ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY HACKSHAW,

APPELLANT

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court judge erred when he did not suppress the fruits of the execution of a search warrant, which revealed that Hackshaw had a computer print out of a mugshot taken of Ellison Hudson from his admission into the Alvin S. Glenn Detention Center, when the search warrant was not valid because it lacked probable cause because it was stale?

II. Whether the trial court judge erred when he allowed the state to admit a prior statement made by Torrian Gleaton when admission of the statement was improper under South Carolina Rules of Evidence, Rule 613(b) because Gleaton did not deny making the statement, but rather was refusing to cooperate by not testifying at trial?

III. Whether the trial court judge further erred when he allowed the state to admit a prior statement made by Torrian Gleaton when admission of the statement violated Hackshaw's right to confront the witnesses against him in violation of the Sixth and Fourteenth Amendments?

IV. Whether the trial court judge erred when he refused Hackshaw's request to charge the jury that Torrian Gleaton, an uncooperative witness, faced up to life in prison for accessory **before** the fact of murder, and only charged them that accessory **after** the fact of murder carries up to 15 years, and when the officers informed him, during his interrogation, that he could be charged with "accessory to murder?"

V. Whether the trial court judge erred when he allowed the state to introduce evidence of a drug relationship between Hackshaw and Ellison Hudson when the admission of that evidence was not necessary for the state to prove its case and when the evidence was unduly prejudicial and highly inflammatory?

VI. Whether the trial court judge erred when he allowed the state to instruct the jurors on the law during the first portion of its closing argument and when doing so violates the South Carolina Constitution?

VII. Whether the trial court judge erred when he found that Hackshaw forfeited his right to last closing because he testified in his own behalf and offered a defense since doing so is an impermissible punishment for Hackshaw's exercising his constitutional rights and violated his right to due process?

STATEMENT OF THE CASE

Anthony Hackshaw was indicted by the Richland County grand jury for murder, 2 counts of assault with intent to kill, and use of a firearm during commission of a violent crime during its September 2009 term. Hackshaw was tried before the Honorable James R. Barber, III on October 21, 2010, and October 25- November 1, 2010 in Columbia. He was represented by Tara Dawn Shurling and Jeremy Thompson, Esquires. The state was represented by Kathryn "Luck" Campbell, Joanna McDuffie and Nicole Simpson, Esquires. He was convicted, and sentenced to 42 years for murder; 15 years for AWIK, 15 years for AWIK, and 5 years for the weapons charge.

This appeal timely follows.

STATEMENT OF FACTS

Hackshaw was arrested in connection with events that occurred on May 20, 2009. On that date, Ebony Fogle was shot and killed. Testimony at trial revealed the following relevant facts.

Law enforcement was dispatched to 300 Juniper Street, Columbia, South Carolina, the home of Ellison Hudson, around 1:00pm. Tr. 180, ll. 13-16. When law enforcement arrived, Cleveland Joyner, Ellison Hudson, and the decedent were present. Tr. 181, ll. 1-4. Officers located several shell casing lying in the grass, and around the decedent's body. Tr. 185, ll. 2-12. Ten shell casings were collected by the Columbia Police Department. Tr. 213, ll. 11-12. Based on the existence of the shell casings, an officer testified that the gun used would have been an automatic or semiautomatic pistol. Tr. 213, ll. 22-25. Later, the South Carolina Law Enforcement Division (SLED) searched the area with a metal detector and located additional projectiles. Tr. 230, l. 22- 232, l. 9. An expert testified that all of the 9 millimeter shell casings found at the scene were fired by the same weapon. Tr. 851, ll. 5-10.

Officer Brian Carroll of the Columbia Police Department (CPD) spoke briefly with Hudson and Joyner at the scene. He was informed that the decedent's assailants were two males, one "in black clothing" and "black hat", "5'10" and "190 pounds." Tr. 187, l. 3- 23. Officer Carroll also heard there was a second assailant wearing a blue hoodie. Tr. 188, ll. 5-18. Hudson did not inform the officer that he knew either of the assailants. Tr. 189, ll. 11-14.

A witness who had just returned home from school testified that she heard the gunshots, and observed two guys running. One of them had a gun. Tr. 201, ll.2-24. She did not see their faces. Tr. 202, ll. 10-14.

Officer Pete Currie, also of the Columbia Police Department, performed gunshot residue kits (GSR) on Hudson, Joyner and Fogle. Tr. 220, ll. 1-17. They were later analyzed by SLED. Tr. 221, ll. 17-20. Ms. Fogle's car was impounded, and processed by the CPD. Tr. 221, l. 21- 222, l. 11.

The state called Cleveland Joyner to testify during its case in chief. At the time of these events, he had known Hudson for approximately 2 years. They would "relax" and "smoke weed" together. Tr. 245, ll. 2-14. On this date, Joyner dropped his girlfriend off at work, and then headed to Hudson's house to smoke some weed. They were outside in the yard, and smoking their marijuana at a table in the middle of the yard. Tr. 247, l. 17- 250, l. 23. While they were enjoying their pot at the table, Fogle showed up at the house. Hudson was going to wash her car, and so she pulled her car into the backyard. Tr. 250, l. 24- 251, l. 25. Hudson had a gun on the backyard table. Tr. 252, ll. 5-16.

