STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
J. Derham Cole, Circuit Court Judge

Appellate Case No. 2013-001411

THE STATE, ...RESPONDENT

v.

ROBERT ODELL BROWN,.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly refused Appellant's request for a jury charge on specific intent to kill when instructing the jury on the law of attempted murder pursuant to section 16-3-29 of the South Carolina Code where the charge given accurately stated the law and where any error with respect to the "intent" aspect of the attempted murder instruction was harmless beyond a reasonable.

2. Whether the trial court properly denied Appellant's motion to compel disclosure of the officer/victim's personnel file where Appellant failed to demonstrate that any evidence was suppressed by the State or that the evidence allegedly suppressed was material to Appellant's guilt.

STATEMENT OF THE CASE

Robert Odell Brown (Appellant) was indicted at the June 12, 2012 term of the grand jury for Spartanburg County for attempted murder (2012-GS-42-358 - count I); possession of a weapon during commission of a violent crime (2012-GS-42-358 - count II); failure to stop motor vehicle when signaled by an officer (2912-GS-42-359); and resisting arrest with a deadly weapon (2012-GS-42-360). He was represented by Chief Public Defender Clay T. Allen of the Seventh Circuit Public Defender's Office. The State was represented by Solicitor Barry J. Barnette of the Seventh Circuit Solicitor's Office. (R.p.1). Appellant made a pretrial motion to compel disclosure of evidence. (R.p.414-415). He was seeking personnel records from the law enforcement officers involved in his arrest, including the officer who was the victim of the charges. On May 9, 2013, a pretrial hearing on Appellant's motion was held at the Spartanburg County Courthouse before the Honorable J. Derham Cole. After hearing arguments, the trial court took the motion under advisement. (R.p.1-p.12). On June 7, 2014, Appellant submitted a memorandum in support of his motion (R.p.416-419), and on June 14, 2013, the Solicitor submitted a written return asking that the motion be denied, restricted, or deferred for several reasons. (R.p.420-426). The trial court ultimately denied the motion at the start of trial, as set forth in greater detail below.

On June 17-20, 2013, Appellant proceeded to trial by jury before the Honorable J. Derham Cole, pursuant to which he was found guilty as indicted. Judge Cole sentenced Appellant to thirty (30) years' imprisonment for attempted murder, ten (10) years' consecutive imprisonment for resisting arrest with a deadly weapon, five (5) years' consecutive imprisonment for possession of a weapon during the commission of a violent

crime, and three (3) years' concurrent imprisonment for failure to stop for a blue light, for an aggregate sentence of forty-five (45) years' imprisonment. (R.p.394, line 23-p.404, line 19). Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a Brief in support of his appeal.[1] This Brief of Respondent (the State) follows.

[1] Based first on an Order from this Court and then a later courtesy request from the State, Appellant filed an Amended Initial Brief and a Second Amended Initial Brief.

STATEMENT OF FACTS

Pretrial Motion to Compel Disclosure

Prior to trial, on May 9, 2013, Appellant made a motion to compel disclosure of evidence. (R.p.414-415). He was seeking employment records regarding the law enforcement officers involved in his arrest, including those for the officer who was the victim of the charges, John Doe.[2] On May 9, 2013, a pretrial hearing on Appellant's motion was held before Judge Cole at the Spartanburg County Courthouse. Appellant explained he was "seeking evidence from the personnel files, internal affairs files and any other evidence of prior conduct of John Doe . . . which may demonstrate [his] character of credibility which may be favorable to the defendant in his case." (R.p.3, lines 1-11) (emphasis added). He claimed he would "take issue with certain material facts related by the officers" and was "trying to determine if there's any information in these files that may indicate these officers have had previous writeups, disciplinaries or any other actions that may relate to their credibility which may lead us to additional evidence which may be admissible evidence in the case as, again, relates to the officers' credibility." (R.p.3, line 18-p.4, line 21) (emphasis added). Appellant repeated: "I only look for information that may relate to the credibility and may lead us to admissible evidence that can be used in his – in my client's case and in this particular case. (R.p.5, lines 9-13) (emphasis added). During the ensuing discussion with the court, Appellant mentioned the possibility there might be "information in a case like this about excessive use of force in other cases in the past" and said that "John Doe in particular – has been known to use excessive force;" however, he continued to emphasize his primary goal was to investigate

[2] In compliance with this Court's Order filed December 18, 2014, Appellant proposed use of the pseudonym "John Doe" in place of the officer's name in the Brief of Appellant and Record on Appeal. The State agrees with the proposal and has adopted use of the pseudonym in the Brief of Respondent.

the personnel files for credibility issues. (R.p.7, line 24-p.10, line 21). The solicitor commented that any information in the personnel files would be hearsay or double hearsay and argued he did not feel it should be the State's obligation to review the personnel files of every witness. (R.p.10, line 22-p.11, line 23). The trial court took the matter under advisement. (R.p.12, lines 14-15).

Ruling on Motion to Compel

When the case was called for trial on June 17, 2013, Appellant moved for a severance from his co-defendant, Shiquan Marquez Freeman. The solicitor consented and the trial court granted the motion to sever. (R.14, line 1-p.18, line 15). Following jury qualification but before the jury was selected and sworn, the court addressed Appellant's pretrial motion to compel disclosure. The judge first restated the grounds for the motion as well as the solicitor's objections and then described the process the court followed in concluding the records were not subject to disclosure pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure or Brady v. Maryland.[3] The trial judge explained that after the May 9, 2013, hearing he instructed the solicitor to get the custodian of the records to bring the employment files to court for review and a determination, in the solicitor's opinion, if there was any information contained in those files that would be subject to disclosure. The judge said the solicitor reviewed the files and, out of an abundance of caution, submitted two "items" for an in-camera review by the court. The trial judge said he had reviewed those two items and determined they are "not discoverable" and "not subject to disclosure pursuant to Rule 5 and/or Brady v. Maryland." (R.p.19, line 8-p.20, line 20).

[3] 373 U.S. 83 (1963).

