STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Steven H. John, Circuit Court Judge

THE STATE,

Respondent,

v.

THOMAS JAMES,

Appellant

Appellate Case No. 2014-002326.

INITIAL BRIEF OF RESPONDENT

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I. Whether the court abused its discretion by allowing the state to call former solicitor Von Herrmann as a witness to "explain" why certain charges were dismissed against its star witness, Keir Johnson, where Johnson admitted that he lied to the police, but maintained he was now telling the truth without consideration, since allowing the solicitor to testify about prosecutorial discretion to explain leniency towards the state's witness was improper, as were the limitations on cross-examining the former solicitor given Rule 611(b), SCRE once she was allowed to testify?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

I. Did the trial court abuse its discretion when it ruled that a former assistant solicitor could testify about the reasons that a testifying co-defendant's collateral charges were dismissed where Appellant's counsel withdrew his objection, where the defense made the reasons for the charges' dismissal relevant, where the former solicitor's testimony did not vouch for or bolster the State's other witnesses, and where the testimony proves harmless.

STATEMENT OF THE CASE

Appellant Thomas James was indicted by the Horry County Grand Jury for the November 8, 2011, murder of victim Shaquille Shontay (Keia) Pertelle. (R. p. *Indictment).

James was represented by Bobby G. Frederick, Esq. at trial, which began with jury selection on October 13, 2014, and continued for five days. (R. p. *). James was jointly tried with co-defendant Carnail Graham, who was represented by David J. Canty, Esq. The Honorable Steven H. John presided, and Nancy Livesay of the Fifteenth Circuit Solicitor's Office prosecuted the case. (R. p. *).

The jury convicted James of murder and Judge John sentenced James to thirty-two years' imprisonment with credit for time served. (Tr. p. 1065, lines 1-5). This appeal follows. (R. p. *Notice of Appeal).

STATEMENT OF FACTS

Keia Pertelle died of a gunshot wound to the chest sustained when intruders invaded her mobile home located outside of Conway. (Tr. p. 155, line 3 – p. 157, line 24; Tr. p. 173, lines 1-24). The shooter was standing over two feet away. (Tr. p. 178, lines 8-14). The first officer who responded to the scene located Pertelle in her residence's front bedroom, deceased on the bed. (Tr. p. 157, lines 16-24). In the living room, investigators found a comforter half thrown from the couch to the floor, indicating that someone leapt from the couch in a hurry. (Tr. p. 304, lines 10-21). The bullet was retrieved from Pertelle's back during autopsy and collected as evidence. (Tr. p. 286, lines 9-25).

Prior to the invasion, Pertelle's roommate Carlton Watts last saw her watching television on the couch. (Tr. p. 68, lines 1-17). Watts testified at trial that he was asleep at the time of the invasion. He initially heard a few gunshots, causing him to roll to the floor and hide underneath his bed. (Tr. p. 61, line 16 – p. 64, line 17). Watts could not identify the intruders, but heard them screaming "where it's at, we're not playing, where it's at," and saw two pairs of sneakers pass by his bed. (Tr. p. 72, line 24 – p. 73, line 15).

The third resident and the victim's boyfriend, known as Splurge, shared a bedroom with the victim. (Tr. p. 61, lines 21-23; Tr. p. 108, lines 16-18). Splurge was also at the house that night, and remained inside until law enforcement arrived on scene and demanded he exit. (Tr. p. 63, lines 15-20; Tr. p. 66, lines 7-22). At the time of the invasion, the victim screamed out to Splurge, who was in their bedroom at the time of the break-in. (Tr. p. 71, line 19 – p. 72, line 3). Splurge did not testify at trial.

A neighbor, David Grissett, heard the gunfire and commotion occurring in Pertelle and Watts' mobile home, then witnessed two people run from the residence and

leave in a van. (Tr. p. 124, line 19 – p. 125, line 10). Grissett called 911. (Tr. p. 125, lines 11-14). Grissett actually noticed the getaway van slightly earlier, finding its presence suspicious. He had never seen it before, but watched it circle his street, park at the end, then drive two streets over and return again to park at the end of the road. This occurred around 2:00 AM. (Tr. p. 122, line 17 – p. 124, line 17). The road on which Grissett and Pertelle lived dead-ended and had no street lights. (Tr. p. 129, lines 14-25).

Between six and seven the morning following the murder, Tiffany Oliver noticed a champagne colored van with tinted windows parked near a tree line behind her mobile home. (Tr. p. 191, line 16 – p. 193, line 4). Oliver called the police in response to the van's discovery because she did not know whom it belonged to and she wanted it removed. (Tr. p. 190, lines 3-11). She did not live on the same street as the victim.[1] (Tr. p. 189, lines 10-12).

On scene, law enforcement documented entry marks from a fired bullet in the front door jamb. (Tr. p. 277, lines 1-16). The front door frame showed additional signs of forced entry. (Tr. p. 282, line 12 – p. 283, line 9). Outside, law enforcement took tire and shoe impressions from where the van was reported to have parked at the end of the street. (Tr. p. 274, line 19 – p. 275, line 18; Tr. p. 326, lines 1-23). No comparison was made between either the tire castings and the van, or the shoe castings and any shoes located in conjunction with the individuals who later emerged as suspects. (Tr. p. 329, line 22 – p. 330, line 9).

Inside, law enforcement found a disheveled bedroom and collected fired bullets

[1] Oliver testified at trial that she knew both Appellant and the victim through Appellant's girlfriend, to whom Oliver was related. (Tr. p. 202, line 6 – p. 203, line 15).

from the kitchen cabinets, the doorway from the kitchen to the living room, and from underneath the living room couch. (Tr. p. 279, lines 2-24). Another bullet hole punctured the television, and yet another punctured the hallway floor. (Tr. p. 279, line 25 – p. 280, line 20). Various bullet jackets and fragments were collected from the scene as well. (Tr. p. 298, line 18 – p. 299, line 25). In addition to the absence of any shell casings on scene, the types of jackets and bullet fragments recovered signaled to law enforcement that a revolver was most likely the type of firearm used during the invasion. (Tr. p. 300, lines 1-25). Investigators also collected two handguns, a .357 Taurus revolver[2] and a .44 Redhawk Ruger, and one SK 7.62 assault rifle from the mobile home. (Tr. p. 290, lines 10-25).

