STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
DEC 19 2016
S.C. SUPREME COURT

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS JAMES,

APPELLANT

APPELLATE CASE NO. 2014-002326

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

STATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

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

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

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

This appeal follows.

ARGUMENT

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

Relevant facts

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

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

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

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

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

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

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

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

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

---

[1] The shooters entered through the front door.

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

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

The star witness

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

The former solicitor as an "explanation" witness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

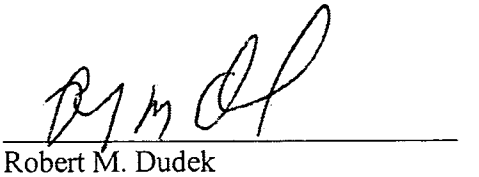
She could not "recall" anything about the particular investigation in this case as it related to appellant, and she maintained those matters were left for law enforcement to

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

CONCLUSION

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

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

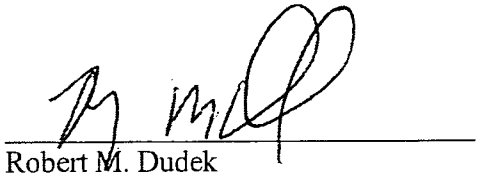
ATTORNEY FOR APPELLANT

This 19th day of May, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

May 19th, 2016



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

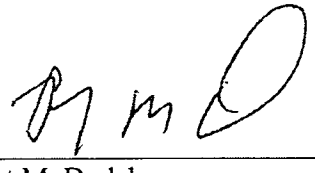
V.

THOMAS JAMES,

APPELLANT

CERTIFICATE OF SERVICE

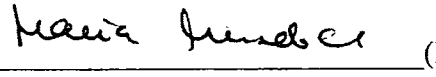
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Caroline M. Scrantom, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19th day of May, 2016.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

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



(L.S.)

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

RECEIVED
19 2016
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

v.

THOMAS JAMES,

Appellant

Appellate Case No. 2014-002326.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

CAROLINE M. SCRANTOM
Assistant Attorney General

P.O. Box 11549
Columbia, South Carolina, 29211
(803) 734-6305

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit
P.O. Box 1276
Conway, SC 29528

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

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

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

Appellant Thomas James was indicted by the Horry County Grand Jury for the November 8, 2011, murder of victim Shaquille Shontay (Keia) Pertelle. (R. pp. 917 – 18).

James was represented by Bobby G. Frederick, Esq. at trial, which began with jury selection on October 13, 2014, and continued for five days. (R. p. 1). James was jointly tried with co-defendant Carnail Graham, who was represented by David J. Canty, Esq. The Honorable Steven H. John presided, and Nancy Livesay of the Fifteenth Circuit Solicitor's Office prosecuted the case. (R. p. 1).

The jury convicted James of murder and Judge John sentenced James to thirty-two years' imprisonment with credit for time served. (R. p. 910, lines 1-5). This appeal follows. (R. p. 919).

STATEMENT OF FACTS

Keia Pertelle died of a gunshot wound to the chest sustained when intruders invaded her mobile home located outside of Conway. (R. p. 130, line 3 – p. 132, line 24; R. p. 147, lines 1-24). The shooter was standing over two feet away. (R. p. 152, lines 8-14). The first officer who responded to the scene located Pertelle in her residence's front bedroom, deceased on the bed. (R. p. 132, lines 16-24). In the living room, investigators found a comforter half thrown from the couch to the floor, indicating that someone leapt from the couch in a hurry. (R. p. 264, lines 10-21). The bullet was retrieved from Pertelle's back during autopsy and collected as evidence. (R. p. 246, lines 9-25).

Prior to the invasion, Pertelle's roommate Carlton Watts last saw her watching television on the couch. (R. p. 49, lines 1-17). Watts testified at trial that he was asleep at the time of the invasion. He initially heard a few gunshots, causing him to roll to the floor and hide underneath his bed. (R. p. 42, line 16 – p. 45, line 17). Watts could not identify the intruders, but heard them screaming "where it's at, we're not playing, where it's at," and saw two pairs of sneakers pass by his bed. (R. p. 53, line 24 – p. 54, line 15).

The third resident and the victim's boyfriend, known as Splurge, shared a bedroom with the victim. (R. p. 42, lines 21-23; R. p. 89, lines 16-18). Splurge was also at the house that night, and remained inside until law enforcement arrived on scene and demanded he exit. (R. p. 44, lines 15-20; R. p. 47, lines 7-22). At the time of the invasion, the victim screamed out to Splurge, who was in their bedroom at the time of the break-in. (R. p. 52, line 19 – p. 53, line 3). Splurge did not testify at trial.

A neighbor, David Grissett, heard the gunfire and commotion occurring in Pertelle and Watts' mobile home, then witnessed two people run from the residence and leave in a van. (R. p.

99, line 19 – p. 100, line 10). Grissett called 911. (R. p. 100, lines 11-14). Grissett actually noticed the getaway van slightly earlier, finding its presence suspicious. He had never seen it before, but watched it circle his street, park at the end, then drive two streets over and return again to park at the end of the road. This occurred around 2:00 AM. (R. p. 97, line 17 – p. 99, line 17). The road on which Grissett and Pertelle lived dead-ended and had no street lights. (R. p. 104, lines 14-25).

