STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of General Sessions

R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2015-000517

THE STATE,

Respondent,

v.

COURTNEY RAY MITCHELL,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Appellant for intimidation of a witness. (R. 124-125) On February 12, 2015, Appellant proceeded to a trial before the Honorable R. Keith Kelly and a jury. Donald L. Smith, Esquire, represented Appellant, and Assistant Solicitor James Hardy Price, IV, Esquire, represented the State. The jury found Appellant guilty, and Judge Kelly sentenced him to ten years' imprisonment. (R. 119.)

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On or about June 22, 2013, Appellant met with the team he used to work with at UPS for a lunch gathering. (R. 61, lines 9–14; R. 63, lines 11–14.) He made erratic and derogatory statements and told the group he had a new military-grade sniper rifle with armor-piercing bullets. (R. 61, lines 15–19.) He also told the group "his fixation was to carry—for the [UPS] director of inside sales to be—to leave that place in a box and corrected himself and said, 'I mean with a box and me beside him.'" (R. 61, lines 20–25.) His former team coach, Gina Jones, reported the incident to her Human Resources department at UPS and Appellant was arrested for breach of peace. (R. 25, lines 13–23; R. 62, lines 19–24.) She was expected to testify against him. (R. 63, lines 8–10.)

On July 26, 2013, before the breach of peace case was called for trial, a man dropped off a package at the UPS office for Derrill Bailey, an inside sales representative. The package contained Bailey's leaf blower, which he had given to Appellant to have repaired. (R. 50, lines 21–25; R. 52, line 14–R. 53, line 8.) Along with the leaf blower, the man gave Bailey an envelope for Gina Jones. He delivered it to Jones and they both looked through it, finding three cell phones; a check written to cash for $50; two trespass notices; a concealed weapons permit (CWP); a Whitten's Nursery business card; a note referencing an earlier text message Jones had received from Appellant, which was written on the letterhead of a hunting club; and a receipt from a 7-Eleven near Jones's mother's house. (R. 50, line 21–R. 54, line 1; R. 63, line 15–R. 65, line 2; R. 88, lines 10–11; R. 90, lines 8–15.) After Bailey reported the incident to a police officer and Jones reported it to Human Resources, a warrant was issued for Appellant's arrest on the charge of intimidation of a witness. (R. 55, line 2–R. 56, line 23; R. 92, lines 14–25; R. 124-125.)

Appellant subsequently filed a motion to vacate orders of protection and a motion to compel and served them on UPS, and on February 9, 2015, Appellant's attorney and the attorney for UPS went before Judge Kelly regarding UPS's motion to quash these motions. (R. 12, lines 2–17.) Judge Miller previously held a hearing on July 11, during which he denied Appellant's motion to compel information regarding 401(k) information. (R. 12, lines 12–23.) Appellant again sent subpoenas asking for the same information, and UPS filed a motion to quash. (R. 13, lines 3–11.) Appellant then sent two more subpoenas, including one for Gina Jones, seeking the exact same information Judge Miller denied. (R. 13, lines 12–20.)

Appellant argued Judge Miller's earlier ruling used the word "it" and, thus, he did not know which of the motions Judge Miller was ruling on. (R. 15, lines 9–19.) He also told Judge Kelly he had requested a speedy trial on the breach of peace charge. (R. 15, lines 20–23.) Appellant then stated his understanding was that the breach of peace charge was not going to trial. (R. 15, lines 23–24.) He argued the intimidation of a witness charge was based on a charge that was no longer there. (R. 15, line 24–Tr. 8, line 3.) He then stated he had subpoenaed both his own and Jones's personnel files. (R. 16, lines 14–19; R. 17, lines 12–23.) Judge Kelly asked Appellant and UPS to get anything to him by the next day so that he could review and consider it before the trial started. (R. 19, lines 1–10.)

