STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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SEP 16 2016

S.C. SUPREME COURT

CERTIORARI TO RICHLAND COUNTY

The Honorable Maité D. Murphy, Circuit Court Judge

Opinion No. 2016-UP-239 (S.C. Ct. App. Filed 6/1/2016)

1997-CP-40-02059

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

KURTINO WEATHERSBEE,

PETITIONER.

APPENDIX

DAVID E. BELDING
SC Bar #00623
Post Office Box 11964
Columbia, SC 29211
(803) 665-3161
ATTORNEY FOR PETITIONER

THE HON. ALAN M. WILSON
JENNIFER ELLIS ROBERTS, ESQ.
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-5253
ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
SEP 11 2015
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Maité D. Murphy, Circuit Court Judge
Trial Court Case No. 2004GS400882, 2004GS400883, 2004GS400886
Appellate Case No.: 2014–002171

The State, ...Respondent,

v.

Kurtino Weathersbee.....Appellant.

RECORD ON APPEAL

Alan McCrory Wilson
Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3596

Jennifer Ellis Roberts
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3727

Daniel Edward Johnson
Solicitor, Fifth Judicial Circuit
P.O. Box 192
Columbia, SC 29202
803-576-1800

ATTORNEYS FOR RESPONDENT

David Edward Belding
P.O. Box 11964
Columbia, SC 29211
(803) 665-3161

ATTORNEY FOR APPELLANT

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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

The State of South Carolina,

v.

KURTINO WEATHERSBEE
Defendant

BOOK 259 OF 0245

ORDER

Indictment No.: 2004-GS-40-0882 ✓
0883 ✓

Warrant No.: H668239; 43-44 0886 ✓

Charge AR, Burg 1st, Kidnapping

RECEIVED

DEC 17 2014

SC Court of Appeals

RICHLAND COUNTY FILED
2014 SEP 29 P 1:15
JEANNETTE W. WALKER
C.C.P. & G.S.

This matter came before the Court on SEPT. 29, 2014. Present at the hearing were DAVID E. BELDING, representing the Defendant; and RICHARD CATHCART, representing the State.

The following motions were presented: MOTION FOR NEW TRIAL BASED ON AFTER-DISCOVERED EVIDENCE

☐ Attached pertinent documents were submitted by the State/Defendant and were made a part of the record.

The Court determined: THE MOTION WAS NOT MADE TIMELY, BEING MADE NINE (9) YEARS AFTER TRIAL; ALSO, DEFENDANT ARGUES THAT THE STATE'S CHIEF WITNESS PERJURED HERSELF; HOWEVER, THE TESTIMONY COULD BE INTERPRETED IN MORE THAN ONE WAY AND THE JURY WAS IN THE BEST POSITION TO DETERMINE THE CREDIBILITY OF SAID WITNESS.

IT IS SO ORDERED.

9/29/14
Date

Presiding Judge for Fifth Judicial Circuit

COPY

STATE OF SOUTH CAROLINA)		IN THE COURT OF GENERAL SESSIONS
)		FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)		
State of South Carolina,)	Indictment Nos.:	2004-GS-40-0882
)		2004-GS-40-0883
vs.)		2004-GS-40-0886
)		
Kurtino Weathersbee,)		
)		
Defendant.)		

NOTICE OF MOTION AND MOTION FOR NEW TRIAL BASED ON AFTER-DISCOVERED EVIDENCE

TO: THE HONORABLE DANIEL E. JOHNSON, SOLICITOR, and DANIEL R. GOLDBERG, DEPUTY SOLICITOR:

YOU WILL PLEASE TAKE NOTICE that the Defendant, through undersigned counsel, will move before the Presiding Judge of the Fifth Judicial Circuit Court of General Sessions in Richland County on the tenth (10th) day after service hereof, or as soon thereafter as the Court may hear same, for an Order vacating the Defendant's convictions and ordering a new trial pursuant to Rule 29, *South Carolina Rules of Criminal Procedure*, and the general law of the State of South Carolina.

RICHLAND COUNTY FILED 2003 SEP 24 PM 2:39

GROUNDS

The specific grounds for this motion are that the State's chief witness, Laquile Chevett Cummings, testified at trial as follows:

1) that she lived on Bailey Street in Columbia and moved because of a robbery that occurred in January of 2004 (*Transcript* pg. 53 line 18 through pg. 54 line 3, copy attached as Exhibit 1);

2) that she saw the Defendant on the morning of January 25, 2004, a Sunday (*Transcript* pg. 59 line 25 through pg. 60 line 7, copy attached as Exhibit 2);

3) that the Defendant pointed a gun at her children's heads and demanded money; that she gave the Defendant approximately $480.00; that she was on unemployment at the time; and that "it" (the money) was from unemployment (*Transcript* pg. 66 line 17

through pg. 67 line 2, copy attached as Exhibit 3); and,

4) on cross-examination, this witness testified that she had the $480.00 from an unemployment check that she cashed and kept in her purse (*Transcript* pg. 75 line 7 through pg. 76 line 10, copy attached as Exhibit 4).

5) On May 17, 2013, in response to a *subpoena duces tecum* issued by undersigned counsel, the Unemployment Insurance Records paralegal, Nancy Andrews Moorer, for the S.C. Department of Employment & Workforce, issued a certified true copy attached as Exhibit 5) of the records pertaining to Laquile Chevett Cummings which show that the weekly benefit check issued to Ms. Cummings during January 2004 was $204.00, not $480.00.

6) Clearly, the State's chief witness lied about having $480.00 from an "unemployment check".

APPLICABLE LAW

For a defendant to prevail on a motion for a new trial based on after discovered evidence, he must show the evidence (1) "is such as will probably change the result if a new trial is granted;" (2) the evidence has been discovered after the trial has ended; (3) the evidence could not have been discovered by the use of due diligence; (4) "the evidence is material;" and (5) the evidence is not cumulative or impeaching. State v. Needs, 333 S.C. 134, 157-58, 508 S.E.2d 857, 869 (1998) (citing State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993)). Defendant submits that each of these factors exists in this case, as follows:

1. The testimony of the State's chief witness was the crucial evidence tying the Defendant to the alleged crime; as such, her credibility was critically important to the jury's findings. It is clear that the witness lied about where the $480.00 came from – not only does the amount ($480.00) not equal one (1) or even two (2) unemployment checks, she would have had to cash three (3) such checks and only have spent $132.00 of that sum to have had $480.00 in cash on her person. That defies logic. If a witness lies about small details, the witness will lie about anything. The result, the jury's verdict, would clearly have been different if the jury had seen this new evidence because it calls into direct question the credibility of the State's chief witness.

2. Defendant's trial counsel did not know about the unemployment testimony of

the witness until trial. As the *Transcript* shows, Defendant's attorney thought the witness could be impeached by a prior inconsistent statement, *i.e.*, that the money allegedly stolen was from an income tax refund. The statement made under oath that the money came "from unemployment" was a surprise to the Defendant which could not be remedied at trial. As Exhibit 5 indicates, unemployment records have to be subpoenaed, which cannot be accomplished during trial. The Defendant, after the conclusion of his appeal and post-conviction proceedings, had these records subpoenaed which are now available post-trial.

3. The unemployment evidence could not have been discovered through due diligence because the testimony about the money coming from unemployment was first brought forth at trial.

4. This evidence is clearly material to the issue of Defendant's guilt or innocence. Convictions based on perjured testimony cannot be allowed to stand for the justice system to be reliable. The credibility of the State's chief witness was the crux of the State's case.

5. The evidence is clearly not cumulative – there was no other evidence about unemployment compensation at trial. Additionally, the Defendant submits that, when issues of credibility arise, the trial court has the discretion to weigh the evidence. See State v. Parker, 249 S.C. 139, 141, 153 S.E.2d 183, 184 (1967) ("It is a fixed rule that the credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the [trial court]". In this case, the trial court was not allowed an opportunity to weigh the evidence in order to address the credibility of the State's chief witness. "In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009).

