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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Horry County
Honorable Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LUZENSKI ALLEN COTTRELL,

APPELLANT

APPELLATE CASE NO 2015-000731

RECORD ON APPEAL

KEIR M. WEYBLE
Cornell Law School
Death Penalty Project
Myron Taylor Hall
Ithaca, NY 14853

SHERI LYNN JOHNSON
Cornell Law School
Death Penalty Project
Myron Taylor Hall
Ithaca, NY 14853

ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEYS FOR APPELLANT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ANTHONY MABRY
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit
P.O. Box 1276
Conway, SC 29526

ATTORNEYS FOR RESPONDENT

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1 P-R-O-C-E-E-D-I-N-G-S

2 THE COURT: Let's get Mr. Cottrell for me,

3 please.

4 (Whereupon, Mr. Cottrell enters the courtroom.)

5 THE COURT: All right. Are we ready to proceed?

6 We have Mr. Cottrell and Ms. Norris and Mr. Hixson.

7 MR. HIXSON: Yes, Your Honor.

8 THE COURT: Ms. Norris, these are your motions?

9 MS. NORRIS: Yes, Your Honor. Our motion

10 essentially is based on exclusion of the testimony of

11 Detective Johnson. We submit that the essence of the

12 case and the trial question was whether there was a

13 voluntary stop there at the Dunkin' Donuts or whether

14 Mr. Cottrell was free to go, and that was essentially

15 the difference later in the jury's verdict of murder

16 versus manslaughter, or even self-defense.

17 The Court (sic) was allowed to present their

18 version of it through Lieutenant Amy Prock (phonetic)

19 testifying about the E-mail --

20 THE COURT: The State was; not the Court.

21 MS. NORRIS: I apologize if I misspoke.

22 Lieutenant Prock testified that Detective Johnson had

23 relayed this information, that Mr. Cottrell was a

24 suspect in a county shooting, and she conveyed that to

25 Officer McGarry and, of course, Officer Guthinger

1 testified that that was passed to him, and that this
2 was a stop to determine whether there was a warrant.
3 The essence of the legal question is that it
4 wasn't enough for Officer McGarry to have good faith.
5 There actually had to be an articulable suspicion
6 based on the information from Detective Johnson, and
7 had he testified as he did in pretrial and in
8 sentencing, he would have said that, one, he didn't
9 have probable cause, nor did he have the information
10 necessary to even conduct a stop.
11 THE COURT: Wasn't that conceded during the trial
12 and stated many times to the jury, that he did not
13 have probable cause to issue any kind of warrant or to
14 arrest Mr. Cottrell?
15 MS. NORRIS: The probable cause part may have
16 been mentioned, but what the State was allowed to
17 present was that it was a voluntary stop, and we
18 submit that it was not. The only way to determine
19 that is to determine whether Detective Johnson had
20 that information. Under United States versus Hensley,
21 from the U.S. Supreme Court, which is the primary case
22 here, one agency can only make a stop based on
23 information from another agency if that first agency
24 has valid information; Detective Johnson did not. So
25 we submit that that Terry stop was not lawful. The

1 jury was not allowed to hear that. So, in essence,
2 although they got instructions on manslaughter and
3 self-defense, they didn't get the evidence that would
4 have allowed them to make that initial determination,
5 which was really the key factor in the whole trial.
6 THE COURT: Well, would not Detective Johnson's
7 testimony, as we heard in pretrial, only have
8 bolstered the State's position?
9 MS. NORRIS: In terms of the validity of the
10 stop? Absolutely not. He testified that he had two
11 valid addresses for Mr. Cottrell. He didn't go talk
12 to him. He even saw him in the parking lot at the
13 phone company.
14 THE COURT: And that was testified to during the
15 trial.
16 MS. NORRIS: Not during the trial; during
17 sentencing. He was excluded during the trial, that is
18 the essence of the motion.
19 THE COURT: Maybe I misspoke. I thought someone
20 testified during the trial about this incident where
21 they saw Mr. Cottrell at the phone company, or
22 something, with the young lady, and I think she
23 testified.
24 MS. NORRIS: Amber Counts may have mentioned
25 that, but that is without the information of anything

