STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SALUDA COUNTY

Court of General Sessions

The Honorable R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2015-001065

THE STATE,

Respondent,

v.

RONNIE MARTIN,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Ronnie Martin was indicted at the February 2014 term of the grand jury for Saluda County for burglary in the first degree (2014-GS-41-035). Martin proceeded to a trial by jury from May 5-7, 2015, in Saluda, South Carolina. At the conclusion of trial, Martin was found guilty as indicted. He was sentenced by the Honorable R. Knox McMahon to life imprisonment without the possibility of parole. Martin timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

At around 8:00 P.M. on December 13, 2013, Dianne Williams walked out of her kitchen and into the front room of her house. ROA. p. 43. Williams's dog went and sniffed the door after hearing a noise. ROA. p. 45. Williams testified, "Well it was a loud noise. The next thing I know there was a kick at the door and the next thing I know Ronnie Moe was coming through the door." Williams explained the "Ronnie Moe" she was referring to is Ronnie Martin, the appellant in this case. ROA. p. 46. After kicking down the door, Appellant grabbed Williams's pocketbook. ROA. p. 47. When Appellant grabbed Williams's pocketbook, she asked him, "Ronnie, what you doing with my pocketbook." ROA. p. 48. Appellant then ran outside with Williams's pocketbook. ROA. p. 49.

Appellant had been at Williams's home earlier in the day when he helped Williams's daughter bring some items into the home. ROA. p. 46. Williams testified Appellant was wearing a blue hoodie and khaki pants when he was at her home earlier in the day. ROA. pp. 46-47. When Appellant returned to the home, he was wearing the same blue hoodie, however the hood on the jacket was up. ROA. p. 47. Despite the fact Appellant had the hood on the sweatshirt up, Williams could clearly see Appellant's face and facial features. ROA. p. 48. Williams testified she was positive the intruder was Appellant. ROA. pp. 48-49. After Appellant ran away from the home, Williams immediately called 911. ROA. p. 50.

Dianne Williams's husband, James Williams, was in another room in the home at the time of the burglary. roa. p. 106. Mr. Williams heard the door slam and heard Dianne Williams say, "Ronnie Moe., put my pocketbook down. What you doing with my

pocketbook?" ROA. p. 106. Mr. Williams also testified it was dark at the time, which prevented him from seeing anything once Appellant left the home. ROA. p. 106.

Chief Jared Goldman was less than a quarter of a mile from the Williams home when he received a call about a stolen purse. ROA. p. 69. Chief Goldman received the call from dispatch at 8:04 PM and arrived at 8:05 PM. ROA. p. 70. Goldman testified that when he arrived, the robbery had just happened moments before and that it was dark at the time of his arrival. ROA. pp. 73-74. Goldman received a description of the suspect from Williams and relayed to other officers to be on the lookout for a black male named Ronnie Moe and that he was wearing khaki pants and a blue hoodie. ROA. p. 74. Goldman then set about taking photographs of the crime scene. ROA. p. 75. Almost immediately after beginning to photograph the crime scene, Goldman received a call indicating the suspect had been spotted. ROA. p. 75.

Officer Mike Rushton was patrolling in Ridge Spring when he saw an individual wearing clothing that matched the description provided by Chief Goldman. ROA. p. 112. Upon seeing Officer Rushton's vehicle, the individual ran into the woods. ROA. p. 112. Officer Rushton and Officer Cody Cockrell eventually were able to locate the man and ascertain that it was Appellant. ROA. p. 113. Rushton, Goldman, and Cockrell had difficulty securing Appellant to place him into custody and had to physically restrain him. ROA. p. 114. Appellant was then placed under arrest for burglary and placed in the back seat of Chief Goldman's car. ROA. p. 114. Appellant did not have anything belonging to Dianne Williams on his person when he was arrested. ROA. p. 94. Once Appellant was safely in the backseat, Goldman returned to the Williams's address to gather some things that were left behind when he hurriedly left the scene to assist in Appellant's arrest.

ROA. p. 80. Once Goldman exited the vehicle, Appellant became upset and began kicking the window. ROA. p. 80. Goldman immediately got back into the vehicle and transported Appellant to the Saluda County Detention Center. ROA. p. 80.

