STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

The Honorable Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERESA ANN MCCRACKEN-HALL,

APPELLANT

Appellate Case No. 2016-001192

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Rules

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Whether the court erred in allowing Detective Lent to repeat what Officer Bellamy allegedly told him about appellant's "strange behavior" in retrieving the decedent's lost cell phone and her failure to inquire where it was found, since the repetition and emphasis of this hearsay testimony about alleged "strange behavior" made it extremely prejudicial?

II. Whether the court erred by excluding evidence appellant's neighbor, Matthew McGurl, had easy access to the decedent husband, that he had been threatening her husband over drug transactions, where the decedent filed a lawsuit against McGurl the same day he was murdered, since appellant had the right to rebut the State's theory of the case that appellant, as the wife, had the unique opportunity and motive to murder the decedent?

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

I. The trial court acted within its discretion to allow Detective Lent to testify about his discussion with Officer Bellamy when the testimony was offered to show why Detective Lent took investigative action, Appellant had the opportunity to cross–examine Bellamy on the same issue, and the testimony was cumulative. Further, Appellant repeatedly drew attention to the issue during cross-examination by asking Lent about Appellant's interaction with Bellamy multiple times. Appellant's objection pursuant to Rule 43, SCRE, is not preserved for review.

II.The trial court properly ruled evidence of third party guilt was inadmissible because the evidence cast nothing but a bare suspicion of guilt on Mr. McGurl. The proffered hostile texts from Mr. McGurl were not sent to the victim, and Mr. McGurl had no access, opportunity, or motive to kill the victim. Because Appellant questioned McGurl's alibi and motive despite the court's ruling, she opened the door to any mention to the jury that McGurl passed a polygraph test.

RESPONDENT'S STATEMENT OF THE CASE

An Horry County Grand Jury indicted Appellant, Teresa Ann McCracken-Hall, in October of 2013 for murder. (Indictment.) On May 23, 2016, Appellant's case was called to trial before the Honorable Larry B. Hyman, Jr. (Transcript p. 1.) Appellant was represented by Greg McCollum, Esquire and Dean Mureddu, Esquire. (Tr. p. 1.) Solicitors Scott Hixson and J. Stephen Grooms represented the State. (Tr. p. 1.) At the conclusion of the four-day trial, the jury returned a verdict of guilty on the murder charge. (Tr. p. 1; p. 625, lines 18-22.) Judge Hyman sentenced Appellant to thirty-five years' imprisonment. (Tr. p. 631, lines 13-19.) Thereafter, Appellant filed this appeal.

RESPONDENT'S STATEMENT OF FACTS

On the evening of July 18, 2013, Officer Jeremy Crews, of the Horry County Police Department, responded to a 911 call in which a woman claimed she found the body of the victim, Steven Hall. (T. pp. 148, line 22 – p. 151, line 9.) When Crews arrived at the home, he found Appellant, Teresa McCracken-Hall, and her sister standing outside. The women told Crews the body was in the back bedroom of the house. (T. p. 153, lines 18-25.) As he approached the home, he noticed a business card from the county police tucked in the front doorway of the residence. (T. p. 152, lines 10-25.) Crews found Mr. Hall on his back, apparently dead from a gunshot wound, but Crews did not see a weapon anywhere near the body. (T. p. 154, lines 6-18.) Crews noticed blood on the dresser and bed, and it did not appear to be fresh. (T. p. 161, lines 5-15.) Crews briefly looked for signs of forced entry, and finding none, secured the house as a crime scene. (T. p. 154, line 19 – p. 155, line 20.) The officer asked Appellant if she recalled locking the house when she left it, and Appellant told him she would have as a matter of habit. (T. p. 159, lines 6-18.)

Police soon discovered that on July 17, one day before Appellant supposedly first discovered her husband's body, neighbor Patricia Pate, who lived across the street from the Halls, heard two "pops," which she assumed were fireworks, though she thought the sounds differed from her previous experience with fireworks. (T. p. 166, line 5 – p. 167, line 3.) She did tell the police officers about what she heard the next day, however. (T. p. 168, line 3 – p. 169, line 9.)

Similarly, Jackie McGurl, the next door neighbor of the Halls, told the police about her observations that day. McGurl said she frequently heard the couple arguing loudly, and on July 17, she overheard an argument between Appellant and victim and believed them to be

intoxicated. (T. p. 176, line 9 – p. 181, line 23.) McGurl was working in her garden at the time and estimated the argument took place between 3:00 pm and 5:00 pm that day. (T. p. 181, line 1 – p. 182, line 5.) McGurl later heard sounds she thought were fireworks, which struck her as unusual because it was not a holiday. (T. p. 183, line 5 – p. 184, line 9.) She then noticed Appellant's sister drive up to the Hall's house and watched Appellant get in the car. McGurl thought it was odd Appellant took the couple's dogs with her because the smaller dog was Steve Hall's constant companion dog. (T. p. 184, line 10 – p. 185, line 18.)

