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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RYAN P. DELESTON,

APPELLANT

APPELLATE CASE NO. 2013-002224

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by refusing to allow Appellant to cross-examine witnesses about an armed robbery and shooting that occurred approximately two weeks before the murder where it was undisputed that Bryan Rivers was the shooter in the prior robbery and that the same firearm was used in both cases, since this prevented Appellant from fully developing and presenting his defense at trial, namely that Bryan Rivers was the shooter who killed the decedent, Marley Lion, and that Appellant was merely present at the scene, in violation of Rule 404(b), SCRE, the rule on third party guilt, and Appellant's due process right to present a defense?

2.

Whether the court erred by informing the jury during the court's opening instruction that a trial was "a search for the truth in an effort to make sure that justice is done" since this instruction was fundamentally incorrect, was burden shifting, and decimated the proper standard and jury inquiry of whether the state had proved Appellant's guilt beyond a reasonable doubt?

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant at the October 2012 term of General Sessions for murder, attempted armed robbery, and possession of a weapon during the commission of a violent crime, and at the December 2012 term for possession of a handgun with an obliterated serial number. R. *. His case was called to trial on October 7, 2013 before the Honorable Kristi Lea Harrington, and a jury. Tr. 1. Solicitor Scarlett A. Wilson and Assistant Solicitor Bruce DuRant represented the state, and D. Ashley Pennington and John J. Kozelski represented Appellant. Tr. 2.

On October 11, 2013, the jury found Appellant guilty as indicted. Tr. 1142, l. 23 – 1143, l. 17. Judge Harrington sentenced Appellant to life without parole for murder, twenty years concurrent for attempted armed robbery, and five years concurrent for possession of a handgun with an obliterated serial number. Tr. 1164, ll. 2-16. The court did not impose a sentence for possession of a weapon during the commission of a violent crime pursuant to S.C. Code Ann. § 16-23-490(A) since Appellant was sentenced to life without parole. Tr. 1164, ll. 13-15; See Tr. 1160, ll. 24 – 1161, l. 12.

This appeal follows.

STATEMENT OF FACTS

Katherine Ridgway testified that on June 15, 2012, the decedent, Marley Lion, picked her up from her apartment around 9:00 pm and drove her to a party at a friend's house. Tr. 274, l. 7 – 275, l. 1; Tr. 276, ll. 13-18. The two had just graduated from high school and were causally dating. Tr. 273, l. 25 – 274, l. 6. She and Marley, who were both drinking, stayed at the house party until around 3:00 am when Marley ultimately drove her home. As he dropped her off, Marley "said he was heading home." Tr. 277, l. 7 – 278, l. 7.

Officer Robert Deal of the Charleston Police Department was dispatched to the Ardmore Subdivision in West Ashley at 4:06 am on June 16, 2012 "in reference to possible shots fired in that area." Tr. 288, ll. 16-22. While driving through the Ardmore neighborhood with his windows down he "noticed to the right, in the parking lot of Famous Joe's, . . . a little white vehicle. And it appeared to have a gentleman laying down on the ground beside the vehicle." Tr. 289, l. 3 – 290, l. 6. Deal went to investigate and see whether the individual needed assistance. Tr. 294, ll. 6-18. As he approached the man lying on the ground, he noticed broken glass on the ground. Tr. 295, ll. 2-3. Deal asked the man if he was okay and the man responded that "he had been shot five times." Tr. 296, ll. 1-4. Deal updated dispatch and requested that EMS respond to the scene.

Deal testified that the man, later identified as Marley Lion, was coherent and told him that "he had pulled in there [the parking lot at Famous Joe's] to kind of get some sleep, that he had been out that evening, and he felt that he was too intoxicated to drive. So he . . . was just going to sleep a little bit to be safe." Tr. 298, ll. 12-18; see Tr. 305, ll. 3-14. According to Deal, Marley said "two black males wearing all black" were responsible for

the shooting, and that they ran "in the direction of the gravel lot," which is a "cut-through" to the Ardmore Subdivision from the Famous Joe's parking lot. Tr. 298, l. 2 – 299, l. 2.

Deal testified that EMS cut and removed Marley's clothing to "assess his injuries" and that he was able to see a gunshot wound "in the upper chest area" and several in the thigh and groin region. Tr. 299, ll. 9-24. Additionally, Deal explained that he located and marked six spent cartridge casings on the ground. However, he did not collect the shell casings, but waited for the detective division and the forensic team to arrive and process the scene. Tr. 304, l. 6 – 305, l. 2.

On cross-examination, Deal, after consulting his report, clarified that Marley told him "that two black males approached him" and "that one was wearing all black, along with blue jeans." According to Deal's report, Marley told him that the black male wearing all black with blue jeans "pulled a gun out that appeared to be all black" and "that individual began to fire at him." However, Marley never provided a clothing description for the second black male. Tr. 316, l. 9 – 318, l. 6.

Julius Brown, who was also charged with the murder of Marley Lion, has lived in the Ardmore neighborhood since he was "young." His sister, Stephanie Brown, is Appellant's girlfriend, and the two were living together on Cashew Street in Ardmore in June 2012. He also has a younger brother named Rayshawn Milligan. Tr. 370, l. 9 – 371, l. 5.

Julius testified that he was charged with murder on July 31, 2012 and, with the advice of his attorney, eventually entered into a plea agreement with the solicitor's office. Under the agreement, the solicitor agreed to allow him to plead guilty to the lesser included offense of voluntary manslaughter with no sentence recommendation in exchange for his

cooperation and testimony against Appellant. Tr. 372, l. 12 – 375, l. 6. Julius has an extensive criminal record including convictions for unlawful carrying of a weapon, third degree criminal sexual conduct, assault on a police officer, numerous drug offenses, providing false information to law enforcement, trespassing, and failure to pay child support. Tr. 368, l. 7 – 369, l. 25.

Julius testified that on the night of July 15, 2012, he was at Appellant's house on Cashew Street with Appellant, Rayshawn, Bryan Rivers, and George Brown, who despite the same last name is unrelated. Tr. 375, ll. 7-22. They were "[d]rinking and smoking marijuana." Tr. 376, ll. 4-6. At some point during the night, they left Appellant's house and drove to downtown Charleston. George Brown drove the group in his black Chevrolet Suburban. Tr. 376, l. 10 – 377, l. 24. According to Julius, on the way downtown, George suggested they "hit a lick," meaning commit "[a] robbery." The group eventually saw a "girl and a boy" walking downtown and decided to rob them. Julius claimed that Appellant and Bryan Rivers, who had George's gun, got out of the car. Rivers walked up to the couple, pointed the gun at them, stole a pocketbook, and ran back to the car. Tr. 377, l. 4 – 381, l. 2. However, Julius testified that Appellant never approached the couple, but instead had walked in the opposite direction. After Rivers got back into the car, George picked Appellant up from a nearby McDonald's and headed back to West Ashley. Tr. 381, ll. 3-22.

Julius explained that on the way back to West Ashley, Rivers went through the pocketbook and discovered there was no money inside. Tr. 381, l. 23 – 382, l. 9. Because that robbery had been unsuccessful money-wise, the group discussed robbing Famous Joe's, a bar in West Ashley. Before going back at Appellant's house, George drove through the

parking lot at Famous Joe's to determine if the bar was a good target. Tr. 382, l. 10 – 383, l. 15.

