STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

Opinion No. 2014-UP-5232 (S.C. Ct. App. filed May 21, 2014 and re-filed July 9, 2014)

08-GS-23-8409 and 11-GS-23-7258A

THE STATE,

RESPONDENT,

V.

CLARENCE WILLIAMS JENKINS,

PETITIONER

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Clarence Williams Jenkins, Appellant.

Appellate Case No. 2012-211588

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 5232
Heard May 6, 2014 – Filed May 21, 2014

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General Melody Jane Brown, all of Columbia; and Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

GEATHERS, J.: Appellant Clarence Williams Jenkins seeks review of his convictions for kidnapping and murder. Appellant argues the trial court's refusal to provide the jury with the circumstantial evidence instruction quoted in *State v.*

Edwards[1] violated his right to require the prosecution to prove his guilt beyond a reasonable doubt. Appellant also challenges the trial court's failure to strike the testimony of the State's fingerprint expert, or, in the alternative, to grant a mistrial, arguing the prosecution withheld evidence material to the testimony in question. We affirm.

FACTS/PROCEDURAL HISTORY

On the morning of April 7, 2008, Sue Bostic discovered a garbage bag with unknown contents sitting on her front porch and a threatening note under the windshield wiper of her automobile.[2] Bostic contacted the Greenville City Police Department, and Officer Scott Odom responded to the call. Officer Amber Allen also arrived at the scene and spoke with Bostic while Officer Odom took the garbage bag to the back of his vehicle to inspect the bag's contents. Officer Odom discovered a severed human foot and hand and several severed toes. Officer Michael Petersen, who was employed with the forensic division of the Greenville County Department of Public Safety, then arrived to assist in processing the crime scene and collecting the evidence. Officers Allen and Petersen were informed that a similar note and garbage bag containing severed body parts had been left at the residence of Judon Burnside. They later proceeded to this residence to collect the evidence.

Officer Petersen took the garbage bags and their contents to the morgue and rolled fingerprint impressions from the severed hands. Captain Jackie Kellet, of the forensic division of the Greenville County Department of Public Safety, examined the fingerprints processed by Officer Petersen and matched them to fingerprints on file for Mekole Harris (Victim).

On April 10, 2008, police arrested Appellant and his wife, Carmen Jenkins (Wife), for the murder of Victim. On November 18, 2008, the Greenville County Grand Jury indicted Appellant for murder. In December 2008, the State filed a Notice of Intent to Seek the Death Penalty against Appellant and Wife. In September 2009,

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[1] 298 S.C. 272, 274–76, 379 S.E.2d 888, 889 (1989), *abrogated by State v. Cherry*, 361 S.C. 588, 595–606, 606 S.E.2d 475, 478–82 (2004).

[2] The facts of this case are horrific; however, it is necessary to discuss them to give context to Appellant's arguments regarding circumstantial evidence and to explain the relevance of Appellant's arguments regarding the fingerprint identification of the victim.

Wife advised investigators of the location of Victim's remains in exchange for the State's withdrawal of its Notice of Intent to Seek the Death Penalty against Wife.

On March 9, 2011, Wife entered into a plea agreement with the State, requiring her truthful testimony in Appellant's trial in exchange for the State's subsequent request for a reduction in Wife's sentence. On September 13, 2011, the Grand Jury indicted Appellant for the kidnapping of Victim. On March 27, 2012, Wife pled guilty to the murder of Victim and was sentenced to fifty years of imprisonment. On this same day, the State withdrew its Notice of Intent to Seek the Death Penalty against Appellant.

Appellant's trial took place on April 9 through 13, 2012. Captain Kellet, who had matched the fingerprints from the severed hands to Victim's fingerprints, was qualified as an expert in fingerprint analysis, and she explained the process she went through in identifying Victim's fingerprints. The first step was entering the unknown fingerprints into the Automated Fingerprint Identification System (AFIS), a computerized database maintained by the South Carolina Law Enforcement Division (SLED). She explained that AFIS "sends back a list of respondents," and in this case "we ask for the top 25 people." Here, Victim's "State ID number"[3] was the first number on the list of respondents. Captain Kellet then pulled a fingerprint card for Victim from her agency's records and visually compared, point by point, Victim's prints to the unknown prints. Once she determined the known and unknown fingerprints matched, she felt no need to examine any other fingerprints from the AFIS list of respondents.

The State also presented the testimony of Wife, who testified about Appellant's alleged plan to intimidate a former housemate, Grace Davis, into returning to their home and continuing to live with them. According to Wife, during the time Davis lived with Appellant and Wife, Davis developed an intimate relationship with both of them. Eventually, the Department of Social Services removed Davis's children from the home and notified her that she could not regain custody of her children as long as she was living with Appellant and Wife. Therefore, Davis left the home. A few days later, Appellant told Wife that Davis "needed to come back to [their] relationship because she was a partner in [their] relationship" and "she knew too much about the organization that he was in." Appellant also told Wife "the organization would kill all of [them] if she didn't come back." Wife testified that she had never heard about this organization until that day.

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[3] The State ID number "is assigned to you by SLED if you've ever been fingerprinted."

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Appellant began executing his plan to intimidate Davis by mailing threatening letters to her and to members of her family. Next, on the evening of Friday, April 4, 2008, Appellant brought home Victim, a prostitute, and handcuffed her to a bed. Appellant told Victim that he and Wife were police officers and that Victim was "under arrest for prostitution and possession of crack." Appellant also told Victim that the only way she would get out of those charges was for her to help Appellant and Wife with a "case." The "case" Appellant referenced was his plan to intimidate Davis into returning to their home.

After Victim agreed to cooperate, Appellant removed the handcuffs. Appellant wrote out a script for Victim to read over a telephone to members of Davis's family. Appellant then handcuffed Victim again and gave the script to her to memorize. Sometime around midnight, Appellant, Wife, and Victim went to a pay telephone at a nearby gasoline station, and Appellant dialed the telephone numbers for Davis's mother, Judon Burnside, and Davis's aunt, Sue Bostic. During each telephone call, Victim recited the material from the script written by Appellant. Appellant and Wife then took Victim back to their home, and Appellant handcuffed Victim to a chair for the remainder of the day on Saturday.

On Saturday night, Appellant crushed up "some Tylenol PM and some other sleeping medicine," mixed it into some ice cream, and gave it to Victim. However, Victim only ate a small amount of the ice cream. On the next day, Sunday, April 6, 2008, Appellant ordered Wife to kill Victim, who was still handcuffed to the chair. Wife attempted to strangle Victim with a cable cord, but as Victim struggled against Wife, Wife lost control of the cord. Appellant then tied the cord to the back of the chair, placed a plastic bag over Victim's head, and suffocated her.

Appellant and Wife took Victim's body to the bathroom and placed her body in the shower. Later that day, Appellant dismembered Victim's body, forcing Wife to participate, and placed the dismembered parts in the couple's freezer. Appellant and Wife disposed of Victim's body near a golf course on Paris Mountain and returned to their residence, where Appellant placed the dismembered parts into two separate garbage bags.

After midnight, Appellant and Wife went to Bostic's apartment. Appellant "dropped [Wife] off right at the entrance of the apartments . . . ." Wife took one of the garbage bags and threw it onto Bostic's front porch. Wife then left a threatening letter on the windshield of Bostic's car. Next, Appellant drove Wife to

Burnside's residence. Wife placed a second threatening letter in Burnside's mailbox and placed the second garbage bag on Burnside's front porch.

Robin Taylor, a SLED employee, also testified at Appellant's trial. Taylor described the DNA analysis she performed on a swab from the severed hand. Taylor matched the DNA from this swab to the DNA from swabs of blood collected from (1) a wall near the ceiling in a bathroom at Appellant's residence; (2) a wall on the right side of the medicine cabinet in Appellant's bathroom; (3) a latex glove found on the floor of Wife's van; and (4) the p-trap of the shower drain in Appellant's bathroom.[4]

The jurors deliberated for over four hours. The foreperson then sent a note to the trial court indicating the jurors were unable to reach a unanimous decision on one of the charges against Appellant. The trial court sent the members of the jury home for the night. The next morning, the trial court provided the jury with an *Allen* instruction before they resumed their deliberations.[5] A little over one hour later, the jury returned a verdict of guilty on both charges against Appellant. The trial court sentenced Appellant to life in prison. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court's refusal to provide the jury with the circumstantial evidence instruction quoted in *State v. Edwards* violate Appellant's right to require the prosecution to prove his guilt beyond a reasonable doubt?

2. Did the trial court err in failing to strike the testimony of Captain Kellet, the State's fingerprint expert, or, in the alternative, to grant a mistrial, where Appellant's counsel did not receive a copy of Captain Kellet's file prior to trial?

3. Did the trial court err in declining to grant Appellant enough recess time to hire an expert to review Captain Kellet's file?

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[4] The record does not indicate when the swabs were taken from Appellant's bathroom and Wife's van.

[5] *See Allen v. United States*, 164 U.S. 492, 501 (1896) (finding no error in a jury instruction admonishing jurors to give due deference to the opinions of their fellow jurors).

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STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. *Id.*

LAW/ANALYSIS

I. Jury Instruction

Appellant maintains the trial court's rejection of his proposed circumstantial evidence instruction, based on the instruction approved in *State v. Edwards*,[6] violated his right to require the prosecution to prove his guilt beyond a reasonable doubt. Appellant argues the instruction given confused the jury regarding how to evaluate circumstantial evidence. We find no reversible error.[7]

"In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial." *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013) (citation omitted). "A jury charge is correct if, when read as a whole, the charge adequately covers the law. *Id.* at 90-91, 747 S.E.2d at 448. "A jury charge that is substantially correct and

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[6] 298 S.C. 272, 274–76, 379 S.E.2d 888, 889 (1989), *abrogated by State v. Cherry*, 361 S.C. 588, 595–606, 606 S.E.2d 475, 478–82 (2004).

