

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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RESPONDENT SC Court of Appeals

THE STATE,

V.

DON-SURVI CHISOLM,

APPELLANT

APPELLATE CASE NO. 2011-200186

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 2015-UP-501

PETITION FOR REHEARING

On October 28, 2015, this Court affirmed Appellant's conviction and sentence in State v. Chisolm, 2015-UP-501 (S.C. Ct. App. Filed October 28, 2015). Pursuant to Rule 221(a), SCACR, Appellant respectfully petitions this Court for rehearing because the Court may have overlooked and misapprehended several significant points when rendering its opinion.

First, this Court incorrectly held the trial court did not err in admitting evidence of Appellant's alleged prior drug dealing since this evidence did not "furnish part of the context of the crime" nor was it "necessary to a full presentation of the case" as this Court found. The testimony regarding Appellant's alleged prior drug dealing should have been excluded under Rule 404(b),

SCRE, because the evidence failed to establish any logical motive despite what the state argued at trial and on appeal. Moreover, this evidence should have been excluded under Rule 402, SCRE and Rule 403, SCRE, because it was irrelevant and its probative value was substantially outweighed by the danger of unfair prejudice to Appellant.

The state alleged at trial that Appellant replaced the front passenger seat of his Dodge Durango within days of the murder to destroy evidence linking him to the offense, specifically blood evidence that was supposedly on the seat. Over objection, the state presented the testimony of Thomas Simonelli. Simonelli testified that on September 14, 2007, the day after the murder, Appellant called him and allegedly asked Simonelli to purchase a passenger seat from LKQ Automotive on a credit card in exchange for cocaine. R. 412, l. 6 – 414, l. 4. Simonelli also claimed he “used to have a drug problem,” and that Appellant sold him drugs. R. 411, ll. 21-24.

The state argued at trial that Simonelli’s testimony was admissible under Rule 404(b), SCRE to show motive. The solicitor emphasized Tamekka Williams’ testimony that the decedent had started selling drugs about a month prior to the murder and argued, “I need to establish at this point . . . [Appellant] also sold drugs in that area to show motive as to why he would want to take out the victim . . .” R. 384, l. 23 – 385, l. 10; See R. 241, l. 20 – 242, l. 8. The solicitor stated, “It’s the state’s position that that would be quite a good reason for Mr. Chisolm [Appellant] to want to take out a fellow drug dealer that’s cutting into his territory.” Id.

The state also argued the testimony was more probative than prejudicial because Appellant told law enforcement he replaced the seat because it had cigarette burns on it. The state further asserted it was unusual that a person who wanted to replace a car seat would do so when he could not afford to do it with cash and was forced to make a third-party purchase involving cocaine the day after a murder. R. 384, ll. 3-22; R. 386, l. 10 – 387, l. 13.

The trial court held Simonelli's testimony was relevant to show Appellant replaced the seat in his vehicle and to show motive under SCRE 404(b). Additionally, the court held "the probative value far exceeds the prejudicial effect" to Appellant because the testimony regarding cocaine and Appellant's alleged prior drug dealing was not similar to the offense for which he was on trial. R. 388, l. 25 – 390, l. 20.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." SCRE Rule 404(b); See State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, alleged prior bad acts that are not the subject of conviction must be proved by clear and convincing evidence. State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998); State v. Smith, 300 S.C. 216, 218-219, 387 S.E.2d 245, 247 (1989). Additionally, the record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. State v. Brooks, 341 S.C. 57, 61, 533 S.E.2d 325, 327 (2000).

"Further, even though the evidence falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." SCRE Rule 403; See State v. Garner, 304 S.C. 220, 221-222, 403 S.E.2d 631, 632 (1991).

Simonelli's testimony that Appellant previously sold him drugs lacked any logical relevance to the murder for which Appellant was accused. See Brooks, 341 S.C. at 61, 533 S.E.2d at 327. *The connection was simply not there.* Besides Simonelli's testimony that Appellant sold him drugs, the only other evidence produced at trial that contributed to the state's farfetched alleged motive was the testimony of Tamekka Williams that the decedent began

selling drugs about a month before his death. See R. 241, l. 20 – 242, l. 8; See also R. 411, l. 21 – 414, l. 4. As Appellant argued at trial, “it’s purely unrelated and unsubstantiated conjecture.” R. 385, ll. 11-14. There was *no* evidence of a conflict between Appellant and the decedent over alleged drug dealing nor was there *any evidence* of a competition between the two. David White, the only witness to the alleged murder, claimed there was *no arguing* between Appellant and the decedent and that he did not know why Appellant allegedly shot the decedent. R. 300, ll. 3-5.

