

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RON SANTA MCCRAY,

APPELLANT,

Appellate Case No. 2012-213393.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

JUL 31 2014

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I.

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

II.

Whether 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 from [sic] the State Law Enforcement Division?

III.

Whether the court's refusal to admit Appellant's proffered testimony regarding the decedent's past criminal record, drug use and violence was a violation of Appellant's Sixth and Fourteenth Amendment rights to offer relevant witness testimony?

IV.

Whether 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?

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court's self-defense charge properly reflected Appellant's duty to retreat in light of Appellant's request to charge S.C. Code Ann. § 16-11-440(C).

II.

Whether the trial court erred in admitting the testimony of an expert witness who opined about DNA results based on her peer review of a DNA analysis performed by one of the expert witness's colleagues.

III.

Whether the trial court properly excluded Appellant's proffered evidence regarding Victim's past criminal record, drug use, and violence.

IV.

Whether the trial court erred in denying Appellant's request to conduct a second, unlimited cross-examination of a witness whose rap sheet Appellant did not receive until after his first cross-examination of that witness.

RESPONDENT'S STATEMENT OF THE CASE

A Berkeley County Grand Jury indicted Appellant, Ron Santa McCray, in July 2011 for the murder of Reginald Porcher (Victim). (R. p. 409). On October 29, 2012, Appellant's case was called to trial before the Honorable Kristi Harrington. (R. p. 1). Appellant was represented by Christopher Biering at trial. (R. p. 1). Brian Alfaro and Ann Williams represented the State. (R. p. 1). At the conclusion of the five-day trial, the jury returned a verdict of guilty. (R. p. 1; R. p. 398, lines 6–16). Judge Harrington sentenced Appellant to life imprisonment for murder. (R. p. 407, lines 1–18). Thereafter, Appellant filed a timely Notice of Appeal. (R. p. 522–24).

RESPONDENT'S STATEMENT OF FACTS

Officer Tony Daniels of the Charleston City Police Department was dispatched to a shooting in the area of Underlie Road and Jack Primis Road on September 16, 2009. (R. p. 12, line 24–p. 15, line 10). Officer Daniels arrived at 4:50 p.m. (R. p. 15, lines 14–16). When Officer Daniels arrived on the scene, he observed “a black female on the ground on her knees. She had a male’s head cradled up next to her body.” (R. p. 16, lines 4–8). Officer Daniels saw blood all around the body, and he noted that the male did not appear to be conscious. (R. p. 16, lines 9–15). According to Officer Daniels, the woman “was screaming, [‘]shot him, shot him, shot him.[’]” (R. p. 16, lines 16–18). The man the woman was cradling was Victim, Reggie Porcher. (R. p. 49, line 6–p. 51, line 17). Officer Daniels proceeded to clear a group of people that was gathered around the woman and to secure the scene. (R. p. 16, lines 19–p. 18, line 18). Officer Daniels did not see any weapons in the area near where the victim was lying, nor did he see anyone at the scene with a weapon. (R. p. 18, lines 1–8).

At Appellant’s trial, a number of witnesses testified about the events surrounding Victim’s death.

For example, Tianna Chanice Mack-Collins testified that she was at her aunt’s house when her cousin and son came in and told her that she “needed to come outside because a man had shot Reggie.” (R. p. 48, line 18–p. 49, line 8). Mack-Collins testified that she jumped up and asked the children again what happened, and her “cousin said the bad man Ron, bad man Ron shot Reggie.” (R. p. 49, lines 11–16). Mack-Collins ran outside. (R. p. 49, lines 17–19). There, she saw Appellant walking to his car. (R. p. 49, line 22–p. 125, line 2). Mack-Collins also saw Victim and called out to him. (R. p. 50, lines 3–22). Victim staggered toward Mack-Collins holding his neck. (R. p. 50, line 23–p. 51, line 3). According to Mack-Collins, “he was

like, help me, Ron just shot me.” (R. p. 51, lines 4–5). Victim then took his hand off of his neck, and blood started coming out of his neck. (R. p. 51, lines 6–7). Mack-Collins tried to help Victim—she held him and stayed with him until the police came. (R. p. 51, lines 8–17).

Another witness, Joyce Wright, testified that she was sitting on a friend’s porch the day that Victim was shot. (R. p. 20, line 5–p. 21, line 20). She saw Victim pull up to the area and saw him talking with one of her nieces. (R. p. 22, lines 4–8). Wright also testified that “later on [she] saw somebody tall with a white T-shirt on walking towards the crowd where a lot of kids was at. And he had something long in his hand.” (R. p. 22, lines 13–16). Then, Wright heard a gunshot, and the children that had been underneath the tree began to run. (R. p. 22, lines 16–18). Some of the children came up to her and shouted, “Ron shot Reggie.” (R. p. 22, line 19–p. 23, line 16). Wright told them to call 911. (R. p. 22, line 20). Wright observed Victim walking around in a circle and holding his neck before he fell to the ground. (R. p. 22, line 20–25).

Felicia Denise Coaxum testified that she had been in her mother’s room asleep before being awakened by a loud noise. (R. p. 27, line 21–p. 28, line 24). Coaxum looked outside and saw Victim’s black truck rolling toward the woods. (R. p. 29, lines 1–11). Coaxum testified that she also “saw Ron McCray and Reggie. Reggie was down on the ground, and I saw Ron McCray was standing over Reggie stomping him and telling him, die mother-fucker, die.” (R. p. 29, lines 22–25). According to Coaxum, Appellant had something with “a metal, wooden handle.” (R. p. 30, lines 1–5). As Victim was laying on the ground, Appellant “asked the other people in the area did they have a problem, and that he’s God.” (R. p. 30, lines 9–12). Coaxum then saw Appellant get in a car and leave. (R. p. 30, lines 6–8).

Akeem Asby testified that he was hanging out under the tree the day Victim was killed. (R. p. 37, line 13–p. 38, line 10). Victim had been there for about twenty or thirty minutes when

Appellant pulled up. (R. p. 39, lines 10–17). Asby saw Appellant get out of his car with what looked like a shotgun in his hand. (R. p. 39, line 22–p. 40, line 1). Asby ran off, but he heard Appellant yelling at Victim. (R. p. 40, lines 2–8). Asby then heard a gunshot and returned to the area. (R. p. 40, lines 5–8). When Asby got back, he saw Appellant leaving in a car, but he heard Appellant say “[s]omething like, God is a faggot. I assure you all I’m God. Things like that.” (R. p. 40, lines 9–17). Victim came over to Asby holding his neck, but Asby told Victim there was nothing he could do to help. (R. p. 40, lines 18–23).

The State also called James Boykin, a friend of Appellant, to testify about what Appellant said and did after the shooting. (R. p. 80, line 2–p. 99, line 9). Boykin testified to the following phone conversation he had with Appellant:

Q. . . . What did the defendant say to you on the phone?

A. Had I seen what happened, and that he had shot Reggie.

Q. Mr. McCray was saying that?

A. Yes.

Q. Tell us the words he used?

A. I shot that—

.....

A. . . . He said, I shot that mother-fucker.

Q. . . . And what else did he say about the fact that he shot him?

A. I hope he died. He said he spat in his face, kicked him, told him, don’t fear God, fear me.

Q. And did he saying anything about what he was saying when he spit in his face and was standing over him?

A. He said, die mother-fucker, die.

(R. p. 87, line 19–p. 88, line 13).

Boykin further testified that Appellant came over to his house the next morning and that Appellant “said that he needed to go get his check and stuff because he had to handle some business because he knows he was in trouble I guess.” (R. p. 88, lines 14–22). However, Boykin testified that Appellant was acting like “[n]ormal Ron” when he came over. (R. p. 89, lines 13–15). According to Boykin, Appellant called his supervisor to have his check put in Boykin’s name. (R. p. 90, lines 19–25). Boykin then dropped Appellant off and went to pick up the check and some of Appellant’s work tools. (R. p. 91, line 13–p. 92, line 24). When Boykin arrived to pick up the check from Appellant’s supervisor, Boykin decided to change course—he called 911 and was given instructions on what to do to assist the police. (R. p. 95, lines 1–9). Boykin then went to the bank, got the check cashed, and gave Appellant the cash. (R. p. 95, line 13–p. 96, line 17). Appellant directed Boykin to go to the pawn shop and “pawn the tools so he could make some more cash.” (R. p. 96, lines 18–25). Because Boykin had informed police of Appellant’s plans, police were waiting at the pawn shop, and they arrested Boykin and Appellant when they pulled into the parking lot. (R. p. 97, line 7–p. 98, line 11).