The trial judge then described the two items as "one sheet of paper which was taken from the personnel file in the custody of the sheriff's department" and "ten sheets of paper that were contained in the personnel file in the custody of the Spartanburg City Police Department." He noted that "seven of those sheets of paper are in the possession of the defense" and that "there are three sheets of paper that have not been provided to the defendant through counsel."[4] The judge explained that one of the three undisclosed pages "is simply a letter that really has nothing to do with anything, just sort of an introduction of what's attached to it" and that the other two pages from the personnel file were not required to be disclosed to the defense. The trial court stated that: "only those items that were presented to me for an in-camera review that are not in the possession of the defense, will be placed into an envelope and sealed and be held in the custody of the Court in the event that somewhere down the line that those items need to be reviewed by anyone."[5] (R.p.20, line 21-p.21, line 22).

Appellant's counsel confirmed he already had possession of seven of the ten pages from John Doe's personnel file but did not specifically describe or otherwise identify those seven pages. The trial judge further clarified that besides a completely unrelated one page letter, which seems to be in the nature of a cover letter based on the description given by the court, there were in fact only two pages from the ten page personnel file which were covered by Appellant's motion to compel disclosure, but which the court was ruling it would not require the solicitor to disclose to Appellant.

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[4] It is unclear how the trial judge arrived at his counts of seven pages and three pages unless he was referring to only the ten pages from the city police file. If there were eleven pages total, either Appellant already possessed copies of eight pages and was missing three, or he possessed seven pages and was missing four. Either way, Appellant now seems to argue that the trial court erred in failing to require the State to disclose all eleven pages, despite his already having copies of at least seven of those pages.

[5] Despite this pronouncement, all eleven pages of Doe's personnel file were later placed in an envelope and sealed.

After further discussion, the trial judge noted he had not reviewed the actual seven pages already in Appellant's possession,[6] and he was not making any ruling on the admissibility of the information in those seven pages. Appellant agreed that any attempted use of the personnel records he possessed would "largely depend upon testimony as it's presented" and advised: "I will certainly alert the Court and request a hearing outside the presence of the jury before I intend to ask any questions that may relate to that." (R.p.20, line 23-p.25, line 3).

The parties then agreed to provide the trial court with copies of the seven pages in Appellant's possession so that the judge would be familiar with them in the event the question of admissibility came up during trial. The solicitor placed all eleven pages from the two original "items" into an envelope for the court. He explained these eleven pages included one page with handwritten notes from the county and ten typed pages from the city, which included the seven pages already in Appellant's possession.[7] In an attempt to clarify the record, counsel for Appellant explained that he had never seen or been given copies of the three pages the trial court declined to disclose. He then questioned whether the records discussed included only "personnel" records or also covered the "internal affairs" records included in his request. The solicitor confirmed that the eleven pages he provided to the court included everything he was given in response to the State's subpoenas for Doe's "personnel files, internal affair files, and/or any record of discipline" from the county and the city. (R.p.25, line 4-p.30, line 25).

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[6] Although the trial judge indicated he had not reviewed the seven pages, he also referenced the solicitor's undisputed representation that those seven pages were "actual copies of documents contained in that personnel file" which had been provided to the court as one of the two "items" submitted by the solicitor at the outset of the discussion.

[7] These eleven pages comprise the eleven pages included in the sealed exhibit which is the subject of both this Court's September 19, 2014, Order, and argument II of Appellant's appeal.

Trial: John Doe

Following the ruling, the jury was sworn, the judge gave preliminary instructions, and the parties made opening statements. (SROA.p.1-3; R.p.32-p. 44, line 25). The State then called Spartanburg County Sheriff's Deputy John Doe to the stand. Doe testified that on the evening of November 6, 2011, he was working uniform patrol on the south side of Spartanburg when he saw a blue Pontiac speed past before making a quick turn without using a turn signal. He pulled in behind the car, activated his blue lights and began following in an attempt to catch-up. Instead of immediately stopping, the car moved to the center of the road and accelerated away from Doe. As Doe continued the car chase, the Pontiac pulled into a driveway where the driver exited the vehicle and fled on foot. Doe stopped his car in the roadway and ran after the driver. He followed the driver over one small chain-link fence and caught up when the driver's pants got hung-up on the barbs at the top of a second fence. They wrestled back and forth over the top of the fence as Doe attempted to place the driver under arrest. Doe then decided to go over the fence to make the arrest but just as his feet hit the ground he heard a loud bang and saw a flash from a gun. As Doe turned to run, he heard two more rounds and felt something hit him on his left hip. He fell face first to the ground and rolled over in time to see the driver coming directly towards him. Fearing the driver was going to continue shooting, Doe pulled his gun and started returning fire, which caused the driver to run. Doe jumped up and started chasing the driver on foot, but when he reached the roadway, he realized he could not see out of his right eye. He reached up and felt blood and a "good-size" hole in the side of his head, so he lay down to wait for back-up. (R.p.45, line 1-p.51, line 15). The State then introduced several exhibits, including the in-car video

recording of the car and foot chase. As the video was published to the jury, Doe described the events recorded. He also described the serious injuries he suffered, including the loss of sight in his right eye. (R.p.54, line 23-p.61, line 9).

Appellant cross-examined Doe regarding minor inconsistencies between his testimony and the written incident report; however, he never asked Doe any questions about his employment history. Appellant did not ask Doe about his character for truthfulness or untruthfulness with city or county law enforcement, and he never attempted to question Doe about specific instances of conduct such as disciplinary actions or violations of departmental policy. Appellant also made no attempt to introduce or otherwise use any of the information from the seven pages from Doe's personnel file that were in his possession and despite his previous comment to the contrary, he never requested a hearing outside the presence of the jury in regard to potential use of any pages from Doe's personnel records. (R.p.61, line 14-p.80, line 25; p.86, line 1-p.88, line 9).

Trial: Other Evidence

After Doe stepped down from the witness stand, the State called a series of witnesses to describe Doe's injuries, the law enforcement investigation of the incident, the forensic evidence, and the manhunt which ultimately led to Appellant's arrest in Virginia. Dr. Michael Orseck, the plastic surgeon who operated on Doe and who was admitted as an expert in plastic surgery, described Doe's injuries and the surgery he performed to treat those injuries. He testified the injury to Doe's face and eye socket was life-threatening. (R.p.89, line 1-p.92, line 15).