Once back at Appellant's house, Julius, Rivers, and Appellant decided to walk back down to Famous Joe's. According to Julius, the plan was to wait for the employees of Famous Joe's to come out of the bar after it closed and rob them. Julius claimed George gave Appellant his gun before the three left and Appellant put the gun "[i]nside his pant on his hip." Tr. 384, l. 6 – 387, l. 4. He said it took them only three minutes to walk from Appellant's house to that area. Tr. 387, ll. 8-11. Once there, they stopped behind a white fence and watched the parking lot in front of Famous Joe's. Julius testified that they eventually saw the employees coming out of Joe's and they "had stuff in their hands," but he could not tell if they had any money. Tr. 387, l. 13 – 388, l. 13. He claimed Appellant was about to rob them when Marley Lion pulled into the parking lot and "interrupt[ed]" the robbery.[1] Tr. 388, l. 24 – 389, l. 8.

Julius claimed that once the employees left, Appellant said "he [was] going to try to see what Marley Lion had" and Julius decided to go "along with it." Tr. 389, ll. 9-20. Julius then walked through the parking lot and passed by Marley's car to see "how much people was in the car," but he "couldn't see inside" because the windows were too dark. After walking by the car, Julius walked back to the white fence where Appellant and Rivers were waiting and told them he "couldn't see in the truck." Tr. 389, l. 25 – 392, l. 13. According to Julius, Appellant and Rivers were "discussing who was going to go, passing the gun back and forth, and then Ryan [Appellant] just decided to go." Tr. 392, l. 14 – 393, l. 4.

[1] Despite referring to Marley Lion by name throughout his testimony, Julius asserted that they did not know who Marley was before this incident. See Tr. 387, l. 22 – 388, l. 3.

Julius testified, "He [Appellant] walked up to the truck and [told] him [Marley] to open the door, and Marley set off the alarm. And that made Deleston [Appellant] run back [to the white fence where Rivers and Julius were standing]. And when he ran back, I told him, I'm like, bust the window, and he turned back around and that's when he started shooting." Tr. 393, ll. 1015. Julius claimed Appellant shot "[a]bout five times." Tr. 394, ll. 6-7. He said he told Appellant to "bust the window" so "he could . . . get in the truck," but, according to Julius, Appellant thought he had said "shoot." Tr. 393, ll. 19-25.

After the shooting, all three men took off running back towards Ardmore. Julius claimed they "went up behind this white boy named Jason house, and Deleston [Appellant] hide the gun under the pool." After hiding the gun, they ran back to Appellant's house on Cashew Street. Tr. 395, ll. 4-21. Julius testified that he told Appellant to go inside and wash his hands with bleach to remove any gunpowder. He claimed Appellant went inside and washed his hands and changed his shirt, but he did not know whether Appellant actually used bleach. Tr. 396, ll. 2-9; Tr. 397, l. 20 – 398, l. 5. When Appellant came back outside, the others told him "he [would] go down for shooting him [Marley]" and "[y]ou's a stupid MF for shooting him for nothing." Tr. 397, ll. 1-7.

Shortly thereafter, Appellant and Julius decided to go back down to the scene because Appellant had allegedly left his red hat and a debit card behind the white fence. Julius opined that it was important to go back and get these items because it "would have been evidence." He explained that the two stopped by his mother's house to pick up two bicycles and then rode down towards Famous Joe's. He said they saw "the police and a fire truck" in the Famous Joe's parking lot, and that, while Appellant hid behind an apartment building, Julius ran out and picked up the hat and debit card. The two then returned to

Julius' mother's house and dropped off the bicycles. Tr. 398, l. 20 – 402, l. 7. Julius testified that they saw two police officers near his mother's house and Appellant told him that one of the officers was "the [same] police who had [previously] stopped me for not having a flashlight on the bike." Tr. 402, ll. 8-17.

Julius claimed that when they got back to Appellant's house on Cashew Street, Appellant burned the shirt and pants he wore that evening and the pocketbook Rivers had stolen during the robbery of the couple downtown in a fire in his backyard. Tr. 398, ll. 6-8; Tr. 402, l. 21 – 403, l. 13.

Julius then walked the jury through surveillance footage capturing the parking lot in front of Famous Joe's during the early morning hours of June 16, 2012. He identifies George's black Suburban driving through the parking lot at 3:08 am after the group had returned from downtown. Tr. 413, l. 25 – 15. Julius testified that the footage shows the employees "leaving out of Joe's" around 3:33 am and then the employees eventually leaving the parking lot after Marley Lion pulls in and parks. Tr. 414, l. 16 – 415, l. 22. He claimed that while Marley was moving stuff around in the back of his car, the three were behind the white fence discussing how many people may be in Marley's car. Julius identifies himself walking through the parking lot at 3:44 am "to see if I could see how much people was in the truck." Tr. 415, l. 24 – 416, l. 15. Then starting around 3:56 am, the shooting takes place. Julius claimed Appellant was the shooter and that he was wearing a striped shirt, blue jeans, and "white Nikes." He also claimed that Rivers was wearing all black, including black Nikes, and that he was wearing a white t-shirt, shorts, and some slippers. Tr. 394, l. 12 – 395, l. 3; Tr. 418, l. 6 – 419, l. 9.

On cross-examination, Julius admitted that when he first spoke to law enforcement in June 2012 while the investigation was still in its early stages he told them that they should look at Bryan Rivers because he wears all black and "he and his associates were doing robberies." Tr. 424, ll. 14-22; Tr. 426, ll. 8-25.

Officer Ulysius Vance of the Charleston Police Department testified that around 4:20 am on June 16, 2012, shortly after the shooting, she was asked to assist Officer Mattingly who was attempting to stop two individuals on White Oak Drive in Ardmore. Tr. 356, l. 19 – 357, l. 11. She explained that she eventually "stopped a Mr. Maurice Simmons." Tr. 358, l. 16 – 359, l. 22. Vance claimed that while she was stopping Simmons, she saw Appellant and another individual, who she did not know at the time, in front of a residence on White Oak Drive. Tr. 360, ll. 4-21. She said they were on bicycles and were both wearing white t-shirts. Tr. 362, ll. 16-22. She testified that she recognized Appellant because she had stopped him on June 5, 2012 for riding a bicycle at night without a flashlight. Tr. 357, l. 12 – 358, l. 7. She claimed that when she saw Appellant the night of the murder, he "made the comment that he had the flashlight tonight." Tr. 360, ll. 22-25.

Bryan Rivers, who admitted he was involved in the shooting of Marley Lion, also has an extensive criminal record including assault with intent to kill, assault and battery of a high and aggravated nature, and numerous drug offenses. He went to prison in 2011 for selling drugs and was released on June 1, 2012, about two weeks before the murder. Tr. 466, l. 24 – 467, l. 1; Tr. 468, ll. 2-22.

Rivers testified that, despite being offered a favorable plea deal, he refused to cooperative with law enforcement or the solicitor until about a month before Appellant's trial. On September 11, 2013, he wrote a letter to Solicitor Scarlett Wilson indicating he

wished to accept the plea offer if it was still available. Rivers explained that he ultimately pled guilty to voluntary manslaughter and attempted armed robbery to avoid a murder conviction. In order to keep the plea agreement, River testified he must "[t]ell the truth" about his involvement. Tr. 470, l. 7 – 476, l. 18.

Rivers explained that when he got out of prison on June 1, 2012, he stayed with Stephanie Brown and Appellant, who were "[g]irlfriend and boyfriend." Tr. 467, l. 20 – 468, l. 1; Tr. 468, ll. 20-25. On the night of June 15, 2012, he was at Appellant's house with Appellant, Julius Brown, George Brown, and Rayshawn Milligan. The group was smoking cigarettes, "[r]eefer," and "just cooling." At some point, they decided to go downtown "[l]ooking for licks," meaning "[r]obberies." Rivers testified that they "went to [the] Rutledge Avenue area, and George Brown, he parked the truck and retrieved a gun" from under his seat. George gave the gun to Rivers who saw "this white couple" who looked like they had been drinking.

