STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
Robert E. Hood, Circuit Court Judge

The State, Respondent,

v.

Marcus Bailey, Appellant.

Appellate Case No. 2013-001680

INITIAL BRIEF OF RESPONDENT

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(FBOA, p. 1).

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II. Whether the trial judge properly denied Appellant's motion for a directed verdict upon consideration of the totality of evidence which demonstrated an abrupt disappearance, difficulties between the victim and Appellant including a threat to suffocate the victim, Appellant's false statements about victim's whereabouts, and medical opinion testimony by the medical examiner that asphyxiation was the cause of death upon exclusion of existing medical conditiona , visible trauma, and was consistent with the circumstances surrounding the death.

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VI. Whether the trial judge abused his discretion in admitting Appellant's statement over his request to suppress for failure to provide a copy at the time the statement was made when it was unconceded a copy had been provided at least seven months prior to trial?

STATEMENT OF THE CASE

A Richland County grand jury indicted Appellant, Marcus Bailey, in October 2012 charging him with the murder of Almanita Smith. (R. pp. * [indictment]). Stanley L. Myers, Esq., S. Jahue Moore, Esq., and M. Brooks Biediger, Esq., represented Appellant on the charges. A jury trial was held July 22 – 31, 2013, before the Honorable Robert E. Hood. The jury convicted as charged. Judge Hood sentence Appellant to fifty (50) years imprisonment. This appeal follows.

RESPONDENT'S STATEMENT OF FACTS

The victim, Almanita Smith, was found dead in the front yard of her home on August 23, 2012. Her body was already severely decomposed.

The victim had abruptly disappeared after August 16, 2012. She failed to contact close family and friends, (Tr. p. 741; p. 745; p. 758; pp. 948-949; p. 1125), failed to meet her obligations to the ROTC program in which she had actively participated, (Tr. pp. 692-693; pp. 763-765), and failed to participate in a graduate school program she had eagerly anticipated, (Tr. pp. 967-971).

Appellant had begun living in the victim's home as a boyfriend, and as the relationship changed, he was allowed to remain as a roommate. (Tr. pp. 1114-1117). Appellant complained of a change in the victim, (Tr. pp. 1761-1763), and her "controlling" nature. (Tr. p. 869). He told a friend he wanted to kill her – suffocate her – and use gloves to avoid connection to the crime. (Tr. pp. 869-871).

On August 16, 2012, the victim spoke to a neighbor and the neighbor offered to loan her lawn mower to the victim. She did not see the victim thereafter. (Tr. pp. 756-758). Victim had acknowledged to a friend that she wanted to do something for Appellant's birthday that same weekend. (Tr. p. 741). However, Appellant celebrated his birthday with other women at various nightclubs, using victim's credit and bank cards. He would also later freely use the victim's home and the cards for other purposes. (Tr. pp. 850-855; pp. 1170-1175; pp. 1373-1391). He invited another woman to the victim's home and had sex with her on the victim's couch. (Tr. pp. 1051-1054). When the victim's friends and family contacted him to ask about the victim, he asserted he had last seen her just hours before and she left with an unknown man, (Tr. p. 951; p. 1119), or

had gone shopping with friends, (Tr. p. 699). Appellant told the victim's father she left with a man in a maroon car. (Tr. p. 952). He told the victim's friend that she left with a man in a black car. (Tr. p. 1119). An officer performing a welfare check on August 22, 2012, noticed a strong smell of air freshners in the home. (Tr. p. 927).

On August 23, 2012, though Appellant was still in the home, it was a neighbor who noticed the victim's body in the early morning hours and called the sheriff's department. (Tr. pp. 399-402; pp. 431-435). Appellant came out of the house, grabbed the badly decomposed corpse, and later placed a blanket over the exposed areas. (Tr. p. 404). The victim was wearing only a shirt. (Tr. p. 460; p. 491). The matching pants were still in the victim's home and curiously damp. (Tr. pp. 1882-1883). Appellant did not appear to be upset or crying. (Tr. p. 438; p. 461).

EMS workers called at the report of the body, declared the victim dead, and transported Appellant (though he showed no respiratory distress). (Tr. p. 611). At the hospital, Appellant advised an investigator he had last seen the victim just before noon the prior day – an impossibility based on the advance stage of decay. (Tr. p. 1757; p. 1835). He also indicated their relationship had changed recently, and she had tried to get him out of the house. (Tr. p. 1760-1762). In his formal statement, he indicated again having seen the victim the day before her body was discovered. (R. p. * [State's Exhibit 220]). A search of the home resulted in finding an intense smell of air freshners, cannisters of more air freshners, receipts where victim's bank and credit cards had been used, and a blanket in a dryer that tested consistent with victim's DNA. (Tr. pp. 1821-1829; pp. 1844-1845; p. 1538-1542). Investigators also noticed Appellant's clothes in bags in the garage while nothing appear to be in the drawers in his bedroom. (Tr. pp.

1830-1834). A cadaver dog identified five separate areas in the house with the scent of a cadaver. (Tr. p. 1440-1445).

The medical examiner determined that the cause of death was asphyxiation, and that the victim had been dead for approximately three to seven days before her body was discovered. (Tr. pp. 1235-1236).

While incarcerated, Appellant spoke with fellow inmate Edward Walker. Mr. Walker testified Appellant stated that he cut his fingernails two days prior to the murder to avoid collection of DNA evidence, and admitted that he did, in fact, kill the victim, though he did not mean to kill the victim. (Tr. pp. 1072-1073). According to Mr. Walker, Appellant stated that he strangled the victim. (Tr. p. 1075). Appellant stated to him that the victim was wearing only a shirt when discovered. (Tr. p. 1077).

ARGUMENT

I.

Whether the trial judge abused his discretion in admitting testimony detailing the cadaver dog search upon receipt of pre-trial testimony establishing sufficient training and credentials of the handler, relevant breed characteristics of the dog used in the search, and specifical training and established reliability of the dog used in the search.

Appellant complains testimony detailing the cadaver dog search should not have been admitted where no evidence corroborated the cadaver dog alerts, and the handler was not an expert. As a first matter, his argument rests on a factually incorrect basis as there was corroboration of the dog's accuracy as the dog alerted where the victim's body was actually found, and also alerted to a blanket with material consistent with the victim's DNA. At any rate, corroboration within the search is not a requirement of admissibility of a scent dog search. *See State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). Also factually incorrect is the assertion the handler was not an expert. Ample evidence of record support the handler's relevant training and credentials for qualification. Lastly, Appellant's assertion of the danger of "false positives" outweighed the probative value is merely speculative and inconsistent with the proof of corroboration in regards to actual location of the body and the blanket. Appellant's argument is with the probative force of the evidence, not any danger of unfair prejudice. The trial judge did not err in admitting the testimony.

Relevant Facts:

Appellant challenged the admissibility of testimony pre-trial. The State presented *in camera* testimony from the handler, Deputy Sephen Pearrow, concerning both his training and the cadaver dog's breed sensitivity for odor detection and training.

The Handler's Qualifications:

In addition to being the senior canine specialist at the Richland County Sheriff's Department, Deputy Pearrow also runs the nonprofit organization, Search Tactics and Rescue Recovery (STARR) that assists official agencies on searching "for the lost and missing." (Tr. pp. 217-218). Deputy Pearrow oversees the training for the cadaver dogs that are certified by STARR. (Tr. p. 219; p. 222). He is the head master trainer – a certification for trainers and handlers given by the National Association of Search and Rescue ("NASAR"). (Tr. p. 219; 220). He trained with the International Detective Canine Foundation. (Tr. pp. 220-221). Deputy Pearrow testified that this is one of the only agencies he knows of that requires you to "train your own green dog," which is a dog with zero prior training. (Tr. p. 221). Pearrow has worked with dogs in law enforcement for over 15 years. (Tr. p. 223). STARR's certification is recognized by FEMA, which used STARR in the aftermath of Hurricane Katrina in New Orleans to search for cadavers before demolishing destroyed buildings. (Tr. p. 223).

