant as evidence, nor was it ever referenced during the trial. The State cut the words "rapeist" from a copy of the statement, enlarged them, and offered them as exhibits. During the trial, the testimony offered by Captain Jones was limited. He testified that he recognized the two cutouts of the word "rapeist" as words that the Co-Defendant wrote in his presence. He acknowledged the Co-Defendant was under arrest at the time, but he never mentioned anything about the Co-Defendant writing a statement. Captain Jones testified that he did not ask the Co-Defendant to write, or tell him how to spell, the word "rapist," and that he did not ask the Co-Defendant how he spells the word. He testified that the misspelling was important because the word carved on the Victim was spelled correctly.

On cross-examination, Captain Jones testified he never told the Co-Defendant the importance of the word "rapist." He admitted that he did not know if the Co-Defendant intentionally misspelled the word. In addition, the Defendant introduced a photograph of coins and bullets that were stolen from the Victim and found on the Co-Defendant when he went to the hospital after the Victim was killed, suggesting to the jury that the Co-Defendant was the killer.

a. **The word was not a hearsay statement.**

Under Rule 801(a), SCRE, a "statement" is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Rule 801(c), SCRE, defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." If a

statement is not offered to prove the truth of the matter asserted, it is not hearsay and is admissible. *See State v. Lewis*, 293 S.C. 107, 359 S.E.2d 66 (1987).

In *State v. Johnson*, 324 S.C. 38, 476 S.E.2d 681 (1996), the defendant was convicted of murder. During the trial, a State's witness testified about a verbal altercation that resulted in the defendant pulling out a pistol and shooting the victim. *See Id.* at 41, 476 S.E.2d at 682. The witness testified that immediately prior to the shooting he heard an unidentified individual ask the defendant "you got a gun?" and the defendant responded "yeah, and I ain't scared to shoot." *Id.* at 41, 476 S.E.2d at 682. The defendant objected on hearsay grounds. *See Id.* at 41, 476 S.E.2d at 682. The Supreme Court held that "you got a gun?" was not hearsay as it was not offered to prove the truth of the matter asserted. *Id.* at 42, 476 S.E.2d at 683. Further, the Court found that the statement was not even an assertion, but was a question asked to appellant. *See Id.* at 42, 476 S.E.2d at 683.

In this case, the misspelled word "rapeist" is not a "statement" under Rule 801(a), SCRE, because the word alone does not constitute an "assertion." The fact the word was taken from a statement written by the Co-Defendant is irrelevant. The statement **in its entirety** would certainly constitute his assertion of what **really** happened and who was **truly** responsible for the Victim's death. However, it was **never** introduced at trial.

By taking the misspelled word "rapeist" from the statement written by the Co-Defendant, the State separated the word from any assertion made by the Co-Defendant. The word "rapeist" does not say anything about what transpired or who killed the Victim. The State's theory that the misspelled word "rapeist" is evidence that the Defendant, not the Co-Defendant, carved "rapist" on the Victim's back does not change this analysis. The misspelled word "rapeist" is not hearsay, it is simply evidence for the jury to consider and judge its credibility.

Likewise, Captain Jones' testimony was not hearsay. He testified as to his observations, and the significance that **he attributed** to the misspelling. He did not testify about the Co-Defendant's version of events.

b. **The Defendant's Sixth Amendment Right to Confront his Co-Defendant was not triggered and not violated.**

Having determined that the misspelled word "rapeist" is not a statement, the Confrontation Clause of the Sixth Amendment to the United States Constitution does not apply. However, assuming *arguendo* the word "rapeist" is a statement, the Defendant's objection still fails the "primary purpose analysis."

The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), the United States Supreme Court held the Confrontation Clause applies to certain **statements**. Specifically, the Court held the Confrontation Clause prohibits the admission of testimonial, out-of-court statements unless the witness is unavailable at trial and the defendant had a prior opportunity to cross-examine the witness. *See Id.* at 68, 124 S. Ct. at 1374.