Rivers testified that he got out of the car with Appellant, who was supposed to help him with the robbery, but Appellant walked in the opposite direction instead. Rivers admitted that he "approached the couple, held them at gunpoint, [and] told them to give me everything." He said the woman gave him a "big purse," but he did not get anything from the man. Tr. 480, l. 2 – 481, l. 5. Rivers admitted he was wearing "[a]ll black. Black T-shirt, black shorts, black sneakers." Tr. 481, ll. 9-12. When he got back to George's car, Appellant was not there. Rivers testified they later picked up Appellant at a McDonald's near the robbery and drove back to West Ashley. Tr. 482, l. 19 – 483, l. 7.

He explained that on the way back to West Ashley, they "drove through Joe's parking lot" to "[s]cope the scene" because they "were planning on robbing the [people]

coming out of Joe's." He claimed that he, Appellant, George, and Julius were all involved in planning the robbery at Joe's. Tr. 484, ll. 1-23. After driving by Famous Joe's, the group went back to Appellant's house. Shortly thereafter, Rivers left with Appellant and Julius to walk down to Joe's. He claimed Appellant had gotten the gun Rivers had used in the earlier downtown robbery from George before they left and "tuck[ed] it under his waistline." Tr. 485, l. 22 – 486, l. 25. He said Appellant was wearing a striped shirt and white sneakers called Willie Dee's. Tr. 487, ll. 1-17.

Rivers testified that they stopped behind a white fence and eventually saw "a couple of people walking out of [Famous Joe's]." According to Rivers, this "was around the time that Marley Lion pulled up." He said that after Marley pulled up, the employees got into their cars and left. He claimed Marley then "got out of his car. I guess he went in the back to get a pillow or something. So Mr. Deleston [Appellant] attentions went off the Joe's robbery, so now he - - he decided . . . [he was] going to rob the white dude [Marley]." Tr. 487, l. 24 – 489, l. 17. Julius then walked through the parking lot "to scope the scene out" and, when he came back, "said everything was good. Said he didn't see anybody else." Tr. 490, ll. 3-15.

Rivers testified Appellant still had the gun, but "tried to pass me the gun, but I gave it back. I pushed it off." Tr. 490, l. 16 – 491, l. 5. He claimed Appellant decided "to continue with the robbery" and "went up to the car and knocked on the window." At that point, the car alarm went off. Rivers said he thought Marley set the alarm off. He claimed that after the alarm went off, Appellant ran back towards him and Julius and Julius told Appellant, "Get him, get him, get him. Not as 'get him' as in to shoot the man, but . . . [to] [c]ontinue with the robbery." Tr. 491, l. 6 – 492, l. 10. According to Rivers, Appellant then

went back to the car and began shooting. He claimed he shot five or six times. Rivers testified that he knew Appellant hit Marley "[b]ecause of the way he [Marley] was yelling and screaming." Tr. 492, l. 17 – 493, l. 3.

After the shooting, all three men took off running. Rivers said they stopped at "this white dude, Jason, his backyard" and Appellant "tucked it [the gun] under the pool." Tr. 493, l. 5 – 494, l. 5. They then continued running until they got back to Appellant's house on Cashew Street. Tr. 494, ll. 6-8. When they got back, Appellant went inside the house. According to Rivers, when he came back out Appellant smelled "like bleach" and "didn't have any shirt on." Tr. 495, ll. 13-25.

Like Julius, Rivers reviewed the surveillance footage and explained what the camera captured early that morning. See Tr. 499, l. 15 – 504, l. 13.

Rayshawn Milligan testified that his brother is Julius Brown and his sister is Stephanie Brown. Tr. 536, l. 3-13. In 2012, Stephanie was dating Appellant and the two lived together on Cashew Street in Ardmore. Tr. 538, ll. 11-25. On June 15, 2012, Rayshawn was hanging out at Appellant's house with Appellant, George Brown, Julius Brown, and Bryan Rivers. Tr. 539, ll. 4-10. Sometime that night, the men left Appellant's house with and drove downtown. George was driving. Tr. 542, ll. 6-16.

Rayshawn testified that while they were driving around downtown, George said "he know where a lick was at" and eventually George pulled over on the side of a "dark street." According to Rayshawn, when George pulled over, Appellant and Rivers got out of the car. He testified that Rivers later returned to the car with a pocketbook, but claimed he did not see what happened while Rivers was gone. On the way back to West Ashley, George picked Appellant up near a McDonald's. Tr. 543, l. 15 – 545, l. 13.

Rayshawn testified that while the group was driving back to Appellant's house, they discussed committing other robberies and decided to "[r]ide by Joe's and see if they was busy or not." Tr. 546, ll. 10-17. Shortly after getting back to Appellant's house on Cashew Street, Appellant, Julius, and Rivers left. Rayshawn claimed that before the three left Appellant got George's gun "out [of] the truck" and "[p]ut it on his hip." Tr. 548, l. 2 – 550, l. 8. They were gone for about fifteen to twenty minutes. Rayshawn said when they returned, Appellant, Julius, and Rivers were arguing and Rivers and Julius both told Appellant, "You stupid. You shouldn't have shoot that guy." Tr. 551, ll. 10-25. According to Rayshawn, Appellant said, "[D]amn, that shit crazy. I know I about to go to jail." Tr. 552, ll. 11-15. Rayshawn said Appellant then went inside the house and changed his clothes and washed his hands. Tr. 552, l. 16 – 553, l. 2.

Rayshawn also maintained that Appellant and Julius later "went back down the street" and "came back with the gun." He claimed they "[t]ried to give it to George, [but] George Brown was, like, I don't want that. It's yours now." Tr. 553, l. 6 – 554, l. 14. According to Rayshawn, Appellant then wrapped the gun up in a towel and put it in "the little storage closet" in the carport. He also claimed that right after Appellant hid the gun, he burned his clothes, and the purse Rivers had stolen from the couple downtown, in a fire in his backyard on Cashew Street. Tr. 554, l. 24 – 555, l. 25.

Furthermore, Rayshawn identified Julius on the surveillance footage as the person walking through the parking lot in front of Famous Joe's at 3:44 am based on the way he walked and "what he had on the night," and Appellant as the person who approached Marley's car at 3:56 am based on "the clothes he have on." Tr. 557, l. 12 – 558, l. 16.

Frank Middleton has lived in the Ardmore Subdivision since 1969. He admitted that he has a lengthy criminal record and has been to prison on four separate occasions. Most recently, in 2001, he was sentenced to fifteen years imprisonment for strong armed robbery. After he was released from prison, he was arrested again on April 24, 2012 for armed robbery and was continuously housed at the Charleston County Detention Center up until Appellant's trial. Tr. 576, l. 10 – 578, l. 10. Middleton admitted that in exchange for his testimony in this case, he is hoping for "[w]hatever leniency that I might can get." Tr. 578, l. 19 – 579, l. 3.

Middleton testified that he met Appellant in late 2011 or early 2012 in Ardmore. During the few months he knew Appellant before Middleton was arrested in April 2012, he claimed he hung out with Appellant "probably two or three days a week at night" and would see Appellant "in passing about seven days a week, because where he lives, I would have to pass where he live at." Tr. 579, l. 15 – 580, l. 20.