On the morning of July 18, 2013, a woman found Steven Hall's cell phone on a dock at Peachtree Landing. (T. p. 219, lines 6-15.) The dock was on the Atlantic Intracostal Waterway, and the phone was sitting on a bench near the water. (T. p. 220, lines 6-18.) The witness called the police and turned the phone into an officer at a nearby gas station. (T. p. 220, lines 16-21.) Officer Bellamy took possession of the phone, turned it on, and found the phone number and owner's name. (T. p. 225, line 13 – p. 229, line 19.) Once Bellamy had the phone number and owner's name, he submitted the data through the police's reporting system. (T. p. 230, lines 10-22.) Bellamy found an address for Hall and attempted to contact him at his home. (T. p. 231, line 20 –p. 232, line 5.) No one answered the door at Hall's house, and Bellamy heard no dogs barking, so he left a business card in the front door with a note asking Hall to contact Horry County in reference to some found property. (T. p. 232, line 11 – p. 233, line 16.)

Bellamy then attempted to contact a family member of Hall by searching through his contacts on the phone. (T. p. 234, lines 1 – 12.) Bellamy left a voicemail with Appellant informing her he found her husband's phone. (T. p. 235, line 1- p. 236, line 8.) A few hours later, Appellant called dispatch and asked to meet Bellamy at a convenience store to retrieve the phone for her husband. (T. p. 236, lines 9-18.)When Appellant arrived at the store, Bellamy asked to

see her driver's license to confirm her identity and then turned over the phone to her. (T. p. 238, lines 4-15.) Bellamy said Appellant did not ask where the phone was found. He later testified that in his experience, property owners typically asked questions about where and when the property was found. (T. p. 239, line 17 – p. 240, line 15.)

Jack Stewart, a lieutenant with the Horry County Special Operations Bureau, was called to search the area where the cell phone was found in an attempt to locate more evidence about the victim's death. (T. p. 248, line 22 – p. 250, line 16.) The dive team was instructed to look for evidence near the location on the dock where the phone was found. (T. p. 253, lines 2-5.) Despite the dangerous and difficult conditions in the Intracoastal Waterway, one of the divers found a handgun. (T. p. 254, line 2 – p. 255, line 4.) When the crime scene analyst arrived on scene, she discovered the handgun was loaded with one round in the chamber. (T. p. 257, lines 6-24.) Steven Hall's DNA would later be found on the barrel of that gun. (T. p. 433, line 8 – p. 434, line 10.) Further, Peachtree Landing at Swing Bridge Park, where the cell phone and gun were found, was located directly on a route from the crime scene on Williamson Circle to the sister's house on Devon Lane. (T. p. 372, line 4 – p. 373, line 13.)

The firearms examiner determined the bullet retrieved from the victim during the autopsy and the bullet retrieved from the wall baseboard in the victim's bedroom were fired by the same weapon. Because of the rust and corrosion on the handgun pulled from the Intracoastal Waterway, however, the examiner was unable to conclude whether the handgun fired the bullets found at the scene. (T. pp. 442 – 443.)

Based on the evidence at the crime scene, investigators believed Steven Hall knew his killer intimately. When crime scene analysts processed the victim's home when his body was found, they saw no signs of forced entry. (T. p. 262, lines 1-8.) Hall appeared to have been shot

while he was eating in his bedroom. In the kitchen, a bowl of ground beef, a plate of taco shells, and a knife were sitting out, indicating someone was cooking dinner when the murder occurred. (T. p. 266, lines 2-19.) In the bedroom, where the victim was found, there was blood on the comforter covering the bed, as well as a plate of food consistent with the food prepared in the kitchen. (T. p. 267, lines 11-25.) There was no sign of a struggle in the bedroom and it did not appear any valuables were taken. (T. p. 268, line 11 – p. 269, line 21.) Investigators would later find two cell phones inside Appellant's purse, one belonging to Appellant and the other belonging to the victim. (T. p. 264, lines 1-6.)

The victim suffered two gunshot wounds: one bullet entered at contact and exited the head, and the second bullet entered the chest at contact or in close proximity and lodged in the body. (T. p. 270, lines 5-24; p. 329, line 7-17.) The bullet to the chest penetrated the right, upper lung. (T. p. 330, lines 3-7.) The pathologist believed it was possible the victim could have survived the chest wound had he received immediate medical attention. (T. p. 332, lines 5-19.) The wound to the head, in which the muzzle imprint of the gun was visible on the victim's skin, would have immediately incapacitated him, however. (T. p. 333, line 2 – p. 336, line 15.)