ARGUMENT

I.

The trial court properly denied Appellant's request to charge the jury with the language of S.C. Code Ann. § 16-11-440(C) regarding Appellant's duty to retreat.

Introduction

Appellant was not entitled to the Protection of Persons and Property Act charge he requested because it did not correctly reflect the law of self-defense in South Carolina. Furthermore, the charge that the trial court gave regarding Appellant's duty to retreat was more favorable than Appellant was entitled to in view of the evidence presented.

Relevant Facts

Appellant and defense counsel had the following exchange regarding Appellant's connection to the area where he shot Victim:

Q. And do you resides [sic] on a piece of heirs property, or have a place where you stay?

A. Yes, I do.

Q. On a piece of heirs property in the Jack Primis area?

A. Yes, sir, I do.

Q. Is that property maintained in the heirs of Wigfall?

A. Yes.

Q. And are you a direct descendent of Mr. Wigfall?

A. Yes, I am.

Q. And that's traced through your mother's family?

A. Yes, My mother's grandmother.

Q. Through your mother's grandmother?

A. Yes, Saddle Vanbolt (phonetic), she used to be a Wigfall. She married into the Vanbolt's family.

Q. And you lived for a while and had a home in the Jack Primis area; is that correct?

A. Yes.

Q. In September of 2009, did you have place in the Jack Primis area?

A. Yes.

Q. And where was that located at?

A. It's on Whitefalls Lane.

(R. p. 294, line 5–p. 295, line 3). In his testimony Appellant identified a tree in the area around Underlie Road where “[g]uys hang out. . . .” (R. p. 295, line 25–p. 296, line 10). Appellant then testified that he was in that area the day he shot Victim, and he described what happened during the shooting. (R. p. 296, line 11–p. 329, line 11).

In closing argument, Appellant's counsel referred to Appellant's testimony concerning his connection to the area where he shot Appellant. Specifically, Appellant's counsel argued the following:

You heard testimony from Ron McCray that he was on his family's property. Heirs property. Heirs of the estate of Joseph Wigfall.

You heard him testify that that heirs property was traced to him through his mother's family. And he provided you an outline of how he was an heir to that property, having a right to be on that property. Having a right to occupy that property. Now [sic] to the exclusion of other heirs, but certainly to the exclusion of others.

What you are going to hear from the Judge is this. You are going to hear from the Judge that there is not a duty to retreat from that property. That's what you are going to hear.

(R. p. 354, lines 6–19).

How the Issue Was Raised at Trial

Defense counsel submitted S.C. Code Ann. § 16-11-440 in its entirety as his request to charge. (R. p. 519–21). On the final day of trial, the trial court marked the document as Court’s Exhibit 2 and noted the State’s objection to the charge. (R. p. 336, lines 1–8). The court stated, “based upon the testimony as presented at this time will be charging self-defense, including the duty to retreat from your own property.” (R. p. 336, lines 3–5).

As part of the charge on self-defense, the trial court charged the jury the following:

The final element of self-defense is that the defendant has no other probable way to avoid the danger of death or serious bodily injury than to act as the defendant did in this particular instance.

If the defendant was on his own premises, the defendant has no duty to retreat before acting in self-defense.

(R. p. 387, lines 9–15).

At the conclusion of the charge, the trial court asked the parties if they had any objections to the charge. (R. p. 389, line 19–p. 390, line 9). Defense counsel responded, “Yes, Your Honor. The objection would simply be that I would specifically ask that the Court charge 16-11-440, subsection C, as previously presented.” (R. p. 390, lines 10–13). The trial court noted that it had marked that request as Court’s Exhibit 2. (R. p. 390, line 14).

The trial court later noted for the record that it had included a portion of Defendant’s Request to Charge. (R. p. 752, lines 18–21). The trial court then inquired further about whether the charge corresponded to defense counsel’s request:

The Court: . . . Do you believe that the Court instructed substantially similar to your request regarding self-defense?

Mr. Biering: With the only exception that I have already made as it relates to the 16-11, the statute that I asked. Yes, Your Honor.

The Court: And I did include the duty to retreat if the defendant was on his own premises, which I believe was the essence of what you requested.

With that there is no other request; is that correct?

Mr. Biering: 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 statute be presented 16-11-440, subsection (C) would be an appropriate charge.

(R. p. 392, line 25–p. 393, line 16). Counsel for the State then noted that “[t]he State had opposed the inclusion of the statute itself, feeling it would be unduly confusing for the jury. There had not been any evidence presented that would substantiate that charge being provided to the jury.” (R. p. 392, line 24–p. 394, line 3).

Standard of Review

As this Court has stated, “[t]he trial court is required to charge the correct law applicable to the case. When a party requests the trial court charge a correct and applicable principle of law, the court must charge it. However, the court is not required to use any particular language in explaining the principle.” *State v. Marin*, 404 S.C. 615, 619–20, 745 S.E.2d 148, 151 (Ct. App. 2013) (citations omitted).

““In reviewing jury charges for error, [appellate courts] must consider the [trial] court’s jury charge as a whole in light of the evidence and issues presented at trial.”” *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)).

“To warrant reversal, a trial judge’s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.” *Brandt*, 393 S.C. at 550, 713 S.E.2d at 603 (quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010)). “A jury charge which is substantially correct and covers the law does not require reversal.” *State v. Zeigler*, 364 S.C. 94, 105, 610 S.E.2d 859, 865 (Ct. App. 2005) (citing *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996); *State v. Hoffman*, 312 S.C. 386, 440 S.E.2d 869 (1994)).

Analysis

The statute that defense counsel requested be charged is part of the Protection of Persons and Property Act (the Act), S.C. Code Ann. § 16-11-410 (2006) *et seq.* The Act provides, “It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person’s home is his castle. . . .” S.C. Code Ann. § 16-11-420(A) (2006). The South Carolina Supreme Court has concluded “that the legislature intended defendants be shielded from trial if they use deadly force as outlined under the Act. Immunity under the Act is therefore a bar to prosecution and, upon motion of either party, must be decided prior to trial.” *State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011).

In this case Appellant never moved for immunity from prosecution under the Act. Instead, as outlined above, he submitted S.C. Code Ann. § 16-11-440 in its entirety as part of his request to charge. (*See R. p. 519–21*). In particular, Appellant asked that subsection C be included in the jury charge. He now asserts that the trial court’s self-defense charge was erroneous because it did not “properly negate the Appellant’s duty to retreat from an altercation occurring on his heirs property.” Final Br. of Appellant, p. 7. Respondent disagrees.

In *State v. Curry*, an opinion issued after Appellant filed his initial brief, the South Carolina Supreme Court considered whether a trial court erred in charging both § 16-11-440(C)

and the standard self-defense charge. *State v. Curry*, 406 S.C. 364, __ S.E.2d __ (2013). In *Curry*, the State presented evidence that Curry shot and killed his cousin (the victim) while the two were visiting Curry's mother's apartment. *Id.* at __, __ S.E.2d __. Several witnesses testified that after an altercation between Curry and the victim, Curry "ran upstairs, came back downstairs, faced the kitchen, and began shooting at [the victim], whose back was to [Curry]." *Id.* Curry, on the other hand, "testified he pulled the gun from his pocket because he believed [the victim] was lunging toward him." *Id.* At the close of the State's evidence, Curry moved for a directed verdict pursuant to the Act, and the trial court denied the motion. *Id.* However, the trial court charged both § 16-11-440(C) and the element of self-defense requiring the defendant to have "no other probable way to avoid the danger or death or serious bodily injury than to act as the defendant did in this particular instance." *Id.* The jury convicted Curry of voluntary manslaughter. *Id.*

Curry appealed, challenging both the denial of immunity and the jury charge, which Curry claimed was inherently inconsistent and confusing to the jury because it included provisions of the Act in addition to the standard self-defense charge. *Id.* The Supreme Court found that there was evidence to support the trial court's denial of immunity under the Act. *Id.* The Court also found "[t]he charge under the Act was indeed error, but one that inured to Appellant's benefit. Specifically, the trial court had denied Appellant immunity, and section 16-11-440(C) should not have been charged to the jury." *Id.* The majority further explained, "Under the Castle Doctrine, one is not required to retreat from *his dwelling place* . . . [, but] the absence of a duty to retreat does not extend to a visitor or social guest in the home of another unless 'the attacker is an intruder.'" *Id.* The Court noted that it "agree[d] with other courts that have found such a broad extension would encourage the use of deadly force." *Id.* In a separate

opinion concurring in part and dissenting in part, Justice Pleicones further clarified the position of the court, stating

I agree with the majority that the Protection of Persons and Property Act (Act) creates a statutory immunity but leaves intact the common law defenses of habitation, of others, and of self-defense. While a criminal defendant is entitled to have the issue of statutory immunity decided prior to trial by a judge, once the case goes to trial a defendant's right to a jury charge on these defenses is determined under common law principles. I therefore agree that appellant was not entitled to a jury charge on the presumption created by S.C. Code Ann. § 16-11-440(C) (Supp. 2012).