Between six and seven the morning following the murder, Tiffany Oliver noticed a champagne colored van with tinted windows parked near a tree line behind her mobile home. (R. p. 165, line 16 – p. 167, line 4). Oliver called the police in response to the van's discovery because she did not know whom it belonged to and she wanted it removed. (R. p. 164, lines 3-11). She did not live on the same street as the victim.[1] (R. p. 163, lines 10-12).

On scene, law enforcement documented entry marks from a fired bullet in the front door jamb. (R. p. 237, lines 1-16). The front door frame showed additional signs of forced entry. (R. p. 242, line 12 – p. 243, line 9). Outside, law enforcement took tire and shoe impressions from where the van was reported to have parked at the end of the street. (R. p. 234, line 19 – p. 235, line 18; R. p. 286, lines 1-23). No comparison was made between either the tire castings and the van, or the shoe castings and any shoes located in conjunction with the individuals who later emerged as suspects. (R. p. 289, line 22 – p. 290, line 9).

Inside, law enforcement found a disheveled bedroom and collected fired bullets from the kitchen cabinets, the doorway from the kitchen to the living room, and from underneath the living room couch. (R. p. 239, lines 2-24). Another bullet hole punctured the television, and yet

[1] Oliver testified at trial that she knew both Appellant and the victim through Appellant's girlfriend, to whom Oliver was related. (R. p. 176, line 6 – p. 177, line 15).

another punctured the hallway floor. (R. p. 239, line 25 – p. 240, line 20). Various bullet jackets and fragments were collected from the scene as well. (R. p. 258, line 18 – p. 259, line 25). In addition to the absence of any shell casings on scene, the types of jackets and bullet fragments recovered signaled to law enforcement that a revolver was most likely the type of firearm used during the invasion. (R. p. 260, lines 1-25). Investigators also collected two handguns, a .357 Taurus revolver[2] and a .44 Redhawk Ruger, and one SK 7.62 assault rifle from the mobile home. (R. p. 250, lines 10-25).

In regards to the projectiles taken from the crime scene, SLED's firearm and toolmark examiner determined that three projectile fragments, State's exhibits 68, 69 and 71, and a complete fired bullet, State's exhibit 67, derived from the .357 Taurus revolver recovered from the crime scene. (R. p. 321, lines 1-8; R. p. 322, line 13 – p. 327, line 7). While crime scene investigation concluded that some shots were fired from the bedroom of the mobile home towards the front door where the intruders entered, and some fired from the intruders back through the living room and towards the bedrooms in the residence, the record lends to the plain inference that the bullets matching this recovered revolver were fired by Splurge in defense of the home invasion. (R. p. 238, line 1 – p. 240, line 23; R. p. 261, lines 1-13).

The State's firearm and toolmark examiner also determined that the bullet recovered from the victim's body during autopsy did not derive from any firearm recovered from the crime scene. The fatal bullet was of .357 caliber and was fired from an unrecovered revolver.[3] (R. p.

---

[2] For ease of identification within the Record, the .357 Taurus revolved was entered into evidence as State's Exhibit 64. (R. p. 253, line 15 – p. 256, line 19).

[3] Though the revolved recovered from the crime scene was of .357 caliber and though the bullet recovered from the victim was also of .357 caliber, toolmark examination showed that the bullet from the victim was fired from a barrel rifled with six grooves and a right twist. The .357 Taurus revolver taken from the crime scene was rifled with five grooves and a right twist. (R. p. 327,

327, line 8 – p. 329, line 7). A match was never made between the bullet sustained by the victim and any other gun. (R. p. 346, line 6 – p. 347, line 10).

In regards to the van, it was taken from Tiffany Oliver's property, impounded, processed and fingerprinted. (R. p. 272, lines 6-25). Nineteen total fingerprints were lifted from the van, but only thirteen lifts had enough ridge detail to utilize for comparison. (R. p. 195, line 17 – p. 196, line 10). No prints taken from the driver's side of the van contained sufficient ridge detail to be matched to any individual. (R. p. 210, lines 19-25). The passenger side of the van, however, provided five prints which could be matched. (R. p. 209, lines 11-18). Appellant was identified as leaving one of these prints—law enforcement identified his right palm print on a passenger side door. (R. p. 209, lines 21-23; R. p. 211, line 24 – p. 212, line 2). Other matches obtained were to testifying co-defendant Keir Lamont Johnson, as well as to Letitia Tasha Freshley and Markel Hasheem Rush. (R. p. 209, line 23 – p. 210, line 12). It was also determined during the course of investigation that the van belonged to Kier Lamont Johnson's ex-girlfriend, Tiara Brown. (R. p. 473, lines 3-7). Kier Lamont Johnson was locally known as "Bootsie." (R. p. 366, lines 5-13).

