STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marion County

D. Craig Brown, Circuit Court Judge

THE STATE,

Respondent,

V.

BLATON WAKEEM SMITH,

Appellant

Appellate Case No. 2014-1769

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Where a witness told a psychiatrist that he smoked marijuana immediately before giving police a statement implicating the defendant, whether the trial judge erred when he refused to allow the defense to cross-examine the witness with his statements that he suffered from delusions when he smoked marijuana?

RESPONDENT'S COUNTER STATEMENT OF ISSUE ON APPEAL

Whether the trial court abused its discretion in limiting Appellant's cross-examination of a fact witness where Appellant failed to proffer the cross-examination testimony and where the court found the evidence was not relevant based on the information presented by Appellant.

RESPONDENT'S STATEMENT OF THE CASE

A Marion County Grand Jury indicted Appellant, Blaton Wakeem Smith, in February 2013 for the murder of Christian James Drawhorn (Victim), as well as for discharging a firearm into a dwelling, for possession of a weapon during the commission of a violent crime, and for four counts of attempted murder. (Indictment Number 2013-GS-33-00097).

On August 6, 2014, Appellant's case was called to trial before the Honorable D. Craig Brown. (R.p. 1, Tr. p. 1). Appellant was represented by Joshua Bailey, Esq. during the three-day trial. (R.p. 1, Tr. p. 1). Appellant was tried along with his co-defendant, Shaheed Hayes, who was represented by Steven DeBerry Esq. (R.p. 1, Tr. p. 1). Solicitor Ed Clements represented the State. (R.p. 1, Tr. p. 1). As to Appellant, the jury returned verdicts of guilty on all counts as charged, except that they found him not guilty of discharging a firearm into a dwelling. (R. 619-20, Tr. p. 694, line 5–p. 695, line 18).The jury returned verdicts of guilty on all counts as charged for Hayes. (R. 617-19, Tr. p. 692, line 22–p. 694, line 4). Judge Brown sentenced Appellant to life imprisonment for murder, to thirty years imprisonment for each count of attempted murder. (R. 621, Tr. p. 708, lines 21.) Judge Brown set the sentences to run consecutively. (R. 621, Tr. p. 708, line 22).

Thereafter, Appellant served a timely notice of appeal. (Notice of Appeal).

RESPONDENT'S STATEMENT OF THE FACTS

On the night of April 12, 2012, Gavin Graves,[1] Victim,[2] Derrick Wilson,[3] Christopher Kollock,[4] and Darrell Davis[5] were sitting in a home off of North Highway 501 in Marion County. (R. 284-86, Tr. p. 359, line 2–p. 361, line 13). The home belonged to Graves, but Wilson lived there, too. (R. 281-82, 353, Tr. p. 360, line 1–p. 362, line 10; Tr. p. 428, lines 11–21). The group had started the evening playing cards, but then they hooked Graves's computer up to his television to browse Facebook. (R. 287, Tr. p. 362, lines 11–20). They were also drinking beer and smoking marijuana. (R. 292, Tr. p. 367, lines 12–19). A little after midnight they thought they heard a knock at the back door. (R. 287-93, 357-60, Tr. p. 362, line 11–p. 368, line 5; Tr. p. 432, line 10–p. 435, line 8). Davis got up to check, but there was no one there. (R. 293, Tr. p. 368, lines 1–7).

About three minutes later, a number of bullets were fired into the home from somewhere outside. (R. 293-94, Tr. p. 368, line 1–p. 369, line 15). According to Graves, "[i]t was like a rain of bullets, like ping, ping, ping, ping, ping, ping, ping, ping, ping, ping, ping, ping, ping, ping, ping. Like—it was like it wouldn't never stop." (R. 294, Tr. p. 369, lines 11–13). Inside the trailer, "[t]he sheetrock was busting up. It was smoky. The cabinets [were] opening up. Glass that was sitting out that the bullet must have went through. You could hear the glasses breaking." (R. 293, Tr. p. 368, lines 20–22). Wilson testified that "it sounded like at least 20—25" gunshots, but there might have been more. (R. 363, Tr. p. 438, lines 16–22). When the gunfire stopped, the men realized that Victim had been hit. (R. 294-95, 364-65, Tr. p. 369, line

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[1] Also known as "Bullet" or "G." (R. 355, Tr. p. 430, lines 16–19).
[2] Also called "C-Murder" because his favorite rapper was C-Murder Master P. (R. 355-56, Tr. p. 430, line 24–p. 431, line 6).
[3] Also known as "Eyebrows." (R. 356, Tr. p. 431, lines 7–13).
[4] Also known as "O.J." or "Juice Man." (R. 355, Tr. p. 430, lines 20–23).
[5] Also called "Goo Baby." (R. 355, Tr. p. 430, lines 12–15).

