ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of General Sessions

The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2016-001286

THE STATE,

Respondent,

v.

GERALD AKEEM GADSDEN,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant was indicted during the November 2014 term of the Grand Jury for Greenville County for armed robbery, two counts of kidnapping, burglary in the second degree[1], conspiracy, and possession of a weapon during the commission of a violent crime. (2014-GS-23-010507). Appellant and his co-defendant, James White, proceeded to a trial by jury from June 6-9, 2016, in Greenville, South Carolina. At the conclusion of trial, Appellant was found guilty of all the charged offenses the State proceeded to trial on. He was sentenced by the Honorable James R. Barber, III, to life imprisonment without the possibility of parole for armed robbery, life imprisonment without the possibility of parole for each count of kidnapping, and imprisonment for a term of five years for conspiracy, with all sentences running concurrently. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

[1] The State ultimately did not proceed to trial on the burglary charge.

STATEMENT OF FACTS

On January 20, 2014, Aaron Kretzschmar was working as the service manager of an Olive Garden in Greenville, South Carolina. R. pp. 69-70. On that evening, Kretzschmar was the sole manager on duty and was in charge of closing the restaurant for the night. R. p. 70. Kretzschmar locked the doors to the restaurant around 10:00 P.M. when the restaurant closed. R. p. 72. At around 11:00 P.M. Kretzschmar gave Damion Riley, a line cook, permission to leave, leaving Kretzschmar, James White, and Terrell Pugh as the only individuals remaining in the restaurant. R. pp. 73-74. White and Pugh worked as dishwashers at the restaurant. R. p. 74. Approximately twenty minutes after Riley left, Kretzschmar left his office to check on White and Pugh and ask when they would be finished with their duties. R. p. 75, R. p. 101. As Kretzschmar was walking towards the dish area, he was struck on the head, which caused him to stumble backwards against a wall. R. p. 76. Kretzschmar testified that the intruder who assaulted him was a black male who pointed a gun at him and instructed him to go to the restaurant's safe. R. p. 76.

Kretzschmar subsequently made his way to the safe in the restaurant's office. R. p. 76. While Kretzschamr opened the safe, the intruder repeatedly struck him and told him to hurry up. R. pp. 76-77. The intruder provided Kretzschmar with a plastic bag in which to place the money. R. pp. 76-77. Kretzschmar testified the safe typically held around thirty-five hundred dollars in cash. R. p. 78. He indicated the safe would be filled with smaller denominations of bills based on the restaurant's need to make change. R. p.p. 78-79, R. p. 113. After placing the cash into the plastic bag, the intruder ordered him to put rolls of coins from the safe into the bag. R. p. 79. When Kretzschmar placed the coins into the bag, it began to rip. R. p. 79. Once the bag began to rip, the intruder fled the office with it. R. p. 79. Kretzschamr immediately closed the door and

called 911. R. pp. 79-80. Kretzschmar later noticed a trail of money left in the intruder's wake as he bolted away from the restaurant. R. p. 80.

Near the front of the restaurant, Kretzschmar noticed a few unusual things, including a white rag propping open the restaurant's front door. R. p. 84. He noted the doors themselves were still locked from when he locked them around 10:00 that evening. R. p. 85. He identified the rag propping open the door as one of the dishtowels that was used by the kitchen staff of the restaurant for cleaning. R. p. 86. He also noticed a brick on the ground and a broken pane on the door. R. p. 84.

When the police arrived, Kretzschmar and the officers checked on White and Pugh. R. p. 100. Kretzschmar stated White and Pugh were still in the dish area. R. p. 101. Kretzschmar described Pugh as "a little bit hurt, possibly from being on the ground and very shaken up." R. p. 101. Kretzschmar noted that on the other hand, White "seemed a lot less shaken up." R. p. 101. Kretzschmar later clarified that Pugh was visibly startled, White was not. R. p. 140. Kretzschmar told law enforcement that the intruder was stocky and "shorter than myself."[2] R. p. 98. He also told the officers that the intruder was wearing a hoodie with a camouflage design. R. p. 98.

Kretzschmar testified the Olive Garden is equipped with one exterior camera that is trained on a series of parking spots designated for pick-up orders. R. p. 97. Inside the store there is a monitor that shows the camera's view. R. p. 97. Strangely, when Kretzschmar checked the monitor after the incident, the monitor's screen was blanked out and it said "on hold" as if it was disabled. R. p. 102. Kretzschmar stated the camera's controls are next to the monitor and can only be disabled from inside the store. R. p. 102. Kretzschamr testified that in order to put the camera "on hold," all that needs to be done is to flip a switch on the side of the monitor. R. p.

[2] Kretzschmar testified he was six feet two inches tall. R. p. 98.

109. Kretzschmar testified he did not notice seeing the monitor on hold previously in the day, and that is something he would have noticed. R. p. 109.

Damion Riley testified that on the evening of the robbery, White told him about a rap concert he performed in where he made "a couple of bands." R. p. 147. Riley explained that by "bands," White meant large sums of money. R. p. 147. Riley described the conversation as "kind of unusual." R. p. 148. Riley stated he recalled leaving on the evening of the robbery and that the doors of the restaurant closed behind him when he left. R. pp. 150-51. He testified that the employees who are responsible for closing the restaurant are asked to close the door behind them and to pull on the door to make sure it is secure. R. p. 151. Riley noted the penalty for failing to close the door is termination. R. p. 151. He testified that when he left for the evening, there was no dishtowel propping open the doorway and that if there had been a dishtowel, he would have removed it. R. p. 152. Riley also testified he did not know anyone by the name of Gerald Gadsden. R. p. 155.

