STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS JAMES,

APPELLANT

APPELLATE CASE NO. 2014-002326

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant Thomas Booker James and co-defendant Carnail Graham were indicted by the Horry County Grand Jury for the offense of murder. R. 917. The state's star witness, Keir Johnson, was also charged in this murder.

Appellant James and co-defendant Graham had their cases called to trial on October 14, 2014 before the Honorable Steven H. John, and a jury. Bobby Fredrick represented appellant. David Canty represented co-defendant Graham. Nancy Livesay was the assistant solicitor. R. 1.

At the conclusion of the trial, the jury found both appellant and co-defendant Graham guilty of murder. R. 904. Judge John sentenced both appellant and co-defendant to thirty-two years imprisonment. R. 909, l. 18 – 910, l. 11.

This appeal follows.

ARGUMENT

The court abused its direction 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.

Relevant facts

The decedent, Keia, lived with her boyfriend, "Splurge," in a mobile home outside of Conway. Splurge did not work but he drove a white Lexus. R. 42, l. 6 - 44, l. 4. Their roommate, Carlton Watts, testified the mobile home was located on a dead end dirt road called Brown Swamp. There were no streetlights around. R. 42, l. 6 – 43, l. 15.

Watts said that they only used the back door to the trailer, and that they never used the front door. On the early morning of the murder, between 2:30 and 3:00 in the morning from all of the evidence presented, Watts came out of his room. He saw the decedent sitting in a chair, and he asked her why she was not asleep. The decedent told Watts that she would be going to bed shortly. Watts testified that he went back to bed, and that he was listening to music on his iPad when he fell asleep. R. 44, l. 23 – 45, l. 21.

He estimated that 30-45 minutes later: "That's when I hear a big boom and like 3 or 4 shots go off and I jumped up, and then I just jumped back on the bed and just rolled under it and started praying and everything. And then like I hear like 2 or 3 more shots go off.

And then I hear her scream, and she's like, Splurge, Splurge, they are breaking in. And then another 2 shots go off." R. 44, l. 23 – 45, l. 21.

Watts said he also heard someone screaming, seemingly before the shooting: "Where is it, where is it, we're not playing, where is it?" R. 45, ll. 22-25. The attackers had entered through the front door. There was alarm system in this mobile home, and it "was going off, it's just steady going off. So I waited until I felt like it was safe to come out." Watts testified he ran out the back door and he saw a man and a woman approaching him.[1] They told Watts that they had heard the shots, and already called the police. R. 45, ll. 4-23.

Watts could not identify the assailants since he had been hiding under the bed. All he saw was "two pair of sneakers all black and one black with red check marks on it." R. 54, ll. 8-11; R. 81, ll. 3-4.

Watts knew both appellant and co-defendant Graham. He went to school "with one of them". Watts had been close to the decedent Keia "all of his life." R. 79, ll. 5-23.

Watts testified on cross-examination that the police arrived quickly. As will be seen infra, neighbor David Grissett had called 911 because he had been watching a suspicious brown van slowly moving around on the dead end dirt road that early morning.

Watts recalled that the police, with guns drawn, ordered anybody remaining in the mobile home out --"with their hands up." R. 84, ll. 6-20. Splurge came out of the mobile home with his hands in the air. Strangely, Watts testified that Splurge was acting "retarded" at the time. R. 85, ll. 4-21. Watts said that he was not aware if Splurge "emptied his 357 magnum revolver through his doorway" at some point.[2] R. 87, ll. 9-11. On redirect

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[1] The shooters entered through the front door.

[2] A couple of witnesses testified that they did not hear "a toilet flush" during the delay, but common sense dictated this was a drug related offense.

examination, Watts maintained that the decedent had been running "to Splurge" at the time of the shooting since her body was found on the bed.[3]

David Grissett, a neighbor on the isolated dirt road was the person who called 911 at about 3:00 a.m. on the morning of the shooting. Grissett said he first saw the suspicious brown van in the area "a few minutes earlier before the whole thing happened and whatnot." R. 96, l. 5 - 97, l. 20.

Grissett testified that he was suspicious of the brown van because it was two or three o'clock in the morning, and the van parked "like two streets over and came back." The brown van then "stopped in the same spot at the end trailer, the last trailer." R. 98, ll. 2-20.