The United States Supreme Court has since developed the "primary purpose analysis" to determine if a statement is testimonial. *See Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (Sotomayor, J., concurring); *Michigan v. Bryant*, 131 S. Ct. 1143 (2011). The Court held where the primary purpose of an out-of-court statement is to serve as evidence or "an out-of-court substitute for trial testimony," the statement is testimonial. *Bullcoming*, 131 S. Ct. at 2721-23 (quoting *Bryant*, 131 S. Ct. at 1155); *see, e.g., Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527 (2009) (sworn certificates from forensic analysts were offered as a substitute for their actual testimony at trial).

However, "where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Bryant*, 131 S. Ct. at 1155. "In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Id.* at 1155. For example, "[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status." *Melendez-Diaz*, 557 U.S. at 321, 129 S. Ct. at 2538; *see also*, *State v. Brockmeyer*, 406 S.C. 324, 751 S.E.2d 645 (2013) (which addressed the defendant's challenge of the chain of custody of evidence and claim of a denial to confront witnesses, the South Carolina Supreme Court held that "[t]he issue of whether evidence is admissible under 'state-law requirements regarding proof of foundational facts' is distinct from the issue of whether a defendant's Sixth Amendment confrontation right was violated ... Brockmeyer may not bootstrap a Confrontation Clause objection onto his objection to the State's proof of foundational facts.").

In this case, the primary purpose of admitting the misspelled word "rapeist" was not for the purpose of being an "out-of-court substitute for trial testimony." The word, standing alone, in no way reflects the version of events written by the Co-Defendant in his six-page statement. The State introduced the misspelled word "rapeist" because of the independent evidentiary value it had apart from the Co-Defendant's statement.

If the entire statement had been introduced into evidence, then the Defendant's right to confront his Co-Defendant would attach. In this case, the Defendant was able to confront and cross-examine the witness against him. That witness was Captain Jones, who testified as to his observations, and the Defendant vigorously cross-examined him.

The word, on its own, can be compared to a handwriting exemplar. Handwriting exemplars are nontestimonial in nature and do not involve the Fifth Amendment right against

self-incrimination. *See State v. Frasier*, 341 S.C. 546, 534 S.E.2d 711 (Ct. App. 2000); *Gilbert v. California*, 388 U.S. 263, 87 S. Ct. 1951 (1967). However, the Fifth Amendment protects a handwriting exemplar by **dictation** where one incriminating aspect of exemplars was the spelling of a certain word by a defendant. *See United States v. Matos*, 990 F.Supp. 141 (E.D.N.Y. 1998). When a word is dictated, the spelling of that same word is testimonial because it is a result of the thought process of the defendant. *See Id; see also In re Grand Jury Subpoena to John Doe*, 475 F. Supp. 2d 1185 (M.D. Fla. 2006) *aff'd sub nom. In re Grand Jury Subpoena No.2002r02810(163), No.2005-01 to John Doe*, 176 F. App'x 72 (11th Cir. 2006); *United States v. Kallstrom*, 446 F.Supp.2d 772 (E.D. Mich. 2006) (requiring the defendant to write a **dictated** statement will constitute a testimonial act because it involves an intellectual exercise in which the defendant will be quizzed on how to spell the dictated words); *United States v. Campbell*, 732 F.2d 1017 (1st Cir. 1984) (recognizing that when a defendant writes a **dictated** word, he is saying "this is how [he] spells it" – a testimonial message in addition to a physical display).

By contrast, in this case, Captain Jones did not **dictate** the word "rapist" to the Co-Defendant, nor did he ask him how to spell the word. The Co-Defendant voluntarily wrote a six-page statement that included a word that proved to be of independent evidentiary value to the State. Similar to a handwriting exemplar not dictated, the word "rapeist" was not testimonial in nature. *See United States v. Dionisio*, 410 U.S. 1, 93 S. Ct. 764, 765 (1973).