[7] The State asserts Appellant failed to preserve his argument that the trial court's circumstantial evidence instruction violated a constitutional right. The State argues trial counsel's request to provide the jury with the *Edwards* instruction was based on state law rather than constitutional law. Given the constitutional foundation on which our state's circumstantial evidence jurisprudence is based, it is likely that trial counsel's reference to recent case law developments sufficiently apprised the trial court of the constitutional component of his request for the *Edwards* instruction. Further, any doubt concerning whether Appellant's "reasonable doubt" argument was preserved for review should be resolved in favor of finding the argument preserved. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) (recognizing "it may be good practice for [the appellate court] to reach the merits of an issue when error preservation is doubtful"); *id.* at 333, 730 S.E.2d at 287 (Toal, C.J., concurring) ("[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.").

covers the law does not require reversal." *Id.* (citation and quotation marks omitted). "Jury instructions should be considered as a whole, and if as a whole, they are free from error, any isolated portions which may be misleading do not constitute reversible error." *Id.* at 94 n.8, 747 S.E.2d at 449 n.8. (citation omitted). "Generally, the trial judge is required to charge only the current and correct law of South Carolina." *State v. Brown*, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.* at 262, 607 S.E.2d at 95.

In *Edwards*, our supreme court quoted the circumstantial evidence standard "to be charged for use by the jury in its deliberation." 298 S.C. at 275, 379 S.E.2d at 889.

> Under this test, the jury may not convict unless:
>
> every circumstance relied upon by the State be proven beyond a reasonable doubt; and . . . all of the circumstances so proven be consistent with each other and taken together, *point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis*. It is not sufficient that they create a probability, though a strong one and if, assuming them to be true they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

Id. (emphasis added) (quoting *State v. Littlejohn*, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955)). However, in *State v. Grippon*, the court recommended that once a proper reasonable doubt instruction is given, the following instruction be given:

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of

> circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

327 S.C. 79, 83-84, 489 S.E.2d 462, 464 (1997).

In *State v. Cherry*, 361 S.C. 588, 597, 606 S.E.2d 475, 480 (2004), our supreme court held that in cases relying, in whole or in part, on circumstantial evidence, South Carolina courts **must** use the jury charge recommended in *Grippon*. *Cherry* also eliminated the "reasonable hypothesis" language found in the *Edwards* instruction. *Cherry*, 361 S.C. at 601, 606 S.E.2d at 482 ("[T]he reasonable hypothesis charge merely serves to confuse juries by leading them to believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence when, in fact, it is not."). Notably, other language from the *Edwards* instruction was recently reaffirmed, slightly modified, and recommended in future jury instructions. *See State v. Logan*, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013) ("[T]o the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused *beyond a reasonable doubt. . . . If these circumstances merely portray the defendant's behavior as suspicious*, the proof has failed.") (emphases added).

In *Logan*, the court set forth the following instruction to be given to the jury, in addition to a proper reasonable doubt instruction, when so requested by a defendant:

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, *all of the circumstances must be consistent with*

> *each other*, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. *If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.*
>
> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Id. at 99, 747 S.E.2d at 452 (emphases added). The court hastened to add: "This holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon* and *Cherry*. However, trial courts may not exclusively rely on that charge over a defendant's objection." *Id.* at 100, 747 S.E.2d at 452-53. Nonetheless, the *Logan* court ultimately concluded any error in the trial court's jury instructions was harmless beyond a reasonable doubt because the trial court "clearly instructed the jury regarding the reasonable doubt burden of proof" and its jury instruction, "as a whole, properly conveyed the applicable law." *Logan*, 405 S.C. at 94 n.8, 747 S.E.2d at 449 n.8. (citations omitted).

In the instant case, the trial court gave the following jury instruction on circumstantial evidence:

> Now, there are two types of evidence which are generally presented during a trial. And they are known as direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eye witness [sic]. It is evidence which immediately establishes the main fact sought to be proven. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of the main fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of

> certainty required of circumstantial evidence than of direct evidence. *You should weigh all of the evidence in the case. After weighing all of the evidence, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, then you should find the Defendant not guilty.*

(emphasis added). This instruction is virtually identical to the *Grippon* instruction. 327 S.C. at 83–84, 489 S.E.2d at 464.

The State argues that at the time of Appellant's trial, the "relevant precedent dictated that only the *Grippon* charge be used." The State points out that the *Logan* opinion was published while the appeal in this case was pending. In response, Appellant maintains that *Logan* applies retroactively to his trial, citing *State v. Belcher*, 385 S.C. 597, 612–13, 685 S.E.2d 802, 810 (2009) and *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), for the proposition that a new rule for the conduct of criminal prosecutions must be applied retroactively to all cases pending on direct review or not yet final. We agree that *Griffith* requires the application of *Logan* to cases pending on appeal at the time the *Logan* opinion was published. Nevertheless, this court is constrained to affirm the trial court's denial of Appellant's request to give the *Edwards* instruction for two reasons.

First, Appellant's proposed instruction contains the following language: "[Y]ou may not convict a defendant unless . . . all of the circumstances . . . taken together, point conclusively to the guilt of the accused *to the exclusion of every other reasonable hypothesis*." Our supreme court has cautioned against using this language in jury instructions. *See Logan*, 405 S.C. at 98, 747 S.E.2d at 451–52 ("[R]equiring a jury to inquire as to whether there is any other reasonable explanation other than the defendant's guilt comes perilously close to shifting the burden of proof from the State to the defendant." (citation omitted)).

Second, any error in the omission of certain language from the *Logan* instruction was harmless beyond a reasonable doubt because the trial court's instruction, as a whole, properly conveyed the applicable law. The trial court provided the following instruction as to the State's burden of proof:

> Now, Clarence Jenkins has pled not guilty to these indictments. And that plea puts the burden on the State to provide [sic] the Defendant guilty. A person charged with committing a criminal offense in South Carolina is

> never required to prove themselves innocent. And I charge you that it is a cardinal and important rule of the law that a defendant in a criminal trial will always be presumed to be innocent of the crime for which an indictment has been issued unless and until guilt has been proven by evidence satisfying you of guilt beyond a reasonable doubt.
>
> Now, reasonable doubt is the kind of doubt which would cause a reasonable person to hesitate to act. And reasonable doubt may arise from the evidence which is in the case or from the lack or absence of evidence in the case. And you, the jury, must determine whether or not reasonable doubt exists as to the guilt of this Defendant. The State has the burden of proving each and every element of a crime beyond a reasonable doubt. And any reasonable doubt that you may have in your deliberations should be resolved in favor of the Defendant.

We find this reasonable doubt instruction to be a correct statement of the law. *See State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 821 (2001) (holding a jury instruction explaining, "A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act" was "a correct statement of South Carolina law."). Further, the trial court's instruction on circumstantial evidence immediately followed the reasonable doubt instruction. As our supreme court ultimately concluded in *Logan*, we conclude the trial court's instructions in the present case, as a whole, properly conveyed the applicable law. *See Logan*, 405 S.C. at 94 n.8, 747 S.E.2d at 449 n.8 ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied." (citation omitted)); *id.* (concluding any error in the trial court's jury instructions was harmless because the trial court "clearly instructed the jury regarding the reasonable doubt burden of proof" and its jury instruction, "as a whole, properly conveyed the applicable law." (citations omitted)). Therefore, we affirm the denial of Appellant's request to provide the *Edwards* instruction.

II. Withholding of Evidence

Appellant challenges the trial court's refusal to grant him relief based on the prosecution's failure to produce Captain Kellet's file documenting her identification of Victim's fingerprints, citing Rule 5 of the South Carolina Rules of Criminal

Procedure.[8] Appellant argues this alleged Rule 5 violation compromised his ability to fully impeach the credibility of Captain Kellet's testimony, and, thus, the trial court should have stricken her testimony or granted a mistrial. We disagree.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Tennant*, 383 S.C. 245, 254, 678 S.E.2d 812, 816 (Ct. App. 2009), *modified on other grounds*, 394 S.C. 5, 21, 714 S.E.2d 297, 305 (2011) (citation and quotation marks omitted). Likewise, "[t]he granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court[,] and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627–28 (2000) (citation omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Tennant*, 383 S.C. at 254, 678 S.E.2d at 816 (citation and quotation marks omitted).

To warrant either a mistrial or reversal based on an evidentiary ruling, the complaining party must prove both the error of the ruling and the resulting prejudice. *Id.* at 254, 678 S.E.2d at 816–17 (as to the admission or exclusion of evidence); *Harris*, 340 S.C. at 63, 530 S.E.2d at 628 (as to a mistrial). "To prove prejudice, the complaining party must show there is a reasonable probability that the jury's verdict was influenced by the challenged evidence or lack thereof." *Tennant*, 383 S.C. at 254, 678 S.E.2d at 817 (citation and quotation marks omitted).

The record shows that for approximately four years prior to trial, Appellant's defense team was aware that fingerprints from the severed hands had been run through AFIS. Thus, the defense team was also aware of the possible existence of

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[8] Rule 5(a)(1)(C), SCRCrimP states:

> Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

AFIS-related documents. Yet, nothing in the record indicates that defense counsel attempted to interview Captain Kellet or review any AFIS-related documents prior to trial. In any event, Appellant did not contest Victim's identity at trial—defense counsel referenced Victim's name several times while cross-examining Wife. Therefore, we find the trial court's failure to grant the requested relief did not result in any unfair prejudice to Appellant. *See State v. Sweet*, 342 S.C. 342, 348, 536 S.E.2d 91, 94 (Ct. App. 2000) ("A criminal defendant is entitled to a fair trial, not a perfect one.").