Spartanburg County Sheriff's Deputy Jason Bryant responded to the scene of the shooting. He located the blue Pontiac and determined it belonged to Crystal Lovett. Bryant learned Appellant lived with Lovett and he obtained a cell phone number belonging to Lovett which the State Law Enforcement Division (SLED) was able to help him track. The Sheriff's Department tracked the cell phone through the Charlotte, North Carolina area and into Virginia, where they ultimately discovered a red Impala with South Carolina tags. The Impala belonged to Joanne Brown Huston, who is a relative of Appellant's. (R.p.93, line 1-p.100, line 21). Johnny Darrell Betsill was a SLED agent at the time of the shooting and assisted in the investigation. He called the cell phone number associated with Crystal Lovett and confirmed with Lovett that she in fact owned the blue Pontiac. He then ordered a trace on the phone so it could be tracked and its location could be relayed to the Sheriff's Department. (R.p.105, line 6-p.108, line 2).

SLED crime scene investigator Melissa Skipper Wallace was dispatched to process the crime scene that had been previously secured by the Sheriff's Department. She identified and described a diagram of the scene, photographs of the scene, photographs of evidence gathered at the scene, and physical evidence gathered at the scene, all of which were admitted into evidence. Wallace was admitted as an expert in fingerprint analysis and identified two of Appellant's palm prints in the blue Pontiac. She later went to a second location where she processed a red Cadillac and a residence. Wallace collected swabs from blood stains on the steering wheel and on the threshold of the driver side door of the red Cadillac for testing. She also photographed the residence and collected evidence from inside including a blood stained towel, a blood stained sheet, a deposit slip with Lovett's name, and shotgun shells. Wallace submitted the physical

evidence for forensic testing. She also submitted Doe's weapon for testing. (R.p.109, line 1-p.154, line 4). SLED forensic technician Janice Bryson conducted presumptive testing for blood on the stained towel, sheets, and several items of clothing, cut pieces from those items, and sent them for DNA testing. (R.p.162, line 1-p.171, line 4).

Timothy Elmer Shirey lived across the street from the residence where Appellant and Doe exchanged gunfire. He owns a video surveillance system with a camera pointing across the street and recorded part of the incident. He provided access to the video recording system to the Sheriff's Department. (R.p.172, line 17-p.173, line 21). Sheriff's Investigator Mike Dominesey downloaded the video recordings from Shirey's surveillance system, identified the recordings of the incident, and published them to the jury. Dominesey explained he also obtained a separate video surveillance recording of the outbuilding behind the residence where the shooting took place. He identified that recording and published it to the jury while describing what it showed. The recording shows a black male with dreadlocks, wearing a white t-shirt and carrying a pair of pants, approaching the door to the building and being admitted by another person. (R.p.174, line 5-p.189, line 7).

On the night of the shooting, Raquentin Kendricks Gray-Miller and some friends were in outbuilding/studio behind his mother's house when they saw lights pass by on the street and then heard loud shots. Shortly thereafter, Appellant came to the door. He had been shot in the upper torso, was not wearing pants, and had a gun. Appellant said he needed help, was about to die, and needed keys to a car. Gray-Miller gave Appellant the keys to his mother's Cadillac and then called 9-1-1 to report the car was taken. (R.p.193, line 21-p.199, line 13).

In November of 2011, Appellant was living with Crystal Dominique Lovett. Lovett owned a blue Pontiac which Appellant was driving on the evening of the incident. Lovett was in her truck when she received a phone call from Appellant's sister Joanne Huston. Lovett went to Joanne's house where she discovered Appellant lying on the floor, bleeding and vomiting. Lovett, Huston and co-defendant Shiquan Freeman used washcloths and blankets to try to stem the bleeding. Eventually, Appellant, Lovett and Freeman got into Freeman's red Impala and drove to Lovett's house where Appellant changed clothes. With Lovett driving, they then headed towards Mary Black Hospital in Spartanburg; however, Appellant asked Lovett to get on I-85 towards Charlotte instead. During the drive, Lovett received a telephone call from a SLED agent, but she lied about where she was and who was with her. She decided to take Appellant to a hospital in Charlotte but stopped by a store first to purchase scissors so Freeman could try to cut Appellant's hair. They approached two hospitals in Charlotte but never entered because they saw police cars in the vicinity. Lovett was pregnant with Appellant's baby and was tired so she switched places to let Freeman drive while she got in the back seat to sleep. When Lovett woke up, they were in Virginia. They went to an apartment complex parking lot and slept. (R.p.210, line 4-p.223, line 22).

When they woke, Lovett drove to a store to get peroxide and band-aids to clean Appellant's wounds. They got back on the road and realized they were being followed by the police. After pulling over, Lovett and Freeman got out of the car and surrendered, but Appellant jumped into the front seat of the Impala and tried to drive away with the Virginia State police in pursuit. He eventually crashed the car into an embankment and

only came out of the car after the police threw something into the window and physically took him out. (R.p.223, line 24-p.226, line 3).

Special Investigator Brad Burnette of the Virginia State Police went to the Twin County Regional Hospital after Appellant's arrest on November 7, 2011, and gathered Appellant's clothes as evidence. Burnette identified Appellant as the person he met in the hospital even though Appellant had originally given him a false name. (R.p.236, line 1-p.239, line 25). Special Agent Heather Brown of the Virginia State Police responded to the scene after Appellant had been arrested and saw the red Impala and the police vehicle which had been crashed up against a bank on the side of the road. She interviewed several witnesses as well as Investigator Williams from Spartanburg County and then obtained a search warrant for the Impala. Brown later helped process the car for evidence. She identified blood, pieces of dreadlocks, scissors, broken glass and medical supplies which were found inside the car. (R.p.240, line 4-p.247, line 20). Special Agent Joseph Campbell of the Virginia State Police also responded to the scene and was primarily responsible for processing it and the red Impala. Campbell identified an assortment of items discovered in the car, including a bottle of peroxide, cell phones, an identification card belonging to Freeman, cut dreadlocks, scissors, a box of bandaids, white gloves, and a purse containing Lovette's insurance card and $500 in cash. All of these items were admitted into evidence over Appellant's objection. (R.p.248, line 2-p.257, line 20).