Grissett telephoned his friend Conswella in the "last trailer," and "a couple of other people that was in the neighborhood" to alert them of the suspicious brown van. R. 99, ll. 2-17. While watching the van, Grissett recalled: "I just heard like gunfire. I think Swella came out on the porch and *she asked one of the guys something.* And like after awhile she was asking a question . . . some gunfire again, you know a bunch of commotion. And, you know I seen somebody run, like two people." R. 99, ll. 5-25. (emphasis added0.

These two people came running "from the house." They ran to the van, jumped in, and the van drove away. R. 99, l. 25 – 104, l. 7. Grissett confirmed that this was a dead end dirt road, and that were no street lights in the neighborhood. R. 104, ll. 4-25. Grissett allegedly could not describe or identify the two people who ran from the mobile home to the van. R. 105, ll. 7-9.

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[3] As will be seen infra, the pathologist, Dr. Edward Proctor, testified that would have been "extremely difficult" for that to happen given her injuries from the gunshot wound to her chest. R. 90, ll. 3-18.

On cross-examination by appellant's defense counsel, Bobby Fredrick, Grissett denied knowing appellant, his co-defendant Graham or Watts. R. 110, ll. 1-9. Grissett said that he could "not recall" whether he told defense investigator Bill Beam **that he knew both appellant and the co-defendant, and that neither were the men running from the trailer to the van.** R. 110, l. 10 – 111, l. 24.

Grissett confirmed that he knew Splurge "from the neighborhood," and that he mentioned him in the 911 call. Grissett also stated that the old brown van had a bad muffler that called even more attention to it that morning. R. 114, ll. 3-20.

Horry County police officer Matthew Singleton testified he arrived at the scene of the shooting at about three a.m. He remembered Splurge coming out of the mobile home when the police ordered anyone remaining inside to come out. The decedent's body was found on the bed with blood surrounding it. R. 128, l. 14 – 133, l. 15.

Singleton confirmed that he did not see the suspicious brown van in the area. Singleton also verified that he wrote in his report that there was some delay in Splurge coming out of the house.[4] R. 139, l. 17 – 140, l. 24.

The brown van was left in the front yard of Tiffany Oliver apparently sometime between 3:00 and 6:45 in the morning.[5] R. 162, l. 25 – 165, l. 21. Oliver's house was also

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[4] Dr. Edward Proctor performed the autopsy on the decedent on November 8, 2011. He testified that the victim was 5'2" 140 pounds and that she died of a gunshot wound to the chest. There was no gunshot residue found so the shot could not have been closer than 18-24 inches. R. 146, l. 11 – 151, l. 19. Dr. Proctor estimated that a large caliber weapon was involved in the shooting. He also opined that it would be not "be likely" that the decedent would have been able to run from a chair in one room to another room with her injuries. R. 156, l. 8 – 159, l. 12

[5] This was the time between the murder, and her discovery of the van. She testified her live-in boyfriend left for work about 5:00 a.m., and he did not tell her about a van being in their yard. It was only when she was getting her child ready for the "early school bus" that she saw the van.

on another isolated dirt road that was a dead end. She said she did not get very close to the brown van when she discovered it in her yard that morning. She telephoned the police between 6:40 and 7:30 that morning because she did not want the van in her yard. R. 164, l. 3 – 167, l. 17.

The star witness

With little but raw suspicion at this point, Keir Johnson claimed appellant and co-defendant Graham were with him in his girlfriend's brown van on the morning of the shooting. Prior to his testimony defense counsel Fredrick citing State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012), State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002), and State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) for the proposition that the defense had a right to cross-examine Johnson about his sentencing exposure, and his dealings with the solicitor's office in this case. R. 422, l. 5 – 440, l. 11. The trial judge noted that Johnson gave a statement implicating both defendants, and he then he was granted bond. The state also dismissed a burglary charge. R. 432, l. 16 – 438, l. 22.

The solicitor claimed that Johnson had already given his statement, and maintained that Johnson "did not need" any sentencing consideration from the state in return for his cooperation, and testimony. "We had no reason to dismiss the charges." R. 438, l. 23 – 440, l. 11.