Mia the Cadaver Dog:

Deputy Pearrow testified that Mia is the three-year old female Beligian Malanious used in the search of the victim's home. (Tr. pp. 225-226). He testified the breed is recognized working well in different environments, *i.e.* temperature and stress, and "for a longer period of time than most other breeds." (Tr. p. 225, lines 18-20). Their sense of smell is "very good ... very acute." (Tr. p. 225, line 23 – p. 226, line 3). Mia was trained for and is only used as a cadaver dog. (Tr. p. 226; p. 232).

Deputy Pearrow testified that he trained Mia together with her present owner, Jamie Gunter. (Tr. pp. 226-227). Both can handle Mia and watch for changes in her

behavior signaling alerts or indications. (Tr. pp. 230-231). According to Deputy Pearrow, Mia was easy to train and odor recognition was very simple for her. (Tr. p. 227). He explained: "Odor recognition for the dog is pretty much when you're imprinting the type of odors you wish for that dog to find for you." (Tr. p. 227, lines 14-16). There are several stages of odor recognition training for the cadaver dogs, a gradual process where the dog goes from finding a single object with the odor to having to choose from several objects to find the one with the odor. (Tr. pp. 227-228). The odor that is used by the trainers includes brain tissue, blood, teeth, hair, any party of a body that has been decomposed that they can obtain with a DHEC license. (Tr. p. 229). STARR requires their dogs to obtain a ninety-eight (98) percent accuracy in their training before they attempt for their certification. The deputy testified that Mia passed her certification on the first attempt – "only the third dog in the history of the team" to do so. (Tr. p. 229, line 23 – p. 230, line 5). Mia undergoes maintenance training two to three times a week, anywhere from 30 minutes to three hours. (Tr. p. 232). The deputy testified Mia has proven to be a reliable cadaver dog. (Tr. p. 232). She has been used approximately twelve to fifteen times assisting in search and rescues. (Tr. p. 234).

Search of Victim's Home:

Deputy Pearrow testified that the presence of others in the home did not contaminate the scene because Mia is only "trained to detect the dead, not the living." (Tr. p. 235). Mia was released from her leash and given the sign to begin, she went to the front door area of the victim's house, and actually indicated in the front yard where the vicitm's body had been. (Tr. pp. 236-240). After a break, Mia was put in the victim's house. (Tr. p. 241). The door was closed to avoid her going back out to alert to the same

spot. (Tr. p. 242). Mia alerted to five (5) areas inside the home. (Tr. p. 243-247). After a break, they conducted another search. (Tr. p. 247). This time, they entered through the back door, as the scent from the victim's body in the front yard became overwhelming. (Tr. p. 248). Mia again alerted in the same areas. (Tr. p. 248).

Mia was also used at a separate location – at the Richland County Sheriff's Department. (Tr. pp. 248-249). At this search, Mia was used to try and locate an item taken from the victim's home – a blanket from a clothes dryer – that was placed in a box at the department's forensic garage. (Tr. p. 250; pp. 1538-1542; p.1828; p. 1911). Several decoy boxes were also set out but Mia indicated on the box with the item. (Tr. p. 251). After another break, and changing the sequence of the boexes, Mia conducted the search again and indicated a second time. (Tr. p. 252).

Appellant's Cross-Examination:

On cross-examination, Deputy Pearrow asserted he was "not an expert" and that, as a non-expert, he merely interprets the dog's reactions. (Tr. p. 253). Deputy Pearrow testified that he defines expert as "someone that thinks they know everything." (Tr. p. 256). The deputy testified that he is not aware of any statewide or national certification for interpreting "dog body language." (Tr. p. 255, line 18- p. 256, line 4). He testified Jamie Gunter was the one-on-one trainer during Mia's training, but he was present for a lot of Mia's training, and helped with the training. (Tr. pp. 262-268). The deputy agrred that if gases from a decomposing body gets on another's clothing, it may cause a false alert. (Tr. p. 277). Appellant presented the deputy with a picture of an officer's boot approximately six to eight inches from the body in this case and asked if such close contact could have resulted in taking gaseous material in the house, which the deputy

acknowledged it could. (Tr. p. 278). Deputy Pearrow testified that he did not know if the house had been contaminated by people walking through it before his arrival with Mia. (Tr. p. 279). He testified he understood he was there with Mia to look for any type of remains or if the body had been in the house at any time. (Tr. p. 285). He testified upon further questioning by Appellant that there is no certification for finding evidence that dead bodies had been somewhere else before they were discovered. (Tr. p. 285; p. 287).

Re-direct Testimony:

The deputy confirmed that he was present "many times" over the length of Mia's two years of training. (Tr. p. 291). Further, he testified that the use of cadaver dogs is a nationally recognized field, and that the FBI uses cadaver dogs. (Tr. p. 293).

Appellant's Argument at Trial:

Appellant argued the factors in *State v. White* for dog tracking should apply, however, the factors were not met as Deputy Pearrow was, by his own testimony, not an expert; that he was not the one-on-one handler for the dog; and the lack of connection with the dog made testimony on alerts suspect, and more prejudicial than probative. (Tr. pp. 294-296).

The Trial Judge's Ruling:

The trial judge first rejected the idea that a modest avoidance of the "expert" title somehow invalidated the deputy's stated qualifications. (Tr. p. 297). The judge found Deputy Pearrow qualified as an expert based on his training, experience, knowledge, and specialized knowledge. (Tr. p. 297). He was concerned that the dog had not been trained to detect where human remains had been: "The dog was reliabile, but I haven't heard any testimony abut that the dog was trailed or certified to figure out where human remains

had been." (Tr. p. 297, line 25 – p. 296, line 2). The State responded that testimony demonstrated "Mia was thoroughly trained in detecting human decomposition odor, not jus remains but the odor that comes from the human decomposition." (Tr. p. 302, lines 4-8). Ultimately, guided by Rule 702, SCRE and *State v. White*, the trial judge ruled:

> ... as Mr. Moore pointed out in his cross-examination and the witness Deputy Pearrow agreed, the body itself has no smell.
>
> What the dog is finding or is attempting to find or is alerting to is the door, the odor in and of itself. So the dog is not specifically searching for a body or a body part. The dog is searching for the odor. Therefore, I'm going to allow that testimony to come in over defense objection.
>
> ...
>
> If necessary, of course, however, I find that deputy Pearrow is an expert under Rule 702. I find that the evidence shows that the dog, being a Belgian Malinois, is a dog, a breed characterized by an acute power of scents and that the dog has been trained to follow or to look for a scent, and that the dog has been found to be reliable. I'm going to allow that testimony into play.
>
> I understand, Mr. Myers, your 403 argument that the prejudicial effect outweighs the probative value. Based on the nature and the circumstances of this case, I'm going to find that the probative value outweighs any prejudicial effect under South Carolina Rule of Evidence 403.

(Tr. p. 318, line 20- p. 320, line 1).

Appellant objected to presentation of the testimony at trial. (See Tr. p. 522). He also moved to strike the testimony during a break in testimony of the next witness after the deputy testified. (Tr. pp. 1490-1493). The trial judge again found the ruling correct as to qualification of the expert; the applicable *White* factors, and the Rule 403 analysis. (Tr. p. 1494-1497).

Discussion:

"A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). *White* sets out the evidentiary framework to guide the bench and bar concerning dog tracking evidence:

> To provide uniformity, we think it advisable to adopt the following evidentiary framework to guide our bench and bar concerning dog tracking evidence. By extrapolating from our case law and other authorities, we conclude a sufficient foundation for the admission of dog tracking evidence is established if (1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) by experience the dog is found to be reliable; (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and (6) the trail was not otherwise contaminated.

White, 382 S.C. at 272, 676 S.E.2d at 687.

