STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi L. Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RON SANTA McCRAY

APPELLANT,

Appellate Case No. 2012-2133393

FINAL BRIEF OF APPELLANT

James K. Falk
Bush Law Group
3 Broad Street, Suite 450
Charleston, SC 29401
(843) 300 -1047

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1159
(803) 724-1343

ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

Appellant was indicted by the Berkeley County Grand Jury for the offense of murder. (R. p. 409, 410). His case was called to trial on October 29, 2012 before the Honorable Kristi Harrington and a jury. (R. p. 1).

Chris Biering was appointed to represent appellant. Anne Williams and Brian Alfaro from the 9th Circuit Solicitor's office represented the State. (R. p. 1).

On November 2, 2012 the jury was charged the law of murder, and self-defense. (R. p. 383, line 22- p. 388, line 3). The jury found appellant guilty of murder. (R. p. 398, line 9). Judge Harrington sentenced appellant to life imprisonment. (R. p. 407, lines 13-17).

This appeal follows.

ARGUMENT

I.

The court's self-defense charge was erroneous because it failed to properly negate the Appellant's duty to retreat from an altercation occurring on his heirs property.

Relevant Facts

Decedent, Reginald Porcher, was shot at an area off of Underlie Lane in Berkeley County South Carolina. Underlie Road runs off of Jack Primus Road, all near Huger, South Carolina. (R. p.13, line 2- p.14, line 4). Specifically the shooting occurred near a tree located off Underlie Road. (R. p. 295, line 25- p. 296, line 10). The "tree" was described as a gathering place for the families that lived in the Jack Primus Road area. (R. p. 21, line 1- p. 22, line 19 & p. 296, lines 1-10).

On September 16, 2009 Appellant was traveling on Jack Primus Road in a car driven by Christopher Cleggett. (R. p. 296, lines 23-24). Decedent had parked his truck near the "tree" and was talking with people congregated there. (R. p. 22, lines 1-9). Appellant and Cleggett pulled off of Jack Primus Road when they saw decedent's truck. (R. p. 297, lines 7-10). The confrontation between Appellant and decedent took place between these two stopped vehicles. (R. p. 298, line 18 – p. 300, line 14).

At the start of the confrontation Appellant called out to decedent that he was coming over to talk to him. Decedent then ran back to his truck. (R. p. 298, line 20- p. 299, line 1). When decedent got back to his truck he reached in and retrieved something that Appellant believed to be a weapon. (R. p. 299, lines 7-18). In response Appellant went back to his car and retrieved a shotgun and fired at decedent. (R. p. 300, lines 6-14).

Appellant testified that he lived on heirs' property that is maintained by the Heirs of Wigfall. (R. p. 294, lines 5-12). The "tree" is on Appellant's heirs property. (R. p. 296, lines 3-10). Appellant is a direct Wigfall decedent through his maternal grandmother. (R. p. 294, lines 14-20). Appellant testified that there were only three houses between his house and Underlie Lane. (R. p. 295, lines 14-20).

The court charged the jury on the law of self-defense. (R. p. 384, line 23- p. 388, line 3). The Court addressed appellant's duty to retreat in the following element of the charge: "*If the defendant was on his own premises, the defendant had no duty to retreat before acting in self-defense.*" (R. p. 387, lines 13-15). After the jury was dismissed, the court asked if there were objections to the charge as read. Defense counsel objected and asked that the court *charge 16-11-440, subsection C, as previously presented.* (R. p. 390, lines 10-13).

Appellant then moved and the court denied his motion for directed verdict. The court then asked if Appellant had anything further regarding the jury charges that needed to be on the record. The court further asked whether Appellant believed that the court instructed *substantially similar to your request regarding self-defense.* (R. p. 393, lines 1-2). Appellant noted his objection that the language from 16-11-440(c) was not included and stated further: *Your Honor, it's just our position that because that has been brought back up by the Court, that the essence of what – the essence of it would not be sufficient. That we requested that code section be presented 16-11-440, subsection (c) would be an appropriate charge.* (R. p. 393, lines 11-16). The court did not recharge the jury to include the requested language.

Discussion

A tenancy in common is created where two or more beneficiaries inherit the property of an intestate. 6 South Carolina Jurisprudence: Cotenancies § 9. Tenants in common have an

undivided right to possess the entire property subject to the equal right of the other cotenants to possess the entire premises.6 South Carolina Jurisprudence: Cotenancies § 4. As a Wigfall heir, Appellant enjoyed a co-tenancy with the other Wigfall heirs on this property and therefore had a possessory interest in the entire tract of Wigfall heirs property. As outlined above, there was evidence presented at trial that the shooting between Decedent and appellant occurred on the Wigfall heirs' property.

In 2006 South Carolina enacted the Protection of Persons and Property Act (the Act) which is codified at S.C. Code Ann. § 16-11-410 (2006) et. seq. The General Assembly's purpose in enacting this legislation was for no *person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.* S.C. Code Ann. § 16-11-420(E) (2006). Additionally the Act provides:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, **but not limited to**, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(c) (2006) (emphasis added). At the time when he confronted decedent, Appellant was not engaged in an unlawful activity and he had no duty to retreat while on his heirs property and had the right to *meet force with force.* See. Id.