The solicitor at this point began to argue that she should be able to call the former solicitor, Heather Von Herrmann, as a witness to "explain" the prosecutorial decisions involving Johnson's charges. R. 440, l. 12 – 452, l. 6.

Defense counsel Fredrick immediately noted his problems and objections with calling the former solicitor as a witness for such an explanation. The defense right to probe Johnson for his bias on cross-examination was well established under South Carolina precedent. Calling Von Herrmann for her to explain her prosecutorial decisions was "improper." R. 442, l. 11 – 444, l. 16. The judge stated that he would allow the impeachment of Johnson by the defense attorneys. R. 444, l. 17 – 445, l. 8.

Johnson would admit throughout his cross-examination that he lied to the police. However, Johnson continued to maintain that once he had an attorney, Ron Hazzard, he was told to "tell the truth." Johnson said the truth was that that appellant and co-defendant Graham were with him on the night of the shooting, and he claimed they entered the mobile home while he waited in the brown van. Johnson claimed that appellant and Graham came running out of the trailer and jumped in the van – he maintained that he did **not hear any shots fired and thought this was a "normal" crack buy.** R. 447, l. 6 – 450, l. 13.

Johnson continued to claim that he had not been promised anything for his testimony, and that he had not received any consideration in exchange for his testimony.[6] R. 447, l. 6 – 450, l. 13. Johnson said that he drove to Splurge's house and parked on dirt road. As stated, Johnson claimed he thought appellant and Graham were "going to buy some drugs," and that was it. Johnson said he noticed a man watching the van so he circled around towards another trailer. Appellant and Graham came running out of the mobile home towards the van, jumped in, and he drove away. Johnson said he noticed a Horry County Sheriff's Deputies car in the area, and therefore he abandoned the van in "somebody's back yard and got out of the van, and we went in the woods or whatever."

[6] Johnson referred to appellant as "Cutty," and Graham as "Dubba."

Johnson told different stories – lies – about what happened. Johnson claimed he called his friend , " Mike Pyatt to come pick me up, and he came and picked me up and took me to my grandma's house." R. 450, l. 8 – 451, l. 22.

At another point Johnson told the police he got a cab ride out of the area. As stated, Johnson's admissions of lying to the police about various items were almost too numerous to mention. R. 462, l. 22 – 473, l. 21; R. 470, l. 3 – 476, l. 20; R. 512, l. 5 – 513, l. 21; R. 518, ll. 3-22; R. 521, ll. 5-12; R. 524, l. 6-7. These are only some of Johnson's admissions of lying to the police.

Johnson maintained that once he had Public Defender Ron Hazzard as his attorney that he was told to tell the truth. Johnson testified that he was telling the truth when he implicated appellant and Graham in the murder. Again, Johnson maintained that he only participated because he thought he was going to get an ounce of crack-cocaine. R. 546, ll. 15-16.

As stated above, on cross-examination by defense counsel Fredrick, Johnson admitted that he told the police he may have gotten a cab after he abandoned the van. Johnson would later claim his friend, Mike Pyatt, gave him a ride from the scene where he abandoned the van.[7] R. 516, l. 4 – 518, l. 2. Defense counsel Fredrick continued to strongly question Johnson's credibility. Johnson admitted at another point that he had lied about being robbed. R. 518, l. 16 – 602, l. 12.

Johnson admitted to counsel for the co-defendant, Mr. Canty, that he had "lied through his teeth." R. 524, ll. 3-7. On redirect-examination by the solicitor Johnson was led

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[7] Johnson admitted he had the van reported stolen to cover his tracks.

into saying that he did not tell the police about Mike Pyatt picking him up, and giving him a ride because they did not ask. R. 557, ll. 15-18.

This record shows that while defense counsel Fredrick impeached Johnson about other charges being dismissed, and his sentencing exposure, Johnson was very evasive. R. 482, l. 24 – 496, l. 21. Johnson denied knowing that a murder conviction carried a minimum sentence of thirty years. He claimed not to know the sentence for other charges. His other charges were dismissed "only" because he had a good lawyer. R. 498, l. 5 – 500, l. 14. Johnson told the jury he was not lying during the trial. R. 500, ll. 20-21.