Middleton explained that Detective Craig Kosarko of the Charleston Police Department met with him while he was incarcerated on July 4, 2012. He claimed he did not ask to speak with Kosarko rather Kosarko "came to the county jail and asked to speak with me, and I sat and talked with him. And he said that the community that I lived in told him that I could help." Tr. 581, ll. 7-20. Middleton said that after he agreed to speak with Kosarko, Kosarko had him transported to the police department. When he got down to the police department, Middleton said Kosarko "showed me the video of the shooting and asked if I could identify the person in the video." Middleton claimed he identified the person on the footage as Appellant "[b]ecause of his briskness of how he approached the vehicle and the stance that he had used." According the Middleton, the man on the surveillance footage

could not be Bryan Rivers because "the person in the showing of the video at the time was larger than Bryan [Rivers] and a little taller than Bryan is." Tr. 582, l. 2 – 584, l. 23.

On cross-examination, Middleton admitted that he could not recognize the individual's face nor could he identify the person by his clothing. Tr. 585, ll. 13-23.

Two search warrants were executed at Appellant's residence on Cashew Street. The first warrant was executed on July 30, 2012 and law enforcement collected a "white Nike shoe" from "the second bedroom floor in front of the closet" and a "red hat [from] on top of the kitchen table." Tr. 629, l. 1 – 632, l. 7. The second search warrant was executed on August 2, 2012 and law enforcement photographed a second "white Nike tennis shoe" that was located on a stool in one of the bedrooms. They also photographed a bottle of Clorox bleach on the floor of the kitchen and "charred remains" found "in the backyard of the residence behind the left side of the house." Tr. 664, l. 22 – 667, l. 24.

George Brown testified that he often hung out in the Ardmore neighborhood on Cashew Street with Appellant, Julius Brown, Rayshawn Milligan, and Bryan Rivers. Tr. 674, ll. 1-4. He has pending charges related to the shooting of Marley Lion including accessory after the fact to murder, possession of a pistol with an obliterated serial number, and attempted armed robbery. He was also charged with accessory before the fact of armed robbery for the robbery of the couple downtown. Tr. 674, l. 12 – 675, l. 17.

George testified similar to Julius, Rivers, and Rayshawn about the events leading up to the shooting of Marley Lion, including driving downtown and looking for "people who were drunk and under the influence" so they could "rob them and get money from them." George admitted that he had a gun that he kept under his seat "on the floorboard" of his

black Suburban. He claimed he bought the gun from a "[k]id named Josh" in the West Ashley area.

George testified that he stopped his car around Rutledge Avenue in downtown Charleston and Rivers, who had his gun, and Appellant got out of the car to "catch some couple walking down the avenue." When Rivers came back to the car, he had a cream colored purse. However, Appellant was not with him. George testified that he later picked Appellant up at a McDonald's. Tr. 686, l. 1 – 687, l. 19.

George explained that on the way back to West Ashley, "Julius came up with the plan [to rob Famous Joe's]" and they drove through the parking lot "to see if anyone else was at Joe's." Tr. 688, l. 19 – 689, l. 16. He testified that once they got back to Cashew Street, Julius, Rivers, and Appellant "were talking about going back to rob Joe's" and asked him to be the driver, but he "told them no" because he "didn't want to be any part of" it. Tr. 690, ll. 4-23. George claimed that before the three "left on foot" he gave Appellant his gun who put it "[o]n his waistline." Tr. 691, l. 3 – 692, l. 12.

According to George, when Julius, Rivers, and Appellant came back to Cashew Street, Appellant "went straight in[to] the house" and, when he came back out he had "changed his clothes, and smelled like bleach." George claimed Julius and Rivers were "angry" and were "[s]aying, he's stupid. He didn't have to do that shit." Tr. 692, l. 13 – 693, l. 15. George testified that he saw Appellant with the gun again later that night and claimed Appellant put the gun in a sock and then hid it in "the storage room" at "the back of the carport." Tr. 693, l. 16 – 694, l. 9. He also claimed that he watched Appellant burn his clothes and the purse from the downtown robbery in the backyard. Tr. 695, ll. 8-23.

Additionally, George testified that he saw the surveillance footage numerous times on the news and in preparation for the trial and claimed Appellant was the shooter. He said "Bryan's [Rivers] too skinny, and the person in the video looks stocky, more like Ryan Deleston [Appellant]." He also said the shooter had on "the clothing Ryan [Appellant] had on when he left." Tr. 696, l. 24 – 697, l. 21. He identified Julius Brown as the man in the white shirt who had walked by the car before the shooting. Tr. 697, l. 25 – 698, l. 5.

George testified that at some point after the murder he drove Julius back to Cashew Street to pick up the gun and, from then on, Julius kept the gun at his house. George explained that he ultimately found a buyer for the gun from his own neighborhood, Ponderosa, but the buy did not go through because the potential buyer "knew where it was coming from, the Ardmore area, and he knew it was hot." Tr. 699, l. 6 – 701, l. 3. However, George claimed that on July 15, 2012, Appellant called him and "wanted me to bring the gun [to Cashew Street] so he could sell it." So George "went to Julius' house and got it from him and carried it [the gun] to him [Appellant]." Tr. 701, ll. 10-25. George said when he got to Appellant's house on Cashew Street, he got out of his car and went inside while Appellant went and got the gun out of George's car. Appellant then "walked off and went around the corner" towards Evergreen Street. George testified that when he came out of Appellant's house after speaking with Stephanie Brown, Appellant was walking back up the yard. Tr. 702, l. 1 – 703, l. 11.

George admitted that he lied over and over again when he was initially interviewed by law enforcement. He ultimately agreed on January 22, 2013, with the advice of counsel, to enter in a "proffer agreement" with the solicitor. Under the agreement he was to be "truthfully honest, and anything that I say wouldn't be used against me." However, George

testified that the agreement "didn't work out" because he "didn't tell you [the solicitor] everything." George did not tell the solicitor that the gun belonged to him, about the downtown robbery, or about "cas[ing] the parking lot." When the solicitor found out George was lying again, the "agreement was taken away" and he "got two more charges," including accessory before the fact to armed robbery [related to the downtown robbery] and attempted armed robbery [related to the shooting of Marley Lion]." Tr. 708, l. 23 – 711, l. 20. George claimed that he was promised "[n]othing" in exchange for his testimony and that he is "not protected by the proffer anymore." Tr. 711, l. 21 – 712, l. 4. However, George admitted that he was hoping "[t]hings look better for me telling the truth today." Tr. 712, ll. 5-9.

Bobby Warthaw, who at the time of trial had pending charges for distribution of crack cocaine, distribution of crack cocaine within the proximity of a school, possession of crack cocaine, breaking and entering into a motor vehicle, possession of burglary tools, and habitual traffic offender, testified that he contacted law enforcement on June 27, 2012 and told them he "had some information" and knew "somebody who wanted to sell a gun from Ardmore." Tr. 730, l. 23 – 731, l. 11. Warthaw explained that he met with Detective Andre Jenkins on June 29, 2012 at the Charleston Police Department and discussed "[b]uying a gun," but the buy did not occur that day because Warthaw "backed out." He was then arrested on a bench warrant for failing to appear in court. Warthaw explained that he was ultimately released from jail on July 12, 2012 "through the police" because he said he would "help them" if they got him out of jail. Tr. 733, l. 15 – 735, l. 24; see Tr. 763, ll. 9-13.