Kimberly Gantt testified at trial. ROA. pp. 119-139. Gantt and Appellant were in a relationship and lived together in December of 2013. ROA. p. 120. Gantt confirmed that on the evening of December 13, 2012, Appellant was wearing a blue hoodie and khaki pants. ROA. p. 121. At some time during the evening hours of December 13th, Gantt learned Appellant had been arrested. ROA. p. 122. After learning of Appellant's arrest, Gantt went to the jail to visit him. ROA. p. 123. Appellant asked Gantt to go and get the purse and return it to Williams. ROA. p. 123. Appellant told her she could find the purse close to The Wedding House in Ride Spring. ROA. pp. 123-124. Gantt was subsequently able to located the pocketbook and return it to Williams. ROA. p. 130. Gantt testified that by returning the purse, she was trying to get Appellant's charges dropped because Williams indicated she only wanted the purse returned. ROA. p. 130.

Gantt communicated with Appellant when he was in jail via telephone and in-person. ROA. p. 125. During one in-person meeting, Appellant asked Gantt to tell authorities that a man named Quentin Samuels showed her where the pocketbook was hidden. ROA. p. 124. When asked what Quentin Samuel's mental state was, Gantt replied, "He's not - - Well, he's not bright."[1] ROA. p. 124. Appellant also asked Gantt to convince Williams to tell the police that Appellant did not commit the crime and Quentin Samuels was the individual who broke into her home and stole her pocketbook. ROA. p.

[1] Previously at trial, Chief Goldman testified he knew Quentin Samuels and that, "I have had some dealings with Quinton and actually know him well. Quinton is a very handicapped or slow individual." ROA. p. 92. Goldman continued, "Quinton Samuels is very child-like. He's very impressionable. He can be talked into doing things, I guess, but really he's just very child-like. I would say he was around eight or ten years old mentally in his mind." ROA. p. 93.

126. At Appellant's instruction, Gantt provided investigators with a false statement where she told Chief Goldman that Quinton was the responsible party and he showed her where the pocketbook was hidden. ROA. p. 127. After she was unable to get Williams to place the blame for the burglary on Quentin Samuels, Gantt received threatening letters from Appellant.

ARGUMENT

I.

The trial judge properly excluded Appellant's third-party guilt evidence where Appellant's testimony failed to meet the Gregory standard, as it merely raised an inference to third-party guilt and had no other effect than to cast a bare suspicion on another where Appellant's proffered testimony lacked the requisite facts and circumstances to clearly point out Quinton Samuels as the guilty party.

Relevant Facts

At the conclusion of the State's case, Appellant indicated he would be testifying in his defense. ROA. p. 159. Before the jury was brought in, the solicitor stated:

> I do have one item that I would like to address. I'm informed that there may be an allegation of third party guilt testimony on the part of the Defendant in this case. I would ask that pursuant - - I'm assuming from my reading of State versus Rice, the last case I saw from 2007 on third party guilt . . . State versus Rice, 375 South Carolina 302 talks about the limitations of third party guilt evidence. I would ask if they intend to introduce evidence of third party guilt in this case that they proffer it here to see if it's going to meet the standards of admission to show that there must be a proof of a connection with the crime such as a train of facts or circumstances that clearly tend to point out such other person as the guilty party. In this case, Your Honor, where there is strong evidence against the Defendant in this case I think they are going to have to show something other than his naked allegations or some conjecture or assertion that there's third party guilt in this case.

ROA. pp. 160-161. The Court then allowed a proffer of Appellant's testimony. ROA. p. 163. During the proffer, Appellant was asked whether he committed the burglary. ROA. p. 164. Appellant replied he did not commit the burglary. ROA. p. 164. Appellant was then asked whether he knew who committed the burglary. ROA. p. 164. Appellant responded, "Well, Quinton Samuels had came by earlier that day and asked me to go with him to make a lick." ROA. p. 164. The term "lick" is slang for a break-in or robbery.

ROA. p. 167. Appellant alleged he told Samuels that he was crazy and declined his offer to pull the "lick." ROA. p. 168. After being again asked whether he knew who committed the robbery, Appellant responded, "Well, after, uh, I got locked up, I just speculated because Quinton came back by and said he had made a lick. I said, if you did where's it at?" Appellant then alleged Samuels told him he had to run because the police were pursuing him. ROA. p. 164. Appellant then testified, "I said, man, you ain't did nothing. He said, yeah I got it, man. I got it. He told me he had got a pocketbook." ROA. pp. 164-165. Appellant claimed Samuels told him he threw the purse away because he was being pursued by police. ROA. p. 169. Appellant testified Samuels told him he threw the purse in a field behind a building known as The Watson House or The Wedding House. ROA. p. 170. Appellant claimed in the jail calls he was imploring Gantt to ask Samuels where the purse was hidden. ROA. p. 174. Appellant testified his recorded statements regarding Samuels meant, "I ain't fixing to go down for something that you [Samuels] did." ROA. p. 172. Appellant conceded he had no direct evidence of seeing Samuels going into Williams' home. ROA. p. 175. Appellant also conceded he did not believe Samuels when he said he made a "lick." ROA. p. 1757.