Detective Gregory Lent, who arrived on scene approximately thirty-five minutes after the 911 call, noticed Appellant was not particularly emotional, although she appeared to be under stress. (T. p. 352, line 2 - p. 354, lines 11-23.) Appellant's sister, however, was extremely upset. (T. p. 355, lines 2-6.) After talking to both women at the scene, and then talking to crime scene technicians, Lent asked both women to come to the police station to give further statements. (T. p. 365, lines 3-20.)

Appellant told Lent on the night of the 17th, she borrowed her sister's white Dodge Nitro to go to the convenience store to get a bottle of water. (T. p. 365, line 21 – p. 366, line 13.)

Police thought this was strange because there was bottled water at the sister's house. (T. p. 366, lines 14-23.) Lent obtained Appellant's cell phone records, as well as those of the victim's, and determined the initial call to Appellant's sister on July 17 at approximately 8:30 pm originated from the victim's phone. (T. p. 364, lines 5-19.) This placed Hall's cell phone in Appellant's hands after the estimated time of death. Later, the Cellebrite data extraction from Appellant's phone revealed a photograph taken on July 4, 2013, of a woman standing on a dock in what appeared to be the same location as where the gun and cell phone were found. . (T. p. 453, lines 17-25.)

The Cellebrite report also showed activity on Appellant's cell phone accessing two online dating sites at approximately 7:00 pm on the evening of the murder. (T. p. 457, line 12 – p. 458, line 9.) Just before 7:00 pm on the night of the murder, Appellant logged into her account on Meet Me and messaged an unknown person, "Dealing with an asshole, and you." (T. p 491, lines 5-23.) At 10:48 pm on July 18, just hours after supposedly discovering her husband's body, Appellant again logged on to the dating site. (T. p. 464, lines 1-4.) Interestingly, the report also showed multiple text messages from Appellant's phone to the victim's phone; even after Appellant received a voice mail from Officer Bellamy informing her he had her husband's cell phone. In those test messages to her husband, Appellant wished him a happy anniversary, told him she loved him, and said, "I hope you've calmed down." (T. p. 460, line 3 – p, 461, line 12.)

Appellant did not testify at her trial, but she did call her sister to testify in her defense. Appellant's sister claimed she heard the voice of Steven Hall mumbling to himself when she arrived to pick up her sister on the night of June 17, but she did not enter the house or see her brother in law. (T. p. 511, line 7 – p. 513, line 9.) Appellant was the last person to see her husband alive.

ARGUMENT

I. The trial court acted within its discretion to allow Detective Lent to testify about his discussion with Officer Bellamy when the testimony was offered to show why Detective Lent took investigative action, Appellant had the opportunity to cross–examine Bellamy on the same issue, and the testimony was cumulative. Further, Appellant repeatedly drew attention to the issue during cross-examination by asking Lent about Appellant's interaction with Bellamy multiple times. Appellant's objection pursuant to Rule 43, SCRE, is not preserved for review.

Appellant argues the trial court erred in allowing Detective Lent to repeat what Officer Bellamy told him about his interaction with Appellant when she retrieved the phone because Bellamy's testimony about her "strange" behavior was impermissible, prejudicial hearsay. (IBOA at p. 3.) A review of the record reveals nothing of the sort. At no time did Bellamy or Lent characterize Appellant's behavior as "strange" when she retrieved the phone, nor was Lent's testimony about what Bellamy told him offered for the truth of the matter asserted.[1]

At trial Appellant only objected to the testimony on the basis of hearsay. She now argues on appeal it was the cumulative nature of the testimony that unfairly prejudiced her. This argument is not preserved for review. Moreover, it was Appellant who repeatedly questioned Lent about what Bellamy told him and when Appellant informed him of that meeting. In fact, Appellant took advantage of the testimony to highlight the portion of Appellant's interview with Lent when she described her statements to Bellamy expressing gratitude for the phone's return. Appellant cannot now change the basis of the original objection and argue on appeal the

[1] The solicitor asked Bellamy if it was "unusual" for people not to show interest in recovered items, and Appellant objected without a stated basis, and the trial court allowed the question. Officer Bellamy then testified it that in his experience property owners ask where and when the property was found, but Appellant did not ask those questions. (T. p. 229, line 17 – p. 240, line 10.) Detective Lent characterized Appellant's demeanor as "strange" when he observed her at the crime scene the night Hall's body was found, but not in reference to Officer Bellamy's characterization to him. (T. p. 354, lines 11-23.)

cumulative nature of the testimony prejudiced her, particularly when she strategically pointed out the discrepancies in the testimony in an effort to discredit Detective Lent.