Defendant's after-discovered evidence is not "impeaching" in the sense of contradicting the substance of petitioner's testimony but, rather, is directed squarely at the State's chief witness's character for truthfulness. By choosing to testify, a witness puts his character for truthfulness in issue. The unemployment evidence goes far beyond "impeachment" – it shows that the witness actually perjured herself about the source of the

money she claimed was stolen by the Defendant. This lie brings into question the witness's entire account of the alleged crime.

Finally, the Defendant submits that his motion for a new trial is timely under Rule 29(b), *South Carolina Rules of Criminal Procedure*, because the actual discovery of the evidence was in May 2013.

The Defendant prays that the Court inquire into these matters and grant the relief justice requires.

Respectfully submitted,

David E. Belding
Post Office Box 11964
Columbia, South Carolina 29211
Phone: (803) 665-3161
Fax: (866) 220-6352
Email: dar820@sc.rr.com
ATTORNEY FOR DEFENDANT

Columbia, South Carolina

September 24, 2013

MR. CATHCART: AT THIS TIME, THE STATE CALLS LAQUILE CUMMINGS.

LAQUILE CUMMINGS, AFTER BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE CLERK: HAVE A SEAT. PLEASE STATE YOUR FULL NAME FOR THE RECORD.

DIRECT EXAMINATION:

BY MR. CATHCART

Q BRING IT DOWN CLOSER SO WE CAN HEAR YOU. PLEASE STATE YOUR NAME FOR THE RECORD, PLEASE.

A LAQUILE SHAQUETTE (PHONETIC) CUMMINGS.

Q WHERE DO YOU LIVE?

A 108 SANFORD STREET, COLUMBIA.

Q OKAY. AND HOW LONG HAVE YOU BEEN THERE?

A SINCE APRIL OF LAST YEAR.

Q APRIL OF LAST YEAR YOU MOVED OUT FROM YOUR OLD PLACE?

A YES, SIR.

Q WHERE WAS YOUR OLD PLACE?

A 1501 BAILEY STREET.

Q 1501 BAILEY, THAT'S HERE IN RICHLAND COUNTY?

A UH-HUH.

Q IN THE CITY LIMITS OF COLUMBIA?

A (NODS IN THE AFFIRMATIVE).

Q WHY DID YOU MOVE FROM BAILEY STREET?

A BECAUSE OF A ROBBERY THAT OCCURRED IN JANUARY OF

2004.
Q THAT'S THE ONE WE'RE TALKING ABOUT TODAY?
A YES, SIR.
Q AND HOW LONG HAVE YOU BEEN AT BAILEY STREET?
A WE MOVED IN APRIL OF THE PREVIOUS YEAR.
Q WHEN YOU SAY "WE", WHO IS WE?
A ME, MY TWO KIDS, AND THEIR FATHER.
Q OKAY. NOW, YOU SAID -- NOW, THEY'RE FATHER IS WHO?
WHO IS THEIR FATHER?
A MARIO WEST.
Q MARIO WEST IS THE GENTLEMAN SITTING RIGHT THERE?
A YES, SIR.
Q AND YOU HAVE TWO KIDS?
A YES, SIR.
Q WHAT ARE THEIR NAMES?
A JANIA WEST AND ELECTRA WEST.
Q WHAT ARE THEIR AGES?
A NOW JANIA IS THREE AND ELECTRA IS ONE.
Q SO BACK WHEN THIS OCCURRED --
A JANIA WAS ONE AND ELECTRA WAS SIX MONTHS.
Q OKAY. AND THEY'RE -- ALL OF YOU LIVED TOGETHER AT
1506 BAILEY?
A YES, SIR.
Q 1501 BAILEY, I'M SORRY. I KNEW I'D GET IT WRONG.
WHERE ARE YOU WORKING?

A YES.

Q HE HAS HUNG OUT MORE WITH YOUR BOYFRIEND THAN WITH YOU?

A YES.

Q AND YOU KNEW HIM BY FACE AND YOU --

A AND HEARING HIM CALL HIS NAME, YES.

Q OKAY. AND HOW LONG HAS HE BEEN -- OR AT LEAST THAT YOU KNOW THAT HE'S BEEN OVER TO MEKA'S HOUSE?

A IT WAS ABOUT TWO WEEKS.

Q AND YOU SAW HIM OFF AND ON?

A YES, SIR.

Q SO I BELIEVE YOU INDICATED MARIO KNEW HIM BETTER THAN YOU DID?

A YES.

Q DO YOU SEE MR. WEATHERSBEE PRESENT IN THE COURTROOM TODAY?

A YES, SIR.

Q CAN YOU PLEASE POINT HIM OUT?

A WITH THE BLACK SUIT ON.

MR. CATHCART: OKAY. LET THE RECORD REFLECT SHE HAS POINTED TO THE DEFENDANT, KURTINO WEATHERSBEE.

THE COURT: THE RECORD REFLECTS.

MR. CATHCART: THANK YOU, YOUR HONOR.

BY MR. CATHCART

Q DID YOU SEE THE DEFENDANT, MR. WEATHERSBEE, ON THE

MORNING OF JANUARY 25TH, 2004?

A YES, I DID. HE KNOCKED ON THE DOOR PRIOR.

Q LET ME ASK YOU THIS FIRST: DO YOU RECALL WHAT DAY IT WAS MONDAY, TUESDAY, WEDNESDAY?

A IT WAS A SUNDAY.

Q SUNDAY?

A SUNDAY MORNING.

Q WHEN DID YOU FIRST SEE KURTINO?

A IT WAS -- I WANT TO SAY A LITTLE BEFORE 12 HE KNOCKED ON THE DOOR AND ASKED IF MARIO WAS HOME. MARIO HAD LEFT, PLAYED BASKETBALL WITH ANOTHER GUY THAT WAS STAYING IN THE HOUSE WITH MEKA.

Q OKAY. WAS HE WEARING ANYTHING? I GUESS HE WAS WEARING SOMETHING. WHAT WAS HE WEARING?

A IT WAS JUST A REGULAR T-SHIRT AND A PAIR OF BLUE JEANS.

Q OKAY. DID YOU NOTICE ANYTHING ELSE ABOUT HIM THAT WAS UNUSUAL?

A AT THAT TIME, NO.

Q DID YOU SEE HIS SHOES?

A AT THAT TIME, NO.

Q OKAY. DO YOU KNOW WHAT KIND OF SHOES HE WAS WEARING?

A SIR, AT THE TIME THAT HE KNOCKED ON THE DOOR THE FIRST TIME?

Q YEAH.

BY HIS SIDE. HE WASN'T --

Q OKAY.

A -- POINTING IT AT ME ANY LONGER.

Q HE DIDN'T POINT IT AT YOUR DAUGHTER'S HEAD ANY MORE. HE POINTED IT DOWN?

A HE JUST POINTED IT DOWN, YES, SIR.

Q HE KEPT CONTROL AND POSSESSION OF THAT GUN?

A YES, SIR.

Q WHILE HE HAD THAT GUN ON YOU, WERE YOU FREE TO LEAVE?

A NO, SIR.

Q COULD YOU LEAVE YOUR APARTMENT, JUST WALK OUT THE DOOR?

A NO, SIR.

Q DID YOU LEAVE YOUR CHILDREN IN THERE WITH A GUN TO THEIR HEADS?

A NO, SIR.

Q WERE YOUR CHILDREN FREE TO LEAVE OUT OF THERE WITH A GUN POINTED TO THEIR HEADS?

A NO, SIR.

Q YOU GAVE HIM -- DO YOU RECALL HOW MUCH MONEY YOU GAVE HIM?

