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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Roger M. Young, Circuit Court Judge

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SC Court of Appeals

Case Nos. 2014-GS-10-00763
2014-GS-10-00765 and 2014-GS-10-00767

Appellate Case No. 2015-000709

The State, ... Respondent,

v.

DENZEL MARQUISE HEYWARD .... Appellant.

FINAL BRIEF OF THE APPELLANT

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September 6, 2016

STATEMENT OF THE ISSUES ON APPEAL

I. The trial court erred in permitting the in-court identification of the Appellant by Jujuain Hemingway, because the court failed to consider the appropriate Biggers reliability factors after determining the identification process was highly suggestive, and relied exclusively on the identifying witness's dishonesty in a prior line-up as the basis for declaring the identification reliable.

II. The trial court erred in permitting irrelevant and prejudicial evidence of domestic violence towards a testifying co-defendant, where the court ruled cross-examination on an unrelated allegation of sexual abuse against a different individual opened the door to questions regarding the Appellant's relationship with the witness.

III. The trial Court erred in commencing sentencing proceedings at 1:30 a.m. over the objection of Appellant, and erroneously considered victim impact testimony unrelated to the crimes for which the Appellant was convicted.

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STATEMENT OF THE CASE

This is an appeal from the verdicts resulting from the joint-trial of Denzel Heyward and Deshaun Simmons, on whom, Mr. Heyward is the Appellant. The indictments charged Denzel Heyward ("Appellant") with four counts arising out of an incident occurring on John's Island, South Carolina, on May 16, 2012. The counts were for (1) the Murder of Kadeem Chambers, pursuant to S.C. Code §16-3-10 (2014-GS-10-00762); (2) the Attempted Murder of Jujuain Hemingway, pursuant to S.C. Code § 16-3-29 (2014-GS-10-00763); (3) Armed Robbery, under S.C. Code § 16-11-330(A) (2014-GS-10-0065); and Possession of a Firearm During the Commission of a Violent Crime, under S.C. Code § 16-23-490 (2014-GS-10-0067). R. pp. 9-14. Mr. Heyward's co-defendant, Deshaun Simmons, was indicted on virtually identical counts.

This matter was originally docketed for February, 2014, but was postponed until the term of court beginning November 10, 2014. The matter was tried from November 10th through November 15, 2015.[1] On November 10th, the court heard the Appellant's motion to exclude identification testimony by Jujuain Hemingway and Appellant's motion to exclude testimony of Quasantrina Rivers regarding episodes of domestic violence involving Rivers and the Appellant. The trial concluded on Friday, November 15, and the jury began deliberations at 5:15 p.m. Tr. Vol. 3, p. 453; R. p. 622.

The jury deliberated for eight hours, and made multiple requests to the court for additional information. During deliberations, the jury submitted notes to the court requesting (1) copies of recorded jailhouse telephone conversations by

[1] No proceedings were held on November 11th, 2014, in observance of Veteran's Day.

Deshaun Simmons;[2] and (2) copies of the testimony of Jujain Hemingway and Quasantrina Rivers. Court's Exhibits 1 and 5; R. pp. 689 and 693. After seven hours, the jury informed the court that it was deadlocked on four counts.[3] Court's Exhibit 6; R. p. 694; Tr. Vol. 3, p. 461; R. p. 630. The court then gave an Allen charge after which, the jury returned guilty verdicts on the counts for the attempted murder of Jujuain Hemingway, armed robbery and the weapons charge. Tr. Vol. 3, p. 462-467; R. pp. 631-636. The jury could not reach a verdict on the murder charge and the court declared a mistrial as to that count. Tr. Vol. 3, p. 470; R. p. 639.

Despite the fact the verdicts were returned at 1:30 a.m. on a Saturday morning, the court proceeded directly to sentencing over defense counsel's objection. Tr. Vol. 3, p. 471; R. p. 640. After hearing victim impact statements, the court sentenced Appellant to the maximum sentence on each conviction for a total of sixty-five (65) years of concurrent time.[4]

Appellant filed post-trial motions, which were denied by Order dated March 17, 2015. Order Denying Post-Trial Motions; R. p. 5-8. The Notice of Appeal was filed on March 23, 2015.

STATEMENT OF THE FACTS

This matter involves incidents occurring in Charleston County in the late hours of May 16, 2012. That evening, Brothers Kadeem Chambers and Jujuain

[2] The jury also requested copies of the state's argument regarding these telephone conversations, which were not provided.

[3] The court declined to inquire which charges were settled at that time, so it is unknown which counts were first resolved.

[4] 30 years for Attempted Murder; 30 years for Armed Robbery; and 5 years for Possession of a Firearm During the Commission of a Violent Crime. Each of these is the maximum penalty allowed by law. *See*, S.C. Code Ann. Code § 16-3-29; S.C. Code Ann. § 16-11-330(A); S.C. Code Ann. § 16-23-490, respectively.

