RECEIVED
SEP 2 5 2015
S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 2015-UP-365 (S.C Ct. App. filed 7/22/15)
11-GS-40-04656

THE STATE,

RESPONDENT,

V.

AHMAD JAMAL WILKINS,

PETITIONER

Appellate Case No. 2015-001968

APPENDIX

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit
Post Office Box 192
Columbia, SC 20202-0192
(803) 576-1800

ATTORNEYS FOR RESPONDENT

INDEX

INDEX i

STATE V. WILKINS, 2015-UP-365 (S.C. Ct. App. FILED JULY 22, 2015) 1

PETITION FOR REHEARING 5

ORDER DENYING PETITION FOR REHEARING 26

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Ahmad Jamal Wilkins, Appellant.

Appellate Case No. 2012-212387

Appeal From Richland County
Clifton Newman, Circuit Court Judge

Unpublished Opinion No. 2015-UP-365
Heard May 6, 2015 – Filed July 22, 2015

AFFIRMED

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

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General W. Edgar Salter III, and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

PER CURIAM: Ahmad Jamal Wilkins appeals his conviction for murder, arguing the circuit court erred in (1) allowing Patruan Hare to testify regarding Wilkins's alleged admission to choking the victim, (2) refusing to allow Wilkins to present the testimony of two witnesses in his case-in-chief to challenge the integrity of the police investigation, (3) not allowing Wilkins to present surrebuttal testimony to allegedly new matter brought out in the State's reply, and (4) denying Wilkins's motion for a mistrial on the ground that the State suppressed evidence. We affirm.

1. Wilkins contends the circuit court erred in allowing Hare to testify regarding Wilkins's alleged admission to choking the victim. According to Wilkins, this testimony qualified as prior bad act evidence under Rule 404(b), SCRE, and was not admissible under any of that rule's exceptions. *See* Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."). Despite Hare's testimony that Wilkins admitted to choking the victim but claimed it was not on the night of the victim's death, the record is clear Hare's testimony pertained to the murder of the victim and was not prior bad act evidence. *See Anderson v. State*, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003) (holding because a threatening statement made by the accused was not a prior bad act, the bar against admitting prior bad acts was not applicable); *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001) ("The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion."). Furthermore, the admission of Hare's testimony was not prohibited by Rule 403, SCRE. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."). The testimony identified Wilkins as the murderer and supplied a motive for the crime, and the State did not introduce the testimony to show Wilkins had a propensity for that type of crime. *See State v. Dickerson*, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000) (finding the danger of unfair prejudice did not substantially outweigh the probative value of the evidence because the State did not introduce the evidence to show the defendant had a propensity for that type of crime); *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) ("We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment.").

2. Wilkins alleges the circuit court erred in refusing to allow him to present the testimony of Sierra Austin and Dawn Davis Young in his case-in-chief to challenge the integrity of the police investigation. The circuit court excluded the testimony of these two witnesses on the basis that their testimonies were

inadmissible hearsay, and Wilkins failed to challenge that ruling in his appellate briefs. Consequently, the circuit court's ruling on this issue is the law of the case and cannot be considered by this court. *See State v. Black*, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012) (holding an unchallenged ruling, right or wrong, becomes the law of the case and will not be considered by the appellate court); *State v. Fripp*, 396 S.C. 434, 441, 721 S.E.2d 465, 468 (Ct. App. 2012) (stating the appellant's failure to challenge the trial court's ruling in the appellate brief renders the unchallenged ruling the law of the case); *State v. Black*, 319 S.C. 515, 518 n.2, 462 S.E.2d 311, 313 n.2 (Ct. App. 1995) ("[A]n exception to the trial court's ruling will be deemed abandoned where the appellant fails to specifically argue it in his brief."). Moreover, while Wilkins contends Austin and Young's testimony would have demonstrated the police's failure to adequately follow up on another lead, both witnesses admitted they never informed the police about their conversations with the victim. Therefore, Wilkins was not prejudiced by the exclusion of this evidence. *See State v. White*, 372 S.C. 364, 373, 642 S.E.2d 607, 611 (Ct. App. 2007) ("To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice.").

3. Wilkins argues the circuit court erred in not allowing him to present surrebuttal testimony to allegedly new matter brought out in the State's reply. The circuit court had previously ruled this testimony was inadmissible hearsay, and Wilkins failed to challenge that ruling in his appellate briefs. The circuit court's ruling on this issue is therefore the law of the case and will not be considered by this court. *See Black*, 400 S.C. at 28, 732 S.E.2d at 890 (holding an unchallenged ruling, right or wrong, becomes the law of the case and will not be considered by the appellate court); *Fripp*, 396 S.C. at 441, 721 S.E.2d at 468 (stating the appellant's failure to challenge the trial court's ruling in the appellate brief renders the unchallenged ruling the law of the case); *Black*, 319 S.C. at 518 n.2, 462 S.E.2d at 313 n.2 ("[A]n exception to the trial court's ruling will be deemed abandoned where the appellant fails to specifically argue it in his brief.").