A IT WAS APPROXIMATELY $480.

Q AND YOU WERE ON UNEMPLOYMENT AT THAT TIME?

A UH-HUH.

Q AND THAT WAS BASICALLY THE PROCEEDS OF YOUR

UNEMPLOYMENT CHECK?
A IT WAS UNEMPLOYMENT, AND I WAS SELLING AVON.
Q AND AFTER HE PUT THE GUN DOWN AND I BELIEVE YOU SAID LEFT THE APARTMENT, HE TOLD YOU WHAT?
A "YOU BETTER NOT CALL THE POLICE."
Q OKAY. AFTER HE LEFT, WHAT DID YOU DO?
A AT FIRST I GRABBED MY DAUGHTER. AFTER HE LEFT, THEY BOTH STARTED CRYING, THEN I CALLED MARIO'S BROTHER, CHICO WEST.
Q OKAY. AND THAT WAS THE FIRST PERSON YOU CALLED?
A YES, SIR.
Q OKAY. AND WHAT HAPPENED AFTER YOU CALLED HIM?
A I ASKED HIM WHERE HE WAS AND --
MS. SAMPSON: OBJECTION, YOUR HONOR. SHE'S ABOUT TO GO INTO HEARSAY, I BELIEVE, IF SHE IS ABOUT TO TELL WHAT HE TOLD HER.
THE COURT: I DON'T KNOW IF IT'S BEING OFFERED FOR THE TRUTH OF THE MATTER ASSERTED. LET'S HEAR WHAT THEY HAVE TO SAY.
BY MR. CATHCART
Q AFTER YOU CALLED HIM, WHAT HAPPENED?
A HE JUST ASKED ME WHAT WAS WRONG. I TOLD HIM, ASKED HIM WHERE HE WAS. HE SAID HE WAS ON TWO NOTCH. HE SAID HE WOULD BE THERE IN A MINUTE. I JUST STAYED THERE. I DIDN'T DO ANYTHING ELSE UNTIL HE GOT THERE.

Q PLEASE ANSWER ANY QUESTIONS FROM DEFENSE COUNSEL.

CROSS-EXAMINATION:

BY MS. SAMPSON

Q GOOD AFTERNOON, MS. CUMMINGS. IF YOU NEED TO TAKE A BREAK, JUST LET ME KNOW.

A NO PROBLEM.

Q YOU STATED ON DIRECT THAT THIS MONEY, THIS $480, THAT YOU HAD IT FROM AN UNEMPLOYMENT CHECK?

A YES, AND SELLING AVON.

Q COULD YOU -- I'M NOT SURE?

A UNEMPLOYMENT AND SELLING AVON.

Q THANK YOU. DO YOU REMEMBER TALKING TO THE OFFICERS WHEN THEY FIRST ARRIVED AT YOUR APARTMENT?

A YES.

Q AND YOU SPOKE WITH -- DO YOU REMEMBER IF YOU SPOKE WITH OFFICER BLEVINS OR OFFICER WINES, DO YOU REMEMBER WHICH ONE IT WAS?

A NO.

Q DO YOU REMEMBER TELLING THEM THAT IT WAS FROM AN INCOME TAX CHECK?

A NO. I DIDN'T TELL THEM THAT. THEY WERE SPEAKING TO MARIO'S BROTHER, AND HE SAID IT WAS AN INCOME CHECK. I NEVER SAID ANYTHING.

Q HE TOLD THEM THAT INFORMATION?

A YES.

Q YOU DIDN'T GIVE THEM THAT?
A EXACTLY.
Q. OKAY. BUT IT WAS -- WELL, LET ME JUST ASK YOU THIS: THIS UNEMPLOYMENT CHECK, DO YOU GET PAID IN CASH OR A CHECK?
A A CHECK.
Q YOU CASHED IT?
A YES.
Q AND YOU JUST KEPT IT ON YOU IN YOUR PURSE?
A YES.
Q ALL RIGHT. NOW, YOU ALSO, WHEN YOU TALKED TO THE INVESTIGATORS, TOLD THEM THAT THE PERSON CAME TO YOUR HOUSE ONCE AND KNOCKED?
A YES.
Q AND THEN LEFT?
A YES.
Q AND CAME BACK LATER?
A YES.
Q DO YOU REMEMBER TELLING THEM THAT THERE WAS 30 MINUTES BETWEEN THEM?
A NO.
Q YOU DON'T REMEMBER TELLING THEM THAT? AND YOU STATED ON DIRECT, I BELIEVE, THAT THE PERSON -- WHEN HE CAME UP THE SECOND TIME -- DO YOU HAVE A PEEPHOLE IN YOUR DOOR?

PO Box 995
1550 Gadsden Street
Columbia, SC 29202
www.dew.sc.gov

Nikki R. Haley
Governor

May 17, 2013

Mr. David E. Belding
Attorney-at-Law
PO Box 11964
Columbia, SC 29211

Re: Kurtino Weathersbee # 292557 v. State of South Carolina
Laquile Chevett Cummings Case No.: 2011-CP-40-5354

Dear Mr. Belding:

This is in response to your letter dated April 29, 2013, transmitting to us your subpoena and check #1007 in the amount of $25.00 for the unemployment information for December 2003 and January 2004, pertaining to Laquile C. Cummings.

We have limited information for records during the time period requested. This individual did file for unemployment insurance benefits in October of 2003 with her benefit year ending on October 25, 2004 and during that period she did receive unemployment benefits but we cannot be more specific as to what weeks she received those benefits. I was able to find out from our Benefits Manager that this individual was paid $1,632.00 in benefits in 2003 with $160.00 withheld in federal taxes and $112.00 withheld in state taxes. As for 2004, $2,040.00 was paid in benefits with $200.00 withheld in federal taxes and $140.00 withheld in state taxes. Enclosed is a copy of the determination that was mailed to Ms. Cummings.

If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

Nancy Andrews Moorer, Paralegal
UI Records
SC Dept. of Employment & Workforce
803.737.0856
NMoorer@dew.sc.gov

Enclosure(s)
UI-1

UCB-103
REV. MAY 2000

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

P.O. BOX 995, COLUMBIA, S.C. 29202

LAQUILE C CUMMINGS

1501 BAILEY ST

COLUMBIA SC 29203

DATE OF THIS NOTICE 11/24/03

CLAIMANT'S NAME				SOCIAL SECURITY NUMBER	EFFECTIVE DATE	DISQUALIFICATION ENDS	
LAQUILE C CUMMINGS				[redacted]5605	10/26/03		
L.O. NO.	TYPE	CATEGORY	WEEKLY BENEFIT AMOUNT	MAXIMUM POTENTIAL ENTITLEMENT	LESS REDUCTION OF	NET TOTAL BENEFITS	BENEFIT YEAR ENDS
400	I	01	$ 204.00	$ 3673.00	$ 0.00	$ 3061.00	10/25/04

DETERMINATION BY CLAIMS ADJUDICATOR ON CLAIM FOR BENEFITS

X You are eligible for benefits from the above effective date.

_____ You have been disqualified from receiving benefits or have been found to be ineligible for benefits for the following reason(s).

YOU LEFT YOUR MOST RECENT BONA FIDE EMPLOYER DUE TO MATERIAL CHANGES IN THE WORKING CONDITIONS. IT HAS NOT BEEN ESTABLISHED THAT YOUR CONDUCT CAUSED THESE CHANGES. IT IS CONSIDERED THAT YOU QUIT WITH GOOD CAUSE UNDER THE SOUTH CAROLINA EMPLOYMENT SECURITY LAW, SECTION 41-35-120(1).

