THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Honorable R. Keith Kelly, Circuit Court Judge

SC Court of Appeals No. 2014-000448

The State, ... Respondent,

vs.

Daniel William Spade ..... Appellant

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Procedural Facts

Daniel Spade was arrested on May 3 , 2011 and charged with criminal sexual conduct with a minor. The Spartanburg grand jury indicted him on June 17, 2011. An amendment was returned on February 21, 2014. He was tried before the Honorable R. Keith Kelley and a jury on February 24-26, 2014. Prior to the start of the trial, Solicitor Barry Barnett presented a letter written by him appointing Mr. Doug Brannon, the attorney who had represented the mother and adoptive father in the second termination of parental rights matter, as a special prosecutor in the trial. The jury convicted Mr. Spade of criminal sexual conduct with a minor. Judge Kelly sentenced him to 35 years in prison. Mr. Spade filed his notice of appeal on March 4, 2014.

Facts of the Case

While Daniel Spade was employed with the same company as Heather Smith, they met and had a brief affair.[1] As a result of this affair, a daughter was born. Mr. Spade, who then resided in Virginia, came to Spartanburg a few months after the birth of his child to visit. Rec. on App. at 155, ll 5-9. He visited numerous other times as she grew older. Rec. on App. at 155, ll 15-17.

Mr. Spade expressed a desire to establish regular visitation with his daughter. When the mother rebuked this attempt, he filed an action seeking visitation in August of 2007. Rec. on App. at 155, ll 15-17; Rec. on App. at 177, ll 23-25. The parties agreed to mediate the

[1] In December of 2007 Mrs. Smith married David Jolley who later adopted the minor child. Rec. On App. at 155, ll 20-21.

matter prior to a hearing. During the mediation conference, the mother of the minor child decided that "Danny D" would be the appropriate name for their daughter to call Mr. Spade. Rec. on App. at 156, ll 6-23. No explanation was given for the name chosen for the daughter to use.

As a result of the mediation, Mr. Spade was given visitation with his daughter. Before visitation could begin, Mrs. Jolley filed the first action to terminate Mr. Spade's parental rights. This action was filed in 2008. Rec. on App. at 24-25 to 153, ll 1-14; Rec. on App. at 196, ll 20-23. After Mrs. Jolley lost the first termination of parental rights action, Mr. Spade started his visitation. He visited with the minor child several times in Spartanburg and for ten days in the summer of 2010 she went to Virginia to stay with him. Rec. on App. at 154, ll 19-23. After the visitation in Virginia, Mr. Spade visited in Spartanburg, SC in September and October of 2010.

After the September of 2010 visit, Mrs. Jolley complained of their daughter having anxiety attacks, not sleeping well, crying for no reason and, after being potty trained, started to wet herself. Rec. on App. at 161, ll 8-25 to 163, ll 1-9. She sought out Kimberly Roseborough, a counselor who was qualified at trial as an expert in child abuse and treatment. Rec. on App. at 202, ll 19-22. At that time she also filed an action to stop all visitation. Rec. On App. at 179, ll 20-23. The purpose of the minor child seeing the counselor was to resolve the anxiety issues. After about 6 months of counseling, during which no allegation of sexual abuse arose, the counselor, on March 28, 2011, told Mrs. Jolley she was recommending that visitation resume. Rec. on App. at 184, ll 5-22; 217, ll 11-16. This counselor had also recommended to Mrs. Jolley that a "sit down" be held with Mr. Spade, the counselor, and Mr. and Mrs. Jolley.

Rec. on App. at 198, 3-8. This was the last contact Ms. Rosborough had with the minor child and Mrs. Jolley.

During the time visitation stopped, Mr. Spade did have telephone contact with his daughter. Rec. on App. at 188, ll 13-13-16; 190, ll 14-18. Mrs. Jolley testified she was "not happy" that Mr. Spade had told their daughter "[Minor child], you can say I love you too, daddy." Rec. on App. at 189, ll 11-18.