On November 6, 2011, after hearing about the shootout, Investigator Lorin Williams of the Spartanburg County Sheriff's Department went to the hospital in Spartanburg to check on Doe, but then reported to the scene of the shooting when he

discovered Doe had already been taken to surgery. He began gathering information about suspect vehicles and the people who owned those vehicles which led him to Lovett's address. After discovering a bloody towel on the sidewalk, Williams secured the scene so Lovett's residence could be processed by SLED. He then started tracking Lovett's cell phone. He and Investigator Jenkins got in a car and followed the coordinates for Lovett's cell phone as they were provided by SLED. They followed those coordinates as the phone moved north up I-85 and stayed approximately twenty miles behind the cell phone all the way to Virginia. Williams determined the phone became stationary at an apartment complex in Virginia and notified the Virginia authorities of the circumstances of the pursuit. He and Jenkins were still not sure exactly what vehicle they were looking for so they took up a position down the road so they could see every vehicle coming in and out. Williams' attention was drawn to a red Impala with a South Carolina tag he saw coming out of the apartments, so they followed the car to a convenience store where it made a brief stop. They continued following the car when it left the store, and were joined by the Virginia State Police. Williams then described the ensuing pursuit, pit maneuver, and the controlled crash of the Impala which led to Appellant's arrest. (R.p.258, line 12-p.268, line 15).

Sergeant David Hogsed of the Spartanburg County Sheriff's Office was the first officer to respond to the scene of the shooting in Spartanburg. He found Doe on the ground on his hands and knees and could see that Doe had been shot in the face. Other police and emergency units responded shortly after Hogsed arrived. He subsequently collected the clothes Doe was wearing when he was shot and took photographs of a hole through the left buttock area of Doe's pants and underwear. Hogsed took a buccal swab

from Doe for DNA purposes and later collected a bullet that was removed from Appellant's shoulder. (R.p.269, line 14-p.279, line 17).

Robert Charles Talanges, an employee in the forensic identification division of the Spartanburg County Sheriff's Office, collected a buccal swab from Appellant for DNA testing. (R.p.281, line 13-p.283, line 18). SLED firearms and toolmark expert Suzanne Cromer received Doe's service weapon for testing and was able to match nine fired cartridge cases from the scene of the shooting to that weapon. She testified the bullet removed from Appellant's shoulder was consistent with the caliber that would have been fired by Doe's weapon. Finally, Cromer testified that there are some revolvers that can shoot shotgun shells. (R.p.284, line 2-p.292, line 4). SLED DNA analyst Mary Ann Boehm was admitted as an expert in DNA testing. She testified several items from the scene of the shooting matched the DNA profile for Doe, and that numerous items from the scene of the shooting and the Cadillac taken from that scene matched Appellant to odds of one in two quintillion. (R.p.297, line 10-p.305, line 10).

Finally, Senior Trooper Ronnie Dean Horton of the Virginia State Police took the stand. Horton was one of several officers who responded during the attempt to stop the red Impala in Virginia. He participated in the high speed chase, the controlled crash of the car, and the ultimate arrest of Freeman, Lovett, and Appellant. Horton's dashboard video camera recorded parts of the chase and arrest and it was admitted into evidence over Appellant's objection. Horton testified Appellant refused to get out of the Impala for 18 minutes after the crash despite repeated verbal commands from the police to exit. Appellant only came out after the police fired teargas into the car. (R.p.308, line 15-p.320, line 6).

Motions, Charge Conference, Closing Arguments, and Verdict

After the State rested, Appellant moved for a directed verdict and stated his motion was: "based on the pretrial motions and the objections which I've made and stated the grounds for throughout the course of this trial." (R.p.322, lines 9-13). However, when Appellant proceeded to argue his motion he did not mention Doe's personnel file, did not claim he was entitled to a directed verdict because of the State's failure to disclose the personnel file, and did not otherwise renew his request for disclosure of all or any part of that file before deciding whether to present any evidence on behalf of the defense. Instead Appellant moved for a directed verdict on the resisting arrest indictment on grounds that Doe failed to advise Appellant he was under arrest. He then moved for a directed verdict on all three indictments based on: (1) his challenge to the search warrant for the vehicles and motion to suppress the evidence discovered in the search; (2) his challenge to the admission of the video recording of the high-speed chase in Virginia, and (3) his motion for a mistrial because the victim began crying during his testimony. The trial court denied Appellant's motion for a directed verdict as to all indictments. (R.p.322, line 1-p.327, line 20).

Before breaking for the day, the attorneys met with the trial judge, off the record, to discuss their jury instruction requests. (R.p.328, lines 1-6). The following morning, Appellant noted that during the discussion he had requested a jury charge explaining that attempted murder under Section 16-3-29 requires a specific intent to kill and not merely malice aforethought. He argued that under the rules of statutory construction, the words of the statute should be given their plain and ordinary meaning and that since it says "with intent to kill" the statute requires a specific intent to kill. The solicitor responded

that the State would be fine with whatever the court decided to charge. The trial court disagreed with Appellant and found it was "just not logical" to require a specific intent to kill for attempted murder where there is no requirement for a specific intent to kill for murder. The trial court held the same mens rea must apply to attempted murder and murder and that it is simply a general criminal intent accompanied by malice aforethought. Thus, the trial court declined Appellant's request to charge specific intent. (R.p.329, line 1-p.332, line 4).

The parties then gave closing arguments. Appellant argued in part that there was no credible evidence he had a gun and no credible evidence he shot Doe. (R.p.336, line 4-p.358, line 25). The trial court then charged the jury on the respective roles of the judge and jury, the burden of proof, the presumption of innocence, reasonable doubt, credibility of witnesses, direct evidence and circumstantial evidence, and the elements of the offenses. (R.p.359, line 1-p.385, line 8). In regard to attempted murder the court charged:

> Section 16-3-29 of the Code of Laws of South Carolina defines the crime of attempted murder, and that section provides that a person who with intent to kill attempts to kill another person with malice aforethought, either expressed or implied, is guilty of the offense of attempted murder.
>
> Now, with regard to that particular section and the phrase intent to kill, you are instructed that proof of an intent to kill in the context of an attempted murder allegation does not require proof of a specific intent to kill on the part of the defendant, but it does required proof of a state of mind of conscious wrongdoing accompanying the intentional commission of an act or acts, the natural tendency of which is to destroy human life.
>
> And the term intent refers to the state of a person's mind which directs his actions towards a specific object or goal. And intent would include those consequences which represent the very purpose for which an act is done, as well as those consequences which are known to be substantially certain to result, whether actually intended or not.