While these requirements are specifically applicable to tracking for identification purposes, the training, ability and need for proof of reliability is shared. Ultimately, the scent drives the alerts. (See Tr. pp. 14-16-1417). Consequently, the *White* factors should control. *Accord Trejos v. State*, 243 S.W.3d 30, 50 (Tex.App.–Houston [1 Dist.] 2007) (finding reliability facts for human-scent dogs "equally applicable to cadaver dogs")[1];

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[1] The *Trejos* court found that the state's existing "factors must be adapted slightly to meet the unique function of a cadaver dog" and set out the following factors that control: "1) is a breed or type that typically works well off-lead, (2) has been trained to discriminate between human scents and animal scents, and (3) has been found by experience to be reliable." 243 S.W.3d at 52-53. The court reasoned that certain elements unique to human-scent tracking – such as given the scent of the suspect, and immediacy of the search – are not applicable to cadaver dog searched. *Id.* Likewise, here, the *White* factor of being placed on the trial in a timely fashion would not be applicable, nor would contamination of the scene which tends to accompany the temporal requirement. (See Tr. p. 277, contamination not a concern for cadaver dog search). Otherwise, the factors should likewise be applied.

People v. Lifrieri, 230 A.D.2d 754, 754 (N.Y.A.D. 2 Dept. 1996) (upholding admissibility of "canine sniff" where "a certified dog handler, testified to the dog's training, reliability, and certification as a so-called 'cadaver dog' (see, United States v. Diaz, 25 F.3d 392, 394).").[2]

Appellant's argument that there is no certification for finding where remains were as opposed to finding remains was rightly rejected below. Appellant's offered distinction between looking for a body by odor and looking for odor to find a body lacks significance. According to Deputy Pearrow, Mia was trained on odor recognition, and odor recognition was very simple for her. (Tr. p. 227, lines 3-12). "Odor recognition for the dog is pretty much when you're imprinting the type of odors you wish for that dog to find for you." (Tr. p. 227, lines 14-16). For cadaver dogs, they are tried on the odor of body parts or fluids. (Tr. pp. 227-229; pp. 1416-1417). As this case shows, the scent may come for material too small to detect with the human eye that is identifiable by the dog nose – the towel certainly had genetic material consistent with the murdered victim. (See Tr. pp. 521-522; pp. 1540-1542). In short, it is the decomposition odor, not a particular body part, that the dog is trained to sniff out.

Appellant also argues that the trial judge abused his discretion by admitting the testimony of the cadaver dog's handler because no evidence was found to corroborate the dog's alerts. Corroboration in the form of evidence from the alerts is not required to determine admissibiility. *Id.* However, there were two very significant corroborating facts in this particular case. One, Mia alerted at the exact area where the victim's body was

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[2] Notably, the *Diaz* case cited regards the "evidence necessary to establish a drug detection dog's training and reliability." 25 F.3d at 394. Again, once training and reliability have been established, scent-based dog searchs should be admissible.

actually discovered. (Tr. pp. 236-240; pp. 1436-1439). Second, Mia alerted to the blanket found in the dryer that was tested and material consistent with the victim's DNA identified. (Tr. pp. 250-251; pp. 1538-1542; p.1828; p. 1911). To the extent any corrobation need be shown, the record well-supports such corrobation. The fact that even more corroboration was not discovered does not invalidate these facts of record. At most, though, Appellant's argument goes to weight not admissibility. Simply, cadaver dogs are used specifically to track where human remains have been, even if the body is no longer visible or there. *See Clark v. State*, 781 A.2d 913, 936 (Md.Ct.App. 2001) (rejecting argument that "process of training dogs to alert on the products of decomposition, as opposed to training them to alert on cadavers themselves, is not generally accepted within the scientific community" citing to testimony that "use of cadaver dogs in trying to determine the existence, or the one-time existence, of human remains at a particular location is a widely accepted practice in the fields of forensic anthropology and pathology").[3]

Appellant's challenge to the expert's qualification based on the witness' own denial of the label of "expert" is not definitive as to qualification. "The party offering the expert must establish that his witness has the necessary qualifications in terms of 'knowledge, skill, experience, training or education.' Rule 702, SCRE." *White*, 382 S.C. at 273, 676 S.E.2d at 688. Qualification is based on these factors and these factors alone. Appellant's argument to the contrary should be rejected.

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[3] In further note that it is not a search method limited to police investigations, our federal district court has noted defense tearm use of the dogs. In *Fulks v. United States*, 875 F.Supp.2d 535, 567 (D.S.C. 2010), the District Court noted: "Some of the trial team' searches utilized cadaver dogs, law students, and even an anthropologist to determine if any bones found were human remains rather than the more common find of deer bones." In sum, the use of cadaver dogs is a broadly accepted search method.

Lastly, Appellant's assertion of the danger of "false positives" outweighed the probative value is merely speculative and inconsistent with the proof of corroboration in regards to actual location of the body and identicating on the blanket. Rule 403, SCRE provides for exclusion only "if its probative value is *substantially* outweighed by the danger of *unfair* prejudice...." (emphasis added). Appellant has not show such a significant danger of unfair prejudice in merely relying on the argument of possible false positives. *See State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct.App. 1998) ("'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.'" (*quoting United States v. Bonds*, 12 F.3d 540, 567 (6th Cir.1993)).

In sum, the trial judge did not abuse his discretion in admitting the probative evidence upon proof of the the handler's qualifications, the the dog's reliability. Appellant's argument to the contrary should be rejected.

II.

The trial judge properly denied Appellant's motion for a directed verdict upon consideration of the totality of evidence which demonstrated an abrupt disappearance, difficulties between the victim and Appellant including a threat to suffocate the victim, Appellant's false statements about victim's whereabouts, and medical opinion testimony by the medical examiner that asphyxiation was the cause of death upon exclusion of existing medical condition, visible trauma, and was consistent with the circumstances surrounding the death.

"The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling." *State v. Stanley*, 365 S.C. 24, 42, 615 S.E.2d 455, 464 (Ct. App. 2005). Here, there is ample evidence supporting the trial judge's denial of Appellant's directed verdict motion. However, Appellant attacks but one portion of the evidence – the sufficiency of the medical examiner's opinon to support the submission of the charge to the jury. Appellant's argument on this one piece of evidence is actually one of contesting the weight of the evidence which is not a factor the trial judge may consider in a directed verdict analysis. Appellant is not entitled to any relief.

Relevant Facts:

Dr. Amy Durso, M.D., Deputy Chief Medical Examiner for Richland County, performed the autopsy on the victim. Though the victim's body showed decomposition and some mummification, Dr. Durso did not see trauma to the body, such as stab wounds, gunshot wounds, or pronounced bruising. (Tr. pp. 1207-1209). Dr. Durso noted a lack of established insect activity that indicated her body was not outside in South Carolina in August for time necessary for the advanced decomposition. (Tr. pp. 1212-1213). The doctor noted the neck showed signs of either trauma or decomposition. (Tr. p. 1219). She examined the hyoid bone in the neck and determined it was not broken; however, she

also determined that particular bone could not be broken as it was not fused – in otherword no amount of pressure would break this individual's bone. (Tr. pp. 1227-1228). Having no obvious cause of death, Dr. Durso turned to the process of elimination of medical causes. She testified the coroner's office obtain medical records that confirmed the absence of an "underlying medical condition." (Tr. p. 1231, lines 4-7). There was "no physical evidence of inflammation or other disease" in the tissues examined at autopsy, nor organs or body systems. (Tr. p. 1231, lines 12-13; po, 1231-1232). There were no drugs or alcohol in her system. (Tr. p. 1235). Dr. Durso found asphyxiation as the cause of death:

> ... she was either strangled or she could have had her head placed in a pillow or had someone place pressure on her chest to the point where she couldn't breath and get oxygen to the brain, which is what we cause asphyxiation. That was her cause of death.

(Tr. p. 1233, line 21-p. 1234, line 1).

As to the classification for manner of death, Dr. Durso opined as "probable homicidal asphyxiation." (Tr. p. 1235). The doctor did not look at the crime scene photos under after determination on cause of death. (Tr. p. 1230; p. 1236). Based on the condition of the body, the victim had been dead three to seven days before discovery. (Tr. p. 1236). The physical findings also supported the victim's body had been stored inside at an air conditioned place then repositioned and placed outside before discovered. (Tr. pp. 1238-1243). Dr. Durso testified that she needed no further information to make the determination as to cause of death. (Tr. p. 1370).