There was *nothing* in the record to support the inference that the decedent and Appellant were involved in competing drug dealing businesses. Therefore, Simonelli’s testimony should not have been admitted under Rule 404(b) to support the state’s farfetched theory of motive.

Additionally, the evidence that Appellant allegedly offered to trade cocaine in exchange for the purchase of the front passenger seat was *not* “necessary to a full presentation of the case” as this Court held. The state was able to present evidence that Appellant had called numerous junk yards looking for a front passenger seat to a 2006 Dodge Durango and that Appellant ultimately obtained a new front passenger seat for his vehicle from LKQ Automotive within a few days of the murder. The specific testimony regarding Appellant’s alleged offer to trade cocaine in exchange for Simonelli putting the seat on a credit card was wholly unnecessary and was simply used by the state to damage Appellant’s character.

Not only was there no logical relevance between Appellant’s alleged prior drug dealing and the murder for which Appellant was tried, but any probative value of the testimony regarding Appellant’s alleged prior drug dealing was substantially outweighed by the danger of unfair prejudice. Appellant was prejudiced because such testimony was destructive to his character and hence his credibility. While Appellant did not testify at trial, he made various statements to law enforcement that were presented to the jury, such as he purchased a new front passenger seat for

his Durango because of burn holes from cigarettes. See R. 428, l. 19 – 429, l. 4. Thus, Appellant's credibility was an important issue in the case.

Moreover, it appears from this Court's brief opinion that the Court may have overlooked our Supreme Court's opinions in State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990), State v. Bolden, 303 S.C. 41, 398 S.E.2d 494 (1990), and State v. Smith, 309 S.C. 442, 424 S.E.2d 496 (1992).

In Coleman, our Supreme Court held prejudice to Coleman from the admission of evidence that he was a social user of cocaine outweighed any probative value to show Coleman's motive or state of mind at the time of the murder. Despite evidence Coleman was "wired" on the morning of the murder, the Court concluded there was no evidence that Coleman's condition was the result of cocaine use nor was there any evidence in the record to support the inference that the victim and Coleman were involved in a drug transaction. Instead, the Court held the only function of this evidence was to demonstrate Coleman's bad character and thus it granted him a new trial. 301 S.C. at 60, 389 S.E.2d at 660.

In Bolden, our Supreme Court held evidence of Bolden's alleged crack cocaine use in a hotel shortly before the hotel was robbed was prejudicial error when its only function was to demonstrate the defendant's bad character. The Court stated, "[T]here is nothing in the record to indicate a logical relevance between use of crack cocaine during the night before the robbery and the robbery which occurred at 6:10 am the following day." 303 S.C. at 43, 398 S.E.2d at 494-495. The Court further held that even if the testimony was relevant, its probative value was clearly outweighed by its unfair prejudice and thus remanded Bolden's case for a new trial. 303 S.C. at 43-44, 398 S.E.2d at 495.

In Smith, our Supreme Court held evidence of Smith's prior drug use, unrelated to the murder and armed robbery, should have been excluded. Despite considerable evidence of cocaine use during the actual murder and armed robbery, the Court held Smith's *prior* cocaine use was highly prejudicial and "so destructive to [Smith's] character, hence her credibility, that it cannot be held harmless error or cumulative." The Supreme Court reversed Smith's convictions and death sentence and remanded the case for a new trial. 309 S.C. at 446-447, 424 S.E.2d at 498-499.

The facts of Appellant's case are similar to the facts of the above cited cases. Evidence of Appellant's alleged *prior* drug dealing was highly prejudicial, failed to establish any logical motive based on the evidence presented, and was extremely destructive to Appellant's character and credibility. Moreover, it was not necessary for "a full presentation of the case."

Second, this Court incorrectly found Appellant's argument that the trial court erred by admitting a weapon into evidence when there was an insufficient nexus to prove the weapon was involved in the murder was not preserved for appeal. The record demonstrates Appellant objected to the admission of the weapon, offered as State's Exhibit No. 14, on grounds of relevance, lack of foundation, and improper chain of custody. R. 433, l. 22 – 434, l. 4; R. 436, ll. 1-6.