> And within the meaning of the statute the term attempts to kill refers to the intentional commission of an act - - an overt act or arts, the natural tendency of which is to cause death.
>
> That intent to kill as the statute requires must also be accomplished by malice aforethought either expressed or implied.

(R.p.369, line 25-p.370, line 20) (emphasis added). Appellant took exception to the instruction concerning specific intent and the exception was noted. (R.p.385, lines 10-24). Following a request from the jury, the trial court repeated the instruction on attempted murder and the lesser included offense of assault and battery of a high and aggravated nature. Appellant renewed his exception to the charge and it was again noted for the record. (R.p.390, line 19-p.394, line 19). The jury found Appellant guilty as indicted. Following the verdict, Appellant moved for a new trial on several grounds including his motion to compel disclosure of Doe's personnel records and his request for a jury charge on specific intent to kill. The motion were denied and the trial court sentenced Appellant to thirty (30) years' imprisonment for attempted murder, ten (10) years' consecutive imprisonment for resisting arrest with a deadly weapon, five (5) years' consecutive imprisonment for possession of a weapon during the commission of a violent crime, and three (3) years' concurrent imprisonment for failure to stop for a blue light, for an aggregate sentence of forty-five (45) years' imprisonment. (R.p.394, line 23-p.404, line 19).

ARGUMENT

I.

The trial court properly refused Appellant's request for a jury charge on specific intent to kill when instructing the jury on the law of attempted murder pursuant to section 16-3-29 of the South Carolina Code because the charge given accurately stated the law and any error with respect to the "intent" aspect of the attempted murder instruction was harmless beyond a reasonable doubt.

Appellant argues the trial judge erred in failing to instruct the jury that in order to convict him of attempted murder they must find he acted with a specific intent to kill. He argues this violated his right to a jury trial under the provisions of the United States and South Carolina Constitutions. The State disagrees and submits the trial court properly instructed the jury on the law of attempted murder pursuant to section 16-3-29 of the South Carolina Code. Therefore, Appellant's conviction should be affirmed. Furthermore, any possible error was harmless when considered in light of the evidence presented at trial and the defense theory that another individual committed the crimes.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Jacobs, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011). The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). "Generally, the trial judge is required to charge only the current and correct law of South Carolina." State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Wharton, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009).

Law / Analysis

The South Carolina Code provides: "[a] person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code § 16-3-29 (Supp. 2014). The trial court charged in its instructions that "proof of an intent to kill in the context of an attempted murder allegation does not require proof of a specific intent to kill on the part of the defendant, but it does required proof of a state of mind of conscious wrongdoing accompanying the intentional commission of an act or acts, the natural tendency of which is to destroy human life." (R.p.370, lines 1-7). The trial court also charged: "and within the meaning of the statute the term attempts to kill refers to the intentional commission of an act - - an overt act or acts, the natural tendency of which is to cause death." (R.p.370, lines 14-17). These charges were an accurate statement of the law.

Relying on general principles of statutory construction, Appellant contends the clear and unambiguous meaning of the statute requires specific intent to kill, and therefore requires a jury charge on specific intent. Alternatively, he argues that to the extent the statutory language is ambiguous, case law demonstrates the legislature intended to require a specific intent to kill when it created attempted murder. The State disagrees and submits the rules of statutory construction support the trial court's decision not to charge specific intent. The trial judge's instruction on attempted murder was not erroneous[8] and Appellant's conviction should be affirmed.

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[8] It appears the trial court's jury instruction came largely from a current version of the Criminal Charges in the Circuit Court Bench Book, which the judicial department distributes to judges and that is now published on the South Carolina Judicial Department's website. http://www.judicial.state.sc.us/whatsnew/displayWhatsNew.cfm?indexId=896 (GS InstructionsJune2013.pdf).

The Legislature is presumed to have been aware of the common law when it enacted the attempted murder statute in 2010. See, e.g., Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) ("In ascertaining the meaning of language used in a statute, we presume the General Assembly is 'aware of the common law, and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense.'") (citations omitted). Under the common law, the "intent to kill" aspect of assault and battery with intent to kill - the precursor offense to statutory attempted murder - was defined as a general intent to kill rather than a specific intent to kill. State v. Foust, 325 S.C. 12, 15-16, 479 S.E.2d 50, 51-52 (1996). In Foust, which is still good law in South Carolina, our supreme court said:

> Although the cases indicate that **some** intent must be demonstrated before an accused may be convicted of ABIK, we do not believe they stand for the proposition that a **specific** intent to kill must be shown. We hold that it is sufficient if there is shown some general intent, such as that heretofore applied in cases of murder in this State. Accordingly, we hold that, in charging juries the law of ABIK, South Carolina trial judges should give a standard "intent" charge, but need not advise the jury that the defendant must have a **specific** intent to kill before he may be convicted of ABIK.

Id.

There is no reason to believe the Legislature intended to deviate from the well-established definition of "intent to kill" when it enacted the attempted murder statute in 2010, particularly considering that the Legislature has expressly equated the offenses of assault and battery with intent to kill and attempted murder. See Act No. 273, § 7.C, 2010 S.C. Acts & Joint Resolutions (". . . except for references in Section 16-1-60 and

Section 17-25-45, *whenever in the 1976 Code reference is made to assault and battery with intent to kill, it means attempted murder as defined in Section 16-3-29.* (emphasis added)). Moreover, the word "specific" does not precede or modify the word "intent" in the attempted murder statute. See Grier v. AMISUB, 397 S.C. at 535-36, 725 S.E.2d at 695 (courts must follow the plain and unambiguous language in a statute and have no right to impose another meaning). Had the Legislature intended to require a "specific" intent to kill, it would have clearly said so. See id. at 536, 725 S.E.2d at 696 (2012) (statutes in derogation of the common law are to be strictly construed; a statute restricting the common law will not be extended beyond the clear intent of the legislature). Thus, there is no ambiguity and the trial judge gave the proper jury charge under the terms of the statute.