4. Wilkins asserts the circuit court erred in denying his motion for a mistrial on the ground the State suppressed evidence. However, Officer Melron Kelly testified he self-reported to internal affairs the rumor of his involvement in the victim's death; thus, the evidence at issue was actually presented to the jury. Hence, Wilkins has failed to demonstrate the allegedly suppressed evidence was material to his guilt or punishment. *See Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999)

("A *Brady*[1] claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." (footnote omitted)); *State v. Kennerly*, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998) ("[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (alteration by court) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)) (internal quotation marks omitted)). As to Wilkins's contention the suppressed evidence should have been disclosed prior to trial to allow him to conduct additional investigation, that argument was first asserted at the hearing on the motion for a new trial and is thus unpreserved. *See State v. Williams*, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (noting in order to preserve an issue for appellate review, a defendant must object on that ground at his first opportunity); *State v. Geer*, 391 S.C. 179, 193, 705 S.E.2d 441, 448 (Ct. App. 2010) (stating an issue may not be raised for the first time in a post-trial motion); *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) (noting an argument must be raised to the trial court in a timely manner to preserve it for appellate review).

AFFIRMED.

THOMAS, KONDUROS, and GEATHERS, JJ., concur.

---

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

AHMAD JAMAL WILKINS,

APPELLANT

Appellate Case No. 2012-212387

Appeal from Richland County

Clifton Newman, Circuit Court Judge

Opinion No. 2015-UP-365

PETITION FOR REHEARING

On July 22, 2015, this Court affirmed Appellant's convictions and sentences in an unpublished opinion. State v. Wilkins, Op. No. 2015-UP-365 (S.C. Ct. App. filed July 22, 2015). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests rehearing on all issues presented based on the significant facts misapprehended by this Court as explained more fully below.

I. Patruan Hare & Prior Bad Acts

Appellant appealed the trial judge's decision to permit Hare to testify regarding an alleged admission by Appellant that he had choked the deceased on a prior occasion. This Court held that "[d]espite Hare's testimony that Wilkins admitted to choking the victim but claimed it was not on the night of the victim's death, the record is clear Hare's testimony pertained to the murder of the

victim and was not prior bad act evidence." This conclusion conflicts with the record. Although the state attempted to treat Hare's testimony as an admission by Appellant, the testimony was clear – it was an alleged **prior** bad act. A detailed review of the record is required to demonstrate how this Court's opinion misapprehended the evidence presented.

When Appellant moved during pre-trial proceedings to exclude the testimony of Hare, a jailhouse snitch pursuant to Rules 401, 403, and 404(b) of the South Carolina Rules of Evidence, he summarized as follows: "'They started to argue. He choked the bitch **but said it wasn't the same night that she ended up dead.**'" R. 61, lines 14-21 (emphasis added). Thus, the proposed testimony by Hare would be that Appellant had choked the deceased on some unknown night prior to the night of her death. R. 61, line 22 – R. 62, line 2. Appellant further explained that Hare claimed that Appellant had run from the police by sending the police on a "wild goose chase." R. 62, lines 9-14.

The prosecution's position was that Hare's statement was an admission by Appellant to choking the deceased. R. 63, line 5. However, the prosecutor made clear that the evidence was being offered to show character and conformity therewith, when the prosecutor stated:

> The fact that he made [an] admission of choking her is specifically pretty significant in this case because she died as a result of that. There's nothing unusual at all in my experience - - Your Honor, I'm sure you've had more experience than I have - - for a defendant to minimize their involvement but to make certain admissions to underlying **bad acts.**

R. 65, line 21 – R. 66, line 3(emphasis added).

The judge allowed Hare's testimony to be presented to the jury:

> As far as he choked her but she didn't die that night, the evidence the state has is that the death occurred between some hour and some other hour when her body was discovered the next day.

> All of that would be up to the jury to kind of listen and figure out the extent to which this may implicate this defendant or not. Of course, part of their being in prison - - some of this has to be redacted, and we'll have to get into how much of it has to be.

R. 66, lines 8-17. Additionally, the trial judge stated, "The weight that the jury would give to whether he's talking about something else or not, I don't see on its face that it's referencing some other situation other than the murder of this victim." R. 66, line 23 – R. 67, line 3.

While the two were incarcerated, Hare questioned Appellant about his pending case and took notes of their conversations. R. 376, lines 2-4. Hare contended that Appellant said he went to the deceased's house to drink and smoke. When Appellant indicated he wanted sex with the deceased, she "wasn't with it." R. 380, lines 7-14. Then, they argued. Appellant said "he choked the bitch." **However, this was not the same night that she died.** R. 380, line 21 – R. 381, line 1.