David White, Appellant's co-defendant, claimed he saw the gun Appellant allegedly used to shoot the decedent. White testified, "It was a twenty-two, a twenty-two long. I know what a twenty-two long look like [sic]. It was a twenty-two long, long on the muzzle." R. 283, ll. 23-25. White provided no further details regarding the appearance or characteristics of the weapon. When presented with a gun identified as State's Exhibit No. 14, White stated, "That *looks like* the gun [Appellant] shot [the decedent] with." R. 284, ll. 17-18 (emphasis added). White further claimed

that before Appellant drove him home on the morning of the murder, Appellant stopped at Bacon Bridge Road and “tossed the gun out over the bridge.” R. 289, ll. 18-23; R. 293, ll. 1-9.

Allison Greer of the Dorchester County Sheriff’s Office testified that the sheriff’s office learned of the location of the alleged murder weapon on November 16, 2007 when David White came forward. R. 429, ll. 16-21. Greer was a member of the “dive team” and was “requested to dive the area off of Bacon’s Bridge Road where the Ashley River crosses over Bacon’s Bridge.” R. 429, l. 22 – 430, l. 7. The dive team ultimately located and recovered a twenty-two caliber Browning Buck Mark semi-automatic pistol a few days into the search. R. 430, l. 25 – 431, l. 4. When presented with a firearm identified as State’s Exhibit No. 14, Greer testified, “That it *appears to be* the same weapon that we located.” R. 433, ll. 14-18 (emphasis added).

When the state subsequently offered State’s Exhibit No. 14 into evidence, Appellant clearly objected on grounds of relevance, lack of foundation, and improper chain of custody. R. 433, l. 22 – 434, l. 4; R. 436, ll. 1-6. Based on the solicitor’s argument in response, it is apparent the state understood the grounds of Appellant’s objection. The solicitor argued the gun was tied to the crime through White’s testimony and that it was found in the water at the location where White said the gun was located, clearly attempting to suggest the weapon was relevant and that there was a sufficient nexus. The solicitor also noted that Greer testified the gun appeared to be the gun the dive team pulled out of the water. He concluded that the gun was “*certainly relevant*” and that the state laid a proper foundation for the gun to be admitted into evidence. R. 434, l. 15 – 435, l. 8 (emphasis added).

Appellant further argued that David White was “high on cocaine, freaked out, he was in a dark car,” thus implying White was not reliable in his identification of the alleged murder weapon and that the gun was not relevant to the case. R. 436, ll. 8-10.

The trial court sustained the objection finding additional foundation was required. R. 436, l. 13 – 43. Greer then testified that she was present when the firearm was recovered from the river. She claimed the gun removed from the water and firearm identified as State’s Exhibit No. 14 both had gold triggers and the handle grips appeared to be the same shape. R. 437, l. 23 – 439, l. 1.

The weapon was ultimately admitted into evidence during the testimony of Detective Zensen of the Dorchester County Sheriff’s Office. Zensen testified that she took possession of the weapon immediately after it was recovered from the water and transported the gun directly to SLED. R. 473, l. 10 – 474, l. 25. She identified State’s Exhibit No. 14 as the gun recovered from the river. She further claimed the weapon had a “very distinctive” green neon sight and a “very distinctive” gold trigger. R. 472, l. 25 – 473, l. 9; R. 474, ll. 23-25.

When the state sought to admit the weapon, Appellant properly renewed his objection stating, “I’ll just renew my objection, Your Honor, *on the same grounds.*” R. 475, ll. 18-23 (emphasis added). The trial court simply ruled, “Very well. Overruled.” App. 475, l. 23. The court therefore presumably overruled the objection based on all grounds raised by Appellant, including lack of relevance, lack of foundation, and an insufficient chain of custody. Consequently, this issue was properly preserved for appellate review and this Court respectfully overlooked the parts of the record that indicate Appellant objected on grounds of relevance and that the weapon was not properly connected to this murder.

Turning to the merits of the issue, the trial court erred by admitting the firearm recovered by law enforcement from the Ashley River into evidence because there was an insufficient nexus to prove the weapon was involved in the murder thereby making the firearm irrelevant.

“Evidence which is not relevant is not admissible.” Rule 402, SCRE. Relevant evidence means “evidence having any tendency to make the existence of any fact that is of consequence to

the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. Additionally, even relevant evidence should be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice.” Rule 403, SCRE. “Unfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” State v. Elders, 386 S.C. 474, 486, 688, S.E.2d 857, 863 (Ct. App. 2010) (quoting State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)).