16–p. 370, line 7; Tr. p. 439, line 13–p. 440, line 7). They immediately called 9-1-1 and then tried to care for Victim, who was gasping for breath. (R. 295-97, 365-66, Tr. p. 370, line 1–p. 372, line 5; Tr. p. 440, line 8–p. 441, line 18). They took Victim outside because he said he was hot, and then the group waited for emergency responders to arrive. (R. 295-97, 366-67, Tr. p. 370, line 8–p. 372, line 19; Tr. p. 441, line 13–p. 442, line 17). EMS came and took Victim away, but he later died from a gunshot wound. (R. 279-82, 297-98, Tr. p. 354, line 23–p. 357, line 15; Tr. p. 372, line 14–p. 373, line 14). The other men stayed at the house and talked to police officers who had arrived to investigate the shooting. (R. 369-70, Tr. p. 444, line 8–p. 445, line 11).

The police were unable to recover any physical evidence from the scene that pointed to any particular suspects. However, Wilson provided the officers with information that helped them to develop potential suspects. Wilson told police that Victim had never had any problems with "the Smith boys" or anybody that Wilson knew of. (R. 371-72, Tr. p. 446, line 23–p. 447, line 6). Wilson, on the other hand, had had problems with Adrian Smith, Appellant's cousin, and he told police about that. (R. 372, Tr. p. 447, lines 7–11). Detectives Charlie Watson and Martin Bell with the Marion County Sheriff's Department followed up on those leads. (R. 149-156, Tr. p. 224, line 17–p. 231, line 18). The detectives contacted Appellant's mother, and she brought him to Marion County for an interview with police, but Appellant was uncooperative. (R. 153, Tr. p. 228, lines 2–15).

Through their investigation, Detectives Watson and Bell also learned that a man named Willie Bethea[6] may have been involved in the shooting. (R. 152, Tr. p. 227, lines 4–11). Bethea also met with police, and he admitted his involvement in the shooting. (R. 153-55, Tr. p.

[6] Also called "Boo Boo." (R. 456, Tr. p. 531, lines 11–14).

228, line 16–p. 230, line 17). As a result of their conversation with Bethea, the police arrested Appellant, Shaheed Hayes, Willie Bethea, and Jamie Williams.[7] (R. 154-55, Tr. p. 229, line 6–p. 230, line 25). Adrian Smith was not arrested because he was out of their jurisdiction, and police could not pinpoint anything that Adrian Smith had done in Marion County. (R. 156, Tr. p. 231, lines 1–18).

At trial both Jamie Williams and Willie Bethea testified about what happened the night of the shooting. Williams testified that Appellant, Hayes, and Bethea picked him up from his home on April 12, 2012. (R. 397-99, Tr. p. 472, line 7–p. 474, line 17). Appellant was driving Adrian Smith's car, and Bethea was in the front passenger seat. (R. 397-99, Tr. p. 472, line 20–p. 474, line 1). Hayes was sitting in the back seat on the passenger's side, and Williams took the seat beside him on the driver's side. (R. 399, Tr. p. 474, lines 2–13). According to Williams, they drove past a home on Highway 501, and Hayes saw Wilson's SUV parked out back. (R. 399-402, Tr. p. 474, line 18–p. 477, line 7). Appellant turned around and slowly drove back by the home[8] while Hayes and Williams shot at the house. (R. 402-05, Tr. p. 477, line 2–p. 480, line 25). Williams testified that Appellant told him to shoot. (R. 405, Tr. p. 480, lines 16–21). Hayes was shooting directly out of the rear, passenger window, and Williams had to hang out of the car and shoot over the top of the car. (R. 404, Tr. p. 479, lines 3–22). Williams testified that he only shot three to five bullets because he "froze up." (R. 404-05, Tr. p. 479, line 23–p. 480, line 7), but Hayes emptied a clip into the home. (R. 405, Tr. p. 480, lines 8–15). They then

[7] Also known as "Lil Boosie." (R. 155, 393-94, Tr. p. 230, lines 20–25; Tr. p. 468, line 20–p. 469, line 2).

[8] Williams was very unsure of the roads in that area. At the time of the shooting, he did not even know they were on Highway 501, but he found out that information afterwards. (R. 399-400, Tr. p. 474, line 18–p. 475, line 1). Williams testified that before the shooting began "we turned around, I don't know how it happened. Like, I don't know the roads or nothing like that. We turned back around and slowed down." (R. 402, Tr. p. 477, lines 8–11).

drove back to Latta where Appellant stopped at a house and took the guns inside while the others waited in the car. (R. 405-07, Tr. p. 480, line 22–p. 482, line 9). After that, they dropped off Williams back at his house. (R. 407-08, Tr. p. 482, line 19–p. 483, line 4).