On February 12, 2015, Appellant proceeded to trial before Judge Kelly and a jury. Defense counsel did not mention the subpoenas or ask for a ruling on his motion to compel. He also did not mention the personnel files. Defense counsel argued pretrial that nothing connected the victim in this case to the breach of peace charge and, therefore, no evidence concerning the alleged breach of peace should be allowed. The State argued the breach of peace charge was part of the *res gestae*. (R. 25, line 13–R. 26, line 20.) After the State listed the evidence it would present and defense counsel argued about why it should not be admissible, the trial court ruled

the evidence was admissible. (R. 26, line 21–R. 27, line 23.) The trial court then asked whether the State would bring in the prior charge or just the facts of the incident. (R. 28, lines 23–25.) The trial court determined the State could both mention that Appellant was charged with breach of peace and call witnesses to testify to the facts regarding that incident. (R. 30, lines 3–19.)

Next, defense counsel argued a motion for dismissal based on alleged difficulties getting discovery from the State. (R. 31, lines 8–17.) Specifically, he argued he was given a UPS security video on January 15 that had "gaps" in it. (R. 31, lines 17–25.) The solicitor explained he had requested the video long ago but did not receive it until recently and gave a copy to defense counsel as soon as he got it from UPS. (R. 32, lines 10–19.) After determining the State had the exact same video with gaps, and that the State had given defense counsel everything it had, the trial court denied Appellant's motion to dismiss. (R. 33, lines 5–25; R. 40, lines 10–21.)

The case then proceeded to trial. First, the State called Keith McNeel, the UPS supervisor responsible for facilities, safety, and security. (R. 43, lines 4–25.) He verified the security cameras were working on July 26, 2013, and that he was able to obtain video from the security footage for that morning. (R. 44, lines 11–25.) He identified State's Exhibit No. 1 as the video, and it was admitted into evidence without objection and played for the jury. (R. 45, line 19–R. 46, line 20.) On cross-examination, defense counsel asked if McNeel was concerned there were two gaps of forty-eight and forty-nine seconds in the four-minute video. (R. 47, line 25–R. 48, line 2.) McNeel stated he was not concerned, that he did not have any control over the video, and that he could not have cut out any portions; rather, he left it just as he received it from the security group. (R. 48, lines 3–19.)

Next, the State called Wiley Derrill Bailey, an inside sales representative for UPS, who testified that on July 26, 2013, he saw a man in the lobby of UPS with the leaf blower he had

previously given to Appellant to have repaired. (R. 49, line 21–R. 52, line 11.) Bailey also testified the man had a manila envelope with him, which Bailey looked through with Gina Jones. (R. 52, line 12–R. 53, line 21.) Inside the envelope were three cell phones, a concealed weapons card with Appellant's picture on it, a check for cash in the amount of $50, and possibly some more items. (R. 53, line 22–R. 54, line 1.) Bailey talked to a police officer about it, and Jones took the envelope to Human Resources. (R. 55, lines 2–5; R. 56, line 20–R. 57, line 2.)

Gina Jones testified next, explaining she was a team coach at UPS on July 26, 2013, and that Appellant was previously an inside sales representative on her team. (R. 58, line 3–R. 59, line 11.) She recalled that early that morning, around 1:00 a.m., she received a text message from Appellant concerning an $80,000 offer from an attorney, in which he referred to Jones as his sister and told her to send his belongings to an address in Abbeville. (R. 60, lines 11–25.) She testified that approximately a month before that date, she and her team had gone to lunch with Appellant, who was no longer working with them at the time. (R. 61, lines 9–14.) During the lunch, Appellant behaved erratically, told everyone about owning a new military-grade sniper rifle with armor-piercing bullets, and said his fixation was for the director of inside sales to leave that place in a box. (R. 61, lines 15–22.) She testified Appellant had then corrected himself and said he meant leave with a box and beside him. (R. 61, lines 22–23.) Appellant also made derogatory statements, used racial slurs, and called specific UPS employees names. (R. 61, lines 23–25.) Jones stated he was very loud and boisterous and that it was both embarrassing and scary. (R. 62, lines 8–12.) She felt obligated to alert her management team because Appellant threatened the life of one of her managers, so she notified Human Resources when she returned to work from lunch. (R. 62, lines 12–22.)