Dr. Bradley J. Marcus, also a forensic pathologist, concurred finding independently that victim died of "homicidal asphysxiation." (Tr. p. 1680). Dr. Marcus likewise used the exclusion of other facts in determining a cause of death. (Tr. p. 1678-

1680). He noted that the pathologist did not label the case a homicide, but that the coroner's office actually labeled the case a homicide. (Tr. p. 1709).

In his motion for a directed verdict, Appellant argued not only that there was not direct evidence that Appellant was the one who killed the victim, but also that:

> The evidence suggests today, as Dr. Bradley Marcus indicated, that she could have died by way of natural causes. The evidence also suggests that she could have died from a number of other things, but there has been no evidence that she actually died from the result of a homicide.

(Tr. p. 1963, line 22 – p. 1964, line 2).

Correctly reviewing the evidence in the light most favorable to the State, the trial judge denied the motion. (Tr. p. 1967).

Discussion:

A defendant is only entitled to a directed verdict of acquittal if the State fails to offer proof of the offense charge, or its proof merely raises a suspicion of guilt. *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011); *State v. Buckmon*, 347 S.C. 316, 321, 555 S.E.2d 402, 404 (2001).

When reviewing the trial judge's denial of a motion for a directed verdict, the appellate court will view the evidence in the light most favorable to the State. *Id. See also State v. Frazier*, 386 S.C. 526, 531, 689 S.E.2d 610, 613 (2010). "If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." *State v. Freiburger*, 366 S.C. 125, 136, 620 S.E.2d 737, 743 (2005). *See also State v. Weston,* 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); *State v. Zeigler*, 364 S.C. 94, 102, 610 S.E.2d 859, 863 (Ct. App. 2005), *cert. denied* (Jan. 31, 2007). Conversely, "[t]he trial

judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty." *Frazier*, 386 S.C. at 531, 689 S.E.2d at 613.

The rule in South Carolina is "an expert in forensic pathology's opinion testimony as to cause and manner of death is admissible under Rule 702, SCRE, so long as the expert does not opine on the criminal defendant's state of mind or guilt or testify on matters of law in such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendant's guilt or innocence." *State v. Commander*, 396 S.C. 254, 269, 721 S.E.2d 413, 421 (2011). The medical examiner's testimony in this case did not cross that line. Rather, based upon exclusion of other factors, the medical examiner determined the cause of death as homicidal asphyxiation. (Tr. p. 1235). Appellant does not argue the opinion admitted here was improperly admitted; rather, he makes the argument the properly admitted opinion is insufficient to prove an unlawful killing by another. Yet, the State does not rely upon the opinion alone.

Murder cases have been proven on less evidence of cause of death. *See, for example, Brown v. State*, 307 S.C. 465, 415 S.E.2d 811 (1992) (body found but condition made determination of cause of death impossible); *State v. Howard*, 295 S.C. 462, 466, 369 S.E.2d 132, 134 (1988) ("The body was partially decomposed and the exact cause of death could not be determined."). *See also State v. Saltz*, 346 S.C. 114, 137-138, 551 S.E.2d 240, 253 (2001) ("[C]ircumstantial evidence may be sufficient to establish the corpus delicti of murder even though the cause of death can not be determined."). The Supreme Court of South Carolina has held "that the circumstantial evidence surrounding the victim's sudden disappearance, considered with the unlikelihood of his voluntary departure as shown by his personal habits and relationships, was sufficient to establish

the corpus delicti of murder or that the victim is dead by the criminal act of another." *State v. Weston*, 367 S.C. at 293, 625 S.E.2d at 648, *citing State v. Owens*, 293 S.C. 161, 359 S.E.2d 275 (1987). *See also State v. Saltz*, 346 S.C. at 137-138, 551 S.E.2d at 253. The State presented ample evidence of sudden, and complete, disappearance.

The victim had abruptly disappeared after August 16, 2012. She failed to contact close family and friends, (Tr. p. 741; p. 745; p. 758; pp. 948-949; p. 1125), failed to meet her obligations to the ROTC program in which she had actively participated, (Tr. pp. 692-693; pp. 763-765), failed to participate in a graduate school program she had eagerly anticipated (Tr. pp. 967-971), and failed to borrow her neighbor's lawn mower as discussed, (Tr. pp. 756-758). She was not found, though, until August 23, 2012. (Tr. pp. 399-402; pp. 431-435). Medical findings support the death coincided with the sudden and complete disappearance – three to seven days before. (Tr. p. 1236). Further, medical findings support the victim's body was kept in an air condition home and the body moved to the lawn right before discovery. (Tr. pp. 1238-1243). The cadaver dog alert in the home, (Tr. pp. 1440-1445), and detected an odor on the blanket found in the dryer which later tested to show blood consistent with the victim's DNA. (Tr. p. 1453; pp. 1540-1542). The smell of air freshners in the home was overwhelming. (Tr. p. 387-388; pp. 1821-1823). Appellant's insistence that he saw the victim alive and well the day before her body was discovered is impossible based on the decomposition noted. (Tr. p. 1370). Appellant's use of the victim's cards and home for his own personal benefit occurred during the same limited time frame. (Tr. pp. 850-855; pp. 1051-1054; pp. 1170-1175; pp. 1373-1391). Further, Appellant admitted the killing by strangulation to inmate Walker. (Tr. p. 1072-1073; p. 1075). Appellant had previously expressed to a friend his desire to

kill victim by suffocation and to avoid detection by various means. (Tr. pp. 869-871). Both methods involved cutting out the air supply. Capt. Parker testified that Appellant received combat training, which included "takedown moves" and "submission chokes." (Tr. p. 1654, lines 1-24). Taken together, evidence was presented to support not only that there was a murder, but also that Appellant committed the murder. Appellant's instant argument, which challenges only the medical examiner's opinion, therefore, rests on incorrect manner of evaluation.

Even so, the fact that the defense could challenge the cause of death opinion as less sure than one resting upon a positive test result or disease confirmation does not eradicate the probative value. *See Saltz*, 346 S.C. at 138, 551 S.E.2d at 253 (rejecting defense argument on directed verdict based where arguments against finding the circumstantial evidence was sufficient "to establish the corpus delicti" of murder simply because the "facts are equally consistent with death by accident or sudden illness" as the evidence must be viewed "in the light most favorable to the State."). Implicite in the argument, as well, is that Appellant fails to take the evidence in the light most favor to the State, which is required in evaluating the sufficiency of the evidence to submit the case to the jury. Further, Appellant essentially argues that in isolation the medical evidence does not definitively show a murder occurred. However, one does not isolate the evidence in evaluating circumstantial evidence. It is, in fact, the combining of the evidence, *i.e.* "substantial circumstantial evidence," that presents the most powerful case for guilt. *See State v. Frazier*, 386 S.C. at 531-532, 689 S.E.2d 613 (reviewing circumstantial evidence of guilt: "This evidence, when viewed collectively, presented a jury question as to Frazier's guilt.") (emphasis added); *State v. Cherry*, 361 S.C. 588,

595, 606 S.E.2d 475, 478 (2004) (relying on "combination of factors" to find evidence "sufficient for the jury to infer an intent to distribute"); *State v. Grippon*, 327 S.C. 79, 83-84, 489 S.E.2d 462, 464 (1997) (recommended charge includes the following explanation: "Circumstantial evidence is proof of *a chain of facts and circumstances* indicating the existence of a fact.") (emphasis added). *Accord State v. Logan*, 405 S.C. 83, 97, 747 S.E.2d 444, 451 (2013) ("evaluation of circumstantial evidence requires jurors to find that the proponent of the evidence *has connected collateral facts* in order to prove the proposition propounded") (emphasis added). Appellant's argument runs contrary to these established legal principles.

But again, the State presented ample evidence of a sudden disappearance, contradictory statements from Appellant, difficulties between Appellant and victim including a threat to kill the victim, and decomposition sites in the home – which was chilled and had the overwhelming scent of air freshers, residential and commericial and innsense – and medical findings supporting the body was stored inside and reposition outside shortly before discovery. In particular, Dr. Durso testified that Appellant's assertion he had seen the victim the day before discovery of the body, alive and walking around, was "[n]ot at all consistent" and was, in fact "not possible." (Tr. p. 1370, lines 13-18). Appellant was not entitled to a directed verdict. Appellant's argument to the contrary should be rejected.