In regards to the projectiles taken from the crime scene, SLED's firearm and toolmark examiner determined that three projectile fragments, State's exhibits 68, 69 and 71, and a complete fired bullet, State's exhibit 67, derived from the .357 Taurus revolver recovered from the crime scene. (Tr. p. 386, line 13 – p. 391, line 7; Tr. p. 385, lines 1-8). While crime scene investigation concluded that some shots were fired from the bedroom of the mobile home towards the front door where the intruders entered, and some fired from the intruders back through the living room and towards the bedrooms in the residence, the record lends to the plain inference that the bullets matching this recovered revolver were fired by Splurge in defense of the home invasion. (Tr. p. 278, line 1 – p. 279, line 12; Tr. p. 407, line 16 – p. 382, line 10).

The State's firearm and toolmark examiner also determined that the bullet

[2] For ease of identification within the Record, the .357 Taurus revolved was entered into evidence as State's Exhibit 64. (Tr. p. 293, line 15 – p. 296, line 19).

recovered from the victim's body during autopsy did not derive from any firearm recovered from the crime scene. The fatal bullet was of .357 caliber and was fired from an unrecovered revolver.[3] (Tr. p. 391, line 8 – p. 393, line 7). A match was never made between the bullet sustained by the victim and any other gun. (Tr. p. 410, line 6 – p. 411, line 10).

In regards to the van, it was taken from Tiffany Oliver's property, impounded, processed and fingerprinted. (Tr. p. 312, lines 6-25). Nineteen total fingerprints were lifted from the van, but only thirteen lifts had enough ridge detail to utilize for comparison. (Tr. p. 226, line 17 – p. 227, line 10). No prints taken from the driver's side of the van contained sufficient ridge detail to be matched to any individual. (Tr. p. 241, lines 19-25). The passenger side of the van, however, provided five prints which could be matched. (Tr. p. 240, lines 11-18). Appellant was identified as leaving one of these prints—law enforcement identified his right palm print on a passenger side door. (Tr. p. 240, lines 21-23; Tr. p. 242, line 24 – p. 243, line 2). Other matches obtained were to testifying co-defendant Keir Lamont Johnson, as well as to Letitia Tasha Freshley and Markel Hasheem Rush. (Tr. p. 240, line 23 – p. 241, line 12). It was also determined during the course of investigation that the van belonged to Kier Lamont Johnson's ex-girlfriend, Tiara Brown. (Tr. p. 554, lines 3-7). Kier Lamont Johnson was locally known as "Bootsie." (Tr. p. 431, lines 5-13).

Howard Parker, a lifelong friend of Appellant, co-defendant Carnail Graham, and

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[3] Though the revolved recovered from the crime scene was of .357 caliber and though the bullet recovered from the victim was also of .357 caliber, toolmark examination showed that the bullet from the victim was fired from a barrel rifled with six grooves and a right twist. The .357 Taurus revolver taken from the crime scene was rifled with five grooves and a right twist. (Tr. p. 391, line 17 – p. 392, line 4).

the victim, testified at trial that he recognized the van as one that Bootsie drove around town. (Tr. p. 430, line 17 – p. 432, line 5). Parker saw Bootsie in the van twice the night of the murder. (Tr. p. 432, lines 6-8). The first was at a gas station around 11:00 PM. (Tr. p. 432, lines 9-25). Parker saw the van for the second time after midnight. It showed up at a house where Parker was gathered with friends. (Tr. p. 433, line 1 – p. 434, line 6). Parker testified that he recognized Appellant leave that house and get inside the van before it left. (Tr. p. 464, line 1 – p. 465, line 19). This was around 2:00 AM. (Tr. p. 464, lines 5-14). On both occasions, Parker noticed, but could not identify, other individuals already inside the van. (Tr. p. 432, lines 9-22; Tr. p. 434, lines 7-23).

Bootsie testified at trial, implicating Appellant, known as "Cutty," and co-defendant Graham, or "Dubba," in the home invasion that resulted in the victim's murder. Bootsie was close friends with Cutty and Dubba.[4] (Tr. p. 528, lines 15-25). Bootsie explained that Dubba called him from Appellant's phone asking for a ride to "go buy some drugs" at Splurge's mobile home. (Tr. p. 531, lines 18-22). Bootsie picked them up near Conway in Tiara's brown Chevy Astro van around 1:40 AM. (Tr. p. 537, lines 10-21). Bootsie testified that he drove down the street in the neighborhood, spoke to a neighbor in the trailer park and drove around the block again while Appellant and Dubba went inside Splurge's trailer. (Tr. p. 541, line 4 – p. 542, line 9). Then Appellant and Dubba got back in Bootsie's van and Bootsie drove away at his passengers' direction. (Tr. p. 531, line 18 – p. 532, line 8).

As they left the scene, a Horry County police officer "swerved around" to follow

[4] Bootsie testified that Dubba had Appellant's and Bootsie's names tattooed on his body. (Tr. p. 529, line 21 – p. 530, line 14).

them, and Dubba urged Bootsie to make a getaway. At that point, Bootsie parked the van in "somebody's backyard" and all three men took off into the woods. (Tr. p. 532, lines 9-15). It was during their getaway that Dubba expressed to his cohorts that he thought he "just killed that mother------."[5] (Tr. p. 542, lines 17-24). Bootsie recalled Appellant and Dubba wearing blue latex gloves and discarding them in the woods; they did not wear masks. (Tr. p. 631, lines 1-21). Bootsie also testified that Dubba threw two guns out of the van window.[6] (Tr. p. 543, lines 1-5; Tr. p. 585, lines 1-25).