The court's self-defense instruction was consistent with the self-defense instruction adopted in State v Davis, 282 S.C. 45, 317 S.E.2d 452 (1984). However, as held by the South Carolina Supreme Court, the Davis charge was not intended to be an

exclusive self-defense charge. State v. Fuller, 297 S.C. 440, 443, 377 S.E.2d 328, 330 (1989). The court in Fuller held that in charging self-defense, the trial court must consider the facts and circumstances of the case at bar in order to fashion an appropriate charge. Id.

The court's self-defense charge only included the "duty to retreat" language found in the Davis charge, which is limited to one's own premises. The self-defense charge from Davis states that if a defendant is on his **own premises** he has no duty to retreat before acting in self-defense. Davis, 282 S.C. at 46, 317 S.E.2d at 453. South Carolina common law has long recognized that a defendant's right not to retreat extend beyond just the defendant's residence. See. State v. Gordon, 128 S.C. 422, 122 S.E. 501, 502 (1924), (holding that defendant who was a farm supervisor had no duty to retreat from an altercation arising out-doors on that farm); State v. Cleland, 148 S.C. 86, 145 S.E. 628, 631 (1928) (holding that owner of farm cultivated by deceased share-cropper had right to go on farm and need not retreat),Overruled on other grounds, State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009); State v. Wiggins, 330 S.C. 538, 548 500 S.E.2d 489, 494 (1998) (finding that business owners would have no duty to retreat from an altercation occurring in the parking lot of their business).

A trial judge's self-defense charge is in error where it fails to adequately reflect the facts and theories presented by defendant. State v Day, 341 S.C. 410, 535 S.E.2d 431, 435. (2000). A trial court commits reversible error when its self-defense charge fails to include elements that are applicable to the issues raised by the defendant. Fuller, 297 S.C. at 444, 377 S.E.2d at 331.

The court in Fuller charged the jury according to the charge approved by the court in Davis. Fuller, 377 S.E.2d at 330. Defense counsel objected to the charge and requested that additional elements be added to the Davis charge. Id. The defendant's counsel in Fuller requested that the self-defense charge also include the following elements: 1) that the defendant had the right to act on appearances; 2) words accompanied by hostile acts may depending on the circumstances establish self-defense; and 3) defendant had no duty to retreat if in doing so he would increase the danger of being killed or suffering serious bodily injury. Id at 330-331. The court in Fuller found that there was factual record support for each of these elements and that they were consistent with South Carolina law. Id. The court Fuller held that the trial judge's self-defense charge did not consider the particular facts and circumstances in the case and therefore reversed and remanded for a new trial. Id at 331.

Similarly in State v Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) the court limited its self-defense charge solely to the common-law elements. Defense counsel objected to the charge and requested the addition of the following elements: 1) the right to act on appearances; 2) relevance of prior difficulties; and 3) that a person does not have to wait before acting in self-defense. Id. at 121. The court in Nichols held that the evidence supported the requested elements to the self-defense charge and reversed and remanded the defendant's conviction. Id. at 122.

By enacting the South Carolina Protection of Persons and Property Act, the legislature made clear that defendants' "stand-your-ground" rights extend beyond just their house and business and extends to those locations on which the defendant has a right to be. S.C. Code Ann. § 16-11-440(c) (2006). Under the Act a defendant need not

prove he was on his own premises, he now need only prove that he was in a place where he had a right to be and that not conducting any unlawful activity.

Appellant's theory of self-defense included his belief that he encountered decedent while decedent was on the Wigfall heirs property. Appellant believed that decedent sought to arm himself as soon as he saw Appellant approach. Appellant was reasonably threatened by decedent's actions. Appellant responded by going back to his car, retrieving his gun, and shooting the decedent.

As a Wigfall heir appellant had a right to be on the property. It would be unrealistic to assume that a juror would know what appellant's legal property rights were in the location where the shooting occurred. A reasonable inference from the self-defense charge that the trial court used might be that the shooting had to have occurred at or near appellant's home in order for appellant to have no duty to retreat.

Under the particular circumstances in this case, namely that the shooting occurred on property in which Appellant enjoyed an ownership interest the court's self-defense charge was inadequate. The court's self-defense charge provided no further explanation or definition of the term premises. It is reasonable to conclude that the term premises would only refer to the Appellant's house and yard. Under the facts in this case, the court's instruction should have made clear that the Wigfall heirs property was the Appellant's premises. The court's failure to tailor the self-defense charge to incorporate the Appellant's theory of defense was prejudicial.

II.

The trial court violated the Appellant's Sixth and Fourteenth Amendment rights to confrontation and cross-examination pursuant to Crawford v. Washington, 541 U.S. 36 (2004) by allowing a witness to testify as an expert in DNA analysis where the expert had no independent basis for her expert opinion and her testimony was based upon testimonial hearsay contained in a report prepared by a non-testifying DNA analyst form the State Law Enforcement Division.

Relevant Facts

The state called Stephanie Stanley, a forensic scientist assigned to South Carolina Law Enforcement Division's (SLED) DNA casework department, to testify about DNA evidence collected from the scene. After reviewing her credentials the state moved to have her qualified as an expert in the field of forensic science, specifically DNA analysis. (R. p. 118, lines 3-5). Despite Appellant's objection to the relevancy of Stanley's testimony, the court admitted Stanley as an expert in DNA analysis. (R. p. 118, line 8). Appellant later stated that he did not wish to voir dire the witness on her qualifications as an expert, but questioned the relevancy of her testimony. (R. p. 118, line 14).