Two days after the shooting, Williams received a call from Appellant, who told him that someone had died and warned him that he better not say anything. (R. 408, Tr. p. 483, lines 5–20). Williams went to Adrian Smith's house later that day. (R. 408, Tr. p. 483, lines 21–24). Williams testified that "they were kind of mad that they hit the wrong person . . . ." (R. 08-09, Tr. p. 483, line 25–p. 484, line 2). According to Williams, "Eyebrows" was the person who was supposed to have gotten hit—"they wanted him dead." (R. 409, 414, Tr. p. 484, lines 3–8; Tr. p. 489, lines 1–8). Williams did not know Wilson (Eyebrows). (R. 415, Tr. p. 490, lines 9–19). Williams testified that he was scared of Adrian Smith because though Adrian Smith is a paraplegic, "[h]e got people too." (R. 409-10, Tr. p. 484, line 20–p. 485, line 5).

Williams testified that when he first spoke with police, he lied and said that Appellant and Hayes were the shooters, but he later admitted that he was one of the shooters and that Appellant was driving the car instead. (R. 410-12, Tr. p. 485, line 20–p. 487, line 21).

Bethea's testimony regarding the shooting was largely consistent with Williams's. Bethea testified that he and Appellant were cousins. (R. 456, Tr. p. 531, lines 15–25). He also identified Hayes as "[o]ne of my people from Latta." (R. 457, Tr. p. 532, lines 1–13). Bethea testified that he and Appellant were together all day on April 12, 2012. (R. 460-61, Tr. p. 535, line 10–p. 536, line 18). They picked up Williams and Hayes later that evening. (R. 461-63, Tr. p. 536, line 16–p. 538, line 10). Bethea believed they were going to a club in Latta on Old Ebenezer Road, which is not far from Highway 501. (R. 463, Tr. p. 538, lines 11–24). But they passed that club, so he assumed they were headed to Fusion in Marion. (R. 465, Tr. p. 540, lines

4–17). Appellant, who was driving, then stopped in front of a trailer that Bethea identified as "Eyebrows' trailer." (R. 465-66, Tr. p. 540, line 25–p. 541, line 8). Appellant said, "'This is the house right here. That's the car in the back.'" (R. 466, Tr. p. 541, lines 9–14). Hayes and Williams then started shooting. (R. 468-72, Tr. p. 543, line 19–p. 547, line 3). After they finished, Hayes said he hoped he hit somebody in the house. (R. 472, Tr. p. 547, lines 5–10). They then drove back to Latta, and Appellant dropped the guns off at "Karen['s] house." (R. 472-75, Tr. p. 547, line 11–p. 550, line 6).

According to Bethea, afterwards, "[w]e just said don't say nothing about it and just keep your mouth closed." (R. 475-76, Tr. p. 550, line 25–p. 551, line 3). Appellant later told Bethea, "'Keep your cool'" and advised him not to say anything about what had happened. (R. 477-78, Tr. p. 552, line 7–p. 553, line 5). Bethea learned that Victim had been killed in the shooting. (R. 478, Tr. p. 553, lines 9–25). Bethea testified that it was Wilson, not Victim, who was the intended target of the shooting because Wilson and Appellant had bad blood. (R. 479, Tr. p. 554, lines 1–15). Bethea left town because he was "worried something crazy was going to happen. That somebody was going to get shot or something." (R. 479-80, Tr. p. 554, line 16–p. 555, line 20). When asked if he left town because he was worried about Hayes or Appellant, Bethea responded, "They just told me—they kept calling me, like, don't say nothing or we're going to do something to you." (R. 480, Tr. p. 555, lines 21–24). Nevertheless, Bethea eventually turned himself in after his mother told him "the police kept coming to her house and she wasn't going to have it . . . ." (R. 483-84, Tr. p. 558, line 16–p. 559, line 14). After the police spoke with Bethea, they arrested him. (R. 484, Tr. p. 559, lines 10–22).

ARGUMENT

Appellant's issue is not preserved because he did not proffer the specific testimony he argues the trial court erroneously excluded.

However, he trial court did not err in prohibiting Appellant from questioning a fact witness about his mental health history, including an alleged statement to a psychiatrist about drug use two weeks after the crime shortly before his arrest, where that information was not relevant or, if it was relevant, it was only marginally so and would have confused the issues.

Introduction

Appellant argues that the trial court erred in limiting his cross-examination of a witness regarding statements allegedly made to doctors that the witness had visual hallucinations when he smoked marijuana and further that he had smoked marijuana thirty minutes before he was arrested. This issue has not been properly preserved for direct appeal since counsel failed to proffer the witness's specific testimony on these statements. Additionally, there was no error where the trial court concluded that such evidence was not relevant. In the alternative, the cross-examination was properly limited under Rule 403, SCRE where any minimal relevance was far outweighed by the danger of unfair prejudice or of confusing the jury.