While they were in the backyard, they observed a silver Honda drive by. They then noticed the car drive by a second time. Hudson grabbed his gun and walked to the front yard. He walked back, and then started washing the car. They heard a car door close, and then Hudson yelled "Get the gun." Tr. 252, l. 21- 254, l. 17. Fogle was at the table; Hudson ran away. Tr. 254, ll. 18-25.

Joyner testified that he heard gunshots and then fell down. He saw someone in a blue hoodie run past him, chasing Hudson. He heard screaming and then more shots. He described the person in the blue hoodie as "tall and skinny." Joyner ran behind a shed with

the gun in his hand. When he saw the person in the blue hoodie running down the other side of the street, he fired the gun at him. He ran after him, and saw the silver Honda drive down the road. Tr. 255, l. 7- 259, l. 25.

Joyner then took the shells out of the gun, and placed the gun under a couch in the house at the direction of Hudson. Tr. 261, ll. 12-22. The police arrived shortly thereafter, and Joyner told Hudson to get his (Hudson's) counterfeit money out of the house. Tr. 262, ll. 6-14. Joyner testified he never saw the shooter's face. Tr. 264, ll. 2-6. Joyner gave a statement to police recounting these events. Tr. 264, ll. 10-22. In this statement, he failed to inform the police that he had a gun. Tr. 273, ll. 3-23.

On June 3, Joyner gave another statement to the police. At that time, he gave them information about a purported "situation" between Hudson and Hackshaw that was relayed to him by Hudson. Tr. 265, ll. 8-19. Joyner testified that he related a message to Hudson from Hackshaw that "if he didn't give him his weed or his money that he was coming for his head." Tr. 266, ll. 17-23.

Ellison Hudson also testified during the state's case in chief. He testified that he had the gun on the table because he "had had numerous people" shoot up his house. Tr. 307, ll. 2-7. He testified that someone had even shot at his house a week before this event, and while his father was standing outside. Tr. 309, ll. 1-5. During cross-examination, Hudson admitted that his house had been shot up "maybe twice" before. Tr. 349, ll. 7-23. He testified that he "saw a tattoo" when the two men approached. Tr. 314, ll. 5-13. He later characterized this as a "little tattoo." Tr. 409, ll. 12-14. After the shooting, he called his father who worked at Best Buy on Two Notch Road. Tr. 322, ll. 9-18. Hudson testified that he got a good look at one of the shooters. Tr. 325, ll. 9-15.

Hudson testified that he lied to the police about the identity of the shooter. Asked why, he responded:

> A: To be honest, I was scared, nervous at the same time. I wanted revenge, you know, because I just know it wasn't right.
>
> Q: You wanted revenge on who?
>
> A: That guy right there (pointing).
>
> Q: So you blamed someone who had nothing to do with it?
>
> A: Yeah. Yes, ma'am.
>
> Q: And who did you pick to blame? How did you come up with him?
>
> A: Just because previous incidents that I had with plenty of people shooting at my house. You know, once—I guess once people finds out where I stays at, then, you know, he had cahoots—he was a part of what was going on during the time, you know, but I was just mad, you know. Like I say, I just wanted revenge. I---.

Tr. 325, l. 20- 326, l. 14.

In fact, Hudson told the police that he was "positive" that the shooter was Jonathan Bailey. Tr. 326, ll. 23-25. Hudson even described the tattoos on Bailey's arm to the police. Tr. 327, ll. 5-6. He testified that he had a "beef" with Bailey's "homie." "So, you know, there was people shooting at my house, you know, threatening, calling my phone or whatnot, snitch this, snitch that." Tr. 350, ll. 10-16. He testified that he told the police that Bailey would be after him because he had snitched on one of his friends who shot up Hudson's mother's car. Tr. 351, l. 17- 355, l. 4; Tr. 366, l. 1- 367, l. 18. When police spoke to Hudson again, on May 23, he told them that Hackshaw was the shooter. Tr. 328, ll. 1-14. Hudson admitted he had "no problem lying to the police and blaming an innocent man." Tr. 356, ll. 3-5. He claimed that he "told the truth" since he was locked up at the detention

center, and knew he would not be able to exact his revenge on Hackshaw. He also claimed that a discussion with his grandfather inspired him to tell the truth. Tr. 368, l. 6- 370, l. 22.

Hudson also described an incident that happened earlier to the police. He told the police that he had stolen drugs from Hackshaw approximately 2-3 weeks earlier, with a friend named "Hot Boy." He told them that they went to Hackshaw's apartment to buy marijuana from him. Instead, Hudson pulled a gun on him and stole the marijuana. Tr. 330, l. 24- 338, l. 4. He claimed that he and Hackshaw fired at one another at the apartment complex. Tr. 338, ll. 17-24.

Before he named Hackshaw as one of the shooters who killed Ebony Fogel, the police were asking Hudson about Hackshaw. Tr. 358, l. 24- 359, l. 12.

Hudson gave a statement to police on June 4th in which he informed them that he was "90 to 95 percent" sure that Hackshaw was the shooter. Tr. 432, l. 13- 433, l. 17.

Additional evidence the state presented in its case against Hackshaw was circumstantial. The state called Nina Gordon to testify that Hackshaw drove a silver Honda at the time of the murder. Tr. 472, l. 21- 476, l. 10. On cross-examination, she admitted that the police only spoke with her about these events over a month after they occurred, and that she only "remembered better" after speaking to a neighbor. Tr. 481, l. 3- 485, l. 10.