Additionally, the Court gleans guidance from authority regarding the redaction of statements written by non-testifying co-defendants. When dealing with **statements** of non-testifying co-defendants, the Supreme Court does not take a position that would unjustifiably shackle the state in presenting an admissible confession. *See State v. Evans*, 316 S.C. 303, 450 S.E.2d 47 (1994). In cases where a co-defendant's version of the facts would otherwise be

admissible, to require the State to redact completely anything that could be viewed in combination with other evidence as a reference or allusion to the defendant, would "unduly handcuff the government's ability to introduce admissible confessions and statements against a declarant in a joint trial." *Id.* at 307 n. 2, 450 S.E.2d at 50 n. 2 (where the co-defendant's statement that he was not driving did not incriminate the defendant **on its face** was admissible, even though it was clear if there were only two people in the vehicle, the other was obviously the defendant).

In *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968), the Supreme Court held that a defendant's rights under the Confrontation Clause are violated by the admission of a non-testifying co-defendant's statement that expressly inculpates a defendant, even if a cautionary instruction is given. The Court, in *Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702 (1987), specifically declined to extend this rule to the situation when the defendant's name or any reference to the defendant is redacted, and held that as long as a statement **on its face** does not incriminate the defendant, it can be properly admitted. Accordingly, if the misspelled word "rapeist" is considered an out-of-court statement, **on its face** it does not incriminate the Defendant.

The Defendant had a full opportunity to confront the witness against him, Captain Jones, and his Sixth Amendment right was not violated. The Defendant's right to confront his Co-Defendant was not an issue at trial because his Co-Defendant's statement was not admitted into evidence or even referenced. Even if the misspelled word "rapeist" was considered to be the Co-Defendant's "statement," the Defendant's rights under *Crawford* were not violated as the "statement" was properly redacted.

c. The misspelled word "rapeist" was admissible under Rule 403, SCRE.

Pursuant to Rule 403, SCRE, admissible 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." "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Caldwell*, 378 S.C. 268, 287, 662 S.E.2d 474, 484 (Ct. App. 2008) (citing *State v. Cheeseboro,* 346 S.C. 526, 547, 552 S.E.2d 300, 311(2001)). "A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *Id.* at 547, 662 S.E.2d at 484 (citing *State v. McLeod*, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004).

In this case, there were two people charged with murder. The misspelled word "rapeist" was clearly significant and probative because the word carved on the Victim's back was spelled correctly. This evidence implicates the Defendant as being involved in the carving of the word on the Victim's back.

The probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. The manner in which this evidence was presented and the fact the Defendant was able to thoroughly cross-exam Captain Jones substantially reduced any prejudicial effect of its admission.

Thus, the Court did not abuse its discretion by admitting into evidence the misspelling of the word "rapist" written by the Co-Defendant. The word was not a hearsay statement. The Defendant's Sixth Amendment right to confront his Co-Defendant was not triggered and it was not violated. Importantly, the word was admissible because its probative value was not

substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. As to this ground, the Motion for a New Trial should be denied.

2. **The Court did not abuse its discretion by allowing Agent Paul LaRosa to testify as a reply witness.**

Reply testimony is the presentation of additional witnesses for the State, after the defense rests its case, where the testimony of the reply witness contradicts issues presented by defense witnesses or addresses the credibility of defense witnesses. The admission of reply testimony is within the discretion of the trial judge. *See State v. Todd*, 290 S.C. 212, 349 S.E.2d 339 (1986).

In this case, the Defendant took the stand and testified that he did not cause the death of the Victim. Specifically, the Defendant testified that he believed the Victim sexually assaulted the Co-Defendant; that he struck the Victim only three times; that he left the house after striking the Victim; that he did not carve the word "rapist" on the Victim's back or cover him up; that he did not see either of those things occur; and that, after he left the house, the Co-Defendant remained in the house with the Victim for approximately 8 to 10 minutes.

In Reply, the State offered Agent LaRosa as an expert in Crime Scene Analysis to rebut the testimony of the Defendant. Both Parties agree, and this Court finds that the testimony offered by Agent LaRosa was non-scientific in nature.

The State established the following regarding the knowledge, skill, experience, training, and education of Agent LaRosa as it relates to Crime Scene Analysis:

> Agent LaRosa has been employed by State Law Enforcement Division (SLED) for 18 years; from 1994 to 2000 as a Special Agent in the crime scene unit collecting and processing evidence, and analyzing and reconstructing crime scenes based on the evidence; from 2005 to 2010 as a violent crimes investigator; and from 2010 to 2012 as a criminal profiler assigned to the behavioral science unit.