Appellant also argues that State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), established that "attempted murder" requires the specific intent to kill. Initially, the State notes Sutton was decided prior to the codification of attempted murder in 2010 and therefore could not have made specific intent an element of attempted murder under our statute. Furthermore, Sutton discussed *common law* attempt crimes, i.e., crimes which are punishable as the principal offense. See Sutton at 397, 532 S.E.2d at 285. Sutton did not contemplate the statutorily-defined "attempted murder" offense that our Legislature codified in 2010. Attempted murder as defined in S.C. Code § 16-3-29 is distinguishable from a common law attempt crime and it is not punishable as for the principal offense of murder; instead, the statute states the penalty for attempted murder is "not more than thirty years." Accordingly, Sutton does not establish that the trial judge's attempted murder charge was erroneous.

In sum, the trial judge's instruction regarding attempted murder was not erroneous where it correctly informed the jury that specific intent to kill was not an element of attempted murder. Appellant is not entitled to reversal of his conviction on this ground.

Harmless Error

Even assuming the trial judge erred by failing to inform the jury that attempted murder includes a specific intent to kill, Appellant could not possibly have suffered any prejudice because the jury could have reached no other conclusion but that Appellant had a specific intent to kill the victim. The evidence reflected that Appellant deliberately aimed his loaded gun at the victim from close range and pulled the trigger in an attempt to evade arrest. This clearly demonstrated he was determined to actually shoot the victim. Appellant's conduct left no doubt about his specific intent to kill the victim. See State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 n5 (2000) ("A specific intent to kill may be, and normally is, inferred from the surrounding circumstances, such as the character of the attack, the use of a deadly weapon, and the nature and extent of the victim's injuries."); 41 C.J.S. *Homicide* § 179 (intent to kill may be inferred from the character of the assault, the use of a deadly weapon with an opportunity to deliberate, or the use of a dangerous or deadly weapon in a manner reasonably calculated to cause death or great bodily harm; intent may be inferred when it is demonstrated that the accused voluntarily and willfully commits an act, the natural tendency of which is to destroy another's life); cf. State v. Middleton, 407 S.C. 312, 319, 755 S.E.2d 432, 436 (2014) (the evidence conclusively established appellant was guilty of only attempted murder where appellant deliberately drove up to the passenger window of a car and shot into the car at least five times, and victims testified the only reason they were not injured

is because one of them jumped into the driver's seat and ran appellant off the road); People v Lopez, 96 A.D.3d 1621, 946 N.Y.S.2d 780 (N.Y. App. Div. 2012) (in attempted murder case, the evidence was legally sufficient to support the defendant's intent to kill where the defendant and the victim quarreled immediately before the shooting and the defendant was only a few feet away from the victim when he pointed the gun at him and fired).

Significantly, despite counsel's claims before trial, the defense theory was *not* that Appellant did not intend to kill the victim or that the shooting was mitigated in some way, but was instead that Appellant never had a gun and another person shot the victim. (R.p.349, line 7-p.358, line 25). The jury rejected this theory and found, beyond a reasonable doubt, that Appellant was the shooter.

Because the State's version of the facts demonstrated beyond a reasonable doubt that Appellant had the specific intent to kill the victim, Appellant could not have suffered prejudice even assuming the trial court's attempted murder charge was erroneous. See State v. Jefferies, 316 S.C. 13, 23, 446 S.E.2d 427, 433 (1994) (erroneous charge harmless where it does not contribute to the verdict); State v. Middleton, 407 S.C. 312, 319, 755 S.E.2d 432, 436 (2014) (any error in failing to charge a lesser-included offense of attempted murder was harmless beyond a reasonable doubt where the error could not have contributed to the verdict). Appellant is not entitled to reversal on this ground.

II.

The trial court properly denied Appellant's motion to compel disclosure of the officer/victim's personnel file where Appellant failed to demonstrate that any evidence was suppressed by the State or that the evidence allegedly suppressed was material to Appellant's guilt.

Appellant argues that, in violation of his right to due process, the trial judge erred in failing to require that the prosecution disclose Doe's entire eleven page personnel file because that file contains favorable impeachment evidence in the form of numerous instances of Doe's dishonest conduct. Specifically, Appellant claims that pursuant to Brady v. Maryland and its progeny he was entitled to inspect and copy the documents contained within the personnel file because they "bore on [Doe's] credibility."[9] (Brief of Appellant, p.13). The State disagrees and submits Appellant's argument should be denied and dismissed on several grounds. Initially, the State submits the argument was waived and is not preserved for appeal because Appellant never renewed his motion to compel disclosure of the personnel file during trial, never objected to the lack of disclosure during trial, and never sought to introduce or otherwise use any of the vast majority of the pages from the file that were already in his possession. Appellant did not

[9] Most states have differentiated between cases wherein a defendant seeks to present evidence that an officer was the aggressor in prosecutions for offenses involving violence against the officer, and those cases where general impeachment material is sought. See Jeffrey F. Ghent, Annotation, *Accused's Right to Discovery or Inspection of Records of Prior Complaints Against, or Similar Personnel Records of, Peace Officers Involved in the Case,* 86 A.L.R. 3d 1170 ("Within cases involving an accused's right to discovery or inspection of records of prior complaints against, or similar personnel records of, a peace officer involved in the case, the most important factual distinction affecting the outcome of the cases appears to be whether the prosecution was for an offense involving violence against an officer or was merely for some other or unspecified offense"). While the offense in this case did involve an act of violence against the officer, only in passing did Appellant's trial counsel suggest that Doe's personnel file may indicate past excessive force complaints and he never argued any such complaints might be associated with Appellant. Rather, Appellant's trial counsel repeatedly explained to the court that Doe's personnel record may produce evidence that would be used to show his testimony should be discounted because it was not credible. His argument in this appeal likewise focuses on the claim that the file "contained numerous instances of dishonest conduct which would have been fodder for impeachment." (Brief of Appellant, p.13).

move for a directed verdict on grounds of non-disclosure at the close of the State's case and he only renewed his complaint about the trial court's decision not to order disclosure after the jury had returned a verdict.

In any event, the solicitor did not suppress any evidence in the State's possession, and instead complied with Brady and the procedures established by the United States Supreme Court in regard to the disclosure of personnel files by submitting them to the trial judge for an in camera review. Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987). Additionally, there could be no Brady violation where the three undisclosed pages from the personnel file were not material to Appellant's guilt or innocence because they failed to show any connection whatsoever between Doe and Appellant, much less demonstrate Doe was biased against Appellant in some fashion.[10] Finally, any error in the court's ruling was harmless in light of the overwhelming evidence of Appellant's guilt.