Id.

Respondent respectfully asserts that the Supreme Court's decision in *Curry* is dispositive of the first issue raised by Appellant in the instant appeal. Defense counsel specifically requested that the trial court charge S.C. Code Ann. § 16-11-440(C), but, as now established by *Curry*, a charge incorporating the language of that subsection of the Act would be an incorrect statement of the law of self-defense in South Carolina. As such, the trial court did not err in reciting the elements self-defense and the duty to retreat under South Carolina law.

Appellant concedes that the charge given by the trial court was consistent with the self-defense instruction adopted in *State v. Davis*, 282 S.C. 45, 317 S.E.2d 452 (1984), which provides that a defendant on his own premises has no duty to retreat before acting in self-defense. However, Appellant contends that "South Carolina common law has long recognized that a defendant's right not to retreat extend [sic] beyond just the defendant's residence." Final Br. of Appellant, p. 10. The cases Appellant cites in support of this proposition relate to the duty to retreat from one's place of business or from property that one owns. *See, e.g., State v. Cleland*, 148 S.C. 86, 145 S.E. 628, 631 (1928) (affirming right of the owner of a piece of property to stand his ground against laborer on that property, but also finding that the right did not extend to the home of the laborer, which was also located on the owner's property); *State v.*

Gordon, 128 S.C. 422, 122 S.E. 501 (1924) (recognizing no duty to retreat at one's place of business). However, in this case Appellant did not request that the court charge the law consistent with the cases now cited by Appellant. Rather, the record reflects Appellant requested that the court charge the law of S.C. Code Ann. § 16-11-440(C), which goes beyond the common law of self-defense in South Carolina.

Respondent submits that the charge given by the trial court, informing the jury “[i]f the defendant was on his own premises, the defendant has no duty to retreat before acting in self-defense[,]” (R. p. 387, lines 13–15), was generous considering the lack of evidence in the record that the area where Appellant shot Victim could even be considered “his own premises.” Appellant now asserts that “[a]s a Wigfall heir, Appellant enjoyed a co-tenancy with the other Wigfall heirs on the property and therefore had a possessory interest in the entire tract of Wigfall heirs property.” Final Br. of Appellant, pp. 8–9. However, during his testimony (the only evidence presented on this issue), Appellant did not state that he enjoyed any kind of possessory interest, such as a co-tenancy,¹ in the property where he shot Victim—at the tree located near Underlie Road. Indeed, Appellant’s testimony at trial established only that he lived on a piece of property on Whitefalls Lane maintained by the heirs of Wigfall and that he was a descendant of Mr. Wigfall.² (R. p. 294, line 3–p. 295, line 3).

Moreover, the record does not establish that the area where Victim was shot is a part of the Wigfall heirs’ property. Multiple witnesses testified that the area where Victim was shot—

¹ From the record it appears that Appellant was to inherit his interest in the property, if any, through his mother. The record also reflects that his mother was still alive at the time of Appellant’s trial. (R. p. 406, lines 7–10). Respondent submits that Appellant has gone beyond the record by stating that he enjoyed a co-tenancy with the other Wigfall heirs—the record does not reflect that Appellant enjoyed any such property interest.

² It is not clear from the record if Appellant’s home on Whitefalls Lane and the tree off of Underlie Road are both located on the same piece of property or not. Appellant testified that his house was only three houses from Underlie Road. (R. p. 294, line 21–p. 295, line 21).

the tree—was somewhat of a community gathering place. (R. p. 21, lines 1–3; R. p. 38, line 21–p. 39, line 3; R. p. 193, line 15–p. 194, line 16; R. p. 195, line 22–p. 196, line 2; R. p. 197, lines 1–4; R. p. 295, line 25–p. 296, line 10). Appellant asserts that “[u]nder the facts in this case, the court’s instruction should have made clear that the Wigfall heirs property was the Appellant’s premises.” Final Br. of Appellant, p. 12. However, Appellant never requested such an instruction. Moreover, as there was no evidence in the record that Appellant had any property rights in the Wigfall heirs’ property or that the area where Victim was shot was on Wigfall heirs’ property, Respondent respectfully submits that the trial court’s charge was more favorable to the defendant than he was entitled to.

For all the reasons discussed above, the trial court properly denied Appellant’s request to charge the jury with the language of S.C. Code Ann. § 16-11-440(C) regarding Appellant’s duty to retreat. Indeed, the charge given by the trial court was more favorable than Appellant was entitled to under the evidence in the record. As such, Appellant was not prejudiced by the trial court’s self-defense charge, and Appellant is not entitled to reversal.

II.

The trial court did not err in admitting the testimony of an expert witness who testified to her own opinions, which were based on her peer review of a DNA analysis performed by the expert witness's former colleague.

Introduction

The trial court did not err in admitting testimony by a DNA analyst that blood found at the crime scene matched the DNA of Victim where the analyst had performed a peer review of the DNA analysis, which was originally conducted by a former coworker. Further, any error in the admission was harmless where substantial evidence revealed Victim was present and bleeding at the scene. Respondent further questions whether the Confrontation Clause issue is preserved.

Relevant Facts

At Appellant's trial the State called Stephanie Stanley, an expert in the field of forensic science, specifically DNA analysis, to the stand. (R. p. 116, line 5–p. 118, line 9). Stanley was a forensic scientist assigned to the DNA casework department at the South Carolina Law Enforcement Division (SLED). (R. p. 116, lines 13–19). Stanley testified that blood recovered from various areas at the crime scene—specifically, from a Toyota Tacoma truck, from the ground on Jack Primis Road, and from a gold Nissan Maxima—matched the DNA of Victim. (R. p. 123, lines 1–8; R. p. 133, lines 7–22).

In coming to that conclusion, Stanley relied on some of the analysis performed by her former co-worker at SLED, Katie Urka. (R. p. 118, line 20–p. 119, line 20). Stanley was a peer reviewer of the case. (R. p. 119, lines 7–20). Stanley explained that, before a DNA report is issued, a peer reviewer reviews everything in a case. (R. p. 119, line 14–p. 120, line 19). Thus,

though Urka tested the evidence that SLED received, Stanley testified that, as a peer reviewer, she did the following:

I would have reviewed her report, all submission forms submitted to SLED, her evidence worksheet, all of her supporting documentation for her DNA analysis.

I would have reviewed her profiles that were developed, the data that was developed from those profiles, and her statistical analysis.

And then in regards to her report, made a review of that as well.

(R. p. 123, line 1–p. 124, line 8).

Stanley further testified about the process that Urka would have taken in testing the evidence. (R. p. 125, lines 6–25). Stanley testified that she agreed with the result that Urka came up with. (R. p. 126, lines 6–8). According to Stanley, before signing off on Urka’s report, she “would have reviewed all of her supporting documentation for her analysis, any of her conclusions, her data, everything prior to signing the technical review.” (R. p. 127, line 25–p. 128, line 3). Urka’s report was not admitted into evidence.

How the Issue Was Raised at Trial

When the State moved to have Stanley qualified as an expert, defense counsel objected on the basis of relevance,³ but the trial court overruled the objection and qualified Stanley as a witness. (R. p. 118, lines 3–17). Defense counsel then continued to object to Stanley’s testimony on the grounds of relevance until the court noted defense counsel’s continuing objection on the grounds of relevance. (R. p. 119, line 1–p. 120, line 8).