Very confusingly, and exemplifying why Hare should have never been allowed to testify, Hare claimed that Appellant said he had strangled the deceased with a bathrobe and burned the deceased. R. 381, lines 7-10. After objections were made, Hare corrected himself to say that Appellant explained the deceased had died as a result of strangulation. R. 381, lines 23-24. Additionally, **Appellant never told Hare that he killed the deceased.** R. 399, line 14 – R. 400, line 2.

A close review of the record demonstrates how this Court misapprehended the evidence presented. Hare's testimony did not concern an alleged admission by Appellant. Further, a review of the existing case law in South Carolina concerning prior bad acts and Rule 403, SCRE reveals the evidence should not have been admitted.

Turning first to evidence of prior bad acts, the South Carolina Rules of Evidence and case law preclude the introduction of evidence of a defendant's other crimes, wrongs, or acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) identity, (3) a

common scheme or plan, (4) the absence of mistake or accident, or (5) intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). In fact "[e]vidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged." State v. Johnson, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987). As explained by the Court in State v. Wesley Smith, 391 S.C. 353, 361, 705 S.E.2d 491,495 (2011), in order to introduce evidence of some other act by the defendant under one of the exceptions, the prosecutor must lay a proper foundation.[1] At the outset, the prosecutor must prove by clear and convincing evidence that the defendant committed the other act, if the defendant was not convicted of the act. Id. (citing State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008)). Next, the prosecutor must articulate the logical connection between the other act and one of the five exceptions listed in Rule 404(b), SCRE. Id. (citing State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006)). This requires a showing of how the evidence of the other act will assist the fact-finder in understanding a material issue in the case related to one of the Rule 404(b), SCRE, exceptions. Id. If the trial judge determines the prosecutor has satisfied both requirements, then the judge must determine whether the probative value outweighs the prejudicial effect pursuant to Rule 403, SCRE. Id. (citing State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009)).

Neither the judge nor the prosecutor explained how the evidence of this alleged prior bad act was admissible against Appellant under one of the exceptions in Rule 404(b), SCRE or that the act had been proven by clear and convincing evidence.

[1] Due to the danger this type of evidence poses, "[e]vidence of other crimes must be put to a rather severe test before admission." State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998).

Exceptions to Rule 404(b), SCRE

This Court held Hare's testimony "identified Wilkins as the murderer and supplied a motive for the crime." Thus, Appellant will limit the discussion in this petition to those two exceptions, but incorporates by reference the discussion of the other exceptions presented in his brief.

Identity

In State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006), the South Carolina Supreme Court held that a defendant's alleged statement to another that he was fleeing from police because a female had accused him of murdering someone and he was out on bond for that murder charge "in no way" identified the defendant as the person who murdered the victim. Rather, the evidence only illustrated that the defendant knew he had been accused of murder and knew the name of the witness. Id. at 211, 631 S.E.2d at 267. Similarly, Appellant's alleged statement to Hare that he had choked the deceased at some unknown date in no way identified Appellant as the person who used a ligature to strangle the deceased and set her apartment afire on February 3, 2009.

Motive

Motive and intent are additional exceptions to the rule prohibiting the introduction of prior bad acts. As these exceptions "are closely related," Appellant will discuss them together. See State v. Fonseca, 383 S.C. 640, 648, 681 S.E.2d 1, 4 (Ct. App. 2009). On this point, the South Carolina Supreme Court has explained that

> [I]n a prosecution for homicide, evidence of other crimes committed by the defendant which are in time and circumstances so intimately connected with and a part of the crime with which he is being charged as to show a motive for the commission of the homicide or a state of mind indicating a purpose for its commission, is admissible to establish such motive or state of mind.

State v. Grainger, 275 S.C. 417, 421, 272 S.E.2d 175, 176 (1980). In State v. Sweat, 362 S.C. 117, 124-125, 606 S.E.2d 508, 512 (Ct. App. 2004), this Court held that a prior criminal domestic

violence incident between the defendant and victim in an assault and battery trial was admissible to show intent and motive where the victim had pressed charges against the defendant for the prior incident, the defendant had gone to jail for the incident, and the assault and battery occurred only eleven days after his release from jail.

In State v. Plyler, 275 S.C. 291, 296, 270 S.E.2d 126, 128 (1980), our Supreme Court allowed evidence of a verbal altercation between the victim and the defendant three days prior to the killing. The Court explained that "[e]vidence of previous difficulties or ill feelings between the accused and the victim and of facts showing the cause of such difficulties or ill will is admissible on the question of motives where there is some connection of cause and effect between the evidence and the crime." Id. (emphasis added). Only where the prior bad act evidence shows motive on the part of the accused and is not so remote in time as to negate its probative value may the evidence be admitted. Id.

Notably, Hare provided no time for when this alleged incident occurred. It could have occurred one week prior to the deceased's death or years prior to her death. Thus, the temporal proximity aspect is completely lacking; therefore, the prosecution failed to show the alleged prior choking was so intimately connected to the deceased's death as to show a motive. There was no evidence the deceased pressed charges against Appellant for the alleged choking like in Sweat, supra. The record disclosed absolutely no connection of cause and effect between the prior bad act evidence and the charges against Appellant.