Standard of Review

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Baccus*, 367 S.C. 41, 625 S.E.2d 216 (2006); *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001). "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011) (citation omitted).

How the Issue Arose at Trial

During Lent's testimony about his actions the night he responded to the 911 call, he said he learned Appellant met with Officer Bellamy to retrieve her husband's cell phone. (T. p. 360, lines 5-11.) When Lent began to describe what Bellamy told him about the encounter, defense counsel objected to "what Officer Bellamy explained to him." The trial court said, "Well. I think it is not offered for the truth of any matter asserted because we already heard from Officer Bellamy, have we not?" (T. p. 360, lines 14-16.) The court went on to say, "This officer is reiterating what he heard in reference to what he did. It is not [offered] to show that it is true, but simply as to what prompted his actions, and I'm going to allow it to that extent." (T. p. 360, lines 19-23.) The State then went on to question Lent on his conversation with Bellamy, without further objection from Appellant. (T. p. 361, line 7 – p. 363, line 6.) Lent said he asked Bellamy

whether Appellant questioned him about the circumstances of the lost phone, and Bellamy told Lent she did not:

> He explained he pulled up, provided her with a phone, and my main question was did she ask where did you get the phone, how did it end up where it was, has anyone spoken to my husband, normal questions of what I felt were normal questions that I would receive from someone who would ask if I returned their loved one's property to them. He stated that none of those questions were asked, that conversation never went on. She didn't ask him any and he didn't provide that information to her. She didn't ask, and that was the extent of their conversation, Here is your husband's phone, okay, and she then left.

(T. p. 362, lines 1-12.) Lent testified Appellant never mentioned the retrieval of her husband's phone earlier that day to him when he talked to her on the scene. (T. p. 362, lines 13-24.)

On cross examination, the first question asked by defense counsel concerned Lent's testimony Appellant neglected to mention her contact with police earlier in the day when she retrieved her husband's phone. (T. p. 387, line 23 – p. 388, line 2.) Defense counsel continued to question Lent on the State's efforts to show Appellant's lack of concern when she was contacted by the police:

> Q All right. Because you made a point of saying that, in your opinion, that if someone were contacted by law enforcement, that in and of itself would cause someone to be alarmed, right?
>
> A It is my opinion that if someone were contacted by law enforcement, that is usually something that would stand out throughout their day.
>
> Q And that is your opinion about what another person would think or not think, right?
>
> A That is my opinion.
>
> Q And sometimes you don't always know how people are going to react, right?
>
> A That is correct. Everyone reacts differently.
>
> Q But as far as the phone goes, when you re-interviewed Ms. Hall, Teresa Hall, she did bring up that the police had returned Steve's phone, right?

(T. p. 388, line 21 – p. 389, line 11.) Defense counsel then read from the transcript of Lent's interview with Appellant, in which Lent asked Appellant questions about her schedule on July 18. Eventually, counsel read the part in which Appellant mentions her meeting with Officer Bellamy. (T. p. 393, line 14 – p. 394, line 9.) Defense counsel then read the part of the transcript in which Appellant described her interaction with Bellamy that morning, when she said she expressed her gratitude for Bellamy's returning the phone and mentioned not knowing it was lost. (T. p. 394, line 22 – p. 395, line 1.)

After questioning Lent about whether he lied to Appellant when he mentioned he was not aware of Appellant's meeting with Bellamy, defense counsel then pointed out that Appellant quoted Bellamy as saying "someone turned it in." (T. p. 396, line 24 – p. 397, line 6.) Following this exchange, defense counsel and Lent engaged in a lengthy discussion about whether Lent would have discovered the information from Bellamy had he not seen Bellamy's card on the front door and whether Appellant could have deceived Lent had she taken the card from the door to prevent him from finding it. (T. pp. 397 – 403.)

Analysis

First, the testimony offered by Detective Lent, in which he described what Officer Bellamy told him about his interaction with Appellant when he returned the phone to her was not impermissible hearsay. As the trial court noted, evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted. *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1991). Additionally, an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken. *State v. Thompson*, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003); *United States v. Love*, 767 F.2d 1052 (1985).