The former solicitor as an "explanation" witness

Defense counsel Fredrick told the judge if the state intended to call the former solicitor Ms. Von Herrmann that the defense had a matter of law to address. R. 563, ll. 6-12. Solicitor Livesay then verified that she intended to call Von Herrmann to reply to "questions about Johnson's charges being dismissed" in this case. Defense counsel Fredrick objected to Von Herrmann being allowed to testify in this manner about her prosecutorial discretion in this case. Fredrick told the trial judge that allowing such testimony "was improper." Fredrick also said that if the judge allowed Von Herrmann to testify over his objection that the defense was entitled to cross-examine her on any issue related to the case. R. 565, l. 10 – 567, l. 7.

The judge asked defense counsel Fredrick to proffer his cross-examination of the former solicitor. Fredrick protested that "some questions may change based on her direct examination." R. 563, l. 6 – 567, l. 19.

Von Herrmann admitted that she was a solicitor in this murder case for "almost the entire pendency of the case." R. 568, ll. 1-18. She testified that she could not recall whether

there were any returns to search warrants regarding cell phone records pertinent to this case. She said they would be in her file if they existed. She testified that she would need to get her file to refresh her memory. Solicitor Livesay said she would get the former solicitor's file for her based on the cell phone records inquiry. R. 568, l. 22 – 570, l. 5.

Von Herrmann said she could not recall whether Johnson's cell phone record revealed he was at the crime scene. [8] She said "a variety of people" worked on the cell phone records. R. 570, l. 7 – 571, l. 7.

Von Herrmann reviewed the indictment and said a scrivener's had caused the wrong victim's name to be placed in the indictment. R. 571, l. 6 – 572, l. 9. Von Herrmann also said she did not recall whether shoe impressions were taken from the crime scene. R. 572, ll. 17-25. Defense counsel Fredrick told the judge "At the moment on the fly, that is all the questions I have." R. 573, ll. 1-3.

Defense counsel Canty then asked if there were any statements his client gave that were not turned over to the defense. Von Herrmann said she did not recall but noted that at times statements not worthy of belief, so she deemed them not exculpatory, and they were not turned over to the defense. R. 574, l. 15 – 575, l. 12.

Defense counsel Fredrick then said he would withdraw his objection to Von Herrmann being allowed to testify if the defense were afforded the extensive latitude that Rule 6ll (b), SCRE provided to the defense. The judge was not going to make any such promise. He also told told defense counsel "don't read me the rule," and he again stated the

[8] Defense counsel hammered in his closing about the incompetence and apathy of the solicitor's office for the truth in this case. This included the cell phone records which could have **exonerated** appellant. R. 795, l. 20 – 819, l. 1.

defense and the judge may not agree about what the scope of the cross-examination of Von Herrmann might be before the jury. R. 576, ll. 11-25.

Heather Von Herrmann then testified in the presence of the jury. She acknowledged that she prosecuted Keir Johnson's pending charges. R. 578, l. 20 – 579, l. 22. She told the present solicitor some of Johnson's charges had been dismissed. Von Herrmann then sought to "explain" that a burglary first charge and an assault and battery charged were dismissed at the request of Johnson's former girlfriend, the victim. R. 580, ll. 2-16. Another armed robbery and possession of a weapons charge were dismissed because Von Herrmann apparently thought the complaining witness was framing Johnson because Johnson would not return her romantic gestures. R. 580, l. 17 – 581, l. 15.

Von Herrmann told the jurors" "**We try to do our best as solicitors to go through and look at these cases and find the ones that we feel like are prosecutable and carry those cases forward. And ones that we, you know, don't feel like there is sufficient evidence to bring to a jury, we dismiss.**" R. 580, l. 17 – 581, l. 21. (emphasis added). Von Herrmann then "explained" that "I believe those are the charges that were dismissed on Mr. Johnson. Of course, at that time the murder charge was pending, and obviously I did not dismiss that." R. 581, l. 16 – 582, l. 2.