Following arguments from the solicitor and Defense Counsel, the trial judge ruled:

> I'm not going to send the jury in and out on this. He says it's not admissible because it's hearsay. To go further, on the Rice case which goes back to Gregory and Gay, Holmes, went to the United States Supreme Court, those forensic cases on third party guilt are somewhat different creatures because of some language in Gay that flipped, I think, Holmes when it went to the United States Supreme Court. But the foundation of the law in Gregory, evidence which can have no other effect than to cast bare suspicion upon another or to raise a conjecture, an inference as to the commission of a crime by another is not admissible. But before such testimony can be received, there must be such proof of a

> connection with it such as a train of facts and circumstances that lead clearly to point out such other person as the guilty party. The first car in the train is that young lady right there, right over the right shoulder of Chief Goldman, Ms. Dianne Williams and according to the engine pulling the train, the person, the guilty party is sitting to my left, Mr. Martin. So anything else inconsistent with that does not meet the third party guilty standard. It does not point out such other person as the guilty party. Not only has she identified Mr. Martin, during the course of the event she's hollering out his name and her husband is coming in and hears the name. The name he hears is not Quinton Samuels. The person she sees and says she sees is not Quinton Samuels. She knows him. He was over there earlier in the day. He went to the Dollar General and got her a box of Honey Buns. He's friends with her daughter. She knows he rides a moped. Therefore, it's just pure conjecture and surmise. Mr. Martin's testimony was Quinton says he's going to make a lick. That's hearsay. And his next statement is I speculate that he may have made the lick. And he says he's running because the police are coming and he kind of just fills in the blanks as he goes. . . It's just pure speculation. It surmises. It doesn't meet the standards. Yes, he can offer a defense. He can tell where he was, where he was at and such as that, but it does not meet the third party guilt standard. Additionally, additionally, it is hearsay and there is no exception to the hearsay rule. Mr. Samuels is present. He's under subpoena of the Court. I had him remain under subpoena of the Court. You are welcome to call Mr. Samuels as a witness.

ROA. pp. 185-186.

Defense Counsel then inquired as to whether Appellant could testify about Samuels alleged statements if Samuels were called as a witness and subsequently denied making the statements. ROA. p. 190. Defense Counsel asserted the statements would then be admissible as a prior inconsistent statement. ROA. p. 190. The trial judge responded:

> I am not going to make an anticipatory ruling in that regard. It depends on whether or not it meets the standard of a prior inconsistent statement. If a witness doesn't clearly deny or has no memory of anything of that nature, it depends on whether or not it meets the various tests under the Rules of Evidence 613 concerning extrinsic evidence."

ROA. p. 190.

The defense subsequently called Quinton Samuels as a witness. ROA. p. 191. When asked whether he recalled the evening of Appellant's arrest, Samuels replied, "No

sir. I have not spoke to that man. I have not saw that man." ROA. p. 197. When asked the last time he saw Appellant, Samuels replied, "I ain't. I ain't been seeing him lately, sir. Every time I be seeing him I be riding with my mama." ROA. p. 197. Samuels also testified he had no personal knowledge of the facts of this case. ROA. p. 198.

Discussion

Appellant asserts the trial court erred in excluding Appellant's testimony concerning purported conversations he had with Quinton Samuels. This arguments is without merit, as the trial judge properly considered the applicable standard under State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), and determined Appellant's testimony did not meet the threshold for admissibility for third-party guilt evidence. Appellant's testimony concerning purported statements made by Quinton Samuels had no effect aside from casting bare suspicion on Samuels by conjecture and inference.

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). In Gregory, the South Carolina Supreme Court set the standard for the admissibility of third-party guilt evidence, stating:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; **evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible**.... But before such testimony can be received, **there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party**. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

198 S.C. at 104-105, 16 S.E.2d at 534-35 (emphasis added). As this Court observed in State v. Burgess, 391 S.C. 15, 703 S.E.2d 512 (2010), the United States Supreme Court found in Holmes v. South Carolina, 547 U.S. 319, 328 (2006) that the rule of State v. Gregory is the type of rule that does not deny a defendant his right to present evidence.