Three days after the recommendation that visitation resume, Dale Smith, the grandmother of the minor child, first reported that the child told her of an incident of alleged sex abuse. Rec. on App. at 219, ll 9-21. A "day or two" after Mrs. Smith was first told of the alleged incident, she told her husband. Rec. on App. at 243, ll 16-25 to 244, ll 1-2 After a few more days, Mr. Smith reported what had been said to Mrs. Jolley. Rec. on App. at 245, ll 20-22.

The child's mother then took the child to Tabitha Webber for a forensic interview. She was qualified at trial as an expert in family counseling and child therapy. Rec. on App. at 261, ll 17-20. Ms. Webber testified that as a result of her interview she contacted the local police and made arrangements for the minor child to enter therapy. Rec. on App. at 253, ll 2-13. As a result of the statement by the minor child, Mr. Spade was arrested.

The minor child testified that during a visit Mr. Spade put his private parts in her mouth. Rec. on App. at 142, ll 7. The minor child further testified that no other act of sexual abuse occurred. Rec. on App. at 144, ll 8-9. She did not identify on which visit this occurred, but that it occurred in the restroom near the pool. Rec. on App. at 142, ll 8-25. She further testified that the pool was on the same floor as their room. Rec. on App. at 148, ll 15-22. The testimony by the witness from the hotel was that Mr. Spade stayed on the second floor on one

visit and the third floor on the other stay. Rec. on App. at 238, ll 18-25 to 239, ll 1-13. The pool was located on the first floor. Rec. on App. at 239, ll 1-2. The minor child also testified that a lot of people were present at the pool. Rec. on App. at 151, ll 23-24. These people would have had ready access to the restroom at the pool. She further stated that the bathroom did not contain a stall. Rec. on App. at 149, ll 13-18. The record did not establish on which day Mr. Spade stayed at the hotel that this incident allegedly occurred.

Argument

Question I

Did the trial court err in excluding the testimony of Dale Smith as to the occurrence of panic attacks by the minor child when adult males other than Daniel Spade was present when the occurrence of panic attacks was used by the state to prove Mr. Spade had abused his daughter?

At trial defense counsel proffered the testimony of Dale Smith to establish that the minor child had had panic attacks when David Jolley, the adoptive father, was present. Rec. on App. at 228, ll 11-17. The state argued that this was proof of third party guilt which had been excluded in a pre-trial hearing. Rec. on App. at 229, ll 21-25. The state further argued the testimony should be excluded because it tended to show "[a]nd even in the best light I don't think you could say that it's just David Jolley. It could be any male person, or whatever, that could cause these panic attacks from there but there were other people available." Rec. on App. at 229, ll 23-25 to 230, ll 1-2. The state then concluded "To me, even if it is relevant in this case, it's highly prejudicial. It outweighs the probative effect in this case." Rec. on App. at 231, ll 20-22. In response, defense counsel appropriately pointed out "We are not establishing third

party guilt. We are establishing explanation for symptoms, which the State of South Carolina is going to argue is a symptom of child sexual abuse and she's having panic attacks because of what her biological father did." Rec. on App. at 232, ll 15-19. The testimony was excluded.[2]

True to the prediction by defense counsel, the state argued in closing the anxiety attacks were caused by the sexual abuse. Mr. Brannon said in closing "Then what we found out was that he got to take [minor child] to Virginia for an extended period of time. And then you hear that [minor child] becomes anxious. You hear that a potty trained little girl wets herself. You hear that a four year old girl, is afraid of the dark. You hear that a four year old little girl has to sleep under a table like this. You hear that this baby does this just so she can close her eyes and not be afraid." Rec. on App. at 301, ll 3-10. He further argued "But what we know is before that meeting [the minor child] was curled up under a table. [The minor child] was fearful. [the minor child] was clinging. [The minor child], potty trained, stands behind a door in the bathroom in her mommy's house and pees herself." Rec. on App. at 303, ll 10-15. But what the jury did not hear was an alternative explanation for these anxiety attacks. The jury was left with only one impression - the attacks were caused by the alleged sexual abuse. With no other explanation for the anxiety attacks, the conclusion of the jury was both logical and compelled by the evidence.