III.

The trial judge did not abuse his discretion in restricting merely the portion of cross-examination when Appellant asked to question the witness about the factual basis of an unrelated crime which was the basis of a then pending charge, when the collateral information did not clearly bear on any fact of proper cross-examination and was protected by the witness' Fifth Amendment privilege. At any rate, any possible error would be harmless as Appellant was properly allowed to cross-examine the witness on the fact of the pending charges, his extensive criminal history as a whole, and his hope for lenciency.

Appellant complains that trial judge erred in allowing Edward Walker to testify as to Appellant's admission of guilt where Mr. Walker asserted his Fifth Amendment Right on proffered cross-examination questions concerning Walker's guilt of a pending charge. Walker's guilt to an unrelated charge was collateral to the action. Appellant's right to cross-examination was not unfairly limited by disallowing inquiry in this purely collateral matter.

Relevant Facts:

Appellant and Edward Walker were incarcerated at Alvin S. Glenn Detention Center after Appellant's arrest on the instant charge. Mr. Walker's charges of murder and armed robbery were unrelated to the instant murder. (Tr. p. 313). Appellant and Mr. Walker were assigned the same dormitory in the Dention Center. (Tr. p. 1740). Mr. Walker testified concerning an admission of guilt by Appellant while incarcerated. (See Tr. pp. 1072-1073; p. 1075).

Appellant moved in pre-trial to excluse Mr. Walker's testimony should Mr. Walker be allowed to "take the 5th Amendment" and decline to answer if he is guilty of the murder for which he is charged. (Tr. pp. 198, line 15 – 199, line 14). Mr. Walker was then represented by counsel, Mr. Sutherland, Esq. Mr. Sutherland indicated that his client should not be asked about culpability of the pending charge. (Tr. p. 305).

Appellant maintained his right to confrontation allowed the question, and specifically stated the questions would "go[] to the issue of credibility." (Tr. p. 310, lines 2-3). The trial judge declined to either allow the question on culpability for unrelated charges or exclude the testimony:

> Whether or not he is guilty or not guilty of the murder or the armed robbery doesn't have anyting to do with it because it's not related to this case.
>
> ...
>
> Because it's not related to his case, it doesn't have anything to do with interest, bias or impartiality of a witness.

(Tr. p. 313, lines 8-16).

The trial judge allowed questions on the possible length of sentence (life without parole), and on motivation for testifying such as seeking leniency. (Tr. p. 312).

Mr. Walker testified he was then currently incarcerated in the Dentention Center on pending charges of murder, attempted armed robbery and robbery. (Tr. p. 1071). Mr. Walker testified Appellant stated that he cut his fingernails two days prior to the murder to avoid collection of DNA evidence, and that he did kill the victim, though he did not mean to kill the victim. (Tr. pp. 1072-1073). According to Mr. Walker, Appellant stated that he strangled the victim. (Tr. p. 1075). Appellant stated the victim was wearing only a shirt when discovered. (Tr. p. 1077). Appellant engaged in lengthy cross-examination, including questioning Mr. Walker concerning his desire for lenciency. (Tr. p. 1080-p. 1099; pp. 1102-1103).

After Mr. Walker testified, Appellant made a proffer of the questions. (Tr. pp. 1105-1107). The trial judge again found the question impermissible, and noted the great

leniency given for proper examination concerning existing charges, possible sentencing, and desire for leniency. (Tr. pp. 1107-1108).

Discussion:

"The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers." *State v. Aleksey*, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000). Trial judges retain discretion to limit cross-examination of matters not directly relevant to the matter at hand. *Id*, 343 S.C. at 34, 538 S.E.2d at 255, *quoting Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431 (1986). "[T] Confrontation Clause 'guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *State v. Stokes,* 381 S.C. 390, 402, 673 S.E.2d 434, 439 - 440 (2009), *quoting United States v. Owens*, 484 U.S. 554, 559, 108 S.Ct. 838 (1988).

"Questions on cross-examination are collateral if they relate solely to the witness's credibility and bear no relation to the subject matter of the direct examination." *State v. Hill*, 382 S.C. 360, 367, 675 S.E.2d 764, 768 (Ct.App. 2009) (*citing United States v. Cardillo*, 316 F.2d 606 (2nd Cir. 1963)). It is not an abuse of discretion to limit cross-examination on purely collateral issues. *Id.* A reviewing court "will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion." *State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012).

Here, Appellant admitted the matter was solely a matter of credibility. (See Tr. p. 310, lines 2-3). Thus, the trial judge did not abuse his discretion in limiting questions on same. *Hill, supra.* In short, Appellant was afforded ample opportunity to effectively

cross-examine the witness. There is no error, or if error, the error could only be harmless for three distinct reasons. *See State v. Gillian*, 360 S.C. 433, 455, 602 S.E.2d 62, 74 (Ct. App. 2004) ("Error is harmless where it could not reasonably have affected the result of the trial."). First, there was clearly impeachment opportunity. The record supports Appellant was provided a fair opportunity challenge the witness on confrontation. Second, both the State and the defense elicited details on Walker and possible culpability in the separate charges during Investigator Martin's testimony. (Tr. pp. 1878-1879). Third, for all the reasons argued in the directed verdict issue above, there is simply overwhelmingly substantial circumstantial evidence of guilt, not the least of which was Applicant's use of the victim's home and money after her disappearance, (Tr. pp. 850-855; pp. 1051-1054; pp. 1170-1175; pp. 1373-1391), and his own statements indicating he saw the victim alive the day before her body was found which was simply impossible, (Tr. p. 1370). Respondent submits there simply was no error for all the foregoing reasons. Appellant's argument to the contrary should be rejected.

IV.

Appellant may not complain of information admitted under his stipulation at trial concerning his separation status from the United States Army. At any rate, such testimony was otherwise admissible when he opened the door to such evidence beginning with his opening statement. Further, such information was merely cumulative to information in his statement to investigators regarding his "raw deal" from the army and would not constitute reversible error.

Appellant complains the evidence regarding his army discharge was improperly admitted. However, Appellant stipulated to the information presented to the jury. (Tr. p. 1168). Further, as the trial judge also found, Petitioner repeatedly opened the door to justify admission of the evidence to rebut a false impression. (Tr. p. 1633). Petitioner may not now complain.

Relevant Facts:

Defense counsel advised the jury in his opening statement that he had "the absolute pleasure and privilege of representing a fine and decedent young man," Appellant. (Tr. p. 355). Counsel stated Appellant "is a fine and decdent young man" who "is also a former soldier of this great nation having served two combat tours in Iraq." (Tr. p. 357, lines 2-10). He continued specifically about Appellant's military career:

> ... Marcus grew up in the San Diego area of California, didn't necessarily have a whole lot but saw a need to defend his county.
>
> So at the young age of 18, 19, he joined the military, did very well, two combat tours to Iraq, several metals, several meritorious awards, did outstanding, achieved the rank of staff sergeant and was basically here at Fort Jackson until January 2012 when he was discharged.

(Tr. p. 357, lines 9-17).

Twyla Perkins was a former army soldier and friend to the victim and victim's family. She testified she stayed in touch with the victim and attempted to be somewhat of a mentor and protector. (Tr. p. 1111-1113). She was aware of the victim's

relationship with Appellant and that Appellant had moved in with the victim around March or April of 2012. Ms. Perkins did not approve. (Tr. p. 1115). She stayed in close contact with the victim, speaking often by phone and throught texts. (Tr. p. 1115). Appellant was not in the home during July, when the victim attending training out of state, but moved back in early August of 2012. (Tr. pp. 1115-1116). Ms. Perkins understood it would be a non-romantic, roommate arrange. (Tr. p. 1117).