1 else. The jury would have had no way to know whether
2 that was significant or not.
3 MR. HIXSON: Thank you, Your Honor. To begin
4 with, we believe the Court made a proper ruling at the
5 time of that excluding Nathan Johnson's testimony
6 under a 403. In other words, we have argued that the
7 testimony wasn't even relevant, but if relevant, it
8 was properly excluded 403. I want to take a little
9 time for the record on specifically what we're talking
10 about.
11 THE COURT: It was confusing.
12 MR. HIXSON: Right. This is exactly what Your
13 Honor had considered over several days, and just to
14 reiterate for the Court, more for the record, that
15 Your Honor heard testimony from Nathan Johnson, sworn
16 testimony subject to cross-examination, initially in
17 the Jackson v. Denno hearing, and was substantively
18 cross-examined on the probable cause, or lack of, in
19 that hearing, once again, for several hours on
20 September 8th.
21 At that time, the State introduced several
22 exhibits including -- I'm holding a copy of it. I
23 don't recall what exhibit number. It was a Court's
24 exhibit, but it was Nathan Johnson's report, State's 2
25 perhaps. In that, he testified in some detail to make

1 sure the Court had a clear in-depth understanding of
2 what we're talking about. In that situation, Your
3 Honor was aware that he generated Mr. Cottrell as a
4 suspect, and he used the term "suspect," person of
5 interest, and a significant person of interest during
6 various times in cross-examination.
7 THE COURT: My concern was that this was going to
8 be very detrimental testimony to Mr. Cottrell.
9 MR. HIXSON: That is correct. The concern that
10 the Court had and the State had is in order for Mr.
11 Johnson to articulate the reasonable suspicion, almost
12 to probable cause, probably not quite there, is
13 because Mr. Cottrell is a drug supplier to Richard
14 Hartman. He sold him marijuana and cocaine, and the
15 person that killed him that night was his drug
16 supplier. He went there for the purposes of getting
17 drugs. In order for us to ask that question, the only
18 thing that the State could do was cross-examine him to
19 bring out the fact that Mr. Cottrell supplied drugs as
20 a trusted friend to Richard Hartman.
21 We have testimony from Ryan Beale, who said that
22 Al is a scary guy and is known to carry guns. That is
23 not admissible at any time in trial. The testimony
24 the State would try to elicit from Mr. Johnson -- in
25 order to clarify, not to mislead the jury on this

1 issue -- that he is a hired enforcer or driver for a
2 prostitution ring, he buys and sells drugs to Richard
3 Hartman and he is a scary guy that carries a gun, and
4 none of that could be admissible.
5 We understand there could be an argument that
6 Mr. McGuire and Ms. Norris would open the door, and as
7 a result the State could elicit that because they
8 opened the door, but under ethical rules, we're not to
9 generate testimony that we know is not admissible.
10 That was the --
11 THE COURT: The footnote in the original opinion
12 from the first trial, you know, almost says that, that
13 you have to explore it and --To go back in time, why
14 the State -- we believe one of the things that the
15 argument misses is that Joe McGarry had articulable
16 suspicion that he was committing a current crime,
17 carrying a firearm on his person as well. So we have
18 the past concerns that Hensley talks about. And to
19 distinguish Hensley, in Hensley there was no
20 articulable suspicion by the St. Bernard flyer. It
21 failed there. There is articulable suspicion. Nathan
22 Johnson has articulable suspicion, and the Court heard
23 it. He called it under oath a suspect. He says he's
24 known to carry a gun, and he narrowed the suspects
25 between the two road wave-runners that day, one is a

1 cooperating male witness, and the only other male
2 witness is a suspect, Mr. Cottrell. The other two
3 were females. That is almost probable cause, but
4 Nathan Johnson made the judgment at that time, no.
5 Two days after his murder, he contacts Myrtle
6 Beach Police Department and asks for more information.
7 We know that Joe McGarry had significantly more
8 information than Nathan Johnson about Mr. Cottrell.
9 He had access to his report that had a violent felony
10 in the past, he knew that. He was familiar with him.
11 If you recall, that initial interaction on the
12 sidewalk in front of the Dunkin' Donuts was a pleasant
13 conversation.
14 One of the things that Hensley talks about is to
15 make sure that that interaction is at least as evasive
16 as possible. In other words, McGarry didn't clear out
17 the Dunkin' Donuts with pistols and get on the ground,
18 get on the ground. The whole thing lasted 81 seconds,
19 30 seconds without lethal force used, without a
20 detention, without back-up officers or bloodhounds or
21 anything. It was almost a voluntary interaction. In
22 other words, our Supreme Court and the U.S. Supreme
23 Court wants that interaction to be as least evasive
24 for as short a period of time as possible. It is
25 difficult to imagine how Mr. McGarry could have done