Warthaw claimed that on July 15, 2012, he called Appellant "about buying the gun" and then met with law enforcement at the Charleston Police Department. His cousin,

Christopher Singleton, agreed to help as well. The two were searched and Singleton was "wired." They then drove to the apartments at the back of the Ardmore Subdivision. Warthaw testified that Singleton was to purchase the gun from Appellant for two hundred dollars and then Appellant was to give Warthaw fifty dollars as a "kickback" for setting up the buy. He claimed it was arranged this way to make it look more legitimate and "make it look better." Tr. 735, l. 25 – 738, l. 24.

Warthaw testified that when he got to the apartments he called Appellant and then got out of the car to meet him while Singleton stayed in the car. Tr. 739, l. 24 – 740, l. 9. Warthaw eventually returned to the car with Appellant who got into the backseat. According to Warthaw, Appellant then "[g]ave us the weapon" and Singleton gave Appellant the two hundred dollars. Tr. 741, l. 16 – 742, l. 12. Warthaw admitted that he was paid two hundred dollars by the Charleston Police Department for his assistance and received thirteen thousand dollars in reward money from Crime Stoppers. Tr. 749, ll. 5-13.

Michael Caplan, the forensic pathologist who conducted the autopsy, testified that the "cause of death was a gunshot wound to the chest with perforations or injuries of the abdominal aorta, the spleen, and the liver. And the manner of death . . . was homicide." Tr. 934, ll. 3-6. In addition to the gunshot wound to the chest, Marley also had several gunshot wounds to the left thigh and groin region and a gunshot wound to the right arm. See Tr. 934, l. 11 – 947, l. 21. Caplan testified that he collected five projectiles from Marley's body during the autopsy. Tr. 950, ll. 6-18.

Suzann Cromer of the South Carolina Law Enforcement Division (SLED) was qualified as an expert in firearms and tool mark identification. She testified that she received six spent cartridge cases, five projectiles recovered during the autopsy, and a

firearm from the Charleston Police Department (CPD) for analysis. Cromer explained that she test fired the gun eight times and compared the spent cartridge cases she fired with the ones she received from the Charleston Police Department. She concluded that the cartridge cases that were recovered from the parking lot at Famous Joe's were fired by the gun she had received from CPD. Cromer also compared the fired projectiles from her test fire with the ones recovered during autopsy and concluded that all of the bullets recovered during autopsy were fired by the gun she had received from CPD. Tr. 983, l. 3 – 992, l. 21.

Appellant, Rivers, and Julius were ultimately arrested on July 30, 2012. George was not arrested until August 1, 2012. See Tr. 882, l. 7 – 885, l. 3. On the morning of his arrest, Appellant was interviewed by law enforcement. The first interview began around 9:15 am and ended around 3:00 pm with a few breaks in between. During this first interview, Appellant did not admit any involvement in the shooting of Marley Lion. However, he did admit to selling the firearm with an obliterated serial number to an informant after he was shown still photographs of him selling the weapon from surveillance footage. Tr. 998, l. 19 – 1009, l. 17. Appellant was again interviewed later that night around 8:00 pm. During this interview, Appellant told law enforcement that he, Julius Brown, and Bryan Rivers "went up to rob [the Famous] Joe's employees, not the business, but the employees, as they were closing up," but as the employees came out, Marley Lion pulled into the parking lot "so they decided to rob Marley." Appellant "identified Julius Brown as the person walking across in front of . . . Marley Lion's vehicle, and he said that Bryan Rivers had the firearm and went up to the vehicle and shot into the vehicle." Tr. 1010, l. 23 – 1013, l. 1.

ARGUMENT

1.

The court erred by refusing to allow Appellant to cross-examine witnesses about an armed robbery and shooting that occurred approximately two weeks before the murder where it was undisputed that Bryan Rivers was the shooter in the prior robbery and that the same firearm was used in both cases, since this prevented Appellant from fully developing and presenting his defense at trial, namely that Bryan Rivers was the shooter who killed the decedent, Marley Lion, and that Appellant was merely present at the scene, in violation of Rule 404(b), SCRE, the rule on third party guilt, and Appellant's due process right to present a defense.

Relevant Facts

The solicitor informed the court pretrial that it anticipated the defense would "attempt to argue that the Chopper shooting[2] two weeks prior [to the murder of Marley Lion] should come in because the same gun was used in the Chopper shooting as was used to kill Marley Lion. I think that that argument is significantly undercut, because just that very night, an hour or so before Marley was shot, Bryan Rivers used that gun, the murder weapon, to do another robbery downtown. He was involved in that robbery with Ryan Deleston [Appellant] and with Julius Brown and with George Brown. But if there is a need to show that someone else had, in fact, used that weapon, they're going to have an armed

[2] Leroy Townsend is a drug dealer also known as "Chopper." It was undisputed that Bryan Rivers shot Townsend in the leg during an armed robbery approximately two weeks before Marley Lion was shot and killed. Appellant, Julius Brown, Rayshawn Milligan, and George Brown were also allegedly involved in this armed robbery. The same gun Rivers used to shoot Townsend was also used to shoot and kill Marley. See Tr. 329, l. 6 – 335, l. 2.

robbery that occurred about one hour before the shooting. To stretch back two weeks prior, to boot strap that in to try to show that because two weeks prior [Bryan] Rivers shot someone in the leg, that he must have shot and killed Marley Lion, I think, is a stretch." Tr. 125, ll. 7-25.

Referencing Rule 404(b), the solicitor further argued, "In more ways than not, the shooting of Chopper is just not the same thing." She stressed several differences she perceived between the two incidents including (1) "Chopper" was someone who was known by Bryan Rivers and the other codefendants and the men had set out to rob him, whereas "Marley Lion just happened to be in the wrong place at the wrong time" and was not the "intended target" and (2) George Brown drove the men to the "Chopper shooting" while the men walked to Famous Joe's. Tr. 126, ll. 1-20.

Additionally, the solicitor argued that under Rule 403 "putting in the evidence that Bryan Rivers shot someone else is more prejudicial than it is probative. It's not probative, because it's nothing like the shooting of Marley Lion." Tr. 126, l. 21 – 127, l. 1.

The defense argued that "this doesn't reach the Lyle analysis because its evidence of third-party guilt. We are submitting the Chopper shooting as evidence that somebody else used this weapon in the very same manner that it was used in the Marley Lion shooting, and that this evidence shows that somebody else was the shooter in the Marley Lion murder. That's exactly what third-party guilt evidence is . . . there for, is to allow Mr. Deleston [Appellant] to present a defense that he, in fact, did not do this, and that somebody else was the trigger man. And we think that this other robbery is very relevant." Tr. 127, ll. 8-20.

The defense further argued that presenting evidence of the "Chopper shooting" does not prejudice the state and certainly does not "prejudice Mr. Rivers in any way. He's

already pled [guilty] to charges related to this." Tr. 127, ll. 21-25. However, the evidence is "probative that somebody else committed this murder. That is the most probative thing that it could possibly stand for. It does not prejudice anybody, and it is probative. It is probative of Mr. Deleston's [Appellant's] innocence and [shows] a third party is guilty." Tr. 134, ll. 1-6.