The state called Stephanie McGowan, Whitney Caruth, Mali Allen, and Norman Jenkins to shore up Jonathan Bailey's alibi at the time of the shooting. Tr. 473, l. 3- 539, l. 10. Law enforcement never contacted any of Bailey's gang associates. Tr. 1123, ll. 17-19.

The state called Shanelle Latimer to testify that Hackshaw's wife, Rosa, lent her a silver Honda the day after the shooting, which she then picked up that Friday. Tr. 540, l. 10- 543, l. 20.

Shaquenda Evans, Rosa's supervisor from work, also testified that she drove Rosa's car because she was interested in taking over the payments (the car belonged to Rosa's sister). They switched cars for a couple of weeks so that she could could "try it out." Tr. 547, l. 19- 553, l. 18.

The state called Lorraine Tracey, a nurse manager from the South Carolina Department of Mental Health and Bryan Hospital, Hackshaw's employer, to testify that on the date of the shooting, Hackshaw's timesheet indicate that he was at work from 7:00am to 3:30pm. Tr. 554, l. 7- 561, l. 9.

William Littlejohn was called by the state to show that Hackshaw usually drives a black Charger, but has seen him "riding in a gray Honda civic" and a green Honda. Tr. 564, l. 6- 565, l. 14.

The state called Jonathan Bailey who testified as to his alibi on the date of the murder, and also revealed that he has been convicted of shoplifting, assault on a federal employee, and that he was, at the time of this trial, indicted for three counts of armed robbery, criminal conspiracy, and possession of a weapon during a violent crime. Tr. 571,l. 9- 588, l. 1.

Sheldon McDowell ("Hot Boy") testified that he and Ellison stole marijuana from Hackshaw. Tr. 588, l. 12- 602, l. 20. He confirmed that Hudson first pulled out a gun during their robbery of Hackshaw. Tr. 596, l. 16- 597, l. 5.

An officer from the Richland County Sheriff's Department (RCSD) testified that he executed a search warrant at Hackshaw's apartment on June 8, 2009 and found a print out of a picture of Ellison Hudson taken at the Alvin S. Glenn Detention Center. Tr. 700, l. 3- 706, l. 24.

Joseph Smith testified that Hackshaw told him he knew who had robbed him and that "he would call G. or Boss or someone, that he'll get it handled." Tr. 721, ll. 15-19. He also testified that Hackshaw was looking for 9 millimeter bullets. Tr. 722, ll. 2-5.

DNA extracted from one of the shell casings located at the crime scene did not match Hackshaw, Jonathan Bailey, Cleveland Joyner, or Ellison Hudson. Tr. 740, l. 10-741, l. 12.

The state called Kelly Cobia, an employee with the Fusion Center at SLED. Tr. 788, ll. 18-25. Cobia testified that she analyzed the cell phone records and tower locations associated with Hackshaw's cell phone records. She testified that Hackshaw's cell phone was used in an area 2.04 miles from the decedent's residence around the time of the shooting (the decedent was killed at Hudson's residence). Tr. 793, ll. 4- 794, l. 18.

A jailhouse informant, Terran Hughey, with convictions for 2 counts of burglary, grand larceny, petit larceny, forgery, receiving stolen goods, another grand larceny, burglary, 3rd degree and assault on a corrections officers, told the jury that Hackshaw told him he was going to "get back at E. and Hot Boy." Tr. 815, ll. 12-14. According to this snitch, Hackshaw gave him details of the shooting. Tr. 816, ll. 1- 821, l. 24. In exchange for his testimony, he was allowed to plead to 2 counts of burglary 2nd, instead of burglary, 1st degree which, of course, carries up to a life sentence in prison. Tr. 820, ll. 11-24.

Another jailhouse snitch, Travis Golston testified that Hackshaw told him he intended to shoot "E" and "Hot Boy." Tr. 882, ll. 15-25. After Golston gave his information to the state, he received a bond reduction. Tr. 889, ll. 1-9. He was being housed at the detention center on charges of assault and battery with intent to kill. Tr. 880, ll. 10-12. He was released on a personal recognizance bond that the solicitor in this case

signed. Tr. 902, l. 18- 903, l. 16. Golston has been convicted of giving false information to police. Tr. 901, ll. 10- 902, l. 12.

An investigator with CPD was allowed to read into evidence a statement purportedly made by Torrian Gleaton, a state's witness who refused to cooperate during trial. This statement is the basis for Arguments II, and III. Tr. 980, l. 14- 1029, l. 12.

The defense presented a case.

Rotania Grenald, Hackshaw's sister-in-law who lives in New Jersey, explained that she gave her car, a silver Honda, to her sister to bring back to South Carolina so that it would not be repossessed due to non-payment. Ms. Grenald testified that she needed time to collect money to bring her account up to date. After she did so, she wanted her car back. Tr. 1145, l. 20- 1152, l. 21.

Rosa Grenald, Hackshaw's wife, testified as the car exchange with her sister, but also informed the jury that when she and Hackshaw became aware that he was wanted in connection with a murder, they immediately travelled back to South Carolina from New Jersey. She also testified that she informed the police about the car situation with her sister, but that they were not interested in anything she had to say. Tr. 1171, l. 3- 1182, l. 25.