Stanley did not perform any DNA analysis in this case, but was permitted to testify regarding her review of a March 27, 2012 report prepared by Katie Urka. (R. p. 122, lines 16- 17 & p. 136 line 1). Urka was a fellow SLED forensic scientist assigned to SLED's DNA casework department. (R. p. 118, lines 20-25). The only explanation that the state provided for the unavailability of Urka was that she no longer worked for SLED. (R. p. 119, line 1). Several times during the course of Stanley's direct examination, defense counsel objected to the relevancy of her testimony. (R. p. 118, line 6 & p. 119, lines l. 3, 12, & 21). After overruling each of defense

counsel's objections, the court took note of Appellant's continuing objection to the relevancy of Stanley's testimony. (R. p. 120, lines 2-7). Stanley testified that her ***only*** involvement in the case was a review of Urka's analysis and results as part of a peer review process. (R. p. 119, line 14- p. 122, line 18).

In the March 27, 2012 report Urka analyzed three samples recovered from the scene which were identified as SLED items 35, swabs from Toyota Tacoma Truck; SLED 36, swabs from ground on Jack Primus Road; and SLED 37 swabs from gold Nissan Maxima. (R. p. 123, lines 5-8). Stanley was then asked if Urka came to a conclusion as to whom the blood belonged, to which defense counsel objected that "the witness is testifying about something that's not her report" (R. p. 123, lines 9-14).

After a bench conference, the solicitor asked a series of questions regarding the manner in which Stanley reviewed Urka's report. (R. p. 123, lin 19 – p. 124, line 13). The state then asked:

> Can you just go step-by-step as to, based on the documentation that you saw, what she did with each piece of evidence, without giving us the conclusion, based on all of the reports that you reviewed. Like, when get a submission sheet, why it that generated? Things like that.

R. p. 124, lines 14 – 19.

Before Stanley could complete her answer, Appellant objected on hearsay grounds. (R. p. 124, line 23). The trial court overruled the objection noting that Stanley was qualified as an expert and could therefore testify as to what she is relying upon to come up with her opinion. (R. p. 124, line 25- p. 125, line 2). The solicitor continued to question Stanley regarding steps that Urka took in order to analyze the evidence. (R. p. 126, lines 10-13). Defense counsel then

objected to the testimony citing as grounds; foundation, relevance, hearsay, and the Confrontation Clause. (R. p. 126, lines 10-13). The following dialogue then took place:

> THE COURT: First of all, Ms. Williams, if you would indicate, lay the foundation as to what her involvement was a team leader in this matter.
>
> Q. (By Ms. Williams) what was your involvement as team leader in this matter?
>
> A. As a team leader, nothing, I'm in charge of a different section in the casework department. As a fellow analysis, we are in charge of reviewing each other's work, performing technical reviews, and administrative reviews prior to issuing reports.
>
> Q. And as someone that does a peer review as part of a peer review, do you review all of the work that a person does, like you did with Ms. Urka in this case, and come to an opinion as to whether you agree with her finding or not?
>
> A. Yes. I have to review everything that another analyst does in a case, from the beginning to the end. And, excuse me issuing the report.

R. p. 126, line – p. 127, line 6. Shortly thereafter the trial court summoned a bench conference and then adjourned court for the day.

When trial resumed the next day Stanley repeated that she reviewed Urka's report, and then described the steps that Urka took to compare the three blood samples described above to the samples from decedent and Appellant. (R. p. 131, line 14- p. 132, line 5). Defense counsel's objection to Stanley's testimony on hearsay grounds was overruled. (R. p. 132, lines 6-14). Stanley then testified that the DNA profile developed from items 35, 36, and 37 matched the DNA profile of decedent and none of the samples matched Appellant's DNA. (R. p. 133, lines 7-21).

On cross examination Stanley admitted that she did not perform DNA analysis in this case. (R. p. 134, lines 13-16). Stanley testified that she was not in the lab when the DNA analysis was performed in this case. (R. p. 134, line 20- p. 135, line 1).

Discussion

Without explaining why Urka was unavailable to testify regarding the DNA analysis she performed on the blood samples recovered from the scene, the state sought to have the testimony of her DNA analysis admitted through Stanley's expert testimony. However, Stanley admitted that she neither conducted the DNA tests nor was present in the lab while the analysis was being done. Stanley's testimony regarding the identity of the blood samples recovered from the scene was based solely upon the hearsay statements contained in Urka's March 27, 2012 report.

The Sixth Amendment's Confrontation Clause guarantees that *[i]n all criminal prosecutions the accused shall enjoy the right...to be confronted with the witnesses against him."* U.S. Const. Amend. VI. Similarly, in South Carolina a criminal defendant's right to confront the State's witnesses is protected by Article 1 Section 14 of the Constitution of South Carolina. The United States Supreme Court in Crawford v. Washington, held that it is a violation of an accused's rights under the Confrontation Clause to admit testimonial hearsay statements against an accused unless the declarant is either available to testify at trial or the accused had a prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 54. The South Carolina Supreme Court in State v. Lander, 373 S.C. 103, 644 S.E.2d 684 (2007), noted that without providing a comprehensive definition of a testimonial statement the Court in Crawford did by way of example include in its definition of testimonial hearsay statements that were made under circumstances which would lead *an objective witness reasonably to believe that the statement would be available for use at a later trial; and statements taken by police officers in the course of interrogations*. Id at 688.