_____ LAST SEPARATION FROM NON-LIABLE EMPLOYER

JOHN LEWIS
UI CLAIMS ADJUDICATOR

MAILING DATE 11/25/2003

IMPORTANT: THIS DETERMINATION WILL BE THE FINAL DECISION OF THE COMMISSION UNLESS YOU FILE AN APPEAL SETTING FORTH IN DETAIL THE GROUNDS FOR APPEAL WITHIN TEN (10) CALENDAR DAYS, INCLUDING WEEKENDS AND HOLIDAYS, FROM THE MAILING DATE SHOWN ABOVE. IF THE TENTH DAY FALLS ON A SATURDAY, SUNDAY, OR HOLIDAY, THE APPEAL PERIOD IS EXTENDED TO THE NEXT BUSINESS DAY. YOUR APPEAL MAY BE FILED IN PERSON AT ANY EMPLOYMENT SECURITY OFFICE, OR BY MAIL, ADDRESSED TO THE "APPEAL TRIBUNAL," P.O. BOX 995, COLUMBIA, SOUTH CAROLINA 29202. FOR ADDITIONAL INFORMATION OR ASSISTANCE IN FILING AN APPEAL, CONTACT YOUR LOCAL EMPLOYMENT SECURITY OFFICE.

016

018

SOUTH CAROLINA DEPARTMENT
OF EMPLOYMENT AND WORKFORCE
Post Office Box 995
Columbia, South Carolina 29202

I certify that the attached is a true copy of the records pertaining to Laquile Chevett Cummings, xxx-xx-5605.

Nancy Andrews Moorer, Paralegal
SC Department of Employment & Workforce

Columbia, South Carolina
May 17, 2013

Indictment Nos.: 2013-GS-40-06614
2013-GS-40-06615
2013-GS-40-06617

CERTIFICATE OF SERVICE

The undersigned hereby attests that on this 24th day of September 2013, he served a copy of the within *Notice of Motion and Motion for New Trial Based on After-Discovered Evidence* on the State of South Carolina, in accordance with Rule 5(b) (1), *South Carolina Rules of Civil Procedure*, as applicable to service of motions under the *South Carolina Rules of Criminal Procedure*, by personally delivering a clocked copy of same to the Office of the Fifth Judicial Circuit Solicitor at 1701 Main Street, 3rd Floor, Columbia, South Carolina, 29201.

David E. Belding

Columbia, S.C.

September 24, 2013

State of South Carolina) In the Court of General Sessions
) Fifth Judicial Circuit
County of Richland) 2004-GS-40-00882, -884, -886

State of South Carolina,

Plaintiff,

Vs.

Kurtino Weathersby,

Defendant.

Transcript of Record

September 29, 2014
Columbia, South Carolina

B e f o r e:

The Honorable Maite D. Murphy, Judge

A p p e a r a n c e s:

Richard Cathcart, Esquire
Attorney for the Plaintiff

David E. Belding, Esquire
Attorney for the Defendant

Bonnie H. Kelly, CVR
Circuit Court Reporter

I N D E X

E X H I B I T S

NO.	DESCRIPTION	I.D.	EV.

-- NO EXHIBITS ENTERED --

THE COURT: Mr. Belding, I take it this is your motion?

MR. BELDING: it is my motion, Your Honor.

THE COURT: All right, sir. I'm happy to hear from you.

MR. BELDING: May it please the Court, Your Honor. I represent Kurtino Weathersby. I was originally court appointed to represent him in a post-conviction relief action. Out of that case, I discovered that there was some information that probably should have come up at trial.

Attached to my motion is -- are some exhibits that I will be referring to. But this case basically turned on the testimony of the State's chief witness, a lady named "Lapeel Chevette Cummings [phonetic]," who was the alleged victim.

Now, in my -- in -- do you have my motion with you, Your Honor?

THE COURT: I don't.

MR. BELDING: Oh. That -- that's always helpful to have. You don't have it in the file anywhere?

THE COURT: I don't have the file. All I have is what ---

MR. BELDING: Okay.

THE COURT: --- you just handed me.

MR. BELDING: Tell you what, I've got one copy, but

it's mine. I'll share Richard's, if that's all right.

THE COURT: That's fine.

(Mr. Belding confers with Mr. Cathcart.)

MR. BELDING: Your Honor, the State's chief witness -- this -- this trial was very unusual. I just attached a few relevant pages of the trial transcript to the motion.

First of all, she testified that she lived on Bailey Street in Columbia. And in Exhibit 1, which is about four pages back, she testifies, in response to questions from Mr. Cathcart, the she lived at 1501 Bailey Street. That's on page 53 of the transcript, at line 19.

In the exhibit -- that I'd like to make part of the record -- the official trial copies of the indictment and sentencing sheet that I obtained from the Attorney General's Office, there are three arrest words attached to each one of the indictments. And each one of them -- it's a little hard to read, but they're -- they're legible -- it states that the defendant lived at 1406 Bailey Street. So she -- there's a discrepancy between the arrest warrants and the testimony of the State's chief witness at trial.

That's important because the Defendant has always maintained that she did not tell the truth, that she perjured herself while under oath in this courtroom. So that is a small detail, but it's an important detail because if she couldn't even testify to where she lived at

the time this alleged crime was supposed to have been committed, her testimony is clearly painted from the start.

But more than that, then she testified -- this is No. 3 on the front page of the -- the motion for a new trial. She was asked by Mr. Cathcart, you know, what was stolen from her as part of the burglary. She testified that $480 was stolen. And in response to a question from Mr. Cathcart, she says -- and this is on page 66, which is part of Exhibit 3 -- page 66 of the transcript, Mr. Cathcart's got her on direct. And she testifies as to what he stole from her, allegedly, at gun point.

And the question on line 20 is (as read): "You gave him -- do you recall how much money you gave him?" And the response was (as read): "It was approximately $480."

And Mr. Cathcart says (as read): "And you were on unemployment at that time?" And she says (as read): "Uh-huh."

Question: "And that was basically the proceeds of your unemployment check?"

And she says (as read): "It was unemployment, and I was selling Avon."

Attached to the motion I have a letter from the South Carolina Department of Employment and Workforce, and the printout that they sent me, pursuant to a subpoena. The letter indicates that the State's chief witness, Ms.

Cummings, was on employment for one year, and that it ran out on October the 25 of 2004.

This trial took place in January 25 -- and you know the exact date -- she got -- January 25 of 2000 -- January 25 of 2005, almost exactly 3 months after she got her last unemployment check. And DEW has confirmed that the amount of each check was $204, and that's in your exhibit.

We think the State's chief witness clearly lied to this Court. There's no way anyone who's on unemployment would keep money from an unemployment check for three months. Not to mention the fact that the checks were only $204 a piece, and she says she lost $480.

So she stated -- and -- and the -- the thing is, it wasn't really even necessary. The State does not have to prove, in a -- in a burglary or armed robbery case, why someone had the money. They just have to state what was stolen.

And in this case, we believe the prosecution wanted her to say that the money came from unemployment because of how it would play to the jury; that the defendant, actually at gun point, stole money from a lady who was on unemployment, and that's where she got her money from.

The fact is, as -- as we have been able to discover and which was not available to the trial attorney at the trial because she was surprised by that testimony -- what

had been disclosed to her in the discovery by the State was that that money came from an income tax refund. As a matter of fact, that is attached to Motion 2, a very brief cross-examination by his trial attorney, Ms. Sampson, to the effect that (as read): "I thought you said it was an income tax refund?" And she essentially responds (as read): "No. My brother said that. I never said that. The money came from unemployment and selling Avon."

No way it came from unemployment, Your Honor. It's clear from the records that she could not have used -- had that money from unemployment for three months. She'd have had to save up more than two checks to get $480. We believe that that clearly shows the State's chief witness perjured herself in that -- in this courtroom.

And also the fact that they say it's from unemployment to try and get some sympathy from the jury, it is improper and it was perjured testimony.