Howard Parker, a lifelong friend of Appellant, co-defendant Carnail Graham, and the victim, testified at trial that he recognized the van as one that Bootsie drove around town. (R. p. 365, line 17 – p. 367, line 5). Parker saw Bootsie in the van twice the night of the murder. (R. p. 367, lines 6-8). The first was at a gas station around 11:00 PM. (R. p. 367, lines 9-25). Parker saw the van for the second time after midnight. It showed up at a house where Parker was gathered with friends. (R. p. 368, line 1 – p. 369, line 6). Parker testified that he recognized Appellant leave that house and get inside the van before it left. (R. p. 393, line 1 – p. 394, line

---

line 17 – p. 328, line 4).

19). This was around 2:00 AM. (R. p. 393, lines 5-14). On both occasions, Parker noticed, but could not identify, other individuals already inside the van. (R. p. 367, lines 9-22; R. p. 369, lines 7-23).

Bootsie testified at trial, implicating Appellant, known as "Cutty," and co-defendant Graham, or "Dubba," in the home invasion that resulted in the victim's murder. Bootsie was close friends with Cutty and Dubba.[4] (R. p. 447, lines 15-25). Bootsie explained that Dubba called him from Appellant's phone asking for a ride to "go buy some drugs" at Splurge's mobile home. (R. p. 450, lines 18-22). Bootsie picked them up near Conway in Tiara's brown Chevy Astro van around 1:40 AM. (R. p. 456, lines 10-21). Bootsie testified that he drove down the street in the neighborhood, spoke to a neighbor in the trailer park and drove around the block again while Appellant and Dubba went inside Splurge's trailer. (R. p. 460, line 4 – p. 461, line 9). Then Appellant and Dubba got back in Bootsie's van and Bootsie drove away at his passengers' direction. (R. p. 450, line 18 – p. 451, line 8).

As they left the scene, a Horry County police officer "swerved around" to follow them, and Dubba urged Bootsie to make a getaway. At that point, Bootsie parked the van in "somebody's backyard" and all three men took off into the woods. (R. p. 451, lines 9-15). It was during their getaway that Dubba expressed to his cohorts that he thought he "just killed that mother——."[5] (R. p. 461, lines 17-24). Bootsie recalled Appellant and Dubba wearing blue latex gloves and discarding them in the woods; they did not wear masks. (R. p. 550, lines 1-21).

---

[4] Bootsie testified that Dubba had Appellant's and Bootsie's names tattooed on his body. (R. p. 448, line 21 – p. 449, line 14).

[5] In his own case-in-chief, Dubba presented the mother of his children, Nakeema Crooms, as an alibi witness to testify that she lived with Dubba at the time of the murder, and he was at home that night asleep with their three-year-old daughter. (R. p. 785, line 8 – p. 786, line 23).

Bootsie also testified that Dubba threw two guns out of the van window.[6] (R. p. 462, lines 1-5; R. p. 504, lines 1-25).

Bootsie later asked his girlfriend to call the police and report the van stolen—he falsely explained to law enforcement that he was robbed of the van while at a gas station. (R. p. 462, line 22 – p. 463, line 6; R. p. 518, line 23 – p. 521, line 4). The instruction to report the van stolen appeared to be one of Bootsie's initial strategies to attempt to evade law enforcement from discovering that he was involved in the victim's murder. (R. p. 462, line 22 – p. 463, line 15). Bootsie incurred a charge for driving without permission with intention to deprive, and made bond the following day. (R. p. 463, lines 7-12).

Bootsie later incurred a murder charge in relation to the case at bar which remained pending at the time of Appellant's trial.[7] (R. p. 463, lines 13-21). Bootsie's attorney acquired his client a bond on the murder charge. (R. p. 468, lines 3-11; R. p. 484, line 14 – p. 486, line 22; R. pp. 912 – 913 Defendant's Exhibit 5). At trial, Bootsie maintained that he was telling the truth about what happened that night—he said that after he hired an attorney he told the truth in every statement that he gave. (R. p. 463, line 22 – p. 464, line 15; R. p. 466, lines 20-23; R. p. 518, line 21 – p. 519, line 1). Bootsie also testified that prior to bonding out, he lied about the events related to this case because he was receiving threats in the county detention center. (R. p. 468, lines 3-18). Even after bonding out, Bootsie made inconsistent statements, but only related to what happened *after* he, Appellant, and Dubba left the victim's mobile home. For instance,

---

[6] Bootsie testified that he had never shot a gun, but that the guns thrown out the van window that night were of .45 and .38 caliber. (R. p. 504, lines 10-25). The State elicited testimony from its firearm and toolmark examiner that a .38 revolver looked similar to a .357 revolver, such as the caliber gun that fired the fatal bullet. (R. p. 345, lines 2-9).

[7] Bootsie previously incurred additional, unrelated charges for burglary first, possession of a weapon, and assault and battery first, the discussion of which gives rise to the issue on appeal. (R. p. 494, line 21 – p. 496, line 21).

Bootsie said that his grandmother's boyfriend picked him up, or that he took a cab after dropping off the van, or that he walked backed to Conway. (R. p. 509, line 8 – p. 514, line 20). It appears however that a fourth party, Mike Pyatt, picked Bootsie up. (R. p. 508, line 27 – p. 509, line 4; R. p. 522, line 18 – p. 523, line 6). But Bootsie never changed his recollection regarding Appellant and Dubba's entering and exiting the victim's mobile home at the time of the murder. (R. p. 555, line 5 – p. 556, line 4).