On cross-examination by defense counsel Fredrick she admitted that the victim in one case had ran screaming toward a police officer with blood covering her body. However, Von Herrmann "explained" that appellant ran from the police and "was cut as well". She said this appeared a mutual combat situation to her, and she offered the defense counsel Fredrick also knew where a "**victim is non-cooperative it is very, very difficult to get a conviction on those type of cases.**" R. 583, l. 21 – 585, l. 12. (emphasis added). Von

Herrmann testified she did go to the crime scene in this case. R. 587, ll. 14-19. However, she again stated she was unaware of whether the cell phone records were closely reviewed in this case. Von Herrmann seemed to rationalize that the local police departments and SLED would be responsible for the scope of such a murder investigation. R. 585, l. 16 – 588, l. 3.

Von Herrmann also acknowledged she opposed bond for co-defendant Graham while a solicitor. She offered that there were a number of witnesses against Graham. R. 590, ll. 9-13.

Von Herrmann told defense counsel Canty that there was no *quid pro quo* for a defendant cooperating, and his charges being dismissed. "*That's not the way it works.*" She told the jurors that **if the defendant entered into a proffer agreement the solicitor's office tried to verify the information and that the solicitor's office did not promise anything beyond informing the judge of the level of cooperation**. R. 593, l. 13 – 595, l. 23.

Von Herrmann admitted she entered into a consent order with Johnson's attorney, Ron Hazzard, so Johnson could make bond and get out of jail. R. 596, ll. 3-5. She also testified that the solicitor's office did not think Johnson was a principal in the crime, they did not believe he entered the mobile home, and "**that his [Johnson's] level culpability was less.**" R. 596, l. 3 – 599, l. 21. During the middle of this cross-examination the judge sent the jury out of the courtroom. R. 599, l. 18 – 600, l. 8.

Solicitor Livesay told the judge that the solicitor's office "*has no ability to charge anyone.*" She said only the police could seek a warrant and a magistrate issue a warrant. She argued the defense cross-examination was not relevant. R. 601, l. 1 – 607, l. 20. (emphasis added).

When the jury came back into the courtroom Canty asked Von Herrmann about her statement that their "were a number of witnesses against my client." He asked Von Herrmann if Howard Parker was one of those witnesses. Von Herrmann responded: "I don't recall." The solicitor objected to the relevance of this inquiry. The judge then told Canty that based on her response that was the end of the inquiry. R. 609, l. 12 – 611, l. 13.

Howard Parker had been earlier questioned about Levana Jackson calling Parker's friend Terry Bease to set up this robbery. The solicitor also objected to the relevance of that testimony. When defense counsel Frederick went to impeach Parker about his statement that they had considered Splurge a "good person for them to hit a lick on," Parker maintained that he was either "lying or wrong." Counsel also questioned Parker about his "shoe size, [for the molds taken at the trailer]," his claim that he got "nothing out of testifying," and why he had not been charged with murder. The judge told the defense to "move on" when witness Parker protested the relevance of the cross-examination. R. 384, l. 6 – 386, l. 19; R. 409, l. 2 – 410, l. 13.

In her closing argument, the solicitor maintained there was no evidence anyone else committed the crime. She said, "Heather Von Herrmann didn't fall for it, nu-uh. The guy that had it after me, or after Heather, he didn't fall for it. But yet here we are. Here we are. Heather von Herrmann dismissed some cases against Bootsie [Johnson], **and she told you why**. But the one she didn't dismiss was the murder case. She has the discretion to dismiss it, to plead it, to charge it with anything she wants to. She has that power . . . **She's not only a witness, she's a (sic) attorney for our office at one time and still a lawyer. She told you, these are the reasons why I dismissed it**, but what I didn't dismiss was that murder case." R. 873, ll. 1-19.

Discussion

Defense counsel correctly argued that a former solicitor should not be allowed to testify as a witness regarding her prosecutorial discretion in this case. Keir Johnson was a critical star witness for the state. In fact, defense counsel said that "but for" Johnson's claims, which had to be taken at face value at the directed verdict stage, he would have asked the court to direct the verdict for appellant. R. 683, ll. 9-12.

As seen, Johnson claimed he did not receive any consideration for testifying against appellant. He also maintained he did not know the sentences for the crimes he had been charged with. Against this backdrop, the state wanted an "explanation" to be given to the jury about the charges being dropped, and other preferential treatment Johnson had received. Such "explanations" involving prosecutorial discretion are improper as defense counsel argued.