Bootsie later asked his girlfriend to call the police and report the van stolen—he falsely explained to law enforcement that he was robbed of the van while at a gas station. (Tr. p. 543, line 22 – p. 544, line 6; Tr. p. 599, line 23 – p. 602, line 4). The instruction to report the van stolen appeared to be one of Bootsie's initial strategies to attempt to evade law enforcement from discovering that he was involved in the victim's murder. (Tr. p. Tr. p. 543, line 22 – p. 544, line 15). Bootsie incurred a charge for driving without permission with intention to deprive, and made bond the following day. (Tr. p. 544, lines 7-12).

Bootsie later incurred a murder charge in relation to the case at bar which remained pending at the time of Appellant's trial.[7] (Tr. p. 544, lines 13-21). Bootsie's

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[5] In his own case-in-chief, Dubba presented the mother of his children, Nakeema Crooms, as an alibi witness to testify that she lived with Dubba at the time of the murder, and he was at home that night asleep with their three-year-old daughter. (Tr. p. 912, line 8 – p. 913, line 23).

[6] Bootsie testified that he had never shot a gun, but that the guns thrown out the van window that night were of .45 and .38 caliber. (Tr. p. 585, lines 10-25). The State elicited testimony from its firearm and toolmark examiner that a .38 revolver looked similar to a .357 revolver, such as the caliber gun that fired the fatal bullet. (Tr. p. 409, lines 2-9).

[7] Bootsie previously incurred additional, unrelated charges for burglary first, possession of a weapon, and assault and battery first, the discussion of which gives rise to the issue

attorney acquired his client a bond on the murder charge. (Tr. p. 549, lines 3-11; Tr. p. 565, line 14 – p. 567, line 22; R. p. *Defendant's Exhibit 5). At trial, Bootsie maintained that he was telling the truth about what happened that night—he said that after he hired an attorney he told the truth in every statement that he gave. (Tr. p. 544, line 22 – p. 545, line 15; Tr. p. 547, lines 20-23; Tr. p. 599, line 21 – p. 600, line 1). Bootsie also testified that prior to bonding out, he lied about the events related to this case because he was receiving threats in the county detention center. (Tr. p. 549, lines 3-18). Even after bonding out, Bootsie made inconsistent statements, but only related to what happened *after* he, Appellant, and Dubba left the victim's mobile home. For instance, Bootsie said that his grandmother's boyfriend picked him up, or that he took a cab after dropping off the van, or that he walked backed to Conway. (Tr. p. 590, line 8 – p. 595, line 20). It appears however that a fourth party, Mike Pyatt, picked Bootsie up. (Tr. p. 589, line 27 – p. 590, line 4; Tr. p. 603, line 18 – p. 604, line 6). But Bootsie never changed his recollection regarding Appellant and Dubba's entering and exiting the victim's mobile home at the time of the murder. (Tr. p. 656, line 7 – p. 637, line 4).

The State put forward two inmates to corroborate Bootsie's testimony. A federal inmate, Sedieka McClam, testified that he witnessed Dubba talking on the phone with Appellant apologizing "for what had happened to Keia" and "[t]hat he panicked when he went through the door and just started shooting." (Tr. p. 727, line 3 – p. 728, line 17; Tr. p. 742, lines 10-20). This occurred in January 2011. McClam subsequently wrote this information in a letter to the solicitor's office. (Tr. p. 728, lines 18-25; R. pp. *Defendant's Exhibit 10). More information from the letter was divulged during

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on appeal. (Tr. p. 575, line 21 – p. 577, line 21).

McClam's cross-examination, during which he recalled Appellant stating "they went to rob Keia's boyfriend, Splurge," and that "he didn't mean to shoot his gun six or seven times[.]"(Tr. p. 743, lines 4-25; Tr. p. 749, lines 10-19). McClam was arrested on federal charges shortly after overhearing this phone conversation, and testified that he wrote the letter in cooperation in hopes of receiving a sentence reduction. (Tr. p. 731, lines 1-25). At the time of trial, McClam had yet to receive any downward sentencing departure. (Tr. p. 738, lines 1-5).

Another federal inmate, Kachief Spain, testified that when he was housed one pod over from Dubba in the Horry County detention center, he witnessed Dubba come to the recreation field and call one of Spain's podmates, Ace Graham, to a door situated "maybe five feet" from where Spain was standing at the time. (Tr. p. 761, lines 1-25). Spain witnessed Dubba slide the discovery in his case through the door to Ace Graham and explain to Graham that "they [the State]" did not have any evidence on him. (Tr. p. 762, lines 1-8; Tr. p. 765, lines 1-5). According to Spain, Dubba told Graham what happened:

> We got to the house, kicked the door in, we kicked the door in, the alarm went on. Keia was on the couch, she jumped up, started running, screaming for Splurge. Everything happened so fast, he just started shooting. She seen his face. He started shooting, you know, he didn't have a choice because she seen him.

(Tr. p. 762, lines 9-17). Spain's cross-examination expounded upon additional details that he initially divulged to the State's investigator: that Dubba stated he went in the front door, that there were eight people in the van, and that Appellant and Dubba "put a gun to Lil Bootsie's head and told him not to tell[.]"[8] (Tr. p. 772, lines 4-16).

[8] A discrepancy arises through both McClam and Spain's testimony as to the color of the van. These inmates testify that the van connected to the murder was blue. (Tr. p. 743,

Cell phone evidence scattered throughout the trial showed that Appellant, Dubba and Bootsie had at least two phones each. (Tr. p. 536, line 2 – p. 536, line 6). Through expert testimony on cell-phone tracking and electronic communications, Appellant established that one of his phones did not conduct any traceable activity near the victim's residence during the time in which the home invasion and murder occurred. (Tr. p. 862, lines 13-22). No records were introduced or discussed regarding Appellant's second cell phone. (Tr. p. 870 lines 8-15). The same expert witness also testified that Bootsie's phone made and received a total of 28 calls in an area northwest of Conway, the direction of the crime scene, around the time of the home invasion and murder. (Tr. p. 843, line 1 – p. 847, line 14; Tr. p. 862, lines 18-22).