Clear and Convincing Evidence

In the opinion, this Court failed to address the state's complete failure to prove the alleged prior bad acts occurred by clear and convincing evidence. Appellant respectfully requests this Court rule on this issue. "Clear and convincing evidence is that degree of proof which will produce in the

mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." Fletcher, 379 S.C. at 24, 664 S.E.2d at 483.

In Fletcher, 379 S.C. at 25, 664 S.E.2d at 483-484, our Supreme Court held it was error to admit the testimony of a witness who testified about observing two incidents of alleged child abuse where the prosecution presented no evidence that the defendant was the person who engaged in the abuse despite evidence in the record that the defendant was at least present at the time of the alleged abuse. Similarly, in State v. Pierce, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997), the Court found error in permitting testimony from witnesses who previously treated the victim for a split lip and a swollen eye in the homicide by child abuse case where there was no evidence the defendant inflicted the injuries. In another homicide by child abuse case, the Court held the trial court erred in admitting evidence of the death of another child and the injuries of a third child due to a lack of evidence that the defendant had caused the death or injuries despite the children having died and acquired the injuries while in her and her husband's care. State v. Cutro, 332 S.C. 100, 106, 504 S.E.2d 324, 327 (1998).

This case differed sharply from other cases where this Court has found clear and convincing evidence of the prior bad act. See State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013)(finding clear and convincing evidence of a prior bad act where the parties related their positions during a hearing and written motions and a brief, the proffered testimony was very specific and appeared credible); State v. Martucci, 380 S.C. 232, 257, 669 S.E.2d 598, 611 (Ct. App. 2008)(finding clear and convincing evidence where the witness testified about his direct observations of prior incidents and other witnesses testified about bruises and burns in this homicide

by child abuse case); State v. Gillian, 373 S.C. 601, 610, 646 S.E.2d 872, 877 (2007)(finding the evidence of the defendant's involvement in a prior residential burglary to be clear and convincing where several witnesses were able to testify to his involvement and he conceded the issue); State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004)(finding clear and convincing evidence where the alleged victim testified that the defendant previously assaulted her, the defendant was arrested and incarcerated, and another witness testified to having seen bruises on the alleged victim's arm following the assault).

During the pre-trial hearing on this matter, the prosecution failed to offer any evidence to support a finding that Petitioner had choked the deceased on some date prior to her death. The only evidence of the alleged prior choking was from a noted jailhouse snitch, who had lied to police previously and sought a reward for his testimony. Hare offered no personal observations of the alleged choking or any corroborative evidence. He simply made bold allegations in an effort to better his position within the federal prison system.

Rule 403, SCRE

Finally, Appellant respectfully requests this Court rehear the matter concerning his claim that the danger of unfair prejudice outweighed the probative value of the evidence. This Court must find that the trial court erred in admitting the prior bad act because the danger of unfair prejudice outweighed the probative value. See Rule 403, SCRE. Rule 403 of the South Carolina Rules of Evidence provides that even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." The obvious starting point in the analysis is to determine what, if any, probative value the proffered evidence has. Next, a court must examine the danger of unfair prejudice, confusion of the issues, and potential of misleading the jury,

unduly delaying the case, wasting time, and needlessly presenting cumulative evidence. Finally, the court must balance those factors.

Hare's claims regarding Appellant's alleged statement about choking the deceased at some unknown time in the past was not probative of whether Appellant had choked the deceased on February 3, 2009 with her bathrobe belt and set her apartment on fire. The only value the evidence offered was to paint Appellant as a bad person. The danger of unfair prejudice was great as the evidence would lead a jury to conclude that if he had done it before, he would do it again. Further, the danger of unfair prejudice was exacerbated when Hare's testimony was twisted by the prosecution to indicate that Appellant had admitted to killing the deceased. Obviously, the mischaracterization of the conversation created a high level of unfair prejudice and misled and confused the jury. In balancing the minimal probative value against the significant danger of unfair prejudice and misleading of the jury, the conclusion is obvious – Hare's testimony should have been excluded.

II. **Restricted defense presentation**

This Court held that the lower court excluded the proffered testimony as hearsay. Further, this Court held Appellant failed to challenge the hearsay ruling. Appellant respectfully disagrees with this Court's construction of the objection and ruling and requests rehearing on the matter.

Three witnesses were proffered by the defense: Tasha Praylow, Sierra Austin, and Dawn Davis Young. The judge ruled he could only present testimony from Praylow. Austin lived next door to the deceased. R. 828, lines 15-17. The deceased told Austin that she was pregnant by Melron Kelly. R. 831, lines 1-5. The deceased asked Young about "messing basically around with an officer." R. 839, lines 11-17. Young informed the deceased that she would not mess around with an officer. R. 839, lines 17-18.