Paul Lomas, a physical therapist with Doctors Wellness Center and Progressive Physical Therapy testified that he provided therapy to Hackshaw on May 20, 2009. Hackshaw had been receiving therapy there for some time, and this was his second-to-last appointment. Lomas testified that he did not notice anything unusual about Hackshaw on that date. He testified that Hackshaw was there "around 1." Tr. 1274, ll. 2-3. According to the sign in sheet, it appears that Hackshaw was there at 1:30 pm. Tr. 1269, l. 12- 1279, l. 10.

Amos Jones, an investigator for the defense, testified that he informed Hackshaw not to discuss his case with anyone in the prison, and he also testified generally to the self-serving actions of jailhouse snitches. Tr. 1333, l. 17- 1343, l. 18. David McDougall, another investigator, testified about jailhouse snitches, too. Tr. 1368, l. 22- 1371, l. 17.

Then Anthony Hackshaw took the stand. He testified that Ellison Hudson robbed him on April 23, 2009. He admitted that Hudson was at his apartment to buy marijuana from him, but then pulled out a gun on him. "Hot Boy" pulled out a gun as well. He testified that they stole about 3 ounces of marijuana. Tr. 1410, l. 14- 1412, l. 24. This amount of marijuana was worth only about $200-300. Tr. 1413, ll. 7-12.

Hackshaw also admitted that after they started shooting that he grabbed wife's pistol and returned fire. When the police arrived, he testified that he lied to them because he did not want them to know that he had a pistol or marijuana. Tr. 1414, l. 1- 1416, l. 7. In June, Hackshaw heard that his apartment had been searched by police in connection with the April 23, 2009 robbery. He decided to leave town. He found out later that the police wanted to question him about a murder, and not the robbery or the marijuana. He made arrangements with an attorney and returned to South Carolina. Hackshaw also confirmed that he was told repeatedly not to speak to others about his case for fear that jailhouse snitches would try to use information to their advantage. He also confirmed that his discovery materials were located in his dorm room at Alvin S. Glenn Detention Center. Hackshaw unequivocally denied that he shot and killed Ebony Fogel. Tr. 1418, l. 3- 1447, l. 16.

ARGUMENTS

I. The trial court judge erred when he did not suppress the fruits of the execution of a search warrant, which revealed that Hackshaw had a computer print out of a mugshot taken of Ellison Hudson from his admission into the Alvin S. Glenn Detention Center, when the search warrant was not valid because it lacked probable cause because it was stale.

Prior to the start of trial, Hackshaw, through counsel, moved to suppress the fruits of the search conducted at Hackshaw's apartment based on a search warrant that was executed in connection with the prior robbery of Hackshaw by Ellison Hudson. Tr. 70, l. 3- 79, l. 1. The robbery occurred on April 23, 2009. Tr. 72, ll. 17-24. On June 5, the police executed the search warrant to look for evidence. Although Hackshaw was, in fact, the victim of this robbery, law enforcement sought to discover evidence of the crime in *his*, and not Hudson's, apartment. In any event, Hudson had, at the time of the execution of the search warrant, given a full accounting of the entire incident which occurred in the breezeway area of the apartment. Hudson never claimed to have even stepped foot into the apartment. Hudson gave a statement on June 4 to law enforcement that he went to Hackshaw's apartment back in April and robbed him. Tr. 74, l. 24- 75, l. 19.

The trial court judge summarily denied the motion. Tr. 78, l. 24- 79, l. 2.

The trial court judge erred because there was not probable cause at the time of the issuance of the warrant to believe that evidence of a crime would be found in Hackshaw's apartment related to the earlier robbery or shootout wherein he was the victim. The warrant was stale as it was executed over a month after the robbery and shootout occurred, and there was no reason to believe that any evidence would be found relating to those events.

In order for an affidavit in support of a search warrant to show probable cause, it must state "the facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause **at that time**." 68 Am.Jur.724 Searches and Seizures 70 (emphasis added). The reason for this rule is that probable cause, with time, dissipates. State v. Winborne, 273 S.C. 62, 254 S.E.2d 297 (1979). As the South Carolina Supreme Court has stated, "[t]he time should be sufficiently short to justify the conclusion that the evidence is likely still at the place where it was seen." Id. at 65. Although length of time will not invalidate a warrant, as a matter of law, it is still an important component in examining the totality of the circumstances. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992).

In this case, law enforcement did not have probable cause to enter Hackshaw's apartment because the robbery and shootout occurred more than a month earlier. It was not reasonable to believe that evidence of any crime would still be at that location. Additionally, Hudson gave a full accounting of the crime prior to law enforcement's search, and so there was not any evidence which would have been relevant or probative to be found at the location. Law enforcement simply used knowledge of this robbery to effectuate a search of Hackshaw's apartment to search for evidence of his participation in a murder, when they lacked probable cause to do so. Law enforcement used the warrant to engage in a fishing expedition, and the photograph of Ellison Hudson should have been suppressed.

The state entered the mug shot into evidence over objection. Tr. 703, l. 19- 705, l. 25. The state argued in closing argument that it indicated that Hackshaw was out to kill him. Tr. 1569, ll. 4-21. The admission of the this mug shot, based on a stale search warrant

that lacked probable cause, denied Hackshaw his right to a fair trial. Respectfully, he asks this Court to reverse his convictions and remand his case for trial.