When counsel for the State asked Stanley what result Urka reached, defense counsel objected by saying, “Objection, foundation, relevance, hearsay . . . Confrontation Clause.” (R.

³ Defense counsel did not elaborate on the basis for his objection on the record.

p. 126, lines 6–13). Rather than render any decision on those objections, the trial court asked the State to lay the foundation as to Stanley’s involvement in the matter, and the State moved on to that line of questioning. (R. p. 126, lines 14–18). Soon after that exchange, the court recessed for the day. (R. p. 128, line 11–p. 129, line 15).

When court resumed the next morning, Stanley took the stand and the State continued its direct examination. (R. p. 131, lines 1–17). The State began by asking Stanley about her review of Urka’s report. (R. p. 131, line 14–p. 132, line 5). Defense counsel then objected, stating, “Your Honor, I want to note for the record my continuing objection as it relates to this witness’s testimony. And specifically at this point an objection on the grounds of hearsay. I’d be happy to be heard further on that argument as we relate to it.” (R. p. 132, lines 6–11). The court overruled defense counsel’s objection because Stanley was “testifying as an expert.” (R. p. 132, lines 12–14). Defense counsel did not raise any additional objections to Stanley’s testimony either during her testimony or later in the record.

Standard of Review

The Confrontation Clause of the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” The United States Supreme Court has held that this provision bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004).

“A violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis.” *State v. Gracely*, 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)).

Whether such an error is harmless in a particular case depends upon a host of factors The factors include the importance of the witness's 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.

Id. (quoting *Van Arsdall*, 475 U.S. at 684).

Analysis

Harmless Error

As an initial matter, Respondent points out that, even if Stanley's testimony violated the Confrontation Clause, the admission of her testimony was harmless error. Stanley merely opined that the blood samples taken from the scene belonged to Victim. This evidence is corroborated by the testimony of multiple other witnesses who testified that Victim bled profusely after being shot. Indeed, evidence that the blood at the scene belonged to Victim is neither surprising nor prejudicial to Appellant, who testified that he shot Victim and that there was no physical confrontation prior to that (thus implying that it could not have been his blood at the scene). (R. p. 321, line 2–p. 325, line 9). Simply put, admission of evidence that the blood from the crime scene belonged to Victim was harmless error if it was error at all.

Expert Testimony and the Confrontation Clause

Even if this issue had been properly preserved, Respondent submits that Stanley's testimony did not violate Appellant's rights under the Confrontation Clause. Below, Respondent discusses three recent United States Supreme Court opinions that have dealt with expert testimony and the Confrontation Clause. Though none of these cases addresses the exact situation presented in this case, the boundaries that the cases set are instructive.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the United States Supreme Court held that a forensic lab report is testimonial for Confrontation Clause purposes and that the prosecution may not introduce such a report without offering a live witness competent to testify to the truth of the report's statements. 557 U.S. at 310–11.

In a subsequent case, *Bullcoming v. Mexico*, __ U.S. __, 131 S. Ct. 2705 (2011), the Court further clarified that the Confrontation Clause does not “permit[] the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification.” 131 S. Ct. at 2710. In *Bullcoming* the prosecution introduced a forensic laboratory report certifying the defendant's blood-alcohol concentration through the testimony of “another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on [the defendant's] blood sample.” *Id.* at 2709. In a concurring opinion in *Bullcoming*, Justice Sotomayor noted, “this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue.” *Id.* at 2722. Sotomayor further noted that *Bullcoming* was “not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence.” *Id.*

In the more recent case of *Williams v. Illinois*, __ U.S. __, 132 S. Ct. 2221 (2012), a plurality of the Court decided that the Confrontation Clause did not prohibit “the prosecution [from] call[ing] an expert who testified that a DNA profile produced by an outside laboratory. . . matched a profile produced by the state police lab using a sample of petitioner's blood.” 132 S.

Ct. at 2227. The plurality set forth two, independent bases for their decision. *Id.* at 2228. First, the plurality concluded

that this form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted. When an expert testifies for the prosecution in a criminal case, the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.

Id. In *Williams* the report of the outside laboratory was not admitted into evidence or shown to the factfinder, nor did the expert quote from or identify the report as the source of her opinions.⁴

Id. at 2230. However, as a second, independent basis, the Court found that “[e]ven if the [outside lab] report had been introduced for its truth, we would nevertheless conclude there was no Confrontation Clause violation” because the report was not created to accuse the petitioner or to create evidence for use at trial. *Id.* at 2242. The primary purpose of the lab report in *Williams* was “to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner who was neither in custody nor under suspicion at that time.” *Id.* at 2243. The Court went on to explain:

The situation in which the [outside lab] technicians found themselves was by no means unique. When lab technicians are asked to work on the production of a DNA profile, they often have no idea what the consequences of their work will be. In some cases, a DNA profile may provide powerful incriminating evidence against a person who is identified either before or after the profile is completed. But in others, the primary effect of the profile is to exonerate a suspect who has been charged or is under investigation. The technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating—or both.

It is also significant that in many labs, numerous technicians work on each DNA profile.

⁴ Additionally, the court noted that the expert did not “testify to anything that was done at the [outside] lab, and she did not vouch for the quality of [the outside lab’s] work.” *Id.* at 2235.

Id. at 2244. Thus, the plurality concluded that “the use at trial of a DNA report prepared by a modern, accredited laboratory ‘bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.’” *Id.* at 2244 (quoting *Michigan v. Bryant*, 562 U.S. ___, 131 S. Ct. 1143, 1167 (2011)).

A Washington state appellate court considered the same scenario now presented to this Court—namely, where “[t]he DNA expert who testified . . . was the technical peer reviewer of the evidence originally examined by another analyst”—and concluded that the expert’s testimony did not violate the Confrontation Clause. *State v. Manion*, 295 P.3d 270, 271 (Wash. Ct. App. 2013). In that case, the Washington Court of Appeals distinguished the scenario from the *Melendez-Diaz*, *Bullcoming*, and *Williams* decisions. *Id.* at 273–81. In *Manion* the court first established that the report relied upon by the expert was a testimonial statement. *Id.* at 276. However, the report was not admitted as evidence in *Manion*. *Id.* Thus, the *Manion* court distinguished “the factual situation in *Bullcoming* where testimonial documents were admitted at trial to assist the prosecution in proving guilt.” *Id.* at 276–77. The court also found a material distinction in the fact that the analyst who authored the report “was unavailable to testify at the fact-finding hearing due to medical leave, unlike the analyst in *Bullcoming* who was on unpaid leave for an undisclosed reason.” *Id.* at 277. According to the *Manion* court, the Supreme Court’s opinions in *Bullcoming* and *Melendez-Diaz* did not address the issue of “whether an expert who testifies at trial may partially rely on forensic material developed by others in rendering an independent opinion without violating the Confrontation Clause.” *Id.* The court noted that in its situation the expert came to her own, independent opinion regarding the DNA analysis—though her opinion was consistent with that of the analyst who wrote the report, the court noted that the expert did not “merely ‘parrot’” the findings of the analyst. *Id.* As such, the

court concluded that the admission of the expert's testimony did not violate the Confrontation Clause for the following reasons:

She independently reviewed the draft report that [the analyst] prepared, exercised her independent judgment, and then co-signed that report prior to the hearing in this case. At the fact-finding hearing, she expressed her independent opinion about the DNA evidenced [sic] based on her technical peer review of [the analyst's] work. This satisfies the requirements of the Confrontation Clause.

Id. at 278. The court further noted that the *Williams* decision did not address the “independent opinion” rationale. *Id.* at 280–81.

Again, the scenario in this case is not exactly like any of the cases that the Supreme Court has looked at. For instance, here, Stanley peer-reviewed all of Urka's materials and came to her own conclusion regarding the DNA analysis before Urka's report was issued. Also, unlike *Bullcoming* in particular, Urka's report was not introduced into evidence—rather, Stanley relied on that report in opining that the blood tested at SLED belonged to Victim. Indeed, Respondent submits that the instant case presents the issue that Justice Sotomayor specifically identified in her concurrence as one of the scenarios that *Bullcoming* did not address.