Grady Pugh testified he recalled the day of the robbery "vividly." R. p. 183. Pugh stated the intruder pointed a gun at him and told him to "get the fuck on the floor." R. p. 187. Pugh recalled the intruder pushing him onto the ground. R. p. 192. Pugh described the intruder as between five foot ten inches and six feet tall. R. p. 191. Pugh also recalled the intruder wearing a camouflage hood. R. p. 189. He testified he did not know an individual named Gerald Gadsden. R. p. 191.

On the day of the robbery, Deputy James Middleton was working as a uniform patrol deputy for the Greenville County Sheriff's Office. R. p. 212. Deputy Middleton responded to the call regarding the armed robbery at the Olive Garden. R. p. 213. Deputy Middleton arrived on the scene at 11:28 P.M. R. p. 214. When Deputy Middleton approached the door of the

restaurant, he noticed coins and bills leading from the front door to the other side of the building. R. p. 215. Deputy Middleton also observed a broken brick lying next to the front door, noting "I could see a broken glass pane form the front door, but there was two panes of glass. I only noticed the front - - one pane of glass was broken, the back pane was still intact. So it didn't break all the way through."[3] R. p. 215. While in the restaurant, Deputy Middleton observed that the camera was "on hold." R. p. 223. Deputy Middleton recalled Pugh was very nervous and was shaking, however White was "nonchalant calm about it." R. p. 225.

Sergeant Thomas Motes was working in the robbery division of the Greenville County Sheriff's Department in January of 2014. R. p. 312. Sergeant Motes was one of the officers assigned to the Olive Garden robbery case. R. p. 313. On January 22, 2014, White came to the Greenville Sherriff's Department to provide a written statement about the robbery. R. p. 313. Sergeant Motes clarified White "was there to give a statement as being a victim in this case." R. p. 315. When White arrived, he was escorted from the lobby to Sergeant Motes's office. R. p. 315. Sergeant Motes testified White was adamant that he write out his own statement. R. p. 316. White subsequently provided the investigators with his written statement, writing: "I went to work at 6:15. I clock in and started in the dishroom washing dishes. About eleven or so a guy with a hood came to da dishroom and pointed a gun and demanded to get on the floor and lay down. He then stood guard and I heard commotion. He then robbed the store." R. p. 317. After White wrote his statement, Sergeant Motes asked if he could look at White's cell phone. R. p. 318. White agreed, and Sergeant Weiner, another officer present for the interview, began filling out a consent to search form. R. p. 318. White also told officers he had another old phone that he had not used in months. R. p. 318. White agreed to let officers search that phone as well, so

[3] Sergeant David Weiner later opined that someone tried to break the window to make it appear that the robbery was not an inside job, but failed to break through both panes of glass. R. pp. 518-19.

Sergeant Weiner added it to the consent to search form. R. p. 318. White then signed the consent to search form. R. p. 318. Sergeant Motes testified that the first phone was a Kyocera model and the phone that White claimed was his old cell phone was a Samsung. R. p. 319. Shortly after taking White's statement, Sergeant Motes experienced a medical issue and had to leave to go to the hospital. R. p. 323.

Sergeant David Weiner, the supervisor of the violent crimes unit, took over the case after Sergeant Motes had to leave for medical reasons. R. p. 323, 434. When interviewing White, Sergeant Weiner asked him about his discussion with Damion Riley immediately prior to the robbery where he told Riley he made a large sum of money rapping in Charleston. R. p. 443. White told Sergeant Weiner, "that he had earned seven thousand, five hundred dollars rapping in Charleston from door sales or ticket sales from people entering." R. pp. 443-44. During a break in the interview, Sergeant Weiner contacted the event promoter. R. p. 444. Upon being informed by Sergeant Weiner that he spoke with the event promoter, White changed his story and told him that he earned seven thousand, five hundred dollars from other rappers paying him, not from the door ticket sales." R. p. 445. When asked about the seventy-five hundred dollars he allegedly earned through the concert, White told Sergeant Weiner that he'd spent it all on women and booze at the clubs. R. p. 445. When asked specifically where he spent the money, White stated he did not recall. R. p. 445. Sergeant Weiner testified that by discussing the rap concert with Damion Riley immediately before the robbery, he believed White was trying to set the stage for him coming into a large sum of money. R. p. 446.

Investigator James Perry works in the computer forensics division of the Greenville County Sheriff's Office. R. p. 359. Investigator Perry performed analysis on the two phones Appellant gave investigators and was able to capture data and images from the phones. R. pp.

363-64. A series of photographs depicting cash and an individual wearing a camouflage hoodie holding a large amount of cash were found on the Samsung phone. R. p. 406. The photograph was taken on January 21, 2014, the day after the robbery. R. p. 406. The photographs on the phone were taken between 2:26 P.M. and 2:31 P.M. on that day. R. p. 419.

Sergeant Motes was eventually able to identify the individual in the photograph as Gerald Gadsden, the Appellant in this case. R. p. 341. Sergeant Motes looked through the contact list on the phone and notice the name "Jr. G." R. p. 343. "Jr. G" is White's stage name. R. p. 343. Sergeant Motes eventually called a contact in the phone named "ma." R. pp. 343-44. The individual Sergeant Motes called identified herself as Crystal Gadsden. R. p. 344. Sergeant Motes described the individual in the photograph, and Ms. Gadsden replied that he was describing her son, Appellant. R. p. 344. Sergeant Motes asked Ms. Gadsden to have Appellant call him so he could talk to him about the incident. R. p. 345. Sergeant Motes subsequently checked the South Carolina Department of Motor Vehicles database for Appellant's driver's license photo and was able to confirm that the individual in the license photograph was the same individual in the photograph found on the phone. R. p. 344. The SCDMV website also listed Appellant as being five foot eleven and weighing two hundred-forty pounds. R. p. 346.