How the Issue Was Raised at Trial

During Appellant's cross-examination of Bethea, Appellant's counsel asked a series of questions about Bethea's mental health and whether he would be able to get adequate mental health treatment in prison. (R. 511-12, Tr. p. 586, line 13–p. 587, line 22). Bethea admitted that he had been diagnosed as schizophrenic and further affirmed he had received mental health treatment in prison but the treatment was not the best. (R. 512, Tr. p. 587, lines 2–22). Appellant's counsel then asked Bethea, "Do you recall telling any doctors that people were jealous of your lifestyle?" (R. 512, Tr. p. 587, lines 23–24). Bethea responded, "I don't know what was going on during that time." (R. 521, Tr. p. 587, line 25). The solicitor objected on relevance grounds. (R. 513, Tr. p. 588, lines 2–3).

A short conference was held out of the presence of the jury where the trial court informed the parties that "his mental health treatment is absolutely objectionable . . . . Unless you can tie—tie that together with his inability to tell the truth, it's not admissible." (R. 513, Tr. p. 588, lines 5–10). The trial court then dismissed the jury from the courtroom, and the discussion about Bethea's mental health continued. (R. 513, Tr. p. 588, lines 20–25).

Appellant's counsel asserted Bethea's mental health treatment went to his credibility as a witness and towards his bias and motive to testify. (R. 514, Tr. p. 589, lines 6–13). The trial court then asked Appellant's counsel if he had any case law that said cross-examination of a witness regarding their mental health was admissible without some connection to that witness's ability to tell the truth. (R. 514, Tr. p. 589, lines 14–21). Appellant's counsel responded he did not have any cases to that effect. (R. 514, Tr. p. 589, lines 22–24).

The trial judge stated he had recently researched the issue for another case, and he recalled the case law did not allow questioning on mental health where it was not relevant to the witness's ability to tell the truth. (R. 514-15, Tr. p. 589, line 25–p. 590, line 5). The trial court then ruled as follows:

> Now, I understand what you're saying is that it is your intention to put out there that he doesn't want to go to prison because he can't get the mental health treatment that he needs. I've heard nothing that would indicate—and maybe you have it. I just want to hear it and I'll allow you to proffer it, but nothing that he had ongoing mental health treatment and that there is a need for ongoing mental health treatment that would tie it in.
>
> You've established through your cross examination that jail ain't a good place. I've allowed you to do that and that certainly goes to bias or whatever you want to call it as to his testimony for that jury to make a decision on, but as far as this mental health stuff, I mean it's just—it's not relevant at this point unless you can give me some more information as to its relevancy.

(R. 515, Tr. p. 590, lines 6–20). Appellant's counsel then noted his objection, and the trial court stated, "I want you to proffer whatever you want. If you want to proffer something . . . ." (R. 515, Tr. p. 590, lines 21–24).

Appellant's counsel stated, "I just have one question for him." (R. 515, Tr. p. 590, line 25). He then went on to provide the following information:

> He has made statements in his past to two doctors about visual hallucinations when he smokes marijuana.
>
> . . . .
>
> And number two, Judge, when he went for his psychiatric evaluation in connection with this case, he told that physician that he smoked marijuana 30 minutes before he got arrested.
>
> . . . .
>
> Am I allowed to bring those up?

(R. 516, Tr. p. 591, lines 2–13). The solicitor replied that Bethea had not smoked marijuana thirty minutes before taking the witness stand at trial and further asserted, "I think he's gone far afield and what he's attempting to do is not admissible at all." (R. 516, Tr. p. 591, lines 21–23).

The trial court asked if there was any evidence that every time Bethea smoked marijuana he had delusions. (R. 516-17, Tr. p. 591, line 24–p. 592, line 2). Appellant's counsel answered that Bethea's statement to the doctor did not say that every time he smoked marijuana he had delusions—it was just that he saw visual hallucinations when he smoked marijuana. (R. 517, Tr. p. 592, lines 3–17). The trial court ultimately ruled defense counsel could not go into that area because such cross-examination did not go to Bethea's ability to tell the truth. (R. 517, Tr. p. 592, lines 18–22).

Before the jury came back into the court room, the trial court asked if Bethea had been declared incompetent, had an inability to know right from wrong, or had been shown not to know

the difference between the truth and a lie. (R. 518, Tr. p. 593, lines 9–21). The solicitor responded, "No, Your Honor" to each of those questions. (R. 518, Tr. p. 593, lines 9–22). The trial court then affirmed its earlier ruling. (R. 518, Tr. p. 593, lines 23–24).

Standard of Review

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

> The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers. This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant.