Respondent submits that the “independent opinion” rationale that the *Manion* court applied is similarly applicable in the instant case and that Stanley's testimony did not violate the Confrontation Clause. Here, Stanley relied on the report in relaying to the jury the procedure that Urka would have taken in analyzing the DNA samples. However, in coming to her ultimate opinion that the samples given to SLED to test matched Victim's DNA, Stanley did not merely “parrot” Urka's result. This is unlike the situation in *Bullcoming* where the testifying analyst merely relayed the results that another analyst had reached after performing a gas chromatograph process on the defendant's blood. Rather, Stanley “reviewed [Urka's] profiles that were developed, the data that was developed from those profiles, and [Urka's] statistical analysis[.]”

(R. p. 124, lines 4–7), and Stanley then rendered an independent opinion regarding the DNA evidence. Stanley applied her own training and experience to the sources before her, thereby creating an original product that could be tested through cross-examination. See *United States v. Palacios*, 677 F.3d 234, 243–44 (4th Cir. 2012). Stanley’s testimony was ripe with issues for cross-examination, and defense counsel tested her opinion and the foundations for that opinion.⁵ Consequently, her testimony did not violate the Confrontation Clause.

Issue Preservation

Finally, Respondent submits that this issue has not been properly preserved for appellate review. “At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.” *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012) (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). This same rule applies to constitutional issues, too. *State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011). Here, defense counsel mentioned the Confrontation Clause in a string of objections to the State’s question to Stanley about Urka’s results, but defense counsel did not explain that objection (or any of the other objections he made to that question). See *id.* (citing *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005)) (“[A] party must have a contemporaneous and specific objection to preserve an issue for appellate review.”). Stanley never responded to the question. Also, the trial court did not specifically rule on defense counsel’s Confrontation Clause objection—instead, the trial court directed the State to lay a foundation for Stanley’s testimony. As such, this issue has not been properly preserved.

⁵ Stanley testified on cross-examination that Katie Urka performed the DNA analysis and Verona Gibson, a forensic technician with the DNA casework department’s evidence processing section performed some of the examinations. (R. p. 134, line 13–p. 139, line 2).

III.

The court did not err in excluding the proffered testimony regarding Victim's past criminal history, drug use, and violence.

Introduction

The trial court did not abuse its discretion in excluding the proffered testimony regarding Victim's past criminal history, drug use, and violence. Much of the testimony proffered by Appellant was impermissible evidence of Victim's prior bad acts and, thus, properly excluded under S.C. R. Evid. 404. Some of the proffered testimony was similarly inadmissible under the strictures of South Carolina case law. And, finally, the excluded proffered testimony of Chavis Wright was properly excluded under S.C. R. Evid. 403.

Relevant Facts and How the Issue Was Raised at Trial

The State submitted a motion in limine to prohibit Appellant from presenting evidence of Victim's "character through testimony or evidence of prior convictions or other alleged bad acts unless they [were] connected toward the defendant or closely connected in point of time or occasion with the homicide." (R. p. 415). The trial court heard brief arguments on the motion from both sides at the start of trial, but the trial court did not issue any ruling on the motion at that time. (R. p. 2, line 25–p. 5, line 12).

Testimony of Robert Porcher, Jr.

The State called Victim's father, Robert Porcher, Jr., to testify about his interaction with Victim before the murder and about how he found out that Appellant had shot Victim. (R. p. 55, line 13–p. 61, line 1). Porcher also testified that he went to Jack Primis and saw his son "laying face-down on the ground. . . .[with] some bullet holes in his shoulder, and one in his neck." (R. p. 61, line 2–p. 62, line 13). During Porcher's testimony, counsel for the State asked him about

the occupations of his other two children. (R. p. 57, lines 9–10). Porcher responded that his daughter was a social worker and his son, Robert, was a retired professional football player. (R. p. 57, lines 11–13). Counsel for the State then asked the following:

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.

Q. And did that affect his walking?

A. Yeah. Yeah. It affected him because one of his ankles had to be fused and it wasn't, with fusing couldn't buckle and bend it like a normal person anymore.

(R. p. 57, lines 14–25).

At the conclusion of Porcher's testimony, defense counsel requested that he be allowed to put an issue in the record and that Porcher not be excused. (R. p. 63, lines 21–23). The court then excused the jury for the day. (R. p. 64, lines 5–23). Defense counsel asserted that the State had "open[ed] the door in their questioning of Mr. Porcher[.]" and he asked to be allowed to proffer further testimony by Porcher. (R. p. 70, lines 18–23). The State responded,

We have no objection to him placing a proffer on the record. We would just say that our position is that the question was about the physical injuries sustained by Reginald Porcher during a car accident, and how they affect his physical limitations. That's relevant to what the defendant says happened at the murder scene.

And we did ask the question if his physical limitations after the accident also prevented him from doing other physical things.

(R. p. 71, lines 5–14). The court then allowed defense counsel to proffer Porcher's testimony on the limited issue of Victim's previous criminal violations. (R. p. 71, lines 15–19).

Q. You had testified that previously that the car wreck prevented him from being able to continue on and play 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). Defense counsel then asked Porcher about his knowledge of Victim's arrests—to which Porcher responded that he recalled Victim being arrested for burglary and being “locked up” once for fighting. (R. p. 73, line 1–p. 75, line 10). When defense counsel asked Porcher if those arrests would have prevented Victim from playing football, Porcher responded, “I told you he had an injury, so the injury would not have allowed him to play. And I don't know if he would have been able to play college football or not, that would be up to the coach or whoever gave those scholarships.” (R. p. 75, lines 2–10).

Victim's SCDC Records and Testimony of Lieutenant Frank Jackson

Defendant proffered two sets of documents—Victim's medical records from the South Carolina Department of Corrections (SCDC) that span from 2002 to 2009 (R. p. 416–79) and Victim's disciplinary records from SCDC that span the same time frame (R. p. 480–516). (R. p. 212, line 4–p. 213, line 14). The State noted that it did not “object to the use of the records for the very limited purpose of the motion in limine as an attempt to proffer what the expected testimony would be.” (R. p. 213, lines 20–23).

Defense counsel also proffered the testimony of Lieutenant Frank Jackson of the Berkeley County Sheriff's Department, who investigated Victim in a burglary/safecracking incident that occurred in 2002. (R. p. 215, line 9–p. 216, line 13). Jackson testified that Victim was convicted of burglary, burglary second as a violent offense, and safecracking after he and

two others took an ATM machine from a convenience store and then flipped their car while fleeing. (R. p. 216, line 14–p. 220, line 1).

Counsel for the State argued that Jackson’s testimony was impermissible character evidence and that there was no indication that the testimony had any connection to Appellant. (R. p. 221, line 7–15). Defense counsel argued that the admissibility of the evidence hinged on the testimony of his client and further argued that the issue he was raising was “not just an issue about 404, it’s an issue about habit or routine.” (R. p. 221, lines 18–25). Defense counsel then argued that there was “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. 222, lines 2–5). In response, counsel for the State argued,

Regarding the argument that it’s 406 habit, the only thing that that witness testifies is to related to ATM’s and the Panty [sic]. There is no indication that the murder took place at either of those locations. There is no indication it had anything to do with that burglary or any other burglary or theft from an ATM.

(R. p. 223, lines 11–17). Defense counsel also alluded to the case of *State v. Amburgey*, 206 S.C. 426, 34 S.E.2d 779 (1945), which allows for the admission of evidence of specific instances of violence by a victim if directed against a defendant or, if directed against others, were connected closely enough in point of time or occasion with the homicide as to indicate victim’s state of mind or to produce a reasonable apprehension of great bodily harm. (R. p. 223, line 18–p. 224, line 8).

The court ruled that the evidence presented in Defendant’s Exhibits 1 and 2 and through the testimony of Jackson was situation-specific and that the facts of the case did not give rise to a similar situation as neither Victim nor Appellant were “near or around a convenience store or an ATM or in a jail cell. . . .” (R. p. 224, lines 9–22). Additionally, the court determined that there

was no evidence that Appellant knew, or should have known, about Victim's previous instances of violence. (R. p. 225, lines 5–11).

Testimony of Lieutenant David Brabham, Jr.