David White, the *only* alleged witness to the murder, testified that the gun Appellant allegedly used to shoot the decedent was a “twenty-two long.” R. 283, ll. 23-25. White provided no further details. White did not testify about the “very distinctive” neon green sight nor did he mention the “very distinctive” gold trigger. See R. 473, ll. 7-9. As Appellant argued at trial, White was high on cocaine and “freaked out” on the night of the alleged murder. See R. 436, ll. 8-10. White testified he did not see any guns before the alleged shooting and that after the alleged shooting he “was in shock” and his “mind went blank.” R. 280, ll. 14-17; R. 282, l. 11 – 283, l. 20. Additionally, the incident allegedly took place in the early morning hours when it was dark outside. See R. 281, ll. 14-20. The lack of description of the alleged murder weapon provided by White coupled with the circumstances surrounding the incident, including the fact that it was dark outside and that White was high on cocaine and “freaked out,” indicate that it was highly unlikely White could reliably identify the alleged weapon.

The only other information White provided to law enforcement was that Appellant allegedly stopped on Bacon Bridge Road on the night of the murder and “tossed the gun out over the bridge.” R. 289, ll. 18-23; R. 293, ll. 1-9. Even if White’s testimony that Appellant threw the gun over Bacon Bridge is to be believed, there is no reliable evidence that the weapon recovered by law

enforcement and presented at trial as the alleged murder weapon was the actual weapon used to inflict the injury upon the decedent.

Parnell, the firearms and tool mark expert, was unable to determine whether the bullet recovered from the decedent's body was or was not fired from the weapon entered into evidence as the murder weapon because the bullet was so badly damaged. R. 612, l. 21 – 613, l. 9.

Additionally, there was no testimony that Appellant owned a similar gun or had been seen with a gun prior to the alleged murder. Tamekka Williams testified that she told detectives she had never seen Appellant with a gun. R. 237, ll. 18-20. Shaquanda White also testified that she told detectives she had never seen Appellant with a weapon. R. 265, ll. 9-11. There was no evidence that Appellant owned the gun recovered by law enforcement in the Ashley River or that he had ever previously had the gun in his possession. In short, there is nothing tying Appellant to that weapon or to this murder besides David White's testimony that it "looks like" the gun Appellant used to allegedly kill the decedent. See R. 284, ll. 17-18.

Because there was no reliable evidence connecting the twenty-two caliber Browning Buck Mark semi-automatic pistol to the murder of Craig Michael Canady or to Appellant, the trial court should have ruled the gun was inadmissible based on a lack of relevance. Weapons with no connection to the crime are not admissible. See State v. Elders, 386 S.C. 474, 688 S.E.2d 857 (Ct. App. 2010). Moreover, because there was an insufficient nexus connecting the weapon to the murder, its admission was unduly prejudicial to Appellant as it led the jury to believe that White's testimony was credible because law enforcement discovered the alleged murder weapon where White said it would be located. Since White was the sole witness to the alleged murder, his credibility was crucial to the state's case.

Respectfully, this Court should grant rehearing and not only find this issue preserved for review, but also hold the trial court erred by admitting State's Exhibit No. 14 into evidence.

Third, this Court incorrectly held the trial court did not err in failing to suppress evidence derived from a search warrant issued on September 27, 2007 for Appellant's 2007 Dodge Durango when the search warrant was based on deliberately false information or an extremely reckless statement.

Appellant moved prior to the start of trial to suppress all evidence seized as a result of a search warrant issued on September 27, 2007 for his 2007 Dodge Durango on grounds that the warrant was issued in violation of S.C. Code §17-13-140 and the Fourth Amendment. R. 133, ll. 11-16. Law enforcement executed a valid search warrant on Appellant's Durango on September 17, 2007 and found no items of evidentiary value. Officers subsequently obtained a second search warrant for the vehicle on September 27, 2007 citing the same grounds for probable cause that led to the first search warrant along with adding new information to the affidavit that was false. R. 133, l. 17 – 134, l. 21. Appellant argued that the new information in the affidavit that was false was the sentence, "Officers obtained several verbal and written statements that Donsurvi Chisolm [Appellant] purchased a passenger side front seat for a Dodge Durango on September 14, 2007." R. 138, l. 3 – 139, l. 19. Appellant stated, "[I]t was never confirmed that a purchase took place on September 14, 2007." R. 139, ll. 4-5.

Appellant argued that the affiant, Detective Mike Giglio of the Dorchester County Sheriff's Office, "willfully and knowingly with reckless disregard for the truth submitted false information on an affidavit for a warrant, and the warrant should therefore be deemed invalid, and its fruits excluded from use in court under the exclusionary rule under the U.S. Constitution." R. 137, ll. 4-9.