On January 25, 2017, Sergeant Weiner received a phone call from White. R. p. 502. During his conversation with White, Sergeant Weiner told him there were pictures on the phone of an individual holding a large amount of cash and wearing a camouflage jacket. R. p. 503. Sergeant Weiner told White he was able to identify the man as Appellant. R. p. 503. White responded that he did not know who Appellant was. R. p. 503.

On January 27, 2014, Sergeant Motes searched White's residence. R. p. 347. Inside the home, Sergeant Motes located a pair of pants with Appellant's debit card in one of the pockets.

R. p. 348. Later that day, Sergeant Motes received a call from Appellant. R. p. 349. Sergeant Motes asked Appellant about his cell phone and he replied that he lost the cell phone on January 15th at a club in North Charleston called Club Sho Tyme. R. p. 350. Sergeant Motes asked Appellant about the Olive Garden robbery and he replied, "what are you talking about?" Sergeant Motes responded, "you know exactly what I'm talking about," and Appellant did not respond. R. pp. 350-51. Appellant told Sergeant Motes he would call him back. R. p. 351. Sergeant Motes asked Appellant for his cell phone number; however Gadsden did not reply and terminated the phone call. R. p. 351.

When reviewing a report compiled regarding the content of the Kyocera cell phone belonging to White, Sergeant Weiner noticed there were nineteen lines of contact between White and Appellant from October 21, 2013 and when White gave his phone to the investigators on January 22, 2014. R. p. 491. All nineteen of those communications were deleted from the phone. R. p. 491. Specifically, on the morning after the Olive Garden was robbed, there were five separate instances of contact between White and Appellant. R. p. 492. During the calls made by White the morning after the robbery, he dialed *67 to conceal the fact that he was calling. R. p. 492. Sergeant Weiner testified that the call would show up as "blocked" or "private number." R. p. 492. Sergeant Weiner testified that after the robbery, Appellant was the first person White called. R. p. 493. On the morning White originally came to the Greenville Sheriff's Department to be interviewed, he sent a text message containing Appellant's full name, date of birth, and social security number to an unidentified individual. R. p. 495.

ARGUMENT

I.

The trial judge properly declined to allow Appellant to cross-examine Damion Riley about a purported misstatement during cross-examination where the testimony was not probative of bias, prejudice, or any motive to misrepresent.

Relevant Facts

During his direct examination of Damion Riley, the solicitor asked Riley whether he was convicted of burglary in the second degree and possession of burglary tools in 2011. R. p. 154. Riley replied that he pled guilty to those charges. R. p. 154. Riley testified he had no knowledge or involvement in the robbery of the Olive Garden. R. p. 154. In an effort to cast suspicion on Riley based purely on his prior, unrelated burglary conviction, White's defense counsel engaged in the following colloquy with Riley during cross-examination:

> Q: Now, [the solicitor] asked you about you had a previous charge of burglary, second.
>
> A: Yes.
>
> Q: And that took place in 2011.
>
> A: Yes.
>
> Q: And you had a recent probation violation.
>
> A: No.
>
> Q: Have you – you haven't had a probation violation between 2011 and now?
>
> A: No, I fulfilled all my probation and everything.
>
> Q: And it's complete?
>
> A: Yes, sir.

R. p. 161. During the cross-examination of Riley by Appellant's defense counsel, the following exchange occurred:

Q: So would it make sense that you went in on the 22nd, two days later, and went to the Law Enforcement Center and gave a statement to Investigator Weiner.

A: Yes.

Q: Was it Weiner or do you remember?

A: Weiner

Q: Okay. Now, did he - - did you tell him that you were on probation for burglary at that time?

A: Yes.

Q: You did mention that to him?

A: I can't really recall. I think he asked me just basic questions about the job, I want to say. I can't recall. It's been - -

Q: So you - -

A: - - a while.

Q: - - can't recall whether you told him or not?

A: I can't say.

Q: Do you recall whether he asked you about that or not?

A: He asked me had I been in trouble.

Q: Okay. And you don't recall what you said?

A: I said yes.

Q: Okay. And I think that Mr. Yarborough might have been getting at, while you didn't have a probation violation hearing in February - -

Mr. Fretwell: Objection, Your Honor. Let me see this document.

Ms. Ross: I think it's relevant. It goes to bias and motive, Your Honor.

R. pp. 167-68. After dismissing the jury, the trial judge asked Defense Counsel, "What does probation have to do with this? Doesn't the rule deal with convictions?" Defense Counsel

replied, "It does. But - - also under Rule 608 (c) I think - - I think I can put evidence of character and bias and I can also impeach. This witness told Mr. Yarbrough that he did not have a probation violation. At that point I - - ." R. p. 169. Defense Counsel then pointed the trial judge to Riley's "Consent Order Imposing Additional Conditions of Probation." R. pp. 169-70. R. p. 717 (Consent Order Imposing Additional Conditions of Probation). The hearing on Riley's probation violation was held on February 19, 2014, before the Honorable Edward W. Miller. R. p. 717 (Consent Order Imposing Additional Conditions of Probation). The consent order noted Riley violated his probation for "failing to complete Substance Abuse Counseling: By failing to have all fees paid prior to closure date of case owing $20 Drug Test Fee, $25 PSE F." (Consent Order Imposing Additional Conditions of Probation). After Defense Counsel explained the nature of the probation violation, the trial judge replied, "We ain't going into it." R. p. 170. After a request for clarification by Defense Counsel, the trial judge reiterated, "We're not going into it." R. p. 170.

Discussion

Appellant contends the trial judge erred in declining to allow him to cross-examine Damion Riley about whether he previously violated his probation because Riley's bias and credibility were central to the State's case. Specifically, Appellant blends arguments under Rule 608(b), SCRE, and Rule 608(c), SCRE, to support his proposition that the trial judge should have allowed him to introduce extrinsic evidence and impeach Riley regarding his probation violation. As an initial matter, Appellant's allusions to Rule 608(b) are not preserved for review by this Court where Appellant's objection below focused exclusively on Rule 608(c). Further, Appellant's arguments lack merit where Riley's alleged misstatements regarding his probationary status did nothing to reveal bias, prejudice, or a motive to misrepresent on his part.