Defense counsel next presented the testimony of Lieutenant David Brabham, Jr., who testified that he arrested Victim in June 2000 for driving under suspension, failure to stop for a blue light, and the unlawful carrying of a pistol. (R. p. 225, line 18–p. 230, line 23).

Following Brabham's testimony, the State argued that the testimony was not relevant as Appellant was not involved, nor did the incident have anything to do with Victim's murder nine years later. (R. p. 231, line 18–p. 232, line 4). Additionally, the State pointed out that the testimony was prejudicial and not probative. (R. p. 232, lines 4–5).

Again, defense counsel argued that both Rules 404 and 406 were at issue. (R. p. 232, lines 9–12). Defense counsel again mentioned *Amburgey*. (R. p. 232, lines 13–14). Defense counsel argued that fleeing from the police was an act of violence. (R. p. 232, line 19–p. 233, line 5).

In reply, the State pointed out that the single incident testified to by Brabham did not establish a habit or routine. (R. p. 234, lines 2–3).

The court ruled that, even assuming there was an act of violence involved in Victim's flight from police, the incident was "not so closely connected with the homicide as to indicate the deceased's state of mind." (R. p. 234, lines 12–16). Additionally, the court found that there was no indication that the incident would cause a reasonable apprehension of great bodily harm. (R. p. 234, lines 17–20).

Testimony of Chavis Wright

The next day, defense counsel sought to call Chavis Wright to the stand. (R. p. 237, lines 6–18). However, understanding that Wright’s testimony would relate to some prior bad acts by Victim, the court required defense counsel to first proffer Wright’s testimony. (R. p. 237, line 19–p. 241, line 20).

During the proffer, Wright testified that he was hanging out with Victim in the Jack Primis area the night before Victim was killed. (R. p. 243, line 11–p. 245, line 11). According to Wright, he went to the Jack Primis area that night to purchase a bag of marijuana from Abdulla Fishburne. (R. p. 245, lines 7–18). Wright testified that Victim was “very upset and very angry” and was “carrying on about the situation with Abdulla and Ron earlier that day.” (R. p. 246, lines 11–15). Wright also testified that he saw Victim with a handgun and that Victim pulled the gun out and shot it in the air a couple times while Wright was there. (R. p. 246, line 16–p. 247, line 2). When asked what Wright learned that night about Victim and Appellant, Wright responded, “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). On proffered cross-examination, Wright gave further detail as to what he witnessed the night before Victim was killed and how he came to testify at Appellant’s trial. (R. p. 248, line 1–p. 254, line 11).

As to Wright’s testimony, the State argued that it was evidence of a prior bad act. (R. p. 258, lines 13–15). The State further argued that the testimony regarding Victim’s possession and firing of a gun was not connected to Appellant. (R. p. 258, line 25–p. 259, line 3).

Defense counsel, on the other hand, argued that the testimony was relevant because it “describe[ed] the scene of the crime.” (R. p. 259, lines 5–16). Defense counsel further added, “I don’t think that 404 applies.” (R. p. 259, lines 17–18).

The State disagreed and pointed out that there was no indication that Victim made any threats toward Appellant. (R. p. 259, line 22–p. 260, line 6).

Later, the court and counsel had further discussions about the admissibility of Wright's testimony. (R. p. 262, line 9–p. 265, line 21). The court specifically asked the State how Wright's testimony could not go to Victim's state of mind. (R. p. 265, lines 22–23). The State responded,

Well, first of all, just for clarification, it's not in the same location. It's all a pretty small area, Jack Primis, but it's the hill, and that's a different location.

In terms of the state of mind of the deceased, you know, he can testify that he was acting crazy, that he was upset, that he was upset that Mr. McCray had beaten up his friend.

But I just think that the gun incident is not related, and it's so prejudicial it's implies that Mr. Porcher then brought a gun to the scene and that's just not true.

And I think that if the only connection that was made was that Mr. Porcher was upset with the defendant for beating up Abdulla Fishburne. If Mr. Wright wants to testify to that, that's the only connection that I saw in the testimony.

As far as the drugs, that they were doing drugs and that there was a gun there and that he was shooting a gun, we would just argue that it's a 403 argument, in addition to everything else. It's highly prejudicial and it's not connected to the defendant.

(R. p. 265, line 24–p. 266, line 20). Thus, the State asked that Wright's testimony be limited.

(R. p. 267, line 15–p. 268, line 7).

Defense counsel again stressed that the incident was within twenty-four hours of Victim's death and that the testimony was relevant though defense counsel stated, "I certainly understand their concern about prejudice." (R. p. 268, line 10–p. 269, line 21).

The court then issued its ruling, finding that neither the drug use nor the shooting of the gun was relevant to the homicide. (R. p. 270, lines 12–22). Additionally, though the court stated

that it would allow Wright to testify that Victim was upset with Appellant for beating up his friend, the court found the testimony regarding the drugs and guns to be more prejudicial than probative. (R. p. 270, line 23–p. 271, line 5).

Standard of Review

The admission or exclusion of evidence in general is within the sound discretion of the trial court. In both instances, the trial court's decision will not be disturbed absent an abuse of discretion. An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. . . .

To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof.

Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 25–26, 609 S.E.2d 506, 509 (2005) (internal citations omitted).

In general, all relevant evidence is admissible. Rule 402, SCRE. However, there are some exceptions to that rule. For instance, according to S.C. R. Evid. 403, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . .” Additionally, S.C. R. Evid. 404 provides the following constraints on the admission of character evidence:

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

. . .

Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

. . .

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

Along those same lines, South Carolina case law provides as follows:

In the murder prosecution of one pleading self-defense against an attack by the deceased, evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant or, if directed against others, were so closely connected at point of time or occasion with the homicide as reasonable to indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm. Whether a specific instance of conduct by the deceased is closely connected in point of time or occasion to the homicide so as to be admissible is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the accused.

State v. Day, 341 S.C. 410, 419–20, 535 S.E.2d 431, 436 (2000) (internal citations omitted).

Day, of course, sets out an exception to the general prohibition on character evidence and evidence of prior bad acts. And there are other ways in which such evidence may be properly admitted despite Rule 404. For example, “[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially.” *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984).

Analysis

Appellant argues that Porcher’s testimony regarding the ability of his son to play football due to injuries from a car accident⁶ opened the door to negative character evidence—specifically,

⁶ There is no evidence in the record that the car accident Porcher testified to (where Victim injured his ankle and had to have it fused) and the car accident Lieutenant Jackson testified to (which occurred after Victim stole an ATM) were one in the same. From the testimony, it would appear that these were two separate accidents. Porcher testified that Victim was hit in a head-on

evidence of Victim's criminal record. Respondent must disagree. Porcher's testimony about his son's ability to play football was not evidence of his good character. Rather, it was a way for the State to explain Victim's physical limitations—that one of his ankles was fused and did not work properly—which were relevant in light of Appellant's version of events. Unlike *State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999), which Appellant cites in support of his position, in this case, the evidence of Victim's physical limitations was relevant. Appellant testified regarding Victim's movements before and after the shooting (R. p. 298, line 10–p. 302, line 13), and counsel for the State cross-examined Appellant extensively about his version of events (how far Victim ran to his truck, what Appellant did during that time, what Victim did after he was shot, how quickly Appellant moved to Victim to kick him after shooting him) (R. p. 310, line 21–p. 326, line 24). Thus, the court did not err in admitting the evidence, nor did Porcher's testimony open the door to evidence regarding Victim's criminal record.

Additionally, Respondent respectfully submits that Appellant's characterization of the evidence as “evidence regarding a potential football career” is off base. Final Br. of Appellant, p. 26. Counsel for the State did not ask Porcher whether Victim was good at football like his brother, nor did Porcher imply that Victim had a college or professional football career ahead of him. He simply stated that Victim could no longer play football because of his injury. Indeed, defense counsel was the one who asked about Victim's potential football career during Porcher's proffered testimony, and while Porcher conceded that Victim's injury prevented him from

collision by another car (and that the driver of the other car was at fault) and that Victim injured his ankle in the accident. (R. p. 57, lines 14–25). Jackson testified about an accident where Victim and others flipped their vehicle and were thrown from it. (R. p. 216, line 14–p. 220, line 1).

playing football,⁷ he also testified that he had no idea whether Victim would have played football in college or after. And the jury did not hear any questions directed specifically to Victim's potential college career. Thus, Respondent submits that the jury was not left with any idea about Victim's potential football prospects prior to his accident.