As a behavioral analyst, Agent LaRosa studied under and is currently working with two court qualified crime scene analysts at SLED. Agent LaRosa testified that he interned with the South Carolina Department of Mental Health under a forensic psychiatrist and psychologist being treated as a peer; completed rounds at psychiatric hospitals; and gave assessments on those individuals. Agent LaRosa stated he completed a two-month internship with the Federal Bureau of Investigation (FBI) working cases and completing crime scene analysis and profiles alongside FBI Profilers. Specifically, he testified that he had an active caseload, worked independently, and that FBI Profilers peer reviewed his work.

Agent LaRosa testified that he has previously been qualified as an expert and testified in Federal Court and General Sessions Court in South Carolina as an expert in crime scene, crime scene reconstruction, and crime scene assessment. In being qualified as an expert in crime scene analysis in this case, Agent LaRosa testified that he would combine forensics, crime scene reconstruction, and the psychology and behavior exhibited at the crime scene to give an opinion as to the number of offenders involved in the crime.

Agent LaRosa testified that he reviewed the crime scene photographs and video, the reports of the first responders regarding how they found the Victim's body, and that he was present for the testimony of the Defendant in this trial.

Agent LaRosa stated he found evidence of "staging." He explained that "staging" is a term used in crime scene assessment and crime scene reconstruction that indicates that the person who committed the crime altered the crime scene in order to misdirect law enforcement and hide the truth.

Agent LaRosa opined that the carving of the word "rapist" into the Victim's back was evidence of staging. He testified that the superficial nature of the carvings supported his belief

that the scene was staged as compared to directed or real anger that he would expect to see in an actual rape. Agent LaRosa testified that the lack of evidence of real anger, such as deeper carvings, or anger directed towards the instrument of the rape, such as injury to the penis or mouth, supported his opinion of staging.

Additionally, Agent LaRosa testified that staging was also evident in the positioning of the body and in the placement of a dildo beside the Victim's body. The Victim was found on his knees face down on the sofa. There was no sign or evidence that the dildo was used in any manner or had anything to do with the murder. He explained that in his opinion the staging in this case indicated that the personality in the crime scene at the time wanted to misdirect law enforcement towards the idea that the victim was a rapist.

Agent LaRosa further testified that the crime scene showed evidence of "undoing." He testified that undoing is a symbolic message from the offender that he wants to cover up the crime or erase what has happened. Evidence of undoing was present in this case by the victim being covered up by a blanket and a pillow. He further stated that this was a classic case of undoing.

Agent LaRosa testified that staging and undoing are two completely distinct and conflicting emotions. Based on his review of the evidence and the Defendant's testimony, specifically the time line supplied by the Defendant, he concluded two offenders where at the scene at the time of the crime. In addition, Agent LaRosa stated, in accordance with SLED policy and prior to testifying, he submitted the evidence from this case to his colleagues for peer review, and they shared his opinion on this matter.

a. The State did not violate *Brady* and Rule 5, SCRCrimP, and "sandbag" the Defendant by not disclosing to the Defendant its intention of offering Agent LaRosa in reply and as an expert witness.

Generally, the State has a duty to disclose evidence that is favorable to the defendant. *See Brady v. Maryland,* 373 U.S. 83, 87, 83 S. Ct. 1194 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); Rule 5, SCRCrimP. A defendant asserting a *Brady* violation must demonstrate the evidence the State failed to disclose was favorable to the defendant, in possession of or known to the State, suppressed by the State, and material to guilt or punishment. *See Gibson v. State,* 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 668, 105 S. Ct. 3375, 3376 (1985); *State v. Frazier*, 394 S.C. 213, 223-24, 715 S.E.2d 650, 655 (Ct. App. 2011).