As a threshold matter, Appellant's arguments concerning Rule 608(b), SCRE, are not preserved for appellate review. While Appellant does not explicitly cite to the rule in his brief, his argument is fraught with references to untruthfulness and Riley's "lie." See Br. of App. pp. 11-12. It seems that Appellant aims to use the portion of his argument concerning Rule 608(c), SCRE, which was argued below, to argue new grounds concerning truthfulness for the first time on appeal. Appellant cannot circumvent our State's error preservation rules by attempting to hitch a new argument to one that was actually argued below. If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). The appellate court will not consider any issues or arguments that were not presented to or passed upon by the trial judge, and an appellant is limited on appeal solely to the grounds raised during trial. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). A party may not argue one ground at trial and an alternate ground on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Since Appellant failed to raise his arguments concerning untruthfulness below, this Court should disregard them, as they are not preserved for appellate review.[4]

As to Appellant's argument that he should have been allowed to cross-examine Riley about his probation violation because it would have exposed his bias in favor of law enforcement, this argument lacks merit. "This Court will not disturb a trial court's ruling

[4] The State would note that extrinsic evidence of Riley's probation violation would not have been admissible under Rule 608(b) either, as Riley did not make a material misrepresentation that would have been probative of untruthfulness. When asked whether he had a probation violation between 2011 and trial, Riley replied, "no, I fulfilled all my probation and everything." Riley's answer seems to be non-responsive to Defense Counsel's question, as it seems Riley understood the question to be whether his probation was revoked and whether he completed the term of probation. Similarly, Riley's testimony that he had not had a recent probation violation was also accurate, as his probation violation occurred more than two years prior to trial.

concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion." State v. Gracely, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012). Pursuant to the Sixth Amendment of the United States Constitution, every criminal defendant has a right to "to be confronted with the witnesses against him" during trial. U.S. Const. amend. VI. "Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses." State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). This right guarantees to a criminal defendant the opportunity to cross-examine the witnesses against him concerning bias. State v. Gillian, 360 S.C. 433, 450, 602 S.E.2d 62, 71 (Ct. App. 2004), aff'd as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007); see also Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.").

When cross-examining a witness in regards to the potential for bias, considerable latitude must be allowed. Gillian, 360 S.C. at 450, 602 S.E.2d at 71. However, although a defendant is entitled to an opportunity for meaningful cross-examination, the scope of that cross-examination still rests in the trial judge's sound discretion. State v. Whitner, 380 S.C. 513, 519, 670 S.E.2d 655, 659 (Ct. App. 2008). A defendant's right to confront the witnesses against him does not deprive the trial judge of his usual discretion in limiting the scope of cross-examination. State v. Turner, 373 S.C. 121, 130, 644 S.E.2d 693, 698 (2007). Trial judges may impose reasonable limitations on cross-examination designed to show bias "based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness's safety, or interrogation that is repetitive or only marginally relevant." State v. Jenkins, 322 S.C. 360, 364, 474 S.E.2d 812, 814 (Ct. App. 1996). The limitation of cross-examination constitutes reversible error only if the

defendant establishes unfair prejudice resulted from the limitation. State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991).

In State v. Mizzell, the Mizzells and their co-defendant were charged with first-degree burglary, grand larceny, and possession of a firearm during the commission of a violent crime. 349 S.C. 326, 329, 563 S.E.2d 315, 316 (2002). During trial, the co-defendant testified against the Mizzells and was permitted to testify he could receive a "long sentence" for the charged offenses. Id. at 334, 563 S.E.2d at 319. However, the trial judge prohibited the Mizzells from asking the co-defendant, who had not yet pled guilty and had not agreed to a plea bargain, about the specific potential sentences he was facing for the charges. Id. at 330, 563 S.E.2d at 317. Subsequently, the Mizzells were convicted and appealed based on the limitations placed upon their cross-examination of the co-defendant. Id. at 330, 563 S.E.2d at 317.

On appeal, the Supreme Court reversed, finding the trial judge erred in limiting the Mizzells' ability to cross-examine their co-defendant. Id. at 333, 563 S.E.2d at 318. The Court noted that, under the circumstances of the Mizzells' case, the trial judge erred in limiting the cross-examination of the co-defendant about the potential sentence he was facing because "[t]he lack of a negotiated plea, if anything, creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation of leniency." Id. Because the Mizzells' co-defendant had not pled guilty or reached a plea agreement, the Court determined testimony regarding his possible sentence for his charged offenses was critical to the jury's ability to evaluate his potential for bias. Id.

In State v. McEachern, 399 S.C. 125, 140, 731 S.E.2d 604, 611 (Ct. App. 2012), McEachern contended the trial judge erred in admitting testimony concerning financial assistance she provided to Terrence Rivera, one of the witnesses after her arrest. During his trial

testimony, Terrence admitted McEachern offered to provide financial assistance; however, the witness asserted that the offer of assistance was not tied to his testimony. Id. at 138. The solicitor subsequently sought to cross-examine McEachern regarding this financial assistance provided to Terrence. Id. at 138-39. Following a proffer of McEachern's testimony, defense counsel objected on relevance grounds. Id. at 139. The solicitor asserted that the evidence was probative of an on-going conspiracy between McEachern and some of the witnesses at trial. Id. The trial judge found that he, "was going to allow it, but only in a very limited sense." Id. When cross-examination of McEachern resumed in front of the jury, the solicitor asked, "if she ever sent money, either directly or through someone else, to Terrence's account in jail." Id. McEachern indicated she gave Terrence's mother money at some point because she indicated Terrence was doing poorly in prison and lacked the funds to make phone calls or purchase other commodities. Id. McEachern also acknowledged she drove Terrence's mother to obtain a lawyer for him. Id. The Court of Appeals found:

> We find the evidence was properly admitted to show bias. Here, evidence that [McEachern] provided Terrence's mother transportation to assist in attaining an attorney for Terrence, as well as evidence that she provided him financial assistance by giving Terrence's mother some money to put in his account was relevant to Terrence's potential bias toward [McEachern].