If Mr. Cathcart will allow me, let me just point out one more thing.

(Mr. Belding and Mr. Cathcart confer.)

MR. BELDING: We think that the -- the defendant has -- can show conclusively through this motion that the State's chief witness perjured her testimony.

But in addition, I would like the Court's indulgence, if she would allow the defendant to also tell you -- since

this is his day in court -- what the State's chief witness did and why he is not guilty of this, why a new trial is warranted in this case. Thank you, Your Honor.

THE COURT: Mr. Weathersby?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Have you been placed under oath yet?

THE DEFENDANT: No, ma'am.

KURTINO WEATHERSBY, having been first duly sworn, testifies as follows:

THE COURT: All right, sir. What would you like to tell me?

THE DEFENDANT: This gonna be real hard. I thought I was gonna be sitting down for cross-examination and -- will you bear with me, please?

THE COURT: Sure.

MR. BELDING: Let me -- can I help him get this out?

(Brief pause.)

THE DEFENDANT: I was convicted in trial by jury for kidnap, arm robbery, and burglary first of a child and her mother. For a gun -- that everybody express their opinion that they knew they had -- I like to point out that the evidence is not overwhelming -- I got nine points to make that the evidence is not overwhelming.

My first point is --

MR. CATHCART: Your Honor, I don't mind him speaking

his mind. This is not part of the motion -- it's not part of the written motion. I ask that we stick to this, the fact -- to mainly the only thing that was in the motion was talking about the money.

THE COURT: Mr. Belding, is this what he's going to talk about?

MR. BELDING: I believe so, Your Honor. And I -- I believe -- I appreciate any indulgence you can give just to let him explain why he was not guilty; and why that testimony from the State's chief witness was, in fact, not true.

THE COURT: All right. So Mr. Weathersby, you understand that what's before me is what's filed in the motion. The other side has to have opportunity to hear your -- to be served with notice as to what you intend to present to the Court, so they have a proper opportunity to prepare and respond.

So what I will consider is what matters are contained within your attorney's motion, as to those matters, so that they have proper notice that -- to be here and respond accordingly. Okay?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. You may proceed.

THE DEFENDANT: Is it -- can I request a continuance so that I may do that?

THE COURT: No, sir. You're -- you're -- I'm happy to hear everything that's properly before the Court on -- on your motion, based on what your attorney's filed. If you have anything to tell me on that, I'm happy to hear from you. So you may go ahead.

THE DEFENDANT: Okay. Well, I been researching my case for over 10 years. And to my understanding, from cases that I read, I believe it's a must -- or that I prove to the Court how the evidence is not overwhelming; and also how this new evidence would change the outcome of the trial if it was had.

I'm not aware that I had to let him know before we came so he could be prepared. I'm not aware of that.

THE COURT: Well, you can tell me what you want to tell me.

THE DEFENDANT: Everything is constricted [sic] to the evidence. I mean, I -- I have exhibits that I want to present to you and all type of thing. I never thought it was gonna happen like this. I thought I was gonna be on cross-examination, maybe sitting at that booth right there where I could take my time.

THE COURT: Well, this is not a new trial. This is a motion for a new trial, based upon the facts as stated by your attorney, regarding the testimony of the witness that testified against you.

THE DEFENDANT: Uh-huh. So I have --

THE COURT: You understand that?

THE DEFENDANT: So I have to constrict [sic] my evidence to what's in the motion. Only ---

THE COURT: That's right.

THE DEFENDANT: Only dealing with the unemployment and the money?

THE DEFENDANT: That's correct.

(The defendant and Mr. Belding confer.)

THE DEFENDANT: The other evidence in my case concerning armed robbery was cocaine evidence, which is found in the police ---

MR. CATHCART: Again, Your Honor, this has nothing to do with the money.

(The Court and the defendant speak simultaneously.)

THE COURT: I'll give him ---

THE DEFENDANT: It's in ---

THE COURT: --- a little latitude to -- just tell me what you want to tell me, and then ---

THE DEFENDANT: It's material evidence ---

THE COURT: --- I'll consider ---

THE DEFENDANT: --- at my trial. The $480 was never recovered, it was never seen. It was just alleged, and obviously the lady committed perjury.

I was never caught with no weapon or -- it's cameras

in the complex, and the Columbia Police Department erred on losing me being taken to jail, to prison. But they never held -- withheld cold, hard evidence of me walking cross the parking lot to rob somebody for $480 in -- early in the morning. They -- they gave me excuse that they record over their tapes every month.

Okay. The cocaine evidence was material that was used at my trial by Mr. Cathcart. He wanted to make sure -- the victim wasn't saying I robbed him for drugs. He just wanted to make sure he had a witness come in and say I told her I did. Everything was circumstantial.

Okay. The cocaine evidence was never used to -- to convict me of arm robbery -- it was used to convict me of arm robbery, but it was never even a conviction. The next day it was *nolle prossed*.

This $480 -- it's after the holidays. Like -- like my lawyer said, this woman had to keep $204 out of a check not once, not twice, but three times, and not spend none. This is an unemployment woman, on Section 8, with two toddler children.

All right. All the evidence concerning the testimony and all those different things, I was prepared to say today, but I don't know -- I -- I wasn't informed that I had to constrict [sic] my argument to this $480 and this unemployment. But that's the main thing.

If you never had this $480, how could I have robbed you? I never possessed the weapon. I was never even proven to possess the weapon. There's cameras in the complex.

Everybody testimony was the same at trial -- everybody's -- everybody's testimony was not the same at trial. You got one person saying, oh, I was at the basketball court; the other person saying I was at church; and another person was in a totally different apartment building.

Now, I'm not gonna sit up here and say I'm a saint or anything and the situation didn't happen, but I -- I was wrongfully convicted for arm robbery, kidnap, and burglary first of a toddler child and her mother. I never brandished a gun on anybody.

I don't know the law; I don't know the case -- I -- I don't know nothing about the law, I just know my case. I mean, this -- this is very hard and difficult for me. I been doing this for 10 years, writing paperwork to the Courts; and now I'm being constricted [sic] at the last minute.

I wish my lawyer would have let me know. This just too hard for me. I mean, I'm -- I'm fighting for my life for something that should have been done by professionals in the court.

I never robbed nobody, ever, $480. I wish the female and her family was here today so you can view them and see them and their responses and -- and put them under cross-examination.

The evidence against me is -- the material evidence was never even proven. The material evidence was I was in the police car, they found cocaine, and Mr. Cathcart wanted to make sure the victims wasn't claim that I stole drugs.

The only material evidence they had at trial -- but the material evidence that they say I actually robbed for, they don't have it. It's -- it's proven fact this woman committed perjury. She should be in jail. They should be in jail.

I been in jail for almost 11 years for something I've never done, period, in my lifetime ever. I asked my lawyer then, Ms. April Sampson, "Can you give me a polygraph test, and if I fail, I'll plead guilty to the max. But if not, if I pass the test, don't even send me back to the county jail. Let me walk out the front door."

My son is sitting back here. I haven't seen him since he was one -- three years old for something I never done, ever. Mr. Cathcart got a job to do. He was supposed to secure his conviction, and that's what he did. He swayed the jury. That's what he did.

I was never proven to rob anybody, and this is proof

it's perjury. And it's more evidence that I am not even allowed to even bring forth to you today in this case.

So if it's constricted [sic] to just the $480, it's all relevant; it's all blatant. How could I arm rob somebody for something that they didn't even have?

THE COURT: Thank you, Mr. Weathersby. Solicitor?

MR. CATHCART: Please the Court, Your Honor. First step -- hurdle that they have is time limits as to this motion. This is almost 9 years later. This is also information that could have been available to them at that time.