II. The trial court judge erred when he allowed the state to admit a prior statement made by Torrian Gleaton when admission of the statement was improper under SCRE 613(b) because Gleaton did not deny making the statement, but rather was refusing to cooperate by not testifying at trial.

At trial, the State called Torrian Gleaton to the stand. Tr. 777, l. 21. He was a critical witness for the state because, according to a statement he gave to police, Hackshaw made highly incriminating statements to him about the shooting. When he first took the stand, the state elicited from him that he had recently pled guilty in federal court to possession of a firearm by a felon, and that he had an outstanding warrant in Sumter County for unlawful possession of a weapon. He also had a conviction for possession of Ecstasy. Tr. 778, l. 17- 780, l. 9.

After he answered these preliminary questions about his record, the state then asked him whether he knew Ellison Hudson. At that point, he testified that he did not want to cooperate. Tr. 780, ll. 11-14. **Seven times** he stated that he did not want to cooperate. Tr. 780, ll. 15-18; Tr. 781, ll. 22-24; Tr. 782, ll. 3-4; ll. 9-11. The trial court judge then addressed Gleaton and informed him that he could be held in contempt. He asked if he wanted to consult with his lawyer, and he replied that he did. Tr. 783, ll. 5-16.

The state informed the court that it wished to admit his statement given to law enforcement in connection with this crime under SCRE, Rule 613(b), Extrinsic Evidence of Prior Inconsistent Statement of a Witness. Tr. 784, ll. 5-9. Giving Gleaton time to meet with counsel, the State called other witnesses.

Gleaton's counsel arrived at the courthouse and spoke to him. Counsel informed the court:

> MR. KIRKLAND: He maintains that the reason that he is not cooperating—unfortunately, he's not able to plead under—to say that it's a fifth amendment privilege against incriminating himself. He's only able to say that he fears for his safety and the safety of his family.

Tr. 834, l. 23- 835, l. 2.

Counsel again reiterated that Gleaton was not going to cooperate at all. Tr. 856, ll. 11-22; Tr. 858, ll. 5-12.

The state argued it should be allowed to admit the statement, and that it was entitled to do so under State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009). Tr. 861, l. 6- 862, l. 14. Trial counsel objected. Tr. 862, l. 16- 865, l. 7.

Gleaton's counsel again reiterated that Gleaton claimed he did not wish to cooperate because it would endanger his life and the life of his family. Tr. 868, l. 23- 869, l. 9.

Counsel again objected to the state's being allowed to introduce the statement. Tr. 873, l. 19-25. The trial court judge ruled that the statement was admissible. Tr. 874, l. 1-24. The court ruled that Stokes was controlling. Tr. 905, ll. 14-24.

Counsel objected when the state called Investigator Walter Mahoney, of the CPD's Major Crimes Unit to read Gleaton's statement to the jury. Tr. 980, ll. 9-10; 983, ll. 12-14.

The state elicited the following relevant testimony:

> Q: "Torrian was saying that the next day Bump says to Torri that E. shot somebody in Greenview. Bump said they went to get E. and started spraying. And Torri—and Bump asked Torri did E. get shot, and Bump said that they shot somebody. They sprayed someone. They didn't know who they hit."

Tr. 986, ll. 21-25 ("Bump" is, supposedly, Hackshaw's nickname).

The officers, according to Mahoney's reading of Gleaton's interview, asked for more detail about the shooting that Hudson's house. Tr. 988, ll. 2-4.

> A "That they sprayed somebody. They were going to look for E. and they were looking for E. and they sprayed."
>
> Q: "That means they were looking for E. before they started shooting?"
>
> A: "Oh, yeah."
>
> Q: "And sprayed means shooting?"
>
> A: "They were looking for E. the day he robbed him. All tell they were going to—all tell they were going to catch up with him."
>
> Q: "All right."
>
> A: "Every day."
>
> Q: "So Bump has told you that they were looking for E. since E. robbed him?"
>
> A: "In one of them phone calls he's asking me have I seen E-Dog."
>
> Q: "Those—the phone calls that you're talking about, are they before Ebony Fogle was killed in E's back yard or after? Because it sounds like you're telling me two different things here."
>
> A: "Before and after."

Tr. 988, ll. 5-25.

According to Mahoney's reading of Gleaton's interview, Gleaton told the police that Bump was going to "retaliate from the robbery." Tr. 989, ll. 10-25. He told them that Bump was out looking for him at night clubs. Tr. 992, ll. 12-24.

After the shooting occurred, according to Mahoney's recitation of the interview, Bump then called Gleaton and asked if E had been killed. Tr. 995, ll. 18- 996, l. 7.

The final interview lasted approximately 36 minutes, although the interrogation prior to the taking of the statement lasted over 2 hours. Tr. 1022, ll. 6-15. Investigator Reese of the CPD testified that it lasted more than 3 hours. Tr. 1126, ll. 10-11. During the interrogation, Investigator Reese used profanity, yelled, and slammed his fist down on the table. Tr. 1023, ll. 7-12. Gleaton told the officers that he was confusing what E. had told him, and what Bump had said to him about the incident. Tr. 1022, ll. 16-23; Tr. 1023, ll. 13-1024, l. 4.

During the interrogation, Investigator Reese threatened to prosecute him:

> Q: Let me rephrase the question. What he actually says is, "You realize you're making yourself an accessory to a murder." That's what he said, isn't it?
>
> A: Yes, ma'am.