1 it in a least evasive way.
2 It is important to remember that he could have
3 developed articulable suspicion also when he sees
4 Mr. Cottrell with baggy clothing, scary guy known to
5 carry guns, all of that known by Mr. McGarry. The
6 cars in the parking lot confirmed that information,
7 and the brief conversation confirmed it. So not only
8 does he have the prior crime of murder, he also has
9 developed articulable suspicion. We know he was
10 carrying a gun illegally that night. So there is a
11 current crime and a prior crime.
12 As it relates to the 403 balancing, as Your Honor
13 is well aware, and I think you mentioned it on the
14 record, Joe McGarry's articulable suspicion -- or the
15 inquiry is -- it can be misleading to the jury if they
16 think they have to talk about Nathan Johnson. As long
17 as Your Honor has found that there was articulable
18 suspicion that Nathan Johnson knew, because he was
19 subjected to cross-examination twice, and the Court's
20 exhibits have developed and shown that. So Your Honor
21 was in the proper position to make that ruling at the
22 time. You did it on the record balancing, as
23 appropriate and as the case law requires. I can go
24 on, but you understand the State's position. We ask
25 that the motion is respectively denied.

1 THE COURT: Reply?
2 MS. NORRIS: Just briefly. With respect to the
3 information that Detective Johnson had, this
4 information about him driving for Mr. Hartman, the
5 allegations about drug dealing, him being a scary guy,
6 none of that adds up to a reasonable, articulable
7 suspicion of murder.
8 THE COURT: But, I mean, don't we avoid the
9 negative impact on Mr. Cottrell's case when the State
10 concedes that Mr. Johnson -- neither Mr. Johnson or
11 anyone else in the Horry County Police Department had
12 probable cause to arrest Mr. Cottrell? I mean, wasn't
13 that just throughout the trial? How many times did I
14 hear that question asked and answered? No, we did not
15 have probable cause to arrest him.
16 MS. NORRIS: But there is a separate level. The
17 Terry stop is a separate level.
18 THE COURT: I understand.
19 MS. NORRIS: And Officer Guthinger testified
20 specifically on questioning -- I think we objected --
21 but he was specifically questioned, did you have a
22 reasonable, articulable suspicion, or did Officer
23 McGarry have this to make this stop? Answer: Yes.
24 They argued that throughout. We weren't allowed to
25 counter that, because Detective Johnson, as he

1 testified in pretrial and sentencing, he didn't have
2 that.
3 THE COURT: But what could Detective Johnson say
4 that Officer McGarry did? I mean, Officer Johnson
5 never spoke with Officer McGarry. He was not in a
6 position to have the perception that Officer McGarry
7 did. Officer Johnson could only testify we were
8 developing a suspect, we had a suspect here, we were
9 developing a case, we asked for information. That is
10 all he could say.
11 MS. NORRIS: And that is the important part.
12 THE COURT: And that is what was presented to the
13 jury, wasn't it? We don't have any information to
14 arrest. All the jury heard was they requested
15 information, and that is how Mr. McGarry learned
16 anything about it.
17 MS. NORRIS: That information about what
18 Detective Johnson could have said, again, under
19 Hensley and the Fourth Amendment, what Officer McGarry
20 believed is not the important part. If he did not
21 have a sound basis, based on the information from
22 Detective Johnson, a reasonable, articulable
23 suspicion, then the Fourth Amendment has been
24 violated. The Solicitor argues that this was almost a
25 voluntary interaction; it wasn't. Officer Guthinger