Urka's statement is testimonial because it was made by a South Carolina law enforcement employee in her course of a criminal investigation with the obvious purpose to be

used as trial evidence. When she prepared the report Urka would have had a reasonable expectation either that she or her report would be used prosecutorially in Appellant's trial.

The Supreme Court's decision in Crawford does not prevent expert witnesses from offering independent judgments merely because those judgments were partially informed by otherwise inadmissible hearsay evidence. United States v. Johnson, 587, F.3d. 625, 635 (4th Cir 2009). See Also Rule 703, SCRE (permitting experts to rely upon inadmissible facts or data). However, a criminal defendant's Confrontation Clause rights are violated when the expert testimony becomes little more than a conduit or transmitter for testimonial hearsay. See Bullcoming v. New Mexico, 131 S.Ct. 2705, 2710 (2011) (holding that the prosecution could not introduce a forensic laboratory report containing a testimonial certification through a scientist who neither performed nor observed the test described in the report).

The test for determining if an expert is providing an independent judgment or merely providing a conduit for transmitting testimonial hearsay is whether *the expert is applying his training and expertise to the sources before him*, thereby creating *an original product that can be tested by cross examination*. United States v. Palacios, 677 F.3d 234, 243 (4th Cir. 2012). Stanley's testimony that she conducted a peer review of Urka's report shows that Stanley was not creating an independent report but instead merely reviewing the procedures Urka followed and the results Urka obtained.

In Bullcoming, the defendant was accused of driving while intoxicated (DWI) and the principal evidence against him was a forensic lab report certifying his blood alcohol content (BAC) as being above the threshold necessary to prosecute for aggravated DWI. Id at 2707. The forensic scientist that performed the BAC test, Caylor, did not testify and the prosecution did not assert he was unavailable. Id. The state called another analyst, Razatos, to testify and validate

Caylor's BAC test. Razatos testified that he was familiar with the testing devices used and with the laboratory's testing procedures. Id. However, Razatos neither participated in nor observed the testing of the defendant's blood sample. Id. The Court in Bullcoming held that Razatos' surrogate testimony did not meet the constitutional requirement. The Court held that the accused had the right to confront the analyst who made the certification, unless that analyst is unavailable for trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist. Id at 2710.

The Court in Bullcoming noted that the surrogate testimony which Razatos provided could not convey what Caylor knew or observed about the defendant's BAC test. Nor could Razatos' surrogate testimony expose any lapses or lies on Caylor's part. Moreover, Razatos stated that he had no independent opinion concerning the defendant's BAC. Id 2715- 2716. In holding that the defendant had a Sixth Amendment right to confront Caylor, the Court in Bullcoming noted that the defendant's opportunity to cross-examine Razatos about Caylor's testimonial statements did not alleviate the Sixth Amendment violation created by the defendant's inability to cross examine Caylor directly. Id. at 2716.

The facts in the case at bar are similar to those before the Court in Bullcoming and therefore justify the same conclusions reached by the Court in Bullcoming. The analyst in this case, Urka, like Caylor was the actual analyst that performed the forensic tests. In both cases the results of the forensic tests formed the basis for the experts' testimony. Both experts, Razatos and Stanley, were only able to testify to their knowledge of the type of testing performed and the procedures used by the labs that performed the tests. Neither expert took part in nor was even present when the forensic testing occurred. Additionally, neither expert performed their own independent investigation.

The state solicitor argued to the jury that only the victim's blood was recovered at the scene and that was important evidence of Appellant's guilt. In the closing argument the solicitor stated:

> Now what is important about ---I mentioned the car so I will talk about it for just a second. McCray tells you that when he went over and kick Reggie he wasn't bleeding, thought he was fine.
>
> You will see all that blood. You saw all that blood in the picture in that Nissan. You will see the victim's blood on the outside of his truck. Victim's blood was on the ground, in the road. Victim's blood was in that Nissan.

T. 715 l. 11- 19. The evidence admitted through Stanley's testimony was prejudicial. Therefore this Court should conclude that the admission of the Stanley's testimony over Appellant's numerous objections constituted a reversible depravation Appellant's confrontation rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I Section 14 of the Constitution of South Carolina.

III.

Since the state opened the door to Appellant's proffered testimony regarding the decedent's past criminal record, drug use and violence; and since the evidence was so closely connected with the homicide as to reasonably indicate the decedent's state of mind, the proffered testimony was relevant and the court's refusal to allow it was a violation of Appellant's Sixth and Fourteenth Amendment rights to offer relevant witness testimony.

Relevant Facts

The state filed an Amended Motion in Limine to prohibit appellant from introducing testimony concerning the victim's character through testimony or evidence of prior convictions or other alleged bad acts unless they are connected toward the defendant or closely connected in point of time or occasion with the homicide. (R. p. 415 & p. 2, lines 1-8). The state renewed its motion several times throughout the course of the trial. In response Appellant proffered testimony from Robert Porcher III, Lieutenants Frank Jackson and David Brabham Jr. and Chavis Wright, along with the decedent's medical and disciplinary records from the South Carolina Department of Corrections. (R. p. 416- 479 & p. 480- 518). The proffered evidence testified to the decedent's criminal record, history of drug abuse and past violent conduct.