In State v. Joseph, 328 S.C. 352, 491, S.E.2d 275 (Ct. App. 1997), this Court held that it was prejudicial error for the trial court to allow a witness to explain the circumstances surrounding his conviction for giving false information to the police. This court noted, at the time, that a witness could be impeached by evidence of a prior conviction for a crime of moral turpitude. State v. Outlaw, 307 S.C. 177, 179, 414 S.E.2d 147, 148 (1992). "However, the details of the crime for which the witness has been convicted, whether the details could be considered mitigating or aggravating, are not admissible, the witness has 'already been afforded [the] opportunity to defend himself against the charge and his [conviction] is conclusive.'" State v. Joseph, 328 S.C. at 361, 491 S.E.2d at 279-280. The same **concept** should apply here – although what occurred here is much worse than the explanation allowed in State v. Joseph.

The solicitor's office chose to dismiss certain charges against star witness, Johnson. Johnson took every opportunity to "explain" -- spin why he was not getting consideration for his testimony against appellant although it may appear that way to a rational person. He repeatedly claimed that he had an excellent lawyer, and that is why the solicitor's office dismissed charges against him. Thus, Johnson was given every *opportunity* to defend himself against proper impeachment of bias and motive to misrepresent, and explain why, in his opinion; he was not being given substantial consideration for his testimony.

A solicitor, conversely, is a "minister of justice." They are not merely advocates for the government. A "prosecutor has special responsibilities to due justice and is held to the highest standards of professional ethics." State v. Quattlebaum, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000).

Von Herrmann was allowed to testify as a minister of justice that the state dismissed one serious charge against Johnson because it did not find the prosecuting witness credible. The government, according to the former solicitor, decided in another case that the complaining witness wanted to have a romantic relationship with Johnson, and was retaliating for his rejection.

The minister of justice, who acknowledged she was **the solicitor on this case at relevant times**, also testified that another serious charge was dismissed against Johnson because the victim, his girlfriend, did not want to continue to prosecute. The former solicitor told the jurors that it was difficult to prosecute a case where the victim was reluctant to cooperate. In fact, as seen above, she lectured defense counsel Fredrick and asserted that appellant's attorney was aware of this fact also.

Allowing a former solicitor to testify about her prosecutorial discretion placed the prestige of the government behind Keir Johnson, a shadowy witness. The jury was asked to believe the former solicitor knew more than they did about what occurred, and that she made the right prosecutorial decision to dismiss the charges again Johnson.

This obviously was meant to support Johnson's testimony that he was not given sentencing consideration for his testimony by way of the dismissal of the charges. Such explanations of prosecutorial discretion by their nature constitute improper vouching of the witness -- here Johnson -- by placing the government's prestige behind the witness' testimony, and his "innocent" explanation for the matter at issue. Von Hermann was telling the jury her prosecutorial discretion was proper in not going forward against Johnson on these charges, and helping him get released on bond. She did not think Johnson was as culpable. See State v. Shuler, 334 S.C. 604, 630, 545 S.E.2d 805, 818 (2001), State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001).[9]

Defense counsel in this case correctly objected to Von Hermann being allowed to testify about her prosecutorial discretion. He further argued that if the trial judge was going to allow the former solicitor to testify over his objection, then she was open to cross-examination on any relevant issue under Rule 611(b), SCRE. As seen, the trial judge stated that what defense counsel thought was relevant, and what the judge thought was relevant may be different matters. The defense obviously wanted to question the former solicitor, who again was the prosecutor on this case for a substantial time, about the failure to pursue leads, and pursue other subjects of investigation.

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[9] *reversed on other grounds* in Kelly v. South Carolina, 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002).

As seen, the defense strongly questioned the integrity of the investigation as far as the cell phone records. The defense had its own expert witness, Roger Boyell, on the subject of "electronic communications, specifically cell phone tracking" when it was time for the defense case. R. 711, ll. 8 – 718, l. 7. Boyell testified about Keir Johnson's two cell phones, the Graham phone, and Michael Pyatt phone. R. 726 – 779.

The former solicitor claimed she could not answer questions about the cell phone records without access to her file. The present solicitor promised to obtain Von Herrmann's file so she could refresh her memory about the cell phone records. However, in the "back and forth" involving the extent of the cross-examination the trial judge was going to allow, the present solicitor apparently never obtained the former solicitor's file for her.