Tr. 1024, ll. 12-15.

Reese also stated that he had no qualms putting Gleaton in jail if he did not keep talking to them. Tr. 1026, ll. 16-19.

Later, defense counsel attempted to call Torrian Gleaton to the stand. He testified that he was still unwilling to answer any of her questions. Tr. 1311, l. 17- 1312, l. 12.

The trial court judge erred by allowing Gleaton's statement to be admitted because it was improper under SCRE 613 (b) which states:

> **Extrinsic evidence of prior inconsistent statement of witness.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982).

The state did not lay the proper foundation for admitting extrinsic evidence of this statement. The state showed Gleaton State's exhibit 68 (written statement) and State's exhibit 69 (recorded statement). The state asked him, "Do you admit making those statements on June the 3rd of this year, 2010, at the Columbia Police Department headquarters to Kevin Reese and Investigator Mahoney." He answered, no. Then, he reiterated once again that **he was not going to cooperate** with the prosecution. Tr. 866, ll. 8- 867, l. 22.

Here, the witness unequivocally informed the state, defense, and the trial court that he did not intend to cooperate at all. He rendered himself unavailable. The purpose of this rule is to provide a mechanism for allowing the jury to assess the credibility of the witness—that is why if the witness admits the statement, no extrinsic evidence is admissible. Historically, this rule only allowed the admission of extrinsic evidence for purposes of impeaching the witness's testimony, and not as substantive evidence. In this case, the witness declined to cooperate, and his unsworn statement was admitted, substantively, to prove the matter asserted—that Hackshaw was involved in this murder. This is not the purpose of the rule, and this statement was inadmissible under SCRE, Rule 613.

The state argued extensively that Gleaton's testimony proved Hackshaw's guilt:

> "The murder of Ebony Fogle. Remember when he talked to his one friend, Mr. Gleaton, who didn't want to be here, who didn't want to get up in front of his friend and testify? You were allowed to listen to that testimony

only because certain circumstances were met and the judge made that call, but what did he tell him? That he sprayed."

Tr. 1564, ll. 15-20.

The state referenced the statement later in the closing argument. Tr. 1577, l. 23- 1578, l. 9.

And yet again.

"Torrian Gleaton, the defendant's friend. He also knows E. He spoke to both of them. He was up front about that. Bump told him about the robbery, said he was looking for E., even tried to remember getting him to go and find out where E. lived or show him. Told him about the shooting. He sprayed the yard."

Tr. 1580, l. 19- 1581, l. 11.

The trial court judge's error in admitting this statement under SCRE, Rule 613(b) was highly prejudicial to Hackshaw, and he was denied his right to a fair trial. Respectfully, he asks this Court to reverse his convictions and remand his case for trial.

III. The trial court judge further erred when he allowed the state to admit a prior statement made by Torrian Gleaton when admission of the statement violated Hackshaw's right to confront the witnesses against him in violation of the Sixth and Fourteenth Amendments.

The trial court judge erred by admitting Gleaton's statement because doing so violated Hackshaw's right to confront the witnesses against him. Gleaton was not available for cross-examination because of his repeated refusals to cooperate with either the prosecution or defense.

The Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S.C.A. 6, 14. This right to confront and cross-examine witnesses "is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial." State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). The Confrontation Clause guarantees the opportunity for cross-examination. United States v. Owens, 484 U.S. 554 (1988). The opportunity for cross-examination has been deemed the "main and essential purpose of confrontation." Delaware v. Fensterer, 474 U.S. 15, 19-20 (1985). And see Crawford v. Washington, 541 U.S. 36 (2004).

Cross-examination allows the accused the opportunity:

> [N]ot only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Douglas v. Alabama, 380 U.S. 415 (1965) (quoting Mattox v. United States, 156 U.S. 237, 242 (1895).

As Stokes makes clear, it is the opportunity to cross-examine that is constitutionally protected. Id. at 402, 440.

In this case, Hackshaw did not have the opportunity to cross-examine Gleaton as to the statements he made to law enforcement because he refused to cooperate. He refused to answer any questions about this incident, and was therefore not available for cross-examination. This case, then, is distinguishable from Stokes because, in that case, the appellant had an opportunity to cross-examine the witness, but chose not to. Here, Gleaton

repeatedly refused to cooperate, and the admission of his statement denied Hackshaw his right to confront the witnesses against him. Given the dearth of evidence tending to show that Hackshaw was guilty of this crime, including Hudson's initially informing law enforcement that someone else did it, the prejudice of allowing this statement into evidence was overwhelming.

Additionally, Hackshaw was prejudiced because the jury would have necessarily have drawn an adverse inference by having Officer Mahoney testify to Gleaton's statements after he refused to cooperate before the jury. See United States v. Griffin, 66 F.3d 68, 71 (5th Cir. 1995); United States v. Maloney, 262 F.2d 535, 537 (2d Cir. 1959).

Additionally, Hackshaw was prejudiced because the jury was concerned about Gleaton's testimony, as evidenced by the notes they sent to the judge during their deliberations. See Court exhibit #4: "We need Gleaton's written testimony." And see Court exhibit #6: "Gleatons hold testimony/ Did he admit that he signed a written statement (sic)". Given the importance of this testimony to the jury during their deliberations, Hackshaw was prejudiced by its improper admission. Additionally, as recounted in Argument II above, the state repeatedly used this statement in its attempt to prove Hackshaw guilty. The trial court judge's error overwhelmingly prejudiced Hackshaw.