Argument Waived and Not Preserved

Appellant's argument that his due process rights were violated by the lack of full disclosure was waived during trial and is not preserved for appeal. Appellant never renewed his motion to compel disclosure of the personnel file during trial, never objected to the lack of disclosure during trial, and never sought to introduce or otherwise use any of the seven or eight pages from the file that were already in his possession. Appellant did not move for a directed verdict on grounds of non-disclosure and only renewed his complaint about the trial court's decision not to order full disclosure after the jury had returned a verdict. Thus, the current argument regarding disclosure was waived.

[10] As noted above, it is unclear which three pages from the eleven page sealed exhibit were not already in Appellant's possession at the start of trial.

In addition, the argument is not preserved because Appellant never articulated precisely how the pages from the personnel file would have been admissible at trial even if they touched upon Doe's general credibility. As addressed above, unless the documents were admissible, any lack of disclosure could not have been material to Appellant's guilt or innocence. Because Appellant failed to make an argument in support of admissibility and then did not advance any such argument by pursuing admission or use of the portions of the personnel file he already possessed, he failed to provide the trial judge with an opportunity to rule on admissibility of any of the file and his underlying argument regarding disclosure is not preserved for review.

Records Not Admissible

Although not articulated at trial, Appellant presumably would have sought to use the personnel records to attack Doe's credibility under Rule 608, SCRE; however, the Rules do not appear to support admission of the personnel records under the circumstances of this case. In criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The conduct of a criminal trial is left largely to the sound discretion of the presiding judge and the appellate court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way. State v. Commander, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (quoting State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982)). Thus, the admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be

disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 494-95 (2013).

As noted above, nothing in the personnel file constitutes evidence of Doe's bias, prejudice or motive to misrepresent as to Appellant; therefore, the records would not have been admissible under Rule 608(c), SCRE. Also, to the extent Appellant might claim he would have attempted to use specific instances of Doe's conduct for the purpose of attacking Doe's credibility during cross-examination under Rule 608(b), SCRE, extrinsic evidence in the form of the personnel file could only be used as proof "in the discretion of the court." The trial judge's ruling not to order full disclosure of the file shows the trial court also would have exercised its discretion by not allowing Appellant to introduce the records during cross-examination of Doe. Finally, any statements, opinions or findings included in the personnel records would be hearsay as defined by Rule 801, SCRE. For all of these reasons, the State submits Appellant failed to demonstrated plausible admissibility, which undercuts any claim of prejudice from nondisclosure. This is particularly true in the broader context of the trial as a whole and Appellant's exercise of his right to cross-examine Doe.

As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed on appeal absent a manifest abuse of discretion. State v. Gracely, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012); State v. Quattlebaum, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000). Pursuant to the Sixth Amendment of the United States Constitution, every criminal defendant has a right to "to be confronted with the witnesses against him" during trial. U.S. Const. amend. VI. Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-

examination of adverse witnesses. State v. Aleksey, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). This right guarantees to a criminal defendant the opportunity to cross-examine the witnesses against him concerning bias. State v. Gillian, 360 S.C. 433, 450, 602 S.E.2d 62, 71 (Ct. App. 2004), aff'd as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007); see also Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.").

"This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination." Aleksey, 343 S.C. at 33-34, 538 S.E.2d at 255; see also State v. Whitner, 380 S.C. 513, 519, 670 S.E.2d 655, 659 (Ct. App. 2008) (finding the scope of cross-examination rests in the trial judge's sound discretion). "On the contrary, 'trial [courts] retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant.'" Aleksey, 343 S.C. at 34, 538 S.E.2d at 255 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)). "The limitation of cross-examination is reversible error if the defendant establishes he was unfairly prejudiced." State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). A criminal defendant may show a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from

which jurors . . . could appropriately draw inferences relating to the reliability of the witness. State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002) (quoting Van Arsdall, 475 U.S. at 680).

Here, Appellant was given a thorough opportunity to cross-examine Doe and at the time he had possession of a majority of the documents he now argues would have been crucial to that cross-examination. Thus, Appellant's constitutional right to confront Doe and to conduct a meaningful cross-examination of him concerning bias was fully protected. U.S. Const. amend. VI; Gracely, supra; Aleksey, supra; Gillian, supra. Since the records would not likely have been admissible even if they had been disclosed, the trial court did not err in declining to order their disclosure. Additionally, to the extent Appellant contends the trial court's ruling impacted his ability to cross-examine Doe, it also was not error. "The appropriate question under a Confrontation Clause analysis is whether there has been any interference with the defendant's opportunity for effective cross-examination at trial." Gillian, 360 S.C. at 450, 602 S.E.2d at 71 (emphasis added). Here, the trial court did not interfere with Appellant's opportunity for effective cross-examination.

Trial Court Complied with Pennsylvania v. Ritchie[11]

"Under Ritchie the State must produce undisclosed evidence for the trial judge's inspection once a defendant has established a basis for his claim that it contains . . . impeachment evidence." State v. Bryant, 307 S.C. 458, 461, 415 S.E.2d 806, 808 (1992). However, "[a] defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the [State's] files." Ritchie, 480 U.S. at 59. Rather, "the trial judge should then rule upon the materiality of the evidence to determine

[11] Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987).

whether the State must produce it for the defendant's use." Bryant at 461-62, 415 S.E.2d at 808-809.

The South Carolina Supreme Court approved the in camera review procedures from Ritchie in State v. Bennett. 328 S.C. 251, 267, 493 S.E.2d 845, 853 (1997). Bennett sought disclosure of the personnel records of a number of guards from the detention center where he was housed. Id. Bennett argued that the records may have contained information with which he could impeach certain witnesses. Id. The trial court ordered portions of the records disclosed, but sealed other portions for appellate review. Id. The Supreme Court then reviewed the documents and, finding none of them relevant for impeachment purposes, affirmed the trial court's decision. Id.