Additionally, the defense argued that "this is really evidence that should be allowed under just a due process of allowing Mr. Deleston to present a full defense and saying, I'm not the shooter this is the shooter. This is . . . a person [Bryan Rivers] who puts himself there, and essentially says, Well, Ryan [Appellant] did it. I didn't do it. So it's not that we're just casting mere suspicion on him. He puts himself there. And to not allow that evidence, they're [the state] essentially saying that the Defense can't put up a defense, if we're not allowed to bring in evidence that somebody else was the shooter. That is our defense, is that Bryan Rivers was the shooter, and they're trying to preclude us from saying that." Tr. 130, l. 14 – 131, l. 1. Defense counsel reasoned that the testimony regarding the "Chopper shooting" is "relevant to the fact [that] it makes it more likely that he [Bryan Rivers] was the individual with the gun. He was in the first armed robbery. He was in the second armed robbery. And then the third armed robbery, he says, Well, I didn't have the gun. And that's just rather convenient in this case." Tr. 131, ll. 5-11.

In response to the state's Rule 404(b) argument, defense counsel argued that both of the shootings occurred in the Ardmore area "less than a mile apart. So they're in the same location, using the same weapon, the same individuals, and [the] same plan. It's a common plan." Tr. 130, ll. 7-12. He later added that both robberies were planned by Julius Brown and executed by the same person, Bryan Rivers, again with the same firearm. Tr. 132, l. 25

– 133, l. 8. Additionally, the defense pointed out that George Brown was the driver in both shootings. Tr. 134, ll. 16-24.

Court's Ruling

The court ruled that under Rule 404(b), "Rivers' armed robbery and the shooting of Leroy 'Chopper' Townsend and the Marley Lion attempted armed robbery and shooting are not sufficiently similar, based upon the testimony that has been presented, to prove a common scheme or plan." Judge Harrington stressed that "[t]he Chopper shooting involved a victim that was known and targeted by the assailants . . . The Marley Lion shooting involved a victim of circumstance who was unknown to the assailants." The court also pointed out that while there was "bad blood" between "Chopper" and the assailants, "there was no bad blood between the victim and the assailants in the Marley Lion murder." Additionally, she stated, "The victim in the Chopper shooting was a 30-year-old African male, while Marley Lion was a 17-year-old white male. In the Chopper shooting, the victim was shot once, was forced to strip and received a minor injury. Marley Lion was shot five times fatally. In the Chopper shooting, they were driven to the crime scene. In the current case, the assailants walked to the crime scene." Lastly, the court stated, "Finally, the Chopper shooting occurred at 9:30 at an apartment complex. Marley Lion was killed at approximately 4:00 am in the parking lot of a business." The only "similarities between the two shootings" the court found were "the fact that the gun used [in both shootings] belonged to George Brown and "that Rivers was present at" both crime scenes. Accordingly, Judge Harrington held that "Rivers' prior bad act of shooting Chopper is not sufficiently similar to the shooting of Marley Lion to qualify for the common scheme or plan under Rule 404(b)." Tr. 210, l. 1 – 212, l. 24.

Moreover, the court held evidence of the "Chopper shooting" was not admissible under a theory of third party guilt because the "evidence in question exceeds the scope of the facts that are inconsistent with his [Appellant's] own guilt. It does not pertain to the commission of the crime currently before this Court." The court further found that the evidence casts only "a mere suspicion upon a third party" and that "the introduction of this evidence would . . . amount to solely a conjectural inference as to commission of a crime by [a] third party." Tr. 216, l. 7 – 217, l. 16.

After the Judge Harrington's ruling, court concluded for the day. The next morning, defense counsel invited the court to make a specific ruling on "our claim that separate and apart from state evidentiary law, . . . we have a due process right to offer a defense." Defense counsel stated, "Our contention is, is that under Holmes, and even under State v. Cope, that new South Carolina case from August, where they talk about a lesser threshold analysis for admissibility, where the defense has what is reliable evidence of third-party guilt, that there's a - - as we read the law, and we contend federal law requires, that due process would permit Mr. Deleston [Appellant] to offer this evidence in his defense under both Holmes and Cope, and that the denial to do so would constitute an unreasonable application of that federal law." Tr. 224, l. 13 – 225, l. 14.

Judge Harrington left her ruling as is and ultimately stated, "I believe I addressed all your due process issues in issuing my ruling and denying the request for that evidence to be brought in." Tr. 227, ll. 5-10.

Proffer and Renewal of Objection

During the middle of trial, Appellant proffered Julius Brown's testimony regarding the Chopper shooting. Julius could not remember when the Chopper shooting occurred, but

testified that it was before the murder of Marley Lion. Julius maintained that he, Bryan Rivers, George Brown, Rayshawn Milligan, Appellant, and a man named Valentino Hayward were all involved in this shooting. Tr. 329, l. 6 – 330, l. 10. According to Julius, George Brown drove the group from Appellant's house on Cashew Street to "The Shires" where there is a "cut to get to Saint Andrew Garden Apartments" where the robbery and shooting took place. He claimed Valentino Hayward and Bryan Rivers got out of the car with George Brown's gun, but he did not actually see the shooting. Rivers and Hayward eventually ran back from Saint Andrew Garden Apartments through the Shires and into Ardmore where they got back into George's car who then drove the group back to Cashew Street. Tr. 331, l. 3 – 334, l. 13. Julius testified that George Brown's gun was used in the Chopper shooting, in the robbery of the couple downtown, and in the murder of Marley Lion. Tr. 342, l. 24 – 343, l. 7; Tr. 346, ll. 7-10.

The defense then went through with the court what testimony he would elicit from Bryan Rivers if he were to proffer his testimony. Defense counsel explained:

> [W]hat I would cover with him [Rivers] in the context of an overall Cross-Examination would be that . . . about six days after the Marley Lion murder, there was an opportunity for Detective Osborne to have a formal meeting, sit down with Bryan Rivers where they talked on tape and Osborne asked him about being involved in a robbery at the Saint Andrews Garden Apartments with Tino, which he denied, and which was not truthful . . . I would use that to show that . . . when he needed to lie, he knew how to lie.
>
> With regard to the follow-up conversation that he had after his arrest on these charges on July 30th and 31st, I would cover the fact that he now admits that he, on June 1st, rode along on the preplanned robbery of Leroy Townsend, a.k.a. "Chopper," in the Saint Andrews Garden Apartments; that he got $1,300 in cash and drugs; he used the Marley Lion murder weapon to rob Townsend; He shot Townsend in the leg; it was George Brown's gun; that he's not been charged with this armed robbery pursuant to his proffer agreement; and he has not also been charged with attempted armed robbery pursuant to his agreement. And that's the sum and substance of what I would cover with Bryan Rivers.

Tr. 348, l. 12 – 349, l. 11.

The solicitor stated that there would be no need to have Rivers testify during a proffer based on what defense counsel indicated he would elicit from Rivers. "The only thing" the solicitor took "real issue with is" was that while Rivers "has not been charged with the Chopper shooting, that's not pursuant to any agreement with us [the solicitor's office]. What our agreement is, [is] that we can't use Bryan Rivers' words against him. We could make a case from other folks against him. He doesn't have immunity from prosecution." Tr. 349, ll. 14-20; see also Tr. 451, l. 14 – 452, l. 22.

Defense counsel renewed his objection at the end of this colloquy. See Tr. 350, l. 18 – 351, l. 1. He also renewed his objection at the end of his cross-examination of Julius Brown and Bryan Rivers, and after the state rested. See Tr. 447, ll. 12-15; see also Tr. 528, l. 22 – 529, l. 4; see also Tr. 1039, ll. 3-6. .