Id. at 141.

In Appellant's case, Riley's probationary status had absolutely no bearing on any bias, prejudice, or motive to misrepresent, as is required by Rule 608(c). Appellant asserts that because Riley violated his probation, he possessed a bias in favor of police. Appellant avers, "Here, Riley was on probation at the time of the robbery and had every incentive to deflect suspicion. He also had an incentive not to risk the wrath of the police because of the ease of which he could have been sent back to prison on a probation violation." Br. of App. p. 12.

Appellant's arguments fail to elucidate any conduct by Riley in this case that would have amounted to a probation violation. Aside from implying Riley was the actual culprit, which was also a theory referred to at trial, Appellant utterly fails to identify any conduct by Riley that would suddenly make him indebted or biased towards law enforcement. If Riley was the actual culprit, he would certainly not be concerned with a probation violation; rather, he would be concerned with being found guilty of burglary as a principal actor. Riley's probationary status thus plays no role in Appellant's assertion that Riley was trying to implicate Appellant in order to escape liability. Furthermore, under S.C. Code Ann. § 24-21-450, the police have no authority to charge Appellant with a probation violation; nor do the police have the authority to send him back to prison on a probation violation. See S.C. Code Ann. § 24-21-460 Appellant wholly fails to establish any sort of causal connection between a probation violation and any sort of bias that could lead to distorted testimony.

Regardless of whether the trial judge properly declined to allow Appellant to cross-examine Riley about his probation violation, Appellant suffered no legitimate prejudice from the exclusion of the evidence. An appellate court will not reverse based on the erroneous admission or exclusion of evidence unless prejudice has been shown. State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998). Accordingly, appellate courts will decline to set aside convictions for insubstantial errors which could not reasonably have affected the result. State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006). Riley was not a critical witness for the State, and his testimony did little to incriminate Appellant and White. There was absolutely no evidence Riley was a suspect in the crime. By comparison, there was exceptionally strong evidence of Appellant and White's conspiracy to rob the Olive Garden. Refusing to allow Appellant to cross-examine Riley about a wholly unrelated probation violation where Riley was not a suspect in the case did

not prejudice Appellant in any legitimate way. Any error in the exclusion of the evidence of the probation violation is therefore harmless. Appellant's convictions and sentences should be affirmed.

II.

The trial judge properly sentenced Appellant to life without the possibility of parole where the statutory conditions of S.C. Code Ann. § 17-25-45 were met, there was no evidence of prosecutorial vindictiveness, and the sentence imposed did not constitute cruel and unusual punishment pursuant to the Eighth Amendment.

Relevant Facts

On April 26, 2016, the State filed a Notice of Intent to Seek Sentence of Imprisonment for Life Without Possibility of Parole. R. p. 722 (Notice of Intent to Seek Sentence of Imprisonment For Life Without Possibility of Parole). During a hearing on various pre-trial motions, the solicitor stated, "Judge, I anticipate, based on our conference in chambers, that [Defense Counsel] in particular will be making some sort of motion on the record with respect to the notice of life without parole." The solicitor then detailed the history of the case and discussed various plea offers that were made to Appellant and White. R. pp. 31-35. Prior to Appellant's trial in this case, it was originally scheduled for November 30, 2015; however his case was not ultimately reached during that term. R. p. 33. Appellant's case was also not reached on his second trial date of January 12, 2016. R. pp. 33-34. The solicitor stated that when he was preparing for Appellant's third trial date, he realized Appellant was eligible for a sentence of LWOP. R. p. 34. The solicitor informed the trial judge:

> [I]n compiling the packed of certified conditions that my paralegal had given to me, I determined that Mr. Gadsden was LWOP eligible. There wasn't anything at that point that I could do. Our office functions in the term of a Life Without Parole Committee. The trial was to be Monday. There was no time to submit that information to the Committee as per our policy. So I did not do that over the

> weekend. When [Appellant] failed to appear that Monday[5], thereafter, that information was submitted to the Committee. In fact, I filed the paperwork on the 18th of April. We learned - - I learned in the very early morning hours of the next day that [Appellant] had been arrested for murder in Anderson. On the 25th of April the LWOP Committee determined and designated that LWOP should be sought and gave permission to extend an additional plea offer since that was after the time all plea offers had expired, which I extended to the Defendant through counsel. . . . We've served notice on [Appellant] in the Anderson County Detention Center on May the 2nd. Thereafter was when we extended that plea offer until the 19th of May. [Defense Counsel] called me on the 19th and indicated that she had spoken to [Appellant]. He was not interested in pleading guilty.

R. p. 35. The solicitor then re-emphasized for the record that Appellant could still plead guilty that day without the State enforcing the LWOP letter. R. p. 35. The Solicitor informed the trial judge that, once the jury was sworn, the State intended to seek life without parole based on Appellant's qualifying prior convictions. R. p. 35.

In response, Defense Counsel argued the State was punishing Appellant for asserting his right to a trial. R. p. 36. Defense Counsel argued:

> I've certainly seen longer rap sheets than this that did not get life without parole. I would argue it violates his right to cruel and unusual punishment. It doesn't compare to other clients in the same position with a second offense. And I'd argue that it's vindictive prosecution and, therefore, I'd object to LWOP being applied as it was applied in this case at this late date.