In State v. Rice, 375 S.C. 302, 313, 652 S.E.2d 409, 414 (2007), *overruled on other grounds by* State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011), Rice sought to impeach co-defendant Iris Bryant with a prior inconsistent statement Bryant made to a fellow prisoner. The substance of the purported statement Bryant made to her fellow prisoner was that a woman named Nikki was responsible for the murder in the case, not Rice. Id. In a footnote, the court noted, "Rice sought to introduce testimony that Bryant's cousin, Tiki, committed the crimes. However, Bryant's initial statements to police did not mention Tiki, but instead named Nikki as the person involved. . . Whether Tiki and Nikki were the same person remains unresolved." Id. at 337 n.1. The court found:

> The trial court adhered to the Gregory rule and applied the proper standard for admission of third-party guilt evidence-there must be such proof of connection with the crime, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. The evidence Rice asserted in support of introducing the third-party guilt testimony implicated Nikki at times, and Tiki at times, with no clarification as to whether they were the same individual. **The record is void of facts or circumstances, other than Bryant's inconsistent statements, linking anyone other than Rice to Brennan's murder. The proffered evidence casts a mere "bare suspicion" on Nikki or Tiki and fails to connect either to the murder by way of the facts and circumstances surrounding the crime.**

Id. at 322 (emphasis added).

Similarly, in State v. Cooper, 334 S.C. 540, 547, 514 S.E.2d 584, 588 (1999), the defendant proffered the testimony of Solomon Nelson who claimed he overheard Shirley Gilmore tell Peter Wayne Marshall that Gilmore, Dottie Suber, and the defendant's

girlfriend murdered the victim in the case. Marshall admitted having a conversation with Gilmore concerning the murder but denied Gilmore confessed to the killing. Id. Marshall testified at trial Gilmore told him the defendant did not act alone in the murder. Id. Gilmore proffered testimony that she did not tell Marshall she killed the victim. Id. Gilmore testified she only told Marshall she believed the defendant was innocent. Id.. The Court emphasized the fact that the defendant admitted the sole purpose for calling Gilmore was to impeach her with Nelson's testimony, thereby supplying evidence of her guilt. Id. at 549. The Court noted "this Court has imposed strict limits on the admissibility of third-party guilt." Id. The Court found:

> In the instant case, Gilmore admitted having a conversation with Marshall concerning Defendant's case, but denied admitting to the crime. Aside from Nelson's assertion, there was no credible evidence linking Gilmore to Victim's murder. Gilmore testified in camera that she had never been to Victim's house. Thus, there was no evidence that tended clearly to point out that Gilmore was guilty of the crime. Nelson's testimony would therefore be prohibited under Gregory, supra.

Id. at 549-550.

In State v. Swafford, 375 S.C. 637, 639-640, 654 S.E.2d 297, 298 (2007), Swafford attempted to introduce evidence at trial that a third party, Jerry Gillespie, was driving his truck at the time of the accident that led to his being charged with felony driving under the influence resulting in death. Swafford sought to introduce two particular pieces of third-party guilt evidence. Id. at 640. Firstly, Carol Johnson testified in camera that she knows Swafford and saw him about 12:30 P.M. on the day of the accident riding in the passenger side of his truck. Id. Johnson identified Gillespie as the driver of the truck. Id. Secondly, Brian Bobo testified in camera that Gillespie was his best friend and told him the evening of the accident that he was involved in a terrible

accident while driving Swafford's truck. Id. Gillespie testified in camera and denied any involvement in the accident. Id. The Court ruled the trial judge in this case considered Cooper, reiterated the rule in Gregory, and properly considered the weakness of the proffered evidence. Id. at 643. The Court found Johnson's testimony did not offer proof Swafford was a passenger at the time of the accident nor that Gillespie was the driver at that point in time. Id. at 642. Johnson's testimony offered no reliable proof that he was driving at the time of the accident. Id. The Court also found no error in the exclusion of Bobo's testimony, as Bobo could produce no support for his bare assertion that he called Gillespie the night of the accident. Id.

As in Rice, Cooper, and Swafford, the trial judge correctly applied the third-party guilt standard and concluded Appellant's testimony concerning his alleged conversations with Quinton Samuels was inadmissible. There are no facts or circumstances, other than Appellant's proffered testimony, linking anyone other than Appellant to the burglary at the Williams' home. The proffered evidence casts a mere "bare suspicion" on Samuels, as there is no credible evidence that tended clearly to point out Samuels was guilty of the crime. Samuels testified he did not speak with Appellant on the night of his arrest, he had no personal knowledge of the facts of the case, and that the only times he had ever seen Appellant, Samuels was riding in the car with his mother. Furthermore, even if Appellant's testimony concerning Samuels' statements was taken as true, they raised only a conjectural inference as to Samuels' guilt. Appellant's testimony was that Samuels invited him to pull a "lick" and later told him he had pulled the "lick" and stolen a purse. Appellant conceded he had no direct evidence of Samuels going into the Williams' home. Appellant's testimony, if it were believed, directly established merely that Samuels

committed a burglary on December 13, 2013. The conclusion that Samuels committed the particular burglary in this case is thus inferential and conjectural, which is counter to the Gregory Rule.