Notwithstanding, by the defendant's own motion through counsel, they've indicated that all she said was the money was from that one specific source. But by transcript that they handed forward, I would point out page 67 from -- from direct examination (as read): "It was from unemployment and I was selling Avon."

That's not limiting the money to just unemployment. She says "... and I was selling Avon."

THE DEFENDANT: There's no such evidence that the woman was selling ---

THE COURT: Mr. Weathersby, you don't need to ---

THE DEFENDANT: I apologize. I apologize.

MR. CATHCART: I will point out to you again, Your Honor, on page 75, upon cross-examination by defense

counsel, she again said that (as read): "It was unemployment and I was selling Avon."

MR. CATHCART: It is consistent with what the facts were, the facts that were testified to. At no point did she say, "I only had $480." She said approximately. At no point did she say it was only from these checks. She said that was -- where the source was from, the checks and also selling Avon.

THE COURT: Anything further from anyone?

MR. BELDING: Let me summarize real quick, Your Honor. I just want to make sure that you -- I mean, Mr. Cathcart's points are -- are logical. Let me tell you why I just don't agree with them.

One is I did the PCR, post-conviction relief. Interestingly enough, the attorney general who was on the other side just happens to be here for another hearing.

The problem with it was was that discovery that was provided to the defense indicated that the money came from an income tax refund. So when this came up at trial, she was clearly surprised. That's why she asked her, on cross-examination, "I thought you" -- and it's in the motion, just the relevant page -- "I thought you got it from a tax refund?" "No. I never said that. My brother said that. The police wrote it down wrong." So it didn't leave his defense counsel anything to cross-examine from. She just

told them that.

The point is is that even if you believe that she was on unemployment, the records clearly show that that's not true; that she'd been off unemployment for three months at the time of the trial. And she can't even get her address right. It's different than what the police say.

My point is -- and this is basically what came up at the PCR. That's why the motions been pending for a year and a half.

The point is is the State's chief witness, the only person that could put him at the scene and alleged that he committed these crimes, didn't tell the truth about where she lived and where she got the money from.

And when the State's chief witness tells untruthful testimony and results in the conviction of somebody, we feel that that subverts the interest of justice.

So we're moving for a new trial on the grounds that the State's chief witness perjured herself at least in two specific points that we can document. The rest of it's going to be, you know, he said/she said kind of stuff. But this stuff is clear, and that's our -- that's our motion, Your Honor.

THE COURT: I -- I certainly understand; however, based upon what you've presented to the Court with the -- with the transcripts, certainly there's a question of the

timeliness of the motion being so late. And I understand the -- the PCR issues. However, it's not really timely.

Certainly at -- during cross-examination, when the question came up as to where the money came from, she said, "No. That's what my brother said." That's -- that's part of cross-examination. Certainly it's not a material fact.

I don't think anything you've provided to me shows that she's perjured herself. Just because you don't think someone can save two paychecks or she -- where exactly the money came from, it's not a material fact that a victim has to prove exactly where the money came from to -- to make it -- to make it a material fact in the issue.

I think at the trial, certainly, the jury's in the best position, and they're instructed to judge the credibility of the witnesses; and that's within, completely, their purview.

And so I'm going to respectfully deny your motion.

MR. CATHCART: Thank you, Your Honor.

-- END OF TRANSCRIPT RECORD --

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Maité D. Murphy, Circuit Court Judge

Appellate Case No.: 2014–002171

The State, ...Respondent,

v.

Kurtino Weathersbee.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the foregoing Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

David E. Belding (SC Bar #000623)
Post Office Box 11964
Columbia, South Carolina 29211
(803) 665-3161
ATTORNEY FOR APPELLANT

September 10, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of General Sessions

Maité D. Murphy, Circuit Court Judge

Appellate Case No. 2014-002171

THE STATE,

Respondent,

v.

KURTINO WEATHERSBEE,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

Post Office Box 192
Columbia, SC 29202
(803) 576-1800

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court properly denied Appellant's motion for a new trial based on after-discovered evidence because the testimony he presented to support his contention that the witness perjured herself could be interpreted in such a way by the jury as to lend credibility to her testimony and the motion was not timely made.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

The trial court properly denied Appellant's motion for a new trial based on after-discovered evidence because the testimony he presented to support his contention that the witness perjured herself could be interpreted by the jury in such a way as to lend credibility to her testimony and the motion was not timely made.

Appellant contends the trial court erred in denying his motion for a new trial based on after-discovered evidence, arguing he had produced records (allegedly not available at trial) that contradict the testimony of the State's chief witness, the victim. However, the unemployment records produced by Appellant that show the amount and time the victim received unemployment benefits do not contradict her testimony. Thus, the trial court correctly denied the motion.

The granting of a motion for a new trial based on after-discovered evidence is not favored and, absent error of law or abuse of discretion, an appellate court will not disturb the trial judge's denial of the motion. State v. Needs, 333 S.C. 134, 158, 508 S.E.2d 857, 869 (1998). For a defendant to prevail on such a motion, he must show the evidence: (1) is such as will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered prior to trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. Id. at 157-58, 508 S.E.2d at 869.

As to the first factor, it is unlikely the evidence would change the result if a new trial were granted. As Appellant himself conceded, the State did not have to prove why the victim had the money; it was sufficient for her to simply state what was stolen. Appellant argues the jury's verdict would have been different because seeing this new evidence would have called into question the victim's credibility. However, Appellant

was able to effectively attack her credibility through cross-examination about the discrepancy between what was in the police report versus what she testified to at trial. Thus, Appellant had the opportunity to call the victim's credibility into question before the jury even without this evidence. The jury was able to evaluate the victim's credibility, as instructed by the trial court, and found Appellant guilty.

The third factor, that the evidence could not have been discovered prior to trial by the exercise of due diligence, is not met because even though the police report indicated that the victim's money came from a tax refund, Appellant's counsel could have met with the victim to determine whether the money came from any other sources if he felt the origin of the money was material. Whatever the case, the trial judge properly determined the evidence was not material (the fourth factor) based on the fact that a victim does not have to prove where stolen money came from. Appellant argues, "Convictions based on perjured testimony cannot be allowed to stand." However, as explained further below, Appellant's assertion that the victim gave perjured testimony is unsupported by the record.

Lastly, the evidence was only cumulative because it supported the victim's testimony that part of the money was what she had been receiving as unemployment benefits and was merely impeaching because it was going to be used by Appellant to discredit the victim's statement about the source of the money. For all of these reasons, the trial judge correctly denied Appellant's motion for a new trial because he did not meet the criteria to prevail on such a motion. Needs, 333 S.C. at 157-58, 508 S.E.2d at 869.

Appellant's claim that the witness perjured herself about the source of the money is a very strong claim that is not supported by the record. As the trial judge astutely

pointed out, the witness explained that her brother was the one who said the money came from a tax refund. She always maintained it came from her unemployment and from selling Avon. (R. 24.)

Appellant notes the documentation shows the victim had not been receiving unemployment benefits for three months prior to the crime and argues "[t]here's no way anyone who's on unemployment would keep money from an unemployment check for three months." (R. 25.) This is a wholly unsupported assertion. Not only does testimony exist showing she got some of her money from selling Avon, but as even Appellant points out, the State did not have to prove why she had the money; she only had to state what was stolen. (R. 25.)

Here, the trial judge appropriately found the evidence was not material. (R. 37.) She noted Appellant was able to use cross-examination to question the witness about what her brother had said about the source of the money versus what she said on the stand. (R. 37.) The trial judge determined Appellant had not provided anything to show the witness perjured herself. (R. 37.) Furthermore, she found that because a victim is not required to prove exactly where money came from, whether someone could save money from two unemployment checks was not a material fact in issue. (R. 37.) Finally, she relied on the fact that the jury was in the best position to judge the credibility of the witnesses. (R. 37; R.2.)