R. p. 36. Defense Counsel also told the Court Appellant was committed at MUSC during his April trial date and averred, "I don't think he should be punished for having mental health issues, which he does. And that, in fact, is what is happening here. And it's also punishing him for asserting his right to a trial, which is his Constitutional right." R. pp. 36-37.

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[5] Appellant was admitted to the North Charleston Psychiatric Hospital on the eve of that trial date. It is unclear whether Appellant admitted himself. R. p. 37. Appellant was previously found incompetent to stand trial, but likely to become competent under medication on May 21, 2016. R. p. 12. Dr. Donna Schwartz-Maddox testified Appellant was diagnosed with schizophrenia. R. p. 14. Dr. Schwartz-Maddox examined Appellant the day before trial and opined he was then competent to stand trial. R. pp. 15-16.

The trial judge stated, "Well, I don't - - of course, I've expressed my opinion about the use of LWOP in chambers, but I don't know of anything that the Court can do to prevent - - that's clearly within the prosecutor's province. And they've elected to proceed in that matter." R. p. 38. The trial judge noted, "I do understand [Defense Counsel's] concern about the mental health issues and the past, and I think the solicitor does as well. That's why he probably extended his time to allow that to be withdrawn so [Defense Counsel] can have some conversation with her client now that he's determined to be competent. . . ." R. p. 38. The trial judge ruled, "I don't know of anything I can do to assist you in your request here, [Defense Counsel]. So your motion to require that I prevent them from going forward is denied because I don't think I can do that." R. p. 39.

During Appellant's sentencing hearing, Defense Counsel argued:

> **I understand your hands are tied**. I'd again object to the LWOP being presented today. I believe it's arbitrary and cruel and unusual punishment. And it was issued after [Appellant] failed to appear in court in April due to seeking mental health assistance. Mental health issues certainly have pervaded through my representation of [Appellant], certainly during the latter part. So I would object to that. But, otherwise, **I understand that as it is, your hands are tied**.

R. p. 708. The trial judge told Appellant:

> **I don't have any discretion on this case**. I'm not a big fan of - - in many instances of this life without parole. If the state hadn't have sought it, I would not have on my own sentenced you to a sentence such as this based on what I heard in this case. But when you made that decision - - I think you and your lawyer made that decision or you made it and you took any control over that out of my hands.

R. p. 709. The trial judge subsequently sentenced Appellant to life imprisonment without the possibility of parole. R. p. 709.

Discussion

Appellant contends his sentence should be vacated and his case remanded for re-sentencing because the trial judge erred in not exercising his discretion to sentence Appellant to a

term of imprisonment other than life without parole. Specifically, Appellant contends the timing of the solicitor's LWOP decision and Appellant's mental illness raised Due Process and Eighth Amendment concerns. Appellant's argument thus has two prongs: 1) prosecutorial vindictiveness on the part of the State amounted to a Due Process violation, and 2) an Eighth Amendment violation such that, under the facts of the case, the judge somehow should have been able to exercise his discretion in delivering a sentence in contravention on the statute. Both these arguments lack merit. There is absolutely no evidence to support the assertion that the decision to pursue LWOP against Appellant was rooted in prosecutorial vindictiveness. Similarly, Appellant's arguments concerning the Eighth Amendment lack merit, as the solicitor's pursuit of a sentence Appellant was statutorily eligible for could not constitute cruel and unusual punishment under the United States Constitution and the facts of this case.

As a threshold matter, it is important to note Appellant's assertion that the trial judge failed to exercise his discretion by refusing to consider Appellant's motion to strike LWOP is simply not correct. While the trial judge's ruling on Appellant's motion is admittedly not very detailed, the trial judge heard argument by the solicitor and Defense Counsel and issued a ruling. Appellant's argument that the trial judge did not think he had the discretion to consider the alleged constitutional violations lacks foundation. The only time the trial judge noted he lacked discretion was during the sentencing hearing at which point he could only lawfully impose a sentence of LWOP. See S.C. Code Ann. §17-25-45 (upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole. . . .). After hearing argument on Defense Counsel's motion to strike LWOP, the trial judge noted he did not like the use of LWOP but acknowledged it was in the prosecutor's province to seek the sentence. The trial judge then made an implicit finding that the

solicitor acted in good faith, noting, "I do understand [Defense Counsel's] concern about the mental health issues and the past, and I think the solicitor does as well. That's why he's probably extended his time to allow that to be withdrawn do that [Defense Counsel] can have some conversation with her client now that he's been determined to be competent." The trial judge then found, "So your motion to require that I prevent them from going forward is denied because I don't think I can do that." Appellant's argument imputes improper meaning as to the trial judge's ruling. Appellant asserts the trial judge's statements were reflective of a belief that he lacked discretion to consider the constitutional claims[6]; however, the more likely meaning was that he was denying the motion because it was meritless. Had the trial judge refused to hear any argument on the matter and refused to issue a ruling, perhaps Appellant's assertion would have more traction. However, the trial judge heard argument on the alleged constitutional violations and made an implicit finding that the solicitor was acting in good faith by continuing to allow Appellant the option of pleading guilty. The record is bereft of any indication by the trial judge that he lacked discretion to hear Appellant's motion. The trial judge thus never found he lacked discretion to consider Appellant's Due Process and Eighth Amendment claims.

Critically, even if this Court found that the trial judge did not rule on Appellant's Motion to Strike LWOP, this Court may still, as a matter of law, find Appellant failed to prove vindictive prosecution and that, under the facts of this case, sentencing Appellant to LWOP did not constitute cruel and unusual punishment under the Eighth Amendment. Further, in the event this Court finds the trial judge did not consider Appellant's motion to strike LWOP, the only remedy is a remand so that the trial judge may make findings as to Appellant's allegations of Due Process and Eighth Amendment violations. See Cook v. Cook, 280 S.C. 91, 93, 311 S.E.2d 90,

[6] See generally Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974) ("[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.")