State v. Aleksey, 343 S.C. 20, 33–34, 538 S.E.2d 248, 255 (2000) (internal quotations and citations omitted). Generally, "[t]he admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's discretion will not be reversed absent an abuse of discretion." *State v. Morris*, 376 S.C. 189, 205–06, 656 S.E.2d 359, 368 (2008) (citing *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)). And even where a court errs in limiting a defendant's cross-examination of a witness, that error is subject to a harmless error analysis. *See State v. Starnes*, 340 S.C. 312, 326 n.11, 531 S.E.2d 907, 915 n.11 (2000).

Analysis

This Issue Is Not Preserved.

As an initial matter, Respondent asserts this issue has not been properly preserved because neither Appellant's counsel nor Hayes' counsel proffered Bethea's testimony regarding his prior statements to doctors about what happens to him when he smokes marijuana and

whether he smoked marijuana shortly before he was arrested. Instead, counsel merely stated what he believed Bethea's testimony would be. In Respondent's view, that proffer was not sufficient.

"Ordinarily, [South Carolina appellate courts] will not review the alleged error of the exclusion of testimony unless a proffer of testimony is properly made on the record." *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 402–03 (1986) (citing *State v. Roper*, 274 S.C. 14, 260 S.E.2d 705 (1979)). In order for the proffer to be proper, the record should "fairly [show] what the rejected testimony would have been." *Roper*, 274 S.C. at 20, 260 S.E.2d at 708. Nevertheless, "[t]he rule regarding proffers has been relaxed where the trial court refuses to allow a proffer and the record clearly demonstrates prejudice, or where the appellate court is able to determine from the record what the testimony was intended to show and that prejudice clearly exists." *State v. Jackson*, 384 S.C. 29, 34 n.3, 681 S.E.2d 17, 20 n.3 (Ct. App. 2009).

Respondent submits the record does not fairly show what the rejected testimony would have been in this case—it is unclear whether Bethea would have admitted to making those statements or would have denied making them. In *State v. Jenkins*, 322 S.C. 360, 474 S.E.2d 812 (Ct. App. 1996), this Court found counsel's representations of what a witness's testimony would have been (as opposed to the actual testimony) were adequate to preserve the issue where, according to the Court, counsel had made a sufficient attempt to proffer and where the Court could discern prejudice even without the proffer. However, *Jenkins* is distinguishable from the instant case because in *Jenkins* "defense counsel's frustration with the limits placed upon his cross-examination by the trial judge was apparent at every turn; additionally, the trial judge continued to assure him his position was protected for the record." *Id.* at 368, 474 S.E.2d at 817. In contrast, here, the trial court did not refuse to allow the proffer of Bethea's testimony, nor did

it frustrate counsel's attempts to do so. Indeed, the record reflects that the trial judge told counsel he wanted him to proffer the testimony. (R. 515, Tr. p. 590, lines 6–24). Nevertheless, Appellant failed to proffer Bethea's actual testimony.

Respondent urges this Court to find Appellant's proffer insufficient in this case. Judge Goolsby's dissent in *Jenkins* identifies the problems with merely summarizing the anticipated testimony as opposed to presenting the testimony itself. Judge Goolsby explained that the rule requiring a proffer necessarily

> requires an appellant to proffer *testimony*, not mere questions. Without showing [appellant's] disallowed questions would have elicited testimony that was both favorable and material to her case, [appellant] cannot show she was prejudiced by the trial court's ruling. Explaining the answers she *hoped* her questions would elicit is not sufficient.

Jenkins, 322 S.C. at 370, 474 S.E.2d at 818 (Goolsby, J., dissenting) (emphasis in original) (internal citation omitted). The proffer offered by Appellant is insufficient because it does not fairly show what Bethea's testimony would have been—it only indicates what Appellant *hopes* Bethea's testimony would have been. And this Court should not overlook the failure to make a proper proffer where the trial court did not disallow or inhibit Appellant from proffering Bethea's testimony.

Furthermore, this court should not overlook the failure to proffer where, even assuming Bethea would have testified consistently with counsel's assertions; there was no prejudice to Appellant in excluding that testimony as explained in further detail below.

The Evidence Was Not Relevant.

The trial court correctly concluded the testimony Appellant sought to introduce was not relevant. And the court did not abuse its discretion in prohibiting cross-examination on whether Bethea had visual hallucinations when he smoked marijuana and whether he smoked marijuana

shorty before he was arrested. Appellant cannot articulate the relevance of the evidence based on the paltry record before this Court without engaging in speculation.

Appellant's counsel informed the trial court he wanted to cross-examine Bethea about some previous statements he had made to medical professionals, namely:

> He has made statements in his past to two doctors about visual hallucinations when he smokes marijuana.
>
> . . . .
>
> And . . . when he went for his psychiatric evaluation in connection with this case, he told that physician that he smoked marijuana 30 minutes before he got arrested.