Rule 613(b), SCRE provides:

> 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. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Rule 613(b), SCRE (emphasis added).

Appellant argues Rule 613, SCRE, would have allowed him to use extrinsic evidence to prove the witness made the statement because she did not admit she made such a statement. However, Appellant's assertion that he would have then been able to introduce the unemployment records is incorrect. The only extrinsic evidence he could have produced is the proof of the statement itself. See State v. Moses, 390 S.C. 502, 522, 702 S.E.2d 395, 405-06 (Ct. App. 2010) (finding the trial court did not err in allowing extrinsic evidence proving a prior inconsistent statement); see also Rule 613(b), SCRE (clarifying "extrinsic evidence of a prior inconsistent statement" means "evidence of such statement" or "evidence that the prior statement was made"). According to the record, it appears the statement may have been a police report. (R. 35.) The unemployment records would not qualify as extrinsic evidence of a "prior inconsistent statement by a witness." Rule 613(b), SCRE.

The trial court also determined Appellant's motion was not timely. Appellant argues the motion was timely under Rule 29(b), SCRCP, because the actual discovery of the evidence was in May 2013. In his Motion for New Trial, Appellant maintained that he received a copy of the victim's unemployment records from the SC Department of Employment and Workforce on May 17, 2013. (R. 3.) However, according to Appellant's own Statement of the Case, he filed his PCR application in August 2011, alleging newly-discovered evidence, which seems to indicate he would have known about the evidence at least as far back as 2011. He did not file his motion for a new trial until

September 24, 2013, which was over two years later. The trial judge noted that the motion was "not really timely" but still ruled on it, so timeliness is not an issue. However, even though the trial judge ruled on the issue, the motion was untimely and this Court can affirm on that ground alone.

CONCLUSION

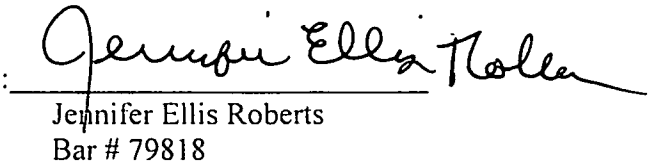
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

BY: 
Jennifer Ellis Roberts
Bar # 79818

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

October 1, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Maité D. Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KURTINO WEATHERSBEE,

APPELLANT.

APPELLATE CASE NO. 2014-002171

FINAL BRIEF OF APPELLANT

DAVID E. BELDING (SC Bar #00623)

Post Office Box 11964

Columbia, SC 29211

803-665-3161

ATTORNEY FOR APPELLANT

September 30, 2015

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STATEMENT OF ISSUE ON APPEAL

Whether the lower court erred in denying Appellant's motion for new trial based on after-discovered evidence because Appellant had produced records, not available at trial, which contradicted the trial testimony of the State's chief witness.

STATEMENT OF THE CASE

Appellant was convicted of Armed Robbery, Kidnapping and Burglary in the First Degree after a jury trial held before the Honorable James R. Barber, III, in Richland County on April 19, 2005. Eighteen (18) year sentences were imposed on each charge, to run concurrently.

Appellant appealed and the convictions were affirmed by the S.C. Court of Appeals on January 10, 2008. State v. Weathersbee, 2008-UP-017.

Appellant filed an application for post-conviction relief on February 26, 2008, and filed an amended application on December 17, 2008. Following an evidentiary hearing, the Honorable L. Casey Manning issued an order dated June 23, 2009, denying relief and dismissing Appellant's PCR case. Appellant appealed, but the South Carolina Supreme Court denied his Petition for Writ of Certiorari on May 26, 2011.

Appellant then filed an application for post-conviction relief on August 15, 2011, alleging newly-discovered evidence showing that the State's chief witness testified falsely as to the source of the money allegedly stolen. The State moved to dismiss this application as untimely and successive. Undersigned counsel was appointed to represent Appellant. An evidentiary hearing was scheduled for May 21, 2012. Prior to the start of the hearing, Appellant informed the Court that he wished to withdraw his PCR application, believing that his allegation of after-discovered evidence would be better suited for a motion for new trial in the Court of General Sessions Court.

Appellant then filed a Notice of Motion and Motion for New Trial Based on After-Discovered Evidence on September 24, 2013, in Richland County. A hearing on the motion was held by the Honorable Maité D. Murphy on September 29, 2014. At the conclusion of the hearing, Judge Murphy denied Appellant's motion and issued a handwritten order (R. p. 002). This appeal follows.

ARGUMENT

Both the United States and South Carolina Constitutions provide that every criminal defendant has the right to cross-examine the witnesses testifying against him. U.S. Const. Amendment VI; S.C. Const. Article I §14. For this right to be genuine and meaningful, a criminal defendant must have full disclosure of the witness's proposed testimony in order for defendant's counsel to adequately prepare for cross-examination.

In the trial of the case herein, the State's chief witness, Laquile Chevett Cummings, testified that Appellant robbed her of approximately Four Hundred Eighty Dollars ($480.00) (R. p. 011, line 22); that she was on unemployment at the time (R. p. 011, lines 23-24); and that "it" (the money stolen) was from unemployment (R. p. 011, line 25 - p. 012 line 1). This testimony contradicted the previously-reported statement of this witness that the money was from a tax refund. Defense counsel questioned the source of the money on cross-examination (R. p. 013, line 19 - p. 014 line 10) but, because this testimony was a surprise to the defense, the testimony was not capable of being controverted by unemployment documentation.

Following Appellant's post-conviction relief action, Appellant, through counsel, subpoenaed records from the South Carolina Department of Employment and Workforce which showed that, during the month of the alleged robbery, the weekly unemployment benefit check was only Two Hundred Four Dollars ($204.00), not the Four Hundred Eighty Dollars ($480.00) the witness claimed was stolen. Appellant filed a motion for new trial based on after-discovered evidence (R. p. 003-014). At the hearing on the motion, Appellant argued that the documentation showed that the State's chief witness had not been truthful about the source of the money alleged to have been stolen.

Rule 608(b), *South Carolina Rules of Evidence (SCRE)*, provides in pertinent part:

> *(b) Specific Instance of Conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence.

Although Rule 608 prohibits extrinsic evidence, it applies only to evidence of *conduct* and not evidence of a *statement*. United States v. Higa, 55 F.3d 448 (9th Cir. 1995). If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible under Rule 613(b). Therefore, defense counsel would have been allowed to impeach this witness's credibility with the government unemployment records had counsel been provided, through discovery, the substance of the testimony the witness would offer at trial. This witness, Laquile Chevett Cummings, was the State's key witness, and therefore her credibility was crucial to the government's case.

Under Rule 401, *SCRE*, relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402, *SCRE*, provides that all relevant evidence is admissible. State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006). Therefore, defense counsel could have properly used the government records as impeachment evidence.

For a defendant to prevail on a motion for a new trial based on after discovered evidence, he must show the evidence (1) "is such as will probably change the result if a new trial is granted;" (2) the evidence has been discovered after the trial has ended; (3) the evidence could not have been discovered by the use of due diligence; (4) "the evidence is material;" and (5) the evidence is not cumulative or impeaching. State v. Needs, 333 S.C. 134, 157-58, 508 S.E.2d

857, 869 (1998) (citing State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993)). Defendant submits that each of these factors exists in this case, as follows:

1. The testimony of the State's chief witness was the crucial evidence tying the Defendant to the alleged crime; as such, her credibility was critically important to the jury's findings. It is clear that the witness lied about where the $480.00 came from – not only does the amount ($480.00) not equal one (1) or even two (2) unemployment checks, she would have had to cash three (3) such checks and only have spent $132.00 of that sum to have had $480.00 in cash on her person. That defies logic. If a witness lies about small details, the witness will lie about anything. The result, the jury's verdict, would clearly have been different if the jury had seen this new evidence because it calls into direct question the credibility of the State's chief witness.