The trial court judge erred when he allowed the state to publish Gleaton's statement to law enforcement because doing so violated Hackshaw's right to confront the witnesses against him, and he was overwhelmingly prejudiced. Respectfully, Hackshaw asks this Court to reverse his convictions and remand his case for a new trial.

IV. The trial court judge erred when he refused Hackshaw's request to charge the jury that Gleaton faced up to life in prison for accessory **before** the fact of murder, and only charged them that accessory **after** the fact of murder carries up to 15 years, and when the officers informed him, during his interrogation, that he could be charged with "accessory to murder."

Gleaton never testified in this case because of his unwillingness to do so. However, had he testified, awareness of the penalties he could have faced in connection with this murder would have been relevant for purposes of showing bias or interest. "'On cross examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (quoting 98 C.J.S. Witnesses §560a (1957). See Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced"). And see State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002). Defense counsel, therefore, asked the trial court judge to instruct the jury regarding the possible penalties he could face. The state did not object. Tr. 1223, l. 10- 1224, l. 8.

Defense counsel and the state disagreed, however, with what possible charges he would have faced. Defense counsel argued that since the officers informed him that he could be charged with "accessory to murder" that the jury should be charged that he could have been charged with "accessory before the fact of murder" which carries the same penalty as murder, 30 years to life. Tr. 1224, ll. 12-22. The state argued that he could only have been charged with accessory after the fact. Tr. 1224, ll. 15-17. Defense counsel noted that, according to Gleaton's interview with the officers, there were phone calls made between Gleaton and Hackshaw **both before and after** the murder which implies that

Gleaton may have been involved prior to the killing. Tr. 1225, ll. 15-19. The judge denied Hackshaw's motion, and stated he would only inform the jury that Gleaton's possible exposure was 0-15 years on accessory after the fact of murder. Tr. 1225, l. 20- 1226, l. 5. Trial counsel objected. Tr. 1226, ll. 6-7. The trial court judge instructed the jury. Tr. 1591, ll. 8-11.

The trial court judge erred because he did not allow the jury to know that, at the time Gleaton was being interrogated by law enforcement, he was being threatened with a potential life sentence. The police did not threaten to charge him with accessory **after the fact** of murder—they threatened to charge him with accessory **to** murder. The state even conceded that Gleaton's legal exposure was relevant information to put before the jury. By only informing the jury that Gleaton's charge carried up to 15 years in prison, it minimized the pressures that Gleaton was under to render a statement consistent with what law enforcement wanted to hear—that Hackshaw was guilty of this murder.

The prejudice in this case is overwhelming for two reasons. First, since Gleaton refused to testify, he was not subject to being cross-examined about his understanding of his legal exposure. But additionally, Hackshaw was prejudiced because Gleaton's statement in evidence constituted the linchpin of the state's case against him. The case against Hackshaw was largely circumstantial except for the testimony of Ellison Hudson, who admitted lying about who the shooter was when he implicated Jonathan Bailey. Gleaton's statement then was important to show that a "friend" of Hackshaw's was testifying to his guilt. The jury should have known that Gleaton was facing the prospect of being charged with a potential life sentence at the time he rendered his incriminating statement. Charging the jury that the charge only carries 15 years minimized those pressures, and Hackshaw was

denied his right to due process. Respectfully, he asks this Court to reverse his conviction and remand his case for trial.

V. The trial court judge erred when he allowed the state to introduce evidence of a drug relationship between Hackshaw and Ellison Hudson when the admission of that evidence was not necessary for the state to prove its case and when the evidence was unduly prejudicial and highly inflammatory.

Prior to the start of trial, defense counsel motioned to exclude any evidence or reference to the robbery being drug-related. The trial court judge took the matter under advisement. Tr. 126, ll. 3-19. The state argued it was relevant because, it contended that the motive for the murder was retaliation for the robbery. Tr. 126, l. 24- 130, l. 20.

Defense counsel argued the state could do so without referring to the nature of the property stolen, and that by informing the jury that Hackshaw was a drug dealer was more prejudical than probative. Tr. 133, ll. 11-25.

The trial court judge denied the motion, finding that "there probably is a different situation in drug deals and thins of that nature that—on the street that this would be probative and it's not substantially outweighed by the prejudicial value." Tr. 134, l. 25- 135, l. 13.

The trial court judge improperly allowed the state to capitalize on the drug component of this case. Doing so prejudiced Hackshaw because it tended to suggest that he was a violent person, in this prosecution for murder. See State v. Banda, 371 S.C. 245, 253, 639 S.E. 2d 36, 40 (2006) (holding the court recognizes an "indisputable nexus between drugs and guns" to justify a frisk search). The drug component was not necessary for the state to prove motive, since any robbery and shoot out would have provided motive, and its introduction was unduly prejudicial. SCRE, Rule 403.