On August 22, 2012, Ms. Perkins received a call from the victim's father, and afterwards when to the victim's home around 8:00 pm. Appellant advised Ms. Perkins the victim had left around noon that day with some one in a black car. (Tr. pp. 1118-1119). He acknowledged that an officer had been by as well as ROTC members looking for the victim. (Tr. p. 1120). She called later that same night to advise the victim's mother would be coming to the house the next day with a key to the home that Ms. Perkins would provide. (Tr. pp. 1121-1122). The next moring Appellant called to advise the victim was dead. (Tr. p. 1123). Though it sounded like he had emotion in her voice, Ms. Perkins testified "[i]t didn't seem real." (Tr. p. 1124, lines 2-3). She advised the cornor that day that the last time she had talked to the victim was August 16, 2012. (Tr. pp. 1124-1125).

On cross-examination, Appellant asked Ms. Perkins to confirm that Appellant and the victim met "when they both were in a combat zone," in Iraq. (Tr. p. 1129, lines 16-21). Appellant asked Ms. Perkins to also confirmed Ms. Perkins did not like Appellant. (Tr. p. 1131). On re-direct, the State noted appellant had elicited that Ms. Perkins did not like him and asked why. Ms. Perkins responded, "[b]ecause he lied to" the victim. (Tr. p. 1134, lines 20-22). The State asked her to explain, and Ms. Perkins referenced

Appellant's talking about leaving the army. Defense counsel objected for lack of personal knowledge. (Tr. p. 1135). The objection was overruled on testimony she did have personal knowledge of the army issue. (Tr. p. 1135). Ms. Perkins continued that while she was still at Fort Jackson, she had researched Appellant's army history and found he was discharged for bad conduct, relieved as drill sergeant for being absence without leave, and that he had various other disciplinary issues. (Tr. p. 1136). Appellant asked to be heard outside the presence of the jury.

Appellant argued the evidence was inadmissible character evidence and moved for a mistrial. (Tr. p. 1137). The State argued that based on Appellant's opening statement and his question to Ms. Perkins about whether she liked him opened the door to the evidence. (Tr. pp. 1137-1139). The trial judge, in considering whether counsel opened the door noted he was not finding counsel "lied" in opening about metals, citiations, but that "it's just not the whole story, so the jury is left with the impression tha thtis guy had a stellar military career when in truth, he got discharged and got bumped down five grades because of his behavior and conduct." (Tr. p. 1149, line 19 – p. 1150, line 2). The trial judge also noted that the cross-examination of Mr. Walker was "basically .... we're supposed to believe you over a combat veteran?" (Tr. p. 1151, lines 13-15). (See Tr. p. 1103). The trial judge expressed again later his concern "that is not the complete and accurate impression based upon opening statements and questioning of witnesses throughout the trial." (Tr. p. 1164, lines 19-24).

After consideration of the evidence and arguments, the trial judge denied the motion for mistrial, but advised he would instruct the jury to disregard Ms. Perkins' testimony as her testimony was somewhat inaccurate concerning the military

background. He also advised he would charge "with the consent of the parties, that [Appellant] was discharged from the United States Army, and that his term of service will be characterized as general under honorable conditions." (Tr. p. 1167, lines 1-20). Appellant had no objection to the curative or the stipulation. (Tr. p. 1167). Further, the trial judge placed the following on the record:

> Okay. Now, in our in-chambers meeting, we had discussed the testimony of Captail Parker, who was a Company Commander, I believe, for Mr. Bailey and the admissibility of him testify as to a patter of misconduct by the defendant and also the defendant being able to ge into the positive aspects of his military career.
>
> My understanding is that there is no objection to that testimony based upon the limiting instructions that I am providing the jury in regards to Ms. Perkins' testimony is that correct?

(Tr. p. 1167, line 25 – p. 1168, line 9).

Both counsel for the State and counsel for Appellant agreed on the record. (Tr. p. 1168). However, when Capt. Parker was called to testify, Appellant objected and argued he did not waive his objection with the stipulation. (Tr. p. 1629). Based on a review of the evidence received prior to the objection, and the evidence received from Capt. Parker *in camera* on the specifics of the history, the trial judge ruled the evidence admissible and affirmatively found the defense had opened the door by opending statement and their questions to the witnesses. (Tr. p. 1633). The testimony was a mix of good and bad: "... he was smart. I mean, he was a good soldier, was a smart soldier," but "... he knew the system. If he could get to the medical side, there could be a way out instead of being chaptered out... and the doctors agreed that it seemed like he was using the system..." (Tr. p. 1647, lines 20-25). The captain testified Appellant also threatened to make others "permanently AWOL." (Tr. p. 1648, lines 22-23). Capt. Parker testified Appellant

received a "general discharge under honorable conditions in that the nature and reason for the separation is pattern of misconduct." (Tr. p. 1651, lines 15-19). Capt. Parker also testified that Appellant received combat training, which included "takedown move" and "submission chokes." (Tr. p. 1654, lines 1-24).

While at the hospital where Appellant was taken after the victim's body was found, Appellant spoke with Investigator Clarke. Appellant advised of his "raw deal" from the army and admitted being busted down in rank. Investigator Clarke testified:

> ... He said he had gone from an E-6 to an E-1 in a very short amount of time. That meant something to me. I was enlisted in the Army, so I know what that meant.
>
> ... He told me he was kicked out of the service. That's the way he said it. He was put out. He said he could go at any day, anytime. He had basically ... [been] labeled as unstable.

(Tr. p. 1759, line 14-p. 1760, line 15).

Discussion:

There are three major hurdles to relief in Appellant's argument. First, he consented to admission of the evidence. He may not assert error on appeal. *State v. Benton*, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (200) (issue conceded below may not be raised on appeal); *Ex parte McMillan*, 319 S.C. 331, 335 461 S.E.2d 43, 45 (1995) (same). A party simply cannot benefit from an error caused by his own action. *State v. Beam*, 336 S.C. 45, 53, 518 S.E.2d 297, 301 (Ct. App. 1999). *See also State v. Bryant*, 372 S.C. 305, 314, 642 S.E.2d 582, 587 (2007) (appellant could not complain of purported error cause by his own chosen trial strategy).

Second, Appellant clearly opened the door to the testimony by the misleading references to his Army history. *See State v. Taylor*, 333 S.C. 159, 175, 508 S.E.2d 870,

878 (1999) ("because appellant 'opened the door' about his relationship with his wife, the solicitor was entitled to cross-examine him about the relationship, even if the responses brought out appellant's prior criminal domestic violence conviction"); *State v. Doby*, 273 S.C. 704, 710, 258 S.E.2d 896, 900 (1979) (finding no error in trial court allowance of cross-examination questions on "appellant's two prior convictions for trespassing in public women's restrooms" where "appellant opened the door to this cross examination by direct testimony regarding his passive character and lack of mature sexual desires."); *State v. (Hollie) McEachern*, 399 S.C. 125, 731 S.E.2d 604 (Ct.App. 2012) (finding no error in cross-examination of defendant on forfeiture where in direct testimony in drug trial defendant "specifically proclaimed none of the money found in her pocketbook was drug money. Thus, Hollie opened the door to admission of evidence that she agreed to forfeit the money in question, and we therefore find no error in the admission of this evidence."); *State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct.App. 2008) ("It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence."). Thus, the testimony was admissible.