A. The decedent's father Robert Porcher, Jr.

The State called the decedent's father, Robert Porcher Jr. to testify. Mr. Porcher testified he had two other adult children at the time, a daughter Crystal Marie Porcher and a son Robert Porcher III. (R. p. 56, line 1). On direct examination the solicitor asked Mr. Porcher if his older son played professional football. (R. p. 56, line 21). Defense counsel objected to the question based on relevance. (R. p. 56, line 23). After a bench conference the court overruled the

objection. (R. p. 57, line 7). Mr. Porcher then confirmed that Robert Porcher III was a retired professional football player. The following dialogue then took place:

> Q. Was there something that happened to Reggie that prevented him from playing football at some point?
>
> A. Yeah, Reginald was in an auto wreck, another car hit him head-on, and the other driver was at fault. And Reginald had both his legs broken, his ankles. And so he was no longer able to participate in sports anymore.

R. p. 57, lines 14-20.

Prior to his cross examination of Mr. Porcher, counsel defense counsel asked to approach the bench. At the conclusion of his cross examination of Mr. Porcher, defense counsel asked the court if he could put the matter discussed at the bench conference on the record and that the witness not be excused and the court agreed. (R. p. 63, lines 21-25). Defense counsel argued that the testimony regarding the decedent's auto accident and its possible effects upon decedent's football career opened the door to questions regarding other events that may have affected his possible football career. (R. p. 70, line 18). Defense counsel then proffered the following in-camera testimony from Mr. Porcher:

> Q. You had testified that previously the car wreck prevented him from being able to continue on and play college football; is that correct?
>
> A. Yes, that's what I said.
>
> Q. Were there other issues in your son Reginald's life that prevented him from being able to play college football?
>
> A. I don't know whether he would have played college football or not. I know he wouldn't have been able to play because of the injury.

R. p. 72, lines 16-25. In response to further questioning under the proffer, Mr. Porcher testified that during the same proximity in time as his injury his son was arrested for:

disturbing schools, (R. p. 73, line 13); burglarizing a service station, (R. p. 74, line 17); and fighting. (R. p. 74, line 22).

B. Decedent's medical and disciplinary records from SCDC, Defense Exhibits 1 & 2

Appellant then proffered two exhibits. Defense Exhibit 1 was the decedent's SCDC medical records from September 2002 through January 2009. Defense Exhibit 2 was the decedent's SCDC disciplinary records for the same time frame. (R. p. 213, lines 2-14).

Throughout decedent's medical records there are mental health entries showing that the decedent suffered from PTSD and took prescription medicines for anxiety and depression. The medical records also provide evidence of the decedent's history of alcohol, cocaine, marijuana, and crack cocaine abuse (R. p. 421, 422, 424, 425). The SCDC medical report also provided evidence of decedent's past violent outbursts. (R. p. 422, 424). Decedent's SCDC disciplinary contained evidence of decedent's violent behavior while incarcerated. (R. p. 481- 490).

C. Lieutenant Frank Jackson

Lieutenant Frank Jackson was employed with the Berkeley County Sheriff's Department. Jackson testified under proffer that he was involved in the 2002 investigation of a burglary safecracking incident involving the decedent. Jackson testified further that the decedent and two co-defendants stole an ATM from a Daniel Island Convenience Store. (R. p. 216, lines 6-19). Jackson also confirmed that the decedent was in an automobile accident during the course of the incident and was hospitalized with leg or ankle injuries. (R. p. 216, line 20- p. 217, line 7). Jackson confirmed that his investigation resulted in a burglary conviction against the decedent. (R. p. 218, lines 15-16).

At the close of Lt Jackson's testimony, the state argued that the testimony was impermissible character evidence. (R. p. 221, lines 7-10). When asked by the Court to respond to the State's objection, Defense Counsel stated:

> Your honor as I stated on the record previously, I believe that the actual admissibility of this information arguably would hinge on my client's testimony. And from the order standpoint, I think we are prejudiced in that light.
>
> But as it would relate to this specific issue, again it's not just an issue about 404, it's an issue about habit or routine.
>
> And what I think that we are going to present, Your Honor, is a litany that is equivalent to evidence of habit or routine practice that goes back to 2000 that involves a violent burglary that was seven years prior to the events here.

R. p. 221, line 23- p.222, line 5.

After additional discussions the court gave a final ruling regarding the admissibility of Jackson's proffered testimony.

> THE COURT: All right. Habit is described as conduct that is situation-specific, or specific particularized conduct capable of almost identical repetition. And that distinguished from character that is a generalized description of a person's disposition of a general trait, such as honesty, temperance or peacefulness.
>
> The testimony that has been presented in Defendant's 1, 2 as to the documents, to the testimony of Lt. Jackson and to the testimony of Lt. Currie (1) they do not rise to a – they are situation-specific.
>
> We do not have either the victim or the defendant near or around a convenience store or an ATM or in a jail cell or any testimony involving urine.
>
> Those two specific incidents of conduct are- the motion in limine, and those two officers, will not be allowed to testify.

R. p. 224, lines 9-25.

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1. Lt. Currie was a director of the Berkeley County Detention Center and testified under proffer regarding an incident where decedent threw a cup of urine at two corrections officers.