In this case, Detective Lent was certainly familiar with Appellant as the wife of the victim, but Lent was undecided on the extent Appellant was culpable in the death of her husband. Lent testified he purposefully withheld information from Appellant, such as his knowledge of her meeting with Bellamy, because he wanted to determine when she would mention it to him (T. p. 362, line 24 – p. 363, line 6.) His testimony about his conversation with Bellamy explained how Lent knew about the meeting and why he used particular investigative techniques to interrogate Appellant. Lent's testimony was not offered for the truth of the matter asserted but rather to explain the timeline of his investigation. Thus, the evidence was not hearsay and was properly before the trial court. *See Caprood v. State*, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000) (finding statements made regarding unrelated crimes not hearsay where "officers were explaining their actions in pursuing the defendants and the statements were not offered for their truth"); *State v. Kirby*, 325 S.C. 390, 396, 481 S.E.2d 150, 153 (Ct.App.1996) (concluding testimony by police officer about dispatcher's call was not hearsay where offered to explain "the reason for the initiation of police surveillance of the vehicle in question"); *State v. Johnson*, 318 S.C. 194, 197, 456 S.E.2d 442, 444 (Ct.App.1995) (ruling testimony that defendant was in a "high drug traffic area" was not hearsay because it was introduced as "background information" about the investigation).

Second, Appellant cannot argue, for the first time on appeal, that the cumulative nature of Lent's testimony unfairly prejudiced Appellant. This argument is not preserved for this Court's review because it was not raised to and ruled upon by the trial court. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal."). Appellant is not entitled to relief

on the merits of the argument either, however, because the testimony's probative value was not outweighed by any unfair prejudice.

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. 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. Holder*, 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009); *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). Stated another way, "evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." *State v. Salley*, 398 S.C. 160, 169, 727 S.E.2d 740, 744 (2012) (citing Rule 401, SCRE); *State v. Bixby* 388 S.C. 528, 544, 698 S.E.2d 572, 581 (2010).

Here, Detective Lent's testimony about how his investigation began to focus on Appellant was clearly relevant to the State's theory of the case. As the lead investigator, Lent could testify comprehensively to the development of the investigation. Thus, the testimony was admissible under Rule 401 and, as discussed previously, was not impermissible hearsay.

Despite Appellant's assertion to the contrary, Appellant was not unfairly prejudiced by the cumulative nature of Lent's testimony. In fact, she took advantage of Lent's account of the meeting, as it was explained to him by Bellamy, to point out in the transcript of her interrogation the portion in which she informed Lent of the meeting. (T. p. 393, lines 11-23.) Defense counsel repeatedly questioned Lent on this exchange, pointing out the inconsistencies in Lent's testimony and Appellant's statements. (T. pp. 392-395.) If the basis of Appellant's objection to the testimony is the cumulative prejudicial impact, then Appellant should not have repeatedly drawn

the jury's attention to the matter in attempting to point out that Appellant expressed surprise the phone was lost when Bellamy contacted her. (T. p. 394, lines 22-25.) Thus, rather than avoid any prejudicial impact of the cumulative evidence, Appellant took advantage of the testimony to discredit the officers. A party cannot complain of prejudice from evidence to which he opened the door. *State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991)

Lastly, Appellant claims, the cumulative nature of the testimony created the harm, when instead, the cumulative nature of the testimony made its introduction through Lent harmless beyond a reasonable doubt. Repeating what Bellamy told Lent was not prejudicial because Appellant could have adequately confronted Bellamy about the same matter asserted. "[R]eversal is not required unless appellant was prejudiced by the error." *Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150 (1985). Even if the court deems Lent's statements to be hearsay, improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless. *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). This issue is without merit.

II. The trial court properly ruled evidence of third party guilt was inadmissible because the evidence cast nothing but a bare suspicion of guilt on Mr. McGurl. The proffered hostile texts from Mr. McGurl were not sent to the victim, and Mr. McGurl had no access, opportunity, or motive to kill the victim. Because Appellant questioned McGurl's alibi and motive despite the court's ruling, she opened the door to any mention to the jury that McGurl passed a polygraph test.

The trial court properly excluded any evidence of Mr. McGurl's guilt because McGurl had no motive to harm the victim, McGurl's alibi was investigated and confirmed by the police, and McGurl had no unique access to the victim. Appellant's assertion McGurl killed Hall because Hall filed a lawsuit against him was contradicted by the timeline of the proof of service – days after Hall's death. Moreover, the jury heard about the lawsuit between the men and clearly found it sufficiency lacking in persuasion of McGurl's guilt. Similarly, the hostile texts

between McGurl and Appellant cast no suspicion on McGurl and were certainly not inconsistent with Appellant's guilt. *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941). In fact, the texts were irrelevant because Appellant could not show any hostility or threats between **McGurl and the victim.** Moreover, while the texts expressed anger, the texts did not express violence. If anything, McGurl instructed Appellant to leave him and Mrs. McGurl alone. Lastly, and most importantly, the hostile texts would have revealed highly prejudicial information about Appellant's drug sales to the jury. See Rule 403, SCRE ("evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice"). Rather than threaten the defense, as Appellant suggests, the solicitor attempted to protect Appellant from damage to her own case and to prevent a grounds for post-conviction relief in the future.