Jones then testified again regarding July 26, 2013, the day she received the envelope. (R. 63, line 15–R. 64, line 2.) She testified that inside the envelope were three cell phones; two

trespass notices for Dwight Inman (another inside sales representative at UPS) and Ken Baca (the director of inside sales); a CWP; a Whitten's Nursery business card; a note referencing the text message she had received from Appellant earlier that morning that was written on the letterhead of a hunting club; and a receipt from the 7-Eleven near her mother's house. (R. 64, line 15–R. 65, line 2.) At that point, Appellant objected on the basis of relevancy, but the trial court advised him the contents had not been offered into evidence yet. (R. 65, lines 3–5.) The solicitor then showed each item to Jones, had her identify it, and moved them all into evidence without objection by Appellant. (R. 65, line 6–R. 68, line 19.) Jones testified that when she saw the items, and based on things Appellant knew about her from working closely together (such as her favorite beer which was listed on the receipt), she felt he was sending her a message that "he has a gun, and he knows where I live, he knows where my family lives." (R. 68, line 22–R. 69, line 11.) She stated, "I was very upset that he took this method of trying to let me know that he knew these things and it all was in relation to the events that happened in June. He scared me. He scared my family." (R. 69, lines 17–21.) When asked if she was afraid to testify against Appellant after receiving the items, she said she was. (R. 69, lines 22–24.)

Lastly, the State called Detective Gregory Scott Wood of the Greenville Police Department, who was working at UPS on special assignment on July 26, 2013. (R. 86, line 10–R. 87, line 25.) He testified he found out from Keith McNeel that Appellant had contacted Bailey by phone and Jones and another employee by text. (R. 89, lines 20–25.) Detective Wood related that there was concern Appellant might make contact with current employees after the incident from the lunch. (R. 90, lines 3–7.) Wood was notified that a package had been delivered so he went to Mr. Baca's office to examine it and learn more about the situation. (R. 90, lines 8–17.) He testified the package contained three cell phones, a CWP, a check for $50, a

receipt from the 7-Eleven, a nursery business card, and the letters to Inman and Baca for trespass notice. (R. 90, lines 19–25.)

On cross-examination, Detective Wood testified he spoke to Jones and sensed fear in her. (R. 91, lines 18–20.) He stated that he believed her fear was absolutely reasonable. (R. 92A, lines 17–22.) When asked if he knew of anything that would make Appellant want to intimidate Jones, he testified he knew Jones was part of the reason Appellant had been charged with breach of peace for the lunch incident. (R. 93, lines 16–21.) When asked what force Appellant used to try to intimidate Jones, he testified, "Psychological force." (R. 94, lines 1–2.)

The State rested, and Appellant moved for a directed verdict arguing "there's been no offering of threat" and "no showing of intent." (R. 94, line 22; R. 95, lines 22–25.) The State argued enough evidence existed between sending one's CWP, along with the receipt and business card, combined with Appellant's talking about killing a co-worker and having firearms and armor-piercing bullets. (R. 96, line 21–R. 97, line 3.) The trial court denied the motion, reminding Appellant the court does not weigh the evidence but rather is only concerned with whether any evidence exists. (R. 97, lines 6–13.) Defense counsel introduced various exhibits and then rested without calling any witnesses or having Appellant testify. (R. 97, line 19–R. 104, line 18.)

After closing arguments and the jury charge, the jury found Appellant guilty and the trial court sentenced him to ten years' imprisonment. (R. 118, lines 1–7; R. 119, lines 19–20.)

ARGUMENT

I.

Appellant's argument that the State failed to prove the elements of intimidation of a witness beyond a reasonable doubt is not a proper issue for appellate review and cannot be a trial court error because the trial court did not make such a holding during trial. However, to the extent the Court may construe Appellant's argument as one regarding the denial of his directed verdict motion, the trial court correctly denied that motion based on the evidence presented.