Based on the foregoing, the trial court properly declined to strike Captain Kellet's testimony or declare a mistrial. *See Tennant*, 383 S.C. at 254, 678 S.E.2d at 816 ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." (citation and quotation marks omitted)); *Harris*, 340 S.C. at 63, 530 S.E.2d at 627–28 ("The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court[,] and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." (citation omitted)).

III. Lengthy Recess

Alternatively, Appellant argues the trial court should have granted him a long recess or short continuance to obtain the assistance of an expert qualified to evaluate the documents in Captain Kellet's file. We disagree.

Because the defense team was aware of Captain Kellet's fingerprint analysis and the possible existence of AFIS-related documents for years prior to trial, the trial court properly declined to grant any further delay in the trial. *See State v. Patterson*, 367 S.C. 219, 230, 625 S.E.2d 239, 245 (Ct. App. 2006) ("The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion.").

CONCLUSION

Accordingly, Appellant's convictions are

AFFIRMED.

SHORT, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

CLARENCE WILLIAMS JENKINS,

APPELLANT

Appellate Case No. 2012-211588

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

Opinion No. 5232

PETITION FOR REHEARING

On May 21, 2014, this Court affirmed Appellant's convictions and sentences in an published opinion. State v. Jenkins, No. 5232 (S.C. Ct. App. filed May 21, 2014). Appellant files this petition for rehearing pursuant to Rule 221(a) in light of the significant points overlooked and/or misapprehended by this Court in arriving at the opinion.

Appellant raised three issues in his brief. The first issue concerned the trial judge's instruction to the jury regarding circumstantial evidence. The second and third issues concerned the trial judge's ruling regarding evidence the prosecutor failed to disclose. Appellant seeks rehearing of all three issues.

Issue I

At the conclusion of the case, Appellant requested multiple jury instructions. R. 272, lines 20-21; Court's #4. Among the instructions requested was a charge regarding circumstantial evidence. Specifically, Appellant, citing State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989) as support, requested:

> When the state relies on circumstantial evidence, you may not convict a defendant unless every circumstance relied on by the state is proven beyond a reasonable doubt, and all of the circumstances so proven are consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that the circumstances create a probability, even if it is a strong one. If, assuming the circumstances are true, there is a reasonable hypothesis which does not include the guilt of the accused the proof has failed.

Court's #4 (Request #10); R. 273, lines 5-6; R. 273, lines 11-20. The judge declined to instruct the jury as Appellant requested. R. 275, line 8. Instead, the judge charged the jury as follows:

> Now, there are two types of evidence which are generally presented during a trial. And they are known as direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes the main fact sought to be proven. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of the main fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all of the evidence in the case. After weighing all of the evidence, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, then you should find the Defendant not guilty.

R. 281, line 10 – R. 282, line 5.[1]

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[1] The jury began deliberations at 4:45 p.m. on April 12, 2012. R. 290, lines 13-14. By 6:15 p.m., the jury sent a note with two questions. R. 291, lines 10-11; R. 292, lines 5-9. At 8:47 p.m., the jury sent a note expressing its inability to arrive at unanimous verdicts: "we have deliberated and are unable to reach a unanimous verdict. ... P.S. we have reached a unanimous decision on one charge." R. 296, lines 14-18; Court's Exhibit #9. The judge decided to send the jurors home for the

While Appellant's case was pending on appeal, the South Carolina Supreme Court issued its decision in State v. Logan, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013). The Supreme Court explained that although a trial court may instruct a jury concerning circumstantial evidence as defined in Grippon[2] and Cherry,[3] the trial court "should provide" an instruction guiding the jury on how to analyze circumstantial evidence, in addition to a proper reasonable doubt instruction, when requested to do so by a defendant. The approved charge provides jurors with much-needed guidance in analyzing circumstantial evidence:

> There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the state relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.
> The state has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the state regardless of whether the state relies on direct evidence, circumstantial evidence, or some combination of the two.

Id. This Court correctly determined that Logan applied retroactively, and Appellant does not seek rehearing as to this holding. However, Appellant seeks rehearing of this Court's affirmance of the

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evening. R. 300, lines 17-21. The jurors left at 9:13 p.m. R. 302, lines 18-19. The jurors returned to court at 9:22 a.m. on April 13, 2012. R. 306, lines 3-4. At that time, the judge instructed the jurors pursuant to Allen v. United States, 164 U.S. 492 (1896). R. 306, line 5 – R. 308, line 8. The jury resumed deliberations at 9:28 a.m. R. 308, lines 24-25. Just over an hour later, at 10:45 a.m., the jury returned guilty verdicts. R. 309, lines 6-10.

[2] State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997).

[3] State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004).

trial court's denial of Appellant's request to instruct the jury as provided in Edwards and reverse his case for a proper instruction to the jury governing circumstantial evidence.

This Court offered two reasons to support its denial of relief. First, this Court concluded that because Appellant requested the instruction pursuant to Edwards, supra, which included language that the circumstantial evidence must point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis, and the Supreme Court had cautioned against such language, the trial court did not err. While the Supreme Court cautioned that requiring a jury to inquire as to other reasonable hypotheses other than a defendant's guilt was "perilously close to shifting the burden of proof from the state to the defendant," the Court did not find the language did in fact shift the burden. In Grippon, 327 S.C. at 84, 489 S.E.2d at 464, then-Justice Toal wrote in her concurring opinion that "[t]he language concerning the necessity that the circumstantial evidence 'point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis' does not shift the burden of proof to the defendant." Additionally, a defendant who requested such a charge could not complain about the charge on appeal. Finally, Appellant simply could not know what language, if any, the Supreme Court would approve in Logan. Appellant is not clairvoyant.

In this Court's second reason for denying Appellant relief, this Court concluded that any error in the omission of language from the Logan charge was harmless beyond a reasonable doubt because the trial court's instruction as a whole, properly conveyed the applicable law. This Court relied upon the trial court's reasonable doubt instruction to the jury to make this finding. However, the Logan Court made clear that the clarifying instruction concerning circumstantial evidence should be given in addition to a proper reasonable doubt charge.

Without question, a proper evaluation of circumstantial evidence requires connection of collateral facts to reach a conclusion, which is not required for evaluating direct evidence. The jury struggled with the evidence before it as demonstrated by the length of time the jury deliberated, the questions posed to the trial court, the jury being deadlocked, and the necessity of the judge giving an Allen charge despite the direct evidence against Appellant. What the jury required was the proper framework and foundation for analyzing the circumstantial evidence presented by the prosecution in order to render a true and just verdict.

Issues 2 & 3

In Appellant's second and third issues, Appellant challenged the trial court's handling of the prosecution's failure to disclose evidence. This Court found that Appellant suffered no unfair prejudice as a result of the trial court's failure to strike the witness' testimony, grant a mistrial, or grant a recess to permit Appellant to obtain the assistance of an expert to evaluate the undisclosed evidence. Thus, it appears this Court found the prosecution failed to disclose material evidence as required by Rule 5 of the South Carolina Rules of Criminal Procedure and Brady v. Maryland, 373 U.S. 83 (1963), but determined that Appellant's proposed remedies – striking of testimony, granting of a mistrial, or a recess – were properly denied under an abuse of discretion standard. Although Appellant agrees with this Court's apparent holding that the prosecution suppressed material evidence that was subject to disclosure pursuant to our rules, Appellant strongly urges this Court to rehear this matter concerning the proper remedy and the reasoning employed governing what duties Appellant had to seek the evidence independent of the solicitor's office.

During a pretrial motion hearing regarding the testimony of an expert witness concerning latent fingerprint examination, Appellant explained to the court that he had received only conclusory statements contained within reports from the prosecution. The reports essentially stated

that "fingerprint examination was done and that it was verified by Captain Kellet." R. 2, lines 18-22. The one-page reports provided no information to allow Appellant to understand the type of examination done. R. 2, lines 22-25. The prosecution explained "our latent experts, they don't do a lengthy report stating, specifically, what ridge matches what ridge." Instead, the report only indicates whether the unknown print matches a known print. R. 3, lines 21-24. The prosecutor further explained he "triple checked. There's no reports other than the conclusory statements that were given to defense counsel that these knowns match these prints." R. 4, lines 7-10. When Appellant requested copies of the prints that were consulted in making the verification, the prosecutor explained the fingerprint cards would be available that day. He further stated "If they want to get their own expert while we're trying the case or something, I'm not sure, but they're ready and available, all the latents are." R. 4, line 17 – R. 4, line 4. The prosecutor assured the court he would check "to see if there's any notes" relating to the fingerprint analysis. R. 6, lines 19-21.

In light of Appellant's objections to the expert's testimony, the court conducted an in camera hearing. Jackie Kellet, employed by the Greenville Department of Public Safety forensic division, testified she entered the unknown print from the severed hand into the Automated Fingerprint Identification System (AFIS). The computer system provided her with a list of potential matches. Kellet printed the card of the person AFIS said the unknown belonged to and used a magnifying glass to visually examining the points to verify the result. R. 61, lines 19-20; R. 65, line 15-12; R. 68, lines 1-11. Kellet testified she made no notes while making the comparison. R. 65, lines 13-25; R. 71, lines 10-13. Other than issuing a report, Kellet made no record of her work. R. 72, lines 1-24.

Kellet then testified before the jury. On direct examination, her testimony tracked her in camera testimony. R. 77, line 8 –R. 84, line 25. On cross-examination, Kellet testified that on a typical day, a latent print examiner may "do 500 to 1000 comparisons a day, easy." R. 86, lines 17-25. She reiterated she made no notes of her comparisons. R. 87, lines 1-3. Appellant then realized Kellet had a file in her hand and asked to examine its contents, which the judge permitted. R. 87, lines 8-11. Upon review of the file, Appellant realized at least three documents had not been produced in discovery – "an AFIS report or a screen shot, an automated fingerprint identification worksheet and what looks to be a latent handprint." R. 88, lines 9-17.