D. Lieutenant David Brabham Jr.

Brabham proffered testimony that in June 2000 while working for a drug enforcement unit with the Berkeley County Sheriff's Office, he attempted to stop decedent's vehicle at a drug checkpoint. (R. p. 228, lines 3-18). Sheriff's officers searched decedent's vehicle and found a fully loaded .38-caliber blue steel Taurus handgun on the front seat of his car. Decedent was charged with unlawful carrying of a pistol, driving under suspension, and failure to stop for a blue light. (R. p. 229, line 11- p. 230, line 8). The state argued that Brabham's testimony was prejudicial and not probative. In response defense counsel argued that the evidence was admissible under Rule 406, SCRE. Appellant also argued that independent of having a loaded firearm in the car, decedent's fleeing from the police and failing to yield to the arresting officer's blue light amounted to dangerous conduct. (R. p. 232, line 13- p. 233 line, 5). The court ruled that Brabham would not be permitted to testify noting that there was no evidence of an act of violence, and if decedent's conduct could be considered violent it was not directed at appellant. Moreover the court ruled that the event was not so closely connected with the homicide as to indicate the deceased's state of mind. (R. p. 234, lines 4-16).

E. Chavis Wright.

At a bench conference prior to Chavis Wright's testimony, defense counsel advised the court that he believed that Wright would testify that he and decedent went to a location to purchase drugs that directly related to the events of September 16, 2012. (R. p. 238, lines 10-16). The state argued that testimony regarding the decedent being present at a location where drugs were being sold was bad acts evidence and should be excluded. (R. p. 239, lines 6-11). Appellant responded that the state had already opened the door regarding decedent's marijuana use through

the testimony of its own witness. (2) (R. p. 240, lines 1-10). The Court ruled that it would first hear Wright's proffer before ruling on its admissibility. (R. p. 240, lines 20-22).

As part of his proffer, Wright testified that on the night before the decedent died, he Abdulla Fishburn and a few other individuals including the decedent went to the Jack Primus area to purchase marijuana. (R. p. 245, lines 13-18). He described decedent as being angry that night because of an incident that occurred earlier in the day between Abdulla and Appellant. (R. p. 246, lines 11-15). He further testified that decedent was carrying a concealed handgun which he then pulled and fired off several rounds into the air. (R. p. 246, lines 18-25). Defense counsel later asked:

> Q. Did you learn anything that night about Reginald Porcher and Ron McCray?
>
> A. All I learn is that he had animosity towards him, and he was going to retaliate on him the next day.

R. p. 247, lines 17- 20.

During cross examination the state asked Wright to describe Abdulla Fishburn's appearance. Wright responded that Abdulla looked upset because of the fight that Abdulla and Appellant had earlier in the day. (R. p. 250, lines 4-16).

Later in the day the court held a bench conference regarding the admissibility of Wright's testimony. Appellant argued that the testimony was admissible because of the close proximity in time between the events testified and decedent's death and it related to decedent's possession of a hand gun at that time. (R. p. 263, line 15- p. 264). After further discussion the court ruled that Wright's testimony regarding drugs, drug use by the victim, and to the mention of the gun, the

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2. The State called Dr. Susan Presnell who testified that decedent's toxicology report showed the presence of marijuana metabolites. T. 438 l. 13-15

shooting of the gun was more prejudicial than probative and that they were not so closely connected with the homicide as to justify their inclusion. The court ruled that Wright could testify that decedent was upset at appellant because he beat up his friend. (R. p. 270, line 12- p. 271, line 5).

Discussion

In light of this Court's recent decision in State v Page, No. 5182 (S.C. App. filed Nov. 6, 2013)(Shearouse Adv. Sh. No. 47 at 17), the trial court erred in not allowing the proffered testimony of Chavis Wright, Lieutenants Frank Jackson, & David Brabham, along with defense exhibits 1 & 2. In Page this court held:

> The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19 (1967). This Sixth Amendment right "guarantee[s] that a criminal charge may be answered through the calling and interrogation of favorable witnesses . . . ." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986). Accordingly, a defendant has a fundamental constitutional right to offer relevant witness testimony. Washington, 388 U.S. at 23.

Id. at 27

The testimony of the decedent's father regarding his son's prior criminal convictions became relevant once he put his son's purported good character in issue through his testimony regarding a potential football career. Appellant had a right to contradict this testimony by showing that it was decedent's bad character and not the auto accident that stymied his career. After the decedent's father testified, the jury was left with the impression that, but for the decedent's auto accident, the decedent would have had the same college or pro football career that his older brother enjoyed. Initially appellant objected to the relevancy of this testimony. (R.

p. 56, line 23). Appellant had not attacked the decedent's character; therefore this good character evidence was not relevant. See. State v. Langley, 334 S.C. 643, 647 515 S.E.2d 98, 100 (1999). (holding that good character evidence of the how victim acquired his nickname and that that he had attended Burke High School and played drums in the band was irrelevant and inadmissible). However, otherwise inadmissible negative character evidence becomes admissible if the opposing party opens the door by putting that witness's character in issue. State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (holding that defendant's question to co-defendant as to whether defendant *ever broke into homes for money*, opened the door to state's introduction of evidence of defendant's two prior robberies). Once the state offered positive character evidence about the decedent, the state could not object to defense counsel's further inquiry into the subject. The trial court's refusal therefore, to allow the testimony of the decedent's criminal record was prejudicial.

The state also opened the door to testimony of the decedent's drug use. Dr. Susan Presnell testified that the toxicology report from the decedent's autopsy showed the presence of marijuana metabolites in his system. (R. p. 147, lines 13-15). Appellant had additional proffered evidence that would have corroborated decedent's drug use both past and recent. In his proffer Wright testified that he was purchasing marijuana with the decedent the night before his death. The decedent's medical records from SCDC revealed a history of substance abuse including marijuana, crack, cocaine and alcohol. As part of the self-defense charge, the court included the following element: *The intoxication of the victim may be considered in deciding whether the defendant's fear of death or bodily harm was reasonable.* (R. p. 387, lines 6-8). Appellant's proffered evidence regarding the decedent's drug use was therefore relevant and the court's refusal to allow it was prejudicial.