The State put forward two inmates to corroborate Bootsie's testimony. A federal inmate, Sedieka McClam, testified that he witnessed Dubba talking on the phone with Appellant apologizing "for what had happened to Keia" and "[t]hat he panicked when he went through the door and just started shooting." (R. p. 626, line 3 – p. 627, line 17; R. p. 641, lines 10-20). This occurred in January 2011. McClam subsequently wrote this information in a letter to the solicitor's office. (R. p. 627, lines 18-25; R. pp. 915 – 916 Defendant's Exhibit 10). More information from the letter was divulged during McClam's cross-examination, during which he recalled Appellant stating "they went to rob Keia's boyfriend, Splurge," and that "he didn't mean to shoot his gun six or seven times[.]"(R. p. 642, lines 4-25; R. p. 648, lines 10-19). McClam was arrested on federal charges shortly after overhearing this phone conversation, and testified that he wrote the letter in cooperation in hopes of receiving a sentence reduction. (R. p. 630, lines 1-25). At the time of trial, McClam had yet to receive any downward sentencing departure. (R. p. 637, lines 1-5).

Another federal inmate, Kachief Spain, testified that when he was housed one pod over from Dubba in the Horry County detention center, he witnessed Dubba come to the recreation field and call one of Spain's podmates, Ace Graham, to a door situated "maybe five feet" from where Spain was standing at the time. (R. p. 660, lines 1-25). Spain witnessed Dubba slide the

discovery in his case through the door to Ace Graham and explain to Graham that "they [the State]" did not have any evidence on him. (R. p. 661, lines 1-8; R. p. 664, lines 1-5). According to Spain, Dubba told Graham what happened:

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

(R. p. 661, lines 9-17). Spain's cross-examination expounded upon additional details that he initially divulged to the State's investigator: that Dubba stated he went in the front door, that there were eight people in the van, and that Appellant and Dubba "put a gun to Lil Bootsie's head and told him not to tell[.]"[8] (R. p. 671, lines 4-16).

Cell phone evidence scattered throughout the trial showed that Appellant, Dubba and Bootsie had at least two phones each. (R. p. 455, line 2 – p. 456, line 6). Through expert testimony on cell-phone tracking and electronic communications, Appellant established that one of his phones did not conduct any traceable activity near the victim's residence during the time in which the home invasion and murder occurred. (R. p. 751, lines 13-22). No records were introduced or discussed regarding Appellant's second cell phone. (R. p. 759 lines 8-15). The same expert witness also testified that Bootsie's phone made and received a total of 28 calls in an area northwest of Conway, the direction of the crime scene, around the time of the home invasion and murder. (R. p. 732, line 1 – p. 736, line 14; R. p. 751, lines 18-22).

[8] A discrepancy arises through both McClam and Spain's testimony as to the color of the van. These inmates testify that the van connected to the murder was blue. (R. p. 642, lines 19-23; R. p. 671, lines 1-3). But direct evidence, and Bootsie's testimony, establishes that the van was tan or brown. (R. p. 229, line 3 – p. 230, line 5). Spain later testifies that he does not recall the color of the van, that it was either blue or brown. (R. p. 651, lines 19-21).

ARGUMENT

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

Testimony Giving Rise to the Issue on Appeal

Prior to Bootsie's trial testimony, Appellant sought leeway to cross-examine the co-defendant about the progression of events related to the State's dismissal of unrelated first degree burglary and possession of a weapon charges. (*See* R. p. 421, line 14 – p. 422, line 17). Bootsie also had an assault and battery charge which was dismissed. (R. p. 443, lines 11-25). Appellant sought to establish that when Bootsie "was charged with murder for this particular crime, [that] he thereafter made a statement that implicated the two defendants." (R. p. 436, lines 16-24). Appellant next sought to establish that after making this statement, Bootsie "was granted bond on the murder charge, that thereafter the State of South Carolina dismissed a burglary first charge and a weapons charge; and that thereafter [Bootsie] was convicted of [petit] larceny or pled guilty to [petit] larceny." (R. p. 436, line 24 – p. 437, line 8).

The State countered Appellant's proposed cross-examination on the premise that it would be "extremely prejudicial to bring up and insinuate that the State dismissed charges in exchange for [Bootsie's] testimony." (R. p. 439, lines 16-18). Assistant Solicitor Livesay specified that the reasons for dismissing Bootsie's unrelated charges did not correlate with his cooperation in the case at bar: the incident lending to those charges involved one female victim who would serve as the only witness, and who "since then has been shot in the neck and is deceased." (R. p. 438, line

24 – p. 439, line 7). Ms. Livesay expounded:

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

(R. p. 439, line 8 – p. 440, line 4).

The trial court did not limit Bootsie's cross-examination, but rather allowed the State an opportunity to respond to it by calling Ms. von Herrmann, a former assistant solicitor who had been assigned to Bootsie's previous charges. The purpose of allowing Ms. von Herrmann to testify was to establish the reason that Bootsie's other charges were dismissed. (R. p. 441, lines 6-14). The trial court reasoned that the jury should be afforded "the full and complete picture of what occurred or didn't occur" for their consideration. (R. p. 442, lines 7-10). The court also reasoned in Appellant's favor:

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

(R. p. 441, lines 15-23). The court further reasoned that it would not be within Bootsie's knowledge precisely why his charges were dismissed because Ms. von Herrmann was the person

in charge of the dismissal. Therefore, Ms. von Herrmann was the proper party to answer those questions. (R. p. 444, line 17 – p. 445, line 4).