(R. 516, Tr. p. 591, lines 2–11). The subject matter of that cross-examination was not relevant. *See* Rule 401, 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."). The shooting occurred in the early morning hours of April 13, 2012, but Bethea did not turn himself in to police, give his statement, and get arrested until over two weeks later on April 30, 2012. (R. 519-20, Tr. p. 594, line 17–p. 595, line 5). There was no evidence (or any representation to the court) Bethea smoked marijuana around the time of the shooting. Thus, Appellant's proposed cross-examination of Bethea was not relevant to Bethea's ability to perceive events the night of the murder. Similarly, there was no evidence (or any representation to the court) Bethea smoked marijuana around the time of his testimony. Thus, Appellant's proposed cross-examination of Bethea was not relevant to Bethea's ability at trial to recall the night of the murder and to testify truthfully to those events.

The Fourth Circuit has held that a trial court did not abuse its discretion in excluding cross-examination testimony by a co-defendant regarding statements he made to nurses that he

had seen hallucinations of dead people. *United States v. Barnes*, 480 F. App'x 231, 236–37 (4th Cir. 2012). The Fourth Circuit acknowledged:

> Mental defect can be a proper basis by which to attack a witness's credibility if the alleged mental defect was "at a time probatively related to the time period about which he was attempting to testify," and it "go[es] to the witness' qualification to testify and ability to recall," and does "not introduce into the case a collateral issue which would confuse the jury."

Id. at 237 (quoting *United States v. Lopez*, 611 F.2d 44, 46 (4th Cir. 1979)[9]). However, the Fourth Circuit found there was no suggestion the co-defendant was unable to perceive or recall the details of the crime because he was experiencing hallucinations at or around the time of the crime. *Id.* Nor was there any evidence the co-defendant "was experiencing hallucinations at the time of trial or that they affected his ability to recall and testify accurately at trial." *Id.* Because "the evidence did not reflect [the co-defendant's] hallucinations occurred 'at a time probatively related to the time period about which he was attempting to testify,'" the trial court did not abuse its discretion in excluding that evidence. *Id.*

Appellant concedes there was no challenge to Bethea's competency as a witness. Thus, Appellant's proposed cross-examination could only conceivably be used to impeach Bethea's

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[9] In *Lopez*, the Fourth Circuit noted,

> One's psychiatric history is an area of great personal privacy which can only be invaded in cross-examination when required in the interests of justice. This is so because cross-examination of an adverse witness on matters of such personal privacy, if of minimal probative value, is manifestly unfair and unnecessarily demeaning of the witness. Moreover, such cross-examination will generally introduce into the case a collateral issue, leading to a larger amount of testimony substantially extraneous to the essential facts and issues of the controversy being tried. Because of the obvious unfairness of such a cross-examination and its needless waste of judicial time, it has been posited in an authoritative text that, "Courts should have the power to protect witnesses against cross-examination that does little to impair credibility but that may damage their reputation, invade their privacy, and assault their personality."

Lopez, 611 F.2d at 45 (quoting 22 Wright & Graham, Federal Practice & Procedure § 5215).

April 30th statement to police two weeks after the April 12th incident. That is to say, the cross-examination could only have been used to challenge Bethea's ability, at the time he made his statement to police, to recall and communicate what happened the night of the murder. This is where Appellant's failure to proffer Bethea's testimony becomes problematic. If Bethea denied making both or either of the statements counsel attributed to him,[10] then there is no relevance to that testimony. If Bethea never stated he had visual hallucinations when he smoked marijuana, and if he did not smoke marijuana thirty minutes before his arrest, then that evidence has no relevance to his ability on April 30th to truthfully recall the night of the shooting. If Bethea told doctors he had visual hallucinations when he smoked marijuana, but he denied stating he smoked marijuana thirty minutes before his arrest, then that evidence has no relevance to his ability on April 30th to truthfully recall the night of the shooting. If Bethea never told doctors that he had visual hallucinations when he smoked marijuana, but he admitted he told a doctor he had smoked marijuana thirty minutes before his arrest, then that evidence has no relevance to his ability on April 30th to truthfully recall the night of the shooting.