Finally, even if the trial court somehow erred in excluding Appellant's testimony concerning third-party guilt, any alleged error in this case was harmless due to overwhelming evidence of Appellant's guilt. Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). The key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) (citations and internal quotations are omitted)." Dianne Williams knew Appellant and interacted with him earlier in the day where he was wearing khaki pants and a blue hoodie. Williams observed Appellant, still wearing the same clothes as earlier in the day, break into her home and grab her purse. Williams could clearly see Appellant's face and called out to him by name. At trial, Kimberly Gantt detailed Appellant's plan to cover up his involvement in the burglary by attempting to frame Quinton Samuels for the crime. The jury, thus, was presented with overwhelming evidence of Appellant's guilt. Appellant's conviction and sentence should be affirmed.

II.

The trial judge properly admitted recordings of telephone calls between Appellant and Kimberly Gantt.

Relevant Facts

Janice Ergle, administrator of the Saluda County Detention Center, is the custodian of records for all phone conversations that are recorded for security purposes in the detention center. ROA. pp. 152-153. Ergle testified the records of the phone conversations are kept in the ordinary course of business and are reviewed as a security measure to monitor what conversations are going forth. ROA. p. 153. Ergle explained inmates who make phone calls from the jail phone system are apprised of the fact that their phone calls are being recorded by a recording that plays at the beginning of the call that alerts inmates the conversation could possibly be monitored. ROA. p. 153. The solicitor brought Ergle's attention to five recorded phone calls that were made in between December 13, 2013, and December 18, 2013. ROA. p. 154. Ergle testified the recordings fairly and accurately represented the phone conversations attributed to Appellant and had not been changed or altered in any way. ROA. pp. 154-155. The recordings of the phone calls were then admitted into evidence. ROA. p. 155.

Discussion

Appellant contends the trial court erred in admitting the recordings of the phone calls Appellant made to Gantt while he was incarcerated. Specifically, Appellant asserts the admission of the jail calls violated 18 U.S.C. §§2511 and 2516 because the federal statute prohibits the interception of telephone conversations in the absence of a court order. Appellant also argues the admission of jail calls at a criminal trial violated

constitutional protections against unreasonable searches and seizures and invasions of privacy because Appellant reasonably expected the contents of his calls would not be used against him in a criminal proceeding. Both of these arguments lack merit. Firstly, the law enforcement and consent exceptions to the wiretapping statutes render the use of jailhouse phone recordings permissible. Secondly, the admission of the phone calls did not violate Fourth Amendment protections against unreasonable search and seizure because Appellant was incarcerated at the time and thus had no expectation of privacy. Also, Appellant lacked an expectation of privacy in the phone calls because he was advised at the beginning of the call that the communication was subject to monitoring.

In United States v. Hammond, 286 F.3d 189 (4th Cir. 2002), the Fourth Circuit dealt with a challenge to the admission of recorded jail phone calls. In Hammond, the defendant sought suppression of the recorded telephone conversations, arguing that the recordings should be excluded from evidence because the government did not comply with the requirements of Title III. Id. at 191. Specifically, Hammond argued the FBI was required to obtain a judicial interception order to listen to the tapes. Id. The court first found that the recordings were admissible under the "law enforcement exception." Id. at 192. The "law enforcement exception" excludes from the definition of "interception" recordings made by "any telephone or telegraph instrument, equipment or facility, or any component thereof . . . being used by . . . an investigative or law enforcement officer in the ordinary course of his duties." 18 U.S.C. §2510(a)(ii). Id. The court found that since the Bureau of Prisons was acting pursuant to its well-known policies in the ordinary course of its duties in taping calls, the law enforcement exception applied. Id. The court also found the "consent" exception to the wiretapping statute applied. Id. 18 U.S.C.

§2011(2)(c) provides: "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." Id. The court concluded the "consent" exception applies to prison inmates required to permit monitoring as a condition of using prison telephones. Id.

As in Hammond, the admission of the recorded phone calls are admissible under the "law enforcement" and "consent" exceptions. The Saluda County Detention Center was acting pursuant to taping phone calls in the regular course of its business, and the policy is well-known since all parties have notice their phone calls are being taped. As Ergle testified, a recording plays at the beginning of the call to inform the caller their communications are subject to monitoring. Appellant thus consented to the recording by continuing to use the prison's phone system after receiving notice the call was being recorded.