Hemingway drove from Longs, South Carolina, to 3475 Cynthia Drive, on John's Island near Charleston. When they arrived just before 11:30 p.m., there was an altercation with two individuals outside the house. During the altercation, one of the subjects, wearing a red shirt, kicked Hemingway in the head, and the other subject fired a round at the ground near him. A female subject attempted to open the trunk of Chambers' car, before Hemingway was instructed to open the trunk of the car himself and get back on the ground. Shortly thereafter, Chambers and the subject holding the weapon "tussled," and two shots were fired. Tr. Vol. 3, p. 149-151, 261-262; R. pp. 414-416, 526-527. Chambers was hit with two bullets. Hemingway fled into a nearby construction site, disposing of "dime bags" of marijuana on the way. Tr. Vol. 3, p. 153-154; R. pp. 418-419. The two assailants left in a dark colored sedan driven by the female.

Charleston County Sherriff's Officers responding to 911 reports of shots fired found Chambers behind the wheel of his Mercedes Benz, which he'd crashed into a white truck near the corner of Cynthia Drive. Tr. Vol. 2, pp. 96-97, 99-100; R. pp. 173-174, 176-177. He was taken to the Medical University of South Carolina, where he passed a few hours later.[5] Officers found Hemingway in a porta-potty at a nearby construction site on Constantine Thorpe Avenue. Hemingway provided a false name and date of birth to officers. Tr. Vol. 3, p. 156; R. p. 421.

On May 17th, investigators interviewed Hemingway about the incident in Longs, South Carolina. Hemingway told investigators that he could identify one

[5] He had $648.27 in his pocket at the time. Tr. Vol. 3, p. 37; R. p. 391.

of the participants who was wearing a red shirt. Courts Exhibit 2, Hearing 11/10/14, p. 5; R. p. 663. On the 18th, the officers returned with a "six-pack" line-up containing a photograph of the Appellant, Denzel Heyward. Hemingway failed to make an identification. The next day, officers returned to Longs and escorted Hemingway to the local police precinct, where they showed him another six-pack line-up containing a photograph of Heyward. In the second line-up on May 19th, Hemingway identified Heyward. However, he failed to identify the Co-Defendants Deshaun Simmons or Quasantrina Rivers. Tr. Vol. 1, p. 128; R. p. 66.

On May 18th, Quasantrina Rivers, the mother of Denzel Heyward's daughter, and an alleged accomplice in the incident on May 16th, disclosed her involvement to family members who then contacted police. Rivers subsequently turned herself in and was charged with accessory to murder, accessory to attempted murder and accessory to robbery. Tr. Vol. 2, pp. 214-219; R. pp. 229-234. She provided two statements to investigators on May 19, 2012. On July 12, 2012, she entered a proffer agreement with the state, and subsequently gave a greatly revised account of the events on July 17, 2012. Tr. Vol. 2, pp. 300, l. 24-302, l. 10; R. pp. 317-319;Tr. Vol. 2, pp. 305-306; R. pp. 320-321; and Tr. Vol. 2, p. 315; R. p. 330) She was able to get out of jail as a result of signing the proffer and providing the second statement. Tr. Vol. 2, p. 316, ll. 4-9; R. p. 331.

ARGUMENT

The trial court erred in permitting testimony regarding a highly dubious identification of the Appellant by Jujuain Hemingway. The court failed to consider

the appropriate reliability factors set before admitting the identification, which amounts to an abuse of discretion. The evidence was used repeatedly by the state to bolster its case, which significantly impacted a very closely decided trial.

The court also erred in permitting highly prejudicial and irrelevant character evidence to be put before the jury. Testimony regarding the Appellant's violent relationship with his girlfriend and co-defendant was used to depict the Defendant as a wicked abuser without even the slightest relevancy to the questions at issue in this proceeding. The court erred in ruling the Defendant had opened the door, by raising a completely unrelated issue and abused its discretion in failing to prevent the admission of this highly prejudicial evidence.

I. The Court erred in permitting the in-court identification of the Appellant by Jujuain Hemingway, because the court failed to consider the appropriate Biggers reliability factors after determining the identification process was highly suggestive, and relied exclusively on the identifying witness's dishonesty in a prior line-up as the basis for declaring the identification reliable.

In a pretrial hearing held on November 10, 2015, the Appellant challenged the line-up identification made by Jujuain Hemingway, pursuant to Neil v. Biggers, 409 U.S. 188 (1972). The hearing concerned two photo line-ups provided to Hemingway on May 18th and 19th and the attendant circumstances of those police interactions.

Charleston County Investigators interviewed Jujuain Hemingway at his mother's house on May 17th, the day after the events occurred on Cynthia Drive. Hemingway provided details of the incident, including that an individual wearing a

red shirt had kicked him.[6] He indicated the other individual, who fired a rifle shot at the ground near his head, was wearing a white shirt. During the interview, Hemingway's brother indicated to Hemingway that a person named "Fat" was involved in the crime. Tr. Vol. 1, pp. 104, 111, 112, 119; 156-157; R. pp. 42, 49, 50, 57, 94-95. The officers asked him if he knew Fat or Fats. Tr. Vol. 1, p. 167; R. p. 105. In response to questioning, he stated that he could identify the suspects if shown a photograph. Court's Exhibit # 2, p. 5; R. p. 663. Hemingway steadfastly denied at all times that he knew Fat or had any prior knowledge of any person by that name. See, Tr. Vol. 1, p. 158; R. p. 96.