The alternative explanation for the anxiety was relevant evidence as it tended to prove the anxiety was not caused by any alleged sexual abuse by Mr. Spade. As the South

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[2] The trial judge cautioned defense counsel concerning this testimony "Don't point to any particular individual." Rec. on App. at 234, ll 8-9. This admonishment apparently did not apply to the prosecution as Mr. Brannon, in his closing argument, pointed to only one individual - Mr. Spade.

Carolina Supreme Court has said " Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); Rule 401, South Carolina Rules of Evidence. The trial court mistakenly viewed the testimony as being evidence of third party guilt which he had excluded in a pre-trial motion. He failed to recognize that the testimony was relevant on the issue of the cause of the anxiety. Defense counsel never argued the testimony related to third party guilt. Nor did the trial judge explain how the testimony related to third party guilt.

As the state argued below, an alternative explanation for the anxiety would, of course, been prejudicial to the theory of the state's case. But when one argues that evidence is prejudicial, this is not what is meant. As the South Carolina Supreme Court has said "Moreover, the standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE is whether there is a danger of unfair prejudice that substantially outweighs the probative value of the evidence." *State v. Collins*, 409 S.C. 524, 536, 763 S.E.2d 22, 28 (2014), reh'g denied (Sept. 24, 2014). Evidence that supplies an alternative explanation for the anxiety is probative of a very relevant issue. Any alleged prejudice to the state in admitting the testimony is not outweighed by the defendant being able to explain a series of facts in a manner inconsistent with the state's theory of guilt. As has been said by another court "Unfair prejudice does not mean the damage to [the state'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." *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir.1993)

The trial judge used an improper basis to rule that the testimony was not admissible. This ruling prevented the jury from hearing relevant evidence that would establish

an alternative explanation for the anxiety attacks. This testimony would not have caused the jury to decide the case on an improper basis. In fact, the testimony would have aided the jury in deciding the case on a proper basis.

Question II

Did the trial court err in declaring that the attorney for Daniel Spade improperly struck Juror 199 based upon her gender strike when the attorney specifically stated the jury was struck for her age and being retired?

During the jury selection, the state objected to the decision of the attorney for Mr. Spade to strike Jurors 13 and 199. When the jury was re-selected, Juror 199, whom the trial judge prevented defense counsel from striking, was selected for the second jury. That juror, therefore, is the only juror in question in this appeal. *See, State v. Adams*, 322 S.C. 114, 126, 470 S.E.2d 366, 373 (1996) ("When the trial judge quashed the first jury panel, the parties selected a new jury. Adams has voiced no complaints about the new jury. We find that no prejudice resulted from the judge's error.")

When asked about Juror 199 defense counsel explained his decision by saying "Number 199 is a retired grandmother. We did not feel she would be appropriate." Rec. on App. at 92, ll 14-15.[3]

After that statement by defense counsel the following occurred between trial counsel and the judge:

THE COURT: Tell me what you mean by that, Ken. She was a

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[3] While defense counsel did not specifically articulate what was meant by not being appropriate, the testimony at trial was that the report of sexual abuse was first made by the grandmother of the minor chid. Rec. on App. at 243, ll 16-25 to 244, ll 1-2

grandmother?

MR. SHABEL: It's prejudicial to our client. We felt that given the age and the retired nature and the number of kids she has, we didn't feel like she would be an appropriate juror in our case." Rec. on App. at 93, ll 8-13

* * *

THE COURT: I'm sorry - - I'm sorry, number 99 - - 199. 199.

Mr. SHABEL: The same thing, Your Honor.

MR. BRANNON: The same thing what? She's a retired grandmother?