Appellant's argument that the admission of the recorded phone calls violates constitutional protections against unreasonable search and seizure and invasions of privacy similarly lacks merit. The United States Supreme Court has repeatedly found prisoners have no reasonable expectation of privacy while incarcerated. See Bell v. Wolfish, 441 U.S. 520 (1979) (holding a requirement that pretrial detainees remain outside their rooms during "shakedowns by prison officials and practice of conducting body-cavity searches following contact visits did not violate Fourth Amendment); Hudson v. Palmer, 468 U.S. 517 (1984) (holding "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison

cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions"). If security concerns can justify cell searches and body-cavity searches, then it is reasonable to monitor prisoner's phone conversations, especially where they are told the calls are being monitored. The fact that prisoners are given express notice that their calls may be monitored clearly informs them they have no expectation of privacy in their phone calls.

As discussed in Respondent's Issue I, the State submits that any alleged error with respect to the admission of the recorded phone calls is harmless due to overwhelming evidence of Appellant's guilt. Appellant's conviction and sentence should be affirmed.

III.

The trial judge properly denied Appellant's request to charge the jury on burglary in the second degree where there was no evidence from which it could be inferred that Appellant committed burglary in the second degree rather than burglary in the first degree.

Relevant Facts

At trial, Dianne Williams testified the burglary occurred around 8:00 P.M. ROA. p. 44. Williams stated, "it wasn't quite dark." ROA. p. 45. Williams elaborated. "But it wasn't quite – it wasn't – it wasn't dark. It was like middle daylight look a little bit. You know how the evening go down?" Williams then clarified she knew it was around 8:00 P.M when Appellant entered her residence. Williams also testified she immediately called 911 when Appellant ran out of the home and that the 911 call was at around 8:00 P.M. ROA. p. 50.

At trial, the solicitor requested the Court take judicial notice of the time of sunset for December 13, 2013. ROA. p. 67. State's Exhibit #18, a report from the U.S. Naval Observatory Astronomical Application Department, was subsequently admitted into evidence without objection. ROA. p. 67. The Court took judicial notice of the times for sunrise, twilight and sunset for December 13, 2013. ROA. pp.67-68.

Chief Goldman testified that the robbery occurred moments before he arrived at the crime scene. ROA. pp. 72-73. Goldman stated it was dark at the time of his arrival. ROA. p. 73. Goldman elaborated the information he collected was that the burglary had just occurred and it was dark at that time. ROA. p. 73. On December 13, 2013, sunset was at 5:19 P.M. ROA. p. 75; R. p. * (U.S. Naval Observatory Astronomical Applications Department Report). Goldman also testified the last possible time there could be a determination it was daylight on December 13, 2013 was at 5:46 P.M. ROA. p. 73; R. p. * (U.S. Naval Observatory Astronomical Applications Department Report). The fact that it was dark outside at the time of the burglary was later corroborated by James Williams. ROA. p. 106.

Defense Counsel later requested a charge of burglary in the second degree, asserting there was testimony by Dianne Williams that it was light outside at the time of the burglary. ROA. p. 259. The solicitor responded:

> Well, Your Honor, the Court has taken judicial notice of the fact that it was by every stretch, all of the testimony tracked that it was, in fact, nighttime. She makes some description of it that it was just turning light and I just don't think that there is any substantive evidence in the record at all that it was anything other than nighttime in this case. And, of course, in this case there is no defense in this case that it wasn't nighttime in this case. And it strictly was wasn't present. Wasn't me. Did not do it was the only thing that was proffered. There was nothing in there about it not being nighttime, Your Honor. I just don't think there is any substantive

> evidence in the record that would permit a jury to find that it was anything other than a nighttime burglary in this case, your Honor.

ROA. p. 260.

The trial judge ruled:

> While I'm charged with informing the jury of the law that they should apply, I don't think the evidence supports a request of a lesser included offense of burglary in the second degree. The State must prove beyond a reasonable doubt that the Defendant entered or remained in the dwelling in the nighttime. Nighttime is the period between sunset and sunrise during which there is not enough daylight to recognize a person's face except by artificial light or moonlight. The uncontroverted testimony as far as the time is concerned is a quarter till eight, 8:00. The response time is within a minute, 8:03 P.M., 8:04 P.M. It just occurred. There is the U.S. Naval Observatory Astronomical Survey that shows when civil twilight was, when sunset was on the 13th. I don't think the comment not quite dark would exclude that period of time between sunset and sunrise. It's a quarter to eight. It clearly had been several hours where there had been sunset. Clearly it's not even getting a whiff of sunrise so to speak so I would respectfully deny that motion as well.