The trial judge explained he was "disturbed that the state ha[d] not produced these documents after all the lengthy hearings and discussions." R. 89, lines 6-11. Appellant reviewed the materials quickly and explained it appeared to be "a series of points of comparison on the screen shot ... [with] at least, two impressions that one looks to be identified, one looks to be the latent." Appellant informed the judge that having the materials would have provided him an opportunity to "raise some questions for cross-examination to support our objection." R. 89, lines 12-20. The prosecutor claimed that after Appellant "filed motions regarding the fingerprint analysis, point by point analysis [he] called Captain Kellet and conferred with her regarding what she had in her file." Thereafter, he told Appellant "there may be some AFIS stuff in there, that's all I know." He further claimed Appellant "didn't want it." R. 89, line 23 – R. 90, line 11. The judge ordered a ten-minute break. R. 90, lines 15-17.

After the break, Appellant explained that the AFIS report provided at least sixteen respondents, or possible matches, with associated scores. Kellet's testimony indicated she found a match with the first respondent. According to the undisclosed document, the first respondent had a score of 5595 and the second respondent had a score of 5415. Therefore, the second respondent

was very close in score to the first. Appellant explained "[h]ad we had this and had we been able to work with an expert in identifying the actual proximity of number one and number two and even number three, we could have, I think much more effectively cross-examined this witness." R. 90, line 22 – R. 91, line 22. Appellant further expressed the difficulty of trying to show prejudice based upon the prosecution's failure to produce the document within a short amount of time, especially when the document relates to scientific expert testimony. Appellant moved to strike the testimony of Kellet or grant a mistrial. R. 92, line 1 – R. 94, line 25.

In response, the prosecutor countered

> we didn't focus on anything regarding AFIS because we were [not] introducing anything regarding AFIS and it wasn't evidence of anything. It was an investigative took used to get them a potential comparison. So it wasn't something that we even imagined would be anything that they would want. Given the fact, they knew it was run through AFIS.

R. 95, lines 18-24. He further argued Appellant was not prejudiced by the failure to disclose. Specifically he said "the only thing on there that they didn't have access to was a list of 20 people that the computer program had a report on. If they wanted the report on those folks, they could have asked for it." R. 96, lines 1-6.

The trial judge expressed his concern that the prosecutor previously claimed in prior discovery conference that he had "given them everything" and "that [was] not the case." The judge further expressed that Appellant had found "a touch point, which has potential for prejudice." He admonished the prosecutor "even though the prosecution may have not [found] a document to be relevant, you have a different mindset than the defense. So it is important to produce all of the documents." R. 96, lines 7-18.[4] The judge also demonstrated concern for Appellant's predicament

[4] The judge later explained that the prosecutor does not have the "mindset" of the defense and may not view the same documents with the same level of importance as the defense as a result.

in being asked to articulate prejudice as a result of the prosecutor's failure to disclose "on the spot." R. 96, lines 19-21. Nevertheless, the judge found the failure to disclose did not rise to the level of requiring striking of the testimony or the granting of a mistrial. R. 97, lines 1-10. The undisclosed documents were made a court's exhibit. R. 99, line 14 – R. 100, line 24; Court's Exhibit #3.

After the judge denied Appellant's request to strike Kellet's testimony or in the alternative grant a mistrial, Appellant requested the court delay the trial to permit Appellant to engage the services of an expert to examine the undisclosed records. R. 98, lines 10-23. The judge denied the request stating, "you can have those examined and you can pursue that without delaying the trial." He acknowledged that Kellet testified she only examined the first respondent, and Appellant may be able to present an expert to "attack the credibility" of Kellet by testifying "it's a better practice to examine the top two or three," and that such "might be of some benefit." R. 98, line 25 – R. 99, line 13.

When a trial judge determines the prosecution violated Rule 5, the judge may fashion the proper remedy. The Rule itself explains that if a party failed to comply with the rule, the court "may prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances." Rule 5(d)(2), SCRCrimP. The Kennerly Court explained the definition of "material" as used in Rule 5 is the same as the definition used in the context of violations and obligations pursuant to Brady v. Maryland, 373 U.S. 83 (1963). Kennerly, 331 S.C. 453, 503 S.E.2d at 220. Thus, evidence is material for purposes of Rule 5 "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985).

He further stated that if Appellant had the documents, they may have been able to hire an expert to dispute Kellet's finding. R. 97, line 19 – R. 98, line 7.

As explained by the Court of Appeals, the goal of Rule 5 is to ensure a criminal defendant's right to a fair trial. Further, the role of a prosecutor is to be a minister of justice, not the representative of an ordinary party. As the representative of the sovereign, the prosecutor's interest in a criminal prosecution is not to win, but to see that justice is done. Kennerly, 331 S.C. 454, 503 S.E.2d at 220.

> The prudent prosecutor will resolve doubtful questions in favor of disclosure. This is as it should be. Such disclosures will serve to justify trust in the prosecutor as the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done. And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.

Riddle v. Ozmint, 369 S.C. 39, 46, 631 S.E.2d 70, 74 (2006). Similarly, the Rules of Professional Conduct impose certain duties upon prosecutors. Specifically, the Rules require a prosecutor "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilty of the accused or mitigates the offense." Rule 3.8(e), SCACR. The special duties imposed upon prosecutors are due to the prosecutor's "responsibility of a minister of justice and not simply that of an advocate." Thus, the prosecutor has "specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Rule 3.8, cmt. 1, SCACR.

"The Brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment." Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012) (citing Brady, supra). "[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted in the defendant's acquittal." Kyles v. Whitley, 514 U.S. 419, 434 (1995). It is enough that it undermines confidence in the verdict. Id. at 435.

Brady requires that prosecutors fully disclose to the accused all exculpatory evidence in their possession. United States Supreme Court decisions have elaborated the Brady obligations to include (1) the duty to disclose impeachment evidence, (2) favorable evidence in the absence of a request by the accused, and (3) evidence in the possession of persons or organizations. See Giglio v. United States, 405 U.S. 150 (1972); United States v. Agurs, 427 U.S. 97 (1976); Kyles, supra. Material must be disclosed "when prejudice to the accused ensures . . .[and where] the nondisclosure [is] so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

The trial judge erred in failing to strike Kellet's testimony or grant a mistrial based upon the prosecution's withholding of material evidence. As explained by trial counsel and admitted by the prosecution, the prosecutor failed to disclose at least three documents contained within the fingerprint examiner's file. Those three documents included one showing the possible matches returned via AFIS. This evidence was necessary to impeach Kellet concerning her failure to examine more than one respondent print, the quality of the prints produced, and the likelihood that other respondent prints possessed the same unique identifying characteristics as the latent print. Additionally, given an opportunity, Appellant may have obtained an expert to challenge Kellet's finding altogether based upon the AFIS results.

This Court erred in putting the onus on Appellant to attempt to interview Kellet or review any AFIS-related documents prior to trial. As an initial matter, Appellant attempted to review AFIS-related documents prior to trial numerous times by filing motions requesting that information specifically. In fact, Appellant questioned Kellet during a pre-trial hearing concerning this evidence and Kellet denied having any documentation at all. It was not until Kellet testified before the jury with a folder in her hand that Appellant was made aware that such documentation existed. There

was simply nothing more that Appellant could do to get the documentation. Further, the law does not require Appellant to do more than make the request, which was made clearly and unequivocally. Rule 5 provides that the prosecution must provide the evidence upon a request from the defendant. Rule 5, S.C.R.Crim.P. Further, controlling United States Supreme Court precedent and South Carolina precedent require the prosecutor to disclose evidence. See Giglio, supra; Agurs, supra; Kyles, supra; Riddle, supra; Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999); State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010).

In the alternative, the trial court's failure to grant a recess or continuance to allow Appellant an opportunity to review the evidence and consult with an expert violated Appellant's right to a fair trial and due process of law.

CONCLUSION

Appellant respectfully requests this Court rehear this matter based on the foregoing points overlooked or misapprehended by this Court in rendering its opinion.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

This 5th day of June, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CLARENCE WILLIAMS JENKINS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Clarence Williams Jenkins, #323856, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 5th day of June, 2014.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 5th day
of June, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

The South Carolina Court of Appeals

The State, Respondent,

v.

Clarence Williams Jenkins, Appellant.

Appellate Case No. 2012-211588

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied. However, we withdraw Opinion No. 5232 and substitute the attached amended opinion.

Paul E. Short, Jr. J.

John C. Beatty J.

Joseph M. Cureton A J.

Columbia, South Carolina

cc:
Susan Barber Hackett, Esquire
Alan McCrory Wilson, Esquire
Melody Jane Brown, Esquire
John W. McIntosh, Esquire
William Walter Wilkins, III, Esquire
Donald J. Zelenka, Esquire
The Honorable Edward W. Miller

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Clarence Williams Jenkins, Appellant.

Appellate Case No. 2012-211588

Appeal From Greenville County
The Honorable Edward W. Miller, Circuit Court Judge

Opinion No. 5232
Heard May 6, 2014 – Filed May 21, 2014
Withdrawn, Substituted and Refiled July 9, 2014

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General Melody Jane Brown, all of Columbia; and William Walter Wilkins, III, of Greenville, for Respondent.

GEATHERS, J.: Appellant Clarence Williams Jenkins seeks review of his convictions for kidnapping and murder. Appellant argues the trial court's refusal to

provide the jury with the circumstantial evidence instruction set forth in *State v. Edwards*[1] violated his right to require the prosecution to prove his guilt beyond a reasonable doubt. Appellant also challenges the trial court's failure to strike the testimony of the State's fingerprint expert, or, in the alternative, to grant a mistrial, arguing the prosecution withheld evidence material to the testimony in question. We affirm.