Even assuming Bethea would have affirmed on cross-examination he had visual hallucinations when he smoked marijuana and he smoked marijuana thirty minutes before he was arrested, that limited bit of evidence is insufficient to impeach Bethea's April 30th statement to police. The case *State v. Turner*, 373 S.C. 121, 644 S.E.2d 693 (2007), is instructive on that point. In *Turner* the South Carolina Supreme Court found a trial court did not err in limiting the defense's cross-examination of a victim on her schizophrenia diagnosis. The victim in *Turner*

[10] If he denied making those statements, and Appellant sought to introduce the prior inconsistent statement under Rule 613, SCRE, then Appellant would presumably have had to call the doctors to whom Bethea made the alleged statements, to make a relatively minor point of impeaching Bethea's first statement to police. This scenario exemplifies Respondent's arguments that to allow the cross-examination had a great possibility of introducing a collateral issue that could have confused the jury.

testified during a proffer she had been diagnosed with schizophrenia and she took Prozac and Risperdal for her condition, and when she did not take her medications, she would become confused, hear voices, and have problems with her memory. 373 S.C. at 129, 644 S.E.2d at 698. The victim further testified she had not been without her medication either during the time of the crimes or anytime recently. *Id.* The trial court disallowed cross-examination on the victim's mental health, finding

> [T]here would be very little that would assist the jury in evaluating her ability to recall what happened or her credibility. The court felt it would require speculation on the jury's part to connect the medical testimony to her ability to testify truthfully. The court stated there was a significant potential for unfair prejudice because it may cause the jury to decide the case on an improper basis.

Id. at 130, 644 S.E.2d at 698. The Supreme Court affirmed, finding that when the victim was taking her medication during the crime and at the time of trial, her specific diagnosis and medication regimen "were irrelevant to her ability to truthfully recall the events." *Id.* at 131, 644 S.E.2d at 698. The Supreme Court further pointed out the appellant had failed to show a nexus between the victim's medications and any alleged misidentification of the appellant. *Id.* Here, too, because Appellant failed to develop Bethea's testimony, he also failed to show a nexus between the alleged visual hallucinations and Bethea's ability to truthfully recall and communicate the events of April 13, 2012. As in *Turner*, it would require speculation on the jury's part to connect the visual hallucination evidence to Bethea's ability to give a truthful statement to police.[11] Thus, the trial court correctly determined the evidence was relevant based on the information presented to the court, and the court properly limited the cross-examination.

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[11] Appellant has failed to articulate how visual hallucinations could have impacted Bethea's statement to police on April 30th. Presumably, the visual hallucinations would be present (if at all) at the time Bethea was giving his statement to police, but there has been no showing that the visual hallucinations impaired Bethea's memory of the shooting or his ability to communicate what he remembered. There has been no showing of what the visual hallucinations even were.

Based on the record, the information Appellant sought to elicit through cross-examination was not relevant. Thus, the trial court did not abuse its discretion in excluding it.

If Relevant, the Evidence Was Properly Excluded Under Rule 403, SCRE.

Even if this Court finds the testimony that would have been elicited through the proposed cross-examination was relevant, Respondent submits the trial court did not abuse his discretion in limiting Appellant's cross-examination where there was reason to limit it under Rule 403, SCRE. If Bethea denied making the statements, then Appellant would presumably have called the doctors to testify, and the presentation of that testimony on such a relatively minor point would have been a waste of time and likely confusing to the jury. *See* Rule 403, SCRE. Furthermore, even if Bethea admitted making the statements, as in *Turner*, the slight probative value of that evidence would be outweighed by unfair prejudice (particularly without further development on the nature of the visual hallucinations or whether they were present on April 30th).

Appellant Was Not Prejudiced.

Moreover, Appellant was not prejudiced by the trial court's limitation on his cross-examination of Bethea where there were other ways in which Appellant could and did impeach Bethea. For example, both Appellant and Hayes questioned Bethea about his motive to testify and the potential sentence he was facing for his participation in the shooting. (R. 488-89, 507-10, Tr. p. 563, line 8–564, line 8; Tr. p. 582, line 2–p. 585, line 6). Bethea was also questioned about his experience in prison. (R. 510-12, Tr. p. 585, line 9–p. 587, line 22). Bethea admitted to the jury he had been diagnosed with schizophrenia and he had been institutionalized in the past. (R. 511-12, Tr. p. 586, line 13–p. 587, line 22). Appellant questioned Bethea regarding inconsistencies in his testimony about what happened the night of the shooting. (R. 524-25, Tr.

p. 599, line 17–p. 600, line 19). Appellant also questioned Bethea about his past drug use, and Bethea admitted he smoked marijuana and had snorted cocaine "a couple times." (R. 537, Tr. p. 612, lines 17–21). There were a number of other ways in which Appellant and his co-defendant could, and did, impeach Bethea, including his schizophrenia diagnosis and his drug use. Thus, Appellant was not prejudiced by the trial court's limitation of his cross-examination of Bethea. *See State v. Stokes*, 381 S.C. 390, 401–02, 673 S.E.2d 434, 439–40 (2009) ("[T]he Confrontation Clause 'guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (quoting *United States v. Owens*, 484 U.S. 554, 559 (1988))).

Any Error Was Harmless.