Appellant next argues that the State opened the door to testimony of Victim's drug use⁸ by introducing testimony that Victim's autopsy showed the presence of marijuana metabolites. This argument has not been preserved.⁹ Additionally, Respondent fails to see how evidence that Victim had marijuana metabolites in his system at the time of his death "opened the door" to evidence of his past drug use. It is true that under South Carolina law "[w]here one party

⁷ Respondent notes that Appellant has misquoted defense counsel's question to Porcher about his testimony on direct examination. Rather than asking if Porcher's earlier testimony was that "the car wreck prevented [Victim] from being able to continue on and play *college* football. . .[.]" Final Br. of Appellant, p. 21 (emphasis added), defense counsel asked Porcher if he previously testified that "the car wreck prevented [Victim] from being able to continue on and play football. . .[.]" (R. p. 72, lines 16–18).

⁸ Respondent presumes that Appellant is only referring to the evidence of prior drug use contained in Victim's SCDC records (R. p. 416–79) as none of the other proffered testimony is evidence of Victim's drug use. The SCDC records indicate a history of alcohol and street drugs use. (See, e.g., R. p. 426).

Respondent would note that during Wright's proffered testimony, he indicated that he smoked marijuana, but he did not testify about Victim's drug habits. (R. p. 241, line 21–p. 254, line 11). Indeed, when later discussing Wright's proffered testimony, defense counsel stated, "I don't believe the witness testified that the Mr. Porcher was smoking marijuana. I think he testified that he was smoking marijuana. . . . I don't recall him saying that Mr. Porcher was smoking marijuana." (R. p. 270, lines 1–9).

⁹ During the discussion of Wright's proffered testimony (which, again, is unrelated to evidence of Victim's drug use), defense counsel stated, "They opened the door to the marijuana. They asked their witness about the marijuana. The jury is not going to be surprised—the prosecution is not going to be prejudiced by the fact that they found out there was marijuana near him because they have already brought that in." (R. p. 268, lines 15–20). However, defense counsel failed to argue that the State had opened the door to evidence of Victim's drug use either when he proffered the SCDC records (R. p. 212, line 4–p. 215, line 2) or when Dr. Susan Presnell testified about Victim's autopsy results (R. p. 140, line 17–p. 181, line 19). Respondent submits that Appellant failed to raise the argument that Dr. Presnell's testimony opened the door to evidence of Victim's drug use, and, consequently, the court never issued a ruling on that issue. As such, this argument has not been properly preserved.

introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though the latter evidence would be incompetent or irrelevant had it been offered initially.” *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984). However, further evidence of Victim’s past drug use would not serve to either explain or rebut the testimony about the marijuana metabolites in Victim’s system at the time of his death. It would only serve as evidence of Victim’s prior bad acts and, thus, was properly excluded.

Appellant asserts that the proffered testimony of Jackson, Brabham, and Wright and Victim’s SCDC records were relevant and should have been admitted as evidence of Victim’s state of mind at the time of his murder. Respondent disagrees.

As to the testimony of Jackson and Brabham regarding Victim’s prior arrests, the trial court correctly concluded that the incidents that those officers testified to, even if violent, were not admissible to show Victim’s state of mind at the time of the homicide or to produce a reasonable apprehension of great bodily harm in Appellant. (R. p. 224, line 9–p. 225, line 11; R. p. 234, lines 4–23). The trial court’s decision should not be disturbed absent an abuse of discretion that resulted in prejudice to Appellant. *See State v. Day*, 341 S.C. 410, 419–20, 535 S.E.2d 431, 436. Respondent submits that the trial court did not abuse its discretion as the burglary/safecracking and failure to stop for a blue light arrests happened in 2002 and 2000, respectively, both arrests occurring well before Victim was murdered in 2009. Furthermore, those incidents were not closely connected with Victim’s murder so as to have indicated his state of mind or to have caused a reasonable apprehension of bodily harm in Appellant. Judge Harrington noted that the circumstances in which Appellant shot Victim were unlike those of either of his arrests. Additionally, while Appellant argues that he was prejudiced by not being

able to introduce the arrests to “further corroborate[] the testimony of the decedent’s violent behavior[,]” the rules of evidence do not permit a defendant to introduce such prior bad acts to prove a victim’s character trait. See Rule 404, SCRE (permitting introduction of evidence of a pertinent character trait of victim but not allowing “[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith”); see also IV Trent N. Pruett, *Criminal Practice and Procedure in South Carolina* § 27.5.4.1 (2010) (“The general reputation of the victim for violence is admissible, but the particular facts of an incident are not, unless the incident in question is so closely connected in time or occasion with the encounter so as to produce in the mind of defendant a reasonable apprehension of grievous bodily harm.”) (citations omitted); cf. *State v. Braxton*, 343 S.C. 629, 635, 541 S.E.2d 833, 836 (2001) (“Clearly, the State wanted [the witness] to testify about the argument between appellant and his brother on the evening before the murder to establish appellant was a violent person and quick to draw his pistol. This testimony regarding appellant’s character was inadmissible. Rule 404(a), SCRE (evidence of a person’s character or character trait is inadmissible for the purpose of establishing the person acted in conformity with that particular character or trait on a particular occasion).”).

Victim’s SCDC records were similarly inadmissible as improper character evidence. Moreover, to the extent they were evidence of prior acts of violence by Victim, they did not serve to establish either Victim’s state of mind at the time of his murder or any reason for fear of great bodily harm in the mind of Appellant.

Appellant additionally argues that Wright’s proffered testimony regarding his encounter the night before Victim’s murder with Victim, who Wright saw pull out a gun and shoot it into the air, should have been admitted. However, Wright’s testimony did not establish any

connection between Victim shooting the gun into the air and his purported anger toward Appellant. Respondent would point to the case of *State v. Douglas*, 302 S.C. 508, 397 S.E.2d 98, a 1990 South Carolina case with a surprisingly similar factual situation. In *Douglas*, the prosecution introduced testimony of a witness, Thoms, who stated that while he and defendant were “horseplaying” the night before victim’s murder, defendant pulled out a gun, cocked it, and threatened to kill Thoms. 302 S.C. 508, 510, 397 S.E.2d 98, 99. The South Carolina Supreme Court found that testimony both inadmissible and prejudicial, explaining:

In our view, the fact that the appellant pulled a gun the night before Barber’s murder after “horseplaying” with Thoms does not tend to establish appellant’s state of mind at the time appellant and Dixon encountered Barber. No connection or relation between the two incidents was established. The State’s failure to set forth the logical relevance between the two incidents renders the testimony about the Thoms episode inadmissible for the purpose of proving appellant’s intent and state of mind at the time of the Barber murder.

Id. at 511, 397 S.E.2d at 99. Respondent submits that Wright’s testimony regarding Victim shooting a gun is similarly inadmissible. Moreover, even if such testimony were admissible, the court correctly found it more prejudicial than probative under S.C. R. Evid. 403, and that finding should not be disturbed absent abuse of discretion. *State v. Hamilton*, 344 S.C. 344, 358, 543 S.E.2d 586, 593 (Ct. App. 2001) (“We review a trial court’s decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court’s judgment), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

For all the reasons discussed above, Respondent submits that the trial court did not err in excluding Appellant’s proffered evidence regarding Victim’s criminal history, drug use, and violence.

IV.

The trial court did not err in denying Appellant's request to an unlimited cross-examination of Felicia Coaxum, as opposed to a cross-examination limited to the issue of the witness's prior crime of dishonesty.

Introduction

As defense counsel failed to proffer the testimony of the witness he wished to recross-examine, this Court cannot make a determination of prejudice. Nevertheless, Respondent submits no *Brady* violation occurred as the delayed impeachment evidence was not material under the standards set forth in *Brady* and its progeny.

Relevant Facts and How the Issue Was Raised at Trial

The State called Felicia Coaxum to testify about what she witnessed the day of Victim's murder.¹⁰ Part of Coaxum's testimony included that she "saw Ron McCray [] standing over Reggie stomping him and telling him, die mother-fucker, die." (R. p. 29, lines 23–25). After the State questioned Coaxum, defense counsel cross-examined Coaxum about her testimony. (R. p. 35, line 11–p. 37, line 10). Defense counsel asked Coaxum about who else was at the scene that day and about the time that she and Victim spent in the area. (R. p. 35, line 13–p. 36, line 2; R. p. 36, lines 11–21).