Appellant argues "[t]he trial court erred when it held that the State proved the elements of intimidation of a witness beyond a reasonable doubt." (App.Br.4.) However, the trial court made no such "holding." Rather, the trial court thoroughly charged the jury on the State's burden of proof, the presumption of innocence, and the elements of the offense (R. 105–117), and *the jury* found the State had proved its case beyond a reasonable doubt when it found Appellant guilty. (R. 118, lines 2–7.) To the extent Appellant's argument could be generously construed as one based on the denial of Appellant's directed verdict motion, the trial court properly denied that motion based on the existence of the evidence presented. Consequently, Appellant's stated issue is not proper for appellate review, and in any event the trial court correctly denied his directed verdict motion.

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not with its weight. State v. Pearson, 415 S.C. 463, 469, 783 S.E.2d 802, 805 (2016). When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. Id. at 470, 783 S.E.2d at 806. The trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. Id. at 469, 783 S.E.2d at 805. A defendant is

entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. (citations omitted).

Section 16-9-340 of the South Carolina Code provides:

> (A) It is unlawful for a person by threat or force to:
>
> (1) intimidate or impede a judge, magistrate, juror, witness, or potential juror or witness, arbiter, commissioner, or member of any commission of this State or any other official of any court, in the discharge of his duty as such; or
>
> (2) destroy, impede, or attempt to obstruct or impede the administration of justice in any court.
>
> (B) A person who violates the provisions of subsection (A) is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars or imprisoned not more than ten years, or both.

S.C. Code Ann. § 16-9-340 (2015).

Appellant argues Appellant did not use any threat or force. He argues the State failed to establish Appellant made any threat to Jones and specifically points out "[t]here was no note or letter directed to Jones containing any threatening statement." (App.Br.5.) However, the State elicited testimony from both Jones and Detective Wood that the combination of the previous threat regarding a co-worker and the contents of the envelope, which included Appellant's CWP and personal information about Jones and her family, were enough to cause Jones to feel threatened. Jones testified that when she saw the items, and based on things Appellant knew about her from working closely together (such as her favorite beer which was listed on the receipt), she felt he was sending her a message that "he has a gun, and he knows where I live, he knows where my family lives." (R. 68, line 22–R. 69, line 11.) She stated, "I was very upset that he took this method of trying to let me know that he knew these things and it all was in relation to the events that happened in June. He scared me. He scared my family." (R. 69, lines

17–21.) When asked if she was afraid to testify against Appellant after receiving the items, she said she was. (R. 69, lines 22–24.) When Wood was asked how Appellant threatened Jones, he testified that based on everything he knew about what happened the day of the lunch, combined with the package and the leaf blower, he sensed fear in Jones and found her fear to be absolutely reasonable. (R. 92A, lines 1–22.) When asked what force Appellant used to try to intimidate Jones, he testified, "Psychological force." (R. 94, lines 1–2.)

One tactic Appellant takes in his brief is to repeatedly claim that Jones is not a reasonable person and to offensively claim she gave theatrical explanations for the items in the envelope. However, Appellant's sweeping generalization that "no reasonable person could interpret receipts and a leaf blower as threatening or intimidating" (App.Br.5.) ignores the most troubling items and Jones's direct testimony that she interpreted the sending of the items as a message that "he has a gun, and he knows where I live, he knows where my family lives." (R. 68, line 22–R. 69, line 11.) Furthermore, even if Appellant believes a "reasonable person" would not have interpreted the items the way Jones did, that would be a decision for the jury, not Appellant or the trial judge. In any event, it is not a standard appearing anywhere in the language of the statute, nor for reviewing a directed verdict motion. The trial court could only base its directed verdict ruling on the existence of evidence from which a reasonable juror could find Appellant guilty, not on whether the victim's reaction was reasonable. See Pearson (quoting State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016) ("[T]he court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt."). Indeed, only the jury was tasked with determining whether Jones was reacting in a reasonable manner when it determined the State met its burden in proving the elements of the crime.

Because the State presented evidence Jones was intimidated by Appellant's implied threat to her and her family, and additionally feared testifying against Appellant after receiving the package, sufficient evidence did exist reasonably tending to prove the guilt of Appellant so that the case should go to the jury. The trial court properly denied Appellant's directed verdict motion, and this Court should affirm.