Here, Appellant had all but three pages of the allegedly undisclosed evidence prior to trial. The solicitor produced those three pages for the trial judge's inspection. The trial judge then ruled upon the materiality of the evidence and determined the State was not required to produce them for Appellant's use. The trial court examined the undisclosed documents contained in Doe's personnel file and found that they were not "subject to disclosure pursuant to Rule 5 and/or Brady v. Maryland and that the information if provided would not likely result in the finding of any other relevant information that might be used in the course of the trial." This is all that was required by Ritchie. Bennett, 328 S.C. at 267, 493 S.E.2d at 853.

Evidence was not Material

The Brady disclosure rule requires that the prosecution provide the defendant with any evidence in the prosecution's possession that may be favorable to the accused **and** material to guilt or punishment. Ritchie, 480 U.S. at 57 (1987); Hyman v. State, 397

S.C. 35, 45, 723 S.E.2d 375, 380 (2012); State v. Anderson, 407 S.C. 278, 286, 754 S.E.2d 905, 909 (Ct. App. 2014). Favorable evidence is either favorable exculpatory evidence or favorable impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 (1985); Hyman at 45, 723 S.E.2d at 380. Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. Hyman, 397 S.C. at 45, 723 S.E.2d at 380; Anderson, 407 S.C. at 287, 754 S.E.2d at 909. A reasonable probability is shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. Hyman, 397 S.C. at 45-46, 723 S.E.2d at 380; Anderson, 407 S.C. at 287, 754 S.E.2d at 909. Furthermore, the prosecution has the duty to disclose such evidence even in the absence of a request by the accused. United States v. Agurs, 427 U.S. 97 (1976); Hyman at 46, 723 S.E.2d at 380; Porter at 384, 629 S.E.2ds at 356. Thus, an individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence, or was impeaching. Kyles v. Whitley, 514 U.S. 419 (1995); Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006).

Recently, the South Carolina Supreme Court decided State v. Burgess, 408 S.C. 421, 759 S.E.2d 407 (2014), which discussed the attempted use of an arresting officer's personnel record in order to impeach his credibility. Burgess sought to introduce the arresting officer's personnel records "asa the records constituted evidence of bias and motive to misrepresent pursuant to Rule 608(c), SCRE." Burgess at 441, 759 S.E.2d at

418.[12] In finding that the trial court did not abuse its discretion in refusing to allow cross-examination regarding the officer's records, the Court recognized that the officer's personnel file contained records of "hostile actions . . . directed at co-workers" but did not "offer evidence that Officer Gilliam lacked credibility due to bias against Burgess." Id. at 442, 759 S.E.2d at 418 (citing Baldez v. State, 386 S.W.3d 324 (Tex. Ct. App. 2012)).

The Baldez Court also found that no Brady violation existed because the evidence of the officer's disciplinary proceedings was not admissible evidence, and therefore the prosecution was under no duty to turn over the report. Id. at 328. Even assuming the report was admissible, however, the Baldez Court found that there was no reasonable probability that the outcome of the trial would have been different had the evidence come in. Id. at 329. Baldez was legally stopped by the officer, he had numerous signs of intoxication, and he had an illegal blood alcohol reading. In light of all of the circumstances, the Texas Court found that no Brady violation occurred.

The circumstances are remarkably similar in Appellant's case. As in Baldez, the personnel records allegedly suppressed here were not material to Appellant's guilt or innocence. Appellant failed to make a sufficient showing to undermine confidence in the outcome of his trial. He claims that because Doe's credibility was central to the State's case, personnel documents which bore on that credibility were necessarily material. Our cases make clear that the defendant must demonstrate materiality. The State has neither a burden to show otherwise, nor an affirmative duty to respond to a defendant's unsubstantiated allegation of materiality. Given the overwhelming evidence of

[12] Burgess was convicted of possession of crack cocaine with intent to distribute. The arresting officer testified that he was the only witness that saw Burgess drop a pill bottle that contained crack cocaine residue.

Appellant's guilt, Appellant failed to demonstrate a reasonable probability the outcome in his trial would have been different even if the personnel file was admitted in its entirety.

Appellant has also failed to demonstrate the allegedly suppressed evidence was favorable to his case, particularly where the remaining eight pages of the personnel file were already in the possession of the defense and where Appellant made no effort pursuant to Rule 608(b), SCRE, to inquire about any specific instances of conduct concerning Doe's character for truthfulness or untruthfulness during his cross-examination of the Doe at trial. Relying on Riddle, supra, and several other cases, Appellant nevertheless maintains the Solicitor's disclosure was insufficient. However in Riddle, the Court recognized that "the overriding theme of the Brady cases is the emphasis the Supreme Court has placed on the prosecutor's responsibility for fair play." Riddle at 46, 631 S.E.2d at 74 (quoting Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999). Here, the Solicitor's disclosure was entirely consistent with his responsibility for fair play because the undisclosed pages of the file were provided to the trial judge for review.

Based on all of these reasons, the State submits the trial court properly denied Appellant's motion to order disclosure. Appellant failed to demonstrate the Solicitor committed a Brady violation. As a result, Appellant's conviction and sentence should be affirmed.

Harmless Error

The purpose of Rule 608, SCRE, is that a defendant be allowed to explore any "bias, prejudice, or other motive to misrepresent" such that the jury gets a clear picture of a witness with which to judge her credibility. Cross-examination is the tool used to

highlight any biases that may exist. Here, the trial court allowed a meaningful cross-examination with numerous opportunities for impeachment, including specifically allowing Appellant to inquire into discrepancies between Doe's testimony and the video recording of the incident. The additional cross-examination sought by Appellant would at best have been marginally relevant to credibility, especially where nothing in the personnel file concerned Appellant. For the same reason the personnel records were not material, any error in the trial court's refusal to order disclosure was harmless beyond a reasonable doubt.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the convictions and sentence of the lower court be affirmed.

Respectfully submitted,

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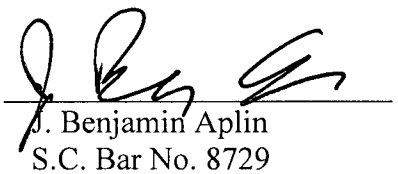
BY: 
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Columbia, South Carolina
August 18, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
J. Derham Cole, Circuit Court Judge

Appellate Case No. 2013-001411

THE STATE,.....RESPONDENT

v.

ROBERT ODELL BROWN,.....APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent*, both dated August 18, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served. This 18th day of August, 2015.

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