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lines 19-23; Tr. p. 772, lines 1-3). But direct evidence, and Bootsie's testimony, establishes that the van was tan or brown. (Tr. p. 269, line 3 – p. 270, line 5). Spain later testifies that he does not recall the color of the van, that it was either blue or brown. (Tr. p. 752, lines 19-21).

ARGUMENT

I. The trial court did not error in allowing the State to call a former assistant solicitor as a fact witness to testify as to why a testifying co-defendant's collateral charges were dismissed. Not only did Appellant withdraw his objection, leaving it unpreserved for review, but the State was entitled to call the former assistant solicitor as a fact witness to corroborate other witness testimony put forward by the State once the defense made the reasons for the charges' dismissal relevant, where the former solicitor's testimony did not vouch for or bolster the State's other witnesses, and where the testimony at issue was corroborative to that of the testifying co-defendant and, considering the totality of the evidence, harmless.

Testimony Giving Rise to the Issue on Appeal

Prior to Bootsie's trial testimony, Appellant sought leeway to cross-examine the co-defendant about the progression of events related to the State's dismissal of unrelated first degree burglary and possession of a weapon charges. (*See* Tr. p. 502, line 14 – p. 503, line 17). Bootsie also had an assault and battery charge which was dismissed. (Tr. p. 524, lines 11-25). Appellant sought to establish that when Bootsie "was charged with murder for this particular crime, [that] he thereafter made a statement that implicated the two defendants." (Tr. p. 517, lines 16-24). Appellant next sought to establish that after making this statement, Bootsie "was granted bond on the murder charge, that thereafter the State of South Carolina dismissed a burglary first charge and a weapons charge; and that thereafter [Bootsie] was convicted of [petit] larceny or pled guilty to [petit] larceny." (Tr. p. 517, line 24 – p. 518, line 8).

The State countered Appellant's proposed cross-examination on the premise that it would be "extremely prejudicial to bring up and insinuate that the State dismissed charges in exchange for [Bootsie's] testimony." (Tr. p. 520, lines 16-18). Assistant Solicitor Livesay specified that the reasons for dismissing Bootsie's unrelated charges did not correlate with his cooperation in the case at bar: the incident lending to those charges

involved one female victim who would serve as the only witness, and who "since then has been shot in the neck and is deceased." (Tr. p. 519, line 24 – p. 520, line 7). Ms. Livesay expounded:

> So the State's argument would be that in my opinion, [Bootsie] had already given us that story. He had already said it was Dubba and Cutty. We then arrested these two defendants. We had no need to give him anything, he had already given us that statement to the solicitor's office, and we had already handed it over to the defendants. So he didn't need anything in return, he had already given that statement.
>
> . . .
>
> Secondly, the charges were dismissed in a case that involved his girlfriend who was the only victim or witness who was shot shortly later, which would, to me, make the case impossible to prosecute. So they want to insinuate on a case that we had no victim on and she was the only witness and get up here and say, [']well, wasn't that dismissed because you're testifying for the State[?']
>
> A trial date had not even been set . . . .

(Tr. p. 520, line 8 – p. 521, line 4).

The trial court did not limit Bootsie's cross-examination, but rather allowed the State an opportunity to respond to it by calling Ms. von Herrmann, a former assistant solicitor who had been assigned to Bootsie's previous charges. The purpose of allowing Ms. von Herrmann to testify was to establish the reason that Bootsie's other charges were dismissed. (Tr. p. 522, lines 6-14). The trial court reasoned that the jury should be afforded "the full and complete picture of what occurred or didn't occur" for their consideration. (Tr. p. 523, lines 7-10). The court also reasoned in Appellant's favor:

> But I think it is proper to allow that timeline to be established [by Appellant]. There might be an extremely valid reason why the State dismissed it. But I think the jury is entitled to know that part of it. So I will allow you, if you want to, to later call in your case in chief Ms. Von Herrmann to say, you know, establish she is the solicitor and why she

> dismissed the charge, all right. But I'm going to allow the defense to ask the question[.]

(Tr. p. 522, lines 15-23). The court further reasoned that it would not be within Bootsie's knowledge precisely why his charges were dismissed because Ms. von Herrmann was the person in charge of the dismissal. Therefore, Ms. von Herrmann was the proper party to answer those questions. (Tr. p. 525, line 17 – p. 526, line 4).

In regards to any collateral charges, Bootsie then testified that his lawyer, not the solicitor, was responsible for getting his other charges dismissed. (Tr. p. 549, line 19 – p. 550, line 11). On cross-examination, Bootsie testified that he was charged with murder in 2011 and that in 2013 he garnered charges for first degree burglary and first degree assault and battery, both of which were dismissed in 2013. Bootsie also testified that he incurred and pled guilty to one charge of petit larceny also in 2013 "so that [he could] make bond." (Tr. p. 575, line 12 – p. 577, line 14). Moreover, testimony was elicited from Bootsie on cross-examination that he was charged with possession of a weapon during the commission of a violent crime in 2012, another charge which was dismissed. (Tr. p. 577, lines 17-21). Bootsie stated "[t]o tell you the truth, that happened after the murder charge[;] [t]hat burglary first and all [the dismissals] happened after this murder charge . . . ." (Tr. p. 578, lines 1-25). He testified that he lied to law enforcement in his November 2011 statement regarding the murder, but that he gave a truthful statement in 2012 after speaking to his lawyer. (Tr. p. 606, line 6 – p. 608, line 6). Bootsie next testified that his robbery and possession of a weapon charges were dismissed after he made the 2012 statement, but that they had been pending since 2009 and the State "had no evidence on [him]" in regards to those charges. Bootsie stated that his attorney got

those collateral charges dismissed, but counsel pointed out that their dismissal occurred twenty days after his 2012 statement to law enforcement. (Tr. p. 610, line 21 – p. 612, line 16).