II.

Appellant's argument that the trial court erred by failing to declare that his arrest for breach of peace was unconstitutional is not preserved for appellate review because it was neither raised to nor ruled upon by the trial court.

Appellant argues the trial court erred by failing to declare that his arrest for breach of peace was unconstitutional. However, this issue was neither raised to nor ruled upon by the trial court. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."); see also State v. Langford, 400 S.C. 421, 432, 735 S.E.2d 471, 477 (2012) ("Constitutional questions must be preserved like any other issue on appeal."). Therefore, it is not preserved for appellate review.

Appellant argues, for the first time in this case, that "there is no basis in fact to establish that [Appellant]'s conversation with his co-workers was a breach of peace." (App.Br.7.) He claims, "He simply made a statement that he wanted to see a manager take his belongings out in a box." (App.Br.7.) This statement is disingenuous, however, because Jones's testimony was that Appellant *first* said his fixation was for the director of inside sales to "*leave that place in a box*" and only then did he correct himself and say he meant "*with a box*" with him beside the director. Appellant admits he made the original statement but asks this Court to consider only the portion made after he "corrected" himself. (App.Br.7.) Appellant also claims none of the other co-workers expressed any discomfort regarding his statements at the lunch and that he did not say anything about or to the co-workers who were there. Finally, he claims he was not arrested at the scene of the incident.

None of the above claims, or the argument as a whole, in any way demonstrate an error by the trial court regarding a failure to declare the breach of peace arrest unconstitutional,

particularly where that arrest did not lead to the conviction that is the subject of this appeal. Appellant never asked the trial court to make a determination that his underlying conviction was unconstitutional, so he cannot argue now that the trial court erred in failing to dismiss his current charge on that basis.

In any event, Appellant has failed to articulate any valid grounds to support the notion that his arrest for breach of the peace was in fact unconstitutional. His argument amounts to a challenge to the factual basis for the arrest, not a claim that any particular constitutional provision was violated. As such, it is without merit and must be denied and dismissed.

III.

Appellant's argument that the trial court erred by failing to hold that the intimidation of a witness charge was the "fruit of the poisonous tree" is not preserved for appellate review because it was neither raised to nor ruled upon by the trial court.

Appellant argues the trial court erred by failing to hold that the intimidation of a witness charge was the "fruit of the poisonous tree." This issue was not raised to or ruled upon by the trial court and, thus, it is not preserved for appellate review. See Dunbar, 356 S.C. at 142, 587 S.E.2d at 693 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."). Furthermore, the State submits Appellant has misconstrued the "fruit of the poisonous tree" doctrine.

"The fruit of the poisonous tree doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality." State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) (citing Wong Sun v. United States, 371 U.S. 471 (1963)) (internal quotations omitted). "However, the challenged evidence is admissible if it was obtained from a lawful source independent of the illegal conduct." Id. (internal citations omitted).

Here, Appellant seems to equate the "fruit of the poisonous tree" doctrine, concerning the suppression of evidence, with an argument about the propriety of criminal charges. He argues the underlying breach of peace charge is unconstitutional and, therefore, the resulting intimidation of a witness charge cannot stand because "[w]ithout the illegal breach of peace charge, there would be no 'witness' to 'intimidate.'" (App.Br.9.) The rationale behind the "fruit of the poisonous tree" doctrine and the judicially created exclusionary rule is to penalize police who use illegal actions by suppressing evidence discovered as a result of those illegal actions. See State v. Adams, 409 S.C. 641, 653, 763 S.E.2d 341, 348 (2014) ("The exclusionary rule is a

judicially created remedy for a Fourth Amendment violation [and its] primary rationale is to deter police misconduct. Where there is no misconduct, and thus no deterrent purpose to be served, suppression of the evidence is an unduly harsh sanction."). In this case, not only were there no illegal actions by police, but there is no articulated evidence Appellant was trying to suppress. Thus, in addition to being unpreserved for appellate review, this doctrine is inapplicable to the case at hand.