Hemingway failed to identify the Appellant during the line-up conducted at his mother's house on May 18th. On the 19th, he was taken to the local precinct and shown another line-up. Appellant was the only person that appeared in both line-ups. Hemingway also testified about the effect of seeing the Appellant in both line-ups:

> Q. So they came in, they said, hey, we want to take you and have you look at another lineup?
> A. Yes.
> Q. Did you find it odd that they would have the same person in the lineup that you recognized from the 18th and now he's in the lineup on the 19th?
> A. Yeah.
> Q. You did find that odd?
> A. They had to know something that I didn't know. They had to know something that I didn't. They keep showing me the same picture.
> Q. I'm sorry, could you say that again?
> A. They had to know something that I didn't know. They kept showing me the same picture.
> Q. They had to know something you didn't know if they were showing you the same picture?
> A. Yes.

[6] Hemingway actually provided two statements on May 17th, a 3 page statement and a 6 page statement. Investigators did not believe his first statement and instructed him to start over. Tr. Vol. 1, p. 154; R. p. 92; *See* Court's Exhibits 1 and 2, Hearing 11/10/14; R. pp. 656-666.

Tr. Vol 1, pp. 177-178; R. pp. 115-116. Hemingway testified that when the police picked him up on the 19th, he feared they were going to lock him up for not making an identification. Tr., Vol. 1, p. 156; R. p 94. During the photo line-up conducted at the police station on the 19th, Hemingway identified the Appellant, circled his picture and wrote, "I know him as fatt" on the identification form. State's Exhibit 166; R. pp. 671-677.

During status conferences between counsel for the Defendants and the state, photographic line-ups of the Appellant were discussed. On the Friday preceding trial (and the Biggers Hearing) the solicitor's office disclosed for the first time that Hemingway could have identified the Appellant in the initial line-up but declined to do so.[7] Hemingway never told Charleston County Sherriff's personnel that he could have identified the Appellant during the first line-up, nor did the solicitor disclose this fact to defense counsel until the Friday evening before trial, despite prior conferences and communications regarding the photo line-ups. Defense counsel brought this delayed disclosure to the attention of the trial court before the hearing. There was a thorough on the record discussion of the failure to disclose. Tr. Vol. 1, p. 80-96; R. pp. 18-34.

After hearing the testimony, the court ruled that the line-up procedure was unduly suggestive. Nevertheless, the court ruled that the second identification was reliable based on the "unique circumstance" that Hemingway had lied to investigators during the first line-up:

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[7] Despite a thousand page production, the claim that Hemingway lied to investigators during the first line-up appeared for the first time in a footnote to the State's Pretrial Brief. Tr. Vol. 1, p. 82; R. p. 20.

So even though the lineup procedure combined -- combining the two was unduly suggestive, I don't think it was unreliable because of the unique -- very unique circumstances of Mr. Hemingway stating that he had, in fact, already identified it, but because of his anger and his youth had decided not to share that identification with police. All right. So your motion to suppress that will be denied."

Tr. Vol. 1, pp. 194-195; R. pp. 132-133.

The trial court erred in relying on the witness's dishonesty as the sole indicator of reliability. A criminal defendant may be deprived of due process of law by an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification. State v. Moore, 334 S.C. 411, 415, 513 S.E.2d 626, 627 (Ct.App. 1999); *citing* Stovall v. Denno, 388 U.S. 293, 87, S.Ct. 1967, 18 L.Ed.2d 1199 (1967). If a defendant makes a Biggers challenge to an out-of-court identification, the court must evaluate the identification using a two-pronged process. First, the court must determine if the line-up procedure used was unnecessarily suggestive thereby creating a risk of improper identification. If it finds the procedure used is unduly suggestive, the court may nevertheless find that the identification is reliable based on the totality of the circumstances. State v. Moore, 334 S.C. 411, 415, 513 S.E.2d 626, 627-628. The appropriate factors to consider in determining reliability are 1) the opportunity of the witness to view the criminals at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of the witness's prior description; 4) the level of certainty demonstrated by the witness at the confrontation; and 5) the amount of time between the crime and the confrontation. Id.

It is beyond dispute that the identification procedure was suggestive, and the solicitor admitted it was problematic. Tr. Vol. 1, p. 192; R. p. 130. The South Carolina Supreme Court has previously found a procedure where a failed photo-identification is followed by another line-up, in which the defendant is the only person included in both confrontations to be suggestive. *See* State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980). In Stewart, the witness admitted on cross-examination, that the presence of the defendant affected her identification "a little bit." In this case, Hemingway's statements regarding the suggestive nature of the subsequent line-up were much stronger: "They had to know something *that I didn't know. They had to know something that I didn't. They keep showing me the same picture."* The repeated presentation of Appellant's photographs was tantamount to telling Hemingway: "This is our guy, and we already know it."