Appellant's Objection

Following the conclusion of Bootsie's testimony, the State did elect to call former assistant solicitor von Herrmann to "reply to the questions as to why [Bootsie's] charges were dismissed after this case, after 2011." (Tr. p. 644, lines 9-17). Appellant objected on the basis that once Ms. von Herrmann is called to testify, the defense is "entitled to cross examine her on any issue relevant to this case" pursuant to Rule 611(b), SCRE. (Tr. p. 644, line 20 – p. 645, line 2). Appellant intimated that by "calling a former solicitor to testify about her prosecutorial decisions," the State opened the door for Appellant to cross-examine Ms. von Herrmann about "any issue relevant to this case," which would include her exercise of prosecutorial discretion. (Tr. p. 646, lines 10-13; Tr. p. 647, line 22 – p. 648, line 7).

The State responded with the specifics of the testimony it intended to elicit through the former assistant solicitor: Ms. von Herrmann formerly "worked at the solicitor's office. At that time she was handling the pending charges, all of Keir Johnson's [Bootsie's] charges. Some of those charges were dismissed, they were not dismissed in any exchange for his testimony or anything regarding this [trial]." (Tr. p. 645, lines 20-25).

The trial court pointed out that defense counsel "raised the issue. So the State is entitled to reply . . . ." (Tr. p. 646, lines 14-19). The court green-lit Ms. von Herrmann's

testimony in reply to matters brought out through Appellant's cross-examination of Bootsie. The court was not "going to allow [Appellant] to delve into "prosecutorial ideas" during his cross-examination of Ms. von Herrmann, but rather was "allowing [the State] to rebut and give a reason why [Bootsie's other] charges were dismissed, because the [victim] died." (Tr. p. 647, lines 15-21). The trial court then invited a proffer of Appellant's cross-examination.

During the proffer, Appellant questioned Ms. von Herrmann on the following topics: (1) how long she was assigned to Appellant's charges, (2) whether she ordered that cell phone records be analyzed in relation to the murder investigation, (3) about a scrivener's error in a former indictment which was later corrected and re-indicted, and (4) whether she ordered an analysis of shoe impressions related to the murder investigation. (Tr. p. 649, line 1 – p. 654, line 2). Dubba's counsel, Mr. Canty, questioned Ms. von Herrmann regarding (5) whether she was aware of jailhouse informants who could testify at Appellant's trial, (6) whether she turned over any incriminating statements provided by third parties, and (7) what she remembered about being at the crime scene investigation immediately following the murder. (Tr. p. 654, line 24 – p. 657, line 8).

The trial court ruled that Appellant could not "ask about a scrivener's errors in the previous indictment."[9] (Tr. p. 653, lines 10-16). Additionally, because Ms. von Herrmann was not the prosecutor trying the case at bar, the trial court also did not allow defense counsel to question her about whether "there was a witness [or statement] in this case whom she elected not to use." (Tr. p. 654, lines 4-16; Tr. p. 655, lines 2-14). The trial court otherwise made no specific rulings nor placed additional limitations on the

[9] Appellant does not take issue with this specific limitation in his brief.

proffered cross-examination.

At this point, **Appellant withdrew his objection** to the court's limiting Ms. von Herrmann's cross-examination. (Tr. p. 657, lines 9-13). The trial court responded that it may disagree with Appellant regarding the specific latitude the court intended to apply to Appellant's cross-examination. Then Ms. von Herrmann took the stand to testify before the jury. (Tr. p. 658, lines 8-22).

Ms. von Herrmann's Testimony

The former assistant solicitor testified that Bootsie incurred a burglary first and an assault and battery first for an incident that occurred on April 28, 2013. His then-girlfriend was the victim, and she asked for the charges to be dismissed because they resulted from an argument. "[I]t was a mutual combat type situation and [Bootsie] had not broken into that house." (Tr. p. 661, lines 2-11). That case was dismissed "based on the victim's assurances." (Tr. p. 661, lines 12-16).

Ms. von Herrmann next testified that Bootsie incurred an armed robbery and a related weapons charge on October 14, 2009. (Tr. p. 661, lines 17-20). The State determined that the victim in that case was experiencing an unrequited affection for Bootsie and reported that Bootsie struck her and took $7 from her pocket. (Tr. p. 661, line 24 – p. 662, line 4). But the charge was dismissed due to a dearth of corroborating evidence: Bootsie was not wearing the clothing the victim reported him to be wearing when he was investigated shortly after the report, and law enforcement could not locate any weapon alleged to have been used in connection with the charges. (Tr. p. 662, lines 4-15). Ms. von Herrmann explained that it was "just not a prosecutable case," because if

there is not "sufficient evidence to bring [it] to a jury," the State dismisses it. (Tr. p. 662, lines 15-21). She succinctly summarized that Bootsie's other charges "were dismissed on their own merit for lack of evidence." (Tr. p. 663, lines 7-8).

Ms. von Herrmann also testified that she was called to the crime scene in this case "when the murder took place," and retained the file on this case until she left the solicitor's officer in October 2014. (Tr. p. 663, lines 9-25). She finished by testifying that she had no involvement in any decision making related to Appellant's trial. (Tr. p. 664, lines 2-12).

Appellant was then afforded a full, fair, and uninterrupted opportunity at cross-examination. (Tr. p. 664, line 17 – p. 669, line 8). Counsel for Appellant's co-defendant was likewise afforded a full, fair, and uninterrupted opportunity at cross-examining Ms. von Herrmann. (Tr. p. 669, line 9 – p. 692, line 6). The matters explored during this time reflected those explored during the proffer. The State did object to relevance during Mr. Canty's cross-examination, but was overruled. (Tr. p. 680, line 22 – p. 682, line 23).

Therefore, aside from limiting testimony related to a previous indictment which contained a scrivener's error, the trial court did not limit Ms. von Herrmann's cross-examination in any way. The only exception was a ruling that Mr. Canty not continue to examine Ms. von Herrmann on a topic which she testified she could not recall. (Tr. p. 691, lines 1-12). Appellant never renewed his Rule 611(b), SCRE objection.