FACTS/PROCEDURAL HISTORY

On the morning of April 7, 2008, Sue Bostic discovered a garbage bag with unknown contents sitting on her front porch and a threatening note under the windshield wiper of her automobile.[2] Bostic contacted the Greenville City Police Department, and Officer Scott Odom responded to the call. Officer Amber Allen also arrived at the scene and spoke with Bostic while Officer Odom took the garbage bag to the back of his vehicle to inspect the bag's contents. Officer Odom discovered a severed human foot and hand and several severed toes. Officer Michael Petersen, who was employed with the forensic division of the Greenville County Department of Public Safety, then arrived to assist in processing the crime scene and collecting the evidence. Officers Allen and Petersen were informed that a similar note and garbage bag containing severed body parts had been left at the residence of Judon Burnside. They later proceeded to this residence to collect the evidence.

Officer Petersen took the garbage bags and their contents to the morgue and rolled fingerprint impressions from the severed hands. Captain Jackie Kellet, of the forensic division of the Greenville County Department of Public Safety, examined the fingerprints processed by Officer Petersen and matched them to fingerprints on file for Mekole Harris (Victim).

On April 10, 2008, police arrested Appellant and his wife, Carmen Jenkins (Wife), for the murder of Victim. On November 18, 2008, the Greenville County Grand Jury indicted Appellant for murder. In December of 2008, the State filed a Notice of Intent to Seek the Death Penalty against Appellant and Wife. In September of

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[1] 298 S.C. 272, 274-76, 379 S.E.2d 888, 889 (1989), *abrogated by State v. Cherry*, 361 S.C. 588, 595-606, 606 S.E.2d 475, 478-82 (2004).

[2] The facts of this case are horrific; however, it is necessary to discuss them to give context to Appellant's arguments regarding circumstantial evidence and to explain the relevance of Appellant's arguments regarding the fingerprint identification of the victim.

2009, Wife advised investigators of the location of Victim's remains in exchange for the State's withdrawal of its Notice of Intent to Seek the Death Penalty against Wife.

On March 9, 2011, Wife entered into a plea agreement with the State, requiring her truthful testimony in Appellant's trial in exchange for the State's subsequent request for a reduction in Wife's sentence. On September 13, 2011, the Grand Jury indicted Appellant for the kidnapping of Victim. On March 27, 2012, Wife pled guilty to the murder of Victim and was sentenced to fifty years of imprisonment. On this same day, the State withdrew its Notice of Intent to Seek the Death Penalty against Appellant.

Appellant's trial took place on April 9 through 13, 2012. Captain Kellet, who had matched the fingerprints from the severed hands to Victim's fingerprints, was qualified as an expert in fingerprint analysis, and she explained the process she went through in identifying Victim's fingerprints. The first step was entering the unknown fingerprints into the Automated Fingerprint Identification System (AFIS), a computerized database maintained by the South Carolina Law Enforcement Division (SLED). She explained that AFIS sends back a list of potential matches, and in this case "we ask for the top 25 people." Here, Victim's "State ID number"[3] was the first number on the list of potential matches. Captain Kellet then pulled a fingerprint card for Victim from agency records and visually compared, point by point, Victim's prints to the unknown prints. Once she determined the known and unknown fingerprints matched, she felt no need to examine any other fingerprints from the AFIS list of potential matches.

The State also presented the testimony of Wife, who testified about Appellant's alleged plan to intimidate a former housemate, Grace Davis, into returning to their home and continuing to live with them. According to Wife, during the time Davis lived with Appellant and Wife, Davis developed an intimate relationship with both of them. Eventually, the Department of Social Services removed Davis's children from the home and notified her that she could not regain custody of her children as long as she was living with Appellant and Wife. Therefore, Davis left the home. A few days later, Appellant told Wife that Davis "needed to come back to [their] relationship because she was a partner in [their] relationship" and "she knew too much about the organization that he was in." Appellant also told Wife "the

[3] The State ID number "is assigned to you by SLED if you've ever been fingerprinted."

organization would kill all of [them] if she didn't come back." Wife testified that she had never heard about this organization until that day.

Appellant began executing his plan to intimidate Davis by mailing threatening letters to her and to members of her family. Next, on the evening of Friday, April 4, 2008, Appellant brought home Victim, a prostitute, and handcuffed her to a bed. Appellant told Victim that he and Wife were police officers and that Victim was "under arrest for prostitution and possession of crack." Appellant also told Victim that the only way she would get out of those "charges" was for her to help Appellant and Wife with a "case." The "case" Appellant referenced was his plan to intimidate Davis into returning to their home.

After Victim agreed to cooperate, Appellant removed the handcuffs. Appellant wrote out a script for Victim to read over the telephone to members of Davis's family. Appellant then handcuffed Victim again and gave the script to her to memorize. Sometime around midnight, Appellant, Wife, and Victim went to a pay telephone at a nearby gasoline station, and Appellant dialed the telephone numbers for Davis's mother, Judon Burnside, and Davis's aunt, Sue Bostic. During each telephone call, Victim recited the material from the script written by Appellant. Appellant and Wife then took Victim back to their home, and Appellant handcuffed Victim to a chair for the remainder of the day on Saturday.

On Saturday night, Appellant crushed up "some Tylenol PM and some other sleeping medicine," mixed it into some ice cream, and gave it to Victim. However, Victim only ate a small amount of the ice cream. On the next day, Sunday, April 6, 2008, Appellant ordered Wife to kill Victim, who was still handcuffed to the chair. Wife attempted to strangle Victim with a cable cord, but as Victim struggled against Wife, Wife lost control of the cord. Appellant then tied the cord to the back of the chair, placed a plastic bag over Victim's head, and suffocated her.

Appellant and Wife took Victim's body to the bathroom and placed her body in the shower. Later that day, Appellant dismembered Victim's body, forcing Wife to participate, and placed the dismembered hands and feet in the couple's freezer. Appellant and Wife disposed of Victim's body near a golf course on Paris Mountain and returned to their residence, where Appellant placed the dismembered parts into two separate garbage bags.

After midnight, Appellant and Wife went to Bostic's apartment. Appellant "dropped [Wife] off right at the entrance of the apartments . . . ." Wife took one of the garbage bags and threw it onto Bostic's front porch. Wife then left a

threatening letter on the windshield of Bostic's car. Next, Appellant drove Wife to Burnside's residence. Wife placed a second threatening letter in Burnside's mailbox and placed the second garbage bag on Burnside's front porch.

Robin Taylor, a SLED employee, also testified at Appellant's trial. Taylor described the DNA analysis she performed on a swab from the severed hand. Taylor matched the DNA from this swab to the DNA from swabs of blood collected from (1) a wall near the ceiling in a bathroom at Appellant's residence; (2) a wall on the right side of the medicine cabinet in Appellant's bathroom; (3) a latex glove found on the floor of Wife's van; and (4) the p-trap of the shower drain in Appellant's bathroom.[4]

The jurors deliberated for over four hours. The foreperson then sent a note to the trial court indicating the jurors were unable to reach a unanimous decision on one of the charges against Appellant. The trial court sent the members of the jury home for the night. The next morning, the trial court provided the jury with an *Allen* instruction before they resumed their deliberations.[5] A little over one hour later, the jury returned a verdict of guilty on both charges against Appellant. The trial court sentenced Appellant to life in prison. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court's refusal to provide the jury with the circumstantial evidence instruction quoted in *State v. Edwards* violate Appellant's right to require the prosecution to prove his guilt beyond a reasonable doubt?

2. Did the trial court err in failing to strike the testimony of Captain Kellet, the State's fingerprint expert, or, in the alternative, to grant a mistrial, where Appellant's counsel did not receive a copy of Captain Kellet's file prior to trial?

3. Did the trial court err in declining to grant Appellant enough recess time to hire an expert to review Captain Kellet's file?

STANDARD OF REVIEW

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[4] The record does not indicate when the swabs were taken from Appellant's bathroom and Wife's van.

[5] *See Allen v. United States*, 164 U.S. 492, 501 (1896) (finding no error in a jury instruction admonishing jurors to give due deference to the opinions of their fellow jurors).

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. *Id.*

LAW/ANALYSIS

I. Jury Instruction

Appellant maintains the trial court's rejection of his proposed circumstantial evidence instruction, based on the instruction approved in *State v. Edwards*,[6] violated his right to require the prosecution to prove his guilt beyond a reasonable doubt. Appellant argues the instruction given confused the jury regarding how to evaluate circumstantial evidence. We find no reversible error.[7]

"In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial." *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013) (citation omitted). "A jury charge is correct if, when read as a whole, the charge adequately covers the law. *Id.* at 90-91, 747 S.E.2d at 448. "A jury charge that is substantially correct and covers the law does not require reversal." *Id.* (citation and quotation marks

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[6] 298 S.C. 272, 274-76, 379 S.E.2d 888, 889 (1989), *abrogated by State v. Cherry*, 361 S.C. 588, 595-606, 606 S.E.2d 475, 478-82 (2004).

[7] The State asserts Appellant failed to preserve his argument that the trial court's circumstantial evidence instruction violated a constitutional right. The State argues trial counsel's request to provide the jury with the *Edwards* instruction was based on state law rather than constitutional law. Given the constitutional foundation on which our state's circumstantial evidence jurisprudence is based, it is likely that trial counsel's reference to recent case law developments sufficiently apprised the trial court of the constitutional component of his request for the *Edwards* instruction. Further, any doubt concerning whether Appellant's "reasonable doubt" argument was preserved for review should be resolved in favor of finding the argument preserved. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) (recognizing "it may be good practice for [the appellate court] to reach the merits of an issue when error preservation is doubtful"); *id.* at 333, 730 S.E.2d at 287 (Toal, C.J., concurring) ("[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.").

omitted). "Jury instructions should be considered as a whole, and if as a whole, they are free from error, any isolated portions which may be misleading do not constitute reversible error." *Id.* at 94 n.8, 747 S.E.2d at 449 n.8 (citation omitted). "Generally, the trial judge is required to charge only the current and correct law of South Carolina." *State v. Brown*, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.* at 262, 607 S.E.2d at 95.