Discussion

The court erred by refusing to allow Appellant to cross-examine Julius Brown and Bryan Rivers about the armed robbery and shooting of Leroy "Chopper" Townsend that occurred approximately two weeks before Marley Lion was murdered. It was undisputed that Bryan Rivers was the shooter in this prior armed robbery, as well as the armed robbery of the couple downtown, and that the same firearm was used in all three cases. The court's erroneous ruling prevented Appellant from fully developing and presenting his defense that Bryan Rivers was the shooter who killed Marley Lion and that Appellant was merely present at the scene. This evidence should have been admissible under Rule 404(b), SCRE, the rule on third party guilt, and Appellant's due process right to present a defense.

Rule 404(b), SCRE

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013) (citing Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 415–16, 118 S.E. 803, 807 (1923)) (internal quotation marks omitted). "However, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Cope, 405 S.C. at 337, 748 S.E.2d at 204 (citing Rule 404(b)) (internal quotation marks omitted). "As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE. Cope, 405 S.C. at 337, 748 S.E.2d at 204 (citing State v. Clasby, 385 S.C., 148, 154, 682 S.E.2d, 892, 895 (2009)). "If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within an exception in Rule 404(b)." Id.

"Where there is a close degree of similarity between the crime charged and the prior bad act, the prior bad act is admissible to demonstrate a common scheme or plan. Cope, 405 S.C. at 337, 748 S.E.2d at 204 (citing Clasby, 385 S.C. at 155, 682 S.E.2d at 896). "When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." Id. (internal quotation marks omitted). "The evidence is admissible if the similarities outweigh the dissimilarities." Id. "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." Cope, 405 S.C. at 337, 748 S.E.2d at 204 (citing State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008))

(internal quotation marks omitted). "Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." Cope, 405 S.C. at 337-338, 748 S.E.2d at 204-205 (citing Clasby, 385 S.C. at 155, 682 S.E.2d at 896).

It was undisputed at trial that Bryan Rivers was the shooter during the armed robbery of Leroy Townsend on June 1, 2012, approximately sixteen days before the murder of Marley Lion. The trial court also found Bryan Rivers' involvement and identity as the shooter in this prior armed robbery was proved by clear and convincing evidence. See Tr. 210, ll. 15-16.

The trial court erred by failing to find there was a close degree of similarity between the attempted armed robbery and murder of Marley Lion and the armed robbery and shooting of Leroy Townsend. Both offenses involved the same people: Bryan Rivers, Julius Brown, George Brown, Rayshawn Milligan, and allegedly Appellant, and were planned by the same person: Julius Brown. Additionally, both robberies occurred near the Ardmore neighborhood within about a mile of each other and George Brown acted as the driver. See Tr. 130, ll. 7-12. Moreover, the same firearm, which belonged to George Brown, was used in both shootings. Finally, Stephanie Brown and Appellant's residence on Cashew Street was used as a home base, where the group originated from and returned to after each armed robbery and shooting.

On the other hand, the only noticeable dissimilarities between the two acts were that an additional person, Valentino Hayward, was involved in the robbery and shooting

of Leroy Townsend, and that Townsend was known to the men where Marley Lion was not.

Because there is an obvious degree of similarity between the two acts and the similarities clearly outweigh the dissimilarities, the trial court should have ruled the evidence of the armed robbery and shooting of Leroy Townsend admissible to demonstrate a common scheme or plan and establish Rivers' identity as the shooter during the attempted armed robbery of Marley Lion. See Cope, 505 S.C. at 337, 748 S.E.2d at 204. Because of this error, Appellant should be granted a new trial.

Third Party Guilt

The admissibility of evidence of third party guilt is governed by the rule set forth in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). In Gregory, our Supreme Court stated:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.... But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

198 S.C. at 104–105, 16 S.E.2d at 534–535 (internal citations omitted); see State v. Burgess, 391 S.C. 15, 22-23, 703 S.E.2d 512, 516 (Ct. App. 2010).

Evidence of Bryan Rivers' involvement and identity as the armed robber and shooter during the robbery of Leroy Townsend approximately two weeks before the murder of Marley Lion coupled with the evidence that he also robbed a couple at gunpoint in downtown Charleston merely hours before Marley Lion was shot "tends clearly to point" to Rivers as the individual who approached Marley Lion's car, attempted to rob him, and shot

into his car five to six times. See Gregory, 198 S.C. at 104–105, 16 S.E.2d at 534–535. This evidence also "raise[s] a reasonable inference" of Appellant's own innocence, especially when one considers Appellant's alleged role in both the armed robbery of Leroy Townsend and the robbery of the couple downtown. See Id. According to witnesses, during the robbery and shooting of Townsend, Appellant merely went along for the ride and remained in George Brown's car the entire time. Moreover, when Rivers held the couple up at gunpoint in downtown Charleston, the testimony was that Appellant, while he did exit the car, merely walked in the opposite direction and had no involvement in the robbery. Based on Rivers' and Appellant's undisputed roles in these two prior armed robberies, both which were extremely close in time to the murder of Marley Lion, again clearly tends to point to Rivers as the guilty party during the attempted armed robbery and shooting of Marley, not Appellant.

Furthermore, Appellant should have been able to fully present the evidence regarding the armed robbery and shooting of Leroy Townsend because of the clear "train of facts or circumstances" between the three known armed robberies. See Id. When Bryan Rivers was released from prison on June 1, 2012, a train of events began involving the same players (Julius Brown, Rayshawn Milligan, George Brown, Bryan Rivers, and Appellant), the same firearm (George Brown's gun), and a similar plan of robbing individuals who the defendants suspected had cash. Because of the evident connection between the robbery and shooting of Townsend and the attempted armed robbery of Marley Lion, the trial court should have permitted Appellant to present this evidence as evidence of third party guilt. Failure to do so was error.

Due Process

"The United States Constitution guarantees a criminal defendant the right 'to present a complete defense.'" Burgess, 391 S.C. at 21, 703 S.E.2d at 515 (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)). "This right is also guaranteed by our State constitution: 'Any person charged with an offense shall enjoy the right ... to be fully heard in his defense....'" Burgess, 391 S.C. at 21-22, 703 S.E.2d 512, 515-516 (quoting S.C. Const. art. I, § 14 (2009)); see S.C. Code Ann. § 17–23–60 (2003) ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor...."); State v. Lyles, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008). In Chambers v. Mississippi, 410 U.S. 284, 302 (1973), the United States Supreme Court stated: "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Burgess, 391 S.C. at 22, 703 S.E.2d at 516.

In Holmes v. South Carolina, 547 U.S. 319 (2006), the United States Supreme Court lowered the standard for presenting evidence of third party guilt. In Holmes, the defendant "sought to introduce evidence that another man, White, had actually perpetrated the crimes for which he was charged. He proffered several witnesses who testified White had been in the neighborhood where the crime occurred on the morning it was committed. He also presented testimony of witnesses who claimed White had admitted committing the crimes. The trial court refused to admit the evidence, noting the substantial incriminating evidence presented by the State and concluding that Holmes 'could not overcome the forensic evidence against him to raise a reasonable inference of his own innocence.'" Cope, 405 S.C. at 339, 748 S.E.2d at 205 (citing Holmes, 547 U.S. at 324) (internal citations omitted). On appeal, the United States "Supreme Court held

the trial court violated Holmes' right to a 'meaningful opportunity to present a complete defense' by excluding evidence of third-party guilt on the grounds that the State had introduced forensic evidence that, if believed, strongly supports a guilty verdict." Cope, 405 S.C. at 339, 748 S.E.2d at 205 (citing Holmes, 547 U.S. at 330–331).