The proffered testimony from Wright, Lieutenants Jackson and Brabham, along with the SCDC records regarding the decedent's past violent conduct was relevant because they were evidence of the decedent's state of mind at the time of the homicide. In a murder prosecution where the defendant pleads self-defense, specific acts of the defendant's violent behavior are admissible provided that the acts were directed against the defendant, or they were so closely connected at point of time or occasion with the homicide as to reasonably indicate the deceased's state of mind at the time of the homicide. State v Day, 535 S.E. 2d, at 436. Although Wright was permitted to testify that on the night before the homicide decedent was visibly upset with Appellant, Wright was not permitted to testify that on the night before his death decedent pulled out a concealed hand gun and fired several shots in the air. The combination of decedent's violent and reckless behavior in brandishing and firing the hand gun combined with visible animosity toward the Appellant was relevant evidence of decedent's state of mind at the time of his death. The Appellant was prejudice when the Court only permitted Wright to testify to half of the story. Brabham's testimony regarding the earlier traffic stop and decedent's possession of a loaded hand gun further corroborates the testimony of the decedent's violent behavior.

Appellant proffered testimony of decedent's criminal record, drug use, and violent past. The testimony about decedent's criminal record and drug use became relevant once the state opened the door. The testimony regarding the decedent brandishing a hand gun the night before his death along with his animosity toward Appellant were relevant because of the close temporal relationship with his death. The court's refusal to allow the testimony was prejudicial and a denial of the Appellant's constitutional right to offer relevant witness testimony. Washington v. Texas, 388 U.S. 14, 23 (1967).

IV.

After Appellant discovered that the state failed to provide Appellant with relevant impeachment evidence in advance of Appellant's initial cross examination of an important witness, the court erroneously denied Appellant's request to conduct a second and unlimited cross examination of the witness.

Relevant Facts

The state called Joyce Wright who lives on Underlie Lane to testify regarding knowledge of the events September 16, 2009. (R. p. 20, line 6- p. 25, line 12). Defense counsel then cross examined Wright. (R. p. 25, line 14- p. 27, line 20).The state's next called Felicia Denise Coaxum to testify as to her personal knowledge of those events. (R. p. 27, line 21- p. 35, line 7). Coaxum's testimony included her statement that she saw the decedent on the ground and the Appellant stomping him and saying "die mother-f***er die". (R. p. 29, lines 22-25). Appellant then conducted its cross examination of Coaxum. (R. p. 37, line 11). Both parties then conducted their examination and cross examination of another Jack Primus resident, Akeem Asby. (R. p. 37, line 18- p. 44, line 13).

At the conclusion of Asby's testimony, the state asked to recall Wright and questioner her regarding her 2001 fraudulent check charge. (R. p. 45, line 10-13). Wright confirmed her conviction and the state had no further questions. On cross examination defense counsel did not ask about her conviction and instead asked Wright if she knew Abdulla Fishburn. The state objected to the question; the court sustained and directed defense counsel to limit his cross examination to Wright's conviction. Defense counsel withdrew the question and had nothing further. (R. p. 45, lines 19-25). The state then recalled Coaxum and questioned her about a 2004

breach of trust charge. Coaxum confirmed her charge. Before conducting his cross examination of the witness, defense counsel sought a bench conference. At the conclusion of the bench conference, the court asked defense counsel if he had any questions related only to that issue. Defense Counsel said he had nothing further. (R. p. 46, line 15- p. 47, line 4).

Later in the day and outside the presence of the jury, defense counsel advised the court that it was not until after Wright and Coaxum were excused that he was provided with the discovery information that they both had prior criminal records. (R. p. 66, lines 8-11). However, on September 23, 2009 Appellant filed a Motion for Discovery and Inspection, in which he specifically requested the Criminal records and bad acts evidence of any witness the state intends to call. (R. p. 411- 414). As a result of the untimely disclosure, defense counsel raised two objections. First, that the state's actions in failing to provide timely discovery amounts to abuse. Second that once he was provided the discovery, the court limited the scope of his re-cross examination solely to the witnesses' prior convictions. (R. p. 66, lines 10- 17).

As a remedy, Defense Counsel asked that he be given another opportunity to cross examine both witnesses without any limitation on its scope. (R. p. 66, line 23- p. 67, line 3). The following dialogue then took place:

> THE COURT: Mr. Biering, tell the Court what the parameter would be then, what difference it makes as to the conviction as to what you would ask them.
>
> MR. BIERING: Quite candidly, Your Honor, I'm not in a position to do that. I think it's something just as I have gone through and calculated what information I would attempt to elicit through cross-examination in my preparation for this trial, it's the type of thing that I will go back to the drawing board and reevaluate how I would cross-examine these witnesses.

R. p. 67, lines 4-14).

In response the state advised the court that the two witnesses' rap sheets were prepared on October 26, 2012, which was the Friday before the trial commenced. Further the State admitted that they should have provided Defense Counsel with the rap sheets before the witnesses testified. The state had not realized their mistake until after the witnesses had taken the stand. (R. p. 68, lines 9- 18). The court then advised Appellant that he would have a further opportunity to be heard on his objections related to these witnesses' testimony.