MR. SHABEL: If I am remembering correctly. Age and background. She's 65 years old and has three children and divorced. We felt she would be prejudicial. Rec. on App. 93, ll 17-25

The state then said "They struck them because they were female, was what they did." Rec. on App. at 94, ll 21-22. Defense counsel then pointed out that two women were on the jury and he still had four strikes left when the final juror was selected.[4] In fact, the fourth juror selected was a female at which time the defendant had only used two of his ten strikes. Also, the eleventh juror selected was a female when the defendant had four strikes left. These facts, when considering the totality of circumstances, are evidence that the defendant did not purposefully strike the juror based upon gender.

In giving the reason for striking Juror 199, the attorney for Mr. Spade stated the strike was based upon her being over 65 and retired. That is a gender neutral basis for striking a potential juror. In an attempt to meet its obligation under *Batson* to refute this gender neutral basis for striking the juror, Mr. Brannon simply said "I think that they also would show that there

[4] Of the twenty-two jurors drawn in the initial jury selection, fourteen were male.

are men the same age as some of the women who were struck on here because they were grandmothers." Rec. on App. at 97, ll 10-13. But the state never named any specific juror who would fit the claimed profile. The trial judge also never named any specific juror who would fit the profile. Our Supreme Court has said "During step three, the party asserting the *Batson* challenge should point to direct evidence of racial discrimination, such as showing that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race." *State v. Inman,* 409 S.C. 19, 27, 760 S.E.2d 105, 108-109 (2014). The state has not met its burden in step three as they failed to identify any specific juror who was male and who was over the age of 65. If any juror were even close to the age of Juror 199, and had the state pointed out a specific juror, defense counsel would have had the opportunity to explain a specific reason for accepting that juror. Mr. Brannon, however, did not name a specific juror so no explanation was required.

This court will not, and should not, review an objection that is not ruled upon by the trial court. *State v. Johnson*, 363 S.C. 53, 59, 609 S.E.2d 520, 523 (2005) ("Because the objection was clearly based on remoteness and not the use of the moral turpitude standard, we hold that the issue regarding the use of the moral turpitude standard is not preserved for appellate review.") Likewise, this court should hold that the failure of the state to identify a seated male juror who was over 65 precludes the trial court and this court from upholding the state's *Batson* motion. The person making the *Batson* objection is required to do more than say some seated juror may have been of the same age or some juror may have been seated that is identical to the reason given in opposition to the *Batson* challenge. Suppose the state, in response to a *Batson* objection by a defendant, gave a racially neutral reason of "unemployed." The defendant would

not have met its burden to prove the ground was pre-textual by saying "I think that they would also show that there were white jurors on that jury who were unemployed." This court would and should require more. This court would, and should, simply say "the defendant failed to prove its allegation." This case is no different.[5]

The reason for such a rule is simple. Had the state made its *Batson* motion and in response said a certain male juror was over 65, then defense counsel would have been given the opportunity to explain why that juror was an appropriate juror notwithstanding his age. For example, defense counsel may have known that the juror had a close friend who had been falsely accused of criminal sexual conduct with a minor or a myriad of other reasons. The trial court would have been required to consider those reasons in making its final determination.

Question III

Did the trial court err in permitting Douglas Brannon, a private attorney, to actively participate in the trial of this case when he had represented the mother and adoptive father of the minor child in the family court case?

On the morning of trial, the solicitor for the Seventh Judicial Circuit gave counsel for Daniel Spade a letter stating that Doug Brannon, the attorney who represented the mother and the adoptive father in the second action involving the termination of the parental rights of Mr. Spade, would be a special prosecutor in the case. Counsel for Mr. Spade asked that Mr. Brannon be disqualified on two grounds. First, he had not been appointed in keeping with the provisions

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[5] In making the *Batson* motion, Mr. Brannon also said "But I don't think age is an appropriate measure of - - a basis for a strike either, Your Honor." Rec. on App. at 95, ll 17-19. The trial court did not rule on the age issue and research has not located a case that says age is a proper basis for a *Batson* motion.

of S.C. Code § 1-7-470. Second, counsel pointed out that Mr. Brannon had represented both the natural mother and the adoptive father in the action in Family Court to terminate the parental rights of Mr. Spade and "that creates an inherent conflict of interest . . . ." Rec. on App. at 18, ll 1-25. The TPR action was based upon the same allegations as this present action.