Detective Giglio testified that, through verbal and written statements from various employees at LKQ Auto Parts and a parts invoice, the Dorchester County Sheriff's Office learned that a customer identified as Appellant attempted to purchase a gray "right front seat" pulled from a 2006 Dodge Durango on September 14, 2007. R. 143, l. 19 – 144, l. 1; R. 145, l. 7 – 146, l. 4. One of the written statements obtained stated, "His dad called in with credit card to pay for seat. Credit card declined. So customer came back the next day and paid cash." R. 151, ll. 6-10. Detective Giglio testified that the business, however, could not produce a final sales receipt and thus it was unclear whether the front passenger seat was purchased by Appellant legally with cash on September 15, 2007 or whether it was stolen on that day. R. 152, l. 16 – 155, l. 24; R. 164, ll. 1-17; R. 166, l. 17 – 167, l. 11. Regardless, it was undisputed that a seat was not purchased on September 14, 2007. R. 151, ll. 6-16.

Detective Giglio claimed he relied on this information when he obtained the second search warrant for Appellant's Dodge Durango. R. 164, l. 22 – 165, l. 12. He further maintained that the statement in the affidavit in support of the second search warrant that stated the seat was purchased on September 14, 2007 was a "clerical error" and it should have stated September 15, 2007. R. 165, l. 17 – 166, l. 4. Giglio claimed he did not know he made a mistake regarding the date until Appellant pointed it out to him. R. 166, ll. 5-10.

After Detective Giglio testified, Appellant cited State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975), and argued the officer "provided false information to a magistrate with absolutely no intention of showing good faith effort to correct it. This information was sworn to and taken by the magistrate as true. I'm sure if [the magistrate] knew it was a lie the warrant would never have been issued, and since we know as much now, I ask for this warrant to be suppressed." R. 168, l. 1 – 169, l. 7.

The trial court found the affidavit was not given in bad faith or recklessly and that it was supported by probable cause. It therefore denied Appellant's motion to suppress. R. 169, l. 14 – 170, l. 15. This was error.

The Fourth Amendment to the United States Constitution, made applicable to the States by way of the Fourteenth Amendment, protects people from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. Additionally, under S.C. Code Section 17-13-140, a warrant should be issued "only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant."

"The Fourth Amendment itself provides no remedy for a violation of the warrant requirement." State v. Brown, 401 S.C. 82, 88, 736 S.E.2d 263, 266 (2012) (internal citations omitted). "However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment." Id.

Under South Carolina case law, the proper test for dealing with inaccuracies in an affidavit in support of a search warrant is as follows: "Did the officer . . . intentionally, recklessly, or in bad faith recite facts he knew or should have known to be erroneous, without correcting the error by additional affidavit or affirmation, to obtain the issuance of a warrant?" Sachs, 264 S.C. at 556, 216 S.E.2d at 509.

Additionally, in State v. Missouri, 337 S.C. 548, 556, 524 S.E.2d 394, 398 (1999), our Supreme Court invalidated a search warrant where it found "the combination of the police officer's

deliberate falsehood and his omission of critical facts pollute the affidavit to the extent that a magistrate could not have found that probable cause existed to issue the search warrant.”

Appellant established during the suppression hearing that Detective Giglio’s statement in the affidavit in support of the second search warrant that “Donsurvi Chisolm purchased a passenger side front seat for a Dodge Durango on September 14, 2007” was false. The evidence produced at the suppression hearing indicated the Dorchester County Sheriff’s Office learned from employees at LKQ Auto Parts that a passenger seat was pulled from a 2006 Dodge Durango for a customer identified as Appellant on September 14, 2007. However, there was no evidence that the seat was actually purchased on that date. Instead, there was very *questionable* evidence regarding whether the seat was purchased by Appellant on the following day, September 15, 2007. The sheriff’s office had no evidence to confirm Appellant or anyone else actually purchased a front passenger seat on September 15, 2007.

It is likely Detective Giglio either intentionally or recklessly made the statement that Appellant purchased a new front passenger seat on September 14, 2007 when he knew or should have known through investigation that the information was false. Without the false statement, there was no new additional probable cause to support a second search warrant. Therefore, the evidence seized as a result of the warrant should have been suppressed under the exclusionary rule. Respectfully, this Court overlooked significant points when it affirmed the ruling of the trial court and should grant rehearing to address this matter.