In regards to any collateral charges, Bootsie then testified that his lawyer, not the solicitor, was responsible for getting his other charges dismissed. (R. p. 468, line 19 – p. 469, line 11). On cross-examination, Bootsie testified that he was charged with murder in 2011 and that in 2013 he garnered charges for first degree burglary and first degree assault and battery, both of which were dismissed in 2013. Bootsie also testified that he incurred and pled guilty to one charge of petit larceny also in 2013 "so that [he could] make bond." (R. p. 494, line 12 – p. 496, line 14). Moreover, testimony was elicited from Bootsie on cross-examination that he was charged with possession of a weapon during the commission of a violent crime in 2012, another charge which was dismissed. (R. p. 496, lines 17-21). Bootsie stated "[t]o tell you the truth, that happened after the murder charge[;] [t]hat burglary first and all [the dismissals] happened after this murder charge . . . ." (R. p. 497, lines 1-25). He testified that he lied to law enforcement in his November 2011 statement regarding the murder, but that he gave a truthful statement in 2012 after speaking to his lawyer. (R. p. 525, line 6 – p. 527, line 6). Bootsie next testified that his robbery and possession of a weapon charges were dismissed after he made the 2012 statement, but that they had been pending since 2009 and the State "had no evidence on [him]" in regards to those charges. Bootsie stated that his attorney got those collateral charges dismissed, but counsel pointed out that their dismissal occurred twenty days after his 2012 statement to law enforcement. (R. p. 529, line 21 – p. 531, line 16).

Appellant's Objection

Following the conclusion of Bootsie's testimony, the State did elect to call former

assistant solicitor von Herrmann to "reply to the questions as to why [Bootsie's] charges were dismissed after this case, after 2011." (R. p. 563, lines 9-17). Appellant objected on the basis that once Ms. von Herrmann is called to testify, the defense is "entitled to cross examine her on any issue relevant to this case" pursuant to Rule 611(b), SCRE. (R. p. 563, line 20 – p. 564, line 2). Appellant intimated that by "calling a former solicitor to testify about her prosecutorial decisions," the State opened the door for Appellant to cross-examine Ms. von Herrmann about "any issue relevant to this case," which would include her exercise of prosecutorial discretion. (R. p. 565, lines 10-13; R. p. 566, line 22 – p. 567, line 7).

The State responded with the specifics of the testimony it intended to elicit through the former assistant solicitor: Ms. von Herrmann formerly "worked at the solicitor's office. At that time she was handling the pending charges, all of Keir Johnson's [Bootsie's] charges. Some of those charges were dismissed, they were not dismissed in any exchange for his testimony or anything regarding this [trial]." (R. p. 564, lines 20-25).

The trial court pointed out that defense counsel "raised the issue. So the State is entitled to reply . . . ." (R. p. 565, lines 14-19). The court green-lit Ms. von Herrmann's testimony in reply to matters brought out through Appellant's cross-examination of Bootsie. The court was not "going to allow [Appellant] to delve into "prosecutorial ideas" during his cross-examination of Ms. von Herrmann, but rather was "allowing [the State] to rebut and give a reason why [Bootsie's other] charges were dismissed, because the [victim] died." (R. p. 566, lines 15-21). The trial court then invited a proffer of Appellant's cross-examination.

During the proffer, Appellant questioned Ms. von Herrmann on the following topics: (1) how long she was assigned to Appellant's charges, (2) whether she ordered that cell phone records be analyzed in relation to the murder investigation, (3) about a scrivener's error in a

former indictment which was later corrected and re-indicted, and (4) whether she ordered an analysis of shoe impressions related to the murder investigation. (R. p. 568, line 1 – p. 573, line 2). Dubba's counsel, Mr. Canty, questioned Ms. von Herrmann regarding (5) whether she was aware of jailhouse informants who could testify at Appellant's trial, (6) whether she turned over any incriminating statements provided by third parties, and (7) what she remembered about being at the crime scene investigation immediately following the murder. (R. p. 573, line 24 – p. 576, line 8).

The trial court ruled that Appellant could not "ask about a scrivener's errors in the previous indictment."[9] (R. p. 572, lines 10-16). Additionally, because Ms. von Herrmann was not the prosecutor trying the case at bar, the trial court also did not allow defense counsel to question her about whether "there was a witness [or statement] in this case whom she elected not to use." (R. p. 573, lines 4-16; R. p. 574, lines 2-14). The trial court otherwise made no specific rulings nor placed additional limitations on the proffered cross-examination.

At this point, **Appellant withdrew his objection** to the court's limiting Ms. von Herrmann's cross-examination. (R. p. 576, lines 9-13). The trial court responded that it may disagree with Appellant regarding the specific latitude the court intended to apply to Appellant's cross-examination. Then Ms. von Herrmann took the stand to testify before the jury. (R. p. 577, lines 8-22).