Appellant argues this Court should distinguish this case from the holding in State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999), where the Supreme Court determined Nelson's charges were not "fruits of the poisonous tree" but rather new and distinct criminal acts. In Nelson, a police officer was driving behind the defendant and flashed his high beam lights to get the defendant's attention. The defendant drove through a stop sign and the officer conducted a traffic stop. After stopping the vehicle, the officer smelled alcohol, but the defendant refused to participate in field sobriety tests. On appeal, the Supreme Court held that even if the initial attempt to stop the defendant would have violated the Fourth Amendment, the officer was justified in making the stop after the defendant committed the subsequent traffic infractions, rationalizing that a strong policy reason exists for holding that "a new and distinct crime, even if triggered by an illegal stop, is a sufficient intervening event to provide independent grounds for arrest." Id. at 194, 519 S.E.2d at 790.

Appellant argues this case is different from Nelson because intimidation of a witness is not a new and distinct crime but rather depends on the earlier crime of breach of peace. He urges this Court to find that Appellant's intimidation of a witness charge did not "purge the taint" of the allegedly illegal breach of peace charge, consider it "fruit of the poisonous tree," and reverse his conviction.

To the extent this Court finds Appellant has sufficiently articulated an argument about whether the intimidation of a witness charge can stand based on his understanding that the breach of peace charge was later dismissed, federal cases provide some guidance in this area. Generally, courts have determined intimidation of a witness to a pending charge is still a crime even if the charge is later dismissed. United States v. White, 256 F. App'x 333 (11th Cir. 2007). "Accepting [the] position [that it is not] would only encourage witness intimidation." Id. at 340. See also United States v. Griffin, 463 F.2d (10th Cir. 1972) (finding charge involving threats and force to intimidate witnesses applies to *prospective* witnesses, where witness is defined as one who knows, or is supposed to know, material facts and is expected to testify). Thus, even if the breach of peace charge was dismissed two days after this trial, it was an indicted charge at the time of trial and its subsequent dismissal has no impact on the validity of Appellant's conviction.

IV.

The trial court provided Appellant his right to due process in regard to discovery and enforcing the State's obligation to disclose all material, exculpatory, and impeachment evidence to the defense.

Appellant argues the trial court denied him his right to due process by failing to enforce his subpoenas and discovery requests. Specifically, Appellant argues that in violation of Brady v. Maryland, 373 U.S. 83 (1963), he was unconstitutionally deprived of three pieces of evidence that he claimed were in possession of the State: employee personnel records of witnesses and his own personnel record, portions of a security video consisting of two "gaps," and the supplement to an incident report.

Personnel Files

Pretrial, on February 9, 2015, defense counsel and counsel for UPS met. At that time, they discussed defense counsel's motion to compel and UPS's motion to quash subpoenas defense counsel had served in an attempt to compel UPS to produce personnel records. (R. 11, lines 20–25; R. 12, line 1–R. 13, line 11.) UPS argued the subpoenas were not properly served. (R. 13, line 12–R. 15, line 5; R. 18, lines 5–12; R. 19, line 25–R. 20, line 2.) Appellant argued he needed to see Jones's personnel file to see if she had been passed over or not promoted and that he also needed to see his own file. (R. 16, lines 15–19; R. 17, lines 12–23.) Defense counsel claimed he served the subpoenas through certified mail and had a receipt that was not with him at the hearing but that he would bring to trial. (R. 18, line 18–25.) The trial judge informed both parties they could give him anything they wanted him to review before trial and asked that they get it to him by the following day. (R. 19, lines 1–10; R. 21, lines 8–16.) When the trial started three days later on February 12, 2015, defense counsel did not mention the motion to compel, the subpoenas, or anything concerning UPS personnel records. Thus, the trial

court made no ruling on the materiality of any personnel records and was never asked to make such a ruling by defense counsel.