Brady and Rule 5, SCRCrimP, do not allow for the discovery of witness lists. *See State v. Miller*, 289 S.C. 316, 345 S.E.2d 489 (1986) (where parties were ordered to exchange lists and the State called a witness not on the list, the Court found the error was harmless); *State v. Nicholson*, 366 S.C. 568, 623 S.E.2d 100 (Ct. App. 2005) (defendant not entitled to suppression or continuance to get own expert where State calls expert to testify about general characteristics of a sex abuse victim; informing defense of this witness before trial was just professional courtesy).

In this case, the State was under no obligation to disclose the witnesses it intended to call. Even if it were required, it would be difficult to require that disclosure of reply witnesses the

State intends to call because reply testimony is based solely on what case, if any, a defendant chooses to present. Additionally, the Defendant is not justified in arguing that he was sandbagged because the State did not call Agent LaRosa in the first trial of this case. Neither the State, nor the Defendant, are required to try exactly the same case the second time around. This ground for a new trial is without merit.

b. Agent LaRosa was sufficiently qualified to give his opinion as a "crime scene analyst" and his testimony was reliable.

Rule 702, SCRE, governs the testimony of an expert. Specifically, Rule 702, SCRE, states,

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"This language makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. It makes clear that any such knowledge might become the subject of expert testimony." *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009) (holding that a dog handler met the requirements of Rule 702, SCRE, based on experience and training).

Accordingly, Agent LaRosa's qualifications, as indicated above, were adequately developed, and, based on his knowledge, skill, experience, training, and education, he was properly qualified to offer an expert opinion in crime scene analysis. Specifically, Agent LaRosa provided testimony regarding staging, directed anger, undoing, and the number of personalities present given the evidence and emotions shown, and, thus, the number of offenders present.

After determining that Agent LaRosa was properly qualified as an expert, this Court next turns its attention to the reliability of the non-scientific testimony offered. *See Id.* at 273-74, 676 S.E.2d at 688. "The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the *Council* factors for scientific evidence serve no useful analytical purpose when evaluating non-scientific expert testimony." *Id.* at 274, 676 S.E.2d at 688; *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). The Supreme Court offers "no formulaic approach" to addressing Rule 702, SCRE, "reliability challenges that could arise with respect to nonscientific expert evidence." *White*, 382 S.C. at 274, 676 S.E.2d at 688.

In this instant, Agent LaRosa did not offer profile evidence or evidence of victimology. Importantly, Agent LaRosa did not offer an opinion as to who the killer was or what role the Defendant played, if any, in the murder.

The Defendant does not dispute that the concepts of staging and undoing are reliable and accepted concepts. He also does not object to Agent LaRosa's opinion that the staging and undoing showed two distinct emotions. However, the Defendant does object to Agent LaRosa's opinion that multiple actors were present at the crime scene.

The Court finds that staging and undoing are basic and accepted concepts of crime scene reconstruction and assessment, both areas in which Agent LaRosa testified previously as an expert. The Court also finds as reliable that two distinct, separate, and opposing emotions are shown in staging and undoing. Finally, the Court finds Agent LaRosa's opinion that multiple actors were present at the death scene is reliable, and is consistent with logic and common sense in light of the testimony of the Defendant.

Therefore, the Court did not abuse its discretion by allowing Agent LaRosa to testify as a reply witness. The State did not violate *Brady* and Rule 5, SCRCrimP, by not disclosing to the

Defendant its intention of calling Agent LaRosa as an expert witness in Reply. More importantly, Agent LaRosa was properly qualified as an expert witness. As to this ground, the Motion for New Trial should be denied.

Harmless Error Analysis

Having allowed the admission of the misspelled word "rapeist" and the reply testimony, the Court finds this evidence is subject to a harmless error analysis. The focus of this analysis is "whether beyond a reasonable doubt the trial error did not contribute to a guilty verdict." *State v. Jarod Wayne Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012). The United States Supreme Court mentioned a number of factors to be considered in determining whether an error is harmless, particularly concerning Confrontation Clause issues. These factors include:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438 (1986); *see also*, *State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002).