Ms. von Herrmann's Testimony

The former assistant solicitor testified that Bootsie incurred a burglary first and an assault and battery first for an incident that occurred on April 28, 2013. His then-girlfriend was the

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

victim, and she asked for the charges to be dismissed because they resulted from an argument. "[I]t was a mutual combat type situation and [Bootsie] had not broken into that house." (R. p. 580, lines 2-11). That case was dismissed "based on the victim's assurances." (R. p. 580, lines 12-16).

Ms. von Herrmann next testified that Bootsie incurred an armed robbery and a related weapons charge on October 14, 2009. (R. p. 580, lines 17-20). The State determined that the victim in that case was experiencing an unrequited affection for Bootsie and reported that Bootsie struck her and took $7 from her pocket. (R. p. 580, line 24 – p. 581, line 4). But the charge was dismissed due to a dearth of corroborating evidence: Bootsie was not wearing the clothing the victim reported him to be wearing when he was investigated shortly after the report, and law enforcement could not locate any weapon alleged to have been used in connection with the charges. (R. p. 581, lines 4-15). Ms. von Herrmann explained that it was "just not a prosecutable case," because if there is not "sufficient evidence to bring [it] to a jury," the State dismisses it. (R. p. 581, lines 15-21). She succinctly summarized that Bootsie's other charges "were dismissed on their own merit for lack of evidence." (R. p. 582, lines 7-8).

Ms. von Herrmann also testified that she was called to the crime scene in this case "when the murder took place," and retained the file on this case until she left the solicitor's officer in October 2014. (R. p. 582, lines 9-25). She finished by testifying that she had no involvement in any decision making related to Appellant's trial. (R. p. 583, lines 2-12).

Appellant was then afforded a full, fair, and uninterrupted opportunity at cross-examination. (R. p. 583, line 17 – p. 588, line 8). Counsel for Appellant's co-defendant was likewise afforded a full, fair, and uninterrupted opportunity at cross-examining Ms. von Herrmann. (R. p. 588, line 9 – p. 611, line 6). The matters explored during this time reflected

those explored during the proffer. The State did object to relevance during Mr. Canty's cross-examination, but was overruled. (R. p. 599, line 22 – p. 601, line 23).

Therefore, aside from limiting testimony related to a previous indictment which contained a scrivener's error, the trial court did not limit Ms. von Herrmann's cross-examination in any way. The only exception was a ruling that Mr. Canty not continue to examine Ms. von Herrmann on a topic which she testified she could not recall. (R. p. 610, lines 1-12). Appellant never renewed his Rule 611(b), SCRE objection.

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

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

The basis of Appellant's objection was that the court should not allow the testimony of a former assistant solicitor who was once assigned to a co-defendant's charge because under Rule 611(b), SCRE, her cross-examination could delve into her exercise of prosecutorial discretion in relation to the case at bar. Appellant argued that prosecutorial discretion would be an improper topic to put before the jury. (R. p. 563, line 20 – p. 567, line 7). But Appellant withdrew his Rule 611(b), SCRE objection to Ms. von Herrmann's cross-examination following a proffer of his cross-examination. (R. p. 576, lines 9-13). It appears from the record that Appellant was able to conduct a cross-examination of Ms. von Herrmann which was unlimited in the topics he desired to explore.[10] (R. p. 583, line 17 – p. 611, line 6). Because Appellant withdrew and did not renew his objection, the issue presently before this Court is unpreserved for review.

[10] With the exception of proffered cross-examination on what was found to be as scrivener's error in relation to the victim's name on a previous indictment. Appellant was re-indicted with a corrected notice instrument. (R. p. 572, lines 10-16; R. pp. 917 – 918 Indictment).

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

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

All relevant evidence is generally admissible. Rule 402, SCRE; *State v. Pittman,* 373 S.C. 527, 578, 647 S.E.2d 144, 170 (2007). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "[G]enerally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.'" *State v. Jones,* 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001) (quoting *State v. Brewington,* 267 S.C. 97, 226 S.E.2d 249 (1976)); *State v. McEachern,* 399 S.C. at 140-41, 731 S.E.2d at 612. Rule 608(c), SCRE preserves this precedent by providing that "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness *or by evidence otherwise adduced.*" Rule 608(c), SCRE (emphasis added).

The reasons for the dismissal of Bootsie's collateral charges became of consequence to the determination of Appellant's guilt due to the light cast upon Bootsie's testimony by defense counsel. Counsel impeached Bootsie by implying that the State dismissed his collateral charges in exchange for his making a statement to law enforcement which implicated Appellant in the victim's murder. To avoid having Appellant mislead the jury on this point, the State elected to

call former assistant solicitor von Herrmann as a fact witness to establish the reasons for the State's dismissing Bootsie's collateral charges. The trial court did not err in allowing the former solicitor to so testify.

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

"Although a prosecuting attorney is competent to testify, his testifying is not approved by the Courts except where it is made necessary by the circumstances of the case . . . . The propriety of allowing the prosecutor to testify is a matter largely within the trial Court's discretion." *Id.* at 540, 28 S.E.2d at 403. "It seems to be generally recognized . . . that the attorney for the State may properly testify under several contingencies in the course of the trial, -viz: where the State has been taken by surprise; and in other instances to meet the exigencies of the case" so long as the advocate and witness not be "mixed up in the same case." *Id.* (internal quotation omitted).