Here, the trial court likewise violated Appellant's right to a "meaningful opportunity to present a complete defense" by excluding evidence regarding Bryan Rivers' use of the murder weapon during the armed robbery and shooting of Leroy Townsend two weeks before Marley Lion was killed. Based on the United States Supreme Court's holding in Holmes and Appellant's due process right to present a defense, Appellant should have been permitted to question Julius Brown and Bryan Rivers about the "Chopper shooting" in front of the jury and fully develop his defense that Rivers was the shooter. Failure to allow Appellant to present this evidence violated his constitutional right to present defense and denied him a fair trial. His convictions and sentence should be reversed and this case remanded for a new trial.

2.

The court erred by informing the jury during the court's opening instruction that a trial was "a search for the truth in an effort to make sure that justice is done" since this instruction was fundamentally incorrect, was burden shifting, and decimated the proper standard and jury inquiry of whether the state had proved Appellant's guilt beyond a reasonable doubt.

Relevant facts

In the judge's opening instructions to the jury she told the jurors their mission:

> Ladies and gentlemen, I wanted to take this opportunity to tell you that this trial probably will be different from what you might expect. Most people do not have the opportunity to come to court as you are doing now, and most people think that from watching television or movies or reading books, that trials are fully of intense drama and riveting circumstances. While all of these things are true at some times, please remember this trial is not for your entertainment. It is a fundamental part of our democracy. **It is a search for the truth in an effort to make sure that justice is done before the parties before you. Searching for the truth and making sure that justice is done is often slow, deliberate, and repetitive, the opposite of what you may have seen on television or movies or read in books.**
>
> This courtroom is a place of honor. It is dedicated to the protection and preservation of citizens' rights to what many have called the greatest justice system ever created. The attorneys that are appearing before you here today are advocates for the parties that they represent, but first and foremost, they are officers of this court. They are sworn to uphold the integrity and the fairness of our judicial system.

Tr. 230, l. 3 – 231, l. 2 (emphasis added).

The judge also instructed the jurors:

> Ladies and gentlemen, after the arguments of counsel, and after you have heard the testimony in this case, and I have charged you in the law applicable to this case, **you will be in**

a position to determine the true facts, and render a true and just verdict.

Tr. 236, ll. 17-22. (emphasis added).

When the jury left the courtroom the judge allowed Defense Counsel Pennington to put on the record his objection to the court's opening instruction. Defense counsel objected to the judge's instruction that a trial was "a search for the truth." Counsel objected because this instruction could mislead the jurors into thinking their job was to be "evaluators of the quality of the evidence" which was confusing because a juror would believe "*this was not a question of purely, have they proven their case, but a search for the truth*, this could result in, I think, a more – inappropriate burden for those jurors." Defense counsel asked the judge to modify her instructions to cure this defect. The judge stood by her instructions and denied relief. Tr. 269, l. 3 – 270, l. 5. (emphasis added).

Discussion

This preliminary instruction is far more pernicious than "seek the truth" language in a closing instruction from the trial court. The fact this occurred at the opening is all the more problematic, in that throughout the trial the jurors were concentrating on evaluating the quality of the evidence in a search for the truth rather than thinking in terms of their actual straightforward task of determining whether the state was proving its case beyond a reasonable doubt. Premature deliberations are prohibited but certainly individual jurors are evaluating the evidence as it is presented, and *the context* in which they are evaluating that evidence based on the judge's initial instructions is very important.

In other words, it is critical whether the jurors are listening to the testimony trying to determine what really happened (a search for the truth) rather than listening in terms of whether the state is meeting its burden of proving guilt beyond a reasonable doubt.

Sixteen years ago, in State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), the Supreme Court strongly urged trial judges to avoid using any "seek" language. The Court noted that such "seek the truth" language was unnecessary, and it ran the risk of unconstitutionally shifting the burden of proof to the defendant.

The Court also explained that the "seek the truth" language is also troublesome when given in conjunction with other confusing or burden shifting language such as a reasonable doubt "is a doubt for which you can give a real reason." See State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991); State v. Raffalt, 318 S.C. 110, 456 S.E.2d 390 (1995).

More recently, almost one year to the day before this trial, the Supreme Court in State v. Daniels, 401 S.C. 251, 737 S.E. 473 (2012) considered a similar jury instruction that "whatever verdict you reach will represent truth and justice for all parties that are involved in this case." Although the issue was not preserved the Supreme Court instructed trial judges "[to]remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is `just' or `fair' to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt."

In this case, the judge also told the jury in her opening instruction that at the conclusion of the case they would be in a position to "render a true and just verdict." Tr. 236, ll. 17-22. This "true and just verdict" language reinforced in the jurors' minds that it was their duty to "seek the truth" and render a "true and just verdict," rather than do what the Constitution requires, determine if the state met its burden beyond a reasonable doubt. See, Jackson v. Virginia, 443 U.S. 307 (1979).

In State v. Aleksey, 343 S.C. 20, 538 SE2d 248 (2000), the Supreme Court repeated its warning that trial courts should avoid using any "seek the truth" language. However, the court in Aleksey noted that the "seek" language was used in that case as an instruction on witness credibility. The "seek" language did not appear in either the reasonable doubt or circumstantial evidence portion of the instruction. The Court in Aleksey therefore found there was not a reasonable likelihood that the jury applied the challenged instruction in a manner inconsistent with the state's burden of proof beyond a reasonable doubt.

Here, conversely, the instruction in this case on the jury's duty being to "search for the truth" was not only included, but became the centerpiece of the judge's instruction to the jury on what a ***criminal trial is all about***. Tr. 230, l. 3 – 231, l. 2; Tr. 236, ll. 17-22. A jury's function is not to search for the truth, and the truth is justice. It is fundamentally different from truth and justice. The jury's function is to determine whether the state has proved the defendant's guilt *beyond a reasonable doubt.*

When examining the judge's initial instruction to the jury regarding the jury's function it is remarkably clear that it was burden shifting due to its lack of an instruction on the duty of the jury to find the defendant guilty beyond a reasonable doubt, and its emphasis that a criminal trial was a "search for the truth" and that it was the jury's "solemn responsibility to determine the guilt or innocence of the Defendant..." Tr. 230, l. 12 – 231, l. 2; Tr. 234, ll. 16-17; Tr. 236, ll. 17-22.

The fact that the trial judge stated her instructions to the jury were not instructions on the law is of no consequence given the reality, and not the legal fiction, that the jury naturally looks up to the trial judge and expects guidance from her on how they should act

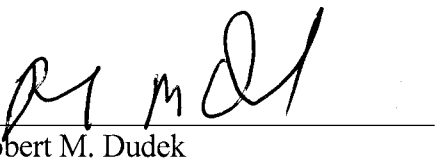
and what their responsibility were. Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22 (1987). That was the reason the judge gave the opening instruction after all.

The judge made clear in her opening instructions that it was the duty of the attorneys to be professional and acted as officers of the court, and it was the jury's function to act professionally and seek the truth when determining whether the defendant was guilty or innocent. That was the antithesis of the jury's real function which was to determine whether the state proved the defendant's guilt beyond a reasonable doubt. Given this fundamentally inaccurate instruction on the purpose of a criminal trial and the jury's function, Appellant should be granted a new trial.

CONCLUSION

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

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

Lara M. Caudy
Appellate Defender

ATTORNEYS FOR APPELLANT

This 3rd day of December, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

DEC 03 2014

SC Court of Appeals

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RYAN P. DELESTON,

APPELLANT

APPELLATE CASE NO. 2013-002224

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 3rd day of December, 2014.

Robert M. Dudek
Chief Appellate Defender

Lara M. Caudy
Appellate Defender

ATTORNEYS FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of December, 2014.

Rhonda Denise Ingworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.