2. Defendant's trial counsel did not know about the unemployment testimony of the witness until trial. As the *Transcript* shows, Defendant's attorney thought the witness could be impeached by a prior inconsistent statement, *i.e.*, that the money allegedly stolen was from an income tax refund. The statement made under oath that the money came "from unemployment" was a surprise to the Defendant which could not be remedied at trial. As Exhibit 5 indicates, unemployment records have to be subpoenaed, which cannot be accomplished during trial. The Defendant, after the conclusion of his appeal and post-conviction proceedings, had these records subpoenaed which are now available post-trial.

3. The unemployment evidence could not have been discovered through due diligence because the testimony about the money coming from unemployment was first brought forth at trial.

4. This evidence is clearly material to the issue of Defendant's guilt or innocence. Convictions based on perjured testimony cannot be allowed to stand for the justice system to be reliable. The credibility of the State's chief witness was the crux of the State's case.

5. The evidence is clearly not cumulative – there was no other evidence about unemployment compensation at trial. Additionally, the Defendant submits that, when issues of credibility arise, the trial court has the discretion to weigh the evidence. See State v. Parker, 249 S.C. 139, 141, 153 S.E.2d 183, 184 (1967) ("It is a fixed rule that the credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the [trial court]". In this case, the trial court was not allowed an opportunity to weigh the evidence in order to address the credibility of the State's chief witness. "In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009).

Defendant's after-discovered evidence is not "impeaching" in the sense of contradicting the substance of petitioner's testimony but, rather, is directed squarely at the State's chief witness's character for truthfulness. By choosing to testify, a witness puts his character for truthfulness in issue. The unemployment evidence goes far beyond "impeachment" – it shows that the witness actually perjured herself about the source of the money she claimed was stolen by the Defendant. This lie brings into question the witness's entire account of the alleged crime.

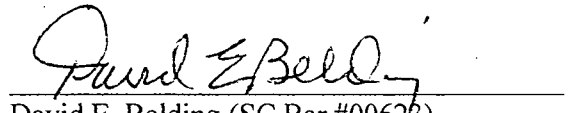
Finally, the Defendant submits that his motion for a new trial is timely under Rule 29(b), *South Carolina Rules of Criminal Procedure*, because the actual discovery of the evidence was in May 2013.

Appellant submits that the lower court erred in failing to properly assess the impact of untruthful testimony of the State's most important witness.

CONCLUSION

Based on the foregoing argument, Appellant's three (3) convictions and sentences should be reversed and vacated, with the matter being remitted to the Fifth Circuit Court of General Sessions for a new trial.

Respectfully submitted,



David E. Belding (SC Bar #00623)
Post Office Box 11964
Columbia, SC 29211
ATTORNEY FOR APPELLANT

This 30th day of September 2015.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kurtino Weathersbee, Appellant.

Appellate Case No. 2014-002171

Appeal From Richland County
Maité D. Murphy, Circuit Court Judge

Unpublished Opinion No. 2016-UP-239
Submitted January 1, 2016 – Filed June 1, 2016

AFFIRMED

David Edward Belding, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Attorney General Jennifer Ellis Roberts, and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: Rule 29(b), SCRCrimP ("A motion for a new trial based on after-discovered evidence must be made within one (1) year after the date of actual

discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence."); *State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) ("'The granting of a new trial because of after-discovered evidence is not favored,' and this court will affirm the [circuit] court's denial of such a motion unless the [circuit] court abused its discretion." (quoting *State v. Irvin*, 270 S.C. 539, 545, 243 S.E.2d 195, 197-98 (1978))); *id.* ("In order to warrant the granting of a new trial on the ground of after-discovered evidence, the movant must show the evidence (1) is such as will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material to the issue; and (5) is not merely cumulative or impeaching.").

AFFIRMED.[1]

HUFF, A.C.J., and WILLIAMS and THOMAS, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

v.

KURTINO WEATHERSBEE,

APPELLANT.

APPELLATE CASE NO. 2014-002171

Appeal from Richland County
Maité D. Murphy, Circuit Court Judge

Unpublished Opinion No. 2016-UP-239
Submitted January 1, 2016 – Filed June 1, 2016

PETITION FOR REHEARING

On June 1, 2016, this Court affirmed the Circuit Court's denial of Appellant's Motion for New Trial Based on After-Discovered Evidence. Pursuant to Rule 221(a), *SCACR*, Appellant respectfully requests rehearing of the issues presented in his case on the significant points overlooked and/or misapprehended by this Court in arriving at its conclusions and holdings.

Improper Ruling on Motion for New Trial

On appeal, Appellant raised the issue that his Motion for New Trial Based on After-Discovered Evidence was supported by written documentation that was not available at trial. Appellant demonstrated that the State's chief witness testified at trial that the money stolen from her was "from unemployment" when police records provided in pre-trial discovery had included a statement that the money was from a "tax refund". The chief

witness's proposed trial testimony was not provided to Appellant's trial counsel; therefore, the change in testimony (from tax refund to unemployment benefits) was a surprise at trial. The State does not have to prove, as an element of Armed Robbery, how the stolen money came into the possession of the victim; however, if the State intends to elicit the source from the victim at trial, the proposed testimony must be provided to a defendant's attorney in order for the Sixth Amendment Right to Counsel to be genuine and meaningful. Here, the State elicited the source of the stolen funds on direct examination with obvious intent to show the jury that the victim was needy. This is improper because it would tend to affect the passions of the jury, *i.e.*, that a poor woman had her unemployment funds stolen. Since there was no requirement to prove the source of the funds, the purpose of this line of questioning could only be intended to inflame the passions of the jurors.

Appellant has demonstrated compliance with Rule 29(b), *SCRCrimP*, in that the motion for new trial was made within one (1) year of actual discovery of the evidence of the chief witness's actual unemployment benefits, which were different than the amount the State asserted had been stolen in the armed robbery.

Appellant has demonstrated that the Circuit Court failed to properly review his motion under the five (5) factor test outlined in *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998). This failure to consider each required factor constitutes an abuse of discretion by the Circuit Court in reviewing Appellant's motion.

Appellant was not previously provided an opportunity for a full hearing before the Court herein rendered its opinion. Appellant respectfully requests this Court to withdraw its prior order and schedule this matter for such a hearing on the merits

Respectfully submitted,

DAVID E. BELDING
SC Bar #00623
Post Office Box 11964
Columbia, South Carolina 29211
(803) 665-3161

ATTORNEY FOR PETITIONER

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

v.

KURTINO WEATHERSBEE,

APPELLANT.

APPELLATE CASE NO. 2014-002171

CERTIFICATE OF SERVICE

I certify that I have served the *Petition for Rehearing* in this case on Jennifer Ellis Roberts, Esquire, counsel for Respondent, by mailing a stamped copy of same on June 7, 2016, to her at Office of the Attorney General, Post Office Box 11549, Columbia, S.C., 29211; and that a stamped copy was also served on Mr. Kurtino Weathersbee, SCDC #292557, Ridgeland Correctional Institution, P.O. Box 2039, Ridgeland, SC 29936.

David E. Belding
ATTORNEY FOR PETITIONER

SWORN TO AND SUBSCRIBED
before me this 7th day of June, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 7-20-21

The South Carolina Court of Appeals

The State, Respondent,

v.

Kurtino Weathersbee, Appellant.

Appellate Case No. 2014-002171

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff J.

H. B. Wo J.

Paula G. Thomas J.

Columbia, South Carolina

cc: Alan McCrory Wilson, Esquire
David Edward Belding, Esquire
Jennifer Ellis Roberts, Esquire
Daniel Edward Johnson, Esquire

FILED
August 18, 2016