ROA. p. 261.

Discussion

Appellant contends the trial court erred in denying an instruction on the lesser-included offense of burglary in the second degree. Specifically, Appellant asserts, "Given Williams purported knew the perpetrator, was guessing as to the time of the day, and the non-emergency nature of the call, it is reasonable to infer that the actual incident occurred well before 8:00 P.M." Br. of Appellant p. 15. This argument lacks merit, as the evidence at trial conclusively established the robbery occurred around 8:00 P.M. and that sunset was at 5:19 P.M. on the day of the burglary. The trial judge, thus, properly declined to charge the jury on burglary in the second degree because there was no evidence from which it could be inferred that Appellant committed burglary in the second degree rather than burglary in the first degree.

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). The trial court only commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 838, 849 (1993). In instructing the jury on the law, "[a] trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Green, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012).

Critically, the trial judge is only required to instruct the jury on the lesser-included offense when the evidence could support an inference the defendant is guilty of **only** the lesser-included offense and not the greater offense. State v. Lambright, 279 S.C. 535, 537, 309 S.E.2d 7, 8 (1983). "It is well settled that a jury instruction on a lesser included offense is required only when the evidence warrants such an instruction." State v. Coleman, 342 S.C. 172, 175, 536 S.E.2d 387, 389 (Ct. App. 2000). "The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty only of the lesser offense." State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006).

In Appellant's case, the fact that the robbery occurred around 8:00 P.M. was uncontroverted throughout trial. Appellant's contention that, "Williams purported knew the perpetrator, was guessing as to the time of the day, and the non-emergency nature of the call, it is reasonable to infer that the actual incident occurred well before 8:00 P.M" is directly contrary to the facts presented at trial. Williams testified the robbery occurred around 8:00 P.M. and she immediately called 911 once Appellant ran out of her home. Chief Goldman arrived at the home within a matter of minutes and testified, based on his conversations with James and Dianne Williams, that the robbery had just occurred. The Court took judicial notice of the Naval Observatory Astronomical Applications Department Report showing sunset on December 13, 2013 was at 5:19 P.M and civil twilight was at 5:46 P.M. Sunset and twilight were several hours before the time of the robbery. Williams's ambiguous statements that it was "not quite dark" and "it was like middle daylight look a little bit. You know how the evening go down" did not support an inference Appellant is guilty of **only** the lesser-included offense and not the greater offense. The facts that the robbery occurred around 8:00 P.M. and that sunset was several hours earlier were conclusively proved at trial. The trial judge, thus, did not err in denying Appellant's request for an instruction on the lesser-included offense of burglary in the second degree.

As discussed in Respondent's Issues I and II, the State submits that any alleged error with respect to the jury charge is harmless due to overwhelming evidence of Appellant's guilt. Appellant's conviction and sentence should be affirmed.

IV.

Appellant's argument that the solicitor's statements infected the trial with unfairness and denied Appellant his due process rights is not preserved for appellate review. Even if Appellant's argument was preserved, the solicitor properly predicated his opening and closing arguments on evidence presented and the reasonable inferences to be drawn from that evidence.

Appellant asserts the alleged errors discussed in issues I, II, and III were compounded by statements made by the Solicitor that were unsupported by the evidence presented at trial. Appellant takes issue with two comments made by the solicitor in his opening argument and one comment made during the solicitor's closing argument. In his opening statement, the solicitor stated:

> You're going to hear that once he [Ronnie Martin] gets into custody in this case the scheming and conniving starts. He gets a hold of Kimberly Gantt and starts talking to her and basically decides he's gonna get in front of this thing and he's gonna frame somebody else for doing this. You're going to hear the name of a young man named Quinton Samuels. You will hear that Mr. Samuels is a little bit slow and has some disability.

ROA. p. 29. Later in his opening argument, the solicitor stated, "And because he [Ronnie Martin] knows her [Dianne Williams], that he can get her to recant her statement and say it wasn't me, it was Quinton Samuels, the slow person therein Ridge Spring." ROA. p. 30. During his closing argument, the solicitor stated:

> You can hear him [Ronnie Martin] scheming. Get her pocketbook back. Get these charges dropped and let's frame a mentally challenged person in the town of Ridge Spring, with all deference to Mr. Samuels who is sitting here, he was practically talking to himself when he got up here on the stand, wanted to pick someone that was defenseless that couldn't defend themselves, that's the Ronnie Martin that's up here.