A. Appellant withdrew his objection, leaving the issue is unpreserved for review.

"An objection withdrawn at trial constitutes an express waiver of the issue and does not preserve the issue for appellate review." *Ligon v. Norris*, 371 S.C. 625, 633, 640 S.E.2d 467, 472 (Ct. App. 2006) (holding issue unpreserved where initial objection withdrawn after *in limine* discussion of the issue). "[W]here an objection is expressly withdrawn, it cannot be raised on appeal." *State v. King,* Op. No. 5390 (S.C. Ct. App. filed March 16, 2016) (Shearouse Adv. Sh. No. 11 at 29). "Furthermore, a party may not argue on ground at trial and an alternate ground on appeal." *State v. Prioleau,* 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (citing *State v. Dickman,* 341 S.C. 293, 534 S.E.2d 268 (2000)).

The basis of Appellant's objection was that the court should not allow the testimony of a former assistant solicitor who was once assigned to a co-defendant's charge because under Rule 611(b), SCRE, her cross-examination could delve into her exercise of prosecutorial discretion in relation to the case at bar. Appellant argued that prosecutorial discretion would be an improper topic to put before the jury. (Tr. p. 644, line 20 – p. 648, line 7). But Appellant withdrew his Rule 611(b), SCRE objection to Ms. von Herrmann's cross-examination following a proffer of his cross-examination. (Tr. p. 657, lines 9-13). It appears from the record that Appellant was able to conduct a cross-examination of Ms. von Herrmann which was unlimited in the topics he desired to explore.[10] (Tr. p. 664, line 17 – p. 692, line 6). Because Appellant withdrew and did not

[10] With the exception of proffered cross-examination on what was found to be as scrivener's error in relation to the victim's name on a previous indictment. Appellant was re-indicted with a corrected notice instrument. (Tr. p. 653, lines 10-16; R. p. *Indictment).

renew his objection, the issue presently before this Court is unpreserved for review.

B. No bar applied to Ms. von Herrmann being called to testify as a former assistant solicitor because she was not an advocate for the State at the time of Appellant's trial, because she served as a fact witness regarding a topic which became of consequence to the determination of Appellant's guilt, and because her testimony did not offer an opinion on the truthfulness of the State's other witnesses.

"The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice." *State v. McEachern,* 399 S.C. 125, 140, 731 S.E.2d 604, 611 (Ct. App. 2012).

All relevant evidence is generally admissible. Rule 402, SCRE; *State v. Pittman,* 373 S.C. 527, 578, 647 S.E.2d 144, 170 (2007). Relevant evidence is "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. "[G]enerally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.'" *State v. Jones,* 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001) (quoting *State v. Brewington,* 267 S.C. 97, 226 S.E.2d 249 (1976)); *State v. McEachern,* 399 S.C. at 140-41, 731 S.E.2d at 612. Rule 608(c), SCRE preserves this precedent by providing that "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness *or by evidence otherwise adduced.*" Rule 608(c), SCRE (emphasis added).

The reasons for the dismissal of Bootsie's collateral charges became of consequence to the determination of Appellant's guilt due to the light cast upon Bootsie's

testimony by defense counsel. Counsel impeached Bootsie by implying that the State dismissed his collateral charges in exchange for his making a statement to law enforcement which implicated Appellant in the victim's murder. To avoid having Appellant mislead the jury on this point, the State elected to call former assistant solicitor von Herrmann as a fact witness to establish the reasons for the State's dismissing Bootsie's collateral charges. The trial court did not err in allowing the former solicitor to so testify.

"There is no statutory prohibition which prevents the calling of a prosecuting attorney by the *defense* as a witness, and generally speaking he is a competent witness to testify as to all relevant facts coming to his knowledge, except privileged communications." *State v. Lee*, 203 S.C. 536, 536, 28 S.E.2d 402, 404 (1943) (emphasis added). Our courts have held that "a criminal defendant has a right to call the prosecuting attorney as a witness, subject to the trial court's usual discretion to exclude witnesses or evidence." *State v. Quattlebaum,* 338 S.C. 441, 453, 527 S.E.2d 105, 111 (2000); *State v. Lee, supra*. The *Lee* court further recognized that "[i]t seems to be well settled that litigants, especially defendants in criminal cases, should not be hampered in their choice of those by whom they choose to prove their cases." *State v. Lee, supra* at 540, 28 S.E.2d at 404.

"Although a prosecuting attorney is competent to testify, his testifying is not approved by the Courts except where it is made necessary by the circumstances of the case . . . . The propriety of allowing the prosecutor to testify is a matter largely within the trial Court's discretion." *Id.* at 540, 28 S.E.2d at 403. "It seems to be generally recognized . . . that the attorney for the State may properly testify under several

contingencies in the course of the trial, -viz: where the State has been taken by surprise; and in other instances to meet the exigencies of the case" so long as the advocate and witness not be "mixed up in the same case." *Id.* (internal quotation omitted).

While calling a prosecutor as witness may be disfavored, our court has agreed with other jurisdictions and has refused to bar the possibility of calling a prosecutor to testify as a witness even where that prosecutor is participating as an advocate. *State v. Inman,* 395 S.C. 539, 557, 720 S.E.2d 31, 41 (2011). Our court has found that the prosecutor may testify so long as his or her testimony is "relevant and material to the theory of the defense and it must not be privileged, repetitious, or cumulative." *Id.* (internal quotations and alterations omitted). Moreover, recusal is not *per se* required when a prosecutor acts as both a witness and an advocate. *Id.* (quoting 81 Am.Jur.2d *Witnesses* § 229 (2004 & Supp. 2011) ("There is no inherent right to disqualification when a member of the state attorney's office is called as witness in a case prosecuted by a state attorney in the same office, unless actual prejudice can be shown."). However,

> it would be improper for a government attorney who has independent personal knowledge about facts that will be controverted at the trial to act as prosecutor (1) if he uses that inside information to testify indirectly by implying to the jury that he has special knowledge or insight, or (2) if he is selected as prosecutor when it is obvious he is the sole witness whose testimony is necessary to establish essential facts otherwise not ascertainable.