In arguing against the motion the solicitor argued:

> MR. BARNETTE: Your honor, I think the solicitor has the right to appoint a special prosecutor.
>
> Mr. Brannon has been involved in this case almost from the beginning. He knows it inside and out. He's been very helpful to our prosecutors. We have actually gotten Jennifer Jordan and Kim Leskanic going to be trying this case, Your Honor, from that standpoint.
>
> * * *
>
> This weekend I made that decision going through, and we actually met with Ms. Jordan, and I said "why don't we just appoint you as special prosecutor to help out in case some issue comes up and potentially help with a witness or help with the situation within the trial itself."
> Rec. on App. at 19, ll 3-21.

Mr Brannon did more than just "help out" on some issue. He argued the *Batson* motion. Rec. on App. at 91, ll 18-25 to 99, ll 1-16. He assisted the minor child from the stand. Rec. on App. at 153, ll 9-11. He conducted the direct examination of Meredith Thompson-Loftis and the motions related to her testimony. Rec. on App. at 254, ll 3-25 to 276, ll 1-14. He argued the issue of the order of closing arguments. Rec. on App. at 285, ll 21-25 to 287, ll 1-18; 292, ll 6-18. Finally, he made the only closing argument for the state. Rec. on App. at 296, ll 15 to 25, to 306, ll 1-8.

In denying the motion on both grounds, the trial judge simply said "Well, I don't see a conflict, though Mr. Shabel. I really don't. Mr. Barnette, as the solicitor of this circuit, can

appoint any licensed attorney to act as a special prosecutor. That's my understanding." Rec. on App. at 20, ll 7-10. He further said "[A]s far as the conflict, I don't see the conflict. Certainly there would be a conflict had he represented your client - - . . . but he didn't." Rec. on App. at 20, ll 14-19.

The inherent conflict of the special prosecutor mentioned by defense counsel below violates the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fifth and Fourteenth Amendments to the Constitution of the United States of America. A defendant in a criminal case has the right to be prosecuted by a prosecutor who is free from any conflict of interest, potential or actual.

The United States Supreme Court has held that an attorney for a company cannot be appointed as special prosecutor in a trademark criminal contempt action for violation of a restraining order where the attorney also represents the company who owned the trademark. The Court said "[A]s will generally be the case, the appointment of counsel for an interested party to bring the contempt prosecution in this case at a minimum created *opportunities* for conflicts to arise, and created at least the *appearance* of impropriety." *Young v. United States*, 481 U.S. 787, 807 (1987)(emphasis in original).

The reason for such a rule is clear. As the Supreme Court said in *Berger v. United States*, 295 U.S. 78, 88 (1935) "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall

not escape nor innocence suffer." A prosecutor does not have the obligation of confidentiality to the natural mother and adoptive father that Mr. Brannon has. The obligation of confidentiality to a client is exactly what creates the conflict. A prosecutor has an ethical duty to share with defense counsel all conversations with prosecution witnesses which may be inconsistent with prior statements. The private lawyer has the exact opposite obligation. His conversations with his client must remain sacrosanct. In holding that a prosecutor who had represented the wife in a divorce action could not also prosecute the husband on a criminal assault charge, the Fourth Circuit Court of Appeals said " We think the conduct of this prosecuting attorney in attempting at once to serve two masters, the people of the Commonwealth and the wife of Ganger, violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment." *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967); *See also, State v. Eldridge,* 951 S.W.2d 775 (Tenn. Ct. Cr. App.)