The prosecution objected to the testimony of all three witnesses as hearsay and third-party guilt. R. 844, lines 3-11. Appellant countered that the proffered testimony attacked the integrity of the investigation; thus, Appellant's contention was that the evidence was not being offered for the truth of the matter asserted. R. 845, line 22 – R. 846, line 9. Judge Newman ruled that Appellant's first proffered witness could testify because the testimony was an exception to hearsay in that it went to the deceased's state of mind that she was fearful that Officer Kelly was going to kill her. However, the judge excluded the testimony of Austin and Young **without further elaboration.** Specifically, the judge stated "So based on all of that, it's my ruling tha the statement of the first witness, Praylow, is admissible based on the state-of-mind exception, that she was fearful that Officer Kelly was coming to kill her. The statements of these other witnesses about the victim being pregnant or the victim being in a relationship and wants to know, figure out how to get out of the platonic relationship, those things are excluded. I'm excluding the second, two and three, and admitting No. 1." R. 851, lines 1-10. Quite simply, the testimony of the other two witnesses was not being offered for the truth of the matter asserted – that the deceased was pregnant or that the deceased questioned how to end a relationship. In fact, the medical testimony was dispositive on the pregnancy aspect – the deceased was not pregnant. Therefore, Appellant could not offer the testimony to prove the truth of the matter asserted. Rather, the evidence was not being offered to prove its veracity, it was being offered to impugn the integrity of the investigation. Appellant respectfully requests this Court review the ruling made by the trial judge, find this issue preserved for review and properly raised on appeal, and decide the issue on the merits.

Praylow, who lived in Bethel Bishop Apartments, saw the deceased at 11:30 on the night of her death. The deceased confided in Praylow that she was scared because Kelly, a police officer, was coming to kill her. R. 855, line 5 – R. 856, line 1; R. 857, lines 8-9. Although Praylow did not

tell Reese about her encounter with the deceased, she did ask Reese if Kelly was being investigated. Reese quickly informed Praylow that Kelly was not a suspect. R. 856, lines 2-9.

The United States Constitution guarantees a criminal defendant the right to present a complete defense through the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment. Crane v. Kentucky, 476 U.S. 683, 690 (1986); State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986)(holding the Sixth Amendment "constitutionalizes" the right to present a defense in a criminal trial). "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane, 476 U.S. 683, 690 (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)). South Carolina's Constitution provides similarly: "Any person charged with an offense shall enjoy the right ... to be fully heard in his defense...." S.C. Const. art. I, § 14; see also S.C. Code Ann. § 17-23-60 ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor....").

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." Taylor v. Illinois, 484 U.S. 400, 408 (1988)(citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973)). "'The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.'" Id. at 408-409 (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)). "'The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.'" Id. at 409 (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)). Without question or hesitation, the United States Supreme Court declared "'[t]his right is a fundamental element of due process of law.'" Id.

Undermining the "ostensible integrity of the investigation" is one method by which a defendant may present a defense. See Kyles v. Whitley, 514 U.S. 419, 448 (1995).

"Evidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears." Schmidt, 288 S.C. at 303, 342 S.E.2d at 403 (citing Assoc. Mgmt. v. E.D. Sauls Constr.Co., 279 S.C. 219, 305 S.E.2d 236 (1983)); see also Rule 401, SCRE (defining relevant evidence). Further, "[e]vidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." Id. (citing Toole v. Salter, 249 S.C. 354, 154 S.E.2d 434 (1967)); see also Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided . . . . Evidence which is not relevant is not admissible.").

In State v. Page, 406 S.C. 272, 287, 750 S.E.2d 623, 631 (Ct. App. 2013), this Court held the trial judge abused his discretion by finding the proffered testimony offered by the defendant was not relevant. Page sought to introduce a text message and testimony by a witness that the alleged victim had admitted to the witness that she had lied to the police. Id. at 288, 750 S.E.2d at 632. On the other hand, this Court affirmed a trial judge's preclusion of evidence that was irrelevant and unfairly prejudicial. State v. Lyles, 379 S.C. 328, 344, 665 S.E.2d 201, 209 (Ct. App. 2008). Lyles sought to introduce evidence of prior drug sale solicitations at the apartment where the shooting occurred and the presence of drugs next to the deceased. Lyles claimed the proffered testimony established that drugs were being sold from the deceased's apartment and bolstered the credibility of Lyles by supporting his claim that he went to the apartment merely to purchase drugs. Id. at 336, 665 S.E.2d at 205. This Court held the evidence was properly excluded because there existed no probative link between the proffered testimony and the pending charges. The proffered testimony established that drugs were offered for sale outside of

the apartment several months prior to the shooting by an unknown individual. Id. at 340, 665 S.E.2d at 207.