Fourth, this Court erred by affirming the trial court’s refusal to allow Appellant to question Detective Zenson about DNA testing performed on a seized firearm, specifically as it pertained to the decedent, Craig Michael Canady, since Appellant had the right to show that the detective’s

answers were inconsistent in this regard. The evidence was also relevant to the thoroughness and accuracy of the investigation.

Detective Zensen of the Dorchester County Sheriff's Office testified extensively regarding her involvement in the investigation of the death of Craig Michael Canady. She was the crime scene technician who processed the scene where the body was discovered on Clubhouse Road. R. 450, l. 17 – 451, l. 11. She also assisted in the execution of a search warrant on Appellant's Dodge Durango and transported the alleged murder weapon to SLED after it was recovered from the water. R. 458, ll. 4-17; R. 472, l. 25 – 474, l. 25.

Throughout her testimony, Zensen testified about various items that were sent to SLED for testing, specifically for comparison against the DNA of the decedent, including swabs, hair, and fingernail clippings, among numerous other items. Towards the end of cross-examination, Appellant asked Zensen whether she recalled anything else being sent to SLED for testing. Zensen responded, "No." R. 515, l. 12 – 516, l. 2. At this point, Appellant attempted to impeach Zensen with evidence that on January 7, 2008 a request was sent to SLED to compare a twenty-five caliber automatic handgun against the DNA of Craig Michael Canady. The state objected on grounds of relevance. R. 516, l. 1 – 517, l. 3.

The state argued the firearm Appellant wished to question Zensen about was recovered from an unrelated individual at some other time and has "no connection to the crime whatsoever." R. 517, ll. 10-13. Appellant argued he should be able to impeach Zensen with the SLED report "since the question was not answered correctly I would, at least, like to straighten out the mis-statement and the false representation . . ." R. 518, ll. 13-21. Appellant said the twenty-five caliber handgun was recovered two months after his arrest and was listed under the same SLED number. R. 520, ll. 20-24; R. 522, ll. 3-6.

After further discussion, the court ruled, "This is absolutely not impeachment. If you want to ask her directly was there another gun at some later time that there was DNA testing done with regards to the alleged victim, we'll talk about that, but this is not impeachment." R. 521, ll. 8-22. The court said the handgun Appellant referred to was listed under a different SLED number than the evidence in this case and that the testing was completed five months later. R. 521, ll. 8-22; R. 522, ll. 7-10. The court also said the line of questioning "up to that point had been items that this witness had removed from your car and had been involved in this investigation. And there's no question in my mind, but that was the focus of your questions. I do not believe that it is fair impeachment for you to now ask her about a DNA comparison that occurred some five, six months later . . ." R. 523, l. 21 – 524, l. 16. The court concluded that Appellant could question Zensen about DNA testing performed on the twenty-five caliber handgun if he could prove relevance, but not as impeachment. R. 519, ll. 16-22; R. 521, l. 24 – 522, l. 2; R. 524, l. 17 – 525, l. 2.

Appellant maintained the evidence was relevant because the weapon was recovered about two to three months after Appellant was arrested from an individual acquainted with the decedent who lived in the very apartment complex where the murder allegedly occurred and was sent to SLED for DNA comparison testing to the decedent. Appellant reasoned the evidence was relevant because if the alleged murder weapon was already found then law enforcement would have no reason to investigate another firearm. R. 525, l. 3 – 526, l. 6. Appellant argued:

MR. CHISOLM: My co-defendant's daughter, Shaquanda White, who took the stand, who's testified already.

THE COURT: Yes.

MR. CHISOLM: Her boyfriend at the time was named Siquan Moody. That's who - -

COURT REPORTER: Who?

MR. CHISOLM: Siquan Moody. The person that Tamekka Williams got on the stand and said that Red was with the last time she saw him on Thursday, and after he left Siquan, Red came with me. I told detectives after Red left me he went back to Azalea Park. Azalea Park is where Siquan Moody stays at. The person that they recovered that gun from is Pierre Moody, that's Siquan Moody's younger brother. They're testing DNA from Craig Michael Canady against Pierre Moody's gun and they're all in the Haven Oaks - - I'm sorry - - they're all in the Azalea Park area, and this is after, like I said, Your Honor, we're already under arrest. But they're still investigating that Red went to Azalea Park and Siquan Moody and Pierre Moody, and they're testing his DNA exactly two to three months after David White said this happened, I did this, after David White gave them a weapon that has never been proven to be the murder weapon. If all that was true, why are they still investigating Siquan Moody's little brother against Craig Michael Canady's DNA on his gun. . ."