Accordingly, any issue as to the personnel files is not preserved for appellate review. See Dunbar, 356 S.C. at 142, 587 S.E.2d at 693 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."). Even if preserved, Appellant suffered no prejudice because the Rules of Evidence do not appear to support admission of the personnel records under the circumstances of this case. Although not articulated at trial, Appellant presumably would have sought to use the personnel records to attack Jones's credibility under Rule 608, SCRE. In criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The conduct of a criminal trial is left largely to the sound discretion of the presiding judge and the appellate court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way. State v. Commander, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (quoting State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982)). Thus, the admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 494-95 (2013).

Nothing in the record indicates that information in the personnel file would contain evidence of Jones's bias, prejudice, or motive to misrepresent as to Appellant; therefore, the records would not have been admissible under Rule 608(c), SCRE. Also, Appellant has given no such explanation that anything in the personnel file would be relevant or show any bias toward him. His argument that the file could have shown bias on the part of Jones due to her being passed up for a promotion is pure speculation, particularly where Appellant failed to show or

even allege a nexus between Jones not being promoted and himself. Also, to the extent Appellant might claim he would have attempted to use specific instances of Jones's conduct for the purpose of attacking her credibility during cross-examination under Rule 608(b), SCRE, extrinsic evidence in the form of the personnel file could only be used as proof "in the discretion of the court." Thus, there is no way to know whether the trial judge would have admitted it if a Rule 608(b) argument had been made, and the judge would have certainly been within his discretion to exclude it even in that circumstance. The trial judge's failure to order full disclosure of the file suggests he also would have exercised his discretion by not allowing Appellant to introduce the records during cross-examination of Jones. Finally, any statements, opinions, or findings included in the personnel records would be hearsay as defined by Rule 801, SCRE, and therefore inadmissible. For all of these reasons, the State submits Appellant failed to demonstrate plausible admissibility, which undercuts any claim of prejudice from nondisclosure of the personnel records. This is particularly true in the broader context of the trial as a whole and Appellant's exercise of his right to cross-examine Jones.

As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed on appeal absent a manifest abuse of discretion. State v. Gracely, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012); State v. Quattlebaum, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000). Pursuant to the Sixth Amendment of the United States Constitution, every criminal defendant has a right to "to be confronted with the witnesses against him" during trial. U.S. Const. amend. VI. Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses. State v. Aleksey, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). This right guarantees to a criminal defendant the opportunity to cross-examine the witnesses against him concerning bias. State v. Gillian, 360 S.C. 433, 450, 602 S.E.2d 62, 71

(Ct. App. 2004), aff'd as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007); see also Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."). "This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination." Aleksey, 343 S.C. at 33-34, 538 S.E.2d at 255; see also State v. Whitner, 380 S.C. 513, 519, 670 S.E.2d 655, 659 (Ct. App. 2008) (finding the scope of cross-examination rests in the trial judge's sound discretion). "On the contrary, 'trial [courts] retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant.'" Aleksey, 343 S.C. at 34, 538 S.E.2d at 255 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)). "The limitation of cross-examination is reversible error if the defendant establishes he was unfairly prejudiced." State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). "A criminal defendant may show a violation of the Confrontation Clause 'by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."'" State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002) (quoting Van Arsdall, 475 U.S. at 680).

Here, Appellant was given a thorough opportunity to cross-examine Jones. Thus, Appellant's constitutional right to confront her and to conduct a meaningful cross-examination of her concerning bias was fully protected. U.S. Const. amend. VI; Gracely, supra; Aleksey, supra; Gillian, supra. Since the records would not likely have been admissible even if they had been disclosed, the trial court did not err in declining to order their disclosure. Additionally, to the

extent Appellant contends the trial court's ruling impacted his ability to cross-examine Jones, it also was not error. "The appropriate question under a Confrontation Clause analysis is whether there has been any interference with the defendant's opportunity for effective cross-examination at trial." Gillian, 360 S.C. at 450, 602 S.E.2d at 71 (emphasis added). Here, the trial court simply did not interfere with Appellant's opportunity for effective cross-examination.