Similarly, in *State v. Dunlap*, 353 S.C. 539, 541, 579 S.E.2d 318, 319 (2003), the Supreme Court of South Carolina found that counsel's opening statement characterizing Dunlap as a drug using not a drug dealer was inconsistent with his actual background leading to admissibility of other evidence: "While it is technically accurate that petitioner had never been convicted of distributing crack cocaine, an examination of his record demonstrates that he had attempted, albeit unsuccessfully, to position himself as a drug dealer." *Id.* The Court found such an argument "opened the door to the introduction of evidence rebutting the contension that petitioner was merely an addict." *Id.* Here,

Appellant offered himself from opening statement through cross-examination to be a good soldier with stellar credentials to bolster the jury's perception of his character. The State was entitled to rebut that false perception. *Id. Accord United States v. Leavis*, 853 F.2d 215 (4th Cir. 1988) ("The prosecution was entitled, as the district court held, to rebut the false impression Leavis was creating by his testimony."); *People v. Hodges*, 99 A.D.3d 629, 630 (N.Y.A.D. 1 Dept. 2012) ("By creating an issue of alleged police brutality, defendant opened the door to rebuttal evidence tending to negate that claim."). Because testimony was rendered admissible by Appellant's opening the door, the bar to general character evidence did not apply. *Dunlap, supra*, *Taylor, supra.*

Third, and lastly, on this record, even if some error could be found, it would not be prejudicial. *See Wilder v. State*, 388 S.C. 282, 285, 696 S.E.2d 587, 589 (2010) ("In order for this Court to reverse petitioner's convictions and sentences, however, we must find that the trial court's error prejudiced petitioner."). The separation from the Army was made an issue by virtue of Appellant's own statement. At most, the other evidence on the separation was harmlessly cumulative. *State v. Haselden*, 353 S.C. 190, 197, 577 S.E.2d 445, 448-449 (2003). Moreover, there is overwhelming circumstantial evidence supporting the conviction. This is so for all the evidence cited above in regard to the directed verdict issue, not the least of which was Applicant's use of the victim's home and money after her disappearance, (Tr. pp. 850-855; pp. 1051-1054; pp. 1170-1175; pp. 1373-1391), and his own statements indicating he saw the victim alive the day before her body was found which was simply impossible. (Tr. p. 1370).

However, Appellant should not be allowed to argue the instant issue on appeal based on his concession at trial.

V.

The trial judge did not abuse his discretion in allowing testimony concerning the search of the home, and admitting evidence from the home, where there was a proper warrant with an affidavit prepared by and sworn to by an investigator who obtained his information from other members of the Richland County Sheriff's Department, as there is no bar to relying on hearsay in such circumstances.

Appellant complains "Deputy Mauldin swore to a search warrant to which he had no personal knowledge." (FBOA, p. 34). He asserts his motion to stike the evidence from the search should have been granted. (FBOA, p. 34). However, the affidavit was properly based upon the investigation as related to the officer, who, in turn, related the assertions in the affidavit to the magistrate. The fact the assertions were based upon hearsy does not affect the sufficiency of the warrant. Appellant's position fails as a matter of law.

Relevant Facts:

Richland County Sheriff Department Corporal Darrell Tucker testified that he responded to victim's home at report of the victim's body being found in the front yard at approximately 6:30 am on August 23, 2012. He testified he secured the scene and did a brief protective sweep of the inside of the home. (Tr. p. 374; pp. 378-379).

Richland County Sheriff's Department Investigator Timothy Lee testified that he arrived at the victim's home at 8:20 am on August 23, 2012. (Tr. p. 483). He testified he remained outside while waiting on a warrant: "... The investigation division was drawing up a search warrant. I believe Investigator Josh Mauldin was seeking that with a judge while we were on the scene...." (Tr. p. 486, lines 14-18). Investigator Lee testified that he did not enter the home until "Investigator Mauldin arrived with a search warrant." (Tr. p. 502, lines 5-8). He then testified as to the search without objection, and

photographs taken and evidence obtained were admitted without objection. (See Tr. pp. 502-553).

Investigator Harold Bouknight similarly testified to the fruits of the search without objection. (See Tr. pp. 627-640). Former Investigator Joshua Mauldin testified that he was tasked with obtaining the warrant. (Tr. p. 981-982). He testified that he "was given information" for purposes of the warrant. (Tr. p. 983). Investigator Mauldin testified to arriving at the home and entering the home. He testified that the home was markedly cool, and "there was definitely a pretty overwhelming overpowering semll of multiple fragrances ... like a Yankee Candle where you have lots of scents like that." (Tr. p. 987, lines 6-25). At that point, Appellant objected and requested argument outside the presence of the jury. (Tr. p. 988). Appellant argued "upon hearing his testimony, [counsel] just realized that we have a violation of a search warrant." (Tr. p. 988, lines 13-15). He argued Investigator Martin lacked personal knowledge to be the affiant, and the search warrant was invalid. (Tr. p. 989). The trial judge noted the lateness of the objection. (Tr. p. 996-997). Appellant argued that he just found out that Investigator Mauldin was never at the scene prior to obtaining the warrant from the Investigator's trial testimony. (Tr. p. 1000). The trial judge did not consider the lateness a bar to the issue and considered the issue on the merits. (Tr. p. 1000). Appellant offered, and the trial judge reviewed, *State v. Dunbar*, 361 S.C. 240, 603 S.E.2d 615 (Ct.App. 2004).[4] The trial judge, quoting the 2004 *Dunbar* case, rejected Appellant's position, where the Court

[4] Prior opinion *State v. Dunbar*, 354 S.C. 479, 581 S.E.2d 840 (Ct.App. 2003), *vacated in part* 356 S.C. 138, 587 S.E.2d 691 (2003). It appears Appellant initially relied upon the vacated 2003 Court of Appeals opinion. (See Tr. p. 999). However, the State offered and relied upon the 2004 case, in which the Court of Appeals, on remand, reviewed the search warrant issue.

of Appeals acknowledge Supreme Court precedent that allows an officer to relate hearsay statements from other officers. (Tr. p. 1001).

Discussion:

Under general preservation rules, the issue here cannot be considered adequately and fairly preserved on appeal as the objection was in no way timely. *See State v. King*, 334 S.C. 504, 510, 514 S.E.2d 578, 581 (1999) ("to preserve an issue for appellate review, the objection must be timely made, which usually requires it be made at the earliest possible opportunity")(*citing State v. Hicks*, 330 S.C. 207, 499 S.E.2d 209 (1998)); *State v. Simmons*, 384 S.C. 145, 172, 682 S.E.2d 19, 33 (Ct. App. 2009) (contemporaneous objection required to preserve an issue for review on appeal). However, the trial judge considered the issue on the merits. Thus, the issue may be reviewed on the merits. As the trial judge found, Appellant failed to show error.

As a first matter, Appellant relied on a case that had been vacated in part by the Supreme Court of South Carolina. In particular, the Court vacated the opinion as to the validity of the search warrant finding the issue was not preserved and should not have been addressed. At any rate, the argument that the officer was not an adequate affiant as the officer in *Dunbar* is factually inopposite.

In *Dunbar*, the magistrate spoke to one officer by phone. The magistrate drafted the affidavit for the warrant. Another officer without any knowledge of all but one fact in the affidavit signed. The Court of Appeals found this insufficient. However, the Court was also careful to caution that it was the established disconnect between the hearsay and affiant that was at issue, not the hearsay itself:

> ... Certainly, magistrates can issue search warrants based upon hearsay information that is not a result of direct personal observations of the

> affiant. *See generally State v. Sullivan*, 267 S.C. 610, 614-15, 230 S.E.2d 621, 623 (1976) (finding a search warrant affidavit may be based on hearsay information). Probable cause for a search warrant can be supported by information given to the affiant by other officers. *U.S. v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965).
>
> The law regarding using hearsay information to support probable cause for a search warrant is inapplicable in the present case. ... there is no evidence O'Quinn relayed hearsay information to the magistrate before signing the affidavit ...
>
> Inasmuch as O'Quinn did not have any knowledge, either from personal observation or from hearsay, that would support the facts in the affidavit ... the search warrant for the motel room lacked probable cause....

State v. Dunbar, 361 S.C. at 249, 603 S.E.2d at 620.

Though Appellant argued there were "two levels of hearsay" involved, (see Tr. p. 999), no double hearsay is apparent. To the extent he argued the factual issue in *Dunbar* was the same as here, he is, again, incorrect. The affiant here, Investigator Mauldin, specifically obtained information from the team at the site. It was that information he included in the affidavit which reflects the information was gathered members of the Richland County Sheriff's Department. (R. p. * [Court Exhibit 3, p. 3]). At any rate, there is no bar to a magistrate considering either hearsay or "double hearsay information," as long as the probable casue standard is met by the information presented. *See, e.g., State v. Sullivan*, 267 S.C. 610, 230 S.E.2d 621 (1976).

Appellant's argument to the contrary should be rejected.

VI.

The trial judge did not abuse his discretion in admitting Appellant's statement over his request to suppress for failure to provide a copy at the time the statement was made when it was uncontested a copy had been provided at least seven months prior to trial.