In Stewart, the court nevertheless determined the identification was not irreparably tainted by reviewing the reliability factors set forth above. 275 S.C. 447, 451, 272 S.E.2d 628, 630. In this case, the court did not conduct any review using the factors identified in Biggers, or its progeny. Instead, the court relied exclusively on the witness's claim that he lied to investigators at the initial line-up to determine this highly suggestive procedure did not cause irreparable danger of misidentification. Tr. Vol. 1, pp. 193-195; R. pp. 131-132. This was error.

Beyond the obvious contradiction that a lie can form the basis of reliability, the court failed to address the evidence presented by the appellant bearing on the appropriate factors. The Appellant presented considerable evidence bearing on the witness's perception, memory and credibility, which the court did not consider. Failure to evaluate the reliability of an identification in light of the factors identified in Biggers, is a failure to exercise discretion, and amounts to an error of law. State v. Moore, 334 S.C. 411, 513 S.E.2d 626 (Ct. App. 1999).

The incident in question happened at 11:30 p.m. on a stormy night. Hemingway had smoked hallucinogenic drugs a short time before the initial contact. Tr. Vol. 1, p. 164; R. p. 102. Although the incident occurred over the course of five minutes, the witness was face down on the ground for the majority of that time. Tr. Vol. 1, p. 148-49; R. pp. 86-87. The witness claimed that he had an equally good look at both of the assailants [Tr. Vol. 1, p. 147; R. p. 85], but he was unable to identify Deshaun Simmons in a May 19th line-up, the date he was supposedly telling the truth. Tr. Vol. 1, p. 161-162; R. pp. 99-100. It is important to note that there was no line-up featuring Simmons on May 18th. This highlights the suggestive nature of the duplicate line-ups featuring Appellant.

The admission of the out-of-court identification as well as the in-court identification led to considerable prejudice to the Appellant. This case turned exclusively on the credibility and testimony of two witnesses: Hemingway and Rivers. Both witnesses suffered from contradictions in

their statements; both admitted to lying to investigators; and both had clear motives to conceal the true facts of what occurred on Cynthia Drive that night.[8] [9] Accordingly, allowing the in-court identification to create accord in their testimony and bolster Hemingway's credibility was severely detrimental to Appellant's right to a fair trial.

Furthermore, and perhaps more importantly, the prosecution repeatedly used the out-of-court identification to bolster its case. Not only was the out-of-court identification introduced at trial, the solicitor presented it as *two affirmative identifications.* Tr. Vol. 3, pp. 150-176; R. pp. 415-441; Defense counsel's renewed objection appears at p. 168; R. p. 443. At the close of the state's case in chief, it introduced recorded telephone calls of both defendants. State's Exhibit 171, Tr. Vol. 3, p. 331; R. p. 553.[10] In a telephone call from Deshaun Simmons to an unidentified third-party, Simmons repeatedly refers to the victim's identification as pointing to Appellant's guilt. The solicitor highlighted Simmons' comments in her closing arguments:

> "[Simmons:] That's why you really need to be keeping up with this case. Dog ain't going nowhere. Too much shit points towards him. *He's saying he ain't even been there and the victim picked him out*

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[8] Rivers testimony was largely based on what she saw in the rear view mirror of her car. Tr. Vol 2, p. 309; R. p. 324.

[9] In her May 19th statement, Rivers stated she was awoken in her car by gun-shots, however in her subsequent statements she stated she was awake when Hemingway and Chambers first arrived. Tr. Vol. 2, p. 305-306; R. pp. 320-321.

[10] At the time the recording was initially played, defense counsel could not make out the content of the telephone call due to the quality of the recording. Although the state disclosed dozens of hours of telephone conversations by both Defendants, it only pin-pointed the calls made by Appellant that it was going to use at trial. Simmons' calls were provided as hours of undifferentiated conversations. *See*, Motion for New Trial Based on Impermissible Bruton Testimony; R pp. 649-653; Tr. Vol. 3, p. 471; R. p. 640.

of a lineup, the victim. The victim, the victim. That's going to make you look stupid.
[Third Party:] That's what that N say? He say he ain't been there?
[Simmons:] From my understanding, y'all trying to tell you and everybody else he ain't been there and he ain't did this and he ain't did that, but everything is pointing towards him . . ."

The solicitor hammered the line-ups again in her closing arguments—both the out-of-court identifications [Tr. Vol., 3, p. 427; R. p. 615] and Simmons's conversations about the line-ups. Tr. Vol. 3, pp. 429, 431-432; R. pp. 617, 619-620.[11]

The jury paid close attention to the phone call testimony, and repeatedly requested copies of the telephone calls *and* the solicitor's arguments regarding the calls. Court's Exhibits 1, 3 and 5; R. pp. 689, 691, 693. It must have played a large part in their decision.