Security Video

As to the issue of the UPS security video, Appellant argued for dismissal based on the fact that he was not given a copy until January 15 and the copy had gaps in it. (R. 31, lines 17–25.) The State explained it had requested the video long ago but did not receive it from UPS until close to trial and immediately gave a copy to defense counsel. (R. 32, lines 10–19.) The State stated that the video with the gaps was the same one it received from UPS and that it would call a witness at trial to explain the gaps. (R. 31, lines 8–25; R. 33, lines 2–25.) After determining the State had the exact same video with the gaps, and that the State had given defense counsel everything it had, the trial court denied Appellant's motion to dismiss. (R. 33, lines 5–25; R. 40, lines 10–21.) This was the proper ruling. The Brady disclosure rule requires that the prosecution provide the defendant with any evidence in the prosecution's possession that may be favorable to the accused **and** material to guilt or punishment. Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012); State v. Anderson, 407 S.C. 278, 286, 754 S.E.2d 905, 909 (Ct. App. 2014). An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence, or was impeaching. Kyles v. Whitley, 514 U.S. 419 (1995); Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006). These requirements have not been met here. Indeed, the State disclosed to Appellant all available portions of the security video. The trial court's ruling should be affirmed.

Supplemental Incident Report

Finally, Appellant complains he did not receive a supplemental incident report until February 10, 2015, eighteen months after the incident. The trial judge discussed the report with both parties and when the State informed the court it would not introduce the supplemental report, Appellant seemed to drop the issue. As with the personnel files, the trial judge did not make a ruling on the allegedly late disclosure and Appellant did not pursue such a ruling. Accordingly, the issue as to the supplemental incident report is not preserved. In any event, where Appellant was given the supplemental incident report before trial, he completely fails to make the requisite four-part showing to demonstrate a Brady violation in regard to the supplemental incident report.

In conclusion, Appellant's right to due process was provided by the trial court. The State committed no Brady violations in regard to the UPS personnel records, the security video, or the supplemental incident report. Appellant's conviction should be affirmed.

V.

Appellant's argument that the trial court erred by denying his right to a speedy trial is not preserved for appellate review because, in regard to the charge for which he was convicted and challenges in this appeal, it was neither raised to nor ruled upon by the trial court.

Appellant argues the trial court erred by denying him his right to a speedy trial, yet this issue was never brought before the trial court. The only mention in the record of a speedy trial motion was what Appellant told Judge Kelly on February 9, 2015, during the hearing with UPS counsel. Thus, this issue was not raised to or ruled upon by the trial court and is not proper for appellate review. See Dunbar, 356 S.C. at 142, 587 S.E.2d at 693 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.").

Furthermore, Appellant never argued either at trial or at the pretrial hearing with UPS that he was being denied a speedy trial on the charge now on appeal. Rather, he brought it up in the larger context of arguing to the court that because the breach of peace charge seemed not to be going forward, the intimidating a witness charge was based on nothing. Appellant stated, "So the breach of peace case that he spoke of earlier, they never brought that to trial because there's no breach of peace. And I've asked for speedy trials and everything all along, never given the opportunity to do that. Now I understand they're not going to bring that. So the case that he's allegedly intimidating a witness they're not even pursuing. . . . [T]here's nothing there." (R. 15, line 20–R. 16, line 3.) (emphasis added.) Appellant continues this argument on appeal. (App.Br.14–16.)

Based on Appellant's statements above and in his appellate brief, it is clear that any speedy trial motions he may have made were in reference solely to the breach of peace charge, not the charge in this case. Nothing in this record indicates he made any such motion on the intimidation of a witness charge now on appeal before this Court. Thus, for an additional reason

this issue is not preserved for the Court's review. See Dunbar, 356 S.C. at 142, 587 S.E.2d at 693 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.").

CONCLUSION

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

Respectfully submitted,

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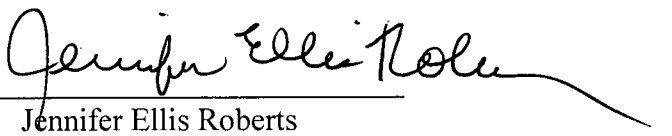
BY: 
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April 5, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of General Sessions

R. Keith Kelly, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2015-000517

THE STATE,

Respondent,

v.

COURTNEY RAY MITCHELL,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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