Lastly, Appellant cannot show prejudice from the trial court's ruling when she flagrantly disregarded that ruling by questioning Jackie McGurl on the lawsuit filed in small claims court against her husband, and questioning Detective Lent on his investigation of Mr. McGurl as a suspect. The jury heard this evidence of third party guilt and found it unpersuasive. The court committed no error in its ruling on this issue, but should this Court find otherwise, any error was harmless beyond a reasonable doubt.

How the Issue Arose At Trial

In pre-trial motions, the State sought a ruling from the court on third party guilt. (T. p. 34, lines 1-3.) The trial court cited to *State v. Gregory*,[2] and asked Appellant if she had any evidence of a third party that might be culpable. Defense counsel said, "I think we are jumping the gun on that motion, Your Honor." The Court later inquired again, "At this time you have no third party?" Defense counsel said, "True." (T. p. 88, lines 6-10.)

[2] 198 S.C. 98, 16 S.E.2d 532 (1941)

Later, during the testimony of Jackie McGurl, the jury learned Mr. McGurl and the victim were involved in a dispute in small claims court but Mrs. McGurl did not know the details of the dispute. (T. p. 190, lines 18-21.) Although Mr. McGurl was not aware at the time, the victim had filed a lawsuit against him in magistrates' court the day he was killed. (T. p. 190, lines 18-21.) Appellant then began to question McGurl on her husband's alibi the night of the murder, and the State objected. (T. p. 191, lines 1-20.)

Appellant claims the solicitor made much of McGurl's polygraph test and "impermissibly presented evidence of that fact in front of the jury." (IBOA at 13). This is flatly contradicted by the record.[3] The discussion about third party guilt occurred outside of the presence of the jury. (T. p. 191, lines 23-24.) Appellant argued McGurl was developed as a suspect because the police polygraphed him. The solicitor necessarily countered Appellant's argument McGurl was a suspect when he explained McGurl passed the polygraph. (T. p. 194, lines 11-16.) The solicitor then explained to the trial court that the dispute over $200 between the victim and Mr. McGurl centered on Appellant's sale of prescription pain medication to Mr. McGurl. The solicitor said the text messages between the victim and Mr. McGurl revealed he did not want his wife to know he was purchasing Appellant's pain pills illegally. The solicitor expressed concern that in addition to the unsubstantiated third party guilt evidence, this could introduce prejudicial evidence about Appellant into the trial. (T. p. 192, lines 1-16.) The solicitor also produced a report from the magistrate's office indicating the lawsuit was not served on Mathew McGurl until August 9, 2013, which would have been many days after the victim's

[3] In fact, the jury only heard McGurl passed a polygraph on Appellant's cross-examination of Detective Lent, after she repeatedly questioned him on other suspects, specifically Mathew McGurl, and Lent's investigation into his alibi the night of the murder. (T. p. 412, line 12 – p. 413, line 12.)

death on or about July 17, 2013. (T. p. 193, lines 4-8.) Appellant's suggestion the lawsuit was motive for McGurl to murder the victim was not supported by the timeline.

The trial court reminded Appellant she must cast more than a bare suspicion of guilt on a third party and that she was limited to evidence inconsistent with her own guilt. (T. p. 194, lines 19-25.) Defense counsel told the court the third party guilt testimony was a "thorny issue" and understood "if I open the door they will be able to go through some of these--" (T. p. 194, lines 1-3.) When the trial court pressed defense counsel further, the following exchange occurred:

> MR. McCOLLUM: I think there is more that gets developed.
>
> THE COURT: Tell me what you have. Tell me.
>
> MR. McCOLLUM: It is our understanding that Mr. Steve Hall owned a bar -- ran a bar ran by Hells Angels or another group, that he was involved in the using, buying, selling prescription narcotics, that he --
>
> THE COURT: How does that relate to Mr. McGurl? Has he ever been in the bar? Do you know anything about that?
>
> MR. McCOLLUM: It relates -- it could -- listen, I understand what Your Honor's point is, okay. Since Mr. McGurl was involved in that enough that it created problems such that they were sending messages back and forth to Ms. Hall and her husband and accusing each other of things, a lot of nasty stuff was going on.
>
> THE COURT: Tell me. I mean, I need to know. What do you have?
>
> MR. McCOLLUM: May I hand it up instead of reading it?
>
> MR. HIXSON: Just to clarify for a second. There could be no better perfect *Gregory* case than having the defendant get a chance to talk about him having a loose affiliation with the Hells Angles with a bar. There is nothing in discovery relating to that other than investigative techniques that anyone else possibly could have done this. I mean, that is on all fours with what Gregory stands for. Trying to get the idea that Matthew McGurl and Hells Angels, that has got to be someone that is violent to get inside the house.
>
> As it relates to what Counsel handed up, I think it is important, for the record, to understand that the Cellebrite report that I intended to introduce tomorrow afternoon is the document that he handed up, that is the extraction report. I'm talking about carrying our burden that this stuff happened, it says in Teresa's phone, Hey, I owe you $200 and 35 for a total of 235. You owe me like $65 bucks for the shit I gave you twice. You said you would give me pills for it and never did. That is the kind of stuff the jury gets to hear if it comes in, and I don't want the jury to hear that. There are more like that in here. I

didn't intend to introduce the Cellebrite report to deflect what this message was -- there is also a text about, Stop texting my wife. My wife doesn't need to know anything about it.

So we know that Matthew was trying to protect his wife because she's continuing to say I'm trying to get him off pills. How that has to do with defendant's guilt is difficult to fathom.

THE COURT: You know, there has to be an order for third-party guilt or evidence of third-party guilt to be admissible. There has to be proof of some connection with the crime, there has to be a chain of facts or circumstances that tends to clearly point to another person as the guilty party, and we don't have any of that. I mean, the fact that he may or may not have sold some pills to the victim would be nothing more than -- nothing more -- nothing that I have seen connects the third-party with this murder, nothing.

(T. p. 195, line 1 –p. 197, line 13.) The State noted that the text messages were between Mr. McGurl and the defendant, not Mr. McGurl and the victim. Defense counsel argued that even though the victim was not taking part in the text conversations, he was necessarily involved in the interaction because Appellant was selling the victim's prescription medications. (T. p. 199, lines 4-22.) Again, when the trial court pressed defense counsel what other evidence implicated Mr. McGurl, counsel pointed to McGurl's proximity as the victim's neighbor. (T. p. 200, lines 2-3.)

The trial court excluded the testimony pursuant to *State v. Gregory,* 198 S.C. 98, 16 S.E.2d 532 (1941), and deemed the third party guilt line of questioning impermissible. After the proffer of Ms. McGurl's testimony, the court found no evidence of third party guilt because Ms. McGurl did not testify to any hostility between her husband and the victim. The court found any further testimony along these lines would confuse and mislead the jury. (T. p. 205, line 15 – p. 206, line 1.)

Later, during Detective Lent's testimony, defense counsel questioned Lent extensively on investigative techniques and whether they investigated Mr. McGurl's alibi. Lent explained the investigation cleared Mr. McGurl as a suspect after they confirmed his alibi and he passed a

polygraph. (T. pp. 403-414.) The State objected to the impermissible questioning on third party guilt, and the court agreed. (T. p. 414, lines 16-20.)

Standard of Review

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the conclusions of the trial court are based on an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice. *State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). The standard of review is limited to determining whether the trial court's ruling is supported by any evidence. *State v. Breeze*, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008) (emphasis added).

Analysis

The admissibility of evidence of third-party guilt is governed by the rule set forth in *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941). *See State v. Cope*, 385 S.C. 274, 292-93, 684 S.E.2d 177, 186-87 (Ct.App.2009) (*quoting State v. Gregory* as the rule governing admissibility of evidence of third-party guilt); *State v. Swafford*, 375 S.C. 637, 641-43, 654 S.E.2d 297, 299-300 (Ct.App.2007) (affirming application of *State v. Gregory*). In *Gregory*, our Supreme Court stated:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.... But before such testimony can be received, **there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty**

> **party**. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

198 S.C. 98, 104-105, 16 S.E.2d 532, 534-35(1941) (emphasis added). The United States Supreme Court clarified the above-outlined rule regarding the admission of third-party guilt in *Holmes v. South Carolina*, 547 U.S. 319 (2006). *Holmes* found the trial court erred by considering the strength of the State's **rather than determining the corroboration of the third party guilt by the defense**. *Id.* at 328–29. The *Holmes* Court also held that though the trial court erred in denying the admissibility of the statement, the limitations on the admissibility of third party guilt as outlined in *Gregory* do not deny a defendant his right to present evidence. *Id; see also*, *State v. Burgess*, 391 S.C. 15, 703 S.E.2d 512 (2010); *Miller v. State*, 379 S.C. 108, 114, 665 S.E.2d 596, 599 (2008). *Holmes v. South Carolina* preserves *Gregory* as the appropriate standard for evaluating the admissibility of evidence of third-party guilt.