In *Edwards*, our supreme court quoted the circumstantial evidence standard "to be charged for use by the jury in its deliberation." 298 S.C. at 275, 379 S.E.2d at 889.

> Under this test, the jury may not convict unless:
>
> every circumstance relied upon by the State be proven beyond a reasonable doubt; and . . . all of the circumstances so proven be consistent with each other and taken together, *point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis*. It is not sufficient that they create a probability, though a strong one and if, assuming them to be true they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

Id. (emphasis added) (quoting *State v. Littlejohn*, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955)). However, in *State v. Grippon*, the court recommended that once a proper reasonable doubt instruction is given, the following instruction be given:

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You

> should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

327 S.C. 79, 83-84, 489 S.E.2d 462, 464 (1997).

In *State v. Cherry*, 361 S.C. 588, 597, 606 S.E.2d 475, 480 (2004), our supreme court held that in cases relying, in whole or in part, on circumstantial evidence, South Carolina courts **must** use the jury charge recommended in *Grippon*. *Cherry* also eliminated the "reasonable hypothesis" language found in the *Edwards* instruction. *Cherry*, 361 S.C. at 601, 606 S.E.2d at 482 ("[T]he reasonable hypothesis charge merely serves to confuse juries by leading them to believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence when, in fact, it is not."). Notably, other language from the *Edwards* instruction was recently reaffirmed, slightly modified, and recommended in future jury instructions. *See State v. Logan*, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013) ("[T]o the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused *beyond a reasonable doubt. . . . If these circumstances merely portray the defendant's behavior as suspicious*, the proof has failed." (emphases added)).

Specifically, the *Logan* court set forth the following instruction to be given to the jury, in addition to a proper reasonable doubt instruction, when so requested by a defendant:

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, *all of the circumstances must be consistent with each other*, and when taken together, point conclusively

> to the guilt of the accused beyond a reasonable doubt. *If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.*
>
> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Id. at 99, 747 S.E.2d at 452 (emphases added). The court hastened to add: "This holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon* and *Cherry*. However, trial courts may not exclusively rely on that charge over a defendant's objection." *Id.* at 100, 747 S.E.2d at 452-53. Nonetheless, the *Logan* court ultimately concluded any error in the trial court's jury instructions was harmless beyond a reasonable doubt because the trial court "clearly instructed the jury regarding the reasonable doubt burden of proof" and its jury instruction, "as a whole, properly conveyed the applicable law." *Logan*, 405 S.C. at 94 n.8, 747 S.E.2d at 449 n.8 (citations omitted).

In the instant case, the trial court gave the following jury instruction on circumstantial evidence:

> Now, there are two types of evidence which are generally presented during a trial. And they are known as direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eye witness [sic]. It is evidence which immediately establishes the main fact sought to be proven. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of the main fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of

> direct evidence. *You should weigh all of the evidence in the case. After weighing all of the evidence, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, then you should find the Defendant not guilty.*

(emphasis added). This instruction is virtually identical to the *Grippon* instruction. 327 S.C. at 83-84, 489 S.E.2d at 464.

The State argues that at the time of Appellant's trial, the "relevant precedent dictated that only the *Grippon* charge be used." The State points out that the *Logan* opinion was published while the appeal in the instant case was pending. In response, Appellant maintains that *Logan* applies retroactively to his trial, citing *State v. Belcher*, 385 S.C. 597, 612-13, 685 S.E.2d 802, 810 (2009) and *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), for the proposition that a new rule for the conduct of criminal prosecutions must be applied retroactively to all cases pending on direct review or not yet final. We agree that *Griffith* requires the application of *Logan* to cases pending on appeal at the time the *Logan* opinion was published. Nevertheless, this court is constrained to affirm the trial court's denial of Appellant's request to give the *Edwards* instruction for two reasons.

First, Appellant's requested instruction contains the following language:

> [Y]ou may not convict a defendant unless . . . all of the circumstances . . . taken together, point conclusively to the guilt of the accused *to the exclusion of every other reasonable hypothesis*. It is not sufficient that the circumstances create a probability, even if it is a strong one. If, assuming the circumstances are true, there is a reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

Our supreme court has excluded the "reasonable hypothesis" language from the circumstantial evidence instruction now required by *Logan*, recognizing that this language is unnecessary. *See Logan*, 405 S.C. at 99-100, 747 S.E.2d at 452-53 (setting forth the instruction to be given by trial courts when requested by a defendant); *id.* at 100, 747 S.E.2d at 452 (citing *Grippon*, 327 S.C. at 83-84, 489 S.E.2d at 463-64.

Second, any error in the omission of other language from the *Logan* instruction was harmless beyond a reasonable doubt because the trial court's instruction, as a whole, properly conveyed the applicable law. *See Logan*, 405 S.C. at 94 n.8, 747 S.E.2d at 449 n.8 ("[E]rroneous jury instructions are subject to a harmless error analysis."). The trial court provided the following instruction as to the State's burden of proof:

> Now, Clarence Jenkins has pled not guilty to these indictments. And that plea puts the burden on the State to provide [sic] the Defendant guilty. A person charged with committing a criminal offense in South Carolina is never required to prove themselves innocent. And I charge you that it is a cardinal and important rule of the law that a defendant in a criminal trial will always be presumed to be innocent of the crime for which an indictment has been issued unless and until guilt has been proven by evidence satisfying you of guilt beyond a reasonable doubt.
>
> Now, reasonable doubt is the kind of doubt which would cause a reasonable person to hesitate to act. And reasonable doubt may arise from the evidence which is in the case or from the lack or absence of evidence in the case. And you, the jury, must determine whether or not reasonable doubt exists as to the guilt of this Defendant. The State has the burden of proving each and every element of a crime beyond a reasonable doubt. And any reasonable doubt that you may have in your deliberations should be resolved in favor of the Defendant.

We find this reasonable doubt instruction to be a correct statement of the law. *See State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 821 (2001) (holding a jury instruction explaining, "A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act" was "a correct statement of South Carolina law."). Further, the trial court's instruction on circumstantial evidence (*see supra*) immediately followed the reasonable doubt instruction. As our supreme court ultimately concluded in *Logan*, we conclude the trial court's instructions in the present case, as a whole, properly conveyed the applicable law. *See Logan*, 405 S.C. at 94 n.8, 747 S.E.2d at 449 n.8 ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the

law to be applied." (citation omitted)); *id.* (concluding any error in the trial court's jury instructions was harmless because the trial court "clearly instructed the jury regarding the reasonable doubt burden of proof" and its jury instruction, "as a whole, properly conveyed the applicable law." (citations omitted)). Therefore, we affirm the denial of Appellant's request to provide the *Edwards* instruction.

II. Withholding of Evidence

Appellant challenges the trial court's refusal to grant him relief based on the prosecution's failure to produce Captain Kellet's file documenting her identification of Victim's fingerprints, citing Rule 5 of the South Carolina Rules of Criminal Procedure. Appellant argues this alleged Rule 5 violation compromised his ability to fully impeach the credibility of Captain Kellet's testimony, and, thus, the trial court should have stricken her testimony or granted a mistrial. We disagree.

Rule 5(a)(1)(C), SCRCrimP states:

> Upon request of the defendant the prosecution shall *permit the defendant to inspect and copy* books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

(emphasis added).

Further, "[t]he admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Tennant*, 383 S.C. 245, 254, 678 S.E.2d 812, 816 (Ct. App. 2009), *modified on other grounds*, 394 S.C. 5, 21, 714 S.E.2d 297, 305 (2011) (citation and quotation marks omitted). Likewise, "[t]he granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court[,] and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000) (citation omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Tennant*, 383 S.C. at 254, 678 S.E.2d at 816 (citation and quotation marks omitted).

To warrant either a mistrial or reversal based on an evidentiary ruling, the complaining party must prove both the error of the ruling and the resulting prejudice. *Id.* at 254, 678 S.E.2d at 816-17 (as to the admission or exclusion of evidence); *Harris*, 340 S.C. at 63, 530 S.E.2d at 628 (as to a mistrial). "To prove prejudice, the complaining party must show there is a reasonable probability that the jury's verdict was influenced by the challenged evidence or lack thereof." *Tennant*, 383 S.C. at 254, 678 S.E.2d at 817 (citation and quotation marks omitted).

According to the solicitor, he conferred with Captain Kellet regarding the contents of her file in response to defense counsel's discovery requests. The solicitor then contacted defense counsel and told him Captain Kellet's file could possibly include some AFIS-related documents. However, defense counsel declined to review them. In fact, for approximately four years prior to trial, Appellant's defense team was aware that fingerprints from the severed hands had been run through AFIS. Moreover, on two occasions prior to trial, defense counsel was accompanied by a representative of the solicitor's office to visit the property and evidence section of the forensic division of the Greenville County Department of Public Safety and was offered the opportunity to visit the latent print section. Yet, nothing in the record indicates that defense counsel attempted to interview Captain Kellet or review any AFIS-related documents prior to trial. Under these circumstances, we find no Rule 5 violation.

Additionally, Appellant did not contest Victim's identity at trial—defense counsel referenced Victim's name several times while cross-examining Wife. Therefore, we find the trial court's failure to grant the requested relief did not result in any unfair prejudice to Appellant.