This is not a case of overwhelming evidence and the error was not harmless. State v. Singleton, 303 S.C. 313, 400 S.E.2d 487 (1991) (finding that in the absence of overwhelming guilt, the error was not harmless). There was no physical evidence linking either defendant to the crime scene. The only evidence against the Defendants came from the eyewitness testimony of two highly unreliable, and highly motivated witnesses. The jury returned a mixed verdict after a deliberation so lengthy, it was unprecedented in the trial court's experience. Given the closeness of this case, the court cannot say that the admission of this identification testimony was harmless.

[11] In addition to the excerpt above, the solicitor also made the following reference: Simmons: "The bitch telling on me is what's really got me fucked up right now. Fat, they picked him out of a line-up." Tr. Vol. 3, p. 429; R. p. 617.

Finally, by condoning this highly suggestive process (and the concomitant late disclosure of this material information), the court would be providing a blue-print for investigators and prosecutors to circumvent reliable procedures.

Accordingly, the trial court should reverse the convictions of the Appellant based on the improper admission of evidence, or in the alternative, remand the case for further proceedings consistent with the court's decision in State v. Moore, 334 S.C. 411, 513 S.E.2d 626 (remanding case for additional determinations by the trial court, where the court failed to make a determination using the proper Biggers factors.).

II. The trial court erred in permitting irrelevant and prejudicial evidence of domestic violence towards a testifying co-defendant that significantly prejudiced the outcome of the trial.

Before trial, the Appellant moved to exclude any testimony about allegations of domestic abuse by the Appellant against Quasantrina Rivers ("Rivers"), an alleged co-conspirator and prosecution witness. The state sought to introduce numerous incidents of domestic violence, including video of the Appellant hitting Rivers months before May 16th. The state argued the violent incidents during the course of the relationship showed the violent nature of the relationship, and specifically the Appellant's violent temperament toward Rivers. Tr. Vol 1, pp. 200-213; R. pp. 138-151. They further argued that the incidents showed that Rivers was under the control of the Appellant. The court properly rejected these arguments, noting the state's efforts to depict Appellant as a violent abuser, directly contravened the purpose of Rule 404(b), which is to exclude character evidence offered to prove a character trait of the defendant

consistent with the crime charged.[12] The court did not totally foreclose the possibility that the state *might* be able to introduce the domestic violence incidents if it was necessary to rehabilitate Rivers following her cross-examination. Tr. Vol 1, pp. 212-213; R. pp. 150-151.

During the cross-examination of Rivers' Mother, Sidearis Singleton, Defense Counsel inquired whether Singleton knew if Rivers had accused Singleton's husband of sexual abuse:

> Q. Do you know if [Rivers has] had some mental health issues?
> A. I am unsure about that.
> Q. Do you know whether she's accused anyone in your family of sexually assaulting her?
> A. I'm not sure about that, sir.
> . . .
> Q. Do you have a husband at the present time?
> A. Yes, sir.
> Q. And what is his name?
> A. His name is Phillip.
> Q. Do you know whether [Rivers] has ever accused Phillip of sexually assaulting her?
> A. No sir.
> Q. You do not know whether that's true or not?
> A. No sir.
> Q. You're still presently married to Phillip?
> A. Yes, sir.
> Q. All right. And if [Rivers] had accused him of sexually molesting her, then you would not be married to him if you believed those were correct; is that true?
> A. Correct.
> Q. You're uncertain whether [Rivers] has ever accused Phillip of sexually assaulting her?

[12] "[Y]our trying to say he's a really bad guy and, therefore, he's convicted -- he should be convicted of this, look at all these other things that he did. And that's exactly what character evidence is usually not allowed to do." Tr. Vol 1, p. 206; R. p. 144.

Tr. Vol. 2, pp. 224-225; R. pp. 239-240. The obvious intent of defense counsel, was to elicit testimony regarding a specific instance of fabrication by Rivers. The suggestion made was that Rivers' mother did not believe the specific allegation of sexual abuse made against her husband.

On redirect, the State then proceeded to ask Ms. Singleton "Who do you know that abused [Rivers]." Tr. Vol. 2, p. 232; R. p. 247. Defense counsel immediately objected. The court initially stated that defense counsel had opened the door, then conducted a sidebar conference with counsel before permitting the line of questioning.

Despite its prior ruling to exclude this testimony, the court permitted Mrs. Singleton to testify extensively regarding the abusive relationship between Appellant and Rivers. Tr. Vol. 2, pp. 233-235; R. pp. 248-250. Singleton testified that the Appellant abused Rivers on multiple occasions, in multiple localities and that she personally disapproved of him having a relationship with her daughter.

Defense counsel further objected to the statements, because Singleton's testimony was based on what Rivers "shared" with her regarding the source of bruises and physical injuries, and that Mrs. Singleton was speculating on the source of her daughter's injuries. Tr. Vol. 2, p. 235; R. p. 250.[13] The court summarily overruled the second objection.[14]

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[13] Although Defense counsel stated the testimony was "speculative," it was clear from the context that he intended a hearsay objection because, the witness was not competent to testify to the circumstances surrounding the actual injuries.