As the U.S. Supreme Court and our state courts have held, evidence of third party guilt must do more than cast a bare suspicion or make a conjectural inference as to the guilt of another before it is admissible. At trial, Appellant attempted to present evidence of third party guilt by casting suspicion on the victim's neighbor, even though she was warned the evidence was inadmissible. Mr. McGurl was working on the evening of the murder. His alibi was confirmed with his employers, and he passed a polygraph test. (T. p. 414, lines 3-5.) The State was able to prove McGurl was not served with lawsuit papers until days after the victim's death. (T. p. 485, lines 17-23.) Thus, Mr. McGurl had neither the motive nor the opportunity to commit the crime.

Further, the texts between McGurl and Appellant did not indicate any predisposition for violence by McGurl against his neighbors. McGurl told Appellant to "[q]uit calling and texting me and my wife." (T. p. 198, lines 3-11.) The proffered texts appear to suggest McGurl wanted

nothing to do with his neighbors in the future. The court properly excluded the proffered texts between McGurl and Appellant because the communications introduced irrelevant, prejudicial information to the jury about Appellant's drug dealing. Appellant argues the text showed motive for McGurl to attack his neighbor over a disputed drug deal. However, because the texts were not sent to the victim, their relevance is tenuous, at best. The greater danger to the Appellant, which the solicitor was trying to prevent, was the portrayal of Appellant as a bad actor in a matter wholly unrelated to the murder of her husband.

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 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). 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).

Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *see also State v. Cooley*, 342 S.C. 63, 69, 536 S.E.2d 666, 669 (2000) (although evidence is relevant, it should be excluded where danger of unfair prejudice substantially outweighs its probative value). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Tynes*, 402 S.C.211 740 S.E.2d 512 (Ct. App. 2013); *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "All evidence is meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403]." *State v. Lee*, 399 S.C. 521, at 529, 732 S.E.2d 225, at 229 (Ct. App. 2012) (quotation marks and

citations omitted). The texts clearly fall on the Rule 403 side of the Rule 401/Rule 403 balancing test and were properly excluded by the trial court.

Lastly, Appellant's argument McGurl had "unique access" to the victim is also with merit. Appellant presented no evidence McGurl had a key to the victim's house. Although the victim may have opened his front door to his neighbor, Appellant certainly could not argue the two men's relationship was so familiar that the victim would allow McGurl to walk into his bedroom and shoot him while he was eating his dinner on his bed.

As the trial court found, the mere location of the neighbor's home in proximity to the victim's cannot give rise to a "reasonable inference or presumption as to [Appellant's] innocence." *Gregory*, 198 S.C. 98, 16 S.E.2d at 534. By that theory, any other neighbor that lived on the same street would have access to the victim. Similarly, neither Appellant's argument with Mr. McGurl over drugs, nor a lawsuit about which McGurl knew nothing constituted motive for McGurl to kill Hall. Defense counsel's continued suggestion to the jury that Mr. McGurl was the actual killer violated the trial court's ruling on third party guilt. Because Appellant impermissibly opened the door to the investigation of McGurl as a suspect, she cannot now complain the results of McGurl's polygraph were improperly introduced to the jury during Appellant's cross-examination of Detective Lent. Because the evidence failed to cast even a bare suspicion of guilt on Mr. McGurl, the trial court properly refused to allow it. Appellant's second issue on appeal is also without merit.

CONCLUSION

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

Respectfully submitted,

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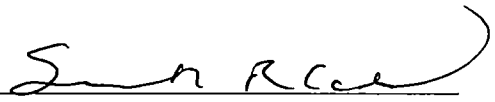
BY: 
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May 22, 2017
Columbia, South Carolina

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May 22, 2017

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Teresa Ann McCracken-Hall
Appellate Case No. 2016-001192

Dear Ms. Kitchings,

Enclosed please find the original and one (1) copy of the ***Initial Brief of Respondent and Designation of Matter***, dated May 22, 2017, along with proof of service, in the above-referenced case.

By copy of this letter, I am serving opposing counsel with same. Thank you for your consideration in this matter.

Sincerely,

Susannah R. Cole
Assistant Attorney General

SRC/
Enclosures

cc: Robert M. Dudek, Esquire, Appellate Defender
The Honorable Jimmy A. Richardson, Solicitor, Fifteenth Judicial Circuit
Trisha Allen, Victim Services