91 (Ct. App. 1984) (When the record is insufficient to permit review of an issue, an appellate court is permitted to remand the matter for further findings); see, e.g., Arnal v. Fraser, 371 S.C. 512, 519, 641 S.E.2d 419, 422, n. 4 (2007) ("A party can always seek a remand from an appellate court if the circumstances of the particular case require it."). Remand for an evidentiary hearing may be appropriate where the record is unclear on some issue or there is insufficient information in the record for the appellate court to rule on a particular issue. See State v. Johnson, 302 S.C. 243, 249, 395 S.E.2d 167, 170 (1990) ("[I]t is not clear from this record whether oral testimony concerning the reliability of the informant was given to the magistrate. Therefore, we remand this issue to the trial court so that it may be determined exactly what information was supplied to the magistrate.")

The State's Pursuit of LWOP Was Not the Product of Vindictive Prosecution

Interestingly, Appellant offers decidedly little substantive argument as to the allegation of prosecutorial vindictiveness. Instead, Appellant merely cites some applicable case law concerning prosecutorial vindictiveness and implies that the timeline employed by the solicitor in serving notice of LWOP was suspect. To the contrary, the solicitor provided a meticulous accounting of the case's procedural history and thorough explanation of why LWOP was sought at that particular point in the proceeding. Aside from merely raising the specter of vindictiveness, Appellant failed to produce any credible evidence evincing a vindictive or improper motive on the part of the State.

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). The Court "is bound by the trial court's factual findings unless they are clearly erroneous." Id. (citing State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)).

"To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" U. S. v. Goodwin, 457 U.S. 368, 372 (1982) (citing Bordenkircher v. Hayes, 434 U.S. 357 (1978)). To establish vindictive prosecution a defendant must prove "that (1) the prosecutor acted with genuine animus toward the defendant and (2) the defendant would not have been prosecuted but for that animus." United States v. Wilson, 262 F.3d 305, 314 (4th Cir.2001). To establish genuine animus, the defendant may prove actual vindictiveness through direct evidence or raise a presumption of vindictiveness when the prosecutor's actions "pose a realistic likelihood of 'vindictiveness.'" Blackledge v. Perry, 417 U.S. 21, 27, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). "[A] defendant asserting prosecutorial misconduct carries a heavy burden of proving that the ... prosecution could not be justified as a proper exercise of prosecutorial discretion.") (internal quotations and citations omitted). State v. Odom, 412 S.C. 253, 265, 772 S.E.2d 149, 154 (2015)

"A charging decision does not levy an improper 'penalty' unless it results solely from the defendant's exercise of a protected legal right, rather than the prosecutor's normal assessment of the societal interest in prosecution." Goodwin, 457 U.S. at 380. "The Supreme Court further stated that an initial decision by the prosecutor should not freeze future conduct, because the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution." State v. Dawkins, 297 S.C. 386, 389, 377 S.E.2d 298, 300 (1989) (citing Goodwin, 457 U.S. 368). "The imposition of punishment is the very purpose of virtually all criminal proceedings." Goodwin, 457 U.S. at 372. "A state's punitive motivation does not represent a constitutional violation where, as here, the state sought to punish not for the right exercised, but for the crime committed." Paradise v. CCI Warden, 136 F.3d 331, 336 (2nd Cir. 1998). "Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser

offense, or they can simply decide not to prosecute the offense in its entirety. The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion. . . ." State v. Thrift, 312 S.C. 282, 291-92, 440 S.E.2d 341, 346-47 (1994).

In Appellant's case, there is absolutely no evidence of vindictive motive on the part of the State. The solicitor realized Appellant was eligible for LWOP, got the requisite approval to seek LWOP through an internal process at the Solicitor's Office, and served notice of the State's intention to seek the sentence within the prescribed statutory time period. Aside from conjecture and inference, Appellant is unable to identify any vindictive conduct or motive on the part of the State. Appellant's assertion that the trial judge should have considered striking mandatory LWOP because of a Due Process violation therefore lacks merit.

Sentencing Appellant to Life Without Parole Did Not Constitute Cruel and Unusual Punishment

Appellant contends that, intertwined with his Due Process argument, was the assertion that the Eighth Amendment barred the solicitor from seeking LWOP because Appellant was in a mental institution when his case was originally called for trial. Appellant's argument is essentially that, because the State fortuitously had yet to realize Appellant was eligible for LWOP when his case was originally called for trial, the State is "locked in" to that sentence because Appellant's absence at the original trial was because of mental illness. Appellant seeks to create an exception for himself to the mandatory LWOP sentence under the facts of this case, asserting that it would amount to cruel and unusual punishment. Initially, the state would note Appellant's argument is not preserved for Appellate review. Further, sentencing appellant to LWOP as mandated by statute, where he committed a prior "most serious" offense, did not constitute cruel and unusual punishment under the Eighth Amendment.

As a threshold matter, Appellant's argument is not preserved for appellate review. The only argument offered by Defense Counsel at trial concerning the Eighth Amendment was the assertion, "I would argue it violates his Eighth Amendment right to cruel and unusual punishment. It doesn't compare to other clients in the same position with a second offense." Appellant's "argument" concerning the Eighth Amendment thus focused on disparate treatment between Appellant and other similarly situated defendants. Appellant's conclusory statement, "I don't think he should be punished for having mental health issues, which he does. . . . And it's also punishing him for asserting his right to a trial, which is his Constitutional right," was framed as a ground supporting his vindictive prosecution claim, not as grounds for an exception to a mandatory sentence based on cruel and unusual punishment. Appellant's argument on appeal is that because of the unique circumstances of his case, the trial judge should have carved out a narrow exception. Appellant believes that because he was mentally ill at the time his case was originally called for trial, the prohibition against cruel and unusual punishment required preferential sentencing. This argument was not raised below, and Appellant's conclusory statement that he was being punished for being mentally ill, which was made in the context of discussing vindictive prosecution, is insufficient to preserve the issue. The appellate court will not consider any issues or arguments that were not presented to or passed upon by the trial judge, and an appellant is limited on appeal solely to the grounds raised during trial. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); see also State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) (holding a conclusory, unsupported argument was abandoned on appeal). Any contention Appellant's argument is preserved for appellate review is belied by Defense Counsel's repeated acknowledgments to the trial judge

during sentencing that she knows his "hands are tied." Since Appellant failed to present the issue below, this Court should not consider Appellant's arguments concerning cruel and unusual punishment based on Appellant's mental illness.