R. p. 525, l. 3 – 526, l. 2.

The court ruled the evidence was not relevant because according to the SLED report, the handgun recovered at the later time was a "semi-automatic pistol which could not fire the bullet that was removed from the body of this alleged victim." R. 527, l. 24 – 529, l. 4.

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; See State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) and State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986).

Appellant should have been permitted at trial to impeach Detective Zensen with the SLED report that a second firearm was sent to SLED for comparison testing against the DNA of the decedent. By failing to allow Appellant to impeach Zensen, her inaccurate statement remained uncorrected in the minds of the jurors. The jury was led to believe that all the potential evidence

that was sent to SLED had been discussed at trial when the truth was that law enforcement was investigating a second firearm as being involved in the murder.

Additionally, the fact that law enforcement was examining another firearm in connection with the case was relevant to the thoroughness and accuracy of the investigation into the death of Craig Michael Canady. The fact that law enforcement was investigating a second weapon indicated the officers from the Dorchester County Sheriff's Office were not firmly convinced that the gun recovered from the Ashley River was the murder weapon and that the officers considered that someone else may have been involved in the murder. This is relevant evidence weakening the case against Appellant and Appellant should have been permitted to question the detective about this relevant evidence to properly defend himself.

Lastly, this Court erred by holding the trial court properly allowed Appellant to represent himself despite the fact that the trial court failed to inquire about the nature of the conflicts Appellant was having with his attorney, did not warn Appellant that a murder conviction in Dorchester County would constitute an aggravating circumstance for the state to seek the death penalty in his Berkeley County murder case, and was very vague about the dangers and disadvantages of self-representation.

An *in camera* ex-parte hearing was held on Appellant's request to represent himself. Appellant was represented by John Loy at the time. R. 1; R. 4, ll. 1-7. It was apparent there were conflicts between Appellant and defense counsel Loy. Appellant offered, "I don't want to waste the court's time arguing the conflicts and issues that me and Mr. Loy have together. I would like to proceed pro se as of this day February 11, 2011." R. 7, ll. 16-19.

The judge said she learned Appellant was being housed in Berkeley County, and that he had to be transported to Dorchester County for this hearing. She maintained that she needed to know if

Appellant was using his motion for purposes of delaying the trials. Appellant told the judge, in response to her question, that his Berkeley County trial had not yet been scheduled. R. 9, ll. 14-24.

Significantly, the subsequent Berkeley County case was also a murder trial. However, that important fact was never raised during this waiver hearing. Neither was the fact that if Appellant was convicted of murder in Dorchester County that that conviction would constitute a “prior murder conviction” which would allow the state to seek -- or legitimately threaten to seek -- the death penalty in Berkeley County.¹ See S.C. Code Ann. § 16-3-20(C)(a)(2); R. 9, l. 10 – 10, l. 9.

During the colloquy, Appellant told the judge he was married with four children and that he had one year of college. Appellant was never asked where he went to college and later told the judge he either graduated from high school or “got [his] GED” in response to a very open-ended question. R. 11, l. 19 – 13, l. 5.

Appellant had been in the service and he spent ten months in Afghanistan. Appellant also told the judge he was in “Special Forces,” and the judge interjected that she understood Appellant could not talk about what occurred in Special Forces. R. 13, l. 7 – 15, l. 2. Appellant had also worked with heavy machinery and most recently worked at a Sonic restaurant and then a McDonald’s. However, his murder charge had hindered his ability to become employed. R. 12, l. 2 – 21, l. 10. Appellant denied he had been treated for post-traumatic stress syndrome or had received any mental health treatment. R. 21, ll. 14-16.

¹ See State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991) (in context of statutory mitigating circumstance of absence of significant history of prior criminal conviction involving use of violence against another person, word “prior” would be construed to mean prior to trial, rather than prior to time of crime for which defendant was on trial). See also State v. Locklair, 341 S.C. 352, 370, 535 S.E.2d 420, 429 (2000) (same principle).

The judge told Appellant that his attorney, John Loy, was her friend, “and he is as fine a lawyer as there is for sure in this state, probably this country, you understand that?” Appellant said he did understand. R. 23, l. 16 – 24, l. 4.

The judge said that one of her prepared questions dealt with possible defenses to the charge. She mentioned self-defense, but then said, “We’re not going to talk about your defenses. We’re just not going to do that. I’m not going to let you go into your factual basis. We’re not going to do that. I’m not going to let you do that.” Appellant did not make any “audible response.” R. 27, l. 22 – 28, l. 5.