Based on the foregoing, the trial court properly declined to strike Captain Kellet's testimony or declare a mistrial. *See Tennant*, 383 S.C. at 254, 678 S.E.2d at 816 ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." (citation and quotation marks omitted)); *Harris*, 340 S.C. at 63, 530 S.E.2d at 627-28 ("The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court[,] and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." (citation omitted)).

III. Lengthy Recess

Alternatively, Appellant argues the trial court should have granted him a long recess or short continuance to obtain the assistance of an expert qualified to evaluate the documents in Captain Kellet's file. We disagree.

Because the defense team was aware of Captain Kellet's fingerprint analysis and the possible existence of AFIS-related documents for years prior to trial, the trial court properly declined to grant any further delay in the trial. *See State v. Patterson*, 367 S.C. 219, 230, 625 S.E.2d 239, 245 (Ct. App. 2006) ("The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion.").

CONCLUSION

Accordingly, Appellant's convictions are

AFFIRMED.

SHORT, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

CLARENCE WILLIAMS JENKINS,

APPELLANT

Appellate Case No. 2012-211588

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

Opinion No. 5232

PETITION FOR REHEARING

On May 21, 2014, this Court affirmed Appellant's convictions and sentences in a published opinion. State v. Jenkins, No. 5232 (S.C. Ct. App. filed May 21, 2014). Appellant filed a petition for rehearing. On July 9, 2014, this Court denied the petition for rehearing, but withdrew the prior opinion and substituted it with another opinion. State v. Jenkins, No. 5232 (S.C. Ct. App. filed July 9, 2014). In light of the substituted opinion, Appellant now files a second petition for rehearing pursuant to Rule 221(a) due to the significant points overlooked and/or misapprehended by this Court in arriving at the opinion on July 9, 2014.

Appellant raised three issues in his brief. The first issue concerned the trial judge's instruction to the jury regarding circumstantial evidence. The second and third issues concerned the

trial judge's ruling regarding evidence the prosecutor failed to disclose. Appellant seeks rehearing of all three issues.

Issue I

At the conclusion of the case, Appellant requested multiple jury instructions. R. 272, lines 20-21; R. 324. Among the instructions requested was a charge regarding circumstantial evidence. Specifically, Appellant, citing State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989) as support, requested:

> When the state relies on circumstantial evidence, you may not convict a defendant unless every circumstance relied on by the state is proven beyond a reasonable doubt, and all of the circumstances so proven are consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that the circumstances create a probability, even if it is a strong one. If, assuming the circumstances are true, there is a reasonable hypothesis which does not include the guilt of the accused the proof has failed.

R. 324 (Request #10); R. 273, lines 5-6; R. 273, lines 11-20. The judge declined to instruct the jury as Appellant requested. R. 275, line 8. Instead, the judge charged the jury as follows:

> Now, there are two types of evidence which are generally presented during a trial. And they are known as direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes the main fact sought to be proven. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of the main fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all of the evidence in the case. After weighing all of the evidence, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, then you should find the Defendant not guilty.

R. 281, line 10 – R. 282, line 5.[1]

While Appellant's case was pending on appeal, the South Carolina Supreme Court issued its decision in State v. Logan, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013). The Supreme Court explained that although a trial court may instruct a jury concerning circumstantial evidence as defined in Grippon[2] and Cherry,[3] the trial court "should provide" an instruction guiding the jury on how to analyze circumstantial evidence, in addition to a proper reasonable doubt instruction, when requested to do so by a defendant. The approved charge provides jurors with much-needed guidance in analyzing circumstantial evidence:

> There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the state relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

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[1] The jury began deliberations at 4:45 p.m. on April 12, 2012. R. 290, lines 13-14. By 6:15 p.m., the jury sent a note with two questions. R. 291, lines 10-11; R. 292, lines 5-9. At 8:47 p.m., the jury sent a note expressing its inability to arrive at unanimous verdicts: "we have deliberated and are unable to reach a unanimous verdict. ... P.S. we have reached a unanimous decision on one charge." R. 296, lines 14-18; R. 328. The judge decided to send the jurors home for the evening. R. 300, lines 17-21. The jurors left at 9:13 p.m. R. 302, lines 18-19. The jurors returned to court at 9:22 a.m. on April 13, 2012. R. 306, lines 3-4. At that time, the judge instructed the jurors pursuant to Allen v. United States, 164 U.S. 492 (1896). R. 306, line 5 – R. 308, line 8. The jury resumed deliberations at 9:28 a.m. R. 308, lines 24-25. Just over an hour later, at 10:45 a.m., the jury returned guilty verdicts. R. 309, lines 6-10.

[2] State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997).

[3] State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004).

> The state has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the state regardless of whether the state relies on direct evidence, circumstantial evidence, or some combination of the two.

Id. This Court correctly determined that Logan applied retroactively, and Appellant does not seek rehearing as to this holding. However, Appellant seeks rehearing of this Court's affirmance of the trial court's denial of Appellant's request to instruct the jury as provided in Edwards and reverse his case for a proper instruction to the jury governing circumstantial evidence.

This Court offered two reasons to support its denial of relief. First, this Court concluded that because Appellant requested the instruction pursuant to Edwards, supra, which included language that the circumstantial evidence must point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis, and the Supreme Court had cautioned against such language, the trial court did not err. While the Supreme Court cautioned that requiring a jury to inquire as to other reasonable hypotheses other than a defendant's guilt was "perilously close to shifting the burden of proof from the state to the defendant," the Court did not find the language did in fact shift the burden. In Grippon, 327 S.C. at 84, 489 S.E.2d at 464, then-Justice Toal wrote in her concurring opinion that "[t]he language concerning the necessity that the circumstantial evidence 'point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis' does not shift the burden of proof to the defendant." Additionally, a defendant who requested such a charge could not complain about the charge on appeal. Finally, Appellant simply could not know what language, if any, the Supreme Court would approve in Logan. Appellant is not clairvoyant.

In this Court's second reason for denying Appellant relief on this issue, this Court concluded that any error in the omission of language from the Logan charge was harmless beyond a reasonable doubt because the trial court's instruction as a whole, properly conveyed the applicable law. This

Court relied upon the trial court's reasonable doubt instruction to the jury to make this finding. However, the Logan Court made clear that the clarifying instruction concerning circumstantial evidence should be given in addition to a proper reasonable doubt charge.

Without question, a proper evaluation of circumstantial evidence requires connection of collateral facts to reach a conclusion, which is not required for evaluating direct evidence. The jury struggled with the evidence before it as demonstrated by the length of time the jury deliberated, the questions posed to the trial court, the jury being deadlocked, and the necessity of the judge giving an Allen charge despite the direct evidence against Appellant. What the jury required was the proper framework and foundation for analyzing the circumstantial evidence presented by the prosecution in order to render a true and just verdict.

Issues 2 & 3

In Appellant's second and third issues, Appellant challenged the trial court's handling of the prosecution's failure to disclose evidence. This Court found that Appellant suffered no unfair prejudice as a result of the trial court's failure to strike the witness' testimony, grant a mistrial, or grant a recess to permit Appellant to obtain the assistance of an expert to evaluate the undisclosed evidence. Thus, it appears this Court found the prosecution failed to disclose material evidence as required by Rule 5 of the South Carolina Rules of Criminal Procedure and Brady v. Maryland, 373 U.S. 83 (1963), but determined that Appellant's proposed remedies – striking of testimony, granting of a mistrial, or a recess – were properly denied under an abuse of discretion standard. Although Appellant agrees with this Court's holding that the prosecution suppressed material evidence that was subject to disclosure pursuant to our rules, Appellant strongly urges this Court to rehear this matter concerning the proper remedy and the reasoning employed governing what duties Appellant had to seek the evidence independent of the solicitor's office.

During a pretrial motion hearing regarding the testimony of an expert witness concerning latent fingerprint examination, Appellant explained to the court that he had received only conclusory statements contained within reports from the prosecution. The reports essentially stated that "fingerprint examination was done and that it was verified by Captain Kellet." R. 2, lines 18-22. The one-page report provided no information to allow Appellant to understand the type of examination done. R. 2, lines 22-25. The prosecution explained "our latent experts, they don't do a lengthy report stating, specifically, what ridge matches what ridge." Instead, the report only indicates whether the unknown print matches a known print. R. 3, lines 21-24. The prosecutor further explained he "triple checked. There's no reports other than the conclusory statements that were given to defense counsel that these knowns match these prints." R. 4, lines 7-10. When Appellant requested copies of the prints that were consulted in making the verification, the prosecutor explained the fingerprint cards would be available that day. He further stated "If they want to get their own expert while we're trying the case or something, I'm not sure, but they're ready and available, all the latents are." R. 4, line 17 – R. 4, line 4. The prosecutor assured the court he would check "to see if there's any notes" relating to the fingerprint analysis. R. 6, lines 19-21.

In light of Appellant's objections to the expert's testimony, the court conducted an in camera hearing. Jackie Kellet, employed by the Greenville Department of Public Safety forensic division, testified she entered the unknown print from the severed hand into the Automated Fingerprint Identification System (AFIS). The computer system provided her with a list of potential matches. Kellet printed the card of the person AFIS said the unknown belonged to and used a magnifying glass to visually examining the points to verify the result. R. 61, lines 19-20; R. 65, line 15-12; R. 68, lines 1-11. Kellet testified she made no notes while making the comparison. R. 65,

lines 13-25; R. 71, lines 10-13. Other than issuing a report, Kellet made no record of her work. R. 72, lines 1-24.