United States v. Hosford, 782 F.2d 936, 939 (11th Cir. 1986) (rejecting the argument that a prosecutor should have been disqualified from prosecuting a soliciting and attempting murder charge because that prosecutor participated in negotiations for a use and immunity agreement that the government alleged the defendant had violated); *see United States v. Thomas,* 193 Fed. Appx. 881, 887-88 (11th Cir. 2006) (court did not

abuse its discretion by refusing to remove a prosecutor who was also a potential witness due to his prosecution of an underlying charge held by the same defendant).

The case at bar is distinguishable—Ms. von Herrmann did not prosecute Appellant, nor did she prosecute Bootsie's murder charge for the same case. The testimony at issue is that of a former prosecutor who made it known to the jury from the outset that she no longer worked for the State, but was engaged in private practice at the time of her testimony. (Tr. p. 670, lines 1-12).

Respondent submits that the propriety of Ms. von Herrmann's testimony as a fact witness merits the same analysis as is applied to the admissibility of a proffer agreement. Had Bootsie entered into a proffer agreement for his collateral charges, the proffer agreement would have been admissible as evidence relevant to bias, prejudice or any motive to misrepresent which Bootsie may employ. "[I]t is generally recognized that the existence of a plea agreement 'may be elicited by the prosecutor on direct examination so that the jury may assess the credibility of the witnesses the government asks them to believe.'" *United States v. Henderson*, 717 F.2d 135, 137 (4th Cir. 1983) (quoting *United States v. Halbert,* 640 F.2d 1000, 1004 (9th Cir. 1981)); *United States v. Sullivan*, 455 F.3d 248, 259 (4th Cir. 2006); *State v. Shuler*, *infra*, 344 S.C. 604, 634, 545 S.E.2d 805, 820 (2001); *State v. Willis,* 390 S.C. 139, 700 S.E.2d 266 (Ct. App. 2010) (defendant's proffer agreement admissible for impeachment absent some affirmative indication the proffer was entered into unknowingly or involuntarily); *see also United States v. Spriggs,* 996 F.2d 320 (D.C. Cir. 1993) (permitting the prosecution on direct examination to introduce the witness' cooperation agreement in its entirety, and adopting majority rule that admission of plea agreements containing "truthtelling" and perjury provisions did not

result in improper bolstering).

If evidence of a plea agreement is generally admissible, it follows that the absence of a plea agreement is similarly admissible, especially where the defense presents to the court its intention to use that information to impeach the State's witness in the same manner it would utilize a proffer agreement for impeachment purposes. "At least where the defendant plans to impeach a witness by showing the existence of a plea agreement, the government's direct examination need not be restricted to the scope of the defendant's intended cross-examination." *United States v. Henderson, supra* (citing *United States v. Whitehead,* 618 F.2d 523, 529 (4th Cir. 1980)). Defense counsel made it clear in the present case that he would be utilizing the dismissal of Bootsie's charges for impeachment, and the State was entitled to respond by presenting additional facts on this topic via the only witness with personal knowledge of why the charges were dismissed: the former assistant solicitor.

"When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." *State v. McEachern,* 399 S.C. at 137, 731 S.E.2d at 610 (citing *State v. Jackson,* 364 S.C. 329, 336, 613 S.E.2d 374, 377 (2005); *State v. Stroman,* 281 S.C. 508, 513, 316 S.E.2d 395, 398 (1984); *State v. Beam,* 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct.App. 1999)). "It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." *State v. Page,* 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008). Appellant interjected the issue of whether Bootsie was testifying against Appellant in exchange for the dismissal of collateral charges. This

notion could have the effect of misleading the jury. Once Appellant impeached Bootsie in this vein, the State was entitled to present testimony on the now-open topic of Bootsie's potential bias.

State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001), is instructive regarding the admissibility of Ms. von Herrmann's testimony in this case. In *Shuler*, as in this case, the State's key witness was an inmate who previously lied to law enforcement, but who testified at trial that he initially lied out of fear and was now truthful. *Id.* at 627, 545 S.E.2d at 816-17. Defense counsel's cross-examination of this witness focused on previous deals made with the United States attorney in exchange for his trial testimony. *Id.* at 628, 545 S.E.2d at 817. "Defense counsel's cross-examination was extensive and focused on [the witness'] legal troubles and deals with law enforcement. The cross-examination effectively impeached [the witness] by demonstrating he had incentive to testify in order to cut time off his sentence." *Id.* Expecting the defense to impeach its witness on this point, the State questioned its witness on his truthfulness on direct examination and again on re-direct. *Id.* The court found the anticipatory examination appropriate given the circumstances:

> Initially, it was not error for the Solicitor to introduce the plea agreement on direct examination because the Solicitor was entitled to anticipate the inevitable cross examination of a federal inmate and to dispel any notion he was hiding something from the jury. Most courts generally recognize the prosecution can introduce evidence of a plea agreement during direct examination of a State witness.[11] However, the Fourth Circuit Court of

[11] *See generally United States v. Spriggs,* 996 F.2d 320 (D.C. Cir. 1993) (permitting the prosecution on direct examination to introduce the witness' cooperation agreement in its entirety, and adopting majority rule that admission of plea agreements containing "truthtelling" and perjury provisions did not result in improper bolstering); *Massachusetts v. Rivera,* 430 Mass. 91, 712 N.E.2d 1127, 1132 (1999) ("On direct examination the prosecution may, of course, properly bring out the fact that the witness has entered into a

> Appeals has found this freedom is not unlimited. *United States v. Romer,* 148 F.3d 359 (4th Cir. 1998) *cert. denied,* 525 U.S. 1141, 119 S.Ct. 1032, 143 L.Ed.2d 41 (1999). The Fourth Circuit Court of Appeals allows the government to elicit testimony regarding a plea agreement on direct examination only if the prosecutor's questions do not imply the government has special knowledge of the witness' veracity, the trial court gives a cautionary instruction, and the prosecutor's closing argument contains no improper use of the witness' promise of truthful cooperation. *Id.* at 369.