1 testified himself that from the moment Mr. Cottrell's
2 ID was seized, he was in custody. He was not free to
3 leave, and when he tried to leave, he was physically
4 grabbed by Officer McGarry, and we submit, shot.
5 Certainly his weapon was pulled out and he was shot at
6 some point, but in any event, he used physical force
7 and a weapon. This is not a voluntary interaction.
8 So whether that --
9 THE COURT: But wasn't the jury called upon to
10 make that determination?
11 MS. NORRIS: The jury was given instruction, but
12 they weren't given the evidence.
13 THE COURT: But that is just it. The burden is
14 on the State. I think the jury got exactly what the
15 State has. He knows nothing about this -- Officer
16 McGarry knows nothing about this Horry County case
17 other than the fact that Mr. Cottrell is a person of
18 interest in some case, and that is what the jury
19 heard. That is all that this officer had. Then you
20 add to that the other things, such as the officer had
21 prior interaction with him, officer may or may not
22 have suspected that he would be an armed person, at
23 least he said he was a 1031, I think was the code.
24 But the jury heard that this officer, this victim, had
25 minimum, little or nothing from Officer Johnson or

1 anyone with the county. Doesn't that add to your
2 case? Doesn't that help your case when the jury says,
3 That is all they had?
4 MS. NORRIS: The jury also was told, through the
5 testimony of Officer Guthinger and the repeated
6 arguments of Mr. Hixson, that it was a proper stop; we
7 submit that it wasn't, and the evidence that could
8 have led the jury to that conclusion was excluded.
9 THE COURT: Okay. All right. I would, Ms.
10 Norris, respectively deny the motion for a new trial.
11 I believe that my ruling is the correct ruling. I
12 would like to reduce this to writing. Mr. Hixson,
13 propose an order for me, please, in the next -- this
14 week at least.
15 MR. HIXSON: Yes, sir.
16 THE COURT: Get it to Ms. Norris. Thank you very
17 much.
18 MS. NORRIS: Thank you, Your Honor.
19 THE COURT: Mr. McGuire did appear, has shown up.
20 Off the record.
21 (Whereupon, the hearing concluded.)
22
23
24
25

1 **CERTIFICATE OF REPORTER**

2

3 STATE OF SOUTH CAROLINA

4 COUNTY OF HORRY

5

6 I, Natalie Dahl, Official Court Reporter for
7 the State of South Carolina, do hereby certify that the
8 foregoing is a true and accurate Transcript of Record
9 captioned on the 18th day of August 2014.
10 I do further certify that I am neither of kin,
11 counsel, nor interest to any party hereto.

12

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15 January 23, 2014

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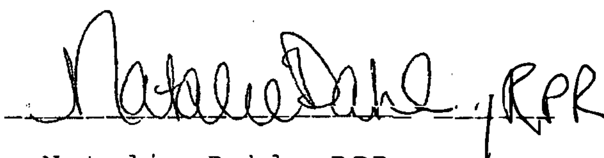
18 

19 Natalie Dahl, RPR

20 Court Reporter

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STATE OF SOUTH CAROLINA	) IN THE COURT OF GENERAL SESSIONS
COUNTY OF HORRY	) 2003-GS-26-20
STATE OF SOUTH CAROLINA	)
VS.	) **Order Denying Defendant's Motion for a New Trial**
LUZENSKI ALLEN COTTRELL	)
Defendant.	)

FILED HORRY COUNTY
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MELANIE HUGGINS-WARD CLERK OF COURT

This matter comes before the Court on motion of the Defendant, Luzenski Allen Cottrell, by and through his attorneys, Teresa Norris and William McGuire, for an Order granting the Defendant a new trial. This Court conducted a hearing on this matter, Monday, November 10, 2014. Teresa Norris presented arguments for Mr. Cottrell, and Chief Deputy Solicitor Scott Hixson presented arguments on behalf of the State.

Factual/Procedural Background

On September 27, 2014, a jury found Luzenski Cottrell guilty of the murder of Officer Joe McGarry and sentenced him to Death.[1] During the trial of the case, counsel for Defense sought to introduce testimony of Horry County Police Detective Nathan Johnson detailing his investigation of the November 23, 2002 murder of Richard Hartman, and how he identified Cottrell as a suspect in an effort to show law enforcement lacked probable cause to arrest Cottrell. Hartman had been killed roughly 37 days prior to Officer McGarry's murder at the hands of Cottrell on December 29, 2002.