The next day during a lunch recess, defense counsel made additional remarks in support of his objections. Defense counsel stated that had he known that the witnesses had criminal records, he would have conducted their cross –examinations differently. Specifically Defense counsel stated that he would have approached both witnesses with very detailed reviews of their prior statements. (R. p. 77, lines 9-24). In response to the Court's question of what relief he was now seeking, defense counsel repeated that he be permitted to re-cross the witnesses. (R. p. 78, lines 22-24). In response the court took the matter under advisement. (R. p. 79, lines 1-5). Later at the close of the state's case, the court heard again heard from both parties before denying defense counsel's motion to recall the witnesses. (R. p. 189, line 14- p. 190, line 6).

Discussion

Coaxum's testimony that she heard the Appellant utter "die mother –f***er, die" was important evidence in the case against the Appellant. The state argued that the utterance was strong evidence of Appellant's guilt and malice. Both portions of the state's closing argument made specific references to this remark. (R. p. 339 lines, 24-25 & R. p. 355, lines 14-18). Moreover, the trial court specifically referred to that testimony in denying Appellant's motion for directed verdict. (R. p. 189, lines 14-15). Coaxum was the only witness to testify that she heard

this statement. (3) Therefore the ability to impeach Coaxum's credibility would have been paramount for Appellant's defense.

The state's failure to provide favorable evidence to a defendant is a due process violation if the evidence is material either to guilt or innocence, *irrespective of the good faith or bad faith* of the prosecution. Brady v. Maryland, 373 U.S. 83, 87 (1963). When considering the prosecution's obligation to disclose Brady materials, impeachment evidence is treated the same as exculpatory evidence. U.S. v. Bagley, 473 U.S. 667, 676 (1985), Sheppard v. State, 357 S.C. 646, 659, 594 S.E.2d. 462, 470 (2004). However, *no due process violation occurs as long as Brady material is disclosed to a defendant in time for its effective use at trial.* United States v. Smith Grading and Paving, Inc., 760 F.2d 527, 532 (4th Cir 1985). Rule 609(a) (2), SCRE provides that for purposes of impeaching a witness's credibility, *evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment.* Coaxum's 2004 conviction for breach of trust conviction was Brady material and the state had an obligation to make a timely disclosure. Since Appellant did not have the information prior to Coaxum's initial cross examination, he was not able to use it effectively in Coaxum's initial cross examination.

By failing to provide Appellant with highly relevant impeachment evidence until after defense counsel completed his cross examination of Coaxum, the state violated the Appellant's right to effectively confront his accusers. Since the trial court limited defense counsel re-cross examination solely to the issue of Coaxum' s 2004 conviction, Appellant's Sixth and Fourteenth

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(3) James Boykin was not present when the decedent died but he testified that at a later date he heard the Appellant repeat the statement. (R. p. 88, lines 2-12)

Amendment rights to confront his accusers was substantially restricted. Defense counsel's suggested remedy namely, that he be permitted an unrestricted re-cross examination of Coaxum, was reasonable under the circumstances. Defense counsel proffered that had he known in advance that Coaxum had a criminal record he would have conducted her cross examination in a different fashion. The court asked defense counsel what specific questions he would have asked on his initial cross-examination. Defense counsel stated that he would have approached the witness with a very detailed review of her prior statement. Defense counsel then went on to state:

> It's always difficult to question a person's credibility, Your Honor, when you are not the person that's in a position to actually have time with that witness beforehand, discuss matters with that witness. And knowing their convictions that I think questions their level of truthfulness, I would approach cross-examination very differently. I would ask to reopen...
>
> [The] only relief that I am seeking is to be able to recross. It's a murder case. I think it's a substantial issue as it relates to my client's ability to have effective cross-examination of witnesses. We were denied information. And I think that the remedy that I am seeking is a very simple, and very mild remedy. And I respectfully request to have recross on both witnesses.

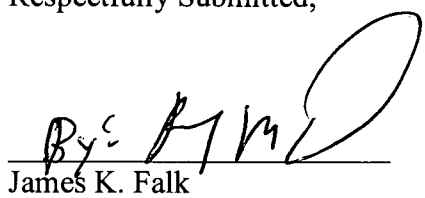
R. p. 78, lines 4-25.

The trial court's decision to deny Appellant the opportunity for a full re-cross examination of Coaxum was another violation of his Sixth and Fourteenth Amendment Right to confrontation and cross-examination. Because of the importance of Coaxum's testimony for the case against the Appellant, the hindrance of Appellant's ability to effectively challenge Coaxum's credibility was highly prejudicial.

CONCLUSION

By reason of the foregoing arguments, petitioner's conviction should be reversed, and this case remanded to the Berkeley County Court of General Sessions for a new trial.

Respectfully Submitted,



James K. Falk
Bush law Group
3 Broad Street, Suite 450
Charleston, SC 29401
(843) 300- 1047
jfalk@bushlaw.com

Robert Dudek, Esq.
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

This 6th day of August, 2014

CERTIFICATE OF COUNSEL

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

August 6, 2014

By: [signature]

Robert M. Dudek
Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County
Kristi L. Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RON SANTA McCRAY

APPELLANT,

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Kaycie Timmons, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of August, 2014.

By: JKM

James K. Falk
Robert Dudek

Attorneys for Appellant

SUBSCRIBED AND SWORN TO
Before me this 6th day of August, 2014

Notary Public for South Carolina
My Commission Expires: July 24, 2022.