State v. Shuler, 344 S.C. at 628-29, 545 S.E.2d at 817-18 (footnote in original).

The *Shuler* court went on to find that the State neither implied that it held special knowledge nor guaranteed the witness' veracity during its examination or closing argument. *Id.* 629, 545 S.E.2d at 818. That court found that "[a]lthough no cautionary instruction was given by the trial judge, the Solicitor did not pursue the plea agreement [in detail] until re-direct examination." *Id.* That court found "no merit to Shuler's argument" because the Solicitor's questions occurred in large part after the witness' credibility had been attacked by the defense, and because the Solicitor "never personally vouched for the truthfulness of [the witness'] testimony," never insinuating he knew better than the jury what the truth and never making an overt statement that he personally believed the witness' testimony to be true. *Id.* at 631, 545 S.E.2d at 819.

Shuler's holding in part relies on the finding that the State did not vouch for or bolster the witness' testimony. *Id.* "Vouching occurs when the prosecutor indicates a personal belief in the credibility or honesty of a witness; bolstering is an implication by the government that the testimony of a witness is corroborated by evidence known to the government but not known to the jury." *United States v. Sanchez,* 118 F.3d 192, 198 (4th

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plea agreement and the witness generally understands his obligations under it."). *State v. Shuler, infra* at 634 n.2, 545 S.E.2d at 820 n.2.

Cir. 1997); *State v. Shuler,* 344 S.C. at 630, 545 S.E.2d at 818 ("Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony."); *see State v. Kelly,* 343 S.C. 350, 540 S.E.2d 851 (2001), *rev'd on other grounds,* 534 U.S. 246, 122 S.Ct. 726 (2002) ("Because a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness' credibility.").

The former assistant solicitor's testimony in the present case fails to meet either definition. Ms. von Herrmann did not testify, nor was she questioned, regarding whether or not Bootsie was telling the truth. She offered no opinion. The State did not act through Ms. von Herrmann to assign credibility to Bootsie's implication of Appellant. (Tr. p. 659, line 25 – p. 692, line 4). Instead, the State put direct evidence in front of the jury so that they could determine the totality of the facts surrounding the timing and dismissal of Bootsie's other charges, which became of consequence at trial because they were dismissed only after Bootsie implicated Appellant in the victim's death. Therefore, her testimony "cannot be vouching, since [either the former prosecutor or the State] made no statement about [a] personal belief in the truth of the statement . . . . Likewise, it cannot be considering bolstering, as it does not refer to evidence not presented to the jury." *United States v. Sullivan,* 455 F.3d at 259. Instead, her testimony constituted permissible relevant evidence on the topic of whether a testifying co-defendant embodied a motive to implicate Appellant for the offense for which he stood trial. No bar applies to her testimony as a fact witness.

C. The former assistant solicitor's testimony constitutes harmless error because it failed to prejudice Appellant's defense considering Appellant's impeachment of Ms. von Herrmann and the remainder of the evidence against him.

An insubstantial error not affecting the result of the trial will be found harmless so long as "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *State v. Bailey,* 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). "Error is harmless where it could not reasonably have affected the trial's outcome. No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Page*, 378 S.C. at 483, 663 S.E.2d at 360 (internal citations omitted). A determination of harmless error in relation to an issue of witness credibility calls for the court to "consider the importance of the witness's testimony to the prosecution's case, whether the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case." *State v. Fossick*, 333 S.C. 66, 70, 508 S.E.2d 32, 34 (1998).

The testimony at issue cannot be found to have substantially altered the outcome of Appellant's trial. Appellant impeached Ms. von Herrmann on cross-examination. *State v. Kelly, supra* at 369-70, 540 S.E.2d at 861 (harmless error applies even when State's questioning found to constitute improper bolstering where the defendant's cross-examination effectively impeached the witness). After she stated that cooperating defendants "don't get [their] charges dismissed" as "qui[d] pro quo," (Tr. p. 674, lines 21-24), additional testimony was elicited from Ms. von

Herrmann wherein she stated that her position regarding Bootsie's bond on the murder charge in fact resulted from his eventual cooperation with law enforcement in the present case. (Tr. p. 676, line 13 – p. 679, line 5).

Also present within the record is overwhelming evidence connecting Appellant to the victim's murder. Absent Bootsie and Ms. von Herrmann's testimony, Appellant was identified as leaving a right palm print on the passenger side door of the brown van witnessed by a neighbor as being associated with the murder. Bootsie's fingerprints were found on the van as well. (Tr. p. 240, line 21 - p. 243, line 2). Another witness testified that he saw Appellant leave a house with Bootsie around shortly before the time of the murder in the same van. (Tr. p. 464, line 1 - p. 465, line 19). A federal inmate testified that after the murder, he heard Appellant's co-defendant speaking with Appellant on the phone apologizing "for what had happened to Keia" and "[t]hat he panicked when he went through the door and just started shooting." (Tr. p. 727, line 3 – p. 728, line 17; Tr. p. 742, lines 10-20). A second inmate corroborated the story, testifying that he witnessed Appellant's co-defendant talking about the State's case against them in the county detention center. According to this inmate, Dubba stated he went in the front door, that there were eight people in the van, and that Appellant and Dubba "put a gun to Lil Bootsie's head and told him not to tell[.]" (Tr. p. 772, lines 4-16).

Even absent Bootsie and Ms. von Herrmann's testimony, the jury was presented with sufficient evidence to convict Appellant under the theory of the hand of one is the hand of all. It is clear from the remainder of the State's case that

Appellant acted in concert with his co-defendants in attending and carrying out the home invasion-turned-murder for which he was convicted. As a result, any error in the trial court's allowing the former assistant solicitor to testify in relation to her dismissal of co-defendant Bootsie's charges proves harmless.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm Appellant's murder conviction.

Respectfully submitted,

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