While calling a prosecutor as witness may be disfavored, our court has agreed with other jurisdictions and has refused to bar the possibility of calling a prosecutor to testify as a witness even where that prosecutor is participating as an advocate. *State v. Inman*, 395 S.C. 539, 557,

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

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

United States v. Hosford, 782 F.2d 936, 939 (11th Cir. 1986) (rejecting the argument that a prosecutor should have been disqualified from prosecuting a soliciting and attempting murder charge because that prosecutor participated in negotiations for a use and immunity agreement that the government alleged the defendant had violated); *see United States v. Thomas*, 193 Fed. Appx. 881, 887-88 (11th Cir. 2006) (court did not abuse its discretion by refusing to remove a prosecutor who was also a potential witness due to his prosecution of an underlying charge held by the same defendant).

The case at bar is distinguishable—Ms. von Herrmann did not prosecute Appellant, nor did she prosecute Bootsie's murder charge for the same case. The testimony at issue is that of a former prosecutor who made it known to the jury from the outset that she no longer worked for the State, but was engaged in private practice at the time of her testimony. (R. p. 289, lines 1-12).

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

If evidence of a plea agreement is generally admissible, it follows that the absence of a plea agreement is similarly admissible, especially where the defense presents to the court its intention to use that information to impeach the State's witness in the same manner it would utilize a proffer agreement for impeachment purposes. "At least where the defendant plans to impeach a witness by showing the existence of a plea agreement, the government's direct examination need not be restricted to the scope of the defendant's intended cross-examination." *United States v. Henderson, supra* (citing *United States v. Whitehead,* 618 F.2d 523, 529 (4th

Cir. 1980)). Defense counsel made it clear in the present case that he would be utilizing the dismissal of Bootsie's charges for impeachment, and the State was entitled to respond by presenting additional facts on this topic via the only witness with personal knowledge of why the charges were dismissed: the former assistant solicitor.

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

State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001), is instructive regarding the admissibility of Ms. von Herrmann's testimony in this case. In *Shuler*, as in this case, the State's key witness was an inmate who previously lied to law enforcement, but who testified at trial that he initially lied out of fear and was now truthful. *Id.* at 627, 545 S.E.2d at 816-17. Defense counsel's cross-examination of this witness focused on previous deals made with the United States attorney in exchange for his trial testimony. *Id.* at 628, 545 S.E.2d at 817. "Defense counsel's cross-examination was extensive and focused on [the witness'] legal troubles and deals

with law enforcement. The cross-examination effectively impeached [the witness] by demonstrating he had incentive to testify in order to cut time off his sentence." *Id.* Expecting the defense to impeach its witness on this point, the State questioned its witness on his truthfulness on direct examination and again on re-direct. *Id.* The court found the anticipatory examination appropriate given the circumstances:

> Initially, it was not error for the Solicitor to introduce the plea agreement on direct examination because the Solicitor was entitled to anticipate the inevitable cross examination of a federal inmate and to dispel any notion he was hiding something from the jury. Most courts generally recognize the prosecution can introduce evidence of a plea agreement during direct examination of a State witness.[11] However, the Fourth Circuit Court of Appeals has found this freedom is not unlimited. *United States v. Romer*, 148 F.3d 359 (4th Cir. 1998) *cert. denied*, 525 U.S. 1141, 119 S.Ct. 1032, 143 L.Ed.2d 41 (1999). The Fourth Circuit Court of Appeals allows the government to elicit testimony regarding a plea agreement on direct examination only if the prosecutor's questions do not imply the government has special knowledge of the witness' veracity, the trial court gives a cautionary instruction, and the prosecutor's closing argument contains no improper use of the witness' promise of truthful cooperation. *Id.* at 369.

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

The *Shuler* court went on to find that the State neither implied that it held special knowledge nor guaranteed the witness' veracity during its examination or closing argument. *Id.* 629, 545 S.E.2d at 818. That court found that "[a]lthough no cautionary instruction was given by the trial judge, the Solicitor did not pursue the plea agreement [in detail] until re-direct examination." *Id.* That court found "no merit to Shuler's argument" because the Solicitor's questions occurred in large part after the witness' credibility had been attacked by the defense,

[11] *See generally United States v. Spriggs*, 996 F.2d 320 (D.C. Cir. 1993) (permitting the prosecution on direct examination to introduce the witness' cooperation agreement in its entirety, and adopting majority rule that admission of plea agreements containing "truthtelling" and perjury provisions did not result in improper bolstering); *Massachusetts v. Rivera*, 430 Mass. 91, 712 N.E.2d 1127, 1132 (1999) ("On direct examination the prosecution may, of course, properly bring out the fact that the witness has entered into a plea agreement and the witness generally understands his obligations under it."). *State v. Shuler*, *infra* at 634 n.2, 545 S.E.2d at 820 n.2.

and because the Solicitor "never personally vouched for the truthfulness of [the witness'] testimony," never insinuating he knew better than the jury what the truth and never making an overt statement that he personally believed the witness' testimony to be true. *Id.* at 631, 545 S.E.2d at 819.