On September 8, 2014, the Court conducted a pre-trial hearing to proffer the testimony of potential witnesses including Detective Johnson. At issue was the limits on admissibility of information developed during the Horry County Police Department (HCPD) investigation of the murder of Hartman, as relayed to Myrtle Beach Police Department (MBPD). The articulable suspicion - not rising to the level of probable cause for a formal arrest - developed in the Hartman killing served as part of the basis for McGarry's brief investigative detention or "Terry" stop of the Defendant to check for warrants and pat down for weapons the evening McGarry was killed.

Detective Johnson's testified in camera that witness Ryan Beall, as well as others, told him that Cottrell was one of Hartman's small group of trusted friends. Cottrell worked for Hartman as a driver and security for the prostitutes in Hartman's illicit escort service. Cottrell also supplied Hartman with drugs. Beall stated that Cottrell was scary, that he had seen him with guns, and that he did not like being around him. Cottrell was one of only two male friends with whom Hartman shared social time riding Hartman's wave runner watercraft. The other friend, a local bondsman, was cooperating with the investigation and was not a suspect. Further, Beall told Detective Johnson that Hartman and Cottrell had gotten into an argument the day before

Hartman's murder. The basis for the disagreement was Cottrell's personal relationship with one of Hartman's prostitutes, Amber Counts, and Hartman's anger with them for not showing up for work or calling in. The Court heard testimony that Hartman spoke with a male drug source several times on the telephone to arrange a drug transaction and that Hartman had gone to buy drugs when he was killed. A witness overheard this telephone conversation and stated the victim was cutting up and joking with the man on the other end, indicating a close relationship with the caller. During this conversation, Hartman had been speaking about how cold it was and said "I guess we couldn't have taken the wave runners out today". Cottrell was the only male individual who would go out on the wave runners with Hartman and who was not already cooperating with investigators. SLED crime scene had informed Johnson that Hartman was shot several times in the head by an assailant, sitting in a position of trust, in the passenger seat of the Hartman's truck. The truck with the victim still inside was found in an isolated area consistent with a covert drug transaction.

MBPD Lt. Amy Stanley-Prock testified that, after speaking with HCPD Detective Johnson, she briefed Officer McGarry on the HCPD investigation because McGarry was personally familiar with Cottrell. McGarry, a street crimes officer, had recently arrested Cottrell on a felony PWID marijuana charge and a minor traffic offense. Lt. Stanley-Prock testified that as a narcotics supervisor she reviewed the arresting officer's "high court" case files before sending them to the Solicitor for prosecution. This review ensured that the officer had obtained the Defendant's NCIC "rap sheet" and had reviewed it for any prior record for charging enhancements. McGarry obtained Cottrell's August 2002 rap sheet which showed an arrest and pending charge for attempted murder from New York. During the briefing, Lt. Stanley-Prock told McGarry that Cottrell was a murder suspect based on HCPD's investigation. After this meeting, Lt. Stanley-Prock called Detective Johnson back and updated him on the additional background information provided by McGarry.

MBPD Officer Mike Guthinger testified that he and Officer McGarry entered the Dunkin Donuts when they both noticed Cottrell behaving loudly and somewhat boisterously at the service counter. McGarry's demeanor changed upon seeing Cottrell. McGarry whispered to Guthinger, "suspect 10-61, 10-32." Guthinger testified about MBPD's radio ten codes in use at that time, as well as his practical understanding of what this communication meant to him personally. Guthinger testified that "10-61" is a "shooting suspect," which referred back to the HCPD investigation into Hartman's murder. The second, "10-32" is a "person with a gun" or "person with a concealed gun," which covered the present threat on December 29, 2002, facing McGarry and the innocent public in the Dunkin Donuts. It is uncontested that there was insufficient evidence for probable cause to formally arrest the Defendant at that moment.

Based on McGarry's prior dealings with the Defendant, his observations of Cottrell's behavior that night, and Lt. Stanley-Prock's briefing of HCPD's ongoing investigation, Officer McGarry conducted an investigative detention on Cottrell. The evidence indicated that this stop occurred at the first available opportunity for Officer McGarry to investigate the concerns he possessed. The initial interaction between McGarry and Cottrell was outwardly relaxed and non-confrontational. He asked for the Defendant's identification, received it, and called dispatch to check for pending warrants. A recording of McGarry's radio traffic corroborates this fact and demonstrates the Officer's initially benign demeanor. The entire interaction was very brief, roughly one and a half minutes from the time Officer McGarry asked Cottrell for his ID until Officer Guthinger called dispatch to announce that shots were fired and an officer was down.