[14] The state also tried to introduce a photograph of Rivers showing abrasions to her hairline and face, which the court excluded. The photographs were made a court's exhibit. Tr. Vol. 2, p. 234, l. 24-p. 235, l. 4; R. pp. 250-251; Tr. Vol. 2, p. 237, l. 3-13; R. pp. 252].

The state called Rivers as its next witness. The state began its *direct* examination of Rivers by eliciting testimony that Denzel Heyward was violent towards her. Tr. Vol. 2, p. 240-241; R. pp. 255-256. The testimony was not introduced as part of a timeline of the events, nor was it linked in any way to the crime alleged. No questions were asked about diminution of her free will or her subservience to the Appellant. The line of questions was gratuitous character assassination.

i. The Court erred in ruling defense counsel had "opened the door" to the prejudicial testimony, because it was not responsive or relevant to the issues addressed in the cross-examination.

The trial court erred in concluding defense counsel's questions on Rivers allegations against her step-father regarding sexual abuse opened the door to testimony regarding the Appellant's relationship with Rivers. Our courts have borrowed the following succinct summary of the "Opening the Door" doctrine: "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." State v. Young, 364 S.C. 476, 613 S.E.2d 386 (2005); quoting State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984) (alterations in original) (citing State v. Albert, 303 N.C. 173, 277 S.E.2d 439, 441 (1981)).

However, there must be a logical, subject-matter nexus between the door opening evidence and the inferences created therefrom, and the "rebuttal" or "explanation" that enters because of the newly opened door. Evidence that does not explain or rebut what the defendant put forward is not properly admitted

under the doctrine of "opening the door." *See,* State v. Foster, 354 S.C. 614, 623, 582 S.E.2d 426, 431, (2003).

For example, in State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998), the court allowed the introduction of an eight year old criminal domestic violence conviction against the defendant, who was on trial for the murder of his wife. The court allowed the conviction to come in on cross-examination because it specifically rebutted the defendant's testimony on direct that his marital relationship had only recently deteriorated within the last few years.

Thus, the doctrine operates to permit one party to respond to an inference or impression created by the other party, however it does not permit the admission of new subject matter based on any attenuated connection advanced by the state. The New York Court of Appeals described the doctrine's limitations as follows:

> The "opening the door" theory must necessarily be approached on a case-by-case basis. As a result, this principle is not readily amenable to any prescribed set of rules. (See McCormick, Evidence [2d ed], § 57.) Nonetheless, it does have its limitations. By simply broaching a new issue on cross-examination, a party does not thereby run the risk that all evidence, no matter how remote or tangential to the subject matter opened up, will be brought out on redirect. Rather, the trial court must limit the inquiry on redirect to the "subject-matter of the cross-examination [which] bear[s] upon the question at issue." Moreover, the court should only allow so much additional evidence to be introduced on redirect as is necessary to "meet what has been brought out in the meantime upon the cross-examination." (6 Wigmore, Evidence [Chadbourn rev ed], § 1896, p 737; The "opening the door" theory does not provide an independent basis for introducing new evidence on redirect; nor does it afford a party the opportunity to place evidence before the jury that should have been brought out on direct examination. The principle merely allows a party to explain or clarify on redirect matters that have been put in issue for the first time on cross-examination, and the trial court should normally "exclude *all*

> *evidence which has not been made necessary by the opponent's case in reply."* (6 Wigmore, § 1873, p 672 [emphasis in original].)

People v. Melendez, 55 N.Y.2d 445, 452-453, 434 N.E.2d 1324, 1328 (1982).

In Melendez, defense counsel asked the investigating officer if he considered the defendant a suspect at the time of a particular interview. On redirect, the prosecutor extensively questioned the investigator about the basis for his suspicions, including the hearsay statements by "concerned citizens" implicating the defendant in the crimes. In finding the defendant had not opened the door, the court noted that:

> "the passageway thus created was not so wide as to admit the hearsay testimony directly implicating the defendant in the crimes charged. The door was opened only as to whether the witness considered [defendant] a suspect. Thus, it was error to broaden the scope of inquiry to include all the hearsay information the detective had learned from other people as part of his investigation of this case."

Melendez, 55 N.Y.2nd 445, 453, 434 N.E.2d 1324, 1328-1329 (1982).

In this case the evidence introduced through Sidearis Singleton on redirect was inapposite to defense counsel's inquiry, which was clearly directed at Rivers' credibility. Bringing out alleged domestic violence at the hands of the Appellant did nothing to elucidate the prior line of questioning or rebut inferences created by it. The State did not ask one question about the allegations against the witness's husband, nor did the prosecutor ask any questions about sexual abuse. Nothing in the redirect tended to show that Rivers was more credible or honest. Additionally, there was absolutely no testimony about how the physical abuse related to the mental health of Rivers, which was the vague, pretextual segue

used by the prosecution to shoe-horn this character assassination into evidence.[15]

This extremely prejudicial evidence was totally unrelated to what had come before, and served no purpose other than to tar the Appellant as a violent, woman-beater. Because the evidence did not rebut—or even relate—to the cross-examination, its admission was error. This is compounded by the fact that the trial court was fully aware of the state's improper purpose for offering this evidence.

ii. The Court Should have excluded the evidence under Rules 404(B) and Rule 403, SCRE, because it was inflammatory, prejudicial, and had no probative value.