This Court's determination that Appellant was not prejudiced by the exclusion of this evidence because the witnesses "never informed the police about their conversations" with the deceased misses the point – the police completely disregarded their duty to investigate the crime. The trial judge erred in refusing Appellant's request to present the testimony of Davis and Austin in his case-in-chief. The proffered testimony indicated the police had failed to conduct an adequate investigation by failing to follow-up on leads concerning "one of their own" – Melron Kelly. Davis and Austin would have provided the link between the testimony of Praylow concerning the deceased's fear of Kelly, the appearance of a police officer's car on the video outside of the deceased's apartment at the time of her murder, the appearance of Kelly at the scene the following day despite his role as a narcotics agent not requiring his presence at the scene of a homicide, and the loss of a key piece of evidence by the Columbia Police Department – the rape kit. This denial of the presentation of witnesses denied Appellant the most fundamental of his his state and federal constitutional rights - to present a complete defense. Appellant's case-in-chief sought to cast doubt on the Columbia Police Department's investigation and to show a motivation for such shoddy work - allegations of improprieties between a fellow officer and the deceased and the potential murder of the deceased by that officer. This denied Appellant his right to present his version of the facts to the jury so it may decide where the truth lies.

III. Surreply

This Court held that Appellant's failure to challenge the trial court's ruling that the proffered testimony to be used in surreply was hearsay rendered this issue not cognizable on appeal. In light of this issue's obvious interrelatedness with the second issue, Appellant incorporates by reference the arguments made therein. The judge's refusal to permit surreply had nothing to do with any concern about the testimony being hearsay. This supports Appellant's argument that the trial judge did not rule the testimony was hearsay when he initially disallowed it. As demonstrated supra, the testimony was not being offered for the truth of the matter asserted. The judge's ruling that Appellant was not permitted to present surreply did not rely upon any alleged hearsay determination because the testimony was not hearsay. Additionally, the prosecution's presentation of reply testimony enhanced the probative value of the surreply offered by Appellant.

After Praylow testified for the defense, the prosecution presented Reese as a reply witness. Reese claimed he had no contact with Praylow "whatsoever." R. 945, lines 11-19. Additionally, the prosecution called Melron Kelly as a reply witness. Kelly admitted that he knew the deceased because she lived in the neighborhood where he was a residential officer at the start of his career. R. 950, lines 6-14. Kelly further admitted that he was at the crime scene on February 3, 2009 "to assist the on-scene investigators." R. 951, lines 10-14. Kelly denied threatening the deceased at any time prior to her death. R. 951, lines 22-24. He further denied any contact with the deceased on February 2nd or February 3rd. R. 951, line 25 – R. 952, line 3. He flatly denied knowing the deceased in any personal capacity or having any personal contact with her. R. 952, lines 10-11. He had no dealings with the deceased other than "[j]ust knowing her as a juvenile growing up in the neighborhood." R. 952, lines 18-21. He unequivocally denied threatening to kill her. R. 952, lines 12-17.

Kelly claimed the residents of Bethel Bishop resented the police and were unhelpful in solving crimes. Further, he claimed it was not uncommon for rumors about police officers to be started there. R. 953, lines 15-25. During the summer of 2009, Kelly claimed he took time off from work to be with his wife and child. R. 954, lines 3-17. During that time he "was notified by one of [his] subordinate officers that an informant was telling them that [Kelly] had been arrested for the murder" of the deceased. R. 954, lines 18-22. Kelly denied being arrested, and claimed he contacted Internal Affairs regarding the allegation. He prepared a written statement and asked the office to investigate. Nothing developed, however. R. 955, lines 2-12.

On cross-examination, Kelly claimed he never had a sexual relationship with the deceased. R. 958, lines 21-25. When Appellant asked, "It wouldn't be good if she claimed that she was pregnant by you either, would it?" the prosecution objected. The judge excused the jury to take up the prosecution's matter of law. R. 959, line 25 – R. 960, line 16. Inexplicably, the prosecution claimed the reply was limited to whether Kelly had threatened the deceased. Appellant pointed to questions asked by the prosecution on direct examination going beyond Kelly having threatened the deceased to include whether Kelly even had a personal relation with the deceased at all. Of course, Kelly had denied such a relationship. R. 960, line 19 – R. 961, line 7. Appellant noted that he had a witness prepared to testify that the deceased claimed to be pregnant by Kelly. R. 961, line 13 – R. 962, line 17.

After the state rested its reply case, Appellant moved to call Austin and Davis as witnesses. R. 972, lines 23-25. Appellant explained that Austin and Davis would be in response to the state's reply witnesses, particularly, Kelly. R. 973, lines 1-3. The judge asked "what would you call that?" R. 973, lines 4-9. Appellant responded, "Sur-reply." R. 973, line 10. The judge then denied the motion. R. 974, line 14. He elaborated that the defense could not create issues that compelled the

state to reply, and "then call additional witnesses to further extend the trial through sur-rebuttal." He refused to exercise his discretion to permit Appellant to present the testimony of Austin and Davis. R. 974, lines 14-24.