Cottrell's gave a post Miranda statement, which this Court found was voluntarily given at a previously held Jackson v Denno hearing. The Defendant's statement corroborates the fact that McGarry was attempting to conduct a brief Terry stop. Cottrell stated that McGarry "asked for my I.D. and when I showed it to him he said he was going to pat me down. I told him no and I walked off." Cottrell pulled an illegally carried handgun he was concealing under his baggy shirt and fatally shot Officer McGarry in the face. The evidence presented shows that McGarry was waiting for the answer to this warrant check via a return call from dispatch when he became locked in the fatal struggle or was already shot. The dispatcher did call back to inform him that there were no pending warrants at that time. McGarry never answered that call.

Law

Rule 401 of the South Carolina Rules of Evidence states: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probably than it would be without the evidence." This rule is identical to the federal rule and consistent with South Carolina common law. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991); State v. Schmidt, 288 S.C. 301, 342 S.E. 2d 401 (1986).

Rule 403 of the South Carolina Rules of Evidence states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." This rule is identical to the federal rule and is consistent with the common law of South Carolina. Alexander, 303 S.C. 377(relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice; State v. Hess, 279 S.C. 14, 301 S.E.2d 547 (limitation of defense testimony upheld where it was merely cumulative to other testimony), cert. denied, 464 U.S. 827, 104 S.Ct. 100, 78 L.Ed2d 105 (1983); State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) (trial judge properly limited the defendant's presentation of certain evidence to guard against confusion of the jury by the injection of collateral issues). When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Gillian, 373 S.C. 601, 609 (2007).

Rule 404(b) of the South Carolina Rules of Evidence states (in relevant part): "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b) SCRE does not set for the the burden of proof required for the admission of evidence of bad acts not the subject of a conviction and, therefore, case law controls this issue. State v. Smith, 300 S.C. 216, 387 S.E.2d 245 (1989). Evidence of a defendant's crimes, wrongs, or acts is generally not admissible. State v. Lyle, 125 S.C. 406, 118 S.E.803 (1923). Such evidence may be admissible for the limited purposes of proving identity, motive, common scheme or plan and lack of mistake or accident. Id. Even if evidence offered for the limited purpose of proving identity, motive, common scheme or plan, or mistake is relevant and permissible for one of the specific purposes enumerated in Lyle, a trial judge may exclude such evidence if the prejudicial effect of the evidence substantially outweighs its probative value. State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991).

A Judge has a responsibility for safeguarding both the rights of the accused and the rights of the public in the administration of criminal justice. State v. Stanley, 365 S.C. 24, 615 S.E.2d

455 (Ct. App. 2005). The conduct of a trial, including the admission and rejection of proffered testimony, is largely within the sound discretion of the trial Judge. State v. Gregory 198 S.C. 98, 16 S.E.2d 532, 534 (1941). The right to present a defense is not unlimited, but must "bow to accommodate other legitimate interests in the criminal trial process." State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001)(overruled on other grounds by State v. Gentry 363 S.C. 93, 610 S.E.2d 494 (2011)(citing Rock v. Arkansas, 483 U.S. 44, 55, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37,49 (1987)((quoting Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297, 309 (1973)). While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence, regardless of its admissibility under the rules of evidence. See United States v. Lancaster, 96 F.3d 734 (4th Cir. 1996).

When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm. Terry v. Ohio, 392 U.S. 1 at 24 (1968). The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Id. "[A]nd in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion... And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief that the action taken was appropriate'?" Terry v. Ohio, 392 U.S. 1 at 21-22 (1968).

In deciding whether to conduct a Terry stop, an officer may rely on information provided by other officers as well as any information known to the team of officers conducting the investigation. U.S. v Navarrete-Barron, 192 F.3d 786 (citing United States v. Robinson, 119 F.3d 663, 666–667 (8th Cir.1997). Terry stops are not limited to crimes currently being committed or about to be committed, but are also permissible for crimes that have already been committed. *See* State v. Hensley, 469 U.S. 221, 105 S.Ct.675(1985). Where police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice. Id. If police have a reasonable suspicion grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a Terry stop may be made to investigate that suspicion. Id at 229.