ROA. p. 303. Appellant contends, "the State's argument was focused not on the validity of the victim identification, the only evidence against Ronnie Martin, but rather on

portraying him as a conspirator preying on a mentally challenged person." Br. of Appellant p. 17. Appellant further contends, "the references to Quinton Samuels as 'mentally challenged' and 'disabled' denote a medically established diagnosis, a fact not in evidence." Br. of Appellant p. 17. Appellant's argument lacks merit, as the solicitor's argument was confined to matter presented during trial and the reasonable inferences to be drawn from the State's evidence.

Initially, the State notes Appellant's argument is not preserved for appellate review, as Defense Counsel did not object to the solicitor's opening or closing statements **at any time**. If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). State v. Varvil, 338 S.C. 335, 339, 526 S.E.2d 248, 251 (Ct. App. 2000) (finding the failure to object to comments made during argument precludes appellate review of the issue; solicitor's interjection of personal beliefs). State v. Wilkins, 310 S.C. 81, 89-90, 425 S.E.2d 68, 73 (Ct. App. 1992) (holding defendant lost right to challenge propriety of prosecutor's opening argument by failing to contemporaneously object). Defense Counsel did not object to the solicitor's statements during opening and closing argument. This error is thus not preserved for Appellate review.

Even if Appellant's argument was preserved for Appellate review, Appellant's argument lacks merit, as the solicitor's comments during opening and closing were permissible where the solicitor's argument was confined to matter presented during trial and the reasonable inferences to be drawn from the State's evidence. The prosecution "may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony." State v. New, 338 S.C. 313, 526

S.E.2d 237 (Ct. App. 1999). The solicitor's closing argument is permissible where it stays within the record and reasonable inferences to it. Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002).

At trial, Kimberly Gantt testified regarding her conspiracy with Appellant to frame Quinton Samuels for the burglary. Kimberly Gantt testified Samuels was "not bright." ROA. p. 124. Chief Jared Goldman testified he knew Quentin Samuels and that, "I have had some dealings with Quinton and actually know him well. Quinton is a very handicapped or slow individual." ROA. p. 92. Goldman continued, "Quinton Samuels is very child-like. He's very impressionable. He can be talked into doing things, I guess, but really he's just very child-like. I would say he was around eight or ten years old mentally in his mind." ROA. p. 93.

As to Appellant's argument that, "the State's argument was focused not on the validity of the victim identification, the only evidence against Ronnie Martin, but rather on portraying him as a conspirator preying on a mentally challenged person," Kimberly Gantt's testified at trial regarding her conspiracy with Appellant to frame Samuels. Gantt and Goldman both testified concerning Samuels's intellectual disabilities. The solicitor's comments were based on evidence previously presented at trial and the inferences to be drawn from it and were wholly permissible.

As to Appellant's argument that, "the references to Quinton Samuels as 'mentally challenged' and 'disabled' denote a medically established diagnosis, a fact not in evidence," Chief Goldman testified based on his personal knowledge that Samuels was "a very handicapped or slow individual" and "child-like" and very impressionable. Gantt also noted Samuels was "not bright." The solicitor's arguments were based on Goldman

and Gantt's trial testimony and thus were based on evidence presented at trial and the reasonable inferences to be drawn from it.

As discussed in Respondent's Issues I, II, and III, the State submits that any alleged error is harmless due to overwhelming evidence of Appellant's guilt. Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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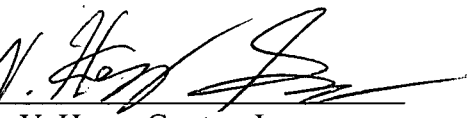
BY: 
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ATTORNEYS FOR RESPONDENT

May 3, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Saluda County
R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

vs.

RONNIE MARTIN,

Appellant.

CERTIFICATE OF COUNSEL

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

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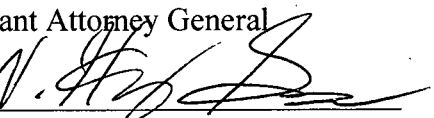
By: 

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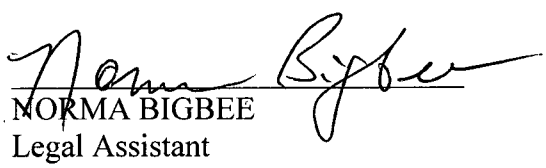
PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Molly R. Hamilton Cawley, Esquire, 1156 Bowman Road, Suite 201, Mt. Pleasant, SC 29464 and Robert M. Dudek, Esquire, Chief Appellate Defender, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 3rd day of May, 2016.



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