Rule 404(b), SCRE, [16] prohibits the introduction of the defendant's prior bad acts reflecting on the defendant's character. The fear being that the jury might convict based on the defendant's characteristics rather than evidence of the elements of the crime charged. In State v. Smith, 391 S.C. 353, 705 S.E. 491 (Ct. App. 2011), this court reviewed the proper 404(B) analysis to be conducted by the trial court. First, to submit evidence of other crimes or bad acts for which there is no conviction, the offering party must demonstrate the defendant committed the act by clear and convincing evidence. Id. If the court is satisfied that the evidence is clear and convincing, the offering party must then demonstrate "a logical connection" between the prior act and a material element of the offense charged. Id. The "material elements" are limited to those

[15] Tr. Vol. 2, p. 232, l. 23-p. 233, l. 2.; R. pp. 247-248.

[16] "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. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

enumerated in the rule, namely: "motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

Here there was no logical relevancy between the abuse testimony and any aspect of the crimes charges. The relationship between Rivers and the Appellant did not have any bearing on what occurred that night, in terms of motive, identity or a common scheme or plan. Nor did the testimony reflect Appellant's intent to commit those crimes. It was stand-alone character evidence, offered for no reason other than to make Rivers appear sympathetic and depict the Appellant as a monster.

Furthermore, even if the act is proven by clear and convincing evidence, and it is connected to a material element, the court must still engage in a Rule 403 analysis. Rule 403 provides that when the prejudicial effect of evidence substantially outweighs its probative value, the evidence may be excluded. State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991). Appellant was entitled to an on the record determination of the admissibility of the evidence pursuant to Rule 403. State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013). (When the record does not reflect any such analysis was performed, the proper remedy is a remand for a determination of the admissibility of the evidence). There is no way the probative value of this evidence could outweigh the prejudice. Accordingly, this matter should be remanded for further proceedings consistent with Spears.

As is discussed above, this was an extremely close case: the jury deliberated in excess of eight hours, and sent numerous notes to the court for copies of the trial testimony. The only evidence of what occurred on Cynthia

Drive came from two witnesses, Quasantrina Rivers and Jujuain Hemingway, who both admitted to lying to investigators during the course of the investigation. *See*, e.g. Tr. Vol. 2, pp. 364-365; R. pp. 379-380. Both witnesses provided several conflicting statements to the police. These statements tended to add new and necessary elements of the crimes charged as the trial drew nearer. *See*, e.g. Tr. Vol. 2, pp. 301-307; R. pp. 316-322; and Tr. Vol. 2, pp. 317-18; R. pp. 332-333; *See* also, Tr. Vol., 2, p. 347; R. p. 362, Rivers adding the asportation element of armed robbery by including the removal of a suitcase to her statement two days before trial). Rivers had obvious reasons for deflecting blame and imputing worse conduct to the co-defendants, including the reduction in her own punishment. Tr. Vol. 2, pp. 315-16; R. pp. 330-331. As her cross-examination revealed, she faced greatly reduced penalties due to her collaboration with prosecutors. Id.

Without the jury crediting Rivers testimony, it is very likely that the conviction for the attempted murder of Jujain Hemingway would not have occurred. Rivers provided the only testimony about a shot being fired from the car as the assailants left the scene. Tr. Vol. 2, p. 271; R. p. 286. This last shot was not corroborated by Hemingway or the 911 calls entered into evidence.

Attempted murder is a specific intent crime, and the defendant must have the specific intent to accomplish the result of murder. State v. King, 412 S.C. 403, 410, 772 S.E.2d. 189, 193, cert. granted March 28, 2016, Case No. 2015-001278). All the other events of the evening, while violent, could be viewed as efforts at intimidation. It is extremely important to note that the jury did not

convict on the murder charge. The obvious conclusion is that they did not see the gunshots during a struggle as rising to the requisite intent. Without the alleged final shot at Hemingway, the evidence shows a warning shot aimed at the ground [Tr. Vol. 2, p. 269; R. p. 284] and a deliberate effort to avoid hitting Mr. Hemingway with the car. Tr. Vol. 2, p. 271, l. 15-18; R. p. 286. On that record, the jury could have easily found there was no specific intent to kill Mr. Hemingway.

Finally, the fact that the State was allowing to introduce this evidence in its case in chief significantly impacted the Appellant's decision to take the stand. The

Accordingly, there was considerable prejudice from admitting this testimony to condemn the Appellant and beatify his co-conspirator. The error requires reversal for a new trial.

III. The Trial Court erred in commencing sentencing proceedings at 1:30 a.m. over the objection of Appellant, and erroneously permitted victim impact testimony unrelated to the crimes for which the Appellant was convicted.