Shuler's holding in part relies on the finding that the State did not vouch for or bolster the witness' testimony. *Id.* "Vouching occurs when the prosecutor indicates a personal belief in the credibility or honesty of a witness; bolstering is an implication by the government that the testimony of a witness is corroborated by evidence known to the government but not known to the jury." *United States v. Sanchez,* 118 F.3d 192, 198 (4th Cir. 1997); *State v. Shuler,* 344 S.C. at 630, 545 S.E.2d at 818 ("Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony."); *see State v. Kelly,* 343 S.C. 350, 540 S.E.2d 851 (2001), *rev'd on other grounds,* 534 U.S. 246, 122 S.Ct. 726 (2002) ("Because a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness' credibility.").

The former assistant solicitor's testimony in the present case fails to meet either definition. Ms. von Herrmann did not testify, nor was she questioned, regarding whether or not Bootsie was telling the truth. She offered no opinion. The State did not act through Ms. von Herrmann to assign credibility to Bootsie's implication of Appellant. (R. p. 578, line 25 – p. 611, line 4). Instead, the State put direct evidence in front of the jury so that they could determine the totality of the facts surrounding the timing and dismissal of Bootsie's other charges, which became of consequence at trial because they were dismissed only after Bootsie implicated

Appellant in the victim's death. Therefore, her testimony "cannot be vouching, since [either the former prosecutor or the State] made no statement about [a] personal belief in the truth of the statement . . . . Likewise, it cannot be considering bolstering, as it does not refer to evidence not presented to the jury." *United States v. Sullivan,* 455 F.3d at 259. Instead, her testimony constituted permissible relevant evidence on the topic of whether a testifying co-defendant embodied a motive to implicate Appellant for the offense for which he stood trial. No bar applies to her testimony as a fact witness.

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

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

The testimony at issue cannot be found to have substantially altered the outcome of Appellant's trial. Appellant impeached Ms. von Herrmann on cross-examination. *State v. Kelly, supra* at 369-70, 540 S.E.2d at 861 (harmless error applies even when State's questioning found to constitute improper bolstering where the defendant's cross-examination effectively impeached the witness). After she stated that cooperating defendants "don't get [their] charges dismissed" as "qui[d] pro quo," (R. p. 593, lines 21-24), additional testimony was elicited from Ms. von Herrmann wherein she stated that her position regarding Bootsie's

bond on the murder charge in fact resulted from his eventual cooperation with law enforcement in the present case. (R. p. 595, line 13 – p. 598, line 5).

Also present within the record is overwhelming evidence connecting Appellant to the victim's murder. Absent Bootsie and Ms. von Herrmann's testimony, Appellant was identified as leaving a right palm print on the passenger side door of the brown van witnessed by a neighbor as being associated with the murder. Bootsie's fingerprints were found on the van as well. (R. p. 209, line 21 - p. 212, line 2). Another witness testified that he saw Appellant leave a house with Bootsie around shortly before the time of the murder in the same van. (R. p. 393, line 1 - p. 394, line 19). A federal inmate testified that after the murder, he heard Appellant's co-defendant speaking with Appellant on the phone apologizing "for what had happened to Keia" and "[t]hat he panicked when he went through the door and just started shooting." (R. p. 626, line 3 – p. 627, line 17; R. p. 641, lines 10-20). A second inmate corroborated the story, testifying that he witnessed Appellant's co-defendant talking about the State's case against them in the county detention center. According to this inmate, Dubba stated he went in the front door, that there were eight people in the van, and that Appellant and Dubba "put a gun to Lil Bootsie's head and told him not to tell[.]" (R. p. 671, lines 4-16).

Even absent Bootsie and Ms. von Herrmann's testimony, the jury was presented with sufficient evidence to convict Appellant under the theory of the hand of one is the hand of all. It is clear from the remainder of the State's case that Appellant acted in concert with his co-defendants in attending and carrying out the home invasion-turned-murder for which he

was convicted. As a result, any error in the trial court's allowing the former assistant solicitor to testify in relation to her dismissal of co-defendant Bootsie's charges proves harmless.

CONCLUSION

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

Respectfully submitted,

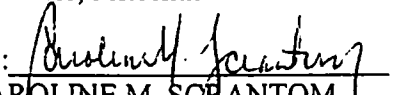
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

CAROLINE M. SCRANTOM
Assistant Attorney General

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit

By: 
CAROLINE M. SCRANTOM
SC Bar No. 101357

Office of Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

May 19, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

v.

THOMAS JAMES,

Appellant

Appellate Case No. 2014-002326.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

CAROLINE M. SCRANTOM
Assistant Attorney General

Office of Attorney General

P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit

CAROLINE M. SCRANTOM
ATTORNEY FOR RESPONDENT

May 19, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

v.

THOMAS JAMES,

Appellant

Appellate Case No. 2014-002326.

PROOF OF SERVICE

I, Caroline M. Scrantom, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appeal by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record at:

Robert M. Dudek
SCCID/Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 19th day of May, 2016.

CAROLINE M. SCRANTOM
Assistant Attorney General
SC Bar No. 101357