Applying these factors, any error would be harmless beyond a reasonable doubt. Captain Jones' testimony was extremely limited and amounted to a very small piece of the State's case against the Defendant. The evidence he provided was cumulative to other direct and circumstantial evidence linking the Defendant to the murder. The Defendant's statements to both the hospital staff and law enforcement that he assaulted the Victim (i.e., that he struck the Victim with "devastating blows" and needed to wash the Victim's blood off his hands) corroborated the evidence. This evidence was subject to rigorous cross-examination by the

Defendant, leading Captain Jones to admit he did not know if the Co-Defendant intentionally misspelled the word "rapist."

Additionally, the Defendant took the stand, addressing this evidence and testifying to his version of the facts, thereby providing the jury a basis to give this particular evidence less weight, or no weight at all. The State presented a substantial, if not overwhelming, case as to the guilt of the Defendant.

After the Defendant testified to his version of the facts, the State called Agent LaRosa as an expert in Reply to refute the version of the facts given by the Defendant. The Defendant had the opportunity to cross-examine Agent LaRosa and, similar to Captain Jones' cross-examination, the Defendant was able to elicit favorable testimony from this witness. Agent LaRosa admitted that he could not say that the **Defendant** staged the crime scene or that the **Defendant** carved the word "rapist" on the Victim's back.

The jury was the judge of the credibility of the testimony offered by Captain Jones regarding his observation of the Co-Defendant writing the misspelled word "rapeist." The jury was the judge of the credibility of the Defendant. The jury was the judge of the credibility of the testimony of Agent LaRosa in Reply.

3. The Defendant argues that the Court erred in denying three of his motions.

The Court denied the Motions for a Speedy Trial, for Suppression of the fruits of the Search Warrant, and for Directed Verdict on the Murder charge made by the Defendant. The Defendant argues that these denials were done in error and the Defendant is entitled to a new trial because of this error. The Court has broad discretionary powers in the granting or denying of motions. In this case, the denial of these motions at the time of trial is not a valid ground for the Court to grant this Motion for New Trial as no error on behalf of the Court was committed.

a. The Court did not err in denying the Motion for a Speedy Trial.

Every defendant has the right to a "speedy and public trial, by an impartial jury" under the Sixth and Fourteenth Amendments to the United States Constitution and under Article I, Section 9 of the South Carolina Constitution. The purposes of Speedy Trial are to prevent prejudice to the defendant caused by the passage of time; to minimize the possibility of lengthy incarceration prior to trial; to reduce the **lesser**, but nevertheless substantial, impairment of liberty imposed on the defendant while released on bail; and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges. *See State v. Chapman*, 289 S.C. 42, 344 S.E.2d 611 (1986); *State v. Cooper*, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009).

There are four factors to consider in determining whether a defendant has been denied the right to a speedy trial, which include the length of the delay, the cause of the delay, when and how defendant asserted his speedy trial right, and prejudice to the defendant. *See Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 (1972). Additionally, the time between a good-faith dismissal of criminal charges and the filing of new charges is not to be considered in determining the length of delay. *See United States v. McDonald*, 456 U.S. 1, 102 S. Ct. 1497 (1982).

In this instant, the Defendant filed a Motion for a Speedy Trial the week before the State called this case for trial. The Defendant was not in jail as he awaited trial and no prejudice to the Defendant has been shown.

The Court acknowledges that the murder in this case occurred on April 22, 2005, and further acknowledges that the Defendant filed a previous Motion for a Speedy Trial on May 6, 2006. However, the relief sought in the previous motion was either a dismissal of the charges or release from the Lexington County Detention Center. That relief was granted when the

Defendant was subsequently released on bond. He remained out on bond until he was convicted of Murder and Robbery on November 29, 2012.

In addition, the Defendant was tried on October 26, 2009 and a mistrial occurred. The Lexington County Grand Jury did not indict the Defendant on these charges again until October of 2012. The Defendant did not invoke his right to a speedy trial until November 20, 2012. This Court cannot consider the length of time between the mistrial of this case and when the Defendant was indicted subsequently. This Court must balance all of these factors along with the conduct of the State and the Defendant, and, in doing so, the Court finds that Motion for Speedy Trial was denied properly.

The Court finds that there was no error in denying the Motion for a Speedy Trial, and the State properly proceeded to call the Defendant for Trial. The denial of the Motion for Speedy Trial is not a valid ground for the grant of this Motion for New Trial.

b. The Court did not err in denying the Motion for Suppression of the fruits of the Search Warrant.