The State recalled Coaxum a few witnesses later to ask her about a breach of trust charge from 2004. (R. p. 46, lines 9–19). Coaxum admitted to the charge. (R. p. 46, line 18). Defense counsel then requested a bench conference. (R. p. 46, line 21). Following the bench conference, the trial court asked defense counsel if he had "any questions related only to that issue[.]" (R. p.

¹⁰ A summary of Coaxum's testimony can be found on page 5 of this brief in Respondent's Statement of Facts.

46, line 25–p. 47, line 1). Defense counsel responded that he had none, and that concluded Coaxum’s testimony. (R. p. 47, lines 2–7).

Following a few more witnesses for the State, Judge Harrington released the jury for the day to take up various matters with the attorneys. (R. p. 64, lines 5–23). At that time, Judge Harrington allowed defense counsel to put some matters on the record, “specifically regarding the convictions of Ms. Wright and Ms. Coaxum.” (R. p. 64, line 25–p. 65, line 3). Defense counsel then informed the court that he had received Coaxum’s rap sheet after he cross-examined her. (R. p. 65, line 4–p. 66, line 18). According to defense counsel, had he had the information earlier he “would have been able to tailor [his] cross-examination in a different way.” (R. p. 66, lines 6–7). Defense counsel thus requested a second, unlimited cross-examination of Coaxum (and another witness).¹¹ (R. p. 66, line 23–p. 67, line 3). When the court asked what defense counsel would now ask the witnesses, defense counsel replied,

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 7–14). The trial court stated that it would allow defense counsel to inform the court in the morning if he wanted any remedy. (R. p. 67, lines 16–19).

Counsel for the State then explained that they had inadvertently failed to provide defense counsel with the rap sheets after obtaining them the Friday before trial started. (R. p. 68, line 6–p. 70, line 6).

The next day defense counsel again asked that he be allowed an unlimited, second cross-examination of Coaxum, stating that he now believed that his cross-examination “should be

¹¹ Defense counsel asked to recross-examine both Coaxum and another witness, Joyce Wright, but Appellant has only challenged the trial court’s denial of his request with regard to Coaxum.

handled in a different way.” (R. p. 76, line 25–p. 77, line 17). When asked by the trial court what he would ask now that he had not asked earlier, defense counsel stated, “I would [have] approached both of these witnesses with very detailed review of their prior statements.” (R. p. 77, lines 18–24). The trial court asked him further questions about his proposed new method of cross-examination and then took the matter under advisement. (R. p. 77, line 25–p. 79, line 5).

After the State rested its case, (R. p. 177, lines 11–12), defense counsel asked for the court’s ruling on his request to further cross-examine Coaxum, (R. p. 189, lines 21–23). The trial court allowed both sides additional argument before denying defense counsel’s motion to recross-examine the witnesses. (R. p. 189, line 24–p. 191, line 7).

Standard of Review

“A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused.” *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006). Evidence that is not disclosed is suppressed for *Brady* purposes even when it is “known only to police investigators and not to the prosecutor.” *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). Evidence is favorable if it is either exculpatory or impeaching. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). “Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Youngblood*, 547 U.S. at 870 (internal quotation marks omitted). However, “a ‘showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal,’” *id.* (quoting *Kyles*, 514 U.S. at 434), but only a “‘showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in

the verdict,” *id.* (quoting *Kyles*, 514 U.S. at 435). The assessment of materiality is made in light of the entire record. *United States v. Agurs*, 427 U.S. 97, 112 (1976).

Analysis

Respondent first respectfully asserts that this issue cannot be properly reviewed as defense counsel failed to proffer his recross-examination of Coaxum. *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 402–03 (1986) (citing *State v. Roper*, 274 S.C. 14, 260 S.E.2d 705 (1979)) (“Ordinarily, this Court will not review alleged error of the exclusion of testimony unless a proffer of testimony is properly made on the record.”). Indeed, after the State elicited testimony regarding Coaxum’s charge,¹² defense counsel did not request to proffer Coaxum’s testimony, nor did he do anything more than provide general assertions that he would have questioned Coaxum in more detail about her statement. Thus, it is not clear from the record what information, if any, further cross-examination would have elicited. *Id.* at 303, 342 S.E.2d at 403 (“[W]here the trial court refuses to allow the proffer, but we can determine from the record . . . what the testimony was intended to show, we will address the merits). Respondent submits that Appellant cannot show prejudice based on the record.

Respondent further submits that no *Brady* violation occurred here because the impeachment evidence was not material as there is no reasonable probability that, had the evidence been disclosed to the defense earlier,¹³ the result of the proceeding would have been

¹² Neither Coaxum’s nor Wright’s arrest records were presented to the jury. (R. p. 45, line 9–p. 47, line 4).

¹³ Respondent also believes that no *Brady* violation occurred because the evidence was given to defense counsel in time for its effective use at trial. See *United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 532 (4th Cir. 1985) (“No due process violation occurs as long as *Brady* material is disclosed to a defendant in time for its effective use at trial.”) However, because defense counsel failed to proffer Coaxum’s testimony, it is unclear what differences, if

different. Coaxum only witnessed the aftermath of the shooting, where she saw Appellant stomp on Victim and say to him, “die mother fucker, die.” (R. p. 28, line 15–p. 29, line 25). She also testified that Appellant had something in his hand and that “[h]e asked the other people in the area did they have a problem, and that he’s God.” (R. p. 30, lines 1–12). These parts of Coaxum’s testimony were further corroborated by the testimony of other witnesses at trial. For example, Appellant’s friend, James Boykin, testified that Appellant called him after the shooting, admitted to shooting Victim, told Boykin that “[h]e said die mother-fucker, die” while standing over Victim, and additionally told Boykin that he told Victim “don’t fear God, fear me.” (R. p. 87, line 19–p. 88, line 13). Along the same lines, Akeem Asby testified that he heard Appellant say, “[s]omething like, God is a faggot. I assure you all I’m God. Things like that.” (R. p. 40, lines 13–14). Even if defense counsel had somehow undermined Coaxum’s testimony through the use of impeachment evidence, her testimony was merely cumulative to the other evidence presented at trial. As such, Respondent submits that Appellant received “a trial resulting in a verdict worth of confidence” despite not having the impeachment evidence before his cross-examination of Coaxum. *See State v. Hill*, 368 S.C. 649, 661, 630 S.E.2d 274, 281 (2006) (citing *Kyles*, 514 U.S. at 434).

Of course, Respondent is mindful that “[t]he question is not whether the defendant would have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Kyles*, 514 U.S. at 435. Even under this standard, Respondent submits that Appellant has not shown that because he was unable to recross-examine Coaxum, he failed to receive a fair trial. Because the impeachment

any, resulted from defense counsel having the information after the first cross-examination of Coaxum.

evidence was not material in light of the *Brady* standards, Appellant's due process rights were not violated.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

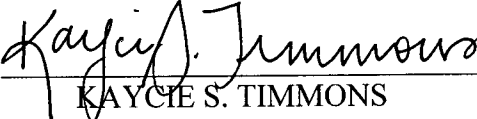
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ATTORNEY(S) FOR RESPONDENT

July 31, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

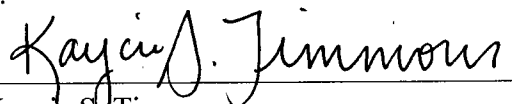
RON SANTA MCCRAY,

APPELLANT

Appellate Case No. 2012-213393.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court, "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."


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Columbia, South Carolina

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SC Court of Appeals

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Appeal from Berkeley County

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THE STATE,

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V.

RON SANTA MCCRAY,

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Appellate Case No. 2012-213393.

PROOF OF SERVICE

I, Kaycie S. Timmons, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorneys of record, addressed as follows:

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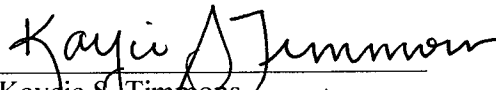
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SC Court of Appeals

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

This thirty-first day of July, 2014.


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Assistant Attorney General
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