Even if Appellant established Bethea had made statements to doctors he had visual hallucinations when he smoked marijuana and he smoked marijuana thirty minutes before he was arrested, and if Appellant further established such evidence was relevant and should not have been excluded by the trial court, any error was harmless.

> "Whether such an error is harmless in a particular case depends upon a host of factors . . . . The factors include the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and, of course, the overall strength of the prosecution's case."

State v. Gracely, 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

Though Bethea's testimony was important to the State's case due to the lack of physical evidence connecting Appellant and his co-defendants to the crime scene, Bethea's story was not the sole evidence relied upon by the State. The State also presented the testimony of Williams,

whose testimony was largely consistent with Bethea's.[12] Furthermore, as discussed earlier, the evidence Appellant sought to elicit only went to impeach Bethea's statement to police on April 30th—it was not relevant to Bethea's testimony about what he recalled from the night of the shooting. Appellant and Hayes were able to cross-examine Bethea on a wide range of matters, including that he was facing charges for his involvement in the drive-by shooting and he had been diagnosed with schizophrenia and had received treatment for it. In their closing arguments, both Appellant and Hayes referenced Bethea's motive to testify, and Appellant specifically noted inconsistencies in Bethea's testimony. (R. 580-81, 590-91, Tr. p. 655, line 3–p. 656, line 11; Tr. p. 665, line 17–p. 666, line 25). Accordingly, the *Van Arsdall* factors indicate that any error in limiting the cross-examination of Bethea was harmless.

[12] Respondent considers the testimonies to be largely similar because Williams and Bethea testified consistently to a number of facts, including the people in the car, where those people were sitting, who fired guns, the way that the gunmen fired (Williams out the window, over top of the car and Appellant directly out of the window), what they did with the guns afterward, and what warnings they received from Appellant and Smith.

Appellant claims that Williams's and Bethea's versions of the shooting have the car facing in opposite directions at the time of the shooting. However, Williams made it clear during his testimony that he was not familiar with the roads in the area. (R. 399-402, 422-27, Tr. 474, line 18–p. 477, line 11; 497, line 9–p. 502, line 5). On the other hand, he was sure of where he was sitting in the car and in what direction he and Appellant were shooting. (R. 423, 427, Tr. p. 498, lines 11–14; Tr. p. 502, lines 1–5). Williams testified that they turned around after passing the house once and drove by again—it is possible, particularly in light of the fact that Williams was admittedly unknowledgeable about the roads, that rather than making a u-turn and driving back by the house in the opposite direction, they somehow turned around and drove back by the house in the same direction as they had before. Were that the case, Williams's testimony would be both internally consistent (except that he would have been incorrect that the car was facing Latta at the time of the shooting) and consistent with Bethea's testimony.

CONCLUSION

For all the foregoing reasons, Respondent respectfully asserts that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully Submitted,

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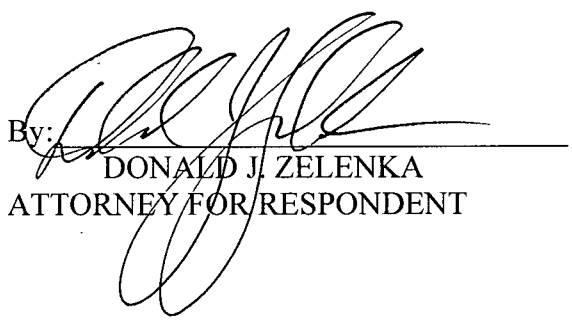

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December 2, 2015

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marion County

D. Craig Brown, Circuit Court Judge

THE STATE,

Respondent,

V.

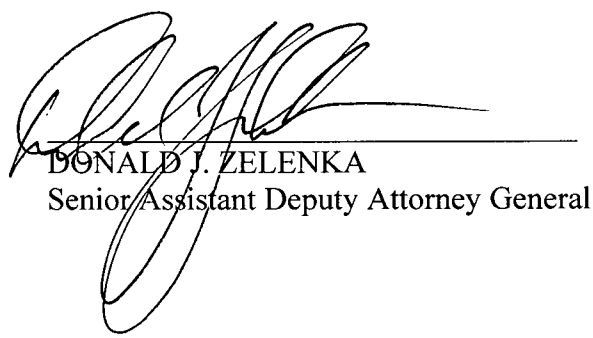
BLATON WAKEEM SMITH,

Appellant,

Appellate Case No. 2014-1769.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014 Order of the South Carolina Supreme Court entitled " Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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December 2, 2015

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THE STATE,

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CERTIFICATE OF SERVICE

I, Donald J. Zelenka, counsel for Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing two (2) copies of the same in the InterAgency Mail to his attorney of record at:

David Alexander
Appellate Defender
SCCID/Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.

This 2nd day of December, 2015.

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General