Von Hermann also could recall whether any shoe impressions were taken from the crime scene. State's witness John Caulder, testified that he was **not** asked to analyze any shoe impressions in this case. He had collected a cast from the "crime scene" which was on the "prosecutor's table" during his testimony. R. 298, l. 12 – 302, l. 16. Again, witness Watts could not identify the robbers, and he only saw their shoes from under the bed. Howard Parker was questioned about his statements to detectives about Lavena Jackson setting up the robbery, and what he saw regarding the brown van. R. 383, l. 3 – 402, l. 7. He was also asked about his shoe size – since they could have been a "match," and not being charged with murder. R. 409, l. 2 – 410, l. 15.

Von Hermann also could not recall whether there were any statements that were not turned over to the defense. She rationalized that a solicitor at times made judgment calls on whether a statement was even credible enough to warrant disclosure.

At each stage of the cross-examination, the former solicitor seemed to have an explanation for leniency for Johnson, in addition to "not recalling" why certain things were not done in the investigation of appellant's case. That is not an attack, but, for example, "a variety of people" worked on the cell phone record," and she may not have found some statements worthy of belief and therefore may not have turned them over to the defense. When counsel for the co-defendant attempted to question Von Herrmann about Howard Parker, she again responded that she did not recall. The judge then stated that was the end of the inquiry.

In short, this record reveals that Von Herrmann did not recall anything of value about the integrity and extent of the investigation in this case. However, she vividly recalled that the investigation showed Johnson was much less culpable in this case, and that was why she entered into a consent order for his bond.

She also claimed that there was no "quid pro quo for a defendant cooperating and his charges being dismissed." She told the jury that they solicitor's office had *to verify the information given by the defendant* (here Johnson), and she maintained *the solicitor's office did not promise anything besides informing the judge of the level of cooperation.* r. 593, l. 13 – 595, l. 23. (emphasis added).

In short, the judge's decision to allow Von Herrmann to testify about her prosecutorial discretion regarding Johnson was prejudicial error as seen above. Further, his reluctance to allow cross-examination on the particulars of the extent of the investigation in this particular case was disastrous and unfair. However, once the trial judge allowed the former solicitor to testify over objection, under South Carolina law cross-examination is limited **only** by the requirement that the inquiry relate to matters

pertinent to the issues involved or the impeachment of the witness. State v. Ham, 259 S.C. 118, 191 S.E.2d 13 (1972).

"Since it is the function of the jury to determine the credibility of witnesses and the weight to be given their testimony, 'as a general rule, 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,' 98 C.J.S. Witnesses s 460; and 'on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness, 98 C.J.S. Witnesses s 560a." State v. Brewington, 267 S.C. 97, 100-101, 226 S.E.2d 249, 250 (1976).

Further, Rule 611(b), SCRE rejected the more restrictive language of the federal rule which limited cross-examination to the subject matter of the direct examination, and matters affecting the credibility of the witness.

In sum, the state got everything it wanted by having its former employee, the former solicitor, *explain her prosecutorial discretion* in dismissing charges against Johnson, and explaining why he was allowed out on bond. As seen, the former solicitor told the jurors that Johnson was less culpable in this case, and she "explained" why charges were dismissed against Johnson. She went so far as to tell the jurors that there is no quid pro quo for a defendant getting sentencing consideration in return for his testimony –"that is not the way the system works." Such a fantasyland explanation of prosecutorial discretion should be reversible error in and of itself – but there was so much more prejudicial error in allowing Von Herrmann's testimony here.

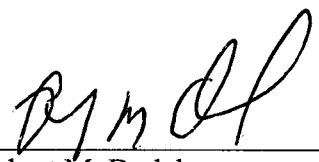
She could not "recall" anything about the particular investigation in this case as it related to appellant, and she maintained those matters were left for law enforcement to

handle as if the solicitor's office was not involved. Johnson was a critical witness in this case, and the former solicitor should not have been allowed to explain her prosecutorial discretion to validate Johnson's testimony.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the Horry County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of May, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

May 19th, 2016

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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MAY 19 2016
SC Court of Appeals

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS JAMES,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Caroline M. Scrantom, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19th day of May, 2016.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of May, 2016.

(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.