Appellant complains his statement was inadmissible as investigators failed to provide a copy of same pursuant to S.C. Code sections 19-1-90 and 8-15-50. However, it was undisputed that Appellant received a copy in discovery in December 2012 before the July 2013 trial. (Tr. p. 166). Thus, the trial court did not abuse its discretion in admitting the statement over this objection.

Relevant Facts:

Appellant did not challenge the voluntariness of his statement. (Tr. pp. 77-78; p. 189). Appellant initially spoke to Investigator Clark on August 23, 2012, at the hospital where he was taken for distress (though there was no physical manifestation of distress detected), (Tr. pp. 611-613; p. 714), after Investigator Clark determined per medical personnel that Appellant was not in physical distress and was able to be questioned, (Tr. p. 1750). Appellant stated he last saw the victim just before noon the prior day, and that she had left in "a black car with some dude." (Tr. p. 1757). Appellant was that same day released and taken to the Richland County Dention Center for questioning. The formal statement followed Appellant's initial statement at the hospital that victim had been alive the prior day as investigators immediately realized was impossible due to the advanced state of decomposition. (Tr. p. 1757; p. 1835). Richland County Sheriff's Department Investigator Jospeh Clarke took the statement and typed the statement. (Tr. p. 1767). (See also R. p. * [State's Exhibit 220]). (See also pp. 1840-1841). Petitioner signed each page of the typed statement. (R. p. * [State's Exhibit 220]).

During pre-trial, Appellant moved to suppress the statement. He argued failure to abide by the statutory provisions directing officers to provide a copy of the statement at the time the statement was taken was not only a violation of the statute, but also prejudicial as it demonstrates Appellant was not able to contemporaneously review the statement and make any necessary changes. (Tr. p. 163; p. 170). He asserted though, that prejudice need not be shown in such circumstances. (Tr. p. 170). Further, Appellant conceded that he received a copy of the statement in discovery in December 2012 before the July 2013 trial. (Tr. p.166).

The State presented the testimony of Investigator Clarke. He testified that he spoke with Appellant while typing and also that Appellant acknowledged the statement and "signed off on" the statement. (Tr. p. 173). (See also Tr. pp. 1768 - 1170). Investigator Clarke testified he recalled going to the copier, but did not recall whether he provided a copy at that time or not. He acknowledged, though, that he did not obtain Appellant's signature for receipt of a copy. (Tr. pp. 173-175). He further testified that a failure to provide a copy at that time would not have been intentional. (Tr. p. 174, p. 178). The State argued any non-compliance was excused as there was no question a copy was received over seven months before trial and there was no prejuide to Applicant. (Tr. pp. 166-167). The State relied upon *State v. Butler*, 277 S.C. 452, 290 S.E.2d 1 (1982), which similar found no prejudice and not necessity to suppress where a copy of the statement was not provided until three weeks after the statements, and almost four months before trial.

The trial judge relying on *Butler*, and *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998) (*citing Butler*), found:

> Based on those [cases] and the knowledge that the defense has has a copy of the statement since December 2012 - - we're now in July of 2013 - - I deem the statement to be admissible even though the statutes wthat were referenced in the motion were not complied with.

(Tr. p. 180, lines 2-6).

Defense counsel objected as the statement was entered at trial pursuant to his pre-trial motion. (Tr. p. 1757).

Discussion:

The Supreme Court has long held that the statutory provisions directing a copy of a statement be given to the maker "at the time of the making of a statement," see S.C. Code § 19-1-80, "does not mean that such copy must be given eo instante." *State v. Jones*, 228 S.C. 484, 493, 91 S.E.2d 1, 6 (1956), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).[5] "The requirement of the statute is satisfied if a copy of the statement be given within a reasonable time after its making, considering the surrounding circumstances, and at all events far enough in advance of the hearing or proceeding to permit the witness to read it before being examined or cross-examined concerning it." *Id.*

The Supreme Court affirmed this finding some twenty-five years later that the "sections shall not be applied in a hypertechnical manner." *State v. Butler*, 277 S.C. 452, 455, 290 S.E.2d 1, 3 (1982) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). In *Butler*, there was a copier malfunction at the station, but "Butler was given a copy three weeks later, prior to the preliminary hearing and approximately four months before trial." *Id.* The Court found no danger to the fairness

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[5] *State v. Jones* actually refers to Section 26-7.1 of the former Code, which appears to have the same text of Section 19-1-80.

of the proceedings: "Clearly, appellant had ample time to prepare his case after receiving a copy of the confession." *Id. See also State v. Chandler*, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976) ("exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the appellant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures").

Here, the trial judge did not abuse his discretion in admitting the statement where the uncontested facts demonstrated Appellant was provided a copy of the typed statement atleast by December 2012, over seven (7) months before the end of July 2013 trial. Appellant claimed no surprise and did not contest the contents of the statement. He could show no prejudice from not receiving the statement at the time it was made. *See also Bannister v. State*, 333 S.C. 298, 304, 509 S.E.2d 807, 810 (1998) (finding no basis from finding the statement would have been suppressed where "Respondent was provided with a copy of his statement on the morning of trial" and "[t]here is no evidence he did not have adequate time to review the statement in preparation for trial"). Appellant simply sought an "overly technical" reading of the statute our Supreme Court has rejected. Consequently, the trial judge did not abuse his discretion in allowing the statement to be admitted.

Appellant's reliance on *State v. Motes,* 264 S.C. 317, 215 S.E.2d 190 (1975), is misplaced. Appellant argues that *Motes* commands the statements be held inadmissible. (FBOA, p. 37). However, *Motes* is readily distinguishable.

Motes involved a trial judge disallowing cross-examination by the defendant of defendant's wife based on inadmissibility of her written statement upon proof of non-compliance. Factually different from the case here, there was no evidence in *Motes* that

the wife was given a copy at all. 264 S.C. at 324, 215 S.E.2d at 193. Further, there was an insufficient record to review the tension between the testimony and the statements and access possible prejudice to the defendant as the statement was not submitted in the appeal. 264 S.C. at 325, 215 S.E.2d at 193. The Court concluded on the available record that the fact of the inconsistency was brought out on cross-examiantion atleast in some measure: "Since the witness admitted that she had made false and inconsistent statements about the matter and defendant was permitted to examine her concerning these inconsistencies, defendant was not prejudiced by the refusal of the trial court to allow the prior statement to be further used in the trial." *Id. See generally State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315, 319 (2002) (any error in limiting cross-examination subject to harmless error analysis). Here, Appellant was given a copy of the statement, and the statement was admitted as substantive evidence, not for impeachment. Thus, *Motes* is not directly controlling. As the trial judge found, *Butler* and *Bannister* are more directly on point and should control.

Appellant's argument to the contrary should be rejected.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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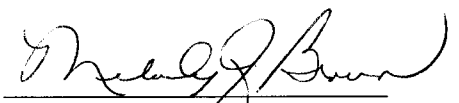
BY: 
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ATTORNEYS FOR RESPONDENT

October 13, 2014.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
Robert E. Hood, Circuit Court Judge

The State, Respondent,

v.

Marcus Bailey, Appellant.

Appellate Case No. 2013-001680

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Initial Brief of Respondent* and *Designation of Matter* on Appellant by depositing two (2) copies of same in the United States mail, postage prepaid, addressed to his attorneys of record:

Stanley L. Myers, Esq.
S. Jahue Moore, Esq.
M. Brooks Biediger, Esq.
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This 13th day of October, 2014.

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SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

October 13, 2014

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: The State v. Marcus Bailey
Appeal from Richland County
Appellate Case No. 2013-001680

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of the ***Initial Brief of Respondent and Designation of Matter***, dated October 13, 2014, along with proof of service, in the above-referenced case.

By copy of this letter, I am serving opposing counsel with same. Thank you for your consideration in this matter.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv
Enclosure

cc: Stanley Lamont Myers, Sr., Esquire
S. Jahue Moore, Esquire
M. Brooks Biediger, Esquire
The Honorable Daniel Johnson, Solicitor, 5th Circuit
Trisha Allen, Victim Services

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