Later, the judge cited State v. Watson, 353 S.C. 620, 579 S.E.2d 148 (Ct. App. 2003) to support his ruling. R. 975, lines 22-23. According to Judge Newman, sur-rebuttal is allowed where "new matter or new facts are injected for the first time in rebuttal, especially where the evidence offered in sur-rebuttal is for the first time made competent by the evidence introduced by plaintiff in rebuttal and could or should have been entered at an earlier time, then it's not new matter." R. 976, line 24 – R. 977, line 4. The judge then explained that whether Kelly had anything to do with the death of the deceased was brought up through Appellant's case, and therefore the proffered testimony was not "new matter." He determined "[t]hese other issues [were] collateral issues" with no bearing on the case. R. 977, lines 6-15. As a review of the record demonstrates, the judge's ruling to disallow surreply was not based upon any supposed finding that the testimony was hearsay. In fact, the judge had not found the testimony was hearsay. Rather, the judge was well aware that the testimony was not being offered for the truth of the matter asserted.

The trial judge's denial of Appellant's surrebuttal implicated Appellant's federal and state constitutional rights to present a defense. "South Carolina courts have approved the use of surrebutal testimony." State v. Watson, 353 S.C. 620, 624, 579 S.E.2d 148, 150 (Ct. App. 2003). In fact, "[a] defendant has a right to respond to **new evidence** given in reply." Camlin v. Bi-Lo, Inc., Store No. 2, 311 S.C. 197, 200, 428 S.E.2d 6, 8 (Ct. App. 1993)(emphasis added)(citing Strait v. City of Rock Hill, 104 S.C. 116, 88 S.E. 469 (1916)). When a party does not inject new evidence, the trial court may allow surrebuttal, but it is not as a matter of right. Bunch v. Charleston & W.C. Ry. Co., 91 S.C. 139, ___, 74 S.E. 363, 365-366 (1912)(stating that "if the plaintiff in reply puts

new matter in evidence or makes a new case different from that at first made out, it becomes the right of the defendant to call witnesses in surrebuttal. And it is within the discretion of the court to permit the introduction of evidence in surrebuttal, where the plaintiff in reply has not transgressed the proper bounds of evidence in rebuttal, though in that case the privilege cannot be claimed as a matter of right.").

Appellant was entitled to surreply as a matter of right because the prosecution injected new evidence – whether Kelly had a personal relationship with the deceased. Despite the prosecutor's blatantly false claim to the trial court that its reply evidence had been limited to a threat, the record is clear the prosecutor's questioning went far beyond a threat. The prosecutor posed questions to Kelly to elicit testimony not only of whether Kelly knew the deceased, but of the nature of their relationship. See R. 952, lines 10-11; R. 952, lines 18-21. The prosecution also elicited that Kelly was aware of "rumors" that he had killed the deceased. Kelly allegedly informed Internal Affairs of the "rumors." The evidence that Kelly had no personal relationship with the deceased and that he was aware of rumors of his having killed the deceased was new evidence which granted Appellant the right to surreply. The trial judge erred in denying Appellant the opportunity to present two witnesses who would have contradicted Kelly's testimony concerning the nature of his relationship with the deceased and the "rumors" regarding his involvement in her death.

IV. **Mistrial**

This Court held that Appellant failed to demonstrate that suppression of evidence was material to his guilt or punishment. Appellant respectfully requests this Court rehear this matter based upon the evidence in the record supporting his claim. Further, Appellant respectfully requests this Court reconsider its determination that Appellant's argument that disclosure of the evidence would have allowed him to conduct an investigation was not preserved for appeal because it was not raised at the first opportunity but was raised during the motion for new trial. While it is true that Appellant argued that he should have received the information in a timely manner in order to conduct an investigation during the motion for new trial, such an argument was implicit in his motion for mistrial based on the state's failure to disclose the evidence.

When the prosecution presented Kelly as a reply witness, it was revealed that the Columbia Police Department was aware of the allegation that Kelly had been involved in a romantic relationship with the deceased and that he had killed her. Not only was the Columbia Police Department aware of the allegations, but Kelly had prepared a written statement and requested an investigation. R. 955, lines 2-6. Despite the rumors of Kelly's involvement and the internal investigation, Kelly was never interrogated and never provided DNA samples. R. 970, lines 19-23.

Appellant moved for a mistrial based upon the prosecution's withholding of the evidence identifying Kelly as a suspect and having been investigated internally. R. 967, lines 12-18. The trial judge summarily denied the motion. R. 967, line 22.

In Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court held that prosecutors must disclose any evidence in the prosecutor's possession that may be favorable to the accused and material to guilt or punishment. See also Kyles v. Whitley, 514 U.S. 419 (1995); Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006). Evidence is favorable to the

accused if it is either favorable exculpatory evidence or favorable impeachment evidence. Porter, 368 S.C. at 384, 629 S.E.2d at 356 (citing United States v. Bagley, 473 U.S. 667, 676 (1985)). Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. Id. A reasonable probability is one that undermines confidence in the outcome of the trial. Bagley, 473 U.S. at 678. A defendant need not request Brady evidence; it is incumbent upon the prosecutor to provide such evidence even without a request. United States v. Agurs, 427 U.S. 97, 107 (1976); see also Rule 3.8(d), RPC, Rule 407, SCACR.

In Riddle v. State, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006), the South Carolina Supreme Court confronted a Brady violation arising during post-conviction relief (PCR) proceedings. Days before Riddle's trial, police officer interviewed a key witness in the case who provided a statement inconsistent with his previous statement. The prosecutor failed to disclose this interview to Riddle. The PCR court held the statement was available to Riddle because he could have interviewed the officer who took the statement. Our Supreme Court disagreed, holding "[n]ot only is it unrealistic to require [Riddle] and his attorneys to reinterview all officers and investigators in the days before the trial, but that is not what Brady requires." As explained by the Court, "[t]he burden is on the solicitor to disclose material evidence which is exculpatory or impeaching." Id.

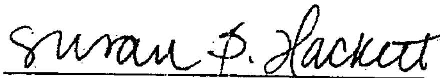
Recently, in State v. Anderson, 407 S.C. 278, 286-287, 754 S.E.2d 905, 909 (Ct. App. 2014), this Court made clear, yet again, that the "[t]he Brady disclosure rule requires the prosecution to provide the defendant with any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment." (citing Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012)); see also, Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (holding that the Brady rule extends to evidence that is not in the

actual possession of the prosecution but known by others acting on the government's behalf including the police).

As early as the summer of 2009, Kelly and the Columbia Police Department was aware of the "rumors" that Kelly had murdered the deceased. Yet, the prosecution failed to disclose any information to Appellant of evidence in the possession and control of the Columbia Police Department for such evidence despite numerous and repeated requests for discovery by Appellant. The very fact that Internal Affairs conducted an investigation should have been disclosed to Appellant prior to trial to permit him additional investigation. According to Kelly's testimony, Kelly learned of the "rumor" from a subordinate officer, whose name was never disclosed. The subordinate officer learned of the "rumor" from an informant, whose name was never disclosed. Interviewing those individuals and gathering additional information was crucial to Appellant's defense and his constitutional right to present a complete defense. The trial judge erred in denying Appellant's motion for a mistrial in light of the prosecution's clear violation of clearly established federal law governing discovery. The failure to disclose evidence by its very nature impairs the defendant from investigating the evidence. Thus, this argument is implicit in the argument that the material should have been disclosed in a timely manner.

For these reasons, Appellant respectfully requests this Court rehear the four issues presented on appeal.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

This 31st day of July, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

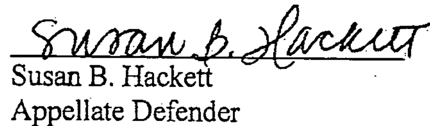
V.

AHMAD JAMAL WILKINS,

APPELLANT

CERTIFICATE OF SERVICE

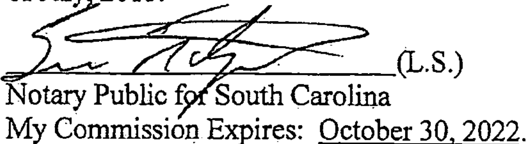
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Ahmad Jamal Wilkins #290911, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 31st day of July, 2015.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 31st day
of July, 2015.



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

The South Carolina Court of Appeals

The State, Respondent,

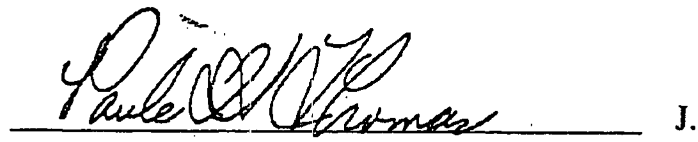
v.

Ahmad Jamal Wilkins, Appellant.

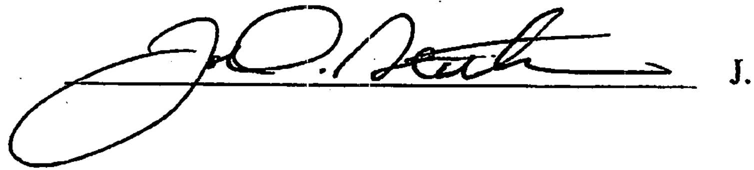
Appellate Case No. 2012-212387

ORDER

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


J.

J.


J.

Columbia, South Carolina

FILED
August 19, 2015

cc: Donald J. Zelenka, Esquire
Susan Barber Hackett, Esquire
Alan McCrory Wilson, Esquire
W. Edgar Salter, III, Esquire
Daniel Edward Johnson, Esquire

John W. McIntosh, Esquire