Findings

This court finds that as a preliminary issue and viewing the facts in the light most favorable to the Defendant, McGarry conducted a legally permissible Terry encounter with Cottrell. McGarry possessed an objective reasonable belief, based specific articulable facts short of probable cause, that Cottrell may have committed a crime and also may have been presently committing a crime by carrying a handgun unlawfully. Further, McGarry had been briefed by Stanley-Prock that Cottrell was a suspect in a Murder investigation. McGarry would not have any knowledge of a prior encounter that day between Cottrell and Johnson. McGarry was acting

with a reasonable and articulable suspicion that Cottrell may have a weapon on his person and may have outstanding warrants based on his briefing from Stanley-Prock. McGarry was legally permitted to briefly detain Cottrell to check his ID, pat him down for weapons, and check for warrants per Terry and Hensley.

I find that the details of the prior murder investigation are not relevant in the instant case and thus were excluded under Rule 401, SCRE. The number of witnesses against Cottrell for the prior murder, the reliability of the witnesses, even other physical evidence, if it existed, linking Cottrell to the prior murder investigation does not make it more or less likely that Cottrell killed McGarry with malice aforethought. Whatever detailed and specific facts existed in Johnson's mind concerning Hartman's murder that were unknown to McGarry, were not relevant to the reasonableness of McGarry's mindset in detaining Cottrell for a warrants check and a pat down for weapons.

The only limited relevant issue in the instant case was whether McGarry had a reasonable articulable suspicion that the defendant either 1) was carrying a weapon as a felon or 2) had outstanding warrants from a completed crime. I admitted testimony from Stanley-Prock that she had informed McGarry that Cottrell was a suspect in a prior shooting case. That testimony was sufficient for the jury to determine whether McGarry had a reasonable articulable suspicion to conduct a Terry stop.

Notwithstanding my holding regarding Rule 401, I find that Rule 404(b) mandates that I exclude any testimony of Cottrell's prior bad acts as that evidence would not be offered for one of the limited reasons allowed by *Lyle*: proving identity, motive, common scheme or plan, or mistake. There is no evidence in the record and no evidence has been presented from either party that evidence that Cottrell committed a prior murder would comply with any of the Lyle requirements.

Notwithstanding my holdings regarding Rules 401 and 404(b), I find that the proffered testimony of Johnson that the defense seeks to admit would be highly prejudicial and that prejudice would outweigh its probative value under Rule 403 of SCRE. A "trial within a trial" about whether law enforcement had probable cause to arrest Cottrell for the prior murder when the state concedes that no probable cause existed only serves to confuse the issues and mislead the jury. Further, probable cause to believe Cottrell committed the prior murder was not required for McGarry to conduct a lawful Terry stop. This Court admitted very limited testimony concerning McGarry's objective beliefs at the time of the stop under res gestae to explain why the Officer singled this individual out for questioning over all other citizens in the Dunkin Donuts that evening. That testimony was sufficient for the jury to make a determination of whether McGarry had a reasonable and articulable suspicion.

This Court finds that the presentation of the facts of Hartman's murder to the jury, through the testimony of Detective Johnson would have created substantial unfair prejudice to the Defendant, would have confused and misled the Jury.

For the foregoing reasons, the Defendant's motion for a new trial is respectfully DENIED.

IT IS SO ORDERED

Conway, South Carolina
March 25 2015

CLERK OF COURT
2015 MAR 25 PM 2:16
HORRY COUNTY
FILED

The Honorable Larry Hyman
Presiding Judge

FILED
HORRY COUN.
2015 MAR 25 PM 2:16
MELANIE HUGGINS-WARD
CLERK OF COURT

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with 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."

Respectfully Submitted,

Robert M. Dudek
Chief Appellate Defender

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

ATTORNEY FOR APPELLANT

This 11th day of January, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

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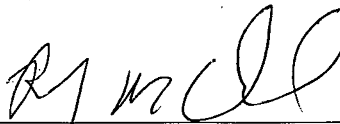

Robert M. Dudek
Chief Appellate Defender

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

ATTORNEY FOR APPELLANT

This 11th day of January, 2017.