The drug component of this crime was repeatedly referenced throughout the trial, but especially through the testimonies of Ellison Hudson, and the officers who testified about executing the search warrant in connection with the drug robbery. The state argued in closing that it constituted the motive for the murder:. Tr. 1563, l. 8- 1564, l. 14. And, "When he sold drugs and did his gang stuff, he's Bump, and he wears that hat well because he knows the system." Tr. 1561, ll. 21-23. Interjecting the drug component of this case was less probative than prejudicial. Hackshaw was denied his right to a fair trial, and respectfully he asks this Court to reverse his convictions and remand his case for a new trial.

VI. The trial court judge erred when he allowed the state to instruct the jurors on the law during the first portion of its closing argument and when doing so violates the South Carolina Constitution.

Defense counsel objected that the state was allowed to open on the law during its closing argument. Counsel argued that the South Carolina Constitution states that it is the purview of the court to determine what law is appropriate, and that the jury is to receive the law from the bench. Tr. 1494, ll. 4-10.

> "It is our position that it is inconsistent with that delegation of authority for the State then to be permitted to open on the law and give their own prosecutorial spin on the law that's applicable on the facts of the given case, and for that reason we would object. We think that it's inappropriate, unconstitutional, and inconsistent with other charges that will be given from the bench that the jury is to, in fact, derive the law to be applied from Your Honor. . .."

Tr. 1494, ll. 4-19.

The South Carolina Constitution, Article V, § 2, states that the judge shall not charge juries in respect to matters of facts, but shall declare the law. The requirement that the judge "shall declare the law" means that he shall explain so much of the criminal law as is applicable to the issues made by the evidence adduced at trial. State v. White, 211 S.C. 276, 44 S.E.2d 741 (1947); State v. DeRant, 87 S.C. 532, 70 S.E. 306 (1910); State v. Brice, 190 S.C. 208, 2 S.E.2d 391 (1939); State v. Rivers, 186 S.C. 221, 196 S.E.6 (1938).

Other states have held that counsel's reading of laws to a jury in a criminal case is improper. See Owen v. People, 118 Colo 415, 195 P.2d 953 (1948); Tindall v. State, 99 Fla 1132, 128 So. 494 (1930); People v. DeLordo, 350 Ill. 148, 182 N.E. 726 (1932); Reed v. Commonwealth, 140 Ky. 736, 131 S.W. 776 (1910); People v. Smith, 177 Mich 358, 143

N.W. 12 (1913); State v. Jones, 153 Mo. 457, 55 S.W. 80 (1899); Mikolajsak v. State, 96 Tex. Crim. 207, 256 S.W. 927 (1923); State v. Hanna, 81 Utah 583, 21 P.2d 537 (1933); State v. Rholedar, 82 Wash. 618, 144 P. 914 (1914).

The trial court judge is charged with instructing the jury as to the law, not the state, yet in this case (as in many others), the state has an opportunity to address the jury on **two** occasions because they have the right to "open on the law." Here, the state charged the jury as to their fact-finding role, the credibility of witnesses, the role of defense counsel, credibility of evidence, why the judge hears objections out of the earshot of jurors, the defendant's right to confront witnesses against him and why reports are not admissible evidence, the definition of "reasonable doubt", the definition of "malice", the other elements of murder including "aforethought", prior bad acts, the definition of "assault with intent to kill", accessory liability, direct and circumstantial evidence, the voluntariness of the statement made by the defendant, identification procedures, and the credibility of witnesses (again). All of these matters are appropriately charged by the judge, and not the state. The trial court judge erred when he allowed the state to "open on the law." Respectfully, Hackshaw asks this Court to reverse his convictions and remand his case for trial.

VII. The trial court judge erred when he found that Hackshaw forfeited his right to last closing because he testified in his own behalf since doing so is an impermissible punishment for Hackshaw's exercising his right to testify and violated his right to due process.

Hackshaw testified in his own defense during his trial, a foundational Constitutional right. United States Constitution, Amendments 6 and 14. Because he testified, and otherwise entered evidence into trial on his own behalf, he "lost" the right to last closing. Instead, the state was given a second opportunity to address the jury.

Defense counsel motioned to allow Hackshaw to have last closing in his trial. Tr. 1494, l. 21- 1496, l. 15. The trial court judge denied the motion. Tr. 1496, ll. 16-24.

The trial court judge erred because not allowing Hackshaw to have the final closing, simply because he exercised his right to present a defense improperly punishes him for exercising that right. United States v. Goodwin, 457 U.S. 368 (1982); North Carolina v. Pearce, 395 U.S. 711 (1969); State v. Higgenbottom, 344 S.C. 11, 542 S.E.2d 718 (2001). Punishing Hackshaw for the exercise of his constitutional rights denied him due process. Respectfully, he asks this Court to reverse his convictions and remand his case for trial.

CONCLUSION

For the preceding reasons, Hackshaw respectfully asks this Court to reverse his convictions and remand his case for trial.

Respectfully submitted,

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of March, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY HACKSHAW,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment(s);
(2) Tr. Pages 22- 146; Tr. 152- 1644
(3) Sentencing transcript and 3rd party guilt proffer, pages 3-34.
(4) Search warrant;
(5) Mug shot of Ellison Hudson
(6) Torrian Gleaton's statement.

I certify that this designation contains no matter which is irrelevant to this appeal.

March 8, 2012

Elizabeth A. Franklin-Best
Appellate Defender

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THE STATE,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 8th day of March, 2012.

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of March, 2012.

(L.S.)
Notary Public for South Carolina

My Commission Expires: May 16, 2021 .