South Carolina Code Section 17-13-140 requires that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record...." A magistrate may issue a search warrant only upon a finding of probable cause. *See State v. Weston*, 329 S.C. 287, 494 S.E.2d 801 (1997); S.C. Code Section 17-13-140. If an affidavit standing alone is insufficient to establish probable cause, it may be supplemented by sworn oral testimony to the magistrate. *See Weston*, 329 S.C. at 290, 494 S.E.2d at 802.

Alternatively, inevitable discovery is an exception to the exclusionary rule, which excludes from evidence items seized improperly. *See Nix v. Williams*, 467 U.S. 431, 446-47, 104 S. Ct. 2501, 2510 (1984). "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial.... Suppression, in

these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of justice." *Nix v. Williams*, 467 U.S. at 446-47, 104 S. Ct. at 2510.

If the State can show by a preponderance of the evidence that the information it sought would ultimately or inevitably have been discovered by lawful means, then the evidence is admissible. *Id.* at 444, 104 S. Ct. at 2509. The State does not have to prove the absence of bad faith on the part of the police. *Id.* at 445, 104 S. Ct. at 2510 (where police would have discovered victim's body even if defendant had not given information as result of improper interrogation).

An "inventory search" is permissible where police intrusion into vehicles impounded or otherwise in lawful police custody is based on securing or protecting the vehicle and its contents. *State v. Boyd*, 288 S.C. 206, 341 S.E.2d 144 (Ct. App. 1986).

In this case, the Defendant moved to suppress the items seized from the search of the vehicle arguing that the search warrant was defective. Although the search warrant may have been defective on its face, the evidence seized was admissible at trial because the search warrant was supplemented with oral testimony and the items would have been inevitably discovered when the vehicle was inventoried.

The Court finds that there was no error in denying the Motion for Suppression of the fruits of the Search Warrant, and the State properly proceeded to call the Defendant for Trial. The denial of the Motion for Suppression of the fruits of the Search Warrant is not a valid ground for the grant of this Motion for New Trial.

c. The Court did not err is denying the Defendant's Motion for Directed Verdict on Murder as there was competent evidence to justify a guilty verdict.

"On motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment. In ruling on the motion, the trial judge shall consider only the existence or non-existence of the evidence and not its weight." Rule 19, SCRCrimP.

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. *See State v. Williams*, 303 S.C. 274, 400 S.E.2d 131 (1991); *State v. Brannon*, 379 S.C. 487, 666 S.E.2d 272 (Ct. App. 2008). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, then the case was submitted properly to the jury. *See State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998); *Brannon*, 379 S.C. 487, 666 S.E.2d 272.

On an appeal from the denial of a directed verdict, the appellate court must view the evidence in the light most favorable to the State. *See State v. Rowell*, 326 S.C. 313, 487 S.E.2d 185 (1997). It should only reverse the ruling of the trial court if that ruling was based on an error of law or there is no evidence in the record to support the ruling. *See State v. Dantonio*, 376 S.C. 594, 658 S.E.2d 337 (Ct. App. 2008). In this case, the State presented an overwhelming amount of evidence tending to prove the Defendant guilty of Murder. The case was properly submitted to the jury and its verdict should not be disturbed.

The Court finds that there was no error in denying the Motion for a Directed Verdict as to the Murder charge, and the State properly proceeded to call the Defendant for Trial. The denial of the Motion for a Directed Verdict as to the Murder charge is not a valid ground for the grant of this Motion for a New Trial.

Conclusion

The Defendant's Motion for a New Trial should be denied. Based on the reasons set forth above, the Court finds that no error occurred at trial, and, if error did occur, it was harmless. The evidence in this case was overwhelming and the testimony allowed was admissible. The Defendant has failed to raise a valid ground for the grant of a new trial.

Therefore, the Defendant's Motion for a New Trial is hereby **DENIED**.

AND, IT IS SO ORDERED.

Clifton Newman
Circuit Court Judge

July 1, 2014

Columbia, South Carolina