An argument has been made that the rule of confidentiality is so strong that even with a waiver, a trial court should disqualify a prosecutor from handling a case that involves his former client. "Moreover, given the public interest in reserving confidentiality, the court may exercise its inherent power and disqualify the district attorney even if the former client waives his confidentiality." Eli Wald, *Disqualifying a District Attorney When a Government Witness Was Once the District Attorney's Client: The Law Between the Courts and the State,* 85 DENV. U. L. REV. 369, 383.

To the extent *State v. Addis*, 257 S.C. 482, 186 S.E.2d 415 (1972) is contrary to the argument of Mr. Spade in this matter, the case should be overruled. *Addis* recognizes that privately retained counsel "assumes the same obligations to the court as the solicitor himself."

Id. at 417, 257 S.E.2d at 487. The case does not address the inherit conflict involved in this dual representation as discussed in this brief. The Court further stated "If he participates in the trial of a case and does only what a solicitor should do, the defendant has no right to complain." *Id.* As noted above, as a matter of ethics, a private attorney cannot do only what a solicitor does. He is required to honor the confidentiality of his conversations with his client. The solicitor does not have such a requirement.

The practice of appointing "special prosecutors" has been criticized by the South Carolina Supreme Court. The court has said "Although we find no error in this practice, we express our disapproval of the practice of appointing private counsel to prosecute criminal cases. Because of the increased possibility of a conflict when private counsel is involved, we believe the practice should be discouraged." *State v. Mattoon,* 287 S.C. 493, 495, 339 S.E.2d 867, 869 (1986). No case in South Carolina involving special prosecutors has discussed or mentioned the inherent conflict of the duty to disclose evidence by a prosecutor and the duty to honor confidentiality by the private lawyer.

Mr. Spade is not required to prove actual prejudice in this case. As noted by the United States Supreme Court "Given the fundamental and pervasive effects of such an appointment, we therefore hold that harmless-error analysis is inappropriate in reviewing the appointment of an interested prosecutor in a case such as this." *Young* at 814. In fact, to develop prejudice Mr. Spade would have to be permitted to examine Mr. Brannon under oath and ask that he obtain a waiver from his clients of the attorney-client privilege. The simplest solution is for this court to reverse the conviction of Mr. Spade with a decision barring in this case and in the future, the use of a special prosecutor who has represented parties involved in the same incident

as the prosecution.

Question IV

Did the trial court err in ruling that Doug Brannon had been properly appointed as required by S. C. Code § 1-7-470 when the solicitor failed to produce the commission from the governor as required by the statute?

In *State v. Matton,* 287 S.C. 493, 339 S.E.2d 867 (1986) the South Carolina Supreme Court held that S. C. Code § 1-7-405 applies to special prosecutors. Thus, S. C. Code § 1-7-470 should also apply to the special prosecutor in this case. Defense counsel called to the attention of the trial court that Doug Brannon had not been commissioned by the governor's office as required by the statute. Rec. on App. at 18, ll 12-16. The trial court simply ignored this argument and permitted Mr. Brannon to act as a counsel in the case.

Our Supreme Court has held that a violation of a statute does not cause a reversal of a trial unless the defendant can establish prejudice. *State v. Huntley*, 349 S.C. 1, 6, 562 S.E.2d 472, 474 (2002)("Evidence the simulator test was not run in conformity with Act 434 goes to the weight, not the admissibility, of Huntley's breathalyzer results."). In this case Mr. Spade can establish prejudice. As the Fourth Circuit has said "We think the conduct of this prosecuting attorney in attempting at once to serve two masters, the people of the Commonwealth and the wife of Ganger, violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment." *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967). By permitting Mr. Brannon to assist in prosecuting this matter, the due process right of Mr. Spade to have a truly independent prosecutor prosecute his case has been violated.

Question V

Did the trial court err in failing to exclude the testimony of Meredith Thompson-Loftis when the state had been ordered to turn over to the defendant the file of Ms. Loftis if they intended to use her as a witness a reasonable time before trial and the state did not turn over substantial portions of the file until four days before trial and portions were not turned over until the day of trial?