The judge only mentioned Appellant’s Berkeley County charges in passing stating they were “not helpful.” R. 28, l. 25 – 29, l. 10. She said she did not need to know any more about the Berkeley charge although it was potentially “problematic.” R. 29, ll. 11-21.

The judge very briefly told Appellant he would have to “comply with the rules . . . rules of evidence, the court rules.” R. 32, ll. 10-18. She said she thought Appellant was proceeding with his eyes open, but then stated:

I don’t think I understand the “why” [you want to represent yourself] part of it. I think I don’t like it. But that - - the judge’s pleasure with it is - - doesn’t get to be factored in. I don’t get a vote. You do. I don’t.

R. 35, ll. 10-13.

Lastly, the judge told Appellant that he was very bright and that he probably could have gone to law school. She told Appellant that she believed he was capable and aware of what he was doing. R. 36, ll. 2-9.

A defendant may waive his right to counsel and proceed *pro se*, but only if it is clear on the record that he understands the dangers and disadvantages of self-representation. See Faretta v. California, 422 U.S. 806 (1975). Here, Appellant was only told in a vague manner of the dangers

and disadvantages of self-representation. Appellant was advised in a very brief fashion that he would have to comply with the rules of evidence, and the rules of court. There is nothing in the waiver record to show Appellant understood the rules of evidence or what court rules the judge was referring to during the colloquy.

The judge did not make any effort to find out the source of the friction between defense counsel Loy and Appellant. Many defendants before trial express problems with their defense attorneys which are solved by the trial judge engaging the defendant in a *specific colloquy about the nature of the problem*.

Appellant had a pending murder charge in Berkeley County at the time of the waiver hearing. A murder conviction in Dorchester County could be used, and was used, as an aggravating circumstance that would justify the state seeking -- or threatening to seek -- the death penalty against Appellant in a future trial in Berkeley County. See S.C. Code §16-3-20 (C)(a)(2) (the aggravating circumstances that “the murder was committed by a person with a prior conviction for murder.”) Yet, the Berkeley County murder case was only mentioned in passing during the waiver hearing to impress upon Appellant the seriousness of what he was doing.

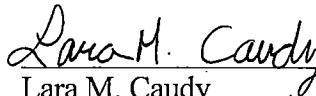
Conversely, in State v. Barnes, 407 S.C. 27, 31, 753 S.E.2d 545, 548 (2014), our Supreme Court ruled the defendant would have been allowed to represent himself where he “demonstrated an understanding of the process of capital *voir dire*, stated his intention to pursue a third-party guilt defense at trial and discussed relevant case law, the burden of proof, and his right to testify.” The defendant in Barnes also answered the judge’s detailed inquiries about the problems with his defense attorneys and the “trust issues” about why he felt betrayed. Id. at 32, 753 S.E.2d at 548. The defendant also demonstrated he had read relevant case law and showed some understanding of the rules of evidence when questioned by the trial judge. Id. at 33, 753 S.E.2d at 548.

None of the factors in Barnes which evidenced an intelligent waiver of the right to counsel, and that the defendant was proceeding with the full understanding of the dangers and disadvantages of self-representation exist in the record before this Court.

Appellant is similarly situated to the defendant in State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010) where our Supreme Court held the record did not demonstrate a knowing and intelligent waiver of the right to counsel with a full understanding of the dangers and disadvantages of self-representation. See Wroten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990); Cf. State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997); State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010). Respectfully, this Court should have held the trial court erred by allowing Appellant to waive his right to counsel and proceed *pro se*.

Because this Court overlooked significant points in the record and case law when affirming Appellant's conviction, rehearing on all five issues presented should be granted.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

This 12th day of November, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

NOV 12 2015

SC Court of Appeals

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

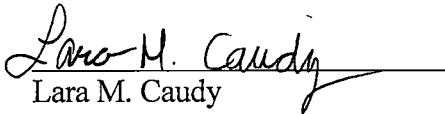
DON-SURVI CHISOLM,

APPELLANT

APPELLATE CASE NO. 2011-200186

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above captioned case has been served upon Melody J. Brown, Esquire, Office of Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of November, 2015.



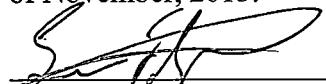
Lara M. Caudy

Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

SWORN TO BEFORE ME this 12th day
of November, 2015.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.