Kellet then testified before the jury. On direct examination, her testimony tracked her in camera testimony. R. 77, line 8 –R. 84, line 25. On cross-examination, Kellet testified that on a typical day, a latent print examiner may "do 500 to 1000 comparisons a day, easy." R. 86, lines 17-25. She reiterated she made no notes of her comparisons. R. 87, lines 1-3. Appellant then realized Kellet had a file in her hand and asked to examine its contents, which the judge permitted. R. 87, lines 8-11. Upon review of the file, Appellant realized at least three documents had not been produced in discovery – "an AFIS report or a screen shot, an automated fingerprint identification worksheet and what looks to be a latent handprint." R. 88, lines 9-17.

The trial judge explained he was "disturbed that the state ha[d] not produced these documents after all the lengthy hearings and discussions." R. 89, lines 6-11. Appellant reviewed the materials quickly and explained it appeared to be "a series of points of comparison on the screen shot ... [with] at least, two impressions that one looks to be identified, one looks to be the latent." Appellant informed the judge that having the materials would have provided him an opportunity to "raise some questions for cross-examination to support our objection." R. 89, lines 12-20. The prosecutor claimed that after Appellant "filed motions regarding the fingerprint analysis, point by point analysis [he] called Captain Kellet and conferred with her regarding what she had in her file." Thereafter, he told Appellant "there may be some AFIS stuff in there, that's all I know." He further claimed Appellant "didn't want it." R. 89, line 23 – R. 90, line 11. The judge ordered a ten-minute break. R. 90, lines 15-17.

After the break, Appellant explained that the AFIS report provided at least sixteen respondents, or possible matches, with associated scores. Kellet's testimony indicated she found a

match with the first respondent. According to the undisclosed document, the first respondent had a score of 5595 and the second respondent had a score of 5415. Therefore, the second respondent was very close in score to the first. Appellant explained "[h]ad we had this and had we been able to work with an expert in identifying the actual proximity of number one and number two and even number three, we could have, I think much more effectively cross-examined this witness." R. 90, line 22 – R. 91, line 22. Appellant further expressed the difficulty of trying to show prejudice based upon the prosecution's failure to produce the document within a short amount of time, especially when the document relates to scientific expert testimony. Appellant moved to strike the testimony of Kellet or grant a mistrial. R. 92, line 1 – R. 94, line 25.

In response, the prosecutor countered

> we didn't focus on anything regarding AFIS because we were [not] introducing anything regarding AFIS and it wasn't evidence of anything. It was an investigative took used to get them a potential comparison. So it wasn't something that we even imagined would be anything that they would want. Given the fact, they knew it was run through AFIS.

R. 95, lines 18-24. He further argued Appellant was not prejudiced by the failure to disclose. Specifically he said "the only thing on there that they didn't have access to was a list of 20 people that the computer program had a report on. If they wanted the report on those folks, they could have asked for it." R. 96, lines 1-6.

The trial judge expressed his concern that the prosecutor previously claimed in prior discovery conference that he had "given them everything" and "that [was] not the case." The judge further expressed that Appellant had found "a touch point, which has potential for prejudice." He admonished the prosecutor "even though the prosecution may have not [found] a document to be relevant, you have a different mindset than the defense. So it is important to produce all of the

documents." R. 96, lines 7-18.[4] The judge also demonstrated concern for Appellant's predicament in being asked to articulate prejudice as a result of the prosecutor's failure to disclose "on the spot." R. 96, lines 19-21. Nevertheless, the judge found the failure to disclose did not rise to the level of requiring striking of the testimony or the granting of a mistrial. R. 97, lines 1-10. The undisclosed documents were made a court's exhibit. R. 99, line 14 – R. 100, line 24; Court's Exhibit #3.

After the judge denied Appellant's request to strike Kellet's testimony or in the alternative grant a mistrial, Appellant requested the court delay the trial to permit Appellant to engage the services of an expert to examine the undisclosed records. R. 98, lines 10-23. The judge denied the request stating, "you can have those examined and you can pursue that without delaying the trial." He acknowledged that Kellet testified she only examined the first respondent, and Appellant may be able to present an expert to "attack the credibility" of Kellet by testifying "it's a better practice to examine the top two or three," and that such "might be of some benefit." R. 98, line 25 – R. 99, line 13.

When a trial judge determines the prosecution violated Rule 5, the judge may fashion the proper remedy. The Rule itself explains that if a party failed to comply with the rule, the court "may prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances." Rule 5(d)(2), SCRCrimP. The Kennerly Court explained the definition of "material" as used in Rule 5 is the same as the definition used in the context of violations and obligations pursuant to Brady v. Maryland, 373 U.S. 83 (1963). State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998). Thus, evidence is material for purposes of Rule 5 "if there is a reasonable probability that, had the evidence been disclosed to the defense, the

[4] The judge later explained that the prosecutor does not have the "mindset" of the defense and may not view the same documents with the same level of importance as the defense as a result.

result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985).

As explained by this Court, the goal of Rule 5 is to ensure a criminal defendant's right to a fair trial. Further, the role of a prosecutor is to be a minister of justice, not the representative of an ordinary party. As the representative of the sovereign, the prosecutor's interest in a criminal prosecution is not to win, but to see that justice is done. Kennerly, 331 S.C. at 454, 503 S.E.2d at 220.

> The prudent prosecutor will resolve doubtful questions in favor of disclosure. This is as it should be. Such disclosures will serve to justify trust in the prosecutor as the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done. And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.

Riddle v. Ozmint, 369 S.C. 39, 46, 631 S.E.2d 70, 74 (2006). Similarly, the Rules of Professional Conduct impose certain duties upon prosecutors. Specifically, the Rules require a prosecutor "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilty of the accused or mitigates the offense." Rule 3.8(e), SCACR. The special duties imposed upon prosecutors are due to the prosecutor's "responsibility of a minister of justice and not simply that of an advocate." Thus, the prosecutor has "specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Rule 3.8, cmt. 1, SCACR.

"The Brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment." Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012) (citing

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He further stated that if Appellant had the documents, they may have been able to hire an expert to dispute Kellet's finding. R. 97, line 19 – R. 98, line 7.

Brady, supra). "[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted in the defendant's acquittal." Kyles v. Whitley, 514 U.S. 419, 434 (1995). It is enough that it undermines confidence in the verdict. Id. at 435.

Brady requires that prosecutors fully disclose to the accused all exculpatory evidence in their possession. United States Supreme Court decisions have elaborated the Brady obligations to include (1) the duty to disclose impeachment evidence, (2) favorable evidence in the absence of a request by the accused, and (3) evidence in the possession of persons or organizations. See Giglio v. United States, 405 U.S. 150 (1972); United States v. Agurs, 427 U.S. 97 (1976); Kyles, supra. Material must be disclosed "when prejudice to the accused ensures . . .[and where] the nondisclosure [is] so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

The trial judge erred in failing to strike Kellet's testimony or grant a mistrial based upon the prosecution's withholding of material evidence. As explained by trial counsel and admitted by the prosecution, the prosecutor failed to disclose at least three documents contained within the fingerprint examiner's file. Those three documents included one showing the possible matches returned via AFIS. This evidence was necessary to impeach Kellet concerning her failure to examine more than one respondent print, the quality of the prints produced, and the likelihood that other respondent prints possessed the same unique identifying characteristics as the latent print. Additionally, given an opportunity, Appellant may have obtained an expert to challenge Kellet's finding altogether based upon the AFIS results.

This Court erred in putting the onus on Appellant to attempt to interview Kellet or review any AFIS-related documents prior to trial. In the substituted opinion, this Court stated

> According to the solicitor, he conferred with Captain Kellet regarding the contents of her file in response to defense counsel's discovery requests. The solicitor then contacted defense counsel and told him Captain Kellet's file could possibly include some AFIS-related documents. However, defense counsel declined to review them. In fact, for approximately four years prior to trial, Appellant's defense team was aware that fingerprints from the severed hands had been run through AFIS. Moreover, on two occasions prior to trial, defense counsel was accompanied by a represented of the solicitor's office to visit the property and evidence section of the forensic division of the Greenville County Department of Public Safety and was offered the opportunity to visit the latent print section. Yet, nothing in the record indicates that defense counsel attempted to interview Captain Kellet or review any AFIS-related documents prior to trial.

As an initial matter, Appellant attempted to review AFIS-related documents prior to trial numerous times by filing motions requesting that information specifically. In fact, Appellant questioned Kellet during a pre-trial hearing concerning this evidence and Kellet denied having any documentation at all. It was not until Kellet testified before the jury with a folder in her hand that Appellant was made aware that such documentation existed. There was simply nothing more that Appellant could do to get the documentation. Further, the law does not require Appellant to do more than make the request, which was made clearly and unequivocally. Rule 5 provides that the prosecution must provide the evidence upon a request from the defendant. Rule 5, S.C.R.Crim.P. Further, controlling United States Supreme Court precedent and South Carolina precedent require the prosecutor to disclose evidence. See Giglio, supra; Agurs, supra; Kyles, supra; Riddle, supra; Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999); State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010).

In the alternative, the trial court's failure to grant a recess or continuance to allow Appellant an opportunity to review the evidence and consult with an expert violated Appellant's right to a fair trial and due process of law.

CONCLUSION

Appellant respectfully requests this Court rehear this matter based on the foregoing points overlooked or misapprehended by this Court in rendering its opinion.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

This 24th day of July, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CLARENCE WILLIAMS JENKINS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Clarence Williams Jenkins, #323856, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 24th day of July, 2014.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 24th day
of July, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

The South Carolina Court of Appeals

The State, Respondent,

v.

Clarence Williams Jenkins, Appellant.

Appellate Case No. 2012-211588

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

J.

A.J.

Columbia, South Carolina

cc:
Susan Barber Hackett, Esquire
Alan McCrory Wilson, Esquire
Melody Jane Brown, Esquire
John W. McIntosh, Esquire
William Walter Wilkins, III, Esquire
Donald J. Zelenka, Esquire
The Honorable Edward W. Miller