Under the order of the Honorable J. Mark Hayes filed on February 27, 2013 the order specifically required the state, within a reasonable time before trial, to turn over the file of Meredith Thompson-Loftis in the event they elected to use her as a witness in the case. Order of J. Mark Hayes filed February 27, 2013. On October 31, 2013 the state sent to defense counsel the records of Ms. Loftis from May 17, 2011 through February 16, 2012. Rec. on App. at 35, ll 15-21. The defendant concedes this was a reasonable time before trial. On Thursday before the trial, the state sent to the defendant records of Ms. Loftis from February 23, 2012 until December 31, 2013. Rec. on App. at 35, ll 18-25 to 26, ll 1-6.

During the testimony of Ms. Loftis, defense counsel learned that the minor child had continued to see Ms. Loftis for January and February of 2014. Rec. on App. at 268, ll 10-25. These notes were not given to defense counsel. The trial judge, in rejecting defense counsel's motion to strike her testimony and exclude her testimony from the record, ruled that the state could not use any testimony from the counseling sessions in January and February of 2014. Rec. on App. at 271, ll 4-23.

The violation of the discovery rules in this case is more than a violation of Rule 5 of the South Carolina Rules of Criminal Procedure. Arguably the notes from Ms. Loftis may not

have been obtainable under Rule 5. *See, State v. Trotter,* 322 S.C. 537, 473 S.E.2d 452 (1996) Defense counsel, in preparation for the trial, and not relying entirely upon Rule 5, had over a year before trial obtained a specific order from Judge Hayes requiring that the notes be turned over a reasonable time before trial. As defense counsel appropriately pointed out to the trial judge "Furthermore, Your Honor, just for the record, it does - - you know, the fact that we got it prevents us from being able to have any experts, should we have wanted to have an expert look at it." Rec. on App. at 38, ll 18-21.

The courts of South Carolina have held on numerous occasions that a violation of Rule 5 discovery is not reversible unless the defendant can show actual prejudice. *See, State* v. *Kerr*, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1999) The defendant contends that this analysis should not apply here because the state has violated a specific order of a circuit judge to produce the information in time for the defendant to be able to use the information at trial. When a specific order is involved, this court should not use a prejudice standard for the state had known of the specific court order. When a specific order is involved this court should not engage in a speculative analysis as to how defense counsel could have used the information.

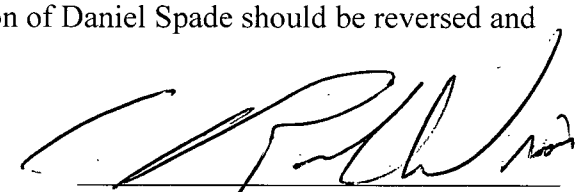
In addition, a defendant would not know how the information may be helpful until defense counsel has had the opportunity to further evaluate the information with an expert. The state had ample notice to provide the defendant with the proper information. In fact had the state simply provided all the notes from Ms. Loftis that it had available on October 31, 2013 this issue would not have arisen. At the trial below the state never explained why they did not produce all of Ms. Loftis' notes that were in fact available when they made a partial disclosure. The state simply cannot assert a good faith effort to comply with the order.

Trial counsel requested that the testimony of Ms. Loftis be excluded. The trial judge refused. But this was not the only alternative available to the trial court. "[O]nce a trial court determines that a discovery violation has occurred, the court may order further discovery, grant a continuance, exclude the evidence, or impose any sanction which, in its discretion, it deems just under the circumstances." *People v. Aguilar*, 218 Ill. App. 3d 1, 9, 578 N.E.2d 109, 115 (1991). At the very least the trial judge should have continued the case to permit defense counsel to evaluate the evidence. Only after an evaluation by an expert can the defendant clearly establish harm.

CONCLUSION

For the foregoing reasons the conviction of Daniel Spade should be reversed and the matter remanded for a new trial.

December 10, 2014



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