Error preservation concerns notwithstanding, Appellant was sentenced according to statute and, as discussed *infra*, the record is devoid of any evidence of impropriety. The South Carolina Code provides, ". . . . [U]pon a conviction for a most serious offense as defined by this section, a person **must** be sentenced to a term of imprisonment for life without the possibility of parole if that person has. . . . (1) one or more prior convictions for: (a) a most serious offense. . . . ." S.C. Code Ann. § 17-25-45(A)(1)(a). As defined by the statute, Assault and Battery with the Intent to Kill is considered to be a most serious offense. S.C. Code Ann. § 17-25-45(C)(1). "The decision to invoke sentencing under this section is in the discretion of the solicitor." S.C. Code Ann. § 17-25-45(G). "Where the solicitor is required to seek or determines to seek sentencing of a defendant under this section, written notice must be given by the solicitor to the defendant and defendant's counsel not less than ten days before trial." S.C. Code Ann. § 17-25-45(H).

Appellant was convicted of the predicate offense of assault and battery with intent to kill on March 6, 2008. R. p. * (ABWIK Sentence Sheet). Upon realizing Appellant was eligible for LWOP, the solicitor filed notice of the State's intention to seek LWOP on April 26, 2016. R. p. * (Notice of Intent to Seek Sentence of Imprisonment for Life Without Possibility of Parole). The notice was subsequently served on Appellant in the Anderson County Detention Center on May 2, 2016. Tr. p. 35. The statutory conditions were thus met and, absent a constitutional violation, the trial judge was not vested with the discretion to sentence Appellant to anything other than LWOP. The State would note that, even if Appellant's argument was preserved, Appellant's Eighth Amendment argument lacks merit.

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Pursuant to the Eighth Amendment, punishments must not be "inherently barbaric" and must be graduated and proportioned to the offense. Graham v. Florida, 560 U.S. 48, 59 (2010); see Atkins v. Virginia, 536 U.S. 304, 311 (2002) (instructing that it is a precept of justice that punishment for a crime should be graduated and proportioned to the offense). However, "[t]he Eighth Amendment does not require strict proportionality between crime and sentence." Harmelin v. Michigan, 501 U.S. 957, 1001 (1991). Instead, "it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id. (citations omitted).

The United States Supreme Court has identified two categories of cases which have invoked review under the Eighth Amendment's cruel and unusual punishment clause: 1) challenges to the length of term-of-years sentences given all the circumstances in a particular case; and 2) cases in which the Court implements the proportionality standard by certain categorical restrictions. Graham, 560 U.S. at 59-61. In his brief, Appellant notes he does not seek a broad, categorical restriction on mandatory LWOP for defendants with mental illnesses. Instead, Appellant contends that the circumstances in this particular case warrant a different sentence. Appellant believes that because the State fortuitously failed to notice he was eligible for LWOP when his case was originally called for trial, it would constitute cruel and unusual punishment to sentence him to something he is admittedly eligible for. This argument borders on absurd, as the State should not be "locked in" to a particular sentence when a case is called for trial and subsequently continued, regardless of the circumstances. While Appellant certainly would have been the beneficiary of an oversight by the State had his case gone forward when originally called for trial, the solicitor was well within his rights to correct the oversight and seek

notice of LWOP upon his realization that he could seek the sentence. Upon realizing Appellant committed a prior most serious offense and was eligible for LWOP, the solicitor fully complied with the notice provisions of the statute. This is all that was required. To sentence Appellant as mandated by statute did not constitute cruel and unusual punishment in this case.[78] Appellant's convictions and sentences should be affirmed.

[7] See Solem v. Helm, 463 U.S. 277, 296 (1983) ("[A] State is justified in punishing a recidivist more severely than it punishes a first offender.").

[8] In State v. Green, 412 S.C. 65, 87, 770 S.E.2d 424 (Ct. App. 2015), Green, who was sentenced to mandatory LWOP, contended the Eighth Amendment requires trial courts to make individualized sentencing decisions. This Court found, "Green's sentence was within the limits provided for by statute and the record does not reveal his sentence was the result of prejudice, oppression, or corrupt motives by the trial court. Therefore we have no authority to review Green's sentence." Id.; see also State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (finding "this Court has no jurisdiction to review a sentence, provided it is within the limits provided by statute for the discretion of the trial court, and is not the result of prejudice, oppression or corrupt motive.").

CONCLUSION

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

Respectfully submitted,

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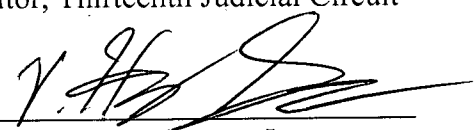
BY: 
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August 28, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2016-001286

THE STATE,.....RESPONDENT

v.

GERALD AKEEM GADSDEN, ...APPELLANT.

CERTIFICATE OF COUNSEL

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

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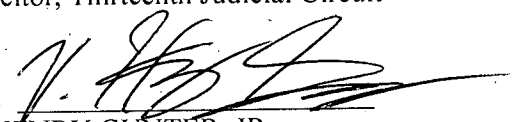
BY: 
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