Deliberations continued until after 1:00 a.m. on November 15th. During that time, the jury submitted numerous notes to the court requesting additional information and assistance, which required trial counsel's attention. After an Allen charge given after midnight, they returned a split verdict at 1:11 a.m. The jury was discharged around 1:30 a.m., at which point the trial judge moved directly to sentencing. Appellant's counsel as well as counsel for Simmons moved to postpone the sentencing hearing, given the exhausting week of court and the extremely late hour. The solicitor argued that the victims' family had

traveled from Longs, South Carolina, and that the sister of Kadeem Chambers, who had prepared a statement, had to be at work the next day (Saturday) at 2:00 p.m. The court denied the motion, noting the victims' family had come from out of town and delaying the sentencing would be a "hardship." Tr. Vol. 3, 471-472; R. pp. 640-641.

The Solicitor then presented victim impact testimony in the form of pictures of Kadeem Chambers, a video memorial of Kadeem Chambers, and a letter read by Talia Chambers, Kadeem's sister, which focused on the family's loss due to Chambers' death. She requested the court to have "no mercy on Denzel Heyward." Tr. Vol. 3, p. 472-475; R. pp. 641-644. Prior to the presentation, the solicitor did not appear to be familiar with the evidence to be offered, and there was no indication that it was provided to the Appellant.[17] The trial judge appeared to be greatly affected by the video tribute to Chambers.[18] The solicitor then argued that the court should give consecutive sentences and reminded the judge that "one young man lost his life that evening." Tr. Vol. 3, p. 476; R. p. 645.

The Appellant was prejudiced by the conduct of this immediate sentencing hearing at 1:30 a.m., without adequate opportunity to review the materials to be considered by the court. Due Process, at the least, means the opportunity to be heard at a meaningful time and in a meaningful manner. Armstrong v. Manzo, 380 U.S. 545, 552 (1965). South Carolina's sentencing procedures are such that defendants do not receive victim impact testimony until after the delivery of a

[17] Tr. Vol. 3, 472-473; R. pp. 641-642.
[18] Defendant' Motion to Reconsider Sentence Imposed, dated November 21, 2014, p. 2; R. pp. 654-655.

verdict. S.C. Code Ann. 16-3-1550(F).[19] While the court has an obligation to hear all impact testimony offered under the statute, the Defendant's right to review these materials for the purpose of responding does not attach until after a guilty verdict is delivered. Id.

By proceeding directly to sentencing at such a late hour, the court deprived Appellant of an adequate opportunity to prepare for the sentencing hearing. From the record, it is clear that the solicitor herself had not had an opportunity to review the materials. Counsel for Simmons, echoed by Appellant's counsel, noted that the jury did not convict either defendant for the murder of Kadeem Chambers, and thus, considering impact testimony focusing exclusively on the loss of Chamber's life in the sentencing process was inappropriate. Tr. Vol., 3, p. 477; R. p. 646. Appellant was sentenced to maximum sentences for each of the crimes, based almost entirely on imputed liability. Based on the circumstances, the proceedings did not provide the Defendant with an adequate opportunity to make a meaningful presentation, and the Appellant requests a remand for a new sentencing hearing, providing Appellant a real opportunity to be heard.

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[19] S.C. Code Ann. § 16-3-1550 (F): "The circuit or family court must hear or review any victim impact statement, whether written or oral, before sentencing. Within a reasonable period of time before sentencing, the prosecuting agency must make available to the defense any written victim impact statement and the court must allow the defense an opportunity to respond to the statement. However, the victim impact statement must not be provided to the defense until the defendant has been found guilty by a judge or jury. The victim impact statement and its contents are not admissible as evidence in any trial."

Conclusion

The severely prejudicial effects of unreliable and inadmissible evidence on Mr. Heyward's case undermined his right to a fair trial. The court should reverse the convictions in the lower court and remand for a new trial. Because the sentencing hearing at 1:30 a.m. deprived the Defendant of an adequate opportunity to make a meaningful presentation, the court should remand for a new sentencing hearing.

Respectfully Submitted,

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September 6, 2016.

Columbia, South Carolina.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Roger M. Young, Circuit Court Judge

Case Nos. 2014-GS-10-00763
2014-GS-10-00765 and 2014-GS-10-00767

Appellate Case No. 2015-000709

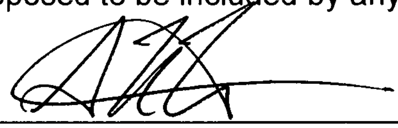
The State, ... Respondent,

v.

Denzel Heyward, ... Appellant

Certificate of Counsel, Rule 210, SCACR

I, D. Michael Mathison, Counsel for the Appellant, hereby certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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PROOF OF SERVICE

I certify that, on September 6, 2016, I served copies of the Final Brief of Appellant and Final Reply Brief of Appellant, by depositing copies of same with sufficient first-class postage prepaid at the United States Post Office located at Columbia, South Carolina, addressed as follows:

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